



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 25112/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

22/11/2022

DATE

T.D. Senaka

SIGNATURE

In the matter between:

GEORGE DAVIDTZ

PLAINTIFF

And

KLIMAX MANUFACTURING (PTY) LIMITED

DEFENDANT

JUDGMENT

1. INTRODUCTION

1.1. The Plaintiff brought a delictual claim arising from the following incident:

1.1.1. On or about 4 May 2017, and at the defendant's premises referred to in paragraph 1.2 supra ("the premises"), the plaintiff sustained severe bodily injuries when he stepped onto a powdery substance present on the metal surface of the floor of a building situated at the premises and subsequently fell down the stairs leading to the factory on the ground floor ("the incident"). The powdery substance present beneath the soles of the plaintiff's shoes caused the plaintiff's left foot to slip when he stepped onto the first stair of the relevant staircase.

1.1.2. The powdery substance referred to in paragraph 1.2 supra emanated from electrical cables which the defendant's employees burnt with the aim of removing the external plastic isolation from the inner copper cabling. The residue powder which was still present on the said copper cabling, fell onto the staircase and the metal surface after the defendant's employees carried the electrical cables into the building referred to in paragraph 1.2 supra ("the building"). In doing so, the defendant's employees created an inherently dangerous situation.¹

2. PLEA

¹ Particulars of claim, Caseline 001 – 23, p5 – 11, Amended particulars of claim, caseline p23 – 29.

- 2.1. Save for what is contained in paragraph 3.2, the plea constitutes a bare denial.

Paragraph 3.2 provides the following:

- 2.2. Alternatively, and in the event of it being found that the alleged incident did occur, then the Defendant pleads as follows:

2.2.1. The plaintiff did not fall as a result of the alleged powdery substance;

2.2.2. The plaintiff orchestrated his fall in order to manipulate the claims herein as set out in his particulars of claim;

2.2.3. To the best knowledge of the defendant, the plaintiff is a member of a medical scheme and as such, his medical aid should have covered all medical expenses incurred; and

2.2.4. The plaintiff had been involved in a motor vehicle collision prior to the alleged incident and has had to undergo medical procedure as a result thereof.²

3. **SEPARATION OF MERITS AND QUANTUM IN TERMS OF RULE 33 (4)**

- 3.1. The parties have agreed to separate the merits from quantum. The judgment will be confined to the issue of merits.

²Plea Caseline p19 – 22, plea to Plaintiff's amended pages caseline p30 – 35.

4. THE PLAINTIFF'S CASE

4.1. Apart from the plaintiff, the following witnesses testified in support of the plaintiff's claim:

4.1.1. Mr Gert Saal;

4.1.2. Mr Peter Krotz;

4.1.3. Mr André Bester; and

4.1.4. Mr Elsabe Bester.

4.2. The most relevant testimony delivered by them are succinctly summarised as follows:

4.2.1. Mr George Davidtz – the Plaintiff

4.2.1.1. At the time of occurrence of the incident on 4 May 2017, he was in the employ of Electroniko (Pty) Ltd ("Elektroniko").

4.2.1.2. On 4 May 2017, he stepped onto a powdery substance present on the landing area with his left foot. Thereafter he stepped over the said substance with his right foot. When

he attempted to take the next step with his left foot on the first staircase, his left foot slipped whereafter he fell down the staircase.

4.2.1.3. He was wearing New Balance running shoes (sneakers) at the time.

4.2.1.4. His immediate reaction was to grab the handrailing with his right hand. He also attempted to grab the handrailing on the left-hand side, but he was unable to do so because the handrailing was obstructed by a polyester sheet. The frayed out polyester sheet prevented him from grabbing the left-hand rail. The polyester sheet is depicted in photograph marked Exhibit E. In X5 on Exhibit E specifically show the position of the polyester sheet.³

4.2.1.5. Mr Chris Delport, an employee of the Defendant, put the polyester sheet up.

4.2.1.6. One of the Defendant's employees, namely Mrs Emily Macaties saw the Plaintiff when he fell down the stairs.

4.2.1.7. The incident occurred at approximately 15h45. He was on his way to the Defendant's workshop when the incident occurred.

4.2.1.8. The building where the incident occurred is occupied by

³ Caselines page 004 – 32.

amongst others, Elektroniko and the Defendant.

- 4.2.1.9. The staircase on which he fell leads down to the factory which is occupied by the Defendant.
- 4.2.1.10. Elektroniko's employees also used the relevant stairs, as the ablution facilities were downstairs.
- 4.2.1.11. After occurrence of the incident, a photograph was taken of the scene where he stepped onto the powder. He identified the black spot as the powdery substance on which he stepped. The photograph is marked Exhibit "A".⁴
- 4.2.1.12. A sample of the powdery substance was handed in to Court. He confirmed that his colleague, Mr Gert Saal collected the said sample.
- 4.2.1.13. He did not shout or make any sound when he fell down the stairs.
- 4.2.1.14. The Defendant's employees did not put out any warning signs to warn the occupants of the building against the presence of the powdery substance, nor did they cordon off the area where the powder was present.
- 4.2.1.15. The powdery substance emanated from electrical cables burnt by one of the Defendant's employees, namely Mr Peter Krotz.

⁴ Caselines page 004 – 5.

4.2.1.16. The black spot appearing on the photograph marked as Exhibit C is where the Defendant's employees burned the electrical cables in the outside yard. The relevant photograph was taken from the inside of Elektroniko's office.⁵ The black spot is residue powder which fell from the burnt electrical cables.

4.2.1.17. The outside yard is primarily and generally used by the Defendant's employees.

4.2.1.18. The staircase is present in the Defendant's factory and it is this staircase which the Defendant's employees used to gain access to the outside yard.

4.2.1.19. Most of the time, a radio was playing in the Defendant's factory. Some of the Defendant's employees used earphones to listen to their personal music on their cell phones.

4.2.1.20. Approximately six (6) months before occurrence of the incident, on 25 November 2016, he had a left knee replacement operation.

4.2.1.21. At the given time, he was a member of Momentum Health medical aid fund and his medical aid fund paid for the

⁵ Caseline page 004 – 9.

relevant operation.

4.2.1.22. His knee replacement operation was successful.

4.2.1.23. When the incident occurred on 4 May 2017, he was still a member of the relevant medical aid fund.

4.2.1.24. Subsequent to the occurrence of the incident, he was taken to Life Dalview Hospital, situated in Brakpan. His wife took him there.

4.2.1.25. X-rays were taken of his left knee and pain medication was prescribed and dispensed.

4.2.1.26. The following day he consulted Dr Rose, who referred him to a specialist for an orthopaedic examination. He was booked off from work for a period of approximately two (2) months after occurrence of the incident.

4.2.1.27. On 11 May 2018, approximately one (1) year after occurrence of the incident, Dr PJ Oosthuizen performed an Iliotibial Band (ITB) operation on him. He was subsequently booked off from work for a period of approximately six (6) weeks for recuperation. He received physiotherapy and biokinetic treatment.

4.2.2. Mr Gert Saal:

4.2.2.1. At the time of occurrence of the incident he was in the employ of Elektroniko.

- 4.2.2.2. He was previously in the Defendant's employ during the period 2013 to 2015.
- 4.2.2.3. On 4 May 2017 he saw Mr Peter Krotz burning electrical cables in the outside yard.
- 4.2.2.4. Mr Krotz was in the employ of the Defendant at the given time. The outside yard depicts the area where Mr Krotz burnt the electrical cables.
- 4.2.2.5. Before occurrence of the incident, he witnessed the Defendant's employees burning electrical cables on a number of other occasions as well.
- 4.2.2.6. After they burnt the cables, he saw Mr Krotz and some of the Defendant's other employees carrying the burnt cables into the Defendant's factory.
- 4.2.2.7. When he first saw the plaintiff after he fell from the stairs, he could notice from his facial expression that he was in pain.
- 4.2.2.8. When he went down to the Defendant's factory after the Plaintiff fell, he noticed a black spot on the landing area.
- 4.2.2.9. At some point in time, he touched and rubbed the black powdery substance between his fingers.
- 4.2.2.10. Elektroniko's employees also used these stairs.

- 4.2.2.11. The Defendant's employees made use of the outside yard *"all the time"*. They often used the outside yard to smoke and they would also collect fruit from the trees present in the yard.
- 4.2.2.12. Elektroniko's employees hardly ever used the outside yard.
- 4.2.2.13. Mr Johannes Skhosana worked at the workbench closest to the staircase where the plaintiff fell.
- 4.2.2.14. At the relevant time, the Defendant's employees used to play a radio in the Defendant's factory most of the time. Some of the Defendant's employees listened to their own music through earphones on their cell phones.
- 4.2.2.15. Some of the Defendant's other employees also used to burn electrical cables from time to time.
- 4.2.2.16. Other employees of the Defendant were present when Mr Krotz burnt the electrical cables.
- 4.2.2.17. Before occurrence of the incident, the plaintiff never complained regarding his two previous operations to him.
- 4.2.2.18. The Defendant's employees usually looked down at their work benches when they were busy with their work, as they were standing.
- 4.2.2.19. In all the years that he has worked for the Defendant, the Defendant has never had any designated cleaning staff.

4.2.3. Mr Peter Krotz

- 4.2.3.1. On 4 May 2017 he was in the employ of the Defendant.
- 4.2.3.2. On 3 May 2017 his Supervisor, Mr David Scholtz, requested him to come in one (1) hour earlier on 4 May 2017 as he wanted him to burn electrical cables.
- 4.2.3.3. Mr Scholtz was in the Defendant's employ at the given time.
- 4.2.3.4. Two of the Defendant's other employees were with him when they burnt the cables on 4 May 2017. They burnt the cables in the outside yard.
- 4.2.3.5. After they burnt the cables, they put it in a box and carried it up the stairs. When they reached the top of the stairs, they put the box down in the area depicted by Exhibit A.
- 4.2.3.6. The box was not sealed at the bottom.
- 4.2.3.7. They subsequently carried the box through the factory and put it in the Defendant's holding area.
- 4.2.3.8. As they were carrying the box, the powder fell from the bottom enroute to the Defendant's holding area.
- 4.2.3.9. He did not clean up the spillage on 4 May 2017.
- 4.2.3.10. The outside yard was only used by the Defendant's

employees.

4.2.3.11. Mr Johannes Skhosana worked at the workbench marked as A3 on Exhibit H⁶.

4.2.3.12. The Defendant's workers usually looked down at their work benches whilst they were working.

4.2.3.13. They also used to play a radio in the Defendant's factory. In fact, it was his radio that they were using.

4.2.3.14. Some of the Defendant's employees listened to music on their cell phones through earphones.

4.2.3.15. In all of the years that he has been in the employ of the Defendant, the Defendant did not have any cleaning staff.

4.2.4. Mr André Johan Bester:

4.2.4.1. He confirmed that the staircase depicted in Exhibit D is present in the Defendant's factory.⁷

4.2.4.2. He also slipped and fell on the relevant stairs at some point in time. None of the Defendant's workers however noticed the incident, as they were too busy working and looking down at their workstations.

4.2.4.3. The Defendant's employees used to play music in the

⁶ Caseline page 004 – 9.

⁷ Caseline page 004 – 48.

factory and they also listened to music on their cell phones through earphones.

- 4.2.4.4. Mr Johannes Skhosana used to work at the workstation marked as A3 on Exhibit H when the incident occurred.

4.2.5. Mrs Elsabe Bester:

- 4.2.5.1. She was in the employ of the Defendant for a period of approximately 24 years.
- 4.2.5.2. She was initially employed as the Factory Manager but was later promoted to Production Manager.
- 4.2.5.3. In her capacity as Production Manager, it was required of her to oversee all workers and furthermore to attend to production planning, purchases, client care, dispatching and sales.
- 4.2.5.4. At the time of occurrence of the incident, her superior was Mr Peter Jansens, the Defendant's Chief Executive Officer.
- 4.2.5.5. The Plaintiff was in the employ of Elektroniko when the incident occurred.
- 4.2.5.6. She did not personally witness the incident. However after occurrence thereof, Ms Emily Macaties informed her that she saw the plaintiff falling down the stairs. Ms Macaties

used to work in the finished goods store, marked as X15 on Exhibit H.⁸

- 4.2.5.7. She saw the plaintiff shortly after he fell. She instructed him to report the matter to the Defendant's Human Resources Department.
- 4.2.5.8. She went to the area where the plaintiff fell on the same day when the incident occurred.
- 4.2.5.9. She saw a powdery like substance on the landing area and took a sample thereof, which she later gave to one of the Defendant's employees, namely Mr Shaun Eldred.
- 4.2.5.10. She confirmed that the powdery substance which she saw was similar to the sample handed in as real evidence to the Court, marked as Exhibit I.⁹
- 4.2.5.11. During November 2016, the plaintiff underwent a knee replacement operation, which operation was paid for in full by his medical aid fund. The Plaintiff was booked off from work when he had his knee replacement operation.
- 4.2.5.12. Between 2000 and 2002, a practice developed where the Defendant's employees would clean electrical cables for purposes of selling the copper on the inside thereof. These cables were cleaned by either stripping or burning the outer insulation coating.

⁸ Caselines page 004 – 47.

⁹ Transcription (17 January 2022), page 24, line 1 to 5.

- 4.2.5.13. The Defendant sold the copper to a scrap metal company. At the time, clean copper would sell for approximately R48 per kilogram, whilst copper which still had its insulation on would sell for approximately R3.50 to R5 per kilogram.
- 4.2.5.14. She discussed the cleaning of the cables with Mr Jansens at some point in time. In particular, she explained the difference in price which the Defendant would receive for clean and unclean copper with him. Mr Jansens subsequently authorised her to attend to the cleaning of electrical cables.
- 4.2.5.15. They used to strip the insulation when it was not too busy at work. However, when it was busy at work and they were pushed for time, they would burn the insulation off the electrical cables.
- 4.2.5.16. They burnt the cables in the outside yard. From time to time, she instructed the Defendant's employees to burn the electrical cables.
- 4.2.5.17. Both she and Mr Scholtz supervised the process of burning cables from time to time.
- 4.2.5.18. She kept a record of all copper sales. The record was signed by her and Mr Jansens and Mr De Pont, the Defendant's other Director.

- 4.2.5.19. She always handed the cash received from the sale of the copper, stainless steel and scrap metal to Mr Jansens.
- 4.2.5.20. The copper, stainless steel and scrap metal was kept in a holding area present in the Defendant's factory. Once the copper was cleaned, the Defendant's employees would weigh it, put it in boxes and subsequently take it to the Defendant's holding area.
- 4.2.5.21. The Defendant's employees often assisted the scrap metal company's workers to load the copper, stainless steel and scrap metal onto the relevant company's vehicle.
- 4.2.5.22. After receipt of the cash, she would put it in an envelope and give it to Mr Jansens when he arrived at the office.
- 4.2.5.23. Upon receipt of the cash, Mr Jansens would sign the cash book register.
- 4.2.5.24. The Defendant's workshop area is depicted in the photograph marked as Exhibit L.¹⁰
- 4.2.5.25. Elektroniko is one of the Defendant's product suppliers.
- 4.2.5.26. The Defendant's employees used the stairs depicted in Exhibit L on a daily basis to collect goods from Elektroniko's office situated upstairs.
- 4.2.5.27. Amongst others, the Defendant's employees used to

¹⁰ Caselines page 004 – 46.

collect thermostats from Elektroniko's office.

- 4.2.5.28. The Defendant's employees also used the relevant stairs to gain access to the outside yard during their smoke breaks, tea time and lunch breaks. They also ate peaches from the peach tree present in the yard and interacted with Bradbury's employees.
- 4.2.5.29. The polyester sheet depicted in the photograph marked as Exhibit E was put up somewhere between 2000 to 2002. Mr De Pont suggested that the polyester sheet be suspended over the windows to block the sun from the Defendant's factory.
- 4.2.5.30. With reference to Exhibit H, she confirmed that Mr Johannes Skhosana worked at the area closest to the staircase, marked as A3 and that Mr Tshepo Morifi worked at the area marked as A7.
- 4.2.5.31. The factory workers used to listen to music whilst they were working. They either listened to the music on a radio which was playing out loud in the factory or they would listen to music on their cell phones through earphones.
- 4.2.5.32. The staircase depicted in Exhibit D is situated in the Defendant's factory.
- 4.2.5.33. Mr Peter Krotz, the erstwhile employee of the Defendant, burnt electrical cables on 4 May 2017. At the given time, he was the Defendant's Factory Supervisor.

4.2.5.34. Mr Krotz was instructed to burn the electrical cables by his Superior, Mr Scholtz. On 3 May 2017, she overheard Mr Scholtz instructing Mr Krotz to come in early the next morning (4 May 2017) to burn the electrical cables. Mr Scholtz's office was situated immediately next to her office.

4.2.5.35. After the Plaintiff fell, she asked Mr Krotz why he neglected to clean up the spillage, to which he replied that he was too busy.

4.2.5.36. Subsequent to the occurrence of the incident, Mr Jansens instructed them to stop burning the electrical cables.

5. CROSS EXAMINATION OF PLAINTIFF AND WITNESSES

5.1. PLAINTIFF

5.1.1. The Plaintiff's evidence was challenged on the basis that he did not fall and that he fabricated or orchestrated his fall in order to claim money from the Defendant. The basis of putting the proposition of fabrication to him was the alleged conversation he had with Elsabe Bester about orchestrating his fall and the video he allegedly showed to Newman.

5.1.2. The Plaintiff refuted the allegations.

5.1.3. The other issue he was taken to task about was the polyester curtain next to the left rail. It was put to him that the curtain was too high and would not have prevented him from grabbing the left rail.

- 5.1.4. He was taken to task on why he did not include the issue of the curtain in his statement to Annette Mouton and in his letter of demand.
- 5.1.5. He answered by stating that the information was relayed to his legal representatives and that the reason the issue of the curtain was not included in the statement to Annette Mouton was that he was concentrating on dealing with the issue of the fall.
- 5.1.6. The issue was clarified when Mr Du Plessis, his counsel, referred him to the amended particulars of claim which included the issue of the polyester curtains.
- 5.1.7. He was taken to task about employees of Klimax who were on the work station tables when he fell. He was adamant that the person he saw on the work station table near the staircase after he fell was Johannes Skhosana and not Morifi.
- 5.1.8. There was a discrepancy regarding when the powder was first seen on the landing area. He testified that it was there a week before his fall. On the other hand Mr Krotz testified that he burnt the cables on the morning of the incident. His evidence in this regard has a bearing on the issue of contributory negligence to which I will consider later.
- 5.1.9. The issue of the incident relating to the fall was confirmed by the reports he made to Vivian Ramoshele and Annette Mouton. The fact that he reported the incident to Dave Scholtz and Elsabe Bester, the form which was completed by Vivian Ramoshele and signed by Newman to confirm the incident and his wife transporting him to the Life Delview Private Hospital where he was provided with medical attention.

5.1.10. His evidence remained consistent regarding the manner in which his fall happened. His evidence in this regard was intensely scrutinised by both counsel and the bench and it remained consistent and unshaken.

5.1.11. The totality, surrounding circumstances and context in which these chain of events unfolded point to the fact that the incident happened on 4 May 2017 as alleged in the Plaintiff's particulars of claim. Even though his fall is circumstantial as there is no direct evidence of a person who saw him fall (Ms Macaties could not be traced), the only inference that can be drawn is that the incident happened.

5.2. **ELSABE BESTER**

5.2.1. The cross examination revolved around the duration in respect of when the cables started to be burnt, the permission to do so from Jansens and the entry into the cash register in respect of the proceeds from the copper cables and scrap metal.

5.2.2. She reiterated that Jansens gave her and Scholtz permission to burn cables in 2000 to 2002 when they went to America to establish a franchise.

5.2.3. The issue of the burning cables was discussed with Jansens at the production meeting and informally.

5.2.4. She resigned on 23 October 2020 due to her issue of pay as you earn (PAYE) with SARS remaining unresolved by Klimax.

5.2.5. She was a Production Manager and Scholtz was a Quality Assurance Manager. Both her and Scholtz were second in command to Jansens who was

the CEO or Managing Director of the Defendant.

- 5.2.6. She gave direct evidence of instances where cables were burnt and sale of cooper and scrap metal. Her evidence was credible.
- 5.2.7. The evidence of Sall and Elsabe Bester cannot be faulted and criticised. They do not fall in the category of witnesses who can be labelled as disgruntled employees.
- 5.2.8. The evidence of the so called disgruntled employees, Peter Krotz and Andre Bester are corroborated by the evidence of the other witnesses and the Plaintiff.
- 5.2.9. I cannot find fault with the evidence of the Plaintiff and his witnesses.
- 5.2.10. In National Employer's General Insurance Co. Ltd v Jagers¹¹

"Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of credibility of the witnesses will therefore be inexplicably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff

¹¹ 1984 (4) SA 437 (E).

can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that defendant's version is false."

6. THE DEFENDANT'S WITNESSES

6.1. The Defendant called four witnesses namely:

6.1.1. Mr Derrick James Newman.

6.1.2. Mr Peter Johannes Jansens.

6.1.3. Mr Shimane Johannes Skhosana.

6.1.4. Mr Tshepo Morifi.

6.2. Mr Derrick James Newman:

6.2.1. Mr Newman's testimony supported the plaintiff's case to a significant degree.

6.2.2. Mr Newman confirmed that he saw the plaintiff on 4 May 2017 and, according to him, it seemed as if the plaintiff had trouble walking. He also saw that his wife, Louise, was helping him.

6.2.3. He acknowledged the fact that Dr Rose treated the plaintiff since 4 May 2017.

- 6.2.4. He conceded that he signed the Employer's Report of Accident Form. He confirmed that by signing the employer's report accident form, he acknowledged that he was satisfied that the Plaintiff was injured in the manner as alleged by him, namely that he fell off the stairs on 4 May 2017.
- 6.2.5. He confirmed that the plaintiff had a knee operation during November 2016. He conceded that the plaintiff's complaints regarding the relevant knee operation related to the progress and period of recuperation only and not to the procedure itself.
- 6.2.6. He confirmed that after occurrence of the incident, the plaintiff attended hospital and furthermore that he was subsequently treated by medical practitioners.
- 6.2.7. He testified that he had knowledge of one incident before 2017 where electrical cables were also burnt in the outside yard, although he did not witness the particular incident. He assumed that one of Bradbury's employees burnt the electrical cables, purely because of the location where it was burnt. Mr Newman confirmed that it could have been one of the Defendant's employees who burnt products at the area marked as Z16 on Exhibit J.¹² According to him, this incident occurred more than 10 years ago. His testimony in this regard corroborates the testimony of Ms Bester who testified that Mr Jansens authorised her during the year 2000 to 2002 already to start burning the electrical cables.

¹² Transcription (17 January 2022) page 165, line 18 – 25, page 166 line 1 to 13, page 34 line 1 to 9. Transcription (18 January 2022) page 33, line 24 and 25,

- 6.2.8. According to Mr Newman, the burning of cables does not fall within the Defendant's normal processes. His testimony in this regard was however contradicted by one of the Defendant's own former employees, namely Mrs Elsabe Bester. Mrs Bester explained in detail why the Defendant took the decision to burn electrical cables during 2000 to 2002 and she furthermore confirmed that since then, the burning of cables was standard practice as it occurred in broad daylight. She also presented documentary proof to the Court which indisputably confirms that the Defendant in actual fact received income from the sale of copper.
- 6.2.9. Mr Newman conceded that because there are no windows at the back of Elektroniko's office, he is unable to refute Mrs Bester's testimony that the Defendant's employees initially burnt the electrical cables in the outside yard at the area marked as Z10 on Exhibit J.¹³
- 6.2.10. Initially Mr Newman corroborated the evidence of Mrs Bester that his company, Elektroniko, supplied thermostats to the Defendant. In fact, according to his testimony the material and thermostats themselves were owned by the Defendant. His company formatted and assembled the thermostats. The Defendant's employees would collect the finished products from Elektroniko's offices upstairs. He however later changed his testimony to the effect that the Defendant's employees used to collect the finished products from Elektroniko's offices before 2010. When asked to explain why he was changing his testimony in this regard, he was unable to provide any satisfactory explanation. Notwithstanding the altering of his testimony, Mr Newman did however

¹³ Transcription (17 January 2022), page 184, line 1 to 25 and page 185, line 1 to 6.

still concede that it might have been possible that the Defendant's employees collected goods from Elektroniko's offices at the time of occurrence of the incident.

6.2.11. Mr Newman also acknowledged the fact that the Defendant's employees used the stairs present in the Defendant's factory (as depicted on Exhibit L) to gain access to Elektroniko's offices.

6.2.12. He confirmed that he cannot dispute Mrs Bester's testimony that:

6.2.12.1. She, in her capacity as Factory Manager of the Defendant, was duly aware of the fact that the Defendant's employees were burning electrical cables over a considerable period of time (stretching over many years);

6.2.12.2. They burnt the cables for purposes of removing the copper on the inside thereof; and

6.2.12.3. The Defendant received the proceeds from the sale of the relevant copper.

6.2.13. He testified that in the last 20 years, he only went to the outside yard on two or three occasions, which corroborates the evidence of the Plaintiff's witnesses that Elektroniko's employees hardly ever used the outside yard and that the outside yard was therefore predominantly used by the Defendant's employees.

- 6.2.14. He also conceded that he cannot dispute Mr Krotz's testimony that he was instructed by his superior Mr Scholtz, to burn electrical cables on the morning of 4 May 2017.
- 6.2.15. He furthermore conceded that he could not dispute Mr Gert Saal's testimony that on the 4th of May 2017 he saw Mr Krotz burning the electrical cables in the outside yard.
- 6.2.16. He also conceded that he could not dispute Mrs Bester's testimony that the copper referred to in the cash sale included copper retrieved from electrical cables which were burnt by the Defendant's employees. He later conceded that his prior remark, that the Defendant would not burn electrical cables in the normal course of its business was a qualified remark, given the fact that he did not have any direct knowledge pertaining to the burning of cables by the Defendant's employees.
- 6.2.17. He acknowledged that he cannot dispute the testimony of the Plaintiff's witnesses that the Defendant's employees used the outside yard during their smoke breaks and lunch times.
- 6.2.18. He confirmed that the shortest way for the Defendant's employees to gain access to the outside yard was to use the stairs present in the Defendant's factory.
- 6.2.19. According to Mr Newman, there were approximately 25 employees working in the Defendant's factory depicted in the photograph marked as Exhibit H. At the given time, Elektroniko only had 5 employees.

6.3. Mr Peter Johannes Jansens

- 6.3.1. Mr Peter Jansens seems to be the proverbial lone ranger.
- 6.3.2. His testimony was contradicted by several witnesses, who were former employees of the Defendant. In addition, his testimony relied to a large extent upon pure speculation, which has no probative value.
- 6.3.3. He conceded that Elektroniko was a supplier of the Defendant when the incident occurred.
- 6.3.4. According to him, the Defendant's employees never used the staircase situated in the Defendant's factory. His testimony in this regard was however contradicted by no less than six (6) witnesses, namely the Plaintiff, Mr Saal, Mr Krotz, Mrs Bester, Mr Newman and Mr Tshepo Morifi.
- 6.3.5. Mr Jansens confirmed that the relevant staircase on which the plaintiff fell, is in fact situated in the Defendant's factory.
- 6.3.6. It was Mr Jansens' testimony that the Defendant's employees did not use or smoke in the outside yard, because the Defendant had certain designated smoking areas. His testimony in this regard was however equally contradicted by the Plaintiff, Mr Saal, Mr Krotz, and Mrs Bester. During cross examination, Mr Jansens declared that all of these witnesses lied. As his evidence in this regard stands uncorroborated, the probabilities are rather overwhelmingly in favour

of the proposition that the relevant witnesses in fact told the truth.

- 6.3.7. Mr Jansens acknowledged that he could not dispute the testimony of the Plaintiff's witnesses that none of Elektroniko's employees smoked when the incident occurred.
- 6.3.8. According to Mr Jansens, he "*knows nothing at all*" about the cables which were burnt by the Defendant's employees from time to time. In stark contradiction to his testimony in this regard, the Defendant's former Factory Manager, Mrs Bester, testified that he (Mr Jansens) in fact authorised her to attend to the burning of electrical cables to increase the Defendant's revenue earned from the sale of copper. In addition, Mr Krotz testified that he was instructed on 3 May 2017 by Mr Scholtz, the Defendant's Quality Assurance Manager, to burn the electrical cables the following morning. Krotz's testimony in this regard was not challenged during cross examination. Mr Scholtz, like Ms Emily Macaties was not available to give evidence. The Defendant did not explain why Scholtz was not called as a witness.
- 6.3.9. Mr Jansens also conceded that Mr Krotz did not have the code of the alarm system and therefore he could not have disarmed the alarm system on the morning of 4 May 2017.
- 6.3.10. He testified that he did not authorise Mrs Bester to instruct the Defendant's employees to burn electrical cables. Regards being had to the fact that Mr Scholtz evidently also instructed the Defendant's employees to burn electrical cables from time to time, his testimony in this regard is highly inconceivable. It ought to be kept in mind that Mr Saal specifically testified that the Defendant's employees burnt

electrical cables on several occasions during broad daylight. It was furthermore the undisputed testimony of Mr Krotz that he put the burnt electrical cables in the Defendant's factory (in the holding area). His testimony in this regard supports the notion that the process of burning the electrical cables did not occur in secrecy and that the Defendant's management staff knew of and in fact instructed the Defendant's employees to burn the electrical cables from time to time.

- 6.3.11. Mr Jansens acknowledged that Mrs Bester is the author of the written records contained in the cash book marked as Exhibit Z1 to Z8. He furthermore conceded that both he and Mr De Pont signed the cash book on a number of occasions and that he in actual fact received the revenue earned from the sale of, amongst others, copper. He also acknowledged the fact that Mrs Bester did not receive any of the proceeds earned from the sales reflected in Exhibit Z1 to Z8.
- 6.3.12. Mr Jansens confirmed that both Mrs Bester and Mr Scholtz were employees of the Defendant when the incident occurred. Mrs Bester was the Defendant's Production Manager whilst Mr Scholtz was the Defendant's Quality Assurance Manager.
- 6.3.13. According to Mr Jansens, he did not hear any music being played in the Defendant's factory, nor did the Defendant's employees listen to music on their cell phones. His testimony in this regard was however likewise contradicted by two of the Defendant's former employees, namely Mrs Bester and Mr Krotz. In fact, Mr Krotz testified that the employees of the Defendant used his personal radio to play music in the Defendant's factory.

- 6.3.14. Mr Jansens conceded that in 2000 to 2002 his co-director, Mr De Pont, gave the instruction to put up the polyester sheet depicted in Exhibit F.¹⁴ He did so to block the sun out from the Defendant's factory. Mr Chris Delport, who was in the employ of the Defendant's Maintenance Department, put the polyester sheet up.
- 6.3.15. Mr Jansens conceded that it would have been very strange for Mr Krotz to walk through the Defendant's factory and to put the burnt cables in the Defendant's holding area, if he was not authorised to burn the cables by his superiors.
- 6.3.16. Mr Jansens also acknowledged that he cannot concretely dispute Mr Krotz's testimony that two of the Defendant's other employees were with him on 4 May 2017 when he burnt the electrical cables.
- 6.3.17. Mr Jansens furthermore acknowledged that he cannot concretely dispute Mr Krotz's testimony that he was instructed by Mr Scholtz on 3 May 2017 to burn electrical cables the following morning.
- 6.3.18. Mr Jansens testified that because the Defendant's employees were uneducated, they could not foresee the possibility that someone might step onto the powder and potentially hurt himself or herself. His testimony in this regard is not only totally inconceivable but also unusual, odd and farfetched. Mr Krotz expressly testified that he knew that he was supposed to clean the spillage.

¹⁴ Caseline page 004 – 29.

6.4. Mr Shimane Johannes Skhosana

- 6.4.1. According to Mr Skhosana, he has been in the employ of the Defendant since 2013. According to him, he worked at the area marked as A7 on Exhibit H. His testimony in this regard was however disputed by the Plaintiff and several of his witnesses, most of which were his fellow colleagues (namely Mrs Bester and Mr Krotz).
- 6.4.2. Mr Skhosana confirmed that some of the Defendant's employees used to listen to music on their cell phones through earphones.
- 6.4.3. Mr Skhosana conceded that it is entirely possible that the Defendant's factory workers will not notice if someone happened to fall on the stairs, as their attention is predominantly focussed on their workstations and their work.
- 6.4.4. According to him, the Defendant's employees only used to smoke in the bathroom or in the open space area at the Canteen. His testimony in this regard was however contradicted by the Defendant's next witness, namely Mr Tshepo Morifi, who testified that in addition to the bathroom and open space area, the Defendant's employees also smoked in the kitchen. Furthermore, Mr Jansens testified that the Defendant's employees also smoked at the front of the Defendant's building.
- 6.4.5. Mr Skhosana acknowledged the fact that the bathroom was not an officially designated smoking area.

- 6.4.6. Mr Skhosana testified that Mr Krotz did not "*get into any trouble*" when he burnt the electrical cables on 4 May 2017. His testimony in this regard therefor supports the proposition that he was in fact duly authorised by the Defendant's manager, Mr Scholtz to burn the electrical cables on even date.
- 6.4.7. He testified that he is only aware of the one occasion when cables were burnt by the Defendant's employees. However, his testimony in this regard was contradicted by one of his colleagues, namely Mrs Bester. Mr Saal also confirmed that the Defendant's employees burnt electrical cables on several occasions.
- 6.4.8. He testified that after the Plaintiff fell, one of the Defendant's employees, a gentleman named Zizo, cleaned (swept) the stairs on which the plaintiff fell. This is a clear indication that the Defendant accepted responsibility for the relevant stairs and furthermore supports the notion that it was in control thereof.
- 6.4.9. According to Mr Skhosana, Mrs Bester also took photographs of the stairs after occurrence of the incident.
- 6.4.10. Mr Skhosana initially testified that none of Elektroniko's staff smoked at the relevant time. He later changed his testimony to the effect that Mr Newman did smoke at the given time.
- 6.4.11. According to Mr Skhosana, the Defendant's employees were not allowed to go upstairs, as it was against company policy. According to him, they were prohibited from doing so by their supervisors. He specifically testified that in all the years that he has been in the

employ of the Defendant, "*not a single person*" in the employ of the Defendant ever used the stairs. His testimony in this regard was however contradicted by Mr Johannes Morifi, who testified that the Defendant's employees did in fact use the relevant stairs. In addition, it was Mr Newman's testimony that the Defendant's employees used the relevant stairs to collect thermostats from Elektroniko's offices. Furthermore, both Mrs Bester and Mr Krotz testified that the Defendant's employees often used the relevant stairs.

6.4.12. According to him there were smoking signs in the building, but according to Mr Jansens there were none.

6.4.13. He conceded that at the given time Mr Scholtz was employed by the Defendant in a managerial position. He also acknowledged that he cannot dispute Mrs Bester's testimony that she overheard Mr Scholtz instructing Mr Krotz on 3 May 2017 to burn the electrical cables on 4 May 2017.

6.4.14. Initially he testified that "*someone lost his job*" because he was caught burning cables. He however later recanted his testimony in that regard without explaining why he was changing his testimony in that regard.

6.5. Mr Tshepo Morifi:

6.5.1. He acknowledged that Ms Macaties would have been able to see the staircase where the plaintiff fell from where she was working.

- 6.5.2. He saw the Plaintiff sitting on the stairs and heard him calling Mr Skhosana.
- 6.5.3. According to him, Mr Skhosana walked towards the plaintiff where he was sitting on the staircase. His testimony in this regard was however contradicted by Mr Skhosana who testified that the plaintiff actually approached him whilst he remained at his workstation.
- 6.5.4. He likewise conceded that some of the Defendant's factory workers listened to music on their cell phones through earphones.
- 6.5.5. In stark contradiction to the testimony of Mr Skhosana, he conceded that the Defendant's employees used the stairs depicted in Exhibit L from time to time. According to him, the Defendant's employees (including himself) used the relevant stairs when they were requested to do so by their Managers. Mrs Bester was one of their Managers.
- 6.5.6. Mr Morifi unequivocally confirmed that during the period 2012 to 2020 the Defendant's employees received instructions to collect and/or deliver goods to and from Elektroniko's office situated upstairs.
- 6.5.7. During cross examination he conceded that he cannot concretely dispute the possibility that some of the Defendant's employees used the outside yard from time to time.
- 6.5.8. He could also not concretely dispute the testimony of Mr Saal, Mr Krotz and Mrs Bester that the Defendant's employees used to smoke in the outside yard.

6.5.9. During 2013 to 2015, he personally went to the outside yard when he was still employed in the Defendant's maintenance department. After he was appointed as a Coiler in August 2015, he also went to the outside yard to throw out the Defendant's trash. He confirmed that occasionally other employees of the Defendant also threw the Defendant's trash out in the outside yard.

7. **ASSESSMENT OF DEFENDANT'S WITNESSES**

7.1. The Defendant's witnesses contradicted each other's testimony in material terms. The evidence of Jansens lacked credibility and was in stark contrast to the evidence of all other witnesses who corroborated each other in material respect.

7.2. The evidence of Newman supported in material respect the evidence of Plaintiff's witnesses.

7.3. The evidence of Skhosana and Morifi in fact cancelled each other and lack credibility on crucial material aspect of the incident. I am unable to place any credence on their evidence.

7.4. In the matter of Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others¹⁵, Nienaber JA described the evaluation process to matters with two irreconcilable versions as follows:

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by

¹⁵ 2003 (1) SA 11 (SCA).

courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events."

8. **APPLICABLE LEGAL PRINCIPLES**

8.1. Vicarious liability:

8.1.1. An employer is liable for damage occasioned by delict committed by an employee in the course and scope of that employee's employment.¹⁶

8.2. Lex Aquilia

8.2.1. The *actio legis Aquiliae* enables a Plaintiff to recover patrimonial loss

¹⁶ K v Minister of Safety and Security 2005 (3) SA 179 (SCA), 2005 (6) SA 419 CC, Loureiro and Another v Imvula Protection (Pty) Ltd 2014 (3) SA 394 CC

suffered through a wrongful and negligent act of the Defendant. Liability depends on the wrongfulness of the act or omission of the Defendant. The Plaintiff must allege and prove the act or omission on which the cause of action is based.¹⁷

8.3. Liability for dangerous property

8.3.1. Generally speaking, it may be laid down that a person who is in control of a dangerous premises owes a duty to persons coming upon the premises to take reasonable care for their safety. Where the owner is himself in occupation of the premises, the duty falls upon him. Where the owner is not himself in occupation, the duty is imposed upon the person who has control of the premises. Such person will normally be the person in occupation of the property. But it is to be noted that the duty may also be owed by a person who has merely a right to use land for a specific purpose.¹⁸

8.3.2. The duty is owed not only to persons entering with the permission, express or implied, of the occupier, but to any person whose presence on the premises might reasonably be foreseen.¹⁹

8.4. Wrongfulness

8.4.1. An act which causes harm to another is in itself insufficient to give rise to delictual liability. For the liability to follow, the act must be

¹⁷ Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd 1978 (4) SA 901, Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd 2011 (4) 276 (SCA).

¹⁸ Law of Delict, 7th Edition, RG McKerron, page 240.

¹⁹ Law of Delict, 7th Edition, RG McKerron, page 241.

wrongful. Without wrongfulness, a Defendant may not be held liable.

8.4.2. The approach was explained in Van Eeden as follows:

“The appropriate test for determining wrongfulness [of an omission] has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.”

8.4.3. In *Moshongwa v Passenger Rail Agency South Africa*²⁰, the Constitutional Court explained as follows:

““Wrongfulness is generally uncontentionous in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful.”

In my view, that principle remains true whether one is dealing with positive conduct, such as an assault or the negligent driving of a motor vehicle, or negative conduct where there is a pre-existing duty, such as the failure to provide safety equipment in a factory or to protect a vulnerable person from harm...”

and

²⁰ 2016 (3) SA 528 CC.

An omission will be regarded as wrongful when it also “evokes moral indignation and the legal convictions of the community require that the omission be regarded as wrongful”. This leads to a legal policy question that must of necessity be answered with reference to the norms and values, embedded in our Constitution, which apply to the South African society. And every other norm or value thought to be relevant to the determination of this issue would find application only if it is consistent with the Constitution.

As Moseneke DCJ put it: “the ultimate question is whether on a conspectus of all reasonable facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages...”

8.5. Fault

8.5.1. An act may be described as delictually wrongful only when it has as its consequence the infringement of a legally protected interest. Whether such a consequence is present, normally requires a concrete investigation of the relevant facts through an analysis of the available evidence.

8.5.2. In *Loureiro and Others v Invula Quality Protection (Pty) Ltd*²¹, the Constitutional Court confirmed that the test for negligence set out in *Kruger v Coetzee* remains authoritative:

²¹ 2014 (3) SA 394 (CC).

“For the purposes of liability culpa arises if –

(a) a diligens paterfamilias in the position of 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) Defendant failed to take such steps.”

8.6. Causation

8.6.1. In *Minister of Police v Skhosana*²², the Appellate Division explained the principle of causation in the following terms:

“Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to... the harm giving rise to the claim. If it did not, then no legal liability can arise and cadit quaestio. If it did, then the second problem becomes relevant viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part.”

²² 1977 (1) SA 31 (A).

- 8.6.2. In *International Shipping Co (Pty) Ltd v Bentley*²³, the Appellate Division explained how the enquiry should be made:

"The enquiry into factual causation is generally conducted by applying the so- called but-for test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question.

8.7. Wrongfulness as breach of a legal duty

- 8.7.1. Wrongfulness need not necessarily be determined with reference to the infringement of a subjective right. The doctrine of subjective rights merely provides one of several juridical methods for determining whether an actual violation of interest is in conflict with the legal convictions of the community and therefore wrongful.

- 8.7.2. In *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)*²⁴ Vivier ADP stated this clearly in respect of omissions:

"The appropriate test for determining wrongfulness [of an omission] has been settled in a long line of decisions of this Court. An omission is wrongful if the Defendant is under a legal duty to act positively to prevent the harm suffered by the Plaintiff. The test is one of reasonableness. A Defendant is under a legal duty to act positively to prevent harm to the Plaintiff if it is reasonable to expect of the

²³ 1990 (1) SA 680 (A).

²⁴ 2003(1) SA 389 (SCA).

Defendant to have taken positive measures to prevent the harm."

8.7.3. If it is found that the Defendant indeed had a legal duty, a breach of that duty is, in the absence of a ground of justification, unreasonable, *contra bonos mores* and thus wrongful. The determination of wrongfulness by the use of breach of legal duty does not entail a new test. Given that in many instances, a legal duty merely constitutes the converse of a subjective right, the test for wrongfulness where breach of a legal duty is involved is in principle clearly the same as the question of whether a subjective right has been infringed. The question of whether a legal duty has been breached is also determined with reference to the *boni mores* or general legal convictions of the community.

8.7.4. In *Minister of Safety and Security V Van Duivenboder*²⁵ Nugent JA formulated the principle of the element of wrongfulness as follows in paragraphs 441E to 442B:

"Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law

²⁵ 2002 (3) All SA 741 (SCA).

recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in Kruger v Coetzee, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it."

8.8. Knowledge and foresight of possible harm

8.8.1. The fact that a person had knowledge or foresight that his omission might cause harm, is indicative of the unreasonableness and therefore wrongfulness of his conduct. Where a person was aware of a dangerous situation this may be a factor in determining whether he had to exercise control over the danger and consequently whether a legal duty rested on him to take steps to avert loss.

8.8.2. In *Govender v GMP Contract Cleaning CC*²⁶ the court referred to and applied the test for negligence which was the well-known test of a diligence *paterfamilias*. It was held that the incident was reasonably foreseeable, that reasonable steps could have been taken to prevent the occurrence of the incident and that the Defendant failed to take steps to prevent the occurrence of the incident. The Defendant was accordingly ordered to pay the Plaintiff's proven damages.

²⁶ [2016] JOL 34163 (KZD).

9. SUMMARY

The testimony of several witnesses, some of whom were or are in the employ of the Defendant, unequivocally confirm the following:

- 9.1. The incident did in fact occur and it was not orchestrated, as is alleged in the Defendant's Plea;
- 9.2. The Plaintiff sustained bodily injuries as a result of the occurrence of the incident.
- 9.3. Shortly after the incident he was transported to Life Dalview Hospital where he received medical treatment and he was later further hospitalised.
- 9.4. Mr Krotz, who was an employee of the Defendant at the time burnt the electrical cables on 4 May 2017. He was instructed to do so by one of the Defendant's other employee, namely Mr Scholtz. In fact Mr Scholtz opened the Defendant's factory for him on the morning of 4 May 2017. Mr Krotz therefore clearly acted within the course and scope of his employment with the Defendant.
- 9.5. At some point in time Mr Krotz and the Defendant's other employees put the box which contained the burnt electrical cables down on the landing area. The box was not sealed at the bottom and therefore the powder of the burnt cables escaped through the flaps at the bottom. Mr

Krotz confirmed that he noticed the powder on the landing area but he deliberately decided not to clean it up. In doing so, he clearly created a dangerous situation. His subsequent failure (omission) to eliminate the dangerous situation is *prima facie* wrongful.

- 9.6. It is furthermore undisputed that the Defendant and its employees did not put out any warning signs to cordon off the area where the powder was present.
- 9.7. The Defendant's employee created a second dangerous situation by hanging the polyester sheet depicted in Exhibit F over the factory windows. This prevented the Plaintiff from grabbing the left-hand railing.
- 9.8. Under the circumstances, there rested a legal duty upon the Defendant and its employees to prevent the damage from materialising. Several witnesses confirmed that the Defendant's employees often used the stairs depicted in Exhibit L and furthermore that they knew that Elektroniko's employees also used the stairs.
- 9.9. Exhibit L clearly shows that the relevant staircase is situated in the Defendant's factory. Accordingly, it does not make logical sense for the Defendant to persist that it was not in control of the relevant staircase. In fact, one of the Defendant's employees cleaned the stairs after occurrence of the incident.
- 9.10. Accordingly the Defendant negligently breached the duty of care in one or more of the respects set out in paragraphs 6.1 to 6.9 of the Particulars of Claim.

10. **CONTRIBUTORY NEGLIGENCE**

It was submitted on behalf of the Defendant as follows:

- 10.1.1. If it is found that Mr Davidtz's fall was not a fabrication and that wrongfulness can be imposed on Klimax, Mr Davidtz was negligent in that he contributed to his alleged fall.
- 10.1.2. It was Mr Davidtz's evidence that the powdery black substance was left on the top platform of the stairwell for a week and no one who worked in the building at the premises did anything about it. Mr Davidtz was accordingly negligent in that he saw the black powder a week prior and failed to arrange that such powder be cleaned and he failed to ensure that he did not step into the black powder, when a reasonable person in the circumstances would have done so.
- 10.1.3. It is clear from Mr Davidtz's evidence that he had had two operations prior to his fall on the same left leg. It is also his evidence that he was not holding onto the hand rails when he was walking down the stairs. One would expect that a person who had prior injury and two prior operations on a leg, resulting in a drop foot and impaired ability to walk correctly, would walk carefully when walking down stairs, and in particular hold onto the hand rails, more so where such stairs are steep. This is exacerbated by the fact that he confirmed in his evidence that he had seen the black powdery substance a week prior to falling down the stairs. Mr Davidtz was therefore aware of the

presence of the black powder and continued to use the stairwell to access the toilet facilities on the ground floor and to enter his office on a daily basis. A reasonable person in Mr Davidtz's situation would have acted differently in the circumstances.

10.1.4. I agree with the submission on behalf of the Defendant and am accordingly apportioning twenty (20) percent of damages in favour of the Defendant and accordingly make a finding that the Plaintiff contributed to his fall by not taking the required precaution

11. THE ORDER

11.1. The Defendant is liable for the bodily injuries which were sustained by the Plaintiff on 4 May 2017.

11.2. The Plaintiff is entitled to eighty (80) percent of the damages that he will be able to prove in due course. The Plaintiff is found to have contributed twenty (20) percent to his fall.

11.3. The determination of quantum of damages which the Plaintiff is entitled stands over to be determined at a later stage.

11.4. The Plaintiff is entitled to the costs occasioned by the trial.

T.D. Seneka

TD SENEKE AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Appearances

For plaintiff :

For defendant: