

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case no.:
5566/2001

In the matter between:

EDWARD LYON GABRIEL

1st Plaintiff

BARBARA PHILLIPA GABRIEL

2nd Plaintiff

and

ENCHANTED BED AND BREAKFAST CC

Defendant

JUDGMENT GIVEN THIS FRIDAY, 2 AUGUST 2002

CLEAVER J:

[1] This case concerns the application of Praetor's edict "*de nautis cauponibus et stabularis*" and in particular the strict liability imposed by that edict on innkeepers in respect of goods brought onto their property by guests.

[2] The plaintiffs are Mr and Mrs Gabriel, an ex-South African couple who emigrated to the USA some 22 years ago and who have lived in that country ever since. On 6 March 2001 they visited Cape Town on holiday and booked in at an accommodation establishment in Craigrownie Rd Sea Point, known as Enchanted Bed and Breakfast (the B & B), owned and operated by the defendant.

[3] The room occupied by the plaintiffs, room no. 6, was on the first floor facing the sea with access to it being gained by an external spiral staircase leading up to a deck outside the room from which in turn access was gained to the room. Before the trial commenced I attended an inspection *in loco* with the parties' legal representatives. The following details of the room and deck are important:

The wall of the bedroom facing the sea comprises two large plate glass panes, each 2.3 metres high. Above one of these panes there are three small windows, each measuring 40cm by 60cm. These windows are today fitted with burglar bars, but at the time of the event, which gave rise to the claim, they were unbarred. A door providing access to the room from the deck, is positioned next to the plate glass pane on the Cape Town side. It is constructed of timber. The bottom portion is solid, but it has eight clear glass panes in it above the solid portion. The door opens outwards. Attached to the doorframe on the inside is an expanding metal door (known as a "*trellidoor*"), which has a lock and key. The trellidoor was in place at the time of the incident. Full-length curtains are provided which cover the two plate glass panes and the small windows above. A counter (the '*kitchenette counter*') is positioned against an interior wall, which runs at right angles to the plate glass wall. It is at a height of 1 metre from the floor and the side nearest to the glass wall extends to approximately 1,2 metres from the wall. It is positioned more

or less in front of the outside door already described. A small bathroom is situated behind the wall on which the kitchenette counter is fixed. Access to it is gained through a door from the bedroom, which can be locked. The bathroom has one window. It has only one pane which measures 55cm by 55cm. This pane opens upward from the bottom to a maximum distance which permits a gap of 18cm. (The opening action of the pane is limited to this extent.) Although there are today burglar bars on this window, there were no bars on the window at the time of the incident.

- [4] On 8 March 2001 the plaintiffs returned to their room between 22h45 and 23h15 after visiting friends. The plaintiffs testified that the manageress of the B & B, Mrs Rauch, had explained to them that the purpose of the trellidoor was to secure themselves within the room while leaving the outside door open. It was in fact necessary to leave the outside door open as it was summer time and by doing so they were able to get fresh air into the room, which they would not otherwise have been able to do. They retired to bed almost immediately after returning to the room. On waking up at about 06h00 Mr Gabriel found that his watch, which he normally takes off and places next to his bed before going to sleep, was not there. He then got up and found that he could also not find his wallet. Furthermore, he noticed that the trellidoor was open with its key in the lock on the inside, while the outer door had been closed. On speaking to his wife he ascertained that her watch and jewellery, which she had placed

in an ashtray next to her bed, were also missing. In due course the plaintiffs discovered that certain items of clothing belonging to each of them were also missing. They were adamant that the trellidoor had been locked and the key removed from the lock before they retired to bed. This evidence was not disputed by the defendant. They explained that in their household Mrs Gabriel assumed the responsibility of locking up and tidying the bedroom before retiring each night. Mrs Gabriel explained that the reason for this was that she was somewhat neurotic about these aspects and since her husband was rather absent-minded he deferred to her views in this regard.

I accept the plaintiff's evidence that having regard to the vulnerability of the room to intruders had the trellidoor not been locked, coupled with Mrs Gabriel's invariable practice of locking up before retiring, they would not have left the trellidoor unlocked and did not do so. That Mrs Gabriel was concerned about her safety is evidenced by the fact that she placed a heavy chair in front of the door giving access to their room from the inside of the establishment when retiring each night. She says that she did this because she did not have a key for the door (it was used by staff in order to gain access for cleaning purposes). It is clear that the room was entered and burgled during the night. During the course of the morning the theft was reported to the police.

- [5] It is common cause that a small safe in which valuables could be stored was provided by the B & B in a cupboard in the room. Mrs Gabriel placed their

passports and some dollars in cash in the safe. The jewellery which was stolen, she explained, was not placed in the safe because it was the jewellery which she wore daily. (I interpose to say that the stolen jewellery included two sets of earrings, but for the rest, the items were all items of jewellery which she wore each day.) It was her custom too to remove her watch upon retiring and to replace this with her everyday jewellery next to her bed. During the course of the trial the *quantum* of the plaintiff's claim in respect of stolen items was settled at R252 000.

- [6] The facts thus far recorded establish a *prima facie* case for the defendant to be held liable in terms of the Praetor's edict.

Davis v Lockstone 1958 AD 153 at 158 and 166

LAWSA Vol 11 para 32.

One might have expected that the strict liability imposed by the edict would have disappeared from our jurisprudence by now and been replaced by a simple test for negligence on the part of the innkeeper, but the principles set forth in *Davis v Lockstone* have remained unaffected by the passage of time.

- [7] I now turn to the defences raised by the defendant. These are:

- 7.1 The loss was unforeseen, unexpected and irresistible.
- 7.2 That the defendant was exempted from liability.
- 7.3 That the plaintiffs' negligence caused the loss.
- 7.4 That the defendant was entitled to an apportionment of the loss resulting from contributory negligence by the plaintiffs.

Since these are special defences, the onus of establishing any one of them rests on the defendant.

[8] **UNFORSEEN, UNEXPECTED AND IRRESISTIBLE CIRCUMSTANCES**

The strict distinction between these defences known in Roman Law as *vis casus fortuitus*, *damnum fatale* and *vis major* is no longer applied, and any event, which is unforeseen, unexpected or irresistible and which human foresight cannot guard against such as burglary with violence or unavoidable accident, can be raised as a special defence (LAWSA, Vol 11 (Hotels and Tourism) paragraph 35). It is clear that the burglary which occurred at the B & B was not one accompanied by violence. As to the defence of unforeseeability the evidence was clear that thefts from houses in the area were common at the time. Both the B & B and a bed and breakfast establishment immediately adjacent to it had experienced intruders coming on to the properties. The premises next door had been burgled while one of the members of close corporation which owns the B & B had surprised an intruder on the premises of the B & B and had been fortunate in being able to chase him off. There had also been a break-in at a private home across the road and here again the owner of the house had been able to chase the burglar away. One of the policemen who testified stated that break-ins in the area were, fortunately for the inhabitants, invariably not accompanied by violence. It was his experience that when confronted, the intruders would flee. In the

light of the prevailing circumstances, this defence cannot succeed.

[9] **EXEMPTION FROM LIABILITY**

This defence stems from the exhibition of a notice reading

“The owner and the staff will not be held liable for any loss or damage sustained by whatsoever cause.”

at the premises.

At the time of the inspection *in loco*, two notices in the form mentioned above were displayed. One was affixed to the wall in the reception area above a desk upon which a register recording the names of guests was kept. The other was affixed to a glass pane in one of the double doors through which access is gained to the premises from the street. It was common cause that at the time of the Gabriel’s visit, only the notice on the front door was displayed. Mrs Rauch testified that after the burglary had occurred, Mr Berzack, one of the members of the defendant, had instructed her to display another copy of the notice more prominently. This is the notice which is now to be seen on the wall in the reception area. According to Mrs Rauch this was done in order to protect themselves. After the event a similar warning was also added to the information on the B & B’s website and the size of the lettering on the notice affixed to the door was also increased slightly. As to this notice, it is relatively insignificant in appearance on the door taking up approximately $\frac{1}{4}$ of the area of one of eight glass panes in one of the two double doors. At the time of the

inspection it was dwarfed by a “*FULL*” sign, which covered the whole pane immediately above it. Mr McGill, who at the time in question was the manager of the bed and breakfast establishment next door, testified that although he had been a regular visitor to the B & B prior to the burglary, he had never seen the sign. The plaintiffs, who at best for the defendant would only have gone through the door once (they were required to use the out-door entrance to their room) also testified that they had never seen the sign. It is common cause that the sign was never pointed out to them and in fact; it was never put to them in cross-examination that the sign had been in place on the front door when they visited the B & B. The defendant’s case was also that a notice similar to that which was on the front door appeared in the brochure which had been left in the room. In this respect also it is common cause that the attention of the plaintiffs was never drawn to the notice in the brochure. They were told by Mrs Rauch that the brochure was available, but Mrs Gabriel testified that neither she nor her husband looked at the brochure until after the theft had occurred. I accept the plaintiffs’ evidence that they were unaware of the notice on the front door and in the brochure and consequently there can be no question of them ever having agreed to the terms of the notice.

[10] **THE PLAINTIFFS’ NEGLIGENCE**

Ultimately this was the aspect which received most attention during the course of the evidence. The issue concerns precisely where the plaintiffs had left the

keys before retiring to bed on the night in question. According to the defendant's witnesses, there was a special ornamental key rack having a number of hooks on it hanging on the internal wall of the room, but the plaintiffs testified that they had not seen this. Although the plaintiffs testified that they would have seen the rack if it had been there, the rack was in all probability available but not noticed by the plaintiffs. Since they did not hang the keys on the rack, the keys would in all probability have been placed in one of three places, namely the small glass table near the glass wall, a dresser against the wall opposite the trellidoor (some three metres from the trellidoor) or on the kitchenette counter. The counter was used for preparing a rudimentary breakfast or tea.

Two sets of keys were supplied for the plaintiffs. One comprised the key to the gate providing access to the spiral staircase along the side of the house, a key to the glass door giving access to the room from the deck and the key to the trellidoor. The other bunch had the same keys on it, plus the key to the small safe.

Neither of the plaintiffs was able to say with certainty where the keys had been left, and I must accordingly decide whether leaving the keys in any one of the places I have mentioned would constitute negligence of the degree sufficient to relieve the defendant from the strict liability imposed by the Praetorian edict. This aspect turns on the conversations which Mrs Rauch and Mr Berzack had

with the plaintiffs shortly after the theft was discovered. Mrs Rauch testified that she was woken by a telephone call from either Mr or Mrs Gabriel at about 6h45. Her immediate reaction was to run upstairs to ascertain if an isolated burglary had occurred or whether any of the other guests has also been robbed. She established that the internal door to the plaintiffs' room was still locked. This satisfied her that only the plaintiffs had been burgled and she then went downstairs again to telephone Mrs Hamburger, one of the members of the defendant close corporation. She was advised by Mrs Hamburger to go up to the plaintiffs to find out what had happened, which she did. She was still in her nightclothes at that stage. Upon entering the room, she says she heard Mrs Gabriel berating her husband for having left the keys on the kitchenette counter. In cross-examination she conceded that Mr Gabriel might have said that it was possible that he had left the keys there. She clearly formed the view that Mr Gabriel had left the keys on the kitchenette counter, for when she went downstairs to meet Mr Berzack and Mrs Hamburger, who arrived shortly thereafter, she informed Mrs Hamburger that the *"asshole left the keys on the side of the table and the burglar put his hand through and robbed them"*. This view may well have reached Mr Berzack's ears. Mr Berzack testified that he had gone up to the plaintiffs' room as soon as he reached the B & B. According to him, Mr Gabriel told him that he had left the keys on the counter. Mr Gabriel denied this emphatically, stating that he could not be certain where the keys had been left. It seems clear that some discussion took place

between Mr Berzack and Mr Gabriel relating to the issue of keys being left on the counter. Mr Gabriel clearly did not consider it likely that the thief would have reached through the trellidoor, picked up the keys from the counter and then unlocked the door from inside the room. He considered such a manoeuvre impossible and indeed unlikely and told Mr Berzack so. Mr Berzack on the other hand, considered such a manoeuvre entirely possible and says that he then proceeded to demonstrate that it could be done. The case for the defendant rests entirely on what Mrs Rauch, and more particularly Mr Berzack, said that Mr Gabriel told them. For this reason it is necessary to evaluate the evidence given by these parties as also the evidence of Mrs Gabriel. Both Mr and Mrs Gabriel gave their evidence in a very spontaneous and open manner. Their evidence was consistent and frank with both (Mr Gabriel in particular) being prepared to make concessions. They were criticised by Mr **Le Breton**, who appeared for the defendant, for certain inconsistencies in the list of missing items furnished to the police and the items for which they claimed from their insurance. In my view, such inconsistencies as there may have been do not detract from their testimony and can be explained by the fact that the initial list was compiled in haste without a detailed search being made. The haste was due to Mr Gabriel's insistence that the theft be reported to the police for insurance purposes. Mrs Rauch did not make a good impression in the witness box. She did not answer spontaneously. Her evidence was characterised by long pauses before

answering questions. I did not get the impression that these pauses were caused by her trying to recall what actually had happened, but rather her wishing to ensure that the answer, which she furnished, was satisfactory. Since she conceded that Mr Gabriel may merely have said that it was possible that the keys had been left on the counter (as opposed to a positive averment that this effect), the only other portion of her evidence which is relevant is her evidence to the effect that she heard Mrs Gabriel berating Mr Gabriel for leaving the keys on the counter. In this regard, her evidence that she stood listening to the two talking and not being spoken to for a period of some five minutes is hardly credible. The plaintiffs denied that Mrs Gabriel had at any stage "*berated*" her husband. On the other hand, it seems clear from the evidence of both plaintiffs, and also from the manner in which Mrs Gabriel gave her evidence, that she was a forceful personality, accustomed to speaking her mind in no uncertain manner. Mrs Rauch conceded that Mrs Gabriel was aggressive and raised her voice in conversation. Mr Gabriel testified that after many years of marriage he had accepted his wife's disposition and was content to let her have her way in respect of many issues. It is therefore quite possible that what Mrs Rauch perceived as Mrs Gabriel berating her husband was no more than her manner of expressing herself forcefully during a discussion about whether or not he had left the keys on the counter. Mrs Rauch eventually conceded that this could have been the case.

As to Mr Berzack's evidence, he too did not answer spontaneously and was

not prepared to make any concessions, notwithstanding the passing of some two and a half years since the incident. However, one aspect of his evidence deserves comment. He testified that Mr Gabriel had at the outset informed him that the burglar had gained entry through the bathroom window. In the first place there is no suggestion that this possibility had been contemplated or discussed either by the plaintiffs between themselves, or by the plaintiffs with Mrs Rauch by the time that Mr Berzack arrived. In fact, the plaintiffs say that they only became aware of this possibility when the police arrived later that morning and indicated that in their view that was how entry had been gained. Secondly, if Mrs Rauch is to be believed that Mrs Gabriel had been berating her husband about leaving the key on the ledge, it is highly unlikely that Mr Gabriel would have suggested that the thief had come in through the window. This leaves a question mark over Mr Berzack's evidence, which the rest of his evidence does not sufficiently dispel.

Sgt Louw, one of the two policemen who visited the premises later that morning, had no doubt as to how access had been obtained. He was shown the premises with the key still in the lock on the inside of the trellidoor and after an inspection, he opined that the thief had entered the premises through the slightly open bathroom window. He explained that he tested the aperture in the window by inserting his head in it. As his head could fit into the gap, he concluded that he himself would have been able to get his body through the window, albeit with some difficulty. He explained that a smaller person would

have been able to get through with ease and that it was not uncommon for thieves to use a small person or a child in order to gain access through small apertures and for that person then to open a door so as to allow access from the outside. Sgt Louw explained, and this was also observed during the course of the inspection *in loco*, that access to the rear of the premises and the deck could easily be obtained through an alleyway between the B & B and the adjacent accommodation establishment. In fact, it would also have been possible to gain access from the adjacent premises on the other side.

In order to establish that the plaintiffs had been negligent in leaving the keys on the counter within reach of the trellidoor, Mr **Le Breton** submitted on the strength of the exercise conducted by Mr Berzack, that the burglar had in a single action reached through the locked trellidoor from the outside, taken hold of the keys, inserted the trellidoor key into the lock from the inside and then unlocked the door. This would then have enabled access to be gained from the outside of the premises. The difficulty and improbability of this theory hardly needs to be stated. Notwithstanding the evidence by the defendant's witnesses to the effect that the block of flats to the sea side of the room had some form of illumination in the stairwells and passages, the room occupied by the plaintiffs would have been dark at night. The glass wall facing the deck had full length curtains along the entire length of the wall, save in front of the trellidoor. The only source of light from the front of the deck would have been from flats in the building in front of the deck and these would have been

extinguished by the time the occupants in the flats retired for the night. In the version suggested by the defence, the person picking up the keys would probably have done so in the dark, would then have had to select the correct key for the trellidoor lock, and thereafter performed the difficult manoeuvre of inserting the key in the lock and unlocking the door from the inside while standing outside the trellidoor. Why he should do this and run the risk of waking the occupants by rattling the keys when he could simply withdraw the keys to the outside, select the correct key and unlock the trellidoor from the outside is difficult to imagine, and improbable, to say the least. The problem for the defence is of course that the key to the trellidoor was found in the lock on the inside of the door the next morning. In my view, the *modus operandi* suggested by the police, namely that access had been gained through the narrow aperture in the bathroom, is far more probable. That would also explain why the keys were found on the inside of the door. The police also found a wet T-shirt lying in the bathroom. Sgt Louw mentioned that thieves sometimes use chloroform, or a similar agent to ensure that the occupants of houses being burgled do not wake up. The method used is to apply the chloroform by pressing a wet cloth soaked with the chloroform briefly over the sleeping victim's face. There was insufficient evidence to conclude that the wet T-shirt had been used for this purpose, but the fact is that the intruder (or one of them) had been in the bathroom at some stage. I accordingly conclude that on a balance of probability, access was gained through the bathroom

window.

Mr **Le Breton** also submitted that the plaintiffs were negligent in not putting their jewellery and watches in the safe before retiring and in leaving the keys on the counter. As to the first proposition, it was Mr Gabriel's invariable habit not to sleep with his watch on but to leave it on the table next to his bed with his wallet. His wife also did not sleep with her watch on and habitually left it on a bedside table, together with her daytime jewellery.

The plaintiffs testified that they believed that once the trellidoor had been locked, they were safe from intruders. Mrs Rauch did not give them any warning as to any special safety precautions which they should take. The information on the B & B's website was also to the effect that

"We are in a high class residential area (safe) 4km from the city centre..."

Mr **Le Breton** submitted that as the plaintiffs were South Africans, they should have been aware of the danger from possible intruders, but to my mind the evidence does not justify this conclusion. They had last been to Cape Town some 20 years ago and although they had been told about the crime rate in Johannesburg (which they had visited before coming to Cape Town), they were under the impression that Cape Town was a much safer place than Johannesburg. Finally, Mrs Rauch had assured them that if they locked the trellidoor, they would be safe. Having regard to Mrs Gabriel's feelings of insecurity, it is unlikely that they would not have closed the bathroom window

or taken other precautions had they not been left with the impression that they were safe. They, like Mr Berzack, assumed that it would be in order to leave the bathroom window open. After all, if Mr Berzack considered that the aperture in the window was sufficiently small to prevent access being gained through it, there is no reason why the plaintiffs should not have considered it safe to leave the window open.

I am satisfied that the defendant has failed to establish as a fact that the keys were left on the kitchenette counter. It is not certain where they were left, but would probably have been left on the glass table near the trellidoor or on the dresser against the opposite wall, or on the kitchenette counter. In all the circumstances I do not consider that they would have been negligent in leaving the keys in any one of these places. Mr **Le Breton** also submitted that the keys would have been visible from the outside in any one of the places and that consequently a thief would have been aware that he could use the keys in order to make his exit from the premises once access had been gained from the bathroom window. In my view this is pure speculation. We do not know what, if anything, could be seen from outside, nor does it follow that if the keys were visible the thief would have known that the bunch included the key for the trellidoor. I accordingly conclude that the plaintiffs were not negligent in leaving their watches and jewellery next to their bed and in failing to place the keys in an otherwise safe or secure place.

[11] **CONTRIBUTORY NEGLIGENCE**

As pointed out in *OK Bazaars (Pty) Ltd and Others v Stern and Ekermans* 1976 (2) SA 521 (C) at 529 A-E, it is strictly speaking not correct to speak of contributory negligence in cases of this nature. The defendant's liability flows from the Praetor's edict and not from negligence. Furthermore, as I have already concluded, the defendant has failed to prove that the plaintiffs were negligent. If anyone was negligent, it was the defendant. Mr Berzack was well aware of the high crime rate in the area, having himself been confronted by an intruder and being aware of thefts from the adjoining accommodation establishment. He had placed burglar bars on all the windows and trellidoors on all the doors in the establishment save the windows at the top of the glass wall facing onto the deck and the window to the bathroom. These actions he had taken because of the crime in the area. His failure, under these circumstances, to secure the bathroom window properly was inadequate to prevent the foreseen danger and was thus negligent.

[12] There will accordingly be judgment for the plaintiffs in the sum of R252 000 and costs. The plaintiffs' costs will include the qualifying fees of their expert witnesses Messrs Trigg and Powell, who are declared necessary witnesses. These gentlemen were present in court at 15h50 on 6 June 2002 when the settlement of the *quantum* of the plaintiffs' claim was recorded, having been present in court from 13h00 on that day. The plaintiffs are also declared to be

necessary witnesses in as much as it was incumbent on them to travel from the United States of America in order to give evidence at the trial.

R B CLEAVER