141/87

COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BOCHRIS INVESTMENTS (PTY) LIMITED ..... First Appellant

CORNELIUS JACOBUS JOUBERT ..... Second Appellant

and

THE STATE ..... Respondent

CORAM: CORBETT, BOTHA, SMALBERGER, VIVIER JJA et NICHOLAS AJA.

Heard: 23 NOVEMBER 1987

Delivered: 27 November 1987

JUDGMENT

NICHOLAS, AJA :

/Wilderness .....

Wilderness Pleasure Resort, at Muldersdrift near Krugersdorp, has a large swimming pool in a setting of lawns and trees, and other facilities such as a trampoline, swings and cable slides. A popular family resort, it attracts a daily average of 500 visitors at weekends, and upon occasion as many as 3 000 in a day.

On Saturday 28 October 1984 Mr Edward Robert Andresen was picnicking at the resort with his two children - his daughter, and his 9 year old son, Ryan Edward Andresen. The three of them were bathing in the pool when, at about 2 p.m., the daughter got out of the water, followed by her father. Andresen called

to .....

to Ryan to come out and join them. Ryan, who was a good swimmer, called back, "Hang on a sec, I want to show you how I can touch the bottom". He dived under the water. When he had not surfaced after about 10 seconds, Andresen dived in. He found Ryan jammed in an outlet pipe near a corner of the pool at the deep end. His body was doubled up, and only his hands and feet were visible at the entrance to the pipe. Andresen made several vain attempts to pull Ryan out, and it was only later that the boy was extracted from the pipe. He had drowned.

Arising .....

Arising out of the death, three persons were charged in the Regional Court, sitting at Krugersdorp, with culpable homicide, alternatively with contravening certain statutory regulations: namely, Bochris Investments (Pty) Ltd ("Bochris"), the owner of Wilderness Pleasure Resort; Cornelius Jacobus Joubert ("Joubert"), a director and the majority shareholder of Bochris, and the manager of the resort; and his wife, Christel Dorothea Joubert, also a shareholder and director of Bochris, who was employed at the resort. All three accused pleaded not guilty.

Bochris and Joubert were convicted of culpable homicide, but Mrs Joubert was acquitted. Bochris was fined R300-00,

and .....

and Joubert was sentenced to a fine of R300-00 or 6 months' imprisonment, the whole of which was conditionally suspended. An appeal to the Transvaal Provincial Division was unsuccessful, but leave was granted to appeal to this Court.

The State called three witnesses: Det. Sgt Streicher of the South African Police; Andresen; and Lieut R J B Norman, also of the South African Police, who gave expert evidence. Joubert was the only defence witness.

Streicher put in a plan of the swimming pool and photographs of the pool and its surroundings and of the opening of the outlet pipe. This is located

in .....

in the wall of what appears from the photographs to be a shallow sump in the floor of the pool near to a corner. The underside of the pipe is somewhat below the bottom of the sump. Streicher gave the measurements of the swimming pool: it is some 48 m long and some 24 m wide; and its depth varies between 1.02 m at the shallow end and 1.85 m at the deep end.

Andresen gave the evidence of the occurrence which is summarized in the second paragraph of this judgment. He was asked in cross-examination by the defence whether Ryan had said that he was going to sit on the bottom of the pool, and he agreed that this was so.

Norman is registered as an engineer-in-training with .....

with the South African Council of Professional Engineers. He holds the degree of B.Sc. in mechanical engineering of the University of the Witwatersrand, and he has experience in the installation of water pumps.

He went to the resort on 29 October 1984 in order to investigate the occurrence. He examined the outlet pipe. It was a 25 cm pipe, the opening to which had been cut at an angle, so that it presented the appearance of an ellipse, with a long axis of 30 cms. Water was pumped through it to a filtration plant and then back to the pool.

In summary, Norman's explanation of how

Ryan's body came to be jammed in the outlet pipe was this. Ryan sat down against the opening of the outlet pipe, so that his buttocks effectively closed it. The pump no longer exerted any significant suction, because there was then no water for it to act on. A vacuum was created which would have exerted "a very small suction". But the water in the pool above him exerted on the boy a force of some 600 kgs, pressing his buttocks, followed by his jack-knifed body, into the pipe.

According to Norman, the pressure exerted by the water on a body at the entrance would depend on the extent to which the opening was blocked. It was only when the pipe was largely blocked off that the pressure would .....

would become noticeable. Norman said that he swam down and blocked the opening with his body in order to see what sort of suction would occur, and there was very little suction until he blocked as much of the opening as he could, and then "nothing happened to me". If the buttocks of a person sitting at the opening were wider than the opening, he would not be pressed into the pipe by the force of the water. Norman put an arm, and then a leg into the pipe, and he experienced "very little noticeable force". He dangled his foot in front of the opening, and there was "very, very little suction". The flow of water through the pipe was no stronger with the pump in operation than it would have been if the water had run out under the force of gravity.

When .....

When Norman arrived on 29 October 1984, the opening had been covered with a guard. While this was adequate, Norman recommended that it be replaced with wire mesh in the shape of a dome.

Under cross-examination, Norman agreed that in view of the location of the opening, a bather would not pass near it in the ordinary course of diving or swimming, and there would be no noticeable suction unless he came very close to the opening.

Joubert said that he had been personally involved in running the resort since 1958. There was then no filtration plant: when the pool was emptied for cleaning purposes, the water flowed out under the force of gravity. In

1967 the pool was altered and improved: it was made shallower, and a pump and filtration system were designed and installed at a cost of R5853,00. A new outlet pipe was installed. The work was done by Safilco (Pty) Ltd, water and waste engineers of Randburg, who are specialists in the design of filtration plants. Joubert was present when the altered pool was commissioned, and regarded it as "a good job". He knew of the opening to the outlet pipe but he was not aware that it was a source of danger. It was not covered with a guard: it did not occur to anyone that this was called for. The pool was swept weekly, when the broom was taken right up to the hole, but it came away easily.

Possibly .....

Possibly 300 000 people had visited the resort since the altered pool was commissioned. No untoward incident had ever occurred and Joubert was not aware, and it was never reported to him, that there was strong suction at the outlet. He had never heard of a case of a child being sucked into the outlet pipe of a swimming pool. The plant was designed by specialists and installed by specialists and he accepted it as such. The outlet would be blocked only if someone covered it with set purpose.

Since the occurrence, a grille has been placed over the opening at a cost of about R50,00.

At the end of the evidence the defence made a formal admission that at all times when the swimming pool was

in use (including 28 October 1984), the filtration plant was in operation.

It was alleged in the main count that the three accused were guilty of the crime of culpable homicide in that they "wrongfully and negligently killed Ryan Edward Andresen in life a 9-year old male". No particulars of negligence were given, and none were asked for. It appears, however, that the case for the State was -

(1) that the unguarded opening to the outlet pipe was potentially dangerous to pool users while the filtration plant was in operation;

(2) that Joubert was the person in control of the swimming pool, which was open to the public (including children), and as such he had a duty to do all that was reasonably requisite to ensure the safety of users; and

(3) .....

(3) that Joubert realised, or ought to have realised that the unguarded opening was dangerous: he ought to have foreseen that, unless reasonable steps were taken to prevent it, death to users could result.

The onus of proving culpa was on the State, which had to establish a failure by the accused to observe that degree of care which a reasonable man would have observed. The reasonable man is the diligens paterfamilias of Roman Law, the average prudent person, "that notional epitome of reasonable prudence", in the words of HOLMES JA in Peri-Urban Areas Health Board v. Munarin, 1965(3) SA 367 (A) at 373 F. The reasonable man is the embodiment of the social judgment of the Court, which applies "common morality and common sense to the activities of the common man".

(per .....

(per DIPLOCK LJ in Doughty vs. Turner Manufacturing Co Ltd, (1964) 1 QB 518 (CA) at 531). The criterion of liability for culpa in both civil and criminal cases is reasonable foreseeability. In a case of culpable homicide, the question is whether a diligens paterfamilias in the position of the accused would have foreseen the possibility of death resulting from his conduct. (See S v. Burger, 1975(4) SA 877(A) at 879 A; S v. Bernardus 1965(3) SA 287 (A)).

There was no direct evidence of the way in which Ryan met his death, and the trial court had to rely on inference from the evidence, mainly that of Norman. His evidence was not always clear and consistent,

and .....

and there are aspects of it which I do not fully understand. Nevertheless the explanation accepted at the trial, and not disputed in this Court, was that Ryan dived down to the bottom of the pool and seated himself on the floor with his back to the opening to the outlet pipe in such a way as to substantially block it with his posterior. The pressure of the water above him forced his buttocks into the pipe where he was trapped. The likelihood is that his seating himself at the opening was a deliberate, not an inadvertent, act.

In holding "that Joubert ought reasonably to have foreseen the possibility of at least serious injury", the magistrate relied on S v. Poole, 1975(1) SA 924 (N),which, he said, was "a case with corresponding facts".

Poole's .....

Poole's case was an appeal against a conviction for culpable homicide arising out of the death of a child in a public tidal pool at Scottburgh. It appeared that while the pool was being emptied, the child had become stuck in an outlet sump in the pool, and had drowned. On appeal counsel for the appellant conceded (rightly, in the view of the court) that on the facts of the case, harm, of the nature which occurred, was foreseeable as a possibility by the reasonable man.

I do not consider that case to be of any assistance in the decision of this appeal. In Kruger v. Coetzee 1966(2) SA 428 (A), HOLMES JA pointed out at 430G that a finding of culpa

"... must .....

"...must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

See also Rex v. Wells, 1949 (3) SA 83 (A) where CENTLIVRES JA said at 87-88:

"Decided cases are ... of value not for the facts but for the principles of law which they lay down. In this connection I cannot do better than quote the remarks of LORD FINLAY in Thomson v. Inland Revenue (1919, S.C. (H.L.) 10):

'No enquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together: the use of cases is for the proposition of law they contain, and it is no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case'."

It is .....

It is, therefore, to the facts of this case that regard must be had.

In regard to (1), it is apparent from Norman's evidence that the opening to the outlet pipe did not constitute a danger in the ordinary course. That is shown, too, by the fact that the pool was in operation for 17 years, during which it was used by about 300 000 people, and no untoward incident occurred.

But the occurrence has shown that, in the circumstances in which it took place there was a danger, namely, when the opening was effectively blocked by gluteal muscles of a size such as to fit into and plug the pipe.

In regard to (2), Joubert was admittedly in

control .....

control of the swimming pool to which the public was invited, and was clearly under a duty to take all reasonable steps to ensure that it was safe.

The crucial question arises in regard to (3): ought Joubert to have realised that the unguarded opening was dangerous - more specifically, ought he to have foreseen that, unless steps were taken to guard it, death could result to a user of the pool?

In considering this question, one must guard against what WILLIAMSON JA called "the insidious subconscious influence of ex post facto knowledge" (in S v. Mini, 1963 (3) SA 188 (A) at 196 E-F). Negligence is not established by showing merely that the occurrence happened (unless the

case is one where res ipsa loquitur), or by showing after it happened how it could have been prevented. The diligens paterfamilias does not have "prophetic foresight". (S v. Burger (supra) at 879 D). In Overseas Tankship (U.K.) Ltd v. Morts Dock and Engineering Co Ltd (The Wagon Mound) 1961 AC 388 (P.C.), VISCOUNT SIMONDS said at 424:

> "After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility."

It would seem that the only possible way in which death could have resulted from the fact that the opening was unguarded, was death by drowning. The fact that Ryan drowned, shows that death can be caused where there is a combination of circumstances such as that in the present case;

but .....

but from Norman's evidence it does not appear that there is any other way. I do not think that the diligens paterfamilias would have foreseen that freakish combination of circumstances. On the evidence, it was not reasonably foreseeable that a child would try, the buoyancy of the human body notwithstanding, to sit on the floor of the pool against the opening. (It may be that a child sitting across the opening with part of his buttocks on either side of it, would be pinned against the wall by the weight of the water above him, but this is speculation for which there is no support in the evidence.) In reply to a question by the magistrate, Norman said that he thought that it would appeal to a 9 or 10 year old child to go and sit on a hole that size - "it definitely would have appealed to me when I was a 9 or 10

year old child." In his judgment in the Court a quo, HEYNS J made a point of the fact that Joubert's attorney did not in cross-examination "place in issue the point of view expressed by the witness about the proclivity of a child to do something like that." In my opinion Norman's evidence on this point was not admissible: the question was one for the trial court, not for an engineer. Nor do I think that the diligens paterfamilias would have appreciated the magnitude of the forces involved, or the mechanism by which an accident of this kind could happen. Without such appreciation the possibility of death could not reasonably have been foreseen.

It can be accepted that, as the prosecutor put it to Joubert in cross-examination, children, being naturally inquisitive, "always poke their hands and feet and noses into

things .....

things that a normal person would not do." Nevertheless, it was not Norman's evidence that such conduct could result in death, and in my view that was not a reasonably foreseeable consequence.

During .....

During the argument the question was raised by a member of the Court - and counsel for the State adopted the point - whether a diligens paterfamilias, seeing the opening, would not have sought advice from an expert as to its potential danger - either from the firm which installed it or from an independant consultant. But even if that be accepted (I express no opinion upon the matter), I do not think that Joubert's failure to seek such advice was shown to be causally connected with Ryan's death: one does not know what the advice would have been.

In my view, therefore, the State failed to establish that Joubert or Bochris was guilty of culpable homicide.

Counsel .....

Counsel for the State did not seek convictions on any of the alternative counts in the event of the appeal against the conviction for culpable homicide being upheld, and it is accordingly unnecessary to deal with those counts.

The appeal is allowed. The convictions and sentences are set aside.

H C NICHOLAS, AJA

CORBETT, JA
BOTHA, JA
SMALBERGER, JA } Concur
VIVIER, JA