



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

“REPORTABLE”

Case No: 13310/2015

In the matter between:

FATIMA CARELSE

Plaintiff

and

THE CITY OF CAPE TOWN

Defendant

QUINTON EKSTEEN

First third party

DYLAN EKSTEEN

Second Third party

JUDGMENT DELIVERED ON 12 DECEMBER 2018

Vos, AJ

INTRODUCTION

- [1] At approximately 13:15 on 7 December 2013 at the Harmony Park Day Camp (“the Day Camp”), Strand, Western Cape Province, the plaintiff was swimming in one of the swimming pools of the public facility, when she was viciously attacked by a dog.

- [2] As a result of the injuries that she sustained in the attack, she instituted action against the defendant (“the City”) in which she claims payment of her damages.
- [3] The City has disputed liability, but in the event of it being held liable to the plaintiff, it claims a contribution from the first and second third parties. I shall refer to the first third party as “Mr Quinton Eksteen”, and to the second third party as “Mr Dylan Eksteen”.
- [4] In terms of the provisions of rule 33 (4) of the Uniform Rules of Court, it was agreed that the issue of liability had to be adjudicated first, and the question of quantum would stand over for later determination, if necessary.

ISSUES THAT ARISE FOR DETERMINATION

- [5] The plaintiff’s claim against the City, based on a breach of a legal duty, was pleaded as follows:

“6. At all material times, the City owed the public utilising the premises and the plaintiff in particular a duty of care, which duty of care entailed that one or more or all of the following reasonable steps was / were taken:

6.1 the premises was (sic) kept in a safe condition for use by the public and the plaintiff in particular;

6.2 the premises did not constitute a source of danger when used by the public and the plaintiff in particular;

6.3 no dogs were allowed on the premises;

6.4 no unaccompanied, unleashed and dogs without muzzle nooses were allowed on the premises;

- 6.5 *to take all necessary steps to avoid incidents such as the one which gave rise to this action;*
- 6.6 *to ensure the safety of any person in or at the premises;*
- 6.7 *to ensure that any person or entity employed, alternatively contracted, to carry out any of the duties referred to hereinabove, would do speedily, properly and effectively.”*

[6] The City has admitted that on 7 December 2013, at approximately 13:15, at the Day Camp, the plaintiff, while swimming in one of the swimming pools, was viciously attacked by the dog.

[7] The City has also admitted that the Day Camp was used by members of the public, and that the City:

“... owed the public utilising the premises and the plaintiff a duty of care...”.

[8] The plaintiff has alleged that the incident was caused wrongfully and negligently by the City’s employees by *inter alia* failing to ensure that no dogs were allowed on the premises.

[9] Save for admitting that the City owed the plaintiff a “duty of care”, all the grounds of negligence and wrongfulness are denied in the City’s plea. Although the parties used the phrase “duty of care” in the pleadings, that nomenclature is inaccurate, because in *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality*¹ the Supreme Court of Appeal said the following about “duty of care”:

¹ 2018 (1) SA 391 (SCA) at para 25

“Before leaving the foreign authorities, it needs to be mentioned that in English law 'duty of care' is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in Trustees, Two Oceans Aquarium Trust at 144F, 'duty of care' in English law 'straddles both elements of wrongfulness and negligence'. Accordingly, the phrase 'duty of care' in our legal setting is inherently misleading.”

[10] In further support of the denial of liability, the City pleaded that:

“... it did comply with its duty of care by taking reasonable precautionary steps to keep the premises in a safe condition and ensure the safety of any person in or at the premises”.

[11] The City also pleaded that:

“... the dog was brought onto the premises unlawfully by a third party (Mr Dylan Eksteen) and in contravention of the defendant's by-laws, and appropriate notice boards in and around the premises.”

[12] The plaintiff averred in the particulars of claim that the Day Camp was under the control and in possession of the City, who exercised such control and possession through its employees, who were at all material times acting in the course and scope of their employment. Those allegations were denied in the City's plea.

[13] Mr Quinton Eksteen and Mr Dylan Eksteen did not deliver a notice of intention to defend, or plea to the third-party notice addressed to them.

[14] In summary, the issues that have to be decided, are as follows:

[14.1] what is the nature of the City's admitted legal duty?

[14.2] did the City act in a wrongful and negligent manner?

[14.3] was the Day Camp under the control of the City?

[14.4] did the employees of the City exercise control at the Day Camp?

[14.5] were the employees acting within the course and scope of their employment?

[14.6] are the third parties liable to make a contribution to the City?

THE EVIDENCE FOR THE PLAINTIFF

[15] The plaintiff, Ms Zulfah Carelse, Mr Emilio Nelson and Mr Dylan Eksteen (the second third party) testified on behalf of the plaintiff.

[16] The plaintiff testified that on 7 December 2013 she, together with friends, travelled to the Day Camp in a bus. They were looking forward to an enjoyable day of recreation. They arrived at the main entrance to the Day Camp, where their bags and possessions were searched by about 15 law enforcement officials. The search was focused primarily on looking for alcohol and firearms.

[17] She stated that immediately in front of the main entrance gate, there are signboards that *inter alia* prohibit alcohol and dogs at the Day Camp. After they had entered through the main entrance, they found a convenient place to sit, and to settle down for the day.

[18] At about 13:15 she was swimming in one of the swimming pools at the Day Camp, and all of a sudden, a dog attacked her in the swimming pool, by biting

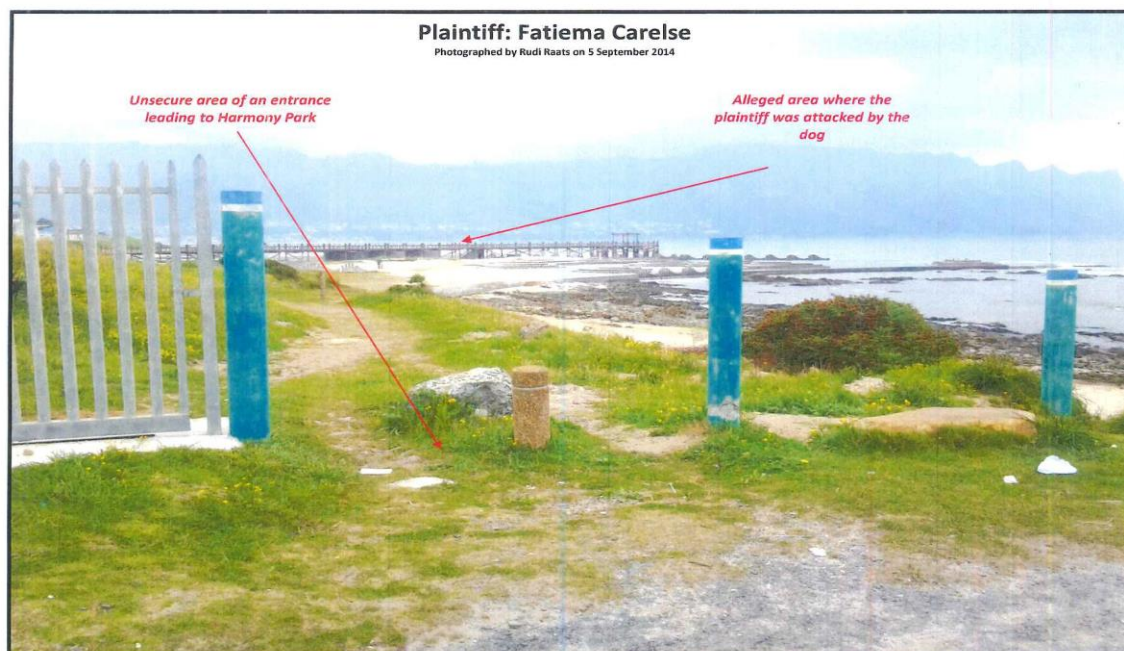
her, and causing serious injuries. After the incident the plaintiff was immediately attended to by law enforcement officials, and she was taken to an office inside the Day Camp. There she was given emergency treatment, after which an ambulance took her to hospital.

[19] Ms Zulfah Carelse testified that she is a niece of the plaintiff. She accompanied the plaintiff on the day in question, and she stated that they arrived at the Day Camp sometime between 09:00 and 10:00. She was also in the swimming pool together with the plaintiff, and they were playing with a ball. There was a large group of people in the swimming pool, and she noticed a dog that was on a leash outside the swimming pool. She noticed that the leash was loosened and then the dog jumped into the swimming pool. It attacked the plaintiff by biting her. After the incident, she accompanied the plaintiff to a nearby office where law enforcement officials attended to the plaintiff. After the incident, she also noticed a law enforcement official who was on a four-wheel motorbike. During cross-examination she stated that, when the dog jumped into the swimming pool, Mr Dylan Eksteen went after the dog into the swimming pool, but he was also bitten by the dog.

[20] Mr Emilio Nelson testified that he accompanied the plaintiff on the day in question. He knew the Day Camp, as he had previously visited it. He confirmed that the law enforcement officials searched the party of people at the main entrance. After entering the Day Camp, they put up a gazebo, and that is where they put their personal belongings. Prior to the dog attacking the plaintiff, he noticed the dog on a jetty, which is in close proximity to the swimming pool. That was about 30 minutes before the attack. At the time of the attack, Mr Nelson was also in the swimming pool.

[21] Mr Dylan Eksteen testified that, prior to the incident, he had attended the Day Camp on several occasions. He was born on 20 June 1997. On the day of the

incident, he was sixteen years old, and he entered the Day Camp through an entrance which he described as a “free entrance”. The entrance appears on a photograph which is marked exhibit “A”, and it is reproduced as follows:



- [22] The photograph depicts an unguarded entrance to the Day Camp. The obstacles preventing vehicular entry, are four pillars, but it is clear that pedestrians can easily access the Day Camp through the pillars. On the left-hand side of the photograph, there is a gate, but it serves no purpose because there is a large opening to the right of the gate where pedestrians and dogs have free access to the Day Camp. The photograph also shows that there is a footpath leading through two of the concrete pillars, and it runs in the direction of the jetty and swimming pools that are situated at the Day Camp.

- [23] Mr Eksteen said that there were no law enforcement officials at the “*free entrance*”, and many people use that entrance. He entered the Day Camp with the dog on a leash, walked over the jetty, and on the other side of the jetty, he walked down some stairs towards the swimming pool in question. He gave the dog water and rinsed it. Somehow, the dog came loose, it jumped into the swimming pool, apparently on its way towards the ball in the swimming pool, and ended up attacking the plaintiff. Mr Eksteen followed the dog by trying to get it under control, but the dog also bit him.
- [24] After the incident, he left the dog and ran to a law enforcement official in the Day Camp as an angry mob wanted to attack him with bottles and bricks. He stated that many people bring their dogs to the Day Camp, and he was aware that no dogs are allowed inside the Day Camp. His evidence to the effect that many people bring their dogs to the Day Camp, was not challenged by the City.

EVIDENCE FOR THE CITY

- [25] Mr Lourens Fourie, Mr Willem Le Roux and Ms Lauren Rodrigues testified on behalf of the City.
- [26] Mr Fourie testified that he is employed by the City as a first inspector. He is in control of the whole Helderberg area, and in December 2013 he was a senior inspector, and the Day Camp fell under his control. He was second in command of his station at the time, and he has been employed by the City for 28 years. He has been stationed at the Day Camp for the last 17 years. The Day Camp is managed and controlled by the City, and the law enforcement officials at the Day Camp are tasked with policing the Day Camp and enforcing the relevant by-laws.

- [27] On the day in question, there were eight law enforcement officials that were employed at the Day Camp. They worked in shifts of four people. Two officers were stationed at the Day Camp, while the other two officers patrolled the Helderberg district that consisted of beaches from the Strand to an area known as Koggelbay. At the time of the incident, the biggest concern at the Day Camp was the abuse of alcohol, but they had previously not experienced a dog attack.
- [28] If an incident occurred at the Day Camp, it was reported to his office, and if there were no personnel in the office, it would be reported to the main entrance. Depending on the level of seriousness of the incident, the metro police would also be involved, and they also had an office in the Day Camp.
- [29] There was also a private security guard deployed during the day and two private security guards during the evening. Their main purpose was to look after the buildings in the Day Camp. There were also life guards employed at the Day Camp, but their concern was to look after the safety of the public while swimming, and they had to prohibit people from diving off the jetty, into the swimming pools.
- [30] He testified that, although no dogs were allowed inside the Day Camp during December and the summer months, dog owners were told on a daily basis to remove their dogs from the Day Camp. If they did not obey an instruction to remove the dogs, they could be fined, and dogs could also be confiscated. The dogs enter the Day Camp through the main entrance and through the two unmanned side entrances.²

² The evidence, freely translated from Afrikaans, is as follows: *"And how do the dogs gain access to the premises? My Lord, through the main entrance when I do not have officers there, then they simply walk past the sign to the swimming pools or to the tidal pools, or they gain access on the side-on the northern side as indicated on page 15 (of exhibit A) and then also on the southern side of which I do not have a photograph here.*

So the dogs gain access through the main entrance, the entrance on page 15, which is the northern side, and then also at the entrance on the southern side? ... Correct"

- [31] Law enforcement officials were deployed at the main entrance to the Day Camp. In addition to the main entrance, there are also two other entrances at the sides of the Day Camp. One of those entrances, is the “*free entrance*” as depicted on exhibit “A15”. That entrance is on the northern side, and the other is on the southern side.
- [32] Approximately 90% of the people attending the Day Camp, enter through the main entrance, and the remaining 10% of the visitors, gain access to the Day Camp through the two side entrances. The two side entrances to the Day Camp, do not have any personnel to search visitors, or to prevent dogs from entering the Day Camp. On the day of the incident, there were approximately 1000 visitors at the Day Camp. The maximum amount of people that the Day Camp can accommodate, is 3500 people.
- [33] The fencing of the Day Camp falls within the jurisdiction of the camp management, which is executed by the City. Mr Fourie was clear that during the month of December, dogs are removed from the Day Camp on a daily basis.
- [34] Mr Willem Le Roux testified that he is the manager at the Day Camp and he is employed by the City. He has been working for the City for the last 26 years and he knows that the Day Camp and tidal pools were built by the City. The law enforcement officials at the main entrance to the Day Camp, *inter alia* ensure that no alcohol or dogs are brought into the Day Camp, and they also manage the people who attend the Day Camp. He stated that the two side entrances cannot be blocked off, as the beach must be open to the public at all times. Between 10% and 20% of the visitors to the Day Camp, gain access through the two side entrances.
- [35] Mrs Lauren Rodrigues testified that approximately 800 people attended the Day Camp on the day in question. She was deployed at the main entrance together

with Mr Titus. Law enforcement officials from other branches of the City, also assisted them at the main entrance on that day. She did not witness the incident, but became involved after it had been reported to her.

- [36] On the day, she had to search visitors at the main entrance for alcohol. Alcohol presented a significant problem, as approximately two out of ten visitors try to bring alcohol into the Day Camp. She was doing duty at the main entrance and she testified that when they saw a dog, they would ask the owner to remove the dog. If the owner did not obey, they would impound the dog. When she received the call that the plaintiff had been bitten by a dog, she saw the plaintiff coming from the swimming pool and she assisted by calling the ambulance. After the incident, the dog was confiscated by the City and thereafter put down.

RELEVANT LEGAL PRINCIPLES APPLICABLE

- [37] The plaintiff's claim is based on the contention that the City wrongfully and negligently omitted to prevent harm to the plaintiff. I proceed to consider the relevant legal principles.
- [38] An *omissio* is not *prima facie* wrongful. In *Hawekwa Youth Camp and Another v Byrne*³ the Supreme Court of Appeal had to consider whether a teacher, and by extension the responsible Minister, was liable when a child, during a school excursion, fell from an upper bunk bed with an inadequate protective barrier. Brand JA said the following in relation to the principles concerning wrongful omissions⁴:

“ . . . [They] have been formulated by this court on a number of occasions in the recent past. These principles proceed

³ 2010 (6) SA 83 (SCA) at para 22

⁴ Paragraph 22

from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages (see eg [Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority 2006 (1) SA 461 (SCA) ([2006] 1 All SA 6; [2005] ZASCA 73)] para 14; [Local Transitional Council of Delmas and Another v Boshoff 2005 (5) SA 514 (SCA) ([2005] 4 All SA 175; [2005] ZASCA 57)] D paras 19 – 20; Gouda Boerdery BK v Transnet 2005 (5) SA 490 (SCA) ([2004] 4 All SA 500; [2004] ZASCA 85) para 12)."

[39] In the matter of *Van Vuuren v Ethekeweni Municipality*⁵ the Supreme Court of Appeal had to determine whether a municipality, providing a beach side facility swimming pool with slides, was under a legal duty to provide supervision or access control. Whether or not the municipality was negligent, was a question of foreseeability.

[40] Nafsa ADP stated the following⁶:

"[24] The concern expressed by the court below that the imposition of a legal duty on the Municipality would result in an abdication of parental control loses sight of the fact that parents are not allowed entry to the facility itself, because its use is restricted to children under the age of 12. Furthermore, they have no authority over the actions of other children. After all,

⁵ 2018 (1) SA 189 (SCA)

⁶ At paragraph 24

the facility is the Municipality's and lies within its administration and control.

- [25] *The additional concern expressed by the court below, that providing supervision and access control would place an intolerable financial burden on the Municipality, is also without foundation. As can be seen from the photograph, access to the slides can be controlled at the top of the stairhead by an official. As stated above, the evidence by Gregersen, that this is all that would be required, was unchallenged. The appellant's evidence that there is supervision at other public pools was also uncontradicted. It might well be that a simple and safely constructed turnstile on either side of the slide with an official centrally placed might be even more effective. I hasten to add that there was no evidence on that score. However, it was clear that a municipal official at the top of the stairhead could exercise control. The Municipality chose deliberately not to lead any evidence about the extent of the burden, financial or otherwise, it would have to bear in the event of the imposition of a duty.*
- [29] *... the Municipality, by providing the slide and pool facility for the use of young children, created a potential risk of harm due to misadventure. Considering, in relation to wrongfulness, the criteria of reasonableness, constitutional norms and policy, the compelling conclusion is that in the circumstances set out above, a legal duty is owed by the Municipality to avoid negligently causing harm to persons in the position of Jacques. As appears from what is stated earlier, the steps that could be taken to prevent harm by ensuring access control are relatively simple and would not place an intolerable financial burden on the Municipality.*
- [31] *As stated above, foreseeability was fiercely contested by the Municipality, particularly on the basis that parents are obliged to care for their children and that the Municipality was entitled to assume that parents would look after and supervise their children. It was contended on behalf of the Municipality that since the appellant herself did not foresee that Jacques would be injured, it follows that the Municipality itself could*

not be expected to foresee harm of the kind suffered by Jacques. We are here concerned with whether, objectively, a sensible person in the position of the Municipality would foresee the reasonable possibility of operating the facility without access control causing harm to children in the position of Jacques. As stated above, it was obvious to Gregersen. From his evidence, it would have been obvious to any official operating the facility on behalf of the Municipality, that unattended access had the effect of children bunching up and pushing against each other and that the kind of harm which ensued in this case was a reasonable possibility. The Municipality failed to take steps to guard against such an occurrence.

[32] Thus, the Municipality's contention that failure to provide supervision or access control was not negligent, must fail."

[41] In *Pro Tempore Akademie CC v Van Der Merwe*⁷ the Supreme Court of Appeal found that the appellant had created a dangerous situation by placing a steel rod in a play ground. It was held liable for the damages suffered by a child injured by such steel rod, as it did not take reasonable steps to prevent the foreseeable risk of harm occasioned by its own prior positive conduct. In that regard, the Supreme Court of Appeal quoted⁸ the following passage in *Lawsa* with approval⁹:

"A duty may arise when the defendant has by lawful prior positive conduct (commissio) created a potential risk of harm to others. If the actor then omits to take reasonable steps to prevent the risk from materialising (omissio), the duty is breached."

[42] In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*¹⁰ the Constitutional Court held that¹¹:

⁷ 2018 (1) SA 181 (SCA)

⁸ At para [18]

⁹ 2ed para 65 at 103 - 4

¹⁰ 2015 (1) SA 1 (CC)

“[22] Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful.”

[43] In *Minister of Safety and Security v Van Duivenboden*¹² the Supreme Court of Appeal dealt with a matter which involved the allegation of a negligent omission:¹³

*“[12] A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.”*

[44] In *Cape Town Metropolitan Council v Graham*¹⁴ the Supreme Court of Appeal held that the Cape Town Metropolitan Council was liable for damages suffered as a result of a rock fall and landslide incident on Chapmans Peak Drive. Liability arose due to the foreseeability of a serious incident following a wet month preceding the incident, and a history of rock falls and landslides in the area. The Court found that it should have closed the road prior to the incident.¹⁵

¹¹ Paragraph 22

¹² 2002 (6) SA 431 (SCA)

¹³ At paragraph 12

¹⁴ [2001] 1 All SA 215 (A)

¹⁵ Paragraphs 14 to 15

[45] In *ZA v Smith*¹⁶ the Supreme Court of Appeal held as follows:

“[24] As to the first of these considerations, I think the short answer is that, in determining what preventative steps the reasonable person would or would not take, every case must depend on its own facts. It follows that if the question were to arise whether or not the reasonable person would take measures to warn and protect visitors to certain areas of Table Mountain or the Drakensberg escarpment at Tugela Falls against the dangers they may encounter, it could only be answered with regard to all the facts and circumstances of that case. Included amongst these would be, for instance, the proportionality considerations which would require the weighing-up of the prospects of the proposed measures being successful; the degree of risk of the harm occurring; the extent of the potential harm; the costs involved in taking the preventative measures proposed; and so forth. To decide, without having regard to all these considerations that the reasonable person would never take any steps to protect or warn visitors to Table Mountain or Tugela Falls, would at best be superficial and ill-considered. Moreover, simply to transpose this ill-considered decision onto the facts of this case, would plainly be untenable.”

[46] In *The City of Cape Town v Shaun Rhoo*¹⁷ the full bench of this Division considered an appeal by the City of Cape Town against an order that the City was liable for 60% of the respondent’s damages arising out of injuries which he sustained when he used a water slide that was owned and operated by the City. 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 Court held that the City was liable for 50% of the proven damages, and noted that *“in recent years our courts have frequently*

¹⁶ 2015 (4) SA 574 (SCA) at paragraph 24

¹⁷ (A314 / 2017) [2018] ZAWHC 49 (17 April 2018) (Unreported)

warned against blurring the elements of wrongfulness and negligence".¹⁸ The City was held liable, because the Court found that it acted in a wrongful and negligent manner.

[47] In *Bridgman N.O v Witzenberg Municipality*¹⁹ the plaintiff, in his capacity as *curator ad litem* for a young woman, successfully sued the municipality for damages arising out of a rape which was perpetrated upon her while being mentally disabled. The particular resort in question, was owned, managed and controlled by the municipality, and it was held liable on the ground of inadequacy of security arrangements. The Court held that in the light of the Constitutional duties imposed upon a municipality, and because it owns, managed and controlled the resort, the municipality's failure to prevent the rape, was wrongful. With regard to the question of negligence, the Court held that negligence was established based on the following facts. The abduction and rape occurred within the fenced boundaries of the resort, the resort was subject to access control and secured by guards who patrolled the premises. The three juvenile perpetrators who committed the crime, gained access to the resort on presentation of a season ticket. On the day in question, only two security guards were on duty, one patrolling, and one manning the gate.

[48] When a Court has to determine whether wrongfulness has been established, it is also important to consider whether a defendant acted in a reasonable manner. In *Odinfin (Pty) Ltd v Reynecke*²⁰ the following was said:

"The test for determining wrongfulness in a delictual sense for omissions was formulated by this court in Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae) as follows:

¹⁸ At paragraph 22

¹⁹ 2017 (3) SA 435 (WCC)

²⁰ 2018 (1) SA 153 (SCA) at para 13

' . . . An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, inter alia, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered. . . . '

[49] I proceed to apply the above legal principles to the facts of this matter, in order to determine whether the City acted in a wrongful manner.

DID THE CITY ACT IN A WRONGFUL MANNER?

[50] The evidence and the pleadings have established that the following are common cause:

[50.1] on the day of the incident, the City owed a legal duty to the plaintiff to ensure her safety at the Day Camp²¹;

[50.2] on the day of the incident, the plaintiff's safety was not ensured, because she was bitten by a dog;

[50.3] the Day Camp was operated, managed and controlled by the City's employees;

²¹ Mr Fourie's evidence, freely translated from Afrikaans, was: "So essentially it is the function of the City of Cape Town not to allow dogs there... Correct"

- [50.4] the Day Camp has three entrances;
 - [50.5] the three entrances consist of a main entrance, an entrance on the northern side and an entrance on the southern side;
 - [50.6] the City knew that visitors gained access to the Day Camp through all three entrances;
 - [50.7] the City knew that about 80% to 90% of visitors gained access to the Day Camp by entering through the main entrance;
 - [50.8] the City knew that about 10% to 20% of visitors gained access to the Day Camp through the entrances on the northern and southern sides;
 - [50.9] the City managed, supervised and controlled access only at the main entrance in order to prevent alcohol, drugs, firearms and dogs from being brought onto the premises through the main entrance;
 - [50.10] the City did not conduct any supervision or access control at the entrances on the northern and southern sides;
 - [50.11] the City knew that dogs were a significant problem at the Day Camp, because during December, they were removed (or confiscated) on a daily basis.
- [51] The City realised that it had a legal duty to supervise and control access at the main entrance gate in order to ensure the plaintiff's safety. Its duty was to prevent dogs, alcohol and firearms from entering the Day Camp.

- [52] So, by placing law enforcement officials at the main entrance, it complied in a reasonable manner with its legal duty to supervise and control access at the main entrance. It did that to ensure the safety of the visitors to the Day Camp.
- [53] In my view, one of the key issues that falls for determination, is whether there was a legal duty on the City to supervise and control access to the Day Camp in a partial or comprehensive manner in order to ensure the safety of the public.
- [54] If the legal duty called for limited, or partial supervision and access control at the Day Camp, the City would not have acted wrongfully, because the measures taken at the main entrance were reasonable and sensible. If, on the other hand, the legal duty involved a comprehensive manner of supervision and access control, the City would have acted wrongfully, because there was no supervision and access control at the two side entrances.
- [55] In general, where the public gain access to a public facility via all the entrances of such a facility, it would be irrational and ineffectual to manage, supervise and conduct strict access control at only one entrance, while conducting no supervision or access control at the other entrances.
- [56] When access control must be done in order to prevent dogs from entering a public facility, such as the Day Camp, it should be done in a reasonable and comprehensive manner. There would be no point in only selecting one entrance area to conduct supervision and access control.
- [57] The City could quite easily have put up signboards at the side entrances, thereby warning visitors not to bring dogs onto the premises. The evidence is that there are no signboards at the northern entrance where Mr Dylan Eksteen and the dog entered. Effective and prominent signboards would probably have contributed towards stemming the influx of visitors through the side entrances.

- [58] The placing of law enforcement officers at the two side entrances, would in all likelihood not have caused financial hardship for the City. If there was only one law enforcement officer at the northern entrance, it is likely that such officer would have prevented the dog from entering the Day Camp, and the attack on the plaintiff.
- [59] In any event, the City did not present any evidence in that regard to claim that the cost of extra law enforcement officials would have involved an intolerable financial burden on the City or, would have been disproportionate to the benefit gained thereby.
- [60] The City knew that visitors and dogs entered the Day Camp through the two unmanned entrance areas. It took no reasonable steps to prevent it.
- [61] I accordingly find that, by failing to provide signboards and access control at the two side entrance areas, the City breached its legal duty in a wrongful manner.

NEGLIGENCE

- [62] The regularly stated test in *Kruger v Coetzee*²² provides that negligence is established if:

“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*

²² 1966 (2) SA 428 (A) at 430 E - F

(ii) *would take reasonable steps to guard against such occurrence; and*

(b) *the defendant failed to take such steps.”*

[63] The enquiry into the question whether the City was negligent, therefore centres around:

[63.1] whether the City should have foreseen the reasonable possibility that a dog attack could occur at the Day Camp, and if so:

[63.2] whether the City should have taken reasonable steps to guard against such dog attack that took place on 7 December 2013.

Foreseeable?

[64] I turn to first deal with the question whether it was foreseeable that a dog could bite a visitor in the Day Camp. While relying on the evidence that previously there was no dog attack, counsel for the City submitted that a dog attack was therefore not foreseeable. Counsel for the plaintiff submitted that it was foreseeable.

[65] In general, a reasonable person should continuously and reasonably evaluate and deal with the facts that confront him. In order to predict the likelihood of future harm occurring, the necessary inferences must be drawn from those facts. In this matter, the obligation to foresee the danger, is not triggered only after the first dog attack has taken place. In order to determine whether a dog attack was foreseeable, regard should be had to the objective facts as they existed at the time immediately before the dog attack occurred.

[66] The following should therefore be considered:

- [66.1] the City has a by-law that *inter alia* deals with dangerous dogs;
- [66.2] the City has two signboards at the main entrance informing the public that dogs are prohibited;
- [66.3] the City's employees prevented dogs at the main entrance from entering the Day Camp;
- [66.4] it is a generally known fact that dogs, even small ones, do bite human beings;
- [66.5] if dogs only occasionally or rarely made their appearance in the Day Camp, the chances of a dog biting somebody, would not have been significant. Then a dog attack may possibly not have been foreseen;
- [66.6] but, as the number of dogs and visitors at the Day Camp increased, the risk of a dog attack would likewise also have increased.
- [66.7] the evidence established that in December the City had to deal with, and remove dogs from the Day Camp, on a daily basis. It also confiscated dogs.
- [66.8] during the month of December, the Day Camp was generally very busy with many people visiting it²³;

²³ Mr Fourie testified that on the day of the incident there were about 1000 people and the Day Camp was busy.

- [66.9] it follows therefore, that there was a significant prevalence of dogs inside the Day Camp. The more dogs there were, the greater the possibility that a dog attack could occur;
- [66.10] after the dog attack, and on 6 January 2014, the City issued an impoundment notice in terms of sections 7, 14 and 20 of the City's Animal By-Law, 2010 read with part 5 (A) of Government Notice R 209, 2002 to Mr Quinton Eksteen. In that impoundment notice it stated: "*your dog is dangerous and constitutes a threat and a source of danger...*"
- [66.11] Section 6(b) of the City's Animal By-Law, illustrates that the City knows that dogs can be dangerous:

"6. Prohibition relating to the keeping of dogs

No person shall –

(a) ...

(b) *urge any dog to attack, worry or frighten any person or animal or through negligence fail to prevent any dog from attacking, worrying or frightening any person or animal, except where necessary for the defence of such first-mentioned person his or her property or of any other person;"* (emphasis added)

- [66.12] section 6(h)(ii) of the by-law also illustrates that the City knows that dogs can be ferocious, vicious or dangerous:

"No person shall –

(h) *permit any dog owned or kept by him or her –*

(i) ... ;

(ii) *which is in the assessment of the authorised official ferocious, vicious or dangerous to be in any public street or public place, unless it is humanely muzzled and held on a leash and under control;*"

[66.13] the purpose of the by-law, is *inter alia*, to prevent dogs from attacking people. The by-law shows that the City had first hand knowledge that dogs could be dangerous, ferocious, vicious, and they do attack people.

[67] Given the significant number of dogs and visitors that regularly frequented the Day Camp during December and the summer season, the City should have foreseen the reasonable possibility that it was only a question of time before an attack would take place.

[68] I therefore find that a reasonable person, in the position of the City, would have foreseen the reasonable possibility that a dog attack could occur inside the Day Camp.

Reasonable steps taken?

[69] I now turn to deal with the next enquiry, and that is whether the City should have taken reasonable steps to guard against a dog attack. The enquiry as to the reasonableness of the City's conduct, must be evaluated in the light of the relevant facts and circumstances. This aspect was discussed in *Graham*²⁴ 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 as reasonable or not depends on a consideration of

²⁴ 2001 (1) SA 1197 (SCA) at para 7

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)

- [70] The gravity of the consequences if a dog had to attack a person at the Day Camp, is self evident. Often victims of a dog attack have scars that they have to bear for the rest of their lives. It is also known that in some cases children have been savagely attacked and killed by dogs. The consequences of a dog attack, can be very serious²⁵.
- [71] The question of utility involves the weighing up of the cost or feasibility of additional safety measures against the advantages that could be achieved thereby.
- [72] The City knew that dogs were entering the Day Camp through the main entrance, the northern and southern entrance. In the light of the fact that the City appreciated that it had a legal duty to ensure the plaintiff's safety and must have foreseen that dogs can be dangerous, and therefore bite people, it should have taken reasonable steps to prevent dogs from gaining access to the Day Camp through those two un-manned entrance areas. By preventing dogs from gaining access through those two entrance areas, it would have prevented the dog attack

²⁵ The law reports are replete with victims claiming damages for serious injuries arising out of dog attacks. In *Trolip v Wattrus* (EL1416/14, ECD3016/14) [2016] ZAECELLC 11 (6 December 2016) the plaintiff was bitten by a dog, as a consequence of which he lost his ear and suffered serious injuries to his arm, neck and face. In *Cloete v Van Meyereren* (731/2017) [2018] ZAECPHC 72 (27 November 2018) the plaintiff was attacked by three dogs and the injuries were so serious, that his left arm had to be amputated.

on the plaintiff on 7 December 2013, and it would thus have complied with its legal duty towards the plaintiff.

[73] Despite the City's knowledge that there were so many dogs frequenting the Day Camp, it had no signboard on the northern and southern side to warn people not to bring dogs onto the premises. It also had no law enforcement officer at the northern and southern entrance. If it had an appropriate signboard and a law enforcement officer at the northern entrance (as illustrated above), it would probably have prevented Mr Dylan Eksteen and the dog from entering the Day Camp, because they entered the Day Camp through the northern entrance. In that case, the plaintiff would not have been injured. Such steps would have been reasonable, effective, affordable and sustainable²⁶. As stated in *Van Vuuren* "...ensuring access control [is] relatively simple and would not place an intolerable financial burden on the Municipality"²⁷.

[74] In my view, the City's failure to erect an appropriate sign board²⁸ at the northern and southern entrances, and the failure to provide supervision and access control at the northern and southern entrances, was unreasonable and negligent. It is unreasonable to only apply access control and supervision in respect of the majority of the visitors to the Day Camp, and in respect of between 10 to 20 %, no supervision and access control is undertaken. That conduct, in my view, falls short of what a reasonable and sensible person, in the position of a municipality, should do.

²⁶ See *Za* at para [28]

²⁷ At para [29]

²⁸ Warning visitors not to bring dogs into the Day Camp

THE QUESTION OF LIABILITY ON THE PART OF THE THIRD PARTIES

Mr Quinton Eksteen

- [75] The City's claim against Mr Quinton Eksteen is based on the *actio de pauperie*, alternatively, it is alleged that he contravened the City's by-law that prohibits dogs at the Day Camp, and in the further alternative, he is liable by failing to take reasonable steps to prevent Mr Dylan Eksteen from taking the dog to the Day Camp.
- [76] No evidence was presented to support a claim based on the alternative claims, and no allegation was made in the pleadings that the conduct complained of in the alternative claims was wrongful and negligent. The alternative claims cannot be upheld.
- [77] I proceed to consider the main claim based on the *actio de pauperie*, within the context of the authorities.
- [78] In *O'Callaghan v Chaplin*²⁹, after an exhaustive review of the authorities, Innes C.J. said :

“By our law, therefore, the owner of a dog that attacks a person who was lawfully at the place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable, as owner, to make good the resulting damage.”

²⁹ 1927 AD 310 at p. 329

- [79] In the matter of *South African Railways and Harbours v Edwards*³⁰ it was confirmed that the *actio de pauperie* is still part of our law, and De Villiers C.J., said:

“The action lies against the owner in respect of harm (pauperies) done by domesticated animals, such for instance as horses, mules, dogs, acting from inward excitement (sponte feritate commota). If the animal does damage from inward excitement or, as it is also called, from vice, it is said to act contra naturam sui generis; its behaviour is not considered such as is usual with a well-behaved animal of the kind.”

- [80] What is meant by an animal acting *contra naturam sui generis*, is explained by Voet³¹ as follows:

'Animals are said to do harm contrary to their nature when, though tame, they take on wildness; as when a horse kicks or an ox gores, albeit that a horse is apt to kick and an ox wont to gore. An ox and a horse, along with other animals which come under the term 'cattle', are wont to graze in a herd under the control of a shepherd without doing harm, and to that extent they are counted among tame fourfooted creatures. Hence it is correctly said that they do damage contrary to the nature of their kind when on their wildness being roused they kick or gore.'
(Gane's translation).

- [81] I agree with the following remarks of P. M. A. Hunt, the author of an article entitled “Bad Dogs”³² :

“The contra naturam concept seems, in fact, to have come to connote ferocious conduct contrary to the gentle behaviour normally expected of domestic animals. This imports an

³⁰ 1930 AD 3 at p. 9

³¹ 9.1.4

³² (1962) 79 S.A.L.J. 326 at p. 328

objective standard suited to humans. It is far more refined than behaviour literally natural to that species of animal. It is what Voet, 9.1.4, means when he speaks of animalia mansueta feritatem assumunt."

- [82] In this matter the plaintiff has alleged that Mr Quinton Eksteen is the owner of the dog, which has not been controverted by him. The dog bit the plaintiff in a public place. She was lawfully at the Day Camp, and the dog was not provoked. I therefore find that the City has made out a case that Mr Quinton Eksteen is liable to make a contribution to the City, in respect of any damages that the plaintiff may prove.

Dylan Eksteen

- [83] The claim against Mr Dylan Eksteen is formulated as follows:

"10.2 The second third party unlawfully brought the dog to Harmony Park, in contravention of the City's by-laws, which is a dog-free zone as clearly indicated by the appropriate notice boards in and around the premises."

- [84] No allegation has been made that that the conduct was wrongful, but the allegation of unlawful conduct may possibly suffice. However, there is no allegation that Mr Dylan Eksteen should have foreseen that the dog was likely to bite the plaintiff. There is no allegation that he acted in a negligent manner. That allegation is required to establish liability.
- [85] Also, no evidence was produced to prove that he should have foreseen the attack, and no evidence was presented to show that he failed to take reasonable steps to guard against the attack. It is unlikely that such evidence could have been presented, because he was only 16 years old. I do not think that children of

that age have the maturity to foresee a dog attack. The City says that it did not foresee a dog attack. I therefore find that the City has failed to establish that Mr Dylan Eksteen is liable to make any contribution to it.

CLOSING REMARKS

[86] As the City breached its legal duty to the plaintiff in a wrongful and negligent manner, it is liable to compensate the plaintiff for such damages as she may prove.

[87] It remains to apportion liability between the City and Mr Quinton Eksteen. In my view it would be fair to hold that Mr Quinton Eksteen should make a contribution of 50% of any proven damages to the City.

ORDER

[88] I make the following order:

[88.1] It is declared that the City of Cape Town is liable for such damages as Ms Fatima Carelse may prove, arising out of a dog attack on 7 December 2013 at the Harmony Park Day Camp;

[88.2] Mr Quinton Eksteen is liable to contribute 50% of the aforementioned proven damages, to the City of Cape Town;

[88.3] The City of Cape Town shall pay the costs of Ms Fatima Carelse;

[88.4] Mr Quinton Eksteen is liable to pay the costs of the City of Cape Town only involving the third-party notice proceedings against him on an undefended basis.

WESLEY VOS, AJ
ACTING JUDGE OF THE HIGH COURT