

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

CASE NO: 3661/2013

In the matter between:

Eazi Access Rental (Pty) Limited

Plaintiff

and

WBHO (Pty) Limited

First Defendant

Rickerd Trading 17CC t/a Titan Projects

Second Defendant

Judgment

Lopes, J:

[1] The plaintiff in this matter, Eazi Access Rental (Pty) Limited ('Eazi Access') instituted action against WBHO (Pty) Limited ('WBHO') and Rickerd Trading 17CC, a close corporation which trades as Titan Projects ('Titan'). Eazi Access's cause of action against WBHO was based on a contract concluded between Eazi Access and WBHO in March 2010. Eazi Access leased to WBHO a diesel scissors lift ('the platform hoist') for use on the construction site at the New Cargo Trade House, King Shaka Airport, KwaZulu-Natal ('the warehouse'). Eazi Access alleges that the platform hoist was delivered in good order and condition, and when returned, it was damaged beyond economic repair, having caught fire and been burnt out. That contractual claim has been settled as between Eazi Access and WBHO.

[2] Eazi Access's action against Titan is based solely in delict. Titan's plea is a bare denial. At the outset of the trial the parties agreed that the issues of liability and quantum be separated, and I made an order accordingly in terms of rule 33 (4) of the Uniform Rules of this court.

[3] The first witness for Eazi Access was Leslee Elijah Pillay, who testified that he had been a logistics manager at Eazi Access for approximately eight years. In March of 2010 he had also been a logistics manager and training officer at Eazi Access. His responsibilities included the entire fleet of machines and vehicles which were hired out by Eazi Access. He ensured that machines were made ready for rental, were delivered, and then were recovered after the rental period. He was able to confirm that the platform hoist which forms the subject matter of this case, was purchased by, and owned by, Eazi Access. He confirmed that a problem arose with the platform hoist, and it could no longer be used. A replacement machine was then hired out and delivered to the site ('the replacement-lift'). Normally a broken-down machine is removed from the site, but this was not done in this case. Mr Pillay testified that the platform hoist was slightly different from the replacement-lift, in that the platform hoist worked vertically only, whilst the replacement-lift was able to raise a platform vertically and then move it horizontally, whilst elevated.

[4] The second witness was Gloria Lynette Richardson, who was employed during 2010 as the safety officer for Group Five at the King Shaka International Airport site. She had been a safety officer for approximately 19 years. She was aware of the incident when the platform hoist was burnt out. It had occurred on a Saturday morning, and she had been called and told that there was a fire in the warehouse. Officers from the fire station, which was nearby, got involved and they quickly put the fire out.

[5] Ms Richardson confirmed that the 'hotworks operator' working in the warehouse had been Titan. She said that Titan had been moving around the warehouse doing 'hotwork' – ie cutting, grinding and welding metal ('anything to do

with sparks'). Ms Richardson confirmed that Riccardo Tripepi and one Llewellyn Thompson ('Junior') had constituted the supervising team working for Titan. In addition one Keith Mathys was also present.

[6] Ms Richardson said that she could not recall anything about a previous incident on Thursday the 15th April 2010 when the platform hoist was damaged. She recalled that when she had responded to the fire alarm she had seen flames against the wall next to where the platform hoist was standing. The platform hoist itself was cordoned-off with snow netting. It later became clear that this snow netting was put into place after the incident on Thursday the 15th April 2010. Ms Richardson confirmed that at the time of the fire on the 17th April 2010, employees of Titan were using the replacement-lift.

[7] Ms Richardson confirmed the procedure followed on the site. As the safety officer, she was required to attend to all the documentation and ensure that every person on the site was registered to be there. In this regard, each company working on the site would provide her with a safety file containing all the necessary details of the people working there. The safety file was kept by her and returned to the main contractor at the end of the project when the file was archived. Every company working on the site who had given her information, however, should have kept a copy of the safety information which they gave to her. That information included a record that each employee working on the site had been properly inducted – ie trained in the safety aspects when starting on the job, and their individual qualifications to be on the site and perform the functions for which they were trained, would be recorded as well.

[8] Ms Richardson was unable to recall many of the matters put to her in examination-in-chief and cross-examination. She could not remember, for example, that Nurshin Naidoo was employed by Extreme Safety as a safety officer on the site. She also could not recall that Titan had used a company named Extreme Safety as

their designated safety officer for the project. Ms Richardson was of the view that if a full time safety officer on site had been employed, she would have recalled it.

[9] It was put to Ms Richardson in cross-examination that at the time of the fire on Saturday the 17th April 2010, the Titan employees had been working on steel beams which extended from the top of a wall in the warehouse to its roof. They had used the platform hoist initially, and subsequently, the replacement-lift in order to do that work.

[10] Ms Richardson was also unable to recall, but accepted, that after the incident on Thursday the 15th April 2010, she had declared the area in the warehouse around the platform hoist to be unsafe. She conceded that she would have insisted that Titan make the area safe before proceeding with any further works. Ms Richardson was also unable to recall that she had advised Titan on the Friday that they could continue with the hotworks.

[11] It was put to Ms Richardson that one Keith Mathys performed work on behalf of Titan, but was not employed by them. She said that she had accepted that all the people working with Titan at that stage were their employees. She did not recall a subcontractor having been hired by Titan to do the hotworks, and said that if that had been the case their details would be in the safety file. She emphasised that there would have had to have been an agreement for any subcontractor to be on site, and there would have been a sub-file in respect of that subcontractor contained in the safety file. Ms Richardson maintained that, had she seen the Titan workers conducting hotworks above the platform hoist, she would have stopped them from doing so immediately.

[12] The next witness for Eazi Access was Tobias Johannes Janse van Rensburg, a professional senior architectural technologist. His employers were the architects on site, and he was responsible for liaising between the site works and his offices

with regard to the design, drawings and other architectural works on site. Each day, he went through the warehouse in order to familiarise himself with the progress so far, and to decide what needed to be done or built on that day. He dealt with requests and queries, etc. In the course of doing so, he liaised with Riccardo Tripepi, Keith Mathys and Junior Thompson. They would discuss specifics of the steel details and the hotworks to be performed.

[13] Mr Janse van Rensburg had taken the photographs which formed exhibit “B” at the trial, and which depicted the platform hoist in the fore-ground surrounded by the snow netting, with the replacement-lift in the background. These photographs were taken on the Saturday, after the fire, and the damage done to the warehouse wall by the fire may clearly be seen by the black section in the photographs directly adjacent to where the platform hoist is standing.

[14] Mr Janse van Rensburg’s knowledge of the platform hoist was that he had been told on Thursday the 15th April 2010 by one of the staff of Ilembe Joint Venture, the principal contractor who was responsible for the entire project, that the platform hoist had broken down and they were waiting to be able to remove it from the building. They said the machine had been made safe, and would stay there until removed. It was unable to be removed because there was no access to the inside of the warehouse, and it was necessary for a ramp to be constructed in order to remove the platform hoist. The ramp had been constructed when the platform hoist was brought into the warehouse, but had been removed.

[15] Mr Janse van Rensburg was asked whether a Drizit spill-kit was used in relation to the platform hoist. (Drizit is a company which specialises in cleaning up industrial spillage and environmental damage. A diesel spill had occurred on Thursday the 15th April 2010 below the platform hoist). He maintained that on the Thursday he had seen a drip tray below the platform hoist. The only person he had seen working on the beams above the machinery depicted in exhibit “B” were the

employees of Titan. He maintained that if he had seen them working in the area above the platform hoist, he would immediately have stopped them.

[16] Mr Janse van Rensburg had no specific knowledge of the employment relationship between the persons doing the hotworks and Titan. He assumed that they were all employees of Titan. He was unable to recall whether any hotworks had been done on the Friday. Mr Janse van Rensburg estimated that the distance between the two machines depicted in exhibit "B" – ie the platform hoist and the replacement-lift – was no more than four metres. He testified that no other contractors were performing hotworks on the Saturday. He would have known had there been any. After the Thursday incident, hotworks had only been stopped in the immediate area around the platform hoist.

[17] The next witness was Daniel Andrew Joubert, a forensic fire investigator and fire engineer. His qualifications and experience as a fire expert were not disputed. He had been asked to provide an expert assessment of the fire which took place on the 17th April 2010. His investigation was based upon information provided and photographs, as well as the previous expert opinion of one doctor Froneman, who is now deceased. Mr Joubert had never visited the site but relied upon the photographs in exhibit "B".

[18] Based upon the information given to him, he concluded that a hydro-carbon fire existed between the platform hoist and the wall, originating at the floor or a very low level. The fire was of reasonably large intensity at the ground level, which was evidenced by the oxidation of the metal plates exposed to the heat. Based on the information he was given, the fire had started because welding was taking place above the platform hoist. A spark from welding, or, more likely, a globule of molten metal had caused the fire. Mr Joubert was told that there had been a diesel spillage below the vehicle which had occurred on the 15th April 2010, and which had been cleaned up with an absorbent material.

[19] Mr Joubert stated that the absorbent material generally used by Drizit was peat-moss and its function is to absorb spilt liquid and prevent the liquid spreading. Once the peat-moss has absorbed the fluid, it is then taken to a disposal site. He testified that diesel has an ignition temperature of approximately 55°C, and that it would be difficult to ignite a bowl of diesel in the courtroom with a lighter, because the temperature of the diesel would be less than the flash point. If the diesel was heated to above 55°C, a sustained flame would occur. However, where the liquid is absorbed into a material, the vaporisation of the liquid occurs over a 360° arc, like a wick in a candle. Here temperature does not play the same role, because the liquid is contained in an absorbent material.

[20] The temperature of sparks which are emitted during welding range between 1200°C and 1800°C. Angle grinding or cutting sparks are relatively short-lived for approximately six to seven metres, but globules of molten metal would retain the temperature for far longer. Such globules will almost certainly cause a fire if they come into contact with diesel soaked material, because they are so hot. That welding creates such globules is a well recorded hazard of welding, and the training of welders covers the risks of hotworks.

[21] With regard to a safe working distance from where hotworks are being carried out, Mr Joubert stated that it is generally expected by Occupational Health and Safety that welding can cause metal globules to be thrown approximately 10 metres (33 feet), and the higher the area where works are being carried out, the further the trajectory will be. The self-ignition temperature of diesel is 250°C, and if it is heated to anything close to that temperature it will spontaneously combust. Any temperature over that is certain to cause a fire. A globule would have to drop in temperature from approximately 1500°C to below the ambient temperature for there to be no fire. Mr Joubert opined that the ventilation provided by a doorway adjacent to the platform hoist would have resulted in a more intense fire beneath the vertical black marks seen on the wall next to the platform hoist. The smoke deposition was all of the same type and indicated the same material was burning across the length

of the area between the machine and the wall. The burn pattern on the wall was consistent with a diesel / peat-moss mixture.

[22] Mr Joubert said that he had not made contact with anyone from Drizit in order to establish what material had been used to clean up the diesel spill which had occurred on the 15th April 2010. He stated that whatever absorption material had been used, whether it was cloth, towelling, sand or peat-moss, the result would have been the same.

[23] When asked in cross-examination whether it was safe to leave the broken-down machine in a place where hotworks were being carried out, Mr Joubert said that it was dangerous to weld above any static equipment. He was then asked whether any measures could have been taken if the machine could not be moved, for example by the use of fire blankets, etc. Mr Joubert opined that any welder worth his salt would have used fire protection methods – ie fire blankets for capturing the spatter, or a fire watch with a fire extinguisher.

[24] Mr Joubert described the peat-moss, which was used as a standard product for the absorption of hydro-carbons, as a benign, biodegradable material. He said that the diesel-soaked peat-moss should have been removed immediately, and then on an ongoing basis. He said that it was common where leaks occurred, to put down another layer of peat-moss after the first layer had been removed. He was emphatic that it was not safe to allow the hotworks to continue if the peat-moss was there. Mr Joubert thought that a drip tray would have been helpful if the leak was continual. He was of the view that if one did hotworks within the 10 metre radius of the peat-moss / diesel mixture, there would almost certainly be a fire. Anyone who was involved in safety or hotworks would know this. In response to a question whether a hotworks worker should have seen or known of the danger, Mr Joubert stated that the worker was obliged to have inspected the surrounding area, and known the risks that his works would have entailed.

[25] That was the case for Eazi Access. Titan then called Riccardo Tripepi, a member of Titan who recorded that Titan was an engineering projects management company. It managed projects on a sub-contract basis and work was always done by using subcontractors. Titan had tendered for the hotworks and had been awarded the contract to provide 150, 100mm x 100mm columns to be erected above the walls in the warehouse. The tubing that was put in place was manufactured in a workshop through another subcontractor and delivered to site to be erected. Mr Tripepi said that Group Five, (one of the main contractors), made the platform hoist available to Titan to enable it to carry the hotworks, and Junior Thompson was on site at all times as one of Titan's general supervisors. Titan had done this type work before. The training for operating the platform hoist was given on site.

[26] Mr Tripepi confirmed the necessity for each employee to go through an induction process and for all the information of Titan to be recorded in the safety file. This process included an explanation of the dangers on site, how to prepare for the works, the protective clothing to be worn, etc. Once the contract had been approved, Titan contracted Extreme Safety to undertake the safety on the site. There were more than 20 people on the site which required a full time safety officer. Members of Extreme Safety would attend a site meeting once a week, and once a day in the mornings they would be available for what is described as a 'toolbox-talk' which took approximately 15 minutes, explaining the nature of the work that was to be done that day. Extreme Safety was responsible for all safety on the site with regard to Titan, and was required to ensure that all equipment and documentation was in order, and to report to the safety officer of the project. The Extreme Safety officer who attended on the site was Nurshin Naidoo. Mr Tripepi liaised extensively with him, and also with Grant Leibrandt, the managing director of Extreme Safety. The safety file had been compiled by the combined efforts of Mr Tripepi, Extreme Safety, and the subcontractor hired by Titan which was Abraham Steel & Piping Fabricators CC. ('Abraham Steel'). Abraham Steel fabricated, installed and erected general steel works. They were obliged to go through precisely the same procedures as any other subcontractor and have the details of its staff contained in the Titan safety file. In addition, their employees had to know how to use the platform hoist. Had Titan and its employees and subcontractor not complied with all

their obligations on site, they would have been asked to leave. Junior Thompson was Titan's site supervisor controlling the site, and was present on site from 7:00am until the close of business every day.

[27] Mr Tripepi was aware of the incident which occurred on the 15th April 2010 having been called in by Junior Thompson, who explained to him what had happened. He went to the platform hoist and saw that the electric starter-motor had caught alight and ruptured the diesel line causing a diesel spill. At that time the platform hoist was exactly where it is depicted in the photographs in exhibit "B". His view was that the starter-motor fire had been caused by an electrical or mechanical fault. Mr Tripepi then went to see William Labuschagne the contracts manager for the principal contractor at the time and Tony, the foreman of the principal contractor on site. He reported the incident, and part of the warehouse was shut down by way of a joint decision. Mr Tripepi was aware that Ms Richardson had been told of the fire. Junior Thompson had been on the site and attended to the putting out of the fire. All hotworks had stopped at that point, because Titan was unable to continue with the hotworks without the platform hoist. William Labuschagne then instructed an environmental company, Drizit, to contain the diesel spill. Mr Tripepi was not involved with that process and worked elsewhere that day. The next day the site was cordoned-off and the all-clear was given to carry on with the hotworks. The principal contractor then provided the replacement-hoist.

[28] Mr Tripepi recorded that when he arrived there the next day the snow netting was in place as it is depicted in exhibit "B". He testified that he had been told that the platform hoist could not be moved, and that that was why the snow netting was put into place. He maintained that Ms Richardson had said it was safe for Titan to carry on working. He also recorded that Titan was under extreme pressure to complete the columns. That is why Titan had agreed to work on Saturday the 17th April 2010. From an inspection which he conducted on the Friday, he noticed that there was still material underneath the platform hoist, but it looked as if the diesel spill was contained and they were given the go-ahead to work on the Saturday.

[29] The Titan team worked on the Friday and nothing untoward happened. They had worked on the steel tubes visible above the wall in the photographs in exhibit “B”. After the fire on the Saturday, Mr Tripepi had shut down the site and pulled his workers off the site. Work was only resumed on the Monday. They were given authority to continue with the works on Monday by Ms Richardson and Tony the foreman. Mr Tripepi did not know what material had been put down by Drizit, and he had suggested that both drip trays and fire blankets be used in the future. The hotworks were completed on the Monday. The safety file belonging to Titan was handed over to the principal contractor, and Titan did not keep a copy. He had made enquiries regarding the whereabouts of the safety file but was told that it has been archived and burnt in a fire.

[30] In cross-examination Mr Tripepi stated that he did not know exactly how the fire had started. He said that Titan employees were working at an elevation of approximately six metres and the fire could have been started by molten steel. No one had seen it start and they had just put it out. In contradiction to what was suggested by Mr Janse van Rensburg, Mr Tripepi testified that there were no drip trays in place on either the Thursday or the Friday. Mr Tripepi also admitted in cross-examination that Titan, via Junior Thompson, had the control of the hotworks. Although he had not seen the hotworks being carried out above the platform hoist, he knew that they were working above it. His view was that the diesel spill had been contained and that his subcontractor could carry on working above the platform hoist.

[31] In re-examination Mr Tripepi suggested that if he had known that the product which had been spilled was diesel he would not have worked there. In reply to a question by Mr *Ungerer* who appeared for Eazi Access, Mr Tripepi stated that he did not know what the absorbent material used by Drizit was, but he knew that diesel had been spilled.

[32] The next witness was Grant Rob Leibrandt who worked for Extreme Safety, which develops health and safety files and assist clients in complying with the occupational health and safety specifications for construction. He is the owner of Extreme Safety and employed four people at that time, one of whom was Nurshin Naidoo. He was paid by Titan to deliver a safety file and to look after the safety file and the employees. He also represented four principal contractors and 13 subcontractors on the site. His function was to ensure that clients were compliant with safety regulations. The safety files were made up and maintained in accordance with the requirements of the principal contractor. His staff also did toolbox-talks, compiled registers, etc. He was responsible for certifying the background of the subcontractors and a monthly ongoing audit was conducted by the principal contractor. Without the relevant documentation having been provided, no employees of contractors would have been allowed onto site, nor would they have gone through the induction process. Mr Leibrandt did not do the documentation in this case, which was done by Nurshin Naidoo, because he was on site. Any safety issues which arose would have been taken up by Nurshin Naidoo with Ms Richardson.

[33] Thavalingan Naidoo ('Daya') then testified that he was the safety manager for the project. His duty was to ensure that everything was safe at the airport construction site. He remembered Ms Richardson who was employed as the safety officer for Group Five. Once a month a safety meeting was held and the safety managers for all parties had to be at the meeting. Daya's main priority was to ensure that each contractor had complied with his obligations to compile the safety file. It was his function to go through the file with contractors to ensure that everything was in order. All employees had to pass a medical before going through the induction process. A card was then made for each employee with their photograph on it. Daya knew that Extreme Safety was employed on the site and was responsible for the safety requirements of a number of the contractors. Daya had been phoned and told about the fire, and he had given the person he spoke to the ambulance numbers. No injuries, however, resulted from the fire. He did not inspect the fire and it was sorted out by Ms Richardson.

[34] The next witness was Nurshin Naidoo who was employed by Extreme Safety as a health and safety officer at the time of the fire. He had compiled the safety file for Titan and ensured that it was updated from time to time as needed. He had kept a copy of the file and sent the original to the head of the construction site. The file was a 'live file' in the sense that it was continually updated. He knew both Riccardo Tripepi and Junior Thompson, and was aware that Abraham Steel was the subcontractor to Titan. He also knew Keith Mathys who acted as liaison between Abraham Steel and contractor. Mr Naidoo attended on site approximately three days' a week and reported to Ms Richardson who ran the site. All aspects of safety on the site were referred to her. No one was allowed onto the site without her permission.

[35] Mr Naidoo clearly had only a vague recollection of the incident because when shown the photographs of the two machines which were contained in exhibit "B", he said that he was not sure why there were two machines in the photographs. He had been told by Ms Richardson on the Friday that an incident had occurred. He would have to have obtained an incident report from the safety officer on the site.

[36] Mr Naidoo maintained that on the Friday, the snow netting was in place as it is depicted in the photographs in exhibit "B". He had been informed by Ms Richardson that it was safe to continue with the hotworks. However, Mr Naidoo was unable to recall whether the whole area had been cordoned-off. He maintained that they would not have continued to work in the area had Ms Richardson not said that it was safe to do so. Mr Naidoo had no knowledge of the fire on the Saturday, and he was only told about it on the Monday. He could not remember about the meeting which was held on Tuesday the 20th April 2010 regarding the fire.

[37] Mr Naidoo said in cross-examination that he was aware on the Friday that a substance had been used to mop up the spilled diesel, and he could see it around the platform hoist. He said that Ms Richardson had said they could only work inside

the area cordoned-off by the snow netting with her authorisation, and he was not aware that that was ever given. He stated that if he had been aware of the fact that hotworks would be done in the vicinity of the platform hoist, he would most definitely have stopped the works. This was particularly so because of the material lying around which was soaked in diesel. That was the case for the defendant.

[38] At the end of all the evidence the following had been established:

- (a) Eazi Access was the owner of the platform hoist.
- (b) Eazi Access hired the platform hoist out to the principal contractor.
- (c) The principal contractor made the platform hoist available to Titan to use in performing hotworks above ground level in the warehouse.
- (d) Titan's subcontractor Abraham Steel performed the hotworks using the platform hoist.
- (e) Titan was the only contractor performing hotworks in the warehouse.
- (f) Titan's subcontractor worked under the direct supervision of Junior Thompson, who worked on the site with the Titan team from 7:00am each until the end of business each day. In addition Mr Tripepi, as the controlling mind of Titan, was involved in the oversight and supervision of the work being performed by Titan.
- (g) Titan hired Extreme Safety to perform the functions of a full-time safety officer on the site.
- (h) The hotworks being performed consisted of grinding, welding and cutting metal. The welding was performed at a height well above ground level whilst the cutting was performed at ground level.
- (i) On Thursday the 15th of April 2010 a minor fire occurred on the platform hoist causing the diesel fuel line to be breached. This fire started as a result of an electrical shortage on the platform hoist.
- (j) The minor fire was extinguished and Drizit, an environmental company, was called out to deal with the diesel spill.
- (k) Drizit used an absorbent material (probably peat-moss) to soak up the diesel. Some of the diesel-soaked material was removed from the site and replaced with other absorbent material to soak up any leakage or remaining diesel on the floor of the warehouse. Absorbent material,

contaminated to some extent with diesel, was left under the platform hoist to ensure that any further leakage would be contained.

- (l) The area around the platform hoist was cordoned-off using snow netting.
- (m) The hotworks continued being carried out by Titan.
- (n) On Saturday the 17th April 2010, and whilst Titan was performing hotworks in the vicinity of the platform hoist, the absorbent material beneath it ignited and caused a fire, resulting in extensive damage to the platform hoist, rendering it irreparable.
- (o) The hotworks, being performed at the time of the fire took place in one of two areas:
 - (i) On the ground near the snow netting; or
 - (ii) Above the level of the platform hoist, and near to it, or directly above it.
- (p) The uncontested evidence of the forensic investigator and fire engineer was that diesel soaked into an absorbent material would almost certainly cause a fire if welding sparks (with a temperature of 1200-1500°C) or molten metal globules (with a temperature of approximately 1500°C) came into contact with the absorbent material.
- (q) The safe working distance for hotworks from the absorbent material would have been the minimum of 10 metres (or 33 feet) and the higher up the work was being done, the greater would have been the trajectory for flying sparks or molten metal globules. The distance between the two machines was no more than four metres.
- (r) Sparks and hot metal globules are well recognised risks of welding and are covered in the training of welders.
- (s) Welders would be aware of the necessary fire prevention methods, for example fire blankets, a fire watch with fire extinguishers, etc.
- (t) It would have been unsafe to allow hotworks to be carried out in the vicinity of the diesel-soaked absorbent material.
- (u) No one actually witnessed the fire start, but the overwhelming probabilities are that it was caused by a spark or metal globule emanating from the hotworks being carried out by Titan.

[39] Mr *Ungerer* eschewed any reliance on the vicarious liability of the subcontractors of Titan. He submitted that it is the direct conduct of the employees of Titan that attracted liability. He referred to *Langley Fox Building Partnership (Pty) Ltd vs De Valence* 1991 (1) SA 1 (A), where Goldstone AJA reiterated the three broad questions which have to be asked in deciding whether a legal duty arose on the part of Titan. At 12H-13C, he stated:

‘In my opinion, it follows from the foregoing that in a case such as the present, there are three broad questions which must be asked, viz:

- (1) would a reasonable man would have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,
- (2) would a reasonable man have taken steps to guard against the danger? If so,
- (3) were such steps duly taken in the case in question?

Only where the answer to the first two questions is in the affirmative does a legal duty arise, the failure to comply with which can form the basis of liability.

...

It follows from the foregoing that the existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend in each case upon the facts. It would be relevant to consider the nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and the independent contractor respectively; and the means available to the employer to avert the danger. This list is in no way intended to be comprehensive. It does follow, however, that the duty of an owner of premises such as the present may not be the same as that of the building contractor employed by him to do the work. That question, too, must be answered with due regard to the facts.’

[40] Mr *Ungerer* submitted that his case was based upon the direct liability of the employees of Titan – ie Mr Tripepi and Junior Thompson – and their roles in supervising and controlling the work which was done by Abraham Steel. He referred to the evidence of Mr Tripepi who testified that Junior Thompson was his site supervisor controlling the site subcontractors. He was present on site from 7:00am to close of business every day. Mr Tripepi also testified that he was continually in and around the Trade Port area, and he conceded in cross-examination that he and

Junior Thompson had control of the hotworks. Although he had not seen Abraham Steel performing hotworks above the platform hoist, he knew that they were required to do so, and would do so.

[41] Mr *Ungerer* pointed out that Mr Tripepi said that he knew about the hotworks to be done, and he knew about the diesel and absorbant material underneath the platform hoist. It was clear from the evidence of Mr Janse van Rensburg, Ms Richardson and Mr Naidoo that Titan could not carry out any works in the barricaded area. There is no suggestion that they were working inside the barricaded area, but were close to it, and that they did not take proper cognisance of the danger. Mr *Ungerer* pointed to the fact that Mr Tripepi testified that Titan was under extreme pressure to finish the hotworks in the warehouse. He referred to the statutory regulations for welding and the fire precautions to be taken on a construction site. The regulations had been applicable since 1986 and had only being repealed in February 2014. He submitted that there was a clear failure to adhere to the regulations because no fire-watch had been appointed, no fire blanket was used to protect the platform hoist, and the overwhelming probabilities were that Abraham Steel was carrying out hotworks within the 10 metre perimeter referred to by the fire expert. In all the circumstances, Titan clearly owed a legal duty to any persons or property in the vicinity of the hotworks. The employees of Titan negligently allowed the hotworks to continue in the vicinity of the platform hoist, without taking steps to ensure that harm was not occasioned.

[42] Mr *Alberts* submitted that Ms Richardson was the final arbiter of whether the hotworks could be carried out in the warehouse. He conceded that it was not his submission that she had given a blanket pass to Titan, but that Titan was entitled to accept that the area was safe. This obviously did not include the cordoned off area. He submitted that that permission entitled Titan to do hotworks up to the snow netting surrounding the platform hoist. No restriction was given as to how close to the cordoned off area the hotworks could continue. He submitted that the welders

themselves could take comfort from the fact that absorbent material had been used to absorb the diesel. Mr *Alberts* further submitted that:

- (a) No duty of care had been pleaded by Eazi Access;
- (b) No wrongfulness had been demonstrated on the part of Titan;
- (c) Any duty which Titan owed was to the principal contractor only. The manner in which Titan operated the platform hoist had nothing to do with Eazi Access. The only legal duty born by Titan was to the person bearing the risk in the machine, and that was the principal contractor. In this regard Mr *Alberts* referred to para 6 of the Hire Agreement between Eazi Access and the principal contractor, in terms of which risk was defined;
- (d) For Titan to be held liable it was necessary for Eazi Access to have demonstrated personal liability on the part of Titan's employees, and not the subcontractors. This had not been done; and
- (e) No negligence had been proved on the part of Titan.

[43] The pleadings of Eazi Access record in two paragraphs that the incident occurred as a result of the negligence of Titan's employees. It is correct, as stated by Mr *Alberts*, that no duty of care (or legal duty) has been pleaded. However, the grounds of negligence are sufficiently pleaded to enable a clear inference to be drawn that the employees of Titan owed a legal duty to Eazi Access to perform the hotworks so that no person or property was harmed. Where the legal duty is created by a source of potential harm introduced by the defendant, then pleading a specific legal duty may be unnecessary where the negligence is pleaded.

[44] Mr *Alberts* also submitted that wrongfulness had not been established, and the question of causation should first be considered. He relied on the analogous situation of first considering negligence, before deciding whether a legal duty existed.

See: *Gouda Boerdery Bpk v Transnet Ltd* 2005 (5) SA 490 (SCA).

[45] In *Karliën van Vuuren v eThekweni Municipality* 2018 (1) SA 189 (SCA) para 16 Navsa ADP, in dealing with a legal duty, referred to *Hawekwa Youth Camp & another v Byrne* 2010 (6) SA 83 (SCA) para 22:

‘(N)egligent 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 of judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages.’

Navsa ADP then referred, at para 17, to *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) para 122:

‘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.’

[46] Navsa ADP referred to the warning of Brand JA in *Haweka* against confusing the delictual elements of wrongfulness and negligence and the appropriateness, depending upon the circumstances, of first dealing with wrongfulness before considering negligence. In this regard, Navsa ADP stated at para 20:

‘As to a legal duty arising where there is prior positive conduct the following is to be noted:

“A duty may arise when the defendant has by lawful prior positive conduct (commissio) created a potential risk of harm to others. If the actor omits to take reasonable steps to prevent the risk from materialising (omissio), the duty is breached.” ‘

[47] In the present matter, in carrying out the hotworks in the warehouse, Titan created a potential risk of harm to others. The danger was patent. Public and legal policy would surely regard it as reasonable to impose a legal duty on Titan to ensure that no harm came to others in its conduct of the hotworks. That this is clearly so is evidenced by the statutory duties imposed upon those who carry out such works. Accordingly, I disagree that wrongfulness has not been established on the part of Titan.

[48] I do not accept the contention that Titan owed no duty to anyone other than the principal contractor, simply because Titan contracted only with Group Five, who bore risk in and to the platform hoist in terms of its contractual relationship with Eazi Access. (The link between the principal contractor, WBHO and Group Five was not explained, but I assume that WBHO and Group Five were part of the Ilembe Joint Venture, the principal contractor. The exact identity of the legal entity who bore the risk in and to the platform hoist does not matter for the purposes of this argument)

The legal duty owed by Titan in performing the hotworks was to all or any persons (or their property) who or which could have been harmed by the failure of Titan to safeguard against doing so. Eazi Access owned the platform hoist.

[49] In *Botha v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* [1978] 1 All SA 148 (T) Nestadt J recorded at 151 that:

‘(i) As a general rule an owner of property has title to sue for damages thereto under the *lex Aquila*. The principle of *res perit domino* applies.

- (ii) Such owner's right so to sue is (at least in the Transvaal) unaffected by the fact that the property has been sold by it on hire-purchase even though the purchaser is contractually bound to indemnify the owner for damage thereto.'

[50] In similar circumstances, the concept of ownership and risk of property was considered by Thring J, in *Lehmbeckers Transport (Pty) Ltd & another v Rennies Finance (Pty) Ltd* [1994] 2 All SA 4 (C) where the learned judge stated:

'The fact that an owner may enjoy a contractual claim for indemnification or reimbursement against a third party is not, generally speaking, a bar to the owner's claim for damages against the wrongdoer.'

In my view, the submission of Mr *Alberts* is dealt with by the above authorities.

[51] The submission that Eazi Access has not demonstrated that the employees of Titan caused the damage, as opposed to the conduct of their sub-contractors, is countered by the following:

- (a) Mr Tripepi accepted that he and Junior Thompson had control of the hotworks, and although he did not see hotworks being performed above the platform hoist, he knew that it was being done.
- (b) Junior Thompson was the site supervisor, who controlled the site via the sub-contractors. He was on duty from 7.00am until work finished each day. The aspects of negligence listed in the particulars of claim were all matters falling within the scope of proper oversight and control of the hotworks.
- (c) Mr Tripepi knew that diesel was underneath the platform hoist, and had been covered.

In those circumstances either or both of Mr Tripepi and Junior Thompson were negligent in allowing hotworks to continue in sufficiently close proximity to the platform hoist to be dangerous.

[52] I record that there is nothing in the demeanour of any of the witnesses which detracts from the conclusions at which I have arrived. Nor does their failure to recall all the events – ie Ms Richardson and Mr Janse van Rensburg – affect the result. I record that Mr Junior Thompson did not testify and no reasons for that circumstance were advanced. If he could have advanced reasons negating the negligence of Titan, I would have expected him to do so.

[53] In all the circumstances I find that Titan is liable to pay to Eazi Access whatever damages it is able to prove that it has suffered as a result of the damage to the platform hoist caused by the fire on the 17th April 2010. There is no reason why costs should not follow the result.

[54] I make the following order:

- (a) The second defendant is liable to pay to the plaintiff whatever damages the plaintiff may prove it has suffered as a result of the fire damaging its platform hoist on the 17th April 2010.
- (b) The second defendant is directed to pay to the plaintiff the costs of the action to date.

Lopes J

Dates of hearing:	12 th March 2018.
Date of Judgment:	12 th April 2018.
Counsel for the Plaintiff:	Mr R G <i>Ungerer</i> (instructed by Cilliers & Reynders Attorneys c/o Weber Attorneys).
Counsel for the Second Defendant:	Mr S M <i>Alberts</i> (instructed by JA Lister & Company).