IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 2565/2018
DATE HEARD: 17/11/2020 and 05/03/2021
DATE DELIVERED: 13/04/2021

In the matter between

CAROL JANE COOPER **PLAINTIFF**

and

SHAMWARI HOSPITALITY (PTY) LTD

t/a SHAMWARI GAME RESERVE **DEFENDANT**

JUDGMENT

ROBERSON J:-

[1] The plaintiff and her husband, Mr Peter Cooper, reside in Essex in the United Kingdom. Since 1996 they have been visitors to South Africa. This action arises from their visit in 2016, when they booked accommodation at the defendant's facility (the reserve) for three nights, namely 26, 27 and 28 November 2016. Unfortunately the plaintiff's stay was cut short because it is common cause that on the evening of the 26 November 2016 she stepped into a swimming pool at the reserve and suffered a fracture of her right femur.

[2] The plaintiff subsequently instituted this action against the defendant for damages under various heads. In her particulars of claim she alleged that the defendant owed a duty of care to the public in general and in particular to her, to: ensure the safety of any person entering and walking in its premises; take all necessary steps to avoid incidents such as that which gave rise to the action;

and ensure that any person employed or contracted to carry out the aforesaid duties would do so speedily, properly and effectively. The plaintiff further alleged that her fall into the swimming pool was caused solely by the defendant's negligence in that the defendant, as represented by its employees: failed to ensure the safety of any person, in particular the plaintiff, entering the premises; failed to ensure the safety of any person, in particular the plaintiff, walking in or at the premises; failed to ensure that the pool was properly demarcated; failed to ensure that the pool was properly lit; failed to ensure that the pool was cordoned off; failed to ensure that any person walking in or at the premises, specifically the plaintiff, was notified of the presence of the pool; failed to take all necessary steps to avoid incidents such as the one giving rise to the action; and failed to ensure that any person or entity employed or contracted to carry out any of the aforesaid duties would do so speedily, properly and effectively.

[3] In its plea the defendant admitted a legal duty to take all reasonably necessary steps, as could reasonably be expected of the reasonable game lodge owner, to ensure that no harm befell the plaintiff while on the premises. The defendant denied a breach of its duty of care and denied that it or its employees acted negligently. Alternatively, if it was found that it did act negligently, the defendant pleaded that such negligence did not cause or contribute causally to the plaintiff's fall. Further alternatively, in the event of the defendant being found to be causally negligent, the defendant pleaded that the plaintiff's injuries were partly caused by the negligence of the plaintiff in that: being aware of the location of the swimming pool she failed to keep a proper lookout; she failed to negotiate the area with the necessary care; she failed to be mindful of the nature of the area she was traversing; and she failed

to avoid the incident in circumstances where she could and should have done so.

[4] In addition, the defendant pleaded that it was exempted from the liability alleged in that the plaintiff had signed a form exempting the defendant from such liability. (In the pleadings the document was referred to as the indemnity form and I shall refer to it in this judgment as the indemnity.) In her replication the plaintiff pleaded a restrictive interpretation of the indemnity, and denied that the indemnity was enforceable because: it was in conflict with certain provisions of the Consumer Protection Act 68 of 2008 (the CPA), the defendant had failed to limit the risk of personal injury; and the indemnity was contrary to public policy because it attempted to exclude the plaintiff's constitutionally enshrined rights.

[5] The matter proceeded on the issue of liability, with quantum to stand over.

[6] Photographs of the swimming pool and its surrounds were submitted, depicting the area in daylight and at night. The swimming pool is positioned in a wooden deck which is approached from a pathway which leads from the reception area and from guests' rooms. The pool is almost flush with the deck. As a person exits the pathway onto the deck, the rectangular pool is visible and distinguishable from the deck in the daylight photographs, to a person entering the deck from the pathway. If one turns to the right from the pathway there is a rough wooden fence at the edge of the deck behind which is foliage. To the right of the pool (from the perspective of someone entering from the pathway) there are tables and chairs shaded by umbrellas. To the left of the pool, again from the perspective of someone entering the area from the pathway, there is a restaurant which is accessed by steps at the far end of the pool. Between

the slightly raised restaurant and the pool is a narrow strip of deck alongside which is a border of plants. The area to the right of the pool is much wider and there is space between the edge of the pool and the tables and chairs. At the end of the pool nearest to a person entering the area from the pathway, there are two pot plants depicted, one in the middle of the edge of the pool and one at the corner on the right. The pool is not fenced or cordoned off. A photograph of the pool and deck area at night shows a fairly bright light attached to the wooden fence, the beam of which extends to the nearest edge of the pool, although it does not illuminate the full width of the pool, particularly where the corner pot plant is placed. It also does not illuminate the side of the pool opposite the restaurant, and the point where the deck meets the pool side is barely distinguishable. The surface of the pool is dark. There is a blue light with a small beam shining beneath the surface of the pool, on the restaurant side.

[7] The plaintiff was the only witness to testify. She was born on 21 December 1953. She is presently retired, but her occupation in the past has been a licensee of pubs and restaurants. As already mentioned, she and her husband have visited South Africa since 1996 and previously holidayed in Cape Town and Limpopo province. This was their first visit to the reserve.

[8] On their arrival at the reserve on 26 November 2016, at about 11h45, they checked in at reception and that is where they both signed the document containing the indemnity. She glanced through it, thinking that it related to areas of the reserve where there were wild animals. Nothing was pointed out to them and she did not recall seeing warning signs. Their room was not ready and they went to the deck area to wait and had lunch there.

[9] They entered the deck area from the path and the plaintiff agreed that from the vantage point of the two lounging chairs placed at the entrance to the deck, the pool was visible in daylight. On her approach to one of the tables to which I have referred in paragraph [6] above she saw the pool. They remained at the table where they had lunch for about two hours, during which time the plaintiff drank three small glasses of wine, which she said amounted to just less than a large glass of wine, which is 250ml. She sat with her back to the pool, looking out at a water hole. She said that she vaguely remembered seeing the pool but did not pay much attention to the pool and did not go near it.

[10] When their room was ready, they left the deck area via the same path by which they had entered the deck area. The plaintiff agreed that there was a short distance between the wooden fence and the pool and she walked nearer to the wooden fence. She did not pay attention to the pool because she was listening to the person who was showing them to their room. When asked if she had looked around her she would have seen the pool close by, she said she would have if she had stopped and looked.

[11] At 16h00 that day the plaintiff and her husband went on a game drive, during which guests were treated to sundowners and snacks. The plaintiff drank a miniature bottle of white wine. They returned from the game drive at about 19h30 or 19h45. Thereafter they walked to the deck area intending to have dinner at the restaurant.

[12] On entering the deck area the plaintiff headed towards the right and was watching the ground as she walked because it was dark. Her husband was in front of her. The light attached to the wooden fence was behind her. She looked up and saw her friends at the foot of the steps at the far end of the

pool, leading up to the restaurant, and headed towards them. She looked down again and walked on the left hand side of the pot plant which was on the corner of the pool. She did not see the water and stepped into the pool with her right leg. Mr Cooper pulled her out of the pool. He had walked ahead of her on the other side of the pot plant and had walked around the pool, as had her friends, who she said had previously stayed at the reserve. She did not see the water because it was dark and the pool was not lit at all. She did not see the difference between the deck and the water because it was dark and the deck and the water looked the same. When referred to her further particulars for trial where it was said that her case was that the pool was not properly lit, as opposed to not lit at all, she said that she had told her legal team that the pool was not properly lit, with reference to the blue light depicted in the night time photograph below the surface of the pool. She knew that there was a pool there but did not register its exact position because she had sat with her back to it at lunch. She had not forgotten about the pool.

[13] After the plaintiff testified, both parties closed their cases.

[14] In my view the determination of the defendant's alleged liability rests on the question of causation. It is not enough for a plaintiff to prove negligence. There must be causal negligence. This was the approach of the defendant in argument.

[15] One must also approach the question of causation in relation to the particular facts of the case. In this case the plaintiff had prior knowledge of the pool. She had seen it in the daylight and was aware that it was situated on the deck. She would have walked past it twice: on her way to sit at a table for lunch and when leaving the deck in order to go to her room. She testified that she was looking where she was going on her way to the restaurant. She also

said that she had looked up and seen her friends and headed towards them. Mr Cooper and her friends clearly avoided the pool. To do so they would have had to move to the right as they entered the deck in order to skirt the pool. If one asks why they did so, the obvious answer is that they were aware of the pool and were avoiding it. It is telling that Mr Cooper did not testify and explain why he was able to avoid the pool. It was initially indicated that Mr Cooper would testify on behalf of the plaintiff. If Mr Cooper and the friends were able to do so, the question is why did the plaintiff not avoid the pool? In my view the obvious answer is that she did not keep a proper lookout and that if she had exercised the necessary care she would not have stepped into the pool. It follows that her conduct was the sole cause of her stepping into the pool and sustaining injuries.

[16] It was submitted on behalf of the plaintiff that Mr Cooper had not necessarily seen the pool and could merely have been avoiding the pot plant at the corner of the pool. In my view this submission is speculative. Mr Cooper did not testify. It was also submitted that Mr Cooper was walking in front of the plaintiff and that he would have blocked the light. Again there is no evidence to this effect and the submission is speculative. It was further submitted that the Coopers' friends would have known the layout of the deck having visited the reserve previously. These friends did not testify and the submission is an assumption.

[17] It follows that the plaintiff failed to prove causal negligence on the part of the defendant and her claim cannot succeed.

[18] If I am wrong in this conclusion and the plaintiff did prove causal negligence on the part of the defendant, or if there was only contributory

negligence on her part, I shall consider whether or not the defendant's liability would be excluded by the indemnity.

[19] The document containing the indemnity reads as follows:

"I, the undersigned, do hereby:-

1. acknowledge and declare that I enter Shamwari Game Reserve and the surrounds and partake in its facilities and activities fully aware of the nature and effect of the acknowledgments, waivers and indemnities hereby given.
2. Agree that the operators and proprietors of Shamwari Game Reserve, and its holding, subsidiary and associated companies, their servants, employees, directors, shareholders and any other person connected (whether directly or indirectly) with the operation of Shamwari Game Reserve will not be liable or responsible for any loss or damage to property, bodily harm, injury, death, loss of support or any other form of damages or claim from whatsoever cause arising including, but not limited to, the injury or death of, or loss of support of or by any third party.
3. waive and abandon all claims of whatsoever nature and howsoever arising (including claims arising directly or indirectly from the injury, death or bodily harm to or loss of support of or by any third party) against Shamwari Game Reserve and its holding, subsidiary and associated companies, their servants, employees, directors, shareholders and any other person connected (whether directly or indirectly) with the operation of Shamwari Game Reserve and facilities accommodated thereon including but not limited to any such claims which may have arisen or which may arise relating to game viewing drives, boat cruises operated by independent operators, walking trails, participating in the explorer camp program and/or transfer to or from the premises of Shamwari Game Reserve.
4. Acknowledge that the waiver and abandonment relates to any claim from whatsoever cause arising, or loss suffered and whether arising from any act (negligent or otherwise), commission or omission on the part of those entities and persons to whom the foregoing waiver and abandonment applies.

5. Indemnify and hold harmless the companies and persons referred in 2 above from any and all claims of whatsoever nature and howsoever arising by any of myself, spouse, companions, partner, children (whether minor or major), any dependants or relatives and any person accompanying me to Shamwari Game Reserve (whether as invitee or employee or otherwise), including but not limited to claims arising from or as a result of : (i) participating in walking trails and/or the explorer camp program and (ii) being transported on or in a vehicle or vessel, whether operated by Shamwari Game Reserve or an independent operator.
6. Acknowledge that any emergency medical treatment arranged or paid for by Shamwari Game Reserve shall be at its discretion and without prejudice to its right and without any admission of liability on its part.
7. Warrant that I have full legal capacity to make and give the acknowledgments, waivers and indemnities.
8. Acknowledge that I have read and understand the acknowledgments, waivers and indemnities and that I am bound thereby without limitation in time, extent or damages or cause of action.
9. Acknowledge that the provisions of this waiver and indemnity do not exclude or limit, or purport to exclude or limit, any liability which by law may not be excluded or limited.
10. Acknowledge that the content and implications of this waiver and indemnity and the dangers that I/we will be exposed to and which are inherent during the course of my/our stay have been explained to me/us.
11. Acknowledge that I/we have considered and understand the aforesaid and that I/we have no questions or misapprehensions about the aforesaid and agree to be bound by and willingly sign this document."

[20] It was not the plaintiff's case that the indemnity had not been brought to her attention. The issue must be determined on an interpretation of the indenmity and whether or not it offends public policy or is in conflict with the provisions of the CPA.

[21] In *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 989G-I Scott JA stated:

> "Against this background it is convenient to consider first the proper construction to be placed on the disclaimer. The correct approach is well established. If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens. (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be 'fanciful' or 'remote' (cf *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 305 (PC) at 310C-D)."

[22] It was submitted on behalf of the plaintiff that the indemnity should be interpreted restrictively and be restricted to the activities specifically mentioned in clauses 3 and 5, namely game viewing drives, boat cruises, walking trails, explorer camp programs, transfer to or from the defendant's premises, and transportation in a vehicle or a vessel. In my view such an interpretation cannot be upheld. In both paragraphs 3 and 5 the words "not limited to" are added after mention of these specific activities. In addition paragraph 2 refers to claims "from whatsoever cause arising". The defendant offered facilities other than game viewing etc, such as accommodation and dining. I am of the view that the indemnity is unambiguous and it follows that "effect must be given to that meaning".

[23] The provisions of the CPA on which the plaintiff relied were s 48 (2) (a) and (b), s 49 (2) and s 58 (1). For convenience I shall include the full sections which provide:

> **48 Unfair, unreasonable or unjust contract terms**

(1) A supplier must not-

(a) offer to supply, supply, or enter into an agreement to supply, any goods or services-

(i) at a price that is unfair, unreasonable or unjust; or

(ii) on terms that are unfair, unreasonable or unjust;

(b) market any goods or services, or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust; or

(c) require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer-

(i) to waive any rights;

(ii) assume any obligation; or

(iii) waive any liability of the supplier,

on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if-

(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;

(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;

(c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or

(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and-

(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or

(ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

49 Notice required for certain terms and conditions

(1) Any notice to consumers or provision of a consumer agreement that purports to-

(a) limit in any way the risk or liability of the supplier or any other person;

(b) constitute an assumption of risk or liability by the consumer;

(c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or

(d) be an acknowledgement of any fact by the consumer,

must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

(2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk-

(a) of an unusual character or nature;

(b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or

(c) that could result in serious injury or death,

the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialling the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.

(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer-

(a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and

(b) before the earlier of the time at which the consumer-

(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or

(ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).

58 Warning concerning fact and nature of risks

(1) The supplier of any activity or facility that is subject to any-

(a) risk of an unusual character or nature;

(b) risk of which a consumer could not reasonably be expected to be aware, or which an ordinarily alert consumer could not reasonably be expected to contemplate, in the circumstances; or

(c) risk that could result in serious injury or death,

must specifically draw the fact, nature and potential effect of that risk to the attention of consumers in a form and manner that meets the standards set out in section 49.

(2) A person who packages any hazardous or unsafe goods for supply to consumers must display on or within that packaging a notice that meets the requirements of section 22, and any other applicable standards, providing the consumer with adequate instructions for the safe handling and use of those goods.

(3) Subsection (2) does not apply to any hazardous or unsafe goods to the extent that a substantially similar label or notice has been applied in terms of any other public regulation.

(4) A person who installs any hazardous or unsafe goods contemplated in subsection (2) for a consumer, or supplies any such goods to a consumer in conjunction with the performance of any services, must give the consumer the original copy of-

(a) any document required in terms of that subsection; or

(b) any similar document applied to those goods in terms of another public regulation.

[24] The plaintiff pleaded that the indemnity falls within the provisions of s 48 (2) (a) and (b) and its terms are accordingly unfair, unreasonable or unjust. The plaintiff further pleaded that the defendant did not comply with the provisions of s 49 (2) and 58 (1).

[25] A consideration of the argument based on s 48 (2) (a) and (b) of the CPA involves in my view a consideration of the plaintiff's contention that the indemnity is against public policy. The chief submissions in this regard were that the plaintiff was in an unequal bargaining position and that the indemnity does not allow her to seek judicial redress for her injuries at all.

[26] In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), Ngcobo J stated the following at paragraph [30]:

> "In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms."

[27] Further at paragraphs [56] to [58] the learned judge stated (footnote omitted):

> "[56] There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.

[57] The first question involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda* which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values which must now inform all laws, including the common law principles of contract.

[58] The second question involves an inquiry into the circumstances that prevented compliance with the clause. It was unreasonable to insist on compliance with the clause or impossible for the person to comply with the time limitation clause. Naturally, the onus is upon the party seeking to avoid the enforcement of the time limitation clause. What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that, in the circumstances of the case there was a good reason why there was a failure to comply."

[28] In the recent judgment of the Constitutional Court in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) in paragraph [58] it was stated that:

"*Barkhuizen* remains the leading authority in our law on the role of equity in contract, as part of public policy considerations."

[29] I mention at this point that regulation 44 (3) (a) of the CPA provides that a term of a consumer agreement is presumed to be unfair if it has the purpose

or effect of excluding or limiting the liability of the supplier for death or personal injury caused to the consumer through an act or omission of that supplier, subject to s 61 (1) of the CPA.[1] However regulation 44 (2) (a) provides that the list in regulation 44 (3) (the sub regulation lists a number of terms which are presumed to be unfair) is indicative only and that a term listed in the sub-regulation may be fair in view of the particular circumstances of the case.

[30] In having regard to this presumption of unfairness and considering whether or not the indemnity is fair in the particular circumstances, I shall focus on the specific grounds raised by the plaintiff in support of her claim that the indemnity is against public policy.

[31] As was submitted on behalf of the defendant, the indemnity in this matter is not unique. It is not unusual for hotels and game reserves to contract on this basis with guests. The plaintiff herself said that she has signed such indemnities on previous occasions. The indemnity in this matter does not altogether exclude the plaintiff's right of access to court. Firstly it was open to her to ask a court to determine fairness in accordance with the authority of *Barkhuizen*. Secondly Clause 9 of the indemnity (see paragraph [19] above) specifically mentions what liability is not excluded. This would include for example liability for gross negligence or intentional wrongful conduct by way of an omission or an act of commission.

[32] I am further of the view that there is no room for finding that the plaintiff was in an unequal bargaining position when she signed the indemnity. In *Barkhuizen* at paragraph [66] Ngcobo J said:

[1] This sub-section provides: Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of— (a) supplying any unsafe goods; (b) a product failure, defect or hazard in any goods; or (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

> "This Court must, however, operate on the basis of the evidence that was presented to the High Court and that is now before us. There is no admissible evidence that the contract was not freely concluded, that there was unequal bargaining power between the parties or that the clause was not drawn to the applicant's attention. There is nothing to suggest that the contract was not freely concluded between persons with equal bargaining power or that the applicant was not aware of the clause. On the contrary, the indications are that he was aware of the time limitations. The contract required him to submit a written claim with the respondent within 30 days of the accident but he submitted his written claim within at least eight days of the accident through his insurance broker."

[33] The overall agreement between the plaintiff and the defendant was the provision of leisure and hospitality services to the plaintiff in return for payment. The plaintiff was not obliged to choose the defendant, or for that matter, any other reserve. There was no evidence that she objected to the indemnity or was forced to sign it. It was submitted on her behalf that she had no choice but to sign the indemnity because she had already paid for the services. This was however not the plaintiff's evidence. She signed the indemnity voluntarily.

[34] I am therefore of the view that in asking the first question stated in *Barkhuizen*, the indemnity was not unreasonable.

[35] The next question is would it be unfair to enforce the indemnity. On behalf of the plaintiff it was submitted that it would be unfair to enforce the indemnity. The plaintiff, so it was submitted, did not expect to step into the pool because she had not observed it. This is not altogether correct, because she had seen the pool earlier in the day and had twice walked past it. It was further submitted that guests would not have expected the presence of the pool in the dark because it and the surrounding deck were dark. In addition, so

it was submitted, the defendant had not done all it could to make the pool safe. This submission overlooks the facts of the case, in that the plaintiff was already aware of the pool and Mr Cooper and their friends managed to avoid the pool that evening.

[36] It was submitted on behalf of the defendant that in asking the second question stated in *Barkhuizen*, the conduct of the plaintiff was to be considered in order to decide whether or not the indemnity should be enforced in the particular circumstances of the case. In other words, did the plaintiff show that there was good reason for the indemnity not to apply. The plaintiff was aware of the presence of the pool, she agreed that it was visible from the vantage point of the lounging chairs which were at the entrance to the deck, and she had not forgotten about the pool. In such circumstances I do not see how it could be unfair to enforce the indemnity. This was not the situation which occurred in *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ). The plaintiff in this matter was a coach driver who had transported passengers to the hotel and who stayed overnight at the hotel. While in the process of leaving the next morning, the plaintiff was injured when a heavy gate, the wheels of which had come off its rails, fell on him. Nicholls J (as she then was) found that the plaintiff had proved negligence on the part of the hotel. The learned judge did not make any finding on whether or not the disclaimer clause in question in the matter was unreasonable but found that it would be unfair and unjust to enforce it. At paragraph [53] she stated:

> "Naidoo was a guest in a hotel. To enter and egress was an integral component of his stay. A guest in a hotel does not take his life in his hands when he exits through the hotel gates. To deny him judicial redress for injuries he suffered in doing so, which came about as a result of the negligent conduct of the hotel, offends against notions of justice and fairness."

[37] It was submitted on behalf of the plaintiff that the facts in the present case are similar to those in *Naidoo*, in that the incident whereby the plaintiff was injured occurred while she was making her way to have dinner at the restaurant, an activity in which there was no inherent danger. The distinction in my view is that a swimming pool is not an unusual feature at a hotel or leisure facility. It is quite commonplace. It is one of a number of facilities for enjoyment by guests, as is a restaurant. At the risk of repetition, the pool was visible to anyone entering the deck from the pathway, and the plaintiff had prior knowledge of the swimming pool and its position in the deck. It is not unreasonable to expect adult hotel guests to look where they are going and to exercise care when on the hotel premises.

[38] It remains for me to consider whether or not there was non-compliance with the provisions of s 49 (2) and 58 (1) of the CPA on the part of the defendant.

[39] With regard to s 49 (2), the question is was the swimming pool a facility that was subject to any risk of an unusual character or nature, or was walking to the restaurant via the deck containing the pool an activity subject to any risk of an unusual character or nature? To some extent I have answered these questions above.

[40] A swimming pool is not an unusual or unexpected facility at a hotel, game reserve or leisure facility, nor is it in the normal course subject to any risk of an unusual character. As counsel for the defendant submitted, a swimming pool is a regular feature in modern society and is no different from for example a sun lounger which potentially could be the cause of a person falling and sustaining injuries. If the pool in question in this case, which had a dark surface, contained some hidden danger beneath the water which was not

visible, that would be different. Further the activity of walking on the deck to reach the restaurant is not in my view subject to an unusual risk. It would be different, and this was an example suggested by counsel for the defendant, if the defendant had not prevented the presence of dangerous wild animals on the deck.

[41] Was the pool a facility of which a consumer could not reasonably be expected to be aware or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate? I repeat that a swimming pool at a hotel or other leisure facility is not unusual or unexpected. The pool in question was clearly visible to guests entering the deck at least in daylight and that evening three out of four persons who were going to dine at the restaurant did not walk into the pool. That fact in my view demonstrates that an ordinarily alert consumer would reasonably have been expected to notice the pool.

[42] Reliance by the plaintiff on s 58 (2) of the CPA therefore falls away.

[43] It follows that in the particular circumstances of this case, if the causal negligence as alleged by the plaintiff had been proved, the defendant was entitled to rely on the indemnity to avoid liability for the plaintiff's damages.

[44] All that remains is the costs which were reserved when the matter was postponed, according to an order in the court file, on 18 August 2020. The matter was set down for hearing on 7 August 2020. It appears that Beshe J, before whom the matter was set to proceed, had ruled that the plaintiff could not rely on the provisions of the CPA without having delivered a replication raising such reliance. The replication was then delivered and further pleadings were exchanged. Although it was submitted on behalf of the plaintiff that the

defendant had only raised the issue of a replication on the day of the trial, nonetheless following the ruling by Beshe J the matter was postponed to enable the plaintiff to deliver a replication. In such circumstances I think it fair that the plaintiff should pay the costs which were reserved.

[45] The following order will issue:

The plaintiff's claim is dismissed with costs, including the costs which were reserved on 18 August 2020.

_____

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances (matter heard virtually)

Plaintiff: Adv A J du Toit, instructed by De Vries Shields Chiat c/o Dold & Stone Inc, Makhanda.

Defendant: Adv D J Coetsee, instructed by BDP Attorneys, c/o de Jager & Lordan Inc, Makhanda.