



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 58525/2008

DATE: 9/7/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO

(3) REVISED. ☐

09-07-2010
DATE

[Signature]
SIGNATURE

IN THE MATTER BETWEEN

ERIK HARM HOLM

PLAINTIFF

AND

SONLAND ONTWIKKELING (MPUMALANGA)
(EDMS) BPK

DEFENDANT

JUDGMENT

MAKGOBA, J

- [1] This case raises the problem of to what extent the owner of land who invites others to use that land owes a duty to protect those users against the consequences of their own foolishness. The plaintiff sues the defendant for damages arising out of the injury sustained by him pursuant to his having dived into the dam at the Lake Umuzi Waterfront Shopping Centre at Secunda, of which the defendant is the owner. As a consequence of the injury sustained by him the plaintiff is permanently paralysed from nipple-level downwards and is thus confined to a wheelchair.
- [2] At the commencement of the trial, the parties agreed to and the court ordered a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court. In terms of the separation order, the issues relating to the liability of the defendant are to be decided first, while those pertaining to the *quantum* of the damages claimed stood over for later determination.
- [3] At the commencement of the trial it was conceded on behalf of the plaintiff that the plaintiff was to a degree negligent in diving into the

dam without satisfying himself that it was safe to do so by way of determining the depth of the water in the dam.

[4] During the course of the trial the plaintiff would therefore endeavour to prove contributory negligence on the part of the defendant. That the defendant owed him a duty of care and was in breach thereof. The defendant in its plea pleaded that the incident was caused solely as a result of plaintiff's own negligence and alternatively pleaded that even in the event of the court finding that the defendant was negligent, which is denied, that the defendant's liability is excluded by virtue of an agreement entered into between the parties (exclusion clause).

[5] The following issues were agreed upon between the parties at the commencement of the trial:

- 5.1 that the defendant is the owner of the property where the incident occurred;
- 5.2 that the water in the dam was turbid at the time of the incident;
- 5.3 that the defendant bears the *onus* of proving the alleged agreement as per the exclusion clause;
- 5.4 for the rest of the issues, the plaintiff bears the *onus* of proof.

- [6] Both parties adduced evidence. On behalf of the plaintiff a Ms Nicollete van Zyl and the plaintiff gave evidence. Mr Johan Rosslee, the shareholder and director of the defendant was called as a witness for the defendant.
- [7] Ms Van Zyl's evidence is that she was in the vicinity of the volleyball court on the date of the incident. She saw the plaintiff kicking the ball over the three metre high nett-fence causing the ball to land in the dam. Plaintiff ran to retrieve the ball and in so doing, dived into the dam. She subsequently realised that the plaintiff was injured.
- [8] Ms Van Zyl testified further that there are two gates for members of the public to gain entrance to the shopping complex, namely a "boom gate" on the one side and a "sliding gate" on the other side. She confirmed that the notice boards containing the exclusion clause were present at the boom gate through which members of the public gained access to the premises. However, as at the date of this incident there were no such notice boards on the sliding gate. She visited the premises some two weeks before the trial date and discovered that the

notice board containing the exclusion clause has since been put on the sliding gate.

- [9] The wording of the board disclaiming liability on the part of the defendant (that is, the exclusion clause) is as follows:

"Sonland Ontwikkeling Mpumalanga (Pty) Ltd and/or any of its employees and/or agents, hereby do not take responsibility for any loss of or damages to any vehicle and/or other property belonging to, or injury to anyone entering this premises, whether such loss or damage was caused by the Company and/or its agents and/or employees, or not.

Entry to this premises is completely at your own risk."

- [10] Under cross-examination Ms Van Zyl stated that the volleyball court was not dangerous and that she did not think that it was dangerous for her children to play on the volleyball court or in the vicinity of the volleyball court. She told the court that the dam or the water in the dam and the surrounding circumstances are such that she would not dive into the dam and does not think that it would be safe for any person to dive into the dam.

[11] She confirms that there are no warning signs in the vicinity of the volleyball court warning members of the public not to dive into the dam. This was the position on the date of the incident and it is still the position.

[12] The plaintiff gave evidence to the effect that on 24 August 2007 he visited, together with the cast who were in Secunda for purposes of performing a play, the premises for the first time. They entered the premises through the sliding gate (as opposed to the boom gate). At the entrance through which they entered the parking area of the shopping complex, there was no board erected by way of disclaiming liability on the part of the defendant for injury to persons entering the premises. After arriving at the shopping complex, the plaintiff and his companions walked around the shopping complex before having lunch at the Ocean Basket restaurant which overlooks the dam. From the deck of the restaurant the plaintiff observed boats on the water. He observed certain notice boards at the shopping centre. Such notice boards did not include any warning that it was not safe to swim in or

dive into the dam, nor was there any railing at the water's edge to prevent one from so doing.

- [13] After lunch, the plaintiff and two others started playing volleyball on the volleyball court which is situated adjacent to the dam at the water's edge. He had borrowed the volleyball from Ms Van Zyl. During the course of the volleyball game, the ball flew over the side-netting of the volleyball court into the dam. A strong wind was blowing which had the effect of causing the ball to start drifting away from the water's edge. He decided to retrieve the ball and in so doing he started running. Whilst running he took off his shirt, and without stopping to ensure that it would be safe to dive into the water, dived into the water to retrieve the ball. He is unable to state whether he injured himself in shallow water or against an object that was not visible.

- [14] The plaintiff conceded that his conduct was dangerous, unsafe and not reasonable. He, however, stated that at the time of his diving into the dam, he believed it was safe to do so on the ground that:

14.1 the plaintiff had observed that there were boats on the water;

- 14.2 the volleyball court was situated adjacent to the dam at the water's edge in spite of there being a likelihood that the ball would in fact fly over the side-netting of the volleyball court into the dam and needed to be retrieved;
- 14.3 there was no warning sign at the volleyball court or elsewhere at the shopping centre of any danger posed by diving into the dam, due to the shallow water level or otherwise;
- 14.4 there was no railing to prevent one from diving into the dam;
- 14.5 one could not due to the murky/turbid state of the water see the bottom of the dam by way of being alerted to the shallow water level of the dam;
- 14.6 children were running and playing in the immediate vicinity of the dam.

[15] The evidence of Mr Rosslee can be summarised as follows. On the day that the plaintiff visited the shopping complex (24 August 2007), there was no notice board at the entrance at which the sliding gate is situated by way of disclaiming liability on the part of the defendant for injury to persons who enter the premises. The water level of the dam was low as a result of irrigation during winter and it would have

appeared to any person that it would not be safe to dive into the dam. He stated that it would not be foreseeable that any member of the public would dive into the dam in order to retrieve a volleyball. Volleyballs have been retrieved during the last couple of years by a number of people who walked into the dam to retrieve the ball, without sustaining any injury.

[16] Mr Rosslee confirmed that there are no signs warning members of the public against diving into the dam. The dam is not suitable for swimming, people do not swim in the dam and the danger posed by diving is so obvious that it does not require any warning. This was the case not only on the date of the incident but subsequently and to date hereof as he does not deem it necessary to warn members of the public against the obvious danger. He does not dispute the plaintiff's evidence that no notice board was erected at the sliding gate. He confirmed that no railing was erected at the water's edge where the volleyball court is situated adjacent to the dam given that, due to the shallow water level, one will not drown if one falls into the dam.

[17] Under cross-examination Mr Rosslee made the following concessions:

- 17.1 that the plaintiff had entered the shopping complex through the entrance at which the sliding gate is situated and where there was no notice board by way of disclaiming liability on the part of the defendant for injury to persons entering the premises;
- 17.2 if there was a notice/warning board at the particular entrance the plaintiff would have known that he entered the premises at his own risk;
- 17.3 the reason for there being no warnings displayed at the shopping complex, by way of warning visitors not to dive into the dam, notwithstanding the shallow water level, was that this was not "the norm" at waterfront shopping complexes (eg the Randburg Waterfront);
- 17.4 that in retrospect, the defendant should have warned visitors not to dive into the dam due to the shallow water level;
- 17.5 that it is not disputed by the defendant that on 24 August 2007 the plaintiff, in order to gauge the depth of the water in the dam, could not see the bottom of the dam;
- 17.6 that when it developed the shopping complex, the defendant situated the volleyball court at the water's edge, in the absence

of any warning as to the danger posed by diving into the dam, rather than away from the water's edge;

17.7 that the defendant did not deem it necessary to display any such warnings to the visitors not to dive into the dam, as it could simply erect a disclaimer board in terms of which it was indemnified against liability for injury to persons entering the premises.

[18] It is appropriate at this juncture to deal with the defendant's defence that its liability is excluded by virtue of an agreement entered into between it and the plaintiff. On the evidence before me it is common cause that the plaintiff entered the premises through the sliding gate. It is further common cause that there was no notice board disclaiming liability at the sliding gate. It goes without saying that the alleged exclusion clause never came to the attention or knowledge of the plaintiff. There can therefore be no agreement between the parties as alleged by the defendant. The defendant has failed to discharge the *onus* of proving that the alleged agreement came to the notice of the plaintiff.

[19] The next issue before me is for the plaintiff to establish the wrongfulness of the defendant's act of omission. Whether there was a duty of care on the part of the defendant and that through its negligence the defendant has breached the duty of care. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. 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 the harm.

[20] The court determines this issue by making a value judgment based on "the legal convictions of the community" and on considerations of policy. The approach of the courts to this issue has always been an open-ended and flexible one. See *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 at 395 par [9].

[21] In the abovementioned decision VIVIER, ADP said the following at page 396:

"[10] In applying the concept of the legal convictions of the community the court is not concerned with what the

community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must further be seen as the legal convictions of the legal policy makers of the community such as the Legislature and Judges. See *Schultz v Butt* 1986 3 SA 667 (A) at 679D-E and *Premier Hangers CC v Polyoak (Pty) Ltd* 1997 1 SA 416 (A) at 422E-F."

- [22] In *Minister van Polisie v Ewels* 1975 3 SA 590 (A) it was held that:
- Our law has developed to a stage wherein an omission is regarded as unlawful conduct when the circumstances of a case are of such a nature that the omission not only incites moral indignation but also that the legal convictions of the community demand that the omission ought to be regarded as unlawful and that the damage suffered ought to be made good by the person who neglected to do a positive act. In order to determine whether there is unlawfulness the question in a given case of an omission is thus not whether there was the usual "negligence" of the *bonus paterfamilias* but whether regard being had

to all the facts, there was a duty in law to act reasonably. Compare *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) at 317C-318A. See also *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) at paras [14] to [16].

[21] A defendant acts wrongfully when he creates a source of danger by means of positive conduct (*commissio*) and subsequently fails to eliminate that danger (*omissio*) with the result that harm is caused to a plaintiff. See Neethling, Potgieter and Visser *Law of Delict* 5th edition at page 52 (par 5.2.1).

Likewise a defendant which is in control of property upon which a hazard exists is under a duty to warn a plaintiff of the nature of the hazard and the risk involved, by appropriate warning of the hazard. Failure to do so involves a wrongful omission. See *Neethling, Potgieter and Visser, supra*, at page 57; *Cape Town Municipality v Bakkerud, supra*, at par [11].

[24] In the recent decided case on the issue before me, BRAND, JA said the following in *Hawekwa Youth Camp v Byrne* [2010] 2 All SA 312 (SCA) at page 321:

"[22] The principles regarding wrongful omissions have been formulated by this court on a number of occasions in the recent past. These principles proceed 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 of 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."

[25] In the light of the principles outlined in the authorities referred to above, Mr Bester, counsel for the plaintiff, made the following submissions:

- 25.1 that the omission on the part of the defendant to take positive steps to prevent harm to the plaintiff (in particular, the failure to display warning signs or erect a railing at the volleyball court) constituted a wrongful omission in breach of the duty of care towards the plaintiff;
- 25.2 that the defendant by its prior conduct, in situating the volleyball court adjacent to the dam at the water's edge, introduced a source of danger and subsequently failed to eliminate that danger (in particular by failing to erect warning signs or a railing at the volleyball court) in breach of its legal duty of care towards the plaintiff;
- 25.3 that the defendant as the owner in control of the shopping complex, was under a legal duty to warn the plaintiff of the nature of the hazard and the risk involved in diving into the dam. In breach of its legal duty in this regard, the defendant wrongfully omitted to warn the plaintiff of such hazard.

[26] I agree with the submissions made by counsel. I may add by concluding that when regard is had to all the circumstances outlined in the evidence, I am of the view that the legal convictions of the

community require the defendant either to ensure that the dam is not hazardous or to take appropriate steps to remove the volleyball court from the edge of the dam, or to warn the public about it, or to erect a barrier or railings preventing members of the public from proceeding into the dam. Public policy, in relation to a public shopping complex such as the defendant requires that.

[27] Turning to the question of negligence, it is now 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 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. See *Cape Metropolitan Council v Graham* 2001 1 SA 1197 (SCA) at 1203 par [7].

[28] According to the test laid down in *Kruger v Coetzee* 1966 2 SA 428 (A) at 430E-F a defendant is negligent if-

- (a) the *diligens paterfamilias* in the position of the defendant-
 - (i) would foresee the reasonable possibility of his act or omission 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.

[29] It has been conceded on behalf of the plaintiff that the plaintiff was to a degree negligent in diving into the dam without first satisfying himself that it was safe to do so. Apparently on the basis of this concession, Mr Pieterse, counsel for the defendant argued and submitted that a reasonable person, in the position of the defendant, does not have to guard against reckless or gross negligent conduct on the part of a plaintiff. In this regard counsel referred me to the

following authorities: *Southern Insurance Association Ltd v Danneberg* 1976 3 SA 253 (A); *Rondalia Versekeringskorp SA Bpk v De Beer* 1976 4 SA 707 (A); *South African Railways & Harbours v Reed* 1965 3 SA 439 (A).

[70] I have considered the authorities referred to by counsel and in my view same cannot be helpful to the defendant *in casu*. The above cases deal with negligence in relation to the driving of motor vehicles. Without suggesting that negligence on the highway falls into a discrete category, it is nevertheless appropriate to point out that particular factual circumstances, which may vary considerably from case to case, attend to driving of motor vehicles. Even in the context of negligent driving there are circumstances when a reasonable driver will foresee and take precautionary measures against the negligent conduct of other drivers.

[51] Although the plaintiff had himself been negligent, the defendant should have reasonably foreseen that members of the public might walk along the water's edge and even dive into the dam, albeit that it was negligent to do so, and should have taken the easy and

inexpensive precautions available to it to avert the potential danger and that it could not, in the circumstances of the case, rely on the principle that one is entitled to assume that others will not act negligently.

[42] The reasonable person in the position of the defendant would have taken reasonable steps to guard against someone diving into the dam to retrieve a volleyball. Steps could have been taken by the defendant, at negligible cost and with minimum effort by simply displaying a warning sign at the volleyball court of the danger of diving into the dam due to the shallow water level, alternatively erecting a railing adjacent to the volleyball court at the water's edge. The defendant failed to take any steps, as it ought to have done, to prevent harm by way of a visitor to the shopping complex diving into the dam.

[43] Mr Rosslee's explanation for the failure to take steps to guard against such occurrence was that the defendant could simply erect a disclaimer board in terms of which the defendant was indemnified against liability for injury to persons entering the premises. I agree with Mr Bester's submission that this amounts to the "devil may care"

attitude on the part of the defendant. It is not surprising that only after the occurrence involving the plaintiff a disclaimer board was erected at the sliding gate.

[34] The degree of plaintiff's negligence must be assessed in order to determine the defendant's contributory negligence. In my view the plaintiff's conduct was momentary in nature, or at most, of only very short duration. It consisted, rather, of a manifestation of poor judgment on the spur of the moment than of recklessness or foolhardiness on the plaintiff's part.

[35] In conclusion I make a finding that the wrongful and negligent omission on the part of the defendant in failing to erect any warning sign of the danger posed by diving into the dam, alternatively to erect railings at the water's edge adjacent to the volleyball court to prevent one from doing so, was directly causally related to the plaintiff's injury.

[36] I accordingly grant the following order:

- (a) The defendant is ordered to pay 50% of the plaintiff's damages, to be proved or agreed, arising out of his having been injured by diving into the dam on 24 August 2007.
- (b) The defendant is ordered to pay the plaintiff's costs of the trial on the merits, such costs to include the costs of two counsel.



E M MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH

COURT
58525-2008

HEARD ON: 8, 9 & 10 JUNE 2010
FOR THE PLAINTIFF: ADV T W G BESTER & ADV J A DU PLESSIS
INSTRUCTED BY: LUBBE INC
FOR THE DEFENDANT: ADV J C PIETERSE
INSTRUCTED BY: CLIFFE DEKKER HOFMEYER INC
c/o GELDENHUYS LESSING MALATJI INC