



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

Case no: 4384/2017

In the matter between:

EUGENE QUINTON MANUEL

Plaintiff

v

THE CITY OF CAPE TOWN

Defendant

KAAPSE KLOPSE KARNIVAL ASSOCIATION

Third Party

Coram: Justice J I Cloete

Heard: 15, 16, 29 and 31 October 2019; 12 and 13 November 2019; 11 and 12 March 2020

Delivered electronically: Wednesday 10 June 2020

JUDGMENT

CLOETE J:

Introduction

[1] The plaintiff¹ claims damages of R1.387 million from the defendant (*'the City'*) arising from an injury to his foot at the Vygieskraal Stadium in Athlone (*'the Stadium'*) on 7 February 2015. The City joined the Kaapse Klopse Carnival Association (*'the KKKA'*) as a third party.

¹ Although the plaintiff's surname is spelt '*Manual*' on the pleadings, according to his identity document the correct spelling is '*Manuel*' – Exhibit "A" page 1.

- [2] The merits and quantum were previously separated and the only issues for determination at this stage are the liability of the City and the contingent liability of the KKKA. The plaintiff testified and called 2 witnesses. The City called 5 witnesses and the KKKA 2 witnesses.

Background

- [3] The City is the owner of the Stadium. On 31 December 2014 the City issued a permit to the KKKA to host its annual carnival there on 1, 10, 17, 24 and 31 January as well as 7 February 2015, subject to a number of special and standard conditions. For present purposes, the relevant conditions were that the KKKA would ensure the deployment of sufficient security personnel for the safety of participants and spectators, and that the City was indemnified against *'...all actions, suits, proceedings, claims, demands, costs and expenses arising out of the permission given'*.
- [4] The plaintiff was a captain of the Symphony Way Youth Development Troupe which participated in the carnival. The final round of the carnival competition was held on 7 February 2015 from 12h00 until about 01h00 the following morning.
- [5] At a stage during that evening the plaintiff was in the foyer of the Stadium, which was a section reserved for VIP members of the KKKA and those who were issued with security passes. It appears that although they were not VIP members, the plaintiff and a fellow captain, Ms Charmaine Walters, had each been issued with such a pass.

- [6] One of the security personnel on duty, and present in the foyer on 7 February 2015, was the plaintiff's witness Mr Colin Minnaar. He was appointed for the event by Vuyisa Risk Management, who were contracted by the KKKA to provide security in compliance with the permit issued to it by the City. Mr Cecil Clarke of Vuyisa was the safety officer in charge for the event.
- [7] A pair of wooden trestles with a stack of loose wooden table tops, about 50cm thick, had been placed in the foyer in close proximity to the entrance of a passage leading *inter alia* to a toilet facility. For convenience I will refer to the trestles and table tops, unless otherwise indicated, as a "structure".
- [8] It was the plaintiff's case that around 21h30 he entered the foyer to use the toilet. He was accompanied by Ms Walters. After exiting the toilet, and as he re-entered the foyer from the passage, the stack of table tops slid onto his left foot, thereby injuring it.
- [9] It was the KKKA's case that the incident was as a result of the plaintiff's own negligence in leaning on or against the structure, which caused the table tops to fall onto his foot, and that this occurred much later that night after the event had concluded and the Stadium was being closed up at around 01h30. None of the City officials were present in the foyer at the time of the incident.

Vicarious liability

- [10] The plaintiff pleaded that the City is vicariously liable for the damages allegedly suffered by him because the table tops were negligently stacked on

the trestles by its employees acting in the course and scope of their employment. During the trial this whittled down to the evidence of the security officer, Mr Colin Minnaar, that shortly before the event started on 7 February 2015, and sometime between 11h00 and 12h00, he observed and partly assisted Mr Henfra Snyman, a City employee, to stack the table tops on the trestles at that spot in the foyer, or at least in very close proximity to that spot. This was denied by Mr Snyman when he testified.

[11] It was not suggested by the plaintiff that those table tops were moved, and a similar structure placed on the same spot, before the plaintiff injured himself. As will appear from the evidence of Mr Colin Minnaar, the plaintiff's case was rather that it was the self-same stack that remained there for hours before the incident. No other witnesses, including the plaintiff himself, were able to cast any light on how those table tops came to be placed on the trestles at that spot.

[12] The primary issue is therefore whether Mr Snyman, acting in the course and scope of his employment, stacked the table tops (at about midday on 7 February 2015) in the area where the plaintiff was injured. Only if this is found to be the case is it necessary to consider whether any negligence can be attributed to the City. Given my conclusion, this renders a consideration of much of the evidence adduced during the trial unnecessary, and I will focus only on that which is directly relevant to the primary issue.

The evidence

- [13] Colin Minnaar testified that before the trial commenced he recognised Snyman from previous occasions at the Stadium but did not know his name. He described Snyman as the City employee who had custody of the Stadium keys and was responsible for unlocking all of the doors each morning. Snyman always wore a golfing t-shirt with a City of Cape Town '*sticker*' on the left breast pocket.
- [14] Minnaar usually arrived at the Stadium at 06h00 and his duties commenced at 07h00. However, as I understood it, on the morning of 7 February 2015 the foyer door was already unlocked when Minnaar arrived there to commence duty, and he did not testify that he observed Snyman opening up the Stadium on that particular day.
- [15] His evidence was further that shortly before midday, while on duty in the foyer, Minnaar saw Snyman approaching from the direction of the passage opposite to that which leads off the foyer to the toilet facility. Snyman was carrying a table top which he proceeded to place on top of two trestles that were already there. Snyman returned with another two table tops and Minnaar helped him to stack them onto the first one.
- [16] According to Minnaar, it was at that point that he decided not to assist further since '*...this is not part of my job description.... I decided to stop helping him, because I knew that if anything is going to happen, they will blame security for stacking...*'.

- [17] Minnaar moved away and Snyman continued to stack. Minnaar warned Snyman that the stacked table tops posed a safety risk and that he should cordon off the structure with danger tape. Snyman responded that the table tops would be removed shortly. According to Minnaar however they were never removed before the incident occurred.
- [18] Various troubling aspects emerged during Minnaar's cross-examination. According to him, and although he was in his early fifties at the time, he did not take a single break (not even a bathroom or refreshment break) from where he was stationed in the foyer from 07h00 on 7 February 2015 until the event closed the following morning at around 01h00 and in particular, he was insistent that from the time Snyman stacked the table tops until the incident occurred he did not once move away from the area, despite, on his version, the presence of a fellow security officer who he did not identify and who was not called to testify.
- [19] Minnaar conceded that he knew he was not permitted to assist Snyman. Despite assisting Snyman in creating what, on Minnaar's version, was a safety risk, he did nothing about it for a period of more than 9 hours until, according to the plaintiff, the incident occurred.
- [20] The explanations that Minnaar gave for this apparent dereliction of duty were implausible. He maintained that he would have got into trouble with the City or KKKa if he moved the table tops and thus averted the safety risk. He alleged that he did not have access to a radio or similar mode of communication to report the risk to officials in the Venue Operation Centre (or VOC), although

he conceded that the security plan presented by Vuyisa to the KKKA, and accepted by the City for purposes of issuing the permit, stipulated that all security points would have radio contact with the VOC. (It furthermore stands to reason that the security point of the VIP area would have been issued with the necessary equipment).

- [21] He was evasive when asked whether, given this testimony, he reported the risk to other personnel who were moving around the general area, responding that it was unnecessary, given that everyone could see that the structure posed a risk:

MS DU TOIT: I just wanted to ask you ... you spoke about your experience in the industry, and how dangerous the situation was. Are we to understand, according to Mr Manuel's version, which you don't dispute, that despite seeing this danger, you just left it there for 10 hours?

MR MINNAAR: Yes, Ma'am, for one reason why: it's not my duty to remove that trestles or anything from there, because if I had to remove it I would have been in trouble, because the City and the Coon Carnivals – I don't know who said the City must place it there, but I can't remove it.

MS DU TOIT: Did you tell anyone about the danger?

MR MINNAAR: Everybody knew what was going on, everybody knew it was a danger, Ma'am, because there is no danger tape around it. If there was danger tape around it, everybody would have known that nobody has to be in that area.

MS DU TOIT: But, Mr Minnaar, why didn't you place danger tape around it if everybody knew it was so dangerous?

MR MINNAAR: That is not part of my job description, Ma'am. If there was a safety officer, it was his duty, Ma'am.'

[22] When pressed, Minnaar's explanation simply made no sense:

MS DU TOIT: But my question to you, Mr Minnaar, was, you say you saw this danger, you looked at it for 10 hours, but you didn't think to report it to anyone.

MR MINNAAR: Ma'am I reported it to my superiors. These superiors said – my supervisor's answer was, whoever placed it there is supposed to have known what's supposed to have come around there.

MS DU TOIT: So you didn't mention earlier during your examination in chief that you reported it. What time of day did you report it to your superiors?

MR MINNAAR: I didn't report it to them, because they walk through the foyer to come and check up on us, so they saw that and they asked me who stacked it there, and that is who [sic] I told them who stacked it there.'

[23] Minnaar was unable to dispute the City's version that it had no responsibility for issues of safety in the VIP area during the event. In his words '*...I think the City was only there to do the unlocking and locking and to put on the lights, and all those necessary things for the Stadium. But where other things are concerned, I can't really say.*'. To this it must be added that neither the plaintiff nor his other witness, Ms Walters, suggested otherwise either.

[24] Minnaar became more evasive as cross-examination progressed, to the point where he denied having previously stated that the structure was unsafe. He conceded that as a security officer during these events he customarily cordoned off areas that he was aware might pose a safety risk, seemingly

forgetting his earlier testimony that this responsibility fell squarely upon the safety officer.

[25] Mr Mario Finnis was the City's first witness. He is employed as a project co-ordinator in the City's Events Permitting Office. He testified that he was assigned this particular event. He confirmed that one of the special conditions of the issued permit was that the KKKA, as event organiser, was to ensure compliance with all safety and security related matters.

[26] His evidence was further that if table tops were stacked in the manner alleged it was the responsibility of the KKKA, and not the City, to ensure that the structure was safely secured; and in the event of any perceived danger, it was the responsibility of the safety and security personnel employed by the KKKA in the immediate vicinity to warn members of the public. The presence of the City's own officials at the Stadium – disaster management, the fire department and Metro police (in addition to SAPS members) – did not relieve the KKKA of this responsibility. Other City staff were only in attendance at the Stadium in a *'caretaking'* capacity.

[27] Finnis was unable to say whether or not the table tops stacked on that particular day were the property of the City, although he conceded it might be possible. He did not know if Snyman was employed by the City on the day in question.

[28] Indeed it appears that Finnis did not even know who Snyman was:

‘MS JOUBERT: *But you are not disagreeing that it’s a possibility that Mr Henfra Snyman was on duty on 7 February 2015?*

MR FINNIS: *If he was an employee of the City of Cape Town and part of any of these disciplines, that could have been possible, M’Lady.*

MS JOUBERT: *Right, there was evidence presented in this Court that on 7 February 2015 Mr Henfra Snyman, a City of Cape Town official, was present at the event. You said you didn’t know about that.*

MR FINNIS: *I can’t confirm that, Ma’am.’ (my emphasis)*

[29] This exchange later led to Finnis making a “concession” which he was clearly not sufficiently informed to make, that if Snyman was employed in the foyer that day and evening, it would have been his responsibility to ensure safety and security. It is apparent that he erroneously assumed that Snyman was “part of the disciplines” of the City’s disaster management, fire department or possibly even Metro police. Finnis also volunteered (despite his earlier testimony to the contrary) that the primary responsibility for safety and security at the event vested in the City’s officials, and that they ‘*would have had access and roles to play*’ in the foyer. This differed from the evidence of other City witnesses as well as those who testified on behalf of the KKKA..

[30] In my view however none of this actually assisted the plaintiff, given that it was never his case that Snyman himself was employed by the City for safety and security purposes. Not even Colin Minnaar, the plaintiff’s only witness who claimed Snyman was responsible for stacking the table tops, suggested this. Accordingly this would only have become relevant if the plaintiff first succeeded in proving vicarious liability, because only then, in the particular circumstances of this case, it is necessary to consider the issue of negligence.

- [31] Mr Shahied Adams, the City's second witness, is employed by it as a principal facility officer. He testified that in 2015 the Stadium fell under his portfolio and he was present there on the day of the incident from about 08h00 until 22h00.
- [32] His evidence was further that the trestle tables used by the KKKA at the event were the property of the City. They were collected from another facility and stored in one of the Stadium's change rooms. The tables were used by the KKKA at entrances, by vendors and to exhibit trophies to be handed out at the end of the event. It was the responsibility of the KKKA to unpack, place and put them away.
- [33] On the day of the incident (seemingly apart from the officials referred to by Finnis) the only City employees present at the Stadium were Adams himself, Mr Clive Minnaar (as opposed to Colin Minnaar, the security officer), Ms Isabelle Juta and Snyman. Clive Minnaar was the supervisor at the Stadium, and his responsibilities included unlocking the facility and handing it over to the event organiser, as well as locking up after the event.
- [34] Snyman and Juta were employed as '*cleaners*' for the event in shifts. The first shift was from 07h00 to 16h00 and the second from 16h00 until the end of the event. Snyman worked the second shift that day. This was in terms of standard practice that shifts were divided in such a manner as to ensure that a male employee would work the second shift, seemingly for personal safety reasons, since that was the busiest shift. Safety and security were not the City's responsibility, but that of the KKKA as event organiser.

- [35] According to Adams, there were no City employees stationed in the foyer on that day because '*...that is the space of the event organiser*' and the KKKA was consequently also responsible for any safety or cleaning issues in that area. Adams was also clear that, contrary to the evidence of Colin Minnaar, it was in fact Clive Minnaar who was responsible for the Stadium keys, and for unlocking and relocking the facility.
- [36] During cross-examination Adams explained that he also recalled this particular event because it was the final round of the carnival competition; was the last he supervised at the Stadium (he was subsequently deployed to a different geographical area); and moreover it had been his personal responsibility to prepare the shift/duty roster for the event.
- [37] According to Adams, it was Clive Minnaar, Snyman and a Mr Mark Kobus who collected the trestle tables from another facility and delivered them to the Stadium on the day before the incident. He confirmed that the change room in which the tables were stored was located in the same passage as the direction from which Colin Minnaar maintained he saw Snyman approaching shortly before midday on the day of the incident. That the trestle tables were stored there was later confirmed by Clive Minnaar during his testimony.
- [38] Adams conceded he was unable to say with certainty that Snyman had not stacked the table tops on the trestles. However, he stated that Snyman had not been instructed by him, nor to the best of his knowledge any other City official, to do so. He repeated that, in any event, Snyman was not present at the Stadium that morning, given that his shift only commenced at 16h00.

[39] Mr Clive Minnaar, the third City witness, is employed by it as an operational supervisor/driver at the Stadium. He has been employed in this capacity for the past 30 odd years and is responsible for supervision of permanent cleaning and maintenance staff. He confirmed that on the day of the incident there was a morning shift and an afternoon shift. According to him, the morning shift was made up of contract workers and the afternoon shift comprised Adams, Snyman, Juta and himself, i.e. permanent staff. He confirmed that the afternoon shift commenced at 16h00.

[40] It was also his evidence that contract workers (as I understood it, persons appointed by the Department of Public Works in one of its expansion programs) had their own supervisor. Consistent with the evidence of other City witnesses, Minnaar stated that none of his staff (nor, for that matter, the contract workers) performed any functions in the foyer during the event, and it was the responsibility of the KKKA to move, place and store the tables away. He had no knowledge of Snyman having stacked table tops in the foyer that morning. The first occasion on which he saw Snyman that day was when he arrived for his afternoon shift and Minnaar booked him in. He confirmed the evidence of Adams that he alone is responsible for the Stadium keys which he retains in his office.

[41] During cross-examination it was accepted on behalf of the plaintiff that Clive Minnaar himself had not instructed anyone to stack the table tops on the trestles in the foyer. Although Minnaar was unable to say who might have stacked them there, he confirmed that once the facility was handed over to

the event organiser, City employees were not permitted in the foyer until after the event ended. It is necessary to emphasise that no evidence was adduced by the plaintiff, nor indeed was it suggested on his behalf, that the City only handed over the Stadium to the KKKA when the event commenced at 12h00. The evidence was rather that this occurred much earlier in the day, particularly given Colin Minnaar's testimony that he started his shift in the foyer at 07h00, at a time when the foyer doors were already unlocked; and the later evidence of Mr Melvin Matthews and Mr Cecil Clarke of the KKKA which I deal with below.

[42] Mr Enock Kopele, the fourth City witness, is employed as its Area Head (Central Area), Disaster Risk Management Unit (*'the DRMU'*) which includes that in which the Stadium is located. He testified that although he was not personally involved in the event in question, some of his staff were present there.

[43] His evidence was further that the role of the DRMU in the event was to ensure a co-ordinated and integrated approach to safety issues, by assessing risk and putting measures in place to mitigate it. This would typically include the strategic deployment of three staff members within the facility, one stationed in the VOC, one on the stadium and one on the field (with none in the foyer) and an on-site meeting on the day of the event (before it commenced) to check whether there was compliance by the event organiser with the safety plan.

[44] With reference to the applicable statutory and regulatory framework, Kopele explained that ultimate responsibility for safety at the event itself vested in the event organiser (in particular, its safety officer) and not in the City. This was consistent with the testimony of other City witnesses, apart from that portion of Finnis' evidence to which I have already referred, and with which Kopele similarly disagreed. He stated:

'As part of granting the permit from the City's side now, the requirement of the event organiser is to appoint a safety officer. So what I'm trying to say is whether SAPS, Metro Police, can be there, but without having to have a safety officer appointed by the event organiser, there will be no permit issued because an event organiser needs to meet all the requirements that they need to meet, in order for the City to provide or to issue a permit for a particular event.'

[45] It was also his evidence that it is fairly common for an event organiser to agree with the City that certain areas at a facility will be reserved exclusively for use by the organiser concerned, thereby precluding the presence of City personnel in that particular area or areas. These agreements are usually reached at pre-planning meetings.

[46] Mr Henfra Snyman was the last witness called by the City. He testified that he has been employed at the Stadium for the past 19 years as a handyman. On the day of the incident he commenced duty at about 16h00 and left again at around 20h00. He was sure of this because he had checked his time sheet for that day in preparation for the trial, and he was of the view that it was accurate because it operates on a biometric (or fingerprint) system.

- [47] Snyman denied having entered the foyer at any stage that day. In his words this was in any event because '*...the staff, us, we are not allowed to go into that area... only security is there...*'. He explained that by '*security*' he meant those officers employed for this purpose by the KKKA.
- [48] He was adamant that during the time he was at the Stadium that day he did not carry or assist anyone with tables or table tops. He confirmed that Clive Minnaar, his supervisor, held the keys to the Stadium. According to him, he did not recognise Colin Minnaar and he denied having spoken to him outside court while waiting to testify as the latter had claimed in his evidence.
- [49] While confirming that tables were ordinarily collected from another facility, Snyman's evidence was that he was not involved in their collection for this event. As far as he knew the tables were in any event collected and brought to the Stadium for any given event on the same day, but deferred to Clive Minnaar's testimony in this regard. He denied that he was trying to distance himself from the presence of stacked table tops in the foyer. He accepted that during his shift he wore an official City tag and agreed that the change room about which Adams and Clive Minnaar had testified was located in the passage in question. His evidence differed from that of Adams in that he denied ever having been employed as a '*cleaner*' by the City.
- [50] Given the dispute about whether or not Snyman personally knew Colin Minnaar the plaintiff arranged for the latter to be present briefly in court. Snyman persisted in his denial. When asked by counsel for the plaintiff how, in these circumstances, Colin Minnaar would have known his first name was

'Henfra', Snyman responded that he might have ascertained it from someone else because no-one referred to him as *'Henfra'* but only as *'Hennie'*. In any event, this was not an entirely accurate reflection of Colin Minnaar's evidence in chief on this aspect:

MS JOUBERT: Now you say this person – maybe we should start giving him a name, the City official with the golf T-shirt on – have you seen him here today?

MR MINNAAR: That's correct, Ma'am.

MS JOUBERT: And did you by any chance ascertain what his name is?

MR MINNAAR: As time went past now in this morning's hour when I was here outside with him, that is where I asked him if he's – he said his surname is Snyman, and that his name is Henry, or something like that, and that is how I knew it was him that – that is how I got known to his name now this morning.'

[51] Mr Melvin Matthews, the first KKKA witness, is one its founder members and was its Chief Executive Officer at the time of the 2015 event. He confirmed that the trestle tables were used by the KKKA for the purposes described by Adams in his testimony, and that it was the responsibility of the KKKA to move, place and store them away. He also confirmed the evidence of City witnesses that the foyer was an exclusive VIP use area for the KKKA. Entry by other persons required a special pass or *'card'*.

[52] His evidence was further that on the day of the incident he arrived at the Stadium at 06h00 and was let in at one of the main entrances by a security guard. His evidence differed from City witnesses in that, according to him, the same security guard unlocked the foyer doors, and that all trestle tables and

chairs used in the event were already stored in the foyer as a '*holding area*' upon his arrival there.

[53] Be that as it may, according to Matthews he was stationed in the foyer as well as an office in the passage in which the toilets are located throughout that day and evening (since he was in charge of finances). All of the furniture in the '*holding area*' was used by the KKKA in the event. It was KKKA members or employees who placed the furniture for the event. The first time he noticed the structure itself was after the event ended, and KKKA members or employees were gathering the trestle tables and chairs to be put away.

[54] According to Matthews he was familiar with the permanent City staff at the Stadium and alleged that Snyman, who he only described as the witness who testified just before him, only arrived there in the afternoon. This struck me as gratuitous, given the evidence of Snyman that he had not entered the foyer at all, coupled with Matthews' own evidence that he never left it. Indeed, Matthews was subsequently constrained to concede that he had no personal knowledge of which City officials and employees were present or when they arrived, given that he was focused on ensuring the smooth running of the event.

[55] The second witness called by the KKKA, and the last witness to testify, was Mr Cecil Clarke, the safety officer appointed by Vuyisa for the 2015 event in terms of its contract with the City. He testified that this was his eighth, and last, annual KKKA event in this capacity.

- [56] He arrived early at the Stadium on 7 February 2015 and, while waiting for the gate to open, Matthews arrived. A security guard unlocked the gate for them, and a City employee based at the Stadium unlocked the building itself. Clarke was unable to recall who this was (it was usually one of two employees, one of whom was the Stadium supervisor).
- [57] When Clarke entered the foyer with Matthews he observed a stack of table tops (about 80cm thick) on three trestles to his right, which he demonstrated was a short distance from where Colin Minnaar testified that Snyman later stacked them. Clarke was unable to say who had placed them there.
- [58] He was stationed in the VOC for most of the event but, as I understood his evidence, when he passed through the foyer to use the toilet at about 14h00, although there were some tables still there, when he returned, these were all being moved outside by KKKA employees.
- [59] According to Clarke by 21h00 (just before the plaintiff maintained the incident occurred) there were no tables in the foyer since they were all in use elsewhere by the KKKA. He recalled this because during this particular event on 7 February 2015 there was scheduled loadshedding at 20h00 for about an hour, which necessitated certain measures being put in place for safety and security purposes. In addition, VOC members (including Clarke), conducted two '*safety walks*' that day, one at 10h00 and the other midway through the competition. No safety risk as claimed by Colin Minnaar was reported.

[60] It was also Clarke's evidence that had Colin Minnaar observed any potentially dangerous situation while stationed in the foyer, he would have been obliged to report it to his supervisor (who was manned with a radio) and the latter would in turn would have been obliged to report it immediately to the VOC. No such report was received. Clarke disagreed that Colin Minnaar had been stationed in the foyer for the entire period without a break, maintaining that he was given two such breaks, each of 90 minutes.

Discussion

[61] In order to discharge the onus of vicarious liability on the part of the City, the plaintiff was obliged to prove that it was Snyman who stacked the table tops on the trestles in the foyer while acting in the course and scope of his employment, whether in accordance with the standard test or one of the so-called "deviation" cases.

[62] Self-evidently, the first enquiry is thus whether the plaintiff proved that Snyman stacked them at all. This in turn boils down to a consideration of the competing versions of Colin Minnaar and Snyman about the latter's presence in the foyer at around 12h00 that day. It is a credibility issue which is inextricably bound up with the probabilities: *National Employers' General Insurance v Jagers*.²

² 1984 (4) SA 432 ECD at 440D-G.

[63] I have already dealt with the disturbing aspects of Colin Minnaar's testimony. Careful consideration of his evidence left me with the distinct impression that he went out of his way to advance the plaintiff's cause. Moreover, it is most unlikely that as a trained security events officer with years of experience in the industry, he would have simply stood by in the presence of what, on his version, was a clear safety risk for hours on end because he feared that he would be blamed if he drew it to any official's attention. To this I would add that, based on his demeanour and the manner in which he testified, Colin Minnaar certainly did not strike me as timid.

[64] I accept that Snyman himself was not an exemplary witness. However there were material aspects of his testimony which had the distinct ring of truth. Perhaps most important was his evidence that he only commenced his shift at 16h00 that day. When this emerged for the first time during Adams' earlier testimony and the City sought to introduce the relevant timesheet into evidence at the eleventh hour, this was vigorously opposed by counsel for the plaintiff because he had already closed his case. This ultimately resulted in the City abandoning any reliance on the timesheet itself.

[65] In my view however this does not, of itself, detract from Snyman's subsequent unchallenged testimony that a biometric system for clocking in and out was used at the time. In addition Snyman's evidence that he personally refreshed his memory by having regard to the timesheet before testifying was not placed in dispute, and he was not asked by counsel for the plaintiff to produce this document when he was cross-examined, which she was entitled to do. It

would have presented the plaintiff with the perfect opportunity to destroy Snyman's credibility, given that it was he (i.e. the plaintiff) who bore the onus.

[66] Of course it was similarly open to counsel for the plaintiff not to require Snyman to produce it, but this document would in all probability have been equally determinative of the matter to the plaintiff's detriment if it showed that Snyman was telling the truth. If it was a tactical decision not to require its production during Snyman's cross-examination, then it was a risk that the plaintiff surely knowingly assumed.

[67] Moreover, both Adams and Clive Minnaar supported Snyman's version about when his shift commenced. Both were patently honest, reliable and credible witnesses. To the extent that there were differences in their respective versions, these were not material and, to my mind, merely served to demonstrate that they had not conspired to tailor their evidence. Where their testimony differed from Colin Minnaar's I have no hesitation in accepting theirs and rejecting his.

[68] Accordingly it was ultimately undisputed that Adams was responsible for preparing the shift roster; that the other permanent City employee who shared shifts with Snyman that day was a female (Ms Juta); and that it was standard practice for the male employee to work the second shift. Moreover Clive Minnaar's testimony that he personally booked in Snyman that day when he arrived for his afternoon shift, the first time that he saw him during the day's event, must be accepted.

[69] To this must be added the evidence of the City and KKKA witnesses that the foyer was reserved as an exclusive KKKA area and that it was only KKKA members or employees who were responsible for moving, placing and later storing the tables. While it is so that both Matthews and Clarke testified that upon their arrival in the foyer early that morning tables were already stacked there (although they differed about how many tables there were), this does not assist the plaintiff, because it was never his case that any stack of table tops present in the foyer posed a danger other than those that were allegedly placed and stacked there by Snyman at around midday. In addition, and save for those aspects of Finnis' testimony with which I have already dealt, the consistent testimony of both the City and KKKA witnesses was that it was the latter that bore the risk for any safety and security incidents in terms of the permit issued by the City. This is borne out by the permit itself, which was annexed to the City's third party notice to the KKKA which was served during September or October 2017, long before the trial. Accordingly the evidence of Snyman, Adams and Minnaar was supported by the probabilities.

[70] In these circumstances I am unable to find, having regard to the mutually destructive versions of Colin Minnaar and Snyman, that the plaintiff has succeeded in persuading me that the City is vicariously liable for any negligence that he might have proven. Put differently, the evidence in support of the plaintiff's case fell short of passing the applicable test as set out in *National Employers*, i.e. that on a balance of probabilities his version of vicarious liability is true and accurate and therefore acceptable, and the competing version of the City is therefore false or mistaken and falls to be

rejected. In addition, given that the plaintiff chose not to sue the KKKA as a co-defendant, the issue of the latter's contingent liability does not arise.

Costs

[71] The City is clearly entitled to its costs. As far as the KKKA's costs are concerned, I have had regard to the following.

[72] The City's third party notice reflects that the KKKA was joined on the basis set out in uniform rule 13(1)(a), namely for indemnity purposes. The City sought an order that in the event of the plaintiff's claim succeeding against it, the KKKA was to indemnify the City '*...in such amount as defendant is ordered to pay, together with the costs of defending the action.*'. This indemnity claim arose from the terms of the permit.

[73] In its third party plea the KKKA made common cause with the City that in terms of the issued permit it bore the risk to the exclusion of the City for any damages proven by the plaintiff.

[74] Unlike uniform rule 10 (which deals with the joinder of plaintiffs and defendants) rule 13 is silent on a court's power to award costs against a party, save as set out in rule 13(9) which pertains to costs in the context of a third party's application for a separation of trials (or issues), and which is not relevant for present purposes.

[75] However, that a court has an inherent discretion to make a costs award against a losing plaintiff in favour of a third party is beyond dispute: *Robertson v Durban Turf Club and Others*,³ *Gross v Commercial Assurance and Another*.⁴

[76] In *Robertson*⁵ the court, after reviewing the authorities, set out the approach to be followed in the exercise of such a discretion:

'In cases under our Rule 13, I think, with respect, that the approach should not be that as a general rule the unsuccessful plaintiff should pay the third parties' costs unless there are "special reasons" for not so ordering, but rather that such plaintiff will not be required to pay the third parties' costs unless the defendant acted reasonably in bringing them in: and that, even if defendant acted reasonably, regard must still be had to general notions of fairness and to the reasonableness or otherwise in all the circumstances of the case of requiring plaintiff to pay the costs of the third parties.'

[77] Applying this test to the present matter, it is my view that the plaintiff should be ordered to pay the KKKA's costs for the following reasons. Firstly, there can be no question that the City, in light of the clear terms of the permit, acted prudently in joining the KKKA as a third party. Secondly, notions of reasonableness and fairness militate in favour of such an award.

[78] The plaintiff's pleaded case was that a stack of tables, stored at '*the premises*' (which were in turn defined as the Stadium), was placed there by '*employees*' of the City acting in the course and scope of their employment.

³ 1970 (4) SA 649 (NPD) at 656H-657B.

⁴ 1974 (1) SA 630 (AD) at 634H-635A.

⁵ At 658C-E.

[79] After making common cause with the City, the KKKA specifically pleaded that at no stage were the tables stacked by City employees. The KKKA's plea was delivered, it would appear, in about August 2018.

[80] In his response to a request for further particulars for trial at the instance of the City, which the plaintiff delivered on 30 January 2019, he stated that Colin Minnaar informed him that it was the City's '*employees*' who were responsible, but that he (i.e. the plaintiff) was '*not sure of the names*' of these employees. Both the particulars of claim and subsequent trial particulars were silent on when exactly the stacking was alleged to have occurred.

[81] This was accordingly the case that both the City and the KKKA came to court to meet. Both the City and the KKKA were deprived of any reasonable opportunity to make their own investigations as to whether there was any truth in the allegations made by the plaintiff. Both were not even placed in a position to know who these alleged employees might have been. It was only when Colin Minnaar testified during the trial that he pointed the finger at Snyman, at Snyman alone, and disclosed when the stacking was alleged to have occurred.

[82] **In the result the following order is made:**

- 1. The plaintiff's claim against the defendant is dismissed.**
- 2. The plaintiff shall pay the costs of the defendant as well as the third party on the scale as between party and party as taxed or agreed, including any reserved costs orders.**

J I CLOETE