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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 48446/14

27/10/2016

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

CHARLINE VILJOEN	1st PLAINTIFF
CHARLINE VILJOEN	
o.b.o. JACOBUS DANIEL VILJOEN	2nd PLAINTIFF

And

DEON CORNELUIS	1st DEFENDANT
SUSANNA CATHARINA CORNELUIS	2nd DEFENDANT
FIRM-O-SEAL CC	3rd DEFENDANT

JUDGMENT

MALI J

[1] The plaintiff is a 36 year old married woman. She described herself as a beautician

residing at and working from […] S. Street, Ben Fleur, Witbank. The plaintiff sues the defendants for damages arising from an incident that took place on 22 March 2014. The claim for damages arises out of the injuries sustained by her because of the alleged defendants' breach of the legal duty of care.

[2] The plaintiff also instituted a claim on behalf of her minor son, who was allegedly been bitten by a meerkat as a result of the defendants' negligence. On 3 May 2016, at the commencement of the proceedings in court the plaintiff withdrew the claim on behalf of her son and tendered wasted costs.

[3] The parties have agreed to a separation of the merits and quantum and an order had been made to that effect. The quantum is postponed sine die. The matter proceeds on merits with this court being tasked to make a determination thereon.

DEFENDANTS

[4] The first defendant is· a major male business man married to the second defendant. Both the first and second defendants are members of the third defendant.

[5] Third defendant is a close corporation duly incorporated in accordance with the company laws of the Republic of South Africa. The third defendant owns u Bhetyan-o-Africa Game Lodge & Safari park ("u Bhetyan"). The first and second defendants manage and operate u Bhetyan.

COMMON CAUSE FACTS

[6] On 21 March 2014, the plaintiff, her husband and their two minor children visited the premises of the third defendant. The purpose of the visit was to attend a couple's boot camp which was held on 22 March 2014. The activities of the boot camp were mainly to traverse various obstacles, which are situated in the obstacle course. The obstacle course is part of the third's defendant's farm and premises.

[7] An incident took place on one of the obstacles and the parties refer to the obstacle in the papers as a Fufi Slide. The Oxford online dictionary and Collins English Dictionary

refers to the obstacle as a Foefie Slide. For ease of reference I will refer to the obstacle as Foefie Slide.

The Oxford online dictionary[1] defines Foefie Slide as follows:

> *"Noun. A rope or cable with* a *suspended handle or pulley by means of which* one *may slide between two points"*

The Collins English Dictionary[2] defines Foefie Slide as follows:

> *"Noun - (South Africa)* a *rope, fixed at an incline, along which* a *person suspended on* a *pulley may traverse* a *space, especially across* a *river'*

[8] On 22 March 2014 the second defendant was in charge of the boot camp which involved traversing the obstacles. One of these obstacles is a Foefie Slide. From the video presented in court marked exhibit 1 the Foefie slide appeared to be constructed in such a way that the starting point of the obstacle is from a platform erected on the side of a dam, approximately 10 meters from the ground, with a rope or cable extending over the water at a downward gradient.

[9] The plaintiff got injured whilst participating in the Foefie slide. According to the plaintiffs particulars of claim the defendants owed her a duty of care, *inter alia;*

> 9.1 to inform her of the inherent dangers of participation in the boot camp;
>
> 9.2 to provide properly trained marshals at each obstacle on the obstacle course to explain and demonstrate to her what to do and how to traverse each obstacle;
>
> 9.3 to provide safety equipment for every dangerous obstacle, and in particular for the Foefie slide a safety harness;
>
> 9.4 to ensure that participants completing the obstacle course were fit and

[1] https://en.oxforddictionaries.com/definition/foefie_slide

physically able to complete it, and in particular the Foefie slide.

[10] In order for the plaintiff to succeed in her claim she must prove there was a legal duty on the defendants to:

10.1 inform her of the inherent dangers of participation in the boot camp;

10.2. provide properly trained marshals at each obstacle on the obstacle course to explain and demonstrate to her what to do and how to traverse each obstacle;

10.3 provide safety equipment for every dangerous obstacle, and in particular for the Foefie slide a safety harness;

10.4. ensure that participants completing the obstacle course were fit and physically able to complete it, and in particular the Foefie slide.

[11] If the duty according to the above terms is established, and the defendants are found to have negligently breached that duty, the next enquiry is whether such negligence caused the plaintiff to suffer harm, which was reasonably foreseeable or not too remote. If all these are established, the defendants' omission would be wrongful and attract liability.

LAW

[12] Milner Negligence in Modern Law (1967) at p.230 states:

"The legal duty

[7] This duty is often referred to as 'the duty of care' (which is a *concept of English law). I will therefore use the term guardedly, bearing in mind the remarks of Harms JA (In Telematrix (pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) para 14.) (as he then was) that to formulate the issue in terms*

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[2] http://www.collinsdictionary.com/dictionary/english/foefie-slide

of the concept of 'duty of *care' may lead one astray. The concept of 'duty of care' comprises two discrete enquiries. Milner Negligence in Modem Law (1967) at p.230 states:*

The duty of care concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based. The fact-based duty of care forms part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test, and 'duty of care' in this sense is a convenient but dispensable concept. On the other hand, the policy-based or notional duty of care is an organic part of the tort; it is basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by it. Here is a *concept entirely divorced from foreseeability and governed by the policy of the law. 'Duty' in this sense is logically antecedent to 'duty' in the fact-determined sense. Until the law acknowledges that* a *particular interest or relationship is capable in principle of supporting* a *negligence claim, enquiries* as *to what was reasonably foreseeable are premature.* "

[8] In Knop v Johannesburg City Council 1995 (2) SA 1 (A) Botha J A, *at 27G-I, citing with approval the passage in Milner, said:*

"The existence of the legal duty to prevent loss is a *conclusion of law depending on* a *consideration of all the circumstances of the case. The general nature* of *the enquiry is stated in the well-known passage in Fleming The Law of* Torts *4th ed at 136, quoted in the Administateur, Natal case supra at 833 in fine 834A:*
In short, recognition of a *duty of care is the outcome of* a *value judgment, that the plaintiffs invaded interest is deemed worthy* of *legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether* or *not there is* a *duty, many factors interplay; the hand of history, our ideas* of *morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties* are *liable* to *adjustment in the light* of *the constant shifts and changes in community attitudes.'*
The enquiry encompasses the application of the general criterion of

reasonableness, having regard to *the legal convictions* of *the community* as *assessed by the Court..."*
The passage in Fleming's work has undergone some *modification in the eighth edition (1992, at p 139) in that the first sentence has been omitted and the second sentence begins: "in the decision whether to recognise* a *duty in* a *given situation but it is the passage in the fourth edition which has been twice approved by the Appellate Division and which has also recently been relied on by the Full Bench of the Transvaal Provincial Division in the decision in Bowley Steels (Ply) Limited v Dalian Engineering (Pfy) Limited 1996 (2) SA 393 (T) at 398G-H*
(See also Minister of Defence v Mkhatswa [1997] 3 All SA *376 (W) at 379 ad fin and 380a-c).*

Negligence

[9] In Kroger v Coetzee 1966 (2) SA *428 (A) at 430E-G the test for negligence was stated as follows:*

'For the purposes of liability culpa arises if -
(a) a *diligens paterfamilias in the position of the defendant-*
(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
(ii) would take reasonable steps to guard against such occurrence; and
(b) the defendant has failed to take such steps.
... *Where* a *diligens paterfamilias in the position* of *the person concerned would take any guarding steps at all and, if* so, *what steps would be reasonable, must always depend upon the particular circumstances* of *each* case. *No hard and fast basis can be laid down.'*
(see the modification of this test in Mukheiber v Raath 1999 (3) SA 1065 (SCA) para 31, in light of subsequent developments).

Causation
[10] It is settled that establishment of negligence, is not the end of the enquiry, and liability does not necessarily follow *for the damages suffered. For liability* to *arise there must be a causal nexus between such negligence and the plaintiffs*

damages. Causation represents a dual problem on different levels of enquiry. This was *authoritatively enunciated in the leading case of Minister of Police v Skosana 1977 (1) SA 31 (A) at 34F-H and 35A D by Corbett JA (as he then was):*

"Causation in the law of delict gives rise to two rather distinct problems. The first is a *factual* one *and relates to the question whether the negligent act* or *omission in question caused or materially contributed to ... the harm giving rise to the claim. If it did not, then no legal liability can arise and cadit quaestio. If it did, then the second problem becomes relevant, viz whether the negligent act or omission is linked to the harm sufficient closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This basically* a *juridical problem in which considerations of legal policy may play a part."*
(See also Siman & Co *(Pty) Ltd v Barclays National Bank 1984 (2) SA 888 (A) at 914C-918A; Tuck Commissioner for Inland Revenue 1988 (3) SA 819 (A) at 832F-G; and Silver v Premier, Gauteng Provincial Government 1998 (4) SA 569 (14? at 574D-G).*

Wrongfulness in delict

[13] The development of wrongfulness as a *criterion for determining the boundaries of delictual liability has its basis and foundation in Minister van Polisie v Ewels 1975 (3) SA 590 (A). In that* case *the Appellant Division found that our law had reached the stage of development were an omission is regarded* as *unlawful when the circumstances of the case are of* a *nature that the legal convictions of the community demand that the omission should be considered wrongful.*

[14] As a *general proposition, there is constitutional and public law duty on the State to protect its citizens and the State is liable for the failure to perform that duty, unless it can be shown that there is compelling reason to deviate from that principle (see Minister of Safety and Security v Carmichele 2004 (3) SA 305 (SCA) para 43). In Minister of* Safety *and Security v Duivenboden 2002 (6)* SA *431 (SCA) paras 20 and 21 the Supreme Court of Appeal held that determining*

wrongfulness in these matters involves the balancing of identifiable norms, which include constitutional norms. An important constitutional norm that will factor in cases such as these is the norm of accountability (see also Olitziki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA) para 31). This view has received the approval of the Constitutional Court in Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 *(CC) paras 73-78.*

[15] Generally, accountability concerns would favour delictual liability but, that is not always the case...As *pointed out by Nugent JA in Van Duivenbonen, para 21, there might be factors that militate against the imposition of liability, which would include the availability of an alternate remedy, the possibility that imposing liability might undermine the functioning of the State organ in question, the convenience of administering* a *rule that liability will be imposed in these circumstances, the possibility of limitless liability and whether the plaintiff is best placed to protect himself against loss. It is generally only when these concerns are net that the value may require the recognition of a legal duty under the wrongful enquiry.*

[16] In the context of delictual damages, the test *for determining wrongfulness or otherwise of an omission to act is* as *restated in Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae) 2003 (1) SA 389 (SCA).*

'Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a *long line of decisions of this Court. An omission is wrongful if the defendant is under* a *legal duty to act positively to prevent the harm suffered by the plaintiff. The test is* one *of reasonableness.* A *defendant is under* a *legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done* so *by making* a *value judgment based,*

inter a/ia, upon its perception of the legal convictions of the community and in considerations of policy. The question whether a *legal duty exists in* a *particular case is thus* a *conclusion of law depending on* a *consideration of all the circumstances of the case and on the interplay of the many factors which have to* be *considered.'*

(See also Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) paras 14-17; Cape Metropolitan Council v Graham 2001 (1) SA 1197 (SCA) para 6; *0/itzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA) para (11 J and (31]; BOB Bank Ltd v Ries 2002 (2) SA 39 (SCA) para 13; and Van Duivenboden above, para 16).*[3] "

[13] The defendants deny being liable for the Plaintiff's injuries based on two grounds namely:

13.1 That the defendants are indemnified against such liability as visitors to the lodge enter onto the property and participate in activities at their own risk.

13.2 That in the light of the above the plaintiff had voluntarily assumed the risk of injury before traversing the obstacles on the obstacle course.

[14] I turn now to inquire whether the defendants ought reasonably and practically to have prevented harm to the plaintiff, ie whether it was reasonable to expect of the defendants to take positive measures to prevent the harm.

EVIDENCE

[15] Two witnesses testified in support of the plaintiff's case, that being the plaintiff and her husband.

PLAINTIFF

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[3] Ramushi v Min of Safety and Security (6895/2002) [2012] ZAGPPHC 175 paragraph 7, 8, 9, 10, 12, 13, 14, 15, 16

[16] The plaintiff testified that on 21 March 2014 she and her family drove to the third defendant's lodge. When they arrived at the premises of the third defendant they found a sliding gate extended to the left and was wide open. She stated that there was a security guard who told them to drive to the reception area. She further stated that she did not notice any signs and neither the guard told them anything about the notice boards. They were following another car and they proceeded to drive to the reception for purposes of check in. At the reception no one drew their attention to the disclaimer boards.

[17] The plaintiff further stated that on the evening of 21 March 2014, the day of their arrival her son was bitten by a meerkat. The plaintiff and her husband drove their son to the hospital to and fro. They again noticed that the gate was wide open and there were no disclaimer boards in place.

[18] On the morning of 22 March 2014 at about 7h30 to 9h00 the plaintiff and her husband joined a group of other participants at the obstacle course. On their way to the obstacle course they never saw any signs and they neither saw any disclaimer boards, nor were they alerted by anyone to the notice boards. Under cross examination the plaintiff stated that she only saw the disclaimer boards on 23 April 2016 when she visited the farm again with her legal team.

[19] When the plaintiff and her husband got to the obstacle course they found the second defendant with other participants as alluded above. The second defendant was giving instructions, inter alia that the couples had to participate together and that they had to run. They were told to run outside the obstacle course, two minutes of each. The second defendant further informed them that she had forgotten the indemnity forms at the lodge, as a result the plaintiff and her husband did not sign indemnity forms.

[20] Under cross examination the plaintiff stated that there were no risks explained to them and she neither accepted any risks. It was put to her that other participants stated they were grown up and did not need to sign the forms. She testified that she was not one of the people who expressly stated that they were grownups, in that manner accepting the risks involved.

[21] The plaintiff stated that the previous evening they were told that there would be marshals at the obstacle courses who were the friends of the son of the second defendant. The role of the said marshals was to monitor the participants including the plaintiff and would show them how to traverse each of the obstacle courses. The plaintiff stated that she did not sign indemnity forms and no one explained to them what the boot camp entailed.

[22] The plaintiff further stated that there were marshals in the obstacle course, she noticed that the marshals were there for fun because they were focussing on demonstration of push ups. The group including the plaintiff ultimately traversed the obstacle courses without any of the marshals explaining anything to them.

[23] The plaintiff said that she got into the Foefie slide whilst her husband was waiting for her on the other side of the dam. The Foefie slide is approximately 8 metres above the dam. The plaintiff was not informed about the depth of the dam. At the time she was participating in the Foefie slide there was a marshal who was standing and not giving her any instructions and there was another marshal who was manoeuvring the handle bar to the back. She stated that in traversing the Foefie slide she climbed on to the ladder and held on to the handle bar holding the cable.

[24] The plaintiff further stated that she dried her hands as her previous obstacle involved water. She dried her hands in order to ensure that she would not encounter any accident and held the ropes of the slide with her hands. Under cross examination when she was asked how she dried her hands she stated that she used the T- shirt she was wearing at the time as there was no towel provided.

[25] The plaintiff testified that she then sat and slided her legs over, when she released herself from the construction her hands slipped and fell off the dam. When she fell she went out of her breath and felt her lower body numb as she could not feel her legs. She then asked for assistance from the marshal who was standing around and not giving her instructions before she asked. The marshal told her to use her arms and did not assist her at all.

[26] Under cross examination it was put to the plaintiff that what happened to her was the accident as the purpose of not using the harness was to fall into the water and swim out. She countered that the purpose was not to hit rock bottom and surface and got injured. In fact she added that when the second defendant gave them instructions she told them that they should not get hurt as the defendants were still waiting for an accreditation. The defendants could not challenge the evidence relating to accreditation.

[27] The plaintiff further stated that the only instruction she received pertaining to the Foefie slide was when the second defendant had a briefing with the participants. The second defendant told them to release the handle bar when they went down. This accords with the second defendant's testimony below that she gave the participants a rough explanation.

[28] The plaintiff further told the court that her friends called her husband who came rushing to her assistance. The plaintiffs husband helped her to get out of the water. She stated she was badly injured and a lot of people surrounded her. Counsel for the plaintiff adduced photographs wherein the plaintiff identified herself and other people she knew. She further stated that she was later taken to the hospital in Fearie Glen Pretoria where she was treated for her injuries.

MR JAKOBUS VILJOEN

[29] Mr Viljoen *("Viljoen")* testified that he was the plaintiff's husband. On 21 March he was driving in a convoy of eight vehicles to the third defendant's place. Mr Viljoen's evidence collaborated the plaintiff's evidence in many respects including the facts that the gate was wide open and there was a guard stationed at the gate, as well as the initial events of the morning of 22 March 2014.

[30] Viljoen further stated that when they got to the Foefie slide he went to the other end of the slide to wait for the plaintiff because it looked like the plaintiff was not going to make it. He saw her drying her hands into her T shirt many times before holding the foefie cables. There was a marshal standing at the bottom without offering any assistance to the plaintiff. As she moved forward towards the structure she fell down and heard her yelling asking for help. Mr Viljoen asked the marshal why he was not

helping the plaintiff, the marshal asked why she did not use her arms.

[31] Viljoen further stated that he was assisted by other participants to pull the plaintiff out of the water. The defendants did not provide any first aid to the plaintiff, although there were people attending to her. Of importance is that Viljoen stated that the first defendant never attended the obstacle course and as a result he never gave any demonstration. His testimony is that he first saw the first defendant after the plaintiffs incident. Viljoen testified that the first defendant came rushing in his motor vehicle bakkie and was clearly very upset with the second defendant.

[32] According to Viljoen the first defendant told the second defendant that he had informed her before that he was going to hurt people. According to Viljoen the first defendant was speaking in Afrikaans and told the second defendant that he did not want anything to do with the accident. Viljoen's averments were not challenged by the defendants. Under cross examination Viljoen was adamant that there were no disclaimer signs and neither notice boards displayed on both dates they were at uBhetyan for the boot camp.

[33] Viljoen further stated that he and the plaintiff did not state they were grownups as a result acquiescing to the risk. He said that in the event he had seen the boards on the day of the event he would still have instituted a claim if he was hurt because he was not alerted to the dangers of the obstacle courses.

[34] Viljoen further opined that if the defendants provided the participants with harness in particular the plaintiff would not have fallen free into the water and that resulting to her injuries. Under cross examination Viljoen stated they were not informed that the purpose of traversing the Foefie slide was to fall into the water.

DEFENDANT'S EVIDENCE

[35] The defendants called five (5) witnesses to testify on their behalf; the first defendant Mr Deon Cornelius, Mr Brian Ludickt Ms Esme Spires the second defendant ,Ms Susan Cornelius and Ms Pinky Madinoge Modila.

MR DEON CORNELIUS

[36] The first defendant testified that on 21 March 2014 the gate was closed and the notices were prominent and visible on the day in question. The warning signs were put up sometime in 2009 and others were placed in 2012. The first defendant provided invoices of the suppliers of the signboards. The first defendant also provided the court with photographs depicting visible and prominent disclaimer and warning signs. With respect invoices do not prove in any manner that the notice boards and disclaimer boards were in the premises when the incident occurred.

[37] Under cross examination the first defendant stated that he did not alert the plaintiff and her husband of the notice boards and he did not know whether anyone alerted them about the sign boards. He further testified that he only deals with the demonstrations of the Foefie slide and that the second defendant attends to the demonstration of other obstacles.

[38] The first defendant testified that some of the marshals were employed by the defendants and others were from the Middleburg Gym. He further stated that he did not know how many marshals were in attendance. He also mentioned one Hanno and Zonya. He conceded that he did not know the extent of both their training. In fact he stated that Hanna's specialisation was in feeding animals and nature reserve related work. Zonya did not have any experience and she was in the defendants' business for six months training.

MR BRIAN LUDICK

[39] Brian Ludick ("Ludick") testified that he works at Glencore Mine, in Mpumalanga and from 21 to 22 March 2014 he attended the defendants' boot camp. He attended with his wife, mother and stepfather. He further stated that he knew the first and second defendant because he met them earlier when he visited the third defendant's farm with his wife on 14 February 2014.

[40] Ludick stated that he saw the disclaimer boards on both days. He said there was a board in the gate entrance as well as in the parking area and also at the bottom

obstacle course there were two boards. He described the boards as orange boards with notices, similar to the boards identified by the first and second defendants during their evidence in chief.

[41] Ludick further stated that the notice board situated at the gate in the position showed in the photographs would not be that clear. The photographs depict the gate in a sliding open position towards the left. He testified that on 22 March 2014 the second defendant told all the participants including the plaintiff and her husband that she had forgotten to bring with the indemnity forms and wanted to go and fetch them. According to him all the people told the second defendant that they were grownups, there was no need to fetch the forms. The second defendant then said *"you are there on your own risk".* Under cross examination he conceded that he did not see and neither heard the plaintiff stating that she was a grown up and there was no need to sign the indemnity forms.

[42] Ludick testified that the second defendant gave demonstrations to the whole group. When it was his turn in the Foefie slide there was a Marshal on top who gave him proper instructions. He further stated that he was the fifth or sixth person to traverse the Foefie slide and he did not follow the procedure, he just jumped off and got injured. He considers the injury to be at his own risk because he was properly instructed. Ludick further stated that he saw the plaintiff falling from the Foefie slide as she had a grip of the rope with one hand and slipped out and fell.

MS ESME SPIRES

[43] Esme Spires ("Spires") testified that she is a personal trainer and the manager at the gym in Middleburg and that she employs personal trainers. She said that she was aware of the obstacle courses at the third defendant's place as she normally utilises them with the gym group.

[44] Spires further testified that there are notice or disclaimer boards at the entrance of the lodge (third defendant). On the day in question she was a first aider and the marshal and there were also two other gentlemen who were marshalling with her. There were approximately 12 marshals on the day and her employees are professional personal

trainers. They are used to the obstacles and they never experienced any problems.

[45] Spires stated that she did not see the plaintiff falling, however she assisted her with first aid when she got injured. She put a splint and the bandage on her knee as she could not band the knee. Under cross examination she could not take it further when she was challenged that she did not put any bandage to the plaintiff.

SUSANNA CATHARINA CORNELUIS (Second Defendant)

[46] The second defendant testified that on 21 March 2014 the gate was closed as it is the practise. On 22 March she informed the participants including the plaintiff that she accidentally forgot the indemnity forms. They told her that they were grownups, however under cross examination she conceded that she never heard the plaintiff stating that there was no need for indemnity forms because she was a grownup. Furthermore she did not corroborate Ludick's averments that she told the participants that they were there on their own risk. It should have been very important for her to remember what she said in particular as it concerns her defence.

[47] According to the second defendant she roughly explained to the participants how the obstacles worked and the first defendant conducted the demonstrations and thereafter the first defendant went back to the lodge. She said she stated that *"no wet hands".* She further stated that there were 12 Marshalls on the day in question and that Spires was in charge of the marshals. She said that there is no specific training required for the marshals to assist the participants in traversing the courses. The functions of the marshals were to assist if they were asked questions by the participants. The second defendant stated that the marshals were not employees of the third defendant.

[48] The second defendant told the court that she is familiar with the Foefie slide and it is not a difficult course because participants are instructed beforehand and that there is no special training required. This is despite the fact that in the defendants' pleading it is stated that capable employees were there. She further stated that Hanno who was a salaried student doing a year practice with them who is now in Namibia was at the Foefie slide giving instructions. When pressed by the plaintiff's counsel under cross examination about what she meant about capable employees in the event there is no

special training required she could not take her statement further.

MS PINKY MADINOGE MODILA

[49] The defendants further called Pinky Madinoge Modila *("Pinky").* She stated that she works for the defendants. Amongst her duties she tends to the bar, work with school groups and teambuilding, handling stock and helping at the rooms. She stated that she resides at the third defendant's premises next to the tent camp. She attends to the obstacle course once a week for cleaning. She testified that there are two visible signboards at the entrance of the obstacle course. She said she found the signboards erected when she commenced working with the defendants in 2013.

[50] Pinky further stated that the plaintiff and her husband were booked in the tent camp. They then requested to change the rooms and they were moved to room 6. She personally directed them to the tent camp and the two disclaimer boards were prominently displayed in outstanding places. Under cross examination Pinky admitted that there is more than one opening leading to the tent camp and or obstacle course. The other opening is covered by tall grass.

ASSESSMENT OF EVIDENCE

[51] The plaintiff and her husband were impressive witnesses who were honest, straightforward and not opportunistic. For example the plaintiff's husband admitted that the plaintiff did not ask before getting to the Foefie slide. Be that as it may it does not relieve the defendants of the duty of giving her proper instructions and care.

[52] The defendants called 5 (five witnesses) some contradicted each other on material aspects. This is despite the fact that the second defendant was sitting in court when the first defendant testified. The second defendant's listening to the first defendant's evidence did not assist things much in their case.

[53] The defendant's defence that the plaintiff was expected to have seen the notice boards as they are prominent and visible at the gate is unacceptable. The gate is a sliding gate, a fact not disputed by the defendants. In the event the gate is left open the

notices are not visible because they are fixed on the sliding part of the gate. In fact this was confirmed by Ludick, defendants' witness. Furthermore Pinky's evidence that there was an extra opening or pathway which could have been covered by tall grass makes it possible that that the plaintiff and her husband could not have noticed the disclaimer boards in the obstacle course.

[54] The defendants could not deny that the plaintiff and her family was driving in a convoy. In fact the defendants admit that the plaintiff was part of the group that came for the boot camp. It is probable that they were following another car driving through a wide open gate. The first and the second defendant's testimony in respect of the fact that the gate is always closed and that there is always personnel at the gate to open for the visitors is not supported by evidence. The defendants did not call the guard who was supposedly manning the gate on 21 March 2014 to testify.

[55] In the absence of the evidence by the defendants that the gate was closed resulting to the visibility of notice boards to the plaintiffs, I am bound to accept the plaintiff's evidence.

[56] Furthermore in respect of the defence of the disclaimer and notice boards the Counsel for the plaintiff contended that the defendants did not plead the defence of disclaimers which were contained in the notice boards. It is trite that pleadings must be read as a whole. Counsel for the defendant insisted that it is pleaded at paragraph 11 of the third's defendant's plea. Paragraph 11 reads:

> *"Visitors to the lodge enter onto the property and participate in activities at their own risk and* are *specifically informed that the owner* of *the property and presenters of activities do not accept liability for any loss or injury"*

[57] The defendants could not explain what they meant by specifically informing the plaintiff of the non- acceptance of liability. Regarding the defendants' insistence that the participants were specifically informed; I cannot accept this contention as the first and second defendants did not tender any evidence in this regard.

[58] The testimony of the second defendant that the plaintiff admitted to the incident

being her own fault is a fabrication. It is not even corroborated by Ludick who happened to hear some of the things said by the second defendant; for example he heard her saying that the participants were there at their own risk, but did not hear her saying "*no wet hands".*

[59] The defendants applied for an inspection *in loco* in order to prove that the notice boards were at the defendants premises and prominently visible. I did not grant the application as I could not see how the inspection would assist the court in determining whether the notice boards were visible or were even there on 21 and 22 March 2014.

[60] The defendants' evidence that the purpose of the Foefie slide would be defeated, in the event the plaintiff was provided with harnesses, as the traversing is meant for the, participant to fall into the water contradicts the defendants' testimony that the plaintiff was given proper instructions and demonstrations by the first defendant and or marshals on how to traverse the slide. If it was intended for the participants to fall there would have been no need for the alleged diligent demonstrations by the first defendant.

[61] Counsel for the defendants, Mr Greef submitted that the plaintiff had knowledge of the existence of disclaimer boards in places of such nature as game reserves and amusement parks. In this regard the Counsel referred to the case of **Durban's Water Wonderland (PTV) LTD v Ingrid Botha and another**[4] wherein the appellant conceded that she was aware that there were notices of the kind in question at amusement parks.

[62] In the present matter the facts are distinguishable from Durban Water. In Durban Water the appellant conceded to the knowledge of signs in amusement parks. The appellant and her child had been flung from one of the amusement amenities. Their claims were based on the cause of action arising from the amusement park. The plaintiff in *casu* did not concede to the knowledge of existence of disclaimer and notice boards at obstacle courses.

[63] The plaintiff was at the third defendant's premises to attend the boot camp It is common cause that the boot camp consisted of traversing the obstacle courses. In

[4] 117/98 SCA at page 16

respect of the Foefie slide where she got injured everything depended on the proper and clear instructions by the defendants as well as the presence of trained marshals or capable personnel in the words of the defendants.

[64] By the defendant's own testimony though not accepted the plaintiff was given demonstration to traverse the slide. As alluded above the defendants have contradicted each other on who gave the instructions to the plaintiff. Their witness Mr Ludick was adamant that there were no demonstrations by the second defendant. The plaintiff admitted knowing about the signs in places like Kruger National Park. It need not be said again that although the defendants run a game farm, the plaintiff was not there for game viewing, her knowledge of the signs in games reserves is irrelevant.

[65] Furthermore I am satisfied that the plaintiff and her husband had proven that the first defendant was never in the Foefie slide to conduct demonstrations. The defendants admitted that the Foefie slide is a dangerous obstacle and the first defendant was supposed to be the one in charge of the Foefie slide. This is exacerbated by the defendants' failure to put positive measures regarding the safety of the plaintiff. By the first defendant's own admission marshals with no adequate training and those who lacked training were in charge of the obstacle courses.

[66] Having regard to the above the first and second defendants foresaw the danger although they acted negligently at their own peril. This is inferred from the second defendant's evidence that she did rough demonstrations. The impact of rough demonstrations in a foreseeable dangerous environment should be tantamount to negligence. It has been proven overwhelmingly that the first defendant never attended to the Foefie slide when the plaintiff commenced traversing it. The first defendant's omission to attend to the demonstrations of the Fufi slide and his failure to be at the Foefie slide when it mattered should be more the reason to show that the defendants breached the duty of care.

[67] Furthermore there are lot of disparities in the evidence of defendants witnesses, for example Ludick testified that during the briefing in respect of the indemnity forms; the second defendant told all the participants that *"You are there on your own risk".* The second defendant did not mention anything in this regard. This is very strange because

the defendant's case is based on the plaintiff having voluntarily accepted the risks. Ludick's statement is a mere fabrication to protect the defendants.

[68] Neither Ludick nor the first defendant corroborated the second defendant on her instructions *"no wet hands".* This should be very important for the defendants considering that their defence is a largely a blame upon the plaintiff for having used wet hands when she participated in the slides. Furthermore the second defendant's testimony that there was a towel placed on top of the Foefie slide is not corroborated by Ludick and neither the first defendant who was supposedly on top of the slide. There was no towel, I believe that the plaintiff wiped her hands with her clothing.

[69] I find that Spires lied when she said that she assisted the plaintiff with first aid by putting splints and bandages. The first defendant stated that marshals were employees of the third defendant and the second defendant' evidence in corroboration of Spires is in total contradiction. The second defendant and Spires testified the marshals were not employees of the third defendant. That proves that there were no responsible marshals at all .The concocted version of the presence of responsible marshals who were there to assist is a mere fabrication. This is intended to persuade the court that things were run in a professional manner. I believe the plaintiff's version that the so called marshals were people who were just there for fun, who did not know their responsibilities if they had any at all.

[70] In conclusion upon enquiry on facts, I find that the defendants had a legal duty towards the plaintiff and they breached their legal duty. The defendants neglected to take the steps to ensure that the plaintiff was given demonstration to traverse the Foefie slide, they did not provide trained marshals and there was no equipment at hand to assist plaintiff and that the defendants failed to take preventative steps. The defendants' negligence led to the injuries sustained by the plaintiff on 22 March 2014.

[71] The duty of the defendants to act positively with respect to their failure to assist the plaintiff with traversing the obstacle fully knowing its dangers, in my view accords with the legal convictions of the community and there are no considerations of public policy militating against the imposition of such duty.

ORDER

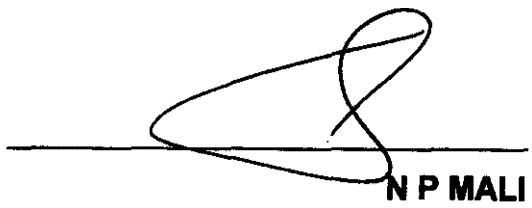
[72] In the result I make the following order;

72.1 The defendant is liable in full for the plaintiff's proven or agreed damages consequent upon the injuries the plaintiff sustained during the incident in question.

72.2 The defendants are ordered to pay the plaintiff's costs, jointly, or severally the paying the other to be absolved.

72.3 The plaintiff is ordered to pay wasted costs of the defendants in respect of her claim on behalf of her minor son.

72.4 The determination of the plaintiff's quantum of damages is postponed *sine die.*



JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv. T.P. KRUGER
Instructed by: MARAIS SASSON INC

Counsel for the Respondent: Adv. J. J. GREEF
Instructed by: KEMP DE BEER & GOOSEN

Date of Hearing: 09 May 2016
Date of Judgment: 27 October 2016