



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

JUDGMENT

Case No: 16771/2019

In the matter between:

LORRAINE JANE PARKER

PLAINTIFF

and

DANIEL PRICE

FIRST DEFENDANT

ANETTE PRICE

SECOND DEFENDANT

Coram: MPHEGO AJ

**Heard: 2 September 2025 (The parties filed supplementary written
submissions on 10 and 19 September 2025, respectively)**

Delivered: 12 March 2026

JUDGMENT

INTRODUCTION

- [1] These action proceedings were met with an application for absolution from the instance at the conclusion of the plaintiff's case. Oral argument on the absolution application ensued, with the parties subsequently being requested to prepare supplementary written submissions. The parties filed the supplementary written submissions on 10 and 19 September 2025, respectively.

BACKGROUND

- [2] The plaintiff is Lorraine Jane Parker, an adult female who owned and operated a landscaping business called Roots and Shoots Landscaping.
- [3] The first defendant is Daniel Price, an adult male. The second defendant is Annette Price, an adult female. The first and second defendants reside at [...] H[...] Lane, Newlands, Cape Town ("the premises"), being the premises where the accident described below occurred.
- [4] On or about 6 September 2018, at approximately 14h30, the plaintiff sustained a head injury when a section of metal fence struck her on the left side of her head.

THE PLAINTIFF'S CASE

- [5] The plaintiff asserted in her particulars of claim, that the first and second respondents as owners, alternatively the beneficial and risk-bearing possessors, of the premises, owed a duty of care towards the public in general and to her in particular, which duty included:
- a) A duty to ensure the safety of any person entering the premises.
 - b) A duty to ensure the safety of any person walking in or at the premises.
 - c) A duty to take all necessary steps to avoid accidents such as the one which gave rise to this action.

- d) A duty to ensure that any person or entity employed, alternatively contracted, to carry out any of the aforesaid duties would do so speedily, properly and effectively.

[6] It was submitted that the second defendant is the owner of the premises.

[7] The plaintiff pleaded that the accident was caused solely by the breach of the duty of care and/or the causal negligence of the first defendant, alternatively the second defendant, further alternatively the first and second defendants jointly and severally, in that they:

- a) Failed to ensure the safety of any person, and in particular the plaintiff, entering the premises.
- b) Failed to ensure the safety of any person, and in particular the plaintiff, walking in or at the premises.
- c) Failed to ensure that the fence of the premises was maintained properly and timeously at all times.
- d) Failed to ensure that the fence of the premises was safely secured.
- e) Failed to take all necessary steps to avoid accidents such as the one which gave rise to this action.
- f) Failed to ensure that any person or entity employed, alternatively contracted, to carry out any of the aforesaid duties would do so speedily, properly and effectively.

[8] In consequence of the accident, the plaintiff sustained certain bodily injuries, including a head injury. As a result of the injuries and the sequelae thereof, the plaintiff suffered, and will continue to suffer, the following damages:

- a) Past hospital, medical and related expenses in the estimated amount of R5 000.
- b) Future hospital, medical and related expenses in the estimated amount of R70 000, comprising future neurological consultations and pain medication.
- c) Past and future loss of earnings, alternatively loss of earning capacity, in the estimated amount of R250 000.
- d) General damages in the amount of R500 000.

[9] The plaintiff claims damages in the total amount of R825 000, together with interest thereon at the prevailing legal rate from the date of demand, alternatively from

fourteen days after the date of judgment to the date of final payment, and costs of suit on the High Court scale.

Evidence presented by the plaintiff

[10] The plaintiff testified in court regarding the accident, stating that:

- a) She was a landscaper appointed to install a new lawn at the premises.
- b) She had been working at the premises for two days prior to the accident (3rd and 4th September 2018).
- c) The fence had been closed and secured by ropes on either side.
- d) On 6 September 2018, Mr Price began undoing the ropes to give access for the lawn installers to come in, and the fence then fell on her head.

[11] Mr Gary Green testified *inter alia* that:

- a) he has known the plaintiff for over 27 years;
- b) since the accident, the plaintiff has been unwell and experiencing dizzy spells, one of which landed her in hospital;
- c) the plaintiff has not fully recovered from the injuries sustained due to the accident, she often loses balance;
- d) the plaintiff experienced pressure on her head which demobilized her and she could not drive; and
- e) the plaintiff had become claustrophobic and broke down at times.

[12] A video clip of the accident was presented as evidence in court. It *inter alia* showed:

- a) the first defendant untying ropes on the fence;
- b) the plaintiff walking towards the first defendant as he was untying the ropes from the fence; and
- c) the fence falling and striking the plaintiff.

[13] The plaintiff testified as follows at the trial: "*Mr Price was busy unravelling the ropes of the fence and, I see from the video, that I stepped back and was doing something to assist him with the rope on one side of the fence and then the fence fell on my head.*". She further acknowledged: "*I may have tried to help.*"

[14] The plaintiff filed extensive medical documentation confirming the nature of her injuries and a Notice in terms of Rule 36(9)(a) and (b) indicating that the plaintiff intended to call the following expert witnesses at trial:

- a) Dr E W Burger (General Practitioner);
- b) Elspeth Burke (Neuro & Clinical Psychologist);
- c) Madeleine Pretorius (Industrial Psychologist); and
- d) Munro Forensic Actuaries.

[15] The trial bundle comprised reports from medical doctors, Burger, Burke and Pretorius, as well as report from Dr Mdunge Mguni (Radiologist), Dr Coenie Hatting (Neuropsychologist), Dr Pierre van der Merwe (Neuropsychologist) and Dr B Leslie. None of the medical doctors testified at the trial.

THE DEFENDANTS' CASE

[16] The defendants denied that they breached any duty of care owed to the plaintiff and pleaded that the portion of the fence was removed at the plaintiff's special instance and request.

[17] The defendants further pleaded that the plaintiff's alleged injuries were caused as a result of the plaintiff's own negligence in that she failed to allow the first defendant to remove the fence on his own, because she interfered with the process of removal of the fence, and stood too close to the first defendant whilst he was in the process of untying the ropes attached to the fence in order to remove a portion of the fence.

[18] In the alternative, the defendants pleaded that the plaintiff consented to be subjected to the risk of injury (*volenti non fit injuria*), in that she (1) was requested not to interfere and assist with the removal of the fence, (2) was requested to stay clear of the area where the fence was removed, (3) was fully aware of the risks involved in standing close to the area where the fence was removed, (4) and despite this knowledge and whilst appreciating the risk, she nevertheless stood close to the area and was bumped when the fence swung around.

[19] In the further alternative, the defendants pleaded that if it is found that they acted wrongfully and/or negligently, the plaintiff was solely and/or contributorily negligent in

failing to avoid the accident and/or her alleged injuries when, by the exercise of due and reasonable care, she could and should have done so.

- [20] In relation to foreseeability and causation, the defendants contend that any injury was not foreseeable and that the plaintiff was negligent by not allowing the first defendant to remove the fence on his own without her interference and standing too close during the removal.
- [21] The defendants pleaded that the plaintiff voluntarily assumed the risk, in that she was fully aware of the risks and, despite this, chose to stand close, thereby consenting to the risk of injury.
- [22] The defendants pleaded that there is some contributory negligence on the part of the plaintiff and in the alternative, if found liable, the defendants argue that the plaintiff was solely or contributorily negligent and any damages should be apportioned in terms of the Apportionment of Damages Act.

Defendants counsel's cross examination of the plaintiff

- [23] At the beginning of cross-examination, the plaintiff was questioned on whether she had requested access to the garden through the portion of fence in question. After some deliberation, the plaintiff conceded that she had indeed requested this access, responding: *'Yes, I needed the access through that gate'*.
- [24] The plaintiff was asked a series of questions about the condition of the premises and the fence prior to the accident including, (1) whether the fence was safely secured before it was opened at her request (2) whether it was a well-maintained fence, and (3) whether the fence remained standing and secured by ropes whilst she was working in the garden before she asked the first defendant to remove it. She responded in the affirmative to the questions.
- [25] The plaintiff was asked whether there was anything present at the property during her 'whole job' that prevented her from doing her work 'speedily, properly and effectively'. She answered 'no' and further conceded that having the fence removed and gaining access through it actually made her job easier and speedier.

- [26] It was put to the plaintiff that what had happened was purely an accident, an unfortunate mishap. The plaintiff responded in agreement, stating: *'It was unfortunate. I don't feel that there was any malicious intent. It happened'*. It was further put to her that accidents sometimes happen, and no one is to blame, to which she responded: *'It was just very unfortunate that it happened because it changed my life. Correct'*.
- [27] When the same proposition (that accidents happen and no one is to blame) was put to her again, the plaintiff vaguely stated that she *'thinks'* someone is to blame. When asked who she thinks is to blame and why, she responded that she *'thinks'* the first defendant is to blame, and as for the reason for her response, she simply stated: *'because it caused a long-term problem'*.
- [28] The plaintiff acknowledged that even she did not foresee the accident occurring, having testified: *'While I was on the property on the previous 2 days, there was no indication that something like this could happen with the moving of the fence'*.
- [29] The plaintiff was taken to some of the reports of the medical experts during cross-examination to highlight discrepancies between her testimony and the contents of the reports in that the plaintiff had given different versions of how the accident occurred:
- a) The plaintiff told Dr Eugene Burger that *'the earthen substructure beneath a section of metal palisade fencing shifted and the fence that it supported collapsed, striking her on the left side of the head.'*¹.
 - b) The plaintiff described *'being impacted by a metal pipe'*².
 - c) At trial, the plaintiff testified that Mr Price was *'busy unravelling the ropes of the fence'* and *'I think Mr Price slipped and the fence fell down.'*³.
- [30] In the supplementary submissions filed by counsel for the plaintiff it is acknowledged that the medical expert reports constitute hearsay evidence.

¹ Trial Bundle, p 49

² Trial Bundle, p 32

³ Defendants' Supplementary Written Submissions, para 18

APPLICATION FOR ABSOLUTION FROM THE INSTANCE

Defendant

- [31] As alluded to above, at the conclusion of the plaintiff's case, the defendants' counsel applied for absolution from the instance on behalf of the defendants from the bench and the court requested that the written submissions be filed on behalf of the plaintiff and the defendants.
- [32] The defendants' counsel submitted that the test for absolution from the instance, as set out in *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) referring to *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H, is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff and that the plaintiff is required to make out a *prima facie* case with evidence relating to all elements of the claim.
- [33] It was submitted on behalf of the defendants that the plaintiff must not only stand or fall by her pleaded case but she should accurately set out the facts which gave rise to her alleged claim or supposed right of action – the nature and/or manner in which he or she alleges that the defendant acted wrongfully and/or negligently – and that these are the facts which the plaintiff must then set out to prove.
- [34] The particulars of claim alleged negligence as set out in paragraph [7] on the basis that the defendants failed to: (1) ensure the safety of persons entering and walking on the premises; (2) ensure the fence was maintained properly and safely secured; (3) take necessary steps to avoid such accidents; and (4) ensure any contracted persons would carry out duties properly.
- [35] The defendants take issue with the fact that the plaintiff failed to lay any foundation, let alone attempt to prove, even a *prima facie* case of wrongfulness or negligence on the part of the defendants. The defendants submit that nothing in the particulars of claim mentions the first defendant having moved, opened, shifted or touched the fence, nor is it mentioned how he could have done so wrongfully or negligently.

[36] The defendants relied on *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA), which provides that the first principle of the law of delict is that everyone has to bear the loss they suffer ("skade rus waar dit val"), and that *Aquilian* liability requires the defendant's act or omission to have been wrongful and negligent and to have caused the loss. The defendants based plaintiff's burden of establishing that the defendants' conduct was both wrongful and negligent in order to succeed in a delictual claim for damages, on this judgment.

[37] The defendants submitted that the plaintiff's evidence refuted her own case. During cross-examination, the plaintiff conceded that:

- a) she requested access through the fence;
- b) the premises were generally safe before the process of untying the ropes to remove the fence was undertaken;
- c) the fence was well-maintained and safely secured before untying of the ropes to remove the fence; and
- d) nothing prevented her from doing her job speedily and effectively, and that by having the fence removed and gaining access through the fence, her job was actually made even easier and speedier.

[38] The effect of these concessions is that the plaintiff effectively admitted that the defendants were not negligent in the ways she had pleaded, thereby undermining her own case.

[39] The defendants' counsel further submitted that the plaintiff failed to lead evidence on what 'necessary' steps the defendants could or should have taken to avoid the accident, as required by the test for negligence in *Kruger v Coetzee* 1966 (2) SA 428 (A). The defendants further submitted that the plaintiff also failed to establish foreseeability, and testified that there was 'no indication that something like this could happen'. The defendants submitted that even if the court could infer what steps would have been necessary or reasonable, the plaintiff did not lead any evidence as to how the defendants failed to take such steps which is also required by *Kruger v Coetzee*.

- [40] Additionally, as stated the defendants contend that the plaintiff failed to establish how the accident and/or the harm was in any way foreseeable by either defendants and pointed to the testimony of the plaintiff that even she, herself did not foresee the accident occurring, stating: *'While I was on the property on the previous 2 days, there was no indication that something like this could happen with the moving of the fence.'* and the plaintiff acknowledged during cross-examination that the accident was an accident with no malicious intent.
- [41] The defendants submit that neither wrongfulness nor negligence can be inferred from the mere fact that a person suffered harm and/or the extent of such harm.
- [42] The defendants further submitted that the plaintiff's evidence was of poor quality, presenting different versions of how the accident occurred, and the plaintiff was unable to explain discrepancies between her testimony and the contemporaneous documents which were filed on her behalf.
- [43] The defendants seek an order of absolution from the instance and dismissal of the plaintiff's claim and costs.

Plaintiff

- [44] The plaintiff submits that her particulars of claim properly allege that the defendants, as owners or beneficial possessors of the premises, owed a duty of care to the public and the plaintiff as set out in paragraph [5] above.
- [45] The plaintiff alleged that the accident was caused solely by the defendants' breach of the duty of care and/or causal negligence, including failure to ensure the fence was maintained and safely secured.
- [46] It was submitted on behalf of the plaintiff that the breach of a legal duty implies wrongfulness, and the plaintiff is not required to plead wrongfulness, relying on authorities including *Minister van Polisie v Ewels* 1975 (3) 590 (A) and *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) and *Minister of Law and Order v Kadir* 1995 (1) SA 303 at 317C to 318A. Notably a review of these cases reveals that:

- a) The *Minister van Polisie v Ewels 1975 (3) SA 590 (A)* case does not directly support the proposition that wrongfulness need not be pleaded separately. Rather, it establishes that wrongfulness depends on the existence of a legal duty.
- b) The *Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA)* case supports the opposite proposition, that wrongfulness is a separate element that must be established in addition to fault (negligence).
- c) The *Minister of Law and Order v Kadir 1995 (1) SA 303 at 317C to 318A* case deals with the relationship between statutory duties and delictual liability. The relevant passage highlighted by the plaintiff's counsel discusses whether a breach of a statutory duty automatically gives rise to a private law action for damages.

[47] It was argued on behalf of the plaintiff that negligence is pleaded in paragraph 8 of the particulars of claim, that the defendants breached their duty by failing to secure the fence (negligently so), causing the fence to fall on her head and sustaining injuries.

[48] The plaintiff made the contention that when the first defendant opened the fence, it was completely unsecured, and had the fence been secured, the accident would not have occurred. She further contended that The fence ought to have been secured, also during the removal process and that the defendants did not ensure the safety of any person walking in or at the premises and the defendants took no steps to avoid the incident, as pleaded by the plaintiff. The plaintiff further submitted that it is not for her to allege and prove what steps the defendants ought to have taken to avoid the accident; rather, the defendants should allege and prove what steps they took to guard against such an occurrence.

[49] The plaintiff submitted that the video evidence indicates the defendants' unsecured fence fell and struck her on the left side of her head. When the first defendant opened the fence, it was completely unsecured, and had it been secured, the accident would not have occurred. However, the video shows the plaintiff walking towards the fence and the first defendant.

- [50] The plaintiff argued that her claim (that the defendants failed to secure the fence) is sustained by the evidence regardless of whether she asked for access or whether the first defendant was the one who physically opened it.
- [51] The plaintiff submitted that she and Mr Gary Green testified as to her condition after the accident, specifically her balance problems, which caused her to suffer a second fall at home.
- [52] The plaintiff submitted that while descriptions of the accident by medical experts constitute hearsay, her own testimony is supported by the video recording. The medical reports of Dr Coenie Hattingh (neuropsychologist) and Dr Pierre van der Merwe (neurologist) remain hearsay evidence, but support her evidence regarding injuries.

EVALUATION

- [53] The principle as set out in *Claude Neon Lights (S.A.) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H⁴ as referred to in *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) require this court to determine whether there is evidence upon which, applying its mind reasonably to evidence presented, could or might (not should, nor ought to) find for the plaintiff. This implies that the plaintiff had to make out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court could find for the plaintiff⁵.
- [54] The *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA) judgment as relied upon by the defendants emphasised that the court ought not to be concerned with what someone else might think - it should rather be concerned with its own judgment and not that of another 'reasonable person' or court. It also prescribes that absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.

⁴ *Claude Neon Lights (S.A.) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H. See too *Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 (A) at 928C.

⁵ *Marine & Trade Insurance Co Ltd v Van der Schyff* [1972] 1 All SA 144 (A); 1972 (1) SA 26 (A) 37G-38A; Schmidt *Law of Evidence* (2003) 3-16/3-17

[55] The court in *On Farm Holdings (Pty) Ltd v Van den Heever* [2024] 3 All SA 629 (ECG) at para 12, stated that absolution at the close of a plaintiff's case should not be granted except in 'very clear cases'.

[56] The plaintiff's pleaded case is set out in paragraphs [5] to [9] above and the evidence advanced by the plaintiff at the trial is set out in paragraphs [10] to [15]. The assessment is, whether taking that evidence into consideration, the plaintiff has made out a *prima facie* case in the sense that there is evidence relating to all the elements of the claim⁶. The threshold of proof is low⁷, but stated above absolution is to be granted sparingly, but when the occasion arises, a court should order it in the interest of justice⁸.

[57] The authorities make clear that the plaintiff must present evidence relating to all the elements of the claim to survive absolution. In, *Abrahams v City of Cape Town* 2025 JDR 1663 (WCC), the court stated: '*A Plaintiff has to present a prima facie case comprising evidence relating to all elements of the claim if it is to evade an application for absolution, as the absence of such evidence would constrain a Court from finding for the Plaintiff.*'⁹.

[58] Below is an assessment of the plaintiff's evidence on each element:

- a) In relation to harm, I am satisfied that the video evidence presented shows the fence striking the plaintiff and that the medical reports do make mention of some injuries sustained by the plaintiff, and Mr Green testified about the injuries sustained by the plaintiff and how it impacted on the plaintiff's life.
- b) In relation to causation, the video shows the fence striking the plaintiff. During cross-examination the plaintiff conceded that the fence was removed at her request and that she 'may have tried to help' the first defendant when he was removing the fence.
- c) In relation to wrongfulness, the plaintiff relies on the principle that the breach of a legal duty implies wrongfulness and submitted that she is not required to

⁶ *De Klerk v Absa Bank Limited & Other* [2003] 1 All SA 651 (SCA) at 656.

⁷ *Van Zyl N.O obo A.M v MEC for Health Western Cape Provincial Department of Health* [2023] 1 All SA 501 (WCC).

⁸ *De Klerk v Absa Bank Limited & Other* [2003] 1 All SA 651 (SCA) at 656.

⁹ For a delictual claim, these elements are: (1) harm; (2) wrongful conduct; (3) a causal connection between the conduct and the harm; and (4) fault or blameworthiness (negligence).

plead wrongfulness¹⁰, as stated above, the authorities relied upon for this proposition do not assist the plaintiff. The plaintiff based a duty of care on the defendants being owners and/or possessors of the premises. The only evidence presented for the breach of that duty centres primarily on the video footage which does not evidence wrongful conduct and negligence on the part of the first defendant.

- d) The plaintiff's evidence on negligence (fault) is significantly weakened by her own concessions. While she pleaded negligence and the video shows the fence falling, she conceded that (1) the fence was 'safely secured' and 'well maintained' before being opened at her request, (2) there was no indication that this could happen, (3) no one is to blame for the accident happening, (4) did not address what steps the defendants should have taken (5) and led no evidence on foreseeability.

[59] A number of judgments prescribe that for delictual liability to be established there must be harm sustained by the plaintiff, conduct on the part of the defendant which is wrongful, a causal connection between the conduct and the plaintiff's harm; and fault or blameworthiness on the part of the defendant¹¹.

[60] The plaintiff's evidence does not satisfy all the elements, she has not led evidence on foreseeability and reasonable steps that could have been taken. Her concessions do not point to negligence on the part of the defendants and no evidence was led pointing to negligence, resulting in the *Kruger v Coetzee*-test¹² not being met by the plaintiff leading to a failure to make out a prima facie case. The requirement is that there must be evidence relating to all the elements of the claim to survive absolution because without such evidence no court could find for the plaintiff.

[61] The video footage shows the plaintiff voluntarily positioning herself next to a fence while it was being removed at her own request, it shows a risk that she voluntarily assumed by standing next to the fence, and it shows the fence falling, but not that the

¹⁰ Relying on *Minister van Polisie v Ewels* 1975 (3) 590 (A); *Minister of Law and Order v Kadir* 1995 (1) SA 303 at 317C to 318A, *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA).

¹¹ *Evins v Shield Insurance Co Ltd* 1980 2 All SA 40 (A); 1980 2 SA 814 (A) 838–839; *Edouard v Administrator, Natal* 1989 4 All SA 309 (D); 1989 2 SA 368 (D) 391; *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* 2000 4 All SA 545 (SCA); 2001 4 SA 814 (SCA) par 13; *McCarthy Ltd t/a Budget Rent a Car v Sunset Beach Trading 300 CC t/a Harvey World Travel* 2012 6 SA 551 (GNP) para 12.

¹² *Kruger v Coetzee* 1966 (2) SA 428 (A)

defendants failed to do something they ought to have done particularly when the plaintiff herself did not perceive any danger warranting precaution.

[62] In the circumstances, the video footage closes off on the harm-causing conduct, but there is a further enquiry that is triggered by this, as the Constitutional Court stated that “harm-causing conduct” is a prerequisite for the further enquiry into the other elements of delict, namely wrongfulness and fault¹³.

[63] I am satisfied that there is no evidence upon which this court, applying its mind reasonably, could or might find for the plaintiff and it would not serve justice to refuse absolution from the instance.

[64] It follows that the plaintiff’s claim should be dismissed and I find no reason why costs should not follow the result.

ORDER

[65] In the circumstances I make the following order:

- a) The plaintiff’s claim is dismissed with costs, with counsel’s fees to be taxed on scale C.

R MPHEGO

Acting Judge of the High Court

Appearances:

¹³ *H v Fetal Assessment Centre* 2015 2 BCLR 127 (CC); 2015 2 SA 193 (CC) para 54

For the Plaintiff:

Adv. AJ du Toit

For the First and Second Defendants:

Adv. R Van Wyk