IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 5229/2018

In the matter between:

GAIL PATRICIA MORRISON Plaintiff

and

MSA DEVCO (PTY) LTD Defendant

JUDGMENT

ANDREWS AJ

Introduction

[1] This is a delictual action instituted by the Plaintiff against the Defendant for payment of damages for injuries sustained when she, on 6 February 2017 at the McDonald's restaurant in Milnerton, Western Cape, slipped on a wet floor and fell. The parties agreed to separate the determination of merits and quantum. The matter accordingly proceeded on the merits only.

The Pleadings

[2] The Plaintiff alleges that on or about 6 February 2017, the Defendant being the owner of McDonald's in Milnerton ("the restaurant") had a duty of care towards the public in general and the Plaintiff in particular, when the Plaintiff slipped on a wet substance on the floor which caused her to fall. Furthermore, that the incident was caused solely by the Defendant's breach of the duty of care and / or the Defendant's causal negligence in that it:

(a) Failed to ensure the safety of any person in particular the Plaintiff entering the premises;

(b) Failed to ensure the safety of any person in particular the Plaintiff walking in or at the premises;

(c) Failed to ensure that the floor of the premises was dry and safe to walk on;

(d) Failed to ensure that warning signs were placed to indicate that the floor of the premises was wet;

(e) Failed to cordon off the section of the floor of the premises that was wet;

(f) Failed to take all necessary steps to avoid incidents such as the one which gave rise to this action;

(g) Failed to ensure that any person or entity employed alternatively contracted to carry out any of the duties referred to hereinabove would do so speedily, properly and effectively. [1]

[3] The Defendant admitted that the Plaintiff reported the incident on 6 February 2017 that she had allegedly injured herself on the premises, but pleaded that it has no

[1] Particulars of Claim, para 9, pages 5 - 6.

knowledge of the incident itself. The Defendant denied that it was negligent as alleged and pleaded that it exercised the standard of care expected of a reasonable restaurant operator by ensuring that the restaurant was safe for patrons to use.

[4] Furthermore, to the extent that the court may find that the alleged incident occurred, the Defendant pleaded that the incident was caused by the sole negligence on the part of the Plaintiff alternatively, that the alleged incident was caused as a result of the contributory negligence on the part of the Plaintiff. [2]

[5] Moreover, the Defendant pleaded that the Plaintiff was reasonably expected:

(a) To keep a proper look out when walking on the premises of the restaurant;

(b) To walk at a reasonable speed / pace in order to avoid slipping and falling on the floor of the premises of the restaurant; and

(c) To wear appropriate footgear in the circumstances in order to reduce the risk of slipping.[3]

The evidence

[6] Mr Peter Mervyn Winspear ("Winspear") and Gail Patricia Morrison ("Plaintiff") testified in the Plaintiff's case. Ms Sandy Snyman ("Snyman"), Mr Mbuyiseli Duna ("Duna") and Ms Phumza Gcayiya ("Gcayiya") testified on behalf of the Defendant.

[2] Plea, paras 9.1.1 – 9.1.3, pages 17 – 18.
[3] Plea, paras 9.1.4.1 – 9.1.4.3, page 18.

Summation of the relevant evidence

[7] The Plaintiff testified that on 6 February 2017, she met Winspear at the restaurant as they had planned a private meeting to talk about work-related concerns. She recounted that they walked into the restaurant. Winspear told her to find a place to sit while he collected their coffee order. The Plaintiff narrated that as she was walking, she slipped and hit the ground hard. She described that her right foot slipped from underneath her. She explained that she had to bring her legs forward. Her left knee was pulled out of joint and she had to push it back. The Plaintiff stated that she was in a lot of pain.

[8] The Plaintiff recalled that when she put her hands on the floor she felt that the floor was damp, which made her realise that the floor had been washed. She was assisted up from the floor onto a chair and her foot was elevated because it was swollen. The Plaintiff further testified that she looked around after she had fallen to see whether there were any yellow warning notices and saw none. She did not recall seeing or noticing the disclaimer notices on the entrance door of the restaurant. The Plaintiff was taken out of the restaurant on a stretcher. She underwent an operation on her right ankle and left knee as she had torn ligaments of the left knee. According to the Plaintiff she wore comfortable sandals with non-slip ripples. She explained that she was walking at a normal pace when she fell.

[9] **Winspear** testified that the Plaintiff worked for his company, Contractokil in a general administrative position. He recounted that arrangements were made with the Plaintiff for them to have a private meeting at the restaurant concerning work over a cup of coffee on 6 February 2017. He explicated that they entered the restaurant

through the front entrance and described their passage of travel as mapped out on Exhibit "A"[4]. He orated that the Plaintiff was walking in front of him. She was approximately three to four metres ahead of him.

[10] Winspear observed a lady who was holding a mop in the middle of the floor area close to the McCafé Coffee Bar.[5] They proceeded to walk past the lady, en route toward the back of the restaurant. He was looking towards the Plaintiff when she slipped and fell. After the Plaintiff had fallen he went to her and noticed that the floor was wet. He orated that as he looked in the direction from where they had walked, he noticed that the floor was wet. Winspear stated that he was unable to tell whether the floor was wet in front of him while he was walking behind the Plaintiff.

[11] After he had gone to the Plaintiff to see how she was, he realised that she was in a lot of pain and discomfort. He observed that there were no wet floor notices on the floor. Winspear took photos of the surrounding area to depict the absence of the signage where the Plaintiff had fallen. Also shown in the pictures were a cleaning bucket and the approximate distance where he had observed the lady with the mop. He explained that the lady was far away from the cleaning bucket. He estimated that the Plaintiff fell six to eight metres away from where the lady with the mop was standing.

[12] **Winspear** also recounted that the Plaintiff was assisted and put onto a stool. According to Winspear, the only other person who witnessed the incident was

[4] Exhibit A, page 5, marked with an orange highlighter.
[5] Exhibit A, page 5, marked with a pink "X".

the lady holding the mop who apologised. He explained that he arranged for the Plaintiff to be taken by ambulance to Milnerton Medi-Clinic.

[13] **Snyman**, who was employed as a restaurant manager for Mc Donald's at the Bellville branch testified that she was at the restaurant where the incident happened to collect stock. When she arrived, the incident had already occurred. She explained that she assisted the restaurant manager on duty with completing the forms. The restaurant manager, one Nombulelo had since left the company.

[14] Snyman explicated that she observed the Plaintiff seated in the dining area as depicted in photograph marked X, on Exhibit "A". She also gave an exposition of the general protocols for mopping as per the standard McDonald's procedure and regulations. Snyman orated that when she arrived at the restaurant, she noticed a wet floor notice which was placed in the walk path on the floor next to the new McCafé Coffee Bar. According to Snyman, nobody was busy mopping the floor when she arrived at the restaurant.

[15] **Duna**, an employee of the restaurant testified what his duties entailed. He explained that on the day of the incident, he was engaged in maintenance duties and changing bins. Whilst proceeding towards the lobby he was approached by a customer who had informed him that a lady had fallen. He, upon investigating, noticed the Plaintiff sitting on a chair. He orated that there was a man assisting the Plaintiff. Duna did not engage with the Plaintiff and went to the manager on duty, Ms Phumza Gcayiya to report the incident.

[16] Duna further stated that there were two wet floor notices, one which was approximately 3 meters away from where the Plaintiff was seated. The other wet floor

notice was close to the entrance of the restaurant, which according to Duna, the Plaintiff ought to have noticed when she entered the restaurant through the front entrance.

[17] **Gcayiya**, narrated that she was the shift manager of the restaurant. She expounded on the McDonald's cleaning procedures and protocols. She testified that on the day of the incident she was called by Duna who informed her that a customer had fallen. Gcayiya accompanied Duna to investigate the report where she observed the Plaintiff lying on her side in the position reflected in the photo exhibit[6]. She did not approach the Plaintiff and made an about turn to call the manager in the office. They then both went to where the Plaintiff was lying.

[18] Gcayiya stated that she did not speak to the Plaintiff and observed the Plaintiff being taken out on a stretcher to the ambulance. According to Gcayiya there were no wet floor notices in the area where the Plaintiff was lying. The wet floor notices were positioned as indicated on Exhibit A.[7]

Common cause facts

[19] The following facts are common cause:

(a) The Defendant at all material times owned and operated a McDonald's franchise restaurant situated within the jurisdiction of this court.

(b) On 6 February 2017 the Defendant was the lawful beneficiary and risk bearing occupier / possessor of the premises on which the restaurant is located.

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[6] Exhibit "A", page 2.
[7] Exhibit A, page 14, marked Z1 and Z2.

(c) At all material times the Defendant has a legal duty to exercise the standard of care expected of a reasonable restaurant operator in the circumstances by ensuring that the premises of the restaurant were safe for patrons to use.

(d) There was a disclaimer notice at the entrance of the restaurant.

(e) On 6 February 2017, the Defendant was duly represented by its employees acting in the course and scope of their employment with the Defendant.

Issues in Dispute

[20] The following issues are the issues in dispute as identified by the parties:

(a) That on or about 6 February 2017, and at or near the restaurant, the Plaintiff was present / attended at or was injured in the alleged incident on the premises of the restaurant;

(b) That if it is found that the Plaintiff was indeed inside the restaurant on 6 February 2017, the Plaintiff disputed that she was negligent as alleged or at all;

(c) That the Defendant breached the duty of care as alleged of a reasonable restaurant operator;

(d) The parties disagree that the Plaintiff fell on a surface inside the restaurant or on the premises where the restaurant is located;

(e) That the Defendant failed to ensure the safety of any person;

(f) That in the event that it is found that the Plaintiff was indeed present inside the restaurant on 6 February 2017 which is denied and that she did indeed fall to the floor which is also denied, then the parties disagree that the Defendant failed to ensure that the floor of the restaurant was dry and safe to walk on at the alleged time when the alleged incident occurred;

(g) If it is found that the Plaintiff did attend at the restaurant on 6 February 2017, the Plaintiff would have seen the disclaimer notice, read and understood the content thereof before entering the restaurant;

(h) That the Defendant failed to ensure that the warning signs were placed to indicate that the floor of the restaurant was wet at the alleged time when the alleged incident occurred;

(i) That the Defendant failed to ensure that the warning signs would as a matter of routine always be placed on the floor of the restaurant, if it was wet and unsafe;

(j) That the floor of the restaurant was wet at the alleged time when the alleged incident occurred and that the Defendant, accordingly had a duty to cordon off the section of the floor of the premises that was allegedly wet at the alleged time when the alleged incident occurred;

(k) That the Defendant failed to take all expected steps of a reasonable restaurant operator to avoid the alleged incident from taking place and

(l) That the Defendant failed to ensure that any person or entity employed, alternatively, contracted carried out any of the duties referred to hereinabove would do so speedily, properly and effectively.

Issues to be determined

[21] The crisp issues to be determined is whether, if it is found that the Plaintiff was in fact present at the restaurant, the Defendant wrongfully and negligently caused the Plaintiff to suffer damages, and, if so, whether the alleged damages were partially caused as a result of the alleged contributory negligence of the Plaintiff by apportioning the damages to the parties in their respective degrees, and a

determination as to whether the disclaimer notice excluded the Defendant from being liable to the Plaintiff as alleged, or at all for the alleged damages the Plaintiff suffered.

Was the Plaintiff at the restaurant?

[22] As a starting point, it would be prudent to deal with the denial by the Defendant that the incident happened at the restaurant or at all. Duna's evidence was that he saw the Plaintiff after the incident had allegedly taken place, sitting on the first white chair as depicted in the photo exhibit.[8] It was Duna who informed Gcayiya about the incident. On Gcayiya's version, Duna accompanied her to the existing dining area after he had reported the fall to her. It can therefore safely be accepted that the Plaintiff was at the restaurant on the day in question and as such the Defendant's denial as pleaded cannot be sustained, as the Defendant's witnesses places the Plaintiff inside the restaurant. The next question to be answered is whether she in fact slipped and fell in the restaurant as alleged.

Did the incident occur?

[23] The Defendant challenged the allegation that the Plaintiff fell in the restaurant, based on Duna's observation as to where he saw the Plaintiff after he was alerted to the incident by another customer. It is the Defendant's hypothesis that the Plaintiff had to move from the stool where she had been sitting to the floor (or back to the floor) where she was lying on her side. When Gcayiya saw the Plaintiff for the first time, she was lying on her side at the scene of the incident.

[8] Witness Bundle, Exhibit A, page 2.

[24] The Defendant however postulates the view that the different immediate observations by Duna and Gcayiya of the positioning of the Plaintiff at the location where the incident is alleged to have occurred in the restaurant remains unexplained and casts doubt on the reliability and credibility of the Plaintiff's evidence. Although the Defendant has requested the court to be mindful that the Plaintiff was present in court when Winspear testified, it does not detract from the fact that Duna and Gcayiya's account of where the Plaintiff was when they came to the scene does not accord with each other.

[25] The fact that Duna says he observed the Plaintiff sitting on a stool cannot be considered in isolation, bearing in mind that he was alerted by a customer that the someone had fallen. The dictionary meaning of "fall" could have a variety of meaning which may include *inter alia*, to drop or descend under force of gravity, as to a lower place through loss or lack of support. It could also mean to come or drop down suddenly to a lower position, especially to leave a standing or erect position suddenly, whether voluntary or not.

[26] It is unrefuted that the Plaintiff was taken out of the restaurant on a stretcher. This it was argued, casts significant doubt on Duna's evidence that she was sitting on the chair after the incident had been reported to him, more especially since he testified that the customer reported that someone had fallen. On Duna's version, the Plaintiff would have had to walk or crawl from the chair to where she was lying on the floor after sustaining the injuries. To my mind, this proposition is not only improbable but also untenable as the nature of her injuries, suggests that she would not have been able to navigate her way from floor to chair and vice versa unassisted.

[27] There is a plethora of case law that deals with witnesses perceiving and interpreting events differently based on their personal perspectives, experiences or biases. This is especially common in cases where multiple parties may recount the same event in ways that conflict or diverge. This however, must be viewed within the factual matrix of this matter as none of the Defendant's witnesses observed the incident and essentially testified about their observations after learning about the alleged fall of the Plaintiff. They all noticed the Plaintiff at different intervals. Inasmuch as it was argued that Winspear's evidence was evasive and overly defensive, there is no evidence to gainsay the evidence of the Plaintiff and Winspear that the Plaintiff fell inside the restaurant, more especially as Duna and Gcayiya's evidence do not align with each other. The Defendant's witnesses are in my view unable to assist the court in determining the actual conditions inside the restaurant when the incident occurred.

[28] I am therefore satisfied that the Plaintiff fell inside the restaurant. This conclusion is further concretised by the description given by the Plaintiff of the extent of her injuries after falling. In this regard she stated that the position of her legs was such that she had to bring her legs forward because her one knee was out of joint. Logical reasoning presupposes that if she had been mobile, there would have been no need for her to be carried out of the restaurant on a stretcher and dispels the version of Duna regarding where he had initially seen the Plaintiff immediately after being informed by a customer that someone had fallen.

Negligence

[29] It is trite that a Defendant is negligent if a reasonable person in his position would have acted differently and if the unlawful act causing damage was

reasonably foreseeable and preventable.[9] Holmes JA, in ***Kruger v Coetzee***,[10] formulated the test to be applied on negligence elucidated the proper approach for establishing the existence or otherwise of negligence as follows:

> *'For the purposes of liability culpa arises if—*
>
> *(a) a diligens paterfamilias in the position of the defendant—*
>
> *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
>
> *(ii) would take reasonable steps to guard against such occurrence; and*
>
> *(b) the defendant failed to take such steps.'*

[30] The court in ***Cenprop Real Estate (Pty) Ltd and another v Holtzhauzen*** [11]*("Cenprop")*, referred to the test for negligence as distilled in ***Kruger v Coetzee*** and remarked that:

> *'This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.'*[12]

Duty of care

[31] The Plaintiff pleaded that the Defendant had a duty of care towards the public in general and the Plaintiff in particular:

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[9] See also *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* [2000] 1 All SA 128 (A) at para 21 *'...in the final analysis the true criterion for determining negligence was whether in the particular circumstances the conduct complained of fell short of the standard of the reasonable person.'*

[10] 1966 (2) SA 428 (A) at 430E-F.

[11] 2023 (3) SA 54 (SCA) at para 17.

[12] *Kruger v Coetzee* 1966 (2) SA 428 (A) Ibid at 430E-G.

(a) To ensure the safety of any person entering the premises;

(b) To ensure the safety of any person walking in or at the premises;

(c) To take all necessary steps to avoid incidents such as the one which gave rise to this action, the full details of which are set out hereunder;

(d) To ensure that any person or entity employed, alternatively contracted, to carry out any of the duties referred to hereinabove, would do so speedily, properly and effectively.[13]

[32] The Defendant admitted that at all material times the Defendant had a legal duty to exercise the standard of care expected of a reasonable restaurant operator in the circumstances by ensuring that the premise of the restaurant was safe for patrons to use.[14] It is trite that the onus rests on the Plaintiff to prove that the Defendant failed to comply with this duty. The Defendant submitted that it took all reasonable steps to ensure that the restaurant was safe and that it complied with its legal duty towards the patrons and ensured that the necessary and required measures are in place.

[33] The Plaintiff however contended that the floor of the restaurant was not safe for use by customers. In this respect, it was argued that the floor was made unsafe by the Defendant's employee in the performance of her cleaning duties. It was submitted that although the facts of the matter in *casu* is distinguishable from other case law regarding spillages on shop floors, the same principles apply.

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[13] Particulars of Claim, para 5, page 4.
[14] Defendant's plea, para 3.8, pages 15 – 16.

[34] There is an abundance of case law oft-referred to as so-called "slip and trip" matters, dealing with the issue of liability on the part of shop-keepers and building-owners. In the matter of ***Probst v Pick n Pay Retailers (Pty) Ltd*** [15] the court held a supermarket liable for injuries sustained by a customer who slipped on a wet floor, emphasising the owner's duty to ensure the safety of patrons by taking reasonable steps to prevent such accidents.

[35] It was argued that the Plaintiff in *casu* has provided sufficient evidence to prove that the cause of her fall was due to negligence on the part of the Defendant. In amplification it was submitted that had the Defendant's employee ensured that the wet floor notices were placed on the floor, the Plaintiff and Winspear would have noticed same. Ms Snyman and Ms Gcayiya conceded that the floor inside the restaurant will be slippery if it is wet. It therefore follows that cleaning protocols ought to be followed strictly.

[36] The cleaning protocols as per the evidence of Snyman, becomes a crucial starting point. She testified that a wet floor sign will be placed at the beginning of the section where a staff member is going to mop, and the second wet floor sign will be placed at the end of the section where the staff member is busy mopping at the time. The staff member will then mop the floor using an 8-figure motion. Only when the floor is dry, then the staff member will move the first sign and place it further down to mop the next section of the restaurant. This protocol was confirmed by Gcayiya during her testimony. She explicated that the purpose of cordoning off the area is to prevent customers from slipping.

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[15] [1998] 2 All SA 186 (W) at 197.

[37] Winspear testified that there was a lady standing with a mop near the coffee bar they walked past. It was argued that this confirms the evidence of Duna and Gcayiya regarding the placement of the wet floor signs Winspear denied there were any wet floor signs in place. Winspear's evidence was that he took the photo in front of the lady cleaning who was to his guestimate, approximately two meters behind him.

[38] The Defendant claims that because the photograph was taken from that angle, the warning signs are not visible. The Defendant argued that Winspear's evidence that there were no warning signs, is not supported by the Plaintiff as she did not remember much details, which included not observing the disclaimer notice. The Defendant submitted that the Plaintiff did not testify that she saw the floor being wet and failed to present any evidence that the floor was in fact wet. The Defendant challenged the reliability of the evidence presented in the Plaintiff's case and suggested that the Plaintiff failed to present any evidence that the floor was in fact wet but rather assumed as much by reason of her alleged slipping and falling on the floor of the restaurant.

[39] This argument does not harmonise with the Plaintiff's evidence as she testified that after she fell, she felt that the floor was damp. It was argued that the Plaintiff, despite having a different recollection of all the events of the day, testified that there were no warning signs on the entire floor of the restaurant. This is underscored, they argued, by the fact that Winspear did not notice any other customers compared with the Plaintiff who on the other hand noticed plenty of customers at the service area situated close to the entrance of the restaurant. Furthermore, they asserted that the evidence of both the witnesses called to testify in the Plaintiff's case is not reliable because according to the Plaintiff's evidence, she did not notice the lady standing at

the coffee station with a mop as per the observations of Winspear, moments before she fell.

[40] It is the Plaintiff's contention that Snyman, Duna and Gcayiya gave contradictory evidence regarding the presence and placement of the wet floor notices. It is uncontroverted that they all became aware of the incident at different times and saw the Plaintiff at different times after the occurrence of the incident. The Plaintiff argued that notwithstanding the contradictions in their evidence, it is evident that no wet floor notices were placed in the existing dining area even after the incident had occurred.

[41] The Plaintiff further contended that the wet floor notice (s) which might have been put on the floor after the incident had occurred was placed at a considerable distance from where the incident had occurred and was not placed in the existing dining area. The Plaintiff asserted that the employees of the Defendant did not inspect the floor to determine whether it was wet or dry. They did not know what caused the Plaintiff to end up on the floor. They were unable to testify whether the wet floor notices were placed on the floor when the incident occurred.

[42] It is manifest that there are mutually destructive versions insofar as the placement of the warning signs. It is settled law that in instances where there are two diametrically opposing versions the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false or

mistaken.[16] The correct approach to be adopted when dealing with mutually destructive versions was briefly set out in ***National Employers General Insurance Company v Jagers***[17] which was approved in seminal judgment of ***Stellenbosch Famer's Winery Group LTD and another v Martell et Cie and Others***[18] .

[43] The Defendant asserted that Duna and Gcayiya's evidence regarding the placement of warning signage and where and how the Plaintiff was found when they first saw her at the scene of the alleged incident, coupled with the absence of CCTV footage, presented as evidence during the trial that may have been conclusive evidence and determinative of the factual issues in dispute, casts sufficient doubt on the Plaintiff's evidence which they argued, ought to be rejected. This they say, must be viewed in conjunction with the Plaintiff's evidence as she remembers very little of the day of the alleged incident.

[44] In evaluating the evidence, I am satisfied that the Plaintiff and Winspear corroborated each other in material respects. In this regard, it is unrefuted that they attended the restaurant on the day of the incident to have a private discussion on issues relating to work and to enjoy coffee. The evidence regarding the placement of the wet floor notices are contradictory and to my mind, the place where the lady was standing and holding a mop, namely, in the middle of the floor area close to the McCafé

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[16] *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 199; *Cloete v Prasa* [2024] 4 All SA 391 (WCC) (10 September 2024) paras 48 -49.

[17] 1984 (4) SA 437 (E) at 440E-G, *'Where there are two mutually destructive versions the party can only succeed if he satisfies the court on a balance of probabilities that his version is true and accurate and therefore acceptable, and the other version advanced is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with the consideration of the probabilities of the case, and if the balance of probabilities favours the plaintiff, then the court will accept his version as probably true.'*

[18] 2003 (1) SA 11 (SCA).

Coffee Bar, approximately 6 meters from where the Plaintiff fell, suggests that it is more probable that the wet floor notices were not in the vicinity where the Plaintiff had slipped and fallen. This is confirmed by the Defendant's own witness Gcayiya who testified that there were no wet floor notices in the area where the Plaintiff was laying.

[45] According to the Plaintiff was that she was heading towards the back of the restaurant in the existing dining area when she slipped and fell. Upon inspecting the floor, after the fall, the Plaintiff discovered that it was damp which made her realise that the floor had been cleaned. Furthermore, there is no contrary evidence that the Plaintiff was not walking at a normal pace prior to slipping and falling. She had to be picked up from the floor and placed on a chair with her foot elevated after the incident. She was removed from the restaurant on a stretcher and transported in an ambulance to Milnerton Mediclinic. The lady holding a mop noticed the incident, but was not called to testify. No other McDonald's employee witnessed the incident.

[46] The evidence of Plaintiff and Winspear is uncontested. Snyman, Duna and Gcayiya gave contradictory evidence regarding the presence and placement of the wet floor notices. Considering that they became aware of the incident at different times and saw the Plaintiff at different times after the occurrence of the incident the contradictions in their evidence is understandable. However, the reliability of the evidence on a balance of probabilities, favour the Plaintiff and Winspear's version that there were no wet floor notice(s) placed in the existing dining area even after the incident had occurred and any notices there may have been were placed at a considerable distance from where the incident occurred.

[47] Thus, it can be safely accepted, on a balance of probabilities that because there were no wet floor notices in the existing dining area, there was no indication that the floor had been mopped or that the floor was wet and/or damp. The evidence suggested that it was not possible to ascertain whether the floor was wet by merely looking at it.

[48] Gamble J, in the matter of ***Williams v Pick 'n Pay Retailers (Pty) Ltd***[19] *("Williams"),* considered the issues grappled with in ***Cenprop*** where the SCA found that the building owner was liable for the shopper's injuries notwithstanding the presences of warning signs cautioning the Plaintiff of wet floors:

> *'In Cenprop the facts were that it was a rainy day and the plaintiff slipped on a puddle of water in a public area inside a shopping mall notwithstanding the presence of warning signs cautioning her of wet floors. It was common cause that rainwater had most likely been transported into the mall through the pedestrian traffic of other shoppers and had been there some while. Further, it was a situation where it was known that the tiles used in the mall area were slippery underfoot when wet. Ultimately, the SCA found that Cenprop, the building owner, was liable for the shopper's injuries.'*

[49] Gamble J, also referred to the seminal judgment of ***Probst*** (which has been referred to with approval in ***Cenprop***) insofar as it distilled a building owner's responsibility towards the welfare of shoppers utilising its premises. More particularly, in relation to the sufficiency of evidence which needs to be adduced to establish negligence on the part of the shopkeeper. In this regard the court held the following in ***Probst*** [20]:

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[19] (8377/2019) [2023] ZAWCHC 229 (1 September 2023), at para 23.
[20] At 197g – 198c

"(I)n such a case the plaintiff generally cannot know either how long the slippery spillage had been on the floor before it caused his fall, or how long was reasonably necessary, in all of the relevant circumstances (which must usually be known to the defendant), to discover the spillage and clear it up. When the plaintiff has testified to the circumstances in which he fell, and the apparent cause of the fall, and has shown that he was taking proper care for his own safety, he has ordinarily done as much as it is possible to do to prove that the cause of the fall was negligence on the part of the defendant who, as a matter of law, has the duty to take reasonable steps to keep his premises reasonably safe at all times when members of the public may be using them... It is therefore justifiable in such a situation to invoke the method of reasoning known as res ipsa loquitur and, in the absence of an explanation from the defendant, to infer prima facie that a negligent failure on the part of the defendant to perform his duty must have been the cause of the fall. As explained in Arthur v Bezuidenhout and Mieny [1962 (2) SA 566 (A)] this does not involve any shifting of the burden of proof onto the defendant: however, it does involve identifying the stage of the trial at which the plaintiff has done enough to establish, with the assistance of reasoning on the lines of res ipsa loquitur, a prima facie case of negligence on the part of the defendant, so that unless the defendant meets the plaintiff's case with evidence which can serve, at least, to invalidate the prima facie inference of negligence on his (the defendant's) part, and so to neutralize the plaintiff's case, judgment must be entered for the plaintiff against the defendant. In this situation the defendant does not have to go so far as to establish on the balance of probabilities that the accident occurred without negligence on his part: it is enough that the defendant should produce evidence which leads to the inference that the accident which caused harm to the plaintiff was just as consistent with the absence of any negligent act or omission on the part of the defendant as with negligence on his part. The plaintiff will then have failed to discharge his onus, and absolution from the instance will have to be ordered."

[50] The court in ***Probst*** elucidated that the Defendant has as a matter of law the duty of care to take reasonable steps to keep his premises reasonably safe at all times when members of the public may be using them. To my mind, ***Probst*** provides the clearest of guidelines on the factors to be considered to prove that the cause of the fall was as a consequence the Defendant's negligence in the absence of an explanation from the Defendant that it has taken reasonable steps to keep the

premises reasonably safe. In those circumstances it would be justifiable to invoke the method of reasoning known as *res ipsa loquitur.* Therefore, in the absence of an explanation from the Defendant, it could be inferred, *prima facie,* that a negligent failure on the part of the Defendant to perform his duty must have been the cause of the fall. The doctrine of *res ipsa loquitur* serves as a *'guide to help identify when a prima facie case is being made out.'*[21]

[51] The doctrine of *res ipsa loquitur* has been succinctly summarised in ***Goliath v MEC for Health, Eastern Cape***[22] as follows:

> *'[10] Broadly stated, res ipsa loquitur (the thing speaks for itself) is a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a prima facie case against him...It is not a presumption of law, but merely a permissible inference which the court may employ if upon all the facts it appears to be justified (Zeffertt & Paizes The South African Law of Evidence 2 ed at 219). It is usually invoked in circumstances when the only known facts, relating to negligence, consist of the occurrence itself...where the occurrence may be of such a nature as to warrant an inference of negligence. The maxim alters neither the incidence of the onus nor the rules of pleading...it being trite that the onus resting upon a plaintiff never shifts.'*[23]

[52] In *casu*, as earlier stated, the only person that could have shed light on whether the cleaning protocols were strictly adhered to was not called to give evidence. This is further underscored by the unrefuted evidence that this lady with the mop, according to Winspear apologised, after the incident occurred. It is noteworthy that the evidence of Winspear is that the restaurant had glazed tiles and that he could

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[21] *Ratcliffe v Plymouth and Torbay Health Authority* [1998] EWCA Civ 2000 (11 February 1998); see also *Checkers Supermarket v Lindsay* 2009 (4) SA 459 (SCA) page 461.
[22] 2015 (2) SA 97 (SCA) at para [10].
[23] See also *Medi-Clinic Ltd v Vermeulen*2015 (1) SA 241 (SCA)page 251 at para 27.

only see a solid wet section when he walked to take the photograph and looked back. Thus, on a balance of probabilities, a wet floor would not have been obviously noticeable if there were no warning signs.

[53] Furthermore, much of the challenges raised by the Defendant is based on speculative hypothesis, on the assumption that the cleaning protocols were strictly adhered to. In applying the considerations set out in ***Probst*** the Plaintiff in *casu* testified as to the circumstances in which the she fell and the apparent cause of the fall. In am satisfied that the Plaintiff has shown that she had taken proper care for her safety in the absence of any evidence in rebuttal in this regard.

[54] Consequently, in light of the inconsistencies regarding the placement of the warning notices and/or absence thereof, the failure of the Defendant to call the actual person who mopped the floor to give evidence, to my mind, would justify the invocation of the doctrine of *res ipsa loquitur*. I am therefore satisfied that a *prima facie* case has been made out that the cause of the Plaintiff's fall was as a consequence of a negligent failure on the part of the Defendant to perform its duty. Should I be wrong in reaching this conclusion, it behoves me to consider whether the incident was also caused as a result of the contributory negligence on the part of the Plaintiff.

Contributory negligence

[55] In the alternative, the Defendant pleaded that in the event that the court finds that the conduct of the Defendant was negligent and that the alleged incidence was caused as a result of the conduct of the Defendant, that the alleged incident was

also caused as a result of the contributory negligence on the part of the Plaintiff. [24] The Defendant submitted that the Plaintiff's fall in the restaurant was caused through her sole negligence by not keeping a proper look out, walking at a reasonable speed or pace and not wearing the appropriate footgear to reduce the risk of falling.

[56] The Defendant asserted that on the Plaintiff's own evidence, it is apparent that she could not remember much from the day of the incident. She was not very observant of her surroundings, to the extent that she testified that she doesn't know what Winspear did or what he saw prior to the alleged incident. The Plaintiff did not see the lady with the mop when she and Winspear entered the restaurant, she did not see the disclaimer notice when she entered and neither did she see the wet floor signs. Her evidence was that her attention was fixated on finding a place to sit. The Defendant therefore submitted that from her own testimony and version of events, the only inference that can be drawn is that the Plaintiff walked around the restaurant focussed solely on selecting a seat, without keeping a proper lookout.

[57] They reason that if the floor in the existing dining area was indeed wet and floor signs were placed on the floor, the Plaintiff would not have seen them. They further suggest that it is most likely that only Winspear would have seen them because, by their own assertion, the Plaintiff, save for noticing that there were many other customers at the main service counter, saw nothing at all and then fell in the restaurant. Furthermore, the Plaintiff's remark that she is now more conscious of her surroundings, presupposes, they argue that when she fell she was not attentive. This

[24] Plea, para 9.1.6. page 19.

they say is also born out by her failure to notice the disclaimer sign or the lady with the mop.

[58] The Defendant argued that if Winspear's evidence is to be accepted then this also leads to the conclusion that if she had kept a proper look-out then she would have also noticed the lady holding the mop and would then reasonably have been expected to adjust the speed at which she was walking, which she did not do, thus causing her to slip and fall. It was further submitted that by virtue of the fact that Winspear was walking behind the Plaintiff at the time without also slipping and falling, he kept a proper look-out and adjusted the speed at which he was walking accordingly.

[59] I pause to mention that the Defendant highlighted that the Plaintiff testified that she wore slip-on sandals with non-slip ripples and that the shoes were fairly new. Winspear on the other hand, was wearing rubber soled shoes. He followed the same pathway and did not fall. This argument in my view, is without substance, as the unrefuted evidence is that the wet floor surface was not noticeable. The cause of the fall was not established to be directly related to the footwear of the Plaintiff, which in my view, was not the cause directly or otherwise of the Plaintiff's fall. Therefore, I am not persuaded that the Plaintiff was solely negligent or contributed to the negligence by failing to wear appropriate footgear in the circumstances in order to reduce the risk of slipping.

[60] I am also not persuaded that the Plaintiff was solely negligent or contributed to the negligence by failing to keep a proper look out when walking on the premises of the restaurant. To cement this finding the evidence on record is that the Plaintiff and Winspear previously patronised that restaurant which suggest that they

were familiar with the layout thereof. The Plaintiff knew exactly where she was going and wasn't expecting to encounter a wet floor surface whilst walking especially as the place where she had slipped was a walk way which patrons frequenting the restaurant would use. There is no suggestion or evidence that the Plaintiff did anything other than what a reasonable restaurant goer would do, when looking for seating.

[61] Neither is there any evidence to suggest or prove that the Plaintiff walked at an unreasonable speed or pace in order to avoid slipping and falling on the floor of the restaurant as pleaded. Her evidence was that she walked at a normal pace. There was no haste in her getting seating and there is no evidence to suggest that she was in a hurry. Again, her evidence is that she walked and then found herself on the floor, in circumstances where the glaze on the floor tile would not have made any water or spillage noticeable even if she had been looking down. There is no evidence to gainsay the evidence of Winspear in this regard. As such, I am not persuaded that the Plaintiff was solely negligent or contributed to the negligence by the manner in which she walked.

[62] It therefore beckons the question whether the disclaimer notice would absolve the Defendant from any liability in these circumstances.

Disclaimer Notice

[63] The Defendant pleaded that the Plaintiff entered the premises of the restaurant at her own risk by disclaiming any liability for damages which she may sustain whilst on the premises. The Defendant is therefore, relying on the disclaimer notice to escape liability for the Plaintiff's injuries. The Defendant submitted that the

disclaimer notice located on the front entrance door of the restaurant is quite conspicuous and would have come to the Plaintiff's attention as the Plaintiff confirmed accessing the restaurant through the front entrance. It is common cause that the disclaimer notice read as follows:

> *"ALL PERSONS ENTERING McDONALD'S AND USING ITS FACILITIES, INCLUDING DRIVE-THROUGH AND PARKING AREAS, DO SO ENTIRELY AT THEIR OWN RISK. NEITHER McDONALD'S NOR IT'S (sic) SUPPLIERS, EMPLOYEES AND OR REPRESENTATIVES SHALL BE RESPONSIBLE AND OR LIABLE IN RESPECT OF ANY THEFT AND OR LOSS AND OR DAMAGES SUSTAINED TO PROPERTY AND OR THE PERSONS OF ANY CUSTOMER AND OR EMPLOYEE OF McDONALD'S WHILST ON THE PREMISES FOR WHATSOEVER REASON. RIGHT OF ADMISSION RESERVED."*

[64] The Defendant submitted that the Plaintiff entered the restaurant at her own risk and indemnified the Defendant against any liability for damages which she might have sustained whilst on the premises to her person. It was asserted that the Plaintiff by entering the premises of the Respondent, voluntarily agreed to aforestated terms of the disclaimer notice.[25] The Defendant pleaded that the Plaintiff was warned by a sign displayed at the entrance to the restaurant that the floors inside may be slippery when wet and she voluntarily assumed the risk of suffering injury as a result thereof by entering the restaurant.[26]

[65] Under cross-examination the Plaintiff admitted that the wording of the disclaimer notice is correct; that if she enters the restaurant and an accident happens then she is liable but she did not notice the disclaimer notice. The Plaintiff and

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[25] Defendant's plea, para 9.1.7, pages 19 – 20.
[26] Defendant's plea, para 9.1.8, page 20.

Winspear from their testimonies, also frequently visited the restaurant to attend private meetings.

[66] The Defendant argued that the damages covered by the disclaimer refers to 2 concepts. One being the damages suffered as a harm caused to the private property of a person and the other damage caused to the person. This they submitted is so because of the use of the word "OR" between the identification of what damages the defendant is indemnified against liability. The user of the words "PERSONS" they say can only have one interpretation in the manner in which the sentence is constructed. That is because in our common law of delict, originally all person would have a remedy to claim damages if an injury or harm is caused to either his property or his person. The word harm is not necessary if the word "damages to persons" are used disjunctively from an earlier reference to an injury / harm caused to property.

[67] The common law remedy, such as *action legis aquiliae* was initially only premised to address injuries to property and or the person (patrimonial losses). The use of the word "person" in our common law of delict means the bodily integrity of a person. This is evident from the judgment ***Swinburne v Newbee Investments (Pty) Ltd*** [27] *("Swinburne")* where the court explains what is meant with the word injury in a

[27] 2010 (5) SA 296 (KZD) at para 35:

'[35] I am not satisfied that a reasonable person reading this clause would understand the reference to 'any damage' as extending to a claim for damages arising from personal injury. It appears in a clause that in other respects, both preceding and following, is clearly dealing only with loss or damage to physical property. There is no word that refers in clear terms to harm to the person as would have been the case had the word "injury" or "personal injury" been used. Whilst a negligent act or omission may cause both damage to property and physical injury to the person the true question in construing this clause is whether the reference to "any damage" extends to the latter. In my view the clause is perfectly capable of a construction that confines its scope to damage to property. The clause is capable of a construction that confines its scope of operation to situations causing damage to property and that construction is consistent with the other provisions of the clause and the lease as a whole. There is no indication anywhere in the lease that what is being sought is an exemption from liability for causing personal injury arising from negligence. There is also no exclusion of the landlord's obligation to make the premises safe for those residing in and visiting them. Neither 'negligence' nor 'injury' is used in any clause. At best for Newbee

disclaimer notice by using the words "harm" or damages to a "person" as being a bodily injury.

[68] The Defendant furthermore submitted that the court is bound by the full court decision of ***City of Cape Town v Rhoode*** [28] where the court found difficulty with the absence of the word "injury" in two disclaimer notices and found that the use of the word "risk" was not sufficient to include damages arising from bodily injuries unless the word "injury" to the body was specifically referred to in the notice. It bears mentioning that the facts in *casu* are however distinguishable.

[69] The Plaintiff could not remember seeing the notice on the entrance door. The Plaintiff did however read the wording of the disclaimer notice during her evidence and when asked if she understood the content of the notice she answered in the affirmative. In this regard, the Defendant argued that from the Plaintiff's evidence it was clear that she understood the wording of the disclaimer, is familiar therewith and would have accepted the risk of harm to her person or bodily integrity and liability.

[70] The Defendant argued that the doctrine of quasi mutual consent finds application in these circumstances rendering the disclaimer valid and enforceable thus excluding any liability on the part of the defendant for "damages" caused to her "person" or body when she entered the restaurant. In this regard, the Defendant referred the court to ***Naidoo v Birchwood Hotel*** [29]

Investments the clause is ambiguous and applying the principles discussed earlier in this judgment it falls to be construed against Newbee Investments.'

[28] [2018] ZAWCHC 49.
[29] 2012 (6) SA 170 (GSJ)

'...In order to rely on quasi-mutual consent, a party has to demonstrate that it took reasonably sufficient steps to bring these terms to the notice of the other party and was therefore entitled to assume that by his conduct in going ahead notwithstanding the disclaimer, the other party had assented to the terms thereof. This is the doctrine applicable in the so-called ticket cases where terms and conditions are to be found on the tickets. The purchaser is assumed to have assented to the conditions once he or she purchases a ticket.[30]'

[71] The seminal judgment of ***Durban's Water Wonderland (Pty) v Botha and Another***[31], deals with the interpretation of an exemption clause. In this matter the SCA essentially dealt with the inquiry to be undertaken whether the Defendant was reasonably entitled to assume from the Plaintiff's conduct in proceeding to enter the premises that he or she assented to the terms of the disclaimer or was prepared to be bound by them without them.

[72] The Defendant also referenced that matter of ***Lombard v McDonald's Wingtip***[32] *("Wingtip")*, where the court dealt with a similarly worded disclaimer notice displayed at the entrance of the restaurant. The court in ***Wingtip*** found that the disclaimer notice stands to be applicable and enforceable despite the Plaintiff's testimony that she could not remember if she did take notice of the disclaimer notice on entering the premises.[33] The Plaintiff in the ***Wingtip*** judgment was refused leave

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[30] *Durban's Water Wonderland* case supra; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A)

[31] 1991 (1) SA 982 (SCA) at 991C.

'. . . [the] answer depends upon whether in all the circumstances the [defendant] did what was "reasonably sufficient" to give patrons notice of the terms of the disclaimer. The phrase "reasonably sufficient" was used by Innes CJ in Central South African Railways v McLaren 1903 TS 727 at 735. Since then various phrases having different shades of meaning have from time to time been employed to describe the standard required. (See King's Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N) at 643G-644A.) It is unnecessary to consider them. In substance they were all intended to convey the same thing, viz an objective test based on reasonableness of the steps taken by the proferens to bring the terms in question to the attention of the customer or patron.'

[32] 2022 JOL 57 57103(GP) at para 104.

[33] *Ibid*, para 104 *'...It is my considered view that this court's interpretation as to the contents of the disclaimer notice is in harmony with the approach envisaged in* ***Endumeni*** *above. As already stated above and contrary*

to appeal and then applied to the SCA for leave to appeal. The SCA dismissed the Plaintiff's / Applicant's application for leave to appeal, stating that there is no reasonable prospect of success on appeal or any other aspect that is of significance warranting an appeal. The Defendant argued that this finding by the SCA is an endorsement of the enforceability of the disclaimer notice *in casu* the Defendant relies on *in casu*.

[73] The Defendant submitted that the Consumer Protection Act [34] ("the CPA"), applies to the relationship between parties, in particular, section 49(3) which provides that a provision, condition or notice must be written in plain language. The Defendant submitted that the wording of the disclaimer notice complies with the provisions of sub-sections 49(3) to (5) of the CPA.[35] The disclaimer was written in plain language and the fact, nature and effect of the notice is drawn to the attention of the customer in a conspicuous manner and form that is likely to attract the attention of an ordinary alert customer.

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to the plaintiff's contention, the contents of the disclaimer notice do not contravene any relevant subsection of section 49 of the CPA. This court makes the above findings despite the plaintiff's testimony that she could not remember if she did take notice of the disclaimer notice on entering the premises. In my view, just on the basis of this evidence, it becomes inexplicable how the plaintiff would still want to appropriate and avail to herself any possible relief that may flow from any issue arising from the disclaimer notice, given that it is her own version that she never had any regard whatsoever to the disclaimer notice. My above view on this notwithstanding, I am satisfied that the disclaimer notice stands to be applicable and enforceable when the conspectus of evidence is considered....'

[34] Act 68 of 2008.

[35] *'(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.*

(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—

(a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and

(b) before the earlier of the time at which the consumer—

(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or

(ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).'

[74] The Plaintiff referred the court to the matter of ***Duffield v Lillyfontein School and Others*** [36] where Pickering J held:

> *'...the only interpretation which can be placed upon the indemnity is that it was conditional upon stringent safety measures being in place. In effect the plaintiff has stated that because stringent safety measures would be in place she therefore indemnifies the defendants against any claims in the event of personal accident or injury.'*

[75] In *casu*, the Plaintiff emphasised that the disclaimer notices are on the front door of the restaurant immediately above the caution notice indicating that the floors may be slippery when wet. The Plaintiff and Mr Winspear reasonably expected to be notified that the floor was wet by the placing of wet floor notices on the floor. It was asserted that if the Defendant displayed the wet floor notices on the wet floor inside the existing dining area, the disclaimer can be enforced. Consequently, they argued that the Defendant should not be allowed to escape liability under the disclaimer.

[76] As previously stated, notwithstanding that the cleaning protocols were elucidated in detail, the actual person, namely, "the lady with the mop", was not called to give evidence as she had apparently witnessed the incident and would have been in the best position to explain where the warning signs were placed when the floor was being mopped. It was explained that this is necessary as floors are slippery when wet and to ensure the safety of customers and employers.

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[36] [2011] ZAECGH 3.

[77] Even if the doctrine of quasi-mutual consent finds application, and even if the wording of the disclaimer notice is was written in plain language, was brought to the attention of the Plaintiff and was understood by the Plaintiff, it must be emphasised that a disclaimer is not an automatic legal shield, and must in my view, be evaluated in the context of the overall safety management of the premises. This approach aims to reshaped how South African courts view disclaimer notices, emphasising reasonable safety over blanket exclusions of liability.

[78] To my mind, the enforcement of an indemnity clause will depend on the facts of each case. The way I see it, the application of an indemnity clause is conditional upon it being established that the indemnifier took reasonable steps to guard against the incident form which it wishes to be indemnified. The authorities are clear that the Defendant has the duty to take reasonable steps to keep his premises reasonably safe at all times when members of the public may be using them. In my view, if the correct cleaning protocols were observed, the harm was reasonably preventable.

Wrongfulness

[79] At the outset of the proceedings the Plaintiff applied to amend the Particulars of Claim to include the word "wrongful" in front of the word "breach" in paragraph 9 of the Particulars of Claim. There was no opposition to the amendment.

[80] The Defendant argued that the Plaintiff failed to prove wrongfulness. The general rule is that a person does not act wrongfully for the purposes of the law of delict if he omits to prevent harm to another person. It is trite that omissions are *prima*

facie lawful. Liability follows only if the omission was in fact wrongful, and this will be the case when a legal duty rests on a Defendant to act positively to prevent harm from occurring and he failed to comply with such duty.[37]

[81] The Defendant failed to comply with its self-imposed reasonable measures to guard against the occurrence of the incident. The caution notice that the floors may be slippery when wet therefore establishes a duty on the Defendant to notify customers that the floor is wet. The Defendant has the duty to take reasonable steps to keep his premises reasonably safe at all times when members of the public may be using them. Its failure to do so would amount to wrongfulness in the context of a delictual action. Consequently, I am not persuaded that the Defendant took reasonable steps to prevent the incident from occurring for the reasons elucidated earlier.

Conclusion

[82] In the absence of an explanation from the Defendant, this court has inferred, *prima facie* that a negligent failure on the part of the Defendant to perform this duty must have been the cause of the fall of the Plaintiff. Consequently, I am of the view that the Defendant has not adduced sufficient evidence to rebut the *prima facie* case of negligence put up by the Plaintiff, which reasoning is in keeping with Gamble J, in ***Williams*** *(supra)*[38].

[83] Having regard to the entirety of the evidence, I am satisfied, on a balance of probabilities, that the Plaintiff has proven that the Defendant wrongfully and

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[37] Neethling *et al "Law of Delict'* LexisNexis (7th ed), para 5.2 page 58.
[38] At para 49 *'In my considered view, then Pick 'n Pay has not adduced sufficient evidence to rebut the prima facie case of negligence put up by the Plaintiff.'*

negligently breached its duty of care owed to members of the general public at large as alleged. In the circumstances I am satisfied that the Plaintiff slipped and fell as a result of the wet floor which incident was occasioned by the negligence of McDonald's employees and she is thus entitled to be fully compensated by the Defendant for such damages as she may prove in the future.

Costs

[84] It is trite that costs ordinarily follow the result. The Plaintiff submitted that the costs of counsel be awarded on Scale C. In the exercise of my discretion, I order that Counsel's fees be taxed on a Scale B given the clearly identified features of this case that were complex, important and valuable to the Plaintiff.

Order

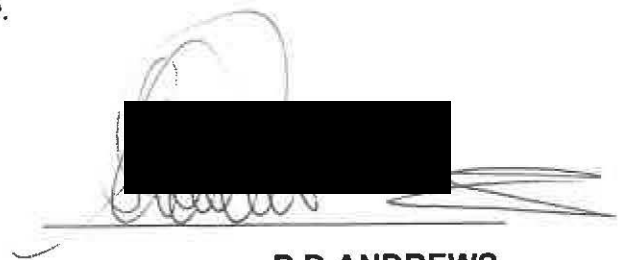
[85] In the result, I grant the following orders:

(a) The Plaintiff's claim on the merits is upheld.

(b) It is ordered that the Defendant is liable to pay to the Plaintiff 100% of such damages as she may establish in due course arising out of her fall at the McDonald's restaurant in Milnerton on 6 February 2017.

(c) The Defendant is ordered to pay the Plaintiff's costs on a party and party scale, including the cost of Counsel to be taxed on a Scale B.

(d) The trial on quantum is postponed *sine die*.



P D ANDREWS

Acting Judge of the High Court of South Africa Western Cape Division, Cape Town

CASE NO: 5229/2018

APPEARANCES:

Counsel for the Plaintiff:	Advocate AJ du Toit
Instructed by:	DSC Attorneys
Counsel for the Defendant:	Advocate A van Loggerenberg
Instructed by:	Clyde and Company

Hearing dates: 05 – 06 August 2024; 28 October 2024

Judgment Delivered: 30 January 2025

This judgment was handed down electronically by circulation to the parties' representatives by email.