



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Reportable
Case No 374/05

In the matter between:

TSOGO SUN HOLDINGS (PTY) LTD

Appellant

and

QING-HE SHAN

First Respondent

KAI RONG SHOA

Second Respondent

Coram: HARMS, ZULMAN, NAVSA, VAN HEERDEN JJA and
CACHALIA AJA

Heard: 23 May 2006

Delivered: 31 May 2006

Subject: Delict — liability of owner/occupant of casino to
patron/client for injuries caused by another patron/client

Neutral citation: This case may be quoted as *Tsogo Sun Holdings
(Pty) Ltd v Shan* [2006] SCA 85 (RSA).

J U D G M E N T

HARMS JA:

[1] The appellant, Tsogo Sun Holdings (Pty) Ltd operates a casino known as Montecasino at Fourways in Sandton. The respondent, Mr Shan, was shot in the parking area of the casino by one Shoa, after having left the casino in the company of Shoa. This happened on 21 June 2001. Shoa, who was charged with attempted murder, undertook in a plea agreement to pay Shan an amount of R200 000 as damages. However, Shan wishes, according to the particulars of claim, to recover all his damages (some R560 000) from Tsogo. Action was instituted against Tsogo in the Transvaal Provincial Division. Tsogo, in addition to disputing liability, joined Shoa as a second defendant by means of a third party notice. Shoa, save for filing a plea in which he relied on the settlement and denied negligence, did not take part in the proceedings.

[2] After hearing evidence Bosielo J issued an order declaring Tsogo liable for the damages caused to the plaintiff as a result of the shooting. (The issue relating to quantum stood over by agreement.) The learned judge, unfortunately, overlooked the fact that he had to make an order on the third party notice but he in any event granted the necessary leave to Tsogo to appeal to this Court.

[3] From the evidence of Shan and some video footage the high court was able to make the following factual findings, which are not disputed on appeal by either side. Shan, accompanied by his wife, went to the casino complex to deliver some goods. His wife proceeded to gamble in the VIP section, where she became involved in a heated argument with Shoa's wife. Shoa is said to be a loan shark Shan owed him money. Shan arrived and entered the fray. Security personnel immediately intervened and defused the situation. Shan and his wife then left Shao and they got involved in a marital spat. Thereafter Shan returned to Shoa and confronted him. Shoa allegedly then asked Shan whether he wished to die. In response Shan, who thought that he could win any physical fight,

invited Shoa outside and he actually led the way, gesticulating all along. The altercation continued outside and in the vicinity of the boom gate of the parking area Shoa fired three shots at Shan, wounding him badly.

[4] The *salon privé* is a restricted area, accessible to selected serious gamblers. Shoa is a regular patron and the holder of a platinum card, which entitles him to VIP privileges. During the preceding year he in fact visited the casino on at least 77 occasions. On the night in question he entered the casino through the VIP entrance, left and returned, passing the same security guards. On his return, which was before the altercation between the ladies began, the guards evidently enquired whether he had any weapon, whereupon he probably said no and to show that he was not in possession of a weapon, lifted his jacket to indicate that he was not. They then allowed him to proceed.

[5] Shan's case, in essence, is that Tsogo had a legal duty to so-called 'invitees' (an outmoded classification that has never formed part of our law and is being abandoned in common law jurisdictions – eg *Neindorf v Junkovic* [2005] HCA 75 para 6) to take reasonable steps to ensure their safety on the premises; it is reasonable to foresee that one gambler could pose a risk to other gamblers; the guards failed to search Shoa properly; had they done so they would have found the firearm; the failure to remove the firearm enabled Shoa to shoot Shan; this dereliction was causally linked to the shooting.

[6] Counsel are agreed that the high court's reasoning holding Tsogo liable was as follows: (1) As a result of an earlier armed robbery Tsogo deployed security personnel at all entrances. They had a specific instruction to prevent people from entering the casino with firearms and were in possession of portable metal detectors. (2) This was clear proof that Tsogo appreciated the grave danger or risk posed by patrons who enter with firearms. (3) The failure to (body) search Shoa was in breach of their instructions and the contractual obligations of the security firm towards Tsogo but Tsogo remains liable for the negligence of its

security contactor. (4) This omission was negligent and allowed Shoa to enter with a firearm, which was later used to shoot Shan. (5) 'Given the peculiar circumstances of the case' Tsogo owed everyone 'at or inside the casino a duty of care.' (6) The risk of harm was clearly foreseeable, something evinced by all the security measures, including surveillance cameras.

[7] The high court in finding for Shan fell, as so many before, into the quagmire of the 'duty of care' doctrine, by failing to distinguish clearly between the different requirements for delictual liability. Wrongfulness and negligence were intertwined and the issue of causation does not appear to have received the necessary consideration.

[8] Finding (5) is somewhat baffling. How can the (unidentified) peculiar circumstances give rise to a general duty to all and sundry and, one may fairly ask, what is the scope of the duty? The owner or occupier of property, no doubt, has a legal duty to ensure that those whose presence can reasonably be anticipated on the property are not harmed by the condition of the property or a construction on the premises (See eg 'Delict' in 8 (1) *Lawsa* 2ed para 76, by JR Midgley and JC van der Walt). This liability is often based on a commission by that person but may also be based on an omission in particular circumstances. However, in the present case we have a clear case of an omission on the part of Tsogo and a damage-causing act by a third and unrelated party, Shoa. The question is what legal duty did Tsogo have vis-à-vis a patron (in the position of Shan) to protect him from harm by another patron who uses the same facilities? Put differently, what are the public policy considerations that require of an owner or occupier of business premises to protect 'clients' against possible assaults by other clients by, for instance, preventing other 'clients' from carrying weapons onto the property? Policy considerations must require that the plaintiff should be entitled to be recompensed by the defendant for the loss caused by a third party before liability can be imposed.

[9] No constitutional considerations arise on the facts here. The only factor the high court took into consideration was the fact that there had been an armed robbery by a gang of robbers some time before this event. As I understand the reasoning, every person who enters a facility open to the public must be fully searched for the possession of weapons if the facility has, in the past, been the subject of an armed robbery. If this were correct, life in this country would become unbearable and the duty cast on owners and occupiers limitless. Many (if not the majority) of banks and petrol service stations, for instance, have been subjected to an armed robbery and many a local corner store too. Passengers have been shot on trains, buses and taxis. Must those in control all employ security guards *for the sake of clients* and is it to be expected that every client has to be bodily searched before being allowed to enter the premises or use public transport? I think not.

[10] Courts have to be pragmatic and realistic, and have to take into consideration the wider implications of their findings on matters such as these. By its judgment the high court unconsciously created a new class of virtually limitless vicarious liability. I therefore come to the conclusion that Tsogo did not, under the circumstances of this case, have a legal duty to protect a person in the position of Shan against persons in the position of Shoa. On this basis the appeal succeeds.

[11] There is another reason why Shan should not have succeeded and that is the absence of negligence. The classic test for *culpa* has been laid down in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F where Holmes JA said the following:

‘For the purposes of liability culpa arises if -

- (a) a *diligens paterfamilias* in the position of the defendant -
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.'

[12] The first question can be reframed for purposes of the facts of this case in these terms: Was it reasonably foreseeable that a regular patron at the *salon privé* could be a danger to another patron? I know of no fact that would lead to an affirmative answer. The high court, however, relied on the fact of the armed robbery by a gang some time in the past as indicating that something like this was foreseeable. I fail to see the relevance of that occurrence. Because of this occurrence Tsogo instructed the security company to be on the look-out for possible members of armed gangs. Shoa hardly fell within that category. He must have been known to the security guards; he was a regular visitor; and he was an esteemed patron. There was no reason why the possibility of harm should have been foreseeable.

[13] In any event, the steps taken by Tsogo were reasonable. Considering that some 30 000 persons visit the casino during a weekend and that a facility such as a casino should be consumer-friendly, I do not accept that it would have been justified to have required of Tsogo to body search each and every patron for weapons. If there were reason to be suspicious of a particular person the position may have been different. In this case there was no good reason to suspect Shoa. In any event, he was asked about weapons and he indicated he had none. There is nothing to show that such a request, which was complied with, did not constitute reasonable steps in the circumstances. In addition there are surveillance cameras all over the casino and one must not forget that as soon as trouble began members of security intervened.

[14] In this regard it is well to recall the words of Scott JA in *Pretoria City Council v de Jager* 1997 (2) SA 46 (A) at 55H-56C:

'The Council was obliged to take no more than reasonable steps to guard against foreseeable harm to the public. Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances

of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgment.'

Applying that test, I am satisfied that the high court erred in finding negligence in this case. I may add that the alleged breach of contract by the security guards cannot be equated with negligence by Tsogo vis-à-vis Shoa.

[15] Legal causation was also not established. The test according to *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700E-701F is this:

'As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". . . . If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'.

. . .

In [S v Mokgethi 1990 (1) SA 32 (A)] Van Heerden JA referred to the various criteria stated in judicial decisions and legal literature for the determination of legal causation, such as the absence of a *novus actus interveniens*, proximate cause, direct cause, foreseeability and sufficient causation ("adekwate veroorsaking"). He concluded, however, as follows [at 40I-41B]:

"Wat die onderskeie kriteria betref, kom dit my ook nie voor dat hulle veel meer eksak is as 'n maatstaf (die soepele maatstaf) waarvolgens aan die hand van beleidsoorwegings beoordeel word of 'n genoegsame noue verband tussen handeling en gevolg bestaan nie. Daarmee gee ek nie te kenne nie dat een of selfs meer van die kriteria nie by die toepassing van die soepele maatstaf op 'n bepaalde soort feitekompleks subsidiêr nuttig aangewend kan word nie; maar slegs dat geen van die kriteria by alle soorte feitekomplekse, en vir die doeleindes van

die koppeling van enige vorm van regs aanspreeklikheid, as 'n meer konkrete afgrensingsmaatstaf gebruik kan word nie.”

[16] Having regard to this approach I am satisfied that Tsogo's failure to body search Shoa was not legally connected to the shooting incident. What really caused the shooting was Shan's intent to involve Shoa in a physical altercation. Assume, for instance, that in the anticipated fist fight Shan was seriously hurt, could this have been ascribed to Tsogo? I think not and by a parity of reasoning the same ought to apply to the fact that he was shot. He would not have been shot but for his insistence that he wished to engage in a fight, which he lost albeit not in a manner anticipated by him. In any event, on leaving the casino Shoa would have been entitled to the return of his gun and he could then have shot Shan. The omission of the guards was in my judgment too remote to fix liability on Tsogo. On this further ground the claim had to flounder.

[17] The appeal is upheld with costs including the costs of two counsel and the order of the high court is amended to read: 'Absolution from the instance with costs.'

L T C HARMS
JUDGE OF APPEAL

AGREE:

ZULMAN JA
NAVSA JA
VAN HEERDEN JA
CACHALIA AJA