THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 501/2023

In the matter between:

KRISTINE KALMER **APPELLANT**

and

GAIRONISA DAVIDS NO **FIRST RESPONDENT**

(IN HER CAPACITY AS THE EXECUTOR

IN THE ESTATE: LATE YASMIN SALIE)

WESTERN PROVINCE ATHLETICS **SECOND RESPONDENT**

Neutral citation: *Kristine Kalmer v Gaironisa Davids NO (in her capacity as the Executor in the Estate: late Yasmin Salie) and Another* (Case no 501/2023) [2025] ZASCA 26 (28 March 2025)

Coram: SCHIPPERS, MEYER and SMITH JJA and VALLY and NORMAN AJJA

Heard: 18 February 2025

Delivered: 28 March 2025

Summary: Delict – negligence – runner colliding with member of public during race – route on promenade not cordoned off – runner negligent in failing to keep a proper lookout.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Gamble, Baartman and Mangcu-Lockwood JJ, sitting as court of appeal):

1 The appeal is dismissed with costs.

2 There is no order as to costs in relation to the second respondent's participation in the appeal.

JUDGMENT

Schippers JA (Meyer and Smith JJA and Vally and Norman AJJA concurring)

[1] This appeal arises from an incident which occurred during a ladies' race in Cape Town in 2014, on a part of the course that was open to the public. The appellant, an elite runner competing for points and prizes in the race, collided with Ms Yasmin Salie (Ms Salie), a member of the public. As a result of injuries sustained in the collision, Ms Salie instituted an action for damages in the Western Cape Division of the High Court, Cape Town (the High Court), against the appellant and the second respondent, Western Province Athletics (WPA), the race organiser.

[2] The High Court dismissed Ms Salie's claim with costs. An appeal to a full bench of the High Court succeeded. It held the appellant liable for 30% of the damages that Ms Salie may prove against her, and dismissed the claim against WPA with costs. The respondent's application for special leave to appeal the dismissal of her claim against WPA was refused by this Court, which granted the

appellant special leave to appeal. Ms Gaironisa Davids NO, the executrix of Ms Salie's estate, has been substituted as the first respondent in the appeal.

The facts and proceedings below

[3] The basic facts are uncontroversial and can be briefly stated. It is common ground that the incident occurred whilst the race was in progress on the promenade (or pavement) in Mouille Point, Cape Town, that was not closed off to the public. In fact, during the race a person pushing a pram emerged from a parking lot onto the pavement, which was open to pedestrians and people walking their dogs. So, Ms Salie was entitled to be at the place that she was when the incident occurred. It was also not disputed that there were race marshals on bicycles, in front of the first group of elite runners who were leading the race. There were no cyclists marshalling the runners further back.

[4] Ms Salie did not testify and called Ms Leonie Olckers (Ms Olckers) as a witness. The latter was a participant who had not yet started the race. Ms Olckers said that while the elite athletes were running, she handed her camera to Ms Salie (probably a cell phone) and asked her to take a photo of Ms Olckers and her family. Ms Salie took the photo from the opposite side of the Olckers group on the pavement, with the ocean in the background.

[5] After the photo was taken, the first group of elite runners had passed and Ms Olckers and Ms Salie walked towards each other so that the camera could be returned. They met in the middle of the pavement and were standing still. Ms Olckers noticed a runner (the appellant) coming from her right who shouted: 'Get out of my way!' Next thing the appellant collided with Ms Salie, who fell to the ground. Ms Olckers said that the appellant had 'pushed Ms Salie'. The pavement is six metres wide. The unchallenged evidence was that the appellant was the only runner in the vicinity of Ms Salie and Ms Olckers immediately

before the collision; and that there was enough space for her to pass them on either side. However, as Ms Olckers put it, 'she did not, she was just focused on the direction that she was going'.

[6] This statement accords with the appellant's own evidence. She testified as follows:

'COUNSEL: As you ran you saw pedestrians.

MS KALMER: As I race a 10-kilometre race I'm focused on myself and on the ground in front of me and the athlete in front of me. I don't look at pedestrians or things that I'm running past.'

[7] The appellant confirmed that she runs every race in this manner. When asked whether she would have changed the way she approached her running if there were pedestrians along the same route she was running, she replied 'no'. Her answer is telling:

'COUNSEL: You would still have continued to just look on the ground in front of you and at the other runners without focusing on other users of the sidewalk. Do I understand you correctly?

MS KALMER: Correct.

[8] That the appellant's focus was mainly on herself and the race, is underscored by the fact that she failed to stop after the collision and continued running, despite the fact that the Olckers group shouted at her to stop because Ms Salie had been injured. The appellant herself said that she did not stop but continued with her race, because there were other people who could help Ms Salie. It was also not disputed that the appellant had shouted at Ms Salie and Ms Olckers to get out of the way. The appellant however said: 'I might have shouted something in the line of *watch*'.

[9] As stated, the High Court (Cloete J) dismissed the first respondent's claim. It said that the evidence established that Ms Salie, a spectator, must have been

aware that a race was underway; that the athletes were running at speed; and that she must reasonably have anticipated that other runners would soon be approaching at similar speed. In these circumstances both WPA and the appellant could also reasonably have anticipated that Ms Salie would keep a proper lookout and not disregard her own safety and that of the race participants, by stepping into the path of athletes running in the middle of the pavement.

[10] The fact that Ms Salie and Ms Olckers were stationary when the collision occurred, the court said, was a 'red herring', since on Ms Olckers' evidence, they had 'connected for a moment' before the collision. It found that Ms Olckers had not kept a proper lookout; and that there was no evidence to refute the appellant's version that she first noticed Ms Salie moving into her path roughly one-and-a half seconds before the collision. The appellant had shouted a warning to which Ms Salie apparently did not respond, which, according to the court, lent support to the appellant's version that by then it was too late to avoid the collision. The court stated that it made no sense that one or both would not have taken avoiding action; and that the urgency of the moment was such that the appellant 'did not even recall seeing Olckers on the pavement as well'.

[11] The High Court concluded that Ms Salie failed to prove negligence against both WPA and the appellant. It held that the appellant had run the race as she was entitled to do; that she could not reasonably have been expected to foresee that Ms Salie would ignore a participant approaching at speed and move into the 'danger zone' of which she must have been aware; and that the appellant tried to avoid the collision by shouting out 'watch', before it occurred.

[12] Before the Full Court the respondent's counsel conceded that Ms Salie was contributorily negligent in failing to keep a proper lookout and observing the appellant running on the pavement. Concerning the appellant's approach in simply looking on the ground in front of her and not focusing on other users of

the pavement, the Full Court said that 'she was running as if in a bubble, oblivious to what was happening around her and intent only on achieving her goal of winning the race'. Although she could not be criticised for this running style, the court said, she was not running on a track but in a public space and all the participants in the race had to take account of this, which was one of the race conditions. The prospect of encountering non-runners, the Full Court held, was entirely foreseeable and the appellant was duty-bound to keep a proper lookout.

[13] The Full Court found that a runner in the position of the appellant would have foreseen the possibility that other users of the pavement might cross her path and that she would be required to take evasive action while running. However, she adopted a blinkered approach. Had she kept a proper lookout, it would have taken little effort to avoid the collision by moving to the left or right of Ms Salie. The court concluded that the appellant was negligent, which contributed to the collision.

Submissions in this Court

[14] Counsel for the appellant submitted that the first respondent failed to prove the incident or the 'duty of care' as pleaded. The particulars of claim read as follows:

'3. **The Incident**

3.1 On or about 6 April 2014 at about 07h20, the Plaintiff was a (stationary) pedestrian on the pavement at the Promenade at Mouille Point, Cape Town, where she was pushed out of the way by the Second Defendant, an athlete who participated in a race which was organised by the First Defendant;

3.2 First Defendant as the organiser of the racing event, and the Second Defendant as an athlete, who participated in the said event, owed the Plaintiff a duty of care and were negligent in one or more of the following respects:

. . .

The Second Defendant, *inter alia*, had the following Duty of Care towards the Plaintiff

3.2.4 The Second Defendant bore the duty to take effective and reasonable steps to safeguard the Plaintiff from sustaining undue physical harm, by not pushing the Plaintiff out of the way, but failed to recognise such duty, pushed Plaintiff out of the way and uttered the words "*get out of my way*" or words to similar effect, when by the exercise of reasonable care she could and should have been able to exercise such duty.

3.2.5 The second Defendant bore the duty to take any or adequate and/or reasonable steps to preserve and protect the bodily integrity and dignity of the Plaintiff, but failed to do so, when by refraining from pushing the Plaintiff, she would have been able to do so.

Foreseeability

3.2.6 The First and Second Defendants should have foreseen the possibility of harm to the Plaintiff, when acting as above, and should have acted in accordance with such apprehension in the same way that a reasonable person would have done.

3.3 The First and Second Defendants' failure to exercise their respective duties of care and failure to act in accordance with the apprehension that the incident may occur, caused Plaintiff to sustain injuries.'

[15] The appellant further submitted that the first respondent was precluded from relying on an allegation that the appellant failed to keep a proper lookout, as this was not pleaded. Even though the appellant was not called upon to meet such a case, so it was submitted, the first respondent failed to establish that the appellant, in the circumstances, 'was required to keep more of a lookout' than what she testified to. If it is found that when keeping a lookout more was required of the appellant, then her negligent failure to do so was not wrongful.

[16] The appellant's counsel also submitted that Ms Salie's negligence was the sole cause of the collision. She had been warned of the passing of the first group of runners and should reasonably have foreseen that she would be an obstruction to further oncoming runners (including the appellant), by being in the middle of the pavement, which could result in injury if a runner collided with her.

[17] Finally, it was submitted that the Full Court failed to consider the principles governing the duty of care owed by a race participant to a spectator and the risk

taken by the latter, based on English authorities referred to in *Clark*.[1] These include the following: the nature of, and rules applicable to, the event; the matter has to be considered from the perspective of the reasonable spectator as well as the reasonable participant, which takes into account that the former knows that the latter will concentrate her attention on winning, particularly if the competition is a fast moving one; and a person attending a game or competition takes the risk of any damage caused to her by an act of a participant done in the course of the game or competition.

[18] The first respondent sought to argue that the race officials were negligent in failing to keep a proper lookout or sounding a warning that Ms Salie was in the middle of the pavement, and consequently that WPA was vicariously liable for their conduct; that the appellant was the sole cause of the collision; and that the Full Court erred in holding that Ms Salie was contributorily negligent. However, this is impermissible since the first respondent's application for leave to appeal these findings was refused. This Court lacks jurisdiction to entertain an appeal in the absence of leave being granted.[2]

[19] The first respondent submitted that the appellant was negligent. She knew that she was running on a pavement where she was likely to encounter members of the public; accepted that she should have kept a proper lookout; and knew that a collision with someone would be potentially calamitous. Despite this, she ran the race, looking on the ground five metres in front of her and occasionally at other competitors, regardless of the circumstances on the route.

[20] *Clark*, it was submitted on behalf of the first respondent, is distinguishable. Ms Salie was not a participant in an event at a sportsground; nor did she purchase

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[1] *Clark and Another v Welsh* 1975 (4) SA 469 (W) at 478A.
[2] *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA); [2015] 2 All SA 322 (SCA) paras 12-14.

a ticket containing a disclaimer or similar clause excluding liability. Rather, when the collision occurred, she was on a pavement to which the public had access, that formed part of the course on which the race was run.

[21] WPA's argument is confined to costs, on the basis that it was compelled to participate in the appeal and file heads of argument to oppose the first respondent's attempt to hold WPA liable for the harm suffered by Ms Salie. It submitted that this Court had refused the first respondent leave to appeal the judgment of the Full Court; and that the scope of the appeal is limited to the appellant's notice of appeal in which she seeks an order that the first respondent's claim be dismissed with costs.

The pleaded case and negligence

[22] There are essentially only two straightforward issues raised by this appeal. The first is whether the particulars of claim sustain a cause of action that the appellant was negligent in failing to keep a proper lookout; and the second, whether she was negligent. The appellant's reliance on English authorities concerning the duties of participants and spectators at sporting events is misplaced. The race was not held at a stadium or similar venue where the organisers are responsible for the safety and security of spectators, and where their attendance and risks are regulated through ticketing.

[23] The particulars of claim are not a model of clarity. This is largely because this pleading confusingly refers to the English 'duty of care' doctrine. In terms of this doctrine, one must first establish whether the defendant owed the plaintiff a duty of care (the duty issue) and then determine whether there was a breach of this duty (the negligence issue). As Van der Walt and Midgley state,[3] 'negligence *simpliciter* is not sufficient to found liability; the defendant must have had a duty

[3] J C Van der Walt and J R Midgley *Principles of Delict* 4 ed (2016) at 118.

to conform to reasonable standards of care'. If both questions are answered in the affirmative, negligence is said to be present.[4]

[24] In deciding whether a duty of care was owed, the criterion traditionally was whether a reasonable person in the position of the defendant would foresee that her conduct might cause damage to the plaintiff. This was a policy-based decision 'in which foreseeability plays no role as to whether interests should be protected against negligent conduct'.[5] In determining whether there was a breach of the duty of care, the court considers whether the defendant exercised the standard of care that the reasonable person would have exercised to prevent damage. Stated differently, would the reasonable person, in contrast to the defendant, have prevented the damage?[6]

[25] There is much to be said for the view of Neethling and Potgieter that the duty of care doctrine is foreign to the principles of Roman Dutch law – the basis of our law of delict. The authors say that the doctrine 'is an unnecessary and roundabout way of establishing what may be established directly by means of the reasonable person test for negligence, ie, whether the reasonable person would have foreseen and guarded against damage'.[7] It is however not necessary to decide this issue, in the absence of argument.

[26] What is more, the duty of care doctrine has created confusion between the test for wrongfulness (breach of a legal duty) with the test for negligence. The test for wrongfulness is whether the policy and legal convictions of the community, constitutionally understood, regard the harm-causing conduct as acceptable. It is based on the duty not to cause harm.[8] This must not be confused

[4] J Neethling and J M Potgieter *Law of Delict* 8 ed (2020) at 188.
[5] *Ibid*; J C Van der Walt and J R Midgley *Principles of Delict* 4 ed (2016) at 118-120.
[6] Neethling and Potgieter fn 4 at 188; Van der Walt and Midgley fn 3 at 118.
[7] Neethling and Potgieter fn 4 at 188.
[8] *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC); [2014] ZACC 4 para 53.

with the duty to take steps to guard against damage in the case where a reasonable person in the position of the defendant would foresee such damage, would take steps to guard against it, and the defendant failed to take such steps.[9] As Scott JA observed in *McIntosh*:

'[T]he "duty", and sometimes even the expression "legal duty", in this context, must not be confused with the concept of "legal duty" in the context of wrongfulness which, as has been indicated, is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression "duty of care" is similarly a source of confusion. In English law "duty of care" is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in *Trustees, Two Oceans Aquarium Trust* at 144F, "duty of care" in English law "straddles both elements of wrongfulness and negligence".'[10]

[27] I return to the pleadings in the present case. A combined summons must contain a clear and concise statement of the material facts on which the pleader relies for her claim with sufficient particularity to enable the opposite party to reply thereto.[11]

[28] The appellant's counsel rightly conceded that there is no allegation in the particulars of claim that, in pushing Ms Salie out of the way, the appellant acted intentionally. Likewise, the appellant's defence was not that she did not deliberately push Ms Salie. Rather, the particulars of claim, properly construed, state that the appellant pushed over, ran over, or collided with Ms Salie whilst running; and that she was negligent in doing so and in failing to avoid the collision, when by the exercise of reasonable care, she could and should have done so. One of the ways to avoid the collision was to keep a proper lookout. Put

[9] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.
[10] *McIntosh v Premier, KwaZulu-Natal and Another* [2008] ZASCA 62; 2008 (6) SA 1 (SCA); [2008] 4 All SA 72 (SCA) at 8A-9B.
[11] *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 102A.

differently, a reasonable person in the appellant's position would have foreseen the possibility of harm to Ms Salie, and would have taken steps to guard against it (by keeping a proper lookout). And it was alleged that the appellant failed to take such steps.

[29] The particulars further state that the appellant had a duty to take reasonable steps to protect Ms Salie's bodily integrity; that she failed to do so; and that she would have been able to do so had she not collided with Ms Salie. Her failure to act in accordance with an apprehension that the incident may occur (by keeping a proper lookout), caused Ms Salie to sustain injury.

[30] That it was Ms Salie's case that the appellant had not intentionally pushed her, is confirmed in the plea. In amplification of her denial of paragraph 3.2.4 and 3.2.5 of the particulars of claim, the appellant pleaded that Ms Salie had stepped in front of her; and that prior to the impact the appellant had raised both her arms and shouted at Ms Salie, 'watch!' Then it is said that after *colliding with the plaintiff*, the appellant continued her participation in the event. For the above reasons, the submission that Ms Salie failed to prove the incident as pleaded, is unsound.

[31] That leaves negligence. On her own version, the appellant was negligent. Contrary to her defence, this is not a case where Ms Salie suddenly stepped into the appellant's path. In any event, her evidence that Ms Salie had stepped into the middle of the pavement, was elicited through a leading question by her counsel. She conceded that there was nothing that impeded her view; that where she focused was entirely up to her; and that she must have realised that if she collided with any person, the consequences might be calamitous. After these concessions, the following statement was put to the appellant:

'COUNSEL: And I say for those reasons you should have looked to see where you were going. Am I right?

MS KALMER: You are correct.'

[32] It is beyond doubt that had the appellant looked to see where she was going, she would have seen Ms Salie and Ms Olckers. On this score, the record speaks for itself:

'COUNSEL: . . . We know that at some stage she was standing against the railings and at some stage she moved into the centre of the sidewalk, where she was speaking to Ms Olckers. Now, if you saw her moving and you knew the speed at which you were running, you could easily have shouted out when you were a distance away so that she would be aware of you coming. Am I right?

MS KALMER: I didn't see her.

COUNCIL: That's the point.'

[33] The unchallenged evidence is that Ms Salie and Ms Olckers were stationary in the middle of the pavement when the collision occurred. It was never put to Ms Olckers that it was unsafe for her to walk across the pavement when she did. The appellant was running in the middle of the pavement, which is six metres wide. She could simply have slowed down or run past Ms Salie and Ms Olckers on either side, and the collision would not have occurred. This part of the course was known to the appellant: she had run the race many times before.

[34] In addition, the collision is explicable on the appellant's own approach to every race she runs – focusing on herself, the ground in front of her and her competitors, with no regard for other users of the pavement and oblivious to what is happening around her. And Ms Olckers – a complete stranger to the appellant – could never have known of this approach, unless she had witnessed the appellant's conduct which showed that she was focused on the race and nothing else. This explains why the appellant continued running and why it was necessary for the Olckers group to shout at her to stop. It also explains why she did not see that she had run past a child on a bicycle. The evidence showed that this child

was on the pavement as women were running at pace; and it would have been catastrophic if that child had moved her bicycle in front of the runners.

[35] Even on the appellant's own version, she was negligent. If one accepts that she saw Ms Salie moving across her path from right to left when the appellant was five to eight metres from her, a reasonable person in the position of the appellant would have been alert to the real possibility that Ms Salie would move into her path. That person would have adjusted her running accordingly by slowing down or taking steps to avoid a collision. But the appellant failed to do so because of her uncompromising approach, quoted above.

[36] What remains is the costs order sought by WPA. It submits that it has incurred unnecessary costs in this Court in seeking to avert an adverse order that might be granted against it. However, WPA is mistaken. It was aware that this Court had dismissed the first respondent's application for special leave to appeal the order dismissing Ms Salie's claim against WPA with costs. Consequently, there was no basis for the first respondent to obtain such an order. The appearance of WPA in this Court was unnecessary. There is no reason why it could not enforce the costs order granted in its favour by the Full Court. Accordingly, there will be no order as to costs in relation to the WPA.

[37] The following order is made:

1 The appeal is dismissed with costs.

2 There is no order as to costs in relation to the second respondent's participation in the appeal.

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A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For appellants:	P J Combrinck SC
Instructed by:	Cliffe Dekker Hofmeyr, Cape Town
	Claude Reid Attorneys, Bloemfontein
For first respondent:	P J Tredoux
Instructed by:	JG Swart Attorneys Inc, Cape Town
	EG Cooper Majiedt Inc, Bloemfontein
For second respondent:	J H Loots SC
Instructed by:	Norton Rose Fulbright South Africa Inc, Cape Town
	Webbers Attorneys, Bloemfontein