**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN LOCAL CIRCUIT DIVISION, GEORGE)**

CASE NUMBER: 7138/2010

DATE: 1 JUNE 2010

In the matter between:

**KHAYALETHU BUSAKWE** Plaintiff

and

**VIKING INSHORE FISHING COMPANY (PTY) LIMITED** Defendant

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# J U D G M E N T

**LOUW, J**:

Having come to a firm conclusion as to the outcome in this matter, this is an *ex tempore* judgment in a trial which was concluded earlier today, I wish to thank counsel for the manner in which the trial was conducted and for their full and concise arguments which have made it possible to give this judgment today.

Mr Khayalethu Busakwe (the plaintiff), sues the defendant, Viking Inshore Fishing Company (Pty) Limited ("Viking") for damages in delict. The claim arises from an incident which

occurred on 19 August 2004 in the ice room at Viking's premises on Quay 3 in the Mossel Bay Harbour, when a part of plaintiff's right foot was amputated by a piece of machinery operated by Viking. At the commencement of the trial, I made an order, requested by agreement between the parties, separating the issues relating to the merits of the case and the quantum of the damages in this case.

At the time of the incident, the plaintiff was a crew member of the fishing vessel, Nikita. Nikita was one of a number of small independent fishing vessels that caught and delivered hake to Viking. Viking carries on business in the fishing industry, catching, buying in and selling fish. Viking had their own fishing fleet, but also bought in hake from small independent vessels such as the Nikita. Viking operated an ice room on Quay 3 in the Mossel Bay Harbour, where it delivered ice to its own vessels and to those independent vessels that delivered hake to it.

The ice room consisted of a refrigerated room, which was, and still is, presumably, nine metres by nine metres in width and in length and four metres high with three ice making machines on top, capable of producing 25 tons of ice per day. The ice dropped into the refrigerated ice room through three holes in the ceiling. Crew members of the vessels due to receive the

ice, were required to work in the ice room and to feed the ice with picks and shovels through a mechanised system onto their vessels moored alongside.

Mr Bertie Stewart, who at the time of the incident, was a principal inspector in the Department of Labour and who, as part of his original training, completed the national diploma in mechanical engineering at the Port Elizabeth Technikon in 1986, gave evidence on behalf of the plaintiff. He inspected the ice room soon after the incident. From his description of the ice room, the following appears. Access to the ice room is obtained through a small door which Mr Bekker, who later testified on behalf of the defendant, Viking, says is about 75 x 75 metres in size. This door is situated slightly higher than knee height from the floor of the ice room.

I might add that there is another door which leads to this small door. The other door being of a normal size. There was an emergency stop switch which controlled an electrically driven spiral worm (the spiral). This switch is situated in the ice room next to the door which I referred to earlier. The spiral is located in the middle of the floor of the ice room in a stainless steel gutter or trench which runs the length of the ice room, from the back towards the front where it passes under the wall of the room to deposit the ice onto a conveyer system on the

outside, which eventually delivers the ice to the vessels. The spiral is sunken into the floor of the ice room and it turns in the stainless gutter referred to earlier.

The gutter itself was at the time covered with three loose grid sections made of iron bars welded into angle iron frames. These grids formed a grille which fitted over the spiral. The top of the grille was flush with the floor of the ice room. The three segments of the grille were not of even length and were not attached to one another and fitted loose in the gutter covering the spiral.

At a pre-trial inspection attended by counsel, certain observations were made and these were placed before me as evidence by agreement. It appears from these observations that the trench in the ice room is approximately 38 centimetres deep and approximately 38 centimetres wide. The grid which covered the trench was 52 centimetres wide. The trench and the grid are depicted on the photos, Exhibit C1 to 3 and 5 to 6. The blade of the spiral is situated about five centimetres below the grid. An architect's drawing was placed before me as an exhibit and it shows that the three sections of the grid were designed to be loose laid on six centimetre wide shelves that ran along the length of the trench.

The grid is described in the drawing as follows. In one place it is described as the "removable grid to be supplied by client" and in another place as "loose laid grid covered by client". There are no design specifications for the grid itself in the drawing. There are design specifications for the trench and the shelf on which the grid was placed.

The plaintiff testified that on the day of the incident, he was one of four crew members of the Nikita who were engaged in feeding ice through the grille into the trench in the ice room. He testified that he had worked in the ice room before and at the end of the trial it was common cause that he had worked in the ice room on approximately five occasions before the incident as a crew member of the Nikita and also of other vessels. The plaintiff testified that on some of the earlier occasions that he worked in the ice room, the workers sometimes removed the grid or moved it away from the trench in order to accommodate pieces of ice that were too large to pass through the openings in the grid.

The defendant's witnesses, Mr Bekker and Mr Buys, testified that they were, at the time, unaware of this happening in the ice room. The plaintiff was, on the day in question, working at the back of the room, that is near the wall furthest from the entrance to the room. He was using a pick to break up the ice

which had formed a solid layer at that point. He stated that he was standing on ice above the grid. The ice at that point was, in his estimation, about 20 centimetres thick. While working in that position, the ice suddenly gave way beneath his right foot. His foot then passed through the ice and through a gap between the grid and the floor of the room. His right foot was caught in the spiral worm, which was turning at thet time and a part of his foot was amputated by the workings of the machine.

It is clear that the grid had moved, or had been moved, sufficiently to allow the plaintiff's foot to slip into the trench. Mr Louis Buys, an employee of Viking, whom I referred to earlier, inspected the position of the grid immediately after the incident and found that at the point closest to the back of the room, the loose section of the grid had moved and had slid over the edge of the adjoining grid section, that would be the middle section, with the result that an area the size of his fist, which was approximately ten centimetres in width, had opened up at the end of the grid. This was obviously where the plaintiff's foot had slipped through on to the spiral. This observation by Mr Buys, was confirmed by Mr Stewart's investigation, during the course of which he was told (it is not clear by whom) that the plaintiff was engaged in chipping ice with a pick, in order for it to pass through the grid and that whilst he was about this work, the compacted ice collapsed

under his foot, with the result that he stepped on to the spiral which had become exposed by the fact that the shortest grid section, that is the one at the back wall of the ice room had moved forward towards the middle of the room.

The day after the incident, Viking, to their credit, took immediate remedial steps. A new set of three grid sections were designed and made in their own workshop to replace the existing sets. In the new grid the round cross irons making up the grid, were replaced with angle irons, which had the effect of narrowing the spaces between the cross members and in addition a device was inserted to join the grids to one another in order to stop the individual grid sections from moving separately and also to stop the grid sections from slipping over one another.

Mr Stewart, in his evidence, described these remedial measures taken by Viking as not only the replacement of the original grid with a grid with smaller openings, but also the spot welding of the new grid sections to the gutter in order that it could not move or be lifted and to ensure that the spiral remained covered at all times. Now the evidence by the defendant's witnesses did, however, not mention the spot welding of the new set of grids to the gutter as described by Mr Stewart.

Mr Stewart testified that in his view Viking had by operating the ice room with the original grid, transgressed various provisions of the Health and Safety Act, Act 85 of 1993, in particular section 9(1) thereof and regulations promulgated under the act, in particular section 2(a) of the Driven Machinery regulations and section 5(2) of the general machinery regulations. He further testified that had compiled a report and that in this report he disclosed his view that Viking had transgressed the provisions of the act and regulations.

The evidence is that no prosecution was instituted by the Director of Public Prosecutions pursuant to Mr Stewart's report. Mr De La Rey, who appeared on behalf of Viking, made some point of this, but in my view this has little bearing, if any, on the questions to be decided in this case. We do not know why the prosecuting authorities did not institute a prosecution. It does not follow from the fact that no such prosecution was instituted, that Mr Stewart had not reported, that in his view there had been a transgression of the statutory provisions. In any event, this is a civil case which is to be decided on the facts placed before this court.

Mr Stewart further expressed the expert opinion that the

original grid design was inadequate in that the grid had not been bolted together and had not been fixed to the floor or gutter in such a way that the segments could not slide over one another or be moved or lifted by an ice pick.

The evidence on behalf of Viking was that the grid had to be loose laid over the trench so as to allow for regular inspections and maintenance. Mr Stewart testified that bolting the sections of the grid to one another and fixing the grid to the gutter or the floor with the aid of a simple key and pinion device and/or bolts were reasonable and practicable measures of immobilising the sections of the grid in the trench. In the circumstances, he suggested, in my view correctly so, that such measures would have allowed for the regular inspections required by Viking to take place and for maintenance to be effected to the spiral and the grid.

In my view these measures were easy to introduce, were cheap and would not have interfered at all with the operations and maintenance of the ice room and equipment. The only issues in dispute at this stage of the case are whether Viking's conduct was wrongful and negligent and if so, whether such negligent conduct caused the plaintiff's injuries.

The well known case of Kruger v Coetzee quoted by both

counsel has for long been the authoritative pronouncement on the issue of negligence. That case is well known and it is reported in 1966(2) SA 428 and the passage relied upon appears at page 430. There the following is said. The test is that of the reasonable man and it was formulated as follows:

> "(a) A *diligens paterfamilias* in the position of the defendant:
>
> (i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and;
>
> (ii) Would take reasonable steps to guard against such occurrence, and;
>
> (b) The defendant failed to take such steps."

In the work of Neethling & Others, Principles of Delict, 5th Edition at page 129, the following is said:

> "As far as the application of the foreseeability test is concerned, it must be stressed that it is not possible to lay down hard and fast rules, because the circumstances of each case are decisive. One may, nevertheless, accept as a broad guideline, that the foreseeability of harm will depend on the

> degree of probability of the manifestation of the harm [or how great the chance or possibility is that it will occur]. Therefore the greater the possibility that harm will occur, the easier it will be to establish that such damage was (reasonably) foreseeable (of course the contrary is also true)."

Neethling *et al* point out that another aspect of the test for negligence is the preventability of harm occurring. In that regard the question is whether in the case of reasonably foreseeable damage, the defendant took adequate, reasonable steps to prevent the materialisation of the damage. In regard to this leg of the inquiry, the authors refer to the work of Van der Walt & Mitchley, Principles of Delict, 3rd Edition, where it is pointed out that four factors are relevant. The first being the nature and extent of the risk inherent in the conduct of the wrongdoer:

> 'The fact that the nature and extent of the risk are not serious or that the harm foreseen is slight, may have the result that the reasonable person, despite the fact that the harm was reasonably foreseeable, would not have taken steps to prevent it (and consequently the wrongdoer is not negligent where he did not take such steps)."

The second consideration is the seriousness of the damage if the risk materialises and the damage follows. Where the risk is grave and extensive damage may occur, then even though there may be only a slight possibility or chance that the damage may actually materialise, a reasonable person will nevertheless take reasonable steps to prevent such serious and extensive damage. A third consideration which has to be borne in mind, is the cost and difficulty of taking the precautionary measures. The following is said by the authors in this regard:

> "Where the risk of harm can be eliminated or reduced without substantial problems, prejudice or cost, it may be accepted that the reasonable person would take precautionary measures, but where, on the other hand, the cost and difficulty of taking precautionary measures are greater than the gravity of the risk involved, the reasonable person would clearly not take such steps to minimise or reduce the risk."

I wish to refer only to those three in the context of this case.

Mr Schubart, on behalf of the plaintiff, submitted that Viking was clearly, casually negligent in regard to plaintiff's injuries.

He emphasised that Viking's own witness, Mr Bekker, stated that the spiral worm did constitute a danger to workers in the ice room and that he foresaw as a possible source of danger, a person slipping and getting his hand through the grid. Mr Schubart submitted that it was foreseeable that the loose grid may move or be moved during the operation of the ice room to expose the spiral worm which could, as a reasonable foreseeable consequence, lead to the kind of injury that happened in this case. In this regard Mr Schubart referred to paragraph 119 of the work of Van der Walt & Mitchley to which I referred to earlier, where it is said:

> "The general nature of the harm suffered by the plaintiff and the general manner in which the harm occurring, must have been reasonably foreseeable. The issue is not whether some harm, irrespective of its nature, was foreseeable, but whether the kind of harm which did occur, was generally foreseeable."

And then further on:

> "However, there is not a requisite that the particular consequence or the extent of the harm, the precise manner of its occurrence, should have been reasonably foreseeable."

To this I might add that in paragraph 120, the writers refer to the requirement that there must be, what is sometimes referred to as a foreseeable plaintiff and in this regard the authors say:

> "If the general category or class of persons ought to have been foreseen, it does not matter that a particular plaintiff ought not to have been part of that class. For example, if a driver of a vehicle ought to foresee harm to passengers, all passengers are foreseeable plaintiffs, even those who have no right to be on board."

In this case the foreseeable plaintiff is clearly a crew member of the vessels working in the ice room.

Mr De La Rey submitted that when the events of 19 August 2004 are seen in the context of all the facts, the incident and the manner in which the plaintiff was injured, were not reasonably foreseeable to the reasonable person. He placed considerable emphasis on the fact that the ice room had at the time of the incident been in operation for seven years since 1997 and that despite the fact that in that time thousands of workers had passed through the ice room at approximately 350 per month, there had never been a similar incident. This, he

submitted, shows that the incident was not reasonably foreseeable to a reasonable person and was in effect a mere accident, not caused by the negligence of Viking. He emphasised that according to Buys and Bekker, workers had on the day in question been given specific warnings about the danger of standing on the grid. The plaintiff says, however, that he never received such a warning, not in the past nor on that day.

It is not in my view necessary to resolve this dispute. I may state in passing that I consider both the plaintiff and Mr Bekker to be honest and credible witnesses. While I have considerable doubt about the reasons advanced by Mr Buys for him giving the workers a warning on that particular day, I do not find him to be a dishonest witness. Both Mr Bekker and Mr Buys are understandably partisan to Viking's case, and their evidence must be evaluated in this light.

Returning to the issue of the warning, there is no evidence of a warning in the past to the crew of the Nikita and in any event, even if a warning was issued on that day, it is not clear that the plaintiff was there at the time that the warning was issued, or if he was present, that he heard or understood the warning. The warning, if given, also did not relate to the possibility that the grid would move away from the trench. Mr Buys stated

that the warning he had given related to the fact that he considered the grid would be more slippery than the floor adjacent to the grid. For that reason the workers were cautioned not to stand on the grid.

Finally, even if a warning had been given, this did not relieve Viking from providing a safe environment by ensuring that the grid could not move or be moved. I will return to this issue in a minute. Mr De La Rey cautioned against in effect requiring Viking to provide absolute safety under all circumstances, that is to guarantee the workers safety and for the Court, with the benefit of hindsight, to hold Viking liable on the basis of such an absolute duty. He referred in this regard to the often quoted dictum by Nicholas, AJA, in S v Burgess Investments (Pty) Ltd & Another 1988(1) SA 861 (A) at 866J. There the learned judge said:

> "In considering this question, that is what was reasonably foreseeable, one must guard against what Williamson, JA called:
>
> > "The insidious subconscious influence of *ex post facto* knowledge." (S v Minnie 1963(3) SA 188 (A) at 196E-F).

Negligence is not established by showing merely that the

occurrence happened (unless the case is one were *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have "prophetic foresight" (S v Burgess supra at 879D). In Overseas Tank Ship UK Limited v Morts Dock & Engineering Company Limited (The Wagon Mound) 1961 AC 388 PC, 1961 14 it said at 424 AC and then 414 GH of the report:

> "After the event, even a fool is wise, but it is not the hindsight of a fool, it is the foresight of the reasonable man which alone can determine responsibility."

Now in my view, and without the insidious influence of hindsight, a reasonable person in the position of Viking, would have acted differently and would have taken steps to safeguard the position in the ice room. This is so, in my view, because the reasonable person would have foreseen the very real, in my view; possibility that the loose grid sections could be moved deliberately by the workers in order to get larger pieces of ice into the trench, or that it could be dislodged inadvertently with the picks and shovels used by them to break up and remove the not inconsiderable amount of ice into the trench.

The proximity of use of such tools to the trench and the grid, makes this, in my view, a reasonably foreseeable occurrence. Once the trench and spiral is exposed, everyone accepted the position in the ice room to be extremely dangerous to the workers working there. This state of affairs, i.e. the workers working in the ice room with the picks and shovels, working ice through the loose grid sections and the extreme danger to the workers if the grid should be disturbed from its position, would in my view have prompted a reasonable person to take steps to avoid harm to the workers. The nature and extent of the risk was very serious and the damage which might materialise was, in my view, so grave that it would override even if there was only a relatively slight possibility of the grid moving or being moved either intentionally or inadvertently during the course of the workers carrying out their task.

In addition the facts show that the cost and difficulty of taking effective precautionary measures, was relatively small and it would have been quite easy for Viking to take these steps. They have their own workshop and when they decided to move after the injury had been done, they moved swiftly and with relative little, if any, disruption of the ice room.

In the circumstances it is my view that the reasonable person would have taken steps to guard against the very occurrence

that took place here, that is of one of the sections of grid moving away and exposing the spiral worm. According to Mr Stewart, once the nine metre of grid sections are joined together, it would have been virtually impossible for the grid to move from its position. It was nog suggested that if the remedial measures had been adopted, the incident would still have occurred. On the evidence the remedial measures would, on the probabilities, have prevented the occurrence.

It follows, therefore, that Viking was both negligent and that their negligent conduct caused the plaintiff's injuries. The failure to take these steps were clearly also unlawful.

It follows that the plaintiff is successful on this, the merits leg of the case.

Mr Schubart asked for costs at this stage, including the cost of the photographs, of the inspection *in loco* attended by counsel and the qualifying expenses of Mr Stewart. In my view such a cost order is justified at this stage. The plaintiff clearly suffered not inconsiderable injuries and consequently damages. In my view this is not a case where there is a realistic likelihood of costs on the magistrate's court scale. Without considering the possible quantum of the claim as a consideration, this is a matter which is clearly of great

importance both to the plaintiff and to Viking and it potentially involved difficult questions of fact and law. The plaintiff was, therefore, in my view, justified in bringing the matter to the High Court. I, therefore, make the following order:

1. It is declared that the defendant is liable to compensate the plaintiff for such damages he may in due course be able to prove to have been caused by the injuries suffered by him due to the incident which occurred on 19 October 2004 in the defendant's ice room.

2. The defendant is ordered to pay the plaintiff's cost to date associated with the determination of the issue of liability, such cost to include:

   (a) The cost of the photographs taken on the plaintiff's behalf;

   (b) The pre-trial inspection *in loco* attended by counsel and;

   (c) The qualifying expenses of Mr Bertie Stewart.

LOUW, J

/bw