



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

**REPORTABLE
CASE NO: 8617/2019**

In the matter between:

**O[...] S[...] N[...]
obo R[...] J[...]**

PLAINTIFF

and

MOEGAMAT SHADLEY CHILWAN

DEFENDANT

Coram: PARKER AJ

**Heard: 23 October 2024, 14 November 2024, 18 February 2025,
4 December 2025 & 8 April 2026 – 9 April 2026**

Delivered: 25 August 2026

ORDER

1. The incident was caused by the wrongful and negligent conduct of the defendant.
2. The defendant is held liable for the damages suffered by the plaintiff's minor child.
3. The defendant is ordered to compensate the plaintiff in such sum as may be agreed or determined in due course.
4. The defendant is liable for the costs:
 - a. occasioned by the postponement on 14 November 2024 on Scale C;

- b. of the application in terms of Rule 27 on Scale C; and
- c. further costs including the costs of counsel on Scale C.

JUDGMENT

Parker AJ:

[1] Accidents unfortunately happen. It is a parent's worst nightmare when such accident concerns a child under care and supervision; whether as a parent, guardian or childminder.

[2] This is a claim by the plaintiff instituted against the defendant in her personal and representative capacity as mother and natural guardian of her minor son R[...], hereinafter referred to as R[...] or the minor. He was born on 28 April 2009.

[3] The delictual action was instituted in May 2019, pursuant to an incident which occurred on 19 September 2017 at the home they were living at, when a gate became dislodged at [...] W[...] Place, 2[...] B[...] Street, Ruiterswacht, Western Cape, hereinafter referred to as the "premises". It is alleged that the gate on the premises toppled onto the minor when he and his mother returned home and gained entry to the premises.

[4] As a result of the incident, the minor sustained serious injuries, including:

- (a) A severe head injury with a fracture, together with frontal hematoma, scalp laceration and abrasions on the forehead; and
- (b) A closed displaced fracture of the shaft of the right femur.

[5] On 30 August 2024, the defendant was granted leave to join the plaintiff as a third party (the third party action will be dealt with in full later hereunder) wherein the

defendant sought a contribution from the plaintiff in her personal capacity in respect of an amount the court may determine just and equitable having regard to the plaintiff was at fault for the damages suffered by the minor, the contribution payable by the plaintiff in her personal capacity will be payable only once the judgment debt has been paid to the plaintiff.

Issues

- [6] What is common cause is the:
- (a) The plaintiff's identity;
 - (b) That she rented a portion of the premises from the defendant;
 - (c) That the premises are surrounded by a wall and entrance to the premises was accessible through a gate fitted with wheels moving horizontally on a track;
 - (d) That on 19 September 2017, the gate became dislodged and toppled directly over and on top of the minor, causing him to sustain injuries; and
 - (e) The defendant at all relevant times hereto owned and/or controlled and/or managed the premises.
- [7] The disputed facts and issues for determination are:
- (a) The cause of the incident;
 - (b) Whether it was the defendant or the third party who was negligent;
 - (c) Whether the stopper and guide fitted to the gate by the defendant were in good working order and safe;
 - (d) Whether the defendant failed to fit a stopper and guides onto the gate;
 - (e) Whether the defendant failed to take all reasonable steps to ensure that the gate was safe; and
 - (f) Whether the manner in which the gate was closed caused it to topple.

Inspection *in loco*

8. I first heard the matter on 18 February 2025, on which date an inspection *in loco* of the premises was held in the presence of the parties' legal representatives. The minutes of the inspection *in loco* recorded the dimensions of the gate, position of the gate motor, the size of the opening, the track, the positions of the brackets pre and post

the incident, the guide rail, and the distance to the kitchen window of the residential unit where one of the witnesses was standing on the date of the incident.

The plaintiff's case

[9] The version of the plaintiff is that on the 19th of September 2017, the gate became dislodged, and toppled directly and on top of the minor, causing him serious injuries. It was the failure of the defendant to fit a stopper and guides onto the gate and to take all reasonable steps to ensure that the gate was safe which caused the incident.

[10] It is the plaintiff's case that the defendant and/or those working for or under him knew or ought to have known at all relevant times hereto that:

- (a) The stopper at the end of the rail was absent and therefore could not prevent the gate from rolling off the rail and/or out from beneath the guide, it was fitted with and whereupon the gate would topple over;
- (b) The guide fitted to the gate was inadequate and not able to, in all circumstances, prevent the gate from toppling over, especially in circumstances where the gate rolls off the track and/or out from beneath its guides; and
- (c) Members of the public like the minor had access to the gate.

[11] Furthermore, the plaintiff avers that the defendant at all relevant times owed the public and the minor a legal duty to, *inter alia*, take all reasonable steps to ensure that the gate cannot topple over onto members of the public.¹ Accordingly, the plaintiff pleaded that the defendant and/or those working for or under his control, wrongfully and negligently breached the legal duties by failing to perform the duties in one or more of the respects as pleaded.²

Defendant's case

[12] The defendant amended his plea and denied that the gate was heavy, denied the incident and the allegations as advanced by the plaintiff. The defendant alleges that there were both a stopper and a guide fitted to the gate and that it was in good working

¹ Para 6 of the Amended Particulars of Claim

² Para 7 of the Amended Particulars of Claim

order, and that it was safe, and that it was the manner in which the gate was closed that caused it to topple.

[13] The defendant denied that the stopper at the end of the rail was absent and could not prevent the gate from rolling off the rail and/or out from beneath the guide it was fitted with, and whereupon the gate would topple over and that the guide fitted to the gate was inadequate and not able to prevent the gate from toppling over.

The third-party application

[14] The defendant sought a joinder application which was granted on the basis that at the time of the incident, the plaintiff was in the company of R[...] when they both were entering the premises at the gate. Upon entering the premises and whilst at the entrance gate, plaintiff was closing the gate when suddenly, plaintiff stopped closing the gate and let R[...] close the gate. The said minor pushed the gate wide open and pushed it back, closing so hard that when the gate closed, it hit a pillar so hard that the stopper broke and dislodged from the wall, causing the gate to topple over.

[15] The defendant pleads that the plaintiff had a duty to supervise R[...] in the manner in which R[...] was closing the gate. He further pleaded that the plaintiff had a duty to control R[...] and the manner in which R[...] closed the gate. Further, that the plaintiff had a duty to exercise reasonable care to prevent foreseeable damage that might have occurred as a result of and in the manner in which R[...] was closing the gate.

[16] In the defendant's view, the gate at the premises was generally and at all times in good working condition. Accordingly, the defendant pleaded that if the defendant is liable for damages claimed by the plaintiff, the defendant and the third party (the plaintiff) are joint wrongdoers as contemplated in section 2(6) of the Apportionment of Damages Act.³

[17] To this end, the defendant pleaded that he is entitled to recover from the third party (the plaintiff) a contribution in an amount as this Court may deem just and

³ 34 of 1956.

equitable having regard to the degree in which the third party was at fault in relation to the bodily injuries sustained by R[...].

The plaintiff's plea to the third-party notice

[18] On the converse, the plaintiff pleaded that it is impermissible to reduce the defendant's liability by way of setting off against the minor's claim (the plaintiff's claim in her representative capacity). Therefore, the defendant is not entitled to recover from the third party (the plaintiff) a contribution in any amount in relation to the claims instituted in her representative capacity on behalf of R[...].

The Evidence

[19] For the plaintiff, the following witnesses were called: Madeline Walker, Vene Van Rhyn, O[...] J[...] and an expert, Mr Anton Krause.

For the defendant, the following witnesses were called: Shadley Chilwan and Natasha Van Rhyn.

The Evidence of Mrs. O[...] J[...]:

[20] Mrs J[...] gave her testimony and related that she was walking with her minor child on the date of the incident and she had to hurry home because she needed to use the bathroom. When they reached the gate, she opened it and told the minor child that she was proceeding ahead and told him to close the gate. After walking further, close to the corner to her entrance where she was residing, she heard the child screaming, and she ran back to where he was. She could not see him but saw the gate lying down. She was unable to lift the gate on her own as it was too heavy and solicited the assistance of other people who then managed to lift the gate off the minor child. She contemplated that the incident occurred about 10 seconds after she left R[...] when she heard the bang. She confirmed that the minor child was injured and taken to hospital.

[21] As to the condition and features of the gate, she testified that there was no bracket in place when the incident occurred and described how she would push it close. The rollers were there when the gates fell, but there was no adjoining pole. She could not recall whether there was a plate at the foot of the gate. She also did not dispute that the scrape marks showed that the plate scraped against the wall and would effectively break the gate.

[22] She was certain that there was no stopper in place at the time of the incident which could have prevented the gate from rolling off the rail and toppling over. According to her, this was the only memory she has of the gate falling over. As once the gate was moving, it would roll on, and once it was standing still, it was not going to roll by itself.

[23] With regard to her responsibility to supervise the minor child, she conceded the duty and had she known what the people told her, after the incident, about the gate; she would not have permitted R[...] to have opened the gate by himself. For her, the gate was safe, and she questioned where the proof was, for any wrongdoing attributable to her, whilst just closing the gate.

The Evidence of Ms Madeline Walker:

[24] Ms Walker testified that she resided on the same premises as the plaintiff. At the time of the incident, she was at work. After she received a telephone call from Mrs J[...], she and another neighbour who works with her, namely, Natasha Van Rhyn, returned to the premises separately. On arriving at the premises, she saw people trying to lift the gate so that they could free R[...]. She saw that Marlon, another tenant, then took R[...] to the hospital.

[25] As to the gate, its mechanism and features, she testified that at the time of the incident, there was no stopper on the wall and no mechanism at the bottom of the wall and there was no mechanism in place during the two years while she stayed there. She described how the gate operated, that it had to be held open, and closed slowly; otherwise, it would run off the rails, because the motor was not working and the gate had to be opened manually. If she was required to drive her vehicle to the inside, Ms N van Rhyn, who worked with her, would get out of the vehicle, open the gate and close it after Ms Walker had driven the vehicle inside.

[26] She testified that there were prior incidents when the gate fell onto adjoining neighbours, namely a Patrick and Louise's vehicle. Under cross-examination, she testified that she was present when this happened, further that on three occasions, the

gate almost fell on her vehicle, but that she was not present when these incidents occurred. She complained “hundreds of times” to the defendant about the lock not working, and about the gate falling off, which complaints were communicated to defendant verbally. She was unable to account for the date of the incidents and her verbal communications to the defendant.

[27] She disagreed that the plate at the foot of the gate was there at the time of the incident. She testified that if someone did not close the gate correctly, it would come off the rail and fall, unless someone was there to catch it.

The Evidence of Ms Vene Van Rhyn:

[28] She was the only other person who was on the premises on the date of the incident. Whilst she was standing at the kitchen washing dishes, she heard the gate opening and saw the plaintiff and the minor child entering the premises. Her focus was on her dishes when suddenly, she heard a loud bang, and when she looked up, she saw the gate had fallen down and saw the plaintiff running towards the gate. Various individuals were trying to lift the gate and saw another tenant named Marlon transporting the plaintiff and her son to hospital. She stated that it was not the first time that the gate fell and that it had fallen on numerous occasions before, but she could not remember when.

The Evidence of Mr Anton Krause (expert):

[29] Mr Krause had physically inspected the entrance to the property and the gate on 16 May 2025. He testified that, generally, manually operated motorised gates presented risks of crushing, pinching or impact. He testified that a gate should have stops, which stop the gate at full closure, and a guide to keep it upright once closed in a fixed upright position. He testified that the design of the gate could create a sail effect, and that gates should lock. He relied on the Occupational Health and Safety Act 85 of 1993 ('OHSA') for his view that gates should be inspected annually:

(a) From a functionality perspective, a gate should slide smoothly and easily without excessive force, open and close fully and securely to allow or prevent vehicle entry and be manually operable by the average user;

- (b) From a safety perspective, a gate should not pose a risk of injury during operation and should include safety stops and guides to prevent derailment and/or tipping and comply with safety legislation and regulations;
- (c) The supports and foundations of a gate should be adequate for the weight and size of the gate; and
- (d) A gate which is an element of a domestic residence structure must remain safe for continued use during the product lifecycle.

[30] He testified that construction regulations promulgated in 2014 placed duties on designers. The original design intent of the gate was for it to be a motorised gate, the fact that it was now operated manually represented an increase in foreseeable risk. He testified that motorised gates normally would stop at the end of the motorised track and include a manual override.

[31] In cross-examination, Mr Krause conceded that the only regulation or legislation to which he referred in his report which was binding on the defendant was the portion of SABS 0400-1900 code / Part D: Public Safety / D2 Pedestrian entrances to parking areas in buildings, where it was required that an entrance should be so positioned, marked or protected that no pedestrian can unintentionally walk into the path of any moving vehicle.

[32] He conceded under cross-examination that the portion he relied on from the National Building Regulation and Building Standards Act 103 of 1977 was in fact an extract from commentary on the SABS 0400-1990 code, and as such, not a binding regulation, as the 2014 building regulations only came into operation in 2014; and, this gate was installed in 2010.

[33] Notwithstanding the above, Mr Krause testified that the general approach to gate design and installation, even if not in terms of binding regulations or laws, was that the gate should be fit for purpose and designed to prevent foreseeable risk. Of importance, had the gate had further stabilising features, it would likely not have toppled over.

[34] He stated that there could be cases where misuse of a properly designed gate would still result in it derailing. Equally important was that the gate's size and movement path posed a reasonably foreseeable danger, especially in a setting where children may be present. It was argued that the reasonable person in the position of the defendant should have foreseen the risk of injury due to tipping or mechanical failure. Mr Krause confirmed that in conjunction with the rollers, the bracket did perform the function of keeping the gate in an upright position when closed.

[35] It was the view of Mr Krause that the incident was the consequence of the gate lacking the required end stops and stabilising features which are critical in preventing derailment and tipping. The injuries suffered by R[...] were preventable and resulted from a combination of poor gate design, inadequate installation, a failure to install and maintain safety-critical components and failure to meet health and safety standards. A hazard that was posed by such a large, heavy and manually operated gate toppling over was foreseeable, and the absence of any damage to basic safety features, including end stops, gate guide rollers and track containment constituted a serious breach of health and safety expectations.

[36] It was also put to Mr Krause during cross-examination that the bracket that was in place at the time of the incident could sufficiently act as a "stopper"; he denied this and reiterated that a stopper was critical in the circumstances and that the bracket on its own was not at all adequate.

[37] Of importance, he testified further that even if all of the factors were as set out above, the bracket which currently is in place as a stopper was not sufficient to prevent the gate derailing. When it was put to him that on the defendant's version, the gate had never derailed before or since, he commented that there could always have been further stabilising features. Mr Krause conceded that he had no evidence that the rail showed signs of corrosion in 2017, or that it was as difficult to operate the gate, then, as when he inspected the gate.

[38] The defendant argued that the premises are not a place of work and since the defendant did not employ the plaintiff, the OHSA does not apply. Furthermore, insofar as OHSA did apply, the obligation is to ensure that 'as far as is reasonably practicable, that the article is safe and without health risks when properly used and that it complies with all the prescribed requirements.

[39] It was argued by the defendant that Mr Krause's opinions were based only on the plaintiff's version as he was not provided with the most recent version of the defendant's plea advancing that the standard that Mr Krause would impose is one to exclude all risk.

The Evidence of Ms Natasha van Rhyn:

[40] Although she was a resident at the premises on the date of the incident, she was not present when the incident occurred. She gave an account of how the gate operated. There was a stopper affixed to the wall at the time of the incident; however, it was not a bracket elevated off the ground, but one located on the ground at the end of the rail. Her husband installed the stopper when the gate was installed. A second stopper was installed when the gate became dislodged and toppled. It broke off the first stopper. She was not aware of any other incidents of the gate becoming dislodged. The rollers were there at the time of the incident.

[41] Her account was that the gate was heavy and one needed to push it forcefully to open it automatically and it would not roll back. If opened wide enough to allow one person through, the gate would stay there and would not roll back. The gate had to be pushed closed. The defendant taught her that if the gate was opened all the way, then the gate had to be closed slowly again, or else it would be dangerous. The plate affixed to the bottom of the wall would scrape against the wall when it was closed. The gate was heavy and would be difficult for a child to push at any significant speed.

[42] On her arrival at the scene of the incident, she saw the minor in the car as they drove over the gate to exit. She testified that the stopper was lying beside it.

The Evidence of Mr Shadley Chilwan:

[43] He bought the premises around 2001 and built the wall and the gates. The gate was not motorised. In his view, the gate was working fine from 2010 to the date of the incident. He rented several properties out, and he visited the premises almost daily. However, on the date of the incident, he was not present.

[44] He denied liability on the basis that a stopper was fixed to the gate at the time of the incident and guides were fitted to the gate to prevent the gate from toppling over. According to him, the stopper broke out when the gate derailed onto the minor. If the gate is used at normal speed, the gate would push against the wall and stop, but it was pushed so that it pushed against the wall and derailed. Some 18 months after the incident, in April 2019, the wheels and the rails were replaced, and the pole was added to the rollers to make it more stable.

[45] According to Ms Chilwan he had several tenants, and through the years not one issue arose concerning the gate during that time. He denied he received complaints from tenants about the safety of the gate, and there was no other instance before or after the present incident where the gate derailed. He conceded that it was possible that these incidents may not have been brought to his attention. In his view, the gate features were reasonably designed and that it was fit for use at the premises.

[46] However, what did transpire from his testimony is that there had been brackets installed in different positions in the past on three occasions and, with adaptations, when the bracket became too loose. However, when he was cross-examined on whether the bracket would keep the gate upright in his view, he maintained that the bracket was sufficient to stop the gate. When it was put to him that if the stopper had been in place, the risk of derailing would have been reduced, he responded that the risks may have been reduced but there would still be a risk.

[47] When it was also put to him that the stopper was there to stop the gate and that in its absence, the gate would run past, he responded that the gate was also braked by the fact that the plate crept against the wall and that it would only fall if it was pushed

with sufficient force to cause it to derail. In his view, there was no reason for him to suspect that the bracket which was in place was not sufficient.

[48] He could not present any evidence in support of his amended plea of the allegation that R[...] pushed the gate wide open and pushed it back, closing so hard that when the gate closed, it hit the pillar so hard that the stopper broke and dislodged from the wall causing the gate to topple over.

Onus

[49] The onus rests upon a plaintiff to prove all the elements of delictual liability, namely conduct, causation, wrongfulness, fault and harm.⁴ A related rule is that, although the wrongfulness of a positive injurious act is presumed, the wrongfulness of an omission is not. An omission is *prima facie* lawful, unless otherwise determined.⁵

Fault

[50] In this regard, it is well established that the owners or other persons in control thereof have a legal duty to take reasonable steps to ensure that their premises are reasonably safe for those members of the public who frequent them. A failure to take such steps will constitute wrongful conduct.⁶

[51] In *Van Vuuren v eThekweni Municipality*,⁷ the court, as a starting point, noted that where a party has, by prior lawful conduct, created a potential risk of harm to others, a duty may arise, which is breached where it fails to take reasonable steps to prevent the risk from materialising.⁸ In the present matter, the defendant admitted in his amended plea that he was the owner of the premises, which was further confirmed during his evidence in chief and during cross-examination. The defendant, when pressed under

⁴ *NVM obo VKM v Tembisa Hospital and Another* (CCT 202/20) [2022] ZACC 11; 2022 (6) BCLR 707 (CC) (25 March 2022) para 51 and *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA).

⁵ *BOE Bank Ltd v Ries* [2001] ZASCA 132; 2002 (2) SA 39 (SCA) para 12.

⁶ *Holzthausen v Cenprop Real Estate (Pty) Ltd & Another* [2019] ZAWCHC 168; 2021 (4) SA 221 (WCC) para 23.

⁷ *Van Vuuren v eThekweni Municipality* 2018 (1) SA 189 (SCA).

⁸ *Van Vuuren v eThekweni Municipality* 2018 (1) SA 189 (SCA) para 20.

cross-examination, further conceded that he had a legal duty to members of the public, more specifically, the plaintiff and R[...] who were his tenants.

[52] Negligence will be established if a *diligens paterfamilias* (reasonable person) in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property, and causing him patrimonial loss, would take reasonable steps to guard against such occurrence, and that the defendant failed to take such reasonable steps.⁹

[53] Four factors have been held to be useful in making the assessment set out above, namely (1) the degree or extent of risk created by actor's conduct, (2) the gravity of possible consequences in event of risk of harm materialising, (3) the utility of actor's conduct, and (4) burden of eliminating risk of harm.¹⁰

Causation

[54] Given the separation of merits and quantum, it is submitted that the issue of causation at this stage should be curtailed only to whether any omission on the part of the defendant contributed to the occurrence of the incident. In order for the plaintiff to hold the defendant delictually liable, a *causal nexus* between the defendant's conduct and the damages is required. In the current circumstances, there can be no doubt that there is factual causation.

Res Ipsa Loquitur

[55] The words *res ipsa loquitur* are neither a doctrine nor a maxim,¹¹ the literal meaning of which is "the thing speaks for itself" assists plaintiffs in certain instances - where the plaintiff is not in a position to produce evidence on a particular aspect which

⁹ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F.

¹⁰ *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) ('Pretoria City Council v De Jager') at 55J-56C.

¹¹ *Macleod v Rens* 1997 (3) SA 1039 (E) 1048, the court noted that *res ipsa loquitur* is neither a doctrine nor a maxim, but a particular form of inferential reasoning "for the particular circumstances where the only available evidence is that of the accident".

usually, but not necessarily, is peculiarly in the knowledge of the defendant.¹² The plaintiff has the onus of proving negligence, including the defendant's capacity to be at fault, on a balance of probabilities.¹³ To assist the Court with this "*maxim*", plaintiff attempts an explanation that the gist of the maxim is in essence that, "if a motor vehicle accident happens in a manner which is unexplained, but which does not ordinarily occur ... the court is entitled to infer that it was caused by negligence of the defendant."¹⁴

[56] However, when a plaintiff is not in a position to produce evidence on a particular aspect, less evidence will suffice to establish a prima facie case where the matter is peculiarly in the knowledge of the defendant.¹⁵ In those circumstances, the law places an evidentiary burden upon the defendant to indicate what steps were taken to comply with the appropriate legal standard.¹⁶

[57] Accordingly, this results in placing the evidentiary burden on the defendant to prove the absence of negligence, and he may be required to complete the factual picture to understand whether the legal standard was appropriate or lacking.

[58] Relying on *Arthur v Bezuidenhout* and *Mieny*,¹⁷ the onus never shifts; a plaintiff must prove that the damage he has sustained has been caused by the defendant's negligence. The plaintiff retains the onus of proof.

[59] Without the additional facts, the inference *res ipsa loquitur* remains, and essentially, the law places an evidentiary burden to show that proper standards were

¹² *Naude v Transvaal Boot & Shoe Manufacturing Co* 1938 AD 379 398-399 392-393; *Goode v SA Mutual Fire & General Insurance Co Ltd* 1979 (4) SA 301 (W) at 305; *Osborne Panama SA v Shell & BP SA Petroleum Refineries (Pty) Ltd* 1982 (4) SA 890 (A) 897-898; *Macleod v Rens* supra note 12.

¹³ *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 573C-H.

¹⁴ *S v Mudoti* 1986 (4) SA 278 (ZS) at 279 citing Hoffmann and Zeffertt on Evidence 3rd ed at 433.

¹⁵ *Monteoli v Woolworths (Pty) Ltd* [2000] ZAGPHC 4; 2000 (4) SA 735 (W) para 27.

¹⁶ *Ex parte the Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 473; *Durban City Council v SA Board Mills Ltd* 1961 3 SA 397 (A) 404-405; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) 37-38, *Jamneck v Wagener* 1993 (2) SA 54 (C).

¹⁷ *Arthur v Bezuidenhout and Mieny* supra at 573C--576A.

maintained.¹⁸ The maxim gives rise to an inference of negligence, not a presumption,¹⁹ and a court will draw the inference only if, on a balance of probabilities, it favours the party bearing the onus of proving negligence.²⁰ It is not a short cut to a finding of negligence and does not permit one to gloss over deficiencies in the plaintiff's evidence.²¹

[60] Only reasonable possibilities can be inferred, and a particular conclusion cannot be reached if there is evidence indicating the contrary.²² If two or more reasonable possibilities can be inferred, then the question depends on the probabilities of the case. Usually, other evidence would have to be presented to indicate which conclusion is more probable.

The distinction between wrongfulness and negligence

[61] As previously stated, the defendant is sought to be held delictually liable, not for a positive act, but for one or more omissions, which caused the plaintiff's injuries. The plaintiff alleges that the defendant was subject to one or more legal duties to plaintiff (described as "*n regsplig*"), which he wrongfully failed to discharge. Thus, the plaintiff must plead and prove facts relied on to support the allegation of a legal duty since wrongfulness is not presumed in such cases.²³ It is common cause that the defendant was the owner of the premises; however, the plaintiff disputed that he had any legal duty as pleaded by the plaintiff.

[62] The breach of a legal duty which is regarded as delictually wrongful, is ultimately premised upon the "legal convictions of the community"; and that, by applying that broad criterion, the law might be developed to recognise new such duties (thus

¹⁸ *Monteoli v Woolworths* supra-742. How much evidence is required to displace the inference will depend upon the facts of each case, but the evidence must provide a substantial foundation for the defendant's explanation - sufficient to destroy the probability that there was negligence - not merely a theory or a hypothetical suggestion: *Macleod v Rens* supra at 1046.

¹⁹ *Ntsala v Mutual and Federal Co Ltd* 1996 (2) SA 184 (T) at 190.

²⁰ *Stacey v Kent* 1995 3 SA 344 (E) 352.

²¹ *Macleod v Rens* Supra at 1048 .

²² *Ibid.*

²³ *South African Hang and Paragliding Association and Another v Bewick* [2015] ZASCA 34; 2015 (3) SA 449 (SCA) at 453E.

increasing the catalogue of wrongful omissions culminating in delictual liability). The judgment in *Minister van Polisie v Ewels* established the breach of a legal duty.²⁴ As to the limited catalogue of duties which existed before *Ewels* prompted development.²⁵

[63] Too often wrongfulness and negligence are conflated and the Courts have sounded caution about its distinction.

[64] Both wrongfulness and negligence invoke the notion “reasonableness”, so that the wrongfulness enquiry may erroneously be regarded as being practically co-extensive with enquiry (a)(ii) in the well-known test for negligence in *Kruger v Coetzee*.²⁶

The duty of property owner

[65] An owner or person in control of premises owes persons whose presence thereon might be reasonably foreseeable a legal duty to take reasonable precautions to avoid them suffering a foreseeable risk of injury.²⁷ The duty ordinarily concerns risks of injury from the condition of the premises.²⁸

[66] In this regard, it is well established that the owners or other persons in control have a legal duty to take reasonable steps to ensure that their premises are reasonably safe for those members of the public who frequent them. A failure to take such steps will constitute wrongful conduct.²⁹

[67] The defendant admitted in his amended plea that he was the owner of the premises, which was further confirmed during his evidence in chief and during cross-examination. The defendant, when pressed under cross-examination, further conceded that he had a legal duty to members of the public, more specifically the plaintiff and

²⁴ *Minister van Polisie v Ewels* 1975 (3) SA 590 (AD).

²⁵ *Za v Smith and Another* 2015 (4) SA 574 (SCA) para 20.

²⁶ *Kruger v Coetzee* 1966 (2) SA 428 (AD). This error was described and addressed in *Za v Smith and Another* 2015(4) SA 574 (SCA) at paras 17 to 19 (essentially elaborating the above-quoted views in *Cape Town Municipality v Bakkerud*).

²⁷ *King v Arlington Court (Muizenberg) (Pty) Ltd* 1952 (2) SA 23 (C), *Beaven v Lansdown Hotel (Pty) Ltd* 1961 (4) SA 8 (N); *Wolff v Foto Helga (Pty) Ltd* 1986 (1) SA 816 (O); *Swart v Department of Economic Affairs, Environment & Tourism (Eastern Cape)* [2001] 2 All SA 357 (E) at 362.

²⁸ *Spencer v Barkley's Bank* 1947 (3) SA 230 (T) at 240 – 241; , supra at 30 D.

²⁹ *Nicolene Holtzhausen v Cenprop Real Estate (Pty) Ltd & Another* 2021 (4) SA 221 (WCC), para 23.

R[...] who were his tenants. This Court, therefore should find that the plaintiff has proved the first leg of the enquiry, namely wrongfulness.

Negligence

[68] The test for negligence formulated in *Kruger v Coetzee* would be established if:

- “(a) A diligence paterfamilias in the position of the defendant –
 - (i) Would foresee the reasonable possibility of his conduct injuring another in his personal 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.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Where 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.”³⁰

[69] The two elements of wrongfulness and negligence have inevitably led to confusion, as was stated in *ZA v Smith*.³¹ When addressing the question of negligence in *Gouda Boerdery Bk v Transnet*, it was concluded as follows:

“Turning to the question of negligence, there can be no doubt that the reasonable possibility of a fire in the reserve and of it spreading to neighbouring properties are foreseeable. The respondent was accordingly obliged to take such precautions as were reasonable to guard against that eventuality. What those steps would have been depends on an examination of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These have been said to include:

‘(a) the degree or extent of the risk created by the actus conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actus conduct; and (d) the burden of eliminating the risk of harm.’

If a reasonable person would have done no more than was actually done, there is no negligence.”³²

³⁰ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E – G.

³¹ *ZA v Smith* 2015 (4) SA 574 (SCA) at 584F.

³² *Gouda Boerdery Bk v Transnet* 2005 (5) SA 490 (SCA) at 500C – E.

[70] Brand JA in *ZA v Smith*³³ in analysing the test as set out in *Kruger v Coetzee*, stated the following:

“As we know, this leg calls for an enquiry into whether the reasonable person, in the position of the respondents, would have taken any steps to warn and to protect persons in the position of the deceased against the harm that he eventually suffered. Properly construed, the defence raised by the respondents thus seeks to provide the negative answer to this question, namely, that the reasonable person would not have done so, because these dangers would be patently clear and apparent to those in the position of the deceased. In consequence, those in the position of the deceased could reasonably be expected to protect themselves.

...

As to the first of these considerations, I think the short answer is that, in determining what preventive steps the reasonable person would or would not take, every case must depend on its own facts. It follows that if the question were to arise whether or not the reasonable person would take measures to warn and protect visitors to certain areas....against the dangers they may encounter, it could only be answered with regard to all the facts and circumstances of that case. Included amongst these would be, for instance, the proportionality considerations which would require the weighing up of the prospects of the proposed measures being successful; the degree of risk of the harm occurring; the extent of the potential harm; the cost involved in taking the preventative measures to proposed; and so forth.”³³

Causation

[71] Given that merits and quantum have been separated, the issue of causation should be curtailed only to whether any omission on the part of the defendant contributed to the occurrence of the incident.

[72] In order for the plaintiff to hold the defendant delictually liable, a causal nexus between the defendant's conduct and the damages is required. It is not a requirement that the plaintiff establishes this causal link with certainty.³⁴ Brand JA in *ZA v Smith*,³⁵ quoting Corbett CJ in *International Shipping Co Pty Limited v Bentley*. Factual

³³ *ZA v Smith* supra paras 22 and 24.

³⁴ Brand JA in dealing with the element of causation in *ZA v Smith* supra at 589D – G.

³⁵ 2015 (4) 575 (SCA) 589 (D) - (G); *International Shipping Co (Pty) Limited v Bentley* 1990 (1) SA 680 (A).

causation is to be determined by the application of the test.³⁶ I agree with the defendant that, given the separation of merits and quantum, the issue of causation should be curtailed only to whether any omission on the part of the defendant contributed to the occurrence of the incident. Whether the incident was the cause of any damages which are proven will properly be determined when the court assesses the plaintiff's proven quantum.

Evaluation

[73] I will start my analysis with the expert, Mr Krause who testified that the general approach to gate design and installation, even if it is not in terms of binding regulations or laws, was that the gate should be fit for purpose and designed to prevent foreseeable risk. It is of importance to note that had the gate had further stabilising features, it would likely not have toppled over.

[74] Ms Walker testified that at the time of the incident, there was no stopper and mechanisms at the bottom of the wall in the years she lived there and the gate had to be held open to prevent it from running off the rails. The defendant argued that Ms Walker's evidence about the gate needing to be held in place, and rolling all over was not corroborated by the other witnesses. She testified that there were prior incidents of the gate falling over.

[75] Ms Natasha Van Rhyn testified that the gate was viewed as dangerous and that it was communicated to the tenants by the defendant which the defendant denied.

[76] She described that when closing the gate, a person had to ensure that the gate would not fall, and it was difficult to operate. Neither the stopper nor the bracket was there at the time of the incident. Of importance, she testified that the gate was big and heavy and would not roll by itself, but one had to hold the gate each time one entered and exited so that it would not fall over. She feared that the gate would fall again.

³⁶ *De Klerk v Minister of Police* 2021 (4) SA 585 (CC) at 596A-B.

[77] The plaintiff could not account for how the incident happened, save to state that it happened when she was 10 (ten) seconds away. However, she testified that there was no bracket in place on the date of the incident and could not recall if there was a plate at the foot of the gate.

[78] The plaintiff's witnesses, including plaintiff herself, created a favourable impression. It cannot be reasonably expected that they would recall with precision the condition of the gate, nor when the gate fell or when the complaints were referred to the defendant. None of the plaintiff's witnesses had any interest, nor did I get the impression that they stood to gain from the plaintiff's success in the proceedings. Overall, with regard to the mechanical features of the gate, including the characteristics and the difficulties encountered in operating it, there is nothing to suggest that the witnesses' evidence should be faulted. There is likewise no apparent reason why their versions of events and features of the gate should not be accepted as credible.

[79] The plaintiff did not exaggerate. She clearly stated that she was not aware of any other incidents of the gate falling over. In deciding the credibility of a witness, a Court looks at the witnesses' candour in the witness box, bias, latent and patent, contradictions in the evidence, external contradictions with that what was pleaded, the probabilities or improbabilities of the versions and the calibre and cogency of the witness performance compared to that of other witnesses who testified about the same incident or events.

[80] The defendant's averment that a stopper was fitted to the gate at the time of the incident was as stated above not supported by any evidence. The plaintiff's witnesses denied that a stopper was in place and the defendant himself, during cross-examination, conceded that a stopper was not in place.

[81] The defendant repeatedly refused to concede that the stopper, installed together with the fixed steel upright pole to prevent lateral movement constituted a safety mechanism that ought to have been in place at the time of the incident. His failure to

acknowledge this, despite being afforded on numerous opportunities to do so, is indicative of a denial of the what the witnesses said, and reflects the recalcitrant evidence in affirming the aforesaid measure and failure to acknowledge that these two components constitute safety mechanisms, is a clear indication of denial and of his recalcitrant attitude he adopted throughout his evidence, particularly during cross-examination.

[82] Accordingly, the defendant's version cannot be considered. He was unable to rebut the evidence of the plaintiff's witnesses that no stopper was in place at the time of the incident. This was ultimately confirmed by the defendant himself, namely that a stopper was not in place at the time of the incident, as the only safety mechanism was that of a bracket that was positioned at the centre of the brick wall at the end of the gate. The defendant's own evidence therefore materially undermines his version and supports the plaintiff's witnesses' evidence that the requisite safety mechanisms were not in place at the time of the incident. Evidently, there was no stopper in place but rather, a bracket. A bracket is not a stop.

[84] Mr Krause's view is that the safety mechanism the defendant had in place was not safe and the defendant could also not counter the testimony of the plaintiff's witnesses that the gate was dangerous. The witnesses as stated earlier had warned the defendant about the danger, which he denied.

[85] I have to accept that the gate was heavy and big in size and that it posed a hazard as a result of its bulk and that it was foreseeable that in the absence of sufficient safety mechanisms, which included stops, guide rollers or a pole, it could derail.

[86] There is no reason why this Court should reject the evidence of all the plaintiff's witnesses and accept the defendant's version as being more plausible given the circumstances of the matter. Accordingly, the plaintiff's version of the events and the material facts of the matter as presented by means of the other witnesses is more probable, given the totality of the facts.

[87] Plaintiff has proved the incident, namely the fact that the gate derailed and fell onto R[...], which itself justifies an inference of negligence against the defendant who has failed to give any proper explanation with regards to the incident and resultantly the *maxim* has given rise to an inference of negligence on the balance of probabilities that the defendant failed in his duty to properly maintain the gate, which inadvertently leads to the conclusion that the defendant wrongfully and negligently caused the incident and the resultant injuries that R[...] suffered. The defendant cannot escape that he should, in the circumstances, have foreseen the possibility of harm to persons making use of the gate and should have taken steps to guard against that possibility. The failure to take the necessary steps to guard against such an event from occurring constitutes negligence.

[88] In conclusion, the incident was caused by the wrongful and negligent conduct of the defendant. Accordingly, the defendant is liable to compensate the plaintiff in such sum as may be agreed upon between the parties or, failing agreement, as may be determined in due course.

[89] Unfortunately, there are no eyewitnesses who observed precisely how the gate toppled. The defendant called no witnesses either to corroborate his version of events. What is established is that the plaintiff was not residing at the premises for an extended period, the minor himself was for the most part residing with his grandmother. The gate was heavy and if not handled with the necessary care and caution was capable of rolling off. It is further common cause the plaintiff had previously made adjustments to the bracket on at least three occasions.

[90] Whilst it was argued that the defendant could not reasonably be expected to possess Solomonic wisdom, prophetic foresight, chameleonic caution or the reflexes of a racing driver, a diligent *paterfamilias* with moderation and prudent common sense, the standard required of him, was nevertheless that of a reasonable and prudent person exercising appropriate care in the circumstances. In my view, the defendant could and should have done more than he did to ensure that the gate was rendered reasonably

safe. To the extent that the defendant contends that the respective versions of the parties are mutually destructive, particularly in relation to whether the bracket was installed at the time of the incident, I do not agree. The evidence, viewed as a whole, does not support the conclusion that the defendant's version should be preferred. Rather, the circumstances and evidence demonstrate that reasonable precautionary measures could have been taken to prevent the gate from moving laterally and ultimately toppling. The defendant's failure to take such reasonable measures constitutes negligence and was causally connected to the incident and the resultant harm suffered by the plaintiff.

[91] In the circumstances, the plaintiff has discharged the onus. It was also argued that the minor was not called to testify and suggested that reliance be put on this for some reason or the other. Plaintiff is representing the minor in her representative capacity as well, and the minor has not turned 18 as yet and more of this may become apparent when the issue of quantum is determined.

[92] As to the third-party claim, the defendant's version of how the incident occurred was therefore not substantiated and falls to be dismissed. The defendant's averment that the plaintiff (the third party) allowed R[...] to close the gate dangerously and resultantly has a duty to supervise R[...] and the manner in which he was closing the gate, again, the defendant failed to present any evidence in support of this proposition and is dismissed.

Wasted Costs

[93] The costs that stood over on the 23rd of October and the 14th of November 2024 stood over for later determination, which fell outside the control of both parties, due to the unavailability of the judge to hear the matter, resulting in neither party being at fault for such postponement. I agree with plaintiff's counsel that such wasted costs occasioned by such postponement should be costs in the cause and recoverable by the successful party.³⁷ *Khan v Rural Licensing Board and others* summed it up well that the necessity for an adjournment should not be laid wholly at the door of either of the

³⁷ *General Leasing Corporation Limited v Louw* 1974 (4) SA 455 (C) at 466E – G.

parties. The adjournment should be regarded as part of the costs of the application.³⁸ I agree that the successful party is entitled to the wasted costs.

[94] In the circumstances, it was submitted that this Court finds that, that incident was caused by the wrongful and negligent conduct of the defendant and that the defendant is ordered to compensate the plaintiff in such sum as may be agreed or determined in due course.

[95] I also had to consider an interlocutory application to hear the evidence of Mr Anton Krause in terms of Rule 27, which order was granted, and costs stood over for later determination. The defendant is liable for payment of the plaintiff's costs, including the costs of counsel on Scale C and the costs of the expert witness, Mr Anton Krause in relation to the aforesaid application, in respect of which I penned the judgment.

[96] It is so that the general rule is that costs follow the event, subject to it being in the discretion of the court. The successful party should, as a matter of fairness and justice, recover the costs incurred in vindicating its rights unless exceptional circumstances dictate otherwise. In this instance, the wasted costs and costs of the day are awarded on Scale C including cost of Counsel on scale C where so employed.

Costs

[97] As to the costs of the hearing, I am guided by the complexity of the matter, the nature of the injuries concerned, the prolonged length of the litigation, the expense plaintiff had to incur to reach finality and securing the attendance of witnesses at court and to have filed an expert report; I do not agree with defendant's counsel that Scale B is appropriate. Neither do I agree that if I were to grant in the plaintiff's favour, an order is sought by the defendant in terms of the third-party claim with costs, dependent on the degree of fault which I would attribute to the third party. This argument falls by the wayside given my findings that no blame can be laid at the feet of the plaintiff. The payment of the plaintiff's costs, including the costs of counsel, is awarded on scale C.

³⁸ Ibid at 471G-H

Order

[98] In the result, the following order is made:

(a) The incident was caused by the wrongful and negligent conduct of the defendant.

(b) The defendant is held liable for the damages suffered by the plaintiff's minor child.

(c) The defendant is ordered to compensate the plaintiff in such sum as may be agreed or determined in due course.

(d) The defendant is liable for the costs:

(i) occasioned by the postponement on 14 November 2024 on Scale C.

(ii) for the cost of the application in terms of Rule 27 on Scale C.

(iii) further costs including the costs of counsel on Scale C.

R PARKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

Plaintiffs' counsel: Adv E Benade

Plaintiff's attorney: Daniel Botha, Holly Wynne (DSC Attorneys)

Defendants' counsel: Adv DG. Whitcomb

Defendants' attorney: Hannes Stimie (Stimie Attorneys)