BS v MS AND ANOTHER

GAUTENG DIVISION, PRETORIA

KOLLAPEN J

2015 APRIL 16, 17; JUNE 17; SEPTEMBER 10

CASE No 3037/2012

Kollapen J:

Introduction

[1] In *Wilford v Little*[1] a decision of the California Court of Appeals the simple but profound observation was made that 'an infant is afraid of nothing and in danger of everything when left to his own devices'.

[2] This accurate characterisation of children has continued to provide challenges to legal systems across the world in how children are to be best protected against their own curiosity and vulnerability when they simply act as children. This tragic and unfortunate case is precisely about that challenge.

[3] The plaintiff in his capacity as biological father and natural guardian of his minor daughter (hereinafter referred to as B) has brought an action against the defendants seeking the payment of damages which arose out of an incident which occurred at the home of the defendants in which incident the child B sustained serious and permanent injuries.

[1] 144 Cal App 2d 477 (1956).

[2] The facts are largely common cause and are not materially in dispute. To the extent that disputes in relation to the facts do exist they are largely tangential to the issues to be determined and not material for the purposes of this judgment.

Background

[3] On 10 July 2005 and at the home of the defendants [. . .] B experienced a near drowning in a fishpond which was situated adjacent to the living room and inside the home of the defendants.

[4] It is common cause that on the particular day of the incident, the plaintiff, his now ex-wife and the mother of B, Ms S, B's elder sister as well as B paid a social visit to the defendants at their home. The families were related as B's mother and the second defendant are sisters. At that stage the families enjoyed a cordial relationship with each other and this visit was preceded by other visits during the course of the year.

[5] The purpose of the visit on the day of the incident was to hang biltong and dry wors and to pack and divide game which had been shot previously when the plaintiff and first defendant hunted at the first defendant’s farm.

[6] The evidence indicated that while the four adults were inside the garage processing and packing the meat, B came in and out of the garage intermittently. A while later according to the plaintiff, his now ex-wife and the second defendant left the garage and both agreed to supervise B.

[7] After hanging the biltong and dry wors the plaintiff and second defendant left the garage, came outside and found the two women sitting close to the pool. The plaintiff went inside the house to wash his hands and went outside again.

[8] The plaintiff, while outside, heard someone scream and when he rushed into the house he came across his ex-wife as she was lifting B from the fishpond.

[9] B had no pulse and was not breathing so the plaintiff immediately started administering CPR and continued with this up until they reached the Montana Hospital where medical personnel took over.

[10] Some 20 minutes later the medical personnel succeeded in reviving B. As a result of the near drowning and the period under which B was without oxygen, she sustained massive brain damage. As a result of the severe brain damage, B is unable to walk, talk or to take care of herself and she requires constant supervision and care.

Basis for the plaintiff's claim

[11] The plaintiff relies on negligence on the part of the defendants, individually and jointly, and alleges that the defendants were negligent in one or more of the following respects:

> ‘4.1 Versuim het om die visdam hoegenaamd toereikend te beveilig.
> 4.2 Nagelaat het om met die nodige en vereisde bedrewendheid, sorgsaamheid, kennis, ingeligtheid, bekwaamheid, bedagsaamheid, voorsorg, versigtigheid en/of omsigtigheid op te tree.
> 4.3 Versuim het om die voorval te verhoed of te vermy toe dit met die uitoefening van redelike sorg kon en moes verhoed of vermy gewees het.
> 4.4 Geen of onvoldoende waarskuwing oor die visdam aan gaste gegee is nie.
> 4.5 'n Gevaarlike situasie by the betrokke perseel geskep is of laat voortduur is.
> 4.6 Geen behoorlike uitkyk gehou is vir die minderjarige nie, dopgehou is nie.
> 4.7 Onvoldoende begeleiding van gaste was in die nabyheid van die visdam.’

[12] During the course of the trial an application was made and granted for the amendment of the plaintiff’s particulars of claim which amendment alleges a further ground of negligence in regard to the fishpond itself ‘wat onwettig was deurdat dit sonder die stadsraad van Tshwane se goedkeuring opgerig is’.

[13] The defendants amended their plea at the beginning of the trial to read as follows:

> ‘The mother of the minor specifically undertook, shortly before the near drowning incident, that she would take care of and supervise the minor.’

[14] The defendants pleaded that B's parents were both present at the premises of the defendants at the time of the incident, and further pleaded that the sole cause of the incident arose out of the failure of the biological parents of B to exercise proper supervision over B.

The fishpond

[15] It is common cause that the fishpond in which B had the near drowning incident was not indicated, as such, on the building plan and that the original building plans, which was approved, was for an indoor garden.

[16] The plaintiff called Mr Adolf Aphane, a chief building Inspector in the employment of the City of Tshwane to testify regarding the approved building plan of the defendants' house which was dated 12 March 2003.

[17] Mr Aphane testified that the deviation from the plans in the form of the fishpond renders the fishpond illegal and that there was no request for deviation and subsequently no approval thereof by the local authority. Mr Aphane further testified that he personally would have insisted on the fishpond having some or other safety measure if an application was made for the approval of the deviation from the approved plan.

[18] The defendants called their own expert witness, being Mr JM Gouws, an architect with 37 years' experience.

[19] Mr Gouws supported the evidence of Mr Aphane in regard to the fishpond being a deviation from the approved building plans and subsequently being nillegal but he testified that the deviation was a minor one and that the approval of the deviation would not have been a problem at the local authority.

[20] Mr Gouws pointed out during his testimony that the safety measure that Mr Aphane would have insisted on, which is in terms of safety measures with regard to public safety, part D of the National Building Regulations SANS 10400-2011, only came into effect in 2011 and therefore did not exist at time of approval of the plans in 2003 and as such could never have become part of any conditions of approval in the event that an application for a deviation from the approved plan was submitted and considered.

[21] The plaintiff testified that on the day of the incident the fishpond was filled knee deep with water. The defendants testified that the fishpond half filled with water.

[22] Mr Gouws accepted that the fishpond constructed and located in the manner that it was, was a source of possible danger not only to children but also to adults and in particular the elderly. In this regard however he expressed the general view and opinion that no property could be rendered 100 % safe for all persons at all times and that there would always be an element of risk in the nature of things .

Dispute

[23] The legal issues that need to be determined are:

(a) Was there a legal duty on the defendants to B in general and specifically in regard to the possible danger or harm posed by the fishpond.

(b) If the answer to the above is in the affirmative that there was a legal duty on the defendants, was the warning given to the plaintiff and his ex-wife about the dangers of the fishpond, a reasonable warning in accordance with the boni mores or was more than a warning required from the defendants.

The boni mores standard

[24] In *Minister van Polise v Ewels*[2] the Appellate Division recognised that wrongfulness is found in circumstances where the legal convictions of the community require a legal duty to shield others form injury.

[25] In general the conduct of a defendant is labelled as wrongful if it offends the legal convictions of society. These legal convictions of the community are firmly established as the criterion for wrongfulness in all cases of delict.[3]

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[2] 1975 (3) SA 590 (A) at 596H–597G.

[3] *Judd v Nelson Mandela Bay Municipality* ECP case No 149/2010 (2010 JDR 290) para 19:

> 'The turning point came in *Minister van Polisie v Ewels* 1975 (3) 590 (A) when the (then) Appellate Division recognised thot wrongfulness is also found in circumstances where the legal convictions of the community require a legal duty to shield others from injury, and not only when there was a negative duty to avoid causing injury (at 596H–597G). After *Ewels* (*supra*) it became generally accepted that in all cases of delict an omission may constitute wrongful conduct in circumstances where the legal convictions of the community impose a legal duty to prevent harm.'

See *Minister of Law and Order v Kadir* 1995 (1) SA 303 at 317C–318A; *Van Eeden v Minister*

[26] In the unreported judgment of *Judd*[4] Alkema J, summarised the test to be applied in regard to convictions by society with reference to cases of *Cape Town Municipality v Bakkerud*[5] and *Minister of Safety and Security v Van Duivenboden*.[6]

[27] Firstly, the boni mores test, as formulated in *Bakkerud* and *Duivenboden,* is an objective test and is not dependant on the court's personal views of what the community's legal convictions ought to be. The question to be determined is what the community's actual prevailing legal convictions are.

[28] Secondly, the legal convictions to be determined are those of the community in which the principle is to be applied as the norms, values and legal convictions of communities differ substantially from place to place and also from time to time.

[29] Thirdly, the legal convictions are required to be worthy of legal protection.

[30] And finally, the legal convictions of any community must by necessary implication also be informed by the values and norms of our society as embodied in the Constitution.[7]

[31] When the above formulated test is applied to the facts in the circumstances, it is clear that society would have reasonably expected the defendants to protect B from the possible harm that is the fishpond.

[32] Community and family members invite people to their homes for social functions on a regular basis and even though a legal duty exists created by society's reasonable expectancy that they nor their children will be exposed to harm or injury upon visiting the property of another upon invitation, it cannot be said that society would reasonably expect a property owner

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of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae 2003 (1) SA 389 (SCA) ([2002] 4 All SA 346).

[4] Supra n 2.

[5] 2000 (3) SA 1049 (SCA) ([2000] 3 All SA 171) at 1057B–C.

[6] 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741; [2002] ZASCA 79).

[7] The Constitution of the Republic of South Africa, 1996.

to go beyond reasonable means in order to make his or her property safe, as this would place an unfair duty on property owners and would also serve to discourage social interaction.

[33] The court finds that in accordance with the boni mores standard that there was a legal duty on the defendants to take reasonable steps to protect B from harm or injury on the defendants' property it being common cause that the fishpond constituted a source of danger to B.

[34] The next issue for determination is whether the defendants acted negligently in accordance with the legal duty and the related question of whether the warning given to the plaintiff and his ex-wife about the dangers of the fishpond coupled with the knowledge that both the plaintiff and the mother of B were aware of the particular danger, was sufficient to discharge the legal duty.

Legal duty on the defendants

[35] In *Hirchman NO* **&** *Hirchman v Kroonstad Municipality*[8] the court found that there is a duty on a landowner with regard to persons who are on his land as of right, to take all reasonable care to protect them from any danger due to the condition of the property. However, this case differs from the current one before court in that it dealt with a concealed source of danger on a piece of land owned by the defendant and of which the defendant was aware that members of the public had a habit of resorting to the land in question.

[36] The plaintiff and his ex-wife admitted during testimony that they were warned about the dangers posed to B by the fishpond and that they themselves were aware of the dangers of the fishpond especially considering that B had just started walking and was at the time of the incident more mobile than she might have been on previous visits to the defendants.

[37] In *Cape Town Municipality v Paine*[9] the question of the duty of care and reasonable steps taken in regard thereto, arose. The court concluded that—

[8] 1914 OPD 37.

[9] 1923 AD 207.

> ‘(t)he reasonable steps to be taken by a diligens paterfamilias in the position of the defendant would depend upon the circumstances of each case and no hard and fast rules could be laid down’.

[38] The court is satisfied that the warning given to the plaintiff and his ex-wife as well as the admission by both of them that they were well aware of the danger and possible harm or injury that the fishpond posed to B was sufficient and a constituted a reasonable step that discharged the legal duty the defendants owed to B.

Argument by the plaintiff in regard of s 28(2) of the Constitution[10]

[39] The plaintiff’s counsel in heads of argument incorporated the ‘best interest of the child’ principle, stated in s 28(2) of the Constitution[11] in order to further the case of the plaintiff.

[40] Section 28(2) reads as follows:

> ‘A child's best interest are of paramount importance in every matter concerning the child.’

[41] However, this right is not absolute as was held in *Minister of Welfare and Population Development v Fitzpatrick and Others.*[12]

[42] In line with our Constitution and the boni mores standard as stated above there was a legal duty on the defendants to protect B from injury or harm on their property by taking reasonable steps.

Reasonable steps

[43] It is common cause that the defendants made the plaintiff and his ex-wife aware of the danger of the fishpond by means of oral warning and that both the plaintiff and his ex-wife were in close proximity to B when the incident took place.

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[10] The Constitution of the Republic of South Africa, 1996.

[11] Id.

[12] 2000 (3) SA 422 (CC).

[44] The issue that needs to be decided is whether the warning given to the plaintiff and his ex-wife was sufficient in the sense that the defendants could have expected that the plaintiff and his ex-wife would in light thereof supervise B accordingly and whether the legal duty that the defendants owed to B was discharged upon issuing of the warning to B's parents.

[45] In *Cakata and Another v Provincial Insurance Co Ltd*[13] assistance the following was stated:

> 'The following passage from *Salmond on Torts*, 12th ed. at p. 458, is in point:
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> > "The fact that an adult is in charge of a child may, however, in certain cases exempt the defendant from a duty of care which would otherwise exist towards the child—the defendant being entitled to assume that the child will be duly protected by his adult, his adult guardian, and therefore is not in danger. In other words, the guardianship of an adult can never excuse the negligence of the defendant towards the child, but it may disprove the existence of any such negligence."'

[46] In *Pieterse and Another v Big Sky Trading 489 CC t/a Mike's Kitchen*[14] the following was held:

> 'Children should be free to play and explore their environment within acceptable limitations but always under adult supervision. Where such supervision is lacking but an entity or person has taken all reasonable steps to ensure the safety of persons in various environments, then such precautions will suffice to safeguard such an entity or person against any liability for injuries which may occur.'

[47] And in para 40:

> 'The restaurant gave parents more than adequate warning that parental or adult supervision was required and what the height restriction was.'

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[13] 1963 (2) SA 607 (D) at 611H–612A.

[14]GP case No 5894/2013, handed down on 12 June 2015 by Jansen J, para 39.

[48] The court accepts that in the context of the particular facts of this case defendants could not have been expected to have a higher duty of care towards B, as that would mean that the defendants have a higher duty of care than that of the parents of B.

Conclusion

[49] It cannot be stated that there was any legal duty on the defendants to do more than that which they had already done.

[50] I am satisfied that the warning issued by the defendants to the plaintiff and his ex-wife with regard to the danger posed by the fishpond to B, was a reasonable step in accordance with the boni mores standard and our common law and subsequently the following order is made.

Order

[51] The plaintiff's claim is dismissed with costs.

Plaintiff's Attorneys: *GP Venter Attorneys*, Pretoria.
Defendants' Attorneys: *Klagsbrun Edelstein Bosman De Vries Inc*, Pretoria.