THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 20197/2014

In the matter between:

MARIANNE ALET PAUW **APPELLANT**

and

GERTRUIDA ELIZABETH DU PREEZ **RESPONDENT**

Neutral citation: *Pauw v Du Preez* (20197/2014) [2015] ZASCA 80 (28 May 2015)

Coram: Brand, Leach and Saldulker JJA and Dambuza and Gorven AJJA

Heard: **6 May 2015**

Delivered: **28 May 2015**

Summary: Delict ─ failure to protect a section of a stairway with a hand-railing ─ such omission wrongful and negligent ─ respondent who fell from stairway not shown to have been negligent.

ORDER

On appeal from: Western Cape Division, Cape Town (Traverso DJP and Erasmus and Goliath JJ concurring):

The appeal is dismissed, with costs

JUDGMENT

Leach JA (Brand and Saldulker JJA and Dambuza and Gorven AJJA concurring)

[1] Whilst leaving a house owned by the appellant in the Strand on Christmas Eve, 2005 the respondent lost her balance and fell from a flight of stairs. She sustained bodily injuries and, in due course, instituted action for damages against the appellant in the Western Cape High Court alleging, inter alia, that the appellant had negligently failed to protect that portion of the stairs from which she had fallen with a railing that would have prevented her fall. When the matter came to trial, the issue of the appellant's liability was decided as a separate issue at the outset with the quantum of damages standing over for later decision.

[2] The trial court concluded both that the appellant had indeed been negligent and that she had failed to establish contributory negligence on the part of the respondent. It therefore issued an order declaring the appellant to be liable to compensate the respondent for whatever damages she might prove in due course. In an appeal to a full court, the appellant accepted that she had been negligent but argued that the trial court had erred in not finding contributory negligence on the part of the respondent. The appeal was dismissed. With special leave, the

appellant now appeals to this court contending, once again, that the respondent's own negligence had contributed to her fall.

[3] The property where the incident occurred was acquired by the appellant's parents as a holiday home in the mid-1950s, at a time when the appellant was a young girl. Initially registered in the name of the appellant's father, it has remained in the family ever since. Although the appellant and her husband had moved to the Strand in November 2002 and had thereafter resided permanently in the house, it was only formally transferred into her name in 2004.

[4] As is apparent from the photographs and plans of the appellant's property included in the record, the house is built on a steep hillside. Access from the street is provided by way of a fairly lengthy but straight flight of stairs leading from the street frontage and passing between a garage and a retaining wall. The garage is set back somewhat, both from the street and the front retaining wall. Viewed from above, the entire length of the stairway is flanked on the right by a wall fitted with a handrail. On the left, it is flanked for approximately half its length by the side wall of the garage. At the level of the front wall of the garage there is a security gate across the stairs, hinged on the right hand side and secured by way of a latch on the garage wall on the left. The fall from the bottom of the edge of the gate to the level of the ground is approximately 1,2 metres. Below the gate the stairs on the side of the garage are not fitted with any safety rail or other form of protection.

[5] It was from this unprotected portion of the stairway below the gate that the respondent fell. 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.

[6] Although the appellant initially denied negligence on her part, the lack of protection on the garage side of the stairs below the gate was an inherently dangerous state of affairs and, as stated earlier, she accepted both in the court a quo and in this court that she ought to be held liable to the respondent for failing to fit a safety railing to secure that portion of the stairway. She also accepted that had there been such a safety railing, the respondent would probably not have fallen off the stairs and been injured. As the respondent's claim was based upon an alleged negligent omission, the appellant's concession embraced an admission that her failure was both wrongful (in the sense that the policy and legal convictions of the community would visit a delictual claim with liability) and negligent (in that she had failed to take steps to avoid the harm when a reasonable person in her position would have foreseen the reasonable possibility of the omission causing injury to another and would have taken steps to avoid the harm occurring). That wrongfulness and negligence are two separate and discrete elements of delictual liability which, importantly, should not be confused, can now be accepted as well established in our law, academic criticism from certain quarters notwithstanding.[1]

[7] In any event, the consequence of the appellant's acceptance of liability is that, in regard to the so-called 'merits' of the respondent's claim, the only issue that this court is called upon to decide is whether the extent of the appellant's liability should be reduced by any contributory negligence on the respondent's part . It is trite that, on this issue, the onus fell on the appellant to prove such contributory negligence.

[1] Cf *Za v Smith* (20134/2014) [2015] ZASCA 75 paras 17-22.

[8] On Christmas Eve, 2005 the respondent and her mother went to visit relations who had hired the appellant's house over the Christmas season (the appellant was with her husband at his beach house at Boggomsbaai at the time). They stayed until about 11 pm. It was when leaving and descending the stairs that the respondent fell and was injured. The fall occurred below the level of the gate where the stairway on the side of the garage was unprotected.

[9] The respondent and her mother were the only two witnesses who testified as to how the incident had occurred. It can be accepted that although it was dark and there were no lights shining directly onto them, the stairs were adequately lit by the lights in the vicinity. The respondent alleged that she had descended the stairs with her mother behind her. Her mother contradicted her, saying that she had gone ahead. At the end of the day it matters not but, as her mother did not see her fall, the probabilities are overwhelming that the respondent had in fact preceded her down the stairs.

[10] The gate was closed when they descended and, closed as it was against the rise of a step, had to be opened away from persons descending, towards the road. After both she and her mother had passed through it, the respondent closed the gate. In order to do so, she first had to proceed down several steps to provide space to close it behind her, and then turned around and moved back up a few steps to secure the gate's latch to the clip mounted on the garage wall. No sooner had she done so when she lost her balance and fell, not down the stairs themselves, but off the stairway to end up lying between it and a motor vehicle that was parked parallel to the stairs facing the garage door.

[11] The appellant's mother was unable to say precisely how the appellant's fall had come about. She volunteered that after the appellant had closed the gate she turned around and, in the process, missed a step which caused her to lose her

balance and fall. However, she admitted that she had not seen this happening and that, at the crucial time, she had turned and was facing down the stairs when she suddenly heard a scream and the sound of the appellant falling.
The appellant herself did not know what had caused her to fall. According to her, she had just closed the gate but still had her hands on it when she lost her balance, her hands slipped off the gate, and she fell. But how or why she lost her balance she was unable to say.

[12] In arguing that the respondent had been negligent, counsel for the appellant contended that the respondent ought not to have closed the gate at all but should have left it to her mother to do so. This argument, as I understood it, was based on the fact that the respondent suffers from a physical disability as a result of a head injury sustained as a young child; that as the latch of the gate was on the side of the garage wall, she had to move towards the open side of the stairway in order to close it, particularly as she was left-handed; and that in these circumstances she had exposed herself to the obvious danger of the unprotected side of the stairway instead of having remained on the opposite side where there was a handrail available for her to support herself.

[13] Not only was this never specifically pleaded as a ground of negligence, but the contention has no merit. It is indeed so that more than 30 years previously the respondent had suffered a brain injury in a motor accident that had left her with a permanent right-sided hemiplegia and an associated limp on that side, and she admitted that in order to compensate for her weak right leg she descended the stairs by angling herself towards her left. But despite her gait being compromised, the respondent has accepted her physical disability with courage and determination. She became a long distance runner who, in 1999, had been a member of an invitation team that attended a para-olympic event in Australia

where she had won three medals, two gold and a silver. And, importantly, as part of her training she used, at times, to run up 10 flights of stairs.

[14] Accordingly, despite her physical disability and the necessity for her to be cautious when traversing non-level terrain, the respondent's hemiplegia was not so severe that the stairs at the house constituted a challenge that she ought not have accepted without assistance. A reasonable person is after all not 'a timorous faint-heart always in trepidation lest he (or she) suffer some injury' but 'ventures out into the world, engages in affairs and takes reasonable chances'.[2] Bearing that in mind, the evidence falls short of establishing that the respondent's disability was such that it was inherently dangerous for her to have attempted to close the gate herself, or that she was negligent in not having her mother do so.

[15] However, as a second string to her bow, the appellant argued that the respondent had been negligent in losing her balance and falling. This argument was based principally upon the contention that she had failed to keep a proper lookout and that, after having closed the gate, she had lost her balance as she must have stepped back and off the edge of the stairway which caused her to fall.

[16] Had the evidence established that the respondent had indeed fallen in this manner, there may have been room for an argument that she had been negligent. But there is no evidence this was in fact how she came to fall, nor can it be so inferred. As I have said, her mother did not see what had happened and the respondent herself does not know what caused her to lose her balance. All one knows is that she did so before she fell, but there are a myriad of potential reasons why persons might lose their balance. It follows that a person doing so,

[2] Per Van den Heever JA in *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490E-F.

and falling, does not in itself give rise to any inference of negligence on his or her part.[3]

[17] Thus the reason why the respondent lost her balance remains an unexplained mystery. It is impermissible to speculate on what led to her doing so. That being the case, the necessary facts from which a conclusion can be drawn that she acted negligently have not been established. In these circumstances the appellant failed to prove contributory negligence on the respondent's part and the appeal must fail.

[18] The appeal is dismissed, with costs.

_____

L E Leach
Judge of Appeal

[3] Cf *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD) para 19 and *Spencer v Barclays Bank* 1947 (3) SA 230 (t) at 238-9.

Appearances:

For the Appellant:	A B Rossouw SC Instructed by: D M Bakker Attorneys, Roodepoort Lovius Block, Bloemfontein
For the Respondent:	J D Maritz SC Instructed by: Rose-Innes, Du Preez Attorneys, Barberton Symington & De Kok, Bloemfontein