IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case nos: **10293/2003**

In the matter between

NEIL KATZEFF obo ANDREA KATZEFF	Plaintiff
CANAL WALK LIMITED T/A CANAL WALK	First Third Party
INDOOR GRAND PRIX (CAPE) (PTY) LIMITED	Second Third Party
and	
INDOOR GRAND PRIX (CAPE) (PTY) LIMITED	Third Third Party
WAYNE MOUTON YATES TANIA GROBLER	
First Defendant Second Defendant	

JUDGMENT GIVEN THIS THURSDAY, 18 AUGUST 200S

CLEAVER J;

[1] The plaintiff has instituted action on behalf of his minor daughter Andrea Katzeff ('Andrea') for the recovery of damages resulting from injuries which she sustained whilst operating a go-kart on a go-kart track owned and operated by the second defendant.

[2] The claim is somewhat unusual because the plaintiff seeks to hold the first defendant, the owner of the premises leased to the second defendant on which the go-kart track and business was operated, liable for the damages suffered by his daughter.

[3] Three parties have been joined as third parties by the first defendant.

The second defendant is joined as the first third party on the basis that in terms of its

lease it indemnified the first defendant against any claim brought against the first defendant in a case where the first defendant is a party to litigation commenced against the second defendant. The second third party is Mr Wayne Mouton Yates ('Yates'), the majority shareholder and director of the second defendant and he is joined because of a suretyship, limited to R400 000 and costs, signed by him as surety and co-principal debtor with the second defendant for all sums which might be owed by the second defendant to the first defendant. The third third party is Mrs Tania Grobler ('Grobler'). She was the person who had taken Andrea to the track. She is alleged to be a joint wrongdoer in respect of any damages suffered because she breached her legal duty of taking reasonable precautions to prevent Andrea from being injured while she was under her care and control by allowing her to drive the go-cart without taking adequate precautions to ensure that her hair was secured. She is also said to be liable because she signed an indemnity on behalf of Andrea in which she held harmless *inter alia* the first defendant against any claims arising from Andrea's injuries.

[4] Grobler was also joined as a third party by the second defendant. Allegations similar to those made by the first defendant to justify her joinder were made by the second defendant.

[5] At this stage of the trial, only the question of liability is at issue, it having been agreed and ordered in terms of rule 33(4) of the Uniform Rules of Court that the question relating to the *quantum* of the plaintiffs claim be deferred for later determination if necessary.

[6] The plaintiff, first defendant and third third party were represented by counsel. At the commencement of the proceedings I heard evidence from Yates. He testified that he was the majority shareholder in and a director of the second defendant which he advised was unable to afford the cost of engaging counsel to represent it He also testified that he was the only member or director of the second defendant which had anything to do with the running of the business conducted by the second defendant; that he was solely in charge of it and was in effect its alter ego. In line with the, reasoning in *California Spice and Marinade (Pty) Ltd and Others in re Bankcorp* v *California Spice and Marinade (Pty) Ltd and Others; Fair O'Rama Property Investment CC and Others; Sapere and* Saperas[1] and in view of the fact that Yates as the second third party was in any event before the court, I permitted him to represent the second defendant during the trial. I should add that counsel for the plaintiff, first defendant and the third third party were in agreement that Yates ought to be permitted to represent the second defendant and in fact supported his application.

[7] The background to the tragic accident is briefly the following:- Andrea was very friendly with Mighail, the son of Grobler, and the two of them often played together. On the morning in question Mighail invited Andrea to accompany him and his mother to the Canal Walk shopping centre where the two of them would go go-karting. Both Andrea's mother and father testified that they had told her that she could go with Mighail to Canal Walk but was not to go go-karting. Andrea's parents dropped her off at Grobler's house where Mrs Katzeff spoke to Mighail's elder sister Marzelle, whom she estimated to be about 15 years of age. Mrs Katzeff says she told Marzelle that Andrea was not to go go-karting. Grobler

1. [1997] 4 All SA 317

was not at home at this stage, but arrived later to collect Marzelle, Mighail and Andrea. A friend and neighbour, Leon Calitz ('Calitz') also accompanied them to Canal Walk. Andrea admits that during the journey to Canal Walk she did not tell Grobler that her parents had told her that she was not to go go-karting. Grobler, on the other hand, testified that she specifically asked her whether her parents would allow her to go go-karting and that Andrea had assured her that this was so, saying that *"of course"* her parents would allow her to go go-karting. When the party arrived at Canal Walk, only two of the employees of the second defendant were on duty to control the racing. Calvyn Green ('Green') had been left to act as race controller and Tendai Hwata ('Hwata') acted as a marshal. Green asked Mighail who was with him and Andrea and was informed that they were with Grobler who, standing some distance away, signalled her acknowledgement to him. He then told the children to go through to the area next to the track from which they were to pick up helmets for use on the track. He did not accompany them and they returned wearing helmets and were shown to their go-karts. Green says that he briefed Andrea, checking the buckle on her helmet and Hwata briefed Mighail, doing the same. Prior to this happening, Mighail had handed Green two forms which later transpired to be indemnities. The one had been signed by Calitz on behalf of Mighail and the other by Grobler on behalf of Andrea. More about these forms in due course. Conflicting and not entirely clear evidence was given by the witnesses in regard to the state of Andrea's hair at this stage. Andrea testified that she wore her hair in a plaited ponytail which reached down the length of her back virtually to her bottom, Grobler testified that Andrea's long hair was conspicuous, but did not give direct evidence as to the state of Andrea's hair once she had put on the

required helmet Andrea says that the hair was hanging down between her back and the

back rest of the seat of the go-kart According to Green all that he initially noticed about Andrea's hair was that it was pulled back. He says that he did not see any hair sticking out of her helmet when he checked the buckle and Hwata also says that he did not see any hair sticking out from under her helmet. The children set off on a practice lap which was aborted when a wheel came off Andrea's kart a short distance after the start. Green took the broken kart to the pits and it would seem that he was either in the pits or coming back from the pits when Andrea set off on her fateful lap. As Andrea was coming around the last corner towards the start line, her hair became entangled with the rear axle of the go-kart. As the rear axle revolved, her hair wound around it more and more, and in the result she was horribly scalped. Andrea says that her helmet came off with her hair and scalp while a witness called by the plaintiff, Mr Benjamin who was at the track in order to supervise his son's venture onto the track, recalls seeing Andrea leaning back without helmet or hair as she drove into the tyres on the side of the track, Grobler, who was best positioned to see the accident, confirms that she drove into tyres at the side of the track and says that Andrea then stood up and took off her helmet, moving it forwards.

THE CLAIM AGAINST THE FIRST DEFENDANT

[8] The basis of this claim is that the first defendant owed the public, and Andrea in particular, when leasing the premises to the second defendant and allowing the second defendant to use the premises as a go-kart track, to ensure that the second defendant had all reasonable and necessary safety features and precautions in place to ensure that anyone taking part in the go-karting would not be injured. The issues in

dispute as narrowed down in the pleadings and further particulars are the following:

1. Whether the first defendant owed the public and in particular Andrea Katzeff a duty of care.

2. Whether the accident was caused by the negligence of the first defendant acting in breach of such duty of care.

3. Whether Andrea drove the go-kart with the knowledge and consent of her parents; and whether the first defendant is entitled to avoid liability on the basis of a voluntary assumption of risk by them.

4. Whether Andrea's parents authorised the third third party to, sign an indemnity for Andrea and whether the first defendant should be held harmless and indemnified in respect of plaintiff's claim as a result thereof.

[9] The duty of care postulated by the plaintiff was the duty of care to ensure that the second defendant had all reasonable and necessary safety procedures and precautions in place and adequately trained and skilled supervisory staff on duty to ensure that anyone taking part in indoor go-karting would not be injured. Such duty was alleged to have arisen when the first defendant let the premises in question to the second defendant and allowed the second defendant to use the premises as an indoor go-kart track. It was alleged that the first defendant as lessor of the premises, and presumably also as the conductor of the business of a shopping centre complex, should have known that the use of the premises as an indoor go-kart track could cause a danger to members of the public who used the go-karts, was an activity which required to be adequately supervised by trained personnel, required adequate and necessary safety equipment and was an activity which required that the go-karts used were such that people using them would not get their hair or clothing caught in

the axles of the karts.

THE

CLAIM AGAINST THE SECOND DEFENDANT

[10] As against the second defendant the plaintiff's case is that the accident was caused by the negligence of the second defendant and/or its employees, acting within the course and scope of their employment who failed adequately to supervise the go-kart activities; failed to ensure that Andrea had adequate protective clothing when she was allowed to participate in the go-karting; failed to have due regard to Andrea's long hair and to what might happen should her hair become entangled in the axle of any go-kart; failed to take steps to take care that Andrea's hair did not become entangled in the go-kart; failed to ensure that the go-karts and equipment used were safe and failed to take adequate safety precautions to ensure that Andrea was not injured. The issues in dispute between the plaintiff and the second defendant are therefore

11 whether the accident was caused by the negligence of the second defendant or its employees acting in the course and scope of their employment;

12whether the second defendant is excused from liability to the plaintiff on the grounds of the indemnity form signed by the third third party;

13 whether Andrea voluntarily accepted the risk of operating a go-kart, thereby excusing the second defendant from liability; and

14 whether Andrea should be regarded as being contributorily negligent, resulting in an apportionment of plaintiffs damages.

[11] The plaintiff seeks to hold the defendants liable on the basis that there was a duty on the defendants to act positively i.e. they are held liable for an omission to

act positively. In *Minister van Polisie v Ewels*[2], the court held that generally a person does not act wrongfully for the purposes of the law of delict where he fails to act positively to prevent harm to another. In *Van Eeden v Minister of Safety and Security*[3] the principles applicable to the liability for omissions were reaffirmed in the following terms:

> *"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 reasonabie to have expected of the defendant to have done so by making a value judgment based, inter alia, upon its perception of the legal convictions of the community and on considerations of policy. The question of 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."*

The principles expounded in *Van Eeden* were expanded somewhat in *Minister of Safety and Security v Van Duivenboderi**

> *"A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable* as *determined by the application of the separate test that has consistently been applied by this court in* Kruger v Coetzee, *namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry* as *to the existence or otherwise of* a *legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised), nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.*
>
> *[13] In* Minister van Polisie v Ewels *it was held by this Court that a negligent omission wilt be regarded as unlawful conduct when the*

circumstances of the case are of such a nature that the omission not only evokes moral indignation but the 'legal convictions of the community' require that it should be regarded as unlawful. Subsequent decisions have reiterated that the enquiry in that regard is a broad one in which all the relevant circumstances must be brought to account. In Knop v

2.1975 (3) SA 590 (A) at 596H
3.2003 (1) SA 389 (SCA) at 395J-396A
4.2002 (6) SA 431 (A) at 441 para 12-442 para 13

Johannesburg City Council *Botha JA said that the following well-known passage from Fleming* The Law of Torts *4th ed at 13$ correctly sets out the general nature of the enquiry:*

> *'In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's 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."*

There is no closed category of situations in which a defendant may be held to be under a legal duty to prevent harm to another (Neethling, Law of Delict, 4th Edition, pages 58 - 72), but the question is always whether the defendant ought reasonably and practically to have prevented harm to the plaintiff, i.e. whether it was reasonable to expect of the defendant to take positive measures to prevent the harm. In *Administrateur Transvaal v Van der Merwe*[5] the court indicated that amongst other aspects, relevant considerations were the necessity to consider and balance the possible extent of the harm, the degree of risk that the harm will materialise, the interests of the defendant and the community, the availability of practical preventative measures, the chances of success of such measures and whether the cost in preventing the harm is reasonably proportional to the harm.

[12] The case for the first defendant is quite simply that it had no duty of care

relating to the activities of the second defendant, bearing in mind that the duty of care which the first defendant was said to have breached was a duty to ensure that people such as Andrea using the go-karts would not get their hair or clothing caught in the axles of such go-karts.

[13] Although there is no closed category of situations in which a defendant may be

5. 1994 (4) SA 347 (A) at 358G-364F

held to be under a legal duty to prevent harm to another, I am not aware of any reported judgment in this country in which a landlord was held liable in delict for failing to ensure that his tenant took precautions to prevent damage to others arising from the tenant's operations.

[14] Although the first defendant has the right in terms of its lease to inspect the leased premises, that right is restricted to the inspection of the premises and would not in my view necessarily entitle the first defendant to inspect the go-karts on the premises. I prefer not to decide the matter on this basis and will therefore address the contentions advanced on behalf of the plaintiff. As to the principle involved, guidance may perhaps be sought from the English law. In *Smit v Scott and Others*[6], the local borough council had placed tenants who were known by the council to. be likely to cause a nuisance in a house adjoining that of the plaintiff. They did in fact cause a nuisance and damaged the plaintiffs premises, causing the plaintiff to leave his premises. The plaintiff's action, based on three grounds, namely nuisance, having brought a "*thing"* (the tenants) onto the defendant's land likely to cause mischief if it escaped and having failed in a duty of care to its neighbour, failed. In the course of his judgment, Pennycuick V-C made the following observations which in my view are apposite in general terms to the situation under review, namely

1.That the established law relating to the rights and liabilities of landowners cannot be reshaped by reference to a duty of care, and

2.*"The relationship of land owner, tenant and neighbour is, in its nature, of the most widespread possible occurrence and the introduction of the duty of care in this connection would have far-reaching implications in relation to business*

6. [1973] Ch 314

as well as residential premises."[7] In the present case we are not concerned with the relationship of land owner, tenant and neighbour, but that of land owner, tenant and the public at large which would result in even wider and more far-reaching implications should the duty of care be introduced into that relationship.

[15] Counsel for the plaintiff accepted that the plaintiff's case does not depend upon a general proposition as to the liability of landlords for the activities of their tenants, but sought to persuade me that in the special circumstances of this case, I should find that the plaintiff had established that a duty of care as pleaded rested on the first defendant. Again it must be stressed that the duty of care postulated was that adequate safety provisions should have been in place to ensure that people using the go-karts would not get their hair caught in the axles of the karts, The. circumstances and reasons relied upon are the following;

> 11 Go-karting is inherently dangerous, the danger arising from that not only from the fact that go-karts travel at speed, but that they contain moving parts which may cause injury. This was the testimony of the witness Mr R K Hering, called by the plaintiff. That go-karting could be dangerous was recognised by the second defendant for a notice was exhibited at the track bearing the warning *"Go-karting can be dangerous".*
>
> 12 The class of persons at risk from the particular danger is relatively restricted and significantly includes as a proportion of such customers, children. It was submitted that a reasonable person in the position of the first defendant would recognise that children would in general have a lower capacity to recognise the

particular dangers themselves or to take

7. Page 322 at F

precautions

in order to protect themselves.

13 The first defendant was partly instrumental in creating the danger. The basis for this contention was that when applying to the local authority for permission to construct the shopping centre known as Canal Walk the first defendant applied for a departure from the zoning provisions in order to permit the activity of go-karting to be conducted at the centre. This was followed by the conclusion of a lease agreement with the second defendant entitling the second defendant to conduct the business of go-karting on the leased premises,

14 The first defendant had a significant commercial interest in the go-karting venture because as set out in its application to the local authority the shopping centre was intended to be not merely a shopping mall, but also a centre which would provide a dynamic and interactive entertainment experience for members of the public, i.e. the go-karting. Furthermore, it was contended that the commercial interest of the first defendant in the go-karting activities was demonstrated by the fact that in addition to the rental payable by the second defendant, the first defendant was also entitled to a percentage of the turnover of the second defendant's business.

15 The first defendant had the ability to take reasonable precautions. The evidence revealed that the first defendant employed various staff members who had their offices at the centre in relatively close proximity to that of the go-kart track. These staff members included persons whose duties related to safety at the centre as a whole. It was contended that the first defendant had the

right to inspect the premises in terms of the lease and nothing would have prevented them from conducting an inspection of the

premises in order to determine the safety or otherwise of the activity being conducted. In fact, the first defendant operated a system whereby it was kept informed of all incidents, including those involving injuries to persons at the centre, including the go-kart track.

16 The evidence revealed that numerous incidents, including incidents giving rise to physical injuries had occurred at the go-kart track prior to Andrea's injury, Reliance was also placed on a similar injury which had occurred when one Nashreen Sawant had been injured at premises previously utilised by the second defendant (not at Canal Walk). She too was a young girl with long hair and had been injured when her hair had become entangled in the chain and on the axle on the inside of the hub of the back wheel of a go-kart. It was submitted on behalf of the plaintiff that the legal convictions of the community required the first defendant to have enquired after this type of fact from the second defendant and to have taken due notice of it.

17 It was submitted that the first defendant could have taken reasonable precautions involving a limited amount of expense and effort in that it could and should have commissioned a report from an appropriately qualified expert in order to have ascertained the nature and extent of dangers to which the public might have been exposed when taking part in go-karting on the second defendant's premises. Such a report would have included advice as to appropriate precautionary measures.

18 The documentation discovered by the first defendant revealed that its employees were aware of injuries sustained by members of the public during the course of go-karting activities at the second defendant's track and that the employees were concerned that the first defendant might

face

legal action as a result. The documentation revealed that representatives of the first defendant were advised than appropriately worded indemnity forms would preclude action being taken against them and it was submitted on behalf of the plaintiff that instead of taking steps to preclude claims being made against it, the first defendant ought to have ensured that adequate safety precautions were in place.

[16] In my view, the grounds for the submission by plaintiffs counsel are not sufficient to justify the conclusion which I have been asked to reach.

11 The fact that the activity in question is inherently and patently dangerous and that the go-karts contain moving parts which may cause injury does not in my view in itself trigger the duty of care in so far as the landlord is concerned. There are many instances where members of the public are exposed to risk and danger on leased premises. One may think also of the example of a funfair or premises on which hazardous goods are stored or used. In the present case notices were prominently displayed on the premises indicating that go-karting can be dangerous and participants were required to sign appropriate indemnity forms.

12 I do not understand precisely what point is intended by the submission that the class of persons who would be at risk from the go-karting is relatively restricted. It seems to me that any number of members of the public might have used the go-karts and the fact that some of the users were children does not in my view in itself alter the situation.

13I do not consider that the fact that the first defendant made mention in its application to the local authority for a departure from the zoning provisions that the centre combines shopping and leisure and had a

wide, diverse

entertainment component, or the fact that the lease provided a turnover clause in respect of the payment of rental operates to take this case out of the ordinary,

14 The fact that the first defendant employed a security manager who had undergone a course in occupational health safety and risk management which was said to provide him with the knowledge and skills necessary to control and run a health and safety program for any type of organisation and that the first defendant employed security staff does not justify the conclusion that these parties would in any way have been able to ensure that the necessary precautionary measures were in place to prevent the accident in which Andrea was involved.

15 As to the number of incidents involving injuries of some sort or another, the schedule admitted into evidence reflected 26 injuries on the track over the period December 2001 to June 2003. (As a matter of fact the incidents referred to constitute a miniscule portion of 175 779 incident reports stored on first defendant's database.) Apart from the fact that the report cannot constitute proof of the contents, details as to the injuries recorded suggest that in the main the injuries were of a minor nature. In any event, both the experts who testified - one on behalf of the plaintiff and one on behalf of the first defendant - accepted that injuries occurred from time to time on a go-kart track and the expert called by the first defendant regarded it as unremarkable that there may have been some broken arms or legs in accidents which occurred on a go-kart track.

16 I do not agree with the submission made on behalf of the plaintiff that the legal convictions of the community required the first defendant to have enquired from the second defendant as to the injury which had

occurred to

Nashreen Sawant on premises

previously utilised by the second defendant.

17 On the applicant's version, the first defendant would have been obliged to commission a report from an appropriately qualified expert in order to ascertain the nature and extent of the dangers flowing from the use of the go-kart track by members of the public at the inception of the second defendant's lease with the first defendant. That presupposes a general duty of care on the first defendant for the activities and the equipment of the second defendant, something which counsel for the first defendant specifically disavowed.

18 The fact that the legal consultant to the first defendant suggested that the indemnity form used by the second defendant be amplified so as to include a reference to the first defendant can not in my view give rise to the alleged duty of care. It was simply a cautionary measure.

[17] THE ALLEGED NEGLIGENCE OF THE FIRST DEFENDANT

Although I have found that the first defendant did not have a duty of care in the circumstances to the extent postulated by the plaintiff, I will nevertheless deal with the question of the first defendant's alleged negligence. As set out in *Kruger v* Coetzee[8] an omission will only attract liability if a reasonable person in the position of the defendant would not only have foreseen the harm but would have acted to avert it. The plaintiff and the first defendant each called an expert witness. The plaintiffs expert, Mr R K Hering is a director and shareholder of a company which owns and operates an indoor go-karting circuit in Randfontein, Gauteng. He acknowledged that go-karting can be dangerous and testified that

6. 1966 (2) SA 428 (A) at 430E-F

there is an inherent risk in karting because of the moving parts such as the rotating axle and the rotating fan on the engine. He inspected the karts of the second defendant on 11 March 2005 and found that the design was not defective, but that what led to the accident was the fact that the seat was too close to the rotating back axle over which no protection had been provided. In his view the type of accident which had occurred was inevitable if a child with long hair which had not been restrained had used the kart, because of the lack of protection over the rotating axle. His karts, which he imports from the United Kingdom, are different from the karts which he viewed in Cape Town which he understands to have been manufactured in Cape Town. His karts have the engine on the left hand side [with the result that the lip of the back rest of the seat is on the left side] as compared with the second defendant's karts which have the engine on the right hand side. When he inspected the second defendant's karts in 2005, each had a plastic covering over the rear axle which in his opinion was now an adequate precaution to protect against the type of accident which had occurred. Of course, no such protection was in place when the accident occurred. He indicated further that at his track special attention is paid to loose clothing, long hair and sandals worn by drivers. Long hair must be restrained at his track and this is done by use of a balaclava or a hair net with a safety helmet then being worn over the net. In addition he provides tightly fitting coloured bibs at his track in which long hair can be tucked into the bib at the rear. He conceded that there was a remote possibility that someone with long hair could have his or her hair become entangled with the axle on his karts. but says that the reason why it has never happened is because his staff take proper precautions. Significantly, I think, he testified that he had never heard of a case such as Andrea's where hair had been caught in the back axle.

[18] The first defendant's expert was Mr H E Rowen. He was engaged by the first defendant to conduct an occupational health safety and environmental survey of the premises of the second defendant on 22 July 2003, that is three days after the date on which Andrea's accident occurred. In his report, he recorded that he had inspected the kart which Andrea had driven at the time of the accident and had found it to be in good order. He recommended that consideration be given to the fitting of a light-weight metal or plastic cover over the chain and shaft assembly to prevent hair entanglement. He also recommended that all persons with long hair be advised that it is compulsory to wear a container paper cap whether or not their hair has been tied back. In his evidence he explained that the recommendations referred to had been made with hindsight in the light of the incident. He stated that but for his knowledge of the incident, he would not have made such recommendations as he would not have considered the smooth axle to pose any danger.

[19] Since the plaintiffs own expert had never heard of an accident of the nature of that in which Andrea had been involved and the first defendant's expert was likewise unaware of the occurrence of such an accident, it can hardly be suggested that the first defendant would have foreseen the reasonable possibility of the conduct of the second defendant injuring Andrea in the manner in which she was injured. If the first defendant had engaged the services of an expert for the purposes of establishing whether there was a reasonable possibility of the injury occurring, he would presumably employed Mr Rowen, who on the strength of the information available to him at the time would not have foreseen Andrea being injured as she was. Mr Rowen was cross-

examined at some length as to

the necessity for the long hair of the driver of a go-kart hair to be restrained in a net or cap, but having regard to the evidence subsequently given by the employees of the second defendant, it is not credible in my view that he would have been told that the second defendant allowed participants to drive with long hair loose. After all, one of the employees of the second defendant testified that if he had seen long hair on Andrea he would have told her to stop. Another said that it was his duty to check for long hair and loose clothing.

[20] I accordingly conclude that even if there was a duty of care on the first defendant, its duty would have gone no further than to have investigated the manner in which Rowen would have investigated it and that any failure by it was not a cause of Andrea's accident.

[21] The two remaining issues between the plaintiff and defendant also fall away because of my findings in regard to the duty of care and the alleged negligence. In any event, it is quite clear that Andrea drove the kart without the knowledge and consent of her parents. Accordingly, there can be no suggestion of them having assumed the risk. It is also clear that the parents at no stage authorised Grobler to sign the indemnity.

[22] **THE CASE AGAINST THE SECOND DEFENDANT**

The position of the second defendant is different from that of the first defendant since it operated the equipment used by Andrea. As in the case of the first defendant, the duty of care which is said to have existed

was the duty to provide adequate protection for a driver with long hair using the go-karts. The second defendant called no evidence to contradict the evidence of Mr Hering even

though Yates, the major shareholder and a director of the second defendant who would have had knowledge of the second defendant's activities was in court throughout. Apart from the evidence of Mr Hering, Mr Ebrahim Sawant testified that on Easter Friday in 2001 he took his three children to the second defendant's go-kart track which at that stage was being operated near the entrance to the Waterfront under the uncompleted flyover bridge. One of his children, Nashreen Sawant, suffered an injury similar to that suffered by Andrea, although far less serious, when her hair became entangled on the back axle of the go-kart which she was driving. She suffered injuries to her neck and back and spent three or four days in the intensive care section of the hospital as a result. The second defendant relied on the evidence of three of his employees who resist the claims by the plaintiff that the accident had been caused by the second defendant's negligence. They were Mr G Adams ("Adams"), T Hwata and Green and their evidence was important in relation to the question as to whether or not Andrea's hair had been contained in her helmet or not and also as to the state of the helmet worn by Andrea. Adams was a race director and at the time of the accident and explained that after meeting clients in the briefing area and collecting their tickets from them, he would fit helmets onto them, check for long hair and loose clothing and then accompany them to the kart area. He had checked all the helmets on the 19 July and testified that all had tie straps and that the padding in each was *"quite fine".* He did not see Andrea at all because shortly before she went onto the track he had gone to the office and was searching through the files in the office when the accident took place. Hwata had been employed as a marshal on the track on the day of the accident having being permanently appointed to this position only some two to three weeks earlier. He was at the race control box when the children arrived and says that he took

Mighail to the kart while Green took Andrea to her kart. According to him, Andrea had a helmet on her head, the strap of which was tied up although he did not specifically check her helmet as he was busy with Mighail. He did not see Andrea's hair, but then said that he did not see that her hair was long and that he didn't see her from behind. Although he gave Andrea her replacement kart when the wheel came off the kart in which she had started out, he did not look in order to see if her hair was tucked up at that stage and admitted that at that stage he did not know whether she had long hair or not, From Green's evidence it was clear that no-one checked whether Andrea's hair was tied up or whether the helmet was fitted. In his evidence in chief he initially said that he was on his way to the pits with the kart which had been abandoned by Andrea when he saw her go past. He then changed this evidence somewhat to say that he was coming out of the pits when he saw her pass and could see her from the back. In cross-examination he said that he was in the pits when Andrea pulled away and saw her as he was coming out of the pits.

[23] I am satisfied that none of the witnesses paid any regard to the state of Andrea's hair and the probabilities are that she was left to her own devices and had her hair hanging behind her back between herself and the backrest of the seat. However, having regard to the evidence given by both Andrea and Grobler, Andrea's long hair, plaited as it was in a long ponytail, must have been conspicuous to all when she arrived at the track. In the absence of any evidence by or for the second defendant to contradict the evidence of Mr Hering and in the light of the evidence to the effect that the injury to Nashreen Sawant was caused in the same

manner as the injury suffered by Andrea and the fact that no attention was paid by the second defendant's employees to Andrea's hair when

she was permitted to drive the go-kart. 1 am satisfied that the test as to the second defendant's liability for *culpa* as set out in *Kruger v Coetzee* has been met. 1 accordingly find that the second defendant was negligent in that its employees, acting at all times within the course and scope of their employment with the defendant, failed to ensure that Andrea had adequate protective clothing and equipment before she was allowed to participate in the go-karting and failed to have due regard to her long hair and to what might happen if her hair should become entangled in the axle of the go-kart and failed to take any adequate or reasonable steps to ensure that her hair did not become entangled in the axle of the go-kart.

[24] Having concluded that the second defendant is liable to the plaintiff, there remains for consideration the contingent pleas raised by the second defendant which are

> 21That it is excused from liability to the plaintiff by virtue of the indemnity signed by the third third party.
>
> 22That Andrea accepted the risk flowing from the hazardous activity of go-karting thus excusing the second defendant from liability.
>
> 23That Andrea was herself negligent in failing to ensure that her hair was properly secured and was accordingly a joint wrong-doer in respect of the damages suffered by her and that the claim accordingly falls to be apportioned in terms of the Apportionment of Damages Act, No 33 of 1956.

THE INDEMNITY

[25] Grobler testified that when they reached the go-kart track, Calitz bought the two

tickets required for the two children to ride in the karts. It later transpired that what had happened was that Calitz had paid the required fee for the children and had been given two forms which were to be filled in, one for each of the children. These were in fact the indemnity forms. The relevant wording of each of the indemnities Is the following;

> *7 hold harmless and indemnify Indoor Grand Prix (Cape) (Pty) Ltd ..., the owners and managers of Canal Walk Shopping Centre, against any claims of whatsoever nature, including costs and expenses, in respect of my ... injury ..., irrespective of whether such ... injury... may have been caused by my act or omission, whether negligent or reckless or otherwise, of any such person.*
> *I acknowledge that I am aware of and understand fully the risks and dangers associated with my participation and hereby accept any consequences etc."*

Grobler says that Calitz, who was with the children at the pay kiosk and standing a little distance from her, called and asked her what Andrea's surname was and how to spell it. She then walked towards him and took the document (which she termed *"die kaartjie')* which he was holding, from him. She completed it by writing in the name of Andrea Katzeff, inserting as Andrea's date of birth 93.08.02 (which incidentally is not the correct date) and by signing her name ('Tania') in the space provided for a signature. This was signed in the space provided for the signature of the driver of the kart. The form also makes provision for the full

name and signature of a guardian, but this portion of the form was not filled in or signed. She cannot explain why the date of birth which she entered onto the document was incorrect since she says she asked Andrea at the time what her date of birth was and was surprised to hear for the first time in court that the date appearing on the document was not Andrea's date of birth. A similar indemnity, ostensibly signed for Mighail, was completed and signed, again in the space intended for the driver of the kart, by Calitz. Calitz thereafter handed the two forms to the lady in charge, whereafter the children were allowed through the

entrance gate in order to obtain helmets. She testified further that she never read the document and regarded it merely as a ticket *{"kaarijle")* which she had completed. The indemnity was not signed by Andrea and in any event, she was not competent to sign any such indemnity.

[26] The question is whether Grobler could legally provide an indemnity on Andrea's behalf. Clearly she did not have the authority of Andrea's parents to sign the undertaking for both the parents testified that they had told Andrea that she was not to take part in any go-karting activities. Grobler admits signing the indemnity, but denies that the document constitutes an indemnity to the first defendant or an indemnity in law. She admits that Andrea was in her care and under her control prior to her driving the go-kart, but contends that her legal duty to take reasonable precautions to prevent Andrea from being injured existed, only while she was in her complete and unfettered care, which was not the case at the moment of the accident. At that stage, she says, Andrea was under the control and care of the second defendant.

[27] Neethling, Potgieter and Visser[9] list the following as the requirements for a valid consent to injury or a consent to the acceptance of a risk of injury

a) The consent must be given freely or voluntarily.

b) The person giving the consent must be capable of volition.

c) The consenting person must have full knowledge of the extent of the possible prejudice.

d) The consenting party must realise and appreciate fully what the nature and extent of the harm will be.

9. The Law of Delict 4th Ed at 101-103

e) The person consenting must in fact subjectively consent to the prejudicial Act.

f)The consent must be permitted by the legal order. In other words the consent must not be *contra bonos mores.*

Requirements c), d) and e) have particular application in this case. In *Castell v De Greef*[10] it was stated that the consenting party

> *"must have had knowledge and been aware of the nature and extent of the harm or risk"*

and

> *"must have appreciated and understood the nature and extent of the harm or risk*[0]*.*

In *Waring and Gillow Ltd v Shearbome* Innes CJ said the following

> "*... it must be clearly shown that the risk was known, that it was realised, and that it was voluntarily undertaken. Knowledge, appreciation, consent-these are the essential elements: but knowledge does not invariably imply appreciation and both together are not necessarily equivalent to consent."*[11]

Important for the consideration of this case, in my view, is the dictum of Ogilvy Thomson CJ in *Santam Insurance Co Ltd v Vorster*[12]

> *"It it be shown that, in addition to the knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself that will ordinarily suffice to establish the 'consent' required to render him* volens - *provided always that the particular risk which culminated in his injury falls within the ambit of the thus foreseen risk."* (my underlining)

Neethling, Potgieter and Visser[13] hold the view that as a rule the prejudiced person himself must consent and that only in exceptional circumstances may consent to prejudice be given on behalf of someone else,

[28] In *Santam Insurance Co Ltd v Vorster the* court pointed out that the *ipse dixit* of

10.1994 (4) SA 408 (C) at 425 (H-I)
11.904 (TS) 340 at 344
12.1973 (4) SA 764 (A) at 780-781
13. Law of Delict 4th Ed at 100 and notes 361 and 362 *in fine*

the claimant will usually carry little weight and it is therefore necessary to resort. to an objective assessment of the relevant facts in order to establish what may fairly be said to have been the inherent risks of the particular hazardous activity under consideration. Thereafter, a factual finding should be made on the question of whether or not the claimant (in this case Grobler) must, despite her probable protestations to the contrary, have foreseen the particular risk which later eventuated and caused the injuries. This is necessary in order to reach a conclusion as to whether or not on a subjective basis the inference arises from all the evidence that the plaintiff must have understood and accepted such risk.

[29] On the evidence given by Grobler, there is no doubt that she had no conception whatever of the nature and extent of the harm to which she has been said to have consented. Her only concern was that the children should not be on the track in the company of adults. She had not taken her son to the defendant's track before, although she had fetched him from the track on one occasion. Although there were signs at the track to the effect that *"Go-karting can be dangerous"* and *"Racing is at your own risk",* she testified that she paid no attention to such signs, nor did she pay any attention to a sign reading *"Indemnity under 18's are to be signed in by a parent or legal guardian".* Although one may be sceptical about Grobler's failure to pay attention to the signs, the fact is that she was not shaken under cross-examination and there is no reason why her evidence should not be accepted. Quite clearly no-one explained either to her or to Calitz the import of what they were to sign. It appears that the forms were merely handed to Calitz.

[30] The two further alternative grounds on which the second defendant denies

bility are

* that Andrea voluntarily accepted the risk attaching to the dangerous activity of go-karting; and

* that Andrea herself was negligent in failing to ensure that her hair was properly secured, was accordingly a joint wrong-doer in respect of the damages alleged and that the plaintiff's claim falls to be apportioned in terms of the Apportionment of Damages Act.

These two defences may be disposed of without further ado. Andrea did not accept any risk and was in any event not competent to do so. There is no basis on which a finding can be made that Andrea should reasonably have foreseen that unless her hair was tied up, it could become entangled in the machinery of the go-kart. The expert called by the first defendant did not foresee the eventuality as being reasonable and having regard to the fact that Andrea was ten years old at the time, she could clearly not reasonably be expected to have had such foresight. Furthermore, there was no sign at the premises indicating that her hair should be tied up and there is no evidence to suggest that anyone told her that this should be done.

[31] Since the plaintiffs claim against the first defendant has failed, it is not necessary to deal with the first defendant's joinder of the first, second and third third parties, save for the question of costs arising therefrom. The question of the costs arising from the joinder of the first and second third parties was not debated in court, the principal reason probably being the fact that the first and second third parties were not legally represented at that stage. In the circumstances I do not propose making any order in

respect of these costs, but the first defendant and the first and second third parties may approach me in Chambers within two weeks from

the date of this judgment in order to arrange for a hearing to determine the issue of the costs should they so desire. In the light of my finding to the effect that no case had been made out against the third third party, the third third party will be entitled to the costs attendant upon her being joined in the proceedings.

[32] In the result, the following orders are made:

1) The second defendant is liable for such damages as may have been sustained by the plaintiff, in his personal capacity and in his capacity as father and natural guardian of his minor daughter, Andrea Katzeff, arising out of the injuries sustained by Andrea on 19 July 2003.

2)The plaintiffs claim against he first defendant is dismissed with costs.

3) The claims of the first and second defendants against the third third party are dismissed with costs for which costs the first and second defendants are jointly and severally liable,

R B CLEAVER