



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

**JUDGMENT**

**Not Reportable**

Case No: 14194/2018

In the matter between:

**URSULA MARLENE GORDON**

**PLAINTIFF**

And

**CIVILS 2000 (PTY) LTD**

**DEFENDANT**

**Neutral citation:**

**Coram:** Mgengwana AJ

**Heard:** 12 November 2025

**Delivered electronically:** The judgment is handed down electronically by circulating to the parties or legal representatives by email. The date for the handing down of the judgment is deemed to be 17 March 2026.

**Summary:** Delict – Negligence – What constitutes negligence – What constitutes being in control of an area for purposes of liability - Member of the public lost balance and fell while walking on a public parking area with uneven surface and loose sand and fractured her left ankle in the process – Onus - Apportionment of Damages Act 34 of 1956

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### **ORDER**

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[1] In the result, I grant the following order:

- (a) The Defendant is liable for fifty percent of the Plaintiff's proven damages.
- (b) The Defendant is to pay the party and party costs relating to the liability aspect of the Plaintiff's claim, such costs to include:
  - i. The costs of the trial of 10 - 12 November 2025.
  - ii. The costs of counsel on Scale B.

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### **JUDGMENT**

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**MGENGWANA AJ;**

## **Introduction**

[1] This is a delictual action brought by the Plaintiff for damages allegedly suffered as a result of her losing her balance and eventually falling while walking on a public parking area with an uneven surface covered in loose sand and rubble thereon. The damages sustained by the Plaintiff are allegedly a direct consequence of a left ankle fracture she sustained during this incident that took place on, 13 August 2016 outside Surfside Pavilion, Beach Road, Strand.

[2] According to the Plaintiff's pleadings, this incident took place on a building site, which was open to members of the public, under the control of the Defendant who was attending to building works thereon at the time and as a result of being in control thereof, the Defendant was responsible for maintaining the site in a safe condition in relation to the members of the public.

[3] The Plaintiff also pleaded that the incident was caused by the sole negligence of the Defendant and/or its employees who were acting within the course and scope of their employment, who were negligent on the following grounds:

- (a) For failing to ensure that the loose sand, which had covered the uneven surface and thereby creating a risk for members of the public, was removed from the site.
- (b) For failing to warn, alternatively, adequately warn members of the public of the presence of the loose sand and uneven surface.

- (c) For failing to take reasonable precautions to ensure that the loose sand and uneven surface do not pose a danger to members of the public.
- (d) For failing to display warning signs to warn members of the public about the loose sand and uneven surface on the site.
- (e) For failing to take reasonable steps to prevent any harm eventuating from the potential risk created by the loose sand and uneven surface.

[4] Besides admitting the fact that it was engaged in building work outside Surfside Pavilion, the Defendant denied all that is contained in paragraphs two and three of this judgment and put the Plaintiff to the proof thereof. The Defendant also reserved the right to lead evidence in rebuttal of the allegation that it was in control of the site where the incident took place (the incident site).

[5] The Defendant also pleaded that the Plaintiff was the sole author of her own misfortune for the following reasons:

- (a) She failed to keep a proper lookout.
- (b) She failed to prevent injury to herself when, by exercise of reasonable care, she could and should have done so.
- (c) She failed to take heed of the warning that she was entering a construction area.
- (d) She failed to take heed of the warning that she was entering an area which contained a tripping hazard.

[6] The Defendant also pleaded in the alternative that should this Court find that it or any of its employees were negligent in any of the alleged respects or

at all, then such negligence neither caused nor contributed to the incident that is the subject of this litigation.

[7] The Defendant pleaded in the further alternative that should this Court find that it or any of its employees were negligent as alleged by the Plaintiff, or at all, and such negligence was the cause of or contributed to the said incident (all of which is denied), then it pleads that the Plaintiff was also at fault in relation to the injuries, she having been negligent in one or more of the respects set out in paragraph five above, the Defendant then pleads that the damages which the Plaintiff may be found to have suffered, be reduced in accordance with the Apportionment of Damages Act 34 of 1956 (as amended).

[8] The trial of this matter only proceeded in respect of the issue of liability following an order separating merits from the quantum, made in terms of Rule 33(4) of the Uniform Rules on 21 November 2023.

### **The evidence**

[9] The Plaintiff testified as follows:

- (a) She was attending her sister-in-law's sixtieth birthday, hosted at the Strand Pavilion. They arrived at the venue at approximately 18:00 at dusk. As the occasion was a formal one, she had high heels on. On their arrival, she could immediately see that they were parked at a construction site and because of this, she walked slowly and cautiously towards the entrance to the Strand Pavilion but across the car park.

While walking, she stepped onto soft sand which caved into what looked like a hole, she then fell onto her left elbow and knee. Although she immediately felt pain, she and her husband laughed about the incident and continued to walk and enter the venue of the birthday. She later realized, on the same evening, that she had sustained a serious injury as she could not stand on her left leg to such an extent that she had to hop when leaving the venue. When asked by her counsel, why she is suing the Defendant, she said the Defendant should have put up signs indicating that the parking was a construction site.

- (b) During cross-examination she conceded that she might not have been keeping a proper lookout as she was concentrating on arriving at the birthday venue. When it was put to her that she was not exercising reasonable care, she said that she did not deem that necessary because the sand on the road surface looked even to the naked eye. She gave the same reason when it was put to her that she failed to exercise caution since she was entering a construction site.

[10] The next person to testify on behalf of the Plaintiff was her husband, who was with her when the incident occurred. He corroborated the manner in which the incident took place. He testified that the incident took place on a Saturday, but he only returned to the incident site to take photographs thereof on the Monday following the incident as he did not take them on Saturday. He also testified that he spoke to Carey Ann Bob (Safety Officer), T. Tomose (Safety Representative) and Jaco Loyd (Site Manager). He testified that he told them about what had happened to his wife at the incident site on the

evening of Saturday, 13 August 2016. The Plaintiff closed her case after the evidence of Mr. Gordon, her husband.

[11] The first witness to testify on behalf of the Defendant was Mr. Kevin Daddy and he testified as follows:

(a) That he was employed as Contracts Manager of the Defendant at the time of the incident. He also testified that the only work that they did on a portion of the incident site was a trench excavation and installation of a pipeline thereon. Thereafter, they closed it by filling it with sand, which they compacted and left it for another service provider to apply tar thereto. He testified that they removed barricades around the site after it was compacted and then they handed it over to the City of Cape Town informally because no handover documents were signed as the work they performed over the portion of the incident site did not form part of their original scope of work they were doing at the time at the Strand Pavilion. Based on the handover, they were not in control of the incident site when the incident took place, even though from time to time they were called upon to perform some maintenance work on the incident site.

(b) During cross-examination, Mr. Daddy testified that after they finished working on it, the incident site was left exposed for approximately three months. He conceded that in such state of exposure, the compacted sand would become loose and uneven because of the weather as Strand is a windy area.

[12] The next witness to testify on behalf of the Defendant was Carey Ann Bob, who testified as follows:

- (a) That she was employed as a Health and Safety Officer of the Defendant at the time of the incident. That she recalled being approached by the husband of the Plaintiff on Monday morning, who told her that a family member got injured during the past Saturday on the Strand Pavilion. That her duties included doing inspections of the construction site and taking photographs thereof. She recalled having taken photographs of the construction site on Friday, the 12<sup>th</sup> of August 2016. She also recalled having taken photographs of the construction site on Monday, the 15<sup>th</sup> of August 2016. She admitted to having inspected the incident site shortly before the incident in question and shortly thereafter but denied having noticed tripping hazards on the incident site. She also testified that she worked with Thembinkosi Tomose and Jaco Loyd at the time, but both individuals are no longer employed by the Defendant.
- (b) During cross-examination she conceded that the Defendant was the last company to perform work on the incident site before 13 August 2016. She also confirmed that no certificate of completion was submitted by the Defendant to the City of Cape Town in respect of the work done on the portion of the incident site. She also confirmed that after they were done with their work, they left the incident site to another service provider to complete the work thereon. She admitted that loose sand does become a hazard at some stage. She also testified that when she

did her last inspection of the incident site on Friday the 12<sup>th</sup> of August 2016 at 14:00pm, the incident site was fine, but she cannot rule out any deterioration having occurred between her last inspection and the incident time even though she did not see any hazards when she inspected the incident site on the Monday following the evening of the incident.

### **Issues for determination**

[13] Based on the above set of facts, this Court is required to decide on whether any negligence may be imputed to the Defendant for any damages sustained by the Plaintiff because of her left ankle fracture. To come to this conclusion, this Court is also enjoined to decide whether the Plaintiff has successfully discharged the onus placed on her, on a balance of probabilities, that the Defendant was in control of the incident site at the time of the incident.

### **Applicable legal principles**

#### ***Negligence***

[14] The classic test for negligence is articulated by Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) as follows:

‘For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

- (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.<sup>1</sup>

[15] Olivier JA restated the law as follows in *Mukheiber v Raath and Others* 1999 (3) SA 1065 (SCA):

‘[31] In our law, the standard of conduct expected from all members of society is that of the *bonus paterfamilias*, i.e. the reasonable man or woman in the position of the defendant. An act which falls short of this standard and which causes damage unlawfully is described as negligent; i.e. it is tainted with *culpa*.

The test for *culpa* can, in the light of the development of our law since *Kruger v Coetzee* 1966 (2) SA 428 (A) be stated as follows (see Boberg, *Law of Delict*, 390):

For the purposes of liability *culpa* arises if -

- (a) a reasonable person in the position of the defendant -
  - (i) would have foreseen harm of the general kind that actually occurred;
  - (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
  - (iii) would have taken steps to guard against it, and

(c) the defendant failed to take those steps.<sup>2</sup>

[16] Boberg states the following in volume 1 of his book titled “*The Law of Delict*”:

“If these requirements are satisfied (and the flexibility of the concept of “general kind” in relation to both harm and to the causal sequence gives the court ample latitude to do justice in unusual cases), it is believed that the ambit of liability will be sufficiently circumscribed to make additional recourse to any doctrine of legal causation entirely superfluous.”<sup>3</sup>

<sup>1</sup> *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

<sup>2</sup> *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) at para 31.

<sup>3</sup> *The Law of Delict* by P.Q.R. Boberg Volume 1 Aquilian Liability 1984 at page 390.

[17] Molefe AJA held as follows in *Cenprop Real Estate (Pty) Ltd and Another v Holtzhauzen*:

‘[17]...Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.’<sup>4</sup>

[18] Brand JA held as follows in *Hawekwa Youth Camp v Byrne*:

‘[22]...By contrast, negligent conduct in the form of an omission is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages (see eg *Telematrix (Pty) Ltd supra* para 14; *Local Transitional Council of Delmas supra* paras 19-20; *Gouda Boerdery Bk v Transnet* 2005 (5) SA 490 (SCA) para 12).’<sup>5</sup>

### **Control**

[19] Nugent JA held as follows in *Chartaprops 16 (Pty) Ltd and Another v Silberman*:

‘[16] It can be taken to be settled that an action lies against a shopkeeper for negligently omitting to clear hazards from the shop floor and I think that applies as

<sup>4</sup> *Cenprop Real Estate (Pty) Ltd and Another v Holtzhauzen* 2023 (3) SA 54 (SCA) at para 17.

<sup>5</sup> *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 (SCA) at para 22.

much to a person in control of a shopping mall in respect of the floors that are under its control...Moreover a reasonable person in control of a shopping mall would clearly foresee that spillages might occur in the passages and cause harm if they were permitted to remain, and would take reasonable steps to guard against harm occurring (*Kruger v Coetzee*).<sup>6</sup>

[20] Makgoba J held as follows in *Holm v Sonland Ontwikkeling* 2010 (6) SA 342 (GNP)

‘[23] A defendant acts wrongfully when he creates a source of danger by means of positive conduct (*commissio*) and subsequently fails to eliminate that danger (*omissio*) with the result that harm is caused to a plaintiff. See Neethling, Potgieter and Visser *Law of Delict* 5<sup>th</sup> edition at page 52 (par 5.2.1).

Likewise a defendant which is in control of property upon which a hazard exists is under a duty to warn a plaintiff of the nature of the hazard and the risk involved, by appropriate warning of the hazard. Failure to do so involves a wrongful omission.’<sup>7</sup>

### ***Onus***

[21] In *Pillay v Krishna* at 951-2, a three-legged approach was stated as follows with regards to burden of proof:

‘The first principle in regard to the burden of proof is that if one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it, where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he

<sup>6</sup> *Chartaprops 16 (Pty) Ltd and Another v Silberman* 2009 (1) SA 265 (SCA) at para 16.

<sup>7</sup> *Holm v Sonland Ontwikkeling* (Mpumalanga) (Edms) Bpk 2010 (6) SA 342 (GNP) at 23.

is entitled to succeed on it. But there is a third rule: “he who asserts, proves not he who denies, since a denial of fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.”<sup>8</sup>

[22] Apportionment of liability in case of contributory negligence is governed by section 1 of the Apportionment of Damages Act which reads as follows:

‘(a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.’<sup>9</sup>

### **Parties’ submissions**

[23] The Plaintiff’s counsel submissions may be summarized as follows:

- (a) Defendant retained control of the incident site as evidenced by the testimonies Mr. Daddy and Ms. Bob. Therefore, the Defendant owed a duty of care to the public.
- (b) Based on the evidence of Mr. Daddy and Ms. Bob regarding the deterioration of the compacted incident site as a result of exposure to adverse weather conditions, the Defendant

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<sup>8</sup> *Pillay v Krishna* 1946 AD 946 at 951-2.

<sup>9</sup> Apportionment of Damages Act 34 of 1956.

reasonably foresaw the possibility of harm being caused to members of the public.

- (c) The Defendant took no steps to prevent the harm from eventuating.
- (d) The Defendant's failure to take any steps to prevent harm from eventuating is wrongful because public policy and legal norms impose a duty of care on a contractor who retains control over a potentially hazardous site open to public use. The Defendant's contractual and professional responsibility to monitor and ensure safety created a clear legal duty to act. Its failure to take adequate preventative measures renders its omission wrongful and actionable.
- (e) There is no evidence to support a finding that the Plaintiff contributed to her still to be proven damages.

[24] The Defendant's counsel submissions may be summarized as follows:

- (a) The Defendant was not in control of the incident site at the time of the incident. The incident site did not form part of the Defendant's contractual works, except insofar as a short deviation trench on a portion thereof. The Defendant's involvement was temporary, concluded months before the incident and followed by formal inspection and acceptance by the Municipality. Upon such acceptance, control reverted to the Municipality.
- (b) In the absence of control, the Defendant owed no duty of care to the Plaintiff at the time of the incident.

- (c) No evidence was given that the Defendant was aware of any latent defect.
- (d) The reasonable foreseeability test cannot be satisfied as no reasonable contractor could have foreseen harm from a latent subsurface void in a compacted, approved section of the ground, handed back months earlier.

### **Analysis of the Evidence**

[25] The undisputed evidence herein is that the Plaintiff sustained a fracture of her left ankle on 13 August 2016 after falling while walking on a public parking area, which had loose sand and an uneven surface outside Surfside Pavilion, Beach Road, Strand. The undisputed evidence is also that the area at which the Plaintiff was, was neither cordoned off to members of the public nor were there warnings cautioning members of the public to be more circumspect when walking thereon.

[26] The undisputed evidence is also that the portion of the park where the incident took place, was previously worked on by the Defendant who dug a trench, installed a pipeline thereon, filled it with sand again, compacted it and informally handed it back to the City of Cape Town. This work took place a couple of months before the incident and no one thereafter performed any work on this site. Although another entity was supposed to come in and tar the incident site, this never occurred.

[27] It is also undisputed that when the incident took place, the Defendant was performing construction work on a site adjacent to the incident site. The evidence is also that even though the Defendant insisted that the incident site was not under their control when the incident took place, their Safety Officer kept on inspecting it and took photographs thereof constantly.

[28] It is also undisputed that because the incident site that was previously dug out, filled back in and compacted, was left unattended for a while and it was susceptible to deterioration because of weather conditions which included wind as Mr. Daddy confirmed that Strand is a windy area hence his team would occasionally attended to the maintenance of the incident site after being requested by the City of Cape Town to do so. Ms. Bob also confirmed that even though she found the incident site in good condition when she inspected it on Friday the 12<sup>th</sup> of August 2016 at 14:00, she cannot rule out the fact that something could have happened to it between that date and the incident date even though her evidence was that she found the site in the same good condition she left it on Friday the 12<sup>th</sup> of August 2016 at 14:00pm.

[29] What is in dispute is whether the Defendant as stated in the papers was in control of the site at the time of the incident. The Defendant passionately argued that it was not in control thereof for two reasons, firstly the work done on the site of the incident did not form part of the work that they were contracted for and secondly, they informally handed over the incident site back to the City of Cape Town when they finished doing their work thereon and after the inspection and acceptance of their work by the City of Cape Town's engineer. The reason proffered for the informal handing over was that

the work done on the incident site was not part of the work they were contracted to do. However, no cogent reason was given for the constant inspection and photography of the incident site whereas the Defendant believed that it was no longer responsible for the site.

[30] When Defendant's counsel was asked what the Court should make of the uncontroverted evidence of the daily inspection and photographing of the incident site by the Safety Officer in the employ of the Defendant, the Court was asked to draw no inference from this conduct. Unfortunately, this Court cannot ignore Defendant's conduct in the aforementioned regard as it is not a once off conduct, but it is constant conduct which is performed by no other person but a Safety Officer employed by the Defendant regularly. The only inference that can be drawn by this Court from this conduct is that the Defendant still considered itself as an entity responsible for the well-being of the incident site, there can be no other explanation for the Defendant's conduct in this regard other than this. Based on the above and the intermittent maintenance of the incident site when called upon by the City of Cape Town, this Court finds that the Defendant was in control of the incident site at the time of the incident.

[31] This finding, having been made, it therefore follows that the Defendant was under a duty to warn the Plaintiff that the area at which she was walking on has uneven surface and loose sand which could injure her by putting up the necessary signage in the absence of cordoning off the entire area however, the Defendant failed to do so.

[32] This Court also finds that the Defendant was aware of the potential danger posed by the loose sand on the uneven surface on the incident site and it also did foresee that this danger had a potential of injuring someone but its action of constantly inspecting and taking photographs the incident site instead of putting up the necessary signage failed to prevent injury to the Plaintiff. This Court therefore also finds that the steps that were taken by the Defendant to prevent injury to the Plaintiff in the circumstances of this case were unreasonable as they failed to prevent injury to the Plaintiff.

[33] This Court is therefore satisfied that the Plaintiff has succeeded in discharging the onus placed on her, she has proved, on a balance of probabilities, that the Defendant was negligent for its failure to take reasonable steps to prevent Plaintiff from injuring herself whilst walking on the incident site that had uneven surface and loose sand even though the Defendant was in control of same and that it is this negligence, had resulted in her fracturing her left ankle.

[34] However, this Court cannot ignore the evidence of the Plaintiff herself. The Plaintiff had testified that when she got out of the car she was travelling in, she could immediately notice that the area she was about to traverse is a construction site, but she nevertheless took a conscious decision to enter same while wearing high heels. It is therefore not surprising that she shortly thereafter fell and fractured her left ankle. This kind of behavior is nothing short of negligence on her own part. She failed to prevent injury to herself when, by exercise of reasonable care, she could and should have done so. She also conceded during the cross-examination that she might not have been

keeping a proper lookout in the prevailing circumstances as she was concentrating on getting to the venue of the birthday. This Court therefore finds that the Plaintiff is equally to blame for the injuries sustained by herself in the incident of the 13 of August 2016.

[35] In the result, I grant the following order:

- (a) The Defendant is liable for fifty percent of the Plaintiff's proven damages.
- (b) The Defendant is to pay the party and party costs relating to the liability aspect of the Plaintiff's claim, such costs to include:
  - i. The costs of the trial from 10 - 12 November 2025.
  - ii. The costs of counsel on Scale B.



**TJ MGENGWANA**  
**Acting Judge of the High Court**

Appearances:

For the plaintiff: A. Smit of Miller Bosman Le Roux

For the Defendant: J.A. du Plessis

Instructed by: L. de Swart of Mellows & de Swart