



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 296/2019

In the matter between:

CITY OF CAPE TOWN

APPELLANT

and

FATIEMA CARELSE

FIRST RESPONDENT

QUINTON EKSTEEN

SECOND RESPONDENT

DYLAN ADRIAN EKSTEEN

THIRD RESPONDENT

Neutral citation: *City of Cape Town v Carelse and Others* (Case no 296/2019) [2020] ZASCA 117 (1 October 2020)

Coram: Navsa, Mocumie and Dlodlo JJA and Eksteen and Poyo-Dlwati AJJA

Heard: 4 September 2020

Delivered: 01 October 2020

Summary: Application for leave to appeal referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 19 of 1959 – whether reasonable prospects of success or other compelling reason for appeal to be heard – visitor to resort under control of Municipality – attacked by dog brought onto premises against Municipality’s By-Laws and

in the face of prominent signage prohibiting dogs – handler avoided main entrance access control – entered through an unsupervised entry point – court below holding that Municipality acted wrongfully and negligently and held Municipality liable – discussion of relevant principles and case law – no prospect of success and no compelling reason for appeal to be heard.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Vos AJ, sitting as court of first instance): judgment reported *sub nom Carelse v City of Cape Town* [2018] ZAWCHC 173; [2019] 2 All SA 125 (WCC)

The application for leave to appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Navsa JA (Mocumie and Dlodlo JJA and Eksteen and Poyo-Dlwati AJJA concurring):

[1] Little did the first respondent, Ms Fatiema Carelse (Fatiema), know, when she set out with friends and family on a bus trip from the Cape Flats to a seaside resort, that what promised to be an enjoyable and social weekend event, would turn into an attack on her by a Pitbull dog, while she and others were frolicking in one of the tidal swimming pools.

This event occurred during the lunch hour on Saturday, 7 December 2013, at the Harmony Park Resort, a day camp (the Day Camp) situated at Strand in the Western Cape. The Day Camp is a public facility under the control of the appellant, the City of Cape Town (the City), a Municipality constituted in terms of the Local Government: Municipal Structures Act 117 of 1998. The dog was owned by the second respondent, Mr Quinton Eksteen (Quinton), and brought to the camp by the third respondent, Mr Dylan Eksteen (Dylan). The dog bit Fatiema, allegedly causing her to sustain serious physical injuries and as a result of which she developed post-traumatic stress disorder. Fatiema instituted action against the City in the Western Cape Division of the High Court, Cape Town, in which she claimed damages sustained as a result of the attack by the dog. The action was based on the alleged negligent breach of a legal duty to ensure the safety of visitors to the Day Camp.

[2] The City defended the action instituted by Fatiema in the court below and served Third Party Notices, in terms of Rule 13 of the Uniform Rules of Court, on Quinton and Dylan, claiming an indemnity or contribution from them in relation to any damages that may be awarded against it. Neither of them defended the City's claim. Dylan did, however, testify at the trial as a witness for Fatiema.

[3] In its plea the City admitted that it owed the public utilising the facility a 'duty of care', but denied liability to Fatiema, stating that it had complied with its duty by taking reasonable precautionary steps to keep the facility safe and to ensure the safety of the public. Furthermore, the City pointed to the fact that the dog was brought onto the premises unlawfully by a third party, in contravention of the City's By-Laws, and in the

face of appropriate notice boards at various points of the facility, which indicated that dogs were prohibited entry. It is common cause that the City's By-Laws prohibit dogs at a facility such as the Day Camp, on pain of a fine, and that there are prominent notices at the facility as asserted by the City.

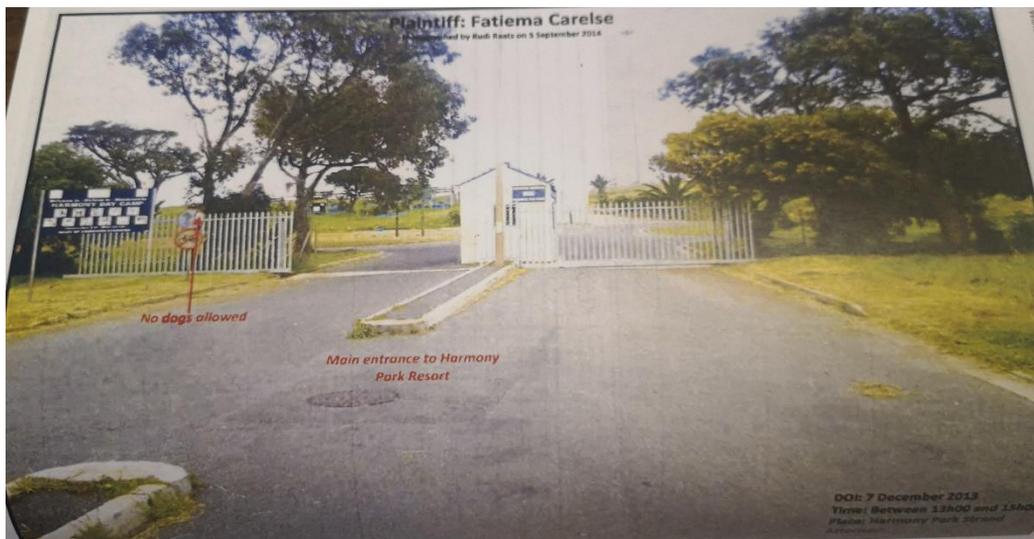
[4] The matter proceeded to trial to determine whether the City should be held liable for the damages sustained by Fatiema. The parties agreed and the court below ordered, in terms of Uniform Rule 33, that there be a separation of issues and that the issue of liability be determined first, with quantum, if necessary, to be determined later. The court below (Vos AJ), after hearing evidence, made the following order:

- '[1] It is declared that the City of Cape Town is liable for such damages as Ms Fatiema Carelse may prove, arising out of a dog attack on 7 December 2013 at the Harmony Park Day Camp;
- [2] Mr Quinton Eksteen is liable to contribute 50% of the aforementioned proven damages, to the City of Cape Town;
- [3] The City of Cape Town shall pay the costs of Ms Fatiema Carelse;
- [4] Mr Quinton Eksteen is liable to pay the costs of the City of Cape Town only involving the third-party notice proceedings against him on an undefended basis.'

[5] The court subsequently dismissed the City's application for leave to appeal against that order. An application for leave to appeal to this court was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 and the parties were directed to be prepared, if called upon to do so, to present argument on the merits. We heard argument on both the application and the merits. The primary question to be addressed

is whether there would be reasonable prospects of success. In order to make that determination it is necessary to have regard to the evidence adduced and to consider the conclusions reached by the court below. The relevant parts of the evidence are set out hereafter.

[6] Fatiema was 23 years old at the time of the incident in question. She was the first witness to testify. Her version of events appears hereafter. At approximately 09h00 on the day of the incident she arrived at the Day Camp with friends and family by bus from Hanover Park, Cape Town, where she lives. She and others made their way to the main entrance, pictured hereunder:



[7] As can be seen, the main entrance is set up so as to ensure access control. At the extreme left-hand side of the photograph is a board indicating that dogs are not allowed. There are also two prominent circular signs at the entrance indicating that cycling and

dogs are not allowed within the resort. The photograph that appears hereafter shows the signs more clearly:



The second image is a part of the photograph (appearing immediately before it) that was entered into evidence. It has been cropped and zoomed to show more clearly the two signs prohibiting dogs at the facility.

[8] Fatiema and her companions were searched by the City's security officials at the main entrance. The security personnel searched their bags for alcohol and firearms. Alcohol and firearms, as indicated on the board depicted on the photos above, are also prohibited at the facility. On that particular day, there were many more officials on duty than is usually the case because there were so many visitors. Security officials had inspected Fatiema's bag a second time while she was within the facility. At around lunchtime, Fatiema made her way to one of the tidal pools located within the Day Camp. While she was in the pool she saw people scattering. Suddenly a dog was attacking and biting her. She attempted to fight off the dog. Before the attack occurred she had seen a fairly large contingent of security personnel patrolling the area, continuing to inspect bags within the resort. Fatiema was playing with a ball in the pool when the dog came towards her. She let go of the ball, thinking that the dog wanted to play with it, but this did not avert the attack.

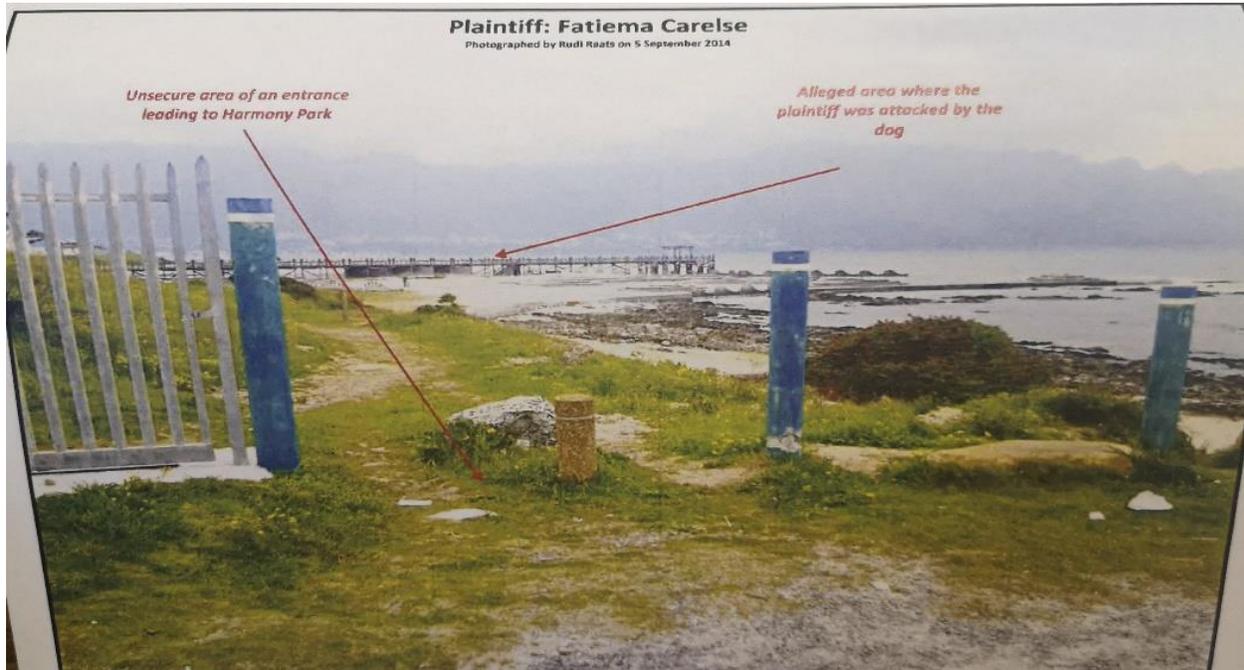
[9] Security officials at the resort came to Fatiema immediately after the dog had attacked her. They summoned an ambulance and questioned her about the attack. They informed her that dogs entered the facility on a daily basis. One of the officials informed her that the dogs usually gained entry through a hole in the railings. Shortly thereafter Fatiema was transported to hospital.

[10] With reference to a photograph presented to her, Fatiema testified that there was an unsecured area near the tidal pool, close to the jetty, which allowed access to people and dogs. The dog had come from that direction.

[11] The next witness to testify was Ms Zulfa Carelse (Zulfa), a relative of Fatiema, who had accompanied her on the visit to the Day Camp. Zulfa confirmed that they were searched by security officials before they were afforded entry. Zulfa witnessed the dog attacking Fatiema. She and Fatiema were both in the pool at that time. Zulfa had seen Dylan approach with the dog on a leash. As he came closer, he unleashed the dog. The dog entered the pool and attacked Fatiema, causing people to scatter. Zulfa heard Fatiema scream and saw the dog attacking her. She later heard City officials say that the dog had entered through a hole in the fence. Zulfa also saw the dog bite Dylan after he had entered the tidal pool and attempted to bring it under control. Dylan was subsequently also attacked in the pool by other visitors at the facility, who were angered by the dog having been brought to the facility.

[12] Fatiema had testified about the incident without drawing a distinction between the City's law enforcement officials and private security officials employed by the City. Zulfa was more specific. She testified that immediately after the incident the City's law enforcement officials were on the scene. She also testified that the people who had searched them at the entrance were the City's law enforcement officials. According to her, the City's law enforcement officials comprised males and females who wore uniforms. Some patrolled the area with quad bikes.

[13] The 'hole' in the railings or the fence, referred to in the evidence of the first two witnesses and also testified about later by others, is best depicted on the photograph that appears hereunder:



As can be seen, there is an unfenced area to the right of the first blue pillar, at the end of the railing. In that area there are pillars, apart from each other, so as to prevent vehicular entry. It is those gaps between the pillars that are referred to as a 'hole' in the railings.

[14] The next witness to testify was Mr Emilio Nelson (Emilio), who was part of the group, including Fatiema and Zulfa, that travelled to the Day Camp. He confirmed that there was entrance control at the main entrance and that they were all searched before entry. He testified that the people exercising entrance control were the City's law enforcement officials.

[15] Emilio testified that he had seen the dog that attacked Fatiema approximately thirty minutes before the incident. The dog was led by Dylan across the overhead pier within the Day Camp. He confirmed that on the day of the incident in question, the City's law enforcement officers patrolled the Day Camp on motorcycles and on foot.

[16] Dylan was the last witness to testify in support of Fatiema's case. He testified that he had visited the Day Camp on other occasions, prior to the day on which the incident in question occurred. This was the first time he had brought the dog.

[17] According to Dylan he had gained entry at the spot between the pillars, shown in the photograph at para 13. It was a 'free entry' spot. After he gained entry he walked on the pier with the dog on a leash. Intending to make his way home, Dylan thought it a good idea to wash the dog at the base of the pier before leaving the Day Camp. The next thing he knew, the dog chased after a ball while people were playing with in the pool. The dog bit the ball, causing Fatiema and her friends to move to the edge of the pool. Fatiema screamed for her ball and this caused the dog to become aggressive. The dog attacked and bit Fatiema and then Dylan. It is necessary to record that, under cross-examination, Dylan testified that he had let the dog off the leash and held it before it broke loose and entered the pool.

[18] According to Dylan he had been at the Day Camp for approximately thirty minutes before the incident occurred. He had seen no law enforcement officials and was stopped by no-one and was not told that dogs were not permitted at the resort.

[19] Under cross-examination, Dylan described how he had visited the Day Camp very often, already from his childhood days. On the day of the incident he had been in the vicinity of the pool for no longer than 10 minutes. If the law enforcement officials had not arrived, fellow Day Camp visitors at the pool would have hurt him. He was instructed by the City's law enforcement officials to fetch the dog. He did so and put the leash back on the dog. The law enforcement people were dressed in uniforms.

[20] Dylan testified that he knew he was not permitted to take a dog into the Day Camp. There is a prominent sign at the main entrance that made that clear. He had seen people with dogs at the Day Camp on a number of prior occasions, but mostly, though not exclusively, on weekdays. That then was the end of the evidence adduced in support of Fatiema's case.

[21] The first witness to testify on behalf of the City was Mr Lourens Fourie, a First Inspector with the City's Law Enforcement Division, responsible for the Helderberg Region which includes Gordon's Bay, Somerset West, Lwandle, Macassar and Strand. At the time of the incident in question, Mr Fourie held the rank of Senior Inspector and was stationed at the Day Camp. He was second-in-command of the entire Helderberg area. At the time he testified he was approaching twenty-nine years of service with the City, seventeen of which had been spent at the Day Camp.

[22] Mr Fourie described the layout of the Day Camp. One is unable to see the pier from the main entrance. At the time of the incident lifesavers were stationed on the pier

because they enjoyed a better view from there and were there to prevent children from diving into the pool or the sea.

[23] At the time of the incident there were eight law enforcement officers employed by the City for the entire Helderberg area. The enforcement officers at the Day Camp are also responsible for the extended area referred to in para 21 above. At the time of the incident the biggest problem experienced at the Day Camp was alcohol abuse, which gave rise to unpleasant consequences. In all of the years of Mr Fourie's tenure at the Day Camp, the only incident involving an attack by a dog was the one involving Fatiema.

[24] In addition to the City's law enforcement officials there were also private security personnel on duty at the Day Camp. They were there at the instance of the City. There were also lifeguards in attendance at the facility. The principal concern of the lifeguards was to prevent swimming incidents especially in relation to the pier. The private security personnel were concerned with safeguarding buildings and property. Where necessary, they would engage the law enforcement officials and/or the Metro Police. The law enforcement officials have a close working relationship with the Metro Police and share an office with them at the Day Camp.

[25] According to Mr Fourie, as soon as someone attempted to bring a dog onto any City facility which prohibits dogs, they are directed away. If they do not heed the instruction they are fined. If they persisted, the dog was impounded. This occurred on a daily basis during periods such as the month of December.

[26] The facility has a capacity of 3500. On busy days the Day Camp welcomes approximately 1000 visitors. Visitors to the Day Camp are concentrated in and around the tidal pools and the adjacent braai areas. The pier is not easily visible from the security area because of the crowd. The dog that bit Fatiema would not have been visible to security officials while it was on the pier.

[27] Mr Fourie testified that, although private security personnel have no instructions from the City in relation to prohibiting dogs from entering the facility, they do, on occasion, report the presence of dogs to the City's law enforcement officials, who then respond immediately.

[28] Under cross-examination, Mr Fourie accepted that the primary responsibility for ensuring that dogs do not have access to the Day Camp rested on the City's Law Enforcement Division. The private security personnel were ever-present at the facility. At the time of the incident there had been no First Inspector for the facility. That is usually the person in charge of the facility and the extended area.

[29] The board at the main entrance indicated what was prohibited at the facility. Prohibited items included alcohol, firearms and other dangerous weapons. These were prohibited in terms of the City's By-Laws. It is normal procedure to search people before entry, as testified to by Fatiema and others. Additionally, spot-checks are conducted within the Day Camp by the City's law enforcement officials. People have, on occasion, depending on nature of their transgressions, been evicted from the Day Camp.

[30] Mr Fourie testified that on the day of the incident there were only two law enforcement officials on duty at the Day Camp, placed at the main entrance. That number was inadequate to deal with the large crowd. Other than the main entrance and the 'free entrance' referred to by Dylan, there was also a short run of beach on the south side from which access could be obtained. There was no access control at entrances other than the main one. It is important to note that Mr Fourie testified that at one stage there had been a fence in the vicinity of the 'free entrance' which extended into the sea. That is the area beyond the pillar on the extreme right-hand side of the pillar as shown in the photograph in para 13 above. With the passage of time the fence that extended into the sea fell into disrepair and is no longer in existence. Mr Fourie could not say whether the lack of fencing there was within the knowledge of the City.

[31] In the past, according to Mr Fourie, one had to pay an entrance fee to enter the Day Camp and it had been properly and adequately fenced. Presently, ninety percent of people entering the facility use the main entrance. Significantly, Mr Fourie testified that people who used the 'free entrance' were usually those who sought to avoid being searched.

[32] The next witness to testify on behalf of the City was Mr Willem Le Roux, the manager at the Day Camp. In the seven years he has been at the facility there had not been one incident involving a dog attack. He is in charge of all the personnel, including the lifeguards and security details. He confirmed that ninety percent of people who gained entry to the Day Camp used the main entrance. Unlike Mr Fourie, Mr Le Roux testified that the private security personnel were responsible for ensuring that alcohol was not

brought in and that dogs did not gain entry. He insisted that this was part of the contract the City had concluded with the security firm. Law Enforcement was responsible for entry at the main entrance. They also inspected the facility. Metro Police were also jointly responsible for law enforcement and controlling the premises. Alcohol abuse was the main cause of incidents at the facility.

[33] Mr Le Roux confirmed that visibility from the security office to the pier was impaired, due to crowd size. Although he was at the Day Camp at the time of the incident he only learnt of it afterwards. He testified that there were no boards in the vicinity of the 'free entrance' indicating that dogs were not permitted in the Day Camp. The City was aware that people gained entrance at that point. At the time of the incident there were between four to six law enforcement officials at the facility. Additionally, there was one person from the private security firm and one from the Metro Police.

[34] The last witness to testify in support of the City's case was Ms Lauren-Lee Rodrigues who is employed in the Disaster Management Division of the City. At the time of the incident she was stationed at the Day Camp and had been working there for two years. On the day in question she was employed by Law Enforcement. There were eight of them during the morning. This grew during the course of the day to 12. Ms Rodrigues was at her post at the main entrance. Their main focus was on people who attempted to bring alcohol onto the premises. Two out of ten people sought to do this. People are searched before entry. When a dog is seen the owner is requested to remove the dog. If the instruction is not heeded the dog may be impounded.

[35] On the day of the incident Ms Rodrigues was at the gate when she was informed by a member of the public that a woman had been bitten by a dog. She saw Fatiema approaching with a towel bound across her hand. Ms Rodrigues called for an ambulance. Fatiema described the dog that bit her as a brown and white Pitbull. A search was launched to find the dog. Ms Rodrigues took Fatiema to the Law Enforcement office at the Day Camp to wait for the ambulance. They then encountered Dylan and the dog. The dog was subsequently impounded.

[36] In Ms Rodrigues' experience a dog has never been allowed to run free within the Day Camp. If security had become aware of the dog they would have taken immediate steps to remove it.

[37] What appears above are the relevant parts of the evidence on which the court below based its conclusions. With reference to decisions of this court dealing with omissions to take precautionary steps to prevent harm, the high court had regard to the fundamental principle that allegedly negligent conduct in the form of an omission is not prima facie wrongful. Wrongfulness depended on the existence of a legal duty. The high court had regard to the following dictum from this court's decision in *Hawekwa Youth Camp and Another v Byrne*:¹

'The imposition of this legal duty is a matter for 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

¹ *Hawekwa Youth Camp and Another v Byrne* [2009] ZASCA 156; 2010(6) SA 83 (SCA) para 22.

considerations require that such omission, if negligent, should attract legal liability for the resulting damages.’

[38] The high court also considered, in relation to wrongfulness and culpa, the decisions of this court in *Van Vuuren v Ethekwini Municipality*,² *Pro Tempore Akademie CC v Van Der Merwe*,³ *Minister of Safety and Security v Van Duivenboden*,⁴ *Cape Town Metropolitan Council v Graham*⁵ and *ZA v Smith and Another*.⁶ Vos AJ, in having regard to the dictum in the preceding paragraph, took into account that the Day Camp had three entrances and that the City knew that 10-20 per cent of people gained entry through the two entrances that had no access control. The court found that the City knew that dogs were a significant problem because they were removed or impounded on a number of prior occasions.

[39] The following parts of the judgment of the court below bear repeating:

‘(a) In general, where the public gain access to a public facility via all the entrances of such a facility, it would be irrational and ineffectual to manage, supervise and conduct strict access control at only one entrance, while conducting no supervision or access control at the other entrances.

(b) When access control must be done in order to prevent dogs from entering a public facility, such as the Day Camp, it should be done in a reasonable and comprehensive manner. There would be no point in only selecting one entrance area to conduct supervision and access control.

² *Van Vuuren v Ethekwini Municipality* [2017] ZASCA 124; 2018(1) SA 189 (SCA) paras 24-32.

³ *Pro Tempore Akademie CC v Van Der Merwe* [2016] ZASCA 39; 2018 (1) SA 181 (SCA).

⁴ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12.

⁵ *Cape Metropolitan Council v Graham* [2001] 1 All SA 215 (A) paras 14-15.

⁶ *ZA v Smith and Another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) para 24.

(c) The City could quite easily have put up signboards at the side entrances, thereby warning visitors not to bring dogs onto the premises. The evidence is that there are no signboards at the northern entrance where Mr Dylan Esksteen and the dog entered. Effective and prominent signboards would probably have contributed towards stemming the influx of visitors through the side entrances.

(d) The placing of law enforcement officers at the two side entrances would in all likelihood not have caused financial hardship for the City. If there was only one law enforcement officer at the northern entrance, it is likely that such officer would have prevented the dog from entering the Day Camp, and the attack on the plaintiff.

(e) In any event, the City did not present any evidence in the regard to claim that the cost of extra law enforcement officials would have involved an intolerable financial burden on the City or, would have been disproportionate to the benefit gained thereby.

(f) The City knew that visitors and dogs entered the Day Camp through the two unmanned entrance areas. It took no reasonable steps to prevent it.

(g) I accordingly find that by failing to provide signboards and access control at the two side entrance areas, the City breached its legal duty in a wrongful manner.¹⁷

[40] In relation to negligence, the court below had regard to the oft-cited case of *Kruger v Coetzee*⁸ and the test for negligence postulated there. It reads as follows:

‘For the purposes of liability culpa arises 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

⁷ *Carelse v City of Cape Town* [2018] ZAWCHC 173; [2019] 2 All SA 125 paras 55-61.

⁸ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-F.

(b) the defendant failed to take such steps.’

[41] The court below, in dealing with foreseeability, noted that the City had taken the trouble to enact a By-Law, dealing with the dangers of dogs. It had placed two signboards at the main entrance prohibiting entrance by dogs. The impounding or turning away of dogs were regular occurrences. Vos AJ concluded as follows:

‘(a) Given the significant number of dogs and visitors that regularly frequented the Day Camp during December and the summer season, the City should have foreseen the reasonable possibility that it was only a question of time before an attack would take place.

(b) I therefore find that a reasonable person, in the position of the City, would have foreseen the reasonable possibility that a dog attack could occur inside the Day Camp.’⁹

[42] The court below went on to consider the question of ‘reasonable steps’ that could have been taken by the City. It reasoned as follows:

‘(a) Despite the City’s knowledge that there were so many dogs frequenting the Day Camp, it had no signboard on the northern and southern side to warn people not to bring dogs onto the premises. It also had no law enforcement officer at the northern and southern entrance. If it had an appropriate signboard and a law enforcement officer at the northern entrance (as illustrated above), it would probably have prevented Mr Dylan Eksteen and the dog from entering the Day Camp, because they entered the Day Camp through the northern entrance. In that case, the plaintiff would not have been injured. Such steps would have been reasonable, effective, affordable and sustainable. As stated in *Van Vuuren* “. . . ensuring access control [is] relatively simple and would not place an intolerable financial burden on the Municipality”.¹⁰

⁹ *Carelse* op cit fn 7 para 67.

¹⁰ *Van Vuuren* op cit fn 2 para 29.

(b) In my view, the City's failure to erect an appropriate sign board at the northern and southern entrances, and the failure to provide supervision and access control at the northern and southern entrances, was unreasonable and negligent. It is unreasonable to only apply access control and supervision in respect of the majority of the visitors to the Day Camp, and in respect of between 10 to 20%, no supervision and access control is undertaken. That conduct, in my view, falls short of what a reasonable and sensible person, in the position of a municipality, should do.¹¹

[43] Insofar as third party liability was concerned, the court below held the owner, Quinton, liable to make a contribution to the City in respect of the damages Fatiema might prove on the basis of the *actio de pauperie*. Vos AJ considered a 50 percent contribution to be reasonable. It did not hold Dylan liable to make any contribution to the City.

[44] Before us it was submitted on behalf of the City, in relation to the tests for granting leave to appeal in terms of s 17(1)(a)(ii) of the Superior Courts Act, namely, whether in the opinion of the judge or judges concerned the appeal would have a reasonable prospect of success, or whether there is some other compelling reason why the appeal should be heard, first, that the court below erred in determining both wrongfulness and negligence against it and that in regard thereto there would be a reasonable prospect of success. Second, that the case raised pertinent questions in relation to liability of a Municipality for the unlawful conduct of third parties. It is to those questions that I now turn.

¹¹ *Carelse* op cit fn 7 para 74.

[45] First, the question of wrongfulness. In *Country Cloud Trading CC v MEC Department of Infrastructure Development*¹², the Constitutional Court said the following:

‘Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or conversely, whether the “social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue”. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, *if paired with fault*, is actionable. And if conduct is not wrongful, the intention is to convey the converse: “that public or legal considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages” notwithstanding his or her fault.’ (Footnotes omitted; emphasis my own.)

[46] In *Le Roux and Others v Dey*¹³ the Constitutional Court spoke thus:

‘In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion for wrongfulness ultimately depends on a judicial determination of whether-*assuming all the other elements of delict 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 reasonableness of the conduct of the defendant’s conduct but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from the conduct.’

¹² *Country Cloud Trading CC v MEC, Department of Infrastructure Development*, Gauteng [2014] ZACC 28; 2015 (1) SA 1(CC) paras 20 and 21.

¹³ *Le Roux and Others v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122.

[47] I pause to consider the repeated statements by this court that wrongfulness should be considered distinctly from the question of negligence. In this regard see *Gouda Boerdery BK v Transnet*,¹⁴ *Hawekwa*,¹⁵ *Van Vuuren*¹⁶ and the highlighted parts in the dicta from the judgments of the Constitutional Court set out in the preceding paragraphs.

[48] In *Gouda*¹⁷ and *Hawekwa*¹⁸ this court pointed out that, depending on the circumstances, it might be appropriate to enquire first, into the question of wrongfulness and for that purpose to assume negligence. Of course, in the event of the absence of negligence – in some cases that might be clear – the question of wrongfulness does not arise¹⁹.

[49] Before us it was accepted that the first enquiry should be into the question of wrongfulness. Counsel on behalf of the City was right to submit that as a starting point one should recognise that Fatiema's claim was based on the City's negligent failure to take adequate steps which would have prevented the attack on her by the dog - an omission. It is also correct as repeatedly stated by this court that in the case of a positive act that causes physical harm, it is presumed to be unlawful. However, in the case of a negligent omission it is only unlawful if in the circumstances the law regards it as sufficient to give rise to a legal duty to avoid negligently causing harm²⁰. This, as referred to in para 37 above, was appreciated by the court below.

¹⁴ *Gouda Boerdery BK v Transnet* [2004] ZASCA 85; 2005 (5) SA 490 (SCA) paras 12 and 13.

¹⁵ *Hawekwa* op cit fn 1 paras 21-23.

¹⁶ *Van Vuuren* op cit fn 2 para 18.

¹⁷ *Gouda* op cit fn 14 para 12.

¹⁸ *Hawekwa* op cit fn 1 para 24.

¹⁹ *Gouda* op cit fn 14 para 12.

²⁰ *Van Duivenboden* op cit fn 4 para 12 and the cases there cited.

[50] The court below criticised the parties for their inaccurate use of the expression 'duty of care, when they clearly meant 'legal duty'. The latter is associated with wrongfulness. The concept 'duty of care' derived from English law and is associated there with the question of negligence.²¹

[51] The attack on Fatiema occurred at a resort under the control of the City, which saw fit to implement admission controls and to provide security oversight to ensure public safety. It put up signs in relation to items and dogs that were prohibited. It did this against the backdrop of its By-Laws, in terms of which the City recognised the dangers attendant on what was prohibited. The City set up an impressive main entrance, which clearly was designed as part of the City's efforts to ensure the safety of the public. It conducted ongoing searches of bags within the facility to ensure that what was prohibited was not being concealed and brought into the resort unlawfully. Dogs are more visible and not easily given to concealment and are at least notionally more easily policed in relation to entry. They have in the past been turned away and their owners or handlers taken to task. On occasion they have been impounded.

[52] The 'hole' in the fence was a weak-spot through which people who were intent on avoiding searches gained entry and through which dogs, in the past, had admittedly gained entry. Furthermore, there had been a fence at the 'free entry' point that had fallen into disrepair and was not replaced. The officials who testified in support of the City's case were uncertain whether the people they reported to within a hierarchy were aware of the

²¹ *Hawekwa* op cit fn 1 para 21.

'hole'. There was no explanation on behalf of the City as to why the fence had not been reinstated. There was no explanation as to why a single guard placed at the free entry point would not be adequate to prevent entry of dogs and prohibited items. It is important to reiterate that the vast majority of people who visit the resort gain entry through the main entrance. The access control at that point is, at first blush, impressive. This must be reassuring to a visitor. If one were to ask a member of the public whether they would expect to receive adequate protection at the resort controlled by the City, within means and reason, the answer would be self-evident. Moreover, the constitutional right to safety of the person and the right to dignity, while visiting the resort are, amongst others, implicated. It is also proper to take into account that the Municipality is part of the State and that it should be concerned with public safety at a resort conducted by it.

[53] In the City's heads of argument there is reference to s 13 of the National Environment Management: Integrated Management Act 24 of 2008, which provides that any natural person has a right of reasonable access to coastal public property and to its use and enjoyment. Section 13(2) does not prevent restrictions in the public interest. Although Mr Le Roux stated that the side entrances, as distinct from the main entrance, could not be blocked off as the beach had to be open to the public at all times, he made no reference to the abovementioned legislation and did not say why access could be restricted at the main entrance but not at other entrances. Be that as it may, even if a fence could not be permanently erected as before – in the past at common law the public would have had a right of access – it was not suggested that the placing of a security official at each of the two side entrances would be unduly burdensome, either financially or otherwise. Imposing liability would not be unreasonable.

[54] Having regard to what is set out above I am of the view that wrongfulness was established. There is no substance to the submission on behalf of the City that wrongfulness was not pleaded by Fatiema and that the claim therefore ought not to have been entertained by the court below. The heading above para 8 of her particulars of claim reads as follows: 'Causal Negligence and/or Wrongful and/or Negligent Omission'. Even though both parties were confused in their use of 'duty of care', wrongfulness was asserted by Fatiema. Additionally, it is clear from the City's plea and the manner in which the case was conducted, argued and dealt with by the court below that wrongfulness was in issue between the parties. Wrongfulness having been disposed of, it is to negligence that I now turn.

[55] The Court below, in applying the test set out in *Kruger v Coetzee* referred to in para 40 above, concluded that a Municipality in the position of the City would have foreseen the possibility of a dog attack and would have taken reasonable steps to prevent the occurrence and that it failed to do so and was consequently liable to Fatiema.

[56] The City recognised the potential dangers that dogs presented, by enactment of the By-Laws referred to. This acknowledgment is reinforced by the signs prominently displayed at the main entrance. It is further substantiated by the officials who have, on numerous occasion prior to the incident, fined persons who brought dogs to the resort, or warned them or impounded dogs. The City's officials were aware that dogs entered the facility, either on their own or led by owners or controllers at the 'free entry' point. They recognised that persons who wanted to avoid detection or being searched used that entry

point. They could have taken the reasonable step of employing access control measures at that point. It was clear from Mr Fourie's evidence that they were understaffed and consequently that security arrangements relative to crowd size was inadequate. One must either employ sufficient staff to ensure public safety, or not conduct a resort at all. A fence that extends into the sea, does not appear to me, in the light of the legislation referred to by counsel, to be an option that can be discounted. In any event the placing of a guard at that point would on the day in question probably have prevented Dylan from bringing the dog to the resort and the attack on Fatiema would not have occurred. I can see no reason to fault the conclusion of the court below.

[57] Consequent upon the conclusions reached it follows that there are no prospects of success in relation to an appeal. It was submitted that the City's liability in relation to wrongful conduct on the part of third parties called for clarity and a pronouncement by this court, and that this met the requirement of a compelling reason for the appeal to be heard in terms of s 17(1)(a)(ii) of the Superior Courts Act. At the end of last year this court confirmed a decision, also by the Western Cape Division of the High Court, holding a Municipality liable for the consequences that followed on the act of a rapist who made his way into a residential resort controlled by it. This court took into account that there had been prior breaches of security at that resort, even though of a less serious nature. There had also been a prior complaint of an assault at that resort. In that case this court took into account that the resort had been left woefully understaffed due to a staff meeting and concluded, with regard to the vulnerability of women and disabled people in our society, that the Municipality in question had rightly been held liable.²² In *Van Vuuren*, a child

²² See *Witzenberg Municipality v Bridgman NO and Others* [2019] ZASCA 186; 2019 JDR 2393 (SCA).

visiting a public pool pushed the child on whose behalf a claim for damages was brought.²³ Of course, our courts will be astute to consider each case on its own merits but there is no compelling reason requiring an appeal to be heard.

[58] One final brief remark. It is incongruous for Quinton to have been held partially liable as a joint wrongdoer on the basis of the *actio de pauperie* but not Dylan, who unlawfully brought the dog to the resort, which led to the attack.²⁴ Counsel were agreed, that for present purposes, this was an aspect that did not deserve any further attention.

[59] The following order is made:

The application for leave to appeal is dismissed with costs, including the costs of two counsel where so employed.

M S Navsa

Judge of Appeal

²³ *Van Vuuren* op cit fn 2.

²⁴ See *Van Meyeren v Cloete* [2020] ZASCA 100.

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