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

Case No: 7599/2015

In the matter between:

YASMIN SALIE Plaintiff

and

WESTERN PROVINCE ATHLETICS First Defendant

KRISTINE KALMER Second Defendant

Coram: Justice J I Cloete

Heard: 1, 2, 7 and 8 December 2020; supplementary notes delivered 19 January 2021, 22 January 2021 and 2 February 2021

Delivered electronically: 19 March 2021

JUDGMENT

CLOETE J:

Introduction

[1] This is a delictual action for damages in which the plaintiff seeks to hold the defendants jointly and severally liable for payment of R718 000 plus interest

and costs, arising from an incident which occurred during a Spar Ladies 10km road race on 6 April 2014 at the Promenade, Mouille Point, Cape Town.

[2] The first defendant ("WPA") was the race/event organiser which consisted of the 10km road race as well as a 5km fun walk. The second defendant ("Kalmer") was the athlete participant who collided with the plaintiff (a member of the public), thereby allegedly injuring her. In turn, WPA and Kalmer joined each other as third parties in the event of the court finding that either or both were negligent.

[3] At the commencement of the trial an order was granted by agreement separating merits and quantum and the trial proceeded on the merits only.

[4] The plaintiff, who was present during the trial, did not testify but called one witness, Ms Leoni Olckers. The WPA called Mr Willie Jacobs, and Kalmer herself testified.

The pleadings

[5] In her amended particulars of claim the plaintiff pleaded that at the time of the incident she was a stationary pedestrian on the pavement at the Promenade when she was pushed out of the way by Kalmer, causing her to fall and sustain injuries to her right femur and knee.

[6] She alleged that WPA, as race organiser, owed her a duty of care but was negligent in one or more of the following respects: (a) it was obliged to

demarcate or cordon off the area used by race participants to separate members of the public from them but failed to do so; (b) it had the duty to ensure *'the presence of adequate, experienced and sufficient people as marshals at the event, but failed to do so as the marshals who were there did not perform their duties adequately'* to protect the plaintiff; and (c) it bore the duty to warn members of the public of the dangers of utilising space demarcated for the race but failed to do so.

[7] The allegation in (a) above was abandoned during closing argument. In relation to (b), the reliance on an insufficient number of marshals was also abandoned. As to (c) *Mr Tredoux*, who appeared with *Mr Du Plessis* for the plaintiff, clarified that WPA's alleged duty was to ensure that *'its'* marshals warned members of the public accordingly.

[8] The plaintiff's pleaded case against WPA thus crystallised into the alleged breach of two so-called duties of care: first, the failure on the part of the marshals present to perform their duties *'adequately'* to protect the plaintiff; and second, its failure to ensure that *'its'* marshals warned members of the public of the inherent dangers. However as the evidence progressed this narrowed even further, and closing argument centred around the failure of one single marshal in close proximity to where the incident occurred to sound a warning to the plaintiff as Kalmer approached.[1] Much was also made of the terms of a permit granted by the City of Cape Town to WPA in order to advance support

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1 Despite the response contained in the plaintiff's trial particulars that the marshals failed to adequately protect the plaintiff since there were only two present in the area where the incident occurred; two were not sufficient to inform the public of the race event; and that they furthermore failed to inform the plaintiff that a race was in progress.

for the averment that WPA owed, but breached, its duty of care towards the plaintiff. I will deal with this later.

[9] There was also an eleventh hour attempt by the plaintiff, in a supplementary note on argument, to impute liability for the omission of the marshal concerned to WPA on the basis of vicarious liability. However, as pointed out by *Mr Mauritz* who appeared for WPA, this was not the plaintiff's pleaded case. She did not allege that the marshals were employees of WPA; nor did she plead the scope of their duties at the relevant time (save for oblique references to their failure to *'adequately'* protect the plaintiff and warn her and other members of the public of the dangers concerned as amplified in her trial particulars).[2] In any event vicarious liability was not established on the only evidence led on the issue, namely that of Mr Jacobs. I will also deal with this hereunder.

[10] As far as Kalmer is concerned, the plaintiff alleged that she bore the duty to take effective and reasonable steps to safeguard the plaintiff from sustaining *'undue physical harm'*, and to protect and preserve her bodily integrity and dignity, by not pushing her out of the way. It was pleaded that Kalmer failed to *'recognise'* this duty when by the exercise of reasonable care she could and should have done so.

[11] In its plea, WPA alleged that it did, in fact, arrange the presence of adequate, experienced and sufficient marshals for the event in question. In pleading sole negligence, alternatively contributory negligence on the plaintiff's part, WPA

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2 See fn 1 above.

alleged that she: (a) failed to keep a proper lookout; (b) failed to notice Kalmer approaching her, alternatively to move out of her way; and (c) failed to avoid the incident when by the exercise of reasonable care she could and should have done so.

[12] Similar averments were made against Kalmer in the further alternative; and reliance was also placed, as yet a further alternative, on the conduct of the plaintiff and/or Kalmer at the time of the incident constituting a *novus actus interveniens* such as to relieve WPA of any liability.

[13] In her amended plea Kalmer alleged that the plaintiff stepped into her path while she was running at approximately 20km per hour and Kalmer shouted the word *'watch'* before raising both arms to brace for the impact. The two thereupon collided and the plaintiff fell to the ground as Kalmer was forced to a standstill, but thereupon continued with the race.

[14] She pleaded that the incident was due to the sole negligence of the plaintiff who: (a) failed to keep a proper lookout for athletes who participated; and (b) stepped into *'the road'* while the race was in progress as the second group of runners (one of whom was Kalmer) were fast approaching, in order to take a photograph of a group of participants in the (5km) fun walk.

[15] Kalmer denied that she had any duty of care towards the plaintiff, but admitted that WPA bore the duties pleaded by the plaintiff against it. Consequential

averments were made in the alternative in relation to the breach of those duties of care in order to support a defence of contributory negligence.

The relevant evidence

[16] Ms Olckers testified that she arrived at the Promenade along with her mother, cousin and a family friend at around 07h30 to participate in the 5km fun walk. After alighting from their vehicle she spotted the plaintiff and her companion standing against the guard rail on the opposite side of the pavement. She decided to ask her to take a group photograph.

[17] With reference to video still footage[3] she identified herself and the plaintiff. The footage depicts Olckers having already crossed the pavement to the plaintiff and the latter holding Olckers' camera in her hands. A group of three runners with competition numbers on their chests are clearly visible moving past the pair on the pavement. These were described by Olckers as the front runners, who she saw. On the footage both Olckers and the plaintiff are looking in the direction from which the runners approached.

[18] The next set of still footage,[4] also identified by Olckers, reflects the plaintiff facing in the direction of Olckers and her party across the pavement, holding the camera in order to take the photograph. By then the plaintiff had moved a short distance away from the guard rail into the area where the first group of runners had passed on the pavement. Also clearly visible is another runner,

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3 Exhibit "B", photos M and N, p7.
4 Exhibit "B", photos O and P, p8.

who must have already passed the plaintiff, a few metres further away. This means that, on the objective evidence, no less than four athletes had passed the plaintiff in very close proximity by the time she took the photograph; yet in her trial particulars the plaintiff's response was that she *'did not observe the leading group of runners passing her'*.

[19] Olckers' evidence was further that after the plaintiff took the photograph she and the plaintiff crossed the pavement from their opposite directions for Olckers to retrieve her camera. While facing each other roughly in the middle of the pavement, another runner (who it became common cause was Kalmer) came along at speed, shouting at her and the plaintiff to *'get out of my way'*, and pushing the plaintiff who fell to the ground, whereafter Kalmer immediately continued her race without stopping.

[20] Olckers testified that there was *'plenty of space'* for Kalmer to have run around the pair. She seemed to suggest that instead Kalmer intentionally ran straight at them. According to Olckers there were no marshals *'around us'* at the time, nor any indication that a race was under way. This was peculiar, given her earlier testimony about the still footage which, at the risk of repetition, quite obviously shows the presence of no less than four athletes clearly involved in a race; as well as her further testimony that after the incident her mother called for assistance from someone who she later realised was a marshal, and who she described as a young lady in a pink top.

[21] During cross-examination on behalf of WPA, Olckers stated that she assumed the young woman was a marshal because she was holding a red flag. She also conceded that, given the direction in which both she and the plaintiff had been looking, this particular marshal would have been directly in their line of vision when the first group of runners passed; that she and the plaintiff had been standing in reasonably close proximity to her; and that, given the fact of the race and runners passing on the pavement, it was likely that other runners too would approach.

[22] Although her evidence was that this individual in the pink shirt bearing a red flag did not respond to the request for assistance after the incident, the fact of her presence contradicted Olckers' earlier claim that there were none in close proximity. The still footage reflects a young woman in a pink T-shirt further along from the plaintiff (in the direction from which the runners were approaching) at the time she was taking the photograph.[5] During the course of the trial the parties agreed that the distance between where the incident occurred and a set of three bollards in the direction from which the runners approached was 11.47 metres. The marshal concerned is reflected in the footage standing almost adjacent to those bollards at the entrance to a parking area.

[23] Olckers conceded having heard cheering from bystanders as the first group of runners approached. She also conceded that a member or members of her party warned the plaintiff to move back at that time (to avoid colliding with these runners) and the plaintiff heeded that warning. She initially conceded that a

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5 Exhibit "B", photo O, p8.

second warning was given by them for the plaintiff to stay back as the next group of runners approached at speed, but later claimed to have no recollection of this. Finally, she conceded that despite clear visibility and a straight stretch of pavement she did not see Kalmer approaching; and indeed that she failed to look out for approaching runners when again moving onto the pavement to fetch her camera from the plaintiff. She also expressed the view that the plaintiff would also not have kept a lookout since they were looking at each other.

[24] The Court is of course left in the dark as to how the plaintiff herself, despite the objective evidence of the footage and the testimony of her own witness that at least one warning to her by a member(s) of Olckers' party was heeded, somehow was nonetheless unaware of the race and presence of the runners; what she herself saw or heard; and how the incident occurred from her perspective.

[25] Given Olckers' concession that she did not see Kalmer approaching, it follows logically that she could not gainsay, as Kalmer claimed, that the plaintiff was moving into her path when she first observed her. The highwater mark of Olckers' testimony in this regard was that she and the plaintiff *'connected for a moment'* immediately prior to the collision.

[26] It is convenient to deal next with Kalmer's evidence since, in light of the ultimate narrowing down of the plaintiff's case, much of Jacobs' lengthy testimony about his qualifications and experience as the individual with overall responsibility for

organising the race, and the arrangements themselves, was rendered superfluous.

[27] It was undisputed that Kalmer, an elite athlete, was a serious contender for points and prizes in the 2014 Grand Prix Series of Spar 10km events, of which the Cape Town event was the first for that year. Her impressive running pedigree including her top 5 finishes in the South African championships for 2012 and 2013, her third placing in the Spar Grand Prix Series for 2012, and fourth or fifth for 2013, was also not challenged. She was accordingly by no means a casual participant in the 2014 event; she ran competitively to achieve the fastest time possible.

[28] In her testimony she described this particular race as the shortest in which she participates. For a race such as this, the first 200 metres is a sprint, and from then on she runs *'in the red'* and at *'maximum heartrate'*. The intensity of the race was further evident from the pace at which Kalmer ran, at 3 minutes 20 seconds per kilometre or 5 metres per second.

[29] It was undisputed that during her participation she complied with the rules of the race, running on course and, at the time of the incident itself, in the middle of the pavement where she was expected to be running.

[30] Her evidence was further, confirmed later by Jacobs in his testimony, that as a serious competitor she focused on the running of her race, her breathing and the positions of her competitors, not on spectators along the route. In particular

she concentrated on the route 5 metres ahead of her, looking up occasionally to check the positions of her closest competitors.

[31] According to her, she first noticed the plaintiff when she looked up and saw her probably 5 to 8 metres ahead, moving into her path from right to left. Given the speed at which she was running, she collided with the plaintiff probably 1 ½ seconds later.

[32] Kalmer denied that in the circumstances she had the opportunity to avoid the collision by veering around the plaintiff, stating that if she had the chance she would have done so. This makes sense since logically any elite athlete will take avoiding action if there is an obstacle in her way which, if she collides with it, would cause her to lose precious time or risk injury.

[33] In similar vein, Kalmer's evidence was that she did not deliberately push the plaintiff out of her way *'since it would have slowed me down in my race'*. Rather, acting instinctively, she may have lifted her right arm either to brace for the impact or simultaneously with the collision. Although forced to a standstill: *'The lady fell over. Seeing that we were in the race, I didn't stop to hear if she was okay and I continued with my race'*, ultimately finishing in sixth or seventh position. It was also her testimony that this type of incident had never happened to her before, despite previous participation in the same race.

[34] In cross-examination by *Mr Tredoux* she stated that she had no knowledge of who enjoyed right of way along the race route in terms of the permit issued by

the City to WPA for the event. She was referred to the permit[6] which stipulates in clause 13 that *'the right of passage along the road cannot be denied to any person wishing to exercise that right'*, seemingly in an attempt to suggest that the plaintiff (as a member of the public) therefore enjoyed the right of way, or at least an equal right of way.

[35] To my mind this was not only inaccurate, but contrived. Clause 13 refers specifically to *'the road'*, not the race route which it was common cause included sections of the pavement at the Promenade. In addition Olckers herself had parked on the road adjoining the pavement where the incident occurred, and it was undisputed that vehicles moved along those portions of the road during the race with oversight by City traffic officials.

[36] Kalmer's evidence was further that, although she was aware of the potential of spectators along the route, she was not informed there might be other pedestrians walking along the pavement that morning. However even if she had, this would have made no difference to how she ran her race *'because in my mind spectators are aware of the race and have an interest in the race'.* She was aware of the bollards and had planned accordingly.

[37] She repeated that, as she recalled the incident, the plaintiff was in any event not stationary when she first noticed her but was moving into her path. Kalmer maintained that she was entitled to run her race as she did, given that no

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6 Exhibit "A" pp48-50.

restrictions were placed on the athletes about where to look or how to focus. She denied that in all the circumstances she failed to keep a proper lookout.

[38] Much was made on the part of the plaintiff about the failure to challenge Olckers' testimony that at the time the plaintiff and Kalmer collided, Olckers and the plaintiff were stationary. In my view this is a red herring, since as previously stated, on Olckers' own version she and the plaintiff had approached each other across the pavement; had only *'connected for a moment'* before Kalmer collided with the plaintiff, and she (Olckers) had herself not kept a proper lookout. The plaintiff bore the onus but did not adduce a shred of evidence to refute Kalmer's version that she first noticed the plaintiff moving into her path roughly 1 ½ seconds before the collision. In addition, even slight movement into Kalmer's path was nonetheless a movement which could have significant consequences, given the speed at which she was running.

[39] Also relevant is that both Olckers and Kalmer testified that the latter shouted a warning to the plaintiff. That the plaintiff appeared not to have responded to that warning lends support for Kalmer's version that by then it was in any event probably too late to avoid the collision. It further makes no sense that, had there been sufficient time, one or both would not have bothered to take avoiding action, even instinctively. Kalmer was not on a mission of self-destruction or to deliberately cause harm to others. Such was the urgency of the moment that she did not even recall having seen Olckers on the pavement as well.

[40] In any event there is a difference between reasonably foreseeing the presence of spectators at such an event and being expected to reasonably foresee that at least two of those spectators (one of whom was Olckers herself, given that she had not yet commenced the fun walk) would move into one's path of travel. Olckers could not dispute that Kalmer was running exactly where she was entitled to. Her complaint was rather that Kalmer could and should have taken avoiding action but instead deliberately pushed the plaintiff.

[41] I will deal only with the salient aspects of Jacobs' testimony. He explained that the development of a marshal plan is an integral component of the overall plan presented to the City to secure the required permit for the event.

[42] WPA itself did not employ the marshals concerned. They were volunteered by athletic clubs of which the marshals are members, and were required to be over the age of 18 years with running experience. Their duties encompassed directing athletes to follow the course, ensuring they covered the correct distance, and protecting them from vehicles or individuals encroaching on the route. All marshals attend the final briefing a week before the event, and on the day prior to the race itself attend the race route to familiarise themselves with it.

[43] When referred to clause IX of the permit which required marshals to be equipped with reflective vests and red flags, Jacobs explained that for this particular event approval had been obtained from the City for them to instead be attired in branded pink T-shirts. The City officials, having granted permission,

were thus aware thereof before issuing the permit, although some of the marshals with more prominent duties (such as leading the group of front runners on bicycles) wore reflective vests and were also equipped with whistles to warn individuals approaching the runners of the race along the Promenade.

[44] During cross-examination by *Mr Tredoux* he was referred to clause VII of the permit which stipulated that *'Notwithstanding the deployment of the Traffic Officers requested, the Event Organiser will ensure sufficient marshals are deployed along the route to ensure the safety of participants and spectators'* [emphasis supplied]. Jacobs responded that WPA's first priority was for the marshals to ensure the safety of the athletes along the route. Had an incident of the nature complained of occurred previously then safety of spectators would no doubt have enjoyed similar priority, and the marshals would have been briefed accordingly. Jacobs had been in overall responsibility for this particular event since 2007 and such an incident had never before occurred.

[45] He conceded that a cheap and easy option to promote safety of members of the public would have been to equip the marshals with whistles which they could use to sound warnings in circumstances such as these. He also conceded that this particular marshal should have been keeping *'an eye out'* and sounded a warning to the plaintiff.

[46] To my mind however these concessions must be viewed in proper context. First, the evidence of the plaintiff's own witness (Olckers) established that before Kalmer approached at speed the plaintiff herself must have been aware

of the race and the runners, yet she inexplicably elected not to testify or present any evidence to the contrary.

[47] Second, there was no evidence about when exactly this marshal (who, on the unchallenged testimony of Jacobs, was monitoring movement of vehicles and members of the public into and out of the parking lot) could reasonably first have observed Kalmer approaching at speed; and on Olckers' own version, she had not kept a lookout and had only momentarily connected with the plaintiff at the time of the incident.

[48] Third, and accordingly, it seems most unlikely, on Kalmer's version, that when the plaintiff moved into her path, the marshal would have had sufficient time to sound the warning even had she observed the plaintiff doing so, and, even if she had, that the plaintiff would have been able to move away quickly enough.

[49] Fourth, and this goes to foreseeability, on the undisputed facts Kalmer was not far behind the group of front runners. The possibility can therefore not be excluded that the marshal concerned may have assumed that the plaintiff would have maintained a proper lookout.

Discussion

[50] To sum up, the plaintiff ultimately relied on two omissions and one act (commission) in seeking to hold the defendants liable. The act complained of, i.e. that Kalmer allegedly pushed her, was simply not established on a balance of probabilities for the reasons already given in my evaluation of the evidence.

[51] In order to succeed with her claims the plaintiff must therefore have shown that the defendants were guilty of conduct (in the form of an omission) which was negligent, wrongful and the cause of her injuries.

[52] The starting point is the dictum of Harms JA in *Telematrix (Pty) Ltd v Advertising Standards Authority SA*[7]:

> *'The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful ...'*

[53] The test for negligence is to be found in *Kruger v Coetzee*[8]:

> *'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 or property and causing him patrimonial loss; and*
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> *(ii) Would take reasonable steps to guard against such occurrence; and*
>
> *(b) The defendant failed to take such steps.*

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7 2006 (1) SA 461 (SCA) para [12].
8 1966 (2) SA 428 (A) at 430E-G.

> *... Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case...'*

[54] In *Za v Smith and Another* [9] Brand JA, referring to the test for factual causation, said:

> *'What it essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the "but-for test" is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common-sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty.'*

[55] As to wrongfulness, in *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* [10] Scott JA said:

> *'If the omission which causes the damage or harm is without fault, that is the end of the matter. If there is fault, whether in the form of dolus or culpa, the question that has to be answered is whether in all the circumstances the omission can be said to have been wrongful...To find the answer the Court is obliged to make what in effect is a value judgment based, inter alia, on its perceptions of the legal convictions of the community and on considerations of policy.'*

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9 2015 (4) SA 574 (SCA) para [30].
10 2000 (1) SA 827 (SCA) para [19].

[56] This was dealt with as follows in *Za v Smith*[11]:

> *'Reverting to the enquiry into wrongfulness – properly understood – in this case, it will be remembered that prior to the watershed decision of this court in* Minister van Polisie v Ewels *1975 (3) SA 590 (A), liability for omissions was confined to certain stereotypes. One of these was referred to as relating to those in control of dangerous property, who were said to be under a duty to render the property reasonably safe for those who could be expected to visit that property. After* Ewels, *those stereotypes did not become entirely irrelevant. They still afford guidance in answering the question whether or not policy considerations dictate that it would be reasonable to impose delictual liability on the defendant in a particular case, although these stereotypes no longer constitute the straitjackets that they were before* Ewels*....'*

[57] In *H v Fetal Assessment Centre*[12] it was said that:

> *'[51] Our pre-constitutional law of delict is not couched in terms of a duty to protect fundamental rights. It is clear, however, that many interests and rights protected under the common law quite easily translate into what we now recognise as fundamental rights under the Constitution...*
>
> *[67] In addition to the general normative framework of constitutional values and fundamental rights, our law has developed an explicitly normative approach to determining the wrongfulness element in our law of delict. It allows courts to question the reasonableness of imposing liability, even on an assumption that all the other elements of delictual liability – harm, causative negligence and damages – have been met, on grounds rooted in the Constitution, policy and legal convictions of the community...'*

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11 (supra) at para [20].
12 2015 (2) SA 193 (CC) at paras [51] and [67].

[58] In *Le Roux and Others v Dey*[13] the Constitutional Court also pointed out that:

> *'Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'*

[59] In *MTO Forestry (Pty) Ltd v Swart N.O.*[14] the Supreme Court of Appeal cleared up the previous confusion about whether foreseeability should be taken into account for purposes of both negligence and wrongfulness:

> *'It is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion will have the effect of the two being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability. Accordingly, I think the time has now come to specifically recognise that foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation.'*

[60] *Mr Combrinck SC*, who appeared for Kalmer, also placed reliance on *Clark and Another v Welsh*,[15] a case which dealt with delict in the context of spectators and participants in sporting events. The learned Judge reviewed a number of decisions (including those in England) on the topic, and ultimately concluded

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[13] 2011 (3) SA 274 (CC) para [122].
[14] 2017 (5) SA 76 (SCA) at para [18].
[15] [1975] 4 All SA 124 (W).

that,[16] as far as spectators are concerned, the same principles apply as those set out in *Kruger v Coetzee*.

[61] With reference to the English authorities referred to in *Clark*, the following considerations apply to an alleged omission:

61.1 Regard must be had to the nature of the event in which Kalmer participated, the special circumstances of the occasion, and the rules applicable to her;

61.2 The matter must be considered both from the point of view of the reasonable spectator as well as the reasonable participant, because what a reasonable spectator would expect a participant to do without regarding it as blameworthy is as relevant to "reasonable care" as what a reasonable participant would think was blameworthy conduct in herself;

61.3 A reasonable spectator knows and presumably desires that a reasonable participant will concentrate her attention on winning, and if the game or competition is a fast moving one, will have to exercise her judgement and attempt to exert her skill in what, in the analogous context of contributory negligence, is sometimes called *'the agony of the moment'*. If the participant does so, whether any mistake she makes

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[16] at 131.

amounts to a breach of a duty to take reasonable care must take account of those circumstances; and

61.4 The participant is entitled to expect the spectator to have such knowledge of the activities, and such vigilance for her own safety, as might reasonably be expected to be possessed by a person who chooses to watch the event.

[62] Given the absence of any evidence as to how the plaintiff came to be standing against the guard rail while a race was in progress when Olckers first spotted her that morning, the Court must assume that, at least by that stage, she was to all intents and purposes a spectator.

[63] The evidence established that the plaintiff must have been aware that a race was under way; that the athletes involved were running at speed; that someone who was presumably a marshal (bearing a red flag) stood just less than 12 metres away from her; and she must reasonably have anticipated that other runners would soon be approaching at similar speed.

[64] In these circumstances both WPA and Kalmer could reasonably have anticipated that the plaintiff would keep a proper lookout and would not simply disregard her own safety as well as that of the race participants, by stepping into the path some had just travelled in the middle of the pavement and where others would no doubt shortly follow suit.

[65] The evidence also established that, even had WPA equipped the marshal concerned with a whistle it is unlikely that, by using it to sound a warning when Kalmer approached, the incident would not have occurred. Kalmer was running her race as she was entitled to do; it could not have been reasonably expected of her to foresee that the plaintiff would ignore the probability of another participant such as her approaching at speed, and nonetheless move into the *'danger zone'* of which she must already have been aware; and in any event Kalmer did attempt avoiding action when confronted with the obstacle moving into her designated path of travel in the form of the plaintiff by shouting out the word *'watch'*.

[66] I am therefore compelled to the conclusion that neither defendant would have foreseen the reasonable possibility that a failure to sound an earlier warning to the plaintiff would cause her injury. This being so, it was not incumbent on either defendant to take steps other than those which they did to guard against such an occurrence in the particular circumstances of the matter. The plaintiff has thus failed to discharge the onus which she bears that either were negligent. Considerations of wrongfulness therefore do not arise because they only come into play when causative negligence has been established.

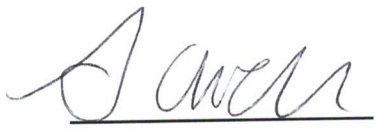
Costs

[67] In a supplementary note filed on behalf of WPA it was made clear that it would not seek costs against Kalmer in respect of its third party proceedings against her should the plaintiff's claim be dismissed. In heads of argument filed on behalf of Kalmer she abandoned any reliance on her third party claim against

WPA. It therefore seems reasonable to order that, in respect of the third party proceedings, each defendant should bear their own costs. Other than that, there is no reason why costs should not follow the result. I wish to add, for purposes of taxation, that the employment of senior counsel to represent Kalmer, given the importance of the matter to the parties and the implications for her personally, was in my view warranted.

[68] **The following order is made:**

1. **The plaintiff's claim against the first and second defendants is dismissed with costs on the party and party scale as taxed or agreed (including, in the case of the second defendant, the costs of senior counsel employed by her) and including any reserved costs orders, but excluding the costs referred to in paragraph 2 below.**
2. **In respect of the third party proceedings instituted by the first and second defendants against each other, each defendant shall pay their own costs.**



J I CLOETE