

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 48624/2020

DOH: 02 June 2023

(1)	REPORTABLE: NO
	OF INTEREST TO OTHER JUDGES:
	NO
	REVISED.
SIGNATURE	<u>05 October 2023</u>
	DATE

In the matter of:

**PIETER ANDRIES VENTER N.O obo
DAVID WILLIAM NAPIER DAVEL**

PLAINTIFF

and

**MINISTER OF PUBLIC WORKS
AND INFRASTRUCTURE**

First DEFENDANT

MINISTER OF DEFENCE AND MILITARY VETERANS

Second DEFENDANT

SOUTH AFRICAN FORCES INSTITUTE

Third DEFENDANT

JUDGMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADED ON CASELINES,
ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 05 OCTOBER 2023**

Bam J

A. Introduction

1. This case concerns a claim for delictual damages suffered by Mr David Davel, (Davel) a 62 year old businessman and Information Technology Technician. Mr Davel was injured when he unknowingly stepped onto a part of a roof made of fibreglass, then covered with a thick crust of dust, leaves and other debris in a building occupied or operated by the third defendant in Thaba-Tshwane. He had mounted the roof to carry out work requested by a senior member of staff of the third defendant. The fibreglass gave way under his weight plunging Davel to a concrete floor four metres below the roof. He was critically injured and rushed to a nearby hospital. The plaintiff, Adv Pieter Andries Venter, the curator who represents Davel, says the defendants were negligent in failing to warn Davel about the parts of the roof made of fibreglass. They knew or ought reasonably to have known of the hazard to persons lawfully on the roof. He wants them held liable for the plaintiff's damages following his life altering injuries.

2. The defendants, whilst accepting that they bear the legal duty to prevent harm to persons who are lawfully present at their premises, disavow any liability for Davel's injuries. They say that (i) Davel was negligent; (ii) he had no authority to mount the roof; Davel ignored warnings by senior management of the third defendant that he should not mount the roof, which he mounted anyway; (iii) finally, the defendants say they are not liable for contractors. Davel, as an independent contractor, was responsible for his own safety. At the start of the hearing, the parties took a consensual order separating the question of liability from quantum.

3. The plaintiff's case was led through the testimony of two witnesses. They are Mr Davel, the patient and Mrs Dorris Davel, the plaintiff's wife. The defendants also called two witnesses, Captain Ledimo, who is said to have been the second most senior person within the management of the third defendant at the time of the incident, and Mr Takalani Makhere, the tenant who operated the workshop. Prior to leading his first witness, the plaintiff sought leave to use certain google images and photographs¹. After some resistance from the defence, the parties resolved amongst themselves that the images could be used to assist the court by giving a general idea of the area and structures such as the buildings and roofs at the time of the incident. Amongst the images relied upon were images of the workshop roof captured from inside the workshop depicting where Davel fell.

¹ Caselines 006-700 to 703.

B. Parties

4. The plaintiff, Adv Venter, was appointed curator *ad litem* to the patient, Mr Davel, pursuant to an order of this court granted on 28 August 2018. The first defendant is the Minister of Public Works. The Minister is cited in his official capacity as contemplated in section 2 (1) of the State Liability Act, Act 20 of 1957. The second defendant is the Minister of Defence and Military Veterans. She is cited in her capacity as the executive authority of the National Department of Defence. The third defendant is the South African Forces Institute, an institution established in terms of section 148 of the Defence Act 42 of 1957. The third defendant's premises are situated in Thaba-Tshwane from which it operates an Engen Fuel Station and tuck shop. In the same premises is a workshop which was occupied by Makhere. There is no dispute that Mr Davel fell through the roof of the workshop.

C. Background

5. The following is either common cause or was not seriously disputed: Mr Davel was 56 at the time of the accident. He had spent time in the navy after leaving school. He had never worked in Thaba-Tshwane prior to contracting with third defendant. After leaving the navy he joined the computer world which led to the establishment of Davdo Computers CC, his own business. At the time of the accident, Davdo had a maintenance contract with the third defendant in terms of which it rendered computer, and IT related services. That contract endured until the date of Davel's accident. The roof of the workshop comprised corrugated iron sheets and fibreglass or some other plastic type roof.

D. Merits

Plaintiff's case

6. The first witness called by the plaintiff was Mr Davel. Davel testified that he could not remember anything after his fall but had some recollection of the events preceding the accident. He testified that on 25 September 2017, he was at the third defendant's premises when he was called to the financial director's, Ms Julia van Graans' (van Graans), office. Van Graans showed him two images on her computer screen, one of which was an antenna or wifi booster. She asked Davel to remove the antenna, to which he enquired why he had to remove it because he had not installed the antenna. He was threatened with cancellation of his contract if he did not remove the antenna. He told the financial director he would think about it and left the office to look for a certain General Phashasky (whom he described as the most senior person in SAFI) or his second in charge, but he was informed that they were not available.

7. He did the same upon his return on 27 September, but he was again informed that the two most senior people were not available. It was Davel's testimony that he had mounted the roof on two previous occasions to do some work, albeit from a different side. On both occasions he had walked on the concrete wall which he said was a little higher than the roof. On the first occasion, he had taken a rope but realised upon reaching the roof that there was nowhere to tie it. On the day in question, he had intended to mount the roof in order to assess the situation before he could carry out any work. It is not in dispute that Mr Davel plunged through the roof to the concrete floor when he stepped on the fibreglass part of the roof.

8. Mr Davel was cross examined extensively about what Davdo's maintenance contract allowed him to do and whether or not it required him to mount roofs; whether he was aware of the Occupational Health and Safety Act in relation to contractors; whether or not he was aware that as an independent contractor he was responsible for his own safety; and whether he used any personal protection equipment (PPE) on that day. He responded that his maintenance contract was broad and he had mounted the roof before to test and install equipment. He was not aware of and had not seen any indication or sign that there was fibreglass on the roof. He was not aware of the provisions of the Occupational Health and Safety Act regarding contractors but he understood that as an independent contractor, he is responsible for his own safety. With reference to his statements that, after speaking to van Graans, he went to look for General Pashasky, he was asked whether he doubted van Graans' authority, to which he replied that he did not doubt Ms van Graans' authority.
9. During re-examination Davel affirmed that he had previously been instructed by van Graans to do work which he did and was paid for. He said he did not doubt van Graans' authority at all. He confirmed there were no warnings anywhere around the roof regarding the sheets made of fibreglass. This marked the end of Mr Davel's testimony. I found Mr Davel a candid witness. His answers did not come across as contrived. Where he did not know something, he answered he did not know. He did not flinch in answering difficult questions. I have no difficulty accepting Mr Davel's testimony.

10. The second and last witness for the plaintiff was Ms Davel. Ms Davel did not witness the incident. Her evidence was confined to, *inter alia*, the events after the accident and her role in assisting her husband at Davdo. She testified that whenever SAFI placed orders for anything they required Davdo to supply, they would send an order to her. On 25 September, Mr Davel came back from work upset because Ms van Graans had threatened to cancel their contract in the event Mr Davel did not remove certain equipment from the roof. According to Ms Davel, it was not the first time that Ms van Graans had threatened to cancel their contract when she wanted things done her way. As to the events of 27 September 2017, she was called by Captain Ledimo and informed her that something had happened with her husband and that she had to meet Captain Ledimo at One Military hospital.

11. When she arrived at One Military, Mr Davel had already been admitted and was being treated. He was transferred on that same afternoon to Steve Biko where he remained in the Intensive Care Unit up until mid-October 2017. Davel left hospital in December 2018 when he went to a step-down facility, Clayton house, where he remained until January 2018. On 28 September she and her daughter went to collect Mr Davel's belongings, including his car. They visited the place where the incident had happened and her daughter took images of the broken parts of the roof through which Mr Davel fell.

12. Ms Davel was asked during cross examination whether SAFI had issued an order for the removal of equipment on 27 September to which she responded there was no order

as the request was covered by the maintenance contract. During re-examination, Ms Davel confirmed that her husband visited SAFI on Wednesdays and Fridays. Mrs Davel was a truthful witness. She did not appear to be making up answers as she went along. I have no hesitation to accept her testimony. The plaintiff closed his case after Ms Davel's re-examination.

13. Perhaps I should remark at this point that whilst the two witnesses for the Plaintiff were on the stand, at no point was the defendants' version put to them.

Defendants' case

14. The first witness to testify for the defendant was Captain Ntai Christo Ledimo. He occupied the position of Deputy General manager and was responsible for administration and operations at the time of the event. He confirmed Davdo's scope of work as maintenance, IT and computers. The building, according to the Captain, was owned by the Department of Public Works and any work that had to be done required the Department's consent. When asked about the roles of Mr June and Richard Tenjokwayo, both of whom are mentioned in the defendants' plea, he mentioned that June was a cleaner. Richard was responsible for building maintenance but had since retired upon reaching 65. As to the events of 27 September, he learned of the accident from van Graans. Upon arriving at the scene and on seeing the extent of Davel's injuries and bleeding while lying on the floor, he concluded it was an emergency and arranged that Davel be transported to One Military even though One Military does not

treat civilians. He mentioned he did not know what had happened, but his priority was to save Davel's life. Upon arrival at the hospital, he impressed upon the doctors that Davel be treated as he was a contractor of SAFI. SAFI, according to the Captain does not have insurance for contractors.

15. The Captain was first cross examined about the various photographs of the roof of the workshop and asked whether he could confirm that, due to the debris, leaves and dust, the fibreglass section was obscured. He began by denying that it was dark but eventually conceded it was. It was put to him that owing to the thick crust that had obscured the fibreglass, a person on the roof would not see that there was fibreglass. He responded that he had never been on the roof and so would not know. He also could not tell whether there is a place to tie a harness for someone walking on the roof. It was put to him that Davel had testified that when he went to the roof for the first time, he went with a rope but realised there was nowhere to tie the rope. The Captain could neither deny nor confirm the statement because he had never been on the roof.

16. He was asked whether SAFI had to issue an order for Davel's maintenance visits. He said no, an order was required only for procurement when SAFI wanted something specific procured. The Captain was asked specifically whether the senior management of SAFI or anyone in senior management had told Davel not to mount the roof. His answer was that he did not know that Davel was going to mount the roof so he did not warn him. He also did not know whether anyone within senior management had warned Davel not to mount the roof. With reference to the defence raised in the defendants'

plea, he did not know anything about Richard Tenjokwayo warning Davel not to mount the roof. He was asked whether SAFI had investigated the alleged unlawful conduct of Davel mounting the roof of the workshop. He said there was no investigation and SAFI was not aware that Davel was on the roof. He was asked pertinently whether there was any reason SAFI did not investigate the reasons and the circumstances that led to Davel's presence on the roof. He said he did not investigate it because, for a long time, Davel was indisposed and, before they could do anything, litigation had already started. He was challenged that between the accident in 2017 and the issue of summons in 2020, a period of three years had elapsed, thus there was time for SAFI to investigate. He simply responded, 'I see.'

17. A proposition was again put to the Captain that the state of the roof, namely, its being left with debris, leaves and dust meant that a person on the roof would not see the fibreglass. The Captain said he did not know. He was challenged that his being coy about the proposition suggested that he appreciated that it is damaging to the defendants' case. He simply said he did not know. He was referred to image 703² and was asked whether he could confirm that the debris had made that part of the roof dark. He conceded that the dirt had made the fibreglass dark. The Captain testified reasonably well. Notwithstanding the difficult questions posed to him during cross examination, he did not seek to prop up the defendants' case. I accept the Captain's testimony.

² 006-703 Caselines.

18. The defence's final witness was Mr Takalani Makhere. Makhere testified he is a tenant running his own business at the third defendant's workshop. He was working with three other people on the 27 September. As to the events of the day, he heard a thunderous sound and went to investigate only to find Davel lying on the concrete floor and badly injured. He ran to report the incident to van Graans whom he said was one of the senior managers. On returning to the scene, he found Captain Ledimo. During cross examination, it took several instances of questioning for this witness to admit that the section of fibreglass through which Davel fell had indeed been obscured by dust and debris. He maintained that from inside, he could see the blue sky through the fibreglass. He denied seeing Ms Davel and her daughter on 28 September, but he could not deny that the images were taken after the incident before the roof was repaired. He confirmed during re-examination that he did not see anyone on 28 September stating that if anyone had arrived he would have seen them. He re-iterated that after the incident he could still see through the fibreglass from inside the workshop.

19. Mr Makhere was a reluctant witness. It took repeated questions for him to admit that large portions of the fibreglass were covered with dust and debris which he promptly changed during re-examination. His evidence must be treated with the necessary caution.

E. The issues

20. The issues are:

- (i) wrongfulness
- (ii) negligence; and
- (iii) causation

(i) Wrongfulness

21. I propose to first enquire on the issue of wrongfulness. In so doing, I assume for purposes of the enquiry, even though I will soon demonstrate, that the defendants were negligent. While negligent conduct in the form of positive conduct causing harm to another is *prima facie* wrongful, the position is less clear when it comes to negligent omissions. Wrongfulness of an omission depends on whether legal and policy considerations, viewed through the prism of the Constitution, demand that such conduct attract liability. In *Hawekwa Youth Camp v Byrne*, the court explained:

‘The principles regarding wrongful omissions have been formulated by this court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is *prima facie* wrongful. By contrast, negligent conduct in the form of an omission is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public and legal policy consistent with constitutional norms....’³

22. The principles were further explained in *Le Roux and others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* thus:

³ (615/2008) [2009] ZASCA 156 (27 November 2009), paragraph 22.

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'⁴

(ii) Negligence

23. The *locus classicus* in respect of negligence is that of *Kruger v Coetzee*⁵, espoused in, amongst others, *Lee v Minister of Correctional Services*⁶. According to the test, negligence is present if a reasonable person:

- (a) would have foreseen the reasonable possibility of his conduct injuring another person and causing him harm;
- (b) would have taken reasonable steps to guard against such occurrence; and
- (c) the defendant failed to take such steps.

24. In *Peri-Urban Areas Health Board v Munarin*⁷, the sole issue before the court was whether the widow of an employee, a pipe-layer employed by the contractor, had a

⁴ 2011 (3) SA 274 (CC) paragraph 122.

⁵ 1966 (2) SA 428 (A) at 430E- F.

⁶ (CCT 20/12) [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) (11 December 2012), paragraph 18.

⁷ 1965 AD 367

claim for the loss of her breadwinner, based on the negligence of the Board or its servants. The facts briefly summarised were: The Board had contracted with a company, the contractor, to construct sewers. The exercise involved digging of a trench by means of a mechanical shovel. Alongside the trench was a wall which was about 9 inches thick and 13 feet high. The trench was about 11 feet deep. It was common cause that the proximity of the wall posed a source of danger because of the pressure it exerted and that it was necessary for steps to be taken to prevent the trench from caving or falling in. On 19 December, the Board's engineer was at the site. He found that the digging of the trench had gone as far as 40 feet and there had not been any shoring done. On the morning of 20 December, digging had progressed to about 79 feet and there had still no shoring done. The Board's clerk of works was at the site. He left the site to have a cup of coffee with the foreman. While they were away, the pipe-layer and his assistant descended into the trench to do some preliminary measuring. The side of the trench gave way and the wall fell into it, with the result that the pipe-layer and his assistant were killed.

25. Entertaining the question of negligence on the part of the Board (the employer) the court, after referring to the test as set out in *Kruger v Coetzee*, took into account the following: (i) the Board, through its sewage engineers, planned the works and knew that they included the dangerous operation of digging a deep trench alongside a high wall, with the potential risk to pipe-layers in the trench, unless shoring precautions were taken; (ii) the Board, in engaging a contractor to carry out the work, retained and thereafter exercised the right of expert technical supervision and control referred to

above; (iii) the Board knew on the afternoon of 19 December, 1962 (through its engineer) and on the morning of 20 December (through its clerk of works) that the contractor had not taken shoring precautions, although excavations had proceeded alongside the wall for a considerable distance, and that the pipe-layer might soon be entering the dangerous trench; (iv) nevertheless the Board's said representatives on the site did not, as they had power to do, order any precautions or defer the pipe-laying pending shoring.

26. In finding that the Board was liable, the court said:

'Now ordinarily a person who engages a contractor to do some work, such as the erection of a multi-storey building, in which there is an element of occupational risk to the workmen, does not owe a duty of care to the latter. But, in the present case, in addition to the provisions of the contract as indicated above, there is a factor that on 19 and 20 December, 1962, the Board had specific knowledge (through its officers) of the very dangerous situation which had been allowed to develop in the absence of shoring, and of the imminent possibility of the pipe-layer's descent into the trench; and it took no steps to stop the work. This knowledge, when superimposed upon the various facts referred to earlier, including in particular the technically skilled supervision and the right to stop the work, brought about a situation in which a diligent paterfamilias would surely have guarded against the possibility of the foreseeable harm to the pipe-layer. In other words, there was then a duty of care, and the breach thereof was negligence...'⁸

27. More recently in *Chartaprops 16 (Pty) Ltd & another v Silberman*, the court, dealing with the question of liability of the employer where a contractor had been employed, remarked:

⁸ at 373 A-D.

‘[7] A defendant might nonetheless be liable for harm that arises from negligent conduct on the part of an independent contractor but, where that occurs, the liability does not arise vicariously. It arises instead from the breach of the defendant’s own duty (I use that term to mean the obligation that arises when the reasonable possibility of injury ought to be foreseen in accordance with the classic test for negligence articulated in *Kruger v Coetzee*)....

[8] One such case was *Tarry v Ashton*, in which a lamp that the defendant had employed an independent contractor to repair was not securely fastened to the wall of the defendant’s house and fell on a passer-by. Finding the defendant to be liable, Lord Blackman said the following:

‘But it was the defendant’s duty to make the lamp reasonably safe, the contractor failed to do that; and the defendant, having the duty, has trusted fulfilment of that duty to another who has not done it. Therefore, the defendant has not done his duty, and he is liable to the plaintiff for the consequences.’

Another was *Hardaker v Idle District Council*, in which Lindley LJ described the nature of the duty that was cast upon the council as follows:

‘But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be....’⁹

28. In his particulars of claim, the plaintiff alleges that the defendants knew or ought reasonably to have known that certain parts of the roof are made of fibreglass; that the roof was not regularly cleaned or at all and that parts of the roof made of fibreglass would not be visible to persons lawfully present on the roof and carrying out work, creating a hazard to those who may unknowingly step thereon and cause harm. Under the circumstances, the defendants had a duty to warn persons such as Davel, or prevent them from mounting the roof, or designate a safe place for such persons to

⁹ 2009 (1) SA 265 (SCA), paragraph 7- 8.

walk on the roof. Their failure to carry out reasonable steps to prevent harm was negligent. I agree.

29. The facts established during the trial show that the defendants, through their employee, a member of senior management no less than the Captain, knew that a portion of the roof was made of fibreglass. Even though the Captain had never been on the roof he did not testify that the roof had been regularly or had ever been cleaned. On being shown the photo (703) depicting the damaged sheet showing where Davel fell, he conceded that it was dark. The concession was wisely made. This implies that a person lawfully present on the roof and unaware of the danger would not be able to distinguish the corrugated iron sheets from those made of fibreglass and might unknowingly step on the fibreglass.

30. A reasonable person in the position of the defendants would have taken steps to guard against harm. A step that the defendants could have taken, which would have involved minimal cost if any, was to put up large, bold signs in conspicuous places to warn those who intend to mount the roof of the imminent danger. Even better, they could have prevented persons who did not know the roofing materials from mounting it. Now, the defendants pleaded that Davel had been negligent yet they led no such evidence. They had also pleaded that Davel had been warned not to climb the roof but again failed to lead evidence to that effect. They failed to call June and Richard Tenjokwayo. Similarly, the defendants had pleaded that Davel had no authority to mount the roof and that only the third defendants' staff were permitted to mount the roof. Yet, Davel's testimony that

a member of senior management, no less than a financial director, had instructed him to remove the booster or antenna was never disturbed. His evidence established that he had mounted the roof on two occasions before the incident was also not disturbed by the defendants. The defendants were negligent.

31. During argument, the defendants saw it fit to argue for apportionment, even though they had not pleaded anything about contributory negligence. Pleadings are there to define issue. [See *Minister of Safety and Security v Slabbert* [2010] 2 All SA 474 SCA, paragraph 11]

32. I find that the defendants' conduct was wrongful and negligent.

(iii) Causation

33. The test for causation is set out in *Za v Smith* (20134/2014) [2015] ZASCA 75 (27 May 2015), paragraph 30, and it says:

'The criterion applied by the *court a quo* for determining factual causation was the well-known but-for test as formulated, e.g. by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-H. What it essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and

negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty...'

34. The facts of this case establish on a preponderance of probabilities that Davel's injuries were caused by the defendants' wrongful and negligent conduct. Davel did not wake up one morning and decided to venture onto the third defendant's roof. He had been asked to go there and remove a booster or an antenna by a senior member of staff. No warning had been sounded to him and no steps were taken by the defendants to prevent harm. The defendants caused Davel's damages and they must be held liable.

F. Order

35. The plaintiff's case succeeds.

1. The Defendants are found jointly and severally liable, one paying the other to be absolved, for the plaintiff's proven or agreed damages;
2. The issue of quantum is separated from liability in terms of Rule 33 (4) and is postponed *sine die*;
3. The defendants must pay the plaintiff's taxed or agreed costs on the High Court scale, including the costs of counsel and the curator *ad litem*.



NN BAM

**JUDGE OF THE HIGH COURT,
PRETORIA**

Date of Hearing:

02 June 2023

Date of Judgement:

05 October 2023

Appearances:

Plaintiff's Counsel:

Adv J Van Den Berg SC

Instructed by:

VZLR Incorporated Attorneys

Monument Park, Pretoria

Defendants' Counsel:

Adv B Gededger

Instructed by:

State Attorneys

Pretoria