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

REPORTABLE

CASE NO: A 205/2021

In the matter between:

GAIRONISA DAVIDS NO
(in her capacity as the Executor in the estate:
Late Jasmin Salie) Appellant

and

WESTERN PROVINCE ATHLETICS First Respondent

KRISTINE KALMER Second Respondent

Bench: E. Baartman, P.A.L. Gamble and N. Mangcu-Lockwood JJ

Heard: 18 July 2022

Delivered: 1 November 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 1 November 2022.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. This is a running down case: literally. On the morning of Sunday 6 April 2014, Ms. Jasmin Salie ("Ms. Salie") and a friend took a stroll along Cape Town's famous Promenade in Sea Point. At the conclusion of her walk, Ms. Salie was knocked to the ground by the second appellant, Kristine Kalmer ("Ms. Kalmer"), who was an athlete participating in a race along, inter alia, the Promenade organized by the first appellant ("the WPA").

2. Ms. Salie sustained a fracture of the hip as a consequence of the collision with Ms. Kalmer and was taken off to hospital by ambulance where she subsequently underwent hip replacement surgery. She later sued the WPA and Ms. Kalmer, jointly and severally, for her damages arising out of the collision.

3. The matter proceeded to trial before Cloete J in this Division at the end of 2020. On 19 March 2021 Her Ladyship dismissed Ms. Salie's claim with costs and later refused an application for leave to appeal. The matter is before this Court by virtue of an order of the Supreme Court of Appeal made on 7 July 2021. Subsequent to the trial, Ms. Salie died from causes unrelated to the incident on 6 April 2014 and the appellant, Ms. Gaironesa Davids, was substituted in her capacity as the executor of Ms. Salie's deceased estate.

4. At the hearing of this appeal the appellant was represented by Mr. P. Tredoux while Messrs H. Loots SC and N Mauritz appeared for the WPA and Mr. P. Combrinck SC represented Ms. Kalmer.

THE SPAR LADIES' RACE

5. The Spar Ladies' Race is an annual athletics event organised by the WPA and sponsored by the Spar supermarket group. It comprises three different races all of which start and end at the Cape Town Stadium in Green Point. It is evidently a well-publicised event and draws many thousands of female runners: from professional and competitive runners to those less serious athletes who dress up in a variety of costumes and participate in a so-called "Fun Walk".

6. The most competitive race is the “10km Grand Prix” event. This is a race in which professional and so-called “elite athletes” participate in the hope of clocking either the winning time on the day or a competitive time which is then added to that runner’s times in other similar events held across the country. For each performance the elite runners are allocated points and at the end of the series of races the runners are awarded substantial monetary prizes commensurate with the aggregate of their respective points. Ms. Kalmer was, at the time of the collision, an elite athlete who excelled over the 10km distance.

7. In addition to the Grand Prix event there was a 5km race for women who preferred to compete over the shorter distance and then there was the Fun Walk. The start of the respective races was staggered so as to avoid congestion. The 10 km race commenced in front of the Cape Town Stadium and then eventually followed a route along the Sea Point Promenade in a westerly direction towards the Sea Point swimming pool where it looped back along Beach Road (which is the main thoroughfare adjacent to the Promenade) towards the Stadium. It is not clear when the 5km race started, but the evidence indicates that the Fun Walk commenced well after the competitive races.

8. Much of the 10 km race was captured on a video camera operated by a photographer mounted onboard a motor cycle which accompanied the front-runners. This video was placed before the court *a quo* and this Court viewed the appropriate snippets. In addition, certain still photographs were extracted from the video footage and utilised in the evidence before the court *a quo.*

9. At the relevant point in the race, the video reflects the front runners – at that stage a quartet – and those in hot pursuit, including Ms. Kalmer who was lying fifth or sixth at a distance of perhaps a couple of hundred metres behind the leading pack. Unfortunately, the camera continued to track the front runners and so the collision between Ms. Salie and Ms. Kalmer itself was not captured. Nevertheless, there is sufficient video and photographic material to provide adequate corroboration of the *viva voce* testimony of the eye witnesses to this unfortunate calamity.

THE TOPOGRAPHY

10. Before reviewing the pertinent evidence, it is necessary to describe the layout of the area along the 10 km route leading up to the collision. As I have said, after the start of the race alongside the Cape Town Stadium, the runners headed south along Fritz Sonnenberg Road before swinging left at the intersection with Granger Bay Boulevard and taking a wide loop past the entrance to the V&A Waterfront and the Radison Blu Hotel in Granger Bay. The runners then ran down Beach Road in the general direction of the lighthouse past the T – intersection with the other leg of Fritz Sonnenberg.

11. About 300m or so from that intersection the sidewalk along Beach Road splits and on a normal day a pedestrian can proceed westwards along the tarred sidewalk or swing immediately right onto the Promenade which is a brick-paved walkway about 10m wide which tracks the flow of the coast line. It is bounded on the sea-side by a metal safety-railing consisting of a number of parallel bars and on the other side by a low stone-clad wall about 500m high – an ideal place for weary dog-walkers, for instance, to rest. In addition there are various public benches scattered along the Promenade at regular intervals offering respite to the public. The elite runners followed this route along the Promenade.

12. Generally, there are public open spaces between the sidewalk and the Promenade as Beach Road runs more or less parallel with the Promenade. These open spaces are wide grass-covered areas where any form of leisure activity, be it dog-walking, picnicking, ball games, kite-flying and the like, might be undertaken. They are obviously areas designated for the pleasure of the general public. Occasionally, the Promenade and the sidewalk converge, such as at Three Anchor Bay and Rocklands Beach where all pedestrians are then obliged to walk on the tarred sidewalk.

13. Mouille Point is famous for its historical light house and there is a parking area between it and the Promenade where visitors and sightseers might park. The light house is located on Beach Road and is perhaps 400m or so from the area at Three Anchor Bay where the Promenade and the sidewalk converge. Adjacent to that

convergence is another parking area, commonly referred to as the “Putt-Putt parking” because of the miniature golf course nearby.

14. Vehicular access is obtained to that parking area directly from Beach Road. Further, between the Putt-Putt parking area and the tarred sidewalk there is a steep ramp which runs down to the slipway at Three Anchor Bay. The ramp is guarded similarly to the Promenade, with safety railings on either side. On either side of the access road to the parking area are a three concrete bollards anchored in the sidewalk to prevent motor vehicles from accessing the sidewalk.

15. On any ordinary day, one would have expected the runners in the 10 km race to follow the Promenade as far as its confluence with the sidewalk at Three Anchor Bay. However, it seems from the video recording that there was some maintenance work or the like being done on the Promenade between the Lighthouse parking area and the Putt-Putt parking area. Accordingly, runners were diverted from the Promenade back to the sidewalk immediately after the Lighthouse parking area along a footpath and then via the road to the parking area itself. Having been thus diverted, the runners swung right onto the tarred sidewalk along Beach Road and headed towards the confluence of the sidewalk and the Promenade at Three Anchor Bay.

16. As they ran down the sidewalk the runners passed a children’s playground, the famous miniature Blue Train (another sea-side attraction for children) an open grassed area, a disused Victorian maze and the Putt-Putt course itself, before arriving at the vehicular entrance to the Putt-Putt parking area where they were required to run between the sets of bollards. Thereafter they would have run towards the confluence with the Promenade with the safety railings to the slipway on their right and Beach Road on their left.

17. At that stage Beach Road has space for parallel parking for vehicles between the road surface and the sidewalk. Once the runners passed the aforesaid confluence they continued along the sidewalk as it bends past the inlet of Three Anchor Bay whereafter they turned back onto the Promenade, which shanks off to the right as the sidewalk continues straight ahead.

THE EVIDENCE

18. Although she was available, Ms. Salie did not testify. The sole witness called for the plaintiff was a certain Ms. Leonie Olckers, who was a participant in the Fun Walk that day and who witnessed the collision between Mesdames Salie and Kalmer. The WPA called Mr. Willie Jacobs, one of its administrators involved in the organizing and safety of events such as the Spar Ladies Race, while Ms. Kalmer testified in person.

19. Before us on appeal, Mr. Tredoux readily conceded that Ms. Salie had been negligent in failing to keep a proper lookout and observing Ms. Kalmer advancing apace down the sidewalk. He submitted that Ms. Kalmer was likewise negligent in colliding with Ms. Salie, while it was further contended that the WPA was negligent in relation to its organization and management of the race generally and in particular at the locality at which the collision occurred. The focus of the case on appeal then is whether the alleged causal negligence of the two respondents and the extent thereof, if any, in relation to the admitted negligence of Ms. Salie, was established before the court *a quo*.

THE TESTIMONY OF MS OLCKERS

20. The evidence of Ms. Olckers was that she and three friends drove to the area in search of a parking spot close to the Stadium before setting off on the Fun Walk. They were fortunate to secure kerbside parking in Beach Road just a short distance away from the entrance to the Putt-Putt parking area. They stood next to their car facing the sidewalk and wanted someone to take a photograph of them for posterity's sake before they set off on their adventure. They spotted the hapless Ms. Salie taking her Sunday walk with her friend Ms. Keraan and asked her if she would oblige. As it turned out, Ms. Salie was in the wrong place at the wrong time.

21. When Ms. Salie agreed to assume the role of photographer *pro tem*, Ms. Olckers said she walked across the sidewalk, which it is common cause was some 6 meters wide, and handed her camera to Ms. Salie. Certain of the still photographs taken from the video clearly demonstrate Ms. Salie standing with her back to the railings guarding the slope down to the slipway, holding up the camera and preparing

to take the proverbial “happy snap”. She did not appear to do so immediately as the group of front runners can be seen running right past her, just a meter or two away.

22. It was common cause that the front group were preceded by a group of cyclists acting as escourts – some rode on the sidewalk and others on the road behind the motorcycle with the videographer on board. There were no cyclists accompanying the other groups of runners further back.

23. Ms. Salie can then be seen holding up the camera to her eye and taking a photograph. Shortly after this, the collision occurred but, as I have said, that was not captured on film. Nevertheless, proof of her assistance was demonstrated in evidence when Ms. Olckers identified a photograph of herself and her three friends standing with their backs to their car, gleefully looking towards the camera held by Ms. Salie.

24. Ms. Olckers said in evidence that after the photograph had been taken she and Ms. Salie walked towards each other across the sidewalk to enable her to retrieve the camera. Ms. Olckers said that as she did so she did not see any runners approaching from her right and thought it was safe to venture towards the middle of the sidewalk for the camera handover.

25. Ms. Olckers said that before she could retrieve her camera, she heard Ms. Kalmer (later duly identified by her running number - 2 – pinned to her vest) shout a warning (words to the effect of “get out of my way”) and saw her forcefully push Ms. Salie aside. Ms. Salie was knocked to the ground as Ms. Kalmer sped by at approximately 20 kph: the speed at which Ms. Kalmer later estimated she was running. With reference to a photograph taken later by an investigator, Ms. Olckers said that the collision was approximately in the middle of the sidewalk.

26. Ms. Olckers said that she and her friends were shocked to see what had just happened and, in particular, that Ms. Kalmer took no steps to stop and address the situation, but rather kept on running regardless. An ambulance was called and after some time Ms. Salie was taken off to hospital.

27. There was some debate in the cross-examination of Ms. Olckers by Mr. Combrinck as to whether she had warned Ms. Salie at any stage of the fact that there

were runners approaching. Use was made by counsel of a collection of statements deposed to by others including, inter alia, a statement by one of Ms. Olckers' fellow fun walkers, Ms. Carla Sade Roberts, in which it was suggested that Ms. Olckers had warned Ms. Salie of the approach of the second group of runners. The cross-examination on the strength of this statement is of little assistance as Ms. Kalmer's counsel did not call Ms. Roberts or any of the other deponents to testify.

28. But for the sake of completeness it is appropriate to relate Ms. Olckers' evidence on this score. Initially, in response to the allegation made in the statement – "*We cautioned Ms. Salie to remain where she was because a next group of three runners were also approaching fast*" – Ms. Olckers said "*That is right.*"

29. The transcript of the relevant evidence continues as follows;

> "*Mr. Combrinck: So she was warned again to remain where she was because there is another group coming?*
>
> *Ms. Olckers: That is right.*
>
> *Mr. Combrinck: Is that right? So my understanding then is she has been warned twice about runners coming along the Promenade?*
>
> *Ms. Olckers: That is correct.*
>
> *Mr. Combrinck: According to this statement, is that right?*
>
> *Ms. Olckers: That is right.*
>
> *Mr. Combrinck: And that's your recollection too?*
>
> *Ms. Olckers: Yes, yes it is.*
>
> *Mr. Combrinck: And the reason why is because if she was in the way she was possibly going to get knocked over. Is that right?*
>
> *Ms. Olckers: Yes.*"

30. A short while later, after counsel had alerted Ms. Olckers to, inter alia, the allegations made in Ms. Keraan's statement and dealt with other issues, he returned to the question of the second warning.

> *Mr. Combrinck: So here is the question, Ms. Olckers, Ms. Salie was warned twice to stay out of the way because of the front bunch of runners first coming through and warned against the second bunch of runners coming through?*
>
> *Ms. Olckers: Let me just recall the first bunch, yes, and we asked her to move back because she took the picture, yes. Okay."*

31. Counsel then re-read part of Ms. Roberts' statement to the witness, and asked here again to confirm that Ms. Salie had been cautioned "*to remain where she was because a next group of three runners were also approaching fast."* The transcript continues as follows;

> *Ms. Olckers: I can't confirm the second one. I know that we've told her to go back for the first bunch which was the ladies that we can see on this page.*
>
> *Mr. Combrinck: Ja.*
>
> *Ms. Olckers: Like I said I was standing with her. It could be. I don't know, I can't remember if there was more runners approaching after that but I know that we have told her to stay back for the first time when she took the picture.*
>
> *Mr. Combrinck: Well this seems to be the recollection of the rest of your group standing against the car. It seems like there was another warning given to Ms. Salie?*
>
> *Ms. Olckers: Okay maybe there was. I just can't recall the second one but I know the first one we told her just to move back to give way to them.*"

32. Given the apparent contradictions in the evidence and the later uncertainty of the witness, it would, in my considered view, be wrong to find on the evidence that Ms. Salie was specifically cautioned about the approach of Ms. Kalmer. In any event, this does not seem to have been likely on the probabilities. It would not have been reasonable for Ms. Olckers to venture out towards the middle of the sidewalk to retrieve the camera, knowing full well that Ms. Kalmer and others were approaching and that a warning to that effect had been given.

33. The reasonable inference to be drawn on the facts is rather that neither Ms. Olckers nor Ms. Salie saw the group of which Ms. Kalmer was a member

approaching and hence thought it was safe to hand over the camera. Clearly, both Ms. Olckers and Ms. Salie failed to keep a proper lookout in the circumstances and Ms. Salie's failure constituted negligence on her part in relation to the bodily injuries which she sustained in this unfortunate collision.

34. The issue for determination, rather, is whether Ms. Salie's injuries were attributable solely to her negligence or whether Ms. Kalmer and/or the WPA were also negligent in the circumstances. I shall consider, firstly, the position in relation to Ms. Kalmer.

THE TESTIMONY OF MS KALMER

35. Ms. Kalmer's evidence established that she was an experienced and accomplished middle distance runner at the time. She competed regularly throughout the country for her team (Boxer Athletics Club) and had excelled in her sport as an elite runner. She worked as a civil engineer and was familiar with the basic scientific principles of speed and motion: she confirmed under cross examination that she appreciated the potential impact of her body weight of some 55kg moving into a stationary object like Ms. Salie. Ms. Kalmer explained to the court *a quo* that her style was to run to her own pace set on her wrist watch. Her pace was set at three minutes and twenty seconds per kilometer which translated into approximately five metres per second or 20 kph. In running terms that was fast.

36. Ms. Kalmer went on to describe how her style was to focus on the ground immediately ahead of her, looking down as she concentrated on keeping to her pace. One is left with the abiding impression that she was running as if in a bubble, oblivious to what was happening around her and intent only on achieving her goal of winning the race. Ms. Kalmer clearly cannot be criticized for adopting such a style. However, in participating in the Spar 10km race that day Ms. Kalmer was not running on an enclosed circuit or track, such as one sees, for example, when a track athlete runs the 10 000m in the Olympic Games. She was in a public space which was open to all-comers on that day and it is indisputable that all runners participating in the event had to take account of this as they ran along either the Promenade or the sidewalk.

37. Moreover, the evidence of Mr. Jacobs was that the race permit from the City of Cape Town granted to the WPA on 4 April 2014 in respect of both the 5 and 10km events contained the City's "Standard Conditions" which confirmed, inter alia, the right of passage to ordinary citizens using the roads in the area.

> "13. (T)hat the right of passage along the road cannot be denied to any person wishing to exercise that right."

Mr. Jacobs explained that the local ratepayers' association had previously been consulted in respect of this condition and that the word "road" in the permit was understood by all concerned to include the sidewalks and Promenade. Further, he confirmed that the City was particularly concerned about the welfare of pedestrians along the route.

38. Lastly, on this point, Mr. Jacobs was asked by the court *a quo* as to what the status of pedestrians, dog-walkers and the like was on race day. He testified that all runners were informed via their pre-race information packs of the prospect of encountering, inter alia, pedestrians along the way and also that such an announcement was made at the start on the day of the race. When asked by the court *a quo* whether there were any road closures such as one might find during the running of the annual Two Oceans Ultra Marathon, Mr. Jacobs suggested that it was only the Cape Town Marathon that required road closures. He said that the Spar 10km Race was a much shorter race (effectively 5km out and 5km back) and thus the route did not warrant road closures or barricading off.

39. In addition, during the cross-examination of Mr. Jacobs on behalf of Ms. Kalmer, Mr. Combrinck accepted that pedestrians had the right of way on the sidewalk.

> *"Mr. Combrinck: What I find interesting, Mr. Jacobs, is that at this point here the athletes are sharing the same pedestrian walkway as members of the public, who are allowed the right of passage on that walkway.*
>
> *Mr. Jacobs: That is correct sir…*

Mr. Combrinck: …And these runners haven't been directed to remain on the road, they've been directed onto the pavement…And they're running on the pavement where there are other, potentially other pedestrians.

Mr. Jacobs: That's correct, sir."

40. In summary then, Ms. Kalmer entered a race which wound its way through an area where the prospect of encountering non-runners along the way was entirely foreseeable. She was thus under a duty to keep a proper lookout for any such potential obstacles as she sped along both the Promenade and the sidewalk in her quest to achieve maximum points on the day.

41. In the cases applicable to the duty of a driver operating a motor vehicle on a public road, it has often been said that, in order to keep a proper lookout, such driver was required to continually scan the road ahead and to be on the lookout for potential obstructions or danger.[1] In Nogude, Jansen JA put it thus.

"A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called "a general look-out": cf. *Rondalia Assurance Corporation of SA Ltd*. v *Page and Others*, 1975 (1) SA 708 (AD) at pp. 718H - 719B). It means –

"more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the road as well".(*Neuhaus, N.O*. v *Bastion Insurance Co. Ltd.*, 1968 (1) SA 398 (AD) at pp. 405H - 406A).

Driving with "*virtually blinkers on*" (*Rondalia Assurance Corporation of SA Ltd*. v *Gonya*, 1973 (2) SA 550 (AD) at p. 554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case."

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[1] See for example Nogude v Union and South-West Africa Insurance Co Ltd 1975 (3) SA 685 (A) at 688; Hockly v AA Mutual Insurance Association Ltd 1980 (1) SA 784 (A) at 794; Goldberg v Standard General Insurance Association Ltd 1980 (3) SA 200 (A).

42. In my view, Ms. Kalmer was under a similar duty and the breach thereof might render her negligent, depending on the circumstances. What was her testimony in that regard?

43. It was a clear day and Ms. Kalmer had a clear view up the sidewalk as she approached the point of collision from the direction of the Lighthouse. It is common cause that Ms. Salie was standing 11,5m beyond the entrance to the Putt-Putt parking area and to arrive at that point Ms. Kalmer would have had to pass through the spaces between the two sets of bollards.

44. Notwithstanding the questioning of Mr. Jacobs by her counsel, Ms. Kalmer testified that she did not know who had the right of way – runners or pedestrians. She accepted under cross-examination by Mr. Tredoux that where she focused her attention that morning was entirely her own affair and so she elected to focus on the ground just ahead of her and keep an eye out for her competition.

> "*I look 5 metres in front of me and every now and again I'll look up to see where the next participant is."*

45. Ms. Kalmer said that she did not look at pedestrians while running, believing that it was the function of the WPA to keep their movement in check. But even if she knew that pedestrians had the right of way, she said she would not have kept a look out for them because –

> "*I'm in a race. So, like I said, I'm not focused on what's going on outside of this race that I'm running."*

46. When pressed by counsel under cross-examination whether she would have changed her approach given the fact that pedestrians had the right of way she was resolute that she would not have done it any differently.

> "*Ms. Kalmer: I wasn't expecting for someone to cross my path as I was running.*
>
> *Mr. Tredoux: That was not the question. That's a different question. If you knew that, unlike other races, here there could be pedestrians along the same route*

that you were running, would you have changed the way you approached your running?

Ms. Kalmer: No

Mr. Tredoux: You would still have continued to just look on the ground in front of you and at the other runners without focusing on other users of the sidewalk. Do I understand you correctly?

Ms. Kalmer: Correct."

47. It is common cause that the point of collision was 11,5m beyond the bollards on the southern side of the entrance to the parking area. Ms. Kalmer said that she saw these and the other pair to the north as she approached from the Lighthouse and took care not to collide with them. Yet she said she did not see Ms. Salie until she was about 5m from her and claimed that at that stage Ms. Salie was moving across her path. The only thing she could do, said Ms. Kalmer, was to put up her arm and brace for impact. She denied in terms that she shouted out at Ms. Salie or that she pushed her to the ground. Further, she said that she was brought to a momentary halt by the collision, whereafter she took off again and raced away.

48. Counsel for Ms. Kalmer did not challenge Ms. Olckers' evidence much, save to allege that she did not push Ms. Salie out of her way. Importantly, counsel did not take issue with the evidence of the witness when she suggested that there was adequate room for Ms. Kalmer to avoid the collision by stepping around Ms. Salie on either the left or the right.

49. Nor was Ms. Olckers challenged on her impression that –

"*Yes, to me it looked like she just needs to complete the race. She is not bothered by what just happened. Her goal was to complete the race. That is how it came across to me personally. She didn't care enough as to (sic) the lady that was injured."*

Indeed, after hearing the evidence of Ms. Kalmer, it is clear that there was no basis for Mr. Combrinck to challenge this observation: it was spot on.

WAS MS KALMER CAUSALLY NEGLIGENT IN THE CIRCUMSTANCES?

50. In my considered view, a reasonable competitive runner in the 10km race that day ought to have been alive to the possibility that she might encounter other users of the sidewalk at close quarters. Further, I am of the view that such a reasonable runner would take into account the nonchalance and lack of interest of ordinary pedestrians who were out and about enjoying the fresh air rather than watching an athletics race. Ordinary human experience tells one that such persons might behave irrationally and get in the way, as it were.

51. In other words, the runner must foresee the possibility that such a person might cross her path and that she would be required to take evasive action in the circumstances where she was moving at speed in relation to the relatively stationary pedestrian. And, in the circumstances such as the present, it would take little more than the proverbial “jump to the left” (or to right for that matter) to avoid an inevitable collision. Had Ms. Kalmer been keeping a reasonable lookout on the day in question, it would have taken little effort to avoid Ms. Salie and not seriously affected her chances of competing in the race. In the words of the Appellate Division, her approach was rather a blinkered one and I conclude that she did not keep a proper lookout in the circumstances. In breach of that duty, she caused Ms. Salie harm.

52. The question that then follows is whether Ms. Kalmer could have avoided the collision in the circumstances. The evidence establishes that as she crossed the entrance to the Putt-Putt parking and navigated her way between the second set of bollards, Ms. Kalmer was about 12m from the point of impact. At her prevailing speed this put her approximately 2 seconds away from the calamity and Mr. Tredoux argued that this was sufficient time to take evasive action.

53. In the days when the issue of driver negligence was so hotly contested in third party insurance claims (particularly in the 1970’s and 1980’s), the courts were regularly required to adjudicate on a driver’s so-called “reaction time” in assessing whether there was sufficient opportunity to avoid a collision. It was assumed that when confronted by an imminent emergency, a driver would require a period of time to appreciate what was happening (so-called “perception time”) and then some further

time to apply the vehicle's brakes by moving the foot from the accelerator to the brake and applying same or even swerving out through a swift yank of the steering wheel (so-called "reaction time"). Mathematical calculations were then applied to an assumed speed of the vehicle to establish how much time (if any) was available to the driver to avoid the collision.

54. Over the years, the courts, including the erstwhile Appellate Division, considered driver-reaction times ranging from anything between half a second and one and a half seconds as reasonable in the circumstances.[2] Those cases should, however, only provide a general approach in this matter because Ms. Kalmer wasn't in a motor vehicle and was in full control of her own body – she could have attempted to come to a complete halt or swerved around Ms. Salie without having to think about brakes or a steering wheel.

55. In the circumstances, I am satisfied that Ms. Kalmer had sufficient time to avoid the calamity and that her breach of the duty of care that she owed Ms. Salie – not to cause her bodily harm by colliding with her – was causally connected to Ms. Salie's injuries. She is thus liable to the appellant for damages yet to be established and the finding of the court *a quo* on this score falls to be set aside and replaced with an appropriate order.

THE CASE AGAINST THE FIRST RESPONDENT

56. After much huffing and puffing, the case advanced against the WPA was that the marshall that it had stationed at the entrance to the Putt-Putt parking area was remiss in not cautioning the pedestrians and on-lookers further down the sidewalk to be on the lookout for approaching runners. Mr. Tredoux argued that had the WPA equipped the marshall with a whistle in addition to her red flag, she might have achieved that end by giving regular shrill blasts on her whistle thereby cautioning all and sundry of the advancing runners.

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[2] See for example Hoffmann v South African Railways and Harbours 1955 (4) SA 476 (A); President Insurance Co Ltd v Tshabalala and another 1981 (1) SA 1016 (A); Rodrigues v SA Mutual and General Insurance Co Ltd 1981 (2) SA 274 (A); Union and SWA Insurance Co Ltd v Markus 1981 (3) SA 1120 (A).

57. In his evidence, Mr. Jacobs took the court *a quo* through the meticulous planning that went into the event. Some of that has been referred to above and much of it is irrelevant to this appeal. There was a high level committee representing various stake-holders which attended to the planning of the race. This planning dealt with, inter alia, the route, emergency services and evacuation procedures, traffic flows, general safety and the allocation of marshalls along the route.

58. Mr. Jacobs explained that the marshalls were volunteers drawn from various amateur athletics clubs who were briefed in advance as to what their specific functions were. So, for example, the marshall on duty at the Putt-Putt parking area was responsible, in the main, with controlling the flow of traffic into and out of that area. She was equipped with a flag but was not wearing the requisite reflective vest as prescribed by the race permit. While the terms of the permit stressed the safety of pedestrians along the route, the marshalls were not advised to look after public safety, only the safety of the athletes.

59. Mr. Tredoux argued that if this particular marshall had been doing her job properly, she would have noticed Ms. Salie standing in the middle of the sidewalk and, appreciating an imminent collision, would have loudly uttered the necessary verbal caution to Ms. Salie. Unfortunately, the submission is lacking in both fact and logic. There is no clear evidence where the marshall was standing and in what direction she was looking at the time Ms. Kalmer crossed over the entrance to the parking area.

60. But even if the said marshall happened to be looking towards Ms. Salie, would she have anticipated that Ms. Salie was likely to move into the path of Ms. Kalmer, or that that the runner had not seen Ms. Salie and was about to collide with her rather than take the relatively simple evasive action of changing her course and passing the errant pedestrian? I think not. The evidence established that this was an unprecedented event, there having been no such similar collision in previous events organized by the WPA. There was thus no basis for the marshall to have anticipated the aberrant behaviour manifested by Ms. Salie and it cannot be said that her duty of care was founded on a reasonably foreseeable event.

61. In the circumstances, I am satisfied that the court *a quo* correctly dismissed the claim against the WPA and the appeal against that finding must fail.

SUPPLEMENTARY ARGUMENTS ADVANCED IN RESPECT OF THE ABSENCE OF MS KALMER'S LIABILITY

62. There were two further arguments advanced by Mr. Combrinck in relation to the absence of liability on the part of Ms. Kalmer. The first point was based on the principle of *volenti non fit iniuriae,* the so-called voluntary assumption of risk. The principle is summarized as follows in the 4th edition of McKerron, Law of Delict at 95-6.

"No man can complain of an act which he has expressly or impliedly assented to. This principle, which was well-known to the Roman and Roman-Dutch law, is commonly expressed by the maxim *volenti non fit injuriae.* Literally interpreted, the maxim is applicable only to cases where a person has consented to support something which would otherwise be an intentional wrong. e.g. consent to undergo a surgical operation or consent to the publication of a defamatory statement. But the maxim is used in a wider sense, and is applied to cases where the person has consented to run the risk of unintentional harm, which would otherwise be actionable as attributable to the negligence of the person who caused it."

63. The defence was not pleaded by Ms. Kalmer and was only raised in argument afterwards. This a litigant may not do, as it is manifestly unfair to advance one case in the pleadings and then attempt to canvas another case which was not put in issue and fully investigated during the course of the evidence. Harms[3] puts the position as follows –

"The pleadings are there to define the issues between the parties…After definition of the issues, the evidence is led at a trial. As such, a party may not plead one issue and then at the trial and/or on appeal attempt to canvas another which was not put in issue and fully investigated."

[3] See, for example, Harms, Civil Procedure in the Supreme Court (2011) at B-140, para B18.7.

64. In any event, it is for a defendant, not only to formally put up such a defence on the pleadings, but to discharge the onus which such a defence attracts.[4] In the context of this case, Ms. Kalmer was required to allege and prove that Ms. Salie–

(a) had knowledge of the risk;

(b) appreciated the ambit of the risk; and

(c) consented to the risk.

Ms. Kalmer failed to allege or prove the defence and the maxim thus does not absolve her from liability.

65. The second "long stop" defence put up in argument by Mr. Combrinck on behalf of Ms. Kalmer was founded on the English decision in Wooldridge[5] which deals with the liability towards spectators at sporting events.

"A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety."

66. As I understand the position, with reference, for example, to an international athletics meeting, if a burly hammer-thrower were to inadvertently release the hammer so that it flew off at an angle and injure a spectator, the competitor might be absolved from liability for damages to that spectator if it were shown that the hammer-thrower did not exhibit "reckless disregard" for the safety of the spectator.

67. While the argument is notionally interesting, it merits no consideration in this matter because it, too, was not raised in the pleadings nor traversed in the evidence. All of that being said, the facts do not in any event suggest that Ms. Salie went to the Promenade that day to watch the prowess of a group of elite athletes.

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[4] Santam Insurance Co Ltd v Vorster 1973 (4) SA 764 (A) at 779

[5] Wooldridge v Sumner & another (1962) 2 All ER 978 (CA) at 989 - 990

Rather, the evidence seems to indicate that she went for a walk and while doing so, the athletes fortuitously passed by her.

68. In the result, I am not persuaded that the Woolridge defence is available to Ms. Kalmer and consequently it does not afford her any success on appeal.

APPORTIONMENT OF DAMAGES

69. The concession by Mr. Tredoux that Ms. Salie was herself negligent in relation to the injury which she sustained, brings into operation the Apportionment of Damages Act, 34 of 1956. The concession acknowledges that Ms. Salie's damages resulting from the negligence of Ms. Kalmer must be reduced in accordance with the extent of her (Ms. Salie's) own negligence.

70. In argument before this Court, Mr. Tredoux suggested that the damages should be apportioned with reference to the negligence of both the WPA and Ms. Kalmer in relation to Ms. Salie's admitted negligence. In light of the finding that the WPA was not negligent in its organization and/or management of the race, the negligence of only Ms. Kalmer falls to be apportioned in relation to Ms. Salie's negligence.

71. How does one weigh up these degrees of negligence up? In my respectful view the decision in Nogude offers some useful assistance. The case involved a pedestrian who crossed a busy road and was run down by an approaching vehicle whose insured driver was found to have properly scanned the road ahead of her. Jansen JA, in considering that the pedestrian was also negligent, found that her negligence was greater than that of the driver and reduced her damages by 60%.

72. In this matter, I am of the view that the contributory negligence of Ms. Salie far outweighs that of Ms. Kalmer. Ms. Salie had to be aware that there was a race on the go that day. As she walked towards the point of collision from the direction of the Sea Point Swimming Pool (whether along the Promenade or the sidewalk), she would have seen the bunting and advertising material along the route that Mr. Jacobs spoke of and, possibly even, the feeding points at which the runners might take on fluids and sustenance.

73. At the point of collision itself she must have been aware that there were athletes whizzing past her. After all, they were preceded by an escourt consisting of a motor cycle and cyclists. Further, it is uncontested that Ms. Olckers had warned Ms. Salie about the imminent arrival of the front group of runners. Her negligence is that she did not look further up the sidewalk when she moved across to hand back the camera to Ms. Olckers. I am consequently of the view that Ms. Salie's negligence was considerably more than the negligence of Ms. Kalmer and I consider that her contributory negligence is to be assessed at 70%. In the result her estate is entitled to recover no more than 30% of her proven damages from Ms. Kalmer.

COSTS

74. The appellant has been substantially successful on appeal as against Ms. Kalmer but has been unsuccessful as against the WPA. Fairness dictates that Ms. Salie's estate is thus entitled to its costs on appeal as against Ms. Kalmer but that it should be liable for the costs on appeal of the WPA.

75. Success for the estate on appeal means that the order of the court *a quo* falls to be set aside as against Ms. Kalmer but confirmed as against the WPA. There is no reason why the costs in the court *a quo* should not follow the result. This would have entitled Ms. Salie to recover her trial costs as against Ms. Kalmer but not against the WPA which the court *a quo* correctly discharged from any liability.

IN THE RESULT I PROPOSE THAT THE FOLLOWING ORDER BE MADE:

A. The appeal as against the first respondent is dismissed with costs.

B. The appeal as against the second respondent is upheld with costs.

C. The entire order of the court *a quo* is set aside and replaced with the following –

"1. The plaintiff's claim against the first defendant is dismissed with costs.

2. The plaintiff's claim against the second defendant is upheld with costs.

3. It is ordered that the plaintiff is entitled to recover 30% of such damages as she may prove against the second defendant in due course."

GAMBLE, J

BAARTMAN, J:

I agree and it is so ordered

BAARTMAN, J

MANGCU-LOCKWOOD J:

I agree

MANGCU-LOCKWOOD, J

APPEARANCES:

For the appellant	Mr.P. Tredoux Instructed by JG Swart Attorneys Inc Crawford.
For the first respondent	Mr H.Loots SC and Mr. N. Mauritz Instructed by Norton Rose Fulbright Cape Town.
For the second appellant	Mr.P. Combrinck SC Instructed by Cliffe Dekker Hofmeyr Cape Town.