

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 8352/2007

In the matter between:

C P A NO

First Plaintiff

M W U A

(NEE K) NO

Second Plaintiff

And

G S

First Defendant

L S

Second Defendant

JUDGMENT DELIVERED ON 25 AUGUST 2016

DONEN AJ

[1] This is an action for damages in which only the merits are in issue at this stage. Mrs and Mrs A are the parents and legal guardians of their daughter, C L A, who was born on 28 December 2001. On 5 June 2007 they issued summons. The matter eventually came to trial over eight

years later. On the face of their combined summons Mr A sued in a representative capacity, as first plaintiff, and Mrs A, in a representative capacity, was the second plaintiff. On 22 November 2012, after pleadings had closed, the first and second plaintiffs then filed a notice of intention to amend their particulars of claim. They inserted a new paragraph 5 in which they alleged that first and second plaintiffs also acted in the matter in their personal capacities. No objection was raised. Nor is there any suggestion that the amendment was brought in bad faith, or that it would prejudice the defendants. Accordingly the A became claimants for damages in both their personal and representative capacities.

[2] Defendants had already pleaded on 14 May 2008. It does not appear that their plea was amended thereafter to deal with the amendment effected by the plaintiffs. It is admitted in defendants' plea that first and second defendants (Mr and Mrs S), either individually or jointly, are the owners or alternatively the persons in control of the premises situated at 1... B..... W....., C....., Western Cape. It is common cause that, on Tuesday, 27 July 2004, when C was a little over 2½ years old she was found floating in the swimming pool situated on these premises.

[3] As a result of this accident she allegedly suffered injuries. Plaintiffs allege that, in their aforementioned capacities, they have suffered

damages in the sum of R62 804 071, 37. They claim that Mr S, alternatively Mrs S, alternatively both of them, are liable to compensate the plaintiffs in the aforementioned amount. Plaintiffs also allege that the injuries to C were caused by the negligence of Mr S; alternatively Mrs S; alternatively the negligence of both; alternatively the failure of both to take reasonable care.

[4] More particularly plaintiffs plead that the defendants were negligent, alternatively failed to take reasonable care, in one or more of the following respects:

[4.1] firstly, defendants failed to take reasonable steps to ensure that the swimming pool situated on their premises was properly fenced off and/or properly secured;

[4.2] secondly, they failed to take reasonable steps to ensure that the gate to the swimming pool was closed and/or properly secured;

[4.3] Thirdly, they failed to take reasonable measures to prevent foreseeable harm to persons present on their premises, particularly to small children, when by the exercise of reasonable care they could have prevented such harm.

[5] In their plea defendants deny that they were negligent. They plead that the injuries to C were caused by the sole negligence of second plaintiff.

[6] The basis pleaded for second plaintiff's alleged negligence is that:

[6.1] she brought C to defendant's premises with the knowledge that there was a swimming pool there and an unprotected fish pond into which C might fall;

[6.2] she failed to keep C under her care and control and allowed her to wander around the premises, without satisfying herself that it was safe for her to so wander unaccompanied;

[6.3] She was aware of the said dangers and failed to take any or adequate steps to stop C from wandering around the premises unaccompanied.

[7] In the alternative, defendants plead that, in the event of it being found that the defendants were negligent, second plaintiff, in her capacity as mother and natural guardian of C, was negligent on the grounds set out above, which negligence causally contributed to C's injuries.

- [8] Defendants not only plead that first and second plaintiffs' claims should be dismissed; but also, in the alternative, that plaintiffs' claims have to be "*reduced in accordance with the provisions of the apportionment of Damages Act, Act 34 of 1956, to such extent as may be just and equitable having regard to second plaintiff's degree of negligence.*" The alternative plea follows the precise wording of section 1(1)(a) of the aforementioned Act.
- [9] At the time of this pleading, second plaintiff was merely a representative of C. She was not a claimant in her personal capacity. It is common cause that at all material times C was *culpae incapax*. She could therefore not be at fault in the accident. Accordingly, there was no legal basis to attenuate Mrs A's claim in her representative capacity. No negligence was attributed to Mr A in defendants' plea. No basis existed to attenuate his claim.
- [10] However, once plaintiffs had effected the aforementioned amendment, in her personal capacity, Mrs A became potentially liable for contributory negligence as a claimant and subject to the application of section 1(1)(a) of the Act. In their reply to first defendant's request for trial particulars, dated 6 October 2015, plaintiffs admit that second plaintiff was the mother and custodian of C and was primarily (but not solely) responsible for C's physical safety.

- [11] It would appear that after the matter was referred to trial, in terms of an order made by agreement on 12 October 2015, counsel for the plaintiffs proceeded to cite Mr and Mrs A, in their personal capacities, as third and fourth plaintiffs.
- [12] I understand the intention in defendants' plea to have been to invoke the provisions contained in section 1 of the aforementioned Act which specifically relate to the contributory negligence of a claimant. In my view, section 2 of the Act has no application. Counsel for the plaintiffs conceded this during argument. He contended, however, that section 1 of the Act does not apply to an apportionment of damage between "*fourth plaintiff*" and first and second defendants, and that there is no basis on the pleadings for the Court to apply such an apportionment.
- [13] On the other hand counsel for the defendants argued that the parties have accepted that section 2 of the Act was applicable and they conducted the trial on that basis. However, certain jurisdictional requirements for the application of section 2 are not present. No notice of this action was given to Mrs A by the plaintiffs or the S before close of pleadings. Mrs A was never sued in this action. Nor did she "*intervene as a defendant.*" Furthermore, no notice was given to her, in terms of Rule 13, before the close of pleadings.

[14] It is apparent from the pleadings as a whole, as well as the circumstances above, that the Court is being called upon to determine whether Mr S, or Mrs S, or both of them, are liable to the plaintiffs for their negligence; and whether the damages recoverable in respect thereof must be reduced having regard to the contributory negligence of Mrs A. Indeed counsel for defendants submit in their written argument that the proper order would be for the Court to declare that Mrs A's entitlement to damages, in her personal capacity, falls to be reduced by the percentage of her contributory negligence.

[15] Before dealing with the evidence it is helpful to consider the layout of the premises where the accident occurred. This was established through an inspection *in loco* at the commencement of the trial. This was attended by the Court and the parties' legal representatives. The property occupies approximately 2 acres. A double storey house of approximately 400 square meters stands there. Its length runs roughly along an axis from east to west. A lounge forms an L-shape on the eastern side and turns north. A garage extends southward on the western side of the axis. A long driveway from B W curves into a large parking area near the entrance at the back (south) of the house and ends at the garage. The driveway runs south towards the swimming

pool before it turns west into the parking area. This area and the back of the house are nearest to and face the swimming pool.

[16] Between the car park and the pool a row of trees or bushes have been planted. The pool is a full size domestic pool. It has a fence surrounding it. There are two gates to enter and exit the pool area. One faces north towards the parking area and house. Another faces west. (For convenience I shall refer to the first-mentioned as “the gate”.) At the time of the inspection each gate had two latches attached to it inside the pool area. Within the pool fence, to the south of the pool, is a garden shed where gardening tools are stored. The garden shed was there in 2004. So too was a slide which had been located (close to) the north east corner of the swimming pool. The distance between the front door (at the back of the house on the aforementioned parking area) and the gate is 23 adult paces. The gate is visible from the driveway side of the parking area. It is not so obvious from the garage side of the driveway.

[17] There is a Khoi fishpond near the front door of the house, facing the parking area to the south of the house. At the time of the inspection it was neither fenced nor covered. It was approximately ½ meter deep on the one side and approximately 1 meter deep on the other.

[18] The lounge area has sliding doors which lead onto a patio. This lies in the crook of the L formed by the lounge and a dining room. The kitchen area and scullery look onto the parking area. At the time of inspection the view of the pool from there was obscured by trees and shrubbery which had grown since 2004. A large garden area is located to the north of the house. A lawn opens off the patio and leads to the front gate of the premises. There is a gazebo on the far side of the lawn. The distance from the patio to the gazebo is 29 adult paces. Near the gazebo there is a small cavity with water which is covered by vegetation.

[19] Four witnesses testified for the plaintiffs. Mrs A testified as follows. She is married to Mr A. She is a devout Christian. During 2004 she belonged to a group of Christian women ("the cell") who used to hold meetings at the house of the S, where the accident occurred. The meetings would commence at about 10h00 and would go on till about noon. After that the women would have tea in the kitchen. The meetings would involve prayer, worship, songs, a message and discussion. Mrs A would be conveyed to the meetings, usually by S P. C would usually accompany her. On two or three separate occasions the A were invited to the S' home. On 8 July 2004 Mrs S hosted a breakfast for Mrs A's birthday. The whole cell attended. On that

occasion Mr A drove his wife and C to the S house. Mr A and C walked around the property. Then Mr A left.

[20] On 27 July 2004, Mrs A and C were given a lift to a cell meeting by K M. Mrs A believed that the driveway had no gates at the time, and that the entrance to the property was completely open. The pool had a fence around it with two gates. The gates did not have any form of automatic closing mechanism, such as the springs which were later observed during an inspection *in loco* in October 2005. The gates were very often completely open. On a few of occasions both Mrs A and Ms P had observed that the gates were open when they arrived on the property. This upset Mrs A. She closed the gate. She reported what she had seen to Mrs S, and asked her to keep the gates closed.

[21] When Mrs A got out of Ms M's car on 27 July 2004 she did not notice whether the gate was open. She explained that this was because she had taken C and her bags out of the car and had never really turned around to the pool side. The meeting started a little late and followed the usual pattern. C remained with her mother, on the floor and playing with her toys and puzzles in front of Mrs A. During the last five or ten minutes of the discussion C became bored and went outside to the patio. Mrs A could see her through the sliding door. C had often done this and had always stayed in eyesight. She would play on the wrought

iron furniture there and with the flowers on the verge of the grass. There were about ten or eleven ladies in the lounge. Some of them could observe C. On the numerous occasions that C had visited the house she had never moved from the patio around the house, to the back area where the pool was located. She would always stay in view. At all times Mrs A was aware of where C was and what she was doing.

[22] Towards the end of the meeting Ms M informed Mrs A that she had to leave the premises at 12h00. It was arranged that M K would give Mrs A and C a lift home. As a result Mrs A had to go outside to the parking area and move C's car seat from Ms M's car to Ms K's car. The process was not speedy because Ms K's car was old, the bolt system was different, and Mrs A had difficulty getting C's car seat belted in. Because it was taking her longer than expected to install the car seat, Mrs A became nervous. She therefore wanted to go back into the house to fetch C. She left the car seat unfixed and went through the house onto the patio. She called C but did not receive an answer.

[23] The other participants in the prayer meeting were in the kitchen with Mrs S. Mrs A ran to the kitchen and shouted to the ladies that she could not find C and did not know where she was. When Mrs A looked into the kitchen she saw Mrs S drop the pan and spatula that she was working with and start to run.

[24] Mrs A then ran from the dining room onto the patio in the direction of the entrance to the property, because she believed that there was no gate and she was concerned that C could have wandered out onto the road. Mrs S was behind her at first, but then ran around the house and straight to the pool on the other side of the house. Mrs A then followed her. Mrs S ran to the pool with Mrs A behind her. When Mrs S reached the pool she started shouting "Oh my God! Oh my God!" Mrs A saw clothes floating on the pool. Upon closer inspection she saw C's hair and realised that it was her. She jumped straight into the pool and grabbed C, who was face down. She turned C around. Foam was coming out her nose and mouth. Mrs A brought C to the edge of the pool and lifted her out. She got out and shouted that somebody should call an ambulance. She fell onto her knees and started praying.

[25] She saw Mr S giving C CPR. G L reacted to Mrs A's request and ran into the house. When she returned she said that she had called her doctor who had told her to bring C to Constantiaberg Hospital. Ms P moved her car to the gate of the pool and they put C in the back. Mr S sat with her. Mrs P drove and Mrs A was in the passenger seat. It took about 10 minutes to reach the hospital. Mr S took C to the ER resuscitation room. At some stage Mr A arrived at the hospital.

[26] After the accident Mrs A went for counselling with G C. A week after the accident she and Ms C went back to the S's house. Both gates to the pool were wide open. A year after the accident the A's again went to the S's house to meet with the pastor of the cell, F P. Again the gates were open.

[27] Under cross-examination it was put to Mrs A that the gates to the driveway of the house had been erected in September 1989 and existed at the date of the accident. It was further put that on 27 July 2004 the gates were open and this presented a hazard to her child. Mrs A conceded that she would not have allowed C near the hazard presented by the cycads and sharply pointed shrubs and plants on the north side of the house, or the pond in the front garden, or the khoi pond, or the swimming pool. She also conceded that the defendants were entitled to assume that she would not leave C unattended.

[28] When it was put to her that she had in fact done so (i.e. allowed C to be near to the pool), and that the tragedy would not have occurred if she had kept C in view, Mrs A replied that she did not believe that she had left C unattended. She was distracted for a moment; two to three minutes at most. C had been in her vision until she was distracted. She had left C on the north side of the house, gone inside, and proceeded to the south side near the driveway where she could not see

C. Mrs A asserted that, even though she had let C out of her sight, if the pool gates had been closed the accident would never have happened. If she had not been distracted the accident would also not have happened.

[29] Mrs A also stated that she had seen the gates to the swimming pool open on at least five occasions, if not more. This upset her because it was a danger. Any child that visited the property could fall into the pool. Whenever she saw the gate open she closed it. If the gates were left open the pool might as well have not had any gates at all.

[30] It was further put to Mrs A that the S's youngest child was 16 years old at the time and the pool did not constitute a danger to him. She agreed. Mrs A also agreed that she would not have allowed C to be alone in the back (parking) area unaccompanied. She asserted that nobody among the group of women on that day could have opened the pool gate.

[31] Under further cross-examination Mrs A stated that the gate had been left open at least five times over half a year. She had taken the matter up with Mrs S on each occasion that she saw the gate open. She also closed the gate herself. It was put to Mrs A that Mr S would say that the gardener had been employed by him since 1996 and was under strict instructions to ensure that the pool gates were always closed.

[32] It was also put that Mrs S had fallen down the stairs in her house and had been severely brain damaged. The result was that she would not be able to testify at the trial. Mrs A admitted that Mrs S had fallen down the stairs of her house, had suffered severe brain damage, and would not be able to testify or contradict Mrs A's evidence. Mrs A testified further that she had arrived before some members of the women's group and after others. It was not possible that any of them would have walked around the swimming pool. They always went straight into the house. They never walked around.

[33] On the day of the accident, when Ms M's vehicle was moving down the driveway towards the pool, Mrs A had been chatting to her and she had not looked at the gate. She was nevertheless perturbed that it had been left open in the past. She did not believe it was her responsibility to check the gate. She replied under cross-examination that she did not check the gate on that day because she was not perfect. She had already mentioned the open gate to Mrs S a couple of times. She expected Mrs S to make sure that the gate was closed on the Tuesday mornings when the cell convened. She conceded that she and C were the only people affected by the open pool gate.

[34] When questioned by the Court, Mrs A stated that an open gate was relevant to her. She admitted under further cross-examination that if the gate had been closed other foreseeable dangers would nevertheless have existed. C could have fallen into the Khoi pool, or have made her way onto the street and been run over; or have pierced her eyes on the cycads.

[35] When it was put to Mrs A that the gates were equipped with springs and self-closing and self-locking devices, she answered that in 2004 there had been no springs on the gates. She had checked the gates, and how to open one of them, shortly after the accident had occurred. She established that C would not have been able to open it because her arms would not have been long enough to reach both latches on the gate. Mrs A did not see any springs on the gate. She admitted that she did not look for springs, but had checked the gate at the time. She opened it. It did not spring back. One could open it wide; and it would stay wide open. This inspection had occurred within one year of the accident. She did not bring it to her lawyer's attention that there were no springs on the gate. The gate had been open a couple of times in 2004. All of the above applied when she checked it.

- [36] Mrs A stated that C had never played at the Khoi pond. She was frightened of it and did not go close to it. She was frightened of the big fish.
- [37] Under further cross-examination Mrs A testified that the cell meeting had been running late. Sometime during its course Ms M had told her that she had to leave at 12h00. It was the first occasion on which Mrs A had needed to move the car seat. The car to which she moved the seat was parked on the curve of the driveway, closer to the pool than Ms M's car. Mrs A did not look at the pool gates because she was busy with the car seat.
- [38] When Mrs A went to the car park to change the car seat she had proceeded from the lounge through a little hallway and out of the backdoor leading onto the parking area. She could not recall if she had shut the door behind her. She had unstrapped the car seat from Ms M's vehicle. This took less than a minute. Then she went to Ms K's vehicle where she encountered problems. This vehicle was parked close to the pool. She could not make the belt of the car seat long enough. She decided to leave it because she did not have enough time, and she wanted to go back and fetch C. She did not want to leave her alone for so long.

[39] When Mrs A had raised the alarm the women were in the kitchen. Mrs A had been moving towards the road when Mrs S ran past her round the house to the pool. She confirmed that she had then followed Mrs S. Prior to that Mrs A had come through the front door from the motor vehicle, and had passed through the dining room onto the patio where she had called C. She had then run back through the dining room towards the kitchen. She and Mrs S had run through the gate to the pool. The gate was wide open. Mrs A did not look at the second gate.

[40] Under re-examination Mrs A confirmed that, after she had told Mrs S that the pool gate had been open and had asked her to ensure that it was closed, she expected Mrs S to make sure that the gate was kept closed. She also confirmed that from the pathway that runs alongside the lounge on the eastern side of the house (as it is depicted on photographs allegedly depicting the scene during 2004) the slide which stood in the pool area was visible. When C was found in the pool she was in the middle towards the opposite side to the slide. Mrs A also confirmed that Ms M's vehicle had been parked in the parking area directly at the wall of the house facing the driveway to the east. Ms K's vehicle was parked on the other side of the driveway, i.e. on the pool side, also facing east. Because of the direction it was facing Mrs A had her back to the pool when she tried to fix the car seat into the car.

[41] When Mrs A had checked the gates after the accident her purpose had been to establish whether C could have reached the top and bottom clips at the same time in order to open the gate. She concluded that C could not have done so. The clips were fairly hard to open. On the day of this check the gate was closed. Mrs A opened it. It did not close itself. She confirmed that after she had raised the alarm she ran across the patio but had not reached the grass before Mrs S starting running around the house towards the pool. She had run straight into the fenced area without stopping. The gate was open.

[42] Later in the proceedings Mrs A was recalled. She was asked whether, in July 2004, there had been any automatic spring closing mechanism on the gate. She replied "*definitely not*". She was asked when she closed the gate on the various occasions that she found it open whether she saw any object keeping it open. She replied that there was no object. She did not remove anything in order to close the gate. She just closed it.

[43] Mr A testified as follows. On the occasion of Mrs A's birthday, 8 July 2004, the family attended a function at the S's house. Mr A did not stay for the duration of the function. He and C had walked around the property. C had wanted to go towards the slide. Mr A had told her that he did not have the time. She was very persuasive. The slide was near

to the pool. They walked through the gate. It was open. They proceeded to the slide which was next to the pool. C went down the slide while Mr A sat on its edge. He told her that she should not go down the slide without her mother and father being present. Shortly after that he left. Mr A also testified that they would take C to a municipal park near their home, and that she would use the slides there. She was strong willed and could use a slide on her own.

[44] Under cross-examination Mr A confirmed that the gate through which he and C entered the pool was the gate nearest the driveway. Because Mrs A was there to look after C, and because the S were there, he was not unduly concerned about the open gate. Furthermore, he was with C when she entered the pool area. Mr A did not know that the gate was supposed to close on its own. When Mr A told C not to use the slide without her parents being present he believed that she would obey him. He did not draw the open gate to the attention of the S.

[45] Under re-examination Mr A stated that the gate that he entered with C was difficult, that it had two catches, and a child would not have been able to open both of them. It was difficult to open the gate even for an adult. He identified the slide on a photographic exhibit (D12) as the one he had seen on 8 July 2004, and had testified about. At that stage it was standing about 300mm away from the pool. It was down that slide

that C had gone when she was with him on 8 July. Under examination by the Court Mr A confirmed that the bottom of the slide had been a short distance from the water's edge on 8 July 2008.

[46] G C testified as follows. After the accident Mrs A consulted with her in her capacity as a Christian counsellor. As part of her therapy Mrs A visited the defendants' premises with Ms C. When they entered the pool area the gate was unlatched and opened inwards. Under cross-examination Ms C stated that the visit took place a week after the accident. They had obtained permission to visit the premises and they were expected. The gate was not wide open. The gate was not latched. The second gate was also unlatched.

[47] S M P testified as follows. She is an attorney and mediator as well as a member of the cell that attended meetings on a weekly basis at the defendants' house. Ms P confirmed that she would often give a lift to Mrs A. She further confirmed that the pool gates had stood wide open on a number of occasions when they visited the S house; and that Mrs A would get annoyed and would go and close the gates herself. On one occasion, in Mrs P's presence, Mrs A brought the fact of the gate being open to the attention of Mrs S. What she remembered Mrs A saying was, *"Look, it is very frustrating to arrive and find that the gate is open. Is there something that can be done about it?"* Mrs S said that she

would do what she could to ensure that the gate was kept closed. Mrs P confirmed that Mrs A was mistaken in regard to the non-existence of a gate at the entrance to the house. There were gates, but they always stood open.

[48] Mrs P also confirmed that, at a meeting of the cell after the accident, people had been very upset at the thought that there might be litigation against Mrs S. Ms P had explained that an insurance claim would have to be based on the insurance company accepting liability on the grounds that the insured household was negligent. Ms P also testified to and confirmed that a meeting had taken place that was attended by the S, the A, Ms P and Father T P. There had been a discussion about an insurance payment on the S' public liability policy. Ms P had explained that this would involve an admission of negligence by the S and that it could be settled out of court. The meeting ended with Mr S saying that he would discuss it with his insurers. Ms P confirmed – contrary to Mr A's evidence – that no settlement of the plaintiffs' claim was ever reached.

[49] Under cross-examination Ms P testified that if the pool gates had been standing wide open on the day of the accident she would have noticed them when she arrived, because her consciousness had been raised around the whole issue. However, having said that, she admitted that

she did not always park beside the pool. From a distance, if the pool gate was not standing open, one could not see whether it was latched or not. This answer was given in reply to the proposition, put by counsel for the defence, that the pool gates were not open on the fateful day. The question was objected to on the basis that no evidence had been put up that the gates were not open; and it had never been put to Mrs A that they were closed on the fateful day. Ms P then stated that the gates might nevertheless have been unlatched. One could only find out if one went right up to the gate. She confirmed that she did not notice the gate on that day, but felt that if it was standing open she would have noticed.

[50] She could not remember where she had parked. She further confirmed, with reference to a sketch drawn by Mrs A, that when she drove down the driveway towards the house the pool gate would have been in full sight. Ms P confirmed that Mrs A had drawn the open gate to her attention until she herself eventually became aware that the gate stood open. She had only ever noticed the one gate nearest the parking area. On the occasions that Mrs A drew it to her attention, Mrs A would say that this gate was open again. Ms P saw that it was visibly standing open on a number of occasions. When it was put to her she could not dispute what Mr S would say, namely, that the spring on the gate

worked, that the gate worked and the gates were well maintained, Ms P admitted that she was not in a position to dispute that.

[51] Ms P also confirmed that, at the settlement meeting which she and the A had attended, Mr S had made it clear that he could not settle without first consulting his insurers.

[52] Mr S testified on behalf of the defendants. He stated that he was at home on 27 July 2004. He worked from a laboratory which joins the house on the western side of the axis described above. He identified certain photographs (exhibit C) which were taken in 1989 of the front gate of the house. He confirmed that this gate would have been open on 27 July 2004.

[53] The pool was on the property when he bought the house. It was enclosed as at the date of his testimony. That included the gates. The gates were spring loaded and had always been in good order. They could not stand open. They might not lock, but they could not stand open. The spring on the gate had eventually broken. It was replaced with a new spring before the inspection in *loco*. Mr S did most of the small handyman repairs himself at the house. The maintenance he did on the property required a bit of skill. Mr S admitted that he kept the house well maintained. Because he had small children when he bought

the house the S made sure that everything worked properly and they did not let the children go near the pool unless they were attended by somebody. They had a gardener who came three times a week, on Mondays, Wednesday and Fridays. He had strict instructions that the pool gates were to be closed and locked at all times. That is, the two latches (on each gate) had to be latched. It was impossible that the two gates to the swimming pool could have stood open as described by the plaintiffs; unless they were wedged by a sizeable rock placed in front of them.

[54] Mrs S had never drawn Mrs A's complaints about the open pool gate to his attention. Mr S further explained that Mrs S had undergone a brain operation in January preceding the trial. She was physically and mentally disabled and could not testify. She remembered nothing. Mr S confirmed that he had said that if the A felt they had a case they should go and pursue it with the insurance company. He had never agreed to write a letter admitting negligence.

[55] His attention was drawn by Mr Bridgman, defendant's junior counsel, to a plastic wire with a padlock around the upright section of the gate that was visible at the inspection *in loco*. Mr S testified that he had put it there. The S had a four star guesthouse at the time and did not want any guests going into the pool area unless they were really sure that if

there were children that they were accompanied by their parents. They would have to come and ask for the key or he would have to show them how to unlock it. His attention was also drawn to the fact that the top latch of the first gate had been defective and that there was a part missing. He said that this was due to a request by his insurers. He had put the other type of latch over it just in case.

[56] Under cross-examination Mr S said that Mrs A was mistaken when she said that she saw the gate open with no wedge on it. He did not understand her evidence. When confronted by the fact that the evidence of Mr and Mrs A, Ms C and Ms P was all to the effect that they had seen the gate open, and that this was left unchallenged when they were cross-examined, Mr S said that the gate was never open. He insisted that all their evidence was incorrect. They were all mistaken and he was correct. However, he conceded that, on the day of the accident, C reached the pool because the gate might have been closed but not latched. He further conceded that if the gate was not slammed, *“it would appear closed, but wouldn’t be latched.”*

[57] He suggested that anyone on the property, except for him or Mrs S, could have opened the gate and left it unlatched. Had he and Mrs S been there they would have made sure that it is was locked. Someone unfamiliar with the property, and there were many on that day, could

have gone through to the pool and come back out, without slamming and latching it. However, he had not been at the cell meeting. He was working. He had to speculate about what, as a matter of fact, had occurred.

[58] He testified that if he had thought that Mrs A would not look after her child he would not have allowed her or C onto the premises. Under examination by the Court Mr S suggested that at the time of the accident the slide in the pool area was as depicted on the photographic exhibit; that is, with its lower end at the edge of the pool.

[59] The present proceedings commenced more than 11 years after the accident. In the circumstances the witnesses could not be expected to remember the finer detail of the event. Mrs A had good reason to remember certain detail. She made a good impression on the Court as a witness. She was clear and consistent on material aspects, and those which were important. Her mistaken beliefs that there were no gates to the S property, and that Mr S was prepared to settle her claim, are understandable. When the cell met the driveway gates were left open. According to Ms P, Mr S had said that he could not settle without consulting his insurers. The opinion of Mrs A, that her visit to the car park to move the car seat was a distraction, will be dealt with below.

[60] Mr A did not testify about the events on the day of the accident. However, he established that the pool gate was standing open when he visited the S home some 19 days before the accident. Ms C was a satisfactory witness. She established that the gate was standing unlatched a week after the accident. Ms P impressed the Court as being credible on the aspects to which she testified, and fair in respect of facts which she had no personal knowledge of. On the other hand Mr S came across as a witness who was determined to question facts of which he had no direct knowledge. His outburst under cross-examination (which is on record), though understandable in the circumstances, did not help to instil the confidence of the Court in the value of his testimony. He was speculative on the material issue of whether the gate was often left standing open before the accident. He conceded that it may have been unlatched on the day of the accident.

[61] Upon a conspectus of the evidence as a whole the following facts were established on a balance of probabilities:

[61.1] On at least five occasions in the six months preceding the accident the gate was standing open on the Tuesdays, when the cell met at the S house and Mrs A visited there;

[61.2] It was standing open when Mr A visited the house on 8 July;

- [61.3] It was standing unlatched when Ms C visited the property a week after the accident.
- [61.4] Mrs A drew the open gate to the attention of Mrs S who undertook to ensure that the gate was kept closed;
- [61.5] Ce would not have been able to unlatch the gate on her own;
- [61.6] On the day of the accident the gate must have been unlatched, at least, in order for C to have gained access to the pool area;
- [61.7] The gate was standing open when Mrs A and Mrs S ran into the pool area;
- [61.8] The slide located within the pool perimeter fence close to the pool was used by children and was an attraction for C;
- [61.9] Ce was strong willed and may have wanted to use the slide if she had seen it;
- [61.10] Mrs A left C unattended on the patio and was away for at least two to three minutes;

[61.11] Had C moved a few meters eastwards from the patio along the outside of the lounge she would probably have seen the slide;

[61.12] She would then have had direct access to the slide whose base was either on the pool edge (per Mr S) or not more than 300mm away from the edge (per Mr A);

[62] Mr S's speculation that someone other than C could have opened the gate on the morning before C entered the pool area remains pure speculation. The evidence that the gate was regularly standing open, despite Mrs A's complaints to Mrs S, leads to the inference – on a balance of probabilities – that the gate was left standing open on the day of the accident as it had been previously. Alternatively, and in any event, it may not have been latched, if it was not slammed shut, as Mr S conceded was possible. (That might explain why Mrs A and Ms P did not notice it standing open when they arrived at the house.) In either event the pool and the gate had not been secured when C approached the pool area and entered it. There is no credible evidence to suggest that the reason the gate was not secured was anything other than the inability of the gate to close itself, and the failure of the persons in control of the property to secure it. It is clear that, if there was a spring

mechanism on the gate it did not operate with such efficiency that it automatically latched the gate.

[63] The issues that arise are:

[63.1] Firstly, whether Mr and/or Mrs S were negligent in failing to ensure that the swimming pool and the gate were properly secured when C visited the premises;

[63.2] Secondly, whether Mrs A was negligent in leaving C unattended for the period that it took the child to leave the patio and reach the pool.

[64] Had Mrs S taken steps – as she undertook to do – to ensure that the gates to the pool were kept closed the accident would not have occurred. Had Mr S taken the same measures to secure the gate before the accident as he did before the inspection *in loco* the accident would not have occurred. Had Mrs A not left C unattended for two to three minutes the accident would not have occurred. The accident was co-caused by the S' failure to secure the gate and Mrs A leaving C unattended.

[65] Negligence on the part of the parties must be tested according to the principles laid down in *Kruger v Coetzee* 1966 (2) SA 428 (AD) at p.430 which were formulated as follows.

[66] “*For the purposes of liability culpa arises if –*

(a) *a diligens paterfamilias, in the position of the defendant–,*

(i) *would foresee the reasonable possibility of his conduct injuring another in (her) person or property and causing (her) patrimonial loss; and*

(ii) *would take reasonable steps to guard against such occurrence; and*

(b) *the defendant failed to take such steps.”*

[67] A reasonable person in the position of the S would foresee that a failure to secure the pool gate could reasonably possibly result in serious injury to a 2½ year old child. The four basic considerations which influence the reaction of the reasonable person in a situation posing a reasonable risk of harm to others are: (a) the degree or extent of the risk posed by the actor’s conduct; (b) the gravity of the possible consequences if the

risk of harm materialises; (c) the utility of the actor's conduct; (d) the burden of eliminating the risk of harm. (See *Ngubane v South African Transport Services 1991 (1) SA 756 AD at 776 H- J*). Consideration of the risk and gravity of consequences, and the ease with which the risk could have been eliminated, would prompt a reasonable person in the position of the S to take steps to prevent such occurrence by securing the pool gate in a closed position (as Mr S did after the accident) with an effective mechanism.

- [68] The defendants assumed that Mrs A would look after her child. Indeed plaintiffs admit in their trial particulars that Mrs A was primarily responsible for C's physical safety. Although a reasonable person in the position of the S might make this assumption, she or he could not have assumed that the child would inevitably remain under her parent's absolute control at all times and under all circumstances over a period of hours and days, and that the risk created by the unsecure gate could simply be left at large. Distractions such as the one that affected Mrs A are an inevitable part of life. Mr S demonstrated, under examination by his own counsel, that he regarded it as necessary to place a plasticised wire with a padlock around the upright section of the pool gate because the S had a four star guesthouse: and they did not want the children of their guests (who bore the same duty to their children as Mrs A) entering the pool area unaccompanied by their parents.

[69] It is not in dispute that Mr and Mrs S were in control of the property, and therefore the pool area. The open pool gate was pertinently drawn to Mrs S's attention. She had a duty to address the danger. She failed to do so. Mr S appears from his evidence to have been directly involved in securing the gate from the time that the S's bought the house. He too was aware of the risk posed by the pool to his own small children. A reasonable person in Mr S's position, as the owner and person in control of the pool, would have observed – as Mrs A and Ms P and Mr A did over a period of six months – that the gate was sometimes standing open and had not self-latched as it was supposed to do. He would have foreseen risk to C, and would have eliminated the risk by securing the gate. According to his evidence Mr S was involved in the regular maintenance and repair of the house, including securing the gate. An unsecured gate was a danger. He had a duty to ensure it was secure.

[70] I reject his speculation that the gate was always secure. I also reject any speculation that the gate was automatically able to close itself at the time of the accident, and that the unchallenged eye witnesses who contradicted him were wrong. I do so particularly in the absence of genuine cross-examination of Mrs A, Ms P and Mr A on their evidence that the gate sometimes stood open.

- [71] The fact that the gate was observed standing open on a number of occasions and over a period of time before the accident; that Mr S remained unaware of this; and that Mrs S did not address the danger after it was brought to her attention, all indicate that the negligence on the part of the defendants was significant.
- [72] The independent negligent omissions of Mr and Mrs S combined to produce the same harmful consequences to C. According to the common law they are concurrent wrongdoers. In failing to take steps to secure the gate the defendants were both jointly and severally liable to C for the same harm. (See *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA) paragraph 10.)
- [73] Insofar as Mrs A's independent act, in leaving C unattended, may also have combined to produce the same damage to C, the Apportionment of Damages Act recognises and regulates a reduction of a claimant's recoverable damages (as well as a right of contribution between joint wrongdoers who are defined to include concurrent wrongdoers at common law).
- [74] That there were risks attendant on the S's property for an unattended 2½ year old child was manifest. These included the open front gate to the property, the pond at the end of the garden across the lawn from the

patio, the Khoi pond, as well as the pool whose access gate (to Mrs A's knowledge) was sometimes left open. Ready access to this pool gate from the patio did exist. Beyond that gate stood a slide. Mrs A should have known that C might seek to use it if she was left free to access it. Moreover, the bottom of the slide was close to the edge of the pool.

[75] Mrs A misjudged the risk posed by the pool gate. C did act unusually, but her movements were foreseeable. Unusually she did leave the patio area, and went around to the back of the house. Although Mrs A eventually foresaw the possibility of C moving out of the S's property and towards the road on its northern side, she did not in fact foresee the possibility of C moving around the house to the pool area. Only when Mrs S ran directly to the pool did Mrs A appear to become conscious of a risk to C that a reasonable person in her position would have already foreseen. Mrs A ignored the possibility and risk of C passing through the pool gate that she had, with concern, observed to be open on a number of occasions.

[76] Mrs S's assurance that she would do what she could to ensure the gate stayed closed might have gone some way towards justifying Mrs S's attitude. However, it is not clear on the evidence before the Court that, between the time this assurance was given and the accident, Mrs A could reasonably have relied on this assurance or did so. It is clear

from the evidence of Mrs A that she entertained some concern that C might leave the patio if she was unattended. As a result Mrs A interrupted the transfer of C's car seat in the car park and made her way back to the patio. A reasonable person in the position of Mrs A would have guarded against the foreseeable possibility of injury resulting to C if she was left unattended on the patio for a period long enough to access the potential hazards on the property including the pool.

[77] I accept that Mrs A faced an unexpected distraction when she was called upon to move C's car seat from one vehicle to another. However, Mrs A had a duty to take charge of the attendant risk. There is no suggestion that she saw fit to ask one or more of the women at the meeting to keep an eye on C in her absence. A reasonable person would have done so. Mrs A left C unattended for a period that was too long. It was long enough for C to pass from the patio around the house (or even through it) across the parking area to the pool's perimeter gate, the slide and the pool.

[78] The unexpected distraction of Mrs A, and her action when she realised that she might be leaving C alone for too long, stand in stark contrast to the lack of any evidence to suggest that the S's, on each of their parts, either responded to the concern about an unsecure pool (raised with Mrs S) or the danger of the gate regularly standing open on Tuesdays

(which should have become obvious to Mr S). The negligence of Mrs A was therefore somewhat mitigated.

[79] Taking a common sense approach to the question of causation (see *Lee v Minister of Correctional Services 2013 (2) SA 144 CC*) on the part of the S I conclude that, had they acted reasonably to ensure that the gate was secured and not intermittently standing open, C would probably not have been able to enter the pool area and suffer damage. There is no evidence on record to suggest that the fact that the gate stood open on the day of the accident was unique or unconnected to the negligence of the S.

[80] Negligence on the part of Mrs A was a *sine qua non* for the accident. In her personal capacity she claims that she suffered damages due to the negligence of the S. If such damages are proved they were caused partly by her own fault and partly by the fault of the S. By virtue of the provisions of section 1(1) of the Apportionment of Damages Act, Mrs A's personal claim is not defeated by her fault as a claimant. The damages recoverable in respect of her claim stand to "*be reduced by the court to such extent as the court may deem just having regard to the degree in which the claimant was at fault in relation to the damages.*" I understand the performance of such an exercise by this court to be the object of defendants' plea.

[81] The court's function is to "assess *the degree of the claimant's [Mrs A's] negligence in relation to the damage which has been caused by the combination of that negligence and the negligence of the defendant.*" (See *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 at 836 B-C). This must be done on the basis of comparison between the respective negligence of the several parties where there is more than one plaintiff or defendant. (See *Jones v Santam Bpk* 1965 (2) SA 542 (A) at 555 C-D). Where two or more defendants are liable the proper approach to apportionment is first to reduce the extent of the recoverable damages in proportion with the plaintiff's negligence and then to apportion remaining damages between the defendants in accordance with their negligence. The entire process remains subject to considerations of justice and equity. (See *Harrington and Another v Transnet Ltd and Others* 2007 (2) SA 228 (CPD) at paragraphs 90 and 91 and the cases quoted and referred to there).

[82] As no fault can be attributed to C, first and second plaintiffs' claim in their representative capacities does not stand to be reduced. To the extent that Mr A, in his personal capacity may have suffered damages from the negligence of the defendants and Mrs A it cannot be said that he was in any sense or degree the author of his own wrong, and that his

wife's negligence can be set up against him. (See *Union Government (Minister v Railways) v Lee* 1927 AD 202.)

[83] The negligence of Mrs A is outweighed by the aggregate of blameworthiness on the part of the defendants. In my view, Mrs A's act, in leaving C unattended for two to three minutes, deviated by 30 percent from the norm of the *bonus paterfamilias*. Defendants' omissions deviated by 60 percent. The respective responsibility for damages of Mrs A and defendants should be assessed upon the basis of 1 to 2, or one third to two thirds. (See the method illustrated by Williamson JA in *Jones NO v S.A.N.T.A.M supra* at 555 E – H.) I deem it to be just and equitable, having regard to the degree in which Mrs A was at fault in relation to the damage caused to C, to reduce the damages recoverable by Mrs A in respect thereof by one third.

[84] Plaintiffs have been substantially successful. They are entitled to their costs.

[85] I therefore make the following order:

- (a) The first and second defendant are jointly and severally liable for all such damages as the first and second plaintiffs, in their representative capacities, and first plaintiff in his personal

capacity, may be found to be entitled in consequence of the accident that befell C A on 27 July 2004 in the swimming pool situated on defendants' premises;

- (b) The damages recoverable in respect thereof by second plaintiff, as a claimant in her personal capacity, shall be reduced by one third in terms of section 1(1) (a) of the Apportionment of Damages Act.
- (c) The defendants are liable to pay costs incurred by the plaintiffs to date.

DONEN AJ