



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **A108/2025**

In the matter between:

GAMLAM INVESTMENTS (PTY) LTD

Plaintiff

and

VIRGINIA BERNADETTE COETZEE

Defendant

Heard on: 24 October 2025

Delivered electronically on: 25 November 2025

Summary: Delict - Negligence is a legal conclusion reached by the court based on an objective analysis of the facts, and it cannot be established merely through a litigant's self-admission. - It is the court's responsibility to apply established legal standards to the evidence presented to determine whether negligence occurred.

A finding of negligence is not negated by a reliance on routine inspections and maintenance schedules. The fact that a defect remained undetected until the incident occurred,- and subsequently required immediate repair, demonstrates that the defect was discoverable and should have been identified prior to the event.

Contributory negligence - The law does not require individuals to exercise an extreme or excessive level of vigilance. Pedestrians, or patrons, are not obligated to constantly scan the ground for defects that should not reasonably be present in areas accessible to the public.

Causation - A party cannot escape liability by claiming a lack of knowledge if that ignorance is a direct result of their own failure to conduct adequate

inspections. - Ignorance is not a valid defense when it arises from a negligent omission of duty.

ORDER

Appeal dismissed.

JUDGEMENT

ADAMS AJ

Introduction

[1]. This is an appeal against the judgment of the Regional Magistrate, who held the appellant liable for the respondent's injuries sustained when she stepped into an indentation within the appellant's parking-area roadway. The appellant challenges both the factual and legal findings on negligence, as well as the court's refusal to apportion fault.

[2]. The appeal was lodged after judgment on quantum was delivered by the Magistrate in March 2025 pursuant, to the separation of merits and quantum. Notice of appeal in terms of Rule 51 of the Magistrate's Court Rules was lodged on 22 April 2025.

Grounds of appeal

[3]. The appellant seeks to assail the judgment on numerous grounds which are set out in the notice at length and in some detail. For present purposes, those grounds are succinctly summarised in the following terms:

The appeal is directed at the Magistrate's factual and legal findings relating to the condition of the premises, the adequacy of the appellant's maintenance measures, and the conclusion that the respondent's fall was caused by the appellant's conduct rather than her own negligence. It is submitted that, on a proper assessment of the evidence, the Magistrate's findings on negligence and contributory negligence cannot be sustained.

- [4]. In summary therefore, the appellant's case on appeal is that the Magistrate misdirected himself in his assessment of the evidence, credibility findings, and legal conclusions on negligence and contributory negligence, and that on a proper evaluation, the respondent's own conduct was the cause of her fall.

The proceedings in the court a quo

The witnesses

- [5]. The plaintiff, Ms. Virginia Bernadette Coetzee, together with her friend and eyewitness, Ms. Kirsten Mongie, testified on behalf of the plaintiff. The defendant called a single witness, Ms. Elzette Oosthuizen, who was at all material times employed by the defendant as a legal administrator.

The evidence

- [6]. The factual background is clearly and usefully detailed in the lower court's judgment, which fully set out the events that occurred both before

and after the incident involving the respondent. As such, it is not necessary to repeat them in this judgment, save for the salient points.

[7]. The central facts required to decide this appeal are largely undisputed and are recorded below. There is no dispute that on 3 August 2017, the defendant owned and managed the property in-house. It was also not disputed that the plaintiff visited the defendant's premises in the company of two friends. It is further common cause that the plaintiff walked in the middle of her companions. After walking to and from the Spar store, she carried two plastic bags containing wine bottles.

[8]. The plaintiff testified that after descending the ramp, crossing the speed hump, and proceeding a few meters, she fell. She recalled that at the time of the fall, she "felt nothing under [her]", her body lunged forward, and she fell. It was later determined that she had stepped into a sunken area in the tarred surface. Ms. Mongie, an eyewitness who also took the photographs contained in the trial bundle, confirmed this version of events. The indentation was located in the lane she was crossing toward her vehicle.

[9]. Ms. Oosthuizen testified that she is employed by Gamlam Investment Properties, the owner of Brighton Square Mall, as a legal administrator. She became aware of both the plaintiff's claim and the indented road surface upon service of summons during March 2018. She testified that she convenes weekly meetings with all centre managers and did not consider the area in question to be a hazard.

[10]. According to her, general maintenance of the properties is carried out twice yearly, while repairs during the rainy season are attended to by a contractor on an ad hoc basis. The area in question was repaired subsequent to the accident of the respondent to prevent future incidents. Under cross-examination, she conceded that the defendant bears a legal duty to ensure the reasonable safety of patrons and to warn them of hazards when necessary.

[11]. The parties agreed during the testimony of Ms. Mongie, that the affected area measured approximately 2.5 square meters. It was established that a shallow pothole or depression existed in the parking surface. The respondent testified that the defect was not readily visible because its colour blended with the surrounding tar and it was covered by dust. The appellant maintained that the depression was minor, clearly visible, and not a hazard. After receipt of the summons, the appellant repaired the affected area, although denying that the repair constituted any admission of liability.

Findings of the court a quo

[12]. The Court a quo held Ms. Oosthuizen to have been a defensive and biased witness, reluctant to make necessary concessions. Her evidence was found to be neither candid nor credible. Her late admission that repairs were undertaken to prevent future incidents underscores the defendant's prior neglect.

[13]. The plaintiff and Ms. Mongie, on the other hand, were held to be credible and consistent. Both testified that the indentation was not visible, that there were no warning signs to alert patrons to the defect, and that it blended with the surrounding tar surface. Their evidence was corroborated by the photographs contained in the trial bundle.

[14]. The Magistrate found that the appellant, as owner, owed a duty of care to members of the public using the parking area, including the respondent. The court a quo held that a reasonable owner would have foreseen the risk of harm arising from such a surface defect and would have taken steps to repair or cordon off the affected area. The court a quo held that the appellant was thus negligent in failing to maintain the parking surface in a reasonably safe condition.

[15]. The court rejected the contention that the respondent was negligent, finding that she was entitled to assume the surface would be reasonably safe for pedestrian use. It further found that the respondent was not contributorily negligent and accordingly held the appellant liable for the respondent's proven damages. Judgment was accordingly granted in favour of the respondent on the merits.

[16]. The court a quo determined the issues after hearing and considering the evidence and concluded that the defendant was liable for the plaintiff's proven damages and for the costs of suit, including the costs of counsel. It is this judgment that the appellant (defendant a quo) seeks to assail in these proceedings, contending that the court a quo erred

both on the facts and in the application of the legal principles governing negligence.

Submissions before this Court

[17]. The appellant submits that the Magistrate erred in finding negligence where the shallow indentation was neither a pothole nor an obvious hazard, had caused no prior incidents, and was reasonably maintained through routine inspections and scheduled roadwork. The further submissions are that the post-incident repair was consistent with existing maintenance practices and does not justify an adverse inference. On the evidence, so the appellant contends, it could not reasonably have foreseen or prevented harm.

[18]. Conversely, the appellant contends that the respondent's own evidence establishes that she failed to keep a proper lookout and that she admitted negligence in that had she looked down, she would have avoided the incident. It is submitted that the respondent walked in the middle of the road at dusk, carrying items in both hands, conversing with friends, unfamiliar with the premises, and failed to observe even a marked speed bump. The appellant submitted that the Magistrate failed to properly consider this decisive evidence or address apportionment. Should any liability attach, so the appellant contends, established authority supports a finding of at least 50% contributory negligence.

[19]. The respondent supports the reasoning and conclusions of the court a quo, contending that the appeal is devoid of merit and should be dismissed with costs.

Issues for determination

[20]. The central issues for determination by this Court may be formulated tersely as follows:

The primary issue for determination is whether the plaintiff's fall on the date in question was caused by a defect or indentation in the surface of the parking area. Closely related to this is the question of the nature and extent of the legal duty owed by the defendant, as occupier, to patrons of the premises. In particular, the Court must consider whether the defendant failed to maintain the parking area in a condition that was reasonably safe, and whether any such failure constitutes negligence.

[21]. This court must also consider whether the respondent's fall was brought about by a negligent breach of any duty by the appellant or whether it was entirely the fault of the respondent. If the fall was not entirely attributable to the respondent, consideration must be given to whether contributory negligence on her part played a role in the incident. Finally, the Court must consider whether the findings of the court a quo in relation to these questions reveal any misdirection that would warrant appellate interference.

Applicable legal principles

[22]. It is well established that an appellate court will be slow to disturb a trial court's factual findings, save where they are demonstrably wrong or tainted by a material misdirection. This deference arises from the trial court's distinct advantage in observing the witnesses first-hand and evaluating their demeanour and credibility. Accordingly, interference with the trial court's assessment of oral evidence is warranted only in exceptional circumstances.

[23]. In *S v Francis*¹, it was held that:

"The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

¹ 1991 (1) SACR 198 (A) at 198j-199a. See also *Bee v Road Accident Fund* (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA) at paragraph 46.

[24]. In appeals involving damages, the factual findings of the trial court are generally accepted as correct, unless clear error is shown. It is therefore for the appellant to demonstrate that those findings cannot be sustained.

[25]. The law of delict concerns the circumstances in which one person may claim compensation from another for harm suffered. The essential elements of a delict, as listed by Boberg² and confirmed by subsequent authority, are:

- (1) Harm sustained by the plaintiff;
- (2) Conduct by the defendant;
- (3) Wrongfulness;
- (4) Causation; and
- (5) Fault or blameworthiness.³

[26]. It is trite that while the wrongfulness of a positive injurious act is presumed, an omission is *prima facie* lawful, unless circumstances dictate otherwise.

[27]. Conduct may manifest either as a positive act or as an omission. An omission is wrongful where the defendant, by virtue of ownership or control of the property, bore a legal duty to take reasonable preventative

² Boberg, P.Q.R., *The Law of Delict*, 1984 at page 24 – 25.

³ In *Yende v City of Johannesburg Metropolitan Municipality and Another* (53968/2021) [2025] ZAGPJHC 392 (22 April 2025), the Court stated that for a plaintiff to succeed, she bears the onus of establishing the five elements of a delict: (1) conduct (either act or omission); (2) wrongfulness; (3) negligence (fault); (4) causation; and (5) harm suffered.

measures and failed to do so. Whether conduct is wrongful is determined by considerations of legal and public policy.

[28]. Negligence entails an enquiry into whether a reasonable person in the defendant's position would have foreseen the reasonable possibility of harm and taken steps to prevent it, and whether the defendant's failure to act accordingly constitutes a deviation from the standard of the reasonable person.

[29]. Causation comprises both factual causation, ordinarily assessed by the "but-for" test, and legal causation, which limits liability to consequences sufficiently closely linked to the wrongful and negligent conduct. Harm requires proof of personal injury and demonstrable loss flowing therefrom.

[30]. The well-known test for negligence was articulated in *Kruger v Coetzee*⁴.

"For the purposes of liability, culpa arises if—

- (a) a diligens paterfamilias in the position of the defendant would foresee the reasonable possibility of his conduct injuring another and causing him patrimonial loss, and would take reasonable steps to guard against such occurrence, and*
- (b) the defendant failed to take such steps."*

⁴ 1966 (2) SA 428 (A) at 430E–F:

[31]. The principle is settled that an owner of premises owes a legal duty to take reasonable precautions to prevent foreseeable injury to patrons.⁵ Such owners of premises are enjoined to take reasonable care to ensure that the premises are safe for ordinary use. The duty is not absolute, but one of reasonableness assessed in the light of the circumstances.⁶

[32]. Contributory negligence is governed by the Apportionment of Damages Act 34 of 1956. Where both parties are negligent, the court must apportion damages according to their respective degrees of fault.

[33]. Negligence is ultimately a legal conclusion, not a matter of self-admission. The court must determine it objectively on the facts.

[34]. South African courts have long recognised the right of patrons to be protected from injury arising from hazards on commercial premises where no reasonable steps were taken by the owner to prevent such injury.⁷

[35]. Similarly, in *Chartaprops 16 (Pty) Ltd v Silberman*⁸, it was held that liability may arise from a failure to adhere to one's own maintenance system, as reasonable foreseeability of injury imposes a corresponding duty to act.

⁵ *Holtzhausen v Cenprop Real Estate (Pty) Ltd* 2021 (4) SA 221 (WCC).

⁶ *Probst v Pick 'n Pay Retailers (Pty) Ltd* 1998 (2) SA 192 (W), the Court emphasized that while a property owner's duty is not absolute, it does require a system ensuring that hazards are detected and rectified with reasonable promptitude.

⁷ *Probst supra*.

⁸ 2009 (1) SA 265 (SCA).

[36]. In *Checkers Supermarket v Lindsay*⁹ the SCA set out what the applicable test is, namely:

‘In our law liability for negligence arises if it is foreseen that there is a reasonable possibility of conduct causing harm to an innocent third party, and where there is an omission or failure to take reasonable steps to guard against such occurrence. The duty of a supermarket owner/keeper to persons entering its supermarket at all times during trading hours is aptly espoused by Stegmann J as follows:

“The duty on the keeper of a supermarket to take reasonable steps is not so onerous as to require that every spillage must be discovered and cleaned up as soon as it occurs. Nevertheless, it does require a system which will ensure that spillages are not allowed to create potential hazards for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptitude.”.’

Evaluation of the merits of the appeal

[37]. Whether there was negligence on the part of the appellant

The appellant’s central submission is that the indentation was minor, neither a pothole nor an obvious hazard, and therefore, not reasonably foreseeable to give rise to harm. This characterisation is not borne out by the record. The indentation extended over a discernible area in a zone routinely traversed by pedestrians, particularly during peak trading hours. The test in *Kruger v Coetzee*, supra requires only that a reasonable person would foresee the possibility of harm and take steps to prevent it. The magistrate found, on the evidence, that the defect was visible, longstanding, and readily detectable upon proper inspection.

⁹ *Checkers Supermarket v Lindsay* [2009] ZASCA 26; 2009 (4) 459 (SCA) para 5.

[38]. The appellant exercised full control over the premises and bore the responsibility for ensuring that common areas were reasonably safe. Its failure to detect and remedy a hazard that ought to have been identified through reasonable inspection satisfies the requirement of wrongfulness. On this basis, he concluded that the appellant failed to exercise the degree of care expected of a reasonable property controller. There is no basis to interfere with that conclusion. A reasonable person would have conducted regular inspections and remedied the hazard. The appellant's failure to do so constitutes a deviation from the standard of the reasonable person.

[39]. The magistrate was therefore correct in concluding that a property controller or owner inviting the public onto its premises must anticipate that pedestrians will utilise the roadway and must ensure that the surface is free of avoidable hazards. The owner bears a legal duty to take reasonable measures to ensure their safety. This duty exists independent of proven subjective knowledge of the defect. It encompasses the obligation to conduct regular inspections and to identify hazards that a reasonable person in the controller's position would detect.

[40]. The appellant's reliance on routine inspections and scheduled maintenance does not undermine the finding of negligence. That the defect persisted and required prompt repair immediately after the incident demonstrates that it was both remediable and should have been detected earlier. The magistrate's inference that the appellant failed to take reasonable measures falls within the bounds of the evidence and discloses no misdirection. The presence of the depression in a pedestrian area created a foreseeable risk of harm. A reasonable occupier [in the position of the appellant] would have foreseen that a member of the public might

trip and/or fall and would have taken minimal and inexpensive steps to repair or cordon off the area. The appellant's failure to do so constitutes negligence within the *Kruger v Coetzee* framework.

Whether the respondent was negligent or contributory negligent

[41]. The appellant's further submission, namely that the respondent was the author of her own misfortune and failed to keep a proper lookout, also cannot succeed. Whether conduct is negligent is a conclusion to be drawn by the court and not determined by the respondent's subjective description of her own conduct in cross-examination. The existence of a hazardous defect in a busy common area, combined with the appellant's failure to detect or repair it, was the primary cause of the incident.

[42]. The respondent's evidence was that she walked at a normal pace and did not see the depression before falling. She denied being distracted or careless. Her version was consistent and unshaken in cross-examination. A patron visiting a shopping mall is entitled to expect that the parking surface will be even and maintained. It is unreasonable to expect patrons to look down at their feet when walking on such premises.

[43]. The Magistrate considered this evidence and, in my view, correctly declined to find contributory negligence. Pedestrians in a busy parking area cannot be expected to split their attention between moving vehicles and every irregularity on the road surface. The respondent walked at a normal pace, in daylight transitioning to dusk, and was entitled to assume that the premises were reasonably safe. The law does not demand hypervigilance, nor does it impose on pedestrians a duty to scan the

ground continuously for defects that ought not to exist on premises held open to the public. Her conduct does not rise to negligence in law.

[44]. The respondent's conduct similarly does not establish contributory negligence. Members of the public are entitled to assume that the premises they are invited to use are reasonably safe. I stress again, the law does not require pedestrians to scrutinise every step while traversing a parking surface that appears level and unobstructed.

[45]. The appellant's contention that the respondent was the sole cause of her injuries is therefore unsustainable. The appellant's argument that the respondent "admitted negligence" is misplaced. A witness's lay concession does not bind the court, nor does it displace the objective test of the reasonable pedestrian. Negligence is a legal conclusion, not a factual one, and must be determined objectively. The magistrate weighed the relevant circumstances and, having evaluated the credibility of the witnesses, concluded that the respondent's conduct fell within the range of reasonableness. There is no basis for appellate interference with these factual findings. The magistrate was correct in rejecting any suggestion that the respondent's conduct broke the chain of causation or diminished the appellant's responsibility.

Causation

[46]. The appellant maintains that the respondent failed to establish causation. The magistrate applied the "but-for" test and found that but for the unrepaired defect, the respondent would not have fallen. That finding is supported by the evidence and cannot be faulted.

[47]. The causal link between the appellant's omission and the respondent's injury was correctly established. But for the existence of the unrepaired depression, the respondent would not have fallen. The harm was a direct and reasonably foreseeable result of the appellant's failure to maintain the surface. It was contended that the defect only came to its attention after the fact of the accident and some nine months later with no incidents other than that involving the respondent reported. The appellant cannot avoid liability by asserting a lack of knowledge where that lack of knowledge itself stems from the negligent omission to conduct adequate inspections.

Remedial steps and inferences

[48]. The appellant's maintenance manager testified that inspections were carried out periodically, but no record of any inspection immediately prior to the incident was produced. She conceded that defects could develop between inspections and that the depression might have existed for some time. Ms. Oosthuizen's evidence revealed that she became aware of the defective road surface only upon receipt of the summons, approximately nine months after the incident.

[49]. During that period, no inspection or repair had taken place. Despite her claim of regular maintenance, her evidence failed to disclose a proactive system addressing such hazards. The area was under the defendant's control, and its failure to ensure that the parking surface was

maintained in a reasonably safe condition exposed patrons to foreseeable danger.

[50]. The appellant's post-incident repair of the defect, while not conclusive proof of negligence, is consistent with an acknowledgment that the area was unsafe. The timing of the repair, shortly after service of summons, supports the inference that the defect was considered problematic. Photographs taken shortly after the incident depict a discernible defective road surface of irregular shape. The inference that it posed a tripping hazard is reasonable. The court a quo's finding in this regard cannot be said to be plainly wrong.

Whether the Magistrate erred in finding negligence

[51]. The Magistrate correctly found that the appellant, as an owner inviting members of the public onto its premises, bore a heightened duty to maintain safe walkways, including areas where pedestrian and vehicular movement intersect.

[52]. The appellant's reliance on its maintenance regime does not displace the finding of negligence. Weekly, visual inspections and biannual road repairs do not absolve an occupier where a defect is plainly present, persistent, and situated in a well-traversed area. The fact that the appellant repaired the indentation once the incident was reported supports, rather than undermines, the inference that it was capable of being remedied with minimal effort.

[53]. The Magistrate committed no misdirection on the facts or the law. The defect was foreseeable and preventable; the appellant failed to take reasonable steps to remedy it; and the respondent's conduct did not warrant apportionment. The magistrate correctly applied the legal principles governing foreseeability and preventability, and his findings are supported by the evidentiary record. The appellant has failed to demonstrate any misdirection or error warranting appellate interference.

The appeal must accordingly be dismissed.

Order

In the result, I propose the following order :

1. The appeal is dismissed with costs.

ACTING JUDGE OF THE HIGH COURT
M F ADAMS

I agree and it is so ordered

CN NZIWENI
JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant : Adv. G Slingers
Instructed by : C&A Friedlander Inc Cape Town

For the Defendant : Adv. E Benade
Instructed by : Visagie Vos Inc. Cape Town