

SOUTH AFRICA / JUDGMENT

Law v Knysna Municipality (20124/19) [2024] ZAWCHC 261 (12 September 2024)

[2024] ZAWCHC 261

COURT

Western Cape High Court, Cape Town

BEFORE

Sher

CASE / FILE NUMBER

20124/19

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FLYNOTES: MUNICIPALITY – Liability for walkway – Access to business centre – Alleged breach of duty of care – Harm occasioned by an omission – Walkway on which incident occurred serves to afford access to centre by visitors to it – Not serving public – Not under jurisdictional control of municipality – Should have sought possible damages from owners of centre – Evidence suggests incident occurred because plaintiff failed to keep a proper look-out – Claim dismissed.

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CIRCUIT LOCAL DIVISION, GEORGE]

Case no: 20124/19

In the matter between:

JOHN GEORGE COOPER LAW

Plaintiff

and

KNYSNA LOCAL MUNICIPALITY

Defendant

GUARDRISK INSURANCE LTD

Third party

JUDGMENT DELIVERED (VIA EMAIL) ON 12 SEPTEMBER 2024

SHER, J:

1. The plaintiff has sued the defendant for damages he allegedly sustained when he fell, on 22 March 2017, outside a business centre (known as ‘Millwood Court’), which is situated at the intersection of Queen Street and Main Road in Knysna. The centre runs in a roughly north-south line in Queen Street. The erf on which the centre stands slopes downwards in a southerly direction. As a result, at its northernmost end in Main Road the centre has a single level or storey, which becomes two levels or storeys as one moves southwards in Queen Street.
2. The incident occurred when the plaintiff stepped off the end of a concrete pedestrian walkway or ‘ramp’, as he referred to it, which runs alongside the western side of the centre. It allows visitors to access businesses in the centre from the adjacent parking area in Queen Street.
3. By agreement between the parties the matter proceeded in respect of the merits i.e. liability issues only, with quantum standing over for later determination. At the commencement of proceedings the plaintiff’s counsel handed up a trial bundle, by agreement, which inter alia contained a series of 11 photographs. Seven of these (photos 1-7) were taken by the plaintiff in 2023 for the purposes of trial. Three of them (photos 1-3) show the western side of the centre and the walkway/ramp which abuts it and one (photo 5) shows the north-western corner of the centre at the intersection of Queen Street and Main Road, whilst the remaining three (photos 4,6 and 7) were taken in a north-south direction, looking down the western side of the centre and the walkway/ramp, in Queen Street. Photos 8 and 9 are apparently photographs which were taken by the plaintiff at the time of the incident in 2017 and depict the tree which one sees on photo 7, which is situated towards the lowest i.e. southernmost end of the centre, and the two parking bays on either

side of it. These bays, marked with crosses, can also be seen on photo 3. Photos 10-11 apparently show a Google Maps Street view of sections of the western side of the centre as it looked some 10 years ago, in October 2014. In addition to the photographs a video which depicts what can be seen on the photos the plaintiff took in 2023, was also admitted into evidence.

The evidence

4. In March 2017 the plaintiff and his wife were in Knysna to celebrate their birthdays, which were a day apart. The incident occurred the day before the plaintiff’s 73rd birthday. As they had gone out for his wife’s birthday the previous night and were planning to eat out again the following night for his, on the evening of 22 March they decided to get takeaways from Sailor Sam, a fish and chips shop in the upper level of the centre, which fronts onto Main Road.
5. The plaintiff arrived at the parking area in Queen Street at about 19h30 that evening. It was his first visit to the centre. It was starting to get dark, but he could still see clearly. He parked his vehicle in the parking bay to the right of the tree, in

a position similar to that shown on photo 8. After alighting from his vehicle he stepped forward and onto the kerb, and from there onto the start of the walkway/ramp, and then proceeded up it to where it met Main Road, and round the corner to Sailor Sam. He had to wait for 20-25 minutes while his food order was processed. By the time he left Sailor Sam it was dark. According to him there were no streetlights on at the time in Queen Street and the parking area was not lit.

6. He returned down the walkway/ramp the same way he had come up it. But, instead of stepping off the end of it at the parking bay just after the tree, where his vehicle was parked, he did so at the bay which was just before it. He said that he did so because he mistook the vehicle that was parked in the bay just before the tree (i.e. the bay to the left of the tree, where the vehicle is standing on photo 9), for his vehicle, as it was also white, and it was dark at the time. He was expecting to take a small step down to the kerb and from there to the parking area. But because he misjudged where he was the step down was about twice the height he expected it to be. This caused him to fall forwards towards the parking area, and to hit his head as he landed. Having regard for the position of the vehicle on photo 9 he probably landed on the island which housed the tree. After he regained his senses, he pulled himself into a sitting position and tried to insert his key in the door of the vehicle next to which he had fallen, but the key would not go in. He then realized it was not his vehicle and crawled around the tree to where it was parked on the other side of it. He was able to unlock it and to drive to his lodgings. His left ankle was very painful. The following day he had it assessed at the local hospital where it was determined that he had sustained a fracture of the malleolus. His ankle was initially

immobilized. A few weeks later he underwent an orthopaedic procedure whereby the fracture was reduced, and a nail was inserted into the ankle to fix it in place. He continued to experience pain in his ankle and had difficulty walking. On undergoing a further medical assessment some months after the fall, it was ascertained that he had also torn his Achilles tendon, and he had to undergo surgery to repair it.

7. In cross-examination the plaintiff admitted that the place where he had initially stepped onto the walkway/ramp, following his arrival at the centre, was almost level, and as he proceeded to walk up the walkway/ramp towards Sailor Sam he had noted that it was ascending. He conceded that the fall occurred because, on his return, he had wrongly stepped off the walkway/ramp at a point where it was still descending and he conceded that, if he had paid proper attention, he would have realised that he was stepping off the pavement/ramp at a point which was higher than where he had first stepped onto it. In this regard he estimated that at the point where he had stepped onto the walkway/ramp it was approximately 30 cm above the level of the tarred parking area, whereas at the point where he stepped off it, on his return, it was about double that height.
8. Although he conceded that there were several streetlights in the vicinity at the time, one of which was situated diagonally opposite where he had parked (i.e. on the other side of Queen Street), he steadfastly maintained that none of them were functional at the time and that the parking area was in darkness. Although he sought to blame his misjudgement on the fact

that it was dark he effectively conceded that, given that he had been able to make out the tree and the car that was parked in the bay before it, he should have realised he was stepping off the ramp at a different point, which was higher. That then as far as the evidence which was put up by the plaintiff.

9. The defendant likewise called a single witness, Mr Randolph Daames. He has a degree in architectural technology. He started working for the defendant in its building control section in June 2017, some 3 months after the plaintiff's fall. He was later promoted to the position of Manager: Building Control and from there to the position of Acting Director of the Planning Department.
10. According to the municipality's files the building plans for the centre were approved by the municipality in July 1994. From an annotation on the Queen Street elevation drawings (at trial bundle p 24) it is evident that the walkway, which abuts the western side of the centre, is on municipal land, and as is also visible from the photos it does not have a single ramp in it, but two (vide trial bundle p 23 and photos 1-2). The drawings of this elevation (at trial bundle pp 24-25) made provision for balustrades on the upper level/storey of the centre, as well as down the section of the walkway and ramp from the intersection at Main Road and Queen Street, in a southerly direction in Queen Street. If one correlates what is depicted on these drawings with what is visible on photos 1 and 2, it appears that the balustrade was to extend along the short, first section of the walkway and ramp as it sloped downwards from Main Road towards the parking area in Queen Street, to the point where it levelled out, just before a large blue access/garage door which is visible on photo 1. From the photographs it will be seen that there is a driveway in front of the door which allows access to vehicles for deliveries and parking inside the centre (inside parking at the lower level is provided for on the drawings at trial bundle pp 23-24). Were the balustrade to extend across the driveway it would not allow for vehicular or delivery access into the centre.
11. The plans seemingly did not make provision for another balustrade along the much longer, further section of the walkway and the second ramp, which starts at the tree in the parking area and runs towards the blue-coloured doorway. As is evident from the plans and photographs, this section of the walkway/ramp has an initial, gentle incline which rises northwards from the tree, over a few metres, and then runs level over several metres, across the face of most of the lower level/storey of the centre. In contrast to this the first, short section, for which the balustrade was required in the plans, extends steeply upwards from the northern side of the blue-coloured doorway towards the intersection with Main Road.
12. Daames said that where there is an encroachment (such as the walkway) by a private landowner onto municipal i.e. public land it is understood that the landowner will be responsible for it and will be liable for any safety issues that arise from it. Conditions which formed part of the approval which the municipality gave for the centre were set regarding the balustrades, which were to run along the veranda on the upper storey and down the first section of the walkway/ramp (from Main Road to the blue-coloured door) as per the building plans, and the owners of the centre were expected to comply with these. Thus, as far as the

municipality was concerned the owners of the centre were responsible for the safety of persons using the walkway/ramp, and to this end were responsible for maintaining it and the balustrade that was required to be erected to safeguard it. Whilst the municipality was responsible for granting the initial, regulatory approval i.e. for scrutinising and approving the building plans for the centre and the walkway/ramp which abutted it, the owners of the centre were responsible for any ongoing safety issues pertaining to it and the buildings that comprised the centre.

13. As far as ensuring that conditions which are set by the municipality as part of its terms of approval of building plans, are adhered to, Daames explained that, due to its limited resources (it currently only has 4 building inspectors to service a large municipal area) and the volume of plans that it must consider and approve, the municipality is unable to actively and continuously monitor and inspect properties for which building plan approval is granted, and relies to a large extent on the vigilance of the public

as far as any non-compliance is concerned. Consequently, the enforcement of such conditions by the municipality commonly comes

about after a complaint is received from a member of the public, which is investigated.

14. During his evidence Daames reviewed correspondence which was on file in relation to the walkway/ramp and the balustrades. On 29 November 1994 the town engineer for Knysna addressed a letter to the builders (Millwood Homes) in which he pointed out that from an on-site inspection that had been carried out it appeared that safety glass had not been installed throughout the entire length of the balustrades, and building plans for the walkway/ramp were still outstanding. The builders were accordingly requested to close 'the ramp' to public access until these aspects had been attended to.
15. Building plans were seemingly submitted by the architects on 2 December 1994, under cover of a letter in which they indicated that steps were being taken to complete the installation of glass in the balustrades. On 24 January 1995 the town engineer noted, in a letter to the then owner of the centre (the Goodwin Stable Trust), that despite this assurance the glass installation was still

incomplete, and the 'incline' of the walkway/ramp was also not in accordance with building regulations in that it exceeded

the maximum permissible incline of 1:8 i.e. a maximum rise of 1 metre for every 8 metres. This must clearly have been a reference to the first, steep section of the walkway/ramp, and not the section near the tree where the plaintiff parked his vehicle. The owner was directed to remedy these aspects urgently as the safety of the public was at issue, as there had already been 2 'incidents'.

Details of these were not provided in the letter.

16. In response, on 31 January 1995 the Trust indicated that the builders had gone into liquidation at the end of 1994 and a new building contractor had taken over the construction works on 26 January, and it had been ascertained that during the builders' holiday in December-January the glazier who had been commissioned to install safety glass in the balustrades had removed sections of it, which had resulted in 2 'accidents'. No indication was given, either in the letter from the town engineer of 24 January 1995 or the response thereto by the owner of the centre a week later, as to where these 'accidents' occurred in relation to the areas along which a balustrade had been installed. Thus, there is no indication whether they occurred on the upper level

of the centre or on the section of the walkway/ramp leading down from Main Road towards the large garage door on the lower level in Queen Street, or the section that extended beyond it towards the tree.

17. On 6 February 1995 the town engineer directed that before 'temporary' occupation of the building could occur several outstanding requirements had to be complied with, including rebuilding the walkway/ramp to comply with the incline requirements set by the National Building Regulations and Building Standards Act ('the NBRSA').^[1] Once again, this must have been a reference to the first, steep section of the walkway towards the intersection of the two roads. Pending the rebuild, the walkway/ramp was to be closed to public use. Nothing was said by Daames in his evidence which indicates that the first section of the walkway/ramp was rebuilt in accordance with this directive and from the photographs compared with the plans it does not appear that it was.
18. The only other correspondence that was referred to during Daames' evidence was a letter which was allegedly addressed to the owners of the centre (c/o LJ de Swart & Partners in Knysna) by the Acting Municipal Manager on 1 April 2003, in which it was noted that a 'further' complaint had been received about the condition of 'the mended' (sic) balustrade

which had prompted an additional inspection by a building inspector, at which time it was found that 'the balustrade' was still 'unstable' in places due to 'wrotten' (sic) pillars and beading that was missing around the (safety) glass, which secured it to the frame of the balustrade. The owners were called upon to 'secure' the balustrade immediately and to then call for a follow-up inspection by the building inspector. Whether this was done was not evident from the evidence of Daames and there does not appear to have been any record of a follow-up on this.

19. Once again, no indication was given in the evidence of where in the balustrades these defects were present i.e. whether this was in the balustrade on the upper level or in the balustrade along the first section of the walkway/ramp. What is apparent is that at some stage after this letter was written whatever balustrade there was along the walkway/ramp, was removed, and Daames testified that during an inspection which he carried out before the trial he noted that the cut-off remains of the pillars of the balustrade on the lower level, were still visible in the concrete walkway/ramp. These remains are not visible on the photographs. Interestingly, the Google Maps Street view photos of October 2014 (some 11

years later), show that there was a balustrade at that time along the second section of the walkway/ramp, which extended to the end of it, in line with the kerbstone of the parking bay to the left of the tree i.e. the one at which the plaintiff stepped off when the incident occurred in 2017. In all likelihood therefore this

balustrade was removed somewhere between 2014 and 2017, as it was not there at the time of the incident. Daames was of the view that this balustrade could not be the one with 'wrotten pillars' that was referred to in the 2003 letter, as it was unlikely to have lasted in that condition for 11 years until 2014 and it was evident from the 2014 photos that the balustrade which was visible along the second section of the walkway/ramp was seemingly in a good condition.

An evaluation

i) The legal principles applicable

20. It is common cause that, as the plaintiff's action is founded on the *actio legis Aquilia*, to succeed he bears the onus of establishing conduct on the part of the municipality which was both unlawful (i.e. wrongful) and

negligent.[2]

21. In his particulars of claim the plaintiff averred that the municipality had acted unlawfully because it had breached a 'duty of care' which it owed to the public in general and to him in particular, by failing to take certain steps which such duty obliged it to take in regard to the walkway/ramp, which the plaintiff referred to as a 'pavement' which had an incline in it in the form of a ramp, and which fell under the 'jurisdiction and control' of the municipality.
22. The reference to the walkway as a 'pavement', which is commonly understood to refer to a paved or tarred path at the side of a road, for public use by pedestrians, was seemingly resorted to in order to bring the matter within the ambit of the legion of cases that have dealt with the liability of municipalities for injuries which have been sustained by persons while using pavements alongside roads, in incidents caused inter alia by potholes or trenches, open manholes, irregular, broken or dangerous surfaces or other hazards.
23. As for the plaintiff's reference to a 'duty of care', this is a concept in the English law of tort (our law of delict) which embraces both wrongfulness and negligence, with which, as was pointed out by the SCA in *Van Duivenboden*[3] English courts have had difficulties as to its ambit and scope. Our law does not recognise such a concept. Instead, we speak of a 'legal' duty which a defendant may be subject to, not 'of care' or to 'take care', but to take certain steps which may reasonably have been required by the particular circumstances. The evolution of such a duty came about following the decision in *Ewels*, [4] in which it was accepted that defendants may be held liable not only for positive acts they commit which result in harm or loss but also for omissions which do so. Whether liability will ensue in such instances will be determined by whether, according to the court, the 'legal convictions' of the community require that the omission i.e. the failure to take certain steps, is to be regarded as wrongful. If so, the defendant will be considered to have had a legal duty to have

taken such steps to prevent the harm from occurring.[5] Thus, unlike instances where loss or harm is the result of a positive act or conduct by a defendant, which will be presumed to be wrongful, where a defendant is sued on the basis of a failure to act i.e. an omission, it will only be held to have acted wrongfully if it is considered to have been under a legal duty to have taken certain steps, which it breached.[6] Consequently, as wrongfulness is not presumed in such instances a plaintiff who seeks to hold a defendant liable on this basis must plead and prove the requisite facts necessary to support the imposition of such liability.[7]

24. As was pointed out in Van Duivenboden, the determination of what the legal convictions of the community require is one that must be carried out with due and proper regard for the Constitution. Thus, as it has been articulated by the SCA[8] and the CC[9], the imposition of liability in cases involving the alleged breach of a legal duty is a matter for judicial determination, according to criteria of public and legal policy, in the light of constitutional values and rights.
25. Because the determination of wrongfulness essentially involves an assessment of whether it would be reasonable[10] to impose liability on a defendant for harm occasioned by an omission, or whether the 'social, economic and other costs'

of doing so are 'too high', the CC has described it as an element of delictual liability which acts as a 'brake'[11] and the SCA has likened it to a 'safety valve'.[12] Care should accordingly be taken to ensure that, when developing the law in this regard, this is not an element that becomes a gate through which floods of public liability flow.

26. Our law also requires that when conducting an enquiry into whether a defendant should be held to have been subject to such a legal duty the delictual elements of wrongfulness and negligence must not be conflated and must be evaluated separately.[13]
27. Negligence is assessed according to a hypothetical standard which the notional reasonable man would meet. It will be held to have been established by a plaintiff if the court determines, on an assessment of all the facts and circumstances before it, that a notional, reasonable man in the position of the defendant would have foreseen the reasonable possibility of harm materialising and would have taken reasonable steps to safeguard against it occurring, and the defendant failed to take them.[14] Thus, as was pointed out in ZA,[15] whereas the test for wrongfulness is whether it is reasonable to have expected the defendant to have taken certain measures, the test for negligence is whether the reasonable person in the position of the defendant would have done so. As it would obviously be reasonable to expect a defendant to do what the reasonable person would have done, conduct which is found to be negligent will inevitably also be held to be wrongful and vice versa.[16]

28. In arriving at a determination of whether certain steps would have been taken the court is required to assess the degree of risk of the harm occurring and its potential extent, whether the measures proposed would have successfully avoided the occurrence of the harm which eventuated, and what the costs would have been of implementing the measures.[17] Where certain steps were taken by the defendant, whether they are to be regarded as reasonable or not will depend on a consideration of all the relevant circumstances.[18]
29. Whilst it has been recognized, at least since 1914,[19] that a landowner ordinarily has a duty to take all reasonable steps as may be required to protect persons who come onto his/her land, from any dangers that may manifest due to the condition of their property, this is not an absolute and unqualified duty that applies inevitably, in each and every instance. Where the land is under the control or in the possession of another party such a duty may be held to rest on them. In the case of a private landowner it has been held that society does not expect him/her to go beyond reasonable measures to make their property safe as this would place an 'unfair' duty on them and would discourage social interaction.[20] Likewise, the fact that the state is the owner of public land does not automatically and necessarily place an unqualified and inevitable

duty on it to safeguard the public, in every instance, from harm that may be occasioned by the use of such land. And the fact that local authorities provide facilities for public use on public land, such as streets and the pavements alongside them, also does not necessarily impose such a duty on them.

30. As Marais JA pointed out for the full court of the SCA in Bakkerud [21] whilst 'it may be tempting to construct such a duty on the strength of the sense of security engendered by the mere provision of a street or pavement by a municipality' one should not generalise in that regard.
31. After reviewing the state of the law in so-called 'municipality' cases prior to the decision in Ewels and those which followed it (which was against imposing liability and consequently was seen to offer an immunity to claims for damages),

and the effect which Ewels and those decisions which followed it had on this position, by broadening the scope of liability in cases of omissions, Marais JA held that the court a quo's introduction of what amounted to a blanket imposition of a legal duty on municipalities to maintain and repair roads and pavements, was wrong and could not be sustained. He held that in each case the court was required to make a value judgement as to what the legal convictions of the community demanded, on the particular facts which were before it.[22]

32. Thus, a 'minuscule and underfunded local authority with many other and more pressing claims upon its shallow purse', which had not kept in repair a 'little-used lane' in which small potholes had developed, which were easily visible to and avoidable by anyone keeping a reasonable look-out, might well be held not to have been under a legal duty to have repaired them or to have warned of their presence. In contrast to this, a large and well-funded municipality which failed to keep in repair a pavement which was 'habitually

thronged with pedestrians so densely concentrated' that it would be extremely difficult to see its surface or to take evasive action to avoid potholes in it 'of substantial size and depth', might well be held to have been under such a duty.[23] And, as it was 'axiomatic' that streets and pavements would not always be in the pristine condition in which they were when first constructed, and it would be 'well-nigh impossible' for even the largest and most well-funded municipalities to keep them all in that state, at all times, Marais JA was of the view that a 'reasonable sense of proportion' was called for and the public was required to realise this, and to have a care for its safety when using roads and pavements.[24]

(ii) The case pleaded by the plaintiff

33. In his particulars of claim the plaintiff alleged that the defendant had a duty to take the following steps, which it failed to discharge: 1) to 'construct' the 'pavement' in such a manner that it did not constitute a danger to personal safety or a threat of injury 2) to 'ensure' that the pavement 'inclusive of all fixtures' that formed part of it, was properly maintained and repaired as required from time to time, so that it did not constitute such a danger or threat
- 3) to fix a 'guardrail' to the inclining section of the pavement (i.e. the ramp(s)) and ensure that it was properly maintained or replaced 4) to provide adequate lighting to the area/areas whether the pavement created a 'dangerous situation' to persons traversing it, and 5) an omnibus duty to take the 'necessary and required' steps to ensure that any person using the pavement could do so safely, without any danger to their personal safety or the threat of injury.[25]

(iii) The principles applied

34. In my view, and for the reasons that follow, the combined weight of the following facts and circumstances is against holding that the defendant was under a legal duty, in one or more of the particular forms claimed by the plaintiff, and the legal convictions of the community and public policy considerations do not expect such a duty to be imposed on it.
35. In the first place, the walkway on which the incident occurred serves, primarily, to afford access to the centre, by visitors to it, rather than to the broader, general public, and is used by the owners of the centre to further their commercial interests. It was built by the owners of the centre to serve the building which they put up next to it (and the businesses housed therein) and was designed to fit in with its aesthetics and requirements. Although it may qualify as a 'pavement' in terms of the dictionary definition, because it is used by pedestrians, it is not a general, public path or thoroughfare of the kind one finds next to a public road or street, which is provided by a municipality for use by pedestrians, and which is controlled by it.

It feeds off, and is alongside, a parking area which was laid out for visitors to the centre and is not directly off and alongside a public road provided by the municipality. Access to and control of it lies in the hands of the owners of the centre and the centre manager, if its premises are leased

out to individual tenants, as they probably are, and not the municipality. In building it the owners encroached onto public land and in doing so effectively expropriated it for their private use. As a result, the walkway does not serve a public purpose in the same manner and way that a pavement along a public road does.

36. Given these circumstances, on what possible basis can it reasonably be contended that the municipality, which had to relinquish its rights of control and use for public purposes, had a duty to construct the walkway and/or to fix a guardrail on it, and had a duty to maintain them? To place such duties on a municipality would be to shift a considerable financial expense and ongoing financial burden onto it which would serve the commercial interests of business owners and private landowners, at the expense of

ratepayers, many of whom might never even come to the centre or use the walkway/ramp. Local authorities are currently deeply stretched

financially and struggle even to find the funds and resources necessary to construct and maintain public roads and pavements, let

alone community facilities. In my view, it would not be reasonable to place this kind of additional burden on them. It would effectively

result in municipalities subsidizing private developments and businesses, at the expense of the public they are required to serve,

in return for which they would incur a potential liability for any harm or loss which might be suffered on land which is no longer in their control. In my view, public policy requires that the plaintiff should have looked to the owners of the centre for possible

recompense, and not the municipality.

37. In the second place, in the building plans which the owners submitted (and for which they requested approval), provision was made for the erection of balustrades along the upper level/storey and the first, steep section of the walkway/ramp, which extended from the intersection of Main Road and Queen Street to the garage door on the lower level, only. From the plans it does not appear as if provision was made for a balustrade to be erected along the second section of the walkway and the ramp, near the tree, where

the incident occurred, where the incline was gentle. Clearly therefore, although no evidence was expressly elicited in this regard, the section of the walkway near the tree and the ramp which was on it could not have constituted a potential source of harm or danger to users thereof, unlike the first, steep section and the ramp on it. If it did it would surely have required a balustrade and provision would have been made for it in the building plans, as was done in the case of the steep ramp in the first section of the walkway. It was not part of the plaintiff's case that the conditions of approval which were sought and granted required the erection of a balustrade over the section of the walkway near the tree. It was not pleaded by the plaintiff, or even suggested to the defendant's witness when he gave evidence, that the defendant erred in failing to require that a

balustrade should be erected over the second section of the walkway/ramp, where the incident occurred.

38. Although the 2014 Google Maps photos show that at some stage prior thereto a balustrade was put up along that section, no evidence was tendered that this was done because it was necessary, in order to secure the safety of persons who were using that section,

and no plans were seemingly ever submitted and approved for that balustrade, nor was there any indication, let alone evidence, that the municipality directed that it should be built. Thus, it is possible that the balustrade was extended in order to harmonize the visual appearance of the western side of the centre. But even if one were to assume, from the fact that a balustrade was put up along the second section of the walkway and ramp, that it therefore constituted a possible danger to users, the balustrade which was erected as per the 2014 photos did not extend to the point where the plaintiff decided to step off the walkway/ramp. From his evidence it is apparent that he probably stepped off the walkway/ramp in line with the driver's door of the vehicle he was approaching, at a point where the balustrade would not have protected him, had it still been in place at the time, as it did not extend that far. In this regard, it is evident from photo 10 (which, from the annotation depicts an October 2014 street view of the western side of the centre and the parking bay at the tree, in which the vehicle which the plaintiff mistook for his was parked), that the balustrade ended in line with the kerbstone which demarcates the end of the bay and the start of the island on which the tree is located. Thus, the place where the plaintiff stepped off the walkway/ramp would not have been protected by the balustrade, had it still been there, because it was a part of the walkway that was not considered to be a danger or hazard to ordinary users, keeping a proper look out, as it was very low i.e. almost at ground level.

39. In the third place, no evidence was led to show any nexus or connection between the safety issues that were experienced with 'the balustrade' in 1994-1995 (some 23 years earlier), or in 2003 (some 14 years earlier); and the incident in 2017 which gave rise to the claim. As is apparent from the correspondence, the 1994-1995 issues had to do with missing panels of safety glass either in the balustrade on the upper level/storey or the one along the first, steep section of the walkway/ramp from Main Road towards the lower level in Queen Street, and in 2003 the complaint was that the safety of users of the walkway could be compromised because 'pillars' of 'the balustrade' were 'wrotten' (sic). As was pointed out previously, no evidence was given as to which of the balustrades were involved in any of these incidents. If there was any connection between these earlier incidents and the incident in 2017 which gave rise to the claim, it was for the plaintiff to produce the necessary evidence in this regard. One would have expected that, if there was some causal or related connection or nexus to the incident, this would have been elicited in evidence.

40. Given the deficiencies in the case that was put up by the plaintiff, on whom the onus rested, as was said in *Bergrivier* [26] ‘where the circumstances presented are as vague as described’ in the evidence and ‘where the municipality is restricted by budgetary and sociological concerns...one would rightly ask how a court can hold that the legal convictions of the community compel a conclusion that the municipality should be held liable’.
41. On the evidence as a whole it is apparent that the incident occurred because the plaintiff failed to keep a proper look-out and elected to step off the walkway at a point that was higher than when he first stepped onto it, thereby injuring himself (and not because he stepped off it at a place where it constituted a danger from which he should have been protected by a balustrade or ‘guardrail’), in the same way that any pedestrian who steps off an ordinary pavement at the side of the road because they fail to keep a proper look-out, would injure themselves. In my view, the plaintiff failed to place cogent and sufficient evidence before the court to show that he stepped off the walkway and injured himself because of a failure by the defendant to put up a balustrade or ‘guardrail’ at that point. It seems to me that in such circumstances, aside from the prior considerations which I referred to, as a matter of public policy it would not be reasonable to impose a duty on the municipality to have erected a balustrade or ‘guardrail’, just as it would be considered obviously unreasonable, given the costs involved, to expect municipalities to erect a balustrade or ‘guardrail’ on the edge of every pavement, to prevent pedestrians from stepping off their kerbs because they fail to keep a proper look-out.
42. As for the remaining grounds of the alleged breach of duty, the plaintiff’s own evidence belies his claim that the incident occurred because the area was not properly lit. There was no suggestion that the incident happened during a bout of load-shedding and his contention that not a single streetlamp in the road was working at the time was highly improbable. On his own version there was enough light for him to navigate his way down the walkway and ramps, from the intersection at Main Road to the vehicle which was parked in the bay before the tree, which he said he mistook for his because it was white. So he was able to make out where he was walking, and the tree and the vehicle in the parking bay to which he was heading. That the area where the incident occurred was not in total darkness is further borne out by the fact that after he came to, the plaintiff was able to see well enough to attempt to insert his key in the driver’s door, and then, upon realizing that his vehicle was parked on the other side of the tree, to crawl around the tree to it. In any event, I did not understand him to contend that the incident happened because it was so dark that he was unable to see where he was going, and as a result he inadvertently stepped off the walkway/ramp. It happened in the course of a deliberate step off the walkway/ramp towards the vehicle which was parked in the bay before the tree.
43. As far as the requirement of negligence is concerned, in my view the plaintiff also failed to discharge the onus in this regard. For the reasons previously referred to, he failed to show that the notional, reasonable man in the position of the defendant would have foreseen the reasonable possibility that a failure to have a balustrade or ‘guardrail’ at the point where the

incident occurred, would result in harm or injury. The reasonable man would not expect a person using the walkway to deliberately step off it, at that point, without keeping a proper look-out. But, even were this to be the case, the reasonable man would not have expected the municipality to have put up a balustrade or 'guardrail' which extended to that point, where the walkway/ramp was almost level, in the same way that the reasonable man would not expect a municipality to put up a balustrade or 'guardrail' at the edge of a pavement, alongside a road, to protect a person who stepped off it, from their failure to keep a proper look out.

(iv) Section 23 of the NBRSA

44. Aside from placing in issue that it owed a 'duty of care' (i.e. more properly a legal duty to take certain steps) and that it was negligent, the municipality also contended that the action could not succeed because it was exempt from liability, by virtue of the provisions of s 23 of the NBRSA. Given the conclusion to which I arrived that legal and public policy does not require that liability should be imposed on the defendant, strictly speaking it is not necessary to rule on this aspect, but for

the sake of completeness and as there appear to be no reported cases that deal with the section, I propose doing so in the briefest of terms.

45. Shorn of verbiage which is not relevant to these proceedings the applicable part of the section[27] provides that 'no approval, permission, report, certificate or act granted, issued or performed' in terms of the Act, by or on behalf of any local authority, in connection with a 'building' or the design, erection or alteration thereof, shall have the effect that the local authority 'shall be liable for any loss, damage, injury or death resulting from or arising out of or in any way connected with the manner in which such building was designed, erected... or altered or the material used' in such processes. The section further provides[28] that, on the other hand, no such 'approval, permission or act' by a local authority shall have the effect that the owner of such a building is exempted from the 'duty of care' (sic) and (the duty) to ensure that such building is designed, erected, completed, occupied and used or altered, in accordance with the provisions of the Act and any other applicable law. Lastly, and in similar vein, the section also provides that no such approval, permission or act by a local authority shall have the effect of exempting 'any person' from the provisions of 'any other law' which may be applicable in the area of jurisdiction of the local authority.[29]
46. It is trite that when interpreting the provisions of the section, regard must be had for their ordinary, grammatical meaning, in the context in which they appear, and with due regard for the purpose which the Act in which they appear seeks to achieve, and a sensible and business-like meaning should be afforded to them and not one that will render their application nonsensical or nugatory. It is further trite that when interpreting exemption clauses a restrictive interpretation is called for, which least affects a claimant's rights.[30] Equally, If the language of a disclaimer or exemption clause is such that it exempts the proferens from liability in express and unambiguous terms, effect must ordinarily be given

to that meaning.[31] If there is ambiguity, the language must be construed against the proferens.. An alternative meaning upon which reliance is placed to illustrate an ambiguity must be one to which the language is fairly susceptible and must not be fanciful or remote. [32]

47. As far as the NBRSA is concerned, its preamble provides that it is aimed at promoting uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities, and the prescribing of building standards. Section 4(1) provides that no person shall, without the prior approval in writing of the local authority in question, erect any 'building' in respect of which plans and specifications are to be drawn and submitted in terms of the Act. A 'building' is defined[33] in wide terms and includes any 'structure', whether of a temporary or permanent nature and irrespective of the materials used in the erection thereof, which is to be used for or in connection with the 'accommodation or convenience of human beings or animals' or the rendering of any 'service', as well as any 'part' of a building. It was common cause between the parties that the walkway/ramp which features in this matter falls within the definition of a building, insofar as it provides for the convenience of persons, and is used 'in connection with' their accommodation, in the centre adjacent to it. Thus, it was common cause that building plans for the walkway/ramp were required to be submitted and approved, before the erection thereof, and this was done.
48. Section 7(1)(b)(ii)(bb) provides that if the local authority to whom building plans are submitted is satisfied that the building to which the application in question relates will 'probably or in fact' be dangerous to life or property it shall refuse to grant its approval in respect thereof. Section 12(1) provides that if a local authority is of the opinion that any building (or the land on which it was, or is being, erected) is dangerous, or is showing signs of becoming dangerous to life or property, it may, by notice in writing, order the owner of such building or land to demolish, alter or secure it in such a manner that it will no longer be dangerous to life or property.
49. Section 14 provides that a certificate of occupancy may be granted by a local authority on completion of a building, and a certificate allowing for its use before the certificate of occupancy is issued may be granted to the owner or any other person having an interest therein. Finally, section 18 contains provisions dealing with the grant of exemptions and deviations from any applicable building regulation.
50. In my view, having regard for the applicable principles, on a proper interpretation the provisions of section 23 do not serve to exempt a municipality from omissions i.e. a failure to take certain steps, which may result in harm or loss. Section 23(a) only purports to afford an exemption in certain defined instances, where harm or loss has been sustained pursuant to a positive act by a municipality viz the grant of approval (of building plans) or permission (which would include the grant of an exemption or deviation from a requirement in terms of building regulations), the issue of a report or certificate (such as occupancy or use certificates), or the 'performance of an act' in terms of the NBRSA.

51. In my view, the section aims primarily to provide an indemnity from liability to a municipality, in instances where loss or harm is sustained because of the bona fide approval of a building plan or the grant of a right of use or occupancy, which should not have been granted, or because of the bona fide performance of other acts by municipal officials in relation to those matters which are dealt with by the Act, pertaining to the erection of buildings and the enforcement of building standards, prescribed by the Act and the regulations. It cannot be interpreted to afford a municipality an exemption from liability where it was under a legal duty, at common law, to take certain steps in order to prevent harm or loss from occurring and failed to do so. That the section was not intended to oust liability for an omission (i.e. a failure to act), in terms of the common law, is supported by the wording of section 23(c), which expressly states that the performance of such (positive) acts shall not have 'the effect' that 'any person' shall be exempted from the provisions of any 'other' law, which would include the common law, and section 23(b), which provides that the owner of a building shall not be exempted from the 'duty of care' (i.e. a legal duty to take certain steps to prevent harm or loss) and the duty to ensure that a building is designed, erected, occupied or used in accordance, not only with the NBRSA, but 'any other applicable law' (such as the common law).

Conclusion

52. In the result, and for the reasons set out above, the action must fail. As far as liability for costs is concerned it was not contended that in the event the action was to be dismissed the ordinary principle that costs should follow the event, should not apply. It was also not contended that this is a matter where a costs order should not be made against the plaintiff because he was seeking

to vindicate his constitutional rights or was raising a novel point of law that impacted on constitutional rights. Both parties were ad idem that the applicable scale of costs that should apply, should be scale B.

53. In the result I make the following order:

The action is dismissed with costs, including the costs of counsel, on scale B.

M SHER

Judge of the High Court

(Signature appended digitally)

Appearances:

Plaintiff's counsel: Adv DL Van der Merwe

Plaintiff's attorneys: Dercksens Inc (Knysna)

Defendant's counsel: Advs M Titus

Defendant's attorneys: Mosdell, Pama & Cox Inc (Knysna)

- [1] Act 103 of 1977.
- [2] City of Cape Town v Mtyido [2020] ZASCA 163 para 3.
- [3] Minister of Safety & Security v Van Duivenboden [2002] 3 All SA 741 (SCA) paras 14-17.
- [4] Minister van Polisie v Ewels 1975
- (3) SA 590 (A).
- [5] Minister van Veiligheid en Sekuriteit v Geldenhuys 2004
- (1) SA 515 (SCA) at 528; Bergrivier Munisipaliteit v Van Ryn Beck 2019
- (4) SA 127 (A) para 43.
- [6] Gouda Boerdery BK v Transnet 2005
- (5) SA 490 (SCA) para 12.
- [7] SA Hang & Paragliding Assoc & Ano v Bewick 2015
- (3) SA 449 (SCA) para 5.
- [8] Gouda n 6 para 12.
- [9] Country Cloud Trading CC v MEC, Department of Infrastructure Development 2015
- (1) SA 1 (CC) paras 20-21.
- [10] Le Roux & Ors v Dey (Freedom of Expression Institute & Restorative Justice Centre as Amici Curiae) 2011
- (3) SA 274 (CC) para 122.
- [11] Country Cloud Trading n 9 para 20.
- [12] ZA v Smith & Ano 2015
- (4) SA 574 (SCA) paras 16 and 19.
- [13] Id.
- [14] Kruger v Coetzee 1966
- (2) SA 428 (A); Bergrivier n 5 para 48.
- [15] Note 12 para 19.
- [16] Id.
- [17] Id, para 24.

[18] Cape Metropolitan Council v Graham 2001

(1) SA 1197 (SCA) at 1203.

[19] Hirschman N.O. & Hirschman v Kroonstad Municipality 1914 OPD 37.

[20] BS v MS & Ano 2015

(6) SA 356 (GP), which concerned whether the owners of a property had taken sufficient and reasonable steps to safeguard a child from falling into a pool.

[21] Municipality of Cape Town v Bakkerud 2000

(3) SA 1049 (SCA); [2000] 3 All SA 171 (A) para 29.

[22] Id, para 27.

[23] Id, para 28.

[24] Id, para 29.

[25] In para 11 of the particulars of claim, which deals with the alleged breach of the aforesaid duties by failing to comply with them in various ways, the plaintiff seemingly added a further duty to the list, which was not pleaded in para 7.1 viz. a duty to place warning signs indicating the danger which was created by the absence of a guardrail. This was not an aspect on which any evidence was led by the plaintiff and was not put to the defendant's witness. It was also not raised during argument as an incidence of the alleged duty and its breach.

[26] Note 5 para 51.

[27] Section 23(a).

[28] In subsection 23(b).

[29] Section 23(c).

[30] Afrox Healthcare Bpk v Strydom 2002

(6) SA 21 (SCA); Fujitsu Services Core (Pty Ltd v Schenker SA (Pty Ltd 2023

(6) SA 327 para 56 (which dealt with an indemnity clause); Hutchinson & Pretorius Law of Contract (3rd ed) at 283.

[31] Durban's Water Wonderland (Pty) Ltd v Botha & Ano 1999

(1) SA 982 (SCA) at 989G-I.

[32] Schenker SA (Pty Ltd v Fujitsu Services Core (Pty Ltd [2022] ZASCA 7 para 13.

[33] In section 1.

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