Be aware of supermarket surroundings

The recently reported case of *Ramafamba v Score Supermarkets (Trading) (Pty) Limited and another (2014) JOL 31293 (SCA)* has highlighted the importance of adequately pleading a claim where a Plaintiff sustains damages from slipping and falling at a supermarket, and like any other case, leading sufficient evidence in support thereof. **Emma Lord and Craig Poole from Mooney Ford** explain to COVER how this case affects the South African consumer.

In *Ramafamba* the Supreme Court of Appeal (SCA) was not satisfied that the Plaintiff led the requisite evidence on the manner in which she fell over shelves, and substituted the court a quo decision with an order of absolution from the instance.

In formulating her case, the Plaintiff appears to have not relied on the core allegation that the Defendant's failure to have an adequate cleaning in system in place was the cause of her damages, in accordance with the test for negligence pronounced by the SCA in *Checkers Supermarket v Lindsay (123/2008) [2009] ZASCA 26 (2 March 2009)*.

> "NOTABLY, IN *RAMAFAMBA* THE COURT WAS PRIMARILY FOCUSED ON ESTABLISHING WHETHER THE EVIDENCE LED AT TRIAL SUPPORTED THE PROBABILITIES THAT THERE WERE IN FACT SHELVES ON THE FLOOR THAT CAUSED THE PLAINTIFF TO FALL."

In *Checkers Supermarket v Lindsay (123/2008) [2009] ZASCA 26 (2 March 2009)* a customer slipped on a patch of oil near a fruit stand whilst shopping at a Checkers Supermarket in Pinetown, KwaZulu-Natal. The customer instituted action against the Supermarket for damages, on the basis that her fall was caused by the Supermarket's negligence.

It was within this context that the Supreme Court of Appeal ("SCA") appears to have pronounced the enquiry that is to be adopted when it comes to determining what constitutes negligence, in the context of customers slipping and falling in a supermarket.

The SCA used as a starting point of its analysis, the well-established test for negligence set out in *Kruger v Coetzee 1966 (2) SA 428 (A) at 430E-G*, and confirmed that there is a duty on a supermarkets to all its patrons entering the shop premises, at all times during trading hours, to take reasonable steps to guard against the occurrence of a customer suffering harm.

This consideration led the court to formulate what appears to be a simple question, namely, whether or not the Supermarket has an adequate cleaning system in place at all times, in order to protect patrons from sustaining any injury resulting from slipping or falling within the Supermarket's shop area.

Notably, in *Ramafamba* the court was primarily focused on establishing whether the evidence led at trial supported the probabilities that there were in fact shelves on the floor that

caused the Plaintiff to fall. The point of departure between this case and the *Lindsay* case appears to be that in the latter case, the enquiry into the adequacy of the cleaning system is only invoked once it is accepted that there was in fact a spillage or obstruction on the floor.

The purpose of revisiting the judgment of *Checkers Supermarket v Lindsay* is to canvass its potential impact on 'slip and fall' cases in supermarkets going forward. The commentary on the interpretation of the effect of the judgment is considered in the absence of any subsequent decisions referring or relying on it.

In *Lindsay* the SCA noted in accordance with the judgments of various High Court jurisdictions, that the duty on shop owners to take reasonable steps in precaution of shoppers injuring themselves should not be so onerous as to have the effect that every spillage must be noticed and cleaned up immediately upon its occurrence. *(Probst v Pick 'n Pay Retailers (Pty) Ltd [1998] 2 All SA 186 (W) at 200F; Brauns v Shoprite Checkers (Pty) Ltd 2004 (6) SA 211 (E) at 218B-D; Gordon v Da Mata 1969 (3) SA 285 (A) at 289H.*)

The court also took cognisance of the notion that the duty on shop owners necessitates a cleaning system which functions in a manner that prevents spillages that amount to a possible danger for any material length of time, and that the spillage will be recognised without reasonable delay. *(Probst v Pick 'n Pay Retailers (Pty) Ltd [1998] 2 All SA 186 (W) at 200F; Brauns v Shoprite Checkers (Pty) Ltd 2004 (6) SA 211 (E) at 218B-D; Gordon v Da Mata 1969 (3) SA 285 (A) at 289H.)*

Given that all cases are factually diverse, and as a consequence of each case's varied facts, each case is decided on its own particular merits, the abovementioned construction leads to the query of how is a material length of time determined in relation to a set of specific of facts.

The SCA appears to have accepted the High Court's approach of deviating from use of the duration of the time a spillage is on the floor as a sole yardstick for determining what amounts to an adequate cleaning system, based on the rationale, for its departure, that the significance placed on the length of time that a spillage remains unnoticed, is an abstract test.

The SCA recorded in the *Lindsay* case that "in any event it was abundantly clear that the spillage did not occur moments before the incident in question". This comment, in the reported judgment, was not referenced to any particular evidence led by the Plaintiff's attorney in support of the argument that the spillage was on the floor for an unreasonable period of time.

It appears that by adopting such divergence, the judgment may be interpreted to have emphasised that three factors, (in addition to the duration of time that the spillage remains undetected) must be considered when considering what amounts to an adequate cleaning system namely: the number of cleaning employees assigned to deal with spillages, the floor area, and the number of shop aisles.

Regarding the question as to how to adjudicate what length of time amounts to a material length of time, the court appears to use the frequency of other past similar slipping incidents that occurred in specific areas of the shop to identify such areas as 'high risk', coupled with whether or not a cleaner arrives at the scene of the slipping event, as indicative of the adequacy of the cleaning system.

On the facts of this case, the court considered the area of the Supermarket's floor, which was 2971.72 square metres, comprising of 22 aisles. Additionally, the court noted that once the Supermarket had commenced trading from 9 am to 2 pm, two cleaners were responsible for the condition of the floor, and that after 2 pm; only one cleaner was accountable for the floor until the Supermarket closed, apart from the Supermarket's six other employees who were obligated to call a cleaner or demarcate the spillage upon sight thereof.

It was within this context that it was held to be unacceptable for one cleaner and six other employees engrossed in other duties, to deal with a spillage between 2 pm and 6 pm.

Realistically speaking, the difficulty that can be seen to arise from this reasoning is that the SCA has effectively placed an onerous obligation on Supermarkets to ensure that there is more than one cleaner on duty in a supermarket that has 22 aisles, bearing in mind that most of the shop floor area is unlikely to be classified as 'high risk'. It also may be presupposed that a cleaner should, if not permanently, but frequently, be stationed in 'high risk' areas.

Any other Supermarkets with a floor space that differs from the facts of this case have been left in the dark as to how to evaluate the scope that their duty extends to shoppers, because the

judgment fails to specify or provide guidelines of how to ascertain whether a cleaning system is likely to be adequate having regard to the number of aisles and the store floor area.

This difficulty is compounded further because not only are there cost repercussions for the Supermarkets in terms of further attainment of cleaning staff, but a gateway has been unbolted for future frivolous legal action, which could inevitably result in floodgates of litigation being upon us, as result of the possible diminishment of the burden of proof on the Plaintiff to prove the duration of time that the spillage was on floor.

Furthermore, the judgment does not appear to deal with the issue of causation, as the focus of the enquiry is directed to the adequacy of the cleaning system, and not merely the failure to remove the specific spillage timeously. Such omission may be construed as the SCA's acceptance that causation was not an issue that requires proof, because once the cleaning system had been declared as inadequate, it was deemed to be the cause of the Plaintiff's loss.

The shift in the focus of the enquiry to the overall adequacy of the cleaning system, and not the specific spillage, might translate into a reality whereby the liability of the shop owner is determined without the element of causation being entertained, despite the plausibility that the specific spillage may not have been caused by the shop owner's failure to remove any specific spillage timeously. Arguably, the possibility that the plaintiff could have slipped as a result of her own negligence may also be excluded, based on this line of reasoning.

Irrespective of whichever opinion is deduced from this judgment regarding the establishment of causation or lack thereof, the SCA has evidently focused the enquiry of delictual liability onto ascertaining whether or not a shop owner has an adequate cleaning system in place at the time a patron slips. In the process of directing the enquiry to this end, it might be said that the 'abstract' test of the length of time that the spillage is on the floor has been expanded to include additional conceptual grounds on which this enquiry has to be conducted.

Notwithstanding this development of the law, and in the apparent absence of subsequent case law referring to it, it remains to be seen whether future Plaintiff's will present their cases to accord with this judgment, and how the courts will interpret the issue of causation within the framework provided in the judgment.