REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No. 513/98

In the matter between:

S M GOLDSTEIN & CO (PTY) LIMITED **Appellant**

and

CATHKIN PARK HOTEL (PTY) LTD **1st Respondent**
DRAKENSBERG SUN HOTEL (PTY) LTD **2nd Respondent**

Coram:	SMALBERGER, HARMS AND PLEWMAN JJA
Heard:	29 AUGUST 2000
Delivered:	8 SEPTEMBER 2000
Subject:	Delictual liability of building contractor to owner and third parties

---

JUDGMENT

HARMS JA

HARMS JA:

[1] The appellant, a building contractor of note, was responsible for the building of an hotel known as the Drakensberg Sun. The land and building owner is the first respondent and the lessee and operator of the hotel the second respondent. During the winter of 1988 a fire which had its source in the fireplace in the lobby of the hotel destroyed part of the complex. The respondents, claiming in delict and alleging negligence, joined the architect, the interior decorator, the project manager and the appellant in an action for damages. The case against the other defendants has either been settled or withdrawn and in the court below Malan J held the appellant liable to compensate the respondents for any damages suffered as a result of the fire. Since the question relating to quantum was separated from the liability issue, the instant appeal (which is before us with the leave of the Chief Justice) is against that finding only.

[2] The Drakensberg tends to be rather cold in winter and a fireplace in the lobby must have been an important design feature. One can assume that between them the architect and the interior decorator decided that the ambience of the area and the hotel called for a rustic look. In the event, the builder was issued with drawings and instructions to build a fireplace using a Jetmaster firebox suitable for an open fire. A railway sleeper, impregnated with bitumen, had to rest on top of the firebox to form a mantlepiece. Above that an ornamental structure consisting of a sheet of chipboard with decorative but real log ends or butts had to be fixed to the masonry which formed the chimney.

[3] As designed, the fireplace did not comply with the installation instructions issued by Jetmaster with every unit sold. Of importance in this case is the following instruction:

"IMPORTANT: Combustible materials should not be fitted within . . . 450 mm above the

firebox unless adequate provision is made to insulate such materials."

In a number of respects the rest of the design did also not comply with the National Building Regulations. For instance, although the roof had to be built with wooden shingles, the necessary and prescribed fire prevention measures did not form part of the design. The appellant, sometimes using nominated subcontractors, built the hotel in general accordance with the architect's plans but in constructing the fireplace failed to adhere to Jetmaster's quoted instructions or the National Building Regulations.

[4] The fireplace was in constant use. The railway sleeper rested on the hottest part of the firebox and in time the heat caused the sleeper to ignite. From there the fire spread into the roof void via a false flue that had been created between the sheet of chipboard and the masonry. The rest of the causal chain need not be related, nor the extent of the damage.

[5] The respondents relied upon and the court below dealt with a large number of grounds of negligence. In the light of the view I take of the matter, it is not necessary to traverse the whole field and I intend to limit the discussion. It is common cause that the appellant -

(i) constructed the fireplace in a manner so as to result in the railway sleeper being mounted directly above and on the lip of the Jetmaster unit;

(ii) failed to have regard to the installation instructions supplied by Jetmaster;

(iii) constructed the fireplace in a manner so as to result in there being no provision for insulation between the firebox and the sleeper and the other combustible material (the decorative feature).

These facts, without more, establish at least a prima facie case of negligence. In addition, although initially in dispute, it became common

cause at least between the witnesses that the design and construction of the fireplace would have been manifestly unsafe to a builder. The initial dispute concerned the question whether the fireplace was with hindsight or with foresight manifestly unsafe. Apart from the fact that it is difficult to conceptualise how something can be manifestly unsafe with hindsight, the witness who had added the caveat conceded the point during cross-examination. Malan J also made such a finding and not only has it not been shown that he was wrong, I am of the view that he was correct. In the light of the evidence it avails the appellant not that the architect or others on site had failed to notice the defective and inherently dangerous design and construction. This simply establishes that others may also have been negligent or in dereliction of their duties. That puts an end to the first leg of the inquiry as formulated in *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-F namely whether a *diligens paterfamilias* in the position

of the defendant would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss.

[6] The next step in the inquiry is to establish whether the reasonable builder would have taken reasonable steps to guard against such occurrence. The answer seems to me to be clear. Any reasonable builder would refrain from building something which is manifestly unsafe. He would follow the manufacturer's installation instructions, especially insofar as they related to safety matters. It would have been fairly simple to have followed the manufacturer's instructions or to have placed some or other effective insulation between the combustibles and the firebox. Since the appellant failed to take any of these steps, it also determines the third leg of the negligence inquiry.

[7] Having found negligence, it is convenient to deal with wrongfulness

(the breach of a legal duty) at this juncture. In this regard it is as well to remember that conduct which is lawful towards one person may be unlawful towards another. The test involves a value judgment by applying in the light of all the circumstances the general criterion of reasonableness. The criterion is based upon considerations of morality and policy and the court's perception of the legal convictions of the community. That harm is foreseeable is a relevant consideration. (See *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) SA 355 (A) 367-369.) In spite of counsel's protestations, it has to be accepted that *in general* a builder does have a legal duty to both the building owner and to third parties to refrain from building something which is manifestly unsafe. Even builders should not play with fire or fireplaces. The essence of counsel's argument was that the appellant had a legal duty in terms of the contract to build in accordance with the

design of the architect and that having so built it could not be held liable in delict. I am prepared to accept for purposes of argument that a building owner cannot hold a builder liable in delict if the builder were contractually required to construct an unsafe structure, although it is improbable that any building contract would contain a term (tacit or otherwise) requiring of a builder to build something which is manifestly unsafe or defective.

[8] The first problem with the submission is that it is no answer to the hotel operator's claim. The second problem is that it fails to have regard to the builder's obligations in terms of the building contract in question. The contract consists of a set of standard conditions of contract and a "bill of quantities" without quantities but containing additional and qualifying terms. On the one hand the contract obliges the builder to carry out and complete the works in accordance with the contract and the

directions of the architect, and to his reasonable satisfaction. He must also comply with the architect's instructions. If he wishes to deviate, he has to give the architect due notice. On the other hand, the contract requires the standard of workmanship to be of the best and records that the objective of the builder's appointment is his expert knowledge and he is made responsible for all aspects of the construction of the hotel. In particular it states that all commodities are to be fixed with care and in strict accordance with the manufacturer's instructions and recommendations. Should these conflict with other specified requirements the architect must be notified forthwith and if anything is unclear, the necessary clarification must be obtained from the architect - in either instance a variation order should be sought.

[9] These terms indicate that the appellant's approach to its legal duty is based upon an oversimplification. The contract did not oblige the

builder to build irrespective of safety concerns. Simple mechanisms were in place to deal with a case where the architect's instructions conflict with safety matters and manufacturers' instructions. Realising his difficulty, counsel sought refuge behind the fact that the failure to advise the architect was not a ground of negligence relied upon in the particulars of claim. This reasoning is flawed. Although the failure to notify or involve the owner or architect is not a ground of negligence, the issue really arises in the context of the existence of a legal duty. Because of the nature of the risk and the degree of foreseeability a prima facie case of the existence of a legal duty was established. The appellant wishes to extricate itself by relying on the building contract. To do so it had to a duty to adduce evidence in order to upset the prima facie case. Proof of the contract alone did nothing to assist it. As far as the evidence went, it established that the appellant did not act in terms of the contract.

[10] Another factor relied upon by the appellant affecting the existence and scope of its legal duty was the employment by the building owner of an architect, a safety consultant and others to design, advise and supervise the works, and the use of nominated subcontractors. These facts do not absolve the appellant. They merely indicate that more than one party had a legal duty towards the respondents in relation to the safety of the fireplace.

[11] In my judgment the appellant is on this simple basis liable and without necessarily agreeing with all the other findings and rulings of law made by the court below, it is unnecessary to consider them. The appellant, in anticipation of such a finding, relied upon the contributory negligence of the first respondent, alleging its negligence (i) in approving the design and the choice of material for the fireplace and roof structure and (ii) in failing to assure that they would not constitute a fire hazard or

cause a fire. There is no merit in the partial defence. The evidence does not establish that the first respondent approved the design details. A number of independent experts were employed to design, construct and manage the construction of an hotel. It was not incumbent upon the first respondent in those circumstances to check independently whether everyone was doing his work properly and it was entitled to rely on those who it paid to do the work.

[12] Finally, the appellant also relied as against the first respondent upon a provision in the General Conditions of Contract which provides in part that ". . . the Contractor shall in no case be liable for any loss or damage to the said Works, material or goods caused by an excepted peril". One of the excepted perils is "the design of the Works . . . by the . . . Employer's servants or agents." Thus, the question is whether the damage was caused by the design of the architect. Having found that the

damage was caused, at least in part, by the negligence of the appellant who in any event did not comply with its contractual duties, the clause appears to me to be inapplicable. Its purpose is to protect a builder who complies fully with his contractual obligations and to place the design responsibility where it should be, namely on the shoulders of the architect. Its object is not to create an exemption for a builder who, having acted negligently, can point to the fact that the design was a contributory cause of the damage.

[13] Judgments of this Court often conclude with a lament about the state of the record. If a properly prepared record, trimmed of all unnecessary material and duly cross-referenced, crosses one's desk one notices it immediately. The record in the instant case is one of the few that justify a commendation.

[14] The appeal is dismissed with costs, including the costs of two counsel.

_____

L T C HARMS
JUDGE OF APPEAL

AGREE:

SMALBERGER JA
PLEWMAN JA