THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 411/07

In the matter between:

JACOBUS HENDRIK SAAYMAN Appellant

and

CHRISTIAAN ANDREAS VISSER Respondent

Coram: *Navsa, Ponnan JJA et Snyders AJA*

Date of hearing: **16 May 2008**
Date of delivery: **30 May 2008**

Summary: Liability of homeowner in relation to the shooting of a 16 year-old boy by a security guard stationed at the premises – test to determine negligence on part of homeowner – reliance on expertise of security company – in totality of circumstances homeowner held not liable.

Neutral citation: *Saayman v Visser* (411/07) [2008] ZASCA 71 (30 May 2008).

JUDGMENT

NAVSA JA

NAVSA JA:

[1] During the early hours of the morning of Saturday 13 February 1999, in a suburb in Kimberley, events unfolded that changed the life of sixteen year-old Gideon Saayman forever. He was shot in the back and the neck whilst in the immediate vicinity of the house of the respondent, Mr Christiaan Visser. Gideon was shot by a security guard, Mr Sylvester Morebudi, who had been stationed at Mr Visser's house at the latter's instance by Griekwa Security CC, a close corporation that provided security services to the public. The close corporation traded under the name Barn Owl Security. Mr Visser was a diamond digger and businessman who kept diamonds and other valuables at his home. He was away from home fairly regularly, sometimes for a month at a time, and required 24-hour protection for his wife and daughter who resided with him in the house. As a consequence of being shot Gideon sustained serious injuries. According to the particulars of claim Gideon's family had to relocate to Parow in the Western Cape to enable him to obtain the necessary medical treatment.

[2] This is an appeal against a judgment of the Kimberley High Court (Tlaletsi AJP), in terms of which the appellant's claim for damages against the respondent, both in his personal and in his representative capacity, as the father and the guardian of Gideon, was dismissed with costs. The other two defendants in the high court, Griekwa Security CC and Mr Morebudi, chose not to defend the action and were held to be jointly and severally liable for the damages sustained by the appellant but not for the latter's costs in relation to the trial on the merits.[1] The present appeal is before us with the leave of the court below.

[3] This case is a very sad and dramatic illustration of how steps taken by an increasingly desperate and hapless populace to protect their lives and homes against the crime wave in this country can have negative effects, particularly when it involves the use of firearms ─ in the present case Mr Morebudi used a Norinco 12-bore shotgun. It demonstrates how far the consequences of rampant crime extend and how easily life can be lost in South Africa. It also serves as a warning to those who advocate a resort to lethal force (irrespective of circumstances) to thwart the threat of crime, against the

[1] At the commencement of the trial the court below made an order in terms of Uniform rule 33(4) that the merits first be determined.

awful results of such force, that are unfortunately all too predictable. On the other hand, it should also serve to prompt government to harness every available resource, as a matter of pressing priority, to end the scourge of crime before confidence in our Constitutional order is lost or abandoned.

The Background

[4] During the night of Friday 12 February 1999, Gideon and his friend, Mr Winton Smith, attended a party at Gideon's home where they both consumed alcohol, if not copiously, then at least in substantial quantities. Mr Smith was 19 years old at the time. Shortly after midnight, after all the other partygoers had gone to sleep, the two youngsters went in search of further entertainment and, to that end, walked to a pub in the vicinity. They spent approximately half an hour at the pub, just conversing. There was however, not much 'action' at the pub and the two decided to return to their homes. As they made their way home, they passed Mr Visser's house and, in their inebriated state, decided to play a prank. Little did they know how costly this would prove. The prank was to consist of overturning a pot-plant located on the lawn in the front of the premises between the perimeter fence and the house. The fence was only partially constructed, the bars between the pillars not yet having being inserted.

[5] The two would-be pranksters entered the premises but found that they could not dislodge the heavy pot, with only the top part giving way to the force applied. Unsuccessful, they decided to leave. As they were departing they heard the sound of a firearm being discharged. They could not tell whence it came. In a panic they ran out of the premises and onto the public street. As they made their way along the pavement, another shot was fired. Gideon was struck and fell. Mr Smith stopped, turned around and saw Mr Morebudi at one of the motor gates. The former put his arms up in a gesture of surrender and Mr Morebudi then motioned him closer. Gideon, who was lying on the ground, appeared to be gurgling or choking. Mr Morebudi handcuffed Mr Smith and made him lie on his stomach on the ground.

[6] Mr Visser, who had been asleep in his house, was awoken by the gunshots. He proceeded to the front door of the house where he was met by Mr Morebudi. The latter reported to him that he had wounded one person and arrested another. The police were summoned and arrived. Mr Smith was transported to the police station and an ambulance took Gideon to hospital.

[7] Mr Morebudi had shot Gideon using a licensed shotgun issued to him by Griekwa Security. At the time of the shooting the street in front of the house was well-lit.

[8] It is common cause that in 1998, the year preceding the shooting, Mr Morebudi had been employed for the first time by Griekwa Security as a security guard to be deployed where clients required such a service. At the beginning of 1999, it was apparently agreed between all the security guards and Griekwa Security that the former would render services to the latter as independent contractors ─ at first blush this appears contrived but the result of the appeal is not affected thereby. This arrangement was in place at the time of the shooting.

[9] Griekwa Security had provided Mr Morebudi's services in terms of an oral agreement concluded during December 1998 between itself and Mr Visser. The close corporation had been approached by Mr Visser with a request that it provide an armed security guard on a 24-hour basis as protection for himself, his family and his assets. In terms of the contract Mr Visser did not have the right to nominate the particular guard to be deployed, nor did he have any say about the manner in which the security guard was to perform his duties. This was all in the province of Griekwa Security. In relation to the exercise of their duties, the security guards were all instructed to follow only such orders as emanated from the close corporation. Griekwa Security also required that any problems that a homeowner might experience with a security guard be taken up with them, rather than with the guard directly. The close corporation had in the past, without incident, provided Mr Visser with security services at another location near the Vaal River.

[10] In Mr Visser's response to a request for further particulars for trial he stated that, upon enquiry, he was informed by Griekwa Security that the security guards who would be employed at his home were indeed properly trained and were instructed in the use of firearms. Mr Visser testified in the court below that, during December 1998, when he concluded the agreement for the provision of security services at his home, he had asked whether the security guard who would be posted there was qualified. Mr Steven Hansen, on behalf of Griekwa Security, told him that the guard had training in the use of the firearm.[2] He had enquired because he was aware of the danger of a firearm being employed on his property.

[11] A document issued by an entity calling itself *Advanced Specialised Security Training* was produced at the trail, certifying that, on 10 October 1998 Mr Morebudi had received training in the use of a 9mm pistol and a Norinco 12-bore shotgun. Other related training received by Mr Morebudi only took place after the shooting incident. At the time of the shooting Griekwa Security was not registered, as required by legislation, with the then regulatory Board, nor was Mr Morebudi then properly qualified to be a security guard. Mr Visser was unaware of this. It is uncontested that Griekwa Security operated in the normal course, as would any entity that provided security services, and from Mr Visser's perspective there was nothing untoward in the manner in which it conducted its business.

[12] Mr Visser had no knowledge of the general tenor of the instructions issued to the guards by Griekwa Security nor of any specific instructions concerning the circumstances under which shooting would be justified. It is common cause that there were no signs at Mr Visser's home warning the public that an armed security guard was on duty.

---

[2] The following is the relevant part of the testimony:
'Al wat ek mnr Hansen gevra het, is die man bevoeg, toe sê hy die man het wel opleiding gehad om hierdie vuurwapen te hanteer.'

[13] At the time of the trial in the court below, the close corporation had no assets worth mentioning and Mr Morebudi was serving a term of imprisonment as a result of his conviction on a charge of attempted murder flowing from the events set out above. This explains, at least partially, why the action against the respondent was pursued and this appeal persisted with.

[14] The issue in this appeal is whether, in the circumstances set out above, Mr Visser is liable for what now appears to be accepted was the unlawful shooting of Gideon.

[15] It was contended on behalf of the appellant that to employ a security guard with a shotgun and live ammunition in a residential area is in itself the creation of a dangerous situation of which the respondent was aware. Counsel for the appellant submitted that a reasonable person in the position of Mr Visser would have foreseen the possibility of trespassers on the property and that they might be injured, and such person would have taken the necessary steps to guard against that eventuality. Counsel argued further that a reasonable person would have ensured that members of the public were alerted, by way of a prominent sign, that an armed security guard was present. Furthermore, that the area where the guard was stationed should have been adequately lit and that Mr Visser should have instructed Griekwa Security to ensure that the shotgun would first discharge at least two blanks and only thereafter, if circumstances so demanded, live ammunition. Thus, it was contended, the respondent should be liable for the injuries suffered by Gideon, even where, as here, Griekwa Security had provided security services as an independent contractor. In this regard the appellant relied on the decision in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A).

[16] The respondent contended that the application of the principles laid down in *Langley Fox* compelled the contrary conclusion. It was contended on behalf of Mr Visser that, when the agreement for the provision for security services was concluded, the parties could only have intended that a firearm would be used in circumstances that

justified it and that he was entitled to assume that the security guards would act accordingly.

[17] In the court below counsel for the appellant accepted that at the time of the shooting Griekwa Security had operated as an independent contractor at the instance of Mr Visser and had contended that the latter was liable for the damages sustained on the basis of *his own* negligence. That stance, particularly having regard to what is set out in para 9 above, rightly, did not change before us.

Conclusions

[18] The general rule of our law is that an employer is not responsible for the negligence or the wrongdoing of an independent contractor utilised by him/her.[3] A recognised exception is where the employer himself/herself has been negligent in regard to the conduct of the independent contractor which caused harm to a third party.[4] Such liability is not vicarious.[5] An employer is liable in circumstances where he/she has broken a duty he/she owed to those injured. In *Langley Fox* the following was stated:

'[I]n every case the answer to the question whether or not the duty arises must depend on all the facts.'[6]

---

[3] See *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 at 431-432 where the following appears:
'To hold an employer liable in a case where he has no say and no right of supervision and control would, in my opinion, be going further than is warranted by principle or authority.'

[4]See also Jonathan Burchell *Principles of Delict* (1993) p 227.
In *Dukes v Marthinusen* 1937 AD 12 at+ 17 an exception to this rule was discussed, both in English law and our own. Liability on the part of an employer would arise where the employer himself/herself has been negligent in regard to the conduct of the independent contractor which causes harm to the third party. In *Dukes* case, after an examination of English law on the subject, Stratford ACJ said the following (at 23):
'The English law on the subject as I have stated it to be is in complete accord with our own, both systems rest the rule as to the liability of an employer for any damage caused by work he authorises another to do upon the law of negligence.'
In relation to the question of determining whether there was a duty on the employer to take precautions to protect the public the following was said:
'The duty if it is to be inferred must arise from the nature of the work authorised taking into consideration all the circumstances of its execution such as, in particular, the place of such execution.'

[5]As indicated in the preceding paragraph vicarious liability was not contended for.

[6]At 9H.

[19] Under English law one situation in which an employer of an independent contractor would be liable for the wrongs of the latter is where the work performed is dangerous.[7] There are dicta in the *Dukes* case which tend to suggest that, whenever the work entails danger to the public, liability is almost inevitable. Goldstone AJA, in *Langley Fox*, after examining English cases on the

[7]In English law the exceptions to the principle that someone who employs an independent contractor to do work on his behalf is not in the ordinary way responsible for any tort committed by the contractor in the course of the execution of the work are set out in *Alcock v Wraith* CA (1991) 59 BLR 16 as cited in Hepple, Howarth & Matthews *Tort Cases & Materials* 5 ed (2000) p 1066:
'(a) Cases where the employer is under some statutory duty which he cannot delegate.
(b) Cases involving the withdrawal of support from neighbouring land.
(c) Cases involving the escape of fire.
(d) Cases involving the escape of substances, such as explosives which have been brought onto the land and which are likely to do damage if they escape; liability will attach under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330.
(e) Cases involving operations on the highway which may cause danger to persons using the highway.
(f) Cases involving non-delegable duties of an employer for the safety of his employees.
(g) Cases involving extra-hazardous acts.'

subject, and considering the *Dukes* case, stated the following:

'In my judgment, the correct approach to the liability of an employer for the negligence of an independent contractor is to apply the fundamental rule of our law that obliges a person to exercise that degree of care which the circumstances demand.'[8]

[20] Later in *Langley Fox* the following is stated:

'Whether the circumstances demand the exercise of care will depend upon proof that the employer owed the plaintiff a duty of care and that the damage suffered was not too remote.'[9]

[21] It is important to note that in our law the fact that the work was dangerous is only one of the factors to be taken into account in determining whether an employer would be personally negligent in regard to the harm caused to a third party by an independent contractor. That fact in itself would not invariably lead to liability.[10]

[22] After discussing *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A), which concerned the liability of the employer of an independent contractor for damages arising from the death of a third party who was injured in consequence of dangerous operations performed by the contractor, Goldstone AJA, in *Langley Fox*, came to the following conclusion:

'[I]n a case such as the present, there are three broad questions which must be asked, viz:

(1) would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,

(2) would a reasonable man have taken steps to guard against the danger? If so,

(3) were such steps duly taken in the case in question?'[11]

[23] Only where the answer to the first two questions is in the affirmative does a legal duty arise, the failure to comply with which can form the basis of liability.

---

[8] At 11E. See also Jonathan Burchell *Principles of Delict*, supra, at 228.
[9] At 11I.
[10] At 9H-11E.
[11] At 12H-J.

The following dictum in *Langley Fox* is important:

'It follows from the aforegoing that the existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend in each case upon the facts. It would be relevant to consider the nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and the independent contractor respectively; and the means available to the employer to avert the danger. This list is in no way meant to be exhaustive.'[12]

[24] In circumstances in which the breach of a duty is established it is often said that whilst the performance of the duties in terms of the contract between the employer and the independent contractor can be delegated the responsibility for the performance cannot be. The expression used is 'non-delegable duties'.[13]

[25] In answer to the first question referred to in para 22 above it appears to me to be clear that the risk of danger in employing an armed security guard on one's premises was reasonably foreseeable.

[26] In dealing with the second question it is necessary to consider that Mr Visser turned to a provider of security services to protect his family. There is no indication that there was anything in the manner in which Griekwa Security conducted or projected itself that would have put a reasonable person on his/her guard. There was nothing to indicate that it did not possess the necessary expertise or that it did not operate within the law. The following part of Mr Visser's testimony is relevant:

'Ek voel . . . ek het 'n maatskappy gehuur wat geregistreer is by die Raad, dit is, hy ken die wet en hy ken sy pligte. Ek ken nie die veiligheidswette en pligte nie.

Moet [ons] daaruit verstaan dat u u op hulle verlaat? --- Dit is heeltemal korrek.'

[27] It is clear that, mindful of the danger of firearms and their use, Mr Visser enquired whether the guards who would be posted had the necessary training in firearms. As stated earlier he was reassured in this regard. Furthermore, Mr Visser had previously used Griekwa Security's services at another location without incident.

---

[12] At 13A-C.

[13] See *Langley Fox* at 8A-J.

[28] At the time immediately prior to the shooting, when the security guard had to deal with the intruders, he was required to exercise what in 'modern' language would be described as a 'judgment call'. Mr Visser was asleep and unaware of the existence of a potentially dangerous situation and could therefore not intervene to prevent the harm that ensued.

[29] In *Veiera v Van Rensburg* 1953 (3) SA 647 (T) the court took into consideration that a reasonable homeowner would foresee that people might, from time to time come to the premises, some to find the way, some to visit and some to sell something. In that case liability for an attack by a vicious dog, kept by the owner to protect his wife and infant child, was in issue. The court had regard to a notice, warning about the presence of the dog and found that it was obscured and not in a place one would expect to find it. The court held that the notice was quite insufficient to protect the plaintiff and that the putting up of the notice was not a proper exercise of the duty of care. The court thus held the defendant liable for the damages suffered by a salesperson who had been attacked by the dog.

[30] A distinction between *Veiera* and the present case is that a vicious dog is not in the position of an independent contractor and is not called upon to exercise judgment. Griekwa Security was employed for its specialist knowledge concerning security arrangements and the protection of persons and property. The employment of an armed guard, particularly on the assumption that he/she is properly trained to deal with any situation that might develop is very different to the use of a fierce dog which the owner knows will attack trespassers as was the case in *Veiera*.[14]

[31] It is probably more common for individual households to contract armed response units rather than to have armed guards permanently stationed at their homes. Assuming for the moment that it can rightly be expected of a homeowner who has an armed security guard permanently on the premises to, at the very least, put up a sign warning the public at large of the presence of the armed guard, it is not at all clear that

[14]See 654H.

the harm in the present case would have been avoided. First, Gideon and Mr Smith were inebriated and no evidence was presented which showed that they were in a state to notice and/or understand any sign that might have been displayed. Although testifying that he had seen no warning sign Mr Smith did not say that, had a sign been displayed, they would definitely not have intruded upon the premises. Second, there was no evidence that they were familiar with the immediate vicinity in which the shooting took place or of how recently, if at all, they had previously passed Mr Visser's house ─ this would have addressed the question of whether the sign, if displayed, might have been noticed by either or both on a prior occasion. Third, considering that they were intent on playing a prank it is more probable than not that their state of mind was such that the sign might have been a spur rather than a deterring factor ─ they were clearly in an uninhibited frame of mind.

[32] Thus, if one were to conclude that Mr Visser was negligent in not displaying a sign warning the public about the presence of an armed guard, the conclusion that the consequences referred to above would have been avoided is unwarranted. If anything, all the pointers are to the contrary.

[33] Furthermore, I am not persuaded that the public should be informed of where exactly an armed security guard is positioned or that his position should be well-lit. It appears to me that this might well put the guard in danger against potential attackers and also put the occupants of the house at risk. It might simply encourage entry from another point of the premises. The submission on behalf of the appellant in this regard is, in my view, fallacious.

[34] The submission that an armed guard expecting to meet danger should as a matter of course first use blank ammunition before resorting to live ammunition is entirely without merit and not deserving of any further consideration.

[35] In assessing whether or not Mr Visser acted reasonably the following passage from Grueber's work on the *Lex Aquilia*, cited in *Fred Saber (Pty) Ltd v Franks* 1949 (1) SA 388 (A) at 405, is important[15]:

'[T]he conduct of the *diligens paterfamilias* implies only an average standard. No one can reasonably expect from a man that he should be possessed of qualities which are rarely to be found amongst men, or that he should use the utmost strength of which he is capable, or that he should be as cautious and careful as a man can possibly be. The standard is, however, an objective one. It is true the conduct of a *diligens paterfamilias* will vary, but it will vary in accordance with the circumstances of the case: the amount of the skill, strength, foresight will always be determined by the nature of the business or work to be done, and insofar as the standard is one and the same for everybody under the same circumstances.'

[36] In the present case Mr Visser contracted a security company which he was entitled to assume had the necessary expertise and that would operate within the confines of the law. He enquired about the proficiency of the security guards concerning the use of firearms. He was reassured. His past experiences with the close corporation must have been a further cause for reassurance. To have expected further enquiry and steps would be placing too heavy a burden on him and other homeowners in his position.

[37] The present litigation might have been avoided had Griekwa Security not been impecunious. Regrettably, what is set out above and the conclusion that must follow, does not provide comfort for Gideon and his parents. However, to land Mr Visser with liability in the circumstances of this case would not only be inequitable but would extend our law beyond sustainable parameters.

[15]This passage was also referred to by Botha JA in *Langley Fox*, supra, at 17D-F.

[38] For the reasons mentioned the following order is made:

The appeal is dismissed with costs.

_____
M S NAVSA
JUDGE OF APPEAL

CONCUR:

PONNAN JA
SNYDERS AJA