

THE POSSIBILITY OF A PRINCIPAL'S LIABILITY FOR THE DELICT OF AN INDEPENDENT CONTRACTOR

Saayman v Visser 2008 5 SA 312 (SCA)
Chartaprops 16 (Pty) Ltd v Silberman 2009 1 SA 265 (SCA)

1 Introduction

The well-known rule that an employer can be held liable for the delicts committed by his employee in the course and scope of the latter's employment is basically not applicable to the situation where a principal (mandator) contracts with an independent contractor to undertake a task and the latter, or his employees, in the process of executing the task then causes detriment in a wrongful and culpable way to a third party (*Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412; see also McKerron *The law of delict* (1971) 102; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 521; Burchell *Principles of delict* (1993) 227; McQuoid-Mason "Vicarious liability" 30 *LAWSA* (1st re-issue 2002) 190). McQuoid-Mason (*loc cit*) points out that the independent contractor is not to be dealt with on the same footing as an

employer, because “the independent contractor undertakes to carry out a specific piece of work (*locatio conductio operis*) and is not subject to the control or directions of his employer concerning the performance of such work”. (Although the old “control test” for distinguishing between an employee and an independent contractor is not the sole criterion for this purpose any more, control by someone who utilises the labour of another, or the lack of such control over the conduct of the active party, remains a very important factor in the process of determining whether one is dealing with an employee, or an independent contractor: *Van den Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 2 SA 242 (SCA) 258.)

In view of the above exposition one can easily understand why individuals or businesses opt to employ the services of an independent contractor, rather than allowing their own employees to do certain work, because it would appear that the risk of possible delictual liability is smaller in the event of the first scenario, should something go wrong in the process with the result that a third party suffers damage. However, in two recent judgments of the Supreme Court of Appeal it was again confirmed that such a practice does not necessarily eliminate the risk factor for the person employing the labour in question (*Saayman v Visser* 2008 5 SA 312 (SCA) and *Chartaprops 16 (Pty) Ltd v Silberman* 2009 1 SA 265 (SCA)).

2 The *Saayman* case

2.1 Facts and judgment

The defendant (respondent) contracted with a private security firm, Griekwa Security CC, to guard his residence. The plaintiff's (appellant's) 16-year old son who had been busy playing pranks on the defendant's property, was pursued by a security guard employed by Griekwa Security CC. The latter fired a shot at the boy in the street and in the process seriously wounded him. As the security guard himself was a man of straw, serving a sentence in gaol for attempted murder in consequence of his wrongful and culpable attack upon the plaintiff's son, and the security firm who employed him was financially very weak, the plaintiff decided to institute a claim for damages against the defendant in his capacity as a principal who had entered into a contractual relationship with the firm as an independent contractor. The court was called upon to decide whether the defendant was liable for the manifestly wrongful, negligent act of the security guard (316F).

The plaintiff's claim failed in the Kimberley High Court. In the Supreme Court of Appeal he was equally unsuccessful, as the court upheld the judgment of the court *a quo* (322C).

2.2 Critical evaluation

Navsa JA proceeded from the general proposition that the independent contractor's delict does not create vicarious liability on the part of the principal, but points out that, in conformity with English law, an important “exception” to this rule is acknowledged, namely, where “the employer himself/herself has been negligent in regard to the conduct of the independent contractor which caused harm to a third party” (317E–F). For this statement of the law he relies on the judgment of Stratford ACJ in *Dukes v Marthinusen* 1937 AD 12 17, where the court gave an indication of the circumstances which would justify a conclusion of the principal's negligence. The influence of the English law of negligence is clearly reflected in that old judgment (*ibid*), where the court decided on the presence or absence of negligence by referring to the possible existence and

breach of a duty (to take care): “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.” Furthermore, it is clear that should it indeed be found that the principal had himself been negligent in respect of the independent contractor’s injurious conduct, any liability on his part will not be vicarious in nature, but will flow from his own wrongful, culpable (negligent) conduct (which will normally be in the form of an omission) (317F–318A).

Two important older judgments which the court referred to – in which the present type of situation presented itself and in which the principal was found to have incurred delictual liability for the damage caused by the contractor – are *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) and *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A).

In the former case a pipe-layer in the employ of an independent contractor, who had been instructed to lay pipes for the principal in a deep trench, was killed when a brick wall, which was situated next to the trench in question, collapsed on him. In terms of the agreement between the principal (Peri-Urban Areas Health Board) and the independent contractor the board’s sewerage engineer remained in full control of the pipe-laying operation, which fact was later regarded as an important indication of the existence of a positive legal duty *vis-à-vis* parties like the deceased workman (372D–E). Furthermore, the actual knowledge of the situation of peril existing on the construction site on the part of the experts in the defendant’s employ also contributed to creating a duty on their part to take precautionary measures to avoid accidents (372G). Holmes JA experienced no difficulty in finding (375C–D) in favour of the claimant (the deceased’s widow), that these circumstances “brought about a situation in which the *diligens paterfamilias* would surely have guarded against the possibility of the foreseeable harm to the pipe-layer. In other words, there was then a duty of care, and the breach thereof was negligence entitling the widow to wages”. This judgment certainly accords with one’s feelings of equity and justice. To hold a principal personally liable for the delicts of an independent contractor (who can also be held liable), employed by him under these circumstances, does not create the risk of casting the net of delictual liability too wide.

In the latter case the facts were as follows: The defendant (appellant) had been occupied with construction work in the Johannesburg central business district. A large portion of the actual building had been put out on contract to subcontractors. One of the subcontractors was in the process of erecting a ceiling in a portion of a building extending over a public sidewalk. The plaintiff (respondent) was seriously injured when she hit her head against a wooden beam erected by the subcontractor. She elected not to institute legal proceedings against the negligent subcontractor, but proceeded to claim damages from the contractor (principal) who had appointed subcontractors. Her action was successful. In the course of his judgment Goldstone AJA lay down most valuable guidelines (12H–J) for judging whether there had been a possible negligent omission on the part of the principal:

“[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?”

According to Navsa JA (319D) positive answers to questions (1) and (2) afford an indication of the existence of a “legal duty” on the defendant’s part, whereas a negative answer to question (3) points to the fact that the legal duty in question has been breached – which is then a confirmation of the defendant’s negligence. It falls to be mentioned here that the application of this negligence test is for all practical purposes identical to the test which is prescribed in the leading case of *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F as a general test for establishing negligence (see Scott “Casino operator not liable for delictual act committed by one patron against another – *Tsogo Sun Holdings (Pty) Ltd v Quing-He Shan* 2006 6 SA 537 (SCA)” 2007 *THRHR* 501 505); however, the *Kruger* judgment is preferable on theoretical grounds, because the confusing “duty of care” concept does not appear in it.

The judge then applied this formula to the set of facts at hand. In respect of question (1) Navsa JA held that it had to be answered in the affirmative: the reasonable person would have foreseen as a reasonable possibility that a situation of risk was created by employing the services of an armed security guard (319G). Regarding question (2) the court found that there was nothing in the manner in which the security firm in question ran its business which would have put a reasonable person on the alert in order to take additional positive steps to prevent a third party from suffering detriment due to the conduct of the armed guard (319H). The negative answer to question (2) thus implied that no “duty of care” rested on Visser (the defendant) to act in a positive way to protect someone like the injured trespasser. In this context the argument was advanced on the plaintiff’s behalf that a reasonable person should at least have erected a notice to draw the attention of trespassers to the fact that an armed security guard was stationed on the premises (cf 320Dff). However, Navsa JA rejected this suggestion without further ado: To expect from the *diligens paterfamilias* to warn prospective trespassers of the precise location of an armed guard would indeed be counter-productive and could even pose a grave danger to the guard (321D–E). Even assuming, for argument’s sake, that the situation at hand pointed to the existence of a duty to place such notice on the premises, the court decided that it was highly improbable that the inebriated trespassers would have paid any attention to it; at its worst it could even have served as a further enticement to the pranksters to commit further transgressions (320H–321C). Seeing, thus, that no legal duty rested upon the defendant to effect steps to protect a trespasser like the plaintiff’s son, it is not clear why Navsa JA thereupon meticulously scrutinises the actions of the defendant (319H–320C 321F–322A), seemingly to arrive at an answer to question (3). The fact that the defendant took no additional steps to prevent loss to someone like the injured boy is of no relevance at all, seeing that no legal duty in this regard rested on him in the first place.

The practical effect of this judgment definitely accords with one’s sense of justice and all homeowners who make use of the services of private security firms can certainly feel relieved in taking cognisance of the following *dictum* (322A): “To have expected further enquiry and steps would be placing too heavy a burden on him and other homeowners in his position.”

3 The *Chartaprops* case

3.1 Facts and judgment

Mrs Silberman, the plaintiff (respondent), claimed damages from the owner and occupier of a shopping mall (*Chartaprops 16 (Pty) Ltd*, the first defendant (appellant)) and an independent contractor (*Advanced Cleaning*, the second

defendant (appellant)) who had contracted with the owner to supply cleaning services on the premises in question. She was injured when she fell to the floor after she had slipped on spillage from the cleaning apparatus belonging to the second defendant and operated by its employees. She averred that the employees of both the first and second defendants had been negligent in failing to wipe the spillage from the floor in an area to which the public had access.

In the Johannesburg High Court Boruchowitz J found both defendants to be jointly and severally liable for the plaintiff's damage. On appeal to the Supreme Court of Appeal a majority judgment was given in favour of the first appellant, whereas the second appellant's appeal was rejected, resulting in the latter having to bear the full burden of damages.

3 2 *Critical evaluation*

3 2 1 Preliminary observation

An interesting feature of this case is that the first judgment reported (viz that of Nugent JA) is a minority judgment, that is nowhere indicated as such – which omission would appear rather strange. Nugent JA dismissed the appeal of Char-taprops, the first appellant, but allowed the appeal of Advanced Cleaning, the second appellant (277H). This is in direct contrast with the majority judgment (of Ponnán, Scott and Maya JJA and Leach AJA) in terms of which the first appellant's appeal was successful, but that of the second appellant failed. Seeing that the majority judgment reflects the practical conclusions of the court in respect of the legal positions of the respective parties, I shall first touch on certain aspects of that judgment. Thereafter some remarks will be made concerning the minority judgment.

3 2 2 The majority judgment

Ponnán JA, delivering the majority judgment, commenced with the well-known statement that in terms of South African law a principal is normally not liable for the delicts of an independent contractor whose services he has employed (279A). He subsequently expresses his concern regarding a tendency, which has already given rise to much debate and controversy in English law, to remove the dividing line between the liability of an employer for the delicts of his employee, on the one hand, and the liability of a principal for the delicts of an independent contractor, on the other hand, resulting in a principal's full vicarious liability for his independent contractor's delicts (278Eff). He explained this tendency as being a result of an application of the legal construct of a "non-delegable (or personal) duty" (278E). This concept dates from the old English judgment of *Dalton v Angus* (1881) 6 AC 740 829 in which the court remarked that "a person causing something to be done, the doing of which casts upon him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor". This type of duty has to do with "a special responsibility or duty to see that care is taken" (*Kondis v State Transport Authority* (1984) 154 CLR 672 687). Ponnán JA accurately described the effect of employing this species of duty to take care in the law pertaining to the liability for delicts committed by independent contractors (278F): "Such a duty enables a plaintiff to outflank the general principle that a defendant is not vicariously responsible for the negligence of an independent contractor where the causative agent of the negligence relied on was not an employee of the defendant but an independent contractor."

After a thorough survey of English and Commonwealth sources in respect of the application of the doctrine of a non-delegable duty (278G–281G), as well as a reference to the judgments of Scott JA in *McIntosh v Premier, KwaZulu-Natal* 2008 6 SA 1 (SCA) para 12 (279A) and of Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) para 14 (279D) in which judgments timely warnings have been levelled against the erroneous application of the term “duty of care” in our law of delict, Ponnán JA in effect came to the conclusion that there is no rational basis for applying the vague concept of non-delegable duty in our law. He referred to the fact that the explanations afforded in the literature are vague and very general, in the sense that such a duty implies no more than the “existence of ‘some element’ that ‘makes it appropriate’ to impose on the defendant a duty to ensure that the safety of the person and property of others is preserved – a duty not discharged merely by securing an independent contractor” (281F–G, referring to the Australian case of *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 63). He reconciled himself (281G) with the conclusion drawn by Glanville Williams “Liability for independent contractors” 1956 *Cambridge LJ* 180 186 that the truth “seems to be that the cases are decided on no rational grounds, but depend merely on whether a judge is attracted to the language of nondelegable duty”. This rejection of a problematic concept of purely English origin is to be welcomed. Our law of delict has already suffered too much in consequence of the introduction of the English “duty to take care” concept in the sphere of our law pertaining to wrongfulness and negligence; one cringes at the further damage that could have followed upon the introduction of the concept on non-delegable duty into our law of delict.

Ponnán JA reiterated the court’s opinion that a definite distinction must be drawn between the vicarious liability of an employer for the civil wrongs of his employee, and the position of a principal who makes use of the services of an independent contractor. In the first place he pointed out that vicarious liability should be viewed with disfavour, because, as a form of strict liability, it flies in the face of the general principle of our law that fault forms the basis of delictual liability (281B). He referred to the accurate description by Fleming *The law of torts* (1998) 434 that holding a principal liable for the torts of an independent contractor would in most instances boil down to a “disguised form of vicarious liability under the fictitious guise of non-delegable duties” (281C).

His further explanation, based on a historical, sociological and pragmatic approach, offers a sound substantiation for the continuing observance in our law of the different legal positions of employers and principals of independent contractors (282A–C):

“It is unlikely that vicarious liability for servants would ever have developed if servants as a class had been capable of paying damages and costs. The historical rationale for imputing liability to a master, namely that they [*sic*] had deeper pockets, hardly applies, I dare say, to most modern contractors, who may in fact be wealthier than their principals. Where both principal and independent contractor are large firms or covered by insurance the incidence of liability may not matter much. But where the principal is an individual without insurance, the imposition of liability upon him may cause grave hardship. From the point of view of a plaintiff, the only case in which the liability of a principal is advantageous is where the independent contractor is unable to pay damages. Whether indeed this situation is sufficiently frequent to warrant provision being made for it must be open to doubt, particularly where it adds so greatly to the difficulty of the law. Courts have to be pragmatic and realistic, and have to take into account the wider implications of their findings on matters such as these.”

Subsequently Ponnan JA found that the correct approach to the principal's possible delictual liability for the negligent conduct of his independent contractor is "to apply the fundamental rule of our law that obliges a person to exercise that degree of care that the circumstances demand" (282I–283A). This entails no more than saying that one has to determine whether the principal himself has not perhaps been negligent in respect of the damage caused by the independent contractor (akin to the approach in *Saayman* above). The negligence test formulated by Goldstone JA in *Langley Fox*, which was applied in *Saayman*, as already pointed out (see 2 2 above), was also favourably considered by Ponnan JA (284E–H). Applying this test to the case under consideration, the court opined that one could not reasonably expect the first appellant who, in his capacity as owner and occupier of the premises in question, bore the responsibility of ensuring a safe environment to persons entering the premises, to do more than taking *reasonable* steps in order to protect members of the public from incurring foreseeable damage (285G–H). Although Ponnan JA did not express himself in such terms, he in fact applied the first two steps formulated by Goldstone JA in *Langley Fox* (see 2 2 above). The first appellant also did not fall foul of the third step of the *Langley Fox* test, seeing that he had appointed a competent independent contractor; under the circumstances he could not reasonably have been expected to be aware of the fact that the second appellant's performance would be defective: "Chartaprops, as a matter of fact, had taken the care which was incumbent on it to make the premises reasonably safe" (285H–I). Thus, the court had to conclude that the principal had not been negligent in respect of the damage caused by the employee of his independent contractor. It in fact decided that the damage complained of was caused solely "by the wrongful act or omission of the independent contractor, Advanced Cleaning, or its employees" (285F).

3 2 3 The minority judgment

In deciding on the position of the first appellant, Chartaprops, Nugent JA referred (269E) to the theoretical basis of vicarious liability, mentioning the useful collection of various explanations contained in the Stellenbosch LLM dissertation of Wicke under the title *Vicarious liability in modern South African law* (1997). One could add to this the doctoral thesis, accepted in Regensburg, of the same author, *Respondeat Superior – Haftung für Verrichtungsgehilfen in römischen, römisch-holländischen, englischen und südafrikanischen Recht* (2000).

Noteworthy is the court's strong assertion – after a survey of the English judgments in *Tarry v Ashton* (1876) 1 QB 314 and *Hardaker v Idle District Council* [1896] 1 QB 335, as well as the South African cases of *Colonial Mutual Life Assurance Society Ltd v MacDonald supra*, *Dukes v Marthinusen supra* and *Langley Fox Building Partnership (Pty) Ltd v De Valence supra* – that any liability on the part of the first appellant would not be vicarious in nature, but would arise "instead from the breach of the defendant's [viz first appellant's] own duty" (269H). (In this respect the minority judgment reflects the same approach taken by the majority (see 3 2 2 above); however, this is as far as any similarity between the two can be perceived.) This typical English-law formulation was then immediately explained as entailing no more than an application of the foreseeability tier of the *diligens paterfamilias* test formulated in the seminal judgment of *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–H. In view of the numerous recent warnings emanating from members of the bench of the selfsame

court (see eg *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27B–G; *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) 520H–521A; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 469B–F; *Trustees, Two Oceans Aquarium Trust v Kantley & Templer (Pty) Ltd* 2006 3 SA 138 (SCA) 144D–145D) against the application of terminology of English origin, like “duty of care” and “legal duty”, one may well ask why the “duty” construct in respect of the negligence test was applied here at all. The time-honoured test for negligence formulated so admirably by Holmes JA in *Kruger v Coetzee supra* has been applied consistently since 1966 in what must be hundreds of judgments, without a reference in the vast majority to the existence and breach of a duty (of care) as the crux of the test. The simple application of the foreseeability and preventability test would seem to be more than adequate to determine the existence or not of negligence under all conceivable circumstances (cf Neethling, Potgieter and Visser *The law of delict* (2006) 134–141; Van der Walt and Midgley *Principles of delict* (2005) 177–184; Van der Merwe and Olivier 129–130).

Nugent JA then proceeded from the position that the negligence issue needed to be dispensed with first (271H–273F). This is also borne out by his later statement that “negligence alone is not sufficient to give rise to liability for an omission: the omission must be wrongful as well” (273F). This later statement, which emerges with monotonous regularity in recent judgments of the Supreme Court of Appeal (see Scott “Railroad operator’s failure to protect passenger against attack on train not negligent – *Shabalala v Metrorail* 2008 3 SA 142 (SCA)” 2009 *THRHR* 156 158–159 for a recent appraisal and references to the case law and literature), is diametrically opposed to all the standard South African textbooks on the law of delict which teach that the question of negligence can only be resolved after wrongfulness has been ascertained, for, as Knobel (“Die volgorde waarin die delikselemente onregmatigheid en skuld bepaal moet word” 2008 *THRHR* 1 8) so lucidly remarked: “As skuld in wese ’n verwyte is, kan dit ’n mens net tref as jy iets verkeerd gedoen [onregmatig gehandel] het.” One can only hope that during the course of some future judgment in which this issue crops up again, the Supreme Court of Appeal would touch upon the reasons for brushing aside (or rather ignoring) the logical objection against ignoring the fact that wrongfulness falls to be determined anterior to fault (negligence).

In the process of determining negligence on the part of the first appellant, Nugent JA accorded great importance to the Australian case of *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 which can in fact be regarded as strong authority for accepting the notion of a non-delegable duty resting upon the principal of an independent contractor. Even after acknowledging in effect (273A–D) that South African judgments such as *Rhodes Fruit Farms Ltd v Cape Town City Council* 1968 3 SA 514 (C) and *Langley Fox supra* failed to implement an adherence to the construct of a non-delegable duty in the present context, Nugent JA would seem to be favourably inclined to introducing this strange English phenomenon into our law of delict, by expressing himself as follows (273E–F):

“But there are other cases, as I hope that I have made clear, in which a reasonable person in the position of the defendant is expected to ensure that reasonable precautions are taken to avoid harm. The defendant is free in those cases to appoint someone else to take those precautions but that by itself will not discharge the defendant’s duty. As pointed out in the passages from *Langley Fox* and *Kruger v*

Coetzee to which I referred earlier, the standard of care that is required of the defendant will be determined by the circumstances of the particular case.”

In the face of what has been remarked in respect of this aspect of the case above (see 3 2 2 above) one can heave a sigh of relief that the judge stood alone on this point.

A strange aspect of the minority judgment is that it touched on the wrongfulness question, even before application of the negligence test has been completed: one can accurately describe the treatment of the wrongfulness element by Nugent JA as an “intermezzo” between the application of the first (foreseeability) tier of that test, and the second (preventability) stage thereof. After having asserted that the first appellant’s omission (or that of his employees) should also be wrongful (273F; see above), Nugent JA appeared content that the omission in question had in fact conformed to the requirements for transforming a mere omission into an actionable one, by concluding (273I–274A):

“It can be taken to be settled that an action lies against a shopkeeper for negligently omitting to clear hazards from the shop floor and I think that applies as much to a person in control of a shopping mall in respect of the floors that are under its control. Indeed, that was admitted by Chartaprops in its plea.”

Proceeding with the second stage of the reasonable person test for negligence, it is abundantly clear why Nugent JA found that the first appellant had not taken adequate steps to protect the public against inherent dangers like the spillage in question: in view of his previous finding that the “duty” (representing the basis of the foreseeability stage of the negligence test) was non-delegable in nature, it follows logically that virtually no steps which had in fact been taken by it to protect the public against injury would have been found to be adequate. Therefore, the fact that the argument on behalf of Chartaprops that “it was a sufficient discharge of that duty [viz to take preventative steps] that it appointed an apparent competent cleaning service to keep the floors of the mall clean and checked on its performance from time to time” (274B) was rejected emphatically, comes as no surprise at all. Seeing that the first appellant had in fact not merely rested on its laurels and had taken additional steps to safeguard persons entering the premises (regular inspections by its own staff), one could rightly ask: What further steps would then have been regarded as adequate? It would appear that nothing less than the continued presence of an overseer from the staff of Chartaprops would have been regarded as adequate! (See the remarks 274G–275C.) This is certainly expecting too much and in reality entails ignoring one of the major factors usually considered in deciding whether there has been adherence to the so-called “preventability” tier of the negligence test, namely the cost and effort attaching to preventative steps (see Van der Walt and Midgley 122).

Finally, a few remarks will suffice in respect of Nugent JA’s finding that the omission on the part of the second appellant, Advanced Cleaning, or its employees, had not been actionable, due to a lack of wrongfulness. The omission in question was thus found to be a so-called “mere omission”. This followed after the judge had surveyed the case law (276B–277A) and then concluded: “I am not aware of any precedent that has pertinently considered and settled that question in the present context” (277B). In thus failing to find a precedent which is on all fours in respect of the factual situation in the case at hand (in spite of strong analogies present in a judgment like *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W)), the judge felt himself obliged to follow the lead of Brand JA in *Trustees, Two Oceans Aquarium Trust v Kantley &*

Templer (Pty) Ltd 145C–D, when confronted by a case “where a court is asked to accept that an omission is wrongful in the absence of precedent” and it is thus in effect “asked to extend delictual liability to a situation where none existed before”, by concluding that “in that event ‘[t]he crucial question . . . is whether there are any considerations of public or legal policy which require that extension’” (276F–G). Thus, ostensibly due to a lack of binding precedent and consequently armed with the authority to make a policy-orientated decision, Nugent JA was able to apply what he termed on a previous occasion “one variation of the general test for wrongfulness” (*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122B; see Scott 2009 *THRHR* 162 for a discussion and reference to further case law and literature), namely, that “an omission is wrongful only where the law recognises that an action would lie (that the person concerned had a legal duty not to be negligent)” (276A), to come to the conclusion (277G): “In my view no legal duty was owed towards the public by Advanced Cleaning or its employees to take reasonable steps to keep the floors safe and any omission to do so on their part is not actionable.” To say the least, such a finding is to the present writer’s mind highly unrealistic, if not dangerous if applied in all conceivable situations where the services of an independent contractor are employed. It is to be welcomed that the majority of the court found itself unable to be aligned with such a finding.

4 Conclusion

Following from our discussion of the two judgments it would appear that our courts maintain the healthy difference between an employer’s vicarious liability for the delicts of his employee on the one hand, and a principal’s possible liability for the damage flowing from the culpable conduct of his independent contractor, on the other hand. In the process our law of delict was saved from the introduction of the unpalatable concept of a non-delegable duty on the part of a principal which has contracted with an independent contractor to do work that entails a situation of potential danger to third parties, which concept was in effect strongly propagated by Nugent JA in his minority judgment in the *Chartaprops* case. It is to be hoped that any effort to re-introduce this concept – which will most certainly destroy the healthy difference in the legal position of an employer and a principal of an independent contractor where the latter has caused damage to third parties in the execution of his obligations under the contract of *locatio conductio operis* – has finally been laid to rest. However, as a review of some of the older cases has revealed, this does not imply that a principal employing the labour of an independent contractor can under all circumstances “rest on his laurels” after the initial act of entering into a contract of service with such contractor.

It would, for instance, be very unwise to employ the services of the first available security firm to guard your premises, simply because it is the first to be listed in the telephone directory, or of a firm which has by far the cheapest rates, for that reason alone, or to close your eyes to the fact that the firm you are contemplating to appoint has an extremely bad reputation because of the inferior quality of training of its security personnel, or by reason of the fact that its guards have a tendency to apply maximum force under all circumstances, even where a perceived threat is insignificant. It will, likewise, not be wise to contract with an undertaking that offers the cheapest cleaning services, when such firm has a bad reputation due to the fact that its workers are untrained and in fact hired on a day-to-day basis. One need not stretch the imagination too far to

realise that the type of conduct on the part of a prospective principal, sketched in the above examples, is not indicative of the conduct of a reasonable person and would as such probably form the basis of a finding of negligence on the part of a principal in respect of damage caused by the employees of the independent contractor in question, when it is evident that the principal's unreasonable (wrongful) omission to acquaint himself with the quality of service of the contractor and/or his failure to take additional steps to protect third parties against possible damage, can in fact be regarded as one of the causes of a third party's damage. In such an event the principal will at least be jointly and severally liable in delict *vis-à-vis* any third party who has suffered damage. Should it then appear that the person responsible for causing the detriment or his employer, the independent contractor, are men of straw, it would entail that the principal will have to foot the bill for the entire amount of damages. The fact that he will be able to recoup a part of such amount by utilising his right of recourse against the other parties (the independent contractor and the employee in question) can barely be regarded as a consolation.

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