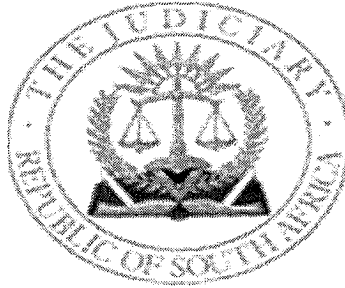


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED:
<u>07/03/19</u>	
Date	ML TWALA

CASE NO: 241/2017

In the matter between:

ELS: KENNETH PAUL

PLAINTIFF

AND

**THE MEMORABLE ORDER OF TIN HATS
(M.O.T.H)**

DEFENDANT

JUDGMENT

TWALA J

- [1] The plaintiff, an admitted and practising attorney, sued the defendant for damages arising from an injury he sustained when he fell on the premises of the defendant on the 18th of January 2014 whilst assisting a wheelchair bound person (*“the deceased”*).
- [2] At the commencement of the trial, the parties agreed that the issue of the merits should be separated from the issue of quantum. An order in terms of rule 33(4) of the Rules of Court was granted under the circumstances. It was further agreed by the parties that the defendant bears the duty to begin.
- [3] Further, the plaintiff conceded that it was not persisting with its claim as stated in paragraph 5.2 of its particulars of claim and that it has no objection in the expert report of Andre Fullard and the minutes of the discussion between Anneliese Stewart and Andre Fullard to be admitted in evidence as annexures “A” and “B” respectively.
- [4] It is not in dispute that the plaintiff was at the premises of the defendant on the 18th of January 2014 and that he fell as he was assisting the deceased up the steps. It is further not in dispute that the deceased weighed about 100kg at the time. What remain for determination by this Court is whether the defendant was negligent in any way which negligence resulted in the plaintiff sustaining an injury causing him damages or whether the plaintiff consented to the injury or consented to the risk of the injury (*Volenti non fit injuria*).

- [5] The plaintiff testified and called one witness in support of its case. The defendant called two witnesses to testify on its behalf. Both witnesses for the defendant are members of the defendant.
- [6] Mr Paul Michael Jansen testified on behalf of the defendant who is known as The Memorable Order of Tin Hats (MOTH) which is a brotherhood of South African former front-line soldiers where they socialise. He was a member of the defendant and was present and assisted in lifting the deceased up the steps on the day in question. He held the front of the wheelchair whilst the plaintiff held it at the back and they lifted the wheelchair up the steps. The plaintiff got his foot stuck on the steps and fell on his back with the wheelchair and the person on it falling on top of him. It was an accident. There was no ramp or rails at the stairs at the time and the deceased would always ask to be assisted. People would volunteer to assist him every time he called for help. He knew the deceased for many years. He broke his hip and became disabled a year before this incident.
- [7] In around October 2018 the defendant received a sum of approximately R180 000, a donation from Freemason Johannesburg, for renovations of the building and utilised some of the money to remove the stairs and built ramps and the railings. He did not hear the deceased calling for the plaintiff to come and assist him. He always called for volunteers to assist him. The plaintiff tripped and fell and it was an accident. He conceded that the plaintiff did not come to assist the deceased to hurt himself. It is possible that he lost his balance and fell backward with the wheelchair and the person on it falling on top of him. He conceded that he was travelling with Mr Swartz each time he came to Court but denied that they discussed this case as he was told not to. They discussed the case with Mr Swartz only when they deposed to affidavits as they went together to the Police Station.

He conceded that the plaintiff was correct that Mr Swartz never participated in assisting the deceased on that day.

- [8] Mr Kenneth John Swartz testified that he was a member of the defendant at the time of the incident involving the plaintiff. He assisted the deceased together with the plaintiff and Mr Jansen. He took the side of the wheelchair at the back which was next to the rails and the plaintiff took the one without rails. Mr Janssen took the front of the wheelchair and they hoisted the wheelchair up the steps. The plaintiff caught his foot on the second steps and fell backward with the wheelchair and the person on it falling on top of him.
- [9] He conceded that the steps were narrow and the wheels of the wheelchair were hanging over and protruding on the steps. He agreed that the plaintiff was called by the deceased to come and assist him. He accepted plaintiff's version that the wheelchair was perpendicular to the wall and it was stuck with the toes of the deceased against the wall. He further stated that there was a notice at the door of the premises which read "*Right of Admission Reserved*". He testified that they usually helped the deceased without any problems and it was just an accident on that day that the plaintiff got injured.
- [10] He testified that the defendant instructed an architect to draw the plans to build the ramps for wheelchairs before this incident but the architect delayed in finalising those plans. He does not know anything about the insurance claim but has heard that the insurance premiums have gone up significantly and that the MOTH might have to sell the premises due to the claim of the plaintiff.

- [11] The plaintiff testified that he attended at the premises of the defendant to consult with a Mr Cheney on his divorce. Whilst in consultation, he was called by the deceased to come and assist him as his wheelchair was stuck at the stairs and against the wall. He came out and found people milling around the wheelchair and he asked them to work with him in lifting the wheelchair up the steps for it was impossible to turn it around because there was not enough space. He held the wheelchair on the back on the left hand side whilst Mr Cheney held it on the right hand side but also at the back. There was a railing on the side of Mr Cheney but nothing on his side. As they lifted the wheelchair up, he lost his balance and fell. He was moving backward carrying the wheelchair and the person on it, as a result the wheelchair fell on top of him. He testified that he experienced such pain that he lost consciousness on the scene.
- [12] He testified that he usually assisted the deceased but it was the first time to assist him on those steps. He was a friend and not a member of the defendant and was its legal adviser too. He testified that he raised the issue of ramps and hand rails with the defendant to accommodate the deceased who was wheelchair bound. There were no hand rails on the one side of the steps-hence he could not grip on them when he tripped and fell. What was upper most in his mind was to help the man with a disability and who was in distress at the time to get the wheelchair out and the only way was to lift it up the steps. He did not go there to get himself injured nor did he know that he was going to be injured.
- [13] Mr Scott Cheney, the only witness for the plaintiff, testified that the deceased called the plaintiff by name to come and assist him. At the time they were sitting inside and consulting about his divorce. They both went to assist the deceased whose wheelchair was stuck with his toes against the

wall. He held the right back of the wheelchair and the plaintiff held the left back. The plaintiff instructed everybody to work in tandem including those that were holding the wheelchair at the front. When the wheelchair was lifted up the steps, there was no proper co-ordination with the plaintiff's instruction and the plaintiff hooked his foot on the steps, lost his balance and fell. The wheelchair and the person on it fell on top of the plaintiff. The two people at the front of the wheelchair were pushing and the plaintiff lost his balance and fell.

[14] It is trite that for the plaintiff to succeed in negligence cases, it must prove that there was a duty of care owed to it by the defendant which the defendant has breached and that the breach has caused harm to occur which resulted in damages.

[15] In *Kruger v Coetzee* 1966 (2) SA (A) 430 the Supreme Court of Appeal stated the following:

- 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 failed to take such steps.*

[16] In *Le Roux and Others v Dey* [2011] (3) ZACC SA 274 (CC) the Constitutional Court stated the following at para 122:

"In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of

whether – assuming all the other elements of delictual liability to present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct."

- [17] In *Country Cloud Trading cc v MEC Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) the Constitutional Court sated the following:

"Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability."

- [18] It is clearly apparent that the defendant owed a duty of care to the deceased to make his access easy to the premises with a wheelchair as a member of the defendant. The defendant is a social club for former members of the army and maintains that brotherhood amongst them. It is this brotherhood in which the deceased relied on each time he visited the club that members and patrons will come and assist him navigate his way around the premises where there were stair cases to negotiate. It is for a period of almost a year

before the incident happened that the members and the plaintiff in particular have been assisting the deceased to navigate the stairs on these premises.

[19] In *Pauw v du Preez* [2015] ZSCA 80 the Supreme Court of Appeal stated the following:

“.....It may well be so, as the appellant testified, that no-one had ever previously fallen off the stairs, but, as the saying goes, there is a first time for everything and the mere fact that no-one else had previously suffered a similar fate does not excuse the appellant from the consequences of her failure to render that portion of the stairway safe.”

[20] The plaintiff who is also a legal advisor to the defendant is on record having advised the defendant to build ramps and rails to assist and protect the deceased and other patrons from injury on the premises. The second witness for the defendant also confirmed that an architect was engaged to prepare plans for the building of ramps and rails before the incident occurred but the architect delayed to produce the plans. However, the ramps and rails have been built late in 2018 after Freemasons Johannesburg came on board and donated a sum of R180 000.

[21] I agree with counsel for the plaintiff that the defendant had a duty to protect its patrons from harm to be caused by the steps which were not protected by railings and it was in breach of that duty – hence the breach caused harm to the plaintiff resulting in him suffering damages. I hold the view that, had the defendant built the ramps for the wheelchair and put rails next to the steps to protect the patrons, the incident involving the plaintiff would have been avoided.

[22] The ineluctable conclusion is that the failure of the defendant to build ramps on the premises to accommodate wheelchair bound persons and patrons exposed the other patrons to danger of assisting the deceased to navigate his way around the premises. The defendant should have foreseen that failure to provide the ramps and rails would be a danger to the other patrons who assist the deceased or any other person with disability. It is my respectful view that the defendant should have foreseen that, for a year the patrons have been assisting the deceased to navigate the stairs, the patrons who assist the deceased might get injured in the process. Nothing turns on the fact that they have been assisting the deceased for almost a year without any problems or any one sustaining an injury.

[23] It is on record that the deceased was a heavy individual who weighed about 100kg and negotiating the stairs with him was no easy matter. Both witnesses for the defendant conceded that from the money they received from the sponsor, only a part thereof was used for the railings and ramps and the rest was used for the renovations of the bathrooms. It is my respectful view that the expense of providing the ramps and railings was not a huge expense for the defendant and therefore it was affordable. I am in respectful agreement with counsel for the plaintiff that had the defendant installed the railings on both sides of the steps, this incident would not have occurred as the plaintiff would have been able to grab the rail when he lost his balance.

[24] I respectfully agree with counsel for the plaintiff that the plaintiff went there to assist the deceased and did not have any intention to injure himself. All the witnesses testified that it was an accident that the plaintiff suffered an injury on that day. However, plaintiff testified that, as an attorney, he advised the defendant to install the ramps and rails to accommodate the deceased. It is therefore my considered view that the plaintiff was aware of

the danger of assisting the deceased navigating the stairs on a wheelchair. I hold the view therefore that the plaintiff was also negligent to some extent, in not taking the necessary precautions to avoid the inherent danger when assisting the defendant.

[25] In his amended plea, the defendant pleaded contributory negligence on the part of the deceased. I find myself in disagreement with the defendant in this regard. The deceased has not been joined in these proceedings and therefore no claim against him can be entertained.

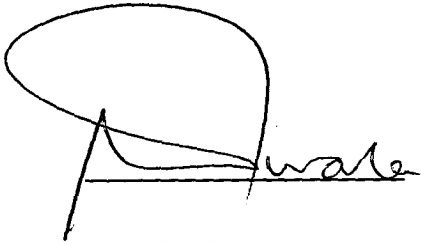
[26] I am unable to agree with the defendant that the plaintiff consented to the risk or voluntarily accepted the risk to the injury because he responded to the call of the deceased for assistance. As indicated above, this is a club of people who know each other fairly well and is based on promoting brotherhood. It would be insensitive of the plaintiff not to respond to a call of the senior member of the club who was in distress at the time calling his name to assist him.

[27] It is my respectful view therefore that the defendant had a duty of care towards the plaintiff and it breached that duty which breach caused harm to the plaintiff as a result whereof it suffered damages. Therefore, the plaintiff succeeds in its action to the extent that plaintiff also contributed 10% to the negligence of the defendant.

[28] In the circumstances, I make the following order:

1. The defendant is liable to compensate 90% of the plaintiff's proven damages;

2. The defendant is liable to pay the costs of the action.

A handwritten signature in black ink, appearing to read 'TWALA M L', written over a horizontal line.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 18th February 2019

Date of Judgment: 7th March 2019

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