

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No. 2596/2020

In the matter between: -

LINEEN SWARTS

Plaintiff

and

**THE MINISTER OF PUBLIC WORKS AND
INFRASTRUCTURE**

First Defendant

**THE MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Defendant

Coram: Bands AJ
Date heard: 14 February 2022
Delivered: 12 August 2022

JUDGMENT

BANDS AJ:

[1] On Friday, 16 November 2018, what ought to have been an ordinary morning at the Gqeberha Magistrates' Court for the plaintiff, a local attorney with many years standing, took a turn for the worse when he slipped and fell on water located on the floor in the building's passageway, injuring his left shoulder.

[2] The plaintiff contends that the slip and fall, and the consequent injuries sustained by him, were caused by the negligent conduct of first defendant;

alternatively, the second defendant; alternatively, both defendants, and/or one or more of their employees and/or cleaning contractor, acting within the course and scope of their employment. Accordingly, the plaintiff instituted action against the defendants, jointly and severally, for damages allegedly arising out of the aforesaid incident for payment in the amount of R2,862,362.17. I deal with the plaintiff's pleaded case in greater detail later.

- [3] The plaintiff's claim was met with various special pleas as well as a plea on the merits. Whilst the defendants initially raised a special plea of non-compliance with section 2 of Act 20 of 1957, read with section 5(1)(a) of Act 8 of 2017, this was later withdrawn despite its inclusion in the first and second defendants' amended plea, which was delivered on the day of trial, prior to the commencement of the matter.
- [4] In addition to the aforesaid, and by way of a special plea of non-joinder, the first defendant contends that Sky Ground Enterprise ("*Sky Ground*"), the company who was contracted to provide cleaning services at the Magistrates' Court by the first defendant at the relevant time, was a necessary party to the proceedings.
- [5] On the other hand, the second defendant, relying on a special plea of mis-joinder, pleads that he does not have a direct and substantial interest in the matter and accordingly his joinder is incompetent.

[6] On 19 October 2021, pursuant to the hearing of opposed argument, an order was granted by Naidu AJ separating the issue of the defendants' liability, inclusive of the special pleas, from the issue of quantum (*"the separation order"*). Prior to the hearing of evidence, the defendants' counsel requested me to revisit the separation order and to grant an order separating the special pleas from the remaining issues in dispute, this being the same order sought by the defendants in the opposed application before Naidu AJ.

[7] Our Courts, inclusive of the Supreme Court of Appeal, have on numerous occasions warned against ill-conceived separation of issues.¹ It is trite that an order in terms of Uniform Rule 33(4) is interlocutory in nature and that I have the authority to revisit such decision.² With this in mind, and after hearing argument on behalf of the plaintiff and the defendants, I was satisfied that the separation order was proper in the circumstances and is reflective of an order which had been granted after careful thought had been given to the anticipated course of the litigation as a whole, consideration having been given to whether or not it was convenient to try the separated issues separately. Accordingly,

¹ *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA)

Bonnievale Piggery (Pty) Ltd v Eugene van der Merwe [2020] ZAWCHC (4) at [24], [32] and [33]. The Judgment of the Full Bench in *Bonnievale* (Western Cape) was upheld on appeal. See *Van der Merwe v Bonnievale Piggery (Pty) Ltd* [2021] ZASCA 162.

² *Kelbrick and Others v Nelson Attorneys and Another* [2019] JOL 43037 (SCA) at para [28].

Wallach v Lew Geffin Estates CC [1993] ZASCA 39; 1993 (3) SA 258 (AD) at 262 – 263.

Rennie Charles Blaine Price N.O & Others v Sun Citrus Packers (Pty) Ltd [2020] ZAECPEHC 4 (6 February 2020), unreported decision of Gqamana J.

and save for amplifying the separation order,³ I declined to grant the order sought by the defendants.

[8] Accordingly, the issues which fall to be determined by me are the respective special pleas, which remain alive on the pleadings; and whether or not the defendants' negligence, or that of their employees and/or cleaning contractor, acting within the course and scope of their employment, was the cause of the plaintiff's fall.

[9] The plaintiff's cause of action is particularised in paragraphs 4 to 7 of his particulars of claim, which read as follows:

- "4. On 16 November 2018, and in a passage in the Port Elizabeth Magistrate's Court building in de Villiers Street, North End, Port Elizabeth, the Plaintiff slipped on a wet floor, lost his balance, and fell on his back.*
- 5. The said Magistrate's Court building was at all times material hereto open to members of the public, including the Plaintiff, and the Defendants were under a legal duty to the public, including the Plaintiff, to ensure that passages, walkways, entrances, and other areas used or traversed by members of the public, would be safe and free of obvious hazards which would pose a risk to members of the public.*
- 6. The Plaintiff's slip and fall was caused by, and ascribable to, the negligence of the First Defendants, and/or one or more of their employees and/or cleaning contractors, who acted within the course and scope of their employment, and who were negligent in one or more or all of the following respects:*

³ To include reference to the respective paragraphs of the plaintiff's particulars of claim and the corresponding paragraphs thereto as contained in the first and second defendants' amended plea, which form part of the separated issues.

- 6.1. *They allowed member of the public to walk on a wet passage floor.*
 - 6.2. *They failed to warn members of the public that the passage floor was wet.*
 - 6.3. *They failed to ensure that the passage floor was safe for members of the public to walk on.*
 - 6.4. *...⁴*
 - 6.5. *They failed to place any warning signs or notices to warn persons of the slippery nature of the passage floors.*
 - 6.6. *They failed to ensure that the Plaintiff did not slip on the passage floor, when by the exercise of reasonable and necessary care, they could and should have done so.*
7. *The whole cause of action arose within the area of jurisdiction of the above honourable court.”*

[10] I interpose to highlight that paragraph 6 of the plaintiff's particulars of claim lays blame, in the alternative, on the negligence of “*one or more of*” the defendants’ “*employees and/or cleaning contractors, who acted within the course and scope of their employment.*” It was argued by Mr Dala that this implies that the plaintiff's claim against the defendants, on the pleadings, is founded on vicarious liability.

[11] As will become more apparent hereunder, I am satisfied that a claim founded on vicarious liability is not the plaintiff's only case on the pleadings, nor was it

⁴ The plaintiff abandoned reliance on paragraph 6.4.

his case at trial. I accordingly accept that the plaintiff's claimed liability, against the first and second defendants, is not founded on vicarious liability.

[12] Whilst the defendants, in their plea, admit that the plaintiff fell in the passageway in question, they dispute that the "*plaintiff slipped on a wet floor and fell on his back*" and attribute his fall to a loss of balance.

[13] Significantly, the plaintiff's pleaded version, which was consistent with his evidence led at trial, was not disputed during cross-examination. Similarly, the defendants' version regarding the cause of the plaintiff's fall was not put to the plaintiff, and accordingly reliance thereon was not pursued by the defendants.

[14] The first defendant, "*as custodian of the property*", admits the legal duty as pleaded by the plaintiff, but seeks to disavow liability on the basis that the first defendant concluded a contract with Sky Ground to provide cleaning services at the court building, which contract was in place at the time of the plaintiff's incident. More particularly, the defendants plead at paragraph 21.5 of their plea that:

"21.5 *The first and second defendants deny they had acted in breach of any legal duty which they may have owed the plaintiff;*

in amplification:-

Sky Ground Enterprises – a competent and professional independent contractor, as stated above, were (sic) contracted to provide cleaning

services at the property, and would not be dangerous to members of the public.”

[15] Despite reference being made to the second defendant in paragraph 21.5, the second defendant goes on to plead that he, in any event, denies liability to the plaintiff in that he is “*the wrong defendant before this Honourable Court.*” Other than the aforesaid, the defendants’ plea, insofar as the plaintiff’s pleaded grounds of negligence are concerned, amounts to no more than a bare denial.

[16] Immediately apparent from paragraph 21.5 of the defendants’ plea is that the defendant, although pleaded rather obliquely, places reliance upon the general rule that a principal is not liable for the wrongs committed by an independent contractor or its employees, to avoid liability. Insofar as it could be said that this aspect had not been raised properly on the pleadings, I am satisfied that it was canvassed fully in the evidence, and I am accordingly able to deal therewith. I return to this in due course.

[17] Three witnesses were called to give evidence before me. The only witness to testify on behalf of the plaintiff was the plaintiff himself. Two witnesses testified on behalf of the defendants, being (i) Thembisa Mzinzi (“*Mzinzi*”), a Cleaning Contract Officer in the employ of the first defendant and the chairperson of the bid evaluation committee and; (ii) Johannes Gideon van der Walt (“*van der Walt*”), the Regional Manager for the Gqeberha Regional office in the employ of the first defendant and the chairperson of the regional bid adjudication committee.

- [18] The only account of the incident was narrated by the plaintiff. The plaintiff testified that on the morning in question, at approximately 08h30, and after reporting to court 51, he proceeded to walk through the passageways of the court building to attend to a scheduled meeting with a clerk of the court, Hazel Mtanga (“*Mtanga*”). The plaintiff’s path of travel and the location of the incident are clearly described in the evidence on record and are depicted in the photographs which were taken by the plaintiff on the day of the incident, which were admitted into evidence as exhibits “A” to “C”.
- [19] In essence, the plaintiff, after exiting court 51, turned to his left and proceeded down the passage through a set of double doors. Once through the double doors, the plaintiff once again turned to his left. As the plaintiff rounded the corner, he immediately noticed a lady, who he identified as a cleaner, and who later was identified as Ms Witbooi (“*Witbooi*”), standing in the passageway with her cellular phone in her one hand, which she held in front of her face.
- [20] The plaintiff, having noticed a black bag positioned on the floor next to Witbooi, walked around the black bag, whereafter he suddenly slipped and fell backwards. Upon realising that he was falling, the plaintiff put out his left hand to break his fall. Ultimately, the plaintiff landed on his back and momentarily lost consciousness. When the plaintiff regained consciousness, he looked up at the roof and realised that he was lying on his back. He noted that the back of his shirt and pants were wet and that he had slipped in water that was present on the floor. Prior to slipping and falling, the plaintiff was unaware of the water’s presence.

[21] The plaintiff got up, unassisted, and approached Witbooi. He enquired why there were no warning signs in place, to which Witbooi responded that she was going to lose her job; that her husband was paralysed; and that she was the only one (between her and her husband) who had employment. Witbooi started crying and several people, having heard the commotion, approached the plaintiff and Witbooi.

[22] The plaintiff thereafter proceeded back to Court 51, where it was brought to his attention that his glasses, which had been on the top of his head, were missing. The plaintiff returned to the scene of the incident to look for his glasses, where he found them on the ground near the door. At that point he also noticed a blue water bucket on the left-hand side of the passage, positioned in front of the black bag, up against the wall. I pause to mention that the black bag and the blue bucket are clearly apparent from exhibit "C". The plaintiff proceeded to report the incident to Mtanga; to Ms Ayanda Deyi, the procurement officer; and to Magistrate Mayataza.

[23] As a result of the plaintiff's slip and fall, he testified that he sustained an injury to his left shoulder, necessitating pre-surgical treatment; shoulder repair surgery; and post-operative treatment, the details of which do not fall to be determined by me and accordingly, need not be traversed for the present purposes.

[24] The plaintiff's evidence pertaining to the events leading up to the incident; the incident itself; and the events which transpired thereafter, whilst that of a single witness, was unchallenged.

[25] The decisions of our courts have over time developed harmony on the importance of challenging the aspects of a witnesses' evidence which a legal practitioner wishes to place in dispute. The Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*⁵ made the following remarks at paragraph [61] in this regard:

"The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witnesses' testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn [(1893) 6 The Reports 67 (HL)] and has been adopted and consistently followed by our courts."

[26] The issues canvassed with the plaintiff under cross-examination largely pertained to the fact that Witbooi was employed by Sky Ground, and that Sky Ground, pursuant to the successful award of a tender, had been appointed, contractually, as the service provider for the provision of cleaning services at the court building, by the first defendant, for a period of 24 months. These aspects were readily conceded to by the plaintiff.

⁵ 2000 (1) SA 1 (CC).

[27] The plaintiff's attention was drawn to clauses 4.17 and 5 of the site specification document which forms part of the contract in question, to which he did not take issue. The respective sections provide as follows:

"4.17. **Floors**

- (a) Damp-wash floors with an approved disinfectant – daily.
- (b) Remove dirty spots and rubbish – daily.
- (c) Non-slip cleaning agents should be used. Employees may not be exposed to wet/ slippery floors.

...

5. **EQUIPMENT, CLEANING MATERIAL AND HYGENIC SERVICES TO BE USED**

5.1 Equipment

...

- i. ...
- ii. ...
- iii. ...
- iv. Regulatory warning Signs
- v. ..."

[28] The aforesaid clauses were utilised to foreshadow the final aspect of the plaintiff's cross-examination, the relevant portions of which are repeated below:

"MR DALA: Just one, well I think I dealt with it, but just to be clear and I just want to put to you Mr Swarts that the department had taken all reasonable steps knowing for examples (sic), floors can be slippery and there must be warning signs, they took all reasonable steps, as you can see from the contract. Anything you would like to say?"

MR SWARTS: Well, that is not the end of it all. There is case law, I do not want to go in that which says something else that what you are saying. But I will leave it to my counsel to argue that at the end of the day.

MR DALA: That is fine. So, you have got nothing to say?"

MR SWARTS: *Well, I am telling you there is (sic) other versions to the same story. I do not want to – I am just not agreeing with you.*

MR DALA: *Okay, you are not in agreement?*

MR SWARTS: *No.”*

- [29] The evidence of Mzinzi, for the defendants, was led primarily to (i) establish the tender process, from a bid evaluation committee standpoint; (ii) to prove the minutes of the bid evaluation committee meeting, which had previously been tendered into evidence, provisionally; and (iii) to confirm that Sky Ground, as the highest scoring bidder, was recommended by the bid evaluation committee. Mzinzi’s evidence was uncontentious
- [30] Van der Walt testified that following the approval of the recommendation received from the bid evaluation committee, he was the signatory to the contract with Sky Ground, on behalf of the first defendant.
- [31] The main thrust of van der Walt’s evidence, in respect of the assessment of the bidders, related to the performance of a financial risk assessment on those bidders that were found to be responsive. Simply put, the prescribed labour rates, together with the cost of materials, were measured against the committee’s independent assessment of what is required to maintain a court building over the contract period. Should a bidder score on, or above, the predetermined breakeven point, this indicates that the bidder is able to deliver the services required.

[32] Van der Walt testified further that the specification was very clear in terms of the products to be utilised in the performance of the services, and confirmed that where the performance of such services may compromise the health and safety of visitors to the court building, regulatory warning signs, as per clause 5 of the site specification document, needed to be utilised. Accordingly, and by virtue of the contractual provisions referred to, van der Walt was of the opinion that all reasonable and necessary steps had been taken by the first defendant to avoid such compromise.

[33] Van der Walt conceded during cross-examination that, on the morning in question, the floor in the passageway where the plaintiff slipped and fell was wet. He further conceded that no warning signs had been utilised to alert persons walking in the vicinity of the wet passageway. When cross-examined on what van der Walt knew about the entity, known as Sky Ground, van der Walt was unable to shed any light on the topic, other than to deduce from the face of the contract document, that it was a legal entity as it had a registration number and that its *domicilium citandi et executandi* was residential in nature.

[34] When enquired as to whether the first defendant had placed anyone at the court building to ensure that the cleaning services had been properly and safely rendered, van der Walt was unable to state much more other than the first defendant has a service level agreement in place with the second defendant in terms of which monthly meetings are held to monitor the progress of, and the quality of, the work performed by the appointed service providers. Van der Walt conceded that the first defendant had no personnel on the

ground at the court building and that incidents such as the incident in question would “*probably be brought to our attention at these monthly meetings.*” When pressed further by Mr Niekerk, on behalf of the plaintiff, the following exchange ensued:

“MR NIEKERK: ... Department of Public Works, took no steps to place anybody at the premises to ensure that the cleaning services were properly and safely carried out. Do you agree with me on that? They were – the answer to that question would be yes?”

VAN DER WALT: The answer to that question is yes, but there is an underlying agreement that regulates our engagement with the Department of Justice.”

[35] Van der Walt’s contention that a non-slip finish ought to have been applied to passageway floors, was equally as non-committal regarding whether or not this had been done and whether or not the first defendant’s personnel ensured compliance with the contract between the first defendant and Sky Ground. Van de Walt, by way of oversight and monitoring functions, once again placed reliance on the stated monthly meetings, and what he referred to as “*regular inspections linked to those meetings*”, which inspections, he said, take place at least once a month. As to whether such meetings took place, van der Walt firstly testified that he would *assume* so as it was required in terms of the specification document, and thereafter he later conceded that whilst inspections had been held, he was unable to state whether this was done on a monthly basis.

[36] Van der Walt further conceded that Sky Ground, by leaving the wet floor unattended to, and by not putting out the required warning signs, had breached the agreement between the first defendant and Sky Ground.

[37] It is common cause that the second defendant is the occupier of the court building and that it had an obligation to occupy the court building responsibly.

[38] Given the body of the evidence led, in the context of the central issues which fall to be determined by me, it is not necessary to make credibility findings on behalf of the defendants' witnesses. Insofar as the plaintiff's evidence is concerned, and as previously set out, same was unchallenged by the defendants and there exists no basis to reject his version of the events, which transpired on the morning of 16 November 2018, and which I accept.

[39] I now turn the relevant legal principles at hand.

[40] The general rule in our law is that a principal is not liable for the wrongs committed by an independent contractor or its employees.⁶ The recognised exception to the general rule is where the employer himself has been negligent in regard to the conduct of the independent contractor, which caused harm to a third party. Such liability is not vicarious.⁷

[41] Whether a principal will indeed be liable for the negligence of an independent contractor has been subject to a continuing debate. This so-called "*personal duty*" or "*non-delegable duty*"⁸ which has been described as "*a special*

⁶ *Colonial Mutual Life Assurance Society Ltd v McDonald* 1931 (AD) 412; *Auto Protection Insurance Co Ltd v McDonald (Pty) Ltd* 1962 (1) SA 793 (A); *Smit v Workmens Compensation Commissioner* 1979 (1) SA 51 (A); *Chartaprops (supra)* at para 28 and *Langley Fox Building Partnerships (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) at 8A.

⁷ *Saayman v Visser* 2008 (5) SA 312 (SCA) at para 18.

⁸ As described in English Law (see *Chartaprops (supra)* at para 29).

responsibility or duty to see that care is taken” enables a plaintiff to outflank the general principle that a defendant is not vicariously responsible for the negligence of an independent contractor.⁹

[42] The concept of personal duty is not without its difficulties as courts have grappled to explain when and why this particular duty should be so classified.¹⁰

[43] Courts have oft been criticised for extending the liability of a principal for the negligence of an independent contractor. In *Chartaprops (supra)*¹¹ the Supreme Court of Appeal, relying on the remarks by Glanville Williams, commented as follows:¹²

“One of the most disturbing features of the law of tort in recent years is the way in which the courts have extended, seemingly without any reference to considerations of policy, the liability for independent contractors.”

[44] The Supreme Court of Appeal has warned of cases that have “sowed the seeds of the large extension” that would efface the whole distinction between employee and independent contractor.¹³ In consideration of the principles applicable to the present matter, I remain mindful of the aforesaid.

⁹ *Chartaprops (supra)* at para 29.

¹⁰ *Chartaprops (supra)* at para 30.

¹¹ *Chartaprops (supra)* at para 28

¹² ‘*Liability for Independent Contractors*’ (1956) Cambridge Law Journal at 180.

¹³ *Chartaprops (supra)* at para 28.

[45] Under English law one situation where an employer of an independent contractor is liable for the wrongs of the latter is where the work performed is dangerous.¹⁴ However, in our law, it is important to note that this is but one of the factors to be taken into account in determining liability. The fact that the work was dangerous does not, in itself, invariably lead to liability.¹⁵

[46] The usual approach to so-called “*slip and trip*” incidents, in places frequented by members of the public, was succinctly set out by Stegmann J in *Probst v Pick ‘n Pay Retailers (Pty) Ltd*¹⁶ as follows:

“The duty on the keeper of a supermarket to take reasonable steps is not so onerous as to require that every spillage must be discovered and cleaned up as soon as it occurs. Nevertheless, it does require a system which will ensure that spillages are not allowed to create a potential hazard for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptitude.”

[47] In *Langley Fox Building Partnership (Pty) Ltd v De Valence*¹⁷ the court in determining liability of the employer for an independent contractor, formulated the test to be applied as follows:

*“(a) would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,
(b) would a reasonable man have taken steps to guard against the danger? If so,
(c) were such steps taken in the case in question?”*¹⁸

¹⁴ *Saayman (supra)* at para 19.

¹⁵ *Saayman (supra)* at para 21.

¹⁶ [1998] 2 All SA 186 (W) at 200f.

¹⁷ 1991 (1) SA 1 (A).

¹⁸ *Langley Fox (supra)* at 13F – 14H. This test was applied in *Saayman (supra)* at para 22 and in *Pienaar v Brown* 2010 (6) SA 365 (SCA) at para 11 and 21 – 22.

[48] The test set out in *Langley Fox* has been said to repeat, in substance, the traditional test for negligence articulated in *Kruger v Coetzee*.¹⁹

[49] In determining the answer to the second enquiry into negligence, the court emphasised the following factors, which were by no means an exhaustive list:

“[t]he nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and the independent contractor respectively; and the means available to the employer to avert the danger.”

[50] Only where the answer to the first two questions is in the affirmative does a legal duty arise, the failure to comply with which can form the basis of liability.²⁰

[51] In the present instance, the plaintiff’s case at trial was that the first defendant as custodian of the building, and the second defendant as the occupier thereof, were under a legal duty to the plaintiff, and the public at large, to ensure that the buildings, including the floors of the building’s passageways, for which they were responsible, are safe and free of obvious hazards which would pose a risk to members of the public. Whilst the first defendant, admitted the aforesaid legal duty on the pleadings, the legal duty which rested upon the second defendant was undisputed in evidence.

[52] I am satisfied that the legal duty as pleaded, was established by the plaintiff in respect of both defendants.

¹⁹ *Pienaar v Brown* 2010 (6) SA 365 (SCA) at para 30. See also *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-H.

²⁰ *Saayman (supra)* at para 23.

[53] It was submitted, on behalf of the plaintiff, that the defendants' legal duty cannot be contracted out of, and cited as authority, *De Kock v Minister of Public Works*.²¹ I disagree that the findings in *De Kock* are authority for such proposition. To hold otherwise would be to endorse the existence of a non-delegable duty, which the Supreme Court of Appeal has cautioned against.

[54] In *De Kock (supra)*, the plaintiff, who was employed as a prosecutor, slipped and fell whilst walking in the court passageway at the Bhisho High Court and sustained certain bodily injuries. The plaintiff thereafter instituted action against the Minister of Public Works. In his plea, the defendant admitted that court buildings fall under his authority and that it was his responsibility to supply the court cleaners with cleaning and maintenance materials, but that such cleaners were employed by the Minister of Justice and Constitutional Development. For that reason, the defendant contended that he could not be held liable for the cleaners' negligence. In this regard, the court stated as follows:²²

"I may just mention in this regard that the attempt in the defendant's pleadings to avoid liability by denying responsibility for the cleaners, which is, in my view, at odds with and cannot be sustained in the light of the admission by the defendant that his department is the "caretaker" of the relevant building, was prudently not pursued in argument by his counsel... It must therefore be accepted that the defendant has a duty to keep the buildings, including the floors of such buildings for which it holds responsibility... reasonably safe for the public using them."

²¹ [2004] 1 All SA 282 (Ck).

²² At 284.

[55] I understand the position in *De Kock* to be aligned with the principle enunciated in *Alberts v Engelbrecht*,²³ that a defendant, as a matter of law, has a duty to take reasonable steps to keep his premises reasonably safe at all times when members of the public may be using them. If liability were to attach to the principal in such instance, it would be as a consequence of his negligence in failing to take preventative measures to prevent the risk of harm from materialising that a reasonable person in those circumstances would have taken, rather than in accordance with a proposition framed in terms of a non-delegable duty.²⁴

[56] In the present instance, the legal duty having been established, what remains to be considered is the third enquiry as set out in *Langley Fox*, namely, whether, on the facts of this particular matter, steps to guard against the danger were taken by the defendants. Put differently, and in light of the defendants' pleaded case, the appropriate enquiry is whether the defendants, discharged their legal duty by the appointment of Sky Ground by the first defendant.

[57] The third requirement requires consideration of all the facts and circumstances of the case and ultimately the inquiry involves a value judgment.²⁵ In this regard it is well to recall the words of Scott JA in *Pretoria City Council v De Jager*.²⁶

²³ 1961 (2) SA 644 (T).

²⁴ *Chartaprops (supra)* at para 41.

²⁵ *Saayman (supra)* at para 12.

²⁶ [1997] 1 All SA 635 (A) at 643.

“Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgment.”

[58] The plaintiff’s case is that the first and second defendants were negligent (in breach of their legal duty) in the respects set out in paragraph 6.1 to 6.3 and 6.5 and 6.6 of the plaintiff’s particulars of claim, which I have cited herein above. It is contended that as a result of this negligence, the plaintiff slipped and fell in the court passageway, sustaining the resultant injury to his shoulder.

[59] Notwithstanding it being common cause, *inter alia*, that the (i) defendants did nothing to warn the plaintiff that the passage floor was wet; (ii) allowed the plaintiff to walk on the wet passage floor; (iii) failed to ensure that the passage floor was safe for the plaintiff to walk on; and (iv) failed to utilise warning signs to warn members of the public of the wet floor, the defendants case was that it took reasonable steps to guard against the foreseeable harm to the public, by the appointment of Sky Ground, a competent and professional independent contractor.

[60] Accordingly, the question arises whether on the evidence, the defendants, in the appointment of Sky Ground by the first defendant, can be said to have taken reasonable steps to guard against foreseeable harm to the public, and accordingly the plaintiff. It is this question which I am called upon to exercise a value judgment.

[61] On a conspectus of the evidence, the answer to this question must be in the negative. The first defendant, and accordingly the second defendant, were satisfied to merely content themselves with the appointment of Sky Ground by the first defendant, an entity which the defendants seemingly knew little about, to perform the cleaning services at the court building, and to sit back and do no more. The high-water mark of the defendants' case, insofar as the assessment of Sky Ground by the first defendant during the bid evaluation and adjudication process is concerned, pertained to a financial risk assessment, which, in my opinion, falls far short of establishing that Sky Ground was a competent and professional independent contractor. The first defendant, but for, at best, once-a-month meetings and/or inspections, distanced herself from the cleaning functions of the court building, despite being the custodian of same and retaining factual control thereover. By the same token, so too did the second defendant, who also retained factual control thereover, as the occupant of the court building.

[62] It is this that distinguishes *Chartaprops 16 (Pty) Ltd and Another v Silberman*²⁷ and *Holtzhausen v Cenprop Real Estate (Pty) Ltd and Another*²⁸ from the present matter. The principals in both such cases took further steps than merely satisfying themselves with the appointment of independent contractors to perform the cleaning services.

²⁷ 2009 (1) SA 265 (SCA).

²⁸ 2021 (4) SA 221 (WCC).

[63] In the circumstances, I find that the plaintiff's fall was caused by the negligence of the first and second defendants. I see no reason to depart from the usual order as to costs. Having come to the above findings, and for such reasons, I find that there is no merit in the respective special pleas raised by the defendants, which need no further comment, and are accordingly dismissed.

[64] In the premises, the following order shall issue:

1. It is declared that the first and second defendants are liable, jointly and severally, for such damages as might be agreed upon or proved in consequence of the event that is the subject of this claim.
2. The first and second defendants are ordered to pay the costs, jointly and severally, of the hearing of the issues already determined in this judgment.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff:	Adv Niekerk
Instructed by:	Boqwana Burns Inc. 84 – 6 th Avenue, Newton Park
For the Defendant	Adv Dala
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