REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between: Case No: 3815/2012

LINDA DU PLESSIS **Plaintiff**

And

NELSON MANDELA BAY MUNCIPALITY **First Defendant**

NATIONWIDE SECURITY **Second Defendant**

Coram: **Chetty, J**

Heard: **12, 13, 15, 19 - 20 August 2014**

Delivered: **4 September 2014**

Summary: ***Delict*** *– Liability for – Wrongfulness and Negligence – Absolution – Test for – Evidence – Whether prima facie case established – Conduct neither wrongful nor negligent – Absolution granted*

JUDGMENT

CHETTY J: -

[1] The plaintiff's claim for damages against the defendants is founded in delict and, given the amplitude of the liability contended for, it is apposite to commence this judgment with the trenchant observation by Harms J.A, in ***Telematrix (Pty) Ltd v Advertising Standards Authority of South Africa***[1] that: -

> "[12] The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that 'skade rus waar dit val'. Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it."

[2] It will be gleaned from the aforegoing that the enquiries into wrongfulness and negligence are discrete and should not be conflated. This distinction, the Constitutional Court emphasized as[2] -

> "[53] The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability. . . . Negligence, on

[1] 2006 (1) SA 461 (SCA) at para (72)
[2] Minister of Safety and Security v Duivenboden 2002 (6) 431 (SCA) at para [21]

> the other hand, focuses on the state of mind of the defendant and tests his or her conduct against that of a reasonable person in the same situation in order to determine fault."

[3] The determination of the validity of the plaintiff's claim must perforce begin with an examination of the allegations in the particulars of claim, an appraisal of the evidence adduced and the application of legal principle. The former commences with a recordal of an invitation extended to the public to access recycled water from the Despatch water treatment works (the property) for domestic garden use, and, somewhat incongruously with subsequent allegations, affirmed that[3]: -

> "6. The first defendant had invited residents to utilise treated water from its treatment plant situate in Despatch (hereinafter referred to as *"the treatment plant"*) to water their gardens, after the use of water from the Municipality's water supply system was prohibited for purposes of watering gardens, lawns, grassed areas, flowerbeds and the like. <u>The Despatch treatment plant is situated in close proximity to the residential area and was ostensibly a safe location at which water could be drawn by members of the public, such as the plaintiff, by reason of:</u>
>
> 6.1 <u>a security fence being erected around the site;</u>
>
> 6.2. <u>a controlled entrance;</u>
>
> 6.3 <u>the presence of a security guard at the entrance to the treatment plant.</u>" (emphasis supplied)

[3]The underlined paragraphs.

[4] In respect of the first defendant, it alleged, apropos the negligent and wrongful components of her claim respectively, that: -

> "9. At all relevant times and in terms of the common law, the first defendant, as a municipality, in the position of a *diligens paterfamilias*:
>
> 9.1 would have foreseen that harm or injury could be caused to residents or members of the public such as the plaintiff, who availed themselves of the municipal invitation to obtain treated water from the treatment plant, if such treatment plant was not safe and secure, and could or should have foreseen the reasonable possibility that its conduct (or omission) could cause injury to the plaintiff in her person or property, causing her loss, including patrimonial loss.
>
> 9.2 would or should have taken reasonable steps in the circumstances to guard against such an occurrence.
>
> 10. A legal duty was owed by the first defendant to members of the public, and in particular, residents of the drought-stricken municipality, including the plaintiff, to ensure that:
>
> 10.1 the treatment plant was adequately secure and safe to ensure that members of the public who obtained treated water from the treatment plant would not be in danger of being attacked or assaulted by criminal elements;
>
> 10.2 the treatment plant was at all relevant times properly guarded by:

i) A security service provider which provided a professional, diligent security service;
ii) sufficient security personnel;
iii) adequately trained and alert guards;

10.3 the perimeter fence surrounding the treatment plant was regularly inspected by security personnel, and adequately maintained by municipal officials or employees responsible for such maintenance and upkeep;

10.4 the perimeter fence was not cut or damaged, or in a bad state of repair or obviously surmounted by branches or objects being placed over the fence (which would defeat the purpose of having the fence at all, as a dilapidated fence could lull the public into a false sense of safety);

10.5 the safety of members of the public who were especially vulnerable and at risk of attack, such as females, was not threatened;

10.6 adequate safety measures would at all relevant times be in place, in particular at the area of the treatment plant where the public was allowed to draw treated water, in the light of the reasonable foreseeability of harm being caused to members of the public should such security measures not be in place."

[5] The first defendant's negligent conduct, it averred, was constituted by a breach of the legal duty in that the first defendant: -

"11.1 failed to regularly inspect and maintain the perimeter fence at all, <u>alternatively</u> failed to inspect and maintain

the perimeter fence adequately and diligently as can be expected of a municipality in such circumstances, resulting in the fence not constituting an effective security measure;

11.2 failed to ensure that the site was adequately guarded by properly trained guards and by a security service provider which provided a professional diligent service;

11.3 failed to detect that sections of the perimeter fence had been deliberately damaged, holes had been made in the fence and, in one instance, a large branch had conspicuously been placed over the fence to allow human access;

11.4 failed to ensure that reasonable security measures were at all relevant times in place, especially in the light of the invitation extended by the first defendant to residents to obtain treated water from the treatment plant with which they could water their gardens;

11.5 have known, alternatively ought to have known, that neither the dilapidated fence, nor the presence of a single disinterested security guard at the entrance gate constituted adequate safety measures as could be expected of the average metropolitan municipality in the given circumstances."

[6] As against the second defendant, the plaintiff's particulars delineated the factual matrix underlying the legal duty contended for as: -

"23. 23.1 The second defendant, acting through its employees, was at all relevant times aware of the fact that by reason of the prevailing drought conditions and municipal water restrictions in place, the first defendant had invited and allowed

members of the public to draw treated water from the treatment plant to water their gardens;

23.2 In the alternative to 23.1: in the light of its contractual appointment by the first defendant and the well-publicised water restrictions and prevailing drought conditions, the second defendant and its employees ought to have been aware of the fact that members of the public were allowed to draw treated water from the first defendant's treatment plant.

24. The second defendant and its employees could and should at all relevant times have foreseen that members of the public might be attacked by criminal elements or vagrants, should such criminal elements or vagrants obtain access to the plant while members of the public were drawing water from the treatment plant, in particular females such as the plaintiff.

25. Immediately prior to the plaintiff being attacked by an individual at the treatment plant on 5 February 2010:

25.1 she had spoken to the security guard on duty at the entrance to the treatment plant and *inter alia:*

(a) enquired of him whether she could safely draw water at the treatment plant;

(b) mentioned to him that she had noticed a person outside the fence the previous afternoon who made her feel uncomfortable and concerned about her own safety;

(C) sought his assurance that she would be safe;

(d) asked him to be alert and to keep watch in the circumstances whilst she filled the container on the trailer towed behind her vehicle."

[7] The negligent breach of the legal duty was formulated as: -

> "28.1 the security guard on duty failed to carry out his guard duties professionally, skilfully and diligently, and was negligent in failing to keep the plaintiff under observation and to ensure that she did not get attacked, especially as she had expressed concern about the presence of a person whom she had noticed the previous afternoon outside the perimeter fence, who might pose a threat to her.
>
> 28.2 having a single security guard on duty was inadequate in the circumstances, having regard to the size of the treatment plant and the inadequately maintained perimeter fence surrounding the treatment plant;
>
> 28.3 the security guard employed by the second defendant at the treatment plant was not properly trained as is required in the security industry;
>
> 28.4 the second defendant acting through its employees, failed to point out the neglected state of the security fence to the first defendant;
>
> 28.5 the security guard on duty failed to keep adequate watch over the plaintiff, especially in the light of her earlier discussion with him;
>
> 28.6 the security guard on duty, acting in the course and scope of his employment with the second defendant, failed to pay any, alternatively sufficient attention to the plaintiff's pertinent mentioning of the presence of a suspect individual outside the fence;
>
> 28.7 despite the discussion between the plaintiff and the security guard on duty at the time, the security guard evidently ignored the discussion alternatively, was dismissive of the reservations which the plaintiff had expressed about her safety to him."

[8] Notwithstanding the imprecision in the formulation of the particulars of claim, it appears that, contextually, the legal duty contended for is the duty to act without negligence. The omissions attributed to the first defendant was its alleged failure to adequately secure the property, to ensure that it was not only guarded by sufficiently trained security personnel, but moreover to regularly inspect the perimeter fencing. To discharge the evidential burden resting upon her, testimony was adduced by the plaintiff and a number of witnesses. After the adduction of such evidence, the defendants applied for an order of absolution from the instance. The correct approach to such an application was stated by Harms J.A. in ***Gordon Lloyd Page and Associates v Rivera***[4] as follows: -

> "[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:
>
> ". . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter, 1917 T.P.D. 170 at p. 173; Ruto Flour Mills (Pty.) Ltd. v Adelson (2), 1958 (4) SA 307 (T))."
>
> This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) 37G-38A; Schmidt Bewysreg 4th

[4]2001 (1) SA 88 (SCA) at para [2].

> ed 91-92). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (Gascoyne loc cit) - a test which had it origin in jury trials when the "reasonable man" was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice..."

To survive absolution, it was thus incumbent upon a plaintiff to make out a *prima facie* case which the law enjoins, which, predicated as it is on the actio *legis aquilia*, to show that she suffered loss through the wrongful and negligent conduct on the part of the defendants.

[9] Before I undertake an analysis of the plaintiff's evidence, I interpolate to emphasize that the claim has, as its genesis, an attack upon the plaintiff at the property on Friday, 5 February 2010 by an unknown intruder who had gained entry thereto in a manner which, notwithstanding the inordinate length of time and attention to detail devoted thereto during the trial, was never established and is rooted in speculation. It is apposite, however, given the centrality of the condition of the perimeter fence as adverted to in the testimony of the plaintiff and her witnesses, to commence with a detailed description of the property, and its accoutrements.

[10] The property, one of four water treatment plants falling under the auspices of the first defendant (the Metro), is situate on the periphery of a residential suburb in the small town of Despatch. The property is vast and, as is apparent from the Google photographs (Section “F“), has situate within its area, a sewerage lagoon system comprising a number of pools, the last of which contained a large volume of recycled water. Although there are a few small buildings utilised for administrative and storage purposes within its confines, the property is primarily an industrial facility manned by a few personnel. At the time, the wire mesh perimeter fencing was affixed to a multitude of embedded, perpendicular, reinforced concrete poles, evenly spaced, each of which was crowned by V-shaped reinforced concrete sections. Seven strands of barbed wire were attached thereto, traversing the length of the perimeter fencing, and, at its pinnacle, coiled razor wire spanned the entire fence. Ingress to the property was through two steel gates similarly topped by barbed and razor wire. Adjacent to the first entrance gate, and in its immediate vicinity, was a wooden hut, which, it is common cause, served as the guard post. The second gate, approximately twenty metres from the first, was permanently locked, the key to the padlock being kept by the guard in the hut. It admitted access to the ponds.

[11] During 2008, a section of the wire mesh fence on the southern perimeter of the property was stolen. It is apparent from the photographs handed in that repairs were effected thereto by affixing several strands of galvanised wire across the entire length of the opening. Sequential coils of razor wire were moreover attached from the barbed wires atop the V frames vertically to the nadir of the concrete poles.

[12] It is common cause that in 2009, Port Elizabeth and its environs was crippled by severe drought and water restrictions were imposed on its populace. Usage of water from the metro's water supply system for watering gardens, etcetera was henceforth prohibited. The use of reclaimed water was however exempted. To alleviate the plight of its citizenry and in particular the gardening aficionados, the Metro publicly announced that recycled water could be collected from the Fish Water Flats, Cape Recife and Driftsands Water treatment works. Although there was no similar official announcement concerning the property, it is not in issue that the public was likewise permitted to source recycled water therefrom.

[13] Duly appraised of the Metro's indulgence, the plaintiff, an avid gardener, accompanied by her sister, Mrs *Beulah Potgieter* (Mrs *Potgieter*), walked to the property, a distance of some 550 metres from her house. The guard duly opened the gate and, upon being appraised of their business, informed them that the responsible Metro official, one *Dawid*, had just left but that they could return the next day to see him. When the plaintiff and Mrs *Potgieter*, arrived at the property the next morning, they met *Dawid* who vouchsafed that they could source water from the property and directed them to the administration office to complete the requisite documentation. The plaintiff was issued with a form which she duly signed and was told to produce it to the security guard at the sentry post whenever she collected water and to sign the entrance register when ingressing the property. She was furthermore told that she could utilise the electricity point in close proximity to the pool.

[14] The plaintiff repaired to her home, collected a water tank, trailer and electrical leads and returned to the property only to be told that she could not utilise the property's electrical supply. Undaunted, she returned home to fetch her generator and, accompanied by her tenant, one Mr *Len Bicknell (Bicknell)*, returned to the property to draw water. Her generator however proved unequal to the task and she returned home. During the course of the day she sourced a generator with a larger capacity and returned to the property the next morning. Following protocol, she handed her permit to the guard, signed the register and drove to the access gate, which the guard duly opened, and thence to the pool. After filling the tank and securing the paraphernalia on the trailer, she fleetingly noticed a person on the outside of the perimeter fence approximately sixty metres away, observed that he wore a white and blue striped top but paid no further attention to him and left the property. The following day she returned to the property.

The adequacy of security arrangements

[15] She testified that she handed her form to the guard who duly opened the gate, climbed onto her trailer and hitched a ride until they reached the second gate which he opened. She stated that she then informed him of the presence of the stripe shirted person on the periphery of the property the previous day and his response was that the person was a cattle herder. She stated that she asked him to accompany her to draw water but that he declined and reassured her by telling her that she was perfectly safe. She furthermore stated that she specifically told him that it would take twenty minutes to fill the tank and that should she not return after that interval or if he heard her hooter or her vehicle alarm, he should immediately hasten

to her vehicle. She duly proceeded to the pond and filled her water tank. Whilst in the process of packing up, she observed the striped shirted person on the other side of fence, paid no further attention to him but within a short space of time found him next to her. It is common cause that the plaintiff was thereafter assaulted and robbed of her possessions. According to her, her ordeal was only halted when she appraised her assailant, who was intent on raping her and manhandling her towards a disused structure, that she was HIV positive whereupon he ran off and exited the property by scaling the corner perimeter fence. After an inordinate length of time, municipal officials arrived to help her. The events thereafter are of no real moment, save for her testimony that when she returned to the property in the company of her brother-in-law, Mr *Hermanus Jacobus Potgieter* (*Potgieter*), the following afternoon, the guard expressly acknowledged both her adjurations to him and his placatory assurances the previous day. It was put to both her and *Potgieter* that this tittle of evidence would be denied by the guard.

[16] As part of his armoury in resisting absolution, Mr *Swanepoel*, replying principally on the ostensible authority of ***Atlantic Continental Assurance Co of SA v Vermaak***[5], submitted that the entire body of the plaintiff's evidence should be accepted as the truth. The exception, enunciated by Munnik J, in ***Atlantic***, he stated, was not of application in *casu*, in as much as the plaintiff's evidence was not inherently unacceptable. The difficulty with this submission is that it completely overlooks unsatisfactory aspects of the plaintiff's testimony, in particular, the inherent improbabilities in her evidence. She was constrained under cross-examination to admit that her observation of the person outside the property on the Thursday was

[5] 1973 (2) SA 525 (E)

fleeting, and of no real moment. The explanation tendered for mentioning his presence to the guard on the morning of 5 February 2010 is entirely unconvincing. She described it as a flashback, something akin, she said, to female intuition. In my view, the experience of seeing the person at a considerable distance the previous day could certainly not have provided the catalyst for her alleged unease. By her own admission he was outside the confines of, from her own observation, a securely fenced property. He was moreover momentarily in her line of vision and, again, by her own admission, she had paid scant regard thereto.

[17] Furthermore, in her evidence in chief she stated that when she accessed the property on the Thursday she saw no need for *Bicknell* to accompany her because of the tranquillity of the place. It is inconceivable therefore that a cursory glance at this person could have triggered any sense of foreboding. Although Inspector *Ferreira* (*Ferreira*), suggested otherwise, a view he was obliged to recant under cross-examination, the property had been crime free, save for a minor theft infraction. Its environs were moreover, as the plaintiff and Mrs *Potgieter* testified, conducive for people taking long walks without fear of any threat to life or limb. The particulars of claim[6] itself vouchsafed its security and, as I shall in due course elaborate upon, surrounded by what was conceded to be a formidable fence, with a single entry point manned by a security guard. The plaintiff was, by her own admission, not the first recipient of the indulgence granted to the general public to source water from the property. It is common cause that their safety was never in jeopardy. Therefore the perceived threat ***"of being attacked or assaulted by criminal elements"***, which

[6]Paragraph 6

the particulars of claim and the plaintiff herself pronounced the indulgence portended, is baseless.

[18] There was therefore no rational basis for the plaintiff to have feared for her safety and her evidence to the contrary is improbable in the extreme and clearly contrived in order to advance her case. *Potgieter's* testimony, tendered as corroboration for the alleged exchange between her and the guard on the Saturday, falls to be rejected as palpably untrue. On the probabilities, there was no need to confront the guard the next day. The matter had already been reported to the police and a claim had been submitted to her insurers. In my view, the evidence of the plaintiff and *Potgieter* relating to the alleged exchanges with the guard on the Friday and Saturday is so improbable that it falls to be rejected as false.

[19] When regard is had to the security measures in place, the first defendant's conduct in securing the services of one security guard to man the security gate during the day and another to keep watch during the night can therefore never be regarded as wrongful. In similar vein, the second defendant's conduct, in compliance with the first defendant's contractual requirements for one guard to be posted at the gate and another for night patrol, can likewise not be regarded as wrongful. Given the prevailing crime free factual scenario, there was in my view, no need whatsoever for additional guards to be posted on the property. There is no warrant to hold that the property was not adequately secured and, in the circumstances, there are no policy or legal considerations necessitating additional security guards to be posted on the property.

The condition of the perimeter fence

[20] As adumbrated hereinbefore, the theft of a section of the perimeter fence necessitated temporary repairs. It was effected by closing the opening with consecutively laid, descending coils of razor wire, affixed to horizontal strands of galvanised wire secured to the concrete poles across the length of the opening. The efficacy of the temporary repairs was however denigrated by the plaintiff and her witnesses. The import of their evidence was that it in all probability facilitated ingress into the property by the plaintiff's assailant. The testimony of the plaintiff and her witnesses' hereanent is thoroughly unconvincing in the light of her own evidence that the assailant exited the property over the formidable high fence.

[21] In her evidence in chief and with reference to photographs of the repaired section of the fence which she herself took, the plaintiff marked an area on photograph "A11" and described it as a hole which, she ventured, could readily admit entry to the property. *Potgieter* and *Ferreira* followed suit, marking the alleged hole in the fence in close proximity to the plaintiff's mark. When the enlargement of photograph "A11" was put to the plaintiff under cross-examination, and, from which it is apparent to the naked eye that, save for the spiral of the coil, there were no holes in the fence depicted on the photograph, she recanted from her earlier version and suggested that the hole through which she had subsequently climbed was not on any of the photographs. Her evidence is palpably untrue. The clear import of her evidence in chief, with particular reference to the photographs, was that the area

marked by her probably constituted the intruder's point of entry and through which she herself climbed through on the day she took the photographs.

[22] *Ferreira* drew a circle in close proximity to that of the plaintiff on "A11". I can place no reliance on his evidence. The inference that he colluded with the plaintiff is inescapable. The entry which he admittedly made in the investigation diary relating to the vehicle's keys inadvertently establishes the collusion between himself, the plaintiff and *Potgieter*. The latter testified that when he and *Bicknell* visited the property on the Saturday, the latter found the key approximately 30 metres to the south of the repaired fence. The clear import of that evidence was that the intruder probably exited the property through the broken fence. He then stated that on their return to the plaintiff's home, he and she repaired to the police station and handed the key to a police official who, despite diligent search in the occurrence book, could find no entry of the incident involving the plaintiff and told them to return another day.

[23] If that is so, then the entry made by *Ferreira* at 08h00 on 8 February 2010 is quite inexplicable. It reads: -

> "The complainant at the office and informed me that she and her brother in law went back to the scene and found the key of her vehicle. She handed the key to me."

Ferreira's puerile attempt to explain the anomaly between his testimony and the syntax of the entry establishes the collusive nature of this evidence. If, as the entry establishes, the key was handed to *Ferreira* on the Monday morning, the plaintiff's

evidence and that of *Potgieter* that they went to the property on the Saturday after handing in the key at the police station when they confronted the guard, cannot be true.

[24] The "**expert**" evidence relating to the alleged dilapidated condition of the fence and the adequacy of the security measures in place at the property, tendered by the plaintiff's witness, Mr *Leon Janse van Rensburg* (*van Rensburg*), is likewise contrived. He was a thoroughly unimpressive witness whose security expertise, vauntingly tendered in chief, was cruelly exposed under cross-examination. I have grave difficulty in understanding any rational basis for excluding, in a risk assessment exercise, empirical historical data. The fact that no incidents occurred at the property, notwithstanding the temporary nature of the repairs to the fence, in fact attests to its effectiveness. Ultimately, he was constrained to concede that the second defendant could not be faulted for complying with the first defendant's contractual terms. It is evident from the plethora of photographs handed in as exhibits that the repairs effected to the perimeter fencing rendered the property secure, though not impregnable. *Van Rensburg* himself conceded that it was virtually impossible to render premises impenetrable.

[25] In determining the reasonableness of the security measures in place, regard must be had to the fact that no incident(s) of whatever nature had occurred on the property. The perimeter fence, and the repairs effected to the stolen section were, as conceded by *van Rensburg*, formidable. As a raw sewerage recycling facility it was certainly not a place which warranted a platoon of security guards to patrol and

guard its installations. A single sentry at its access point was, in my view, more than sufficient. It follows from the aforegoing that the security measures in place were entirely reasonable.

[26] The repairs to the perimeter fencing and the presence of a guard at the sentry box was, in my view, more than adequate to safeguard the property. The harm which befell the plaintiff was accordingly not foreseeable. In the result the following order will issue: -

There will be an order for absolution from the instance with costs.

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D.CHETTY

JUDGE OF THE HIGH COURT

Obo the Plaintiff:	*Adv M. Swanepoel SC*
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