

CASE STUDY:

NEGLIGENCE, LEGAL LIABILITY & THIRD PARTY CONTRACTORS



In a recent decision in the Supreme Court of Appeal, Viv's Tippers (Edms) Bpk vs. Pha Phama Staff Services (Edms) Bpk 2010 (4) SA 455 (SCA), the Court had to determine whether a third party (Pha Phama) were indeed liable through delict (wrongful negligence) for the financial loss of Viv's Tippers.

The facts of the case were as follows:

The appellant, Viv's Tippers (Edms) Bpk (Viv's Tippers) lets trucks to construction firms. In September 2004 it let several trucks to Lone Rock Construction (Pty) Ltd (Lone Rock) which was carrying out construction works on a site at Kibler Park, Johannesburg.

The site was guarded by security guards employed by the respondent, Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security (Pha Phama) in terms of a contract between Lone Rock and Pha Phama. Viv's Tippers was aware of the security provided. The evidence of Mr Viviers, a director of Viv's Tippers, was that it was a term of its contract with Lone Rock that the site should be secured.

There was a long weekend from 23 to 26 September 2004. A Mercedes Benz truck, belonging to Viv's Tippers, was parked on the site, which was enclosed, and which could be entered only through a locked gate.

A security guard employed by Pha Phama was on duty. Two men arrived at the site on Sunday 26 September and presented a letter to the guard, purporting to be from a firm of truck repairers.

I shall deal with the terms of the letter more fully when dealing with the question whether the security guard acted negligently. In essence it stated that mechanics would be sent to the site on that date to repair the diesel pump of the truck in question, for which the vehicle registration number was given.

The letter also stated that while the truck would be fixed on site, the mechanics would test drive it. The guard allowed the men to drive the truck away from the site – and it was never seen again.

Viv's Tippers instituted an action in delict against Pha Phama claiming the value of the truck (which was agreed), contending that as owner of the stolen truck it had suffered loss as a result of the theft; that Pha Phama was vicariously liable for the conduct of the security guard; and that Pha Phama owed it a legal duty, rendering it liable for the loss.

Pha Phama denied liability on the basis that it had no legal duty and that even if it did have, the guard was not negligent.

Du Plessis J dismissed the claim finding that there was no legal duty on Pha Phama towards external parties and that the guard had not been negligent.

This decision raises some interesting questions, for instance:

1. What would be the case if it was a person that was injured on a site?
2. Is the third party contractor still not liable?
3. What if wrongful negligence can be proven?
4. Would an indemnity clause in the contract protect the contractor from liability as it did in the above case?

A recent decision in *Chartaprops 16 (Pty) Ltd and Another v Silberman (300/07) [2008] ZASCA 115; 2009 (1) SA 265 (SCA) (25 September 2008)* should answer these questions.

In this case the facts were as follows:

The respondent in this appeal, Mrs Silberman, visited a shopping mall in Johannesburg. In one of the passageways of the mall was a pool of slippery substance (what the substance was has not been established) that had been spilt on the floor.

Oblivious to its presence Mrs Silberman slipped on the substance and was injured.

The shopping mall was owned by and under the control of the first appellant (Chartaprops), which had contracted with the second appellant (Advanced Cleaning) to keep the floors of the shopping mall clean.

Mrs Silberman sued both appellants in the High Court at Johannesburg for the recovery of her damages. The action was tried by Boruchowitz J who held both appellants jointly and severally liable (the amount of the damages has yet to be determined) but granted them leave to appeal to this court.

Precisely how the substance came to be on the floor has not been established. It is possible that it was spilt by one of the cleaners but it might just as well have been spilt by a member of the public.

The complaint against the appellants is not that they, or those for whose conduct they are legally responsible, created the hazard. The complaint is that they or their employees negligently omitted to detect and remove the hazard and that the respondents are liable for the consequences of the omission.

According to the decision, Chartaprops16 had a duty to provide a safe and healthy environment for its shoppers. Therefore it had to take steps to prevent harm to its customers. Chartaprops16 therefore had to conduct supervision of the contractor to exempt itself from liability.

Chartaprops16 could be held liable for the injury based on the following grounds:

1. Its duty to the public to provide safe and healthy shopping premises,
2. Vicarious Liability

As far as point one is concerned:

The Appeal Court distinguished between 2 situations:

- Where the duty had to be accompanied by the performance of actual actions to discharge the property owners from liability, such as was the case in Langley Fox Building Partnership (Pty) Ltd v de Valence 1991 (1) SA 1 (A) 8F-H, due to the inherent dangers associated with a specific job, and
- a situation where only the fact that the property owners reasonably contracted a competent contractor to perform the duties for them, would be sufficient, as was the case in Rhodes Fruit Farms Ltd vs. Cape Town City Council 1968 (3) SA 514 (C) at 519. This option would only apply in circumstances where the work was of a routine nature and not inherently dangerous.

The Appeal Court ruled that Chartaprops16 was not liable for damages due to the fact that the employees of Chartaprops16 acted as a **reasonable man** would in the circumstances, namely having regular meetings with the cleaning company, and doing the necessary inspections, to try and avoid incidents from happening.

The Appeal Court was of the opinion that vicarious liability for the incident as a basis for liability for Chartaprops16 was not applicable, due to the decision in Colonial Mutual Life Assurance Society Ltd vs. McDonald 2 1931 AD 412 in which the head note reads as follows:

‘A principal is liable for the acts of his agent where the agent is a servant but not where the agent is a contractor, sub-contractor or the servant of a contractor or sub-contractor.’

There must therefore be a special relationship between principal and contractor for vicarious liability to apply,

eg. Employer/employee or principal/representative.

In this case there was no such special relationship between Chartaprops16 and the contractor, only a normal contract for the cleaning of the floors.

Chartaprops16 was therefore declared not liable for the incident.

Advanced Cleaning, on the other hand, was found liable for the injuries sustained by the plaintiff. Whether the staff of Advanced cleaning did not follow company procedures or were negligent, is irrelevant, the fact is the potential hazard was not identified and mitigated in time.

Nugent JA in his verdict in par 47 states “Neither the terms of Advanced Cleaning’s engagement , nor the terms of its contract with Chartaprops, can operate to discharge it from a legal duty to persons who are strangers to those contracts, nor can they directly determine what it must do to satisfy its duty to such persons. That duty is cast upon it by law, not because it made a contract, but because it entered upon the work.”

In conclusion, the difference between the 2 cases should be clear now. In the first case, the security company could only be held responsible to the third party, if negligence could be proven. Also it was able to absolve itself from liability from the site owners, by the use of indemnity clauses.

In the second case, the contractor was held liable, whether it was negligent or not, because the **duty of care was placed on it by law**, and it could not be limited or delegated by the use of indemnity clauses.

“A principal is liable for the acts of his agent where the agent is a servant but not where the agent is a contractor, sub-contractor or the servant of a contractor or sub-contractor.”



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