IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 3674/07

In the matter between

RUSSEL JAMES BROWN	First Plaintiff
JOHN SLOEP	Second Plaintiff

and

PIETER ANDRIES PIENAAR	First Defendant
MELVIN DOUGLAS CLASSEN	Second Defendant
CLASSENS HOME IMPROVEMENT CC	Third Defendant
DON NOEL DANIEL LAMBERTS	Fourth Defendant
VEN PROJECTS CC	Fifth Defendant

Advocates for Plaintiffs	:	Adv Peter Corbett
Instructed by	:	Malcolm Lyons & Brink Inc Tel 021 425-5570 (T Brivik) 21st Floor 1 Thibault Square CAPE TOWN
Advocate for Fourth and Fifth Defendant	:	Adv D A Stephens
Instructed by	:	A A Mayat Attorneys 82 Garfield Road CLAREMONT
Dates of hearing	:	27th November 2008
Date of judgment	:	11August 2008

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JUDGEMENT : 11th day of August 2008

NDITA, J

This is an edited version of my judgment delivered on 11 August 2008.

Introduction

[1] The plaintiff claims against the defendants arise from personal injuries sustained by them when the balcony of a building collapsed at 109, High Level

Road, Sea Point, on 25 April 2004. As a result of the fall, the plaintiffs allegedly sustained serious injuries, suffered shock, pain and discomfort and incurred medical expenses.

[2] The parties are in agreement that only the merits of the plaintiff's claim are to be decided at this stage.

[3] The plaintiffs are adult male persons residing at Loader Street, Cape Town. The first defendant is the owner of residential premises situate at 109 High Level Road, Sea Point, Cape Town, where the balcony collapsed. The second defendant is a building contractor, who conducts his business through the vehicle of a close corporation, namely Classens Home Improvements CC, which is the third defendant. The fourth defendant is the owner of a steel works business and conducts his business through Ven Projects CC, which is the fifth defendant.

[4] The plaintiffs in their particulars of claim allege that the collapse of the balcony was caused by the negligence of the first and/or second and/or third and/or fourth and/or fifth defendants who were negligent in one or more of the following respects, in that they:

1. failed to obtain the services of a structural engineer to advise in relation to the planned construction of the said balcony;
2. failed to instruct a structural engineer to design appropriate details to ensure the structural integrity of the said balcony;

3. notwithstanding being aware that the Planning Department of the Cape Town City Council had refused to approve the plans for the building of the balcony on the grounds that the structural details to be provided by a structural engineer had not been submitted to it, caused the balcony to be constructed in the absence of such structural details;
4. constructed the said balcony and/or permitted the construction of the said balcony without regard for its structural integrity, thereby rendering it unsafe for visitors to the said premises such as the plaintiffs;
5. constructed the said balcony in a manner, which was unprofessional, unworkmanlike and rendered it unsafe; and/or
6. failed to act with due care.

UNDISPUTED FACTS

[5] The following facts are not disputed:

1. The first plaintiff sustained a severe fracture and dislocation of the left foot and ankle and suffered shock, pain, suffering and discomfort as a result of the fall.
2. The second plaintiff sustained serious bodily injuries in the form of a fracture of the left tibula and left ankle and suffered shock, pain, and discomfort as a result of the fall.
3. Both plaintiffs have *locus standi*.
4. At all material times, the first defendant was the owner of the premises wherefrom the plaintiffs suffered a fall.

5. The fifth defendant constructed the balcony that collapsed when the plaintiffs were standing thereon.

6. The defendants failed to obtain the services of a structural engineer to advise in relation to the construction of the said balcony.

7. The defendants failed to instruct a structural engineer to design appropriate details to ensure the structural integrity of the said balcony.

8. No plans were submitted or passed by the City Council for the construction of the balcony.

THE DEFENDANTS' PLEAS

[6] The first defendant pleads that during or about 2002, he entered in an oral agreement with the second defendant alternatively third defendant, it having been represented by the second defendant, and in terms of which the second defendant alternatively the third defendant became obliged to inter alia construct the balcony in question. Consequently, the second or alternatively the third defendant caused the construction of the balcony to be effected and contracted the fourth, alternatively the fifth defendant to do so. Furthermore, the first defendant denies that the balcony collapsed as a result of any negligence on its part and avers in particular that the negligence giving rise to the collapse of the building is attributable to the second or third or fourth and/or fifth defendant. In the alternative, the first defendant denies causation, and in the further alternative pleads that the accident occurred as a result of the negligence of all the defendants as joint wrongdoers.

[7] The second and third defendants deny constructing a balcony on the premises of the first defendant. According to the defendants, the balcony was constructed by the fourth, alternatively the fifth defendant at special instance and request of the first defendant. Furthermore, if it is found that the second and third respondents were negligent, then the damages fall to be apportioned in terms of section 2 (8) (a) of the Apportionment of damages Act no: 34 of 1956.

[8] In terms of their amended plea, the fourth and fifth defendants allege that the fifth defendant constructed and installed the said balcony as sub-contractor to the third defendant. It is further alleged that at the time of the installation of the balcony the fifth defendant intended supporting the balcony by means of two vertical supports. Furthermore, the first defendant, in the presence of the second defendant, instructed the fifth defendant not to utilize the vertical support but to utilize a knee brace to support the balcony. It is further alleged that the fifth defendant advised the first and second defendants that the knee brace would not be adequate and that the fifth defendant would not guarantee that it would support the weight of the balcony, but, nevertheless, the first defendant instructed the fifth defendant to utilize the knee brace and the second defendant agreed thereto. It is further alleged that as a result of the circumstances set out above, the first and second defendants "*tacitly or impliedly indemnified the fifth defendant from any claim for damages arising from the inadequate knee brace"*. In the alternative, it is alleged that at all material times, the fifth defendant acted

as a subcontractor to the second defendant, alternatively, third defendant and is consequently not liable.

[9] In the further alternative, they alleged by the fourth and fifth defendant that the first, second and third defendants are joint wrongdoers and were negligent in one or more of the following aspects:

(a) causing the balcony to be supported by a knee brace support in circumstances where this was not adequate;

(b) preventing the fifth defendant from installing the two vertical supports which it intended to install;

(d) failing to ascertain what would be appropriate supports for the balcony.

In the further alternative, they allege that the plaintiffs were negligent on the grounds that:

(a) they stood or occupied a balcony which was not adequately supported;

(b) they stood or occupied a balcony which was overcrowded at the time and not intended to support the additional weight occasioned by its overcrowding.

THE EVIDENCE

The plaintiff's case

[10] The first plaintiff, a dentist by profession, testified that he and the second plaintiff were friends with the first defendant, Mr Pienaar. On 25th April 2004, both plaintiffs were invited to a birthday party at the home of the first defendant. A

group of people attended the party which was held in the living room of the first defendant's home. Whilst enjoying the party a car alarm went off. Mr Brown testified that he went to the balcony which overlooked the area where the cars were parked, to investigate whether it was their car alarm. A number of people followed. In a split second, the balcony fell off and he was trapped by its tension wires. When he looked down on his leg, he observed that his tibia and fibular were exposed. Mr Brown also injured his back during the fall.

[11] Under cross-examination, it transpired that Mr Brown was not warned that he should not step onto the balcony.

[12] A further witness to be called in support of the plaintiff's case, was Mr Ugo Giuseppe Rivera, who is a civil engineer in private practice with extensive experience in the field of structural engineering. Mr Rivera inspected the photographs of the balcony (exhibit "B") after its collapse and testified that:

In terms of the National Building Regulations and Building Standards Act 103 of 1977 and the regulations promulgated thereunder, the first defendant was required to submit plans for the intended balcony to the Cape Town City Council for approval prior to the commencement of the construction of the balcony. After submission of the plans to the Council, the first defendant would have been required in terms of the said regulations to submit a rational design of the balcony. The rational design is carried out by a structural engineer or structural technician appointed by the owner before the building plans are approved. That engineer would have had to undertake a detailed design, including sizing of the

structural members, the load imposed on the structural members, the fixings of the balcony to the existing building and checking that the existing building was capable of supporting the existing load. Although minor buildings are exempt from these requirements, an extension such as the balcony is not exempt because Regulation A1.3 expressly provides that:

> *"No person shall erect any building, which is to be supported by an existing building, or extend an existing building, unless a professional engineer, or other approved competent person has judged the existing building to be capable of carrying any additional load arising from such erection, or extension, and has in writing so informed the local authority".*

[13] In terms of the regulations, on completion of the construction, a certificate indicating that the building of the balcony complied with the design and duly submitted plans, would be issued by the structural engineer. Furthermore, prior to the occupation of the first defendant's balcony and after the work had been carried out, the first defendant was obliged to obtain an occupancy certificate from the Council. That certificate is normally issued after receipt of certain documentation, including a completion certificate issued by the appointed structural engineer. According to Mr Rivera, it was the responsibility of the owner of the property and all persons and/or entities involved in the construction of the balcony to ensure that it was built according to a safe design.

[14] When asked to comment on the design of the balcony and the manner in which it was fixed to the wall, Mr Rivera stated that:

(a) The type of fixings used to secure the balcony, namely, coach screws, were not suitable.

(b) The fixings were installed too close to the door reveal.

(d) The calculated tension in the fixings at the top of the handrail on either side of the door reveal was well in excess of the recommended safe load for such fixings even into solid concrete. Furthermore, the fixings were not into concrete and in most cases were not even into brickwork, but into plaster.

(e) It was the tension force which caused the balcony to collapse. If it had been constructed with supports, it would not have collapsed.

[15] The plaintiff next called Mr Cornelius Johannes Moir, a Principal Building Control Officer employed by the City of Cape Town. Mr Moir testified that it was the duty of the owner of the building and the builder to ensure that plans were submitted to the Council before the commencement of construction. He confirmed the earlier testimony of Mr Rivera that plans and a rational design for the construction of the balcony were necessary. According to Mr Moir, the first defendant had an existing file with the City Council. After he had perused the file, he observed that the first defendant had submitted a plan involving the addition of a second storey to his dwelling. In that application, the first defendant had nominated the second defendant as his agent and Mr Johan Coetzee as his

structural engineer to oversee the rational design pursuant to the provisions of the relevant regulations. After objections from the neighbours, the plan was eventually approved in 2005. However, with regard to the construction of the balcony, no such plans were submitted. Mr Moir's evidence merely confirmed what already is common cause.

[16] That completed the case for the plaintiff.

[17] At the end of the plaintiff's case, the first, second, fourth and fifth defendants brought an application for absolution from the instance which was refused.

The defendant's case

[18] The first defendant gave evidence to the effect that he is a semi-retired businessman and lives with his partner of 24 years, Mr Du Bruyn. He first met the second defendant socially through the second defendant's wife. In early 2002 he consulted with first defendant for the first time as a building contractor when he intended to carry out major renovations at his home, which included building a second storey. The second defendant arranged for plans to be drawn by a Mr Abrahams on behalf of the first defendant. The second defendant undertook to submit the plans to Council for approval. In November 2002, the first defendant conveyed to the second defendant, that he wanted to construct in front of the lounge a half-moon wooden balcony with balustrades that is not connected to the

floor. The second defendant informed him that he was not able to manufacture and install the metal framework and recommended the fourth defendant. A few days later, the fourth defendant proceeded to first defendant's home to take the necessary measurements. The fourth defendant, and Pieter du Bruyn were present at the meeting. Subsequently, the second defendant presented a quotation for the construction of the balcony for an amount of R10 944 (exhibit "A17"), which the first defendant accepted on 27 November 2002. The first defendant testified that he received a telephone call from the fourth defendant requesting that he inspect the made up steel frame of the balcony at the fourth defendant's business premises. Because he was at work at the time of the call, he instructed his partner, Mr Pieter Du Bruyn, to inspect the steel frame. To his knowledge, Mr Du Bruyn requested that the supports for the balustrades be brought together. Subsequently, the balcony was installed. The first defendant, however, testified that he was not present during installation and when he returned from work, he found that the balcony was fully installed. After the steel construction was fitted to the wall, the second defendant attended to the wooden flooring. When the work was completed the money for the installation was paid to the second defendant. The amount included that which was due to the fourth defendant.

[19] The first defendant testified that before the installation of the balcony, he did not make any enquiries as to whether plans were necessary, either by asking the second defendant or directing enquiries to the Council or the structural

engineer who he had commissioned to draw the design for the major renovations or to Mr Abrahams, who had drawn the original plans.

[20] It is common cause that the balcony collapsed on 25 April 2004, the day they had guests to celebrate Mr Du Bryun's birthday. The first defendant confirmed that a car alarm went and the guests went to investigate. After the collapse of the balcony, the first defendant notified his insurance company whereafter he sent a letter to the second defendant. It is necessary in this judgement to quote a portion of its contents:

> *"Dear Melvin*
>
> *Almost seven days later and we still have one very seriously injured friend in hospital.*
>
> *All this is because of sub-standard workmanship done on the two balconies. Last Sunday, the balcony in front of the lounge totally collapsed with only five people standing on it. The result of this was that three had ankle injuries – some broken and the one friend still in Constantiaberg Medi-Clinic with very serious complications due to the injuries to the foot and three operations on the ankle.*
>
> *Two ambulances with emergency personnel worked hard to stabilize the injured. Everybody had to be taken to hospital for their injuries.*

I dont know if you know that both balconies were installed with plastic wall plugs. To make matters worse these plugs were only 9 to 10 cm in length. Surely these plugs were not the correct ones used. What happened to the rollbolts (metal) that were supposed to be used?

…

We are shocked and appauling workmanship, not to the mention the "no care" attitude from your side. Maybe you must take a minute or two from your busy schedule to think about the trauma and hurt you have caused.

The second defendant immediately responded and attended at the first defendant's home to inspect the damage. He then arranged for the fourth defendant to repair the balcony and reinstall it. A similar repair job was done to the other balcony in front of the bedroom.

[21] Under cross-examination the first defendant conceded that although the second defendant, who was his contractor, did not advise him to seek Council approval, but he also considered unnecessary to do so because the work on the balcony was fairly minimal. When Mr Corbett put it to him that he absolutely made no attempt to satisfy himself that this balcony was going to be constructed in a safe manner or planning approval was necessary he replied that:

"But I was guided by my contractor, that had knowledge, that should have told me and say, listen, we need this and that, because that's why I've got a contractor that's got knowledge in that field where I'm layman. I mean, I know about pottery and glass and that, but I don't know about

construction. And while – Mr Classen said I'm getting a specialist to come and do the job".

According to the first defendant, the second defendant informed him that he is contracted out to ABSA Bank and he has a lot of experience in his line of work. On this basis, he (the first defendant) did not deem it necessary to verify that.

[22] With regard to the rawl bolts mentioned in the first defendant's letter, it transpired in cross-examination that the manner of installation was discussed by all the parties, and rawl bolts were considered to support the floating balcony.

[23] In further cross-examination by Mr Stephens, who appeared for the second defendant, it was put to the first defendant that on the day that all the parties had dinner at the Fishmonger restaurant, the first defendant and the fourth defendant discussed the installation of the balcony, which culminated in the fourth defendant proceeding to the first defendant's home to take measurements the following day. In fact, the purpose of the dinner was to enable the first defendant to meet with the fourth defendant to discuss the details of the balcony installation. Stated differently, the version of the second defendant as put to the first defendant is that the first and fourth defendants entered into a contract in which they agreed on the terms of the installation without the intervention of the second defendant. The first defendant denied that the second defendant was not involved in the installation of the balcony and according to the first defendant, there were no such discussions as that was a purely social evening.

[24] One of the issues that arose in cross-examination is the allegation by the second defendant that the first defendant instructed the fourth respondent in the presence of the second respondent not to support the balcony by putting pillars but affix it with a knee brace. However, the first defendant testified that he did not even know what a knee brace was until the commencement of these proceedings and therefore could not have made such a suggestion. According to the first defendant, the agreement was with the second defendant that is why all payments for the installation were made to him. Furthermore, the first defendant according to his evidence was not even aware of how much the fourth defendant charged for the installation as the quote was from the second defendant and did not specify any amounts due to the fourth defendant.

[25] When Mr O'Brien, who represented the fourth and fifth defendant cross-examined the first defendant, it emerged that the first and fourth defendants specifically discussed how the half-moon balcony was to be installed. In that discussion, the first defendant indicated that he did not want it to be supported by posts or pillars. It is common cause that the quotation from the second defendant includes the two posts intended to support the balcony, but the first defendant insisted that it had all times been his intention to install a floating balcony without pillar support.

[26] Mr Pieter Du Bruyn gave evidence in support of the first defendant's case. He testified that he was not involved in the business dealings between the defendants but was aware that the first defendant wanted a floating balcony without pillars or columns to support it. Mr Du Bruyn recalled being requested by the first defendant to go to the fourth defendant's factory in Brackenfell to inspect the metal frame of the balcony. He confirms that he merely requested that the uprights for the balustrade be closer together but was not present when the balcony was installed.

[27] The second defendant is a builder with twenty years experience but has no formal education in the building industry. He is on the panel of approved contractors for ABSA Bank. A large part of his work involves household repairs on the instruction of ABSA bank. It is not in dispute that the second and first defendants have been friends since 1999. In his evidence, the second defendant confirmed that he was consulted by the first defendant about major renovations and he recommended that a certain Mr Abrahams be appointed to draw the necessary plans but because there were objections from neighbours, the first defendant decided to start with minor renovations in the meantime.

[28] On 23 November 2002 the second defendant and his wife went to supper at the first defendant's home to discuss these renovations. He was able to recall the date through an entry made in his diary. After supper, the second defendant advised the first defendant that he could do all the work on the balcony but for

the steel frame. He further advised the first defendant that he (the second defendant) knew of a person who would be able to do it and would speak to him. This person turned out to be the fourth defendant. The second defendant then contacted the fourth defendant who came to his home to view the sketch of the balcony (exhibit "7"). According to the second defendant, the fourth defendant agreed that he would be able to do the job and indicated that his price would be between R6 000, 00 and R7 000, 00.

[29] On 27 November 2002 the first defendant and his partner, the second defendant and his wife, and the fourth defendant and his wife all went out to dinner at the Fishmonger Restaurant. During the evening, the first and fourth defendants discussed the balcony and agreed at a firm price of R6 500, 00. At the end of the evening, the first defendant asked the second defendant to include the amount agreed upon in his quote stating *"just put on his quote"*. However, according to his understanding, the quotes were rough estimates and never intended to be exact prices. The second defendant testified that he probably made out the quotations in the early hours of the 28 November 2002. The quotation reads as follows:

" Decking to front

A) Lounge

1. Galv. ½ moon frame with 1 – 2 Posts (supports)

2. Meranti timber covering.

3. Galv. Balustrades with twisted steel cabling.

B Bedroom

1. Galv. Balustrades with twisted steel cabling to the bedroom balcony.

Amount	*9600.00*
VAT	*1344.00*
TOTAL	R10 944-00".

According to the second defendant, the wording describing the balcony was given to him by the fourth defendant.

[30] The second defendant further testified that the same group of people gathered at the first defendant's home on 1 December 2002 for a breakfast or brunch. During that brunch the first and fourth defendants went downstairs onto the ground floor level to discuss by themselves the balcony and for the fourth defendant to take measurements. At some stage during the brunch, the first defendant showed the fourth defendant a balcony in the neighbourhood similar to that which he wanted installed. Throughout these discussions, none of the parties raised the question of plans. However, the second defendant testified that he did not consider it necessary for him to be involved with the planning approval because he did not regard the balcony as part of his work. But he was present at the fourth defendant's premises when the first defendant's partner, Mr Du Bruyn and a friend Nettie went to inspect the metal framework of the balcony. However, he was only there because Mr Du Bruyn did not know the directions to the fourth defendant 's place of business. Furthermore, he was not present when

the balcony was installed and only arrived late in the afternoon when it was already fixed to the walls and the workers were tightening the screws. His second in command, Mr John Links, was however on site at the time.

[31] Under cross-examination the second defendant conceded that, had he regarded it as his duty, he would have been in a position to supervise the way in which the metal frame of the balcony was installed and fixed to the wall. After the installation, the fourth defendant requested money for the balcony. Because he (the fourth defendant) had been unable to get in touch with first defendant, the second defendant telephoned the first defendant and arranged to collect the money, which he in turn paid to the fourth defendant.

[32] A second balcony similar to the first one was installed in front of the bedroom window on the first defendant's premises. It was identical to the one which is now the subject of this judgement. Again, payment in respect of the second balcony was made by the first defendant to the second defendant, who in turn passed it on to the fourth defendant.

[34] After the collapse of the balcony and receipt of the fax from the first defendant, the second defendant proceeded with his wife to the first defendant's home . He told the first defendant that the fourth defendant was not his sub-contractor but that he would arrange for the necessary repairs to be carried out. After this debacle their friendship ended.

[35] It will be recalled that the second defendant carried out some repair and maintenance work for ABSA Bank. He testified that he had discussed the court case with ABSA Bank who then advised him that because he had nothing to do with the installation, his service on the ABSA bank panel would be retained.

[36] Mr John Links gave evidence on behalf of the second defendant. He testified that at the time the balcony was installed at the first defendant's home, he was working for the second defendant as a supervisor. He further reconfirmed that during the balcony installation, a scaffolding belonging to the second defendant was used. Mr Links conceded that he could not remember the details of the installation with clarity because the incident had taken place a long time ago. In his evidence, Mr Links further conceded that had he been present when the balcony was installed he could have been in a position to supervise the installation and ensure that rawlbolts were used instead of couch screws.

[37] The next witness was Mr Gavin Striker who is a loss adjuster, and was employed at the instance of Hollard Insurance Company, the insurers of the second defendant. He testified that he had interviews with both second and fourth defendants. During his interview with the fourth defendant, he (the fourth defendant) stated that he was not a subcontractor with the second defendant but had a direct contact the first defendant. It emerged from Mr Striker's evidence that it was important from the point of view of Hollard Insurance Company that

the fourth defendant was not a sub-contractor, but the principal contractor so that it would escape liability under the insurance contract.

[38] The fourth defendant testified on his behalf and on behalf of the fifth defendant that:

He is a qualified fitter and turner who has been running his own business for the past 10 years. He has never manufactured a steel balcony such as the one in question. The second defendant met Mr Du Bruyn and the first defendant through the second defendant. The second defendant brought the first defendant and his partner Mr Du Bruyn to the fourth defendant's home where they had a few drinks and later dinner at the Fishmonger Restaurant in Stellenbosch. According to his evidence, this was a social gathering and no business was discussed. According to the defendant, they left the restaurant quite late. At the Fishmonger, it was agreed by their wives and Mr Du Bruyn that they gather the following morning at the first defendant's home for brunch on Sunday the 1st of December 2002. This too was a social gathering and there was no discussion about the balcony installation.

[39] A few days later, perhaps, a Monday or Tuesday, the fourth defendant met with the first and second defendants at the premises where fourth defendant took measurements . Discussions took place as to what the balcony should look like and the first defendant pointed out to the fourth and second defendants a balcony some distance higher up the mountain to the rear of the property with similar balustrades. The fourth defendant then went back to his business

premises and obtained quotes for making roll top rail and also for the steel. After adding on profit for himself he gave the first defendant a firm quotation of an amount of R6500, 00. He confirmed in his evidence the description of the balcony he was to manufacture as set out in exhibit “A17” (the quotation referred to above). On arrival at his workshop, he sketched the drawings of the steel structure with two support posts. The drawing was for his own use.

[40] The fourth defendant testified that the second defendant telephoned him and said he should go ahead and manufacture the balcony. Once the manufacture was complete and the steel work was ready for galvanising, the fourth defendant telephoned the first defendant and requested him to view the balcony. The second defendant, Mr Du Bryun and one Nettie arrived at the fourth defendant’s premises to view the balcony. When the balcony was ready for installation, the fourth defendant telephoned the second defendant and informed him. When the fourth defendant arrived on site to install it the second defendant was not there but arrived later. The first defendant was however on site. The fourth defendant supervised the installation of the balcony by three of his workers. The second defendant’s workers were also on site and helped the fourth defendant hoist the balcony up over the front wall onto the first level of the property as well as with the putting up of the scaffolding.

[41] When the holes were drilled into the wall in order to fix the balcony, the fourth defendant noticed that the brickwork was very powdery. He showed this to

first defendant and advised him that if he used rawlbolts the brickwork would crack. The first defendant suggested that he should use something that would not damage the brickwork. It is for that reason that he used the coach screws to secure the balcony to the wall. At that stage the balcony was still supported by the scaffolding and it was time to put up the metal support posts, which had been brought to support it. The fourth defendant testified that he did not put up the metal supports because the first defendant informed him that he did not want metal supports to be fixed to the floor as the floor had recently been tiled and that would affect access to the wine cellar underneath the balcony. The first defendant then asked whether or not the post could rather be put up at an angle to the wall. The fourth defendant testified that he replied and said that he was not in favour of this suggestion as such as a knee brace would not be adequate support. According to the defendant, the second defendant was present during this discussion about the supports and suggested that he (the fourth defendant) should do what the client wanted. One of the posts was then cut down and used as knee brace and the other taken back to the fourth defendant's workshop. Later the balustrades were fitted into the balcony. About one and a half to two months later, the second balcony was installed for the same price and according to a similar design.

[42] After the fourth defendant was informed that the balcony had collapsed, he refitted the balcony and carried out repairs on the second balcony as well. After the proceedings had commenced the second and fourth defendants

discussed the matter. As they had been friends for a long time, the second defendant asked the fourth defendant not disclose that he was his sub-contractor. The fourth defendant's response was that the first defendant would deny that the fourth defendant was not a sub-contractor but the second defendant dismissed this concern by stating that that would not matter. At that stage the summons had not yet been served on the fourth defendant. A few days later, the second defendant arranged for the fourth defendant to meet with Mr Striker. Mr Striker asked him to help "*and to get Melvin off"* and say that he was not his sub-contractor. He could not remember what he told Mr Striker However, later after the fourth defendant had spoken to Mr Striker, summons were served on him and he became a party to the litigation. The fourth defendant denied that he had any direct dealings with first defendant. He stated that he was a sub-contractor to the second defendant for the manufacture and installation of the balcony and that all payments received were made via the second defendant.

[43] The fourth defendant called Mr Sandile Nazo who testified that at the time of the construction of the balcony he worked for the fourth defendant as a labourer and assisted with the installation. According to Mr Nazo, both the first and second defendant were present at the premises when the balcony was installed. They brought with them two metal supports which were going to be used for the balcony. However, such supports were not used and one was cut down to make the knee brace. During the installation of the balcony the second

defendant gave instructions and also discussed matters with the fourth defendant.

[44] That brought to an end all the defendant's cases. I now turn to consider the applicable law.

THE ISSUES

On all of this evidence, the relevant issues are the following:

1. Were the defendants negligent?
2. Did the fourth defendant act as a subcontractor to the second and or third defendant.
3. Was the contract for the installation of the half-moon balcony between the first and the fourth and fifth defendant?

THE LAW

[45] It is trite law that liability for negligence only arises if a reasonable person in the position of the defendant:

1. would foresee the reasonable possibility of his conduct injuring another person and property causing him patrimonial loss; and
2. would take reasonable steps to guard against such occurrence; and
3. failed to take such steps.

(See Neethling Potgiter Visser, **The Law of Delict**, 4th edition, p 128 to 129 and **Kruger v Coetzee** 1966 (2) SA 428 (A))

THE LIABILITY OF THE FIRST DEFENDANT

[46] Mr P. Corbett, who appeared on behalf of the plaintiffs, argued that the first defendant was negligent on the basis that firstly, he failed in his statutory duties to submit plans for approval to the Cape Town City Council, which plans would, on the evidence, have included a rational design by a structural engineer or technician. Secondly he was negligent in causing or permitting that the balcony to be constructed without regard to its structural integrity, thereby rendering it unsafe for visitors such as the plaintiffs by insisting that vertical support posts should not be used. Mr Sawma, who represented the first defendant, on the other hand submitted, relying on the dictum in **Savage and Lovemore Mining v International Shipping Co (Pty) Ltd** 1987 (2) SA 149 (WLD) at 210E – 211that in applying the principles of negligence, due cognizance must given to the acceptance in our law, of the principle that mere ignorance does not constitute negligence. Furthermore, such ignorance gives rise to negligence only where a person undertakes an activity for which expert knowledge is required while such person knows or should reasonably know that he or she lacks the requisite expert knowledge for such activity. In addition, an error of law made by a person, as is the case with an error of fact excludes an inference of negligence where it shown that the person making such error acted bona fide, and that the error was reasonable. Moreover, it is a general principle of our law that an employer is not liable for the negligence or the wrongdoing of

an independent contractor employed by him or her save where the employer has personally been at fault in some form or fashion in regard to the conduct of such independent contractor, which has in turn caused harm to another.

[47] I now turn to consider whether the failure to submit plans for approval on the part of the first defendant constitutes negligence.

The first defendant's breach of a statutory duty

[48] It is common cause in the instant matter that the first defendant did not submit the building plans for approval to the Cape Town City Council. The first defendant testified that neither himself nor his partner Mr Du Bruin were aware of the fact that plans were required to be submitted in terms of the regulations, nor were they aware of the prerequisites of the regulatory provisions that the first defendant needed to submit rational designs, as contemplated by the legislation. The first defendant claims that he relied on the second defendant as the main contractor to advise him on these matters. The question therefore is whether the error is bona fide.

[49] The evidence established that the first defendant had previously made an application to the local authority for the approval of building plans for a second storey in his premises. His neighbours objected. Whilst the application was pending before the Council, the first defendant decided to commence with the installation of the balconies. According to his evidence because the work was

minor, he did not think it was necessary to seek Council approval. In short, the first defendant was not a novice when it comes to buildings. Even if he were, he or any layman for that matter was obliged before commencing with any renovations to first consider building legislation as well as the impact the intended alterations will have on his neighbours. Mr Corbett correctly submitted that the decision in **Savage and Lovemore** upon which the defendant relies for the proposition that a breach of a statutory duty cannot amount to negligence does not support this contention. In the same decision the Court pointed out at page 210 E – 211 B that:

> *It is expected of anyone who engages in a filed of activity governed by statutory provisions to keep himself abreast of the statutory provisions relevant thereto: S v De Blom…*
>
> *A failure on the part of such person to acquaint himself with the statutory provisions governing his activity would prima facie establish negligence on his part. However he cannot be said to have an absolute duty to know the provisions precisely and to interpret them correctly S v Wandrag 1970 (3) SA 151 (O) at 160B-C contains the suggestion that a reasonable man doing business in the building industry would go to the relevant government department to find out what statutory provisions he needed to comply with, and would see that he does not misunderstand the information there given to him. That indicates that the reasonable man, at least in that situation is not necessarily expected to acquire and study his*

own copy of the relevant Act and regulations or consult a lawyer about the interpretation thereof. However, depending upon the particular facts of the case, due care may require of him that he consults with his own sources. The government department which he approaches is not necessarily obliged to help him solve his problems, particularly if what he needs is a general understanding of the legal position governing his occupation. Where the guidance he needs relates to administrative procedures to be complied with, and a government official of sufficient seniority to be responsible is prepared to guide him, there is no reason why the reasonable man should not rely on such guidance (provided of course that he has duly disclosed all the relevant facts of the matter to the official. The test to be applied is simply to ask whether the conduct of the person alleged to have been negligent in his failure to know the relevant statutory provision fell short of the standard of care to be expected of the reasonable man or bonus paterfamilias.

…

It is to the effect that in the case of an error of law, no less than the error of fact, the inference of negligence on the part of the person who made the error would be excluded if it is shown that such person acted bona fidei and that the error was reasonable".

[50] The Court in the **Savage and Lovemore** decision found that Gardner was *bona fidei* and reasonable having regard to the following:

1. Gardner's conduct in seeking and relying upon the guidance of senior officials engaged in the administration of import permits rather than consulting a lawyer or reading and interpreting the Act did not fall short of what is expected of the reasonable man;
2. the incorrect information was used with the knowledge and concurrence of responsible officials within the department;
3. Gardner erred in believing that there was nothing unlawful about the use of such permits; and'
4. that the same error was made by a number of other responsible persons within the department.

It is clear from the Savage decision that the first defendant was expected to acquaint himself with the relevant statutory provisions governing building works. However, the evidence establishes that he did not make any enquiries with regard to what his obligations were despite having access to Mr Abrahams who had drawn a plan for his major renovations. Similarly, he had also appointed a structural engineer Mr Coetzee to draw the necessary details, and could have easily ascertained what his obligations were in terms of the law. Lastly, he could have enquired from the second defendant or fourth defendant but chose not to do so. The law cannot protect defendants who deliberately choose not to know.

[51] Mr Corbett further submitted and I agree, that the **Savage** decision is wholly distinguishable from the present matter on the following grounds:

1. the incorrect permit was used with the knowledge and concurrence of responsible officials within the department;
2. Gardner erred in believing that there was nothing unlawful about the use of such permits; and
3. the same error of law was made by a number of other responsible persons within the department.

[52] The omission by the first defendant is the cause of the harm suffered by the plaintiffs. It is clear that had the relevant application been lodged with the City Council, a structural engineer would have made recommendations on how the balcony could have be securely fixed to the wall, and in turn, the probabilities are that it would not have collapsed in the manner in which it did. In the words of Mr Rivera if a plan had been submitted:

> *"a competent person should have been appointed to design it, and such a competent person would either be a structural engineer or somebody accepted by the municipality, and basically that somebody who is either a registered professional engineer or registered professional technician, registered with the Engineering Council of South Africa basically. Having done so, that engineer would have to undertake a detailed design, including the sizing of the structural members, the loads imposed on the structural members, the fixings of the balcony to the existing building, checking that the existing building was capable of supporting loads and all*

of those kinds of things that would normally come into the structural design of a building element."

Furthermore, it can be safely assumed that the structural engineer would have been able to advise the number of people the balcony could accommodate at a given time. For all of the above reasons and on this ground alone, I find that the first defendant was negligent in his failure to comply with the statutory requirements and that a reasonable man in his position would have made the necessary enquiries before commencing with balcony installation.

[53] The second leg of the alleged negligence on the part of the first defendant is that he caused the balcony to be constructed without regard to its structural integrity, by insisting that vertical support posts should not be used when regard is had to the fourth defendant's evidence. The fourth defendant testified that his design of the balcony included installation of two support posts. Even though I have indicated in this judgement, that the fourth defendant admitted that he lied to Mr Striker by stating that he was not a sub-contractor to the second defendant, his evidence regarding the installation is acceptable. The first defendant struck me as an honest, dependable and trustworthy witness. He gave his evidence in a clear unambiguous manner and withstood lengthy cross-examination despite being an elderly gentleman. However, when it came to the issue of installation and use of rawlbolts, my view is that he became evasive and conveniently did not remember whether there was a discussion with regard to the installation whilst not denying that he was advised by the fourth defendant that the wall was brittle

and was ill-equipped for use of rawl bolts. The first defendant admits having a discussion with the fourth defendant involving the use rawl bolts. The fact that the fourth defendant arrived with two support posts but cut and used one as a knee brace lends credence to a very strong probability that the first defendant did influence the manner in which the balcony was eventually secured to the wall. Otherwise, how else would the fourth defendant have known that the two posts if installed would hinder entrance to the wine cellar and damage tiling work that had been recently effected? The probabilities favour a finding that the first defendant did suggest to the fourth defendant that vertical posts should not be used and in that way caused the balcony to be constructed without regard to its structural integrity and therefore negligent.

[54] I now proceed to consider whether the fourth defendant was the second defendant's subcontractor.

Was the second defendant the main contractor?

[55] The legal basis for negligence against the second defendant is based on the claim by the first defendant that he was the main contractor. The general rule of our law is that an employer is not responsible for the negligence or the wrongdoing of an independent contractor utilised by him/her unless the employer himself/herself has been negligent in regard to the conduct of the independent contractor. (See **Colonial Mutual Life Assurance Society Ltd v Macdonald** 1931 AD 412 AT 431-432).

Goldstone AJA, in **Langley Fox Building Partnership (Pty) Ltd v De Valence** 1991 (1) SA 1 at 11 1 stated:

> *'Whether the circumstances demand the exercise of care will depend upon proof that the employer owed the plaintiff a duty of care and that the damage suffered was not too remote.'*

After discussing **Peri-Urban Areas Health Board v Munarin** 1965 (3) SA 367 (A), a case which concerned the liability of the employer of an independent contractor for damages arising from the death of a third party who was injured in consequence of dangerous operations performed by the contractor, Goldstone AJA, in **Langley Fox** at 12 H-J, came to the following conclusion:

> '[I]n a case such as the present, there 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?'

If the answers to the first two questions are in the affirmative a legal duty arises, the failure to comply with which can form the basis of liability.

[56] Accordingly, the relevant issues pertaining to the second and or third defendant can be formulated as follows:

1. Was the second or third defendant the main contractor in respect of the balcony?
2. If so, was the second or third defendant's conduct causally negligently in relation to the harm suffered to the plaintiff?

[57] In order to answer the two questions above, it is necessary to refer to the contractual position of the parties as they appear in the pleadings. The first defendant avers that he had a contract with the second or third defendant for the manufacture and installation of the balcony in question. The second and third defendants deny the existence of such a contract. Accordingly, the onus rests upon the first defendant to prove it. With regard to the existence of the contract, the oral evidence of the various witnesses called by the parties has resulted in irreconcilable versions. In order to come to a conclusion on the disputed issues it is necessary to adopt the approach set out by Nienaber JA in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others** 2003 (1) SA 11 SCA:

> *"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, to, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to the conclusion on the disputed issues a court must make findings on (a) the credibility of various witnesses; (b) their reliability; and (c) the probabilities.*

As to (a) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vii) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[58] Mr Stephens, who appeared on behalf of the second and third defendants, submitted that the first defendant failed to discharge the onus of proving the contract with first defendant. This is so because the second defendant was not in charge of the manufacturing and installation of the balcony. According to the second defendant, the contract to manufacture and install the balcony was between the first and fourth defendant. Because the first and second defendant had been friends for years, he merely acted as conduit pipe for the passing of payments to the fourth defendant. In those instances where he may have made an input on the installation of the balcony, it was on the basis of the friendship of the parties, not because he was contractually bound to do so. In order to properly apply the approach set out by Nienaber JA in the **Stellenbosh Farmers Winery** case, it becomes necessary to revisit the version put by the second defendant.

[59] The second defendant's version is that he attended a dinner party at the home of the first defendant on 23 November 2002 when the issue of the balcony, among other requirements was discussed. Both the first and the second defendant are in agreement that the latter had already stated at that dinner that a specialist would need to be called in order to manufacture and install the balcony. Indeed it was on this occasion that a rough sketch was prepared by Mr Du Bruin. The second defendant informed the first defendant that the fourth defendant Mr Don Lamberts was the right man for the job. The second defendant further testified that based on his experience as a builder, he was able to give to the

fourth defendant rough measurements when he discussed the matter with him a day or two after the 23rd of November 2002. According to the second defendant and in the course of that discussion, the fourth defendant indicated that the price for the manufacture and subsequent installation would be between R6000,00 and R7000,00. The second defendant further testified that a supper engagement was arranged for the 27th November 2002 at the Fishmonger restaurant. The purpose of the supper, according to the second defendant was for the first defendant to meet with the fourth defendant and directly discuss with him in detail the manufacture and installation of the said balcony. At the end of the supper, the first defendant informed the second defendant that they had agreed on a price of R6500.00. The first defendant asked the second defendant to put the quoted amount on his existing quote for the minor improvements he was to effect on the first defendant's premise. This evidence should be viewed against the backdrop of the fourth defendant who testified that the supper was merely a social event and business was discussed.

[60] Upon closer scrutiny of the evidence given by the second defendant, it became clear that he was not forthright and honest to the Court. He was quick to change his version depending on the direction the wind was flowing. For example, initially he sought to distance himself from the fact he utilised subcontractors, e.g., electrician and carpenters. This is in stark contract to the testimony of his witness, Mr Links. When faced with entries in his diary dated 22 January 2003 (exhibit A"52"), reflecting subcontracting Trevor, an electrician, he

was forced to concede that occasionally he engaged services of a subcontractor, despite his firm evidence in chief to the contrary. The second defendant's basis for denying that he subcontracts was that he could not sub-contract work he could not supervise, he was once more forced to conceded that it is precisely work that one cannot render that one sub-contracts out. The impression he gave was that he sought to distance himself from anything to do with subcontracting, whereas his very letterheads offer work that he himself cannot render and has to sub-contract.

[61] Another factor which casts serious aspersions on the second defendant as a worthy witness is that his version is that he was at all times during these negotiations merely helping out a friend and was not part of the contract. This aspect of his evidence strikes a discordant note because he later testified that he would never allow any of his workers to assist the fourth defendant and would fire them if they did. Although this version is unconvincingly echoed by Mr Links, his supervisor, the evidence establishes that his workers did assist the fourth defendant with putting up of the scaffolding and they were not fired. In addition, the second defendant's version put to the first defendant's witnesses was that the second defendant would contend that he drew up the quote in question on the evening of 27th November 2002. However, when the first and defendant and Mr Du Bruin testified that that could not be the case in consequence of the late hour upon which the dinner at the Fishmonger terminated, he was quick to tailor his version by stating that it could have been at the early hours of the morning of the

28th November 2002, contending that he is workaholic. Strangely, the second defendant could not explain why the quote was dated the 27th November if it was made on the 28th.November. The second defendant did not make a good impression as a witness.

[62] The rest of the second defendant's testimony is riddled with mutations of his evidence resulting in a new version coming up with each question. When asked why the payment for the balcony installation was tendered to him, he testified that the reason was that the fourth defendant could not get hold of the first defendant telephonically and therefore he took it upon himself to contact the first defendant. Miraculously, the second defendant managed to get hold of the first defendant. He did not tell him that his contractor was looking for him. Instead he made arrangements to collect the money and pass it on. When asked by the Court why the fourth defendant could not leave a message with the first defendant's secretary, the second defendant once again tailored his evidence and stated that he also had problems reaching the first defended but he persisted. Why would a the second defendant as a person not contracted to the first defendant be that persistent in ensuring that he eventually got hold of him?

[63] I think it would be cumbersome in this judgement to detail every inconsistency, contradiction and variation in the second defendant's testimony, but I have indicated earlier on that his evidence under cross-examination is riddled with same. Besides the unreliability of the second defendant as a witness,

the evidence establishes with certainty that he at all times conducted himself as the main contractor to the fourth defendant. The following facts bear testimony to that fact:

1. The second defendant was requested to quote for all the work including the steel balcony and no separate price was stipulated for the balcony, but it was simply included in the globular amount for the whole quotation.
2. All payments in respect of the work rendered by the fourth defendant were made by the first defendant to the second defendant who paid the fourth defendant his share. The same modus operandi was adopted in respect of the second balcony.
3. After the collapse of the balcony, the first defendant wrote to the second defendant complaining about his laissez-fair attitude to his predicament. The first defendant did not ask why the complaints were addressed to him as he had nothing to do with the balcony installation; instead he promptly proceeded to the first defendant's home and made arrangements with the fourth defendant to immediately repair the balcony.
4. It is improbable that the fifth defendant would have given a quote or agreed to a price prior to have taken measurements
5. Although the fifth defendant admitted being untruthful with regard to the information he gave to Mr Striker to the effect that he was not the second defendant's subcontractor, it can be accepted that at

the time he had not yet been joined as a party to these proceedings and did not realise the impact of his lying to protect the second defendant. This aspect of the fifth defendant's testimony is plausible.

[64] In my view, for the above reasons, the first defendant has discharged the onus of proving that the second defendant was the main contractor.

[65] Having found that the second defendant was the main contractor, I proceed to consider if any negligence can be attributable to him. Like all construction contracts, it is implied by law that the contractor is to execute the work, first, in a proper and workmanlike manner and, secondly, the materials used must be of sound quality and fit for their designated purpose. (See **LAWSA** 2 part 1 at 474 and **Colin v De Guisti** 1975 (4) SA 223 (NC)). In the present case, the evidence reveals that the second defendant is an experienced builder. He, more than anyone should have known that Council approval was necessary before a structure such as a balcony is installed. As the main contractor, he had a duty to investigate and advise the first defendant that he was not prepared to even consider rendering the services without the parties complying with the enabling regulations and legislation. Applying the test enunciated in the **Langley Fox** judgment, I have come to the conclusion that he should have foreseen the risk of danger in consequence of the work he employed the contractor to perform without Council approval. Similarly, he was in a position to take steps to guard

against the danger and he did not take the steps in question. Thus, he was negligent. Had the second defendant performed his work in a professional manner, an engineer or structural technician would have been appointed to advise on the material to be used and the manner in which the balcony should have been fixed to the existing structure. Instead, he agreed to change the design of the balcony and the installation without vertical supports. This was done in circumstances in which he knew or ought to have known, that only coach screws were used to secure the balcony to the wall. Even if it he did not know that coach screws were used, as the main contractor, he ought to have enquired from the sub-contractor. That is what a reasonable builder would have done in the circumstances. As the principal contractor, he is liable for the clearly negligent conduct of his sub-contractor.

[66] At this point, I turn to consider whether the fourth defendant was negligent.

Was the fourth defendant negligent?

[67] It is common cause that the fourth defendant was responsible for the manufacture and installation of the balcony. A reading of the national building regulations (A1 APPLICATION section 3) provides that:

> *"No person shall erect any building which is to be supported by an existing building which is to be supported by an existing building or an extend an existing building unless a professional engineer or other approved competent person has judged the existing building to be capable of*

carrying any additional load arising from such erection or extension and has, in writing, so informed the local authority."

The regulations further give direction with regard to structural steelwork and provide that:

"3. The documentation for structural steelwork shall, to the extent required by the local authority, show-

(a) The grades of steel of all members;

(b) Details of connection between members; and

(c) Details of the corrosions protection to the steel structure

[68] With regard to the quality of the fourth defendant's evidence as well as his demeanour, it can be said that he was not a good witness at all. Initially he was untruthful about the statement he made to Mr Striker and led the Court to believe that he did not read it. In his own words under-cross-examination by Mr Sawma with regard to what he told Mr Striker he stated that:

"What I said on that day, I might have, I might have not --- the exact wording I cant' remember, but he jotted down what I said. I don't know what he put in there. He never read it back to me. After two, three weeks, Mr Stewart came to see me. And he also took notes from me and then he went away and he faxed me through a __this document that we've been looking at in 17, I don't know."

However, it later transpired that after reading the statement, he faxed a copy to the second defendant. Furthermore, he admitted that he lied to Mr Striker to

protect the second defendant. However, not all of his evidence can be discounted as untrue. For instance, his undisputed evidence that he initially intended to support the balcony with two posts is plausible when regard is had to the fact that on the day of installation he arrived with those posts and cut one using it as knee brace. It can be accepted that there were discussions with the first defendant with regard to the quality of the wall and the damaging effect that the rawl bolts would have on it.

[69] The salient features of the fourth defendant's evidence are that:

1. Despite realising that the wall of the building on which the balcony was to be fixed was brittle, he nevertheless continued installing the balcony by using the inappropriate coach screws. This he did because the first defendant insisted that he did not want the bricks of the house to be damaged by the use of rawl bolts. He was aware of the shortcomings of installing the balcony without proper support.
2. The fourth defendant failed to make enquiries in regard to whether or not the methods he utilised would serve the purpose of safely securing the balcony.
3. The evidence sufficiently establishes that he installed the balcony without due regard to the regulatory requirements applicable to steelworks.
4. The collapse of the balcony is entirely due the deficient workmanship of the fourth defendant. Apart from the defective

workmanship, he failed to ensure that plans and the rational design were submitted to the City Council before commencing with the work.

[70] In a joint minute, accepted as exhibit “D”, Mr Abrahams and Rivera set out the following reasons for the collapse of the balcony:

“1. Type of fixings used to secure balcony were not suitable for application.

2. Fixings were installed too close to the edges of the opening on all three sides.

3. The loading for which the balcony should have been designed in accordance with SABS 0160 is 4.0 kn/m2.

4. The calculated tension in the two top fixings in accordance with the above loading is well in excess of the recommended safe loads for such fixings in solid concrete.

5. The manufacturers of fixings do not give recommended loads for such fixings in brickwork due to the large range of scatter of test results.

6. In this case the fixings were not into concrete, and in most cases not even in brickwork.

7. Drawings should have been to the local authority to the local authority for approval.

8. *An approved competent person should have been appointed to undertake the rational design structure.*

[71] None of the concerns raised above were disputed by the fourth defendant. In fact, he conceded that he had serious concerns about the safety of the balcony in the light of the brittle walls and absence of vertical support it and could not guarantee its safety. In my view, where a contractor knowingly performs work likely to cause danger and despite this knowledge succumbs to the pressure from the employer to bypass the requisite prescripts, he cannot avoid liability or claim indemnity on the basis that he was acting on the instructions of the owner. He is after all the one with the expertise. Despite knowing that the balcony was likely to be unsafe, the fourth defendant succumbed to the pressure from the first defendant and abandoned the use of vertical supports. As a professional, he simply should have refused installing the balcony in circumstances where its safety was compromised. However, that is not his only display of play negligence. The use of couch screws in order to avoid damaging the wall of the building was negligent in the extreme.

[72] In my opinion, and applying the **Langley Fox** judgement, it follows from the aforegoing that the fourth defendant foresaw the risk of danger in consequence of the work he employed to contract and failed to take such steps to guard against the danger to prevent harm to the plaintiffs and judgment, is directly liable for the damages and pure economic loss sustained by the plaintiffs.

Again, apart from the defective workmanship, the fourth and fifth defendants were also negligent in failing to ensure that plans and the rational design were submitted to the City Council prior to commencement of the work. It is my judgement therefore that for all the above reasons, it is clear that the fourth defendant was negligent.

THE VICARIOUS LIABILITY OF THE THIRD AND FIFTH EDEFENDANT

[73] I indicated earlier on in this judgement that the third and fifth defendants are vehicles through which the second and fourth defendants conduct their business respectively. This is not disputed. I have found that the second and fourth defendants are personally liable in delict for their own negligence. With regard to the second defendant there is no doubt in my mind that he was acting in his capacity as the director of the third defendant. This was not in dispute during the trial. Furthermore, the quotation for the work done was issued in the name of the third defendant, thereby establishing a relationship between the second and third defendants. It follows that by virtue of such a relationship, the third defendant is indirectly liable for the delict committed by the second defendant.

[74] With regard to the fifth defendant, Mr O'Brien submitted that the fourth defendant contracted with third defendant in his personal capacity but as a member of the fifth defendant close corporation and is for that reason not liable in his personal capacity but only as the fifth defendant. The fourth defendant should

therefore be absolved. When examined by Mr O'Brien he stated that he started the fifth defendant in 1999 and is its sole director. However, it is clear from the evidence that fourth defendant is personally liable in delict. In my judgement, the third and fifth defendants are vicariously liable for the conduct of second and fourth defendants' delictual conduct.

[75] Finally, the fifth defendant pleaded in the alternative that plaintiffs were negligent by occupying a balcony which was not adequately supported or by standing on an overcrowded balcony not intended to support the additional weight occasioned by its over-crowding. I must from the outset hold that this submission has no basis. Had the rational plans and design been obtained by either of the defendants, an engineer would have been a position to advise the amount of weight the balcony could carry.

THE DIVISIBILITY OF DAMAGES

[76] The defendants requested the court make a Declaratory Order relating to the degrees of fault of individual defendants. The plaintiff on the other hand submitted that the harm suffered by the plaintiffs is indivisible and each of the defendants is liable for the whole of the damage (*in solidium*). Section 2(1) of the Apportionment of Damages Act 34 of 1956 provides that joint wrongdoers are in solidium liable to the plaintiff for the full damage and the Court may order that they jointly and severally liable and that the payment from one of them may absolve the others from liability to the plaintiff. However, a Court may, if it is

satisfied that all wrongdoers are before it, apportion the damages among them on the basis of their relative degrees of fault, and may give judgement against the wrongdoer for his part of the damages. (See Neethling, Potgieter, Visser, Law of Delict, Fourth edition at page 270).

[77] It should be remembered that in this judgement, the liability of the third and fourth defendant is vicarious. It is therefore almost impossible to determine to what extent each of the defendants are liable. Suffice to say that each joint wrongdoer is liable to the plaintiffs to the full amount of their damages.

CONCLUSION

[78] I have in this judgement held that all the defendants were negligent in causing the balcony to be installed without the approval of the Council and the rational design by a structural engineer. Similarly, all the defendants by installing the balcony without regard to its structural integrity were negligent. The negligence caused the balcony to collapse injuring both plaintiffs. In respect of the second and third defendant, it is the finding of this court that he was the main contractor. It is my conclusion therefore that all the defendants are jointly and severally liable to the plaintiff.

ORDER

[79] In consequence of the above the following order will issue:

1. Judgement is hereby granted in favour of the plaintiffs and that the first, second, third, fourth and fifth defendants are liable jointly and severally for such damages the plaintiff may prove to have suffered as a result of the collapse of the balcony.
2. Costs of suit including:

   Qualifying expenses of the plaintiff's expert witness, Mr. Rivera

   Costs of the application for absolution from the instance.

NDITA;J