IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 10514/06

In the matter between:

MERVYN CLIVE SWINBURNE Plaintiff

and

NEWBEE INVESTMENTS (PTY) LIMITED Defendant

J U D G M E N T
Delivered on 22April 2010

WALLIS J

[1] In terms of a lease concluded with Newbee Investments (Pty) Ltd on the 10 December 2004, Mr Swinburne is the tenant of flat 5 Arli Court, Channel View Road, on the Bluff in Durban. This action arises because on the 16 April 2006, just after 9 pm, Mr Swinburne fell and injured himself whilst climbing a short flight of stairs from the garage area of the block to a path giving access to the flats themselves. He attributes his fall to negligence on the part of his landlord, principally in failing to erect a handrail on the stairs that would have prevented his fall. Newbee Investments denies negligence and in the alternative contends that it is protected against Mr Swinburne's claims by two clauses in the lease. Mr Swinburne's reply is that, if these clauses would otherwise operate to bar his claim, they are to that extent contrary to public policy and unenforceable.

[2] At the commencement of the trial the issues on the merits were separated from the question of whether Mr Swinburne had suffered damages and, if so, the quantum of his loss. In the result I heard the evidence of Mr Swinburne and another tenant, Mr Geldenhuys, on behalf of the plaintiff, and that of Mrs Black on behalf of the defendant. She is an estate agent whose firm administers Arli Court on behalf of Newbee Investments. In addition to this oral testimony I was furnished with three sets of photographs depicting various aspects of Arli Court and the stairs from which Mr Swinburne fell as well as a copy of the lease and two documents pertinent to an insurance claim made on Newbee Investment's public liability insurer.

[3] The property on which Arli Court stands is situated on the lower side of Channel View Road and falls away fairly steeply from the road. It is roughly rectangular in shape with the narrow ends of the rectangle at the top and bottom of the property and the longer sides to the left and right as one views the property from the road. Access to the property is obtained via an asphalted driveway that runs from the road down the right-hand side of the building and curves round at the bottom of the building. The driveway is initially fairly steep and then flattens out at the lower end where there is both undercover and open-air parking for vehicles. Below the asphalted driveway the property falls away again, but less steeply. This area is grassed and washing lines are erected on it.

[4] Arli Court is likewise rectangular following the outlines of the property. There are five flats, two on the ground floor, two on the first floor, and one on the top floor. The fall of the land is such that at the lower end of the block

and underneath the flats themselves there are three undercover parking bays, two of which appear to be large enough to take two motor vehicles, whilst the third one is not as long and has a room situated at the end of it.

[5] The parking bays are open and access to them can be obtained from the driveway. The first parking bay, that is the one nearest the road, was the one used by Mr Swinburne. It, unlike the other two, is open ended on both sides of the building. On the one side, as I have described, is the driveway. On the other there is a small courtyard, which, like the driveway itself, is asphalted. The accident involving Mr Swinburne occurred here. The courtyard is bounded on the one side by the block of flats and at its lower end by the driveway. The other two sides are bounded by a brick retaining wall. On the upper side this wall is approximately one metre high and runs at right angles to the block of flats. It then turns at right angles towards the lower end of the property and runs parallel to the building itself adjacent to the neighbouring property. Along this stretch the wall is slightly higher than one metre. Above the wall both on the side of the road and next to the adjacent property the slope of the ground is relatively steep. On the side of the road a rockery has been created with large stones and some groundcover, whilst adjacent to the neighbouring property groundcover and some shrubs have been planted. The photographs show that at the time of Mr Swinburne's fall this vegetation was not highly developed.

[6] The stairs from which Mr Swinburne fell are situated in the corner of the courtyard at the point where the retaining wall creates a right-angle. There are five stairs, each a little over 900 mm wide and a person using them steps up from the top stair on to a path on the bank at the top of the retaining wall.

Whilst the underlying structure of the stairs is constructed in brick, the stairs themselves are made of cement with stone chips embedded in it. There is a path at the top of the wall between the last course of bricks in the wall and the beginning of the rockery. A person climbing the stairs turns left at the top and walks along this path towards the block of flats and turns right at a point fairly close to the flats, where there is a path constituted by three broad concrete slabs leading to the building itself. At the top of this path one could, at the time of the accident, obtain access to the passageway outside flats 1 and 2 on the ground floor, or climb a flight of external stairs leading to the upper floors.

[7] The evidence is clear that the residents of the flats almost invariably used the path down to the courtyard and the courtyard stairs in order to obtain access to and egress from the block. Manifestly this was the quickest and most convenient route for them to use. The alternative was to walk up or down a relatively steep asphalted driveway between the main entrance leading to the internal stairs, which is at the point closest to the road, and the garages. Unless one parks, as it is possible for one vehicle to do, immediately outside this entrance, anyone entering the property by car and parking in the parking bays or the open parking areas at the bottom of the block would almost certainly regard the courtyard stairs as the obvious route to use to obtain access. Even Mrs Black said that she had used it occasionally although she preferred to park in the driveway and use the main stairs.

[8] On the night of the 16 April 2006, Mr Swinburne and his wife were returning from a day out, culminating in a visit to a friend who lived nearby.

It had been raining heavily on the day in question and, according to Mr Swinburne, also on the three days preceding it. He said that the rain had caused sand to wash down the courtyard stairs and accumulate in the corners at the time they left the building that morning. He and his wife arrived home shortly after 9 pm and she went ahead of him up the stairs to their flat. He locked the car and followed. When he put his foot on the fifth step, that is the last one before the top of the wall, his foot slipped on the sand that had accumulated there and he lost his balance. He described the experience as being as if he had put his foot in a hole. He tried to pull himself upright and prevent himself falling backwards down the stairs and in doing so twisted to his left, came off the edge of the stairs and fell heavily into the courtyard. According to the report by an orthopaedic surgeon annexed to the Particulars of Claim, he suffered a severe fracture of the left tibia.

[9] The first issue is whether Mr Swinburne's fall was due to negligence on the part of Newbee Investments. Whilst a number of grounds of negligence were advanced in the particulars of claim the argument ultimately focussed on one alone. That was the contention that a handrail should have been provided for use by people walking up or down the stairs. Such a handrail, located on the left-hand side of the stairs as one views them from the bottom, could then be continued along the top of the wall to provide protection for people using the path at the top of the wall. (The matter was argued on the basis of the provision of a handrail as appropriate protection for people using the stairs. As a matter of fact, after Mr Swinburne's fall, a wooden fence consisting of a few poles and crossbeams was erected across the pathway barring its use entirely.)

[10] It was accepted in the course of argument that had there been a handrail in position it is improbable that Mr Swinburne would have fallen as he did or suffered the injuries that he suffered. Is Newbee Investments liable to compensate him for his damages on the basis that it was negligent for it not to provide a handrail? In order to determine that question one must first consider whether Newbee Investments owed to Mr Swinburne a legal duty to take steps to protect him and other users of these stairs against harm arising from their use of the stairs. It is only if that question is answered in the affirmative that one considers the further question whether it was negligent on their part not to provide the handrail. The question of legal duty, or blameworthiness, is necessarily anterior to the question of negligence.

[11] Legal liability arising from omissions has always been a difficult area of the law because it raises different issues from liability for harm caused by a person's positive acts. In general the legal position is that people are not under a legal duty to prevent physical harm to others, whatever moral duty they may be thought to labour under. However, in certain circumstances a legal duty to prevent harm or to protect another against harm may arise. In a series of cases, starting with the decision in *Minister van Polisie v Ewels* and followed in a number of recent decisions by the Constitutional Court and the Supreme Court of Appeal, our courts have imposed such a duty on police personnel and prosecutors to protect individuals against assaults in circumstances where they were looking to the police and courts for protection. The relevant legal principles emerge from these cases.

[12] The test for the existence of a legal duty has been expressed in the

following terms:

"Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness 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. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending upon a consideration of the circumstances of the case and on the interplay of the many factors which have to be considered.

The process of determining whether policy demands that a legal duty be imposed in a new situation is "not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms". The process will be informed by the norms and values of our society as embodied in the Constitution.

[13] It is clear that the owner of 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. That is so whether one is dealing with trespassers, invitees or others who may have a right to enter upon the property, such as tenants. There are a number of instances where our courts have imposed upon an owner of property such a legal duty in relation to the condition of stairs and staircases. As Wessels J expressed it,

as long ago as 1903:

'The law upon the subject is perfectly clear. If the owner of a building lets that building to various tenants, and if the public use that building in order to visit those tenants, then it is the duty of the owner to see that the approaches to the rooms let are not so defective as to be a source of danger to the public using those approaches.'

Whilst that was said in regard to a visitor to the leased premises later cases show that it is equally applicable to a tenant. I agree with what Price J said in *Spencer* (at 240-1) that:

'The landlord provided this staircase to the occupiers of the flats as a means of ingress into and out of their flats; he looked after it, and it seems to me that under these circumstances he was under a legal duty to see that the staircase was not dangerous. It was *culpa* on his part to allow the staircase to get into a dangerous condition, as it was under his control and was a common means of access to the flats which he provided to all and sundry - by which I mean to his tenants and to people who were otherwise lawfully coming to and going from the flats.

[14] The stairs in the present case were, as I have already described, the obvious and natural route for tenants and others visiting the premises to use in order to gain access to and egress from the flats. There was a tentative suggestion put in cross-examination to Mr Swinburne that they had originally been intended for use only by staff, such as domestic workers and gardeners, using the premises. It is unclear whether the purpose of this suggestion was to bolster a contention that they should not have been used by Mr Swinburne and other tenants or to explain (or seek to justify) a lesser duty to protect users against accidents. However, Mr Voormolen, who appeared for the defendant, wisely did not persist in suggesting in argument that this made any difference and it is impossible to see why it should. In the result I conclude that Newbee Investments owed to Mr Swinburne a legal duty to ensure that the stairs were safe to use.

[15] The next question is whether there was a negligent failure on the part of Newbee Investments to ensure that the stairs were reasonably safe for use. More particularly it is whether in discharge of their legal duty they should have provided a handrail. Here the test is that of the *diligens paterfamilias* who would foresee the possibility of his conduct leading to injury to others and would take reasonable steps to guard against such injury.

[16] In my view there can be little doubt that a reasonable person, in the position of Newbee Investments, would have foreseen the possibility of someone walking up or down the stairs slipping on loose material, such as sand or leaves washed down from the higher ground, and being unable to maintain their balance and falling. Mrs Black, who is effectively the human face of Newbee Investments, accepted that the presence of such material could render the stairs slippery. The nature of the surface suggests that this would be the case. Mrs Black was aware that the stairs were being used by residents and others. She accordingly knew that people of all ages, young and old, hearty and infirm, would use the stairs by day and by night and in all weather conditions. Some would have been familiar with them and others not. The danger was even more manifest in relation to people walking along the path at the top of the wall, but would I think have been apparent to any reasonable person looking objectively at the stairs and asking themselves whether they posed a hazard to users. The provision of a handrail was the obvious way in which to protect users of the path and stairs against this type of hazard and there is no suggestion that it would have been unduly costly to install.

[17] Mr Voormolen deployed two arguments against a finding of negligence. First he said that the residents were not under any obligation to use the stairs as they could equally well have walked up the driveway, entered the building at the main entrance and climbed the internal stairs to their flats. No doubt that is so, although the steepness of the driveway suggests that it too might have been hazardous in wet conditions if soil was washed down from the higher parts of the property. However I do not see on what basis it can be suggested that Newbee Investments was not negligent in relation to these stairs merely because of the availability of another, possibly safer, route for residents to follow. It is not the case that the residents were taking a short cut by way of an unusual route not designed for that purpose. They were using stairs and a pathway created for that purpose by Newbee Investments and doing so to the knowledge of their landlord. That they were entitled to do and Newbee Investments was obliged to take reasonable steps to ensure that the stairs were safe for use for that purpose.

[18] Mr Voormolen's other argument was that the weather conditions that night were so extreme that it should have been apparent to Mr Swinburne that the stairs were not safe to use. He said that there was already a substantial accumulation of soil on the steps when he went out in the morning and by the time he returned the position must have been considerably worse. Mr Voormolen relied upon a statement by Innes CJ in *Skinner*'s case (at 860) that the property owner is excused from liability provided that there is:

'… no hidden danger of which the user is unaware. Open danger, manifest and apparent, it would be unreasonable to expect the owner to guard against.'

In my view there is no merit in this argument. Mr Swinburne had safely

negotiated the stairs in the morning and his wife had preceded him in going up the stairs. Plainly they were not in such a dangerous condition that no reasonable person would try to use them. It was not suggested to Mr Swinburne in cross-examination that in climbing the stairs he ignored the possible hazard caused by the rain and the fact that soil had washed onto the stairs. Those conditions caused him to slip and it was the absence of a handrail that resulted in him not being able to recover his balance and falling.

[19] I accordingly find that the accident involving Mr Swinburne was occasioned by negligence on the part of Newbee Investments. The negligence lay in failing to provide a handrail for users of the stairs leading to the flats. That failure meant that when the stairs were wet or covered with sand, wet soil or other debris rendering them slippery, users had no means of steadying themselves while climbing the stairs or if they happened to slip. I do not think that any negligence on the part of Mr Swinburne contributed to either his fall or his injuries. The foundation for that suggestion is the proposition that the conditions were so obviously dangerous on the night in question that he should not have used the stairs at all but have walked up the driveway, a proposition I have already rejected. I turn then to consider whether the liability that would otherwise attach to Newbee Investments is excluded by virtue of the provisions of the lease agreement.

[20] In its plea Newbee Investments relied upon two clauses in the lease. They are clauses 15 and 26, which read as follows:

"17. The LESSOR shall keep all main walls and roofs in order but shall not be responsible for any damages caused by leakage, rain, hail, snow or fire, or any cause

whatsoever, nor shall the LESSOR be responsible for any loss or damage which the LESSEE may sustain by reason of any act whatsoever or neglect on the part of the LESSOR or employees, or by reason of the PREMISES or the building in which they are situate at any time falling into a defective state of repair, or by reason of any repairs to be effected by the LESSOR, not being effected timeously or at all, and the LESSEE shall not be entitled for any of the reasons aforementioned or for any reason whatsoever, to withhold any monies payable by him under this Agreement, or to claim any refund, in respect of monies paid.

26. The LESSOR shall not be responsible or liable to the LESSEE, his family, friend, servant or guests for loss sustained by any of them as a result of any theft, burglary or fire on the PREMISES or in or about the building or for any damage suffered as a result of any negligent act or omission on the part of the LESSOR, and/or its agent/s and/or its caretaker and/or other employees or as a result of any state of disrepair, defect or flaw in or failure, non-functioning or breakage of the PREMISES or the building, in which the PREMISES are situate, or any fittings, or in any fixtures, appliances or lifts therein. The nature of the service given in the flats by the servants of the LESSOR or the agent/s shall be at the discretion of the LESSOR or the agent/s and the LESSOR'S or the agent's/agents' representatives and servants accept no responsibility or liability of whatsoever nature in respect of the receipt or the non-receipt and delivery or non-delivery of goods, postal matter or other correspondence.'

[21] In both his heads of argument and his oral submissions Mr Voormolen concentrated his attention on the latter of these clauses and in particular on the words:

The LESSOR shall not be responsible or liable to the LESSEE … for any damage suffered as a result of any negligent act or omission on the part of the LESSOR …"

He submitted that these words clearly cover any negligence found to have occurred in this case and exempt Newbee Investments from liability arising from such negligence.

[22] Whilst not abandoning reliance on clause 17 Mr Voormolen advanced no submissions in support of a contention that it operated to exclude Newbee Investments' liability in this case. In my view he exercised a wise discretion in doing so. Clause 17 provides for the obligations of the lessor in regard to the maintenance and repair of the exterior of the building and the reference to 'any act whatsoever or neglect on the part of the lessor or employees' should, when read in context, be construed as acts or neglects relating to those obligations of repair and maintenance. On that basis they do not extend to the provision of a basic safety feature such as a handrail for the stairs on which Mr Swinburne fell.

[23] The proper approach to the construction of a disclaimer clause, such as clause 26, was set out in *Durban's Water Wonderland (Pty) Limited v Botha and Another* in the following terms:

"The correct approach is well-established. If the language of a disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity the language must be construed against the *proferens*... But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be 'fanciful' or 'remote'."

The *proferens* is the party in whose favour the disclaimer or exemption clause operates, in this case, Newbee Investments.

[24] To similar effect is the following statement by Marais JA:

"Before turning to a consideration of the term here in question, the traditional approach to problems of this kind needs to be borne in mind. It amounts to this: in matters of

contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it, is to be absolved is plainly spelt out. This strictness in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language which is sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application. (See *South African Railways and Harbours v Lyle Shipping Co Limited* 1958 (3) SA 416 A at 419 D-E).

[25] On the same point Lewis AJA said:

"There does not, therefore, appear to be any clear authority for a general principle that exemption clauses should be construed differently from other provisions in a contract. But that does not mean that courts are not, or should not be, wary of contractual exclusions, since they do deprive parties of rights that they would otherwise have had at common law. In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability insofar as it is legally permissible. The very fact, however, that an exclusion clause limits or ousts common law rights should make a court consider with great care the meaning of the clause, especially if it is very general in its application …"

[26] It is not correct, however, to view disclaimers or exclusion clauses as some type of separate species of contract to which special rules of

interpretation apply. They are simply contractual provisions that must be construed by examining the words used, the structure of the provision itself and the context of the contract as a whole. The court engages upon a conventional process of construction as with any other contractual provision, but one of the factors that is relevant to that process is the contention that the effect of the provision is to exempt the party relying on it from a liability that would otherwise attach. In those circumstances it is appropriate to consider whether that is how a reasonable person would understand the provision in question. That also explains why, if the provision is ambiguous, such ambiguity is fatal to reliance upon the clause.

[27] The agreement of lease is in a standard form issued many years ago by the Institute of Estate Agents of South Africa. Mrs Black said that she had been given this form years ago and had simply continued to use it. Its age is apparent from its references to outdated legislation such as the Rents Act 43 of 1950 and in the language in which it refers to domestic workers. A number of the clauses, such as the provision that the building is in the course of construction and the clause dealing with a non-existent swimming pool are simply irrelevant to the circumstances of Mr Swinburne. In other words this is a classic standard form contract not tailored to the particular relationship between Newbee Investments and Mr Swinburne, but designed to cover in broad and general terms various aspects of the relationship between landlord and tenant and various eventualities that might arise in the course of that relationship, to be used or adapted to fit any situation.

[28] An overview of the lease reveals that its provisions fall into three broad categories. These deal with the tenant’s rights of occupation of the leased

premises and the constraints imposed on it; the rights of the landlord and the obligations of the tenant in regard to payment of rental and other amounts and lastly clauses dealing with the condition of the premises. That leaves the two exemption clauses 26 and 27. The latter provides that goods brought by the lessee on to the premises are placed there at the lessee's sole risk and that no responsibility whatsoever is undertaken by the lessor or the agent for those goods. The feature of this provision is that it relates to the tenant's goods and nothing more.

[29] Clause 26 falls to be construed against the background of that general context. That background is that it is in general concerned with regulating the ordinary and natural consequences of the relationship between landlord and tenant. There is not the slightest indication that it is directed at accidents causing personal injuries such as that giving rise to Mr Swinburne's claim. Nor does it deal expressly with questions of possible negligence, save possibly in clause 17 in the reference to neglect on the part of the lessor in relation to undertaking repairs to the building. As Mr Voormolen accepted, that clause relates to acts or neglect on the part of the landlord in relation to the ongoing maintenance and repair of the fabric of the building and to damage to property or interference with the tenant's right of occupation that may flow from that. The language does not refer to personal injuries and there is no reason to construe it as having a broader scope.

[30] Clause 26 commences by saying that the lessor shall not be responsible or liable to the lessee, his family, a friend, servant or guests for loss sustained by any of them as a result of any theft, burglary or fire on the premises or in or about the building. The losses excluded by those

provisions are losses arising from the loss of or damage to property. That follows from the fact that the exempted causes of such loss are theft, burglary or fire. Those are primarily matters that cause injury to physical property. Whilst fire is obviously capable of causing personal injury, when used in conjunction with theft and burglary, it seems clear that it is directed only at loss caused by harm to property.

[31] The latter portion of clause 26 likewise relates only to physical property. It repeats the provisions of clause 11 of the lease that services provided by the lessor or its agents are discretionary and then records that no responsibility or liability is accepted in respect of the receipt or non-receipt and delivery or non-delivery of goods, postal matter or other correspondence. In other words if goods being delivered to the premises are damaged or items, including postal items, go astray the lessor does not accept liability for that occurrence. Whatever the precise scope of this disclaimer the significant point is that it deals with physical property.

[32] The defendant's contention is that although these portions of clause 26 deal with claims that might arise from events relating to physical property the disclaimer of responsibility:

"… for any damage suffered as a result of any negligent act or omission on the part of the lessor, and/or its agent/s or its caretaker and/or other employees …"

is broader and encompasses claims arising from personal injury. The submission as expressed in Mr Voormolen's heads of argument is that:

"The general tenor of clause 26 is to exclude the liability of the defendant for acts or omissions amounting to negligence and it is submitted that the facts of the present case (if negligence is indeed established) would fall squarely within that clause."

[33] The foundation for that submission is that the words "any damage suffered" include not only damage to property but also injury to persons. If it does then it seems correct that liability for negligently causing that injury is excluded. That would follow because of the breadth of the word 'any', which qualifies both 'damage' and 'negligent act' and is treated as a word of the widest amplitude covering each and every thing that it qualifies. The question is whether it is correct to say that in clause 26 the word 'damage' includes harm arising from personal injury.

[34] It is correct that the word 'damage' may sometimes be used to refer to harm to both property and person. It is used in that sense in s 1(a) of the Apportionment of Damages Act 34 of 1956. However that is a less common meaning of the word as appears from the definition in *The New Shorter Oxford English Dictionary* (6th Ed, 2007), which reads:

'**Damage** - noun

1. Loss or detriment to one's property, reputation etc.

2. Harm done to a thing or (less usually, chiefly *joc*) person; *esp* physical injury impairing value or usefulness'

In the corresponding definition in the *South African Concise Oxford Dictionary* (2002) there is no reference to injury to a person, the definition reading:

"Physical harm impairing the value, usefulness, or normal function of something."

It is true that the *Collins English Dictionary* (6th Ed, 2003) simply says that "damage" means:

"Injury or harm impairing the function or condition of a person or thing"

but that merely illustrates that the word is capable of encompassing harm to

either person or property or to both. Which it is in any particular case will depend upon the context and other factors relevant to the interpretative task.

[35] I am not satisfied that a reasonable person reading this clause would understand the reference to 'any damage' as extending to a claim for damages arising from personal injury. It appears in a clause that in other respects,, both preceding and following, is clearly dealing only with loss or damage to physical property. There is no word that refers in clear terms to harm to the person as would have been the case had the word "injury" or "personal injury" been used. Whilst a negligent act or omission may cause both damage to property and physical injury to the person the true question in construing this clause is whether the reference to "any damage" extends to the latter. In my view the clause is perfectly capable of a construction that confines its scope to damage to property. The clause is capable of a construction that confines its scope of operation to situations causing damage to property and that construction is consistent with the other provisions of the clause and the lease as a whole. There is no indication anywhere in the lease that what is being sought is an exemption from liability for causing personal injury arising from negligence. There is also no exclusion of the landlord's obligation to make the premises safe for those residing in and visiting them. Neither 'negligence' nor 'injury' is used in any clause. At best for Newbee Investments the clause is ambiguous and applying the principles discussed earlier in this judgment it falls to be construed against Newbee Investments.

[36] It follows that Newbee Investments is not exempted by either clause 17 of clause 26 from liability for the consequences of its having negligently

caused the accident in which Mr Swinburne was injured. That conclusion renders it unnecessary for me to consider the argument that such a construction of the clause would be contrary to public policy. The validity of an exemption clause was upheld by the Supreme Court of Appeal in *Afrox Health Care Beperk v Strydom.* However since that judgment the Constitutional Court in *Barkhuizen v Napier* appears to have broadened the scope within which courts may be required to hold that contractual provisions are contrary to public policy. In addition, the majority in the Supreme Court of Appeal itself, in *Johannesburg Country Club v Stott and Another* has questioned whether an exemption from liability for negligently killing a person is compatible with the constitutional guarantee of the right to life in s 11 of the Bill of Rights. On similar reasoning it may be argued that exemptions from liability for causing physical injury infringe upon the right to freedom and security of the person and bodily and psychological integrity embodied in s 12 of the Bill of Rights. As Mr Justice Brand has noted:

"Further development and fine tuning of public policy as an instrument in the present context, will also require greater awareness and imagination on the part of practitioners. Take *Afrox* as an example. If it had been pleaded and argued that any contractual exemption from liability for death and/or personal injury is *per se* contrary to public policy, the result may very well have been different. It may also have made a difference – both in *Afrox* and in *Barkhuizen* – if the response had been pertinently raised and then supported by the evidence, that the indemnity clauses were unnecessary and/or unduly oppressive, and/or that the bargaining position of parties were so unequal that the plaintiff in reality had no say at all. And maybe the fine tuning of 'public policy' may also require greater activism and ingenuity on the part of the judiciary than they have hitherto displayed."

[37] The conclusion that I have reached renders it unnecessary to enter upon this terrain or to exercise any degree of greater activism and ingenuity than has been displayed by judges in the past. I need only say that on the facts of the present case, if the exemption contained in clause 26 of the lease had applied to exclude Newbee Investments' liability for Mr Swinburne's claim, I think the argument based upon public policy would have had some force. I say this for the following reasons. First the lease is manifestly what is commonly called a contract of adhesion in regard to the terms of which Mr Swinburne had no real bargaining power. He was presented with the lease to sign on the basis that if he wanted the flat these were the terms on which it was available to him. Second the terms of the exclusion are buried in the fine print of the document and were not explained to him in advance of his signing the lease. He was accordingly not alerted to the need to provide his own insurance against the eventuality that occurred. Third the exemption is contrary to the common law right that a tenant has against the landlord that the latter take reasonable steps to ensure that the leased premises and the building in which they are situated are safe for persons living in the building. Fourth, a landlord in the position of Newbee Investments is able to protect itself in two ways against this type of liability. It can take steps to ensure as best it can that the premises are safe for use by the tenants and it can, as did Newbee Investments, insure against liability occasioned by its negligence. Fifth, the constitutional right to bodily integrity ought to be given weight in the consideration of the impact of public policy on this type of clause. However, it is unnecessary for me to weigh the precise impact of these factors on the question of the enforceability of the exemption clause in the light of my finding that it does not exclude liability for Mr Swinburne's claim.

[38] There will accordingly be a declaration that Newbee Investments is liable to compensate Mr Swinburne for such losses as he may have suffered consequent upon his injuries in the accident that befell him on the 16th April 2006. That leaves only the question of costs. Mr Voormolen submitted that I should not make an order for costs at this stage because it would not be possible until the quantum of damages had been determined to assess on what scale such costs should be awarded. However, it is clear that Mr Swinburne suffered significant injuries, was hospitalised and prevented from working for a period after the accident. The injuries he has suffered are similar to those that are considered in proceedings before the High Court on a regular basis in claims against the Road Accident Fund. In addition the issues raised in this case were not entirely free from difficulty and had it been necessary to reach a conclusion on the public policy argument that would have required the exploration of new ground. In the circumstances it seems to me that Mr Swinburne was justified in instituting these proceedings before the High Court irrespective of the amount of any damages finally awarded to him. As he has been successful I think therefore that he is entitled to his costs to date.

[39] When this action was previously set down for hearing it came before Van der Reyden J. The plaintiff's replication raising the public policy argument had apparently been filed only shortly before the hearing and as a result the trial was adjourned with the costs being reserved. I have considered the replication and it raises a point of law without occasioning any need for additional evidence. In the circumstances I do not think that the plaintiff should be penalised as a result of the lateness of the replication. In

my view a fair approach is to treat the costs of the adjournment as costs in the cause.

[39] I accordingly make the following order:-

1. It is declared that the defendant, Newbee Investments (Pty) Limited, is liable to compensate the plaintiff for such damages as he may have suffered in consequence of the injuries sustained by him on 16 April 2006 when he fell from the stairs leading from the garage to his flat at 5 Arli Court, Channel View Road, Bluff, Durban;
2. The defendant is ordered to pay the plaintiff's costs to date hereof including the costs reserved at the previous hearing before Van der Reyden J.

DATE OF HEARING	17, 18, 19 MARCH 2010
DATE OF JUDGMENT	22 APRIL 2010
PLAINTIFF'S COUNSEL	MR E LINGENFELDER
PLAINTIFF'S ATTORNEYS	WEBER ATTORNEYS
DEFENDANT'S COUNSEL	MR A.V. VOORMOLEN
DEFENDANT'S ATTORNEYS	ASKEW AND ASSOCIATES