THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 1308/2016

In the matter between:

KARLIEN VAN VUUREN **APPELLANT**

and

eTHEKWINI MUNICIPALITY **RESPONDENT**

Neutral Citation: *Van Vuuren v eThekwini Municipality* (1308/2016) [2017] ZASCA 124 (27 September 2017).

Coram: Navsa ADP, Majiedt & Mathopo JJA and Plasket & Tsoka AJJA

Heard: 7 September 2017

Delivered: 27 September 2017

Summary: Municipality providing a beachside facility of a pool with slides – whether legal duty on Municipality to provide supervision or access control – whether Municipality negligent – foreseeability.

ORDER

On appeal from: The KwaZulu-Natal Division of the High Court, Durban (Steyn J sitting as court of first instance).

The following order is made:

1 The appeal is upheld, with costs.

2 The order of the court below is set aside and replaced with the following:

'1 The defendant is liable to pay such damages as may be proved by the plaintiff, in her personal capacity and as the guardian on behalf of her minor son, John Ray Jacques van Vuuren, in respect of the injuries he sustained in the incident that occurred on the 21st May 2011;

2 The defendant is ordered to pay the costs of the action to date.

3 The trial is adjourned sine die.'

JUDGMENT

Navsa ADP (Majiedt & Mathopo JJA and Plasket & Tsoka AJJA concurring):

[1] On 21 May 2011 John Ray Jacques Van Vuuren (Jacques), then eight years old, accompanied by his mother, the appellant, Ms Karlien Van Vuuren, paid a visit to the beachfront in Durban, KwaZulu Natal, for what promised to be an enjoyable day. Little did he know that a descent down a water slide at a pool on the Promenade would result in allegedly serious injuries due to an awkward landing at the end. The water slide and pool are facilities provided for the use of children by the respondent, the eThekwini Municipality (the Municipality).

[2] On his descent down the slide, Jacques appears to have lost his balance, apparently due to being pushed by another child in the queue behind him. It is

common cause that the Municipality did not employ or have in attendance a person or persons to supervise children at play in the pools and control the use of the slide. More specifically, there was no-one to ensure that a child at the top of the slide would be safe from being pushed by or colliding with another child in close proximity.

[3] During July 2012 the appellant, in her personal and representative capacity, instituted an action in the KwaZulu Natal Division of the High Court, Durban for damages flowing from the injuries sustained by Jacques which, it was alleged, included a fracture of his jaw and loss of teeth that required surgical intervention and future operative procedures. The basis for liability on the part of the Municipality is set out as follows in the appellant's particulars of claim:

'The Defendant, alternatively the Defendant's employees, alternatively their agents were negligent in one or more of the following ways;-

a. in failing to ensure that the construction of the slide was of such a nature that it was safe for all those who made use of it;

b. in failing to ensure that the materials used for the construction of the slide made it safe for members of the public to use;

c. in failing to ensure that appropriate materials were used so that users of the slide would be protected at all times;

d. in erecting a structure which the Defendant, its employees alternatively agents knew would be predominately used by children knowing that such structure was inherently unsafe;

e. in failing to ensure proper control and adult supervision by qualified and competent persons at the swimming pool and the slide;

f. in failing to control access or limit the number of children using the swimming pool and the slide at the same time to ensure that it was utilised in a safe manner;

g. in failing to ensure that access to the slide was controlled in such a manner that it remained safe for children using this facility.'

[4] The Municipality in its plea denied that it was negligent and stated the following:

'In the alternative, and in the event that the Plaintiff proves that her child was injured as pleaded, the Defendant pleads that:

5.1 the Plaintiff knew that unsupervised children using the pool and slide facilities would be dangerous and may result in injury;

5.2 the Plaintiff was fully aware of the risks involved in allowing her child to utilise the pool and slide facilities;
5.3 despite this knowledge, and whilst appreciating the risk, the Plaintiff nevertheless allowed her child to use the pool and slide facilities;
5.4 accordingly, the Plaintiff consented to be subject to the risk of injury to her child and, in the premises the Defendant is not liable for any loss or damage suffered.'

This is the defence of voluntary assumption of risk which will be dealt with in due course. In addition, the Municipality pleaded that in the event of the court finding that it had been negligent the appellant too was negligent in one or more of the following respects:

'13.1 the Plaintiff failed to take reasonable steps to ensure that John Ray Jacques van Vuuren was properly supervised whilst utilising the slides provided in the pools at the beachfront area;
13.2 failed to ensure that John Ray Jacques Van Vuuren utilised the slide facilities at the beachfront area in the manner intended.'

The Municipality went on to state that it was the aforesaid negligence that contributed to Jacques losing control as he descended the slide leading to the injuries sustained by him. In that event the Municipality sought a reduction in terms of s 1 of the Apportionment of Damages Act 34 of 1956, of such damages as might be awarded to the appellant.

[5] The matter proceeded to trial before Steyn J. After agreement by the parties the court ordered that liability and quantum be separated and that the issue of liability be determined first. At the outset, the learned judge stated that the issue for adjudication was 'whether a parent exercising parental control over a child can legally expect of a local authority to either share in the duty of parental control or usurp the duty and responsibility'. After considering the totality of the evidence, including the testimony of an expert, she reached the conclusions recorded hereafter:

(i) Jacques was injured as he came down the water slide approximately 60 metres away from an observation tower that was manned;
(ii) the structure was and is safe;

(iii) there was no evidence that the harm Jacques suffered could have been prevented if the Municipality had a person in attendance controlling access to the slide;
(iv) there was nothing alerting the mother to any danger and she did not consider it necessary to intervene;
(v) in light of what is set out in (iv) above one could hardly place a more onerous burden on the Municipality.

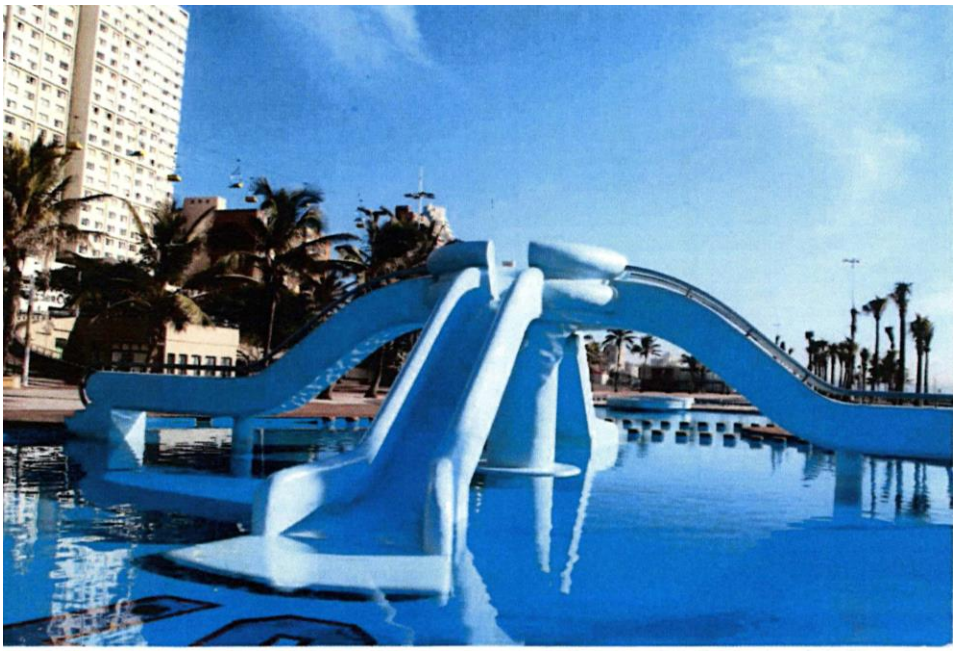
[6] I consider it necessary to quote the following four paragraphs of the judgement in full:
'[29] In my view to place a duty on the local authority to act under circumstances where it is not expected of the parent to act would impose an unsustainable, if not intolerable burden on local authorities to supervise other people's children in instances where the parents are present but fail to do so. It is not reasonable to saddle the local authority with a greater duty of care than what is imposed on parents.
[30] To expect the defendant to employ gatekeepers at the slides to control the number of children using it at a specific time is unreasonable given the circumstances and the facts before me. I am not persuaded on the facts of this case that such a finding would merely result in the defendant employing "playground police" at this one pool. In fact, such a finding would lead to a duty to secure supervisors or playground police at all playgrounds under the control of the defendant. If such a duty is imposed on the defendant in circumstances where the parent is sufficiently able and capable of exercising parental control, then parents would always be exonerated from exercising parental supervision and care at any playground used by their children. In my view public policy dictates that parents should fulfil the duty of parental care and supervision. They are obligated to do that and act in the interest of their own children.
[31] Can it be said that the defendant ought to have provided a supervisor at the slide just as a matter of caution? In my view it would be unreasonable to expect the local authority to provide such supervision at an enormous cost just in case of an eventuality. To make such a finding would lead to limitless liability.
[32] Whilst it is sad that the plaintiff's young child suffered harm on this day, there is no reason to find that the plaintiff should be compensated for any loss suffered. The fact that he suffered harm does not translate into a finding that the defendant should be held accountable in circumstances where there is no legal duty. To impose a legal duty on the defendant where no need for such duty has been proved, would not be in accordance with

public policy, nor with one's sense of justice. The plaintiff's interest to be compensated is, in my view, outweighed by the greater societal interest.'

[7] The court then went on to dismiss the appellant's action with costs. It is against that order and the abovementioned findings that the present appeal, with the leave of the court below, is directed.

[8] Before us, and indeed in the court below, it was unchallenged that the slide was safely constructed and designed for use by children. The core of the appellant's case was that the Municipality was obliged to provide supervision, independent of parental control, in order to prevent events such as the one in question. It is apt at this stage to have regard to the material evidence presented in the court below.

[9] Before dealing with the evidence of the only two witnesses who testified, it is necessary to have regard to a photograph of the pool and slide in question.



It is common cause that the slide was for use only by children under 12 years of age. The slide facility is located in one of three pools within the municipal pool area. As appears from the photograph, there are stairs leading up from edges at opposite sides of the pool towards a stairhead which is supported by a column with a slide on opposite sides leading into the pool. The slides are made of a moulded material that appear to be fibreglass and which have smooth surfaces that are slippery when wet.

[10] Two witnesses testified in support of the appellant's case. The Municipality called no witnesses. The first witness was Mr Theodore Gregersen (Gregersen), a qualified mechanical engineer and occupational health and safety consultant. During November 2013, almost two and a half years after the incident in question, he inspected the pool where the waterslide is situated, and noted that an observation tower was located 60 metres away from the pool.

[11] Gregersen testified that at the time of his inspection there were numbers of children using the facility with no access control in place. Children crowded the steps leading to the top of the slide and were pushing each other. They did not slide down individually but in groups, sometimes up to five at a time. Gregersen noted that the descent down the slide is at 'quite a speed'. Children who were nervous to descend were pushed. In his view, access control would lead to greater safety and an unimpaired descent. He insisted that there should be Municipal staff at the pool to ensure the safety of the children. Significantly, he stated that there was access control in place at other facilities in Durban. This statement was not challenged.

[12] Under cross-examination Gregersen accepted that the slide itself was safely constructed, but insisted that if a child were to be pushed it would lead to a dangerous situation as the child would then come down the slide in an awkward position. He conceded that when he paid a visit to the facility in question there was a signboard stating that there should be no 'rough play'. It is common cause that at the time of the incident there was no such sign.

[13] The appellant was the second and last witness to testify. Jacques is her only child. She recalled the fateful visit to the facility in question. The event occurred at around midday. Jacques had without incident already descended the slide on two occasions before his disastrous fall. She kept him under observation every time he descended the slide with other children in close proximity. There were 10 to 15 children behind him on the stairs waiting to descend. The third time Jacques descended the appellant saw children coming down from behind and bumping into him. It was then that he lost control, could not hold onto the sides and bumped his face at the bottom of the pool. Upon approaching him she saw an abundance of blood and that his teeth were pushed up into his nose. She then ran to the

observation tower to seek assistance, but found no-one in attendance. There was no medical assistance to be found.

[14] The appellant transported Jacques to Addington hospital where speedy assistance did not appear to be forthcoming, so she took him to Kingsway Hospital in Amanzimtoti, where he received treatment. She went back to the pool the next day where she observed children using the facility without supervision.

[15] That then is the totality of material evidence against which the appeal has to be decided. Counsel before us were agreed that the court below had misidentified the issue to be addressed. It will be recalled that Steyn J considered the following to be the issue to be adjudicated:

'[W]hether a parent exercising parental control over a child can legally expect of a local authority to either share in the duty of parental control or usurp the duty and responsibility.'

Counsel agreed that the primary issue was rather, whether there was a legal duty on the part of the Municipality to supervise and control access to the slide. The Municipality also contended that there had been no negligence on its part and in particular, that the consequences suffered by Jacques had not been foreseeable.

[16] In *Hawekwa Youth Camp & another v Byrne* 2010 (6) SA 83 (SCA), this court restated the following jurisprudential truism in para 22:

'[N]egligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is prima facie wrongful. By contrast, negligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter of judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages.'

[17] In *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC) the following appears at para 122:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial

determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'

[18] In *Hawekwa*, Brand JA warned against confusing the delictual elements of wrongfulness and negligence and went on to state that, depending on the circumstances, it may be appropriate to enquire, first, into the question of wrongfulness, in which case negligence might be assumed for the purposes of the inquiry and in other cases it may be convenient to do the opposite.[1] In *Hawekwa* a substantial part of the contentions on behalf of the Minister was devoted to the element of wrongfulness. Brand JA dealt with wrongfulness before considering negligence.

[19] In the present case, as agreed by counsel, it is convenient to deal with the question of wrongfulness first, that is, whether there was a legal duty to supervise and control access to the slide.

[20] As to a legal duty arising where there is prior positive conduct the following is to be noted:

'A duty may arise when the defendant has by lawful prior positive conduct (commissio) created a potential risk of harm to others. If the actor omits to take reasonable steps to prevent the risk from materialising (omissio), the duty is breached.'[2]

[21] As a starting point it is important to note that, in providing the pool with the slide, the Municipality created a potential risk of harm to others. In its plea, after denying that Jacques was injured as alleged, the Municipality stated, in the alternative, that the appellant as a parent was aware that using the pool and slide

[1] See *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12 and *Hawekwa* para 24.
[2] See J R Midgley and J C van der Walt on 'Delict', 2 *Lawsa* 2 ed para 65.

facilities 'would be dangerous and may result in injury'. Further, the Municipality stated the following:

'despite this knowledge, and whilst appreciating the risk, the Plaintiff nevertheless allowed her child to use the pool and slide facilities;

Accordingly, the Plaintiff consented to be subject to the risk of injury to her child and, in the premises the Defendant is not liable for any loss or damage suffered.'

I shall in due course deal briefly with the pleaded defence of voluntary assumption of risk. For the moment, it suffices to say that the creation of the slide facility posed a potential risk of harm to others.

[22] In determining whether a duty ought to be imposed on the Municipality, the following factors appear to me to be significant. First, the children allowed access to the slide are below the age of 12, suggesting a fair degree of immaturity and indiscipline. The applicable by-laws at the time made it an offence for any person above the age of 12 to enter upon, be on, or use the slide in question.[3] Secondly, s 28(2) of the Constitution provides:

'A child's best interests are of paramount importance in every matter concerning the child.'

This is a constitutional norm that must be taken into account in determining whether a duty ought to be imposed.

[23] It was obvious to Gregersen that children were using the slide in a chaotic manner. The appellant herself witnessed uncontrolled access to the slide with the result that children bunched up against each other. This would also have been obvious to any official or employee of the Municipality responsible for the facility in question. Public policy would require a municipality to prevent this kind of chaos which threatens the safety of the children using the facility.

[24] The concern expressed by the court below that the imposition of a legal duty on the Municipality would result in an abdication of parental control loses sight of the fact that parents are not allowed entry to the facility itself, because its use is restricted to children under the age of 12. They are therefore precluded from entering or being proximate to the slide to control the actions of their children. Furthermore,

[3] 'City of Durban Pool ByLaws' Provincial Notice No. 85 of 1989, published in *Provincial Gazette* NO. 4683 dated 16 March 1989. Clause 9(xx).

they have no authority over the actions of other children. After all, the facility is the Municipality's and lies within its administration and control. The assumption on the part of the court below that children at public facilities will always have parents in attendance is doubtful. Significantly, attendance at the facility was not made dependent on parental control and supervision.

[25] The additional concern expressed by the court below, that providing supervision and access control would place an intolerable financial burden on the Municipality, is also without foundation. As can be seen from the photograph, access to the slides can be controlled at the top of the stairhead by an official. As stated above, the evidence by Gregersen, that this is all that would be required, was unchallenged. The appellant's evidence that there is supervision at other public pools was also uncontradicted. It might well be that a simple and safely constructed turnstile on either side of the slide with an official centrally placed might be even more effective. I hasten to add that there was no evidence on that score. However, it was clear that a municipal official at the top of the stairhead could exercise control. The Municipality chose deliberately not to lead any evidence about the extent of the burden, financial or otherwise, it would have to bear in the event of the imposition of a duty.

[26] Over and above ensuring municipal supervision at the top of the slide or, perhaps as an alternative, access control could be provided at the foot of the stairs leading up to the slide. When supervision is not available access could be blocked off altogether. Perhaps one side of the staircase could be blocked off and supervision could be exercised at the open end. None of these steps were considered, let alone implemented. The steps that could be implemented do not appear to be financially prohibitive, but, of course, no evidence concerning this was tendered by the Municipality.

[27] The court below was also concerned that imposing a duty in this instance would mean that such a duty would exist in respect of all public facilities controlled by the Municipality. That concern, too, is unwarranted as in the present matter one is dealing with the circumstances and facts of this particular case and no other.

[28] In *Pro Tempo v Van der Merwe* (20853/2014) [2016] ZASCA 39 (24 March 2016) this court, in dealing with liability of educators and administrators in respect of young children, had regard, amongst others, to the decision in *Transvaal Provincial Administration v Coley* 1925 AD 24. In para 21 of *Pro Tempo* the following appears:

'In *Coley* the planting of wooden stakes in a play area was rightly seen as constituting a sufficient basis to create a duty on the part of the Administration to prevent there being a danger to children in that vicinity. *Coley* is not distinguishable from the present case. By placing a steel rod within a playground where children engaged in ball games the appellant created a dangerous situation. It did not take reasonable steps to prevent a foreseeable risk of harm through misadventure from materialising. Section 28(1)*(b)* of the Constitution dictates that every child has the right to appropriate alternative care when removed from the family environment. Having regard to all the circumstance of the case, including the fact that one is dealing with children who struggle with learning disabilities and that Jaco's hyperactivity was known to the school and considering the factors set out in para 19 above, the conclusion is compelled that the appellant's submission that the public policy considerations demand that liability should not be extended to the appellant is wholly unfounded.'

[29] As stated above, the Municipality, by providing the slide and pool facility for the use of young children, created a potential risk of harm due to misadventure. Considering, in relation to wrongfulness, the criteria of reasonableness, constitutional norms and policy, the compelling conclusion is that in the circumstances set out above, a legal duty is owed by the Municipality to avoid negligently causing harm to persons in the position of Jacques.[4] As appears from what is stated earlier, the steps that could be taken to prevent harm by ensuring access control are relatively simple and would not place an intolerable financial burden on the Municipality.

[30] I now turn to the question of negligence. The well-known test for the determination of negligence is the one formulated in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430H-E, which provides that negligence is established if:

'*(a)* a *diligens paterfamilias* in the position of the defendant –

(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) Would take reasonable steps to guard against such occurrence; and

[4] See *Gouda Boerdery* at para 12.

(b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement *(a)*(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.'

[31] As stated above, foreseeability was fiercely contested by the Municipality, particularly on the basis that parents are obliged to care for their children and that the Municipality was entitled to assume that parents would look after and supervise their children. It was contended on behalf of the Municipality that since the appellant herself did not foresee that Jacques would be injured, it follows that the Municipality itself could not be expected to foresee harm of the kind suffered by Jacques. We are here concerned with whether, objectively, a sensible person in the position of the Municipality would foresee the reasonable possibility of operating the facility without access control causing harm to children in the position of Jacques. As stated above, it was obvious to Gregersen. From his evidence, it would have been obvious to any official operating the facility on behalf of the Municipality, that unattended access had the effect of children bunching up and pushing against each other and that the kind of harm which ensued in this case was a reasonable possibility. The Municipality failed to take steps to guard against such an occurrence.

[32] Thus, the Municipality's contention that failure to provide supervision or access control was not negligent, must fail. The defence of *volenti non fit injuria* or voluntary assumption of risk, briefly alluded to above, was rightly abandoned in argument before us. The appellant could hardly consent to risk of injury to her minor child. The defence of contributory negligence on the part of the appellant was also raised by the Municipality. It was contended that this flowed from the appellant's negligence in failing to supervise her child's use of the slide.

[33] In *Road Accident Fund v Myhill N O* 2013 (5) SA 426 (SCA), Leach JA said the following of the rule that a debt owed to a minor by a debtor cannot be set off by that debtor against a debt owed him or her by the minor's guardian:

'[28] Not only has this been accepted as a correct reflection of the law for many years but there seems to me to be no reason in principle why the general rules of set-off, which

exclude a debt owed by or to an individual in his personal capacity being set-off against a debt owed by or to that person in a representative capacity, should not operate in respect of claims brought by custodian parents on behalf of their minor children. Not to apply the general rule can only be to the disadvantage of any such minor. While there do not appear to be any reported decisions advancing the contrary conclusion, I think the time has now come for this court to put the matter beyond doubt and to rule that a debtor liable to a minor child, when sued by the child's custodian parent, may not set off against its liability to the child any amount that it may personally be owed by the custodian parent.

[29] That being so, it was impermissible to reduce the appellant's liability . . . by way of setting off against their claims the alleged personal liability of the plaintiff to it arising from contributory negligence on her part, and the two children were clearly prejudiced by having done so.'

[34] Faced with that authority, counsel on behalf of the Municipality accepted that contributory negligence could not apply in respect of the claims brought by the appellant in her representative capacity. On the other hand, counsel for the appellant accepted that insofar as the appellant's personal claims in respect of medical expenses and loss of earnings as a result of time taken off to attend when operative procedures were performed on Jacques, as set out para 10 of the particulars of claim, were concerned, contributory negligence, assuming there to be an assessment of such on the part of the appellant, could come into operation. It is important to note that para 10 contains a composite of claims in both the appellant's personal and representative capacities. Because of the conclusions reached by the court below, it did not embark on an apportionment of damages assessment in terms of the Apportionment of Damages Act 34 of 1956. That, counsel agreed, is an issue they were willing to have the trial court adjudicate in conjunction with the determination of quantum. The substituted order that follows has to be read in light thereof.

[35] For the reasons set out above, the court below erred in not holding the Municipality liable for such damages as the appellant in her personal and representative capacity may ultimately prove.

[36] The following order is made:

1 The appeal is upheld, with costs.

2 The order of the court below is set aside and replaced with the following:

‘1 The defendant is liable to pay such damages as may be proved by the plaintiff, in her personal capacity and as the guardian on behalf of her minor son, John Ray Jacques van Vuuren, in respect of the injuries he sustained in the incident that occurred on the 21st May 2011;

2 The defendant is ordered to pay the costs of the action to date.

3 The trial is adjourned sine die.’

M S Navsa

Acting Deputy President

Appearances:

Counsel for Appellant:	R Pillemer Instructed by: A C de Sousa Attorneys, Durban Honey Attorneys, Bloemfontein
Counsel for Respondent:	W N Shapiro Instructed by: Ngidi & Company Inc., Pietermaritzburg Strauss Daly, Bloemfontein