OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case NO: 2367/2022
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO

In the matter between:

AMANDA JOHANNA MARTINSON	**PLAINTIFF**
and	
OVERTURE RESTAURANT CC	**FIRST DEFENDANT**
HIDDEN VALLEY WINES (PTY) LTD	**SECOND DEFENDANT**
HIDDEN VALLEY WINES (PTY) LTD	**and THIRD PARTY**

Coram: Kholong, AJ
Date of hearing: 5 September 2025
Date of judgment: 6 October 2025

Summary: Delictual claim for damages arising from a trip and fall – onus on plaintiff to prove the elements - wrongfulness, fault, causation and patrimonial loss.

ORDER

1. The plaintiff's claim is dismissed.

2. The plaintiff to pay costs on scale A.

JUDGMENT

KHOLONG AJ

Introduction

[1] This Court is called upon to determine an action for damages instituted by plaintiff, Mrs. Amanda Martinson against first defendant Overture Restaurant cc. Overture Restaurant in turn served a third party notice and joined Hidden Valley Wines (Pty) Ltd in the action seeking indemnity in the event they were found liable.

[2] The Plaintiff is Mrs. Amanda Johanna Martinson, an adult female administrative manager residing in Roundhay, Western Cape.

[3] First defendant is Overture Restaurant cc a close corporation registered in the Republic and at the time of the incident in question was conducting business as a restaurant on the Hidden Valley Wine Estate in Stellenbosch.

[4] The second defendant is Hidden Valley Wines (Pty) Ltd) a private company which has its principal place of business situated on the Hidden Valley Estate, Stellenbosch.

Background

[5] First defendant operated as a restaurant known as Overture Restaurant (herein-after "the restaurant") which was situated on the Hidden Valley Wine Estate operated by second defendant and landlord. The plaintiff slipped and fell whilst walking to her vehicle, after a work related year-end function when leaving the restaurant as a patron. She was at the time travelling with her husband, Mr. Martinson who had accompanied her for the event and had been driving the vehicle to and from that event.

[6] The record indicates that she fell on 10 December 2020 at approximately 21h02 whilst walking down the pathway after leaving the restaurant with her husband and was walking towards the parking area where her husband's car had been parked. She suffered injuries as a result of that fall. An injury set out as a right ankle trimalleolar fracture – dislocation involving the articular surface of the ankle joint.

[7] The parties have agreed to separate the issues in terms of rule 33(4). Consequently, the only issue for this court to determine is whether first or and second defendant are liable for that fall and consequent injury. First defendant had issued a third-party notice against second defendant wherein it alleged that if the first defendant was found liable to compensate plaintiff for damages, the area in question fell outside the area leased by the restaurant and third party, and that the second defendant was responsible for the maintenance thereof. That in the event the first defendant, the restaurant was found to be liable, the third party was in turn liable or joint wrongdoer. In its plea to the annexure, the second defendant denied liability.

Plaintiff's evidence

[8] The Plaintiff led the evidence of Mrs. Amanda Johanna Martinson and that of her husband, Mr. Martinson with whom she was travelling on the day in question. Her evidence in essence was that when the plaintiff and the husband arrived at the wine estate her husband, Mr. Martinson had been driving.

[9] Mr. Martinson's testimony confirmed that of plaintiff that he had been driving on the day in question. He testified that he had followed, during the afternoon, other vehicles in front of him which had continued driving straight at the junction with

signboard showing directions to various destinations. These directions included direction to the parking area for the restaurant but had simply followed the vehicles he was travelling behind to the parking they used. He testified that he had proceeded, following those vehicles, to park at the bottom level parking area.

[10] Both plaintiff and Mr. Martinson's testimony is that after parking, they then ascended steps which form a tapered treads creating a curved stairway to the right when ascending the stairs leading to a paved walkway and then up the stone clad ramp. They testified that at the top of the ramp they continued walking straight across a terrace which led them directly to the entrance of the restaurant.

[11] Both witnesses testified further that upon leaving the restaurant at around 21h02, the plaintiff and her husband exited the restaurant the same way that they had entered earlier in the day. Their testimony is that after walking out of the restaurant, they walked the same route they came straight across the terrace, down the stone clad ramp and across the paved walkway.

[12] The evidence points out that whilst plaintiff and her husband were walking from the restaurant to the vehicle the pathway was getting incrementally dark and because of the dark and lack of illumination, she was unaware that the steps were situated right where she fell. Plaintiff testified that the steps were not visible to her because it was dark and because there were no lights to illuminate the stairs. Her testimony was that the lighting on the ramp was poor as some lights on the ramp were not working. Further that the lights on the light post next to walkway were not switched on. She could not recall if the light on the light post at the bottom of the steps was working. Plaintiff explained that there was little illumination on the pathway when suddenly everything was dark, because there ware no lighting on the steps. She testified that she shouted to her husband: "Ek kan nie sien nie, ek kan nie sien nie". The next moment she lost her footing and fell. Plaintiff confirmed that she took one step forward after she said she couldn't see. Because she didn't expect to encounter the steps there.

[13] It was at the point when she shouted that she couldn't see that she lost her footing and fell. This resulting in her fractured right ankle. The plaintiff's contention is

that it was the defendant's fault as they had failed to render the steps safe for use as they were an integral part of the route used by members of the public to access the restaurant. Plaintiff further complained that defendants failed to make the walkway safe for use together with the curved steps because of lack of illumination and the absence of a handrail which created a hidden trap.

[14] Plaintiff stated that there were no signs which prohibited her husband from parking in the lower parking area, which was also where the other vehicles that were driving in front of them had parked. She stated that there was no car guard or parking attendant in the said parking where they parked. She denied that she was walking too quickly at the time of the accident. Plaintiff testified that there were no disclaimer notice in the parking area nor at the steps or along the walkway. That when they went up to the restaurant she had been on the right and thus didn't see the disclaimer notice on the pathway. She denied that the wording on the notice was legible. Further that there was no handrail or ballustrate next to the steps. She pointed out that on leaving the restaurant she had forgotten about the exact configuration of the steps.

[15] Mr. Martinson, on the other hand testified that he was certain that the lights situated next to the pathway were off at the time of the incident. He confirmed that he had been to the restaurant before and used the same parking and entrance into the restaurant. He stated that the restaurant staff were aware that guests had entered and left the restaurant via the ramp.

[16] Plaintiff also led the evidence of its expert Mr. Michael Bester an architect by trade. He testified that he had inspected the wine estate and took a number of photographs. He testified on the layout that the ramp was originally intended as the primary point of entrance and egress to the restaurant and that this changed because a new entrance was created and had become the new entrance. He explained that the main entrance to the restaurant was accessed from the upper level via a pathway that leads into the restaurant from the parking area. He further explained that there were a number of ways a person could enter the restaurant like through the ramp. He also explained that there were a number of parking areas on the property where a person could park should they wish to enter the property. He

further explained that all the parking areas can be reached via a ring road constituting a continuous looping access roadway.

[17] He commented that the signboards were not good and had too much information on them such that one would not stop to read them. Mr. Bester denied that the top parking area could be used exclusively for restaurant patrons. He stated that one can use that parking to access other areas on the property. He testified that on the steps, the angels of the treads on the one side are relatively narrow and on the other wider. He noticed dimensional irregularities in the steps which make them dangerous and unsafe to use. That from a design perspective his testimony was that they could have been made safer with balustrade on the side of the steps or not have the steps at all. His evidence was that the wood material used for the steps was such that when wet it would create a slippery surface as moisture cannot penetrate the wood easily. He found the plaintiff's explanation of how she fell plausible. He also commented on what he termed the low level at which the lighting was positioned, which he contended even if the area had light on the day it would have just been poor patches of lights leaving surrounding area in total darkness.

[18] Mr. Bester conceded that the steps didn't need to comply to national building regulations. He was also of the opinion that the disclaimer notice was not placed at the right place given that where it is located a person would have walked a bit at risk. He was of the opinion that plaintiff fell at the beginning of the steps and had not started descending the steps when she fell. That the parking the plaintiff used was a natural area to park going to the restaurant.

[19] Plaintiff also led the evidence of Ms. Roeleen Henning an expert in occupational health and safety who testified that defendants were obliged to comply with sections 8, 9 and 17 of the Occupational Health and Safety Act[1] which require an employer to perform a hazard identification and risk assessment. She testified that an employer needed to take measures to reduce risk to people who may be exposed to their facilities. She further testified that defendants failed to comply with sections 8 and 9 as no risk assessments were done. It was her view that the

[1] Act 85 of 1993.

disclaimer signs failed to exonerate the defendants from liability as the sign was put at the wrong place and its reference to risk was not clear. Her view on the signboards was simply that they were information boards which pointed to a preferred parking for the restaurant. That there was no signboard at the bottom where plaintiff parked indicating that patrons of the restaurant were not to park there.

[20] Ms. Henning further testified that clause 19.2 of the lease agreement enjoined the restaurant to observe occupational health and safety which included monitoring access to its premises and lighting that works. She testified that the lighting around the steps was insufficient to render the steps safe for use. She was of the view that the restaurant as a tenant was also responsible for the safety of common areas like steps even though the lease agreement stated that common areas shall be subject to the exclusive control and management of the landlord.

[21] In argument, Counsel for plaintiff contended that the wording of sections 9(1) and 41 of the Occupational Health and safety Act is broad enough to include any member of the public who may be affected by an employer's activities. Further that in terms of section 41 an employer may not indemnify himself from any provisions of the Occupational Health and Safety Act. That this meant that any notice of indemnity or waiver of liability or own risk notice will be invalid (null and void) should a person sustain an injury which is due to an employer's breach of the Act.

[22] In respect of the disclaimer notice, counsel contended that whilst second defendant accepted that it bears the onus of proof that plaintiff was bound by the terms of the disclaimer notice, that second defendant had to prove that plaintiff was aware of the disclaimer notice and that she had accepted the terms thereof either by actual consensus or based on the doctrine of quasi mutual assent. He argues that in order to rely on a disclaimer of liability, the notice must have been prominently displayed where one would ordinarily expect to find such a notice. Further that a disclaimer of liability must be restrictively interpreted (contra proferentem) because it seeks to deprive a party of his or her right to seek judicial redress for injuries sustained. That such notice must be clear and unambiguous.

[23] It was Counsel's argument that the cumulative effect of the evidence presented on behalf of the plaintiff was sufficiently cogent to place evidential burden on defendants to counter such evidence, which both defendants failed to do. That the court should draw an inference that testimony on behalf of defendants would have corroborated plaintiff's version.

Defendant's evidence

[24] Both first and second defendants closed their case after plaintiff had closed its case. The first and second defendant argued that plaintiff's testimony and some testimony of the experts proves their case absolving them individually of liability. In the pleadings responding to this action, first defendant filed a plea denying that it owed plaintiff any legal duty. In denying liability, it pointed out that the area where the plaintiff allegedly fell was not situated on the restaurant premises leased. That the incident occurred on the second defendant's farm and on an area where the second defendant was the owner and operator.

[25] First defendant had also pleaded that the stairs led to a parking area demarcated and designated for the second defendant's wine tasting room, and which was not the parking area demarcated and designated for the first defendant's restaurant and thus did not fall within its control, responsibility or liability. First defendant accordingly denied that it was responsible for the state of the stairs. First defendant pleaded that the incident was due to the conduct of plaintiff who was causally negligent and responsible for the incident or at least contributed thereto.

[26] The argument was that plaintiff elected to park in a parking area not demarcated or designated for the restaurant. That she failed to traverse the steps with due caution given her allegations as to the condition of the stairs and that she failed to indicate to any personnel of first or second defendant that she required any form of assistance in traversing the stairs.

[27] Second defendant pleaded that plaintiff's husband parked his vehicle in the parking area of the wine tasting facility and not the parking area of the first defendant's restaurant, which parking facility is situated on the other side of the

building. Second defendant admitted that it had a legal duty to take all necessary steps as could reasonably be expected of a reasonable wine farm owner, to ensure that no harm befell patrons of the wine farm while attending at the farm. Second defendant's plea was that plaintiff was negligent by failing to park her vehicle in the parking area of first defendant and using the pathway indicated for use of first defendant's patrons during nighttime.

[28] They averred that plaintiff was also negligent by parking the vehicle in the parking area of wine tasting facility which is an area not utilized at night and by using a pathway from the parking area that is not utilized after dark. They averred that she failed to keep a proper lookout and failed to take into consideration the layout of the pathway having traversed the stairs earlier during daytime. They also averred that plaintiff failed to pay heed to signs erected by second defendant.

[29] Second defendant further averred that when entering and leaving premises on the pathway where the alleged incident occurred, there was a disclaimer of liability signboard which read:

> *"This is a working farm and inherent risks exists on this property. All persons entering these premises do so entirely at their own risk. The owner, employees, agents, representatives and management of these premises shall not be liable for any damage, loss, theft, injury, accident or death suffered by any person howsoever caused".*

[30] They thus pleaded that plaintiff was warned that it was dangerous to walk on that area of farm and was fully aware of the risks involved with walking on the pathway which according to them is not a pathway to the entrance of the restaurant. That in spite of this knowledge plaintiff proceeded thereby consented to be subjected to the risk of injury. That therefore second defendant was not liable for any loss or damage suffered by plaintiff.

[31] In argument Counsel for first defendant pointed out that the inquiry in a delictual claim is not general but specific. He submitted that the court must enquire whether first defendant, the restaurant, owed plaintiff a legal duty at the time and

place where the injury occurred. Whether the restaurant wrongfully breached that duty at the time and at the place where the injury occurred. Further whether that breach in fact caused the injury.

[32] In this regard Counsel argued that plaintiff failed to establish the existence of any legal duty on the part of the restaurant relating to the hazard which caused her fall and further that her evidence point to her having caused her injury. Counsel reminded the court of the special plea the first defendant took which is that the place where the injury occurred did not fall within first defendant's control, responsibility or liability. He pointed out that the lease agreement, handed into evidence had material terms which excluded the point where the incident occurred. That clause 11 set out that whilst restaurant will have access to common areas, they at all times were subject to the exclusive control and management of landlord.

[33] Counsel points out that the plaintiff accepted that first defendant is not the owner of the farm and the area where she fell does not fall within the area leased by first defendant. Further that she accepted that the area where she fell may constitute part of the common area in which case it fell within the exclusive control and management of the landlord in terms of the lease. That in cross examination plaintiff agreed with the points they raised in the special plea. He also pointed out that in cross examination the expert, Ms. Henning conceded that the landlord remained responsible for all common areas by which access was gained. That therefore plaintiff has conceded the special plea in its entirety.

[34] Counsel for first defendant argues therefore that there is no negative inference to be drawn from restaurant's failure to lead its evidence because there is nothing for the first defendant to lead by way of evidence as the plaintiff accepts that first defendant does not own or lease the area where the steps are located. She accepted under cross examination that the first defendant does not have control over the area, and has conceded how her fall came about. That plaintiff has failed to make out a case against first defendant and thus there can be no negative inference to be drawn. Counsel contended that in the event this court were to find that there was a legal duty, the next step would be to determine negligence in respect of the steps. In this respect they argued that the court may have to consider whether

plaintiff was attentive or not when she fell. Further that if this court were to find first defendant negligent, then the lease agreement between first and second defendant contains a clear indemnification of first defendant and is entitled to the order sought in its third party notice.

[35] Counsel for second defendant on the other hand argued that plaintiff failed to discharge the onus resting on her to prove (i) wrongfulness (ii) fault (negligence in this case) and (iii) causation. He argues that it will not be necessary for the court to consider wrongfulness or causation as plaintiff's case falls on negligence hurdle to begin with.

[36] He notes that there is no dispute about the existence of a disclaimer notice to the left of the walkway at the bottom of the ramp leading to the main building. Further that there is no dispute about the express wording of the disclaimer notice. He submits that Plaintiff conceded in cross examination that had she kept a proper look out she would have seen the notice. Counsel proceeded to hinge his case around the precedence laid by ticket cases or doctrine of quasi mutual assent. He also advanced argument on enforceability of clauses that exclude liability.

[37] Counsel for second defendant explains that a reasonable person walking along the footpath would have seen the disclaimer notice. Read and understood that the terms of the notice meant that the second defendant intended excluding liability for damages resulting from injury. That second defendant took reasonably sufficient steps to bring the terms of the notice to the attention of a person such as the plaintiff walking past the disclaimer notice. That second defendant was entitled to assume that plaintiff walking past the disclaimer notice and continuing further, assented to the terms of the disclaimer notice. That therefore the plaintiff is bound by the terms of the disclaimer notice having consented to them on the basis of quasi mutual assent.

The Law

[38] The plaintiff's claim is based on delictual liability arising from the alleged wrongful and negligent failure by the defendants to take reasonable steps to avoid the incident which caused the plaintiff injuries. It is this court's assessment that in

order to succeed, the plaintiff must prove all the elements of delict. **Boberg**[2] notes that in an aquilian action there are four requirements (a) a wrongful act or omission (b) fault, which may consist of either intention or negligence (c) causation which must not be too remote and (d) patrimonial loss.

[39] The Court in ***Swinburne v Newbee Investments (Pty) Ltd***[3] held that the owner of a property is ordinarily liable to ensure that the property does not present undue hazards to persons who may enter upon and use the property. In other words, it is the owner's legal duty to ensure that the premises are safe for those who use them. This authority elucidates the point that there are instances where our courts have imposed upon an owner of property such a legal duty in relation to the condition of stairs and staircases.

[40] In this instance second defendant as owner ordinarily has this legal duty. There is no evidence if regard is had to the lease agreement that such a legal duty had been transferred to the tenant, the restaurant. On the contrary, clause 11.2 of the lease agreement makes it clear that all common areas remain at all times subject to the exclusive control and management of the landlord. It specifically states that the landlord, being second defendant, shall have the right from time to time to establish, modify and enforce reasonable rules and regulations appertaining to common areas. Clause 11.3 states that the tenant agrees to abide by and conform to such rules and regulations and to procure that its suppliers, employees, contractors and patrons and invitees also abide and conform to such rules and regulations. Clause 11 allows the landlord to do anything it deems necessary to the common area. The only reference in clause 11.6 to tenant is the duty to keep cloakroom clean during dinner ours.

[41] The incident on the evidence before this court thus did not happen in this court's view within the leased area of first defendant as contemplated in clauses 2.1.1; 2.1.2 looked together with clause 13 and exhibit b handed into evidence.

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[2] PQR Boberg, The Law of Delict, vol 1. Juta and Company, 1984 at 24.
[3] Swinburne v Newbee Investments (Pty) Ltd 2010 (5) SA 296 (KZD) at [13] – [14].

[42] Equally, it can be said that disclaimer notices have been accepted by our courts in delictual claims if found to be appropriately placed and a party willfully elect to consent to the terms thereof. In ***Fujitsu Services Core (Pty) Ltd v Schenker South Africa (Pty) Ltd***[4] the constitutional court found provisions excluding liability even in circumstances of loss caused by deliberate wrongdoing enforceable. It was noted in ***Durban's Water Wonderland (Pty) Ltd v Botha and Another***[5] that in cases of disclaimer notices the answer in determining this defense depends upon whether in all circumstances a litigant did what was reasonably sufficient to give patrons notice of the terms of the disclaimer.

[43] The plaintiff conceded in cross examination that the incident where she fell on the first top stair leading to the parking area is not situated on the restaurant premises leased by first defendant. It is situated if regard is had to the lease agreement clauses 2.1.1; 2.1.2;13.1 and 13.5 handed into evidence to an area under the control of the landlord and second defendant. In terms of clause 11.6 and 18.3 first defendant is responsible for the interior of the building.

[44] In cross examination plaintiff agreed that first defendant is not the owner of the farm and that they only leased a portion. She also conceded that the area where she fell was under the control of the second defendant. She conceded under cross examination that she overlooked the signboards guiding her to the designated entrance to the restaurant. It is this court's view therefore that the testimony of the expert witnesses Ms. Henning and Mr. Bester where thus unhelpful especially looked against direct evidence of the witnesses, the plaintiff and her husband in assisting this court to understand why the plaintiff and her husband elected to ignore the signboards directing them to the correct parking area. It is quite evident that if plaintiff and her husband had followed the road signs or signboards correctly, they would have avoided the incident leading to plaintiff's fracture as the correct entrance had no stairs from the parking.

[45] The explanation by both expert witnesses could also not help this court to understand how a reasonable person whatever the color scheme used on the

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[4] 2023 (6) SA 327 (cc).
[5] 1999 (1) SA 982 (SCA).

signboards, could ignore or overlook a direction to the restaurant to which they were invited and enter into their own frolic ostensibly because other cars ahead of them were moving in that direction or they did it before, in circumstances where the farm is a multi-purpose destination. In any event this court finds that the experts Mr. Bester and Ms. Henning have been qualified as an architect and occupational health and safety experts respectively and not signboard experts. This court thus finds their opinions on signboards and disclaimer notice looked against the direct evidence of the witnesses themselves and the minute of the in loco inspection of not much use in respect of the signboards and disclaimer notices.

[46] It is therefore this court's view that the first defendant thus had no control of the area where plaintiff fell and could thus not control the design nor workings of the stairs lighting. This court also finds that even if it were to be found that first defendant didn't comply with the requirements of the occupational health and safety act in respect of the areas it leased, that cannot reasonably be extended to an area evidently outside its control and under the exclusive control of the landlord. This court thus accepts the submission by first defendant that it had no legal duty in respect of the steps. Consequently, first defendant is not the factual nor legal cause of the injury sustained by the plaintiff. This court accepts first defendant's argument that there is no evidence before this court that plaintiff sought assistance from first defendant's employees when leaving the restaurant and seeing that the area to which she and her husband were walking was incrementally getting dark.

[47] When asked to explain exactly how she fell, plaintiff stated that she slipped, resulting in her losing her footing whereafter she tripped and fell down the stairs. Following cross examination she stated that she assumed that she had slipped because the steps were wet. She stated that should there have been enough lighting she would not have fallen. Plaintiff has testified that she had been to the restaurant approximately 3 or 4 years before the incident. Her husband in his testimony also testified that she had previously been to the farm before the day of the incident. Further that on that previous occasion they had also parked in the same parking area and had entered the restaurant through the same ramp where the incident happened. Plaintiff testified that she knew that the ramp would take her to the entrance of the restaurant. That she was unaware that that entrance was not the

main entrance into the restaurant. This court accepts the testimony by both the plaintiff and her husband, Mr. Martinson who was driving on the day in question, that they had in previous occasions been on the farm.

[48] The evidence based on plaintiff's concession is that plaintiff fell on the first railway sleeper coming down from the ramp and there being no evidence before this court that the sleeper was wet on the day plaintiff fell means that the court must accept that it was not wet as previously pleaded by plaintiff and was thus acceptable. The expert, Mr. Bester, testified that the railway sleeper was acceptable when dry.

[49] Equally, the evidence is that from the exit the plaintiff used, given the design of the lights, there were patches of light and then complete darkness. Plaintiff testified that she stepped for about a meter or a leg forward in complete darkness and shouted to her husband that she could not see anything at all. In these circumstances, this court agrees with first defendant that the actual cause of the plaintiff's fall is her rashness. This court concurs with defendants that a reasonable person would not have continued into pitch darkness having appreciated the danger of ascending stairs earlier in the day and on at least one other previous occasion that there were steps on the pathway they will come across. To transfer that liability to first or second defendant is in this court's view unreasonable given that she used an undesignated exit for the restaurant and at a time there was no wine tasting activity for second defendant's patrons.

[50] The photographs and minute of the in loco inspection conducted by the parties and handed into evidence points to signboards guiding patrons about directions to different destinations on the farm. In those circumstances, this court finds the evidence by the plaintiff and her husband Mr. Martinson that they did not see or ignored the signboards that directed them to the parking area of the restaurant to which they were going simply because they were following cars that were moving ahead of them unsatisfactory on balance. A reasonable person, intending to reach their destination appropriately, would not as a guide to their destination simply and aimlessly without regard to directions and signboards follow cars ahead of them regardless of where those cars were headed.

[51] The photographs admitted into evidence shows the disclaimer notice on the left side of the ramp. Much was made by the experts about its location and appropriateness. This court cannot accept the argument by plaintiff and the expert, Ms. Henning and Mr. Bester that the notice to be visible had to have been worded or colored or positioned differently. This court is satisfied that second defendant had taken reasonable steps firstly to direct patrons on the direction to the designated entrance to the restaurant which plaintiff ignored or overlooked.

[52] Secondly the court is satisfied about measures taken in respect of the disclaimer notice on content and position. This court thus finds that second defendant had taken reasonable measures to communicate the disclaimer notice and finds plaintiff to be bound by the terms of the disclaimer notice which she passed on the day in question having freely proceeded to the restaurant and back in spite of the terms of that disclaimer notice. The court finds the testimony that she did not see the notice because she was to the right of the husband not credible especially given that she had been to the property on previous occasions and had gone up the same ramp past the same disclaimer notice.

[53] This court finds that the second defendant was entitled to assume that a reasonable person walking past the disclaimer notice and continuing further like the plaintiff did had assented to the terms of the disclaimer notice. Plaintiff's argument that she did not see the notice walking in as she was to the right of her husband falls to be rejected.

Conclusion

[54] This Court thus concludes that first defendant had no legal duty and was thus not the factual nor legal cause of the injury given the location and circumstances of the incident and is thus not liable for the injury sustained by plaintiff.

[55] This court also finds that second defendant had a legal duty to ensure the safe use of its premises. This court further finds that plaintiff is bound by the terms of the disclaimer notice and her claim falls to be dismissed based on her consent to the terms of the disclaimer notice on the basis of the doctrine of quasi-mutual assent.

Costs

[56] Plaintiff and defendant made submissions on costs. Costs must follow the results including costs of Counsel where so employed on scale A.

Order

Accordingly, I would make the following order:

[57] The plaintiff's claim is dismissed.

[58] The plaintiff to pay costs on scale A.

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KHOLONG, AJ

Appearances:

For the Plaintiff:	Adv. W.S. Coughlan
Instructed by:	Jonathan Cohen and Associates
For the First Defendant:	Adv A.D. Brown
Instructed by:	BDP Attorneys
For the Second Defendant:	Adv. D.J Coetsee
Instructed by:	MacGregor Stanford Kruger In