

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 2467/2011

In the matter between:

GERHARD JOHANNES BRUWER

Plaintiff

and

BENJAMIN BUCHANAN NORTJE N.O.

First Defendant

BENJAMIN NORTJE N.O.

Second Defendant

HEARD ON: 22 & 23 JANUARY 2013

JUDGMENT BY: LEKALE, J

DELIVERED ON: 21 FEBRUARY 2013

INTRODUCTION AND BACKGROUND

- [1] On 21 February 2009 the plaintiff sustained serious personal injuries when he fell off a cable slide (foefie slide) at the holiday farm ran by the defendants in their capacities as trustees of the De Rust Trust (the trust).
- [2] He, thereafter, instituted action for recovery of general and special damages from the trust on the basis that the defendants were negligent, alternatively grossly negligent, in that they, *inter alia*, failed to mount the cable sufficiently tight and/or to ensure

that the mechanism used for sliding (sliding tong) functions smoothly without any impediments or jerky movements.

- [3] The defendants resist the claim on, *inter alia*, the grounds that the trust was not negligent as to the cause of the plaintiff's injuries and that the trust is contractually exempted from liability for the relevant damages suffered by the plaintiff.
- [4] At the commencement of the trial the parties, in line with their Rule 37 minute, secured an order for separation of issues and, thus, limited the present proceedings to the determination of liability with the question of quantum standing over for determination, if necessary, at a later stage.

ISSUES IN DISPUTE

- [5] The parties are effectively in dispute over whether or not the trust was negligent, alternatively grossly negligent as to the cause of the incident which resulted in the plaintiff sustaining injuries.
- [6] In the event of this question being decided in the affirmative, the parties are in dispute over whether or not the trust is exempted from liability *vis-a-vis* the plaintiff in respect of his injuries.

PLAINTIFF'S CASE

- [7] In support of his claim the plaintiff testified that on the fateful

day he attended at the holiday farm as a guest of his brother-in-law who was celebrating a birthday. He was with his family and duly signed a document at the entrance when they entered the premises. He did not read the relevant document although he could have read the same had he wanted to. They proceeded to the chalet allocated to them. He did not see any other documents or notices in the chalet nor did he see any notices on the premises. They left their luggage at the chalet and proceeded to join other guests for the function. He enjoyed some refreshments, whereafter, they all proceeded to the pool area to watch a game of rugby. On their way to the pool area he went via his chalet and collected his beer cans. All that he remembers, thereafter, is that he was in conversation with his sister-in-law and the next thing he woke up in hospital with extensive personal injuries. He cannot even remember seeing the cable slide.

- [8] **Francois L. Slabbert** testified that he is the plaintiff's brother-in-law and was also a guest at the relevant function. He did not see the notices on the property, but does not dispute that they could have been in place. The accident occurred during the half-time break in the match and he saw children around the cable slide. He saw the wife of one Johnny and their son go down the cable slide without any incidents. The cable slide consisted of a 2.5 metres to 3 metres long cable mounted onto two Bluegum trees with one end on one tree and the other end on the other tree. There was a 3.5 metres high platform for

reaching the cable. The sliding mechanism also had a handhold which a person wishing to slide had to hold with both hands. He had a camera and wanted to take photographs of the plaintiff as he slid down. He saw children sitting down on the cable, but they stood up and left when the plaintiff was on the platform. He saw the plaintiff place his hands on the handhold and lift his feet and slide down. The cable was, however, hanging low with low tension and, at the critical moment, it got stuck and threw the plaintiff up in the air with his feet while his hands remained on the handhold. The plaintiff came down, lost the hold on the mechanism and fell down. He sustained serious injuries.

THE TRUST'S CASE

[9] **Johannes Steyl Willemse** testified as the sole witness for the trust to the effect that he was the manager of the farm at the relevant time. In his view the farm was more suitable for functions and was not necessarily a holiday farm. The trustees are his father-in-law and brother-in-law respectively. The farm was sold in 2010 and well after the incident in question. The cable slide was already in place when he got involved as the manager. The cable slide used to be serviced on a regular basis by technicians at least once a month. He and his niece used the cable that very morning without a problem and so did other people.

[10] Notices to the effect that the use of facilities on the farm was at

own risk were in place and were displayed prominently all over the area. One 2.4 metres x 1.2 metres big notice board was at the entrance as reflected on photographs 15 to and including 17 in exhibit “A”. Notices were, further, placed behind the doors in the chalets and on the tables as per photograph 12 in exhibit “A”. The cable slide was clearly dangerous. The Rules and Regulations referred to in the receipt signed by the plaintiff as reflected on document number 1 on page 3 of exhibit “B” are the ones on page 1 of the same exhibit. It is clear from number 2 of those Rules and Regulations that the trust is exempted from liability for injuries and damages arising from, *inter alia*, the use of facilities. Notwithstanding what the relevant receipt says about Rules and Regulations as well as Terms and Conditions, there existed no separate document dealing with terms and conditions. The only document available was the one outlining what are referred to as “Rules and Regulations” on page 1 of exhibit “B”. Provision was made for English version of the same as A02 while the Afrikaans version was A01.

PLAINTIFF’S CONTENTIONS

[11] Mr Reinders for the plaintiff submits at length that it is patent from evidence that the defendants owed members of the public a duty of care and that they breached it by not ensuring that the relevant facility did not pose a danger to the public.

[12] It is, further, contended for the plaintiff that in law the onus is on

the defendants to prove the terms and conditions of the contract allegedly excluding liability on the part of the trust in respect of the incident in question.

[13] In conclusion it is submitted for the plaintiff that no evidence was tendered by the defendants to prove what it regarded as terms and conditions and that without such terms and conditions there can be no agreement exempting the trust from liability.

[14] In Mr Reinders' view liability should be apportioned at 80/20 in favour of the plaintiff with the same being applicable to costs.

DEFENDANTS' CONTENTIONS

[15] Mr Pohl for the defendants submits that there is no proof of any form of negligence on the part of the trust before the court insofar as no evidence was tendered of any defect in the cable slide.

[16] The harm suffered by the plaintiff was not foreseeable to the trust because undisputed evidence is to the effect that the cable slide had been in use for two years without any harmful incident and was, further, used that morning without any hiccups.

[17] It is, further, contended that the plaintiff consented to the risk of harm insofar as he signed the receipt excluding liability on the part of the trust in circumstances where he knew the

importance of the document in question and he could have read the same if he had wanted to.

[18] The trust took reasonable and sufficient steps to bring the fact and/or import of the exclusionary clause to the attention of the plaintiff through notices which were clear and unambiguous.

[19] The claim should, therefore, be dismissed with costs in Mr Pohl's view.

APPLICABLE LAW

[20] The parties correctly submit that the test for negligence is whether or not a reasonable man in the position of the defendant would have foreseen the reasonable possibility of his conduct injuring another and, if so, whether or not he would have taken reasonable steps to guard against such eventuality, which steps the defendant failed to take. (See **Kruger v Coetzee** 1966 (2) SA 428 (AD) at 430E – F.)

[21] The precise way in which the harm eventuates might not be foreseeable. What must, however, be foreseeable to the *diligens paterfamilias* in the position of the person whose conduct is in issue, is the general manner of the occurrence of the harm in question. (See **Mkhatswa v Minister of Defence** 2000 (1) SA 1104 (SCA) at 1112D and **S v Bochriss Investments (Pty) Ltd and Another** 1988 (1) SA 861 (AD).)

- [22] Parties to a contract may validly and lawfully agree to exempt one of them or each other from liability for specified harm or damages by including exclusionary clauses to that effect in their contracts. Such clauses are enforceable by the courts to the extent that they are not contrary to public policy. (See **Wells v South African Alumenite Co.** 1927 AD 69 at 72 and **Afrox Healthcare Bpk v Strydom** 2002 (6) SA 21 (SCA).)
- [23] An exclusionary clause exempting a party from the consequences of his own negligent conduct is permissible and, as such, legally enforceable. (See **Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another** 2008 (6) SA 654 (SCA) at par [30].)
- [24] As the parties correctly submit the onus of establishing the terms of the contract, *inter alia*, excluding liability is on the party relying on the same and, in the instant matter, on the defendants. (See **Afrox Healthcare Bpk v Strydom**, *supra*, at par [6].)

NEGLIGENCE

- [25] The onus is on the plaintiff to prove negligence on the part of the trust insofar as his claim is based on delict.
- [26] In discharging the onus in question, the plaintiff first has to prove, on a balance of probabilities, that the possibility of the slide mechanism getting stuck on the sliding cable and

catapulting the plaintiff into the air, thus, causing him to fall to his near fatal injuries, was reasonably foreseeable to the reasonable man in the position of the defendants. The only undisputed evidence available in this regard is that no incidents of such nature ever took place in the two years preceding the relevant incident. Slabbert's evidence on this point is, with respect, vague, unreliable and simple inadmissible hearsay. The undisputed and/or common cause evidence is that the facility in question was being serviced regularly and was used without any problems that very morning and immediately before the plaintiff's unfortunate experience. In my view, it can hardly be said that the harm in question was reasonably foreseeable to the *diligens paterfamilias* in the position of the trust.

[27] The plaintiff's claim, in my judgment, fails the very first leg of the enquiry insofar as the concession by Willemse that the cable slide was clearly dangerous does not assist the plaintiff's claim. The concession in question is, in my view, as general as a statement that there always existed the possibility that someone might fall from the slide and injure himself. That concession is not remotely related to the manner in which the fall in the present matter took place. There is no reliable evidence tendered with regard to the actual cause of the plaintiff's fall.

[28] Slabbert testified that there was no visible fault with the slide mechanism. He, in fact, speculated that the tension on the

cable was reduced when a child or children who had been sitting on the same stood up. There is no evidence before the court that the defendants were aware of and, in fact, authorised such a state of affairs. The particulars of such a child or children are not before the court and it is, further, not clear how and at what stage the tension was reduced. In this regard Slabbert's evidence is that the children or the child in question, stood up when the plaintiff was on the platform and, *a fortiori*, before he could slide down the cable. There is, further, no evidence of the effect such a reduction in the tension had on the cable slide and how same could have caused the plaintiff's fall. The possibility of the plaintiff falling in the manner in which he did was, in my view, not so real or reasonable as to be foreseeable to the trust.

[29] Even if I am wrong in the foregoing finding with regard to foreseeability of the reasonable possibility, I am not persuaded that the reasonable man would have taken any steps other than to ensure that the cable slide gets serviced regularly. There exists no evidence of any other reasonable measures which the trust could and should reasonably have taken to guard against the relevant risk. The position would, most probably, be different if evidence was to the effect that the defendants were aware of the need for the tension on the cable to be maintained through external means such as constant human intervention.

[30] The plaintiff contends in the particulars of claim that the trust

failed to ensure that the slide mechanism runs smoothly and has no impediments which subject it to jerky movements. There is, however, no evidence tendered in support of these contentions.

[31] In my judgment the enquiry relating to disclaimer does not arise in the light of the foregoing findings. Even if I am wrong in this regard, I am satisfied from evidence that liability is excluded in the instant matter insofar as the plaintiff admittedly signed the relevant receipt which, *inter alia*, incorporates, by reference, the relevant rules and regulations excluding liability in clear and unambiguous terms.

ORDER

[32] In the result the claim is dismissed with costs.

L. J. LEKALE, J

On behalf of applicant:
Instructed by:

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BLOEMFONTEIN

On behalf of defendants:
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