

SOUTH AFRICA / JUDGMENT

**Prime Invest 253 (Pty) Ltd and Others v
114-11th Road Kew (Pty) Ltd and Others
(57426/2009) [2011] ZAGPPHC 139 (27 July 2011)**
[2011] ZAGPPHC 139

COURT

North Gauteng High Court, Pretoria

BEFORE

K E Matojane

CASE / FILE NUMBER

57426/2009

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NOT REPORTABLE

NORTH GAUTENG HIGH COURT,
PRETORIA ,REPUBLIC OF SOUTH AFRICA)

CASE NO:57426/2009

DATE:27/07/2011

In the matter between:

PRIME INVEST 253 (PTY) LTD.....1st Plaintiff
GINGER STEVENS (PTY) LTD.....2nd Plaintiff
GRAHAM WESLEY STEVENS.....3rd Plaintiff
CHAIRMATE (PTY) LTD.....4th Plaintiff

And

114-11™ ROAD KEW (PTY) LTD.....1st Defendant
COUGAR TAR MAINTENANCE (PTY) LTD.....2nd Defendant
KEITH DU TOIT.....3rd Defendant
CONTOOL & MACHINERY.....4th Defendant
CON-TOOL & MACHINERY (PTY).....5th Defendant
BLACK ROOTES (PTY) LTD.....6th Defendant

ARTICULATED STRUCTURES (PTY) LTD.....7th Defendant

KWAGGA ROADS CONSTRUCTION AND.....8th

DefendantMAINTENANCE (PTY) LTD

MR MAJOLA.....9th Defendant

MATOJANE J

- [1] First plaintiff and first defendant are owners of adjoining factory premises situated at 114-11th Road Kew, Wynberg, Johannesburg. On the 8 October 2008 a fire that started at the factory premises of the first defendant spread to the first plaintiff's factory premises and destroyed the factory and also damaged the contents of the factory that belonged to the second to fourth plaintiffs.
- [2] Second to fourth plaintiffs were tenants in the factory premises owned by the first plaintiff. The premises of the first defendant was occupied on 8 October 2006 by second defendant, fifth defendant and such of the employees of the first defendant as may have been present.
- [3] Claiming that the start of the fire and spreading thereof to the plaintiff's property and the destruction of the plaintiff's property had been unlawfully and negligently started by one or more of the defendant's or their servants (acting as such). First plaintiff sued the defendants for the payment of the sum of R879 906.67 being the reasonable costs of labour and material to reinstate the factory building to its pre-damaged condition. Second plaintiff claimed payment for the sum of R2 091 925.60, this allegedly represented the reasonable value of the plant, machinery and items in the building and costs incurred as a result of the business interruption. Third plaintiff claimed payment in the amount of R213 444.50 and fourth plaintiff claimed payment of R234 558.34 being damages they allegedly suffered as a result of the fire.
- [4] The court ordered in terms of Court Rule 34(4) that the issue of quantum of the plaintiffs claims be dealt with separately, and be postponed sine die, and that at this trial all the other issues as pleaded in the pleadings be dealt with.
- [5] The plaintiffs case is that one or more or all of the defendants were causally negligent in relation to the loss suffered by the plaintiffs, and that their conduct was unlawful. It is contended that first defendant who was the owner of the factory building failed to take reasonable precautions to guard against the fire starting on first defendant's property, by failing to conduct mixing operations of flammable liquids in a safe area, by failing to ensure that the properties were properly equipped with fire prevention measures which would have prevented the spread of the fire to plaintiff's property and also by failing to comply with certain statutory requirements in respect of fire safety in terms of the National Building Regulations and or the Local Authority By-Laws, by conducting a high risk industrial mixing operation on the outside of the building, by keeping of quantities of flammable and combustible liquids exceeding the limitations imposed by law, by failing to comply with the requirement of bunding and that this failure caused or contributed to the start and spread of

the fire. It is further contended that second defendant and third defendant, had employees on the factory premises who worked over the weekend without proper supervision and that one of those employees caused the fire when he lit a cigarette during an illegal and highly dangerous production process which was being conducted on first defendant's premises.

- [6] The plaintiffs called four witnesses in support of their case. The defendants closed their cases without testifying. The first witness to testify was Mr. Jorge Roderiques, a tenant at the property of first defendant at the time of the fire. He said that Mr. Keith du Toit (third defendant) was in charge of and represented first defendant when his business, African Timber King concluded a lease agreement with first defendant. He testified that third defendant, Keith du Toit was visibly in charge of first and second defendant and was on the premises on a daily basis.
- [7] Roderiques testified that Keith du Toit was involved in the production process in the premises wherein a black tar like substance

was heated and mixed with benzene, which was added to thin the tar, and stored in drums, and then sold. Keith du Toit told him about the details of the production process that he witnessed. The production process was conducted in an open space in the yard. He told him that he could not keep up with the demand for the product. Employees were working over the weekend to meet the demand. Prior to signing the lease, he raised his concern about the bitumen in the premises and Du Toit told him that the Municipality had informed him that the operation was illegal on the premises and that he had to move it to this other land he had purchased for this purpose. It was on this understanding that he signed the lease agreement.

- [8] On his arrival on the scene after he was informed of the fire, he stated that "the bitumen was not burning that bad but my timber was up in flames, it was totally gone and when I asked Keith du Toit what had happened, he basically told me that one of his guys was busy decanting benzene into one of those smaller containers with a cigarette in his mouth and essentially that is how the fire started". He saw the fire brigade using foam on the Ginger Stevens fire and water on his burning timber and that the bitumen was no longer burning at that time. During cross examination it was put to Roderiques that Du Toit will deny that he told him that his operation was illegal and that Roderiques understanding of the process was flawed and incorrect as the substance used was 'solumix' not benzene.
- [9] The second witness to testify was Dr Phillip de Vos, a civil engineer who specializes in structural stability of buildings during a fire and the analyses and assessment of that. He is qualified to express an opinion about fire safety in buildings, statutory requirements for fire safety in buildings, fire risk management and related matters. He testified that he was instructed by a loss adjuster to assess compliance with statutory requirements regarding fire safety, and the effect of possible non-compliance on the origin and spread of the fire. He was met on site by Mr. Gavin du Toit who took him through the site, and explained to him the processes that occurred there. Gavin du Toit explained to him the exact quantum and the temperatures at which the elements were mixed and what the altitude gas was used for. It

was obvious to him that there had been a significant fire and that there was a process being conducted with a forklift standing with a mixing drum still elevated. He could see that there were a lot of drums that had ruptured and others were still undamaged with the flammable warning stickers on them. He knew that the drums could not

have been empty, because if they had contained air only, there would not have been a fire.

[10] Dr de Vos testified that there was no compliance with statutory requirements relating to the mixing operation of combustible and flammable materials on the outside, which should have been inside of a building. There were no fire resistant walls and bunding and too high volume of flammable and combustible liquids were kept on the premises. He found that the non-compliance with statutory

requirements and the nature of the operation led to the hazardous conditions on the first defendant's premises, which led to the spread of the fire to neighbouring premises. It was put to Dr de Vos that the actions of the fire brigade who attempted to extinguish a chemical fire with water caused its lateral spread into the plaintiff's premises, de Vos rejected the supposition and reiterated

correctly, in my view, that all what Roderiques said in his testimony was that he had only seen water being used on his timber. It was also put to Dr de Vos that his interpretation of the By-Laws was wrong and that his opinion is based on an incorrect interpretation of the law in that the rules that Dr de Vos said were not complied with did not have the power of law since they were not Building Regulations but only "deemed-to-satisfy rules".

[11] Ms. Anina Burger, an independent fire investigator employed by CSIR conducted an investigation at the premises about five days after the fire. She found that based on the fire movement and fire intensity pattern, the fire spread from first defendant's property to the property of first plaintiff. She explained that the tarlike substance, which was deposited on the adjacent building of the second plaintiff, came from the drums on first defendant's property from which tar was propelled from the drums during the fire. She testified that some of the drums exploded, became airborne and landed on the roofs of neighbouring properties. She observed lines of demarcation on a number of drums, which meant that the drums had liquid inside when they exploded and other drums had been full. She was adamant that the spread of the fire from the one premises to the other could have been prevented had reasonable fire prevention standards been complied with. In her opinion, the fire patterns on the separating wall between the open yard and the plaintiff's premises excluded the possibility of the actions of the fire brigade causing the spread of the fire to plaintiff's premises.

- [12] Mr. Fouche was the last witness to testify. He was employed by Mutual and Federal insurance at the time as an investigator. He testified that he could not succeed in obtaining statements from witnesses on the defendant's property as Mr. Keith du Toit refused him access to any witness in the premises to establish what happened there. It was put to him that du Toit will say that he had never seen him before.
- [13] The defendant's counsel, in his heads of argument raised the point in limine that, firstly, De Vos conclusions are based on inadmissible hearsay evidence, given to him by Gavin du Toit. It must be mentioned that counsel did not object when De Vos tendered evidence of the statement made to him by Gavin du Toit about the production process conducted on the premises. Importantly, De Vos testified that when he walked on the premises he knew from his experience and training and from what he saw from the remaining debris, that there had been a lot of combustibles on the premises prior to the fire and there were significant breaches of the By-Laws and safety rules in terms of the Building Regulations. It is clear that he arrived at his conclusions based on his own observations and experience even if the scene was contaminated at the time of inspection as contended by counsel.
- [14] Secondly, counsel submitted that De Vos was not a chemical engineer and could not testify as to the chemical components of substances present at the scene as he did not take measurements and samples or analyse any of the substances found at the scene. He therefore could not identify the process at the scene and could not assess compliance with regulations or local By-Laws for that process. De Vos testified that if Gavin du Tort's hearsay information was false or incorrect, that information would not nullify his report. It might change the quantities, temperatures and the exact procedural manufacturing process of mixing processes but in essence it remains that there was a significant fire because of the very large quantity of combustible and flammable materials on site contrary to the safety rules in terms of Building Regulations.
- [15] Lastly, counsel submitted that the evidence of Ms. Burger was based on hearsay evidence of witnesses she interviewed and was inadmissible. Ms. Burger testified she could establish based on fire movement and fire patterns and specifically the fire intensity pattern, that the fire originated and spread from first defendant's premises where second and third defendants conducted the production process with combustibles and flammable material.
- [16] The statements made by operators to Ms. Burger about the manufacturing process on the day when the fire started and what caused the fire and the fact that Gavin du Toit made the statement about the production process to De Vos is not hearsay and is admissible to proof that the statements were in fact made. In *Subramanian v Public Prosecutor* (1956) 1 WLR 965 at 969 the court held:

"Evidence of a statement made to a witness by a person which is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

[17] In my view, the points in limine raised by counsel for the defendants are without merit and are accordingly dismissed.

[18] It is common cause that first defendant was the owner of the premises and that second defendant was a tenant of the first defendant and carried on business at the premises. According to the evidence of Roderiques, the third defendant, Keith du Toit was on the premises on a daily basis and was involved in the production process observed by Roderiques, conducted in an open yard with vast quantities of combustible and flammable material. The defendants did not tender any evidence displacing the inference of negligence arising from that fact. The correct role of the maxim *res ipsa loquitur* is well settled in our law. In *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780G-H, HOLMES JA said the following:

"At the end of the case, the Court has to decide whether, on all of the evidence and the probabilities and the inferences, the plaintiff has discharged the onus of proof on the pleadings on a preponderance of probability, just as the Court would do in any other case concerning negligence. In this final analysis, the Court does not adopt the piecemeal approach of (a), first drawing the inference of negligence from the occurrence itself, and regarding this as a *prima facie* case; and then (b), deciding whether this has been rebutted by the defendant's explanation."

[19] In *Arthur v Bezuidenhout & Mieny*, 1962 (2) SA 566 A the Appellate Division held that the finding of *res ipsa loquitur* does not alter the incident of the onus of proof, it merely casts an evidential burden of rebuttal on the defendant. If the defendant fails to adduce evidence to negative the inference of negligence, his failure to do so tilts the scale in the claimant's favour and the latter is entitled to succeed against the defendant. In the present matter, numerous suppositions were put to De Vos that he was wrong in arriving at certain conclusions and that his understanding of the process and the risk involved was wrong and flawed and that Keith du Toit will come and explain about what had really happened there, and what the risks really had been. Keith du Toit never backed up the suppositions in evidence to rebut the evidential burden casted on him and other defendants. The defendants failed to testify about facts clearly within their knowledge as to why the fire started on their premises and why it spread to plaintiff's premises.

[20] I agree with the submission by counsel for the plaintiff that first defendant as the landowner, and the second defendant as occupier in terms of the lease agreement, and the third defendant who was in charge of the first and second defendants should have foreseen that in the circumstances where the production process was conducted with huge quantities of combustible and flammables, that such operation could cause harm to neighbours, should

something go wrong, and they should have taken reasonable precautions to prevent harm to others

[21] The uncontested evidence of Ms. Burger that it was either an intentional or negligent act of a human being that caused the origin of the fire should be accepted and that in the absence of evidence to contradict the evidence of de Vos it should be accepted that the failure to comply with the Building Regulations and By-Laws (as testified to by Dr de Vos) caused the fire once it started to spread from the first defendant's factory to the plaintiff's factory. This contention is borne out by the observations and findings made by Ms. Burger.

[22] I am therefore of the view that plaintiff's have succeeded in proving on a balance of probability that the causal negligence of at least first, second and third defendants caused their damages.

The following order is made:

1. First defendant, alternatively second defendant, alternatively third defendant, alternatively all three the defendants jointly and severally are liable for the plaintiffs' proven or agreed damages resultant from the fire which on 8 October 2006 occurred at 112 - 11th Road, Kew.
2. First defendant, second defendant and third defendant, alternatively the three defendants jointly and severally are liable to pay plaintiffs' agreed or taxed costs of the merits part of the action.

K E MATOJANE

JUDGE OF THE HIGH COURT

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