



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: **4538/2014**

In the matter between:

PETRA KRUGER

Plaintiff

and

WAWIEL PARK (PTY) LTD

Defendant

CORAM: JP DAFFUE, J

HEARD ON: 31 OCTOBER 2022, 01 NOVEMBER 2022 & 04 NOVEMBER 2022

DELIVERED ON: 23 DECEMBER 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 23 December 2022.

ORDER

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1. The defendant is liable to pay the plaintiff's damages to be proven or agreed upon arising from the injuries sustained by her on 25 December 2012 on the defendant's premises.
 2. The defendant is liable for the plaintiff's costs of the action, inclusive of the trial costs of 31 October 2022, 01 November 2022 and 04 November 2022, including the costs of senior counsel.

JUDGMENT

Introduction

[1] On Christmas day, 25 December 2012, nearly ten years ago, the plaintiff, Mrs Petra Kruger and family members were day visitors at the holiday resort Wawiel Park (the resort), it being owned by the defendant, Wawiel Park (Pty) Ltd.

[2] That day a traumatic event occurred during which the plaintiff sustained a serious injury as a result of which she instituted action against the defendant to claim damages due to the alleged unlawful conduct of the defendant, acting through its directors and/or employees.

[3] The matter went on trial on 31 October 2022, 01 November 2022 and 04 November 2022 for adjudication of the issue of liability. An order was granted in terms of rule 33(4), specifically recording that all disputes relating to paragraphs 1, 5, 6, 7 and 8 of the particulars of claim read with the corresponding paragraphs of the special plea and plea, to wit paragraphs 1, 2, 6, 7, 8 and 9 thereof, as well as the averments in the replication were to be adjudicated. All remaining disputes stood over for later adjudication if required.

Issues to be adjudicated

[4] Adv PJJ Zietsman SC on behalf of the defendant referred to the issues in dispute as are apparent from the pleadings, but as I shall indicate later herein, several issues in dispute on the pleadings have not been taken any further during the hearing, especially insofar as the defendant decided to close its case without calling any witnesses. The issue of contributory negligence on the part of the plaintiff as pleaded was not taken up with her in cross-examination and there is no factual basis on which this issue can be considered and/or adjudicated. Mr Zietsman did not argue the contrary. The real issues between the parties to be adjudicated are:

- a. whether the plaintiff was injured at the resort on 25 December 2012;
- b. whether the defendant, acting through its directors and/or employees, was negligent, and in particular, grossly negligent;
- c. whether the defendant can rely on the disclaimer notices displayed on two separate notice boards to avoid liability.

Wrongfulness

[5] It is apparent from the disputes to be adjudicated mentioned in the previous paragraph that wrongfulness was not an issue during the trial. Notwithstanding this, it is perhaps apposite to state what the Constitutional Court had to say about wrongfulness in *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae)*¹:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'

As the Constitutional Court warned, reasonableness in the context of wrongfulness concerns the reasonableness of imposing liability on a defendant for the harm resulting from that conduct and has nothing to do with the reasonableness of the defendant's conduct when considering fault.

The test for establishing negligence

[6] The locus classicus remains *Kruger v Coetzee*,² the court describing the test as follows:

'For the purposes of liability *culpa* arises if -

(a) a *diligens paterfamilias* in the position of the defendant -

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

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

(b) the defendant failed to take such steps.'

¹ [2011] ZACC 4; 2011 (3) SA 274 (CC) at para 122.

² 1966 (2) SA 428 (A) at p 430 E – F; see also *Jacobs v Transnet Ltd t/a Metrorail* [2014] ZASCA 113; 2015 (1) SA 139 (SCA) para 6, confirming the dictum and explaining that the test rests on two bases, namely reasonable foreseeability and the reasonable preventability of damage; in *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 776G – 777 the court identified four considerations influencing the reaction of the reasonable man in a situation involving foreseeable harm to others, to wit (a) the degree or extent of the risk created by the actor's conduct, (b) the gravity of the possible consequences if the risk materialises, (c) the utility of the actor's conduct, and (d) the burden of eliminating the risk of harm.

[7] In *MV Stella Tingas: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas*³ the court referred to the concept of gross negligence as follows:⁴

'I shall assume, without deciding, that the exemption would not apply if the pilot were found to have been grossly negligent. Gross negligence is not an exact concept capable of precise definition. Despite *dicta* which sometimes seem to suggest the contrary, what is now clear, following the decision of this Court in *S v Van Zyl* 1969 (1) SA 553 (A), is that it is not consciousness of risk-taking that distinguishes gross negligence from ordinary negligence. ... If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances. ... On the other hand, even in the absence of conscious risk-taking, conduct may depart so radically from the standard of the reasonable person as to amount to gross negligence. It follows that whether there is conscious risk-taking or not, it is necessary in each case to determine whether the deviation from what is reasonable is so marked as to justify it being condemned as gross. ... It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.' (Emphasis added.)

In *S v Van Zyl*⁵ referred to in *Stella Tingas* the court stated that the word 'reckless' in s 138 (1) of Ordinance 21 of 1966 (C) also embraced gross negligence without advertent negligence, held that gross negligence had been proved and that the conduct of the accused could be characterised as 'reckless'.

A summary of the evidence pertaining to the incident and an evaluation thereof

[8] A photo album containing 66 photographs was handed in by agreement as exhibit 'A'. The evidence was led with reference to some of the photographs. The plaintiff's son-in-law, Mr Pieter Labuschagne, her husband, Mr Johannes Kruger and she testified about the events that occurred at the resort on Christmas day, 25 December 2012. I do not intend to summarise the versions individually, but will point out from time to time where the witnesses differ from one another. Mr Kruger also testified about a further visit to the resort on 29 December 2012 when photos were taken to which I shall revert. The plaintiff also attended the scene with her attorney

³ 2003 (2) SA 473 (SCA).

⁴ *Ibid* para 7.

⁵ 1969 (1) SA 553 (A) at p 559.

several years later when further photographs were taken. The witnesses never visited the resort before 25 December 2012.

[9] Mr Kruger and the plaintiff who reside in Orkney decided later the morning of 25 December 2012 to join their daughters, their partners and their grandchildren at the resort on the banks of the Vaal River in the Free State Province. Although Mr and Mrs Kruger initially did not want to join the others because of the weather conditions, they were convinced by the children who indicated that they had found a picnic spot. It is not in contention that this picnic spot turned out to be on the lawn area which was packed with holiday makers. It was in proximity of the heated and cold swimming pools. The family enjoyed themselves like hundreds of other holiday makers. Mr Labuschagne's evidence differs from that of the plaintiff and her husband pertaining to the time of his in-laws' arrival at the resort, when they started to braai and when the thunderstorm erupted. In my view these discrepancies are immaterial, bearing in mind the time lapse of ten years. I accept that the thunderstorm erupted closer to 16h00 than about 13h00 as estimated by Mr Labuschagne if the totality of the evidence is considered and particularly the hospital notes referred to in cross-examination.

[10] Mr Kruger and the plaintiff corroborated each other on several material aspects. They conceded having discussed the issue over the years which I find to be totally probable bearing in mind the fact that they are spouses, having been married for several decades. The plaintiff testified about the crucial issue as to how she had sustained her injuries to which neither her husband, nor Mr Labuschagne, could offer any corroboration or assistance.

[11] Once the plaintiff and her husband have parked their vehicle, they went down towards the lawn area where they found their family at the picnic spot. According to Mr Pieter Labuschagne the family were sitting approximately one meter from the huge hole in the ground depicted on the photographs taken on 29 December 2012, although he was unaware thereof at the time. This evidence is contradicted by that of the plaintiff and Mr Kruger. Mr Kruger was of the view that they were about 10 to 15 meters from this hole, whilst the plaintiff indicated that they were about 8 to 10 paces from it. All three testified on this aspect whilst totally unaware of the position of the hole at the stage when they were enjoying their picnic. They made their estimates years after the event, based on, either where Mr Labuschagne found the injured plaintiff under the

tree, or the position of the hole depicted on the photographs. It must be recorded that the lawns were packed with holiday makers and covered with blankets and camping chairs.

[12] The men, that is Mr Kruger and the partners of their daughters, made a fire and prepared for a traditional South African braai. Just as the meat was about ready to be taken off the fire, a thunderstorm described as a cloudburst accompanied by light hail, arrived suddenly. Streams of water quickly started to run down towards the Vaal River and in the process several items of holiday makers were washed down as well. Holiday makers scrambled to find protection. The plaintiff's daughters' priorities were their infants and they sought shelter under a veranda, whilst the men grabbed so much of their belongings that they managed to carry in order to put that in the vehicles. Mr Kruger accompanied the sons-in-law on one occasion, but on his return decided to seek shelter underneath a veranda. The plaintiff stayed at the picnic spot and covered the remaining items with a blanket in order to prevent them from being washed away. At a stage she decided to seek shelter underneath a nearby tree closer to the river. As she was about to reach the tree, she fell into a hole with both legs. The hole was so deep – her knees were underneath ground level - that she had severe difficulty to get out, especially bearing in mind the serious injuries in the form of deep lacerations sustained to her right foot and leg. She eventually managed to grab the tree trunk in order to get upright whilst screaming for help. Blood was spurting from two different locations. She unsuccessfully tried to stop bleeding by using her thumbs.

[13] On his way back from his vehicle, Mr Labuschagne heard the screams but due to the heavy downpour found it difficult to see the plaintiff initially. When he approached her the plaintiff had to make him aware of the hole as it was impossible to see it due to being filled with water and the streams of water running down towards the river. The plaintiff and Mr Labuschagne's versions differ in respect of when she warned him about the hole. Contrary to her version, he testified that she warned him on their way back to the vehicles. There must have been much confusion and I am not prepared to find that any of their versions should be rejected as false. Anyone might have made an innocent mistake in the circumstances. Mr Labuschagne took off his T-shirt to dress the wounds, but to no avail. He assisted the plaintiff on the way to the vehicles as she could not step on her right foot, but found it difficult on his own. At a stage a person unknown to them, identifying himself as Aubrey, alleging that he was an employee at

the resort, working at the hot water swimming pool, assisted Mr Labuschagne. This person was eventually relieved as the plaintiff's other son-in-law, Mr Jean Watson, arrived. As blood was still spurting out of the two separate wounds on her foot, Mr Watson transported the plaintiff in his vehicle to the casualties' department of the Wilmed Park private hospital. As the plaintiff was not a member of a medical aid fund, the wounds were merely dressed to stop the bleeding, where after she was taken, first to the Klerksdorp hospital who did not assist her and thereafter to the Tshepong hospital where the wounds were cleaned and sutured. Operations followed later on as Mr Zietsman extracted in cross-examination which was really unnecessary and will become relevant only when quantum is to be adjudicated, save insofar as he tried to establish that the plaintiff was not a credible witness.

[14] Four days after the incident Mr Kruger and Mr Watson visited the holiday resort. Photos were taken, inter alia depicting a huge hole in the ground. Mr Kruger testified that the hole was about 600mm deep and 800mm x 800mm in length and width. The photographs depict a broken glass bottle (apparently a beer bottle) and nappies as well as a piece of a newspaper inside the hole. Mr Zietsman indicated correctly that it appears as if the newspaper was completely dry at that stage, suggesting that the newspaper must have been put in the hole after the storm four days earlier. At that stage camping chairs were placed around the hole, apparently by visitors, whilst in the background several other holiday makers are visible, standing around or sitting on their camping chairs. According to Mr Kruger there must have been a thousand holiday makers at the resort on Christmas day whilst the number was approximately three hundred on the 29th of December 2012. Mr Kruger testified that the soil dug out to make the hole was thrown next to it although this is not clearly depicted on the photographs. His evidence was not disputed.

[15] A major issue was made in cross-examination by Mr Zietsman of the fact that, contrary to the pleadings, the hole as depicted in the photographs was not situated on the lawn area. I do not agree with his line of questioning which was not conceded. It is apparent from the photographs that numerous fire places have been erected all over the picnic area under the trees and that the area is covered by lawns although the grass is sparse around the tree trunks. This is especially so where the hole was dug. The plaintiff explained this aspect satisfactorily with reference to her own garden. As mentioned and depicted on the photographs of the 29th, the holiday makers utilised

this lawn area for their picnics. The submission that the evidence differs from the pleadings is incorrect or at best for the defendant, immaterial. The hole was located where patrons gathered to enjoy themselves on the lawn area underneath the trees.

[16] Mr Zietsman never denied the existence of this particular hole or any other similar hole on 25 December 2012 during cross-examination of any of the witnesses and that it still remained there on 29 December 2012 when the photos were taken. He suggested, perhaps more tongue in the cheek than otherwise, that the hole could have been dug by holiday makers on Christmas day and that the plaintiff perhaps just did not notice that. The plaintiff could not meaningfully respond to this suggestion, but in my view this is so improbable that it can be ignored. There is no reason why holiday makers would arrive at a resort on Christmas day with a spade and pick-axe to dig a hole for their garbage. In the absence of any evidence on behalf of the defendant, this was really nothing, but a grasping at straws. Furthermore, bearing in mind the allegations in the defendant's further particulars for purposes of trial, the premises were allegedly cleaned and examined daily by a number of personnel to identify defects and any potentially dangerous situations. This duty was not seriously undertaken, given the established facts.

[17] Plaintiff's evidence of the fall is uncontroverted. She proceeded to a nearby tree on the lawn area to shield her from the heavy rain and hail. She did not run and although her view was partly obscured as a result of the rain, she could see where she was going. Unfortunately, the streams of water not only filled the hole, but caused her not to identify the danger. Her evidence is unimpeachable. I am satisfied that the plaintiff stepped into this man-made hole on the defendant's lawn area as depicted in the photographs and that this hole must have contained sharp objects such as broken glass bottles although it may not be possible to make a definite finding that the specific broken bottle in the hole depicted in the photographs is the one that cut the plaintiff. Garbage might have been removed from the hole after the 25th and new garbage might have been thrown into the hole before the photos were taken on the 29th of December 2012.

[18] Contrary to the denial in the pleadings, Mr Zietsman did not deny during cross-examination of any of the witnesses that the plaintiff and her family visited the resort on 25 December 2012 and that she was injured on the defendant's premises as

alleged by her. I accept that she does not have first-hand knowledge of what exactly caused the severe cuts to her foot and leg. In this regard the broken bottle found in the hole four days after the event lends support for a finding based on circumstantial evidence. Mr Zietsman considered it relevant to refer the plaintiff to the medical records of the Tshepong hospital indicating that on 26 December 2012 she refused medical care. In my view she explained sufficiently what occurred and there is no reason to deal with this aspect any further. Instead of supporting a possible version put to her by the defendant, the records support the plaintiff's case. The documents contained in the discovery bundle provide *inter alia* the duty doctor's assessment that the plaintiff had fallen and sustained lacerations to her dorsal area. It is also apparent from the hospital records that the plaintiff first attended the hospital late afternoon of 25 December 2012. Several photographs in the photo-album, although not specifically dealt with in the evidence, depict the lacerations after being sutured. These three aspects: the plaintiff's direct testimony, the objective hospital records brought into play during cross-examination and the photographs of the sutured lacerations, taken together, point to the only reasonable and logical inference to be drawn (applying the stricter test used in criminal matters) or the more plausible inference than any other inference, being the test in civil matters, that the plaintiff was cut by a sharp object such as a broken glass bottle when she fell in the hole at the resort. Mr Zietsman did not put it to plaintiff or the other two witnesses that she did not injure her foot as alleged in the particulars of claim and as testified; yet he submitted in argument that she should not be believed and that a negative credibility finding should be made against her. Such submission is in direct conflict with the authorities, the most well-known of all being *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.⁶ Therefore, although not even suggested by Mr Zietsman that the plaintiff injured herself at a different location - not on the defendant's premises - I disregard the possibility of the injuries being sustained due to for example uneven ground or any other like cause, or even the glass plates with snacks that she was carrying when falling in the hole.

[19] The plaintiff was not negligent. Contrary to the allegations in the plea, Mr Zietsman did not submit as such. He submitted that even if the defendant was aware of the existence of the hole, but failed to cordon it off with warning tape, such

⁶ 2000 (1) SA 1 (CC) para 63.

negligence would not have been causally connected to the injuries suffered by the plaintiff as she could not see in front of her moments before she fell into the hole. This submission is factually incorrect and based on speculation as no cross-examination was conducted in this regard. I am satisfied that the proved facts called for an explanation, but none was forthcoming. Consequently, an adverse inference can be drawn from the defendant's silence.⁷ The defendant never denied the version that Aubrey, who assisted the injured plaintiff, was employed by it, he having conducted duties at the hot water swimming pool. No evidence was placed on record to dispute this uncontested version. The plaintiff's letter of demand dated 11 March 2013 was delivered to the defendant within three months from the date of the incident, allowing the defendant sufficient time and opportunity to investigate the plaintiff's allegations. Yet, the defendant elected not to present a version.

[20] The defendant, acting through its directors and/or employees, acted grossly negligent in either digging the hole, or allowing the hole to be left open without cordoning it off properly to prevent patrons to fall in it, and/or providing any warning signs to warn patrons of the imminent danger. Contrary to what was stated in the further particulars, the huge hole dug in the ground which caused the plaintiff's injuries, was either dug by the defendant's directors and/or employees to be used as an unprotected garbage pit, or if that was not the case, it was not detected and left open over a period of four days between 25 and 29 December 2012 when the first photos were taken. In my book and bearing in mind the hundreds of patrons that visited the resort during those days, this constitutes gross negligence, if not recklessness. In the words of the court in *Stella Tingas* supra, there was a departure from the standard of the reasonable person to such an extent that it may be categorised as extreme and at best for the defendant, a total failure to take care of its resort. If the hole was not there in the first place, no injuries would have been sustained by the plaintiff. If the hole was properly cordoned off to avoid a person from falling into it, the same would apply. If proper warning signs were erected, this would in all probability have been heeded to although the plaintiff's vision was affected to an extent. She was at least able to see the tree where she wanted to seek protection from the rain. Her son-in-law was able to find her. Aubrey came to her assistance and clearly managed to see her from a distance. Therefore, causation has been proven.

⁷ *Venter v Credit Guarantee Corporation* 1996 (3) SA 966 (A) at p 980.

[21] Finally, I need to address Mr Zietsman's remarks during argument that the plaintiff and her husband in particular confirmed that they discussed the matter. He failed to persuade me to dismiss the version of any of the witnesses on the basis of their untrustworthiness. If Mr Kruger wanted to support the plaintiff's testimony as to exactly what happened to her on the particular Christmas afternoon, he as well as his son-in-law could have lied and presented factual evidence of exactly what happened to her, what was found in this hole and what caused her injuries. They maintained that they did not have first-hand knowledge of the ordeal and explained where they were at the relevant time. It was never stated during cross-examination that the witnesses' versions would be contradicted by evidence of opposing witnesses and the precise nature of the evidence to be presented in order to provide an opportunity for an explanation. Furthermore, it was never put to any of the witnesses that they should be disbelieved for them to respond accordingly. In fact, evidence of the serious injuries sustained by the plaintiff that faithful afternoon has not been challenged at all during cross-examination. In his heads of argument Mr Zietsman for the first time touched on the subject, submitting that the court should 'make a negative credibility finding against the plaintiff and to find that she did not injure her leg as alleged in the particulars of claim.' He said nothing about her viva voce evidence.

[22] I am satisfied that the first two issues mentioned in paragraph 4 above, to wit whether the plaintiff was injured at the resort on 25 December 2012 and whether the defendant's gross negligence caused the injuries should be adjudicated in favour of the plaintiff. The remaining issue is the disclaimers relied upon on which I shall focus under the next heading.

The disclaimers

[23] As mentioned, two disclaimer notices are depicted on the photographs. It is not in dispute that on 25 December 2012 the two notice boards were in place as depicted on the photographs. The first one should have been visible as the plaintiff and her husband drove past it. As the plaintiff and her husband approached the resort in their vehicle, driven by her husband, the plaintiff's attention was focussed on some lions in a camp on the right hand side of the road leading towards the resort. She did not see the first notice board at the first set of gates which were open at the time and not manned by anybody. During cross-examination she had to concede that on her own version, they would have passed the lions by the time that they arrived at the first set

of gates. It is apparent from the photographs that this notice board containing disclaimers in three languages, is erected on the left hand side of the road and just where the road curves to the right. There is no indication that visitors are directed to stop and read the notices before proceeding. In fact, the gates do not depict the entrance to the resort which is some distance away. Visitors driving past the notice board will have a split second to read the contents if they are actually aware of the notice board. The defendant did not present evidence to prove from what distance the contents are legible and how long it would take to read same. In my view, and unless the driver comes to a stationary position right in front of the notice board, it would not be possible to read the contents in order to appreciate that it has something to do with a visit to the resort. I find that the defendant did not take reasonably sufficient steps to notify the plaintiff of the terms of this disclaimer. Therefore, I am not satisfied that actual or quasi-mutual assent was proven in respect of the first disclaimer, ie that on the factual basis presented at the time, the plaintiff assented to the terms thereof. This disclaimer was not prominently displayed in the manner found in *Durban's Water Wonderland (Pty) Ltd v Botha*⁸ (*Durban's Water Wonderland*), ie on either side of a ticket booth where visitors had to purchase their tickets for the amusement park. In that case the court held that any reasonable person approaching the ticket booth would hardly have failed to see the notice.⁹ The facts in *Durban Water Wonderland* are distinguishable from the facts in this case pertaining to the first disclaimer. The defendant does not have a valid defence in respect of this disclaimer.

[24] At the second set of gates where one enters the resort, prospective patrons have to stop in order to pay entrance fees. Here, the second notice board is erected to the left hand side of vehicles on their way into the resort. The plaintiff testified initially that she also did not see this notice board, her excuse being that she was looking to find out where the children had parked their motor vehicles. She also explained that she was calling her children on her cell phone at that stage to establish where exactly they were seated. She testified that even if she had noticed or observed the notice board and read the contents thereof she would not relate ('associate') herself with the contents thereof. Eventually she conceded that she did not read everything on the notice board and that she had associated herself with the information which she had read. The cross-examination did not go further to establish what was read and what

⁸ 1999 (1) SA 982 (SCA).

⁹ *Ibid* at p 988 A – D.

not. Fact of the matter is that the plaintiff had sufficient time to read the second disclaimer, unlike the case with the first one, that the disclaimer was prominently displayed and that any ordinary alert visitor to the resort would have seen and be able to read it, an aspect in essence conceded by the plaintiff. I am satisfied that actual, or at the best for her, quasi-mutual assent was proven in respect of this second disclaimer, ie that on the factual basis presented at the time, the plaintiff assented to the terms thereof. Although she insisted in evidence that she did not associate herself with the contents, this is irrelevant if the applicable legal principles are kept in mind.¹⁰ Mr Kruger who was the driver of the vehicle did not make any meaningful contribution towards the issue. According to him he was not aware of the two notice boards. The next issue to be considered is the language used by the defendant to rely on the disclaimers.

[25] A party wishing to contract out of liability must do so in clear and unequivocal terms. The Supreme Court of Appeal made it clear as follows in *Durban's Water Wonderland*¹¹ that exemption clauses or disclaimers are part of our law:

'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'.

[26] Marais JA stated in *First National Bank of SA Ltd v Rosenblum and Another*¹² as follows:

'In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out... Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application.'

¹⁰ *Ibid* at pp 991D – 992D.

¹¹ *Ibid* at 989 G – J; see also *Viv's Tippers v Pha Phama Staff Services* 2010 (4) SA 455 (SCA) paras 13 – 18.

¹² 2001 (4) SA 189 (SCA) para 6.

[27] The wording of the second disclaimer is in Afrikaans only, the home language of the plaintiff, while the first disclaimer is in three languages, including Afrikaans and English. If I find that the wording of the second disclaimer is clear and unambiguous and that it was properly displayed at the time, it may be the end of the plaintiff's case.

[28] The plaintiff relied on *Hanson v Liberty Group Ltd and Others*.¹³ In that case the plaintiff who was visiting the Sandton City shopping centre, tripped over an elevated expansion joint cover in the parking area. She was a passenger in the motor vehicle that entered the parking area. The court held that the defendant did not take reasonably sufficient steps to notify the plaintiff of the terms of the disclaimer notice and did not discharge the onus on it. Just a few days ago the Supreme Court of Appeal dealt with a disclaimer defence in *Cenprop Real Estate (Pty) Ltd v Holtzhauzen*.¹⁴ It found, based on the proven facts, that the respondent (the injured customer) had never seen the disclaimer notices (either on the day of the injury, or during her previous visits to the premises), that even assuming the disclaimer notices were in fact displayed, they were hidden or obstructed by objects and not visible to shoppers. This case is different. Here, the second disclaimer notice in particular, was prominently displayed and right in front of the plaintiff's eyes. The defendant took appropriate steps to notify prospective patrons of the conditions applicable to them when entering the resort. Before I conclude on the defence raised by the defendant in respect of the second disclaimer, I need to refer to the plaintiff's replication as well as other authorities.

[29] The plaintiff filed a replication to deal with the defendant's plea relying on the two disclaimers. She averred that it was unconstitutional to rely on a notice exempting the defendant from liability, alternatively, the defendant could not rely on such a defence as it was against public policy. She did not quote the legislation relied upon. As a general rule, if a party relies in litigation on a particular statute or section within a statute, that party must state the statute fully with reference to the name and number thereof, or formulate their cause of action or defence sufficiently clearly so as to allow the court to adjudicate what they are relying on.¹⁵ Mr Ferreira referred in the heads of argument and during oral argument for the first time to the protection given to consumers in terms of the Consumer Protection Act 68 of 2008 (the CPA). He also

¹³ [2012] JOL 28202 (GSJ).

¹⁴ [2022] ZASCA 183 (19 December 2022) paras 35 – 37.

¹⁵ *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at p 623 F – H.

quoted from *Koen v Pretoria Central Investments (Pty) Ltd t/a Pretoria Parkade*¹⁶ (*Koen*) where the learned judge put great emphasis on several sections of the CPA. I quote the judge's conclusion verbatim:¹⁷

'Accordingly disclaimer notices that a bad in law and not being able to be enforce or allow an injured person to approach the courts for redress are bad in law and can therefore not pass the constitutional muster.'

This conclusion is in direct conflict with all available authorities of the Supreme Court of Appeal and the judgment should not be followed. Both the judgments in *Bafana Finance Mabopane v Makwakwa and Another*¹⁸ (*Bafana Finance*) and *Barkhuizen v Napier*¹⁹ relied upon, do not support the learned judge's conclusion.

[30] In *Bafana Finance* a clause in a moneylending contract whereby the debtor undertook not to apply for an administration order, and if they did apply for such order, the loan debt would not form part of the administration order, was held to be unenforceable as being contrary to public policy. This case is totally irrelevant to the issue at hand. In *Barkhuizen v Napier* the Constitutional Court dealt with a time-limitation clause in an insurance contract in terms whereof an insured had to institute action within the time period specified in the contract, namely 90 days from date of repudiation of the claim. The court specifically accepted that the doctrine of *pacta sunt servanda* is still part of our law, although it stated that courts are allowed to decline to enforce contractual terms that are in conflict with constitutional values even if parties may have consented thereto. In that case the Constitutional Court held that the enforcement of the clause would not be contrary to public policy and thus also not unjust to the insured.²⁰ Clearly, as the Constitutional Court found, the insured's right of access to court provided for in s 34 of the Constitution was not ignored.

[31] In *Reineke v Intercape Ferreira Mainliner (Pty) Ltd*²¹ the full bench dealt with a disclaimer in a so-called ticket case and stated that 'however widely phrased a disclaimer may be, if its language upon a proper interpretation thereof expressly and unambiguously exempts the *proferens* from liability, then effect must be given to it.' It also held that the disclaimer had to be read in the context of the respondent's core

¹⁶ (33737/13) [2018] ZAGPPHC 113 (2 March 2018).

¹⁷ *Ibid* para 54.

¹⁸ [2006] ZASCA 46; 2006 (4) SA 581 (SCA).

¹⁹ [2007] ZACC 5; 2007 (5) SA 323 (CC).

²⁰ See *inter alia* paras 30 & 67.

²¹ [2013] ZAECGHC 47 (23 May 2013) at p 10 of the typed judgment.

business, which was the daily conveyance of passengers by bus on public roads and concluded that the respondent's defence in relying on the disclaimer was good in law. In this case the defendant's core business is that of managing a resort, providing picnic facilities on its lawns on the banks of the Vaal River as well as other amenities such as swimming pools, a playground for children, trampolines and fishing.²² I shall deal with the apparent ratio for the disclaimer in this case hereunder.

[32] Although the plaintiff failed to rely on the principles enunciated in the CPA in her pleadings, and although a case might have been made out that she should not be heard now to rely thereon as the defendant was not given an opportunity to consider the matter before the closure of its case, Mr Zietsman did not submit that I should disregard any submissions raised in terms of the CPA. Consequently, I am prepared to briefly deal with the CPA. Section 49(1) thereof states inter alia that any notice to consumers that purports to limit in any way the risk or liability of the supplier or any other person, or impose an obligation on the consumer to indemnify the supplier or any other person, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsecs 3 to 5. Sub-section 3 refers to the fact that the notice should be written in plane language. Sub-section 4 stipulates that the attention of the consumer must be drawn in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer and the notice must be given before the consumer engages in the activity, or enters, or gains access to the facility. Furthermore, the consumer must be given adequate opportunity to receive and comprehend the provision or notice. Bearing in mind these provisions, I am satisfied that the second disclaimer notice in particular complies with the CPA.

[33] In the second disclaimer – only in Afrikaans - patrons entering the resort accept it to be an express condition of their visit that the resort would not be held liable for any damages sustained as a result of fire, theft, flooding of property or physical injuries, whether fatal or otherwise. The wording is clear: it exempts the defendant from liability in express and unambiguous terms. In accordance with the *Durban Water Wonderland*-principle effect must be given to that meaning, unless other considerations come into play to assist the plaintiff. One may understand why the

²² See also *Walker v Redhouse* [2006] ZASCA 96; 2007 (3) SA 514 (SCA), a case where a novice fell off a horse that bolted on a guest farm after signing an indemnity, the interpretation of the indemnity clause and the court finding that the indemnity was a complete defence to the claim: paras 15, 19 & 20.

defendant would want to obtain an indemnity against damage caused by fire (patrons injuring themselves or others during braais), theft (patrons stealing from other patrons), flooding of property (bearing in mind the mighty Vaal River and thunderstorms) and physical injuries (caused by diving into swimming pools, falling off trampolines, children falling off swings, to name but a few typical incidents.) No reference is made to any negligence, gross negligence or recklessness by the defendant, its directors or employees, although one may argue that the defendant intended to protect it against negligence by its directors and/or employees in providing the facilities, eg where the defendant fails to provide proper security to curb theft, or fails to ensure that a qualified instructor oversees trampoline activities and/or if a novice is allowed to use the trampoline without supervision. Logic dictates that a service provider such as the defendant would for various reasons insist on disclaimers in order to protect it against the risks occasioned by the attendance of numerous patrons of all walks of life. Objectively speaking, this is what the defendant must have had in mind when the notice was displayed.

[34] Mr Ferreira submitted that I should follow *Koen*²³ and *Naidoo v Birchwood Hotel*.²⁴ I already mentioned that *Koen* is not good law insofar as it held that all disclaimers are 'bad in law and can therefore not pass constitutional muster.' Heaton-Nicholls J did not go that far in *Naidoo v Birchwood Hotel* although the learned judge stated that she was unconvinced that such clauses would withstand constitutional scrutiny.²⁵ She held, based on the facts in that case – a heavy steel gate jammed, ran off its rail and fell on a hotel guest – that the plaintiff discharged the onus of proving his delictual claim and that neither the disclaimer notices, nor the exemption clauses, were a good defence to the claim. I do not agree with the view of the learned judge that exemption clauses will not pass constitutional muster. Each case involving reliance on a disclaimer will have to be scrutinised to ensure that the values enshrined in the Constitution are not undermined. The legislature accepts, as provided for in s 49 of the CPA mentioned above, that a supplier or service provider may limit its risk or liability, subject to the provisions enumerated in the subsections thereof and obviously bearing in mind public policy considerations.

²³ *Koen loc cit*, fn 16.

²⁴ 2012 (6) SA 170 (GSJ).

²⁵ *Ibid* paras 45 & 54.

[35] The defendant did not expressly seek indemnity in the second disclaimer against gross negligence or recklessness of its directors and/or employees. Such a clause in the disclaimer would be contrary to public policy and unenforceable. The disclaimer is so wide in ambit that the defendant seeks to be indemnified in respect of all events, imaginable or unimaginable, whether its directors and/or employees are guilty of direct intent, *dolus eventualis*, recklessness or gross negligence in causing death, injury, or loss of property. I pointed out earlier that disclaimers must be interpreted restrictively. In *Stella Tingas*²⁶ the Supreme Court of Appeal assumed, without deciding, that the exemption would not apply if the pilot were found to have been grossly negligent. In my view, although the *pacta sunt servanda* principle remains part of our law as reiterated in *Barkhuizen v Napier*,²⁷ a term in a contract that is inimical to the values enshrined in the Constitution is contrary to public policy and unenforceable.

[36] *Durban Water Wonderland* was decided on 27 November 1998, but the incident occurred as long ago as November 1988, ie in the pre-constitutional era. It is distinguishable on the facts insofar as no case of gross negligence or recklessness was presented, but mere negligence. In *Afrox Healthcare Bpk v Strydom*²⁸ the Supreme Court of Appeal held that the principle of contractual autonomy was paramount and that the disclaimer in that case was not contrary to the public interest. The court considered public policy and constitutional principles and made it clear that the values underpinning the Constitution had to be taken into account in considering whether a particular contractual provision was in conflict with the interests of the community.²⁹ The court pertinently raised the aspect of gross negligence which was not relied upon by the respondent on the part of the appellant's nursing staff. In an obiter dictum it stated that although the question was not relevant in that matter, contractual exclusion of liability caused by gross negligence was not necessarily in conflict with the public interest and would cause the automatic invalidity of the relevant clause. It suggested that the clause would probably rather have to be interpreted restrictively to exclude gross negligence.³⁰

²⁶ Fn 3 above.

²⁷ *Barkhuizen v Napier* loc cit paras 28 – 29.

²⁸ 2002 (6) SA 21 (SCA).

²⁹ *Ibid* para 18.

³⁰ *Ibid* para 13, relying on the dictum of Innes HR in *Wells v South African Alumenite Company* 1927 AD 69 at pp 72 - 73.

[37] Whatever the nature of the disclaimers relied upon by the defendant, and even if I am wrong in the conclusions arrived at earlier, they cannot indemnify it against liability in this case. It would be against public policy to allow a resort such as the one run by the defendant to escape liability on the basis of either of the disclaimers and specifically the second one.

Conclusion

[38] The defendant cannot rely on the disclaimer defence in circumstances where I have found that it, acting through its directors and/or employees, was grossly negligent which caused the injuries sustained by the plaintiff. Consequently, the plaintiff is entitled to success on the merits of her claim and an appropriate order will be made. She is also entitled to the costs of her senior counsel. The defendant also considered the matter sufficiently serious to employ senior counsel and there is no reason not to allow the costs of her senior counsel.

Order:

1. The defendant is liable to pay the plaintiff's damages to be proven or agreed upon arising from the injuries sustained by her on 25 December 2012 on the defendant's premises.
2. The defendant is liable for the plaintiff's costs of the action, inclusive of the trial costs of 31 October 2022, 01 November 2022 and 04 November 2022, including the costs of senior counsel.

J P DAFFUE, J



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