

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 1267/01
Heard: 23-24/11/06
Delivered: 02/01/2007

In the matter between:

JACOBUS HENDRIK SAAYMAN

Plaintiff

And

CHRISTIAAN ANDREAS VISSER
Defendant

1st

GRIEKWA SECURITY CC
Defendant

2nd

SYLVESTER M MOREBUDI
Defendant

3rd

JUDGMENT

Tlaletsi J:

1. The plaintiff has instituted an action for damages against the three defendants both in his personal capacity as well as in a representative capacity, as father and natural guardian of his son, *Gideon Bartholomeus Saayman* ("*Gideon*"). The cause of action arises from a shooting incident that took place

on 12 February 1999 in Kimberley.

2. At the inception of the trial I made an order in terms of Rule 33(4) of the *Uniform Rules*, with the effect that at this stage the merits be determined first and the *quantum* separately thereafter. Initially all three defendants opposed the plaintiff's claim. However, the second defendant withdrew its defence on 26 August 2003 by notice. The third defendant was placed under Bar for failure to file his plea. Subsequent thereto his attorneys withdrew as his attorneys of record. He failed to provide a new address for service of the process on him in compliance with Rule 16. He was notwithstanding, served with a notice of set down of the trial and he did not turn up or do anything about this case. The case against him is therefore not defended. The trial proceeded against first defendant only and judgment by default was requested against second and third defendant.
3. The plaintiff tendered the evidence of *Winton Franscois Smith*("Smith"), a 24 year old who was in the company of Gideon at the time of the incident. A bundle of documents including photos of the scene was admitted and the first defendant was prepared to admit certain aspects of the material found at the scene. These admissions dispensed with the need to

tender evidence of the police officer(s) who attended the scene. An inspection *in loco* was conducted and with the consent of the first defendant certain points were accepted as evidence. The plaintiff thereafter closed its case. The first defendant tendered the evidence of *Steven Peter Hansen* ("Hansen"), who is the manager of the second defendant, as well as his own evidence. After the first defendant closed its case the matter was by consent postponed *sine die in* order to enable the plaintiff to bring an application to re-open his case and tender further evidence. He was ordered to pay the costs occasioned by the postponement. On the next day of trial the order to re-open the plaintiff's case was granted unopposed and the plaintiff was ordered to pay costs accessioned thereby. This happened on 14 November 2005 and the matter was again postponed *sine die*.

4. The trial resumed on 5 December 2006. On this day an agreement entered into by the parties was made an order of court. In the agreement the plaintiff tendered the affidavits of *Waldemor Engines Eksteen* ("Eksteen"), who is an inspector in the employ of the *Private Security Industry Regulatory Authority*, and that of *Dennis Leslie Morgenrood* ("Morgenrood"), who is formerly a member of the South African Police Services and now attached to the entity known as *Stallion Security* in Bloemfontein. In addition to the

affidavits the Plaintiff accepted certain facts relating to the affidavit. The case for the plaintiff was thereafter closed.

5. The evidence in this matter, which is common cause, is briefly that the witness Smith and Gideon then aged 20 and 16 years respectively, were on 12 February 1999 at Gideon's parental home where they had a party. The occasion, for some unknown reasons, entailed the consumption of liquor by the two teenagers. When the party was over and after other people left, the two left the premises after midnight and walked to a pub known as the *Half Way House*. They spent about half an hour there conversing. They did not partake in further consumption of liquor. They thereafter left for home. They walked along *Olver Road*.
6. As the two walked past the first plaintiff's residence they saw a garden pot (ornament) inside the premises on the lawn. The premises were not yet fenced and the parameter wall was still under construction. They decided to enter the premises in order to over turn the garden pot. They could only manage to shift the top part of the pot. They tried to overturn it without success as the pot was too heavy for them. In the process a shot was fired. They ran away. As they ran on the pavement a second shot was fired and Gideon

was struck on the back and fell. They were at this stage about 40m away from the premises. Gideon was paralysed as a result of the injury he sustained.

7. The aforesaid shots were fired by the third defendant from a shotgun. It is now common cause that third defendant was an employee of the second defendant. He was posted at the first defendant's premises by the second defendant to guard the premises in terms of a service agreement between the first and second defendant. He used live ammunition. Third defendant was as a result of this incident criminally charged and was convicted of attempted murder and sentenced to 5 years imprisonment. The transcribed record of the criminal proceedings forms part of the bundle prepared by the plaintiff. It's contents are not in dispute.
8. In the particulars of claim, the plaintiff alleges that the third defendant was at all relevant times and at the time of the incident acting within the course and scope of his employment with the first defendant, alternatively the second defendant, alternatively the first and second defendants had control over the third defendant. In the alternative to the above, the plaintiff alleges that the third defendant as an employee of the second defendant rendered security services under the authority and control and within

the premises and in the interests of the first defendant. The plaintiff's case is therefore that the first and second defendants should also be held liable for the delict committed by the third defendant alternatively, that the defendants owed plaintiff a duty of care and having breached such duty the defendants are also liable to the plaintiff for his damages. In the further alternative the plaintiff alleges that it is fair, reasonable and justified that the first defendant be held liable for the relevant unlawful conduct of the third defendant.

9. The central issue in this case is whether the three defendants, as matter of law can on the facts of the case be held liable for the damages suffered by the plaintiff. It is clear from the facts that the legal position of the three defendants would differ from one another. The position of the third defendant as the person who fired the shot that caused harm is more straightforward. The position of the second defendant as the employer of the third defendant is not as complicated as that of the first defendant. The crisp issue is therefore whether the first defendant can on the facts of this case be held liable for the delict committed by the third defendant. It is convenient to deal with the position of the first defendant and consider the position of the other two defendants who did not defend the action thereafter.

10. Vicarious liability exists where one is liable, not for a delict committed by oneself, but for a delict which is committed by another person. As a general rule an employer is vicariously liable for the delicts of his/her employee acting in the course and scope of the employer's employment. The position of an independent contractor was authoritatively set out by **Van Reenen J** in the **Stein v Rising Title Productions CC, 2002 (5) SA 199(C) at 205 F-I** as follows:-

“As a general rule, an employer is vicariously liable for the delicts of his or her employee acting in the course and scope of the latter's employment, while, in general, an employer is not vicariously liable for the negligence or wrongdoing of an independent contractor employed by him or her. The main distinction between an employee (servant) and an independent contractor appears to lie in the fact that the former undertakes to render personal services to the employer, while the latter undertakes to perform a certain specified piece of work or to produce a certain specified result for the employer. Unlike an employee, an independent contractor is generally not subject to the control or the instructions of the employer as to the manner in which he or she performs the work or produces the result”.

It is not necessary to go into the authorities including those referred to by Mr *De Bruin* on behalf of the first defendant regarding the determination of the nature of the employment relationship between first defendant and third defendant. Mr *Danzfuss* argued the matter on the basis that second defendant was employed by the first defendant as an independent contractor. This approach is a correct one as it is

supported by the evidence tendered. Put differently, no attempt was made to tender evidence that third defendant was an employee of the first defendant, as alleged in the particulars of claim.

11. In **Langley Fox Building Partnership(Pty) Ltd v De Valence 1991(1) SA 1(A)** at p12 **Goldstone AJA** (as he then was) after reviewing various decisions on the subject, formulated the principles applicable to the liability of a person for a delict committed by an independent contractor as follows:

“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 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.”

The learned Judge further held that:

“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.”(p13 A-C)

12. The correct approach to the liability of an employer for the negligence of an independent contractor is to apply the fundamental rule of our law that obliges a person to exercise that degree of care which the circumstances demand. Put differently, one should determine whether the employer had in fact been personally at fault in regard to the harm caused to a third party by the conduct of the independent contractor. One should therefore determine whether the first defendant owed a separate legal duty to the plaintiff. The traditional test would therefore be the question whether a *diligens paterfamilias* in the position of the defendant would foresee the possibility of harm occurring to the plaintiff and would have taken steps to guard against its occurrence.

13. **Botha J A** in the **Langley Fox-case** (*supra*) correctly put the test as follows at p16j:

“The real difficulty in this case is occasioned by the second of the three questions postulated: would a reasonable man in the position of the appellant have taken steps to guard against the danger.

*As appears from the judgment of Goldstone AJA the answer to this crucial question depends upon the particular circumstances of the case. For my purposes, as will appear presently, it is necessary to emphasise the importance of this approach. To that end I venture to add a further authority to those already mentioned by Goldstone AJA... I have in mind the well-known passage in Grueber’s Work on the *lex aquiliae* which was quoted by Centlivres JA in *Fred Saber (Pty)Ltd v Franks*, 1949 (1) SA 388 (A) at 405*

and which I consider bears repetition in the context of a case such as the present.”

After having quoted from the case at p17C-E of the **Langley Fox-case** judgment, the learned judge of Appeal proceeds as follows:

“In my view, when the liability of an employer for the consequences of the negligent conduct of his independent contractor is in issue, a facet of the enquiry into the relevant circumstances, which requires particular scrutiny is the state of the employer’s knowledge relating to the actual existence of a dangerous situation at the very time when harm befalls a third party. The importance of such an enquiry may be illustrated by means of contrasting to hypothetical examples. In the first, the employer is present when the contractor is in the process of executing the work, perceives that the contractor has not taken any precautions against harm resulting from the danger inherent in it, and does nothing to remedy the situation. In the second, the employer is unaware of the fact that the contractor has commenced the execution of the work and consequently does not know that a dangerous situation has been created by the contractor’s failure to take the requisite precautionary measures.”

14. The learned judge points further that not a too heavy burden is to be cast on the employer and points out(at p18) that a potential danger may be of an extraordinary nature which is encountered by infrequently and extraordinary and special precautions are required to avoid it. He cautioned that:

“An employer should not be fixed with liability solely and simply on the basis of categorizing the work entrusted to the contractor as being inherently dangerous, lest the distinction between the relationship of employer and independent contractor and that of Master and servant be blurred, and the employer be held vicariously liable for negligence of his contractor.”(at p.18 c)

15. I now proceed to consider the facts of this case and determine whether the first defendant can be held

liable. The first argument raised by Mr *Danzfuss* is that the mere fact that Gideon was a trespasser on the first defendant's property will not affect the liability of any of the parties towards the plaintiff. Relying on the authority of, *inter alia*, **Veiera v Van Rensburg, 1953(3) SA 647(T)** at 653 A-D and F-G, he submitted that in this case it was foreseeable that a trespasser may enter upon the premises, and that the third defendant was on the premises for the very foreseeable reason, and he was armed with a shotgun and live ammunition to enable him to shoot trespassers. I agree that the evidence show that it was foreseeable that trespassers may enter the premises. However, the question which should be answered together with the others, is whether a reasonable man under the circumstances and in the position of the first defendant, would have taken steps to guard against harm to trespassers, and if so, what steps would have been taken. The **Veiera-case** is distinguishable from the present case in that in the **Veiera-case**, the person(a salesman) who entered the premises was busy talking to the appellant's wife enquiring about a debtor when the dog attacked him from behind and caused him serious harm. Secondly, a dog and a human being who is a trained guard should not be unfairly equated. Thirdly, this court in the **Veiera-case** the evidence was that the appellant kept a ferocious dog well knowing that it will attack

any trespasser and not merely a fierce dog to bark, and frighten trespassers away and further secured in such a way that the trespassers are able to keep out of its way.

16. The factual basis relied upon on behalf of the plaintiff is that the first defendant was well aware of the fact that a security guard armed with a shotgun and live ammunition was patrolling his premises with his consent and that he specifically requested an armed security guard who must be able to shoot and as such created a dangerous situation. It was further argued that he had no information whatsoever about the training the third defendant underwent and its duration that he knew that the security guard's sole object, was to shoot human beings should he deem it necessary and when the situation in his opinion called upon him to do so. It was therefore argued that the first defendant did not do anything or take any precautions to ensure that warning signs were placed on the premises to warn the public, or take other alternative measures available to first and second defendant for protecting the first defendant's premises, wife and daughter. It was further argued that first defendant did not only condone or authorise a dangerous situation but instructed second defendant to create a dangerous situation. The first defendant, it was argued, as the owner of the premises, has a duty

of care and take precautions against damages to others should a dangerous situation occur on his premises, and as a result no reasonable precautions were taken by the first defendant to prevent harm to *Gideon*.

17. Mr *De Bruin* argued on behalf of the first defendant that the plaintiff has failed to discharge the *onus* of proving that the first defendant is liable for the damages suffered by the plaintiff. He submitted that in the circumstances of this case the first defendant did not owe the plaintiff a duty of care and that even if the test of foreseeability is applied no reasonable person in the position of the first defendant would have foreseen that third defendant would have fired shots in the circumstances in which he did.
18. The accepted evidence reveal that the third defendant was one of the two security guards who were provided by second defendant 24 hours a day. The third defendant had previously, on behalf of the second defendant, guarded over first defendant's property. In terms of the agreement entered into between the second and third defendant dated 18 September 1998, third defendant was obliged to stand guard, patrol and assist clients of the second defendant where necessary and was not entitled to refuse any instruction given to him by the employer. The

agreement further states that he must at all times act within the law and in cases where he is unsure he must contact the office for help. Furthermore, Hansen's evidence, which is not disputed, is that he ensured that second defendant was licensed to possess firearms and that first defendant enquired from him whether third defendant was competent in handling a firearm. He gave him the assurance that he had the necessary training to handle the specific weapon.

19. The reason advanced by the first defendant for requesting armed guards on his premises was because of the risk involved in the premises not having been fenced off, his position as a diamond mine owner and the presence of his wife and daughter during long hours of the day while he was absent. He also had information of unlicensed motor vehicles being parked in front of his home in the street keeping surveillance of his premises. He therefore employed a well-known registered security firm and relied on the assurance given to him by Hansen regarding the training of the third defendant.
20. It was argued on behalf of the plaintiff that the mere fact that the second defendant being a commercial security company was probably eager to obtain this contract because of the remuneration attached

thereto should have warned the first defendant to be careful towards communications regarding the competence of the security guard. He should not, it was argued have simply accepted Hansen's word in this regard without any information regarding the nature and extend of the training of the third defendant, as well as the instructions given by the second defendant to the third defendant, eg. regarding when he may shoot and when not, the extent of the violence he is authorized to use and under what circumstances he is entitled to use the firearm. I am of the view that accepting this contention would be unduly blurring the distinction between an employee and an independent contractor. It would also be expecting too much from the first defendant. The reasonable position is that first defendant employed the second defendant to perform security services on a legitimate and lawful basis having the assurance that trained guards are deployed. Unlike ferocious animals and certain construction works, the employment of security services is by its very nature not a dangerous operation. One must be careful not to shift the second defendant's responsibilities as the employer of the third defendant and place them on the shoulders of the first defendant. I am not convinced that the first defendant should be found liable on the basis that he created a nuisance on his property. Such a finding is

not supported by the evidence and has its own requirements.

21. In my view, even if the first defendant knew that there was an armed guard in his premises which created a dangerous situation, he was at the time of the incident asleep in his house and it would be unreasonable to find that he should have anticipated that third defendant would have, in breach of the law, shoot a young man on the back while running away from the scene where he could have posed a possible threat to property. The circumstances of this case should be distinguished from those in **Mouton and Others v Beket, 1918 AD 181** referred to by Mr *Danzfuss*. In the latter case one *Van Niekerk* who was a commander of a commando of rebels was held liable for the unlawful actions of a scouting group that shot and hit the plaintiff who was a member of the then Union Forces. Although *Van Niekerk* was not present at the time of the shooting it was found that the operation was undertaken entirely in the interest of and for the protection of the commando and those who were not present are liable on the ground that they authorized them to engage in that operation. However, in the present case, third defendant was not posted to conduct illegal activities as was the aims and objective of the commando, and was only authorized to act within certain parameters and

circumstances. The first defendant, can therefore in my view, not be taken to have authorized the shooting of *Gideon*. Shooting people is not a probable and natural outcome of security services as it was found to be the scouting (see: **Hammon v South West African Peoples Organisation 1991(1)SA 127 (SWA) at 140H-141A.**)

22. In applying the test set out in the **Langley Fox- case** I am not satisfied that a reasonable man in the position of the first defendant would have foreseen the risk of danger in consequence of the work he employed the second defendant to perform. Even if it could be found that a reasonable man would have foreseen the risk of danger, in my view, the first defendant acted reasonably in all the circumstances in that he enquired from the second defendant whether the guards were properly trained and competent. There was in my view, no need for him to go behind what he was assured by the other contracting party and to enquire from each individual guard whether he was in fact properly trained and competent, and what the content and syllabus of his training entailed. Even if the evidence of *Eksteen* to the effect that third defendant had at the time of the incident never attended any formal training as a security guard provided by the regulatory authority and that he was not entitled to perform any security functions is

accepted, the fact of the matter is that first defendant was given the assurance that he was trained and competent and that the third defendant had on previous occasions been posted to guard first defendant's previous premises. In addition, the shooting incident did not happen on the first day of his deployment or few days thereafter. It occurred after some considerable period.

23. The same applies to the evidence of *Morgenrood*. It cannot be the responsibility of the first defendant to enquire whether third defendant was undergoing further training, and whether he loaded blank ammunition in his firearm, or if he knew of having to fire warning shots first. That was the responsibility of second defendant. It was for him to ensure that warning signs if necessary, were placed on the premises and to conduct a feasibility study of the area. He was being paid for his special services. This case is not to be equated with the case where the employer knew that a contractor had already started constructing a dangerous situation and therefore had to foresee the possibility of harm and had to, as a reasonable man, take steps to guard against it. In view of the fact that the first defendant was assured that the security guard was trained in handling the firearm he correctly, under the circumstances, relied on the judgment of the guard to decide when he may

legitimately fire and lawfully discharge the firearm.

24. I therefore find on the evidence presented that the plaintiff has failed to discharge the onus of proving that the first defendant is liable to him for the payment of damages. His claims both in his personal and representative capacities should be dismissed with costs.
25. What remains is the claims against the second and the third defendants. I have no doubt that even though no evidence was presented by these defendants to oppose plaintiff's claim, the evidence on record support the finding that the plaintiff has discharged its onus of proving its claims unopposed and is entitled to the damages he is able to prove. As these defendants did not take part in this trial there shall be no costs order against them.

I make the following Order.

- 1) The plaintiff's claim against the first defendant is dismissed with costs.**
- 2) The plaintiff's claim against second and third defendants succeeds and the two defendants are ordered to pay the plaintiff's proved**

damages jointly and severally, the one paying the other to be absolved.

- 3) There shall be no order for costs against second and third defendants in relation to the trial on the merits.**

**L P TLALETSI
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

**For the Applicant: FWA Danzfuss, SC
Instructed by: Duncan & Rothman Attorneys
For the Respondents: J P De Bruin, SC
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