



REPUBLIC OF SOUTH AFRICA

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

Case No 179/96

In the appeal between:

SAMUEL GROENEWALD

Appellant

and

ANNA WILHELMINA GROENEWALD

Respondent

Before: Mahomed CJ, Olivier, Zulman, Plewman and Streicher JJA.

Heard: 19 February 1998

Delivered: 23 March 1998

JUDGMENT

STREICHER JA.

STREICHER JA:

On 9 December 1990 the appellant ("the defendant") physically assaulted the respondent ("the plaintiff"), threatened to kill her and locked her in the suite of offices from which they had been conducting a video production business in Richmond, Johannesburg. The plaintiff attempted to escape through a window but sustained injuries when she fell from the third floor of the building. In an action for damages instituted by the plaintiff against the defendant the court *a quo*, applying Rule 33(4), first tried the question of liability. At the conclusion of the trial the court *a quo* held that the defendant was liable for the damages which the plaintiff might establish as a result of his threats and assaults on her in the office suite and her fall from the ledge outside the third floor of the building. With the leave of the court *a quo* the appellant appeals to this court.

The court *a quo* rejected the evidence of the defendant where it conflicted with that of the plaintiff and her witnesses on any material issue. The defendant did not and could not contend that the court *a quo* erred in this regard. He conceded that the matter had to be decided on the plaintiff's version. On this basis the relevant facts can be summarised as follows (much of it is taken verbatim from the judgment of the court *a quo*):

At the time of the trial the plaintiff was 36 years old. The defendant is 13 years older than the plaintiff. They met in 1979 and were married in 1984. A few days before their marriage and during a quarrel the defendant tied the plaintiff to a bed, took out a knife, leaned over her and said: "If I can't have you, no one will have you." Thereafter, during the marriage, the defendant was often aggressive and became frustrated when things did

not go his way. When he consumed alcohol his aggressive nature was aggravated. The marriage relationship deteriorated until about November 1990 when the plaintiff moved out of the joint home. The parties were nevertheless hopeful that their marriage could be saved and planned to go on holiday together. As a result of an angry dispute over a trivial matter during a shopping expedition on Saturday morning 8 December 1990 the defendant stated that they had in fact reached the end of the road. They returned to the defendant's house where he took some of the plaintiff's belongings and threw them into the passage.

Early that evening the defendant went to the cottage to which the plaintiff had moved, to make arrangements for the final break. She was not there. She had gone out with one Combrink, a recent acquaintance, whom she had met at the Drakensberg Sun Hotel. The defendant went

to a restaurant nearby and drank some wine. He then returned to the cottage but the plaintiff was still not there. He drove around the neighbourhood and eventually, after midnight, the plaintiff appeared in her car. The defendant intimated to the plaintiff that he had come to make arrangements for the termination of their relationship and gave her some of her possessions. His anger was aggravated by a telephone call which Combrink, at that stage, made to the plaintiff. The defendant intercepted the call and accused Combrink of having an affair with his wife. He told him that he intended to telephone the Drakensberg Sun to find out what had been going on. The level of the defendant's verbal attack on Combrink was such that the plaintiff had to implore him to lower his voice because she feared that her landlord would be disturbed. The defendant told the plaintiff that she was a "whore and a slut" and charged

that Combrink was responsible for the break-up of their marriage. He asked the plaintiff for her set of the office keys which she gave him.

The defendant asked the plaintiff to write out a cheque for her salary for December and January as he was terminating her employment. The plaintiff complained that there was some "tape stock" belonging to her which was not among the things the defendant had returned to her.

Notwithstanding a tender by the defendant to pay for the tapes the plaintiff insisted that she wanted her tapes. In anger the defendant said that they should then go to the office to fetch them. He said that he wanted there and then to achieve a clean break with his wife. The plaintiff protested that she would be happy to receive the tapes later in the week.

Combrink phoned again. The plaintiff told him that he should "get lost" and unplugged the telephone. On the insistence of the defendant they then

left in his car for the office to fetch the tapes. In the car the defendant drank a few mouthfuls from a bottle of whisky.

While on the way to the office the defendant told the plaintiff that he wanted her to go to a nearby hospital for a semen test to ascertain whether she had had intercourse with Combrink. She denied this charge but said that she would be happy to undergo such a test. When they arrived at the defendant's suite of offices he was incensed to hear Combrink's voice on the telephone answering machine. The message was that if the defendant wished to know about employees at the Drakensberg Sun, he should be man enough to speak direct to Combrink. By telephoning a senior person at the Drakensberg Sun the defendant unsuccessfully tried to ascertain Combrink's telephone number and address. He threatened to sue the hotel on the ground that one of its

employees was having an affair with his wife.

The plaintiff pretended not to know Combrink's telephone number or address in Johannesburg. The defendant thereupon attempted to strangle her by putting his hands round her throat until she could no longer breathe. The plaintiff panicked and, thinking that the defendant was "beyond the point of anger", gave him the number. While the defendant was busy dialing Combrink's number the plaintiff took the opportunity to escape from the office suite. The staircase down which she descended was dark. She was, she says, "paranoid". She did not have keys to unlock the entrance door to the building. She hid in a dark corner on the stairway. The defendant came after her and found her. He grabbed her by her hair and body and dragged her back to the office. He pushed her against a cupboard and locked the office door. He then went to a drawer to

take out what was called a cheese knife which had a sharp blade, measuring between 8 and 10 centimeters. He held the knife against the plaintiff's throat and said that, while she thought she could get away from him, he was going to kill her that night. He said that she should telephone her mother and say goodbye to her because that would be the last time she would speak to her. At this stage Combrink telephoned again and the defendant told him "I am going to kill both of you tonight". The plaintiff took the telephone and told Combrink to come to the office because the defendant was "serious". She gave him the address. She was at this stage apprehensive as to her safety and, as against the danger to which Combrinck might be exposed if he were to have a confrontation with the defendant, considered this paramount.

While the plaintiff was attempting to telephone her mother,

unsuccessfully up to this point, she heard the defendant saying on another telephone: "If you want to witness a murder you must come to number 1 Park Road. I am going to kill my wife." Thereafter the defendant once again insisted that the plaintiff should telephone her mother and stated that it was the last time the plaintiff would speak to her. The defendant then left the office saying that he was going downstairs to wait for Combrink. He locked the door. The plaintiff, in a state of panic, telephoned her brother who lived in another suburb. He said that he would come immediately and he or his wife said that they would telephone the police. The plaintiff then telephoned her sister and asked her to telephone the police as well. When the defendant returned the plaintiff was speaking to her mother. In tears she was telling her mother what had happened. The plaintiff's mother asked to speak to the defendant. Eventually the

defendant agreed to this request. He grabbed the telephone and said to the plaintiff's mother that the plaintiff was a "whore and a slut" and that he was going to kill her that night.

The defendant then again locked the door and went downstairs, presumably to wait for Combrink. At that stage the plaintiff telephoned a Mrs Ferensi, who was a close friend of both the defendant and herself, told her what had happened and asked her to telephone the police. Mrs Ferensi lived in Berea, a nearby suburb.

The plaintiff's brother had suggested to her that she should lock herself up in an office until the police came. The plaintiff knew that it would take some time for her brother to come from Windsor West and for Mrs Ferensi to come from Berea. There was no sign of the police. At this stage she was in fear for her life. She did not think that it would be

safe to follow her brother's advice because the defendant could force open any door she locked. Consequently she decided on another course. She opened a window and climbed through onto a ledge which ran along the wall of the building at the level of the third floor. After having drawn the curtains, so that the defendant would not detect that she had escaped through the window, she locked it behind her. She then eased her way along the ledge, precariously edging around protruding pillars. She was hoping to find a place where she could descend to the ground level. She walked along the ledge for about sixty meters and around some six pillars. When she reached the end of the ledge she found that she could go no further. She then attempted to get a footing on the ledge of the second floor and to let herself down, hanging onto the third floor ledge by her hands. Photographs of the building clearly show that she had no hope of

successfully doing so. Her feet did not reach the ledge on the second floor and she did not have the strength to pull herself back to the third floor ledge. She cried out for help, even calling the defendant's name. Her arms were tiring. Eventually she had to let go and fell to the ground.

The defendant found the plaintiff lying on the ground, knelt alongside her, held a knife to her throat and said: "You thought you were going to get away but I am still going to kill you tonight." It was at this point that the police, an ambulance, Mrs Ferensi and the plaintiff's brother arrived on the scene. The defendant simply moved away. He says that he informed the police that there were people present who knew where he could be contacted and that his office was in the building. He then left.

Subsequently the defendant was convicted of assault and the marriage was terminated by divorce.

Relying on the decision in *Mabaso and Others v Minister of Police and Another*, 1980 (4) SA 319 (W) the defendant submitted that the case pleaded by the plaintiff was that he intentionally caused her to fall from the ledge and injure herself. He submitted further that the court *a quo* had correctly found that it had not been proved that the defendant had such an intention and submitted that the plaintiff's action as pleaded should therefore have been dismissed.

The plaintiff pleaded her cause of action as follows:

- "3. On 9 December 1990, at Johannesburg, the Defendant unlawfully assaulted the Plaintiff by threatening to kill her, strangling her, threatening her with a knife, dragging her by the hair and throwing her against a table.
4. As a result of the assault the Plaintiff fell from the third storey of an office building, situated at 1 Park Road, Richmond, Johannesburg."

In *Mabaso* the plaintiffs alleged that the defendant assaulted them

by shooting, hitting and kicking them, thereby causing them severe bodily injury. Goldstone AJ held at 324A:

"The characterization of the alleged conduct of the second defendant as 'assaults' in the original particulars of claim clearly carries with it an implicit allegation of intentional conduct on the part of the second defendant. In respect of that allegation evidence tending to prove negligence only would be irrelevant, and, if the plaintiffs fail to prove the intention in question, the action as presently pleaded would fail."

I agree that the allegation in the plaintiff's particulars of claim that the defendant "assaulted" the plaintiff by threatening her with a knife, dragging her by the hair and throwing her against a table carries with it an implicit allegation that the defendant did so intentionally. It does however not follow that it also carried the implicit allegation that the defendant intended the alleged result.

The defendant would only have been delictually liable to the

plaintiff if the wrongful acts committed by him were committed intentionally or negligently. Counsel for the defendant argued that in the case of intention, foresight and that, in the case of negligence, reasonable foreseeability, of the harm of the general nature suffered by the plaintiff and of the general manner of such harm occurring were the essential elements of the requisite fault. This submission requires closer examination.

In delictual claims of the nature involved in the present case two separate questions arise:

1. Was the defendant at fault ?
2. For what consequences caused to the plaintiff in consequence of the defendant's conduct, is the defendant liable in damages to the plaintiff ?

For the purposes of answering the first question the defendant would be

held to be at fault as long as he intended to cause harm to the plaintiff, even if he did not intend that the consequences of such conduct would be to cause the kind of harm actually suffered by the plaintiff or harm of that general nature. He would also be held to be at fault if a reasonable person in the position of the defendant would have realized that harm to the plaintiff might be caused by such conduct, even if he would not have realized that the consequences of that conduct would be to cause the plaintiff the very harm he actually suffered or harm of that general nature.

Once fault in this way is attributed to the defendant, the second question is determined by asking whether the damages actually suffered by the plaintiff are damages which the defendant can be compelled to compensate the plaintiff for. In respect of this second enquiry reasonable foreseeability might in some cases be an irrelevant criterion, and in some

cases might even operate as a decisive criterion; but it is one of many criteria which might flexibly be applied as a matter of policy to determine whether or not the damages actually suffered by the plaintiff are or are not too remote to hold the defendant liable.

It is clear that the defendant intentionally assaulted, threatened and confined the plaintiff well knowing that his conduct was wrongful. The requisite fault on the part of the defendant was therefore established.

It remains to consider whether the intentional wrongful conduct of the defendant caused the harm suffered by the plaintiff as alleged by her.

In the law of delict causation involves two distinct inquiries. In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700

E-I Corbett CJ formulated them as follows :

"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'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. 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'."

There can be no doubt that the factual cause of the alleged result

was the intentional threats to, assault of, and confinement of the plaintiff by the defendant. Had it not been for those acts of the defendant there would have been no reason for the plaintiff to escape by climbing through the window and attempting to reach the ground from the ledge outside the building.

The test to determine legal causation "is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part". (See *Standard Chartered Bank of Canada v Nedperm Bank Limited* 1994 (4) SA 747 (A) at 764I to 765B.)

The defendant threatened to kill the plaintiff and must have intended the plaintiff to take his threats seriously. She in fact took him seriously. This was not unreasonable in the circumstances. A reasonable person in

the defendant's position would have foreseen that, if there was a way for the plaintiff to escape and possibly avoid being killed, she would try to escape. Escaping through the window and jumping from the third storey was a way of escaping with less serious consequences than death. Unless there was another way of avoiding being killed, which was so obvious and so certain to be successful as to make an escape through the window unreasonable, even for a person in the plaintiff's state of mind, a reasonable person would have foreseen that she might do so. Counsel for the defendant suggested that she could have locked herself in one or other of the other offices in the suite or that she could have unlocked the suite with a spare key which was, to her knowledge, available in a box kept in the reception area. In my view the suggestions are untenable. In the plaintiff's state of mind, she could not be blamed for not appreciating such

alternatives. Attempting to escape through the front door had previously proved to be unsuccessful. To lock herself in another office could also have proved unsuccessful as an office door could easily be forced open. In these circumstances it is quite understandable that the plaintiff would have chosen to attempt to escape through the window and down the side of the building. A reasonable person would have foreseen that she might do so.

The defendant submitted that her attempt to lower herself from the ledge constituted a *novus actus interveniens*. He submitted that the plaintiff had closed the window and the curtains and left no trace that she had escaped through the window and of the direction in which she had gone; she had proceeded around six concrete pillars and completely out of range of the defendant; she had alerted four different sources of help in her

predicament and knew that the police would have been notified and that they could arrive at any minute.

Viewed with hindsight, it might have been preferable for the plaintiff to have remained on the ledge. However, she did fear for her life, she did not know how long the police or the people she had telephoned for help would take to arrive (minutes probably felt like hours) and she was not out of reach of the defendant. If he could not have followed her round the pillars he could still have reached her from inside the building even if he had to break doors down in order to do so. In my view a reasonable man would have foreseen that the plaintiff, if she really believed that he would kill her, might do exactly what she did i.e. climb through the window, move along the ledge and then try to reach the ground even if she had to jump. That being the case the plaintiff's conduct did not affect the

chain of causation to such an extent that the defendant should by reason of such conduct not be held liable for the damages suffered by the plaintiff (see *Fischbach v Pretoria City Council* 1969 (2) SA 693 (T) at 699G to 700G).

There are no considerations of legal policy which militate against holding the defendant liable for the plaintiff's damages. Furthermore, it would in my view be eminently reasonable, fair and just to hold the defendant liable for the damages suffered by the plaintiff as a result of his threats and her fall from the third storey.

To summarize. By threatening to kill the plaintiff, by confining her and by assaulting her the defendant intentionally committed a wrongful act which factually caused the plaintiff to fall from the ledge outside the third floor of the building and to sustain injuries for which he should in my view

be held legally liable.

It follows that the appeal should be dismissed with costs. A request by the plaintiff that the costs of two counsel should be allowed was opposed by the defendant. A similar request by the plaintiff was refused by the court *a quo*. In my view the volume of work involved and the complexity of the case did not justify the employment of two counsel.

The appeal is therefore dismissed with costs.

STREICHER JA.

MAHOMED	CJ)	
OLIVIER	JA)	
ZULMAN	JA)	
PLEWMAN	JA)	Concurred.