

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 7099/2012

In the matter between:

KARLIEN VAN VUUREN

PLAINTIFF

and

ETHEKWINI MUNICIPALITY

DEFENDANT

J U D G M E N T

STEYN J

[1] This case focuses on a very sensitive issue albeit interesting of whether a parent exercising parental control over a child can legally expect of a local authority to either share in the duty of parental control or usurp the duty and responsibility. The matter has its genesis in an incident that occurred at the Durban beachfront on a balmy day in May 2011 when a young boy used one of the water slides on the beachfront.

[2] The plaintiff, the mother of a boy of 13 years old, instituted a claim for damages in both her personal and representative capacity, for injuries

suffered by her son on 21 May 2011. The incident occurred when the boy used a slide in one of the pools made available for children under 12 years old at the Durban beachfront. The issues of liability and quantum were separated at the commencement of the trial and it was ordered that the issue of liability be determined. The defendant is the eThekweni Municipality, the local authority responsible for the construction and maintenance of the greater Durban beachfront area, which includes the water slides and paddling pool where the incident occurred.

- [3] It is alleged in the amended particulars of claim that the defendant owed a legal duty to the plaintiff since:

‘At all material times hereto the defendant:

- 5.1 was the authority responsible for the construction and maintenance of the said beachfront area;
- 5.2 was obliged to ensure that all facilities, including the slide and swimming pool situated on the beachfront area was properly controlled and safely used;
- 5.3 the defendant was obliged to ensure that access to the swimming pool and the slide was controlled and the number of children allowed to use the slide at one time was restricted;
- 5.4 the defendant owed a duty of care to ensure that the facilities on the beachfront area under its control were safe.’¹

- [4] The legal duty was defined very differently in the original particulars of claim issued on 2 November 2012. Since counsel for the defendant relied on the original particulars during the cross-examination of the plaintiff, I consider it necessary to quote from the particulars as stated in exhibit ‘E’ of the bundle:

‘7. The Defendant, alternatively the Defendants employees, alternatively their agents were negligent in one or more of the following ways:

¹ See para 5 of the particulars of claim as amended.

- (a) in failing to ensure that the construction of the slide was of such a nature that it was safe for all those who made use of it;
- (b) in failing to ensure that the materials used for the construction of the slide made it safe for members of the public to use;
- (c) in failing to ensure that appropriate materials were used so that users of the slide would be protected at all times;
- (d) in erecting a structure which the Defendant, its employees alternatively agents knew would be predominately used by children knowing that such structure was inherently unsafe.²
(My emphasis.)

[5] The defendant denied liability and pleaded:

- ‘5.1 The plaintiff knew that unsupervised children using the pool and slide facilities would be dangerous and may result in injury;
- 5.2 The plaintiff was fully aware of the risks involved in allowing her child to utilise the pool and slide facilities’
- 5.3 Despite this knowledge, and whilst appreciating the risk, the plaintiff nevertheless allowed her child to use the pool and slide facilities;
- 5.4 Accordingly, the plaintiff consented to be subject to the risk of injury to her child and, in the premises, the defendant is not liable for any loss or damage suffered.’

[6] At para 13 of the plea the defendant added to the defence of *volenti non fit iniuria*, contributory negligence in that the plaintiff should have taken reasonable steps to supervise the child whilst using the slides and had failed to do so.

[7] What needs to be decided is whether the defendant was under a legal obligation to control or supervise children who are using its slides. Put differently whether the Municipality had failed to take the necessary preventative action in circumstances where the law requires it to do so. Since the action is based on delict the following elements needed to be proved by

² See exhibit ‘E’.

the plaintiff: (a) an act; (b) which is wrongful; (c) fault, i.e. negligence in this case; (d) harm suffered by the plaintiff; and (e) a causal nexus between (a) and (d).³ It is trite that wrongfulness must be determined before the question of fault.

Applicable Law

- [8] Brand JA in *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd*⁴ defined the criterion of wrongfulness as follows:

‘It is sometimes said that the criterion for the determination of wrongfulness is ‘a general criterion of reasonableness’, i.e. whether it would be reasonable to impose a legal duty on the defendant (see e.g. *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) SA 355 (A) at 367E-G; *Gouda Boerdery BK (supra)* in para [12]). Where that terminology is employed, however, it is to be borne in mind that what is meant by reasonableness in the context of wrongfulness is something different from the reasonableness of the conduct itself which is an element of negligence. It concerns the reasonableness of imposing liability on the defendant (see e.g. Anton Fagan ‘*Rethinking wrongfulness in the law of delict*’ (2005) 122 SALJ 90 at 109). Likewise, the ‘legal duty’ referred to in this context must not be confused with the ‘duty of care’ in English law which straddles both elements of wrongfulness and negligence (see e.g. *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27B-G; *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) in para [20]). In fact, with hindsight, even the reference to ‘a legal duty’ in the context of wrongfulness was somewhat unfortunate. As was pointed out by Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) in para [14], reference to a ‘legal duty’ as a criterion for wrongfulness can lead the unwary astray. To illustrate, he gives the following example:

‘(T)here is obviously a duty – even a legal duty – on a judicial officer to adjudicate cases correctly and not negligently. That does not mean that the judicial officer who fails in the duty, because of negligence, acted wrongfully.’ (My emphasis.)

(See also *Knop v Johannesburg City Council (supra)* at 33D-E.)’

³ See *HL & H Timber Products (Pty) Ltd v SAPPI Manufacturing (Pty) Ltd* 2001 (4) SA 814 (SCA).

⁴ 2006 (3) SA 138 (SCA) para 11.

- [9] Brand JA dealt with the confusion between the delictual elements of wrongfulness and negligence in *Hawekwa Youth Camp & another v Byrne*.⁵

‘As I see it, the quoted contentions are indicative of confusion between the delictual elements of wrongfulness and negligence. This confusion in turn, so it seems, originated from a further confusion between the concept of ‘a legal duty’, which is associated in our law with the element of wrongfulness, and the concept of ‘a duty of care’ in English law, which is usually associated in that legal system with the element of negligence (see eg *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27B-G; *Local Transitional Council of Delmas and Another v Boshoff* 2005 (5) SA 514 (SCA) ([2005] 4 All SA 175) para 20). Warnings against this confusion and the fact that it may lead the unwary astray had been sounded by this court on more than one occasion (see eg *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) ([2006] 1 All SA 6) para 14; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) ([2007] 1 All SA 240) para 11). Nonetheless, it again occurred in this case.’⁶ (My emphasis.)

- [10] The test for negligence has been formulated in the well-known case of *Kruger v Coetzee*⁷ 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.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.^{8 9}

⁵ 2010 (6) SA 83 (SCA).

⁶ *Supra* at 90F-H.

⁷ 1966 (2) SA 428 (A).

⁸ *Ibid* at 430E-H.

[11] In *Minister of Safety and Security v Van Duivenboden*¹⁰ Nugent JA said:

‘When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case.’¹¹

[12] The question whether there is a legal duty to avoid the risk or harm eventuating in our law was answered in *Halliwell v Johannesburg Municipality Council*.¹²

‘For the decision of the present dispute it is sufficient to say that where in consequence of some positive act, a duty is created to do some other act or exercise some special care so as to avoid injury to others, then the person concerned is under Roman Dutch law liable for damage caused to those to whom he owes such duty by an omission to discharge it.’¹³

The Evidence

[13] Mr Theo Gregersen was called by the plaintiff as an expert in Occupational Health and Safety. He is a qualified mechanical engineer. After he obtained his degree, he practiced as an engineer from 1962 to 1985. He thereafter joined the Department of Labour and worked in the occupational health and safety division until his retirement in 2000. Mr Gregersen stated that he is the

⁹ In *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) the Court formulated the traditional test as follows: ‘I owe him such a duty if a *diligens paterfamilias*, that notional epitome of reasonable prudence, in the position in which I am in, would - (a) foresee the possibility of harm occurring to him, and (b) take steps to guard against its occurrence.’ (At 373F-G.)

¹⁰ 2002 (6) SA 431 (SCA).

¹¹ *Supra* at 446G.

¹² 1912 AD 659.

¹³ *Supra* at 672.

author of three books and had investigated many incidents and compiled many reports. He confirmed his report consisting of six pages as per exhibit 'C'. He was instructed to evaluate the slide facility where the plaintiff's son had sustained injuries. He reached the following conclusions in his report:

- '1. Public swimming pools are known to pose a danger to children when they are not controlled. The very nature of wet surfaces, high places such as access steps to slides, are dangerous and need constant adult supervision by qualified and competent persons. Numerous accidents have occurred at swimming pools. These range from slipping when running on wet surfaces to diving into shallow water and hitting the bottom of the pool.
2. During the inspection conducted on the 14th November 2013, no supervision of the swimming pool was noticed. This was especially obvious by the number of children who were running around uncontrolled on the wet surfaces, bunching up at the top of the slide and pushing each other forcefully and dangerously down the slide.
3. Access to the Durban South Beach swimming pool is unrestricted. There are no fences to control access or limit the number of children using the swimming pool at the same time and there was no supervisor controlling the access to the swimming pool. The swimming pool is situated in the middle of an open public area where children and adults have free unrestricted access.
4. The apparent absence of supervision at the swimming pool was a direct contravention by the Ethekwini Municipality of Section 9 of the Occupational Health & Safety Act and also Regulation D4 of the National Building Regulations in that there was no access control at the swimming pool and the children were not being controlled. If there was a supervisor in the immediate vicinity he/she was not obvious and was certainly not controlling the activities of the unruly children running around dangerously and pushing each other on the slide at the time of the inspection on the 14th November 2013.'¹⁴

[14] The methodology employed by Mr Gregersen was to contact the plaintiff and collect information about the incident, as well as to inspect the scene of the incident and the facility. According to his observations a supervisor's tower, approximately 60 metres from the slide, was found as can be seen in picture 13 of exhibit 'C'. When he inspected the area there were a large number of

¹⁴ See para 6 of exhibit 'C'.

children on the slide and no control or supervision was exercised. The slide was very slippery and very quick. In his view it would have been safer if someone was in control of the children. On the date of the incident there was no such supervision or control. In his opinion, one supervisor in the tower was not sufficient since it is too far away from the slides. Mr Gregersen did not elaborate or explain why the tower should be nearer to the slides, nor did he investigate the qualification or duties of the supervisors manning this tower. He confirmed that the supervisor had a whistle to use to alert the people using the pool. He did not notice any first aid sign displayed near the slides.

[15] Under cross-examination Mr Gregersen confirmed that the structure was sound and safe and that the sides were high. He conceded that if the slide was used properly then it was a safe structure. There were two signs in place reading 'No rough play' and 'Kids under parental supervision' near the slides. He noticed these signs but claimed that it was not displayed at the time of the incident in question, his opinion in this regard was based on what he had heard. Mr Gregersen was questioned on the application of s 1 of the National Building Regulations and Building Standards Act 103 of 1977, especially since s 2 of the Act is not binding on the State. He conceded that this is correct. He also became less certain of his initial opinion that the Occupational Health and Safety Act 85 of 1993 places a duty on the defendant to have acted in a different manner.¹⁵

[16] Mr Gregersen further conceded that the structure was safe but contended that the use of it was not necessarily safe in the absence of control. He insisted that the apparent absence of control is in contravention of the Municipality's legal duty. In his view the Municipality should have controlled the use of the facility. He contended that the defendant ought to have made a risk

¹⁵ In his report he relied on s 9 of the Occupational Health and Safety Act 85 of 1993, which defines the general duties of an employer to his/her employees.

assessment and based on that had a responsibility to see to it that the slides are safely used. He conceded that children take chances and are exuberant, nonetheless, he claimed that the Municipality should have monitored the slides. He reluctantly agreed that parents likewise needed to control their children.

[17] The plaintiff, Karlien van Vuuren, confirmed that she lived and worked in Pretoria and has one son, John Ray Jaques van Vuuren, nicknamed JJ, who is 13 years old. At the time of the incident he was eight years old. She confirmed that the incident occurred on a day when they were at the paddling pool at/or about midday. She was waiting on someone and JJ had asked if he could swim and use the slides. According to her JJ used the slides twice without any incident, but when he came down the third time there were about 10 or 15 children behind him on the stairs. When he came down the slide there were other children who must have bumped him, because he lost control and bumped his face on the side of the slide and at the bottom of the slide. Mrs van Vuuren saw he was bleeding profusely and ran into the pool and picked him up. She noticed that he was injured and that his teeth were pushed up to his nose. She carried him to the tower for assistance but no-one helped her. The person manning the tower merely took photographs of JJ and told her to take her child to the hospital. She took JJ to the car and drove him to Addington Hospital where she received no assistance, whereafter she took him to Kingsway Hospital where he was treated. His injuries are reflected in the pictures as per exhibit 'B'.

[18] Mrs van Vuuren went back to the scene the day after the incident and took photographs of the area. She found no board displayed that indemnifies the Municipality. One sign at the scene stated that only children under 12 were allowed on the slides. On that day there was no supervision and no-one was manning the tower. She confirmed that she took the photographs in exhibit

'A'. She claimed that if she had known how dangerous the slides were she would not have allowed her son to use them.

[19] Under cross-examination she agreed that many play areas could be regarded as dangerous. She agreed that some areas have the potential to cause injuries. She reiterated that it was hot on the day in question and that JJ had asked her permission to swim and use the slides. She saw the children coming down the slide, making a noise and playing. She did however not see anyone controlling the access to the slides. She further agreed that there was the possibility that her son could get hurt using the slide, but insisted that it ought not to have been to the extent that he was injured. It was put to her that her initial complaint was that the facility was unsafe and not that the usage of the slide had to be supervised. Counsel for the defendant read to her the original particulars of claim (see exhibit 'E') and proposed to her that it was only after Gregersen's report was released, stating that the structure was safe that the complaint of no control arose as per the amended particulars of claim. Mrs van Vuuren faintly tried to explain that the particulars are similar in that it related to 'safety'.

[20] The plaintiff closed its case and thereafter, the defendant closed its case without calling any witnesses.

[21] I shall be brief in the evaluation of the evidence tendered. Mr Gregersen, although called as an expert in the field of occupational health and safety, ventured on numerous occasions into the field of legal experts. In cross-examination he became uncertain and less persuasive in any opinion proffered. His reliance on the Occupational Health and Safety Act was, given the facts of this case, misplaced. His opinion is not supported by the legislation nor by the facts. At most reliance can be placed on his

examination of the structure. He appears to be duly qualified to offer an opinion on this aspect. His finding was that the slides were structurally safe.

[22] Mr Gregersen desperately tried to explain that any child's parent was prohibited from controlling the usage of the slide since there was a sign that said persons under 12 were not allowed to use the paddling pool. Once more this view is based on his interpretation of what is meant by the said sign. Counsel for the plaintiff, Mr Pillemer, during re-examination, tried to make reference to the Municipality's pool by-laws but failed, since the witness lacked any knowledge of s 9 of the Pool By-law. I am not persuaded that the Pool By-law prohibits a parent from using the stairs going to the slides. In fact what is provided for in terms of section 9 of the By-law as promulgated by 85 of 1989, *pg* 4683, 16 March 1989 is: 'A person commits an offence if at any pool he – (xx) being a person above the age of twelve years enters upon, is on or uses a slide'. Mr Gregersen is factually and legally mistaken.

[23] He conceded that children should be supervised by their parents and/or custodians when on a playground but claimed that such duty is co-shared by the Municipality. The witness failed to substantiate this extra-ordinary opinion. The conclusions reached by Mr Gregersen cannot be reconciled with the evidence or the facts before me.

[24] Mrs van Vuuren was the only other witness called by the plaintiff. She impressed in the witness stand as an honest witness, this much was also conceded by counsel for the defendant, Mr Shapiro. She acknowledged that as a parent she had a duty to safeguard her child on the day. She never assessed the usage of the slide as a dangerous practice until her child was injured on the third time going down the slide. She also conceded that she most certainly did not require a sign to warn her or guide her to supervise her child. When confronted with the earlier particulars which dealt with the

structure not being safe, she could at best explain that the particulars originally and amended dealt with the safety of the slides.

[25] In the light of all the evidence, I find that the plaintiff's son, John Ray Jaques van Vuuren was injured coming down a slide in one of the pools at the Durban beachfront. The slide is a structure provided for by the defendant for the use of children under the age of 12 years old. On the day in question there was a person manning the observation tower as reflected in photograph 13, page 7. This tower is 60 metres away from the slides. The overwhelming evidence shows that the structure was and is safe. What is in issue is whether the Municipality ought to have done more in instances where the slides were used and, if so, whether it was negligent in not safeguarding the use of the slides.

[26] The plaintiff relies on harm that was caused as a result of an omission. It ought to be borne in mind that such harm is not *prima facie* wrongful in our law. The plaintiff had a duty to show that there are policy considerations present which support a finding of wrongfulness. In *Van Eeden v Minister of Safety and Security*¹⁶ Vivier ADP emphasised the test for wrongfulness, in the instance of an omission, as follows:

'Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. 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 the 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

¹⁶ 2003 (1) SA 389 (SCA).

of the many factors which have to be considered. See the judgment of this Court in *Carmichael* at para [7] and recent decisions of this Court in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at paras [14] – [17]; *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) para [6]; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) paras [11] and [31]; *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) para [13] and the unreported judgment of this Court in *Minister of Safety and Security v Van Duivenboden*, case No. 209/2001 delivered on 22 August 2002, para [16].¹⁷

[27] It is assumed, without deciding, for the sake of determining wrongfulness *in casu* that the defendant was negligent. The enquiry based on the abovementioned *dicta* is whether it is reasonable to have expected the Municipality to have acted to prevent any harm to JJ and thus, should it have been done as a matter of public and legal policy.

[28] There is no evidence before this Court that supports the contention that the harm that JJ had suffered would not have occurred had the defendant secured the services of a supervisor who would have controlled access to the slides and the number of children going down. There was nothing in the usage either by the plaintiff's own child or the other children that followed him that alerted his mother to any danger. She did not consider it necessary to prevent any harm in the circumstances. If the failure of the plaintiff is not regarded as blameworthy, on what basis should there be a more onerous burden on the defendant to protect and control the use of the slides? In my view it is reasonable for the Municipality to expect that the parents of young children would supervise and control them. Parents are best equipped to know their children and their children's behaviour, also their strengths and weaknesses which includes their ability to use a water slide. Members of the public have every right to reasonably expect parents to guard their children against harm. JJ was not an unattended minor on this day, he was duly supervised by his mother who was satisfied that the slide was safe and that her child was in no danger.

¹⁷ *Supra* at 395H-396C.

- [29] In my view to place a duty on the local authority to act under circumstances where it is not expected of the parent to act would impose an unsustainable, if not intolerable burden on local authorities to supervise other people's children in instances where the parents are present but fail to do so. It is not reasonable to saddle the local authority with a greater duty of care than what is imposed on parents.¹⁸
- [30] To expect the defendant to employ gatekeepers at the slides to control the number of children using it at a specific time is unreasonable given the circumstances and the facts before me. I am not persuaded on the facts of this case that such a finding would merely result in the defendant employing 'playground police' at this one pool. In fact, such a finding would lead to a duty to secure supervisors or playground police at all playgrounds under the control of the defendant. If such a duty is imposed on the defendant in circumstances where the parent is sufficiently able and capable of exercising parental control, then parents would always be exonerated from exercising parental supervision and care at any playground used by their children. In my view public policy dictates that parents should fulfil the duty of parental care and supervision. They are obligated to do that and act in the interest of their own children.
- [31] Can it be said that the defendant ought to have provided a supervisor at the slide just as a matter of caution? In my view it would be unreasonable to expect the local authority to provide such supervision at an enormous cost just in case of an eventuality. To make such a finding would lead to limitless liability.
- [32] Whilst it is sad that the plaintiff's young child suffered harm on this day, there is no reason to find that the plaintiff should be compensated for any loss

¹⁸ See *Pieterse v Big Sky Trading* 489 CC 2015 JDR 1187 GP paras 31-42.

suffered. The fact that he suffered harm does not translate into a finding that the defendant should be held accountable in circumstances where there is no legal duty. To impose a legal duty on the defendant where no need for such duty has been proved, would not be in accordance with public policy, nor with one's sense of justice. The plaintiff's interest to be compensated is, in my view, outweighed by the greater societal interest.

[33] Finally, it has become trite that the enquiry into wrongfulness focuses on:

'[T]he [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.'¹⁹

[34] The claim fails on the basis that the conduct of the defendant, in this case not to act, is not a wrongful act and accordingly it cannot be held delictually liable.²⁰ For this reason, I do not consider it necessary to deal with other elements, nor with the defences raised by the defendant.

[35] The plaintiff has failed to succeed in the burden of proof.

[36] In the result, the action is dismissed, with costs.

.....

STEYN J

¹⁹ *Loureiro & others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 CC para 53; also see *Za v Smith & another* 2015 (4) SA 574 (SCA) para 15.

²⁰ Cf. *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) and *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) where it was held that the defendants are not delictually liable for reasons of public and legal policy.

Trial heard on :	25 & 26 January 2016
Counsel for the plaintiff :	Mr R Pillemer
Instructed by :	AC de Sousa Attorneys
Counsel for the defendant :	Mr WN Shapiro
Instructed by :	Ngidi & Company
Judgment handed down on :	19 February 2016