IN THE HIGH COURT OF SOUTH AFRICA — Reportable

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A63/2005

DATE: 3-6-2005

In the matter between:

RENATE ROY — Appellant

and

JAN BASSON N.O. — Respondent

(Executor Estate Late Dafue)

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JUDGMENT

SELIKOWITZ, J: The appellant issued summons against the respondent in the Stellenbosch Magistrate's Court as a result of having put a claim into the deceased estate representing the respondent. The executor refused to admit the claim and after an objection was lodged with the Master, the Master advised that the plaintiff should proceed with the action in order to protect her rights. The plaintiff (now the appellant) therefore sought an order authorising and ordering the defendant to admit her claim of R28 272,00 together with interest and costs of suit.

The claim arose as a result of the plaintiff losing possessions which she had stored at the Wedge Farm Inn owned by the late Mr Dafue whilst she travelled in other parts of South Africa. She was a visitor to this country from France, where she lives. Her action is based upon the Praetor's edict *nauta cauponibus et stabularis* which imposes strict liabilities on innkeepers and which is still a part of our law.

The action was dismissed with costs, including a costs order that the

costs of counsel should be allowed on the basis of the tariff of the Cape Bar Council applicable on 18 May 2004. Appellant appeals against the dismissal of her claim and against the costs order on the following grounds:

1. That the magistrate erred in finding that the fire was unforeseen, unexpected and irresistible event and that human foresight could not guard against it.
2. That the magistrate erred in finding that the defendant was not negligent in not taking proper fire preventative measures to protect the guests and their property in the inn.
3. That the magistrate erred in finding that the defendant was not negligent as a reasonable inn-keeper would have been in not taking immediate action to limit the damages as a result of the firefighters' calming words.
4. The magistrate erred in finding that the Veld Fires Act No. 101 of 1998 does not apply in this matter.

Let me immediately deal with the last of the grounds of appeal and say that the National Veld Fires Act No. 101 of 1998 has no application to this matter. It deals with liability where a fire started on or spread from land owned by the defendant. In this case the fire did not start on nor spread from the land owned by the defendant.

Plaintiff sought to establish her claim on the merits based, as I said, on the Praetor's edict; alternatively, on Wedge Farm Inn's

negligence in not taking proper precautions or preventative measures or applying proper fire retardant mechanisms and equipment in the inn; alternatively, the negligence of the estate in not managing and maintaining a proper fire control on the immovable property.

In the plea the allegations were denied and indeed, in order to deal with the *onus* that was upon the defendant in terms of the Praetor's edict, it was pleaded that the fire and subsequent damage were caused by *damnum fatale*, alternatively *vis major*, as an occurrence which was unforeseen, unexpected and irresistible and that therefore the Praetor's edict was not applicable. Alternatively, it was denied that the Wedge Farm Inn was negligent in not taking proper precautions or preventative measures when installing fire retardant mechanisms as a fire resistant canvass had in fact been installed. In the further alternative, there was a claim based on a tacit or implied agreement relating to the goods stored at owner's risk, more importantly that the liability had been waived by the plaintiff when she came to stay at the inn.

At some stage during the trial there was an amendment to introduce vicarious liability, an issue which does not seem to have been heard of ever since, either at the trial, nor indeed in this appeal. As I have said, plaintiff also relied upon the presumption in Act 101 of 1998.

The South African Law of Inn-Keepers imposes strict liability for damage belonging to parties who bring it into the inn. The exceptions are *major casus fortuitus* and *damnum fatale*, concepts which over the years have given courts difficulty in finding a suitable and comprehensive definition for each. Indeed, there is a suggestion that the borders

between these concepts have become blurred. The discussion of the subject matter in Wille: Principles of South African Law (8th ed) is certainly useful:

> "This *major* or superior force is some force, power or agency which cannot be resisted or controlled by the ordinary individual. The term is now used as including not only acts of nature, *vis divina* or acts of God, but also acts of man. *Casus fortuitus* or inevitable accident is a species of this *major* and imports something exceptional, extraordinary or unforeseen and which human foresight cannot be expected to anticipate or, if it can be foreseen, cannot be avoided by the exercise of reasonable caution."

I think I should pause here to state that care must be taken in looking at these definitions not to mistake the concept of foreseeability in those definitions by equating it with foreseeability in a normal Aquilian liability situation. To do so would destroy the strict liability and equate every claim under the Praetor's edict to a claim for damages under the *lex Aquilia*. Examples of acts which are regarded as acts of God and beyond human control, include earthquakes, piracy, shipwrecks, abnormal weather conditions and fire. Indeed, in Gaine's translation of the Voet commentaries on the Pandect in the commentary on Book 4 Title 9 section 2, the learned author gives examples from Leyser's Meditations on the Digest and says "examples of this sort are found in fires arising from lightening or from neighbouring houses".

What we need to look at in this case is not whether there have

been many, many fires in the area, but at the circumstances relating to this particular fire. Thus, for example, many ships sink at sea but when one examines the Praetor's edict, as it has been extended to ships; one does not start off by saying there have been many ships that have sunk at sea and therefore the captain of the ship has to foresee that his ship may sink. That is not the correct approach. The correct approach is to look at the circumstances in which the particular ship sank and to determine whether those were circumstances which resulted from some power or agency which cannot be resisted or controlled by the ordinary individual.

In the instant case it is not primarily the fire that caused the loss, but the fact that the plaintiff's goods perished in the fire. Thus, for example, if the goods had been taken out of the inn the fact that the inn burnt down would have been of no consequence to plaintiff whatsoever. Her focus is upon her goods, not upon whether the building burnt down.

On the evidence Mr van der Poel, a fire officer, stated that a strong wind, which got stronger as the day went on, fanned the flames in the Lantana plantation where the fire had begun. He suspected or thought that the fire on the thatch roof had been started by a flying coal and he went on to say that whilst these coals are visible at night, they are invisible in the day time. This fire took place in the day time.

Mrs Dafue gives more direct evidence. She says it was not a flying ignited coal, but a flaming seed ball which flew from the plantation, some 80 to 100 metres across the property, and landed on the corner of the thatched roof and ignited it.

On the facts before the Court I am satisfied that the magistrate was correct in finding that the flying through the air of the flaming object was not a matter that could be resisted, nor indeed avoided, and that it was as a result of *vis major* or a *casus fortuitus* that the particular roof was ignited on the day in question.

There is also the evidence of the expert Mr van der Poel who was the fireman at the scene who states that the course of the fire, including the flying of coals, was "onvoorspelbaar en onvoorsienbaar". Indeed, he said that trying to douse the fire totally was an "onbegonne taak" and was "onmoontlik" and suggested that a helicopter would have been the most effective way of dealing with the fire in the plantation.

I am, therefore satisfied, in all the circumstances, that the defendant has discharged the *onus* of proving that there is no liability for plaintiff's claim pursuant to the Praetor's edict.

I turn now to consider the question of the *lex Aquilia* and, in particular, of negligence. The allegations are that the owners of the inn did not instal proper equipment to deal with the fact that the roof was made of thatch, which is notoriously a material that burns violently and quickly. In this regard the *onus* is on the plaintiff (appellant). Claims were made that there are a number of devices that can be installed such as sprinkler systems or some sort of netting or barrier below the roof in the ceiling in the attic which would prevent the thatch falling through and igniting the contents of the house below. There is no question that these devices exist but what is clear from the evidence in this case is that they are not, by any measure, foolproof and that installing them might not

have saved the goods of the plaintiff. There is also evidence that the late Mr Dafue constructed the roof of thatch that had been treated to resist fire and included a fire canvass, a "branddoek", which was intended to retard the fire.

The evidence of Mr Pohl in this regard can be criticised as being hearsay, but even if you accept his statements, not for the truth of the content and have regard to the late Mr Dafue having informed him that there was a problem relating to a chemical smell from the roof, and you combine that with Mrs Dafue's evidence, it seems to me that that evidence from the side of the defendants offsets the speculation of the two firemen in regard to what actually happened. Indeed, as I understand the record correctly, Mr van der Poel suggested that with the wind in question, the thatch roof having been ignited by a coal, as he described it, spread so fast that little, if anything, exists that could have saved the building. I also note that the evidence of Mrs Dafue in connection with the roof construction, the treating of the roof and the fire canvass was not subjected to any cross-examination of substance and ought, therefore, to be accepted.

Importantly, in regard to negligence, is the evidence of both Mr Pohl and Mrs Dafue that they approached the firemen some time before the roof caught alight; Mrs Dafue thinks about 30 minutes; to ask the firemen to give them advice and that from both Mr van der Poel and from another fireman they received reassurance to the effect that the fire was under control. What is abundantly clear is that the firemen did not suggest that, even as a precautionary measure, steps be taken to

evacuate the premises.

Given those circumstances, and here there is no cross-examination whatsoever of Mrs Dafue in regard to her detailed evidence about approaching the two firemen, and given the evidence it seems to me that the plaintiff has failed to prove that the defendant, or its servants, acted in any way unreasonably in not evacuating the people or contents of the inn before the fire began on the roof.

There is mention in the pleadings and particularly in the plea, as also in the grounds of appeal of a contractual exclusion of liability. Indeed, considerable evidence was led in regard to that issue. That evidence was, however, inconclusive as a result of the fact that all the documentation and records of the Wedge Farm Inn were destroyed in the fire. It therefore does not come as a surprise to me that that matter does not appear to have been pursued any further.

For the reasons stated I am satisfied that the magistrate's judgment on the merits, namely the dismissal of plaintiff's claim, was the correct decision and I would not interfere with it.

As far as the costs are concerned, the magistrate made a costs order without any reasons therefor or without any discussion. He said the following:

> "The cost is to include the cost of counsel as per the Cape Bar Council parameters, including preparation, waiting time and travelling as requested by Advocate Harrington in his heads of argument."

Ms Ipser for the appellant correctly points out that the effect of the order

as it appears in the judgment raises a number of questions. Firstly, in the absence of reasons, whether the magistrate in fact applied his mind and exercised his discretion. I point out that no further reasons were furnished by the magistrate after he received the notice of appeal which specifically addresses the costs order. Secondly, that the order in question goes beyond the empowerment which the magistrate has in terms of the Magistrates Court Act and, in any event, the order insofar as it provides for the fees to be fixed pursuant to a tariff adopted by the Cape Bar Council, is *ultra vires* the provisions of the Magistrates Court Act.

I agree with Ms Ipser who relied upon War Systems Technology CC v United Computer Systems 2004[1] All SA 457 as authority for the propositions she raised.

As a creature of statute, the Magistrate's Court is limited to the powers that are granted by that Act. Section 80 of the Act provides that the costs shall be payable in accordance with scales prescribed in the rules and also that the Taxing Master may allow costs and charges for services reasonably performed by an attorney at the request of his client. It is clear from the provisions and the provisions that refer to advocate's fees that it is beyond the power of the magistrate to give a costs order which has the effect of permitting someone other than the Taxing Master to fix the fees and thereby deprive the Taxing Master of exercising the power which is given in terms of section 80 of the Magistrates Court Act.

The effect of the order in this case may well be to provide a higher

fee than that permitted by the Act, either as party and party costs, or indeed, as attorney/client costs. This Court has no idea what the actual fees of the Bar Council are or were at the time in relation to the tariff and as I have said, the order has the effect of depriving the Taxing Master of his or her supervisory jurisdiction.

The order for costs is accordingly bad in law and must be set aside. It ought, in my view, to be replaced with an order which is just and equitable in all the circumstances and that, in my view, is an order for the payment of the costs of the trial on the basis of party and party costs. There are indeed no outstanding features which would require any special order, such order to include the costs of counsel as allowed in terms of the Magistrates Court Act.

That leaves the question of the costs of this appeal. The appellant has had some success; but that success is limited to the costs order and if one has a conspectus of the scope of the appeal, the question of the costs order plays a relatively small part in the appeal. The success on the costs order can hardly be described as substantial success and indeed, it may well have been possible to pursue that appeal without, for example, copying the whole record for the purposes of the appeal. The Court should, however, recognise the fact that the appellant has had some success in that the respondent has opposed the appeal against the costs order and not conceded it. It seems to me, therefore, that whilst the appellant is going to have to pay her own costs, she should not have to pay all of the defendant's costs and, in my view, an order that the appellant pay 75% of the respondent's costs on appeal should meet the

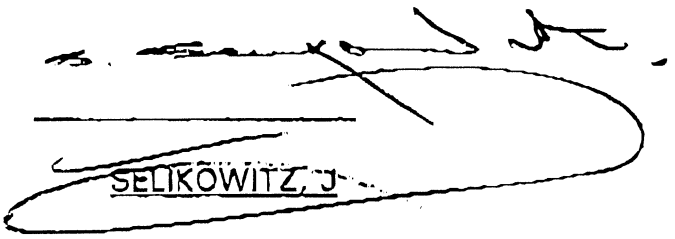
requirements.

In the result the order that I would make is as follows:

1. The appeal succeeds to the extent that the order of the trial Court as to costs is set aside and replaced with an order:

   "Plaintiff is to pay the costs on a party and party scale, including the costs of counsel as allowed in terms of the Magistrates Court Act."

2. The appellant is to pay 75% of the respondent's costs on appeal.



SELIKOWITZ, J

TRAVERSO, DJP: I agree and it is so ordered.

TRAVERSO, DJP