Lakay v Minister of Justice and Correctional Services and another
[2022] JOL 56183 (WCC)

THE REPUBLIC OF SOUTH AFRICA

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

Case no: **22403/2017**

In the matter between:

NAZLEY LAKAY Plaintiff

and

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 1st Defendant

THE MINISTER OF PUBLIC WORKS 2nd Defendant

JUDGMENT

SLINGERS J

Introduction

[1] On or about 23 April 2017 the plaintiff tripped and fell while walking on the pathway near or about the visitor's section of Pollsmoor Prison, Steenberg, Tokai **('the incident').** As a result hereof the plaintiff sustained bodily injuries and suffered damages.

[2] The defendants do not deny that the first defendant was, at all relevant times, through its employees responsible for the maintenance, management, upkeep and day to day running of Pollsmoor Prison, including, but not limited to,

the pathway used by visitors to Pollsmoor Prison, including the plaintiff when she tripped and fell.[1]

[3] The defendants do not deny that the second defendant is the owner of the land on which the pathway is situated and equally responsible for the maintenance, management, upkeep and day-to day- running of Pollsmoor, including, but not limited to, the pathway used by visitors to Pollsmoor Prison, including the plaintiff when she tripped and fell.[2]

[4] During December 2017, the plaintiff instituted a delictual action against the defendants. The plaintiff alleges that the defendants were under a legal duty to ensure, *inter alia,* that:

> (i) the areas in and around Pollsmoor Prison **('Pollsmoor'),** in particular the pathway, did not pose any potential hazard to members of the public making use thereof, in particular, the plaintiff;
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> (ii) the paths leading to and from the entrance of Pollsmoor, in particular the pathway, were kept in a suitable state of repair and maintenance so as to ensure that they were kept in a state if repair for their intended use and would not cause harm to members of the public making use of the pathway, in particular the plaintiff;
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> (iii) all and any uneven surfaces were suitably signposted with warning signs for visible notice to members of the public making use of the pathway so as to alert members of the public, and in particular the plaintiff, of any dangers inherent in the use of the pathway; and

[1] Paragraph 6.1 of the particulars of claim read with paragraph 6 of the defendants' plea.
[2] Paragraph 6.2 of the particulars of claim read with paragraph 7 of the defendants' plea.

(iv) all and any uneven surfaces on the pathway were timeously repaired so as to prevent members of the public, and in particular the plaintiff, from becoming being exposed to any potential harm.

[5] The plaintiff claims that the defendants wrongfully and unlawfully breached their legal duty by negligently failing to ensure that:

(i) the areas in and around Pollsmoore, in particular the pathway, did not pose any potential hazard to members of the public making use thereof, in particular the plaintiff;

(ii) the paths leading to and from the entrance of Pollsmoor, in particular the pathway, were kept in a suitable state of repair and maintenance so as to ensure that they were kept in a state if repair for their intended use and would not cause harm to members of the public making use of the pathway, in particular the plaintiff;

(iii) all and any uneven surfaces were suitably signposted with warning signs for visible notice to members of the public making use of the pathway so as to alert members of the public, and in particular the plaintiff, of any dangers inherent in the use of the pathway; and

(iv) all and any uneven surfaces on the pathway were timeously repaired so as to prevent members of the public, and in particular the plaintiff, from becoming being exposed to any potential harm.

[6] The defendants filed a notice to defend and in pleading to the plaintiff's action denied that the incident had occurred and tendered a bare denial.

[7] On 13 December 2019, an Order was taken by agreement between the

parties in terms whereof the issues relating to the defendants' alleged liability were separated from the issues relating to the quantum of the plaintiff's claim.

The trial

[8] The trial in respect of the merits of the plaintiff's claim commenced on 5 September 2022. Plaintiff's counsel moved to amend paragraph 4 of the particular of claim which read as:

> *'On or about 23 April 2017, and at approximately 10:45 AM, the plaintiff was existing the visitors section of Pollsmoor Prison, Steenberg. Road, Tokai, Western Cape ("Pollsmoor"), and whilst proceeding by foot along the designated exit pathway to the parking lot ("the pathway"), the plaintiff tripped and fell on the uneven surface of the pathway ("the incident").'*
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> to read as:
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> *'On or about 23 April 2017, and at approximately 10:45 AM, the plaintiff was **entering** the visitors section of Pollsmoor Prison, Steenberg. Road, Tokai, Western Cape ("Pollsmoor"), and whilst proceeding by foot along the designated exit pathway to the parking lot ("the pathway"), the plaintiff tripped and fell on the uneven surface of the pathway ("the incident").'*

[9] The defendants' counsel had no instructions pertaining to the requested amendment but indicated that, if the requested amendment was granted, it would not be necessary to amend their plea and there would be no prejudice to them. The plaintiff was granted leave to amend her particulars of claim after the court considered the application moved from the bar to amend same and the defendants' position thereto.

[10] The first witness to testify in support of the plaintiff's action was Michael Bester **('Bester').** He obtained a Bachelor of Architectural Studies from the University of Cape Town **('UCT')** in 1991, a post-graduate Bachelor of Architecture from UCT in 1994, a diploma in Theology, with distinction from TEE College in 2006 and a Master of Arts in Church History, with distinction, from the University of Nottingham in 2019. He is a professional architect in terms of the Architectural Profession Act, Act 44 of 2000 and has been continuously professionally registered as an architect in South Africa since 1996. Bester was also a professional construction project manager in terms of the Construction and Project Management Professions Act, Act 48 of 2000 from 2004 to 2018.

[11] Bester testified that he was unable to physically inspect or survey the pathway leading out of Pollsmoor near the main entrance and close to the Communications Centre and to the visitors' parking lot **('the pathway')** because of the Covid-19 pandemic and the national lockdown which was in place at the time he was briefed to prepare his report. The pathway has subsequently been completely repaved and resurfaced and no longer resembles the pathway, as it existed at the time of the incident.

[12] The images depicted on photograph A2 of the plaintiff's trial bundle shows that the pathway is the only pathway available to visitors to use when exiting Pollsmoor to get to the visitor's parking lot, with the only alternative being to walk in the road. This was not disputed by the defendants. Photograph 85 of the plaintiff's trial bundle depicts the pathway as it looked at the time of the incident. It is apparent from photographs B4 and BS of the plaintiff's trial bundle that the pathway is narrow and that it is somewhat blocked by a large aloe plant.

[13] The photographs of the pathway, as it looked at the time of the incident, depicts a pathway which consisted of deteriorated and broken-down concrete with an uneven surface which abounded with large loose stones.

[14] Bester testified that, in his opinion, the pathway was not in a good condition with large bits and pieces that were not entirely broken down in gravel texture lying loose. He also expressed the view that the pathway was unsafe and unsound to be used by members of the general public, who could misstep by several ways such as standing on broken off concrete pieces which were not stable. This could result in a person stumbling and falling. Similarly, a person using the pathway could easily misstep and fall. It was not put to Bester during cross examination that this was not the position nor was it put to him that the pathway was safe to be used by members of the public and that it posed no danger to them.[3]

[15] Post the incident, the pathway has been repaved and presents as a level, well- paved pathway which is safe to use.

[16] During cross-examination it was put to Bester that his qualification as an architect did not qualify him to provide an opinion on the condition of the pathway. Bester replied that he has designed many pathways and that he obtained a certificate in client-appointed construction health and safety agency which was jointly awarded to him by the Cape Peninsula University of Technology and the South African Built Environment Research Centre in 2005 and was therefore qualified to offer his opinion. After considering Bester's qualifications and expertise, I was satisfied that he was suitable qualified as an expert to offer his opinion on the state of the pathway. Bester provided his evidence in a reasoned and logical fashion.

[17] It was not disputed that the photographs set out in the plaintiff's trial

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[3] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) where it was held that when it is intended to suggest that a witness was not speaking the truth on a particular point, then the witness' attention must be directed to this by questions posed in cross examination, alternatively the basis on which it will be disputed that the

bundle as B12 to B9 depicted the pathway as it existed at the time of the incident. It was the court's observation from these photographs that the pathway had an uneven surface, peppered with large loose stones and broken down pieces of concrete.

[18] The second witness to testify was the plaintiff, Ms Nazlay Lakay. She testified that she visited Pollsmoor on 23 April 2017. She had taken her neighbour to visit her husband and she went to visit her son who was also incarcerated at Pollsmoor. Mrs Lakay impressed as a calm witness who gave her evidence in a considered manner, without unnecessary embellishment or exaggeration.

[19] Mrs Lakay testified that when a member of the public visits an inmate at Pollsmoor, he or she is first processed in the visitor's section and then taken through a security gate to a waiting room. Thereafter, the member of the public is collected by a taxi in the area near the communications centre which is located near the main entrance of Pollsmoor and from there is transported to the relevant section where the inmate who is to be visited, is held. After Mrs Lakay visited with her son, the taxi returned her to the pick-up point whereafter she exited the area through the gates near the entrance and communication centre of Pollsmoor. She used the pathway to make her way back to the visitor's parking lot where she waited for her neighbour's return. This was the pathway depicted in photograph B2 and B3 of her trial bundle.

[20] After waiting a while, Mrs Lakay returned to the area in the vicinity of the gates near the entrance and communication centre. She again used the pathway. Mrs Lakay asked one of the wardens present at the time how long her neighbour would still be and thereafter proceeded to sit on the low wall depicted on A2 of her trial bundle to wait for her neighbour. After being told that she could

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witness is telling the truth must be put to the witness in order to allow the witness to respond thereto.

not wait at that specific place, she once more existed Pollsmoor using the pathway and waited at a different place for approximately half an hour.

[21] Thereafter, the plaintiff once more started making her way back to the pick-up point inside Pollsmoor via the pathway. Mrs Lakay noticed the taxi driver who collected her friend and started walking towards him. While walking towards the taxi driver along the pathway, Mrs Lakay fell and injured herself. She testified that she fell before she reached the aloe tree.

[22] Mrs Lakay testified that there were no signs which indicated that the pathway could only be used to exit Pollsmoor. On the contrary, she testified that if a member wants to obtain information or a religious group visits Pollsmoor then you enter via the gates via the pathway. People walk in and out of the gates all the time.

[23] Mrs Lakay testified that photograph B1 was taken on the day of the incident. Photographs B2 and B3 were taken by the plaintiff's lawyer to record the state of the pathway at the time of the incident. The female depicted in photographs B2 and B3 is the plaintiff's daughter. At this time, the plaintiff could not walk as she was in a wheelchair.

[24] After she fell, one of the visitors came to her and saw her lying there. He took B1 and sent it to her daughter.

[25] The plaintiff identified where she fell on 82 and described it as a rugged area. The plaintiff testified that she stepped on a rugged piece of concrete which gave way, causing her foot to twist which caused her to fall and land on her back. Mrs Lakay testified that approximately six wardens came to assist her. They placed a cushion under her head and brought an umbrella to protect her against the sun. They also notified the head of the prison of the incident.

[26] During cross-examination it was put to the plaintiff that she was familiar with the pathway and she was asked whether she considered the pathway dangerous. Mrs Lakay answered that she did not think about it and that it was the first time that she tripped.

[27] It was put to Mrs Lakay that at the time of the incident there were other roadworks happening in Steenberg road, outside Pollsmoor. The plaintiff testified that she cannot remember this as it was long ago. It was put to the plaintiff that her medical records recorded that she fell into a ditch. Therefore, it was put to her that she did not fall at Pollsmoor but that she fell in Steenberg road where the road works were taking place. This was denied by Mrs Lakay. It was also put to Mrs Lakay that she was staging the entire incident and when the wardens tried to assist her, she turned them away. The only reason why a photograph of Mrs Lakay was taken was because she asked someone to do so. This was denied by Mrs Lakay. Mrs Lakay testified that she laid where she fell for more than an hour and that the warden called her daughter to fetch her. She also testified that it took six wardens to assist her into her daughter's vehicle. Mrs Lakay testified that although there was an ambulance on the scene at Pollsmoore, it could not transport her to hospital as it was only authorised to transport prisoners. The wardens had also offered her medicine, which she refused.

[28] It was put to Mrs Lakay that no-one saw her fall in the manner she says she did. Mrs Lakay testified that everyone came to see her when she fell as she shouted.

[29] During the presentation of the defendants' case no factual basis and/or evidence was presented to establish the grounds on which it was put to the plaintiff that she was staging the incident and that it had not occurred in the

manner she testified it did. It is reckless and unethical to put speculative versions which have no basis to a witness. This conduct is to be discouraged and avoided.

[30] Furthermore, it was put to the plaintiff that her failure to keep a proper lookout caused the accident. This was denied by Mrs Lakay who testified that at the time of the incident she was wearing medical wedges and there was nothing she could have done to avoid the incident. It was not put to the plaintiff what steps she could have taken to avoid the incident nor the basis on which it was alleged that she failed to keep a proper look-out.

[31] After the plaintiff testified, Roleen Henning **('Henning')** testified in support of the plaintiff's case. She testified that she previously worked for Afrox as a transport economist and that she had 7 years' experience in the health and safety arena. In 2008, sheg opened her own consulting company, which dealt with various projects focusing health and safety issues.

[32] Henning was briefed by the plaintiff's legal representative to consider the health and safety facts of this matter. In explaining her procedure to discharge her brief, Henning testified that she firstly considered the relevant legislation as it creates the framework for safe work practices and systems, an example of this would be section 8 of The Occupational Health and Safety Act which sets out the duties of employers. Thereafter, she would consider the regulations, which provides more detail in respect of what is required to provide for a safe work environment. Henning would also consider the South African National Codes, which provide specific details to ensure safe work practices and a safe working environment and informs of what must be done. In the present matter there were no applicable codes. Lastly, Henning would consider the management systems and whether specific systems have been implemented for the specific working environment. A risk assessment would be the backbone of any

assessment.

[33] Henning testified that the South African National Codes sets out a party's obligations in terms of the Occupational Health and Safety Act, more particularly sections 8 and 9. Section 8 sets out the general duties of employers to their employees and section 9 sets out the general duties of employers to persons other than employees- such as visitors to the establishment. After considering these provisions together with the relevant institution or organisation, control would be built in. An example of a control built in would be any signage used. The relevant regulations would set out what language/s the sign must be and how admission to a property would be regulated.

[34] Henning testified that the Occupational Health and Safety Act is applicable to the defendants and that section 8 sets out their duties to their employees and section 9 sets out their duties to members of the public visiting Pollsmoor. This was not denied by the defendants. In discharging her brief, Henning requested information to consider whether the defendants had complied with the requirements of the Occupational Health and Safety Act, Act 85 of 1993. The requested information included information pertaining to Pollsmoor's safety health representatives and committee, which was not forthcoming. In the absence of the information, Henning accepted that Pollsmoore did not have any safety health representatives or committees. This was not disputed by the defendants. As the requested documentation and information was not furnished, Henning had no proof that Pollsmoor undertook a risk assessment, or that it understood Act 85 of 1993 and applied its provisions.

[35] As a result of the Covid-19 restrictions, Henning did not physically visit the site as but was given photographs thereof.

[36] In Henning's opinion, the pathway constituted a hazard. It consisted of an

uneven surface which looked like uneven gravel on which people walk. She testified that the more the pathway is used, the higher the risk would be. Henning expressed the view that the pathway constituted a high-risk area.

[37] Henning testified that had there been a control in place and if the pathway constituted a hazard because it was smooth, or consisted of broken tiles or gravel, it would have been picked up on inspection.

[38] Henning provided evidence which was technical and detailed.

[39] After Henning's evidence, the plaintiff closed its case. At this stage defendants' counsel requested a postponement as they were not ready to proceed.

[40] It was the defendant's case that the pathway did not present any danger. It had existed in the same condition, as it was when the incident occurred, for years and did not cause or result in any other incidences. Consequently, the defendants argued that the harm was not foreseeable. Alternatively, the defendants would argue that the plaintiff had associated herself with the risk when she visited Pollsmoor and that she was contributory negligent for her damages.

[41] At this stage of the proceedings the pleadings, the cross examination of witnesses and the defendants' opening address all indicated that defendants' counsel was representing both defendants. There was no reason to question or suspect that counsel did not represent both defendants.

[42] The first witness to testify in support of the defendants' case was Nathan Rosenberg **('Rosenberg').** He testified that he was an artisan bricklayer and that he had been employed with Pollsmoor for 16 years. His current duties include all

bricklaying, plastering and tiling, paving. It included basically all the wet trades of the building industry.

[43] Rosenberg testified that he was familiar with the pathway. When he was asked for his comments if it was put to him that the pathway was dangerous, he testified that he uses the pathway daily.[4] Furthermore, he does not know of any incidents other that of the plaintiff.

[44] During cross- examination, Rosenberg admitted that it was possible that there were other incidents which had occurred but that he did not know about it as incidents would not be reported to him but rather to his supervisor.

[45] In 2018 he received instructions to pave the pathway. He does not know the reason for the instruction.

[46] Rosenberg confirmed that the photographs in the plaintiff's trial bundle accurately depicted the condition of the pathway. When he was asked to describe the pathway, he testified that he had grown up in the townships and that he was used to walking on surfaces of that nature. It is noteworthy that he offered no comment on the nature of the pathway.

[47] After Rosenberg's testimony, the matter was postponed to 9 September 2022.

[48] When the hearing resumed on 9 September 2022, the defendants' counsel informed the court that she only had instructions to appear for the first defendant and not for the second, who would abide the decision of the court. No information was placed before the court as to when counsel ceased to act for the second defendant nor when the second defendant elected to abide the decision

[4] No steps were taken to qualify Rosenberg as an expert who could assist the court with an expert

of the court. Notwithstanding requests for further information and copies of the relevant notices, counsel for the defendants were unable to take the matter further.

[49] The second witness to testify on behalf of the defendants was Mr Brandt, the assistant director of maintenance, Pollsmoor. He has been employed with Pollsmoor for over 30 years and as assistant director of maintenance he is responsible for maintenance at Pollsmoor which includes the members' areas and maintenance at the correctional community in Cape Town and the accommodation in Kenilworth and Waterloo.

[50] He testified that he is familiar with the pathway and that he usually uses it when there are maintenance issues. Visitors exiting Pollsmoor use the pathway during the day and members use the pathway when they exit or enter the management area. He testified that visitors only use the pathway when they exit the communications centre en-route to the visitor's parking lot.

[51] When he was asked to comment on the suggestion that the pathway was dangerous, Mr Brandt testified that it is not dangerous. He testified that members use the pathway daily and he never received a complaint or reports of an accident happening there. It merits mentioning that Mr Brandt testified that he also did not receive a report of the incident giving rise to the defendant's claim.

[52] He testified that the pathway falls under the control of Pollsmoor and that, the paving of the pathway was outstanding for some time. There was some paving left over from a different project which was used to pave the pathway. The paving of the pathway was part of planned maintenance and was not because of an emergency.

[53] After Brandt's testimony, the defendants closed their case.

[54] Both the defendants' witnesses came across as honest witnesses. However, neither Mr Brandt nor Mr Rosenberg were qualified as experts who were competent to express an opinion on whether or not the pathway was dangerous. Furthermore, they are both employees of the first defendant and therefore cannot be said to be independent witnesses. As reiterated in *Jacobs and Another v Transnet Ltd t/a Metrorail and Another*[5] *an* expert witness must be objective and his/her evidence is of little value when he/she is partisan and called to favour the cause of one of the parties.

[55] In his closing argument, plaintiff's counsel stated that the claim is not based on the Occupational Health and Safety Act but on the defendant's duty to maintain the pathway. Rather, it is a question of public policy and the fact that organs of the state must be concerned with the safety of the public who are obliged to use their facilities. He argued that the defendants were under a legal duty of care, which they breached resulting in the incident. Furthermore, he argued that foreseeability was not about whether the risk eventuated but whether there was a potential for risk.

[56] The Occupational Health and Safety Act set out what the first defendant had to do as an employer and the fact that it was not done is an indication of negligence as the act provided a guideline of what was expected of it.

[57] Furthermore, the plaintiff's counsel argued that the concept of a proper look-out found application within the context of motor-vehicle accidents and not in a matter of this factual matrix. Consequently, there cannot be any contributory negligence and the defendants should be found to be a hundred percent liable for the plaintiff's proven damages.

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[5] 2015 (1) SA 139 (SCA)

[58] In her closing argument, counsel for the defendants confirmed that she only acted on the instructions of the first defendant and that the second defendant intended to abide by the decision of the court. However, this need not cause the court any concern as the defendants had reached a private arrangement pertaining wherein the first defendant would indemnify the second defendant in respect of any adverse finding and/or cost implications. To date the second respondent has not filed a notice to abide with the court.

[59] Defendants' counsel argued that the issue of a legal duty is a fluid concept and that the reasonable person test cannot be used in this case to determine the issue of liability.

[60] Furthermore, it is the defendants' position that the plaintiff used the pathway more than once and that in the circumstances she associated herself with the risk. It is on this basis that the defendants were asking for a finding contributory negligence, in the event that the court found that the defendants were negligent. The defendants recommended an apportionment of 70-30 percent in the plaintiff's favour.

[61] In the event that the plaintiff's claim is dismissed, the defendants' counsel asked for the costs of both defendants.

Discussion

[62] Pollsmoor is a correctional facility which is frequented by members of the public who visit their loved ones and friends who may be incarcerated there as well as by religious groups who minister to the incarcerated. Both defendants are part of the state and should be concerned with the safety of those who visit

Pollsmoor.[6]

[63] The defendants' failure to take steps to prevent the incident would be wrongful if the defendants were under a legal duty to prevent the harm. Whether or not the defendants were under a legal duty is determined by ascertaining whether it was reasonable to expect the defendants to take reasonable steps to prevent the harm. Reasonableness is determined by a value judgment based on the court's perceptions of the legal convictions of the community and upon considerations of policy, all viewed through the prism of Constitutional values.[7]

[64] The application of the legal convictions of the community (the *boni mores)* essentially entails the weighing up of the interests in the light of the surrounding circumstances and is an objective test.[8]

[65] One of the factors which may be taken into account in account when determining wrongfulness is whether the defendants had control over a hazardous or potentially hazardous object.[9] As set out above, the defendants do not deny that they were responsible for the maintenance and day to day upkeep of Pollsmoor, including the pathway. However, the fact that the defendants had control of the pathway does not in itself establish a duty to take precautionary measure. This will depend on the facts and circumstances of a particular situation.

[66] It has been held that an occupier of a property or a building where (potentially) dangerous conditions exist, has a legal duty to prevent injuries to

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[6] *Cape Town City v CareLse and Others* 2021 (1) SA 355 (SCA)
[7] *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 1 SA 389 (SCA)
[8] Neethling- Potgieter- Visser *Law of Delict,* 7th edition, LexisNexis, pg 55
[9] *Law of Delict,* pg 62; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 1 SA 389 (SCA) 400

persons, even trespassers, who visit the property.[10] The defendants, as organs of the state were constitutionally obliged to ensure the safety of members of the public who visited Pollsmoor. Members of the public who have the right to visit with loved ones and or friends who are incarcerated at Pollsmoor, have no choice but to visit Pollsmoor and have no choice but to traverse the only pathway leading to the visitor's parking lot when exiting Pollsmoor. It appears that the pathway could and was easily paved. No facts or evidence was placed before the court why it was not done sooner and/or why it was eventually paved. Furthermore, the defendants were obliged to minimise the risk of harm to members of the public visiting Pollsmoor in terms of section 9 of the Occupational Health and Safety Act. After considering the interests of the parties, the nature of the relationship between the parties, and the seemingly ease with which the pathway was paved[11], I am of the view that the defendants were obliged to prevent injuries to persons who visited Pollsmoor and to ensure that they could do so safely. Therefore, the Court finds that the defendants had a legal duty to prevent the incident.

[67] I turn now to the test formulated in *Kruger v Coetzee*[12] to determine whether the defendants were negligent.[13] This is an objective test.[14] The defendants would be negligent if a *diligens paterfamilias* in the defendants' position would foresee the reasonable possibility of the conduct injuring another in his/her person or property and causing him or her patrimonial loss and would take reasonable steps to guard against such conduct occurring, and the defendants failed to take such steps.

[68] There are no definite rules in respect of the application of the

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[10] *Tsogo Sun Holdings (Pty) Ltd v Qing -He Shan and Another* 2006 (6)S 637 (SCA) 539
[11] *Administrateur, Trasvaal v Van der Merwe* 1994 (4 SA 347 (A) at 360-364
[12] 1966 (2) SA 428 (A)
[13] *Gouda Boedery BK v Transnet* 2005 (5) SA 490 (SCA)
[14] *Minister of Safety and Security v Mohofe* 2007 4 SA 215 (SCA)

foreseeability test as the circumstances of each case would be definitive.[15] However, the greater the possibility that damage will occur, the easier it will be to establish that the damage was foreseeable.[16]

[69] In the present matter members of the public and employees of the first defendant were obliged to use the only pathway exiting Pollsmoor to the visitors' parking lot. This pathway was not only obstructed by a large aloe plant but also consisted of uneven, broken up concrete pieces and loose stones. The pathway was exposed to foot traffic everyday both from members of the public and employees of the first defendant. As a result of the everyday use and disintegrated state of the pathway, it would have been reasonably foreseeable that the pathway posed a danger to those using it and that it was only a matter of time before someone tripped and/or fell because of the uneven and loose surface which characterised the pathway.

[70] I turn now to the preventability aspect for the test for negligence. Four factors have been identified as being particularly relevant to this aspect of negligence:

(i) the nature and extent of the risk inherent in the conduct;

(ii) the seriousness of the damage if the risk materialises and damage follows;

(iii) the relative importance and object of the wrongdoer's conduct; and

(iv) the cost and difficulty of taking precautionary measures.[17]

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[15] *Law of Delict,* pg 150
[16] ibid
[17] *Law of Delict,* pg 151-153

[71] If the foreseeable harm would be trivial and the risk of it eventuating was slight, then it may be that a reasonable person would not take any steps to avoid the harm.[18] It can be accepted that the contrary position would be that if the risk of the harm eventuating was high and the resultant harm serious, then a reasonable person would take steps to prevent the harm from materialising. In this matter, risk of the harm occurring was high and the harm which could eventuate was serious.

[72] The courts have held that even if the risk of any damage occurring was low but the damage which could materialise was severe and/or extensive then a reasonable person would take steps to prevent the harm.[19]

[73] In addressing the relative importance and object of the wrongdoer's conduct, it has been stated that the *'gravity of the risk'* must be weighed against the *'utility of the conduct.'*[20] An example of this was evident in *Minister of Safety and Security v Mohofe* the risk of bystanders being shot had to be weighed against the duty of the police to apprehend and against further danger to others if the suspects were allowed to escape. Based on the evidence presented in this matter, this aspect is not applicable in determining whether the defendants were negligent.

[74] In her closing argument, defendants' counsel argued that the court cannot expect a defendant with limited resources to take steps to prevent the harm and that the inadequacy of resources will impact on the reasonableness of the steps taken. However, no evidence was presented to show that the defendants had financial and/or human resource difficulties or limitations which prevented the pathway from being paved and/or signage being put up to show that users of the

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[18] *Herschel v Mrupe* 1954 3 SA 464 (A)
[19] *Law of Delict,* pg 152, fn 160
[20] *Minister of Safety and Security v Mohofe* 2007 (4) SA 215 (SCA)

pathway must exercise caution when using it. The evidence presented by the defendants is that the paving of the pathway was long outstanding but no reasons for this were furnished. No evidence was presented in respect when the request for the repaving of the pathway was made or why it was made. On the contrary, the evidence indicates that the pathway was repaved with relative ease and affordability in that it was done with resources left over from a different project.

[75] After considering the nature of the potential harm, the high probability of it eventuating and the seriousness of the damage which could result as well as the cost and difficulty of taking steps to prevent the harm from occurring such as the paving of the pathway and the putting up signs warning users of the pathway to exercise caution, together with the fact that both defendants, as part of the state, were obliged to be concerned with the safety of those who visit Pollsmoor, I am of the view that the defendants were negligent in failing to take any steps to prevent the harm.

[76] In summary, I find that the defendants were under a legal duty to ensure that:

> (i) the areas in and around Pollsmoor Prison **('Pollsmoor'),** in particular the pathway, did not pose any potential hazard to members of the public making use thereof, in particular, the plaintiff;
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> (ii) the paths leading to and from the entrance of Pollsmoor, in particular the pathway, were kept in a suitable state of repair and maintenance so as to ensure that they were kept in a state if repair for their intended use and would not cause harm to members of the public making use of the pathway, in particular the plaintiff;
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> (iii) all and any uneven surfaces were suitably signposted with warning signs for visible notice to members of the public making use of the pathway

to alert members of the public, and in particular the plaintiff, of any dangers inherent in the use of the pathway; and

(iv) all and any uneven surfaces on the pathway were timeously repaired to prevent members of the public, and in particular the plaintiff, from becoming being exposed to any potential harm.

[77] I find further that the defendants breached this legal duty by their wrongful conduct which were negligent in that they failed to ensure that:

(i) the areas in and around Pollsmoor, in particular the pathway, did not pose any potential hazard to members of the public making use thereof, in particular the plaintiff;

(ii) the paths leading to and from the entrance of Pollsmoor, in particular the pathway, were kept in a suitable state of repair and maintenance so as to ensure that they were kept in a state if repair for their intended use and would not cause harm to members of the public making use of the pathway, in particular the plaintiff;

(iii) all and any uneven surfaces were suitably signposted with warning signs for visible notice to members of the public making use of the pathway so as to alert members of the public, and in particular the plaintiff, of any dangers inherent in the use of the pathway; and

(iv) all and any uneven surfaces on the pathway were timeously repaired so as to prevent members of the public, and in particular the plaintiff, from becoming being exposed to any potential harm.

[78] Although the defendants pleaded that the plaintiff failed to keep a proper look-out and that that she associated herself with the risk which eventuated, they failed to present any evidence to substantiate this plea. During her cross-examination, the basis on which it was alleged that the plaintiff failed to keep a proper-lookout or associated herself with the risk was never put to her. It was

insufficient to simply put it to the plaintiff that she was someone who frequently used the pathway and therefore, she was familiar with the pathway and actively associated herself with the risk. More was required, especially in light of the undisputed fact that there was only one pathway available to the plaintiff to use when she visited her son.

[79] Therefore, I find that the defendants have not shown that the plaintiff can be held to have been contributory negligent either by failing to keep a proper look-out or by assuming the risk associated with using the pathway.

[80] In the circumstances, I make the following order:

(i) the defendants are held fully (100%) liable for plaintiff's proven damages, which is yet to be established; and

(ii) the costs of this trial shall be borne by the defendants, jointly and severally, the one paying to absolve the other.

Slingers, J

2 November 2022