IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. CA 216/2021

In the matter between:

SOUTH AFRICAN POST OFFICE SOC LIMITED **APPELLANT**

And

DEON VIVIERS **RESPONDENT**

JUDGMENT

GQAMANA J:

[1] This appeal is with the leave of the Supreme Court of Appeal against the judgment and order of the trial court, which held the appellant liable for such damages as the respondent may prove consequent to the injuries he sustained on 14 July 2012 at Grahamstown Road, Swartkops, Port Elizabeth (now known as "Gqeberha") and to pay costs of such action. For convenience the parties shall be referred to as cited in the trial. The plaintiff is Mr *Deon Viviers* and the defendant is *South African Post Office Soc Limited*, an organ of State.

[2] Central to this appeal is the element of wrongfulness in a claim based on delict. To be precise, the issue is whether the defendant owed the plaintiff the legal duty to prevent harm and to ensure the plaintiff's safety when the latter took a short cut route to Village bar, an entertainment venue on a Saturday evening and stepped into an uncovered storm water drain and injured himself.

[3] The facts foundational to this appeal can be summarized as follows. Just over a decade ago, on 14 July 2012, the plaintiff fell into an uncovered storm water drain which was located adjacent to the Telkom building on the boundary of the paved parking area. It is common cause that the defendant has entered into a lease agreement with Telkom in terms of which it leased premises from the Telkom building referred to '*the Swartkops ETE and Post Office measuring approximately 308 square metres in the Buildings situated on the Property subject to the final measurements according to SAPOA and 3 parking bays*.'

[4] The plaintiff caused summons to be issued against both Telkom SA Limited and the defendant for the recovery of damages arising out of the injuries sustained when he fell into the uncovered storm water drain. The action was later withdrawn against Telkom, and he proceeded to trial only against the defendant.

[5] The plaintiff's cause of action was couched on the basis of a general duty to prevent harm that the defendant owed the plaintiff towards ensuring the latter's safety when he took a short cut over the property destined to the Village bar on a Saturday evening, during which he injured himself. It was specifically pleaded in the particulars of claim that the defendant breached its duty towards the plaintiff in that it failed to ensure that the aforementioned storm water drain was covered by safety grids or similar covering, alternatively, it failed to take steps to cordon it off.

[6] In resisting the claim, the defendant, *inter alia*, denied that it was in control of the property where the alleged uncovered drain was located and pleaded that it had the responsibility to maintain only the portion of the leased premises as defined in the lease agreement with Telkom, and not the property. The defendant also denied that it owed the plaintiff a duty to prevent harm in any respect relating to the property. The defendant further pleaded that its liability for delict in public law is limited in terms of the provisions of s 26 of the South African Post Office Act.[1]

[7] After closure of the plaintiff's case, the defendant applied for absolution from the instance but same was refused. Evident from the judgment, the trial court was alive to the fact that amongst the contested issues was the element of wrongfulness. In refusing the application for absolution, the trial court was persuaded by the fact that the plaintiff's claim was a common law delictual claim and not based on public law liability. Further on the lease agreement issue, the trial court concluded that the defendant was the lessee of the property which is connected to the drain in question.

[8] On the issue of wrongfulness, the trial court found that, based on legal convictions of the community, the defendant had the legal duty to take reasonable steps to prevent the members of the public from the harm or injury and the uncovered drain constituted a source of danger.

[9] In this appeal, counsel for the defendant argued that the defendant, as an organ of State, had neither public law obligation in terms of the common law nor any statutory duty towards the plaintiff. Much argument by the defendant was directed at what was termed 'the public law of delict' versus 'the private law of delict'. We have no aspiration to venture into that debate as this matter can be resolved without any consideration of that submission. The gist of the argument for the defendant was that the defendant could only be held delictually liable to the plaintiff if there was a legal

[1] Act 28 of 2015 (the Act).

duty derived from either a statute[2] or the Constitution to ensure the safety of the plaintiff in the circumstances.

[10] With reference to the Constitutional Court judgment in *BE obo JE v Member of the Executive Council for Social Development, Western Cape*,[3] counsel for the defendant argued that a public body has a legal duty to ensure the safety of citizens only if its enabling legislation creates such duty. Because the defendant was an organ of State, plaintiff had to allege and prove a duty to act which is a different duty from a general duty of care. And in order for the defendant to be held liable, it must have a duty to act, which duty in itself could only be founded on its enabling legislation.[4] She argued that if a specific breach of duty to act is relied upon, the nature of the duty must be stated.[5]

[11] The defendant further submitted that, in order to prove a breach of duty of care, the plaintiff had to first prove that a right owed to him. Therefore, the plaintiff must prove the act or omission on which the breach of duty is premised. In the present matter, because the defendant is an organ of State, such a duty would arise from the existence of a relationship between the defendant and its customers, either based on a contract or its public law statutory obligations. As an insulation to this argument, counsel placed reliance on the *dicta* by *Moseneke* DCJ (then), in *Steenkamp v Provincial Tender Board of the Eastern Cape*[6] that:

"*It appears to me that if the breach of a statutory duty, on a conspectus of the statute, can give rise to damages claim, a common-law duty cannot arise. If the statute points in other direction, namely that there is no liability, the common law cannot provide relief to the plaintiff because that would be contrary to the statutory scheme.*"

[2] The Act, Occupational Health and Safety Act 85 of 1993 and Postal Services Act 124 of 1998.
[3] 2022 (1) SA 1 (CC) at para [21] & [22].
[4] The Act.
[5] *SAR&H v Marais* 1950 (4) SA 610 (A), *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A) at 83 and *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A).
[6] 2007 (3) SA 121 (CC).

[12] The argument, therefore, was that in terms of the provisions of s 26 of the Post Office Act, the defendant's liability is circumscribed and the case pleaded by the plaintiff fell foul thereof. It was fervently argued that in order for the defendant to attract liability, the plaintiff had to allege and prove that the defendant had a statutory duty to act preventative towards him and that, it unlawfully and or, in a grossly negligent manner and or in bad faith and or fraudulently omitted to do so, thereby infringed his rights, because it failed to secure a short cut for the plaintiff to take to the Village bar on a Saturday evening – a duty which would have a chilling effect if it were to be extended to the plaintiff under the circumstances.

[13] The plaintiff, in response, argued that the defendant's submissions are flawed because his claim hinges not on a breach of a statutory duty, but on a common law duty. In developing that thesis, he argued that:

"*Conduct is wrongful if it either infringes a legal recognized right of the plaintiff or constitutes the breach of a legal duty owed by the defendant to the plaintiff. The legal duty may be imposed by statute or by the operation of common law, in which case the imposition of duty depends upon the particular circumstances of the case*."[7]

[14] The plaintiff submitted that in determining the question of a legal duty vested on the defendant, the question of control of the relevant property is a factor to be considered. The plaintiff supported the findings by the trial court that the defendant was in control of the premises and it carried on its business from the premises in question. As such it was under a duty to warn the plaintiff of the nature of hazard and the risk involved by issuing appropriate warnings of the hazard and therefore its failure to do so amounts to a wrongful omission.[8] The plaintiff's counsel further placed reliance on the unreported judgment in *Melissa Van Schalkwyk v John De Villiers Melville* NO and *Others*,[9] where *Plasket* J (then) said:

"[20] … In Minister van Polisie v Ewels,[10] Rumpff CJ held that an omission is regarded as wrongful when the legal convictions of the community demand legal liability be imposed in respect of the failure to act positively to avoid harm. The role of the element of wrongfulness was summarized by the Constitutional Court in Country Cloud Trading CC v MEC,

[7] Joubert LAWSA 2nd Edition vol 8 part 1 p 33.
[8] *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at para 11.
[9] Unreported judgment Case number 2270/08 delivered on 12 December 2017.
[10] 1975 (3) SA 590 (A) at 597 A – C.

Department of Infrastructure Development[11] *in which Kampepe J stated that the element of wrongfulness 'functions to determine whether the infliction of culpably caused harm demands the imposition of liability' and so acts as 'a break on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability:*

[22] In deciding on the wrongfulness element – i.e whether a person 'was under a duty not to act negligently' – a court is required to 'exercise a value judgment embracing all relevant facts and involving consideration of policy."

[15] It is trite law that wrongfulness in the case of an omission is not presumed; there is an obligation on the plaintiff to allege and prove facts relied upon to support the wrongfulness allegation.[12] For wrongfulness to be established, reliance must be placed on a legal duty.[13] Because the plaintiff's claim was based on omission, as a general rule, the defendant's liability would have followed only if the omission was wrongful, meaning the defendant had a duty to act positively to prevent the harm from occurring and that it failed to comply with such duty.[14]

[16] Further, it was aptly stated in *Minister of Justice and Constitutional Development v X*,[15] by *Fourie* AJA that:

"*A negligent omission will be wrongful only if the appellant is under a legal duty to act positively to prevent the harm suffered by the respondent. The omission will be regarded as the wrongful when the legal convictions of the community imposed a legal as opposed to a mere moral duty to avoid harm to others by positive action*"

[17] It was made clear by the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape*, that in determining wrongfulness, the enquiry is an after the fact objective assessment. It was held that:

"*[41] ... the enquiry into wrongfulness is an after-the-fact, objective assessment of whether the conduct which may not be prima facie wrongful should be regarded as attracting legal sanction. In Knop v Johannesburg City Council*[16] *the test for wrongfulness was said to involve objective reasonableness and whether the boni mores required that 'the conduct be*

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[11] 2015 (1) SA 1 (CC) at para 20.
[12] *South African Hang and Paragliding Association v Bewick* 2015 (3) SA 449 (SCA) para [6].
[13] *The Memorable Order of Tin Hats v Kenneth Paul Els* (488/2021) [2022] ZASCA 99 (22 June 2022) para [17].
[14] *Bergrivier Municipality v Van Ryn Beck* 2019 (4) SA 127 (SCA) para [43].
[15] 2015 (1) SA 25 [SCA].
[16] 1995 (2) SA 1 (A) at 27 E – I.

regarded as wrongful'. The boni mores is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy, both of which now derive from the values of the Constitution.

[42] Our courts – Faircape, Knop, Du Plessis and Duivenboden – and courts in other common–law jurisdictions readily recognise that factors that go to wrongfulness would include whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party; …, whether the object of the statutory scheme is mainly to protect individuals or advance public good; …, whether an imposition of liability for damages is likely to have a 'chilling effect on performance of administrative or statutory function; whether the party bearing the loss is the author of its misfortune, whether the harm that ensued was foreseeable. It should be kept in mind that in the determination of wrongfulness foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant. The ultimate question is whether on a conspectus of all the relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages. Our emphasis is underlined. "

[18] Although in *Steenkamp*, the focus was on a statutory duty, the principle equally applies to claims based on the common law duty to prevent the harm.

[19] I disagree with the defendant's contention that the defendant could attract liability only under circumstances prescribed in s 26 of the Post Office Act. In my view, the origin and existence of the duty allegedly owed to plaintiff has to be established through a proper assessment of the evidence. Liability would depend on the existence of a legal duty owed by the defendant to the plaintiff and to take steps to prevent harm causing conduct that gave rise to the claim.[17]

[20] It is common cause that the defendant provides postal services to its customers. The plaintiff was not the defendant's customer and had no business to attend to the post office at that hour of the night. It is also common cause that the plaintiff did not attend the property to make use of postal services when the incident happened. On the plaintiff's own evidence, he ventured onto the area where the storm water drain was purely for purposes of attending the Village bar on a Saturday evening between 19h00 and 20h00 outside of the business hours of the defendant. On his own evidence, he took the short cut to prevent himself from getting wet because it was

[17] *Bergrivier Municipality supra.*

raining. The area is not sheltered and the plaintiff was familiar with the environment in and around the Village bar.

[21] The plaintiff was a regular customer and patron to the Village bar even before the incident took place. The storm water drain was clearly visible both during the day and at night.

[22] In addition, the plaintiff conceded that the short cut route he took was not a normal pathway used by members of public to access either the postal services or the entrance to the Village bar. The entrance to the bar where the plaintiff was destined to, directly faces and is adjacent to a paved driveway leading to the back of the property which is occupied by Telkom ETE. The entrance to the aforementioned building is secured by a large gate. Parking and entrance therein by members of the public or the defendant's customers was prohibited. The area is a clearly demarcated driveway reserved for use by Telkom's vehicles only.

[23] Unlike in *Swinburne v Newbee Investments (Pty) Ltd*,[18] the route that the plaintiff ventured onto was a short cut and not the usual route to get to the Village bar or to the Post Office. As indicated above, the plaintiff took that route to shield himself against the rain.

[24] The defendant exercised no control over the area where the drain was located. Evident from the lease agreement is the portion of the building leased by the defendant: '*Swartkops ETE and Post Office measuring approximately 308 square metres in the Building on the Property and 3 parking bays*.' The storm water drain was on the outside of the building. The lease agreement limits the defendant's obligations to the premises leased as defined in agreement. The drain was not connected to the portion of the building rented and occupied by the defendant. In terms clause 11.12.1 of the lease agreement, the defendant had a legal obligation to

[18] 2010 (5) SA 296 (KZN).

maintain drain(s) only where same is connected to the leased premises as defined in the lease agreement.

[25] As postulated by Brand JA (then), in *South African Paragliding* (*supra*) that, in relation to liability for omission, wrongfulness is not presumed but it depends on the existence of a legal duty. And the imposition of such legal duty is a matter for judicial determination according to the criteria of public and legal policy consistent with the constitutional norms.

[26] In my view, on the *boni mores* or legal duty convictions of the community, having regard to a conspectus of all the relevant facts herein and considering public policy consistent with constitutional norms, the plaintiff failed to prove any legal duty owed to him by the defendant. The defendant cannot be expected to ensure the safety of the patrons attending the Village bar after hours, in the evening on a weekend. The short cut ventured onto by the plaintiff was not the normal pathway to either the entrance of the Post Office or to the Village bar. The plaintiff took the short cut to shield himself from the rain. The trial court erred in finding that the element of wrongfulness was established by the plaintiff.

[27] With regard to costs, there is no reason why the costs should not follow the results. I must, however, express my displeasure with the manner the appeal record was prepared. The record was voluminous and most of it was unnecessary taking into account the limited issue on this appeal. Judicial time and resources were wasted in reading the unnecessary record. This was pointed out to the defendant's counsel during argument and she readily conceded that. However, based on her submission that initially both wrongfulness and negligence elements were hotly contested hence the entire record of the trial proceedings was incorporated in the appeal record, no portion of the defendant's costs of this appeal will be disallowed.

[26] In the circumstances the following order is made:

1. The appeal is upheld with costs.

2. The judgment by the trial court is substituted with the following order:

"*(a) The plaintiff's claim is dismissed.*

(b) The plaintiff shall pay the defendant's costs of suit."

N GQAMANA
JUDGE OF THE HIGH COURT

I agree:

S M MBENENGE JP

JUDGE PRESIDENT OF THE HIGH COURT

I agree:

R KRUGER AJ

APPEARANCES:

For the Appellant : *A E Lourens*

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Date heard	:	7 November 2022
Date judgment delivered	:	13 December 2022