



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 488/2021

In the matter between:

THE MEMORABLE ORDER OF TIN HATS

APPELLANT

and

KENNETH PAUL ELS

RESPONDENT

Neutral citation: *The Memorable Order of Tin Hats v Kenneth Paul Els* (488/2021) [2022] ZASCA 99 (22 June 2022)

Coram: PLASKET, CARELSE and HUGHES JJA and TSOKA and MAKAULA AJJA

Heard: 23 May 2022

Delivered: 22 June 2022

Summary: Delict – negligence – omission to install second handrail on flight of stairs – liability for wrongfulness – appellant under a duty to the public and its members to ensure their safety – no causal connection between incident and omission.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Lamont J, Meyer J and Harrison AJ sitting as a court of appeal):

(1) The appeal is upheld with costs, such costs to include the costs of two counsel.

(2) The order of the full court is set aside and replaced with an order in the following terms:

‘(a) The appeal is upheld with costs.

(b) The order of the trial court is set aside and replaced with an order in the following terms:

“The plaintiff’s claim is dismissed with costs, including the costs of the expert witness, Mr André Fullard.”

JUDGMENT

Hughes JA (Plasket and Carelse JJA and Tsoka and Makaula AJJA concurring)

[1] The appellant is, the Memorable Order of Tin Hats (the M.O.T.H), a voluntary association and brotherhood of former South African soldiers. One of the premises of the M.O.T.H, is the M.O.T.H Hall, situated at the corner of 16th Street and 2nd Avenue, Parkhurst, Johannesburg, which was opened on 12 November 1955. This two storey building, is occupied by a school in the main hall area on the ground floor. The basement area is occupied by the M.O.T.H which utilises it as a pub for recreational gatherings of its members and the public. To access the building, the occupants of the school use the main entrance of the building on the eastern façade. The M.O.T.H uses the entrance on the western façade of the building to gain access to the basement. Importantly, on exiting the basement, there is a two-step stairway directly outside. It is this route from the pub on the basement level to the parking area on the ground level that is at the centre of this dispute.

[2] The respondent, Mr Kenneth Paul Els, often frequented the pub, though he was not a member of the M.O.T.H. On 18 January 2014, he went to the pub to consult with a client. Whilst busy with his consultation, one of the members, Mr Pat Levengs, sought assistance to leave the premises of the pub and proceed to the parking lot. It was a regular occurrence that, as Mr Levengs was wheelchair-bound, he sought assistance from the patrons to get him to the parking area. It was also common cause that Mr Els had assisted him on many occasions. On the day in question and during the process of assisting Mr Levengs, Mr Els was injured. I shall outline the circumstances of the accident in detail below.

[3] Mr Els instituted action proceedings for delictual damages arising from the injury he sustained. His claim was premised on the negligence of the appellant in the following relevant respects:

‘...

5.3 it/they unlawfully and/or wrongfully failed to provide adequate hand rails at staircases;

5.4 it/they unlawfully and/or wrongfully failed to provide any regulation compliant on and off ramps to allow for safe wheelchair access/ingress/egress or from the M.O.T.H. Hall;

5.5 it/they unlawfully and /or wrongfully failed to provide for handrails on both sides of staircases;

5.6 it/they unlawfully and or wrongfully failed to ensure that each tread step is of the same height and does not exceed 170mm;

5.7 it/they unlawfully and wrongfully failed to make every effort to provide safe access/ ingress/ egress facilities to the M.O.T.H Hall;

5.8 it/they unlawfully and /wrongfully failed and/or omitted to take any reasonable measures or action; to avoid the reasonably foreseeable incident, which could have been avoided through the taking of reasonable, care, skill, effort and /or precautionary measures, which it/they could and should have taken, yet unlawfully and/or wrongfully failed to take.’

[4] In essence, Mr Els’ case is that his delictual claim arose from the unlawful and wrongful failure or omission of the M.O.T.H to take reasonable measures to avoid a foreseeable incident that resulted in the damages he suffered as a result of his injuries.

[5] The matter came before Twala J who granted a separation of issues in terms of rule 33(4) of the Uniform Rules of Court. Thus, the matter proceeded on the merits and quantum was held over. Twala J found 90% in favour of Mr Els and refused an

application for leave to appeal. The M.O.T.H petitioned this Court and was granted leave to appeal to the full court of the Gauteng Division, Johannesburg. The full court, per Lamont J, Meyer J and Harrison AJ concurring, dismissed the M.O.T.H's appeal. Dissatisfied, it applied for special leave to appeal. These proceedings are with the leave of this Court, special leave having been granted.

[6] Briefly, the events of 18 January 2014 are as follow. As already alluded to, Mr Els visited the pub to consult with a client, Mr Scott Cheney, who is a member of the M.O.T.H. According to Mr Els, during the course of his consultation, Mr Levengs called from outside of the pub, for his assistance to help him up the flight of two stairs en route to the car park. He testified that it was common practise for him to assist Mr Levengs to exit the pub en route to the car park.

[7] He testified that as he exited the pub with Mr Cheney in tow, he found Mr Levengs with two other patrons, Mr Paul Jansen and Mr Kenneth Swartz who were trying to assist him. According to his evidence, he had assisted Mr Levengs to exit the pub on prior occasions, but had used another route. This was his first attempt at this staircase en route to the car park, as he had never been at this specific area. On arrival he observed that the wheelchair and Mr Levengs were jammed between the step and the outer wall. It is common cause that Mr Levengs sitting in that wheelchair weighed 120 kilograms.

[8] Having assessed the situation, Mr Els deduced that '[i]t was impossible to turn the wheelchair because of the lack of space and probably because of his weight too, it was jammed. The only reasonable way to end the problem was to continue with the manoeuvre of what they were trying to do, and that is to walk this wheelchair up the steps to get to the top of the stormwater sloop [storm water drain]'.

[9] Mr Els testified that, having been called to assist by Mr Levengs, he went there on his own accord to assist as he had done on previous occasions. Through his testimony it emerged that he had 'no idea what happened'. He stated that although 'I do not know exactly what happened...I believe I lost my balance'. Further, in advancing an explanation of what he believed transpired he stated that: '[t]here was a lot of huffing

and puffing, and I do not know exactly what went wrong, but it would seem that I lost my balance. I could not get my foot out . . .'. He ended up falling on his back and losing consciousness, with Mr Levengs and his wheelchair on top of him.

[10] Mr Cheney's evidence was that he and Mr Els held onto the back of the chair, while Mr Jansen and Mr Swartz held the front. It transpired according to Mr Cheney that the incident occurred as a result of the fact that '[t]hey were pushing and Mr Kenneth Els' foot got stuck between the [first] riser of that staircase and the wheelchair'.

[11] Mr Els identified the M.O.T.H's negligence as being two-fold. He stated that '...their negligence I would perceive as not having steps which were safe in the first place. But in the second place they should have had ramps there, which there are now'.

[12] Both Mr Jansen and Mr Swartz testified that Mr Levengs did not specifically call on Mr Els for help and usually when Mr Levengs sought assistance, volunteers were sought from the pub. Further, both testified, which evidence was not challenged, that they had on many occasions assisted Mr Levengs up the stair case in question without any incident occurring. In addition, both were adamant that Mr Els hooked or caught his foot on the step and fell backward.

'Mr Jansen: ...Then we pulled Pat onto the first step and then again, one, two, three, go and then up the second and then the plaintiff hooked his foot on the step and fell over backwards.'

'Mr Swartz: When the wheels were on the first step and when he went back on the second step his back foot caught the back step- and he fell backwards with the wheelchair and obviously he was trying to protect the old man, then he went down and he held the wheelchair on top of him.'

[13] What emerges from the evidence, on the respondent's version, is that the wheelchair was stuck and in an attempt by the group to free it, Mr Els lost his balance, while his foot was jammed. This resulted in him falling backwards and sustaining his injuries.

[14] The gist of the M.O.T.H's case is that the full court erred in holding that it was liable in delict for the damage suffered by Mr Els. The evidence did not, according to it, establish negligence, legal causation or wrongful conduct on its part.

[15] The trial court found that the M.O.T.H owed a duty to protect its patrons against harm (duty of care) from stairs which did not have railings and that such breach had caused harm to Mr Els. Furthermore, had a wheelchair ramp been built and rails placed at the staircase, Mr Els' claim would not have materialised.

[16] The full court on appeal concluded: 'The appellant had a duty to protect its members and guests from harm which could be caused by the steps and should have facilitated the navigation of the steps by providing rails, ramps or signage ...The appellant was negligent in failing to take the appropriate steps to render the hazard safe'.

[17] It is well established that negligence arises from positive conduct which causes physical harm which raises a presumption of wrongfulness. However, with an omission as opposed to positive conduct, wrongfulness is not presumed, and for wrongfulness to be established reliance falls upon a legal duty. This duty arises from public and legal policy considerations. This case rests on the liability attracted for an omission on the part of the M.O.T.H. In these circumstances, a different approach than that of positive conduct is applicable, in addressing wrongfulness for the omission or failure to do something.¹

[18] An omission per se is not wrongful unless it is considered to go against legal policy or public considerations, which dictate that a plaintiff be compensated for the loss suffered as a result of such omission. Thus, the approach alluded to above, involves a further enquiry, that being whether there was a legal duty that gave rise to

¹ *The South African Hang and Paragliding Association v Bewick* [2015] ZASCA 34; 2015 (3) SA 449 (SCA); [2015] 2 All SA 581 (SCA) para 5; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) paras 22-25.

delictual liability.² Put differently an omission does not necessarily attract liability, only if it was culpable would it do so.³

[19] As aptly stated by Brand JA in *The South African Hang and Paragliding Association v Bewick*: '[s]ince wrongfulness is not presumed in the case of an omission, a plaintiff who claims on this basis must plead and prove facts relied upon to support that essential allegation (see eg *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency* 2009 (2) SA 150 (SCA) para 14).'⁴

[20] The duty to prove negligence by conduct or omission lies on Mr Els, as the plaintiff in the trial, as it is trite that he who alleges must prove. Staircases by their very nature are dangerous to traverse, more so, if safety features are lacking and in this instance a second handrail was absent. Thus, even though the staircase, having only one handrail was practical and useable, as per the expert reports, it was not completely safe for use by the M.O.T.H's members and the public, abled or disabled. It can therefore be accepted that the M.O.T.H's omission in ensuring that the staircase was safe for use by its members and the public was a catalyst to cause potential harm and no reasonable steps were taken to safeguard its members and the public from this harm.

[21] The M.O.T.H conceded that it had a legal duty to take reasonable steps to ensure the premises, inclusive of this staircase, were safe for its members and the public. Thus, a negligent omission on its part can be accepted to have infringed on the policy and legal convictions of the public, as the appellant owed a duty to the public and its members to ensure the safe use of the staircase. This conduct was wrongful as the negligent omission resulted in harm, which with reasonable care could have been avoided. It is thus reasonable that this conduct gives rise to delictual liability. All things considered thus far, this is a classic case as stated by Brand JA in *Trustees*,

² *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) paras 13-14; *The South African Hang and Paragliding Association* para 7.

³ *Kruger v Coetzee* 1966 (2) SA 428 (A).

⁴ *The South African Hang and Paragliding Association* para 6.

*Two Oceans Aquarium Trust*⁵, where ‘. . . duty of care’ in English Law ‘straddles both elements of wrongfulness and negligence’.

[22] In this case, even on the assumptions above, the critical issue is that of causation. The question to be answered is what caused Mr Els to fall backwards on the staircase. He said that he did not know why he fell but he thought that he lost his balance and his foot got stuck whilst they were in the process of transferring Mr Levengs in his wheelchair. The witnesses for the M.O.T.H agreed that he tripped and fell backwards.

[23] Despite the fact that the precise manner of the accident is not clear, it is apparent that while helping Mr Levengs, Mr Els overbalanced, tripped and fell backwards, with Mr Levengs and his wheelchair falling onto him. As stated above the combined weight of Mr Levengs and his wheelchair was estimated by the witnesses to be in the region of 120 kilograms. I am prepared to accept for purposes of this judgment that the M.O.T.H’s omission to install a second handrail on the stairs was negligent and wrongful.

[24] That, however, is not the end of the enquiry. The element of causation also had to be proved by Mr Els. In my view, he failed to prove a culpably causative relationship between the omission and the harm. It is more probable than not that, when Mr Els overbalanced and fell, a handrail on his side of the stairs would not have averted the harm. Even if he had been able to grab onto such a handrail, the force of 120 kilograms falling onto him from above, would have broken his grip – and he would have fallen and injured himself despite it being present. That he would still have fallen even if the handrail had been there was conceded on his behalf during argument.

[25] On an examination of the evidence the conclusion that I have reached is that the M.O.T.H’s negligent omission and the wrongful conduct were not the catalysts for the unfortunate accident. Mr Els failed to prove that they were more than likely the

⁵ *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty)Ltd* [2005] ZASCA 109; [2007] 1 All SA 240 (SCA) para 11.

cause of the harm.⁶ The result is that the appeal must succeed. Costs ought to follow the result, including the costs of two counsel in the appeal.

[26] Consequently, the following order is made:

- 1 The appeal is upheld with costs, such costs to include the costs of two counsel.
- 2 The order of the full court is set aside and replaced with an order in the following terms:

‘(a) The appeal is upheld with costs.

(b) The order of the trial court is set aside and replaced with an order in the following terms:

“The plaintiff’s claim is dismissed with costs, including the costs of the expert witness, Mr André Fullard.”

W Hughes
Judge of Appeal

⁶ *Za v Smith and Another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA); [2015] 3 All SA 288 (SCA) para 30 and the cases mentioned therein.

APPEARANCES

For the Appellant:

Adv. C H Van Bergen SC

Adv. T Pillay

Instructed by:

RIC Martin Inc, Sandton

McIntyre Van Der Post, Bloemfontein

For the Respondent:

Adv. C Ascar

Instructed by:

Dyason Attorneys, Johannesburg

Aucamp & Cronje Attorneys, Johannesburg

Symington & De Kok, Bloemfontein