REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-DEL-2019/02636

In the matter between:

MARTHA SABINA MADISIA

PLAINTIFF

and

EDGARS STORES NAMIBIA LTD t/a

JET STORES WALVIS BAY **DEFENDANT**

Neutral citation: *Madisia v Edgars Stores Namibia t/a Jet Stores Walvis Bay* (HC-MD-CIV-ACT-DEL-2019/02636) [2022] NAHCMD 488 (16 September 2022)

Coram: SIBEYA J

Heard: **30 - 31 March 2021; 01 April; 20-24 September 2021**

Order: **12 April 2022**

Reasons: **16 September 2022**

Flynote: Delict – Action for damages – Based on bodily injuries, pain and suffering, discomfort, emotional shock, loss of amenities of life, hospital and medical expenses and future hospital, medical expenses – Claim arising from an alleged fall on a wet floor in Jet Stores – Plaintiff is alleged to have sustained injuries to her hip, knee and her shoulder – The approach to mutually destructive versions restated –

The repetition of an allegation does not make it true – Court found that the plaintiff's evidence is improbable and false – Court found that it was not proven on a balance of probabilities that plaintiff fell in Jet Stores and sustained the injuries complained of as a result – Plaintiff's claim dismissed.

Summary: The plaintiff claims in her particulars of claim that on 17 June 2016, while shopping in Jet Stores, Walvis Bay, she slipped and fell on a wet floor which resulted in injuries sustained to her hip, knee and shoulder. As a result of the fall, the plaintiff claims to have sustained injuries, more particularly pain, suffering and discomfort, emotional shock and trauma.

The defendant, in its plea, denied that the floor of the store was wet on 17 June 2016, and further denied that the plaintiff slipped and fell in its store on the said date or any other date. The defendant further pleaded that the plaintiff had known injuries or medical conditions regarding her knees, hips and joints pre-dating 17 June 2016. It pleaded further that the plaintiff also had degenerative changes regarding her hips, femur and acetabulum.

Held, it is the duty of owners or other person or entity that controls a store to ensure that such store is safe for use by members of the public, however, in order for the defendant to be held liable for the damages allegedly suffered by the plaintiff there must be a causal link between the fall and the cause of damages.

Held that, repeating an allegation to different persons several times does not elevate such allegation by any degree nor does it necessarily make such an allegation true.

Held further that, the evidence of Dr Tietz who undisputedly assisted with over 500 orthopaedic surgeries and is the first point of contact for orthopaedic conditions supported the finding by Dr Moolman that the medical condition of the plaintiff resulted from degeneration of the joints related to age. The court accepted the opinions of Dr Moolman and Dr Tietz that the medical condition of the plaintiff was due to the degenerative condition related to age and not the alleged fall.

Held further that, the plaintiff did not prove on a balance of probabilities that there was a wet floor in Jet Stores on 17 June 2016 and that she fell and sustained injuries as a result, therefore, the plaintiff's claim is dismissed.

ORDER

---

1. The plaintiff's claim against the defendant is dismissed with costs, such costs include costs of one instructing and one instructed counsel.

2. The matter is regarded as finalised and removed from the roll.

JUDGMENT

SIBEYA J:

Introduction

[1] This court is seized with a claim that the plaintiff fell on a wet floor in Jet Stores, Walvis Bay which resulted in injuries sustained to her hip, knee and shoulder. On the bases of the said injuries, plaintiff claims damages for pain, suffering, discomfort, emotional shock, loss of amenities of life, hospital and medical expenses and future hospital and medical expenses. The claim is defended.

The parties and their representation

[2] The plaintiff is Ms Martha Sabina Madisia, an adult Namibian female pensioner, and a resident of Walvis Bay, Namibia.

[3] The defendant is Edgars Stores Namibia LTD t/a Jet Stores Walvis Bay, a company registered in terms of the applicable laws of the Republic of Namibia, with

its registered address situated at LA Chambers, Dr Agostinho Neto Road, Windhoek Namibia.

[4] Where reference is made to the plaintiff and the defendant jointly, they shall be referred to as the parties.

[5] The plaintiff is represented by Ms R Mondo while the defendant is represented by Ms L Ihalwa.

The pleadings

[6] The plaintiff alleges, in her particulars of claim, that on 17 June 2016, while shopping in Jet Stores situated in Walvis Bay, she slipped and fell on a wet floor. She sustained bodily injuries to her left hip and knee as a result of the fall.

[7] The plaintiff claims that her fall was caused by the negligence of the defendant or its employees whilst they were acting in the course and scope of their employment, by failing to:

(a) Take reasonable steps to ensure that the floor is safe to the members of the public;

(b) Secure the area that was wet;

(c) Warn the public of the danger of the wet floor;

(d) Ensure that the floor was free of water or slippery fluids.

[8] The plaintiff further claims that the defendant or its employees owed a legal duty to the public to secure its floors and warn the public of the dangers of the wet floors. The defendant or its employees further knew or ought to have known that by failing to ensure that the floors were properly maintained and inspected, and that the wet floor was closed off and secured, the wet floors posed a danger to the public and the plaintiff in particular. The defendant or its employees' failure to secure the wet floor constitutes a breach of their legal duty.

[9] As a result of the fall, the plaintiff claims to have sustained injuries, more particularly she experienced pain, suffering and discomfort, emotional shock and trauma. She required hospital and medical treatment. She further claims to suffer from limited but permanent general disability.

[10] As a result of the injuries, plaintiff claims that she suffered and continue to suffer from the following damages:

(a) Pain, suffering, discomfort, emotional shock and trauma, loss of enjoyment of amenities of life in the amount of N$500 000;

(b) Hospital, medical and related expenses in the amount of N$4 927.99; and

(c) Future hospital, medical and related expenses estimated at N$300 000.

[11] The defendant, in its plea, denied that the floors of its store were wet on 17 June 2016 and further denied that the plaintiff slipped and fell in its store on the said date or any other date. The defendant further pleaded that the plaintiff had known injuries or medical conditions regarding her knees, hips and joints pre-dating 17 June 2016. It pleaded further that the plaintiff also had degenerative changes regarding her hips, femur and acetabulum.

[12] The defendant further pleaded that it has standard company policies in place regarding wet floors whereby its employees take reasonable steps to safeguard the public who are visiting the store. The defendant pleaded that its employees take the following measures;

(a) Carry out regular store floor inspections;

(b) Upon noticing a wet floor, the employee remains at such place until such time that it is secured and cleaned;

(c) They place luminous warning signs at such place and customers are warned either by signs or verbal or both;

(d) They immediately clean the place.

[13] The defendant further denied breaching any legal duty that it owes to the public or the plaintiff. The defendant ultimately denied liability for the plaintiff's claim and also denied the damages allegedly sustained by the plaintiff.

The pre-trial order

[14] This court in *Mbaile v Shiindi*[1] emphasised the importance of listing issues in dispute between the parties, and remarked as follows in para [10]:

> 'The stage of the pre-trial hearing is arguably the most crucial procedural step leading to the trial. It requires of the parties or their legal representatives to analyse the pleadings and documents filed of record with an eagle eye and in order to unambiguously lay the factual issues in dispute before court. Inevitably, at this stage, the pleadings would have been closed and discovery occurred.[2] The parties are therefore duty bound to strip the pleadings and documents filed of record to their bare bones in order to identify the real issues for resolution by the court. Parties should further be mindful that they are bound to the issues which they bring to court for determination. It is not the responsibility of the court to navigate through various issues raised for determination in order to pinpoint what is relevant, but that of the parties to bring forth their disputes and point out the issues for determination from their dispute.'

[15] It is vital for the parties to carry out their duties in order to limit the dispute to the real issues and not list every conceivable question and list it as a matter to be determined by the court. It is not the duty of the court to peruse through the pleadings and documents filed including witness statements in order to identify conceivable disputes of fact or law between the parties. This duty commences and rests with the parties. Similarly, it is the duty of the parties to also list issues that are not in dispute or common-cause between them. This will inevitably avoid sending the court into a wild goose chase for fact-finding on issues that are common-cause between the parties.

[16] In *casu,* the parties filed their proposed pre-trial report dated 30 October 2020 which was adopted and made an order of court on 5 November 2020. They listed twenty issues of fact and eleven issues of law to be resolved at trial which brings the

---

[1] *Mbaile v Shiindi* (HC-NLD-CIV-ACT-DEL-2018/00316) [2020] NAHCNLD 152 (22 October 2020).
[2] Rule 26.

total number of issues for determination to thirty-one. As for issues which are common-cause between them, the parties only mentioned their citations and location of Jet Stores Walvis Bay as at the date of the alleged incident. The pre-trial report, in this matter, leaves a lot to be desired, to say the least.

[17] Parties must be meticulous, and limit issues for determination to what is material and not list every wishful question for determination. The pre-trial report, as such report forms the basis of the trial, demands legal analysis of the issues so as not to waste the court's time while simultaneously ensuring that the real disputes between the parties are clearly identified for determination and further that common-cause facts are set out.

[18] In summary, the issues of fact listed by the parties for determination are the following:

(a) Whether or not the plaintiff visited the defendant's store situated at the corner of 9th and 11th Avenue in Walvis Bay and fell in the store due to a wet floor and as a result of which she sustained injuries;

(b) If established that the floor was wet, whether or not the defendant's employees took reasonable steps to secure the wet floor and whether or not they warned the public of the dangers of the wet floor;

(c) Whether or not the plaintiff sustained injuries and experienced pain, suffering, discomfort, emotional shock, trauma and limited permanent disability as a result of the fall;

(d) Whether or not the plaintiff required hospital and medical care and treatment and whether she will require future hospital and medical care and treatment;

(e) The costs of actual hospital and medical care and treatment and future related costs;

(f) Whether or not the plaintiff have pre-existing injuries or medical conditions in respect of her knees, hips and joints pre-dating 17 June 2016 and effect thereof on her claim;

(g) Whether or not the defendant has the relevant policies regarding wet floors.

[19] The following summarized relevant issues of law for determination were listed by the parties:

(a) Whether or not the defendant owed a legal duty to take reasonable steps to ensure that the floor of the store was safe for use by the public;

(b) Whether or not the defendant breached such duty and whether such breach was out of negligence or not;

(c) Whether the plaintiff sustained injuries and suffered the damages claimed, and the quantum.

[20] It is now opportune to consider the evidence led by the parties in order to determine whether the plaintiff proved her claim or not.

[21] The plaintiff took to the stand and testified in an attempt to prove her claim. She also led the evidence of Ms Priscilla Plaatjies, Dr Masimba Jinguri, Dr Cobus Moolman, Ms Cathy Kaabo, Dr Marius Johannes Steytler. The defendant on the other hand led the evidence of Ms Patricia Groenewald, Ms Laimi Kashopola, Ms Juliana Yvonne Olivier and Dr Wolfang Helmut Tietz.

<u>Plaintiff's evidence</u>

[22] The plaintiff testified, *inter alia*, that: On Friday, 17 June 2016 at around 11:00, she went to Jet Stores, Walvis Bay for shopping. It was her testimony further that whilst in the store at the kitchen section, she slipped and fell on the wet floor. She landed on the left side of her body, dropped the items from her hands and screamed.

Her dress was wet. She looked up and noticed water dripping from the ceiling, so she testified.

[23] The plaintiff further testified that five ladies who worked for the defendant stood by while two of them assisted her. One of the ladies that assisted her was Ms Ms Priscilla Plaatjies. Another lady from the five picked up the items which she dropped from her hands. She was in shock, so she testified. She informed a certain employee Kelly in the store that she fell but Kelly did not respond.

[24] The plaintiff testified that she went to the till where Ms Laimi Kashopola was the cashier and paid for the items. Ms Kashopola informed her that she saw her fall. The plaintiff further testified that Ms Kashopola inquired from her if she injured herself when she fell, where she responded that she was fine as she felt no pain. She testified further that she then paid for items and left the store. She went home and did not really feel pain, resultantly, she did not think that she could be seriously injured.

[25] The plaintiff testified further that on Sunday morning, 19 June 2016, while preparing to go to church, she realised that her skin turned blue and was reddish in colour on the side where she fell. She felt pain in her hip and her knee was swollen. After church she spent the day in bed due to the pain.

[26] The plaintiff testified that on Monday, 20 June 2016, she approached the manager at the store, Ms Patricia Groenewald for financial assistance in order to seek medical help. According to the plaintiff, Ms Groenewald informed her that she was aware of the incident whereby the plaintiff fell in the store but further Ms Groenewald said nobody saw her falling and declined the plaintiff's request for financial assistance.

[27] The plaintiff testified further that she proceeded to Dr Jinguri (her family doctor), and complained of pain and she was prescribed pain killers. Three days later she returned to Jet Stores with Ms Priscilla Plaatjies and approached Ms Groenewald and asked for financial assistance to pay for medical treatment. Ms Gronewald called some of the staff members and inquired if they saw the plaintiff fall. Some confirmed while others did not, so the plaintiff testified. Ms Groenewald then

requested one of the employees to provide relief spray and cotton wool from the shelf to the plaintiff. The plaintiff further testified that she informed Ms Groenewald that if she could check the CCTV cameras she will observe the plaintiff falling but Ms Groenewald said that the CCTV cameras did not record the plaintiff's incident.

[28] The plaintiff testified that her pain worsened with time and her mobility was impaired. The pain in the hip escalated to a point where she had to hold on to something to make her way around. On the advice of Dr Jinguri, she obtained crutches from the hospital. The crutches also caused her pain in the left shoulder. She sought medical assistance in November 2017, February and July 2018.

[29] The plaintiff testified further that she consulted the Ombudsman about her case who then advised her to obtain two witnesses to support her version of the fall. She approached Ms Plaatjies who agreed to be her witness. She also consulted Mr Allister Beukes who was employed at Jet Stores. The plaintiff said Mr Beukes remembered that she fell in Jet Stores. I should hasten to state that Mr Beukes was not called to testify in this matter and as such what he is alleged to have said constitute inadmissible hearsay evidence.

[30] The plaintiff testified further that she contacted Ms Kashopola, an employee at Jet Stores and inquired if she knew about her fall. Ms Kashopola allegedly informed the plaintiff that she was advised not to discuss the fall without first obtaining permission to do so and she feared that she could lose her job.

[31] Plaintiff testified further that she consulted Dr Moolman who advised her that she will require three operations on the shoulder, hip and the knee. Dr Moolman advised her that the costs for the operation will be about N$350 000. As a result of the fall, her movements were impaired and thus affecting her life. She suffers from constant pain and has to resort to taking pain killers all the time.

[32] She testified that she fell as a result of the negligence of the defendant and or its employees who failed to warn the general public of the wet floor. The defendant and its employees further failed to ensure that the floor was not slippery and free of water.

[33] In cross-examination, she was questioned by Ms Ihalwa that she was quite about experiencing pain on Saturday, 18 June 2016, where she answered that she did not experience serious pain. The plaintiff was further questioned about the pain in the shoulder as the particulars of claim only refers to the pain in her knee and hip. The plaintiff said that she also had pain in her shoulder. It further emerged in cross-examination that later, in November 2017, the plaintiff complained of foot and ankle pain which affected her mobility and this was isolated from the alleged fall. She complained of chronic painful left knee and right ankle.

[34] The plaintiff testified when questioned in cross-examination, that her foot was operated by Dr Steytler before the alleged fall in Jet Stores which culminated in the plaintiff instituting action against Dr Steytler. The plaintiff said that she never informed Dr Jinguri about the operation (surgery) carried out by Dr Steytler.

[35] It was put to the plaintiff in cross-examination that in his report, Dr Jinguri stated that the pain to her hip might be age related and that she may have twisted her knee and further that her alleged fall (reported to him by the plaintiff) might aggravate the pre-existing joint pathological pain. To this, the plaintiff said that Dr Jinguri informed her so, despite the fact that she never told Dr Jinguri of her pre-existing pain.

[36] The plaintiff was further questioned by Ms Ihalwa that when she was examined by Dr Tietz, she was asked about the extent of the pain she was experiencing in her knee and requested to measure the pain on a scale of 0 to 10. She said 10 out of 10. Dr Tietz disagreed.

[37] The plaintiff testified that she did not inform Dr Tietz of the operation to her toes conducted by Dr Steytler. When asked for reason of not disclosing the operation to Dr Tietz, the plaintiff said that she forgot about it. Dr Tietz noticed that the plaintiff was operated, he questioned her about it and she confirmed. Dr Tietz said that the plaintiff's knee did not require crutches.

[38] A letter dated 21 August 2009 by Dr Steytler was produced into evidence where it is stated that Dr Steytler examined the plaintiff in April 2002 where she complained of pain in her left knee following her fall that year and she was

diagnosed with a medial collateral ligament injury. When this version of Dr Steytler was put to the plaintiff, she did not dispute but said that she could no longer remember if she injured her knee in 2002 or not, as a long time has passed. In re-examination the plaintiff confirmed that Dr Steytler examined her in April 2002 regarding the pain in the knee that resulted from her fall that year.

[39] The plaintiff further testified that the pain escalated on Sunday, 19 June 2016. On Monday, 20 June 2016 while experiencing severe pain, she first went to Jet Store to seek financial assistance for medical help.

[40] When pressed on the time that she fell in the store, the plaintiff said that it was around 11:00. When questioned further on the version by Ms Plaatjies that she fell in the store just before the store closed, the plaintiff said she could no longer recall.

Ms Priscilla Plaatjies

[41] Ms Plaatjies testified that she knows the plaintiff as they live together in Kuisebmund, whom she would see at church and in the street. In 2016, she was employed as a casual worker at Jet Stores, Walvis Bay. She worked at the stores' warehouse but before the store closes she would carry-out house-keeping which includes packing clothes.

[42] Ms Plaatjies testified that during the weekend on 17 June 2016, it was raining and she was carrying-out housekeeping when the plaintiff entered Jet Store and the store was about to close. She testified that the floor was wet and the plaintiff slipped and fell on the wet floor. She attended to the plaintiff who immediately left the shop. She testified further that there was a bucket on the floor catching water from the leaking roof. There was no sign that the floor was wet neither did any employee inform the public about the wet floor. Ms Plaatjies said that during the time of the alleged incident, she had a grievance with the employer (the defendant) and later she stopped working.

[43] The plaintiff denied seeing a bucket on the floor close to where she fell.

Dr Masimba Jinguri

[44] Dr Jinguri testified, *inter alia*, that he is a general practitioner. The plaintiff is his patient from 2016. He testified that he examined the plaintiff on 20 June 2016, following her report that she fell in a store and found that she had swelling and tenderness of the left knee with bruising. After 20 June 2016, the plaintiff returned to him in 2017 where she complained of pain and swelling in the left knee. X-ray examination conducted between 2017 and 2018 revealed that the plaintiff had mild degenerative changes in the knee with osteophytes. The X-ray conducted on the left side hip revealed that it was irregular and impingement suggesting degenerative changes related to age. He testified that he was not aware of any pre-existing non pathology pain.

[45] Dr Jinguri referred to the report by Dr A K Pandey an Orthopaedic Surgeon and a Specialist who examined the plaintiff in 2019 and who diagnosed her with post-traumatic left hip osteoarthritis (the disorder of joints characterised by cartilage degeneration in the bones common in older persons and causing pain, morning stiffness and which affects mobility) and left knee collateral ligament rapture and recommended operative interventions. In cross-examination, Dr Jinguri testified that the medical history of the plaintiff that she fell in 2002 was not brought to his attention by the plaintiff and such information would have been relevant to the examination and diagnosis if the plaintiff. .

Dr Cobus Moolman

[46] Dr Moolman, an Orthopaedic Surgeon testified, *inter alia*, that he examined the plaintiff on 23 July 2019. He examined the X-ray results of 2018 which showed impingement in both hips and the *coxa profunda* (the hip balls were slightly out of socket as a result of the cartilage being worn out). He found that the plaintiff has osteoarthritis on the left hip and the left knee and suspected degenerative left shoulder.

[47] Dr Moolman testified further that the plaintiff informed him that she fell in a storein 2016 and wanted to hold another party liable for the fall. She wanted him to state in the report that her medical condition was due to the fall in the store in 2016 but he declined. He testified that the plaintiff's medical condition is commonly

observed in her age group as part of the degenerative process of the joints. She was then 62 years old.

[48] Dr Moolman testified further that he could not find any features that would specifically link the plaintiff's condition to the alleged fall of 2016. Dr Moolman provided a quotation for a hip replacement because the plaintiff requested for it but not that she needed it. It was his testimony further that surgery would be his last resort and not at an early stage as in this matter. When the plaintiff requested for the quotation she said that the operation costs were to be paid by another party.

Cathy Kaambo

[49] Ms Kaambo testified, *inter alia*, that she knows the plaintiff for many years as they grew up together. She testified further that she accompanied the plaintiff to Dr Tietz for medical examination. Ms Kaambo testified that while they were on the way to Dr Tietz's office the plaintiff tripped and almost fell where after she was put in a wheelchair and the plaintiff arrived at the doctor's practice in a wheel chair.[3]

[50] Ms Kaambo further testified that she was present in the consulting room during the examination of the plaintiff by Dr Tietz. The plaintiff informed Dr Tietz that Dr Pandey said that she must be operated and Dr Tietz said he does not see the need for surgery. In the witness statement, Ms Kaambo stated that when she arrived with the plaintiff at Dr Tietz's office, he greeted them and told Ms Kaambo to leave the office as he wanted to examine the plaintiff. Ms Kaambo left the office as a result and was later just informed by the plaintiff of what transpired between the plaintiff and Dr Tietz.

Dr Maruis Johannes Steytler

[51] Dr Steytler, an Orthopaedic Surgeon, testified, *inter alia*, that he consulted the plaintiff from November 1998. In 1998 the plaintiff complained of pain in her right hip. A Computed Tomography (CT scan), which can show detailed images of the scanned body part, was carried out which revealed that she required no operation. He examined the plaintiff again in April 2002 where she complained of pain in her left

[3] Exhibit DD.

knee after she fell in the same year. The plaintiff consulted him again in June 2005 where she complained of a painful right little toe and knob on the big toe. She was treated with surgery on the little toe and the knob on the big toe was removed.

[52] The plaintiff consulted him again in March and December 2006, with a complaint of pain in the ankle. In March 2008 she consulted him again and complained of pain in the right ankle. He operated on her on 13 March 2008. On 3 November 2008 she consulted him again and she had clawing of the fourth and fifth toes of the left foot which were stiff. She had instability due to clawed toes which were operated on.

Defendants' evidence

Patricia Groenewald

[53] Ms Groenewald testified, *inter alia*, that she was a Store Manager at Jet Stores Walvis Bay since August 2010 until August 2020 when the store was closed. Her duties included store and staff management, ceiling inspection to ensure that thieves do not hide in the ceiling and ensure security at the front door. The building of the store did not belong to the defendant and was occupied on lease. If anything on the building (including the lights, ceiling, tiles) was found to be broken it would be reported to the landlord to be fixed or replaced.

[54] She testified further that in the event of a wet floor in the store while cleaning, the staff members would put a red corn as a warning sign.

[55] She testified that on 16 June 2016 she was at work stationed at the office inside the store. As per normal practice she attended to regular rounds through the store. She testified that she did not witness the alleged fall of the plaintiff nor did any customer, staff member or any person inform her of the alleged fall of the plaintiff.

[56] Ms Groenewald testified further that the plaintiff, unaccompanied by anybody, only approached her on Monday, 20 June 2016 where the plaintiff informed her that she fell in the store on Friday, 17 June 2016. Her words were: "Party, are you aware that I fell in the store. Can we see the CCTC footage?" The plaintiff had no bandages

or a kierie with her. When she questioned the plaintiff for the reason why she did not report the incident on the same day, the plaintiff answered that she did not feel well and she wanted to go to church. The plaintiff further said that she thought that there were CCTV cameras or footage that recorded her fall. Ms Groenewald informed the plaintiff that there were no CCTV cameras at the side of the store where she alleged to have fallen. The CCTV cameras were installed at the entrance, service centre and the backdoor and at the cash office. At one stage Ms Groenewald said that the plaintiff did not request for the CCTV footage.

[57] Ms Groenewald further testified that the plaintiff asked her for assistance but she declined the request as she was duty bound to report the claim and the required processes to the store Regional Manager within 24 hours of the incident or injury. Ms Groenewald denied the allegation that she provided the plaintiff with relief spray and cotton wool and said further that the store did not stock pain relief sprays.

[58] She testified further that she knew the plaintiff who was a regular customer at the store for about 10 years. She would see her and they would have casual conversations from time to time. The plaintiff always had bandages on her legs or walked with assistance of a kierie.

[59] During cross-examination, Ms Mondo put it to Ms Groenewald that the ceiling in the store was leaking. Ms Groenewald denied such statement and said further that there were no water pipes at the side of the store where the incident is alleged to have occurred and the roof is made out of concrete and therefore disputed the assertion that the ceiling was leaking.

[60] Ms Mondo further put a follow up statement to Ms Groenewald that it was raining on that specific day. To this, Ms Groenewald stated that she could not recall that on Friday, 17 June 2016 it was raining and she said further that she was born and raised in Walvis Bay and <u>during the month of June it is usually hot without rain</u>.

[61] Ms Groenewald testified further that in October 2018, she became aware of the plaintiff's efforts to persuade staff members to testify on the plaintiff's behalf for a claim resulting from her alleged fall in the shop.

[62] Ms Groenewald further testified that Ms Priscilla Plaatjies is a former casual employee of the defendant who was appointed as a Casual Stock Counter on 27 May 2016 but commenced employment on 11 June 2016.[4] She testified further that Ms Plaatjies worked at the back of the store and had no direct contact with customers. Ms Plaatjies was still new and was being trained for weeks before she could work directly with customers. Ms Plaatjies was only allowed to work in the store where customers have access, when she had to attend to housekeeping (packing up or folding clothes and tidying the displays) and this was only after all the customers have left the store and just before closing time. The store opened at 08h30 and housekeeping time was usually from 16h45 to 17h30. Before 16h45, Ms Plaatjies never worked on the floor where the customers had access.

[63] Ms Plaatjies had a labour dispute with the defendant regarding a salary for two weeks and reported this to the Office of the Labour Commissioner.

Laimi Kashopola

[64] Ms Kashopola testified that in 2016, she was employed by the defendant as a cellular phone repair specialist. She was telephoned by the plaintiff during November 2018 and asked if she remembered that the plaintiff fell in Jet Store Walvis Bay. This was the first time that she learnt about the alleged fall of the plaintiff and she responded to the plaintiff that she was at work and will phone her back later. She did not return her call. She testified that she did not witness the alleged fall by the plaintiff. She denied the allegations that she informed the plaintiff that she saw her fall in the store and that the plaintiff could have injured herself.

[65] In cross-examination, Ms Kashopola was asked by Ms Mondo as to what actions do the employees take when there is a leakage in the roof. She responded that they would put a sign in order to alert the customers of the wet floor and they would notify the landlord of such leakage. She testified that on Friday, 17 June 2016, she was a permanent employee on duty and knows that the ceiling was not leaking and there was no wet floor in the store.

[4] Exhibit D.

Juliana Yvonne Olivier

[66] Ms Olivier testified that she is a nurse employed at the WH Tietz Medical Practice in Swakopmund. She testified further that she was present when the plaintiff was examined by Dr Tietz on 3 July 2020. It was her testimony that on the said day, the plaintiff entered the consulting room by herself using a crutch. Dr Tietz physically examined the plaintiff regarding her complaints and alleged injuries while Ms Olivier stood by. Dr Tietz touched the plaintiff's arm, leg and knee during the examination. Ms Olivier testified further that Dr Tietz made no verbal diagnosis.

Dr Wolfgan Helmut Tietz

[67] Dr Tietz testified, *inter alia*, that he is a medical practitioner and specialist family physician practicing as such in Swakopmund. He said that on 3 July 2020, he examined the plaintiff on instructions of the defendant's legal practitioners. The examination was in respect of the alleged fall of the plaintiff in Jet Stores Walvis Bay in June 2016. At the consulting room on 3 July 2020, the plaintiff sat with her left arm in a sling and had one crutch with her which she took into her left hand after she took her sling off. She also used her left arm to get off the chair. She walked slowly but unassisted.

[68] Dr Tietz testified further that he physically and clinically examined the plaintiff, examined her hip rotation, shoulder bent, knee bent and straightened and the plaintiff executed all the movements.

[69] Dr Tietz examined the plaintiff in the presence of Ms Olivier. Dr Tietz's examination to the left shoulder was extremely painful and sensitive to touch and his clinical opinion was early osteoarthritis (a degenerative joint condition) with a rotator cuff syndrome. The examination to the left hip revealed limited internal rotation and his clinical opinion was early osteoarthritis. The examination to the left knee showed bilateral genu valgus (knock knees) left knee more than right knee and both feet had claw toes with early calluses. The clinical opinion was osteoarthritis.

[70] She could tip-toe and heel walk while holding onto the examination couch. There was a clear discrepancy between her alleged experienced pain and her facial

or body expressions and movements during examination. When getting off the couch she pressed onto the surface with her left hand. Her body expressions were therefore not commensurate to her alleged pain levels. The plaintiff was further under a misconception that her left clavicle (collar bone) was fractured but this the X-ray showed degenerative *acromio-clavicular* junction (the joint that connects the shoulder blade to the collar bone) and not a fracture. During the examination the plaintiff was requested to state her level of pain experienced at that time out of 10 and she said 10 of out of 10, but this was not commensurate to the observation made by Dr Tietz. She did not demonstrate that she was experiencing excruciating pain.

[71] After investigating the plaintiff's history, consultations, special investigations, her age (63 years old), Dr Tietz agreed with the statement made by Dr Moolman on 23 July 2019 that:

> '… her condition is commonly seen in her age group as part of the degenerative process of joints. I could not find any features that would specifically link her condition to the alleged incident.'

[72] Dr Tietz emphasised in his testimony that he could not find concrete medical evidence which confirms that the plaintiff's condition resulted from a fall in the store as she alleged.

[73] Dr Tietz expressed reservations regarding the validity of the diagnosis made by Dr Pandey on 10 July 2018 and 23 January 2019, that the plaintiff was diagnosed with left hip joint post-traumatic osteoarthritis and left knee joint post-traumatic lateral collateral ligament rupture as Dr Pandey ordered X-rays. The X-rays do not show any trauma or injuries. The X-rays also cannot show the knee ligament rapture as ligaments are soft tissues which are not visible on the X-rays and that is why the Magnetic Resonance Imaging (the MRI) was requested.

[74] Osteophytes are little growth which develops between the joints.

[75] In respect of *Coxa profundus* in the left knee, Dr Tietz testified that it occurs when the cup of the joint (hip) is deep into the hip socket thus causing the hip not to

move normally and causes early joint pain and limited movement in the joints. In this scenario early osteoarthritis is expected.[5] Dr Tietz concluded that any person with osteoarthritis can benefit from hip replacement.

[76] Dr Tietz explained that primary osteoarthritis occurs where there is no direct cause. This is caused by age, overweight, excessive alcohol intake, lack of exercise, diabetes, etc. Secondary osteoarthritis requires a definitive cause e.g. joint infection, gout, etc.

[77] Dr Tietz testified that when one falls to the ground on his or her left side and is injured the impact of the injury, will be experienced on the particular part of the body or joint which hit the ground. If the body part that hits a hard surface is a person's hip, the knee and the shoulder will not be affected.

[78] Dr Tietz further testified regarding the report compiled by Dr Junguri of 13 July 2018.[6] Dr Tietz said that Dr Jinguri stated in his report that X-rays were conducted on the plaintiff which showed mild degenerative changes in the knee with osteophytes. Dr Jinguri further said in the report that there was laxity in joints which was suggestive of a possible tear of lateral ligaments hence the MRI scan was requested. X-rays of the hip showed degenerative changes which are age related. It was the testimony of Dr Tietz that the conclusion by Dr Jinguri reached that the possible fall of the plaintiff, might aggravate a pre-existing joint pathology pain contradicts his earlier finding of degenerative changes. Dr Tietz testified further that for trauma to cause secondary osteoarthritis the force must be extensive than just falling. The impact on the ground and the weight of the person may also play a role. The said trauma must cause a fracture and result in immediate impact like limping.

[79] Dr Tietz further questioned the plaintiff for the reason why she did not inform him about the operation carried out Dr Steyter, which Dr Tietz only noticed during the examination, the plaintiff said "oooh I forgot".

[80] During cross-examination, Dr Tietz conceded that he is not an orthopaedic surgeon (a surgeon specialising in injuries of the musculoskeletal system including

---

[5] Exhibit Y2.
[6] Exhibit U.

bones). He, however, said that he has assisted orthopaedic surgeons during surgeries since 2008 and have so far assisted in over 500 surgeries. He said that he is the first point of contact for orthopaedic conditions and would only refer to orthopaedic surgeon for chronic or exacerbated cases. When questioned whether pain in the knee and the hip was associated with the fall, Dr Tietz testified that there was no radiology evidence to support the claim for the injury, and furthermore, pain cannot be observed but an inflammation can be seen.

Brief submissions by counsel

[81] Ms Mondo argued that the plaintiff walked properly without assistance on 17 June 2016 when she fell on a wet floor in the defendant's store. Ms Mondo further argued that the plaintiff approached the defendant's employees to tell them about her fall, she requested for the CCTV footage, she approached the Ombudsman for assistance, she telephoned employees of the defendant and asked them to confirm that she fell in the defendant's store and this insistence, according to Ms Mondo, is not common unless if the plaintiff indeed fell in the store.

[82] Ms Mondo further argued that the version of the plaintiff was confirmed by Ms Plaatjies who testified that "Ms Madisia was at the store that Saturday. As she was walking, she slipped and fell on the floor, the floor was wet." It was Ms Plaaitjies evidence that the fall occurred over the weekend. Ms Mondo further argued that neither Ms Groenewald nor Ms Kashopola could observe the plaintiff fall as they were not at the area where the plaintiff allegedly fell. Ms Mondo further urged the court to draw a negative inference against the defendant for failure to lead the evidence of Mr Allister Beukes. It was the defendants' case that when MR beukes was consulted he was under the influence of alcohol, this court therefore draws no adverse inference against the defendant for failure to call Mr Beukes.

[83] Ms Ihalwa counter argued contrariwise that Ms Groenewald was clear that as a store manager she would go through the sales floor in order to ensure that the store is 100% safe for customers before it is opened and if there was a leak or a wet floor she would have seen it during her rounds. Ms Ihalwa further argued that Ms Groenewald stated that the ceiling of the store was made out of concrete and that Ms Plaatjies who was a casual worker remained and worked at the store room until

such time that the store closed and there were no customers, when she would come to the sales section of the store.

[84] It was further argued by Ms Ihalwa that both Ms Groenewald and Ms Kashopola testified clearly that whenever there was a wet floor from cleaning a warning sign to that effect would be put on the floor to warn the public.

[85] Ms Ihalwa argued that the plaintiff is unreliable as she testified that she entered the store at around 11:00 and when questioned about Ms Plaatjies' version that she was in store when the store was about to close, the plaintiff changed her version and said that she could not remember the time that she entered the store. Ms Plaatjies was not allowed in the store while there were customers and therefor, argued Ms Ihalwa, she could not witness the fall. Ms Ihalwa called for the plaintiff's claim to be dismissed.

Burden of proof

[86] It is settled law that the plaintiff bears the burden to prove her claim on a balance of probabilities.

[87] For the plaintiff to prove negligence on the part of the defendant, the following test as described by Holmes JA in *Kruger v Coetzee*[7] must be proven:

> '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.

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

[7] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-H.

can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.'

[88] The parties were *ad idem*, and correctly so, on the duty that befalls storeowners or persons in control of shops. It is the duty of owners or other person or entity that controls a store to ensure that such store is safe for use by members of the public. In *Probst v Pick n Pay Retailers*,[8] the court remarked as follows regarding a duty owed by storeowners:

> 'As a matter of law, the defendants [the supermarkets] owed a duty to persons entering their store at Southgate during trading hours, to take reasonable steps to ensure that, at all times during trading hours, the floor was kept in a condition that was reasonably safe for shoppers, bearing in mind that they would spend much of their time in the store with their attention focused on goods displayed on the shelves, or on their trolleys, and not looking at the floor to ensure that every step they took was safe.'

[89] The court in the *Probst* case proceeded to state that:

> 'The duty on the keepers 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 that will ensure that spillages are not allowed to create potential hazards for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptitude.'

[90] In order for the defendant to be held liable for the damages allegedly suffered by the plaintiff there must be a causal link between the fall and the cause of damages.

<u>Analysis</u>

[91] At the outset of the consideration of the evidence led, I consider it prudent to address some of the questions raised for determination by the parties. The allegations that the plaintiff entered Jet store and fell in the store as a result of the wet floor and that the plaintiff consequently suffered injuries should, in my view, be determined first before other questions raised by the parties are resorted to.

[8] *Probst v Pick n Pay Retailers* [1998] 2 All SA 186 (W). See also: *Gordon v Shoprite Checkers (Pty) Ltd and Another* (32665/2010) [2014] ZAGPPHC 773 (26 September 2014).

[92] It was established that the plaintiff was a regular customer at Jet Stores and it was not in dispute that the plaintiff entered Jet Store on Friday, 17 June 2016. What is heavily disputed by the defendant are the allegations that there was a wet floor in the store and that the plaintiff fell in the store on 17 June 2016, where she sustained injuries. The versions presented by the plaintiff and the defendant are miles apart and mutually destructive in respect of the wet floor, the fall, and the injuries sustained.

Mutually destructive versions

[93] The plaintiff testified that on Friday, 17 June 2016, at around 11:00 in the morning she entered Jet Stores for shopping and while in the store she slipped and fell due to a wet floor. She looked up and noticed a hole in the ceiling where water was leaking. The alleged fall signifies the genesis and the foundation on which the injuries sustained emanates from. Ms Plaatjies supported the version of the plaintiff that she observed the plaintiff fall and assisted to pick her up but this was just before the store closed. The store closed around 17:30. Ms Groenewald and Ms Kashopola testified to the contrary that there was no wet floor in the store on 17 June 2016 and the plaintiff did not fall in the store.

[94] The aforesaid versions*, inter alia*, constitute mutually destructive evidence. They are versions incapable of co-existing.

[95] The approach to mutually destructive versions was set out in the Supreme Court of Appeal of South Africa in *SFW Group Ltd and Another v Martell Et Cie and Others,* where the court remarked that:[9]

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour; (ii) his bias, latent and

[9] *SFW Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.

blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his with his own extra-curial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .'

[96] The above passage, therefore, provides that where the probabilities do not resolve the matter, the court can resort to the credibility of witnesses in order to find in favour of the one or the other party. A consideration of the candour and demeanour of witnesses, self-contradiction or contradiction with the evidence of other witnesses who are supposed to present the same version of events must be assessed.

[97] In *National Employers' General Insurance v Jagers*,[10] Eksteen AJP said the following while discussing the approach to mutually destructive evidence:

> 'In a civil case … where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probability that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.'

[98] Guided by the above, I consider, hereunder, the evidence led and submissions made.

<u>Analysis of evidence and submissions</u>

The alleged fall

[99] The plaintiff's evidence was that on Friday, 17 June 2016, she entered Jet Store, Walvis Bay at around 11:00 for shopping. Ms Plaatjies, on the other hand, testified that it was during the weekend on 17 June 2016, when the store was about to close that the plaintiff entered Jet Stores. It is not in dispute that the plaintiff was a regular customer at Jet Stores, Walvis Bay. The plaintiff's evidence that she entered

[10] *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440E-F.

Jet Store on 17 June 2016, is not disputed by the defendant. 17 June 2016 was a Friday.

[100] The evidence established that the closing time for Jet Stores was 17:30. Ms Plaatjies testified that the plaintiff entered the store when such store was about to close, which is irreconcilable with the time of 11:00 that the plaintiff claims to have entered the store. Confronted with this different time, the plaintiff said that she could not clearly recall the time that she entered the store given that a long time had passed from 17 June 2016, to the time that she testified. Her witness statement recorded in June 2021, which was received to form part of evidence reveals that she said that she entered Jet Stores on 17June 2016 at around 11:00.[11]

[101] It was plaintiff's evidence that when she was in the store she collected items to be paid for, and while at the kitchen side she slipped and fell on the wet floor. She landed on the left side of her body, dropped the items from her hands and screamed. She looked up and saw water dripping from the ceiling. Five employees of the defendant looked on while two assisted her. She informed a certain Kelly (one of the employees) that she fell. Kelly did not testify.

[102] The plaintiff's version about the fall was corroborated by Ms Plaatjies who stated that the plaintiff slipped and fell on the wet floor. She attended to the plaintiff who immediately left the shop. This is contrary to the testimony of the plaintiff who said that when she stood up from where she fell in the store she went to the cashier, Ms Kashopola, and paid for the items in her hand, not that she immediately left the store.

[103] Of great importance, given the significant role that it is alleged to have played, is the bucket used to fetch water that was observed close to where the plaintiff fell by Ms Plaatjies. Crucial as it is because it confirms the version of the plaintiff that indeed the roof or ceiling was leaking and further that there was a wet floor and there was even a bucket to catch water, the plaintiff denied observing a bucket on the floor where she allegedly fell. Ms Plaatjies also noticed a bucket used to fetch water. This, in my view, is a serious discrepancy in the evidence of the plaintiff and Ms Plaatjies.

---

[11] Exhibit E.

[104] Both the plaintiff and Ms Plaatjies said that there was no warning sign of the wet floor to members of the public. It was the testimony of Ms Groenewald and Ms Kashopola that whenever the floor was wet, warning signs would be displayed in order to caution the members of the public about the wet floor and the defendant had policies in place which regulated what should happen when there is a wet floor.

[105] The plaintiff testified that after she fell, she stood up and went to the till where Ms Kashopola was and paid for the items and Ms Kashopola informed her that she saw her fall and inquired if the plaintiff was not injured. Ms Kashopola, in her testimony, disputed the said version of the plaintiff. According to Ms Kashopola, she learnt about the alleged fall of the plaintiff for the first time when plaintiff telephoned her in November 2018. The reason why the plaintiff telephoned Ms Kashopola was to inquire if she remembered that the plaintiff fell in Jet Stores. Ms Kashopola denied such knowledge and further denied inquiring if the plaintiff was injured or not.

[106] Ms Mondo took issue with the fact that Ms Kashopola did not state, in her witness statement, that when she was telephoned by the plaintiff she informed her that she did not witness her fall and this only surfaced during her oral evidence. Ms Mondo is correct that, in her witness statement, Ms Kashopola only stated that when the plaintiff telephoned her and inquired if she remembered that the plaintiff fell in Jet Store, she said that she was at work at the time of the phone call and could not talk and that she will call the plaintiff later. She blocked the plaintiff's number and never returned her call. However, the sentence which forms part of her witness statement that follows immediately after the sentence where she says that she blocked the plaintiff's number, Ms Kashopola states that: "I repeat that I did not witness the plaintiff's alleged fall."

[107] The fact that Ms Kashopola stated in her witness statement that she did not witness the alleged fall and in her oral evidence that she informed the plaintiff that she did not witness the alleged fall reveals, in my view, no discrepancies, or at the very least an immaterial discrepancy. The message that comes out of the two statements is that she did not witness the plaintiff's alleged fall.

[108] When she was questioned in cross-examination by Ms Mondo about procedures carried out when there is a leak in the roof, Ms Kashopola testified that

the employees would put a sign to alert the customers of the wet floor and they will inform the landlord. Ms Kashopola further denied allegations that the floor was wet on 17 June 2016.

[109] Ms Kashopola testified in a forthright manner and struck me as a credible witness with nothing to gain from this matter. She was a reliable witness who spoke frankly and was impressive as a witness.

[110] It was the plaintiff's evidence that she only approached Ms Groenewald on Monday, 20 June 2016, for financial assistance to seek medical care. Plaintiff said that Ms Groenewald informed her that she knew that the plaintiff fell in the store. Ms Groenewald then, plaintiff said, called staff members and inquired if they observed the plaintiff fall, some confirmed while others did not. Ms Groenewald, who no longer works for Jet Stores from August 2020, following the closure of the store testified that she did not observe the plaintiff fall nor did any person inform her of such alleged fall.

[111] Ms Groenewald testified that on 20 June 2016, the plaintiff inquired if she was aware that the plaintiff fell in the store on 17 June 2016, which alleged event she had no knowledge of. Ms Groenewald further denied being informed by other employees that the plaintiff fell in the store. Contrary to the version of the plaintiff that Ms Groenewald provided her with a relief spray and cotton wool from the shelf, Ms Groenewald testified that the plaintiff only asked for financial assistance which Ms Groenewald declined as she was required to notify the Regional Manager within 24 hours of the incident. Ms Groenewald denied providing the plaintiff with a relief spray and cotton wool from the shelf as the store did not even stock relief sprays. This evidence of Ms Groenewald that the store did not even stock relief sprays was not disputed. I could not find any reason or motive for Ms Groenewald to fabricate her evidence.

[112] It was during the cross-examination that Ms Mondo put to Ms Groenewald that the ceiling was leaking. Ms Groenewald denied the allegation and said that there were no water pipes at the side of the store where the alleged incident was said to have occurred and the roof is made out of concrete. This testimony by Ms Groenewald was elicited by Ms Mondo and it remained unchallenged.

[113] Ms Mondo further put it to Ms Groenewald that on the date of the alleged incident it was raining. This suggestion was dispelled by Ms Groenewald who said that although she could not recall if it was raining on 17 June 2016, it could not have rained as she was born and raised in Walvis Bay and it never rained in June. This answer by Ms Groenewald demonstrated honesty and lack of ulterior motive on the part of Ms Groenewald. Ms Groenewald could easily say that it did not rain on 17 June 2016 but where she could not recall she did not hesitate to say so. This counts towards her credibility.

[114] In respect of Ms Plaatjies, Ms Groenewald said that she was not allowed in the store when there were customers and she was still new and a casual worker who was assigned at the back of the store. She was only allowed in the store for housekeeping when the customers were gone.

[115] The plaintiff testified that she approached the Ombudsman in September 2018 about her condition allegedly emanating from the fall and was advised to obtain two witnesses to support her case. The Ombudsman did not testify.

[116] I find that the plaintiff went all out from inception to try and identify persons who could validate her allegations that she fell in the store. Why the plaintiff did not call some of the five employees who allegedly saw her fall, is a material question that remain unanswered. The plaintiff insisted that Ms Kashopola said that she saw her fall which was denied by Ms Kashopola who was impressive as a witness. To the contrary, the plaintiff performed poorly as a witness, in my view, who appeared hell bend to establish liability on the part of the defendant. This position including the plaintiff going on a fishing expedition to find evidence that can support her claim.

[117] Ms Plaatjies, in my view, is not an independent witness, as she knew the plaintiff and they lived together in Kuisebmund, she was not allowed to be in the store during the time that customers were shopping. She observed a bucket close to where the plaintiff fell and which bucket was not observed by the affected person, the plaintiff. It was the testimony of Ms Kashopola and Ms Groenewald that the roof did not leak on 17 June 2016. Coupled with the undisputed evidence that the roof of the store was made out of concrete, that Ms Groenewald conducted routine inspection of the store, the undisputed evidence of Ms Groenewald that in June

Walvis Bay is hot with no rain, that whenever there is water on the floor from cleaning, the employees put up warning signs in order to caution members of the public of such wet floor, the evidence points to the reality that it has not been established that there was a wet floor on 17 June 2016 in Jet Stores.

[118] Dr Jinguri examined the plaintiff on 20 June 2016 and found that she had a swelling and tenderness of the left knee with bruising. According to Dr Jinguri, a general practitioner, the X-ray examination conducted between 2017 and 2018 showed mild degenerative changes to the knee with osteophytes. The plaintiff did not inform Dr Jinguri of her medical history emanating from her fall in 2002 and he was not aware of the plaintiff's pre-existing non pathological pain. Dr Jinguri relied on the report by Dr Pandey who found post traumatic left hip osteoarthritis and left knee collateral ligament rapture. As stated above, Dr Pandey did not testify.

[119] Dr Moolman, upon examination of the plaintiff, found that she has osteoarthritis on the left hip and left knee which is commonly part of the degenerative process of the joints in her age group. Dr Moolman said that he could not find features that link her medical condition to the alleged fall. Dr Moolman testified that the plaintiff wanted him to mention in his report that her medical condition was due to the fall in the store in 2016 which request he declined.

[120] The plaintiff's insistence that Dr Moolman should write in his report that the injuries emanates from the alleged fall in the store instead of leaving the expert to express his opinion is tantamount to an attempt to influence the opinion of the doctor. This attitude of the plaintiff is, in my view, synonymous with going all out to build a case which can justify her claim, come what may.

[121] Ms Mondo argued that the persistence of the plaintiff in her claim that she fell in the store, the plaintiff's report to Ms Groenewald that she fell in the store, her report to the Ombudsman, her report to the doctors are indicative of truthfulness. I disagree. When the truthfulness of the allegation is not established it matters not how many times such allegation is repeated to different persons, it will still remain unproven. A false averment is not elevated to truthfulness by virtue of being repeatedly mentioned to different persons.

[122] Dr Moolman further testified that the plaintiff informed him that the operation costs were to be paid by another party, hence she requested for a quotation for the surgery, not that surgery was actually necessary. This proves that the plaintiff was gathering records to establish a case and ensure that somebody pays for the surgery, hence she sought to obtain a quotation even when it was not really necessary.

[123] Dr Tietz, a family physician testified that he examined the plaintiff on 3 July 2020, who sat with her left arm in a sling and had one crutch which she took with her left hand after she removed her sling. When she stood up, she pressed on the couch with her left hand. Dr Tietz found that her physical expression was not commensurate with her alleged pain levels which said was at 10 out of 10. He stated that he could not find concrete medical evidence that the plaintiff's condition resulted from the fall.

[124] Dr Tietz questioned the diagnosis made by Dr Pandey of post-traumatic osteoarthritis in the left hip and post-traumatic lateral collateral ligament rapture in the left knee. The X-rays ordered by Dr Pandey do not show any trauma or injuries. Dr Tietz further said that the X-rays cannot show the knee ligament rapture as ligaments are soft tissues which are not visible on the X-rays and requires an MRI scan. Dr Tietz further stated that the conclusion reached by Dr Jinguri that the alleged fall aggravated the pre-existing pathology pain was inconsistent with Dr Jinguri's earlier finding of degenerative changes.

[125] Dr Tietz testified further that for trauma to cause secondary osteoarthritis the force must be extensive than falling. The trauma must cause a fracture and result in immediate limping.

[126] The plaintiff did not inform Dr Tietz about the surgery conducted on her by Dr Steytler and when Dr Tiez questioned her about the said surgery, the plaintiff said "oooh I forgot". How the plaintiff could forget her previous surgery is hard to believe.

[127] Dr Jinguri's report placed heavy reliance on the report by Dr Pandey (who did not testify). Dr Jinguri further diagnosed the plaintiff with osteoarthritis while stating that the alleged fall could have aggravated the plaintiff's medical condition.

[128] I have no reason to doubt the evidence of Dr Tietz who have undisputedly assisted with over 500 orthopaedic surgeries and is the first point of contact for orthopaedic conditions. Dr Tietz supported the finding by Dr Moolman that the condition of the plaintiff resulted from degeneration of the joints related to age. I, therefore, accept the opinions of Dr Moolman and Dr Tietz that the medical condition of the plaintiff was due to the degenerative condition related to age and not the alleged fall.

Conclusion

[129] After considering the evidence led in its totality I find that the plaintiff did not prove on a balance of probabilities that there was a wet floor in Jet Stores on 17 June 2016 and that as a result she fell and sustained injuries on which she bases her claim. I further find that the plaintiff failed to prove that her medical condition resulted from the alleged fall.

Costs

[130] It is a well beaten principle of our law that costs follow the event. No compelling reasons were placed before the court why the said principle should not be followed neither could be established from the evidence why such principle should be departed from. As a result, the plaintiff is awarded costs.

Order

[131] In the result, I order as follows:

1. The plaintiff's claim against the defendant is dismissed with costs, such costs include costs of one instructing and one instructed counsel.

2. The matter is regarded as finalised and removed from the roll.

_____

O S Sibeya

Judge

APPEARANCES:

PLAINTIFF:	R Mondo Of Nixon Marcus Public Law Office, Windhoek.
DEFENDANT:	L Ihalwa Instructed by ENSAfrica / Namibia, Windhoek