THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 48/2009

PIETER ANDRIES PIENAAR **1st Appellant**

MELVIN DOUGLAS CLASSEN **2nd Appellant**

CLASSENS HOME IMPROVEMENTS CC **3rd Appellant**

and

RUSSELL JAMES BROWN **1st Respondent**

JOHN SLOEP **2nd Respondent**

DON NOEL DANIEL LAMBERTS **3rd Respondent**

VEN PROJECTS CC **4th Respondent**

Neutral citation: *Pienaar v Brown* (48/2009)[2009] ZASCA 165 (1 December 2009)

Coram: Mthiyane, Nugent, Maya JJA, Tshiqi and Wallis AJJA

Heard: 9 November 2009
Delivered: 1 December 2009

Summary: **Claim for damages against property owner, building contractor and his sub-contractor ─ based on negligence ─ principles applied ─ whether failure to comply with statutory obligation under s 4(1) read with s 7 of National Building Regulations and Building Standards Act 103 of 1977 is evidence of negligence.**

ORDER

On appeal from: Cape of Good Hope Provincial Division (Ndita J sitting as court of first instance).

1. The appeals are allowed.

2. The first and second respondents are ordered to pay the appellants' costs.

3. The order of the court below is set aside and replaced with the following:

'1. The first and second plaintiffs' claims against the first, second and third defendants are dismissed.

2. The first and second plaintiffs are ordered to pay the costs of the first, second and third defendants, jointly and severally the one paying the other to be absolved.

3. The fourth and fifth defendants are found to be liable jointly and severally the one paying the other to be absolved, for whatever damages the first and second plaintiffs might prove for injuries sustained by them as a result of the collapse of the balcony on 25 April 2004.

4. The fourth and fifth defendants are ordered to pay the plaintiffs' costs of suit, jointly and severally the one paying the other to be absolved, including the qualifying expenses of the plaintiffs' expert witness, Mr U Rivera and the costs of the application for absolution from the instance.'

JUDGMENT

MTHIYANE JA (Maya JA, Tshiqi and Wallis AJJA concurring):

[1] On 25 April 2004 the first and second respondents, Mr Russell James Brown and Mr Joseph Sloep (the plaintiffs) were injured when a balcony on which they were standing at the house of the first appellant, Mr Pieter Andries Pienaar, in Green Point, Cape Town collapsed. The plaintiffs were guests at the house of the first appellant, Mr Pieter Andries Pienaar, in Green Point, Cape Town, at a function to celebrate the birthday of Pienaar's life partner, Mr de Bruin. During the course of the afternoon a car alarm went off and a number of guests including the plaintiffs and De Bruin went out onto the balcony to see what was happening. As they did so the balcony collapsed outwards as the screws fixing it to the wall at the upper level pulled out of the wall and it 'folded' downwards until its outer edge was resting on the tiling below. The guests on the balcony fell forward and the plaintiffs were fairly seriously injured as a result.

[2] The plaintiffs instituted action for damages in the Cape High Court citing as defendants Pienaar, as the owner of the property at which the balcony collapsed; the second appellant, Mr Melvin Douglas Classen who had been employed as the main contractor and the third appellant, a close corporation through which Classen conducted his business; the third respondent, Mr Don Noel Daniel Lamberts, who designed, manufactured and installed the balcony, and his corporate entity, Ven Projects CC, the fourth respondent who designed, manufactured and installed the balcony.

The third respondent, Mr Don Noel Daniel Lamberts, was the individual who physically performed the work. The claim was based on their alleged negligence in the design, construction and installation of the balcony. For the sake of convenience the first, second and third appellants will be referred to by their respective names and, depending on the context, collectively as 'the defendants'. References to Classen and Lamberts refer also to their respective close corporations.

[3] On 23 November 2002 Pienaar, the owner of the property had approached Classen, the builder, to provide a quote for amongst other things, the balcony in question. On about 27 November 2002 Classen's corporate entity, Cape Home Improvements CC (as the third appellant was then known), had provided separate quotes to Pienaar in respect of various parts of the work proposed, which included a quote for the construction and installation of a steel-framed balcony.

[4] It is common cause that Classen said to Pienaar that he did not possess any expertise or ability to design, construct and install a steel balcony as requested, and that an individual who possessed the necessary expertise should be requested to carry out part of the work. Classen's part of the work on the balcony was limited to the laying of the meranti floor on the steel work after it had been manufactured and installed. Classen accordingly contacted Lamberts and requested him to provide a quote for the proposed work.

[5] Lamberts, after taking the necessary measurements, provided a quote for the balcony (R6500) to Classen and a general quote was supplied by Classen to Pienaar which included the work he (Classen) was

to perform (R10944), namely the laying of meranti timber flooring after the balcony had been manufactured and installed.

[6] Lamberts then designed, constructed and installed the balcony off Pienaar's main lounge on the top floor. It was a half-moon shaped steel framed structure, approximately 3 metres long and over 1.5 metres wide at its apex. It was largely a cantilevered construction, meaning that it was fastened to the wall of the house without material support from below. Holes were drilled in the wall surrounding the door reveal at parts where the base of the balcony and the top frame abutted the wall, and the holes were plugged with plastic plugs. The balcony was then attached to the wall by means of coach screws 110 mm long. Allowing for the thickness of the steel being 38 mm these penetrated the wall to a depth of some 70 mm. Apart from the screws a brace, referred to as a knee brace, was attached underneath the balcony, near the apex of the half-moon and ran at an acute angle to a point on the wall no more that 1 metre below the level of the balcony. In the original design Lamberts had intended that the balcony would be supported on its outer edge by two steel posts or pillars but when the time came for these to be installed Pienaar objected to them and they were not installed and instead they were adapted to form the knee brace.

[7] No plans or approvals were sought from or granted by the local authority as required by s 4(1) of the National Building Regulations and Building Standards Act 103 of 1977. The sub-section provides that no person shall without the prior approval in writing of the local authority erect any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act. The approval by a local

authority is provided for in s 7 of the Act. It is not disputed that the defendants were in breach of this statutory provision.

[8] At the trial the case proceeded on the question of liability only. The court determined that for purposes of liability three issues fell to be determined. The first was the question of negligence in respect of Pienaar, Classen and Lamberts and their corporate entities, and quantum stood over for later determination. The remaining two issues turned on whether Lamberts was a sub-contractor or an independent contractor, and whether he had been employed by Pienaar. It is now conceded that he was Classen's sub-contractor and the latter issues have, accordingly fallen away leaving only the question of negligence to be determined. At the conclusion of the trial the court found all the defendants to have been negligent and thus liable to the plaintiffs jointly and severally, the one paying the others to be absolved. Pienaar and Classen were granted leave to appeal to this court. Lamberts and his corporate entity have not appealed the decision.

[9] Pienaar's negligence was found to have arisen firstly from his failure to comply with the statutory requirements [s 4(1) read with s 7 of the National Building Standards Act]. Secondly, it was held that he had 'caused the balcony to be constructed without regard to its structural integrity, by insisting that vertical support posts should not be used' when having regard to the fourth defendant's [Lamberts'] evidence.

[10] Classen was found to have been negligent on several grounds. The court held that:

* he should have known that council approval was necessary before a structure such as a balcony could be installed;

* he had a duty 'to investigate and advise' Pienaar;

* he should have foreseen the risk of danger in consequence of the work he employed the contractor [Lamberts] to perform without council approval;

* he was in a position to take steps to guard against the danger and he did not take the steps in question;

* he ought to have appointed an engineer or a structural technician;

* he agreed 'to change the design of the balcony and installation without virtual supports;

* he is liable [therefore] for the negligent conduct of his sub-contractor (Lamberts).

[11] In *Langley Fox Building Partnership (Pty) Ltd v De Valence*,[1] a case in which an independent contractor was employed to perform the work, the test for liability of the employer of the independent contractor as it applies to cases such as the present matter, was enunciated by Goldstone AJA as follows:

'[T]here are three broad questions which must be asked, viz:

(1) would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,

(2) would a reasonable man have taken steps to guard against the danger? If so,

(3) were such steps duly taken in the case in question? (See also *Chartaprops 16 (Pty) Ltd v Silberman*.[2]) This emphasises the point that the liability in these cases is personal not vicarious, and that it is not a question of the liability of the employer being passed to the independent contractor and thence to any sub-contractor, but a question of the respective individual liability of each of them. As Goldstone AJA pointed out that where the answer to the first two questions is in the affirmative does a 'legal duty arise, the failure to comply with which can form the basis of liability.'

---

[1] 1991 (1) SA 1 (A) at 12H-J.
[2] 2009 (1) SA 265 (SCA) at para 42, [2008] ZASCA 115.

[12] It bears mention that in order to satisfy requirement (3) a party is required to take no more than reasonable steps to guard against harm to the public. Whether or not such threshold has been achieved depends upon a consideration of all the facts and circumstances of the case. The fact that the harm which was foreseeable did eventually occur would not mean that the steps taken were necessarily unreasonable. Ultimately the enquiry involves a value judgment (See *Chartaprops* at para 48; *Pretoria City Council v De Jager*.)[3]

[13] Turning to the facts of this case, it is convenient to consider the question of Pienaar and Classen's possible negligence vis-à-vis the plaintiffs separately. As to Pienaar the court below found him to be negligent on two grounds. First, he was said to be negligent in failing to comply with the statutory requirements to submit plans in respect of the balcony, in circumstances where a reasonable person in his position would have made enquiries before commencing with the installation of the balcony. Secondly, it was found that he had caused the balcony to be constructed without regard to its structural integrity, by insisting that vertical supports not be used in its construction. In argument it was sought to contend that he had also failed to take adequate steps to ensure that a competent contractor was employed, but this case was not pleaded and it is not supported by the evidence. It can therefore be disregarded.

[14] There can be no question that as a general proposition any person (Pienaar included) who causes a two metre high balcony to be erected at his home would foresee the risk of harm to a person stepping onto it if it was not properly secured. As such he would have been expected to take reasonable steps to avoid harm to such a person who might be injured in

[3] 1997 (2) SA 46 (A) at 55H-I.

the event of the structure collapsing. The real question before us is what steps should have been taken and whether Pienaar took those steps to avoid the risk of harm to the plaintiffs in terms of requirement (3) of the *Langley Fox* test as set out in paragraph 11 above.

[15] As already indicated Pienaar did not submit any plans for the balcony in question as he had done previously when he did alterations and additions to his house in 2002. He did not make enquires from his builder, Classen, as to whether plans were required for undertaking this type of work. Consequently the question that arises is whether this failure rendered Pienaar liable in damages arising from the collapse of the balcony. In the way the case has been pleaded it does not appear that the plaintiffs are relying on the breach per se as creating liability or providing them with a right to claim damages. How one goes about determining whether the statute provides for such a right of action was alluded to by Cameron JA in *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) at para 12 where he said:

'Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent.'

[16] On a proper reading of the Act there is nothing to suggest that a failure to comply with its requirement would necessarily lead to liability. On the facts of this case what makes it particularly problematic is that on the available expert evidence it is not the failure to submit plans that

caused the balcony to collapse, but the manner in which it was fixed to the wall. It is unnecessary to consider whether in other circumstances a failure to submit plans for approval may ground a claim for damages. In this case it cannot do so because there is no causal link between that failure and the collapse of the balcony.

[17] As to the second ground of negligence advanced against Pienaar and accepted by the court below, namely, that he caused the balcony to be constructed without regard to its structural integrity, by insisting that the vertical supports not be used in its construction, here again the point breaks down in the light of the evidence presented in court. There was no evidence that the vertical posts would have prevented the balcony from collapsing when it pulled out of the wall from its fixings. Nor was this proposition supported by Mr Ugo Giuseppe Rivera, a Structural Engineer who testified as an expert witness at the trial. All that he was prepared to say in that regard was that the posts 'would have reduced the tension force on the fixings which, in the end were the cause of failure.' Even if it is assumed however that pillars would have helped there is no evidence that Pienaar had reason to think that their exclusion could be a source of danger. Cantilevered balconies are a sufficiently common feature of houses for a lay-person like Pienaar to believe ─ and correctly so ─ that a suitably qualified person will erect it safely.

[18] It seems to me that Pienaar took all reasonable steps to ensure that a proper balcony was designed, erected and installed. He contracted Classen, a builder of some 20 years standing, whom he (and his life partner De Bruin) believed had the necessary ability, integrity and expertise to undertake the work. Classen came with the necessary credentials, as being on the Absa Panel of Contractors, a group of

contractors shortlisted by a major bank to do alterations and additions for their clients. Pienaar had no reason to think that Classen or his corporate entity would not perform the work in a professional or workmanlike manner or would fail to appoint a similarly qualified person as a sub-contractor.

[19] Pienaar could not do the work himself as he had no expertise to do so. It cannot be said that he acted unreasonably. I consider him to have complied with the third leg of the *Langley Fox* test and he is accordingly not liable to the plaintiffs for the damages claimed.

[20] Turning to Classen, it must be borne in mind that from the outset he disavowed any skill or expertise in the design, manufacture or installation of a steel balcony. His mandate was limited to finding a contractor who had the necessary expertise in that field. And so no mandate was given to Classen to manufacture or erect the steel balcony. The person who was to perform the work, Lamberts, was introduced to Pienaar and De Bruin and on occasion they interacted with him directly. Having regard to the evidence as a whole it is clear that the balcony collapsed as a result of the negligent manner in which Lamberts fixed it to the wall. At the last minute he used coach screws instead of the intended rawl bolts and positioned them incorrectly.

[21] The first question is whether Classen can be held vicariously liable for the negligence of Lamberts. The answer is no. As pointed out in *Langley Fox*, the general rule of our law is that an employer is not responsible for the negligence or the wrongdoing of an independent contractor employed by him. (See *Langley Fox* at 8A-B.) I consider that

on the facts of this case Classen falls in the category of the aforesaid employer and was not responsible for the negligence of Lamberts.

[22] This second question is whether any personal fault can be attributed to Classen. The absence of vicarious liability does not mean that there cannot be situations in which an employer, or principle contractor, may be liable because of their own negligence. In the present matter Classen would not escape liability if there was evidence implicating him in negligence. In the present matter there is no such evidence.

[23] It is true that he too is implicated in the failure to submit plans and is perhaps more culpable than Pienaar. But for the reasons given in relation to Pienaar this is not causally linked to the collapse of the balcony and is therefore irrelevant.

[24] There was some suggestion that when he arrived at the scene during the installation of the balcony he too asked Lamberts to remove the vertical support posts by saying he should do what the client wishes. As already indicated the vertical posts were not shown or alleged to be a factor in the collapse of the balcony. I have already alluded to the fact that Rivera was not even asked any questions about it. Of greater importance is that Classen had no reason to believe that Lamberts had fixed the balcony to the wall in an inadequate fashion.

[25] Classen had no means to prevent the collapse of the balcony. His evidence was that when he arrived at the scene the balcony was already installed. There is evidence that the head of the coach screws used to fix it in place were the same in appearance as those of rawl bolts. That being

so, he had no means of telling that inadequate fastenings were used. Nor had he any knowledge that they were wrongly positioned because they had been inserted into plaster instead of brick. In my view no negligence was proved against Classen and he should not have been found liable.

[26] In the result the following orders are made:

1. The appeals are allowed.

2. The first and second respondents are ordered to pay the appellants' costs.

3. The order of the court below is set aside and replaced with the following:

'1. The first and second plaintiffs' claims against the first, second and third defendants are dismissed.

2. The first and second plaintiffs are ordered to pay the costs of the first, second and third defendants, jointly and severally the one paying the other to be absolved.

3. The fourth and fifth defendants are found to be liable jointly and severally the one paying the other to be absolved for whatever damages the first and second plaintiffs might prove for injuries sustained by them as a result of the collapse of the balcony on 25 April 2004.

4. The fourth and fifth defendants are ordered to pay the plaintiffs' costs of suit, jointly and severally the one paying the other to be absolved, including the qualifying expenses of the plaintiffs expert witness Mr U Rivera and the costs of the application for absolution from the instance.'

KK MTHIYANE
JUDGE OF APPEAL

NUGENT JA (concurring)

[27] Cases like this one bring to mind the game known as 'pass the parcel'. They arise when the responsibility for performing a task is passed from hand to hand until ultimately it reaches the person or persons who actually do the work, whether as employees or as independent contractors. The question that can arise in such cases is who (if anyone) bears liability (I am referring to direct liability and not liability that might arise vicariously) if the performance (or failure to perform) the task causes foreseeable harm to a third party? Unless one is to say that liability always falls only upon the person or persons at the end of the line who actually did the work it follows that somewhere along the line there might be a party whose legal responsibility is not discharged by assigning the work to someone else but only by ensuring that the work is properly done. That is not a matter of jurisprudence but a matter of logic.

[28] That occurred in *Chartaprops 16 (Pty) Ltd v Silberman*.[4] The task of maintaining the cleanliness of the floors of a shopping mall was assigned by the owner to a cleaning contractor who in turn assigned it to employees who did the cleaning. The effect of the decision in that case was that responsibility for the consequences of failing to maintain the cleanliness of the floors passed from the owner to the contractor but there it stopped. (Whether or not the cleaners were also vulnerable to liability on one basis or another was not considered). Notwithstanding that an ordinarily adequate system had been put in place the system was not adhered to by one or other of the cleaners and on that basis the trial court

[4] 2009 (1) SA 265 (SCA).

found (this court confined itself to endorsing that finding[5]) that because the employees 'failed to take reasonable steps to detect and remove [the hazard]' the system was 'not sufficiently adequate to detect and remove spillages with reasonable promptitude'. Although not expressed in terms I think it is evident that the court considered that a reasonable contractor was required not merely to put in place an adequate system but also to ensure that the work was indeed done.

[29] This case once again involves three parties. The owner (Mr Pienaar) assigned work to a contractor (Mr Classen) who assigned it to a sub-contractor (Mr Lamberts). All three knew (or at least ought to have known) that harm could be caused to third parties if the work was not properly done. The question before us is whether they (or either of them) are liable for such harm when it occurred.

[30] The legal test to be applied when answering that question, as pointed out by my colleague, is that set out in *Langley Fox* (which repeats in substance the traditional test for negligence articulated in *Kruger v Coetzee*[6]) and for present purposes we need concern ourselves only with the third leg of that test.

[31] I agree with my colleague that no more could reasonably be expected of Mr Pienaar, who had no expertise in the field, than to pass the work on to an experienced building contractor, in the expectation that he would pass it on to a person whom he considered to be an expert. As for Mr Classen it was argued on behalf of the respondents – much along the lines of the finding in relation to the contractor in *Chartaprops* – that his

[5] Para 4.
[6] 1996 (2) SA 428 (A) at 430E-H.

responsibility did not stop with passing the work on to Mr Lamberts but he was called upon also to ensure that it was properly done. Mr Classen also had no expertise in this particular field and once more I do not think that could reasonably be expected of a building contractor in that position.

[32] Thus I agree with my colleague that neither Mr Pienaar nor Mr Classen were shown to have been negligent and I concur in the order he proposes.

_____

RW NUGENT
JUDGE OF APPEAL

Appearances:

For 1st Appellant:	AG Sawma
	Instructed by: Shakenovksy-Nysschen c/o Fairbridges Attorneys Cape Town Lovius Block Attorneys Bloemfontein
For 2nd & 3rd Appellants:	JC Butler SC
	Instructed by: Everinghams Attorneys Cape Town Webbers Attorneys Bloemfontein
For 1st & 2nd Respondents:	PA Corbett
	Instructed by: Malcolm Lyons & Brivik Inc Cape Town Matsepes Inc Bloemfontein