REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE TOWN] CAPEHIGH COURT,

Case No: **275/10**

In the matter between:

LOUIS ARNOLD DU PLOOY Plaintiff

and

THE CASCADES BODY CORPORATE FirstDefendant

BROWMANN PROPERTY MANAGEMENT CC Second Defendant

JUDGMENT DELIVERED: 12 MARCH 2013

FOURIE, J:

[1] Plaintiff claims damages from first and second defendants, jointly and severally, arising out of an incident during the late afternoon of 29 July 2009, when he allegedly slipped and fell on slime and moss that had accumulated on the floor of the washing line area at the Cascades Sectional Title Development Scheme ("the development") in Table View, Western Cape.

[2] Alleging that the fall was caused by the negligent breach of a legal duty, owed to him by the first and/or second defendants, to take steps to prevent him from slipping and falling in this area, he seeks the recovery of damages suffered by him pursuant to the injury sustained as a consequence of the fall. The claim is opposed by both the defendants.

[3] At the request of the parties I ordered, in terms of Rule 33 (4), that the issue of liability be determined first and that the issue relating to the quantum of plaintiff's damages stand over for later determination, if necessary.

[4] Plaintiff is the owner of one of the eight units in the development, while first defendant is the body corporate established for the development in terms of

section 36 of the Sectional Titles Act 95 of 1986 (“the Act”). Second defendant was at all relevant times the management agent of the development, contractually appointed as such by the first defendant. Second defendant was at all material times represented by Mrs Lucinda Brown (“Brown”).

[5] The incident took place in an enclosed outdoor area,depicted in the photographs which form part of exhibit B. The area forms part of the common property of the development. Photograph 11 shows the walled-in rectangular area with the washing lines where the incident took place virtually in the centre of the area. Photograph 25 is taken from the opposite side, where a gate provides entrance to the area, and shows the washing lines where the incident took place closest to the photographer. As can be seen, the washing lines rotate around a centre pole affixed to the concrete floorand the unit is known as a “whirly bird”.

[6] I now proceed to deal with plaintiff’s claim against the first defendant.

[7] It is clear from the provisions of the Act (see in general sections 36 and 37), that first defendant, as the body corporate, is legally responsible for the control, administration and management of the common property at the

development. The Act expressly provides that a body corporate shall manage, control and administer the common property for the benefit of all owners. In view thereof, one cannot quarrel with plaintiff's submission that first defendant is in virtually the same position as a landlord, hotel owner or shopkeeper, who, by virtue of his or her control over property, has a legal duty to take reasonable steps in respect of maintenance and supervision to ensure that the property is in a safe condition with reference to the type of person who may normally and reasonably make use of it. See **Beaven v Lansdown Hotel (Pty) Ltd**1961 (4) (DCLD) SA 8; **Buys and Another v Lennox Residential Hotel** 1978 (3) SA 1037 (C) and **Chartaprops 16 (Pty) Ltd v Silberman** 2009 (1) SA 265 (SCA).

[8] The crucial issue between plaintiff and first defendant turns on the requirement of *culpa* in the law of delict and, in particular, whether or not first defendant had negligently failed to discharge the legal duty which it owed plaintiff, as a person who would normally and reasonably make use of the washing line area.

[9] According to the evidence, the common property of this development covers a reasonably small area, not more than half the size of a rugby field. This includes the washing line area. In order to discharge its statutory duty to

properly maintain the common property and keep it in a state of good and serviceable repair, the first defendant initially employed a cleaning/gardening service contractor known as HAP Flat Maintenance. However, at the annual general meeting of the members of first defendant ,held on 9 September 2008, plaintiff expressed his dissatisfaction with the service provided by this contractor. The meeting then resolved that, with effect from 1 October 2008, plaintiff would take over, at the same rate of remuneration as HAP Flat Maintenance, the cleaning/garden service at the development. I should mention that at this same AGM, the plaintiff and one Mrs C Freeman ("Freeman") were appointed as the two trustees of first defendant for the year ending September 2009.

[10] Plaintiff took over the cleaning/gardening services in accordance with a work schedule which he had prepared. In terms thereof, the whole outside area of the development had to be swept twice a week (Mondays and Thursdays) and other cleaning and gardening tasks had to be performed on Mondays, Wednesdays and Thursdays. According to the evidence, the plaintiff'stasks were in the main performed by his mother and, in due course, since May 2009,by his fiancée (later his wife). Plaintiff assisted them in this regard. According to plaintiff and his wife,the sweeping duties included the cleaning and sweeping of the floor in the washing line area twice a week.

[11] There has been much debate regarding the legal significance of plaintiff's appointment to perform the cleaning/gardening services at the development. It was argued on behalf of plaintiff that, by appointing plaintiff to perform these services, first defendant did not delegate to plaintiff its duty to ensure that the common property is safe. To me this appears to be correct, with the result that the legal duty to ensure that the common property was safe,remainedwith first defendant. However, being a legal persona, first defendant could not itself discharge this duty and had to take steps to have same discharged. The obvious way in which this is done, is by the appointment of agents or employees as envisaged in section 38 (a) of the Act. To this end plaintiff was appointed in October 2008, to attend to the upkeep of the common property of the development. The question, therefore, is whether plaintiff's appointment as a cleaner/gardener constituted the taking of reasonable steps by first defendant to ensure that the common property of the development, and, in particular, the washing line area, was safe for those who would normally and reasonably make use of it.

[12] The following appears to be common cause regarding the condition of the floor of the washing line area:

a) A downpipe runs down the common wall shared by the washing line area and the adjacent unit of plaintiff. Prior to 29 July 2009,

the downpipe was not fitted with a rain sump, resulting in its contents being discharged onto the floor surface of the washing line area.

b) The downpipe is connected to six or seven geysers which, when heated, will each discharge up to three litres of water per day into the downpipe. If any of the valves of the geysers were to be faulty, additional water will be discharged into the downpipe. Also, any rainwater and other substances, e.g. leaves in the gutters, will be discharged into the downpipe.

c) A sewerage pipe is fitted to the wall next to the downpipe and at the time of the incident it had a crack which resulted in minimal dampness seeping through to the concrete floor of the washing line area.

d) As a consequence of this discharge onto the concrete floor of the washing line area, this surface was constantly wet and covered by slime and moss, rendering it slippery and dangerous.

e) The extent of the area covered by the wet slime and moss, varied, depending on the aforesaid factors, but at the time of the incident it extended approximately 1 metre from the wall in the area where the downpipe discharges its content onto the floor of the washing line area. (See photographs 1 to 6, which were taken on the day of the incident). On that occasion the slippery area extended

underneath the one washing line of the whirly bird and caused a hazard for any person hanging up or removing washing at that particular side of the whirly bird.

[13] I should mention that, approximately nine months after the incident, this downpipe was re-routed to discharge its contents outside the washing line area into the garden. A channel was also fitted next to the wall ensuring that any leak from the downpipe or sewerage pipe would be disposed of through the channel and not run onto the surface of the washing line area. In addition, a warning sign was affixed to the wall, warning users that the floor is slippery when wet. These remedial measures (see photographs 22/23)were implemented without incurring substantial costs.

[14] The defence raised by first defendant against plaintiff's claim, is a denial of any negligent conduct on its part, alleging that it took the necessary reasonable steps to keep the common property of the development safe by appointing plaintiff as first defendant's cleaner/gardener. It is therefore necessary to determine the legal effectiveness of the appointment of plaintiff in this capacity.Put differently, did the appointment of plaintiff constitute a dischargeof first defendant's duty to ensure that reasonable steps were taken in

respect of the maintenance and supervision of the common property, and in particular the washing line area, to ensure that it was in a safe condition for those persons, such as plaintiff, who would normally and reasonably use same?

[15] In order to discharge its legal duty to take care that the common property at the development was safe, first defendant was obliged to take no more than reasonable steps to guard against foreseeable harm to owners and other users of the common property. That is in accordance with the classic test for *culpa* laid down in **Kruger v Coetzee** 1966 (2) SA 428 (A).In determining whether reasonable steps were taken by first defendant, the following *dictum* in **Pretoria City Council v De Jager** 1997 (2) SA 46 (A) at 55I is apposite:

"Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgment."

[16] In the context of the duty to take care that the floors of a shopping mall were safe, the Supreme Court of Appeal said the following in **Chartaprops 16 (Pty) Ltd & Another v Silberman**, supra at para 46:

"Where, as here, the duty is to take care that the premises are safe I cannot see how it can be discharged better than by the employment of a competent contractor. That was done by Chartaprops in this case, who had no means of knowing that the work of Advanced Cleaning (the contractor) *was defective. Chartaprops, as a matter of fact, had taken the care which was incumbent on it to make the premises reasonably safe."*

[17] In **Checkers Supermarket v Lindsay** 2009 (4) SA 459 (SCA), the nature of the inquiry insofar as the floor of a supermarket is concerned, was explained thus at para 6:

"The issue is therefore whether, on the particular facts of this matter, the appellant had in place a reasonably adequate and efficient system, in relation to discovering and removing dangerous spillages on the supermarket's floor, to safeguard persons who frequented the supermarket from harm. In other words, was harm to the respondent reasonably predictable?"

[18] In the instant matter plaintiff was appointed as from 1 October 2008, to attend to the cleaning of the common property of the development. It should be borne in mind that he was not only appointed as the contractor to perform this service, but was also one of the two elected trustees of first defendant. The evidence shows that, as the owner of a unit,plaintiff had, since taking occupation of his unit in 2006, shown a keen interest in the day to day running

of the affairs of the development. His involvement is reflected in the minutes of the relevant annual general meetings and, for example,includethe following:

a) He liaised with HAP Flat Maintenance regarding the cleaning of the common property;
b) He attended to matters concerning the upkeep of the swimming pool;
c) He donated and installed a salt chlorinator for the swimming pool;
d) He was involved with the installation of waterproofing in the units and suggested that aluminium gutters be installed;
e) He installed a rear side gate to the premises to prevent easy access to the pool area;
f) He replaced the lock to the motor gate;
g) When the water consumption was high he carried out an exercise to establish whether the development had a water leak;
h) He refitted the existing surrounding tiles of the pool.

[19] As alluded to earlier, when plaintiff's offer to replace the existing cleaning/gardening contractor, was accepted, plaintiff presented a work schedule detailing the work to be done by him. A perusal thereof shows that this involved practically all the aspects relating to the upkeep of the outside areas of the common property of the development. It should be borne in mind that this is a relatively small development and plaintiff, with the assistance of his mother

and his wife, ought not to have experienced any difficulty in performing these tasks. In any event, they never complained of an excessive workload. On the contrary, the impression I gained is that they enthusiastically performed these tasks; found same manageable and prided themselves in the quality of their work. This included the cleaning and sweeping of the washing line area twice a week.

[20] In her evidence, Freeman described plaintiff as the perfect person to do the job. According to her, he always went far beyond the call of duty to make sure that the common property was well-kept. She described him as being "extremely efficient" and recalled that when he was appointed as cleaner/gardener, plaintiff said that he was dedicated to keep the property in a good condition and that it should look good as it is his home. The picture painted of plaintiff, is that of a capable and meticulous person who would do everything in his power to keep the common property clean and safe. Freeman reiterated that she had full confidence in his ability and there was no reason to doubt his ability to properly perform the cleaning/gardening services at the development. This evidence was not disputed. On the contrary, the evidence and demeanour of plaintiff underscored this assessment of him as a dedicated, meticulous and capable person.

[21] Having regard to this evidence, it appears to me that first defendant, in discharging its duty to take care that the common property of the development was kept safe, could not have opted for a better person. Plaintiff was not merely an independent contractor, but a dedicated owner and trustee who had the proven ability to perform these duties and in the process ensure that the common property of the development would be safe for those owners and occupants who used same. It is important to bear in mind that, in doing so, he was assisted by his mother, and later, by his wife. There is no evidence to suggest that they did not perform the tasks properly, nor is there any suggestion of any complaint being made regarding the performance of their agreed tasks.

[22] I accordingly have no hesitation in finding that, by appointing plaintiff to discharge these duties, first defendant had taken the necessary reasonable steps to ensure that the common property of the development,including the washing line area, was safe and did not constitute a hazard to those using same. I am further of the view that, in so appointing plaintiff, first defendant could reasonably rely upon this dedicated person to detect and take steps to remove, or report, any hazardous conditions which would render the common property, or any part thereof, unsafe for use by owners and occupants.

[23] The case which plaintiff attempted to make out, is that first defendant actually knew, or ought to have known,of the slippery condition of the floor of the washing line area and failed to take steps to make it safe. Turning, firstly, to the contention that first defendant ought to have known of this hazard, I understood the submission on behalf of plaintiff to be that, apart from appointing plaintiff to perform the functions referred to above, first defendant should have regularly monitoredthe common property to enable it to detect any hazards which could render the common property unsafe.

[24] I do not agree with this submission. As I have mentioned above, first defendant appointed plaintiff, a dedicated and efficient person, to perform the cleaning/gardening services and the evidence shows that he, with the assistance of his family members, diligently performed these tasks, *inter alia*, by regularly cleaning the washing line area with a hosepipe and broom. To expect that first defendant, should, in addition thereto, also regularly monitor the common property, in my view, goes beyond what is reasonably required of the first defendant.

[25] As far as the washing line area is concerned, it should be borne in mind that there has never before been an incident of this nature in this area and

Freeman testified that nobody ever complained about the condition of the concrete floor of the area. I believe that, in the prevailing circumstances, first defendant was reasonably entitled to rely upon plaintiff attending to or reporting any unsafe condition in the washing line area. Also, first defendant could reasonably have expected other owners and tenants, who became aware of any unsafe condition in the washing line area, to have reported it to first defendant.

[26] One should also bear in mind that the common property of the development covers a relatively small area, which is not frequented by a large number of people, as would be the case with a supermarket. There are only eight units in the development and the washing line area would normally only be visited by the occupiers of those units. There would be no reason for anybody else to enter the washing line area. In circumstances where the washing line area is swept and washed down twice a week by the appointed cleaning contractor and no reports are received by first respondent of any existing slippery condition of the floor of the area, it would surely be unreasonable to expect first defendant to take additional steps of a monitoring nature to discharge its legal duty in this regard.

[27] Also, in the context of whether first defendant ought to have been aware of the slippery condition in the washing line area, which caused plaintiff to slip and fall, account has to be taken of the evidence regarding the detectability of the slippery area. The plumber, Mr Bedford, testified that during February 2009, prior to the incident, he attended to a leak in the roof which he accessed from the washing line area. His unchallenged evidence is that, on his visit to the premises in February 2009, the slippery area only extended approximately 300 millimetres into the washing line area, and certainly not approximately one metre, as depicted in photographs 1-6. It appears that a reduced slippery area of this extent would probably not have presented a danger to those who wished to use the whirly bird, as the affected area would only have been close-up to the wall depicted in photographs 1-6. This is confirmed by Bedford who said that, had the slimy area extended a metre from the wall, he would not have been able to put his ladder up against the wall and he would have reported this to the managing agent.

[28] Freeman emphatically denied that she was at any stage aware that the floor of this area was unsafe due to the accumulation of slippery slime and moss. She testified that she owns several properties in the Cape Peninsula and has been a landlord for many years. Over the years she had several tenants in her unit in the development and she would visit the development 4-5 times a

year to inspect the property. She testified that she had noticed a small amount of slime under the water downpipe on one occasion, but that it was hardly sufficient to constitute a hazard of any kind. She also testified that no tenants occupying her unit at any time complained to her of any slime in the washing line area or that this area was unsafe.

[29] Having regard to the whole of the evidence presented on this issue, I find that plaintiff has failed to establish, on a balance of probabilities, that first defendant at any stage ought to have been aware of any slippery and unsafe condition of the washing line area.

[30] What remains, is to consider whether plaintiff has proved, on a balance of probabilities, that first defendant actually knew of the slippery condition of the floor of the washing line area, particularly at the time when the incident took place. Plaintiff's case in this regard is that he and his wife brought the unsafe condition of the washing line area to the attention of first defendant, represented by Freeman.

[31] As pointed out by first defendant, it is significant to note that, in his particulars of claim, plaintiff does not allege that he had reported this to first

defendant and, in particular, to Freeman. However, in his trial particulars, plaintiff alleges that he had reported it to Freeman. Be that as it may, Freeman strenuously denies that plaintiff ever made any report to her in this regard. When one analyses the evidence of plaintiff, it appears that he only relies on one occasion during 2009 (no date provided) when he allegedly verbally informed Freeman of the problem with the floor of the washing line area. According to plaintiff, Freeman said that she would contact the managing agent, Brown, in this regard. As I have mentioned, Freeman denies this evidence.

[32] I do find it strange that, if there was a progressive build-up of slime and moss during the period 2007 to 2009, as testified by plaintiff, that, on his version, he only once mentioned it to Freeman. In view of his active involvement in the affairs of this development, it is highly improbable, to put it mildly, that he would not have frequently mentioned his concern in this regard to his co-trustee. Yet, for a period of two years, he only mentioned it once to Freeman and apparently never thereafter followed it up with her. It rather seems to me that the probabilities favour Freeman’s version that he, in fact, never mentioned it to her.

[33] Plaintiff also testified that he mentioned this problem at an AGM (no date supplied) when he allegedly stated that someone would slip and fall and break his or her neck in the washing line area. Strangely enough, there is nothing in the minutes of the AGM's during the relevant period which suggests that this had been noted. Once again, I would have expected plaintiff, who obviously never hesitated to come forward if things were not to his liking, to have formally raised the issue at the AGM and followed it up subsequent thereto. However, nothing of the kind happened. Also, Freeman and Brown testified that, if such a problem had been mentioned at an AGM by plaintiff, it would most certainly have been minuted and action would have been taken. In my view the probabilities rather favour the conclusion that plaintiff had not mentioned this aspect at an AGM.

[34] I should add that the unchallenged evidence of Freeman and Brown was that, after every AGM, draft minutes would be circulated amongst all the members and if there were any corrections due, these could be reported to the managing agent. This notwithstanding, plaintiff never recorded any objection to the minutes to ensure that his alleged concern regarding the washing line area, was noted. Once again, the probabilities dictate that this issue was never raised at an AGM by plaintiff.

[35] Plaintiff also called his wife as a witness to prove that the unsafe condition of the washing line area was brought to the attention of Freeman. According to Mrs Du Plooy, she had a conversation with Freeman approximately three weeks to a month before 29 July 2009. On this occasion Freeman was present at the development as a new tenant was due to take occupation of her unit and Mrs Du Plooy invited her in for coffee. During their conversation, Mrs Du Plooy alleges, she mentioned the slime build-up in the washing line area to Freeman. Mrs Du Plooy says that she remembers the conversation as this was the occasion when Freeman had problems with mildew in her unit after the previous tenant had moved out.

[36] Freeman denied that Mrs Du Plooy made any reference to a problem in the washing line area during their conversation. She also provided a copy of a lease agreement between herself and her tenant, who only took occupation in November 2009 and whose lease expired in October 2010. She testified that it was after the expiry of this lease that her unit showed mildew. Apparently this was due to the fact that her tenant had never opened his curtains or windows. The tenant was one Freddie Nkosi. This evidence of Freeman, supported by the agreement of lease, was not challenged by plaintiff.

[37] It follows that the conversation between Mrs Du Plooy and Freeman could only have taken place in November 2010, some 18 months after the incident at the whirly bird. I therefore have to conclude that Mrs Du Plooy's evidence in this regard is unreliable and does not show that she had, prior to 29 July 2009, brought the issue of the slippery floor of the washing line area to the attention of Freeman. I should mention that Freeman, in any event, testified that the condition of the floor of the washing line area had not been raised in the conversation that she hadwith Mrs Du Plooy.

[38] Having evaluated the evidence presented on this issue, I find that plaintiff has also failed to establish, on a balance of probabilities, that he or his wife had brought the unsafe condition of the washing line area to the attention of first defendant, represented by Freeman. It therefore follows that there is no basis upon which it can be held that first defendant actually knew of the slippery condition of the floor of the washing line area, particularly at the time when the incident took place.

[39] This brings me to the claim against second defendant, the managing agent of the development. At first blush it would appear rather unusual to saddle the managing agent with a positive legal duty to ensure that the common property

of the development is safe for use by those who normally use it. It is unusual, as the managing agent is not in control of the premises and its duties would normally be of an administrative nature. See Van der Merwe, Sectional Titles, Share Blocks and Time-Sharing, Volume I 15-3/4.

[40] It is significant to note that, at the AGM of 2006, Brown, a member of the managing agent, described its role as follows:

"…the duty of the managing agent is administrative. It is the trustees' duty to run the day to day affairs of the body corporate and instruct the managing agent as needed. Should special projects be carried out, the managing agent will call for the necessary quotes and the trustees/committee will meet on site to appoint the necessary contractors and oversee the workmanship."

[41] It is common cause that second defendant was contractually engaged as managing agent by first defendant, from approximately 2000 until September 2009, when it resigned as a consequence of the present action instituted against it by plaintiff. Brown testified that, although the appointment of second defendant as managing agent did not take place in terms of a written agreement, the terms of the appointment are encapsulated in second defendant's standard written agreement, which deals with the duties of the managing agent under the

headings of administration, accounting and secretarial. See Pleadings pages 60-64 (a).

[42] It is plaintiff's case that the legal duty contended for, arose by virtue of the contractual relationship between first and second defendant, which, *inter alia*, required second defendant to receive requests and complaints regarding maintenance and repairs to be effected at the common property of the development.This means that second defendant would, in this manner, be made aware of any hazardous conditions pertaining to the common property. Second defendant would then be required to engage contractors, on first defendant's behalf, to perform the necessary maintenance work or repairs. Therefore, plaintiff submits, that second defendant owed plaintiff a legal duty to take reasonable steps to ensure that all hazardous conditions pertaining to complaints or reports made to second defendant, regarding the common property of the development, were timeously and effectively attended to. It is this duty which, plaintiff contends, second defendant failed to discharge in the instant case.

[43] I have difficulty in construing a legal duty of this nature. As mentioned earlier, second defendant's duties as managing agent were mainly of an administrative nature. In that capacity second defendant would also call for

quotations from contractors, to effect maintenance and repairs at the development.However, at no stage did second defendant undertake to oversee any repairs or maintenance to be undertaken on common property, or to ensure that such repairs or maintenance had, in fact, been undertaken, or, indeed, undertaken correctly. Moreover, at no stage did second defendant ever have control of the common property, nor was it responsible to supervise the common property.

[44] The evidence of Brown was clear, that the role of second defendant was limited to the obtaining of quotations and the ultimate appointment of contractors on behalf of first defendant. Thereafter second defendant would facilitate payment by first defendant, to the contractors who had undertaken the work in respect of the common property. In circumstances where small payments were due, same would on occasion be made by second defendant on behalf of first defendant. However, Brown stressed that there was no obligation on second defendant to oversee the work or to ensure that the work had been attended to properly. This evidence of Brown was not really put in issue.

[45] It has to be borne in mind that there is no statutory duty cast upon second defendant, as the managing agent, to be responsible for the common property or

for the safety of those who may use the common property of the development. The source of such duty, therefore, has to be found in the contractual arrangement, and the implementation thereof, between first and second defendant.

[46] In view of the aforesaid, it is not surprising that plaintiff, in seeking to hold second defendant responsible, effectively had to limit its claim for the existence of such a legal duty to those occasions where complaints or reports may have been made to second defendant pertaining to unsafe or hazardous conditions at the common property of the development. According to plaintiff, second defendant would, in such circumstances, be required to act positively to ensure that such hazardous conditions were timeously and effectively removed.

[47] In my view the *boni mores* of the community do not dictate the imposition of the legal duty contended for by plaintiff. It would simply cast upon second defendant a duty in circumstances where there is no need for it andbe difficult to discharge, particularly so, as according to Brown, second defendant at the relevant time managed approximately 57 sectional title developments.Also, by virtue of the duties performed by a managing agent, there is no need to regularly visit these developments, while the imposition of

this legal duty would require second defendant to physically monitor maintenance and repair work done at these developments. This would clearly be an impossible task. In my view, there is no reason why this legal duty should be imposed upon second defendant, particularly in circumstances where first defendant has the statutory and legal duty to see to it that the common property is properly maintained and in a state of good and serviceable repair. In addition, first defendant appointed a dedicated and competent person (plaintiff) to take care of the common property at an agreed remuneration. Why should second defendant now also be saddled with a legal duty, merely because it is required to make the necessary administrative arrangements for repairs or maintenance to be effected at the development?

[48] Further, and in any event, I am not persuaded that plaintiff has proved on a balance of probabilities that second defendant, in the person of Brown, was made aware of any hazardous condition relating to the washing line area.

[49] What the evidence shows, is that plaintiff contacted Brown during 2007, reporting a problem with moisture ingress into his unit. Brown contacted a waterproofing expert who attended to the problem. Thereafter, in February 2009, plaintiff again contacted her reporting water seeping into his unit and

advised her that, in his view,it was caused by a waste pipe on the roof of his unit. Brown contacted the plumber, Bedford, who attended to the problem. The plumber subsequently advised her that the problem had been rectified and thereafter a waterproofing expert rounded off the work. This was presumably done to the satisfaction of plaintiff, who did not thereafter complain about it.

[50] Brown testified that, apart from being made aware of these problems relating to plaintiff's unit, she was not informed by him or the plumber or any trustee or any owner in the development of a hazardous condition relating to the floor of the washing line area. In particular, she was not made aware of any leaking waste pipe or sewerage pipe or the existence of moss or slime in the area of the whirly bird. The first that she heard of the alleged unsafe condition of this area, was when plaintiff informed her that he had fallen in the washing line area and that he intended lodging a claim against second defendant's insurers. Thereafter Brown again sent the plumber to investigate and to attend to the problem. She reiterated that, prior to this incident, she was never requested by anybody to attend to a downpipe or sewerage pipe which may have caused an unsafe condition to exist in the area of the washing lines.

[51] The evidence placed before the court by plaintiff in an attempt to show that Brown was aware of the unsafe condition of the washing line area,is most unimpressive. He personally never informed Brown of the existence of slime causing a hazardous condition. He relied on the aforesaid two occasions when he had reported the leaks at his premises to Brown, but, as indicated earlier, this did not result in Brown being made aware of any hazardous condition. In addition, I find it highly improbable, if the unsafe condition of the floor of the washing line area existed over a period of time, and plaintiff considered it to constitute a safety risk, that he would not have advised Brown of this hazard. This is totally at variance with his character, as described in the evidence, and at odds with his conduct in the past, when he would not hesitate to report any matter which he believed to impact negatively on the rights of owners, to the managing agent.

[52] As I have mentioned earlier, plaintiff also attempted to rely on a comment which he allegedly made, in passing, at an AGM.He recalls that he said that someone would slip and fall and break his or her neck in the washing line area. However, no recordal of this statement is to be found in any of the minutes of the AGM's. Brown testified that she had attended all the AGM's, and had such a statement been made by plaintiff, it would have been recorded and attended to. Having regard to the obvious competence of Brown as a managing agent,I have

no doubt that, had such a statement been made by plaintiff, she would immediately have followed it up.

[53] Finally, plaintiff relied on the evidence of his wife to the effect that, during February 2009, she contacted Brown, advising her of the leaking downpipe in the washing line area and that this caused slime which they had difficulty in removing. According to plaintiff's wife, she subsequently visited the offices of Brown to collect keys, at which occasion she repeated her report to Brown. In her evidence Brown emphatically denied this evidence of plaintiff's wife, adding that, if Mrs Du Plooy had come to their offices to collect keys, she would not have made contact with Brown, but would have dealt with the receptionist only.

[54] I have earlier, when dealing with plaintiff's claim against the first defendant, expressed my concern about the reliability of the evidence of Mrs Du Plooy. It will be recalled that her evidence, regarding the report allegedly made to Freeman about the unsafe condition of the floor of the washing line area, was found to be unreliable. This obviously impacts adversely on her credibility as a witness.

[55] It is strange that, if, as testified by plaintiff, the slippery area had progressively grown from 2007 to 2009, he would not regularly have brought it to the attention of Brown. He had no hesitation in the past to bring matters that concerned him, to her attention, but now he inexplicably remained silent. I have no hesitation in accepting Brown's evidence that, if such an unsafe condition was brought to her attention, she would immediately have taken action. The impression that I gained of her is that of a highly competent person who prides herself in the quality of work that she delivers.

[56] I also, therefore, find it rather strange that, if Mrs Du Plooy had informed Brown of the slippery area on two occasions in 2009, Brown would merely have ignored it and taken no steps at all to have the problem attended to. The evidence shows that when other problems were reported to her, she would immediately follow it up. It seems rather improbable that she would have flatly ignored this potentially hazardous condition.

[57] Having regard to the evidence as a whole, I conclude that plaintiff has failed to prove on a balance of probabilities that second defendant, represented by Brown, had the legal duty contended for by plaintiff and, even if such a legal

duty existed, that second defendant was made aware of the unsafe condition of the floor of the washing line area, requiring it to take steps in this regard.

[58] In view of my findings above, the action falls to be dismissed. I do, however, wish to add that it would in any event appear that, on plaintiff's own version, the incident was caused by his sole negligence. It should be borne in mind that plaintiff contractually undertook to keep the common property clean, *inter alia*, by hosing down and sweeping the washing line area twice a week. Although this may not have amounted to a delegation of first defendant's legal duty to plaintiff, it meant that plaintiff was contractually obliged to execute the duty on behalf of first defendant. He would, in a manner of speaking, be the ears, eyes and arms of first defendant. On his own version,he was fully aware of the pre-existing danger, but had taken no effective steps to remove same or to have same removed. Notwithstanding this knowledge, he entered the courtyard and walked to the washing lines closest to the wall, where, according to his knowledge, the slime created a danger. There was no need for him to approach that point as he could have remained on the safe side of the whirly bird and merely turned the washing lines in his direction. He could offer no explanation for his conduct, but to say that he had forgotten about the slime.

[59] As to the issue of costs, defendants as the successful parties are entitled to their costs. First defendant has sought a punitive costs order, but, in my view, plaintiff has not been shown to have conducted the litigation in a manner justifying such an order.

[60] In the result the following order is made:

> *"The plaintiff's action against first defendant and second defendant is dismissed with costs, including the costs occasioned by the postponement of the trial on 8 October 2012"*.

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P B Fourie, J

Judgment by : Fourie J

Counsel for Plaintiff : Adv. Wallis Roux

Counsel for First Defendant	:	Mr. R Krautkramer
Counsel for Second Defendant	:	Mr. M Bey
Attorney for Plaintiff	:	Mellows & De Swardt – Mr.Lucas De Swardt
Attorney for First Defendant	:	MiltonsMatsemela Inc.
Attorney for Second Defendant	:	Smith Tabata Buchanan Boyes
Date(s) of hearing	:	4, 5, 6 and 18 February2013
Date of Judgment	:	12March 2013