IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN CASE NO. 972/2016

In the matter between:

**JAN DRAGHOENDER** **Plaintiff**

and

**LUKHANJI LOCAL MUNICIPALITY** **Defendant**

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**JUDGMENT**

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**Bloem J.**

[1] Jan Draghoender, the plaintiff, instituted an action for damages against the Lukhanji Local Municipality (the municipality), the defendant, arising from an incident on 19 April 2015 at the Dumpy Adams Recreational Ground at Queenstown (the stadium) when he fell through a temporary pavilion (the stand or stands) onto the ground and injured his ankle. The defendant denied liability. At the commencement of the trial and by agreement between the parties it was ordered that the defendant's alleged liability be separated from the quantum of the plaintiff's claim and that the trial run only to determine whether or not the defendant was liable, the determination of the quantum of the plaintiff's claim to stand over.

[2] The issue is whether the municipality should be held liable, in delict, for the harm suffered by the plaintiff. A delict has been defined as the conduct of a person that, in a wrongful and culpable manner, causes harm to another.[1] The elements of a delict are: (1) conduct – either in the form of a commission or omission; (2) wrongfulness;

[1] Neethling, Potgieter and Visser *Law of Delict* 7th ed (2014) at p4.

(3) fault; (4) causation; and (5) harm. In this case the defendant placed wrongfulness in issue. In an endeavour to prove his claim the plaintiff testified and Vuyani Matshoba, employed by the defendant as supervisor of all its recreational facilities in and around Queenstown, testified on behalf of the municipality.

[3] The undisputed facts are that during mid-December 2014 the municipality hosted the South African Local Government Association (Salga) sports tournament at the stadium. In preparation for the tournament the municipality collected two stands from the Mlungisi sports facility and delivered them at the stadium. The stands were constructed of a steel frame. Wooden planks had been affixed horizontally to the steel frame on five levels. During a match spectators could sit or stand on the planks at any of those levels. Those stands required repairs. It was for that reason that the municipality was requisitioned to repair the stands but they were not repaired before the commencement of the Salga tournament. Stands were accordingly borrowed from a private entity. They were placed next to the soccer field to enable spectators to use them during the tournament. The borrowed stands were returned to the private entity after the tournament.

[4] The plaintiff testified that after the Salga tournament he, as a soccer enthusiast and administrator, watched most of the soccer matches which were played at the stadium. Those matches were played on almost every Wednesday and weekends. During the period being between December 2014 and 19 April 2015, there were no stands for spectators to use while watching soccer games played on the soccer field in question, except for the stands which had been collected from the Mlungisi sports facility. The plaintiff's evidence was that, during that period, he and other spectators regularly watched matches while using the stands which were positioned on the side of the soccer field next to the centre line. He was unable to say when precisely the

stands were positioned there but he can remember using them soon after the Salga tournament.

[5] The plaintiff furthermore testified that on the day of the incident he sat on the planks on the fourth level of one of the stands. A goal was scored and he stood up to celebrate. His celebrations were short-lived because he fell through the planks on the third level on which he was standing and landed on the ground.

[6] Mr Matshoba testified that, when the stands were delivered at the stadium before the Salga tournament, they were placed in the parking area which is approximately 30 meters from the soccer field. They were placed there because there because they were not in a good condition as most of the planks were rotten. The stands were unusable, he testified. He did not notice that the stands were next to the soccer field between December 2014 and 19 April 2015. He could accordingly not dispute the plaintiff's evidence in that regard.

[7] It is against the background of the above evidence that it must be determined whether or not the defendant is liable to the plaintiff. The plaintiff's evidence, that he injured his ankle and that the injury was caused when he fell through the planks, was undisputed. There is no reason not to accept that evidence. The plaintiff accordingly proved the elements of harm and causation. It must therefore be determined whether or not he also proved that the municipality, through wrongful and culpable conduct, caused him to injure his ankle.

[8] The conduct complained of in this matter is the municipality's alleged failure (omission) to take positive steps to prevent harm to other people. In his particulars of claim the plaintiff pleaded that the municipality failed to maintain the stands in a proper and serviceable condition, failed to ensure that the planks on the stands had

not deteriorated and/or rotted with the passage of time so as to pose a threat to persons using them, particularly the plaintiff; failed to replace defective planks on the stands to ensure that the stands remained in a safe and usable condition; failed to avoid injuries to members of the public, particularly the plaintiff, when by the exercise of reasonable care and skill the municipality could and should have done so; and failed to provide any warning to members of the public that the stands were defective and inappropriate for use. I shall deal with the municipality's alleged omission hereunder in the discussion of wrongfulness.

[9] Wrongfulness functions to determine whether the infliction of harm (through commission or omission) that was caused by fault should be visited with liability. The legal convictions of the community determine whether or not it would be reasonable to impose delictual liability on a defendant for the harm that his or her conduct caused. Conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the defendant's culpable conduct, omission in this case. It is then that it can be said that the legal convictions of society regard the conduct as wrongful.[2] In this regard Khampepe J had the following to say in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*[3]:

> *"The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse; 'that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages', notwithstanding his or her fault."*

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[2] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 468E.
[3] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at 9A-B.

[10] The reasonableness in the context of wrongfulness should not be conflated with the reasonableness of the defendant's conduct because they have different legal meanings. Reasonableness in respect of wrongfulness is the criterion used to determine whether it would be reasonable to impose liability on the defendant whereas reasonableness of the defendant's conduct is an element of negligence.[4]

[11] For purposes of determining wrongfulness, it is assumed that the other elements of the delict have been established. On the assumption firstly, that the defendant could have prevented the plaintiff from falling through the planks of the stand in question; and secondly, that the injury sustained by the plaintiff was caused by the defendant's failure to take reasonable steps to prevent the plaintiff from falling through the planks, the enquiry is whether it would be reasonable to impose delictual liability on the defendant for the harm suffered by the plaintiff as a result of the defendant's negligence.[5]

[12] When he testified Mr Matshoba conceded that, when the stands arrived at the stadium, they created a dangerous situation. The municipality not only knew that the stands were unusable when they were delivered, it also realised that the planks were dangerous to be used for the purpose that they had been constructed. It was for that reason that they were placed near the parking area, about 30 metres from the soccer field.

[13] In my view it is immaterial whether the municipality placed the stands 3 or 30 meters from the soccer field. The important factor is that the municipality was at all times material hereto in control of the stands which created a dangerous situation. The fact that the municipality had control over the stands and failed to exercise that control

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[4] *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at 144D-E.
[5] *ZA v Smith and another* 2015 (4) SA 574 (SCA) at 585I-586B.

with resultant harm to the plaintiff is not, in itself, sufficient to establish a duty to take measures to prevent harm. It may be a factor in determining such a duty. A defendant is liable to a plaintiff only if a failure to act is wrongful. That will be the case if, in the circumstances of the specific case, a legal duty rests on the defendant to act positively to prevent harm from occurring and the defendant failed to prevent such harm.[6] The facts and circumstances of each situation will be decisive in determining whether or not there was a legal duty on the defendant to take steps to prevent harm. The question is whether the steps that the municipality should have taken to prevent harm could, in the circumstances of this case, reasonably and practicably have been required of it.[7]

[14] In this regard I have taken into account the fact that the municipality was aware of the dangerous situation created by the stands in the stadium. I have also taken into account that the municipality was aware of the need for some form of seating facility for soccer spectators, hence the delivery of the two stands and the loan of other stands from the private entity. The only seating available to soccer spectators in the stadium after the borrowed stands had been returned, were the stands in question. I have furthermore taken into account that when Mr Matshoba learned of the incident in question, he immediately caused danger tape to be wrapped around the stands. The fact that danger tape was wrapped around the stands shortly after the incident justifies the inference that it could easily and cheaply have been done before the incident without imposing any undue burden on the municipality. The incident might have been avoided had danger tape been wrapped around the stands from the time that they arrived at the stadium. Furthermore the municipality could also have placed danger signs on the stands to warn spectators of the danger of using them.

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[6] *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at 528F-G.
[7] *Administrateur, Transvaal v van der Merwe* 1994 (4) SA 347 (A) at 360D-H.

[15] Considering that the defendant created a dangerous situation when it put the stands at the stadium, that the stands belonged to it, that it was in control of the stadium and the stands, that the stands provided the only seating facilities to soccer spectators at the stadium, that it would have been neither expensive to place danger signs on the stands or to purchase danger tape and wrap it around the stands nor a labour intensive exercise to remove the stands from the field, I am of the view that a legal duty rested on the municipality to prevent harm to soccer spectators and that policy considerations dictate that it would be reasonable to impose delictual liability on the defendant in this case. I am accordingly satisfied that the plaintiff established the element of wrongfulness.

[16] Fault takes the form of negligence in this case. The enquiry is whether or not the municipality's wrongful conduct which caused the plaintiff to injure his ankle was negligent – an enquiry into the municipality's legal blameworthiness. The test for negligence was stated as follows in *Kruger v Coetzee*:[8]

> "For the purposes of liability *culpa* arises if –
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> (a) a *diligens paterfamilias* in the position of the defendant –
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> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
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> (ii) would take reasonable steps to guard against such occurrence; and
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> (b) the defendant failed to take such steps."

[17] Mr de la Harpe, counsel for the municipality, submitted that a reasonable person would not have used the stands because the danger to use them would have been clear and apparent to any reasonable soccer spectator. For the submission reliance

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

was placed on photographs of the stands. They depicted a few holes in the planks. One photograph also depicted dry rot at the bottom of a plank where it is affixed to the steel frame. The rot would not have been visible, and therefore unknown, to any person who wanted to use the stand in question. The fact that the planks had holes in them does not necessarily mean that they were not strong enough to carry the weight of spectators using them. The plaintiff's unchallenged evidence was that he and others regularly used those stands, without incident, between January and 19 April 2014. He and other spectators were accordingly unaware, and therefore did not appreciate, that the stands constituted a danger. Mr Matshoba knew in December 2013 already that the stands were unsafe to use, hence the requisition for repairs.

[18] In this case:

18.1. a reasonable person in the position of the municipality –

18.1.1. would have foreseen the reasonable possibility that by leaving the stands in the stadium, spectators would use them while watching soccer and would have foreseen the reasonable possibility of its omission injuring spectators and causing them harm; and

18.1.2. would have removed the stands from the stadium or, if it elected to leave them in the stadium, to wrap danger tape around them or place danger signs on them to warn and protect the unwary spectators against the danger of using them; and

18.2. the municipality failed to take any of the above steps.

[19] In my view the reasonable person in the position of the municipality would have taken the above steps to prevent the plaintiff from injuring his ankle. It was negligent when

it failed to take those steps. In all the circumstances, the defendant is liable to the plaintiff for damages suffered by him arising from the injury that he sustained as a result of the municipality's wrongful and negligent conduct.

[20] The defendant pleaded, in the alternative, that the plaintiff's injury was caused by his own negligence in climbing upon the stand which was in an obvious state of disrepair in that the planks were rotten and broken and that the amount of damages to be awarded to the plaintiff be reduced in terms of section 1 of the Apportionment of Damages Act.[9] The municipality would not be liable to the plaintiff for the injury to his ankle if it was demonstrated that the plaintiff knew of the risk to use the stands, that he appreciated the ambit of the risk and that he consented to the risk of being injured.[10] The onus of establishing the defence of *volenti non fit iniuria* rested on the municipality.[11]

[21] Counsel for the municipality submitted that the plaintiff's alleged negligence contributed to his injury. It was submitted that the planks were dangerous and that, despite such danger, the plaintiff climbed on them. It has already been found that the plaintiff had no knowledge of the rot in the planks and that he did not appreciate that the planks would not carry his weight. The undisputed evidence is that he and others regularly used the stands before 19 April 2015. On the basis of the above evidence, I find that the plaintiff had no knowledge of the risk and accordingly its ambit and that he did not submit to the risk. The defence of *volenti non fit iniuria* can therefore not succeed. Since the defendant failed to prove that a reasonable person in the plaintiff's position would have foreseen the reasonable possibility of being injured if the stands were used, the plaintiff was under no duty to take steps to guard against

[9] Apportionment of Damages Act, 1956 (Act No. 34 of 1956).
[10] *Durban City Council v SA Board Mills Ltd* 1961 (3) SA 397 (A) at 406H-407B.
[11] *Santam Insurance Co. Ltd v Vorster* 1973 (4) SA 764 (A) at 779A-B.

such occurrence. The defence of contributory negligence must also fail.

[22] In all the premises, I am satisfied that the plaintiff established that the defendant's conduct wrongfully and negligently caused the injury to his ankle. The plaintiff's action must accordingly succeed. There is no reason why the plaintiff should not be entitled to the costs of the action.

[23] In the result, it is ordered:

23.1. the defendant is liable to compensate the plaintiff for any proved or agreed damages suffered by him as a result of the defendant's wrongful and negligent conduct on 19 April 2015.

23.2. the defendant pay the plaintiff's costs of suit.

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G H BLOEM
Judge of the High Court

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| For the plaintiff: | Adv S H Cole, instructed by de Wet Shaw & Baxter Attorneys, Queenstown and Wheeldon Rushmere & Cole, Grahamstown |
| For the defendant: | Adv D H de la Harpe, instructed by Neville Borman & Botha Attorneys, Grahamstown |
| Date of hearing: | 3 and 4 September 2018 |
| Date of delivery of the judgment: | 2 October 2018 |