IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 72869/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE DATE

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30/06/2020

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In the matter between:

VERNON MORGAN **PLAINTIFF**

and

MEMBER OF THE EXECUTIVE COUNCIL FOR GAUTENG DEPARTMENT OF AGRICULTURE, CONSERVATION ENVIRONMENT AND LAND AFFAIRS **1ST DEFENDANT**

PROTEA HOSPITALITY GROUP (PTY) LTD **2ND DEFENDANT**

PROTEA HOSPITALITY GROUP (PTY) LTD **THIRD PARTY**

LEAVE TO APPEAL- JUDGMENT

N V KHUMALO J

Introduction

[1] This is an application for leave to Appeal to the full bench of this court or the Supreme Court of Appeal against this court's Judgment delivered on 3 December 2020, dismissing the Applicant's claim for damages against the 1st Respondent/1st Defendant with costs. The Applicant was also ordered to pay the 1st Defendant's costs occasioned by the Third Party claim.

[2] Prior to the hearing of the matter I had in terms of Rule 42 (1) (b) sought to correct patent errors on the authorities cited and the text that was intended to be quoted on paragraphs [55] to [57] of the Judgment. This then takes care of the concerns raised by the Applicant in paragraphs 2 to 4 of his Notice of leave to appeal.

[3] The claim of the Applicant, Mr V Morgan (Plaintiff in the main action) arose as a result of injuries he sustained on 4 December 2010 when he fell down a wooden staircase in one of the chalets where he was a guest at a Protea Hotel owned by the 1st Respondent, the Department of Agriculture, Conservation Environment and Land Affairs and managed by the Protea, the 2nd Respondent, who were, respectively, the 1st and 2nd Defendant in the main action, (henceforth I will refer to parties as in the main action). The Plaintiff alleged that the negligence of the 1st Defendant or alternatively of the 2nd Defendant or alternatively of both the 1st Defendant and the 2nd Defendant and or their employees acting within the course and scope of their employment was the sole cause of the accident.

[4] The 1st and 2nd Defendants were alleged to have been negligent by allowing the condition and the state of repair of the staircase and the table at the bottom of the stairs to pose a danger to the guests and by failing to take adequate steps to prevent or warn the public of such potential danger and ensure that such is suitable for public use, as a result failed to **exercise** such care and skill a reasonable person in the position of the 1st Defendant**,** would have normally done, by for instance providing a handrail for guests. The Plaintiff had alleged to have knocked his head against the coffee table at the bottom of the stairs.

[5] The 1st Defendant in its main defence admitted as owner, to have a legal duty to take reasonable care that the premises, including the wooden staircase, were safe for use by resort guests and to have complied with such duty**.** It alleged that the Plaintiff 's own negligence was

the sole cause of his fall, since he failed to descend the staircase in a safe and proper manner, and or holding onto the staircase whilst descending.

[6] The 1st Defendant filed a 3rd Party Notice against the 2nd Defendant, based on their management contract and joined issue with the 2nd Defendant, seeking indemnification or a contribution from 2nd Defendant should it be held liable to pay the Plaintiff's proven or agreed damages.

[7] A day after commencement of the trial, the Plaintiff and the 2nd Defendant settled the matter between them. The details of the settlement were not divulged to the court. The parties subsequently proceeded as if there was no settlement. It led to the court's oversight, failing in its judgment to make a pronouncement on the fate of the 3rd Party claim as between the 1st Defendant and the 2nd Defendant (although having confirmed that due to the finding of the court the issue of the 3rd Party claim did not arise) and the related costs. On dismissal of the Plaintiff's claim against the 1st Defendant with costs, the Plaintiff was also ordered to pay the costs of the 1st Defendant occasioned by the issuing of a 3rd Party Notice, since the issue of the 3rd Party claim remained relevant as long as the Plaintiff's claim against the 1st Defendant was still to be resolved. On further submissions made by the parties in that regard, it became clearer that the 2nd Defendant was also kept alive as a party to the proceedings owing to the 3rd Party claim whose fate had to be pronounced. It is therefore justifiable for the court to correct its error and make a pronouncement on the 3rd Party claim and the attendant costs payable, which will have to be consistent with the outcome.

[8] In the ordinary courts the general rule is that the costs follow the result; see *Khumalo and Another v Twin City Developers (Pty) Ltd and Others* [2017] ZASCA 143. The judgment is therefore to be corrected accordingly to include an order dismissing the 1st Defendant's 3rd Party claim with costs, inclusive of costs of senior counsel.

Legal framework on leave to appeal

[9] It has become common place that for an Applicant to succeed in its Application for leave to appeal the requirements as set out in s 17 (1) of the Superior Court Act 10 of 2013, have raised the bar of the test that he will have to be meet. The subsection compels a court to

grant leave to appeal only when it is of the believe that there are reasonable prospects that another court would come to a different conclusion.

[10] The threshold to which the test is raised is outlined in the unreported decision of the Land Claims Court in *The Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) which held per Bertelsmann J at para [6], albeit obiter, that:

> "It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others 1*985 (2) SA 342 (T) at 343H. The use of the word **"would**" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against." [My emphasis)

[11] The Supreme Court of Appeal, confirmed in *Notshokovu v S* (157/15) [2016] ZASCA 112 (20 September 2016) at para [2] recognising the new challenge, that an Appellant now faces a higher and stringent threshold in terms of the Act. In *MEC for Health, Eastern Cape v Mkhitha and Another* (1221/2015[2015] ZASCA 176 (25 November 2016) the court held at par [17] that:

> "[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[12] In *Democratic Alliance v President of the Republic of South Africa and Others* (2124/ 2020) [2020] ZAGPPHC 326 (29 July 2020) at par [4] – [5] the Full Court following on *Mkhitha supra* held as follows:

> "More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal. This dictum serves to emphasise a vital point: Leave to appeal is

not simply for the taking. A balance between the rights of the party which was successful before the court a quo and the rights of the losing party seeking leave to appeal need to be established so that **the absence of a realistic chance of succeeding on appeal dictates that the balance must be struck in favour of the party which was initially successful."** (my emphasis).

[13] It is due to this realisation of the higher threshold that needs to be met, that I consider the grounds of appeal in this Application.

Grounds of appeal

[14] The Plaintiff's grounds for seeking leave to appeal are that the court erred as follows;

Ad paragraph 1.1 and 1.2

1.1 By finding that, the general rule (of our law is as the English law), that an employer is not responsible for the negligence or the wrongdoing of an independent contractor employed by him, finds application in this instance, as the Plaintiff does not seek to hold the 1st Defendant liable for the negligence of the independent contractor.

1.2 In not finding that the principle as set out in *Spencer v Barclays Bank* 1943 (3) SA 230 (T) namely that the different categories of persons visiting premises are said to be those visiting by invitation, express or implied of the occupier (that would be the 1st Defendant in the present case), those visiting with the leave and licence of the occupier, trespassers and that the duty which rests upon the occupier of the premises (that would be the 1st Defendant in the present case) towards the persons who come to such premises differs according to the category into which the visit falls. The highest duty exists towards those persons who fall into the first category, and those who are present by the invitation of the occupier (that would be the Plaintiff in the present case). Towards such person, the occupier has the duty of taking reasonable care that the premises are safe.

[14.1] No finding is made as alleged in par 1.1 of the Plaintiff's Notice of Application for Leave to Appeal, but a general rule is mentioned. Further highlighted is Stratford

ACJ's outlining the rationale of the rule in the context of facts in <u>*Dukes v Marthinusen*</u> 1937, stating at paragraph 17, that:

> "The English law on the subject as I have stated it to be is in complete accord with our own**,** both systems rest the rule as to the liability of an employer for any damage caused by work he authorises another to do upon the law of negligence... In all questions of negligence that imaginary person, the reasonable man, must be invoked and must be made to pronounce his suppositious view. What should a reasonable man anticipate? What should he do to avoid possible injurious consequences of his acts which reasonably he should anticipate? Questions of negligence are nearly always difficult, and it has been said more than once in this Court (quoting Beven, I think) that the question of negligence can never be disentangled from the facts. (my emphasis) see [54].

[14.2] The application to appeal against the mentioning or use of a certain principle or doctrine is objectionable and has no value since what is appealable is the court order or judgment; A court order or judgement is described in *Zweni v Minister of Law and Order of the Republic of South Africa* (310/91) [1992] ZASCA 197; [1993] 1 All SA 365 (A) 1993 (1) SA 523 (A) at 532D as follows:

> "The word "judgment" has (for present purposes) two meanings, first the reasoning of the judicial officer (known to American jurists as his "opinion)" and second, "the pronouncement of the disposition" (Garner, A Dictionary of Modern Legal Usage s v Judgments, Appellate Court) upon relief claimed in a trial action. In the context of s 20 (1) we are concerned with the latter meaning only."

[14.3] The fact that a considerable number of interesting and difficult points of law are raised is not a sufficient reason to make views expressed by the court on any of those points the subject of a pronouncement in the judgment – all the more so when the view taken on the point in question makes no difference to the outcome of the case: see *Absa Bank Limited v Mkhize and Another, Absa Bank Ltd v Chetty, Absa Bank Ltd v Mlipha* (716/12) [2013] ZASCA 139; 2014 (5) SA 16 (SCA) where Ponnan JA opined that:

> "Thus the fact that the high court granted leave carries the matter no further, since its power to do so arises only in respect of 'a judgment or order' within the meaning of that expression. In truth the matter was approached as if an appeal lies against the reasons for judgment. It does not. Rather, an appeal lies against the substantive order made by a court." (Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 355.)

[14.4] Furthermore in paragraph 1.2 the Plaintiff indicates his misconception of the application of the doctrine of duty of care and the categories into which the 1st Defendant or 2nd Defendant fits. The occupier in this matter as per his illustration in the context of *Spencer* cannot be the 1st defendant but the 2nd Defendant. The Plaintiff's action was instituted against 1st Defendant as an owner, alternatively liability attributed to 2nd Defendant's negligence. The issues in relation to this particular case being fairly obvious, are outlined in the judgment starting from paragraph 55, where it is clearly stated that the 1st Defendant's duty of care is not in dispute. Furthermore, paragraphs 56 - 59 dealt substantively with the test in the context of the circumstances of this case, also from the *Swissburne*'s perspective, which I am not going to repeat here. The complexity of this sphere of law is elaborated comprehensively by Ponnan J in *Chartaprops 16 Pty Ltd and Another v Silberman* 2009 (1) SA 265 SCA. Consequently, this contention, which is not repeated in the Plaintiff's heads of argument has no merit.

Ad paragraph 5.1 and 5.2

> 5.1 In finding that in order to establish reasonableness of the employer's conduct and determine where liability lies, the Plaintiff had to prove that the 1st Defendant had the expertise to be able to realise the potential of harm and the means to guard against the said harm. The 1st Defendant's failure to guard against the harm must be proven to have resulted in the harm that was envisaged.'
>
> **5.2** In not finding that where the defect in premises is one likely to cause harm to others and **is in itself of such a character that it should have been discovered by the exercise of reasonable care** on the part of the owner

/landlord (in this instance, the 1st Defendant) **the latter is negligent in permitting the defect to continue to exist.**

[14.5] Paragraph [29] of the Judgment is instructive on the mentioned contentions. The *locus classicus* relevant to this issue is indeed *Kruger v Coetzee* 1966 (2) SA 428 (A) as referred to by the 1st Defendant's Counsel, Mr Patel. At page 430 paragraphs [E] and [F] of the judgment, Holmes JA pronounced on the applicable law 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
> (b) the defendant failed to take such steps.
>
> This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence, the futility, in general, of seeking guidance from the facts and results of other cases.'

[14.6] Consequently whether conduct is reasonable, is objectively tested (being from a perspective of a reasonable man in the position of the 1st Defendant), and relative to foreseeability of potential harm, which is established from the facts; see *Peri- Urban Areas Health Board at 373H* as quoted in the judgment. It does not happen in a vacuum but circumstances prevailing in each case dictates foreseeability and reasonableness of conduct. The 1st Defendant had a duty towards guests to circumvent any foreseeable danger posed by the staircase whether due to a structural or design defect. For the 1st Defendant to comply with such duty the defect must be detectable or capable of being detected by a person in the 1st Defendant's position exercising reasonable care and skill. The Plaintiff had therefore to prove that the potential harm or danger posed was foreseeable, the defect being detectable to the person in 1st Defendant's position,

applying reasonable care and skills. Failure then to guard against such foreseeable potential harm would under the circumstances be negligent. As established in *Langley Fox* at 13A-C, the nature of the danger, the context in which the danger may arise, the degree of expertise available to the 1st Defendant to avert the danger are factors relevant for determination of foreseeability and the reasonableness of conduct. The list is not meant to be comprehensive.

[14.7] Heher JA in *Member of the Executive Council for Education Mpumalanga v Onica Skhosana o.b.o SS MEC for Education: Mpumalanga v Skhosana* (523/11) [2012] ZASCA 63 (17 May 2012) albeit dissenting, established in the context of that case that the test for negligence on the Defendant part requires consideration of how a reasonable teacher in the same circumstances would have behaved. Further that the application of that test presupposes that the court is adequately apprised of the circumstances. Due to the plaintiff's case being silent on the age, training, skills, experience and worldly knowledge of the teacher concerned. He found that the plaintiff's case left the court with unanswered questions on all these material aspects and did not consider that the onus was discharged. Commenting that, this might not matter as much in a more sophisticated context but here one does not even know whether the school environment was urban or rural. Mindful also of the Defendant's failure to testify.

[14.8] Furthermore, for liability to arise from the duty of care, besides proving negligence, the Plaintiff had to also prove that such negligence was wrongful in that the injuries sustained were as a direct result of such negligence. It is a fact that, considering the evidence of the Plaintiff and Fullard, the Plaintiff failed to prove not only that the potential harm allegedly posed by the structural defect, albeit the handrail, was foreseeable, but also that the injuries he sustained were as a result of the Defendant's alleged negligence (the failure to supply handrails).

Ad paragraph 6.1 – 6.2, 6.2.1 – 6.2.4

6.1 and 6.2 In the assessment of evidence of the Plaintiff and Fullard and the finding with regard thereto as set out from paragraph 60-67 and ultimately

reaching the conclusion that the Plaintiff had failed to indicate how the handrails could have assisted him when he failed to use the existing one and that no one could have foreseen that the Plaintiff would descend the stairs clumsily without using the assistance of the existing rails.

6.2.1 and 6.2.2 by not coming to the conclusion that the 1st Defendant conceded that the staircase in question had a defect as a result of the design flaws contained therein, that Fullard opined that the stepladder was not safe for use by design flaws contained therein.

6.2.3 in finding that with all the evidence taken into consideration it must be accepted that the stepladder in question was unsafe for its intended use and that the incident in which the Plaintiff fell and sustained serious bodily injuries was a direct result of the stepladder being unsafe for its intended use.

6.2.4 the unrefuted evidence of the Plaintiff was that had there been handrails fitted to the staircase in question he would have used them, would have been able to control his descent and would have not fallen. Obviously disregarding the existence of the grabrails.

[14.9] The judgement is very clear on how the conclusions made were consistent with the Plaintiff and Fullard's evidence. Once more, the Plaintiff is misguided in his approach, as it is a well- established principle in our law that an appeal or cross appeal can be noted only against the substantive order of a Court and not against the reasons for the order, as clearly expounded by the Appellate Division in *Western Johannesburg Rent Board and Another supra* at 355, when Centlivres JA, stated as follows:

> '[I]t is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a Court. For instance, it is open to a respondent on appeal to contend that the order appealed against should be supported on grounds which were rejected by the trial judge: he cannot note a cross- appeal … unless he desires a variation of the order." See *Municipal Council of Bulawayo v Bulawayo Waterworks, Ltd*. (1915) Ad 611 at pp. 625, 631, 632)'.

[14.10] Any conclusions or findings the court made where established from and dictated by the facts. In respect of Fullard's evidence, Fullard was satisfied that he found the cause of the accident, which was a structural and design defect, that is, the absence of a handrail and the protruding soft timber treads beyond the aluminium angle tread supports, amounting to a weak spot in the stepladder's structure. Those were the two defects Fullard identified to have existed at the time, which were likely to have caused the accident, the one defect not ordinarily identifiable except through certain expertise. Fullard indicated that the harm envisaged on the treads was capable of being discovered only by an expert not by any ordinary person. Foreseeability therefore, was out of the question for the person in 1st Defendant's position even with the exercise of reasonable care and skills. Fullard's direct comment being that: 'only a structural engineer's design review could have indicated if the staircase was indeed safe in terms of the structural defect.'

[14.11] In addition, it was not the Plaintiff's case that the staircase posed a danger due to a structural defect, but its state of disrepair and absence of handrails. Since Fullard confirmed that the stairs did not show any state of disrepair, so what was only relevant to the Plaintiff's case was the finding on the absence of handrails. The Plaintiff was required to prove that the absence of handrails was negligent and the cause of his fall, a *lis* between the handrails and the Plaintiff's fall being important, which he failed to do. Fullard's testimony was that the existent grab rails might have assisted on the first and second treads if one was to descend holding the stringers but beyond the second treads the grabrails were out of reach. According to Fullard, when not using the grabrails, Plaintiff's fall would have exerted pressure on the next treads. It is a fact that the Plaintiff never mentioned the existence or alleged to have ever used the grabrails.

Ad paragraph 7.1 to 7.1.1 to 7.1.7

In finding that no special duty of care rested on the 1st Defendant.

Not differentiating between grabrails which formed part of the Loft structure and handrails. Finding that there were handrails available to negotiate part of the stairs and the Plaintiff disregarded the grabrails.

> Finding that the falling down the stairs was not caused by the absence of the handrails but his own conduct that was devoid of forethought and contrary to what a reasonable person would do. Finding that the fall of the Plaintiff cannot be connected to the absence of handrails. Finding that a reasonable man like the Plaintiff would have foreseen the likelihood of harm and guard against his conduct accordingly.

[14.12] Plaintiff is once again ill-advised in following this approach, raising issues that are subject to the trite rule that disallows an appeal against reasons of a judgment. In Erasmus: Superior Court Practice pages A2-36 and A2-37 it is clearly explained that: "An appeal can be noted only against the judgment itself (i.e., the substantive order), not against the reasons for judgment and a notice which purport to appeal against the reasons for judgment is bad".

[14.13] *Tecmed Africa (Pty) Ltd v Minister of Health & another* [2012] 4 All SA 149 (SCA), is instructive in that issue and Ponnan JA put it thus in paras 17

> **"**[17] First, appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a Court of Appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same."

[14.14] In *Atholl Developments v The Valuation Appeal Board for the City of Johannesburg* [2015] ZASCA 55 (30 March 2015 Salduker concluded that:

> "[11] As the appeal is directed at the reasons as opposed to the substantive order of the court below, there is no proper appeal before us. It must follow that the appeal must be struck off the roll."

[14.15] In the often quoted judgment of *Western Johannesburg Rent Board & another v Ursula Mansion (Pty) Ltd* 1948 (3) SA 353 (A) at 354, Centlivres CJ said the following:

> 'This court mero motu drew counsel's attention to the fact that the so-called notice of appeal was not a notice of appeal at all, for it does not purport to note an appeal against any part of the order made by the court a quo. Even apart from sub-rules (2) and (3) of Rule 6 of this Court, it is clear that an appeal can be noted not against the reasons for judgment but against the substantive order made by a Court.'

[14.16] Also alleging the evidence that was led by the Plaintiff and Mr Fullard, to be findings of the court. Nevertheless, all being factual, the appeal court would be reluctant to interfere in the factual findings of the court a quo.

Ad paragraph 7.2, 7.2.1 to 7.2.5

[14.17] All the conclusions of law in relation to the authorities that are applicable to the relevant facts have been considered properly and sufficiently in the judgment and the Plaintiff's repeat of the arguments herein not warranted and a fundamental flaw.

Ad paragraph 8, 9.1 to 9.2.

8. The court erred in finding that the expert Fullard was not impartial, not neutral and not helpful and that his evidence was of little value. In not finding the evidence of Fullard as being acceptable and reliable in toto.

9.1 In finding that there is no case for the 1st Defendant to answer. That 1st Defendant's failure to lead the evidence put to Fullard did not jeopardise the 1st Defendant's case.

9.2 In not finding that the failure by the 1st Defendant to lead evidence put to the Plaintiff or Fullard in cross examination prejudiced the Plaintiff and that the court cannot rely on the statement made or consider such statements in deciding the Plaintiff's case.

[14.18] Paragraphs 71 to 72 of the judgment cover extensively the assessment of the evidence and the reasons for the findings. Nothing more could persuade another court to deal differently with the evidence which clearly point to a failure by the Plaintiff to build a prima facie case. The alleged statements that were put to Fullard were hardly disputed but instead confirmed and not put in contention. Besides, Fullard's expert opinion was that the potential danger that would have rendered the 1st Defendant liable to guard against such danger happening was not foreseeable due to the latent defects. In addition, he at one stage conceded as an expert, saying that he would not be surprised that there has been no prior incident with the stepladder. He furthermore acknowledged the existence of the grab rails on the staircase, and admitted to not have inspected them or gone up the staircase he was required to give an expert opinion on, failing as an expert to do the structural review. These are facts, not criticism.

[14.19] Likewise there was nothing in the evidence of the Plaintiff that burdened the 1st Defendant with a duty of rebuttal or disproof. The judgement in paragraph 80 deals extensively with this contention. Plaintiff 's testimony on how he fell was illogical and did not correspond with the injuries he sustained. This is all factual and would doubt if the appeal court would interfere with the conclusion of the court in that regard.

[14.20] The conduct of the 1st Defendant cannot be said to have resulted in failure to guard against a foreseeable danger. The alleged defects that created the potential harm were latent structural defects the character of which Fullard had confirmed could only be identified through an expert's review. As a result, they would not be detectable to a reasonable man of the 1st Defendant's position. Furthermore, he confirmed that the issued engineer and architectural completion certificate said all structural components were fine and that his own inspection did not show any visual flaws or cracks or failure on the treads. He did not see any defect or distress in the timber, that is treads. Since visual inspection could not reveal any defect or cracks, he said even the use thereof would not have indicated any defect.

Ad paragraph 10 and 11

10. In finding that the first Defendant is not liable to compensate the Plaintiff for the damages sustained by him and dismissing the Plaintiff's claim

with costs. In finding that the Plaintiff is liable to pay the 1st Defendant's costs occasioned by the issuing of the 3rd Party's notice and not finding that the 1st Defendant is liable to pay the Plaintiff's costs.

11. In not finding that the Plaintiff settled his claim against the 2nd Defendant as set out in paragraph 1 of the 2nd Defendant's heads of argument. The 1st Defendant chose to keep the 2nd Defendant involved in the litigation regardless of the settlement and is therefore liable to pay the 2nd Defendant's costs relating to the 2nd Defendant's notice and subsequent trial.

[14.21] The Plaintiff failed to prove that the injuries he sustained were as a result of the 1st defendant's negligence and therefore not entitled to be compensated for the said injuries with the costs having to follow the result.

[14.22] The Plaintiff is referred to paragraph 7, 8 and 9 of this judgment. The details or terms of the settlement reached between the Plaintiff and 2nd Defendant was not disclosed. All the same, the Third Party claim became redundant as argued by the 2nd Defendant only when the Plaintiff's claim was dismissed. Prior thereto the 1st Defendant would not have known that the Third Party claim was to end up unessential. For that reason, the Third Party claim remained significant until final determination of the claim against the 1st Defendant. Therefore, the order against the Plaintiff to pay costs occasioned by the issuing of a Third Party Notice remains justified.

[14.23] It is the basic rule of our law that an award for costs is in the discretion of the court, which discretion must be exercised judicially. In *Kruger Bross & Wasserman v Ruskin,* 1918 AD 63 at 69. Innes CJ held that:

> "The rule of our law is that all costs –unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order without his permission."

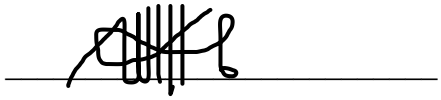
[14.24] The 1st Defendant was correctly found not liable to compensate the Plaintiff for the damages sustained, with the Plaintiff's claim then dismissed, the costs

had to follow the result. The 1st Defendant's 3rd party claim also being dismissed with costs, which costs are to include the costs of Senior Counsel. The judgment is amended accordingly.

[15] Accordingly having considered the Applicant's grounds for leave to appeal, there are no prospects of another court arriving at a different conclusion

Under the circumstances the following order is made:

1. The Application for leave to appeal is dismissed with costs, which costs include the costs of senior counsel.



N.V. Khumalo

Judge of the High Court

Appearances:

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