



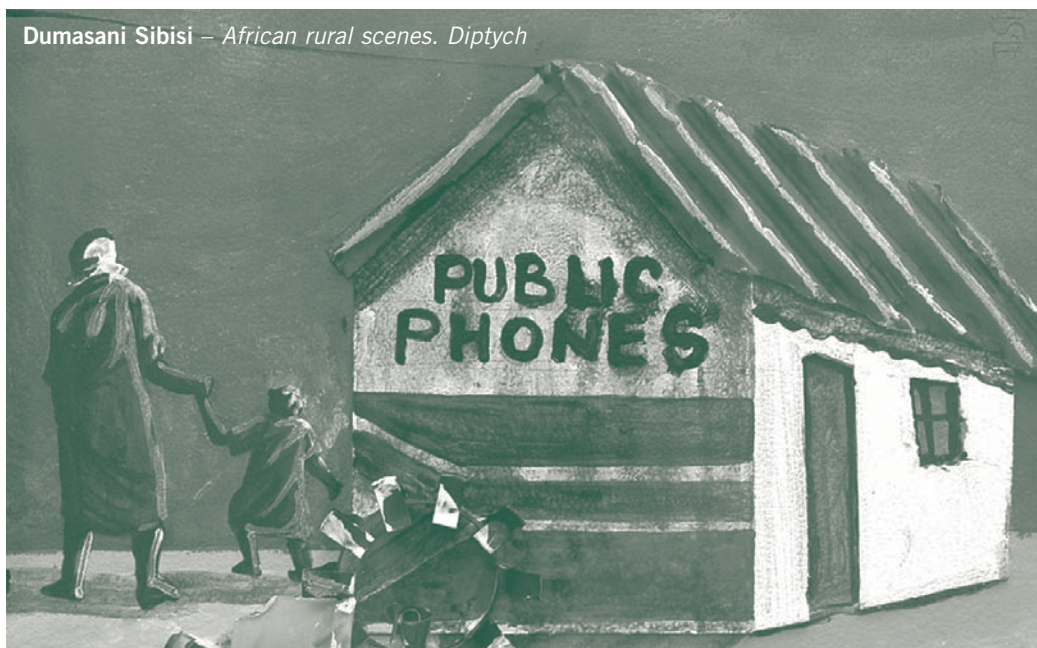
BRINK COHEN LE ROUX

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Dumasani Sibisi – African rural scenes. Diptych



Insurance – myths, misconceptions and pitfalls

Assume that you are suing me for R10 000 in respect of damages (financial loss) that I caused you when I negligently reversed into your car and dented the bodywork.

Assume that I happen to learn that you are fully insured against such damage.

Can I now say – I don't owe you anything because you haven't suffered any damages, as you are covered by insurance.

In law, this does not amount to a defence to your claim.

The law holds that, from my point of view, the fact that you had taken out insurance is *res inter alios acta*, meaning an arrangement entered into between other people. Or to express it more loosely, the fact that you are insured is your private affair, and confers no benefit on me.

A CURIOUS HIGH COURT JUDGMENT

A rather curious case in this regard recently came before the Eastern Cape High Court in the matter of **CDK Sekuriteit CC v Cookhouse Service Station CC (case 213/2007)**.

Cookhouse Service Station CC carried on the business of a service and filling station at

Cookhouse. In 1999, it entered into an agreement with CDK Sekuriteit CC, in terms of which the latter would transport the service station's cash takings to a bank in nearby Somerset East.

The security company duly collected some R43 000 in cash and cheques from the service station. En route to Somerset East, the security van was robbed of all the money.

Not unnaturally, the service station wanted the security company to reimburse it. To which the security company replied, "Our insurers have only paid us out R20 000 in respect of this robbery. We'll pay that money over to you, but no more."

Being substantially out of pocket, Cookhouse Service Station CC wanted to recover the shortfall from CDK Sekuriteit CC, and instituted action against the latter.

THE ARGUMENT AND THE JUDGMENT

The service station based its claim on the argument there was an implied term in the contract for the transporting of the money to the bank in Somerset East that the security company "would take out insurance to indemnify (the service station) in respect of any loss suffered" if the money were stolen.

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An implied term means a term of the agreement that was not put into words, but which was tacitly understood by the parties to form part of the agreement.

In an appeal to the High Court, it was held that no such implied term could be read into the contract, and the court dismissed with costs the service station's claim against the security company.

In our view, the service station received wrong legal advice as to the basis of its claim, and the court erred, both in its reasoning and in its judgment.

Firstly, it was completely irrelevant to the service station as to whether the security company was or was not insured.

As was noted above, from the service station's point of view, the question whether the security company was insured was *res inter alios acta*. Even if the security company had been fully covered by insurance, this would not mean that the service station could claim the benefits of that insurance. However, should a plaintiff receive an amount from the liability insurer of the defendant, such amount is a benefit which must be taken into account in reducing his damages.

WHAT WAS THE CORRECT ANALYSIS?

In our view, this case should simply have turned on whether, in terms of the principles of contract law, the fact that the money in question was stolen in transit and that delivery to the bank became impossible, was a valid excuse for non-performance by the security company of what it had promised to do.

In our view, the nature of this particular contract was that the particular risk – that is to say, the risk that the security company might be the victim of a robbery and that the transported money might be stolen in transit – was a risk that was clearly within the contemplation of the parties.

Indeed, awareness of the risk of such a robbery was precisely why the service station contracted for the services of a security company.

In our view, it was implicit in the agreement between the parties that this risk would be borne by the security company, not by the customer, and that the financial loss, in the event of a robbery, would be borne by the security company.

In our view, the facts of this case did not fall into the category of the kind of “supervening impossibility of performance” that our law recognises as an excuse for failing to do what has been agreed upon – in this case to transport the money to the bank.

There is, however, an important lesson to be learned from this judgment. Insurance is relatively cheap. Make sure that the risks that you are trying to protect yourself against are covered by insurance, and that you are the beneficiary under the policy.

This quick and easy solution is far more sensible than relying on the drawn-out, expensive and unpredictable results of embarking on litigation to recover your loss, which could be left in the hands of the insurer.

In the judgment discussed above, the party who suffered the loss eventually had to bear the whole of that loss, and had to pay the other party's legal costs as well.

South Africa's abstract system of land ownership

One of the most important concepts in our law is that of private property – that is to say, the idea that a person can, in law, be the owner of property with all the rights that the law attaches to ownership.

Where movable property is concerned, there is no register of owners. For example, a business may own a computer, but there is no official register of computers and their owners.

You may own a car, and that car may be registered in a government registry, but registration of the car in someone's name is not proof of ownership. If I sell my car to you, receive the price, and hand it over to you, ownership has passed to you, irrespective of what the record in the government register may say.

A different principle applies to **immovable property** (land and fixed structures built on land). In law (with very few exceptions) whoever is registered in the records of the Deeds Office as being the owner of land is, in law, the owner of that land. In other words registration in the Deeds Office is proof of ownership.

In this regard, our law has a so-called abstract system of land ownership. In other words, the transfer of immovable property through registration in the Deeds Office remains valid even if there was some defect or flaw in the agreement in terms of which that transfer took place.

Thus, if you sell land or a building to me, and I pay you in full for it, I am entitled to demand that you “register transfer” of the land to me, in other words, to demand that you co-operate in having my name registered in the Deeds Office as the owner of the land.

But – unlike in the example of the car, given above – I am not the owner of the land unless and until it is registered in my name in the Deeds Office.

THE PROBLEM OF DOUBLE SALES

Assume that A is the owner of land, and it is registered in his name in the Deeds Office. A enters into a contract with B, in terms of which he sells the land to B. Then A sells the self-same land to C.

What does the law say of this situation of a so-called “double sale”?

Firstly, both contracts are entirely valid. Each fulfils all the legal requirements for a valid contract. And, significantly (for the reasons explained above) A did not cease to be the owner of the land just because he had sold it to B.

Of course, A is not going to be able to pass transfer of the land to both B and C. But the only consequence of this is that A is going to be in breach of contract toward either B or C, whichever is unable to get registration of transfer of the property.

It was, of course, foolish or dishonest of A to sell the same land to two people. But A has done so, and must bear the consequences, namely that he is going to be sued for breach of contract by either B or C.

Let us add another complicating factor to the hypothetical scenario. Let us assume that C manages to get the land registered in his name in the Deeds Office before B does so.

Can B – who, we have postulated, purchased the land from A before C did so – demand that, since he was the first purchaser, C must transfer the land to him?

The difficulty is clear. B will say – I was the first purchaser, so my rights should prevail. C will say, I got transfer into my name first, so my rights should prevail.

Our law solves the problem of such double sales by the application of a simple principle, called “the doctrine of notice” which decrees that, if at the time he took transfer of the property, C knew of – in other words had notice of – the earlier sale to B, then he must transfer the property to B and be content with a claim for damages against A.

If, at the time he took transfer, C did not know of the earlier sale to B, then C does not have to transfer the property to B. In that event B's only recourse is to sue A for damages, that is to say, for monetary compensation for breach of contract.

Our law takes the view that, if C knew of the earlier sale at the time he took transfer, then it was a form of fraud on his part to accept transfer into his name.

Thus, in the recent case of **Riley v Slipe NO [2008] ZANHC 22** the court quoted with approval an earlier judgment which held that – “it is a *species* of fraud to attempt to secure a *res* (an item of property) which is known to have been promised to another”.

It is clear, therefore, how important it is not to delay taking transfer of immovable property that you have purchased.

It would, for example, be extremely dangerous to purchase immovable property in terms of some kind of instalment agreement whereby you would only take transfer when you had paid the final instalment.

Liability for damages caused by your independent contractor

The South African law of delict is, in general, based on fault.

If I cause injury or loss to you, I am legally liable to pay you monetary compensation if there was fault on my part, in the form either of an intent to do harm, or *negligence*.

An important exception to this rule is that an employer is *vicariously liable* for injury or damage caused by delicts (wrongful acts) committed by his employee if the latter, at the time of inflicting the loss or damage was acting *in the course and scope of his employment or whilst engaged in any activity reasonably incidental thereto*.

Thus, an employer is liable for injury or damage negligently caused by his employees, even though he (the employer) was not at fault in any way.

The employer's legal liability in this regard is not based on the employer's fault, but arises as a result of the employer – employee relationship.

For example, if I employ a driver who causes damage through his negligent driving while carrying out an errand for me, I am liable for the damage caused, and it is no defence for me to say that I hired my drivers with care and trained them properly. It is irrelevant that I, as employer, was not negligent; I am vicariously liable for my employee's negligence.

In order to hold me legally liable, the injured party needs to show that his injury or loss was caused by the driver's negligence and that the driver was acting in the course and scope of his employment when he committed the act that caused the injury or loss.

EMPLOYEES AND INDEPENDENT CONTRACTORS

The principle of vicarious liability applies only in respect of employees, not independent contractors.

An employee is someone who works under an employer's control and instructions, such as a driver or a clerk.

An independent contractor is someone who carries out a specific piece of work, but is not subject to the employer's control and

instructions. If you call in an electrician to repair a fault in the wiring of your house, he is an independent contractor, not your employee.

The principle that an employer is vicariously liable for the delicts of its employees caused in the course and scope of their employment is important where an injured party is trying to secure compensation. Very often, the employee is a person of no financial means, and unable to pay damages, whereas the employer may have deep pockets.

The injured party is thus more likely to recover payment if, in law, he can hold the employer liable.

A RECENT SUPREME COURT OF APPEAL DECISION

There is a widespread misapprehension that an employer is never liable for damages caused by an 'independent contractor', employed by him, as distinct from an 'employee'.

This is not so, as was recently affirmed by the Supreme Court of Appeal in **Chartaprops 16 (Pty) Ltd v Advanced Cleaning Services CC and Silberman [2008] ZASCA 115**.

In this case, a Mrs Silberman visited a shopping mall in Johannesburg. In one of the passageways, a pool of some slippery substance had been spilled on the floor. She slipped on that substance and was injured.

The shopping mall was owned by Chartaprops, which had entered into a contract with Advanced Cleaning Services CC in terms of which the latter was to keep the floors of the shopping mall clean.

The question before the court was – who was legally liable to compensate Mrs Silberman for her injuries – Chartaprops (the owner of the mall) or Advanced Cleaning (who had a contract with Chartaprops to keep the floors clean)?

The High Court had found that the spillage in question had been on the floor for some thirty minutes by the time Mrs Silberman slipped on it, and that Advanced Cleaning had failed to put in place a system to clean up spillages promptly. The court concluded that Advanced Cleaning had been negligent, and that Chartaprops was vicariously liable for that negligence, and thus liable for Mrs Silberman's damages.

The High Court accepted that an employer is vicariously liable only for the delicts of an employee committed in the course and scope of an employment, and is not vicariously liable for the acts of an independent contractor.

On appeal, the Supreme Court of Appeal made the important point that an employer – “might nonetheless be liable for harm that arises from negligent conduct on the part of an *independent contractor* but, where that occurs, the *liability does not arise vicariously*. It arises *instead from the breach of the defendant's own duty* (in other words, the duty to take steps to guard against harm).”

The Supreme Court of Appeal said that, in law, the duty to guard against harm being done to other people may be such that the duty can be discharged only if reasonable precautions were in fact taken. In that event, the employer *will be legally liable if the independent contractor fails to take those precautions*.

In other words, the court held that in certain circumstances, an employer cannot escape legal liability by *delegating* to someone else (e.g. an independent contractor) the duty to take precautions to guard against harm being caused to third parties.

The crucial question will be whether, in the particular circumstances of the case, the employer himself was under a duty to take precautions, for if he was, then he will be liable for any damages if those precautions were not taken, irrespective of whether he had employed an employee or an independent contractor to take those precautions.



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In support of this principle, the court cited the 1991 Appellate Division decision in **Langley Fox Partnership (Pty) Ltd v De Valence** in which the defendant had hired an independent contractor. The court held that the work which the latter was hired to do was inherently dangerous and, consequently, the employer ought to have taken reasonable steps to guard against the danger.

WHERE A HIGHER STANDARD OF CARE IS REQUIRED, THE DUTY TO TAKE PRECAUTIONS CANNOT BE DELEGATED

In the present case, the court said that in some cases the law will require of an employer to ensure that the necessary precautions are taken, whether by himself or by someone else, such as his independent contractor. Where this higher standard of care is called for, the duty to take precautions cannot be delegated, and the duty will be discharged only if those precautions are in fact taken.

The court held that the facts of the present case were such that the law imposed that higher standard of care, and commented that –

“A person who invites the public to frequent a shopping mall will be expected by members of the public to have ensured that the floors of the premises are reasonably safe and will expect to look to that person if they are not. ... In short, they are entirely reliant on the person in control of the premises to ensure that reasonable precautions are taken to keep the floor safe.”

In the above case, the court said that the evidence established that the spillage had lain on the floor for some thirty minutes and this was an excessive time.

In the circumstances, Chartaprops, the owner of the mall, was held to be liable for the damages sustained by the plaintiff, Mrs Silberman.

Interestingly, and perhaps surprisingly, the court held that Advanced Cleaning Services CC, who had been contracted to keep the floor clean, was not jointly liable with Chartaprops vis-a-vis Mrs Silberman for the damages she had suffered. The court remarked in this regard that –

“I think it would be most unjust if the law were to require as a condition for taking up a mop and bucket in return for a wage that the cleaner should assume legal responsibility for the safety of the floors. I see no distinction when the person who wields the mop is not an employee but an independent contractor.”

Recent events and achievements

BCLR moved to the following new premises on 1 February 2009:

BCLR Place, 85 Central Street, Houghton, Johannesburg, 2000.

Our existing telephone and telefax numbers as well as our email address will remain unchanged.

Johan Brink and Kim Wyness advised Ethos Private Equity Fund in connection with its successful joint bid with Old Mutual Private Equity for the acquisition of a strategic consortium interest in Idwala Industrial Holdings Limited, a vertically integrated supplier of processed lime, calcium carbonate and other minerals.

Willem Le Roux and Pieter Colyn (assisted by Edward James) represented South Deep Gold Mine in an investigation conducted by the Principal Inspector of Mines of the Mine Health and Safety (Mpumalanga Region) of the Department of Minerals and Energy into the death of 9 persons following an accident on 1 May 2008.

During March this year, Johan Brink appeared on Summit TV in a panel discussion hosted by Ewald Muller on the implications of the new Companies Act 2008 for directors' liability and employees' rights. Johan Olivier was interviewed by Chris Gibbons on Radio 702 about the appropriateness in terms of our labour law of the settlement package paid to Khaya Ncquqa, the former CEO of SAA.

Peter Le Roux served as an acting judge in the Labour Court in February this year.

Ebrahim Jooma has been appointed on behalf of Mothle Jooma Sabdia Inc, in conjunction with two other black firms to undertake a standardization review of all Transnet Group's agreements.

On 28 November 2008, Willem le Roux presented a seminar in conjunction with LexisNexis on the Mine Health and Safety Amendment Bill which seeks to introduce corporate homicide and to extend similar provisions to the CEO, managers, employees and agents. The seminar was attended by approximately 150 delegates. During January and February 2009 he negotiated on behalf of the Chamber of the Mines in an endeavour to have certain amendments effected to the Bill. Such attempts culminated in agreement being reached between the Unions and the Chamber on 23 February 2009. The President will be requested to give effect to the agreement.