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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: A84/2016

In the matter between:

S. D. R.

Appellant

and

CHRISTIAAN DANIEL VAN DER WATT

1st Respondent

CHRISTIAAN DANIEL VAN DER WATT N.O

2nd Respondent

CORAM: LEKALE, J *et* HANCKE, J

HEARD ON: 24 OCTOBER 2016

JUDGMENT BY: LEKALE, J

DELIVERED ON: 27 OCTOBER 2016

[1] On Sunday the 15th April 2012 the second respondent's 16 year old daughter one K., who was part of a church excursion to appellant's wild farm in the Hoopstad district, sustained injuries to her left upper arm when an Asiatic black bear closed its paw around it as she was posing for a photograph near its cage unbeknown to the appellant. She,

thereafter, received medical attention at Hoopstad and Bloemfontein with the costs being carried by the first respondent as her father and natural guardian. The respondents, thereafter, instituted action against the appellant for recovery of special damages in first respondent's personal capacity as the first plaintiff and general damages in second respondent's representative capacity as the second plaintiff in this court. The matter was, however, eventually transferred to and heard in the regional court sitting at Bloemfontein.

[2] The appellant resisted the action and filed a plea effectively denying liability and contending that he was not negligent as to the injuries sustained by the said K.. The matter proceeded to trial on merits only after the parties agreed to separation of issues and on 2 February 2016 the court found the appellant liable for respondents' proven damages in their entirety and ordered him to pay costs inclusive of increased advocate's fees.

[3] Appellant feels aggrieved by the whole of that judgment and order. He now approaches us on appeal against same contending, *inter alia*, that the trial court erred in finding that he was negligent as to the cause of the incident. On their part the respondents oppose the appeal and support the impugned judgment and order.

[4] On finding for the respondents the trial court, in effect, *inter alia*, held that appellant was negligent in leaving the tour group in the hands of Mr Van der Berg, the professional hunter who arranged the tour and Pastor Erasmus without being satisfied, as a matter of fact, that they carried knowledge about the temperament, characteristics or propensities of bears. The court below, further, found that the appellant ought to have realised that Erasmus could not be trusted with the safety of the group insofar as he breached the safe distance rule by touching one of the bears just after the rule was communicated to the group. In the trial court's view the appellant was, further, negligent in not drawing the

attention of the injured child and others to the warning notices or disclaimers and, furthermore, that the appellant failed to take reasonable steps that were required under the circumstances of the instant matter to avert the harm that eventuated insofar as there existed no barriers or markers or indications of whatever nature to ensure that the visitors did not come into close proximity with the bears.

[5] In argument on papers and before us Mr Lubbe for the appellant submits, *inter alia*, that a reasonable man in the position of the appellant would not have foreseen the relevant harm insofar as the relevant premises were private, there existed clear warning signs on the premises, the relevant cages comply with the statutory requirements of the Department of Environmental Affairs, no similar incident had ever occurred on the premises over a period of 20 years notwithstanding the fact that various groups, including school children, visited the farm. The visiting group was, further, led by responsible adults including an experienced professional hunter who had visited the premises with touring groups in the past and the appellant briefed the group and warned them to keep safe distances from the cages at the beginning of the tour. He, further, reminds the court, with reference to case law, that in order to be liable in *delict* the act or omission complained of on the part of the defendant must have been both wrongful and negligent.

[6] On their part the respondents, through Mr Ploos van Amstel, support the impugned judgment and maintain, on the papers and before us, *inter alia*, that the appellant should have foreseen harm insofar as he failed to point out the warning signs to the visiting group and left inexperienced and untrained people in charge of the group. In their view the appellant failed to take the necessary steps, as a reasonable person would have done, to guard against such harm as found by the trial court. The injured girl was not negligent

because she was a minor who was never informed of any dangers of turning her back on the bears.

[7] The parties are correctly *ad idem* that in our law the test for negligence involves an enquiry as to:

7.1 whether or not a reasonable man in the position of the defendant would have foreseen the reasonable possibility of his conduct causing harm towards another; if so

7.2 whether or not such a reasonable man would have taken steps to guard against such harm; if the answer is in the affirmative

7.3 whether or not the defendant failed to take such reasonable steps. (See **Kruger v Coetzee** 1966 (2) at 428 (A) at 430 E G)

[8] Conduct must be wrongful before it may be faulty in the sense of being either intentional or negligent. For conduct to be wrongful or unlawful in order to be actionable it should occur "**in circumstances that the law recognises as making it unlawful**" in that it infringes the plaintiff's recognised rights or it constitutes breach of the duty defendant owes to the plaintiff. (See generally **Minister of Safety and Security v Van Duivenboden** 2002 (6) SA 431 (SCA) para [12] and **Telematrix (Pty) Ltd v Matrix Vehicle Tracking v Advertising Standards Authority SA** 2006 (1) SA 461 (SCA))

[9] Control of dangerous animals saddles the custodian with the duty to avert the possibility of such animals causing harm to others. Failure on his part to observe such a duty of care which he, as the custodian, owes to others is wrongful as a matter of public and/or legal policy. (See **Kruger v Coetzee** (*supra*) and **Hawekwa Youth Camp v**

Byrne [2010]2 All SA 312 (SCA) 321)

[10] On appeal and in the absence of any misdirection on its part, the factual findings of the trial court, its acceptance of oral evidence as well as its conclusions are presumed to be correct. (See S v Francis 1991 (1) SACR 198 (A) at 204).

[11] It was common cause between the parties and before the court below that the appellant's farm, as at the date of the unfortunate incident complained of, was not accessible to the general public and that access to the same could only be gained per appointment. The parties were, further, in agreement that an appointment for the visit to the farm on the fateful Sunday in question was secured by the professional hunter who was very familiar with the farm as he used to bring local and international visitors thereto since 2000. It was, furthermore, not in dispute that the visitors in the present matter did not pay any fees for the visit and that the appellant, in effect, made it clear to them on arrival that he was not going to be available to take them around and left them with Van der Berg, who was one of their leaders, as the guide.

[12] The facts in the instant matter suggest that the parties were effectively in agreement before the trial court that the appellant generally owed the visiting group the duty of care insofar as he granted them access to the farm with full knowledge that the animals on the farm were wild and dangerous. Wrongfulness was, therefore, not an issue before the trial court with the parties having effectively limited their dispute to the existence of fault, in the form of negligence, on the part of the appellant.

[13] The parties were, further, effectively *ad idem* that the bear did not break out of the cage to attack the 16 year old girl. It is, furthermore, clear from recorded evidence that the bear did not even attack the girl in question insofar as it smelt her left arm, extended its paw to her arm and, when the girl tried to move away in fear, it closed its paw

around her arm.

[14] The evidence is clear that Van der Berg accepted responsibility for the welfare of the group and regarded himself as adequately competent to guide it on the tour regard being had to his experience and previous visits on the farm. It is possible, in my view, that after handing over the supervision of the group to Van der Berg and Erasmus in the condition in which the farm was, the appellant no longer owed the group any duty of care with regard to their general conduct as and when they toured the farm inclusive of the keeping of safe distances from the cages insofar as he was no longer their supervisor. Van der Berg correctly admitted that he was at all times material to the unfortunate incident responsible for and in charge of the group on the farm. He, therefore, assumed responsibility and owed the group the duty to ensure their safety as and when they toured the farm regard being had to, *inter alia*, the required safe distances.

[15] The trial magistrate, therefore, misdirected herself, in my view, when she, in effect, concluded on the facts that a reasonable man, in the position of the appellant, would not have left Van der Berg in charge of the group regard being had to, *inter alia*, the fact that the latter was familiar with applicable rules and safety measures. He was, further, the one who secured an appointment with the appellant and assumed the role of the supervisor in circumstances where nothing was payable to the appellant as *quid pro quo* for the visit and the appellant was expressly not available to remain with the group on the tour. The group did not pay for the appellant's services and, as such, did not hire him to guide them on the tour. We are, as such, at large to consider the matter afresh regard being had to the totality of the evidence before the trial court.

[16] The *diligens paterfamilias* in the appellant's shoes would, in my opinion, not have foreseen that K., the injured girl, would remain behind and breach safety measures by

turning her back on the cage in close proximity thereto when posing for a photograph. A reasonable man would, further, not have foreseen, as a reasonable possibility, that the professional hunter of Van der Berg's experience would not keep a vigilant eye over the group to ensure that it remained together and all its members kept safe distances from bear cages. Van der Berg's lack of knowledge about the temperament, characteristics or propensities of bears was not an issue because he and Erasmus were in charge of the group and not the bears. Theirs was to control, guide and take care of the group and not the wild animals kept on the farm.

[17] I am, further, not persuaded by the material properly before the trial court that the appellant was negligent as to the incident by not structuring bear cages differently insofar as the accident was not occasioned by any defects in the manner in which the cages were built. I am, furthermore, not moved by the recorded evidence to find that the appellant was negligent in not marking safe distances or placing barriers to keep the visitors some 2(two) or more metres away from the cages. Van der Berg was familiar with safe distances and admitted the same in his evidence. Knowledge by the appellant of his familiarity with safety measures, among others was, in my view, sufficient for the appellant to trust and allow him and Erasmus to take over supervision of the group. In this regard it is worth noting that he gave the group an orientation talk in which he, at least, mentioned safe distances. He, further, reprimanded Erasmus when the latter touched one of the bears and was, reasonably, satisfied that Erasmus understood safety measures because he (Erasmus) proceeded to repeat the same to the children immediately after he was called to order. It is, further, apparent from available evidence that Erasmus was, most probably, not with the group when the safe distance rule was communicated. He, therefore, did not disregard the relevant rule deliberately and with full knowledge of its existence

contrary to the effective finding of the trial court.

[18] In conclusion and with regard to wrongfulness the facts of the present matter are, in my view, such that the appellant generally owed the touring group access to a safe game farm which duty he observed excellently insofar as the unfortunate incident complained of was not the result of any defects in the farm's structures or lapses in existing safety measures. He did not owe them the duty to serve them by taking them on a tour of the farm ensuring, *inter alia*, that they kept safe distances from the cages insofar as he was expressly not available for that task and was, further, not retained for such services. The duty to take the group on a tour rested on Van der Berg who organised the visit, assumed such a role together with Erasmus and was familiar with applicable rules and standards. Any shortcomings on the part of Van der Berg and Erasmus cannot, in my opinion, fairly and in law be visited on the appellant because they were not in his service. I may, further, mention *en passant* and without deciding the issue, that on available evidence it is possible that K., the injured girl, was negligent as to the incident regard being had to the evidence of her fellow visitor, Miss Goosen, who witnessed the incident and was in the same vicinity as she during the orientation session when the appellant, *inter alia*, warned the group about the need to keep safe distances. It was, further, not K.'s evidence before the trial court that she consciously moved closer to the cage because of her impression of the conduct of the appellant and Erasmus in touching the bears. Her evidence, as recorded, clearly indicates that she was not even alive to the distance between her and the relevant cage.

ORDER

[19] In the result the appeal succeeds with costs.

[20] The order of the court *a quo* is set aside and in its place and stead is substituted

the following:

"1. The plaintiffs' respective claims on merits fail.

2. The plaintiffs shall pay defendant's costs, including increased advocate's fees, jointly and severally, the one paying, the other to be absolved."

LJ LEKALE, J

I concur

SPB HANCKE, J

On behalf of appellant: Adv. J Lubbe SC

Instructed by: Rosendorff Reitz Barry

Bloemfontein

On behalf of respondents: Adv. PC Ploos van Amstel

Instructed by: Stander & Partners

Bloemfontein