



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

Case No: A314/2017

Before the Hon. Mr Justice Bozalek, the Hon Mr Justice Samela and the Hon. Mr Justice Wille
Hearing: 29 – 30 January 2018
Judgment Delivered: 17 April 2018

In the matter between:

THE CITY OF CAPE TOWN

Appellant

and

SHAUN RHOODE

Respondent

JUDGMENT

BOZALEK J

[1] This is an appeal with the leave of the Court *a quo* against an order that the appellant, the City of Cape Town, is liable for 60% of such damages as the respondent may prove arising out of injuries which he sustained on 7 January 2011 when he used a water slide owned and operated by the appellant at the Mnandi Resort, Mitchells Plain. After descending down the water slide head first the respondent struck the bottom of the pool with the crown of his head sustaining a spinal injury which rendered him a quadriplegic.

The pleadings and the issues

[2] The respondent sued the appellant in delict alleging that the appellant owed, the public in general and him in particular, a duty to ensure:

1. that the water slide was manufactured and/or erected in such a manner that it would not constitute a source of danger to persons utilising it;
2. that the water slide would be monitored by employees and/or lifeguards in order to prevent it constituting a source of dangers to its users;
3. that the swimming pool into which water sliders plunged would be sufficiently deep or filled with water so as not to constitute a source of danger to users; and
4. that users of the slide would do so in such a way that they would not be at risk of injury.

[3] In its plea, the appellant denied that its conduct had in any way been wrongful, as alleged, or that it had been causally negligent. It also raised certain special defences, namely:

1. that the respondent agreed to exempt the appellant from liability;
2. that the respondent, through his conduct, voluntarily assumed the risk of injury to himself; and
3. contributory negligence.

[4] The issue of liability was separated from that of quantum in terms of rule 33(4) of the Uniform Rules of Court and was determined first. It is against the order made by the

Court *a quo* at the conclusion of the hearing relating to the merits, together with a costs order in favour of the respondent, that the appellant now appeals.

[5] The respondent gave evidence on his own behalf in the trial and also led the evidence of an expert, Professor J Hillman. The respondent placed the evidence of a lifeguard who was on duty on the day in question, Mr L Ngwandi, before the court. Also admitted into evidence was a sworn statement by another employee of the appellant who was on duty that day, Mr Memani, but who had passed away by the time of the trial.

[6] The evidence of the witnesses is set out in some detail in the judgment of the Court *a quo* and I shall not repeat it save where it is necessary for a determination of the issues on appeal. A brief summary of the facts at this stage is, however, appropriate. At the time of the incident the respondent was 19 years of age and this was the first occasion on which he had visited Mnandi Resort ('the resort'). After spending several hours in the company of the party with which he arrived he decided to use the water slide ('the slide'). The slide comprises a wooden structure some 8.4 metres in height from which twin chutes, some 31.3 metres in length, lubricated by water, descend into the pool. Persons wishing to use the slide ascend stairs to the top of the structure where an employee of the respondent operates a plank or boom to ensure that not more than one person at a time uses each of the two chutes. At various points on the grounds of the resort, in some cases near the slide, are signs erected by the appellant stipulating the manner in which it is to be used. At the top of the structure, on a pole between the two chutes, was a further such sign. It was common cause that the respondent had been aware of the presence of these signs but had not troubled to read their contents.

[7] The respondent testified that he had decided to descend the slide head first. He had previously used similar slides at other facilities in the Cape Town area and had descended head first without any difficulties. On the day in question he also witnessed one other person descend head first before he did so but he had been unaware that the water into which he would plunge was only 0.75 metres deep. Before sliding down the chute he had positioned himself at its starting point on his knees with his buttocks on his heels. In this position he had received the go ahead from Mr Memani, the appellant's employee who was stationed at the top of the slide structure and who was supervising its use from that vantage point. When he entered the water from the chute he had performed some kind of breaststroke manoeuvre with his arms in order to '*go deeper*'.

[8] Mr Ngwandi testified that he was performing lifeguard duties at the relevant time and was positioned at a rock near the point where water sliders exited into the pool. At the time of the incident his attention had been drawn to the unusual noise made when the respondent entered the water and by his failure to surface in the normal manner. Mr Ngwandi jumped into the pool to assist the respondent, called for the necessary paramedical and other assistance and reported the incident to his superior. He testified further that this was the second occasion that day the respondent had descended the slide. On the first occasion he had also descended head first whereupon Mr Ngwandi had warned him not to do so.

[9] The respondent denied that he descended the slide before the accident or that he had been so warned. Mr Ngwandi's evidence in this regard was not accepted by the Court *a quo*, which determined the case on the basis of the respondent's evidence that the accident had occurred on his first and only descent of the slide. Mr Ngwandi also gave

evidence about the signage at the resort relating to the terms and conditions of entry and how users of the pool and the slide were required to conduct themselves.

[10] Professor JC Hillman, a consultant mechanical engineer, testified that he measured the depth of the pool at several points forward of the chute exit and found it to be 0.75 metres. He performed various experiments and found that users of the slide would reach different speeds upon entry into the water, varying between 40 – 50 kilometres an hour when lying supine. He testified that the required depth for water slide exit pools in Australia, Canada and the United States of America was in most cases 1.2 metres and in some cases 0.9 metres but both come with the proviso that *'head first'* riding is prohibited, even at the 1.2 meter level. He expressed the view that this calls for some form of control at the access point to the slide chute which would prevent a user attempting to descend head first and that the most common such system involved a physical barrier of some sort at the launch point which was then removed or de-activated by an attendant once the rider was correctly positioned on the chute.

[11] Professor Hillman concluded that the respondent's spinal injury was the result of inadequate exit pool depth coupled with the lack of an effective rider control system. His opinion was further that these deficiencies should have been identified in any thorough risk assessment as being potentially hazardous for users of the slide, that the explicit warning signs demonstrated that head first sliding was acknowledged to be a real hazard and therefore that action should have been taken to ensure that slide users were compelled to comply with this requirement.

Findings of the Court a quo

[12] The Court *a quo* found that the appellant had displayed two signs '*prominently*', on poles on either side of the steps leading from the entrance to the main pool stating that the pool rules had to be followed, that patrons may not run and dive and that the pool water was shallow.

[13] Another sign near the ladder to the slide informed users to descend the slide feet first and prohibited other manners of descent such as head first. Finally, a further notice was displayed at the top of the water slide informing users to descend feet first. The Court *a quo* found too that the appellant had appointed staff, including Mr Memani, stationed at the top of the slide, to monitor its use. It recorded that the respondent did not see or pay attention to any of the signs prohibiting him from descending the slide head first.

[14] The Court found that the respondent was an honest witness and that '*overall, his evidence was truthful*'. It preferred the respondent's evidence that he had descended only once in contrast to the testimony of Mr Ngwandi, finding the latter's evidence in this regard unreliable. Dealing firstly with wrongfulness, the Court *a quo* was satisfied that the respondent had proven that the appellant was in control of the recreational facilities at the resort which members of the public were allowed, for a fee, to make use of and which facilities proved to be '*extremely dangerous*'. The Court held that in these circumstances the appellant owed the respondent a legal duty of care, the negligent breach whereof would constitute wrongfulness.

[15] The Court then dealt with the issue of negligence, applying the test laid down in *Kruger v Coetzee*.¹ Regarding the requirement that the harm must have been reasonably foreseeable, it found that it was clear that the appellant was alive to the fact that head first descent of the slide was dangerous, a fact borne out by the signage which it had erected warning against such conduct. On the further question of whether the appellant should have taken reasonable steps to guard against any such occurrence, it took into account Mr Ngwandi's evidence that, notwithstanding the warning signs as well as the presence of lifeguards, some users continued to descend head first. It noted too the absence of any sign at the slide exit indicating the depth of the water in the pool at that point and therefore that it was *'unlikely, that patrons would align the warnings of the shallowness of the water or with the dangers inherent in descending the water slide head first'*. The Court *a quo* concluded that a reasonable person in the position of the appellant would have foreseen that the slide constituted a serious risk of injury to persons descending head first and that the existing measures employed to avert such harm were inadequate. It then embarked on the exercise of establishing what steps the appellant ought to reasonably have taken to guard against that danger. It held that effective control by the appellant's staff was *'pivotal'* to preventing the kind of harm suffered by the respondent.

[16] The Court *a quo* also held that the appellant's warning signs were ineffective inasmuch as none of them spelt out the danger of descending head first into the shallow water at its exit. Finally, it observed that the appellant could also have used loudhailers to advise users about the dangers inherent in head first descent.

[17] The Court then turned to the issue of causation, namely, the question of whether, but for the appellant's wrongful and negligent conduct, the respondent would not have

¹ 1966 (2) SA 428 (A) at 430.

suffered the injury which he did. Here the Court noted the respondent's admission that even if he had studied the warning signs he may well still have descended the slide head first because he had assumed that the water at the exit point would take him up to his chest i.e. he had not realised how shallow it was. Nevertheless the Court found that, but for the appellant's negligent conduct in the form of inadequate control at the top of the slide and inadequate signage, the respondent would not have suffered his injury.

[18] As regards the defence of voluntary assumption of risk, the Court *a quo* concluded that the appellant had failed to meet the requirements of the *volens* defence. Finally, as regards the exemption agreement defence, the Court *a quo* held that given the far-reaching consequences of the disclaimer, the absence of any specific reference in the notices to injuries which might be sustained rendered them ambiguous and thus that they were to be interpreted against the appellant as *proferens*.

Grounds of appeal

[19] The main grounds of appeal relied upon by the appellant were that the Court *a quo* had erred in attributing a duty to the appellant to ensure that the slide did not constitute any source of danger to any person as opposed to a duty to take no more than reasonable precautions; further by finding that it was unlikely that those who observed the warning signs would appreciate that they were being warned that it was dangerous to descend the slide head first and that the water was shallow. A further ground was that the Court *a quo* had erred in finding that the appellant could have prevented the respondent from descending the slide a second time despite accepting the respondent's evidence that he had only descended the slide once; further that it had erred in finding that it had failed to discharge its duty in law and had acted negligently notwithstanding unchallenged evidence of all the precautionary measures which it had adopted. Further grounds of

appeal were that the Court *a quo* had incorrectly found that it was negligent for the appellant not to have used loudhailers to warn patrons of the danger and in failing to maintain a depth of water at the slide exit point greater than 0.75 metres in the absence of evidence that this was an acceptable standard or that the appellant had the financial resources to meet such a requirement. Another ground related to the Court's credibility findings, more specifically the Court's rejection of Mr Ngwandi's evidence. Other grounds of appeal were that the Court had erred in accepting the respondent's evidence and in finding that the respondent had discharged the burden of proof relating to causation.

Wrongfulness

[20] As previously mentioned the appellant disputed the element of wrongfulness. It contended in this regard that the Court *a quo* had in effect misdirected itself in two important respects: firstly, by applying an incorrect standard in finding that the appellant owed an absolute duty to eliminate any source of danger from the slide as opposed to a duty to take no more than reasonable precautions against such danger/s eventuating. The appellant's second contention was that the respondent's case asserted a failure by the appellant to take further steps to prevent any harm or danger eventuating without examining whether any such omission was wrongful, thereby potentially extending the boundaries of the duty of care without limitation.

[21] I do not think that the Court *a quo* held in effect that the appellant was under an absolute duty in law to eliminate any conceivable danger potentially inherent in the slide's use. Any impression to the contrary urged by the appellant arises from the Court's somewhat loose use of language in para 36 of its judgment, rather than its evident reasoning. In my view it is clear enough on a fair reading of the judgment that the Court *a*

quo went no further in respect of the issue of wrongfulness than to hold that the extent of the duty on the appellant was no more than to take reasonable measures to guard against the dangers inherent in the use of slide eventuating.

[22] Regarding the contention that the Court *a quo* failed to consider the requirement of wrongfulness, one notes that in recent years our courts have frequently warned against blurring the elements of wrongfulness and negligence. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority*² it was pointed out that a first principle of our law of delict is that everyone has to bear the loss that she or he suffers. Inasmuch as Aquilian liability provides an exception to this rule, the act or omission complained of must not only be negligent and have caused the harm but it must also be wrongful.³

[23] In *Za v Smith*⁴ Brand JA quoted with approval the dictum of Khampepe J in *Country Cloud Trading CC v MEC Department of Infrastructure Development*⁵ as follows:

“Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether ‘the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue’. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirably and overly burdensome to impose liability.”

Brand JA went on to warn of the potential confusion between wrongfulness and negligence which could lead to instances of defendants being held liable because

² 2006 (1) SA 461 (SCA).

³ At 468A-C (para 12).

⁴ 2015 (4) SA 574 (SCA) at 583B-C (para 15).

⁵ 2015 (1) SA 1 (CC).

negligence has been established but without the requirement of wrongfulness being considered.⁶

[24] In *Loureiro v Imvula Quality Protection (Pty) Ltd*⁷ the Constitutional Court held that the wrongfulness enquiry focuses on “*the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability*”.

[25] In *Hawekwa Youth Camp v Byrne*,⁸ again speaking for the Court, Brand JA stated that depending on the circumstances it may be appropriate to consider wrongfulness first, i.e. assuming negligence, or, in another case, vice versa.

[26] In my view the former approach best suits the present matter, the circumstances of which are similar in many respects to those in the recent matter of *Van Vuuren v eThekweni Municipality*⁹. That case also concerned a water slide at a swimming pool operated by a local authority in which an eight year old child sustained serious facial injuries when he lost his balance descending the slide after apparently being pushed by a child behind him. There was no access control to the slide and no supervision at the top.

[27] On appeal the Court dealt first with the issue of wrongfulness *viz* whether there was a legal duty to supervise and control access to the slide. Its starting point was to note that where a party has by prior lawful conduct created a potential risk of harm to others a duty may arise which is breached where it fails to take reasonable steps to prevent the risk from materialising. The Court noted that in providing the pool with a slide the

⁶ ZA above n 4 at 583-5D (paras 17-9).

⁷ 2014 SA 398 CC at para 53.

⁸ 2010 (6) SA 83 (SCA) at 91F (para 24).

⁹ 2018 (1) SA 189 (SCA).

municipality created a potential risk of harm to others. It found as significant the following factors: the fact that children under 12 years of age used the facility, their protected position in terms of section 28(2) of the Constitution, that children used the slide in a chaotic manner, that parents were precluded from entering or being proximate to the slide so as to control the actions of their children and, finally, that making provision for supervision and access control by the local authority would not place an intolerable burden on it.

[28] The approach of the Supreme Court of Appeal in *Van Vuuren* is instructive for the present matter. Against the background of a finding by the trial court that no legal duty could be imposed upon the local authority to provide a supervisor at a water slide used by children i.e. apparently holding that this omission on the part of the local authority was not wrongful, the Court stated as follows:

“It will be recalled that Steyn J considered the following to be the issue to be adjudicated:

‘[W]hether a parent exercising parental control over a child can legally expect of a local authority to either share in the duty of parental control or usurp the duty and responsibility.’

Counsel agreed that the primary issue was rather, whether there was a legal duty on the part of the Municipality to supervise and control access to the slide. The Municipality also contended that there had been no negligence on its part and in particular, that the consequences suffered by Jacques had not been foreseeable.”¹⁰

[29] In arguing that the element of wrongfulness had not been established Mr Butler, on behalf of the appellant, sought to distinguish the present matter from that of *Van Vuuren*, inter alia, on the grounds that the interests of children were concerned in the latter case. Apart from the fact that the evidence suggests that the slide at Mnandi Resort

¹⁰ *Ibid* at 194G-H (para 15).

was also available for use by children, that factor alone does not, in the present circumstances, and in my view, make any material difference to the question of wrongfulness. In terms of our Constitution all citizens have a right to their bodily integrity.¹¹

[30] The appellant, a local authority, established and constructed the resort as a public amenity, including the swimming pool and the water slide facilities. Combined, these two amenities, notwithstanding the pleasure which they afforded innumerable users over the years, constituted a potential source of danger to such users inasmuch as incorrect use of the slide could lead to catastrophic harm in the form of serious injury or even death. Moreover, to the knowledge of the appellant the slide was sometimes used in a potentially dangerous manner. The slide facility was seemingly available to every visitor to the resort irrespective of their age. I venture to suggest that such visitors would reasonably expect the appellant to take all reasonable measures to guard against dangers inherent in the use of the facilities. In these circumstances, where the potential harm can be averted, forestalled or minimised through the taking of reasonable measures by the local authority without imposing too great a burden on it financially or otherwise, then I have no doubt that the legal convictions of society would regard a failure to meet those standards as wrongful.

[31] In the present matter not only did the appellant create a potential risk of harm to resort users in providing the water slide, the evidence as a whole, and in particular its own signage, established that it was well aware that the slide, improperly used, could be dangerous and might result in grave injury. In particular it was aware that head first descent of the slide posed a serious risk of injury to users. An even more compelling

¹¹ Section 12(2) of the Constitution.

consideration was revealed by Mr Ngwandi's evidence that, notwithstanding all the warnings, slide users regularly descended head first. A further consideration, one to which I shall return, is that the water level at the point of exit of the water slide was 0.75 metres deep. On the evidence presented to the Court *a quo* this increased the risk of harm to water slide users who descended head first. Taking all these circumstances into account I consider that the element of wrongfulness, namely, that the appellant should be liable for a failure to take reasonable measures to avoid injury to users of the slide, was satisfactorily established.

[32] Mr Butler also argued that the appellant had taken a range of steps to ensure the safe use of the slide at the resort, that potentially there was no limit to further safeguards which could be added, and that the line should be drawn where it presently stands. In my view this argument raises questions which must be dealt with under the issue of negligence, to which I now turn.

Negligence

[33] The oft-stated test formulated in *Kruger v Coetzee*,¹² provides that negligence is established 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.*”

[34] The appellant did not put paragraph (a) of the test in *Kruger* in issue on the facts of this case. The area of contestation bore on paragraph (b), with the appellant contending

¹² 1966 (2) SA 428 (A) at 430E-F.

that it had not been negligent because the steps that it had taken were reasonable and adequate.

[35] The enquiry into negligence therefore turns around whether the appellant took reasonable steps to guard against such occurrence. In this regard the appellant contended that it took all reasonable steps which included the posting of prominent signs throughout the facility warning persons not to dive, that the water was shallow and that they should not descend the slide head first.

[36] The clarity and sufficiency of these signs were challenged on behalf of the respondent, in my view with some justification. Certain of the signs appeared faded and were not immediately comprehensible. For example one sign (Vol 6 pages 543 and 544), has an important panel depicting a user descending the water slide head first. However, the accompanying written message is contradictory, namely, *'slide this way/gly op hierdie manier'*. The thick red line across that entire panel, apparently suggesting a prohibited practice, does not entirely remove the confusion. No sign specifically warned that head first descent of the slide could lead to head or spinal injuries, a danger which was not necessarily obvious to all users.

[37] Notwithstanding these shortcomings, however, the final sign visible to users, which is erected on a wooden post between the two chutes where slide users commence their ride, is clear. It reads: *'How to have fun and be safe - Always enter chute by holding bar and ride feet first'*. This message is then illustrated pictorially. Underneath follows the words *'Danger no diving – shallow pools'*. It reads further *'Ride feet first only'* and provides some six (6) pictorial depictions of prohibited modes of descending the slide

which are variations of either descending head first, standing or, crucially for this matter, kneeling.

[38] It is clear therefore that the appellant had been at pains to erect signage at the resort warning potential users of the slide that descending head first and certain other modes of descent were prohibited. There was also uncontested evidence that the appellant exercised supervision over the use of the pool generally and the slide in particular through the deployment of lifeguards. At the relevant time Mr Ngwandi was specifically deployed to monitor slide users descending into the pool whilst Mr Memani controlled access at the top of the slide structure. It would appear further that Mr Ngwandi, at least, had undergone training as a lifeguard. Mr Memani was not a lifeguard but a permanent member of staff. Details of his training or responsibilities were not clear beyond that he was tasked with ensuring that not more than one person used the chutes at one time and did not descend before other users had cleared that part of the pool area into which the slide exited.

[39] A noticeable, if not glaring, omission in the evidence concerned the issue of what control or supervision, if any, was exercised, particularly at the top of the slide, in an effort to ensure that slide users did not descend head first. Mr Ngwandi's evidence in this regard must be considered. He appeared to testify that the respondent had descended the slide twice on the day in question, on both occasions head first. Unfortunately Mr Ngwandi did not testify in his mother tongue but in English in which he was clearly not proficient for the purposes of giving evidence. As a result his testimony on several aspects was far from clear. As best one can make out, however, his account was that the respondent commenced his first descent in the sitting position but then changed it to head first. Mr Ngwandi then warned him not to do this again which warning the respondent

appeared to accept. Nonetheless he immediately proceeded to make his second descent in the same manner i.e. starting off in the sitting position but, by implication, changing this to a head first position.

[40] The respondent steadfastly denied that he had descended twice or that he had been warned not to do so. He insisted that he had descended only once, that he had commenced in the kneeling position and immediately moved into the head first position.

[41] Mr Ngwandi also testified that it was a regular occurrence for slide users to descend head first. On such occasions he would advise the superintendent if the user in question was refusing to heed warnings not to do so again. In those instances, and after advising his superintendent, '*law enforcement*' would remove such persons from the resort.

[42] Asked what were the duties of persons in the position of Mr Memani i.e. stationed at the top of the water slide, Mr Ngwandi replied that it was to monitor those persons using the slide but he could add nothing by way of detail. There was no further evidence from the appellant on this score since Mr Ngwandi was the only witness which it called. The evidence of Mr Memani as to what transpired at the top of the water slide that day would have been critical but he passed away before the trial. A brief affidavit which he made shortly after the incident was admitted by the Court *a quo* but it said no more than that he had warned the respondent (and others) not to go down the slide head first but that they had refused to listen to him.

[43] On the evidence then, two contrasting versions of what had taken place on the day in question were presented to the Court. On behalf of the appellant Mr Butler was content

to argue the appeal on the basis that the Court *a quo*'s credibility findings should stand, even though one of the appellant's grounds of appeal belies this.

[44] On first principles credibility findings are not to be judged in isolation but must be considered in light of the proven facts and the probabilities of the matter as a whole. Although a court of appeal is generally reluctant to disturb the findings based on credibility it will do so where such findings are plainly wrong.¹³ This is because, inter alia, of the advantages which the trial Court enjoys in observing the witness and his or her demeanour at first hand. Nonetheless overemphasis of these advantages is to be avoided "*lest an appellant's right of appeal becomes illusory*".¹⁴

[45] The Court *a quo*'s decision to accept the respondent's evidence that he only used the slide once on that day and to reject Mr Ngwandi's evidence that there were two such occasions was not based on a wholesale rejection of his evidence. It rejected Mr Ngwandi's evidence only in respect of certain points where it differed from that of the respondent, principally on the issue of whether the respondent had descended the slide once or twice that day after being warned by Mr Ngwandi on the first such occasion. The question is whether it is appropriate or justified for the Court to interfere with that finding, particularly in the light of the appellant's attitude as mentioned above. As mentioned, the appellant was content to argue the appeal on the respondent's version of events as regards whether he used the water slide once or twice that day, possibly because any advantage it gained from a finding that the respondent was specifically warned not to descend head first after his first descent is offset by the stark fact that the respondent was nonetheless able, or permitted, to do so a second time.

¹³ *Rex v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706.

¹⁴ See *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) at para 5.

[46] In my view the Court *a quo*'s findings on this score were reasoned and substantiated and based on the evidence as a whole, the proven facts and the probabilities. There is thus no warrant for this Court to interfere with those limited credibility findings made by the Court *a quo*.

[47] The respondent testified that on the sole occasion he descended the water slide that day he positioned himself on his knees before he was permitted to proceed by one of the persons on duty at the top of the water slide, presumably Mr Memani. The respondent further clarified that he was not kneeling in an upright position but with his buttocks on his heels – a '*backwards kneeling position*'. Upon launching himself down the chute he immediately changed his position to head first i.e. on his stomach with his hands in front of him. He testified that the official at the top of the slide, nor anyone else for that matter, had not told him not to do so. He added that had an official done so he would have obeyed.

[48] The respondent testified that the official had given him the go ahead while he was on his knees by saying 'go'. It was put to him that it was probable that Mr Memani had thought that he was going to descend in the normal and permitted manner i.e. on his back or bottom but the respondent resisted this suggestion and held firm that whilst on his knees on the chute he was told to go.

[49] In light of the Court *a quo*'s acceptance of the respondent's version of events, including what happened at the top of the water slide, and there being no countervailing evidence from Mr Memani, one is led inescapably to one of two conclusions: either Mr Memani observed the respondent in a kneeling position immediately prior to him descending the water slide or he did not observe this when, had he paid attention, this

would have been obvious to him. Had the respondent been seen in the kneeling position by Mr Memani it would also have been obvious to him that the respondent was intent upon launching himself down the slide head first. Clearly the kneeling position is the natural one to adopt if a rider is intent upon descending head first whilst the sitting position is the natural position to adopt for a feet first descent. To change from the kneeling position so as to descend feet first, either prior to commencing the ride or whilst doing so, would require extricating one's legs from underneath one's buttocks, a physically cumbersome and unlikely exercise.

[50] Given these conclusions the question then becomes whether it was negligent on the part of the appellant, acting through Mr Memani, to have either not observed that the respondent was intent upon descending head first or if, this had been noticed, to have failed to take any steps to have prevented him from doing so. Such negligence would fall within two of the grounds of negligence pleaded by the respondent, namely, that the appellant was under a duty to ensure:

1. that the water slide would be monitored by employees in order to prevent it constituting a source of danger to users; and
2. that persons using the water slide do so in such a way that they would not be at risk of injury.

[51] In determining whether the appellant was negligent regard must also be had to two other factors, namely, the depth or shallowness of the water at the slide exit point and the issue of what additional control mechanism or mechanisms, if any, the appellant could have implemented in order to reduce the danger to users.

[52] It is in these areas that Professor Hillman's evidence becomes relevant. He expressed the opinion that the respondent's injury was the result of '*inadequate exit pool depth with a lack of an effective rider control system*' and that these deficiencies could have been identified in any thorough risk assessment of the slide as being potentially hazardous for its users.

[53] It was common cause that the depth of the water where the slide exited into the pool was 0.75 metres. Professor Hillman testified that an internet survey of applicable standards and guidelines for exit pool depths for water slides in Australia, Canada and the United States of America revealed that most require a minimum of 1.2 metres but some only 0.9 metres. Following an analysis of the variables which would influence the likelihood of a slide user sustaining a head or neck injury he expressed the opinion that had the water depth at the resort being 0.9 metres this would not necessarily have prevented contact being made between the respondent's head and the floor of the pool but would likely have been sufficient to reduce the impact speed to a level at which the respondent not have suffered any serious injury.

[54] On behalf of the respondent Mr Butler criticised Professor Hillman's evidence in relation to alleged international standards for the depth of water of pools at the exit to water slides as being in part hearsay. He also questioned the value of Professor Hillman's evidence given his failure to investigate the conduct of the respondent himself i.e. on the basis that his investigation was one-sided. Further criticisms were that Professor Hillman's consideration of the four input variables for his calculations involved a certain amount of guess work and that he had no expertise in the field of access control systems.

[55] In considering these criticisms it is as well to note that the appellant also filed the expert opinion report of a consulting civil and structural engineer, a Mr J Rozowsky, in regard to the question whether the slide and pool design at the resort could be considered as safe for feet first descent. He was also asked to comment generally on Professor Hillman's report.

[56] In my view the criticisms of Professor Hillman lack substance. It is inevitable that his calculations relating to the exit speed of slide users and safe water depth would not be capable of precise measurement given the number of variables and the difficulty of measuring them. Whilst it is correct that his evidence of water depth at similar resorts in the Cape Town area appeared to be hearsay this was not central to his evidence. His evidence regarding safe pool depths in other countries was presumably gathered from reputable sources on the internet and it is difficult to see how else, practically speaking, this could have been done. It is also not correct to suggest that Professor Hillman turned a blind eye to the respondent's conduct since he took full account of the only two relevant factors in that regard, namely, that he descended head first and upon entry performed a breaststroke manoeuvre. All other considerations relating to the respondent's conduct fell outside his brief and were for the Court *a quo* to determine in its enquires into negligence and causation. Professor Hillman's evidence was cogent and logical and in my view meets all the requirements for an expert witness, not least in its objectivity and reasoning.

[57] Although the appellant gave notice of its intention to call its expert, a Mr J Rozowsky, it did not do so. In a joint minute, however, the two experts agreed that:

1. the water slide was designed for '*feet first usage only*' and was safe for that purpose;

2. an increase in the depth of the exit pool to 1.2 metres would have substantially reduced the severity of the impact between the respondent's head and the floor of the pool.

[58] Professor Hillman relied on and cited three journal articles in his Rule 36(9)(b) report, copies of which were introduced as exhibits. The most relevant was entitled '*Bio mechanical analysis of swimming pool neck injuries.*'¹⁵, a study used in the development of swimming pool equipment safety standards which investigated 67 accidents involving neck injuries. Nine of these injuries were sustained after a head first entry from a water slide into shallow water described as three and a half feet or less. Dealing with this subsection the study reads in part:

"The normal body position at the water surface is with the head and hands up and the back arched. This causes the slider to skim across the surface with little penetration. If, however, the head and/or the hands are lowered, a snap roll or tumble occurs. The head and hands increase the drag causing the body to rotate towards the pool bottom.

...

It is clear from the number and severity of the accidents presented here that diving or head first sliding into shallow waters is potentially very dangerous and should be actively discouraged. The snap roll motion probably occurred in many of these accidents."

[59] It is correct that Professor Hillman could not give personal evidence of measurements he had taken of pool depth at water slides internationally and objection was taken to his evidence in this regard. However, no countervailing evidence was presented on behalf of the appellant regarding water depth. Furthermore, as a matter of logic, (and as was agreed by the experts in their joint minute), the shallower the water at exit/entry point the greater the likelihood of injury. By any standard a depth of 0.75 metres (which is less than waist height for an adult of average height) had the potential

¹⁵ J McElhaney and others from *The Human Neck Injury Mechanism and Biomechanics* Warrendale, PA, Society of Automotive Engineers, 1979, pp 47 – 53.

for serious head and/or neck injuries where slide users were entering the water head first at speeds of around 40 kilometres per hour.

[60] The second critical element to be considered is the question of control mechanisms to ensure that slide users did not descend head first. It was the appellant's own case that head first descent was potentially dangerous and that the pool was only safe for feet first descent. The quantity and the content of the signage which it erected as well as the evidence of Mr Ngwandi established that the appellant was well aware of the risks involved in head first descent. The measures adopted by the appellant to ensure the safety of slide users did not end with its signage, however. Lifeguards were deployed to ensure that the slide was safely used, and, in addition, an official was stationed at its top to control access to the chutes. Presumably this was done to ensure that they were only used by one rider at a time and, furthermore, that riders did not descend until such time as the pool exit area was clear of those who had preceded them. However, Mr Ngwandi's evidence was that notwithstanding these measures it was a regular occurrence for slide users to descend head first and it appears that the measures taken to prevent this were, at best, somewhat ineffective, seemingly limited to having repeat offenders removed from the resort in isolated instances by law enforcement officials.

[61] It is unclear from the evidence whether Mr Memani and others stationed at his post saw it as part of their duties to ensure as far as possible that slide users did not descend head first. This would entail instructing and/or requiring all users to position themselves on the slide in a feet first position. On the contrary, on the evidence accepted by the Court *a quo* the respondent was allowed to assume a kneeling position on the slide which was clearly a prelude to him launching himself down the slide head first and, furthermore, whilst in the kneeling position he received the go ahead from Mr Memani.

The respondent's evidence that had he been so warned or instructed by Mr Memani he would have changed his position to feet first, cannot be gainsaid. On the probabilities therefore, had Mr Memani been alert to the possibility of the respondent descending head first a timely warning or instruction would have averted this eventuality.

[62] It is striking that the final and possibly the most important sign which slide users see has one panel expressly prohibiting the user from assuming the position which the respondent did shortly before he commenced his descent, namely, on his knees. It highlights the question of why Mr Memani either gave the respondent the go ahead to descend whilst in this position or simply failed to notice that he was kneeling.

[63] What is more Professor Hillman's evidence was also that a simple control mechanism, such as a pole or gate erected in front of the user on the chute which would be lifted only when he/she was seen to be correctly positioned, would have gone even further in preventing head first descents. He testified of the dangers inherent in '*head first*' riding and recommended some form of control at the access point to the chute to prevent a user attempting to descend in such a position. Professor Hillman added that the most common system involves a physical barrier of some sort at the launch point which is then removed or deactivated by an attendant once the rider is correctly positioned on the chute.

[64] In evidence Professor Hillman made the simple but important point that if one wants prevent something from occurring, '*notices are one thing, but you have to actually take some action to make sure that ... people don't disobey what you trying to tell them*'. He referred to the possibility of something as simple as a '*pole device*' that goes through the side of the chute and which the attendant removes once satisfied that the rider is

positioned properly. Another possible safety device could be something like a carpark boom blocking the chute off which could be lifted electrically or manually with a pulley system when the rider was safely positioned and Professor Hillman was referred to photographs taken in Amanzimtoti of such a device actually in operation (record page 506 and 507).

[65] Counsel for the respondent objected to Professor Hillman's evidence as a whole regarding possible safety devices but in my view it is eminently within the province of an engineer to testify not only about the feasibility of such devices but also their probable cost. That cost appeared to be well within reason, particularly if a manually operated device was employed.

[66] In argument before us appellant's counsel was asked why a control mechanism could not have been put in place to ensure that users could not descend until such time as they were in the correct and safe position. Counsel's response was to contend that this would be yet a further step on top of the many steps which the appellant had already taken to ensure the safety of users and that one could always envisage yet a further step to ensure the safety of the slide's users. In my view this is an inadequate response since the real issue is whether the measures taken by the appellant in dealing with the risks inherent in the use of the water slide were reasonable or not. Of course the enquiry as to the reasonableness of the appellant's conduct must be related to the relevant circumstances. This aspect was discussed in *Cape Metropolitan Council v Graham*¹⁶ where Scott JA said:

"Turning to the question of negligence, it is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded

¹⁶ 2001 (1) SA 1197 (SCA) at para 7.

as reasonable or not depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be

‘(a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm’.

... If a reasonable person in the position of the defendant would have done no more than was actually done, there is, of course, no negligence.” [citations omitted].

[67] Applying these factors to the present matter it is common cause that the erection of the slide exiting into comparatively shallow water posed a serious risk for any users who descended head first. The gravity of the risk was self-evident: striking one's head with force on the floor of the pool could quite conceivably lead to a serious head or neck injury as happened in the present instance. The question of utility involves the weighing up the cost or feasibility of additional safety measures against the advantages which they might deliver. In my view given that an official was already routinely stationed at the top of the slide to control access, expanding that person's duties to include ensuring that users were in the correct body position immediately before sliding would eliminate a substantial proportion of those persons initially intent upon descending the slide head first. Ordinary human experience tells one that if a personal warning is addressed to someone disobeying a rule the chances are much better that the person will correct his/her behaviour. This, incidentally, was demonstrated by the fact that, earlier on during his visit the respondent was engaged in horse play in the pool. When a whistle was blown and a lifeguard told him to desist he immediately did so. Furthermore, the fitting of an access control device, either manually or electrically operated would, on the probabilities, have ensured that virtually all instances of persons descending head first would have been obviated. Such a mechanism may not have provided for a complete elimination of such

instances since there was some evidence that if a user is determined enough he/she can change position from feet first to head first in mid-descent, albeit with difficulty. These instances would surely be a very small minority.

[68] A final consideration is the burden, financial or otherwise, of introducing such additional safety measures. Every indication was that this would be very limited. An employee was already routinely on duty at the top of the slide and one would reasonably expect that ensuring that users were in the correct bodily position would be part of such official's duties in any event. Unfortunately no evidence was led on this score. The death of Mr Memani may perhaps have been partly responsible for this omission but it was noteworthy that no person in a position of higher authority e.g. the manager of the resort, was called to testify as to the scope of the duties of the employee stationed at the top of the slide and in particular whether this extended to ensuring that slide users launched from the top of the chute in a safe position. Furthermore, on the available evidence the further step of erecting an access control device at the top of the chutes would not have been burdensome from the appellants' point of view. The costs involved in erecting such a device do not appear to be substantial and it could easily be designed so that it was operated by the self-same employee, either manually or electrically.

[69] The potentially catastrophic consequences to slide users descending head first, the frequent infractions of the stipulation that head first descent was not permitted and the comparative ease of introducing measures to eliminate or significantly reduce such infraction, leads me to the conclusion that a reasonable person in the position of the appellant would have done more i.e. taken at least one or more of these steps to ensure that head first descents were greatly minimised, if not eliminated.

[70] For these reasons I find that the appellant was negligent in not taking the further steps discussed above.

[71] In reaching this conclusion my reasoning differs somewhat from that of the Court *a quo*. It relied largely on the lack of any sign or indication at the slide exit that the water in the pool was shallow and the unlikelihood of users making the connection between the warnings against head first descent and the fact of the shallow water. Secondly, it considered that the appellant could have used loudhailers to warn the public and; thirdly, that it could have prevented the respondent from descending a second time. On the factual matrix accepted by the Court *a quo* there was no second descent by the respondent and in my view the efficacy of using loudhailers is open to doubt. There is a good deal to be said for improving the clarity of the signage employed at the resort but it is not necessary to make any finding in this regard in order to find negligence on the part of the appellant not least since it is academic in the present matter.

[72] These differences in reasoning do not, however, affect the central finding that the appellant was negligent in not taking further the steps that I have discussed above to prevent or at least to minimize the instances of slide users descending head first.

Causation

[73] The final issue to be addressed to establish liability on the part of the appellant is causation. The appellant challenged the Court *a quo*'s finding that causation had been proved, basing this principally on two legs. Firstly, it was contended that even if the respondent had been aware of the risks of descending head first he would still have done so. In this regard the appellant relied on the respondent's concession that he was a '*risk-taker*'. The second leg of the appellant's argument was that the respondent's performing

a breaststroke movement upon entering the water had forced him deeper under the water and was something which no other user had done. The argument proceeded that it stood to reason that it was this conduct which distinguished the respondent's case from that of many others who had safely descended the water slide head first and was therefore, the ultimate cause of his spinal injury.

[74] The first leg of the appellant's argument does not support its case in relation to causation, firstly because it is speculative and secondly, because it is based on the assumption that the appellant's negligence lay in not adequately conveying to the respondent that by descending head first he ran the risk of sustaining a serious injury i.e. on a lack of adequate signage. This factor, however, was not the sole basis of the Court *a quo*'s finding that the appellant was negligent and certainly is not the rationale for this Court making such a finding. The appellant's negligence lay instead in not taking appropriate measures, through Mr Memani or other employees at his post, to ensure that slide users did not descend head first irrespective of whether they were '*risk-takers*' or not.

[75] There are also considerable difficulties attendant upon the second leg of the appellant's argument disputing causation. In the first place the principal causative factor for the respondent sustaining his injury was his head first descent. If he had descended in the correct manner i.e. feet first, whatever hand or head movements he made would have been irrelevant in that they could not have caused any similar injury. Secondly, the appellant's main hypothesis regarding the breaststroke action is also largely speculative and unsupported by any acceptable evidence. There was no evidence from its own expert or any witness for that matter suggesting that it was the respondent's alleged breaststroke movement which caused him to hit the crown of his head against the pool bottom with

such force. Professor Hillman, in my view a fair-minded witness, was not prepared to concede that any breaststroke movement by the respondent was the sole distinguishing feature between him descending head first and sustaining an injury and other persons who had descended head first without being injured.

[76] The Court *a quo*'s ultimate finding that the breaststroke movement played no material role in causing the respondent's injury was strongly challenged by the appellant. Its contention was that this was at odds both with Professor Hillman's evidence and with earlier findings made by the Court *a quo*. Given the importance which the appellant attaches to the respondent's breaststroke movement, both in relation to causation and the apportionment of fault, the evidence on this score must be examined more carefully.

[77] In his report Professor Hillman noted that in a head first descent should the rider's head be tilted down upon entry this would tend to direct the rider's body on a trajectory towards the pool floor whilst the forward placing of the arms would accentuate this effect somewhat. The effect of a breaststroke manoeuvre upon entry would have been to steepen the downward trajectory. In evidence Professor Hillman testified that the cause of the respondent's steep underwater descent was a combination of '*quite a few things*' and was not clear but that having his head bent forward as well as his arm and hand action would have forced him down. As regards the latter factor Professor Hillman testified that any breaststroke movement would have had a limited effect upon the respondent's speed through the water as distinct from its role in deepening his angle of descent.

[78] As noted earlier, the article by McElhaney relied upon by Professor Hillman indicates that it is the position of the head or hands which is critical, i.e. where they are

lowered, drag is increased causing a snap roll or tumble and the consequent impact on the pool floor.

[79] In my view, the evidence as a whole does not support the hypothesis that it was the respondent's *'reckless'* breaststroke action which was the crucial difference between an injury-free head first descent and the catastrophic injury he suffered. It does not appear possible to determine precisely what combination of factors or forces caused the respondent's injury apart, of course, from the fundamental fact of his head first descent, but the (downward) position of his head and his hands or arms clearly also played a role.

[80] In the recent case of *Za v Smith* 2015 (4) SA 574 (SCA) at 589D–G Brand JA stated the following:

“The criterion applied by the court a quo for determining factual causation was the well-known but-for test as formulated, e.g. by Corbett CJ in International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A). What it essentially lays down is the enquiry — in the case of an omission — as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the ‘but-for test’ is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common-sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty.” [citation omitted].

[81] The test to be applied then in the present circumstances is whether, had the appellant's staff member on duty applied a protocol of requiring slide users to assume the correct physical position for a safe descent of the slide and/or had the appellant utilised a gate mechanism to ensure that this was the case, the respondent would nevertheless have

sustained the injury. I have no doubt that the respondent established on the probabilities that had those measures been in place he would not have descended head first and would therefore not have sustained the injury. In my view the Court *a quo* correctly found that causation had been established.

The defence of voluntary assumption of risk

[82] In argument the appellant's counsel acknowledged that, in the event of the court finding that the exemption or disclaimer defence was not sound, little or no reliance could be placed on the defence of voluntary assumption of risk. Nonetheless I propose to deal first with the *volens* defence. The appellant bore an onus to establish this defence, the elements of which are that the respondent had knowledge of the risk, appreciated its ambit and consented thereto. As long ago as 1973, the Appellate Division (as it then was) set out in *Santam Insurance Co. Ltd v Vorster*¹⁷ the correct approach in determining whether the defence has been satisfied.

“The Court must, in my view, thus perforce resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under consideration. Thereafter the Court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations to the contrary, have foreseen the particular risk which later eventuated and caused his injuries, and is accordingly to be held to have consented thereto.”

[83] Ogilvie Thompson CJ stated as follows:

“That the onus of establishing this defence rests upon the appellant, is common cause. Nor is it disputed that the essential elements of the defence were correctly stated in Innes, CJ's well-known succinct summary of ‘knowledge, appreciation and consent’ ... The overall enquiry is undoubtedly one of fact to be determined in relation to the circumstances of the particular case ... Little or no difficulty is encountered regarding

¹⁷ 1973 (4) SA 764 (AD) at 781D.

the first two of the above-mentioned essential elements; but it is in relation to the requisite of “consent” that problems of considerable difficulty present themselves. It is well established the knowledge and appreciation alone do not constitute such consent; as it is sometimes said the maximum is volenti non fit injuria, and not scienti non fit injuria.”¹⁸

[84] On the facts found by the Court *a quo*, when the respondent injured himself it was the first time that he had used that particular water slide. Furthermore, his evidence that he was given the go ahead by the official on duty to descend even though at that stage he was in a kneeling position, must be accepted. The respondent testified that he thought that the depth of the water at the slide’s exit point was similar to the depth of the water at the deep end of the pool and that it would reach up to his chest. He testified further that he had used similar water slides at other resorts where his experience had been that the depth of the water upon exit would take him up to his chest or thereabouts. He stated further that had Mr Memani told him that he should not go down head first he would have obeyed him. His evidence was also that he had not taken any notice of the signs warning him not to descend other than feet first. Finally, the respondent was asked by his counsel whether if he had known that the water upon exit would only have taken him somewhere up above his knees or midway between his knees and his waist he still would have descended head first. His answer was that he would not have done so since the water would have been too shallow and similar to that in a baby pool. Taking all this evidence into account it appears to me that the appellant has come nowhere near establishing knowledge, appreciation and consent of the risk on the part of the respondent.

¹⁸ *Ibid* at 779B-C.

The exemption agreement defence

[85] In contending that it was exempt from liability for the injury suffered by the respondent, the appellant pleaded and contended that by reason of two prominent signs at the entrance to the resort advising that visitors entered and used it at their own risk, the respondent must have taken to have agreed to these terms.

[86] The two signs appear at pages 533 – 534 of the record. They are prominently displayed on either side of the entrance to the resort just before the ticket office. The relevant part of sign A, on the left hand side, reads in English as follows: *‘Take care – all facilities to be used at your own risk’* (record page 481). It is followed, however, by an injunction to visitors to the resort to look after their valuable articles. It is also followed by a request that tickets be retained for inspection purposes and notification that *‘the Council accepts no liability whatsoever for the loss of any article from these premises however caused’*.

[87] The sign on the right hand side does not address the question of risk. Although the appellant placed no reliance on it, a third sign was displayed just within the entrance to the resort on the wall opposite the ticket office (record page 536). Under the heading *‘Rules applicable to this pool’* rule number two reads: *‘All facilities are used at your own risk and the Council accepts no liability whatsoever for the loss of any article from these premises’*. A list of prohibited activities follow but diving is not listed amongst them.

[88] For the sake of completeness I should add that it would appear that sometime after the respondent’s accident prominent new notices (record page 502 and 584 – 586) were erected, apparently also just within the entrance to the resort near the ticket office. They contained the following warning: *‘Please note that all facilities are used at your own*

risk'. In smaller letters below this warning appear the words: '*The City of Cape Town accepts no liability whatsoever for any injuries or for the loss of or damage to any property*'. [my underlining]. It is common cause that these signs were not displayed at the time of the incident, and were the first signs to make reference to '*injuries*'.

[89] The respondent admitted that he was aware of the presence of the signs at the entrance to the resort but stated that he did not read them. This too is not in dispute. The issue is then whether the respondent was bound by the provisions of the sign stating '*Take care – all facilities to be used at your own risk*' and what risk was covered by that warning.

[90] The Court *a quo* found that it was difficult to fathom with any precision the risk that the appellant was referring to in the disclaimer notice/notices. It held further that, given the potentially far-reaching consequences and magnitude of the disclaimer, it was imperative that the appellant made specific reference therein to injuries which might be sustained by users of the resort's facilities. The Court *a quo* found further that the warning was ambiguous and therefore had to be interpreted against the appellant. As a result it found that it was unnecessary to deal with the respondent's further argument that the disclaimer notice fell foul of public policy and the Constitution.

[91] For the purposes of considering the exemption defence I am prepared to accept that by reason of the doctrine of quasi mutual assent the respondent must be taken to have read the signs in question and be bound by their terms.¹⁹ The facts in the present matter as

¹⁹ See *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ).

regards the visibility of the signs in question are somewhat similar to those in *Durban's Water Wonderworld (Pty) Ltd v Botha and Another*²⁰ where Scott JA stated as follows:

“Any reasonable person approaching the office in order to purchase a ticket could hardly have failed to observe the notices with their bold white painted border on either side of the cashier’s window.”

[92] On behalf of the appellant it was contended that the words on the relevant sign were not ambiguous and were not qualified in any way. Counsel further contended that the expression *‘at your own risk’* was well known and sought to rely on the cases of *Holm v Sonland Ontwikkeling (Mpumalanga) (Edms) Bpk*²¹ and *Van Wyk v Thrills Incorporated (Pty) Ltd*.²² In the latter case the warnings were explicit: *‘Hot rod racing is dangerous - any member of the public attending this meeting does so entirely at their own risk’* and *‘You attend this meeting at your own risk. Speedway racing can be dangerous. Please do not walk near or stand close to the fence while a race is in progress. Do not sit on the lower concrete seats’*.²³ In addition other notice boards warned patrons to *‘Keep away from the fence during performance’*.²⁴ The adequacy of the warnings was also only one factor in the larger question of whether the appellant had taken reasonable precautions against a spectator being injured. The case therefore offers little assistance to the appellant.

[93] In *Holm*²⁵ a warning notice contained the phrase *‘(e)ntry to this premises is completely at your own risk’* but it also referred to *‘injury to anyone entering’* the premises. In any event it was common cause that the alleged exclusion clause never came

²⁰ 1999 (1) SA 982 (SCA) at 992B.

²¹ 2010 (6) SA 342 (GNP).

²² 1978 (2) SA 614 (A).

²³ *Ibid* at 620H – 621A.

²⁴ *Ibid* at 621A.

²⁵ Above n 21 at 344G.

to the attention or knowledge of the plaintiff and thus could not be relied upon by the defendant. This case is also of no assistance to the appellant.

[94] A case in point, however, is *Swinburne v Newbee Investments (Pty) Ltd*²⁶ where the Court was concerned with the proper interpretation of clauses contained in a lease agreement. It held that the proper approach to the construction of a disclaimer clause was set out in *Durban's Water Wonderland (Pty) Ltd* and quoted with approval the following passage:

*“The correct approach is well-established. If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity the language must be construed against the proferens But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be ‘fanciful’ or ‘remote’.”*²⁷

[95] Turning to the wording of the signs in the present matter, it is immediately apparent that the sign at the entrance outside of the resort makes no reference to injury to a person, stating only that *‘All facilities to be used at your own risk’*. Nor are these facilities listed or explained. Significantly, the warning is followed by references to taking care of one’s valuable articles and that the Council will accept no liability for the loss of *‘any article from these premises’* however caused. The second sign just within the precincts of the resort similarly makes no reference to the risk of injury to a person. In fact it links the concepts of risk and the loss of property even more closely than the external sign by combining them in the only relevant warning, namely *‘All facilities are used at your own risk and the council accepts no liability whatsoever for the loss of any article from these premises’*.

²⁶ 2010 (5) SA 296 (KZD).

²⁷ *Ibid* at para 23.

[96] One of the questions which arose in *Swinburne* was whether the words ‘any damage’ in the provisions of a lease extended to a claim for damages arising from personal injury. The Court found against the party invoking this disclaimer as a defence to liability stating as follows:

*“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 Investments, the clause is ambiguous and applying the principles discussed earlier in this judgment it falls to be construed against Newbee Investments.”*²⁸

[97] I am not satisfied that a reasonable person reading the provisions of the two notices in the present matter would understand the reference to using the facilities at their ‘own risk’ as extending to exclude a claim for damages arising from personal injury. There is no wording referring in clear terms to physical harm to a person as would have been the case had the word ‘injury’ or a variant thereof been used. In my view the relevant provisions in the two notices are readily capable of a construction that confines

²⁸ *Ibid* at para 35.

their scope to damage to, or loss of, property. At best for the appellant the disclaimer clauses are ambiguous as to whether they extend to physical injuries and therefore they fall to be construed against the appellant.

[98] It follows that the Court *a quo* was correct in holding that the appellant was not exempted by the warning notices from liability for the consequences of it having negligently caused the accident in which the respondent was injured. It is unnecessary therefore to consider the argument that upholding the disclaimer defence in these circumstances would be contrary to public policy or the Constitution.

Apportionment

[99] Finally, the appellant challenged the Court *a quo*'s findings on apportionment contending that when the respondent's '*effective recklessness*' was weighed against the appellant's '*simple negligence*' any apportionment should be heavily in favour of the appellant.

[100] In its findings the Court *a quo* took into account on the one hand that the respondent had ignored warning signs and that his decision to descend head first was unreasonable in that it was based on previous experiences at other slides. It discounted as a factor weighing against the respondent his '*appetite for risk*' as evidenced by his statement at one point that even if he had read the signs he might or might not have taken the risk. The Court *a quo* also gave no weight to the role of the respondent's breaststroke movement which may have caused him to descend deeper into the water. In this regard it held that there was no clear evidence as to what extent that movement might have facilitated the occurrence of the accident. Implicit in the Court's finding was a further conclusion, with which I also agree, namely, that the respondent's blameworthiness in

descending head first cannot be exacerbated by the fact that he performed a breaststroke manoeuvre upon entry into the water. For the reasons already discussed I am of the view that the Court *a quo* did not err or misdirect itself in the apportionment exercise in the manner it approached the issue of the breaststroke manoeuvre.

[101] On the other side of the scale the Court *a quo* found that the appellant had been negligent in two respects, namely, that it had failed to ensure that the slide was monitored by employees and/or lifeguards in order to prevent it constituting a source of danger to users; secondly, it had failed to ensure that there was sufficient water in the swimming pool to prevent the respondent being injured when he descended head first. In this latter regard it referred to the evidence that the depth of the water at the exit of the water slide was not specifically indicated and the respondent's evidence that had he had known that the water was so shallow he would not have descended head first.

[102] In *South British Insurance Co Ltd v Smith*²⁹ it was held that section 1(1)(a) of the Apportionment of Damages Act 34 of 1956 requires the Court to assess the degree of the claimant's negligence in relation to the damage which has been caused by the combination of that negligence and the negligence of the defendant. In doing so the Court must determine how far the claimant's acts or omissions, causally linked with the damage in issue, deviated from the norm of the *bonus paterfamilias*. Dealing with the test on appeal the Court stated as follows:

"From the very nature of the enquiry, apportionment of damages imports a considerable measure of individual judgment: the assessment of 'the degree in which the claimant was at fault in relation to the damage' is necessarily a matter upon which opinions may vary. Were this Court readily to interfere with the trial Court's apportionment of damages, dissatisfied litigants would be encouraged to appeal in well-nigh every case. Where,

²⁹ 1962 (3) (AD) 826.

therefore, the trial Court has correctly found the facts and has made no error in principle, this Court, as was indicated by Schreiner ACJ in Frodsham's ... will not lightly disturb the apportionment decided upon by the trial Court."³⁰

[103] This approach was reinforced by the dictum of Cloete JA in *Transnet Ltd t/a Metrorail and Another v Witter*³¹ where the following was stated:

"[Section 1(1)(a) of the Apportionment of Damages Act, 34 of 1956] requires the court of first instance to exercise a narrow discretion. Accordingly, an appeal court will not decide the question afresh; it will interfere with the exercise of the discretion exercised by the trial court only where it is shown that:

'(T)he lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

An appeal court is therefore entitled to interfere (as it can in respect of sentences imposed in criminal matters - another example of the exercise of a narrow discretion) where its assessment differs so markedly from that of the court a quo as to warrant interference." (citations omitted).

[104] On behalf of the appellant it was contended that as far as the conduct of the respondent was concerned regard must be had to his almost deliberate ignoring of the warning signs, that his decision to descend head first was based only upon his previous experiences at other water slides and seeing just one other person do so at Mnandi Resort, as well as his concession that he was a '*risk-taker*' and finally the consideration that, even if he had read the warnings, he might still have disobeyed them.

[105] In my view the respondent's ignoring of the warning signs and basing his decision to descend head first on rather flimsy or inappropriate grounds must be taken into account in the apportionment exercise. However, the respondent's evidence that even if

³⁰ *Ibid* at 837I-J.

³¹ 2008 (6) SA 549 (SCA) at 557A-C.

he had read the signs he may still have descended head first is neither here nor there in the evaluation of fault inasmuch as it both has no causal relevance and is speculative.

[106] Turning to the other side of the scale the proven negligence on the part of appellant was its failure to exercise access or control at the top of the slide to ensure that, as far as possible, users did not descend head first. At worst for the appellant the comparative shallowness of the water in the pool at the slide's exit point was a secondary factor inasmuch as had the water been deeper than 0.75 metres the risk of the respondent sustaining a serious injury would likely have been reduced. In my view, however, the depth of the water at the exit point or the lack thereof was not proven as an independent ground of negligence on the part of the appellant. The parties were in agreement that the depth of 0.75 metres was a safe depth for a feet first descent. Mr Ngwandi's evidence was that in the three years he worked at the resort he had never witnessed nor heard of anyone being injured in any manner after descending down the water slide. There is also the difficult question of whether increasing the depth of the water at the exit point might not have created or exacerbated other dangers such as drowning.

[107] Although not specifically stating so, the Court *a quo* appeared also to take into account the appellant's failure to indicate the depth of the water at the slide exit point. In this regard it cited the respondent's '*uncontroverted*' evidence that he had not been unaware of the water depth at the exit point. This approach assumed, unrealistically, in my view, that the respondent would have paid attention to any such depth marker. It also overlooks the evidence that the respondent ignored every warning sign on the premises as well as other indications that the water at the exit point was shallower than in other parts of the pool. In any event this omission was not a ground of negligence specifically relied upon by the respondent in his particulars of claim.

[108] In my view, the Court *a quo* erred in holding that, on top of its negligence in not adequately monitoring users of the slide, the appellant was negligent in failing to ensure that there was sufficient water in the swimming pool to prevent the respondent being injured in a head first descent. In these circumstances, this Court is entitled to make its own assessment in relation to the apportionment of damage.

[109] When the full picture is considered, what stands out is the fact that had the respondent taken the trouble to read, and then to heed, even some of the many warning signs on the resort's premises or had he exercised reasonable care in determining whether it was safe to descend head first the accident would never have happened. On the other hand had the appellant taken simple precautions to enforce its rule that no head first descents were permitted, similarly, there would have been little, if any, likelihood of the respondent descending head first and sustaining the injury that he did. In my view having regard to all the relevant circumstances and factors it would not be fair to apportion a greater degree of blame to either of the parties and the appropriate award is a 50/50 apportionment.

Costs

[110] None of the defences raised by the appellant in this appeal has prevailed. It has succeeded in disturbing the apportionment made by the Court *a quo* but only by a factor of 10%. Seen in the context of the appeal as a whole I would hesitate to describe this limited gain a '*substantial success*'. Having regard to all the circumstances I consider that the most appropriate costs order would be that each party bear its own costs in the appeal.

Order

[111] In the result the following order is made:

1. The appeal succeeds but only to the extent that the Court *a quo*'s apportionment of 60/40 in favour of the respondent is set aside and replaced with the following order:

The defendant is liable for 50% (fifty percent) of such damages the plaintiff may prove to have sustained in the accident that occurred on 7 January 2011.

2. Each party will bear its own costs in the appeal.

BOZALEK J

SAMELA J

WILLE J

For the Appellant	:	Adv J Butler (SC)
As Instructed by	:	Clyde & Co
For the Respondent	:	Adv R Van Rooyen (SC)
		Adv E Benade
As Instructed by	:	Lester & Associates