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)

1 Introduction

In this judgment Harms JA applied the ordinary principles of delictual liability to a situation which has not yet arisen for decision by our courts. Although the index of the law report in question announces this case as dealing with vicarious liability – probably as a result of the judge's reference to the danger of creating "a new class of virtually limitless vicarious liability" (540F) – it essentially touches the question of the appellant's (defendant's) personal liability, albeit in a situation where someone else allegedly caused harm directly in a wrongful and culpable way. The principles of vicarious liability never arose for application and/or evaluation.

2 Facts

The appellant was the operator of a casino of which Mr Shan (the plaintiff/ respondent) was a patron. While the latter was in the process of delivering goods to the casino complex in question, his wife, who had accompanied him, started gambling in the VIP section. She became entangled in a heated argument with the wife of a certain Mr Shao, an alleged loan shark, to whom Mr Shan owed money. Thereupon Shan arrived on the scene and became embroiled in the same argument. After the security personnel had defused the situation, Shan and his wife first got involved in a marital spat and thereafter Shan confronted Shao. After Shao had uttered death threats to Shan, the latter invited Shao outside in order to get into a physical altercation. The confrontation ended outdoors when Shao fired three shots at Shan, wounding him seriously.

Shao, a regular patron of the casino, had earlier that evening entered the casino through the VIP entrance. At the entrance he had been asked by security guards whether he was in possession of a firearm. He answered in the negative, in the process lifting his jacket to indicate such, although he in fact carried a concealed weapon.

Although Shao, who was charged with attempted murder, undertook in a plea agreement to pay R200 000 to Shan as compensation, the latter preferred to claim the full amount of his damages (R560 000) from Tsogo Sun Holdings in the Transvaal Provincial Division. The basis of the plaintiff's action was that the defendant, as a casino operator, owed all *invitees*, (viz persons entering premises "in pursuance of some business or material interest common to him and the occupier; for example, a customer": McKerron *The law of delict* (1971) 242; Harms JA emphatically rejected this terminology, stating that it never formed part of our law and has even been abandoned in common-law jurisdictions: 539C) a legal duty to take reasonable steps to ensure their safety on the premises; that it was reasonably foreseeable that one gambler could harm other gamblers; that the security personnel failed to search Shao properly, which enabled him to enter the playing area with a firearm; and that this failure was causally linked to the shooting of the plaintiff (see 539C–D).

3 Judgment

3 1 The court a quo

Bosielo J handed down a judgment in favour of the plaintiff, declaring that the defendant was liable to compensate all the plaintiff's damage caused by the shooting, although the issue of *quantum* was not disposed of at that stage (538F–G). It would appear that some difficulty was experienced during the subsequent appeal to fathom the precise reasons for this judgment. Harms JA relied on the fact that "[c]ounsel are agreed" as to the High Court's reasoning before paraphrasing it in his own words. The gist of this paraphrasing is as follows: (1) As a result of an earlier armed robbery, security personnel, issued with metal detectors, were posted at all entrances with specific instructions to prevent persons from entering with firearms. (2) This proved clearly that the defendant was fully aware of the grave risk posed by patrons who enter with such arms. (3) The failure of security guards to body-search Shao constituted a breach of the security company's contractual obligations towards the defendant, but the latter remains liable for the negligence of its security contractor. (4) The omission of the security personnel was negligent under the prevailing circumstances. (5) "'Given the peculiar circumstances of the case', the defendant owed everyone 'at or inside the casino a duty of care.'" (6) The risk of harm was clearly foreseeable.

3 2 The Supreme Court of Appeal

In rejecting the judgment of Bosielo J, Harms JA held that the relevant conduct of the appellant constituted an omission (540A), but that no breach of a legal duty was committed (540F). In essence this amounted to a finding that no wrongfulness had been established on the appellant's part. In addition, Harms JA found that the appellant's conduct had not been negligent (540G–541F). In conclusion he also held that legal causation had not been established (541G–542E). The appeal was thus upheld and the order of the Transvaal Provincial Division amended to one of absolution from the instance with costs.

4 Critical evaluation

4 1 Introduction

On the face of it, this judgment of the Supreme Court of Appeal seems unremarkable. However, several points are worthy of comment. In a sense one could perhaps liken Harms JA's approach as being akin to swatting a fly with a 4 lb hammer (if one may use outdated, but well-known terminology): a finding of a lack of wrongfulness alone would have "done the trick" for the appellant. However, he decided also to test the facts against the principles of another two elements which are essential for concluding that delictual liability exists in a given case, namely negligence and legal causation.

4 2 The wrongfulness issue

It is heartening, from a theoretical point of view, that Harms JA commences his *ratio decidendi* by criticising the court *a quo*'s reference to the "duty of care" doctrine (539H). This is consistent with the same judge's true approach in the recent case of *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 1 SA 451 (SCA) 469B where he opined that "to formulate the issue in terms of a 'duty of care' may lead one astray'". He specifically

referred to the lower court's "falling into the quagmire of the [English] 'duty of care' doctrine by failing to distinguish clearly between the different requirements for (elements of) delictual liability", which poses the particular danger of the elements of wrongfulness and negligence being confused (539H), as evidenced by many previous judgments, even of the Supreme Court of Appeal (see the recent reference to case law in this context by Neethling and Potgieter 2006 *Journal of South African Law* 609 611ff; for academic criticism of the application of the duty of care doctrine, see Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afikaanse Reg* (1989) 129–130; Neethling, Potgieter and Visser *The law of delict* (2006) 137–138); see Boberg *The law of delict – Aquilian liability* (1984) 35–36 for a survey of older literature on this aspect).

Harms JA proceeded from the finding (5) of the court *a quo*, declaring it to be somewhat baffling (539I):

> "How can the (unidentified) peculiar circumstances give rise to a general duty to all and sundry and, one may fairly ask, what is the scope of the duty? The owner or occupier of property, no doubt, has a legal duty to ensure that those whose presence can reasonably be anticipated on the property are not harmed *by the condition of the property or a construction on the* premises" (italics supplied).

This *dictum* is substantiated by a reference to Van der Walt and Midgley "Delict" 8(1) *LAWSA* (2005) para 76 (which publication is an identical version of *Principles of delict*) where the authors discuss the legal position of an occupier/owner in respect of trespassers. Approaching the problem in a more general fashion, I would suggest that the principles pertaining to actionable omissions are even more applicable: Harms JA in fact described the nature of the question in this instance as "a clear case of an omission on the part of Tsogo" (540A). It is well-known that the determination of wrongfulness in the case of an omission hinges on the presence and breach of a legal duty to take positive steps to prevent harm from occurring to another. On the basis of the *boni mores* or legal convictions of the community, that is, public policy, several concrete rules have been developed over a vast period of time to identify factors which may indicate that a legal duty to act positively existed in a specific instance. Neethling, Potgieter and Visser 52–68 identify no less than seven such factors, ranging from the ancient *omissio per commissionem* to the "creation of the impression that the interests of a third party will be protected".

The crystallised factor which on face value would seem to suit our case best, is that of the control of a dangerous object, the rules of which provide that the occupier of property or a building where a dangerous condition exists, has a legal duty to prevent injury to persons entering those premises or that building (Neethling, Potgieter and Visser 57; Van der Walt and Midgley 86). However, in the case at hand the plaintiff was not injured due to a dangerous condition inherent in the property or building, which is a requirement for the application of this factor (see the italicised phrase at the end of the previous quotation), but by the conduct "by a third and unrelated party" (540A). The fact that Tsogo's omission does not fall into one of the recognised categories does not imply that such omission is to be regarded as a mere omission of which the law takes no cognisance, and thus not actionable. What happens now is that the *boni mores* test for wrongfulness kicks in as an independent test: the legal convictions of the community are applied as a yardstick to ascertain the existence or absence of a duty to have taken precautionary measures on the part of the occupier owner (cf Neethling, Potgieter and Visser 41ff). This is precisely the way in which Harms JA went to work, although he did not describe the process just explained. The

following *dictum* from the judgment clearly establishes the correctness of such evaluation of the judge's method (540A–B):

> "The question is, what legal duty did Tsogo have *vis-à-vis* a patron (in the position of Shan), to protect him from harm by another patron who uses the same facilities? Put differently, what are the public policy considerations that require of an owner or occupier of business premises to protect 'clients' against possible assaults by other 'clients' by, for instance, preventing other 'clients' from carrying weapons onto the property? Policy considerations must require that the plaintiff should be entitled to be recompensed by the defendant for the loss caused by a third party before liability can be imposed."

The facts were then scrutinised in the process of applying public policy considerations (the *boni mores* test) in order to establish the presence or absence of a duty on the appellant to have protected the plaintiff from the harm which he had suffered. Harms JA emphatically rejected the occurrence of an earlier armed robbery by a gang of robbers as an indicator that such duty existed: would that be the case, it would imply that every owner or occupier of a facility open to the public, which has been subjected to an armed robbery, has the duty to have every single person entering upon such property searched – this would apply to facilities such as banks, petrol service stations, small shops and even trains, buses and taxis (540E). Harms JA then declared that courts have to be pragmatic and realistic and thereupon made a finding that it would be asking too much of an owner or occupier to burden him with such a duty of protection (540F–G).

On the face of it, it would seem that this is a case where the costs and effort to take preventative steps to avert the harm in question, as well as the degree of probability of the success of preventative measures – although not specifically referred to as considerations – played a crucial role in the court's decision (see eg *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 361 362A; Neethling, Potgieter and Visser 35). However, on closer consideration one realises that the appellant had in fact taken *all the necessary realistic positive steps* to protect its patrons – it employed an independent security contractor to man all entrances to be on the look-out for possible dangers, like guests entering with firearms. Surely, a failure to implement the labour of such a specialist agency after having suffered an armed robbery would have been indicative of a breach of a duty towards its patrons. However, this was not the case at all.

Only if one accepts that the appellant is vicariously liable for the acts of employees of an independent contractor working for him, does Harms JA's finding in this context make real sense. It is nowhere stated in the judgment of the Supreme Court of Appeal that the appellant had possibly incurred vicarious liability for the conduct of the security company's employees on the basis of the multi-faceted test expounded in a case like *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 3 SA 17 (SCA). In the court *a quo*, according to the paraphrasing of Harms JA (finding (3) – see para 3 1 above), Bosielo J simply accepted that the defendant was liable for the negligence of its security contractor. By implication Harms JA goes even further: he essentially evaluates the appellant's conduct (omission) through the actions of the security contractor's personnel, *as if they were indeed in the employ of the appellant itself*. The confusion is further exacerbated when Harms JA criticises the trial court's finding by stating that "[b]y its judgment, the High Court created a new class of virtually limitless vicarious liability" (540F). The only logical explanation for this phrase is that "vicarious liability" here refers to the liability of the appellant for the conduct of a patron (*in casu* Shao), which is neither an

employee, nor an independent contractor, of the appellant. However, from the facts of this case it is, patent that such vicarious liability was never in issue; what was in issue, is the personal liability of the appellant company for its possible wrongful, culpable omission. It is thus to be lamented that the term "vicarious liability" was employed in this context at all. It is simply not applicable and creates unnecessary confusion.

4 3 The negligence issue

Having concluded that wrongful conduct had been lacking on the part of the appellant, Harms JA allowed the appeal (540G). This accords with the well-known principle that "if any one (or more) of these elements [of delict] is missing, there is no question of a delict and consequently, no liability" (Neethling, Potgieter and Visser 4; see also *Herschel v Mrupe* 1954 3 SA 464 (A) 490; *Gouda Boerdery BK v Transnet* 2005 5 SA 490 (SCA) 498G). One was thus rather startled when the judge continued to say that another reason why the respondent should not have been successful, was the absence of negligence on the appellant's part (540G–H). It is noteworthy that he refrained from saying that this would be the case, should the court be wrong in its finding that there was no wrongful omission on the appellant's part. However, to my mind the consideration of the applicability of negligence principles by the judge can only be logically explained if one assumes that wrongful conduct *was* established on the appellant's part. (There is ample evidence in our case law that a finding of wrongfulness is a prerequisite for establishing negligence on a defendant's part: see eg *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 441E–F; Van der Walt and Midgley 155.) In addition, seeing that a finding was reached on the appellant's non-liability due to a lack of wrongfulness, the treatment of negligence (as well as legal causation) can at most be regarded as constituting an *obiter dictum*.

In testing for negligence, Harms JA took as his point of departure the classic test for negligence, as formulated by Holmes JA in *Kruger v Coetzee* 1966 2 SA 428 (A)430E–F). It is not an exaggeration to declare that this judgment is quoted in virtually all cases dealing with negligence – its correctness is above reproach. This test requires that one asks whether the harm in question would reasonably have been foreseen by the *diligens paterfamilias* standing in the defendant's shoes. In the event of a *positive answer*, the second enquiry is whether the reasonable person would have taken reasonable steps to prevent the harm. Should this enquiry also yield a positive answer, the final issue is whether the defendant in fact failed to take those steps. Only when this question is answered affirmatively, has negligence been established. Students understand this best when one teaches that the three questions posed in the *Kruger v Coetzee* formulation of the negligence test must yield three "yes" answers for a finding of negligence.

Harms JA had no difficulty in concluding that the harm in the present case had not been foreseeable in terms of the first stage of the negligence test (540I–541B). The answer to the first question was thus a firm "no". It is thus rather perplexing to find the judge spending time on establishing that the harm was not preventable in light of the fact that "the steps taken by Tsogo were reasonable" (541B). Surely, this is only relevant if he would have found that the harm had been reasonably foreseeable in the first place! Maybe one should assume, for reasons of logic, that the judge tacitly assumed that his finding on the reasonableness of

the steps taken by the appellant rested upon accepting, for argument's sake, that he had been wrong in his finding on the first stage of the negligence test!

One can only agree with his final verdict in the context of negligence, that is, that the alleged breach of contract by the security personnel is not tantamount to negligent behaviour of the appellant *vis-à-vis* the respondent. (541F).

4 4 The causation issue

Finally, Harms JA held that legal causation had also not been established. In view of the criticism expressed above against the judge's enquiry into negligence, one has to conclude that the enquiry into legal causation was also superfluous. The issue of legal causation had in fact already been dealt with by the judge, when he found wrongfulness (and negligence) to be absent on the appellant's part. This position is stated very lucidly by Neethling, Potgieter and Visser (172–173):

> "Normally legal causation is only problematic where a chain of consecutive or remote consequences results from the wrongdoer's conduct, and where it is alleged that he should not be held legally responsible for *all* the consequences . . . [T]he liability of an actor who in fact causes damage, but who does not act wrongfully, or who acts wrongfully but not negligently, is 'limited' by (the absence of) the elements of wrongfulness and fault respectively. However, legal causation as an independent element arises specifically where it appears that the wrongdoer's conduct was wrongful and culpable with reference to at least *certain* consequences (and that the consequences concerned should, in addition, be imputed to him), but where *additional* consequences ("ulterior harm") result and the question arises whether he should be liable for those *additional* consequences."

From the above it is submitted that the question of legal causation should never have been treated in this case at all. The judge's finding that legal causation had not been established (541G) – which was probably made *ex abundanti cautela*, in the same fashion as he had decided upon the issue of a lack of negligence – is to be expected. One may ask: what would have been the position if he did in fact find legal causation to be present? Surely, the lack of wrongfulness (and negligence) would have made such "legal causation" irrelevant, seeing that no delictual liability can arise in the absence of even one delictual "element".

5 Conclusion

The *ratio decidendi* of this judgment will in future be useful in the intricate process of establishing the presence or absence of a legal duty to act positively and whether a breach of such duty occurred or not. It will thus be a valuable addition to our case law in the realm of wrongfulness in delict. However, in view of the superfluous nature of the findings on negligence and legal causation, it is to be expected that it will at most contribute to the body of *obiter dicta* in those fields.

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