IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NUMBER: 23341/2011

In the matter between:

SHAUN RHOODE Plaintiff

and

THE CITY OF CAPE TOWN Defendant

JUDGMENT delivered 29 June 2017

NDITA, J:

[1] On or about 7 January 2011, the plaintiff, Mr Shaun Rhoode, an adult male person, sustained a broken neck (medically referred to as a fracture of the C5 vertebra) when he went down a water slide on his stomach,

hitting his head on the bottom or side of a swimming pool operated by the defendant at Mnandi Resort, Mitchell's Plain. The defendant, the City of Cape Town, is a metropolitan municipality established in terms of the Local Government Municipal Structures Act of 1998, with its principal place of business at 12 Hertzog Boulevard, Cape Town. As a result of the aforesaid injury, the plaintiff was hospitalised, underwent medical treatment, suffered pain and was rendered a complete quadriplegic, thereby losing several amenities of life.

The pleadings

[2] Pursuant to the incident, the plaintiff lodged a claim for damages and other ancillary expenses with the defendant. The plaintiff alleges that the defendant, as the manager of the resort and in turn the water slide, had a duty to ensure that the resort, and in particular, the water slide did not constitute a danger to members of the public utilising it. More specifically, the plaintiff pleads that the defendant and/or its servants, acting within the scope of their employment, owed the public and the plaintiff a duty to ensure that:

2.1 that the water slide was manufactured and/or erected in such a way that it would not constitute a danger to persons utilising the slide.

2.2 the water slide would be monitored by employees and/or lifeguards in order to prevent the water slide constituting a source of danger to persons utilising such water slide and

2.3 the swimming pool into which individuals who utilised the water slide plunged, would be sufficiently deep and/or sufficiently filled with water so as not to constitute danger to persons utilising the water slide.

[3] According to the plaintiff, the defendant breached the duty of care it owed to the plaintiff, and were wrongfully negligent in one or all of the following respects:

3.1 the defendant or its servant failed to ensure that the water slide was manufactured or erected in such a way that utilising the water slide would not constitute danger to people using it;

3.2 the defendant or its servant failed to have monitors and or lifeguards to ensure that individuals using the water slide, in particular the

plaintiff, did not place themselves in a situation where they could be injured in utilising the water slide;

3.4 the monitors and/or lifeguards monitoring the water slide failed to ensure the safety of persons, particularly the plaintiff, who used the water slide;

3.5 the defendant and/or its servants acting as such, failed to ensure that there was sufficient water in the swimming pool so that when persons, particularly the plaintiff who entered the swimming pool after sliding down the water slide were not injured by hitting the bottom and/or side of the pool;

3.6 the defendant and/or its servants acting as aforesaid failed to avoid the incident in circumstances whereby the exercise of reasonable care, the incident could, and should have been avoided;

3.7 the defendant and/or its servants failed to adequately warn persons, particularly the plaintiff, of the dangers of using the water slide and

3.8 The defendant and/or its servants failed to institute adequate measures to control how persons, particularly the plaintiff, used the waterslide.

[4] The defendant pleads that whilst it was aware that members of the public frequented the resort and utilised the waterslide, it denies any specific allegation that it was responsible or owed a duty of care for ensuring that the resort and the waterslide did not constitute any source of danger to any person. And in so far as it is alleged that the defendant was responsible or owed a duty of care for ensuring that the resort and the waterslide did not constitute any source of danger to any person, the defendant denies those allegations. The defendant pleads that at all material times, and particularly on 7 January 2011, the defendant discharged any duty owed by it to persons such as the plaintiff by doing the following:

4.1 warning all visitors at the entrance to the resort that the superintendent's instructions must be obeyed;

4.2 displaying two signs prominently on two tall poles on either side of the steps leading from the entrance to the main pool that the pool rules must be followed, that patrons may not run and dive, and that the water pool is shallow;

4.3 posting four additional warning signs prominently around the main pool area, prohibiting running and diving;

4.4 advertising prominently, next to the pool, the depth of the pool;

4.5 displaying prominently, near the ladder to the waterslide, signs specifically informing users to descend the waterslide feet first, with one's back against the slide, and specifically prohibiting other manners of using the slide such as descending head first;

4.6 displaying, at the top of the waterslide, a further prominent notice informing those using the slide to descend the slide feet first and

4.7 appointing staff to monitor the use of the slide, including a member of staff at the top of the slide.

[5] The defendant further pleads that the plaintiff, by entering the resort, agreed to do so at his own risk as two prominent signs to this effect were displayed at the entrance to the resort, and visitors were advised that they would enter the resort at their own risk and that they agreed thereto by using the resort. According to the defendant, the plaintiff voluntarily assumed risk of injury to himself. In addition, the plaintiff had exempted the defendant from any liability for harm of the nature pleaded by the plaintiff. For all these reasons, so alleges the defendant, the plaintiff's claim is

precluded by virtue of the terms agreed to by the plaintiff. Besides, so pleads the defendant, the plaintiff acted recklessly and negligently by descending the waterslide, head first, as well disregarding the warnings by the defendant's staff not to do so. As such, the plaintiff's damages were caused by the plaintiff's reckless and/or negligent conduct. Alternatively, in the event that it is found that the defendant was negligent in any respect, the plaintiff's damages were not caused solely by the defendant's conduct, the plaintiff's injury or damages were also caused by the plaintiff's reckless conduct. According to the defendant, this is so because a member of the defendant's staff specifically warned the plaintiff against doing tricks on the slide. Notwithstanding the warnings, the plaintiff descended the waterslide head first. By conducting himself in that manner, the plaintiff knowingly and voluntarily assumed the risk of injury to himself.

[6] Alternatively, in the event of it being found that the defendant was negligent in any respect, the plaintiff's damages were not solely caused by the plaintiff's conduct and the defendant's negligence contributed to the plaintiff's damages, the defendant pleads that the plaintiff's injury and

damages were caused partly by the fault of the plaintiff, whose conduct was reckless and/or negligent as set out above.

[7] In replication, the plaintiff denies that by entering into the resort, he entered into any agreement at all. However, should the court find that such an agreement came into existence, the plaintiff denies the terms of such an agreement as pleaded by the defendant. The plaintiff particularly denies:

7.1 that in terms of the said agreement, that the defendant would be absolved of its duty of care and subsequent negligence as pleaded by the plaintiff;

7.2 that the plaintiff in terms of such agreement voluntarily assumed the injury to himself;

7.3 the plaintiff denies his claim is precluded by the alleged agreement as pleaded by the defendant. To this end, the plaintiff alleges that it would be contrary to public policy to nullify or exempt the defendant from its liability as well as duties and obligations.

The Issues

[8] The only issue for determination in these proceedings is whether the plaintiff's injuries were caused by wrongful and negligent conduct on the part of the defendant.

The Evidence

[9] The plaintiff gave evidence to the following effect: He was born on 8 August 1991 and the highest educational standard he had achieved at school was Grade 7. Whilst at school, he enjoyed sport, was a runner, threw javelin and also did gymnastics. He left school in 2010 without completing Grade 8 when his girlfriend, Jocelyn, fell pregnant. The plaintiff testified that after leaving school, he obtained employment at Woolworths as a packer, but his contract ended in November of the same year. The child was born on 14 February 2011.

[10] With regard to the merits, the plaintiff testified that during the morning of the day in question, Jocelyn's uncle came to pick him up and they went to the Mnandi resort. Inside the vehicle was the plaintiff, Jocelyn's uncle,

Jocelyn, her sister Trish and her four children. At that time Jocelyn was 8 (eight) months pregnant. The plaintiff gave evidence to the effect that Trish paid the entrance fee, and as she did, the rest of her fellow travelers stood next to her, watching over the children. After the entrance fee was paid, they all entered the resort and settled next to the shallow end of the pool. There they set up their camping tent. The plaintiff testified that he was able to discern the shallow end of the pool because it was written 'shallow' in yellow. Besides, according to his evidence, it was not his first time to visit the resort as he had previously done so when he was about 11 or 12 years old. But on that occasion, he did not go down the water slide as his father forbade him to do so. However, the plaintiff recounted his past experiences going down water slides and testified that he had been to the slide at Hendon Park, Strand, the Water Park and the Farmyard Park in Wellington when he was between 15 and 16 years of age. According to Mr Shaun Rhoode (herein referred to as Mr Rhoode), after settling in at the resort, he and Jocelyn went for a swim. Inside the water, they were skipping and bouncing up and down, generally having fun. As they were skipping, one of the lifeguards blew his whistle and told them to stop skipping and get out of the pool as Jocyln was highly pregnant. They got out, but the witness went back into the pool for a swim. Mr Rhoode testified that after swimming and

relaxing for a while at the camp site, he walked across the grass to the water slide. When he got to the slide, he found other people visiting the resort and briefly conversed with them. According to Mr Rhoode, they joked about the hole that was on the part of the fence. He walked up the stairs to the platform where he waited for the lifeguard to release the latch giving him way onto the slide. Another boy was waiting with him. Mr Rhoode testified that he got on his knees to position himself to go down the slide, held on to the rails and went down the slide on his stomach, and entered the water head first. According to the witness when he came into the water, he opened his arms, in a breaststroke kind of movement, but when he was going down the water slide, holding onto the rails, his hands were in front of him. The plaintiff landed on his crown. When asked why he went down the slide head first, the plaintiff explained that he saw someone else doing it, and had always done it at the other resorts he had visited. According to his evidence, he had also assumed that the water at the deep end would be at the level of his chest as that had been the case in all the other resorts he had previously visited.

[11] The plaintiff further testified that before he went down the water slide, he had not observed any notice boards telling him that he could not go down the slide on his stomach. Furthermore, had he been told by the operators that he should not slide on his stomach, head first, he would have listened and would not have gone down the slide on his stomach. In addition, had there been an indication before he went down the slide that the pool was shallow at the bottom of the slide, he would not have gone down head first. The attention of the witness was drawn to Exhibit A12 depicting a board showing that users of the water slide were permitted to *'ride feet first only'*. His evidence was that he could not recall seeing the sign, and if he did have a look at it, he might not have taken serious note of it.

[12] Under cross-examination, Mr Rhoode explained that the board reflected on Exhibit A12 was about approximately five metres from them, as a group, and the reason why he could not take note of it is because they were talking to each other. It was put to Mr Rhoode that as he came out of the office, there was another sign which read thus:

"Main pool. Please observe all pool rules and supervisor's instructions. No running or horseplay."

The sign also read *'shallow water, no diving'*. The witness confirmed that if he had read the sign, he would have surely understood it as it was written in both English and Afrikaans and he is fully conversant in both languages. He also conceded that whilst he was swimming in the middle of the pool, he could have easily noticed the signs placed around the pool prohibiting diving and running. The witness also revealed that in order to get to the top of the water slide, he joined a queue to the water slide which began at its bottom. He conceded that whilst standing in the queue awaiting his turn onto the water slide, he had lots of opportunity to look at the sign at Exhibit A12 that was behind the slide. Similarly, Mr was referred to Exhibit A11, which showed a red line running across a picture of someone sliding on their stomach. When asked whether he understood the sign to mean that going down the slide on one's stomach was prohibited, he confirmed that had seen it, he would have realised that that is what it stood for. However, later, when asked the same question, Mr explained that because the sign reads '*slide this way'* and has a red line running through it, it was confusing to him. It was nonetheless clear through further questioning that Mr firmly understood that the board at Exhibit A11 clearly prohibited sliding through

the stomach. Similarly, the witness confirmed that had he been paying attention to the signs put by the respondent, he would have seen a further sign which prohibited sliding on one's stomach and conceded that had he paid attention to the signs, he would not have gone down the slide on his stomach, and consequently, the accident would not have happened. Mr Rhoode further explained that what encouraged him to go down the slide on his stomach was because he had done so previously on other water slides, coupled with the fact that as he was waiting in line for his turn, he watched a man who was in front of him sliding in head first and then swimming towards the deep end.

[13] Mr further explained that when he was in the middle of the pool, he could see the lifeguards around the swimming pool. According to his evidence, some were walking around, and up and down the pool, whilst others were watching the pool. Mr confirmed that there was another person based on the platform of the slide controlling the plank that leads to the slide. It was suggested to Mr that the person who was in charge of the slide platform was Mr Mncedisi Memani, who has since passed away. A

statement made by Mr Memani with regard to the incident was read into the record. The statement reads thus:

> *"On Friday 2011-01-07 at 14:45 was on duty at Mnandi Beach Pool monitoring the slide. I've warned Shaun and several other persons to go down the slide head first, but he and the other persons refused to listen to me. I've also shown them the signs that prevents [sic] them from doing that."*

Mr was confronted with the above statement and it was put to him that because he was fired to go down head first, he did so notwithstanding the explicit warning from Mr Memani. Mr reiterated that if he had been warned not to go down head first, he would not have done so. According to his evidence any version that suggests that he was verbally warned not to slide in head first was a lie. This assertion is despite his earlier admission that as a 19 year old, he was a little bit of a risk taker. It was further put to Mr that one of the defendant's witnesses would give evidence to the effect that he (Mr) went down the slide more than once. His response was that such testimony would be a lie. The witness was quizzed on the plausibility of his version to the effect that he walked around the resort for approximately two hours without seeing a single sign that warned him not to dive in head first. He was adamant that he did not take note of any such sign. Mr Butler SC, who represented the defendant, suggested the following scenario to Mr :

"I'm suggesting to you that, while you were in the company of your nine month, eight and a half, nine month old – nine month pregnant girlfriend, you were quite careful with her in the shallow part of the pool. You had dutifully, appropriately dutifully, looked after her. You had stopped doing some silly thing when you were in her company. But when you approached the water slide, you were now in the company of other young guys, who were keen for a bit of fun, is that correct? - - - - Yes

Just as you'd done on other water slides, you were just going to go down head first, is that right? - - - - That's correct

That is correct. And you disregarded all the warnings, is that right?

- *- - - That's correct.'*

When it was put to Mr that a witness saw him change position as he was going down the slide, he confirmed that he started on his knees and after he was told that he may go down the slide, he went down on his stomach. Mr further explained that as he was kneeling on the slide, he was crouching forward and his bottom was on his heels.

[14] In re-examination Mr emphasised that even if he had seen the sign that prevented him from sliding head first, because he is a chance taker, he

might have slid on his stomach, but had he known that the water was shallow, he would not have taken a chance. He further stated that when he went down the slide on the day in question, his intention was merely was to just swim under the water, and he assumed that the water would be deep enough. Mr reiterated that at no stage did Mr Memani or anyone employed by the defendant admonish not to go down the slide head first.

[15] It will be recalled that the plaintiff alleges that that the water slide was not manufactured and/or erected in such a way that it would not constitute a danger to persons utilising the slide. In support of this allegation, the plaintiff tendered the evidence of Professor Jeffrey Christopher Hillman, a mechanical engineer. Professor Hillman testified that on 2 February 2015, he visited the scene of the accident at Mnandi Recreational Facility in order to evaluate how the accident may have occurred. Professor Hillman explained that in order to carry out the evaluation, he needed to get an idea of what sort of speed the riders of the slide achieved when they enter the splash pool at the bottom of the slide, and to measure the depth of the pool. According to his evidence, the speed at the exit of the slide ranged from 25 kilometres per hour at the slowest up to 40 and 50 kilometres per

hour. The above measurements were taken using a stopwatch. He qualified these assertions by explaining that speed is affected by a variety of factors, for example, how heavy an individual is; what sort of clothing he or she was wearing; the amount and type of sunscreen and how much water the operator is pumping into the slide. According to the witness's evidence, the quantity of water as a lubricant would also have a small effect on the friction co-efficiency. He further explained that the amount and type of sunscreen is relevant because it is slippery and can reduce friction. Professor Hillman told the court that he also measured the level of the water at the exit of the pool and found it to be .75 metres.

[16] It is well to recall that the plaintiff suffered a fracture of the C5 vertebra. In Professor's Hillman's opinion, this type of injury is consistent with the plaintiff striking his head on the bottom of the pool while the rest of his body was essentially in line with it. In addition, this type of injury can occur at relatively low speeds when the object being struck is both hard and immovable, as it was in this case a concrete pool floor. Commenting on the plaintiff's injury, Professor Hillman stated that when one is in a head first position and comes to a dead stop, the whole body presses on the

spine and the neck region takes the maximum force. However, in the case of the plaintiff, the ‘breaststroke manoeuvre’ according to the witness caused him to penetrate the surface of the water as soon as he exited the slide. Professor Hillman explained the mechanic as follows:

> *“. . . normally when people come down the slide, regardless of whether they go head first, they would normally plane along the surface of the water briefly and then come to a stop and the legs would then sink. If you go down head first, they’ll sink behind you and cause you to stand up. If you go down feet first, the legs will go down and you end up standing up that way. Somehow, because of the orientation of the plaintiff’s head, and the action he took with his arms, he’d managed to penetrate the surface of the water as soon as he exited the slide, and direct himself down to the bottom of the pool.”*

In short, the effect of the plaintiff’s breaststroke manoeuvre would have been the downward trajectory of the rider’s body. In Professor Hillman’s opinion, the plaintiff must have had his head bent forward quite a lot to encourage the water to go over the back of his head and then force him down and the same applies to the action with his arms and with his hands. The witness further explained that as the speed of the rider is reduced by the resistance or drag of the water:

'the substantial negative buoyancy of the legs would then gradually cause the body to rotate vertically backwards until it comes to rest with the feet at the bottom of the pool and the head on the surface of the water. This slowing and rotational phase requires a minimum depth of water in order to prevent the rider's hands, arms, and in this case, the head, making any contact with the bottom of the pool before the described rotation of the body obviates this possibility'.

[17] As to the depth of the pool , Professor Hillman testified that in assessing the sufficiency of the water level for the water slide at the Mnandi Resort, he had regard to the excerpt pool depth for water slides; speed tubes and novelty slides in Australia; Canada and USA, and the research revealed that most require a minimum depth of 1.2 metres and some 0.9 metres. Professor Hillman told the court that a substantial amount of research has been conducted into the causes of spinal injuries arising from shallow water diving and it is apparent from it that there is a wide range of values for what is deemed to be the maximum impact speed above that can be tolerated by a rider's head without causing a spinal injury as well as identifying a minimum speed about which spinal injuries will occur with increasing likelihood of severity. The witness explained that there is a

formula that one applies to circumstances such as the present, which is that as one enters the water, the maximum deceleration that one achieves is at the moment of entry, and thereafter the rate with which one slows down decreases. He expatiated on the theory as follows:

> *". . . And it's a function, and how deep you will go and what your speed is at any particular depth, is a function of the speed that you entered the water, because obviously the faster you went into the water, the deeper you will go, and a thing called the K factor, which has a constant for different individuals and it's a function of the drag, in other words or the friction that you get entering the water. It's a function of the effective cross-sectional area of the individual. So somebody who has got a really big chest and really wide shoulders and a big head, will clearly slow down, you know, the K factor will be higher than somebody that's very slight.'*

Professor Hillman further explained the formula applied for various diving speeds as v = Ve to the minus ks, where v = a diver's residual speed at a depth after entering the water at an initial speed of V exponential to the minus whereas the value of k is a function of mass and size and drag co-efficiency and density of the water. According to his evidence, this formula dictates that a small increase in depth will significantly reduce a diver's speed by the time that he reaches the bottom. To better explain the

formula, Professor Hillman provided the court with a colour coded table accepted on record as “Appendix A” to his report. The table reflects varying values for K. Professor Hillman reiterated that the depth of a pool makes a considerable difference to the risk of getting an injury. Based on the table presented had the Mnandi Resort facility been 0.9 or 1.2 metres deep, with all other factors being the same, it is highly unlikely that the plaintiff would have experienced an injury or even that his head would have made contact with the bottom of the pool. According to Professor Hillman, the relationship between water depth and retardation dictates that had the exit pool at Mnandi been of a similar depth to the others in the area, then the plaintiff would not have sustained an injury, even in the unlikely event that he still managed to strike his head on the bottom of the pool. Professor Hillman testified that even if the pool had complied with the recommended minimum international standards of 0.9 depth for water slides, it would not necessarily have prevented contact between the plaintiff’s head and the bottom of the pool, but it would likely have been sufficient to reduce the impact speed to a level that would not have caused any serious injuries.

[18] It is well to recall that the plaintiff in his evidence explained how after watching one other person *'slide in a head first orientation*', he entered the chute, went on his knees and positioned himself to slide down head first. Commenting on the state of platform of the slide, Professor Hillman in his report states that an inspection of the launch area at the stop of the slide revealed that there is nothing to prevent riders adopting whatever position they chose at launch should they either ignore or fail to note the warning posters and instructions of the attendant on duty to adopt a 'feet first' orientation only. According to the witness, it is noteworthy that the minimum depths for water slide exit pools recommended by international standards, comes with a proviso that *'head first'* riding is prohibited, even at the 1.2 metre level. In the opinion of Professor Hillman, this calls for some form of control at the access point to the slide chute that will prevent a user from attempting to ride down in any such fashion. In addition to control at the access point of the slide, Professor Hillman expressed an opinion that;

> *"I think it's just the understanding that if you want to prevent something from occurring, notices are one thing, but you have to actually take some action to make sure that, you know, people don't' disobey what you are trying to tell them. So if you insist that you can only go down feet first, you need some method of ensuring that this is the case, and a barrier of some sort would obviously not*

allow anybody to take off, until the attendant, or whatever, was assured that, you know, you weren't going to go down head first."

This suggestion by the witness is in line with paragraph 19 of Professor Hillman's report wherein he states that:

"It would appear from anecdotal evidence that "head first" riding down the slide is not an uncommon event and the layout of the slide entry at Mnandi and the alleged position in which the attendant stands makes him unable to prevent this. It seems that the primary task of the attendant is to only permit access to the launch platform. A similar inexpensive device could easily be fitted to the launch point and this would provide the attendant with complete control over the rider's launch orientation."

Professor Hillman in his evidence described the type of barrier or pole device that he referred to on page 28-29 of exhibit A , depicting a photograph of an electrically operated device at Splash Waterworld in Amanzimtoti, which prevents anybody from taking off until the barrier is lifted out of the way. Professor Hillman provided an estimation of the amount the installation of device may cost, but Mr Butler rightly protested that such evidence was outside the expertise of the witness and therefore Professor Hillman's evidence of quantities and costs must obviously be disregarded during evaluation. This is particularly so in the light of

Professor's Hillman's unequivocal acknowledgement that he is not an expert in design and manufacture of these barriers and his opinion is informed by an internet search. The nub of this aspect of Professor Hillman's evidence is simply that a barrier could be easily installed at minimal cost.

[19] Professor Hillman gave evidence to the effect that in reaching his conclusions he had regard to certain values identified by James McElhaney in an article, Biomechanical Analysis of Swimming Pool Neck Injuries. I do not at this stage propose to interrogate the McElhaney values as these are effectively dealt which during cross-examination of the witness. The conclusion reached by Professor Hillman can be summarised thus:

> *"I conclude from the above that the plaintiff's injury was the result of inadequate exit pool depth coupled with the lack of an effective rider control system. These deficiencies should have been identified in any thorough risk assessment as being potentially harzadous for its users. The presence of explicit warning notices declaring that "head first" riding was prohibited demonstrates that the hazard was acknowledged to be a real one and therefore action should have been taken to ensure that riders were compelled to comply with this requirement."*

[20] Professor Hillman was referred to a supplementary opinion filed by the defendant's expert witness, Mr Rozowsky, a civil and structural engineer wherein the former's hypotheses that a rider going down head first must have positioned himself that way at the start of the ride was put to the test. A video demonstration where a rider entered the chute in a *"feet first"* position and before entering the pool at the foot of the slide the rider again adjusted his orientation in the chute a second time into a *"feet first"*position again was taken. Professor Hillman acknowledged that in the video that was achieved but seemed to attribute it to athletic display. The witness confirmed the joint minute compiled by him and Mr Rozowsky. It is necessary to refer to paragraph 2.1 and 2.2 of Mr Rozowsky's opinion which reads thus:

"2.1 It is agreed that an increase in the depth of the exit pool to 1.2m would have substantially reduced the severity of the impact between the Plaintiff's head and the bottom of the pool.

2.2 However, Rozowsky does not agree that the reduction in head impact would probably have prevented the plaintiff's spinal injury and reiterates that the literature recommends that the pool depth should be up to 1.8m in order to achieve this".

Professor Hillman confirmed that he disagrees with the Rozowsky contention on the basis that the *"safe"* depth of 1.8m referred to by Rozowsky is for poolside diving and that is substantially different to the dynamics of the plaintiff's entry into the exit pool. Professor Hillman explained his dissension in the following manner:

> *"Yes, I mean this for individuals who stand on the side of the pool or run towards the pool and dive in head first, and you need 1.8 metres in order to ensure that, you know, they don't injure themselves. That's really not relevant to this situation of the slide. I mean it doesn't add or detract anything, it just seemed to be of no relevance."*

[21] Under cross-examination, Professor Hillman explained that the focus of his analysis was the benefit of having the exit pool deeper. The witness's attention was drawn to paragraph 2.4 of the expert joint minute which reads thus:

> *"Hillman further states that even if the pool had only complied with appropriate international standards at the minimum depth of just 0.9 m would not necessarily have prevented contact being made between the Plaintiff's head and the bottom of the pool but it would likely have been sufficient to reduce the impact to a level that would not have caused any serious injury."*

The above statement must be read with paragraph 10 of the Hillman expert report which reads as follows:

> *"Research into the dynamics of diving into water, provides values for CD in the range of 0.9 to one in the absence of special friction reducing swimsuits."*

Furthermore that:

> *"These values enable one to compile a table of corresponding values for K."*

Against this backdrop, the witness confirmed that in the two scenarios dealt with in Table 2 and 3, he calculated the values for velocity at the foot of the slide, i.e K and derived values for different depths. In Table 2, the witness indicated that at 50 kilometres per hour, at the depth of 0.9 metres there is a given K value of 1.3 to 1.4. Professor Hillman further confirmed that what can be discerned from the two tables is that the faster one goes into the water, the more space is needed for one to slow down to a safe speed. He further conceded that the angle after entering the water constitutes a further variable. Furthermore, because in the matter at hand the angle at which the plaintiff descended after entering the water is unknown, the results would need to be adjusted if it turned out that it was at a steeper angle. It is necessary to restate that Professor Hillman had explained that the value of K indicates how much one will slow down as one goes into the

water and that there are numerous elements that go into the K variable. In other words, the lower the K variable, the greater the depth required for safety. One such variable is the mass of the person entering the water as well as the quality of the swimsuit. When it was put to Professor Hillman under cross-examination that the bigger the swimsuit, the greater the drag and the more streamline the swimsuit, the less the drag, his response was that, that doesn't make much difference on the facts such as the present and would be of greater impact in swimming Olympics. Similarly, the fact that the plaintiff propelled himself forward with a breaststroke movement has no major effect on speed, but rather, it is the change in direction which made him break into the surface at a steeper angle, according to Professor Hillman, it might have a very small effect on the equivalent entry speed into the water.

[22] With regard to velocity, Professor Hillman was quizzed on the two calculations he had made at 45 and 50 kilometres per hour. He was asked whether in his calculations he made allowance for the possibility that the person coming down the slide may have propelled themselves from a lift at the back of the slide when they began, he responded that he did, but added

that propelling oneself off the top adds very little to the final velocity achieved at the end of the slide. Professor Hillman readily conceded that with relatively minor adjustments to the input in variables, the indicated safety depth of 0.9 m might be wrong and that it might quite easily be the greater depth that is required.

[23] I indicated earlier on in this judgment that the conclusions in Professor Hillman's report were influenced by the principles stated in article written by James McElhaney. The article is an analysis and examination of certain swimming pool neck injury mechanisms. More precisely, the authors examined vertebra injuries from C1 to T17 and indicated that the most likely areas are C4 and C5. It appears from the article that they analysed nine accidents of head first entry into shallow water but these were a simulation of other accidents that had happened. Professor Hillman again conceded that there is a scope for variation in the input factors which lead to a significant result in what is assessed to be a safe depth. Cross-examination also clarified the fact that any reference made by Professor Hillman to other waterslides and their depths was purely anecdotal facts as it was not facts observed by the witness but those given to him by others.

[24] After the examination of Professor Hillman, the plaintiff closed his case.

[25] The defendant opened its case and led the evidence of Mr Lubabalo Ngwadi who was at the time of the accident employed as a lifeguard at the Mnandi pool facility . Mr Ngwadi testified that in 2011, he had been working at Mnandi for three years. The witness testified that on the day in question he was on duty as a lifeguard next to the pool and so was Mr Memani. According to the witness, there weren't many people at the resort on the day in question. Mr Ngwadi testified that the signs shown on Exhibit B 1 to 15 were displayed at the resort on the day of the incident. According to the witness, the signs were there as at January 2011. I think it is prudent to list what is depicted on each sign confirmed by Mr Ngwadi, more specifically those relevant to the warnings related to the waterslide. These are:

Exhibit B3

1. B3 Entrance to Mnandi Resort with two blue signs prominently displayed on both sides of the entrance door. The one sign states in both English and Afrikaans that ‘all facilities are to be used your own risk’.

2. B7 is placed next to the edge of the swimming pool and reads:

‘MAIN POOL

Please observe all pool rules and supervisor’s instructions. No running or horse play. Failure to obey the rules will result in you being asked to leave. Shallow water. No diving”.

3. B8

4. B9

5. B12 A sign written in red on the deep end of the pool, and it also reads *‘DEEP END’*.

6. B13 reads thus:

SPEED SLIDE

It shows a figure sliding down on his stomach. A red bold line is drawn across the picture.

7. B15

8. B 16 reads as follows:

"HOW TO HAVE FUN AND BE SAFE

Always enter pool at holding & ride feet first. It also warns 'Danger no diving-Shallow pools and cautions

Ride Feet First Only."

[26] Mr Ngwadi testified that on the day in question, he saw the plaintiff and his family entering the swimming pool. The witness testified that he saw the plaintiff going down the slide on his stomach and he admonished him that that was an incorrect way of sliding. When the plaintiff went down the slide, Mr Memani was already on top. The plaintiff was not injured the first time he went down on his stomach. Mr Ngwadi testified that he when he stopped the plaintiff and admonished him, the plaintiff said *'I'm sorry uncle, I won't do it again*'. But, contrary to the undertaking, the plaintiff went down the slide again and slid like he did in the first occasion, so testified Mr Mngadi. According to the witness, on the second occasion the plaintiff initially sat on the slide, but in the next moment, Mr Mngadi heard a booming sound. At that time the plaintiff was already in the water. He proceeded to the pool and found the plaintiff lying with his face in the water. He turned the plaintiff's head and found him smiling. Mr Ngwadi told the

court that he asked the plaintiff if he was alright and he responded and said that he was fine but was feeling some pain. The witness asked Ricardo, a fellow lifeguard to bring a spinal board and the paramedics attended to him.

[27] Cross-examination elicited the following: Mr Ngwadi became a lifeguard around 2008/2009. The resort opens at 07:00. Mr Cerfontein is the superintendent at the facility. During peak season, the facility does have up to 4000 visitors. The resort does not open all year round. It opens for six months in a year. The people who stand at the top of the slide are permanent employees but not lifeguards. The lifeguards patrol the pool area and the pool. It is not unusual for people to slide down on their stomach at Mnandi resort. In fact, every day the witness is on duty, there are people going down on their stomachs. The witness testified that when that happens, he would inform his superintendent, who in turn, would call law enforcement officers. There are enforcement problems when some of the visitors who slide down on their stomach are stopped as the witness mentioned feeling threatened by gangsters and those taking drugs.

[27] Mr Ngwadi revealed under cross-examination that Mr Memani was working alone on the top of the slide on 7 January 2011, the day of the incident. He further explained that on this day, he came in at 11:30 and a senior lifeguard would then tell him on which spot he should stand. After 30 minutes he would rotate and go to the deep side of the pool. On this day his allocated spot was next to a rock and is marked with an X at B69. The witness's duty at any allocated spot was to monitor the people and ensure that those that were coming down the slide exited the pool. According to Mr Ngwadi, he had been standing at the spot for approximately ten minutes when he saw the plaintiff. He was waiting for the plant operator to switch the slide on so that he could start to monitor the people. The slide was switched on after one of the visitors had asked that it be put on. It transpired during further questioning that it was the plaintiff's group that had requested that the slide be switched on. According to Mr Ngwadi, the plaintiff also approached him and asked that the slide be switched on. Mr Ngwadi further revealed that he saw the plaintiff and his group as they emerged from the cash office proceeding towards the lawn. The plaintiff was, according to the witness in the company of his girlfriend who was pregnant as well as two ladies ('aunties'). Mr Ngwadi told the court that at the time he noticed the plaintiff, he was getting in by the swimming pool at

11:30. On their arrival, the plaintiff and his group chose a spot under a tree on the lawn and unpacked their clothes.

When asked as to who is supposed to monitor the people as they come down the slide, Mr Ngwadi had this to say:

> *"I don't know whether my answer would be the right one sir. First thing, he's the first person to monitor himself. He's supposed to be alert to – to be alert of himself that because our boards, they already saying that there are things which you must'nt do, there are things which you must do."*

It emerged under cross-examination that Mr Ngwadi did not see the plaintiff sliding down the second time, he only heard the booming sound.

[28] Mr Ngwadi was ceaselessly quizzed on the report made to his supervisor, Mr Cerfontein**,** as well as on the contents of the statement he made to the police pertaining to the incident. Mr Ngwadi explained that he told Mr Cerfontein that before the plaintiff got injured, he had warned him not to slide down on his stomach. The witness confirmed that he told the police about the incident in the precise manner in which it took place. The statement Mr Ngwadi made to the police reads as follows:

"On Friday 2011-01-07 at 14:45 I was on duty at Mnandi Beach doing pool duties when I saw Shawn coming down the slide head first and dived into the pool. Ricardo Losper was on duty with me and also witnessed what happened. We knew Shawn had injuries and stabilised Shawn while Ricardo ran to fetch the trauma board. Shaun was taken to our first aid room and waited for the paramedics to come."

It will be recalled that the plaintiff testified that the incident occurred during his first posting at about 12 noon. He was confronted with the obvious anomaly in his statement to the effect that it happened at 14:45. Mr Ngwadi conceded that he made a mistake when he stated that it occurred at 12:00. It was pointed out to the witness that in his statement, he failed to mention when the accident happened, the plaintiff was getting into the slide for the second time and that he was admonished not to slide on his stomach. It was further suggested to Mr Ngwadi that the version in his statement is consistent with the plaintiff's version and inconsistent with his (Mr Ngwadi's) own evidence in chief. The witnesses again conceded that he made a mistake by omitting to disclose in his statement that he did warn the plaintiff about sliding head first.

[29] Regarding the court's impression of Mr Ngwadi as a witness, I must from the outset acknowledge that Mr Ngwadi testified in English and it is apparent from his evidence that there was a language barrier. However, it must also be said that the statement he made to the police differed markedly from the evidence he gave during the trial. First, Mr Ngwadi failed to disclose to the police that when the plaintiff got injured, he had been sliding head first for the second time. The puzzling aspect with Mr Ngwadi's failure to disclose this is that it is important to the defendant's defence as it demonstrates that there was effective control of the patrons sliding on the chute on this day. Mr Memani also failed to mention in his statement that the plaintiff went down the slide two times. An inference that this aspect of Mr Ngwadi's evidence is an afterthought is irresistible. He did not tell the police that on the first instance, he had admonished him not to slide on his stomach. Similarly, in his evidence in chief, Mr Ngwadi appeared confident as he recounted how thirty minutes after reporting for duty at 11:30 he saw the plaintiff and his family arriving and settling at a spot in the grass. Cross-examination cast serious aspersions on the reliability of this evidence as Mr Ngwadi was confronted with the evidence that contradicted his time frame relating to when the plaintiff was injured. Despite his concession that he made a mistake, I find it difficult to understand his evidence that the plaintiff

shortly after his arrival asked him to open the slide. Where there is a difference between the *viva voce* evidence of a witness and his or her statement, it remains the duty of the trial court to consider these differences, which may even be material and its final task is to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether the evidence is reliable or not and whether the truth has been told, despite any shortcomings. *See* **S v Mafaladiso en Andere 2003 (1) SACR 583 (SCA)** at 593 b - 594 h. I find the shortcomings in Mr Ngwadi's evidence quite material as it is difficult to reconcile his version that when the plaintiff went down the slide the second time, he observed him to monitor whether he would slide head first for the second time. Strangely, Mr Ngwadi testified that he did not observe the plaintiff go down the slide, he only heard a big sound as his head hit the bottom of the pool. It is my judgment that the inconsistencies and contradictions in Mr Ngwadi's evidence are so material that no court can place any reliance on his evidence and as such it is rejected.

[30] The plaintiff gave his evidence in a clear and consistent manner. He struck me as being honest because he made concessions which could

have a damaging effect on his case. For example, he did not try to hide the fact that he is a risk taker. That is hardly surprising for a nineteen year old male person. He correctly conceded that he did not pay any attention to his surroundings and that had he done so, he would have observed the signs warning him not slide in head first. It is not difficult to believe him when he states that had he been admonished not to slide on his stomach, he would have listened. After all the evidence,when he was told not jump in the swimming pool with his pregnant girlfriend, he stopped. It must be said that he did try to duck and dive when it was suggested to him that because he is a chance taker, he would have slid head first even if he had seen and observed the warning signs. However, this does not detract from the fact that, overall that his evidence was truthful.

The legal principles and evaluation

[31] As set out in the pleadings, the plaintiff's claim is based on delictual liability arising from the alleged wrongful and negligent failure by the defendant to take reasonable steps to avoid the incident, which rendered the plaintiff a complete quadriplegic.

Wrongfulness:

In the pleadings, the plaintiff alleges that the defendant, as the manager of the resort and in turn the water slide, had a duty to ensure that the resort, and in particular the water slide did not constitute a danger to members of the public utilising it. Therefore, the conduct of the defendant, on which the plaintiff relies relates to an omission and in the circumstances the existence of a legal duty to act depends upon questions of policy and what should reasonably be expected of the defendant. In this regard Brand JA in **Hawekwa Youth Camp v Byrne 2010 (6) SA 83 (SCA)** at par 22 stated the following:

> *"The principles regarding wrongful omissions have been formulated by this Court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such*

omission, if negligent, should attract legal liability for the resulting damages (See Gouda Boerdery Bk v Transnet 2005 (5) SA 490 (SCA) para 12)".

The Supreme Court of Appeal in **Gouda Boerdery BK v Transnet**, supra at 449E - 500B, on the question of wrongfulness endorsed the Judge a quo's formulation of the enquiry, expressed as follows:

"I am of the view that the legal convictions of the community would, in a case such as the present, expect that if the defendant's negligent conduct leads to harm by fire to a neighbour's property, such harm should be regarded as having been wrongfully inflicted, or, put another way, that the defendant should be regarded as having been subject to a duty not to cause such harm. In arriving at this conclusion I particularly bear in mind the fact that the defendant is a commercial entity, all of whose shares are held by the State, and that its purpose is to conduct a commercial rail operation. That being the case, and if it can be shown to have acted negligently and in a manner to have caused harm, there can be no reason to excuse it from liability. In arriving at this conclusion, I take into account the fact that the net of liability will not be cast too wide as a plaintiff still needs to establish both negligence and causation before it is entitled to succeed.

In the premises, I hold that the defendant was under a legal duty to the plaintiff not to negligently cause harm to it, more particularly by allowing a fire to spread from its property to that of the plaintiff."

(See Gouda Boerdery Bp v Transnet, supra at 499E- 500B)

In **Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA)** at 1055 to 1057, the Supreme Court of Appeal stated that all relevant factors, which according to the convictions of the community may be indicative of a legal duty to act positively, must be considered and in the era of our new constitutional dispensation these factors must be furthermore applied in the light of the spirit, purport and objects of the bill of rights. The court further held that the legal convictions of the community can even in the absence of prior conduct place a legal duty on a municipality to, for instance, warn against danger.

[31] Counsel for the plaintiff contended that the defendant, an organ of state, which is constitutionally accountable, was in control of a resort, which held a serious risk to life and limb to visitors which were allowed as members of the public, including, the plaintiff, for a fee, to make use of the recreational facilities at the resort, which proved to be extremely dangerous. As such, so continued the contention that this court should find that the plaintiff has proved the first leg of the enquiry, namely wrongfulness. Furthermore, if the measures that were in place inadequate,

the legal convictions of the community would in a case such as the present one, expect if the defendant's negligent conduct leads to harm, such should be regarded as having been wrongfully inflicted. Counsel for the defendant further argued that in reply to a list of admissions referred to in terms or Rule 37 (4) en passente, it would appear that it had a legal duty to persons utilising the waterslide. It follows that if a legal duty exists, injuries resulting from an omission to control the dangerous situation would be *prima facie* wrongful.

[32] It is well to recall that the defendant in the pleadings denies any allegation that it was responsible or owed a duty of care for ensuring that the resort and the waterslide did not constitute any source of danger to any person. It further refutes any implied allegation that it owed a duty of care for ensuring that the resort and the waterslide did not constitute any source of danger to any person. Notwithstanding the defendant's plea, I am satisfied that the plaintiff has proven that the defendant was in control of the recreational facilities at Mnandi resort, wherein members of the public, including, the plaintiff, were allowed for a fee, to make use of same, which proved to be extremely dangerous. I therefore hold that the defendant owed the plaintiff the legal duty of care. In the light of this finding, the next

enquiry should be whether the defendant took reasonable steps to prevent the plaintiff's injury.

Negligence

[33] Having found that the element of wrongfulness on the part of the defendant has been satisfied, the next issue for determination is whether the defendant was negligent in failing to ensure that the plaintiff was not injured when using the water slide. The test for negligence has been authoritatively laid down as follows in **Coetzee Kruger v Coetzee 1966 (2) SA 428 (A)** at 430

'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 his person on property and causing him patrimonial loss; and

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

(b) the defendant failed to take such steps.'

This test rests on two bases, namely reasonable foreseeability and the reasonable preventability of damage. (See Jacobs *v Transnet Ltd t/a Metrorail* 2015 (1) SA 139 (SCA). If the answer to all three questions is in the affirmative then the defendant is said to have failed to measure up to the standard of a reasonable person, and is consequently negligent. In **Ngubane v South African Transport Services Ngubane v South African Transport Services 1991 (1) SA 756 (A)** at 776E-777C. Kumleben JA, explained the principle as follows:

> *"Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created 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; and (d) the burden of eliminating the risk of harm."*

"The first two considerations are recognised and discussed in the well-known and oft-quoted passage in Herschel v Mrupe 1954 (3) SA 464 (A) at 477A-C, which is as follows:

No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial. An extensive gradation from remote possibility to near certainty and from insignificant inconvenience to deadly harm can, by way of illustration, be envisaged in relation to uneven patches and excavations in or near ways used by other persons."

[34] It is clear that the defendant was alive to the fact that sliding down head first on one's stomach was dangerous. The experts also agree that the slide was not designed for sliding with your head first and that it was only designed to go down feet first. Hence, the defendant erected warning signs. It is for the same reason that after the incident, the Mnandi resort introduced amended signs which clarified the prohibition on sliding down head first. This was an unequivocal acknowledgement of the dangers of going down head first. There can be no doubt that the reasonable possibility of harm resulting from head first sliding was foreseeable. On this basis, it is clear that the defendant foresaw the harm of sliding in head first. It is my judgment that the first leg of the test for negligence, namely, reasonable foreseeability of harm has been satisfied. The next leg of the test entails an enquiry into whether the defendant was obliged to take such precautions as were reasonable to guard against the eventuality of harm. In **Gouda Boerdery Bk v Transnet 2005 (5) SA 490 (SCA)** at 500 C-E the concluded thus:

> *"Turning to the question of negligence, there can be no doubt that the reasonable possibility of a fire in the reserve and of it spreading to neighbouring properties was foreseeable. The respondent was accordingly obliged to take such precautions as were reasonable to guard against that eventuality. What those*

steps would have been depends on an examination of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These have been said to include:

> *(a) the degree or extent of the risk created 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; and (d) the burden of eliminating the risk of harm."*

In **ZA v Smith 2015(4) SA 574 (SCA)** at para 22 the court further explained the negligence test thus:

> *"As we know, this leg calls for an enquiry into whether the reasonable person, in the position of the respondents, would have taken any steps to warn and to protect persons in the position of the deceased against the harm that he eventually suffered. Properly construed, the defence raised by the respondents thus seeks to provide the negative answer to this question, namely, that the reasonable person would not have done so, because these dangers would be patently clear and apparent to those in the position of the deceased. In consequence, those in the position of the deceased could reasonably be expected to protect themselves"……..*

At para 24:*"As to the first of these considerations, I think the short answer is that, in determining what preventative steps the reasonable person would or*

would not take, every case must depend on its own facts. It follows that if the question were to arise whether or not the reasonable person would take measures to warn and protect visitors to certain areas . . . against the dangers they may encounter, it could only be answered with regard to all the facts and circumstances of that case. Indeed amongst those would be, for instance, the proportionality considerations which would require the weighing up of the prospects of the proposed measures being successful; the degree of risk of the harm occurring; the extent of the potential harm; the costs involved in taking the preventative measures proposed".

In *casu*, the evidence from Mr Ngwadi establishes that notwithstanding warning signs as well the presence of lifeguards to monitor the water slide, patrons continued to slide down head first on their stomachs. In fact, Mr Ngwadi testified that on certain occasions, Mr Cerfontein would engage the services of law enforcement when things got completely out of hand. This knowledge on the part of the defendant shows without a doubt that the defendant more than foresaw the reasonable possibility of harm to the plaintiff. With regard to warning signs, it is common cause that there was no sign or indication at the slide exit that the water in the pool was shallow (75 cm). That means that even if the sign that warns against on the stomach, head first, was prominently displayed, it is unlikely that patrons would align such a warning with the shallowness of the water or with the

dangers inherent in diving head first into a shallow slide exit. In my judgment, a reasonable person operating the swimming pool would have realised how shallow it was and would have foreseen that it constitutes a serious risk of injury to people going down head first on the waterslide. In addition, the defendant ought to have seen that the measures employed to avert harm on persons such as the plaintiff were inadequate or insufficient. This is particularly so in the light of the evidence of Mr Ngwadi to the effect that law enforcement had on occasions been deployed to control patrons sliding head first.

[35] The next leg entails considering what steps the defendant ought to have taken to guard against the foreseeable danger.

[36] The defendant pleads that it discharged any duty of care owed to the plaintiff or any such person as introduced measures. In the matter at hand, it is clear from the evidence that the steps taken by the defendant to guard against the materialisation of the harm were inadequate. Having accepted the plaintiff's evidence, it is clear that he was not warned not go down on

his knees. To answer the question as to what a reasonable person in the position of the defendant would have done, the answer is simply that effective control by the slide operators is pivotal to preventing the kind of harm suffered by the plaintiff. It is clear, that Mr Memani could have prevented the plaintiff from going down the slide for the second time. His averment that he admonished the plaintiff and other patrons proves that he did not exercise effective control in ensuring that the patrons abided by the rules. As argued by counsel for the plaintiff Mr Dane, loud hailers could also be used to tell patrons about the dangers of sliding head first as these are already used to locate lost children. As to the warning signs, it is clear that none of them actually spells out the dangers of sliding head first onto a shallow edge of the pool. Clear signs spelling out the dangers of sliding head first onto a shallow edge of the pool could also be effective.

CAUSATION

[37] I have in this judgment held that the conduct of the defendant is wrongful and negligent. What must follow is a determination of whether but for the defendant's wrongful and negligent failure to take reasonable steps

that the plaintiff's injury and loss would have ensued. The evidence shows that when the plaintiff descended head first on the waterslide, he was unaware of the depth of the water at the exit. This is so because there was no indication of such depth. The only indication related to the pool depth is that it was 1.2 metres deep. The plaintiff further testified that had he known that the water at the slide exit was dangerously shallow, he would not have slided head first. According to his evidence, he assumed that the water at the edge of the slide would measure up to his chest. He did not notice the warning boards but even he had, he admitted that he would have descended on his stomach anyway because he saw another person doing so. I have already held that the measures put up by the plaintiff were ineffective and inadequate. It follows that but for the defendant's wrongful and negligent failure to take reasonable steps, the harm which befell the plaintiff would not have occurred. When regard is had to the plaintiff's evidence that when he swam in the pool the water was up to his chest, it makes sense that he would have thought that the water was at the same level at the edge of the slide.

[38] It must be stated from the outset that some of the essential facts in this trial are not in dispute as can be discerned from the evidence tendered. These are that:

38.1. The plaintiff sustained the injury as a result of going down the slide operated by the defendant head first.

38.2. The defendant had displayed two signs prominently on two tall poles on either side of the steps leading from the entrance to the main pool that the pool rules must be followed, that patrons may not run and dive, and that the pool water is shallow.

38.3. Another sign was posted near the ladder to the waterslide, signs specifically informing users to descend the waterslide feet first, with one's back against the slide, and specifically prohibiting other manners of using the slide such as descending head first.

38.4. A further notice was displayed at the top of the waterslide, informing those using the slide to descend the slide feet first;

38.5. The defendant had appointed staff, including Mr Memani, at the top of the slide to monitor the use of the slide.

38.7. The plaintiff did not see or pay attention to any of the signs prohibiting him from sliding down the waterslide head first.

The expert evidence of Professor Hillman

[39] In assessing whether the defendant was negligent, I start by analyzing the evidence of Professor Hillman given that in the pleadings the plaintiff alleges that:

39.1 the water slide was manufactured and/or erected in such a way that it would not constitute a danger to persons utilising the slide.

39.2 the swimming pool into which individuals who utilised the water slide plunged, would be sufficiently deep and/or sufficiently filled with water so as not to constitute danger to persons utilising the water slide.

[40] The principles governing the admission of expert evidence are restated in **Schneider NO v AA 2010 (5) SA 203 (WCC)** at 211 E as follows:

"In this connection it is necessary to deal with the role of an expert. In Zeffertt, Paizes, & Skeen The South African Law of Evidence at 330, the learned authors, citing the English judgment of National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer') [1993] 2 Lloyd's Rep 68, set out the duties of an expert witness thus:

'1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in matters within his expertise . . . . An expert witness should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the

whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.'

In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased opinion, based on his or her expertise for the purposes of that particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

In **Michael v Linksfield Park Clinic (Pty) Ltd 2001 (3) SA 1188 (SCA)** at [37] the court further explained that a court will accept evidence of a witness if and when it is satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'. At paragraph 36, the court said that:

"[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning."

To recap the evidence, Professor Hillman testified that in assessing the sufficiency of the water level for the water slide at the Mnandi Resort, he had regard to the excerpt pool depth for waterslides and speed tube and novelty slides in Australia, Canada, USA and the research revealed that most require a minimum depth of 1.2 metres and some 0.9 metres. He concluded that the relationship between water depth and retardation dictates that had the exit pool at Mnandi been of a similar depth to the others in the area, then the plaintiff would not have sustained an injury, even in the unlikely event that he still managed to strike his head on the bottom of the pool. Both experts agree that water slide at Mnandi resort is not safe for head first descent.

[41] As correctly submitted by Mr Butler, It is clear from the evidence that Professor Hillman's reference to the depths at other comparative slides constitutes unmitigated hearsay evidence as he also admitted during cross-examination that he had not conducted those investigations. Similarly, Professor Hillman's reference to photographs of waterslides in Durban must be disregarded as he conceded that he did not visit Durban, neither did he take photographs of the waterslide. It is so that hearsay evidence

remains hearsay, even if proffered by an expert witness, unless it is proved in the ordinary manner, it therefore remains inadmissible. In **Holtzhauzen v Roodt 1997 (4) SA 766 (W)** Satchwell J stated thus:

> *"Experts are frequently called in to assist our Courts. The relevant principles applicable to the admissibility of expert opinion evidence in this particular case appear to me to be as follows:*
>
> *…….Fourth, the facts upon which the expert opinion is based must be proved by admissible evidence. These facts are either within the personal knowledge of the expert or on the basis of facts proved by others."*

Flowing from the aforegoing, it must be accepted that the evidence of Professor Hillman relating to the steps that the defendant could have taken to implement access control to the water slide must be disregarded as Professor Hillman is not an expert on the subject and neither did he conduct an investigation into the feasibility of any of those systems and his opinion was, merely based on his being a DIY enthusiast.

[42] Again, as rightly pointed out by Mr Butler, there is yet another level at which the evidence of Professor Hillman must be disregarded. One of the issues for determination by this court is whether there were other steps the

defendant could have taken or ought to have taken to avert the harm to the plaintiff. Professor Hillman's evidence relating to the installation of access control and the attendant costs constitutes an opinion on the general merits of the case, and usurps the function of the court whose duty is to ultimately decide what steps ought to have been taken by the defendant to prevent harm to the plaintiff.

[43] The question is whether the rest of the evidence of Professor Hillman is capable of withstanding logical analysis to render it reasonable. Mr Butler lamented the fact that Professor Hillman's brief did not include the extent to which the plaintiff's breaststroke *manouvre* may have, to a large extent contributed to his demise. This becomes particularly important when regard is had to the fact that the plaintiff himself testified that one other person slide head first but there is no evidence that that person was injured. I am not of the view that the failure to investigate the impact of the plaintiff's breaststroke movement taints the evidence of Professor Hillman in any way. This I say because Professor Hillman explained that, that would constitute a variable and that most of the time a valuation in one value will be cancelled by a variation in another value. But it is clear from Professor

Hillman's evidence that the orientation of the plaintiff's head and the action he took with his arms caused him to manage to penetrate the surface of the water as soon as he exited the slide thereby directing himself down to the bottom of the pool. Logically, if he hit the edge of the pool earlier than he would have had, but for the breaststroke movement, it follows that the movement also had a direct impact on the injury he sustained, albeit uncalculated. Inasmuch as I have rejected certain aspects of Professor Hillman's evidence, it must be said that he, otherwise gave his evidence in a clear and straight forward manner and I did not get the impression that he was at all costs advancing the plaintiff's case. Professor Hillman made concessions when that was called for and generally gave a credible and logical account of his opinion.

[44] Counsel for the respondent argued that it is debatable whether the facility would have been safe at a depth of 90cm. According to the argument, this is particularly so because the plaintiff entered the slide with his head down and deliberately propelled himself under the water with a breast stroke motion. However, I consider the following aspects of

Professor Hillman's opinions as specifically acceptable, because it is in my view these are not only reasonable, but also logical:

"1. That an inspection of the launch area at the stop of the slide revealed that there is nothing to prevent riders adopting whatever position they chose at launch should they either ignore or fail to note the warning posters and instructions of the attendant on duty to adopt a 'feet first' orientation only.as admissible as it is, in my view, based on upon logic.

2. The above calls for some form of control at the access point to the slide chute that will prevent a user from attempting to ride down in any such fashion.

3. The relationship between water depth and retardation dictates that had the exit pool at Mnandi been of a similar depth to the others in the area, then the plaintiff would not have sustained an injury, even in the unlikely event that he still managed to strike his head on the bottom of the pool.

4. Even if the pool had complied with the recommended minimum international standards of 0.9 depth for water slides, it would not

necessarily have prevented contact between the plaintiff's head and the bottom of the pool, but it would likely have been sufficient to reduce the impact speed to a level that would not have caused any serious injuries.

5. That both Professor Hillman and the defendant's expert Mr Rozowsky, agree in the joint minute that an increase in the depth of the exit pool to 1.2m would have substantially reduced the severity of the impact between the Plaintiff's head and the bottom of the pool.

6. The plaintiff's 'breaststroke manouvre' according caused him to penetrate the surface of the water as soon as he exited the slide.

This I say notwithstanding the fact that according to the defendant, the witness's computation is uncertain".

The probative value of the hearsay evidence of Mr Memani

[45] It will be recalled that the statement of Mr Memani who is deceased was accepted as having sufficient probative value to qualify it for consideration and then to analyse it to see whether it has sufficient cogency to warrant acceptance. (See *Mnyama v Gxalaba* 1990 (1) SA 650

(C) at 653 H). Mr Memani said in his statement that he explained to the plaintiff and several other persons that they were not permitted to go down the slide, head first. It is easy to discern from Mr Memani's statement how pivotal his oral evidence would have been in these proceedings. I think that it is important to recap the law governing the reception of hearsay evidence. The reception of hearsay evidence is regulated by s 3(1) of the Law of Evidence Amendment Act 45 of 1988. The section provides as follows:

> *'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence in criminal proceedingsor civil proceedings, unless -*
>
> > *(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
> >
> > *(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
> >
> > *(c) the court, having regard to -*
> >
> > > *(i) the nature of the proceedings;*

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice".

It has long been acknowledged that the acceptance of and reliance upon hearsay evidence restricts the trier of fact of observing the witness' demeanour. This acknowledgement is captured in **Johnson v Road Accident Fund 2001 (1) SA 307 (C)** at 310H as follows:

"What a witness is alleged to have told someone else leaves room for misstatements, misunderstandings and misconstructions. The statement, however carefully drafted, can never be as reliable as listening to the ipsissima

verbaof the witness himself. Signing or otherwise confirming the content of a previous statement does not remove the inherent deficiencies of the hearsay nature of the evidence and all its inherent faults. The best test of the accuracy and truth of what a witness says lies in an independent assessment of his actually spoken words. It lies in the Court's ability to listen to his words and to observe his demeanour. It lies in the Court's ability to observe and note any degree of hesitancy or uncertainty which may or may not attend upon a concession by the witness or his affirmation of a given fact. Ultimately this Court is a trier of facts of the case….."

In *Mnyama*, *supra*, at 654 A, the court offered the following guidelines to assess the cogency of hearsay evidence:

"A court should ideally be in a position to establish as closely as possible the mood of the speaker, the interests he was attempting to serve, and any reason he might have had for concealing his true sentiments from the witness or for exaggerating them and this is very difficult when one is examining not the speaker himself but only an account of what he is supposed to have said. Moreover, oral statements are notoriously difficult to fully comprehend and to recall and reproduce adequately. The smallest change of inflection or nuance could change their meaning and words uttered in casual conversation are particular vulnerable to these defects. 'Talk is cheap' is an old adage which, I think, is as apt to hearsay evidence as it is to unkept promises. Fabrication of hearsay evidence is always a danger. So is the danger innocent misreporting.'

[46] In assessing the cogency of Mr Memani's statement, I accept that very little weight can be attached to it given that it has neither been tested by cross-examination, nor has the court had the opportunity to assess his reliability and credibility as a witness. Mr Memani's statement must be tested against the evidence of the plaintiff and Mr Ngwadi. In trying to locate the mood of Mr Memani and the interests that he was attempting to serve, I must recount the evidence of Mr Ngwadi relating to the mood that was prevailing when he went to the police station with Ricardo to make a statement. He testified thus:

> *"And you went to the police station to what?*
>
> *To testify or to talk or to say what did happen over there because we were supposed to give the statement, sir, of what did happen that day I – it was another thing, sir which was happening in that pool that day according to this plaintiff incident. So then everything was happening so fast, after – after this incident happened because every – even – even the parents, if they were parents, the first thing which they, if I still remember well, the first thing which they did, they put the lifeguards wrong. They put us wrong, in the position which is wrong because that- the plaintiff already got the incident and then it's like, . . . I won't say they were drunk but it's like the way it was happening because this field, this is the field, this is the field which we put the plaintiff that time we finish*

to dress him. They talk Afrikaans, they talk English, but I can hear they are accusing the lifeguards. I don't know which the accused us because I've already to you, you come down by the slide in a right way, at the end in a wrong way. I can't stop you.'

It is clear from the aforegoing that blame for the plaintiff's demise was laid squarely on the doorstep of the lifeguards and Mr Memani as a slide operator. In my view, it is therefore hardly surprising that in making their statements to the police, the lifeguards and Mr Memani would exonerate themselves. In my view, self-preservation was the primary motive for making the statements to the police. I am fortified in this view by the fact that their statements provide no more than a denial of the responsibility for the plaintiff's injury. I have already found the evidence of Mr Ngwadi relating to how the plaintiff was injured to be unreliable. As correctly contended by Mr Dane, Mr Memani's statement is unconvincing. Indeed, if the plaintiff had gone head first on the first occasion as testified to Mr Ngwadi, Mr Memani ought to have observed when he went back onto the slide for the second time. His statement does not to this end corroborate Mr Ngwadi. I am inclined to believe that, if that version is true, he was mindful of the fact that he should not have him back onto the slide the second time.

It defies logic why Mr Memani did not prevent the plaintiff from doing so, seeing that he had already defied Mr Ngwadi's instructions and he (Mr Memani) controlled the access to the slide. After all, it is the evidence of Mr Ngwadi that the plaintiff was going onto to the slide head first for the second time when he got injured. For all these reasons, I find myself unable to place any reliance on the statement made by Mr Memani.

Voluntary assumption of risk

[47] The defendant pleads that the two prominent signs were placed next to the waterslide informing users not to descend head first and the plaintiff had been specifically warned against running and doing tricks on the slide, but he nonetheless descended head first on the slide. In so doing, so pleads the defendant, the plaintiff knowingly and voluntarily assumed the risk of injury to himself. Stated differently, the plaintiff assented to the risk or injury inherent or associated with the use of the water slide.

Neethling, Potgieter en Visser, Law of Delict, 5th ed, page 92-94 outline the requirements for valid consent to the risk of harm constitutes a ground of justification as the following:

1. *The consent must be given freely and voluntarily;*

2. The person giving consent must be capable of volition;

3. The consenting person must have full knowledge of the nature and extent of the risk of possible prejudice;

4. The consenting party must also comprehend and understand the nature and extent of the harm or risk;

5. The person consenting must in fact subjectively consent to the prejudicial act. This consent has to be inferred from the proven facts; and

6. The consent must be permitted by the legal order; in other words, the consent must not be contra bonis mores.

7. The requirements for this defence are further explained in Santam Insurance Co Ltd v Vorster 1973(4) SA 464(A) at 781:

> *"I am . . . of opinion that, if it be shown that, in addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself, that will ordinarily suffice to establish the consent required . . ., provided always that the particular risk which culminated in his injuries falls within the ambit of the thus foreseen risk. The inherent difficulty that the central factum probanda viz, the consent to the particular risk which occasioned the supervening injuries – is basically a subjective enquiry, can, I suggest, be only be bridged by way of inference from the proved facts. In the nature of things direct evidence will seldom, if ever, be available, and manifestly the*

negative ipse dixit of the claimant himself can by itself carry but little weight. The Court must, in my view, thus perforce resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under consideration. Thereafter the Court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations to the contrary have foreseen the particular risk which later eventuated and caused his injuries, and is accordingly to be held to have consented thereto."

The court in **Maartens v Pope 1992(4) SA 883 (NPD)** at 888 C-E expatiated on these words thus:

"The question is not, one notices, whether the claimant should have foreseen the risk. It is whether he must have foreseen the risk, and therefore in fact foresaw it. The judgment did not analyse how strongly innately had to be before it entered the reckoning. The prospect of its eventuation which counts can hardly be limited to one so great that the risk gets turned into a virtual certainty. The very notion belies the thought, as Van Winsen J reminded us in Rosseau v Viljoen 1970 (3) SA 415 (C) when he remarked (at 420 G)

'(T)he fact that . . . an occurrence is unlikely to happen does not mean that there is no risk of it happening.'

Nor, it surely stands to reason, does account need to be taken of a risk so remote at the other extreme, of a risk so like the kinds which few human activities are

free altogether that only a nervous pessimist would think it amounted to such. Between those poles, however, the concept does not lend itself to calibration. No more definite a generalization will do there, it seems to me, than this. What must emerge is not merely a fanciful or abstract risk, but a real one inherent in the situation."

[48] The defendant must therefore prove on a balance of probabilities that the plaintiff had the knowledge and appreciation of the risk inherent in sliding head first to a shallow edge of the pool. The plaintiff obviously protests that he had no such knowledge, and in the result, there was no danger to foresee and nonetheless act contrary to such foresight. In a nutshell, the plaintiff says that he could not have consented to the injury. According to his evidence, he slid only once on his stomach and was injured. Mr Memani did not advise him that he was not allowed to slide head first and if he had, he would have heeded the warning. The plaintiff testified that it was not his first time to go on a slide. He had slid in three other resorts without injuries. It is for this reason that he assumed that he could do so at Mnandi Resort. Besides, he had seen one person doing it. This aspect of the plaintiff's evidence is corroborated by Mr Ngwadi when he stated that it was a usual occurrence for people to defy instructions and notices and slide head first. Mr Ngwadi further testified that they would

report the recalcitrant sliders to Mr Cerfontein, who in turn would summon law enforcement officers.

[49] The crux of the defendant's argument is that the plaintiff failed to have regard to the warning signs which were visibly displayed. The plaintiff on the other hand contends that even if the warning signs were visible and or prominent, this does not absolve the plaintiff from its duties. Furthermore, so goes the contention, the defendant's sole witness, Mr Ngwadi testified that notwithstanding the signs and warnings, people continued on a regular basis to slide head first. Therefore, having regard to the evidence, the defendant ought to have foreseen that the signs were ineffective. The plaintiff testified that even if there signs prohibiting sliding head first, he did not see or pay attention to them. There is no evidence to counter the plaintiff's assertions. That he stated that as a nineteen year old lad even if he had seen the warning signs, he might have chosen to take the risk cannot and should not be elevated to knowledge and appreciation in these circumstances. I am not convinced that the plaintiff's youthful penchant for risk taking should absolve the defendant. The defendant ought to have reasonably foreseen that members of the public might slide on their stomachs despite the warnings. The defendant in my view ought to

have taken effective precautions to avert the potential danger. It therefore is my judgment that the defendant has not proved the *volens* defence. In my view, no sufficient warrant exists to find that the defence has been made out.

The Exemption Clause

[50] I have already indicated that the defendant pleads that the plaintiff on entering the resort was faced by two prominent signs wherein visitors were advised that they would enter the resort at their own risk and that they agreed thereto by entering the resort. The notice reads thus:

> *"PLEASE NOTE/LET WEL*
>
> *Take care – all facilities are used at your own risk.*
>
> *Wees asseblief versigtig – alle geriewe word op eie risiko gebruik"*

The second notice reads as follows:

> *"The right of admission is reserved.*
>
> *All facilities are used at your own risk and the Council accepts no liability whatsoever for the loss of any article from these premises."*

The question to be answered is whether the plaintiff, in law, taken to have agreed to the terms contained in the notice. In essence the defendant is

relying on the quasi-mutual assent document. The application of the principle is explained in **Naidoo v Birchwood Hotel 2012 (6) SA 170 (GSJ)**:

> *"In order to rely on quasi-mutual consent, a party has to demonstrate that it took reasonably sufficient steps to bring these terms to the notice of the other party and it was therefore entitled to assume that by his conduct in going ahead, notwithstanding the disclaimer, the other party had assented to the terms thereof. This is the doctrine applicable in the so-called ticket cases where the terms and conditions are to be found on the tickets. The purchase is assumed to have assented to the conditions once he or she purchases a ticket."*

Counsel for the defendant submitted that facts of the matter at hand stands on all fours with facts in **Durban's Water Wonderland v Botha and Another 1999 (1) SA 982 (SCA)** where the court reasoned and said the following:

> *"The principles applicable to the so-called "ticket cases" apply mutatis mutandis to cases such as the present where the reliance is placed on the display of a notice containing terms relating to a contract . . . . Had Mrs Botha read and accepted the terms of the notices in question there would have been actual consensus and both she and Mariska's Guardian, on whose behalf she also contracted, would have been bound by those terms. Had she seen one of the notices, realised that it contained conditions relating to the use of the amenities*

but not bothered to read it, there would similarly have been actual consensus on the basis that she would have agreed to be bound by those terms, whatever they may have been. . . . The evidence, however, did not go that far. Mrs Botha conceded that she was aware that there were notices of the kind in question at amusement parks but did not admit to having actually seen any of the notices at the Appellant's Park on the evening concerned, or for that matter at any other time. In these circumstances, the appellant was obliged to establish that the respondents were bound by the terms of the disclaimer on the basis of quasi-mutual assent. This involves an inquiry whether the appellant reasonably entitled to assume from Mrs Botha's conduct in going ahead and purchasing a ticket that she had assented to the terms of the disclaimer or was prepared to be bound by them without reading them. . . The answer depends upon whether in all the circumstances the appellant did what was "reasonably sufficient" to give patrons notice of the disclaimer. . . . I have previously described the notices containing the disclaimer and their location. From that description it is apparent that they were prominently displayed at a place where one would ordinarily expect to find any notice containing terms governing the contract entered into by the purchase of a ticket, viz at the ticket office. Any reasonable person approaching the office in order to purchase a ticket could hardly have failed to observe the notices with their bold-white painted border on either side of the cashier's window."

Counsel for the defendant urged the court to adopt this reasoning and apply it on the facts of this case.

[51] The evidence is uncontested that the signs referred to above were prominently displayed at the entrance of the resort and next to the ticket sales, what remains to be determined is whether the language of the disclaimer exempts the proferens from liability. In **Durban's Waterland** at 989 H-I, supra, the court outlined the proper approach to the construction of a disclaimer and stated the following:

> *'The correct approach is well-established. If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the proferens……. But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be "fanciful" or "remote".'*

When one has regard to the disclaimer in the present matter, it is difficult to fathom with precision the risk that the defendant is referring to in the disclaimer notice. This I say because one finds some form of qualification of the risk where it states that the defendant accepts no liability or risk of lost articles. In my view the disclaimer in the present case is not a model of

clarity in that it makes no reference to injury at all. An example of a clear disclaimer is found in **Naidoo *v* Birchwood Hotel,** *supra*, and reads thus:

> *"The guest hereby agrees on behalf of himself and the members of his party that it is a condition of his/their occupation of the Hotel that the Hotel shall not be responsible for any injury to, or death of, any person or the loss or destruction of or damage to any property on the premises, whether arising from fire, theft or any cause, and by whomsoever caused or arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel."*

Similarly, the notice in **Swinburne v Newbee Investments (Pty) Ltd 2010 (5) SA 296 (KZD)** contains clear terms of the disclaimer and reads thus:

> *"26 The LESSOR shall not be responsible or liable to the LESSEE, his family, friend, servant or guests for loss sustained by any of them as a result of theft, burglary, or fire on the PREMISES or in or about the building or for any damage suffered as a result of any any negligent act or omission on the part of the LESSOR, and/or its I agent/s and/or its caretaker and/or other employees or as a result of any state of disrepair, defect or flaw in or failure, non-functioning or breakage of the PREMISES or the building, in which the PREMISES are situate, or any fittings, or in any fixtures, appliances or lifts therein. . . ."*

In my view, given the far-reaching consequences and magnitude of the disclaimer in the present case, it was imperative on the part of the

defendant to make specific reference to injuries sustained in the course of the visit. Otherwise, this court cannot assume that had the plaintiff read the notice, he might have understood the word “risk” to pertain to injuries he might sustain as a result of partaking in the amenities at Mnandi resort. I am fortified in my view in paragraph 25 of **Swinburne v Newbee**, which reads as follows:

> *“On the same point Lewis AJA said:*
>
> *There does not, therefore, appear to be any clear authority for a general principle that exemption clauses should be construed differently from other provisions in the contract. But that does not mean that courts are not, or should not be, wary of contractual exclusions, since they do deprive parties of rights that they would otherwise have had at common law. In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability insofar as it is legally permissible. The very fact, however, that an exclusion clause limits ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application...”*

I emphasise that I find it difficult to conclude that the word "risk" includes harm arising from personal injury in the circumstances of the present matter. It is noteworthy that the notice in **Durban's Water Walk Wonderland** case was to the following effect:

> *"The amenities which we provide at our amusement park have been designed and constructed to the best of our ability for your enjoyment and safety. Nevertheless we regret that the management, its servants and agents, must stipulate that they are absolutely unable to accept liability or responsibility for injury or damage of any nature whatsoever whether arising from negligence or any other cause howsoever which is suffered by any person who enters the premises and/or uses the amenities provided."*

Again, it is clear from the notice that the risk pertains to damage and/or injury sustained in the course of the enjoyment of the amenities offered by the **Durban's Water Wonderland.** In the matter at hand, and as I said, it is difficult to locate and define the ambit of the word "risk", in the result that the notice is in my judgment, ambiguous. This is such a case where the ambiguity in the disclaimer notice must be interpreted against the proferens. (See **Durban's Water Wonderland (Pty)**, *supra).* In the result,

the defendant has failed to prove that the plaintiff accepted any risk of injury to himself.

[52] The second leg of the plaintiff's argument is that the disclaimer notice falls foul of public policy and the Constitution. According to the plaintiff, an unjustified limitation on the right to seek judicial redress, or a denial of such a right, is prima facie a breach of Section 34 of the Constitution, namely the right to access the courts. It is so that in **Barkhuizen v Napier 2007 (5) SA 323 (CC).** Ngcobo J stated that when challenging a contractual term, the question of public policy inevitably arises. But this was no longer difficult to determine because:

> *"Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it…….human dignity, the achievement of equality and the advancement of human rights and freedoms……as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."*

The first question to be considered in such circumstances was whether the clause itself was objectively unreasonable, and the second question was, if it were found to be reasonable, then should it be enforced in the circumstances. Given that I have already found that the ambiguity in the disclaimer notice must be interpreted against the proferens, I deem it unnecessary to make a determination on the grounds of public policy.

Conclusion

Apportionment of Damages

[53] It is well to recall that the defendant pleads that in the event of it being found that the defendant was negligent in any respect, the plaintiff's damages were not solely caused by the plaintiff's conduct and the defendant's negligence contributed to the plaintiff's damages, the defendant pleads that the plaintiff's injury and damages were cause caused partly by the fault of the plaintiff, whose conduct was reckless and or negligent as set out above. Section 1(1) (a) of the Apportionment of Damages Act 34 of 1956 provides as follows:

> *"Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not*

be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage."

It follows that this court must make a factual determination of the degree of fault, if any, attributable to the plaintiff. Counsel for the respondent submitted the following circumstances which assist in the factual determination:

1. The plaintiff deliberately ignored warning signs;
2. His decision to slide on his stomach was unreasonable as it was based on previous experiences at other water slides.
3. His conduct was motivated by seeing one other person descend head first.
4. He is a self-confessed chance taker, and even if he had read the warnings, he might or might not have obeyed them.

According to the defendant, all the evidence points towards the plaintiff being reckless and having no concern for the consequences of his actions. He displayed an intent to take risk despite the obvious warnings.

[54] I am not of the view that the plaintiff's concession to the effect that even if he had read the signs he might or might not have taken the risk. I find his averments to this effect consistent with the exuberance of youth. Equally, I am not convinced that the plaintiff's execution of the exaggerated breast stroke movement whilst exiting the waterslide to make himself descend deeper into the water had any particular significance in the manner in which he sustained the injury. It is so that it is one of the variables but there is no direct evidence as what extent that might have facilitated the occurrence of the accident. The defendant passed an opportunity to present evidence of a correlation between the plaintiff's breaststroke movement and its effect on the injury. That said, it is clear that part of the blameworthiness must be attributable to the plaintiff.

[55] The defendant on the other hand has been found negligent in more than one way. Firstly, the defendant failed to ensure that the water slide was be monitored by employees and/or lifeguards in order to prevent the water slide constituting a source of danger to persons utilising such water slide. It has been abundantly established through the evidence of Mr

Ngwadi that the defendant was very much alive to the fact that patrons were descending on the water slide head first. In spite of this knowledge, the defendant failed to implement effective measures to prevent the slide from constituting a danger to people. Secondly, the defendant and/or its servants acting as such, failed to ensure that there was sufficient water in the swimming pool so that when the plaintiff who entered the swimming pool after sliding down the water slide he was not injured by hitting the bottom and/or side of the pool. The plaintiff's uncontroverted evidence is that he was not aware that the water was shallow on the side of the pool wherein he slided. Furthermore, the plaintiff specifically testified that had he had this knowledge, he would not have descended the slide in the manner in which he did. The plaintiff's version to this end is supported by the fact that the depth of the water inside the pool was indicated at 1.2m, whereas there was no indication of the depth of the water at the exit slide. However, the plaintiff's appetite for risk caused him to enter the slide head first without considering the consequences and in complete disregard of signs prohibiting same. All of the above is clear from evaluation of the evidence. An apportionment of 60% to 40% in favour of the plaintiff is in my view reasonable under the circumstances.

CONCLUSION

[56] In conclusion, the harm of the plaintiff hitting his head on the edge of a shallow pool was reasonably foreseeable. The evidence, establishes unequivocally that the defendant was aware of the fact that visitors were frequently sliding on their stomachs to the shallow edge of the pool. The defendant failed to take adequate reasonable steps to prevent the materialisation of the harm, namely by ensuring that the water levels at the edge of the pool were within the safe and acceptable limit. Had the defendant ensured that the level of the water above .75m, the injury sustained by the plaintiff would not have occurred at all, if it did, it would have been greatly mitigated. There is a yet another leg in respect of which the defendant foresaw harm and yet failed to take reasonable steps. Whereas the defendant was acutely aware of the dangers of sliding head first in that it had put up warning sings, its employees monitoring the slide, failed to take reasonable steps to ensure that the plaintiff did not slide head first. On the uncontested evidence, this simple precautionary measure would have averted the accident altogether. In the circumstances, the respondent is liable for the injury sustained by the plaintiff.

[57] **ORDER**

The following order is issued:

1. The defendant is liable for sixty percent (60%) of such damages as the plaintiff may prove to have sustained in the accident that occurred on 7 January 2011.
2. The defendant is ordered to pay the plaintiffs' costs of suit, inclusive of the costs of two counsels.

_____

NDITA, J