CASE NO 12/97 *REPORTABLE*

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

SEA HARVEST CORPORATION (PTY) LTD *First Appellant*
SOUTH ATLANTIC ISLANDS DEVELOPMENT CORPORATION *Second Appellant*

and

DUNCAN DOCK COLD STORAGE (PTY) LTD *First Respondent*
TRANSNET LIMITED t/a PORTNET *Second Respondent*

CORAM : *SMALBERGER, HOWIE, MARAIS, SCOTT et STREICHER JJA*

HEARD : *1 & 2 NOVEMBER 1999*

DELIVERED: *26 NOVEMBER 1999*

Delict - determining the issue of *culpa* before the issue of wrongfulness - foreseeability in relation to *culpa* - no formula when applied strictly can be appropriate in every case - need for measure of flexibility.

J U D G M E N T

***SCOTT JA**/...*
***SCOTT JA**:*

[1] Shortly after midnight on 1 January 1993 the first respondent's cold store at K berth, Duncan Dock, Table Bay Harbour, was set alight by a distress flare fired by an unknown reveller in celebration of the New Year. The city fire brigade was summoned but by the time the fire was eventually extinguished the cold store and its contents had been largely destroyed. The cold store was recently built and had been in operation for no more than a few months. It was the product of a joint venture between the second respondent ("Portnet") and a company, Afco Holdings Limited, the latter having a shareholding of 70% and the former a shareholding of 30% in the first respondent which was established to operate the cold store. The building was erected on land belonging to Portnet and let to the first respondent. The facilities provided included those suitable for the storage of tuna fish at extremely low temperatures, ie in the region of -60°C, and intended for export. According to the port engineer, Portnet's participation in the venture was mainly to ensure that the facilities provided by the cold store were made available to all.

[2] Prior to the fire, the first respondent entered into oral agreements of deposit with both the first and second appellants in terms of which it undertook for reward, in the case of the first appellant, to freeze and store certain fish and fish products and, in the case of the second appellant, to store pre-frozen raw and cooked lobster tails. The property of both appellants was destroyed in the fire and each, as plaintiff, instituted a separate but similar action for damages against the respondents in the Cape Provincial Division. The actions were consolidated and in due course the trial proceeded before King J who was asked to decide only the issue of liability and to permit the question of quantum of damages to stand over. The learned judge found in favour of the respondents on the issue of liability, hence the present appeal.

[3] The appellants' claims were founded in the first instance on oral contracts of deposit and were directed at the first respondent alone. In the alternative they sued in delict, alleging that the destruction of their respective property in the fire was occasioned by the negligence of the first respondent or alternatively the negligence of Portnet or in the further alternative the negligence of both the first respondent and Portnet. I shall set out the grounds of negligence relied upon later in this judgment. The first respondent admitted the contracts of deposit but alleged that each was subject to one or other implied or tacit term or trade usage to the effect, stated broadly, that it would be liable only in the event of wilful misconduct on its part and not for negligence. In their respective replications the appellants denied the existence of such additional terms or trade usage and alleged

that in any event any exemption or limitation applied only to acts or omissions committed subsequent to the conclusion of the contracts of deposit and not to those committed prior to the conclusion of the contracts and upon which they relied to found their claims in delict. The appellants contended further that the first respondent was precluded from relying on the alleged terms by reason of a non-disclosure on its part of various facts relating to the construction of the cold store, which facts form the basis of the claim in delict and to which I shall refer in more detail later.

[4] It was common cause that in the event of it being held that the contracts of storage were not subject to one or other of the additional terms or the trade usage alleged by the first respondent it would be obliged, in order to escape liability, to establish on a balance of probabilities that the loss suffered by the appellants was not caused by *dolus* or *culpa* on its part. (*Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 761 H - 762 C.) As far as the claim against Portnet was concerned, the onus, of course, remained on the appellants. The court *a quo* did not deal with the appellants' claim in contract against the first respondent. It considered only the question of negligence and concluded that neither the first respondent nor Portnet had been negligent. In other words, even assuming that the first respondent bore the onus of proving it was not negligent, it was held to have discharged that onus. Before considering the grounds upon which the appellants contend that the respondents were negligent and in order better to understand them it is necessary first to set out certain facts and circumstances which are largely common cause.

[5] A firm of consulting engineers specialising in industrial refrigeration, Worthington-Smith and Brouwer, was engaged by the first respondent to design the cold store in question. Mr Worthington-Smith, or more accurately his firm, was also appointed as project-leader to co-ordinate the work to be performed by the various professional firms engaged to assist in the project, including structural engineers, mechanical engineers, electrical engineers and architects. Work began in about the last quarter of 1991. By the end of June 1992 it was all but completed.

[6] The main section of the building, and the section which contained the refrigeration chambers, was steel-framed with a roof of fibre cement sheeting made up of two pitches separated by a 70 m-long valley gutter. The gutter was a custom-built box gutter and made of fibreglass as specified by the structural engineers, Kantey and Templer. Although difficult to ignite, fibreglass is combustible and burns quickly with a high heat output. Its obvious advantage is that it is non-corrosive. The roof sheeting was non-combustible. It was insulated, however, by panels of insulation material fitted above the roof purlins. These panels were

referred to in evidence by their trade name "Kulite" and I shall do the same. They consisted of a core of expanded polystyrene 25 mm thick enclosed in a sheath of aluminium foil. Kulite, as in the case of the fibreglass gutter, was specified by Kantey and Templer. Although the sheath provided some protection, the polystyrene core was combustible and would burn once the panel delaminated or the joining strips failed, allowing the polystyrene to flow from the panel when it melted. Kulite was widely used as a roof insulation. It was the subject of a report dated January 1986 by the National Building Institute of the CSIR in which it was stated that Kulite panels "will not add to the growth and spread of fire when used as lay-in ceilings or as over-purlin roof insulation". The reason, shortly stated, was said to be that the polystyrene core would melt before it ignited so that the panels would "drop out of the hot zone of a fire long before the ignition temperature of polystyrene .... [was] reached". It was common cause that in the present case the Kulite panels had not been capped and had been allowed to protrude from under the roof sheeting into the valley gutter.

[7] There were five refrigeration chambers; three operated at -30°C and two at -60°C. A 'T'-shaped passage provided access to all five. The height of each was 10 m. The total floor area was in the region of 5000 square metres. They were constructed of insulation material similar to Kulite save that both the core of polystyrene and the metal sheet-covering were thicker. Panels of this nature are used almost exclusively in cold stores. They were referred to in evidence by their trade name "Chromodeck" and I shall do the same. In the case of the chambers operating at -30°C, the thickness of the polystyrene cores in the panels of both the walls and ceilings was 200 mm. In the case of the chambers operating at -60°C, it was 300 mm. The total quantity of polystyrene in the Kulite roof panels was of the order of 3% of the total quantity in the Chromodeck panels.

[8] The products stored in the refrigeration chambers were generally set on wooden pallets piled in stacks some 9 m high. Corridors were maintained between the stacks to permit access by forklift loaders. Whether the products were contained in cardboard cartons or not depended on what they were. Frozen tuna was not; most other products were. On the night of the fire the store was approximately 88% full. The products stored comprised fish (including lobster), chicken and vegetables with a total weight of 8 000 tons. The quantity of wood and cardboard in the store amounted to approximately 430 and 80 tons respectively, ie in the region of 6.5% of the total of the frozen products.

[9] The area above the refrigeration chambers, i e between the Chromodeck roof of the refrigeration chambers and the roof of the building, was referred to as the roof void or service area. It housed amongst other things various service pipes and items of equipment relating to the freezing process. Access was

gained to it by means of a catwalk. Finally, and to complete the picture, it is necessary to mention that adjoining what I have called the main section of the building were an office block and other structures containing a workshop, plant and the like. These, however, were sealed off from the main section. The building was relatively isolated in the sense that there were no other buildings nearby from which a fire could spread to the cold store.

[10] The port area did not fall within the jurisdiction of the Cape Town municipality. Accordingly, the erection of any building in the area did not require the approval of the City Council but the approval of the port engineer. The latter would cause the plans to be circulated amongst the various departments of Portnet which would scrutinize them to see that they complied *inter alia* with the current building regulations. These departments included a fire department. Portnet had previously had its own fire brigade but in terms of an agreement concluded with the City Council on 10 February 1992 the latter had undertaken to provide a fire fighting service within the port area. The agreement, however, made no provision for the approval of plans by the City Council.

[11] In the course of 1991 the plans for the cold store at K berth were submitted to the port engineer in the ordinary way. Although not required in terms of the agreement, the plans were referred to the City Council's fire department for its comments. In the event, they were considered not only by the fire department but by all the relevant departments of the Council. By letter dated 11 May 1992 addressed to the head of Portnet's drawing office, the city planner set out the "requirements" of his various departments, including those of the chief officer, fire and rescue services. In addition to requiring a number of hose-reels and fire extinguishers which were in due course provided, the chief officer classified the cold store as a "J2 Occupancy", i e as a "moderate risk storage" within the meaning of the regulations framed under s 17(1) of the National Building Regulations and Building Standards Act 103 of 1977 ("the National Building Regulations"), and required "the entire ground floor and first floor (the roof void) ... to be protected by an approved sprinkler installation". I shall refer to the question of classification in more detail later. It is sufficient at this stage to explain that in terms of the regulations (which are to be read with a Code of Practice issued by the Council of the South African Bureau of Standards - code SABS 0400) buildings in which materials are stored are classified as either "high risk" (J1), "moderate risk" (J2) or "low risk" (J3). A classification of the cold store as J2 would in terms of code SABS 0400 require the installation of a sprinkler system both in the roof void and the store itself in the absence of some alternative rational design such as, for example, the provision of carbon dioxide sprays or a dry-pipe sprinkler system in the refrigeration chambers.

[12] In 1992 none of the cold stores owned by the group of companies to which the first respondent belonged was fitted with a sprinkler system nor did any other cold stores in South Africa, except perhaps for one or two, have sprinkler systems. Even those recently constructed were classified J3 so that sprinkler systems were not required. Generally in 1992 the same was true of the United Kingdom and Europe where sprinkler systems in cold stores were neither required nor used. However, in the United States of America they were required, mainly at the insistence of insurance companies. It was common cause that, generally speaking, cold stores had a good reputation as far as fire was concerned. Worthington-Smith testified that he knew of no fire having occurred in a cold store while in operation.

[13] The classification and "requirements" of the chief fire officer contained in the city planner's letter of 11 May 1992 were, after some delay, communicated to the first respondent's architect who in turn advised Worthington-Smith. A meeting was arranged between the port engineer, Mr Visser, the architect and Worthington-Smith to discuss the matter. This was probably sometime early in August 1992. At the meeting, Worthington-Smith advised Visser that in South Africa sprinkler systems had not in the past been required in cold stores and referred in particular to a recently constructed cold store in George which had been classified J3 after the municipality had sought the guidance of the Council of the SABS. Visser did not take a decision immediately. He consulted the National Building Regulations and code SABS 0400 and after considering the matter further, came to the conclusion that the correct classification was J3 and that a sprinkler system was accordingly not required. His decision was duly conveyed to Worthington-Smith. A sprinkler system was not installed.

[14] The firing of distress flares in the harbour area other than for assistance is prohibited by regulation. Nonetheless it appeared from the evidence of a member of the Royal Cape Yacht Club that the firing of flares at midnight on New Year's eve was a regular occurrence and had been for at least the past 20 years. Distress flares (or more accurately, in the present context, parachute pyrotechnic signals) are designed to burn out before they reach the water. There was no evidence to suggest that a flare had ever caused a fire in the harbour or its surrounding area.

[15] Although there was some dispute in the evidence as to the precise course the fire was likely to have taken, the parties were in agreement as to its probable cause and the manner of its probable spread. Their agreement was recorded as follows:

> "A parachute distress signal (flare) probably landed in the catchment area of the central box gutter, rolled into the gutter and ignited same. This, in turn, ignited the over-purlin expanded polystyrene insulation and spread along the insulation through the roof void to the roof of the cold rooms and into the cold rooms."

Mr Goring, a fire expert who testified on behalf of the appellants, characterised the fire as "bizarre". Mr Basson, a former head of the fire and research laboratory of the building research institute at the CSIR, described it as "unique". It was not in dispute that a sprinkler system would have extinguished the fire or at least served to control it.

[16] Against this background I set out the grounds upon which it was alleged that the first respondent, alternatively Portnet or alternatively both, were negligent; *viz* that one or other or both -

> "1. negligently failed to instal or have installed a sprinkler system which was capable of extinguishing or containing a fire, such sprinkler system being essential having regard to:
>
> 1.1 the inflammable nature of the:
>
> (a) materials used in the construction of the building;
>
> (b) the goods stored therein; and
>
> (c) the containers in which the goods are stored;
>
> 1.2 the method of construction employed in the construction of the cold store;
>
> 1.3 the design of the cold store;
>
> 2. negligently failed to follow the advice of the Chief Fire Officer as aforesaid to instal a suitable or any water sprinkler system;
>
> 3. negligently permitted highly flammable material, namely expanded polystyrene sheeting, to protrude into the gutters and box gutters of the cold store, thereby exposing such material and creating a serious fire hazard."

The particulars of claim in both actions were amended to allege an additional and distinct ground of negligence against each of the respondents. It is convenient, however, to consider first the grounds set out above relating, as they do, to both respondents before turning to the additional grounds.

[17] Dr Bland, a fire expert who testified on behalf of the appellants, was of the view that once the fibreglass gutter ignited the protrusion of the Kulite into

the gutter would have been of little consequence as the substantial and prolonged ignition source created by the burning gutter would in any event have been sufficient to ensure the spread of the fire. This evidence was not disputed by the appellants' other witnesses.

[18] Much evidence was adduced on both sides as to the correct occupancy classification of the cold store. Not surprisingly the appellants' experts thought it was J2 while those called on behalf of the respondents thought it was J3. Moderate risk storage, ie J2, is defined in the National Building Regulations as "occupancy where material is stored and where the stored material is liable in the event of fire to cause combustion with moderate rapidity". What is immediately apparent is that the definition assumes a fire. In other words, it does not take into account the likelihood or otherwise of a fire starting. Furthermore, it relates solely to the combustibility of the material stored (including presumably the packaging) but not to the combustibility of the building itself. To this extent, therefore, it is not an entirely appropriate yardstick for determining the need for a sprinkler system, although this, it would seem, was largely the basis upon which the municipality's chief fire officer recommended the installation of a sprinkler system. It is unnecessary to attempt to analyse the evidence relating to the classification. What is apparent is that there is much to be said for both viewpoints. The court *a quo* accepted for the purposes of its judgment that the building was probably correctly classified J2 but pointed out that:

> "this only really became evident after weeks of debate and dispute and minute analysis amongst experts of international stature, called by the parties."

and that the appellants'

> "foremost experts Bland and Van Rensburg recognised that the classification was vague and inexact, requiring a value judgment and that there was room for differing opinions."

I have no quarrel with this approach or the observations made by the learned judge. Whatever the correct classification may have been, the true inquiry was whether in all the circumstances Worthington-Smith was negligent in failing to install a sprinkler system and whether the port engineer's failure to insist upon its installation was both wrongful and negligent. Only if the answer is in the affirmative does it become necessary to consider the further question of whether there was vicarious liability on the part of either of the respondents.

[19] In the course of the past 20 years or more this court has repeatedly emphasized that wrongfulness is a requirement of the modern Aquilian action which is distinct from the requirement of fault and that the inquiry into the existence of the one is discrete from the inquiry into the existence of the other. Nonetheless, in many if not most delicts the issue of wrongfulness is uncontentious as the action is founded upon conduct which, if held to be culpable, would be *prima facie* wrongful. (*Cf Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 497 B - C.) It is essentially in relation to liability for omissions and pure economic loss that the element of wrongfulness gains importance. Liability for omissions has been a source of judicial uncertainty since Roman times. The underlying difficulty arises from the notion that while one must not cause harm to another, one is generally speaking entitled in law to mind one's own business. Since the decision in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) the courts have employed the element of wrongfulness as a means of regulating liability in the case of omissions. If the omission which causes the damage or harm is without fault, that is the end of the matter. If there is fault, whether in the form of *dolus* or *culpa*, the question that has to be answered is whether in all the circumstances the omission can be said to have been wrongful; or, as it is sometimes stated, whether there existed a legal duty to act. (The expression "duty of care" derived from English law can be ambiguous and is less appropriate in this context. See *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27 D - E.) To find the answer the court is obliged to make what in effect is a value judgment based *inter alia* on its perceptions of the legal convictions of the community and on considerations of policy. The nature of the enquiry has been formulated in various ways. See for instance: *Minister van Polisie v Ewels*, *supra*, at 597 A - B; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318 E - H and the recent formulation, albeit in a different context, in *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (A) at 1204 D. It is clear that the same facts may give rise to a claim for damages both *ex delicto* and *ex contractu* so that the plaintiff may choose which to pursue. But a breach of a contractual duty is not *per se* wrongful for the purposes of Aquilian liability. (See the *Lillicrap* case, *supra*, at 496 D - I, 499 D - G). Whether the requirement of wrongfulness has been fulfilled or not will be determined in each case by the proper application of the test referred to above.

[20] Even if the contractual nexus between the appellants and the first respondent is disregarded, the position of the latter with regard to the question of wrongfulness would be somewhat different from that of Portnet. Nonetheless, and by reason of the existence of that contract, the issue of wrongfulness in the context of a delictual action against the first respondent does not arise. It is common cause that the appellants stored goods in the cold store in pursuance of contracts of

deposit. What is in dispute is whether the first respondent successfully contracted out of liability for negligence. If it did, the appellants cannot succeed in their claim even if there was negligence. If it did not, the first respondent would be liable unless it can show that the loss occurred without *culpa* or *dolus* on its part. As far as Portnet is concerned, the appellants' claims are founded solely in delict. Portnet was not the party that was directly responsible for the construction of the cold store or the party that employed the persons engaged in its construction. Nonetheless the action is premised on the existence of a legal duty on the part of Portnet to take steps to ensure that adequate fire protection measures were adopted in the construction of the cold store so that Portnet's failure to have a sprinkler system installed or to see that there was adherence to the advice of the chief fire officer was not only negligent but also wrongful. It is convenient to deal first with the issue of negligence both on the part of the first respondent and Portnet. In the absence of negligence the issue of wrongfulness does not arise.

[21] A formula for determining negligence which has been quoted with approval and applied by this Court time without measure is that enunciated by Holmes JA in *Kruger v Coetzee* 1966(2) SA 428 (A) at 430 E - F. It reads:

> "For the purposes of liability *culpa* arises if -
> (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."

However, in *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) the following was said at 1077 E - F:

> "The test for *culpa* can, in the light of the development of our law since *Kruger v Coetzee* 1966 (2) SA 428 (A) be stated as follows (see Boberg *The Law of Delict* at 390):
>
> For the purposes of liability *culpa* arises if -
> (a) a reasonable person in the position of the defendant-
> (i) would have foreseen harm of the general kind that actually occurred;
> (ii) would have foreseen the general kind of causal sequence by which that harm occurred;

(iii) would have taken steps to guard against it, and

(b) the defendant failed to take those steps."

The formula is that of Boberg. A reading of the reference cited reveals, however, that the learned author's formulation of the test is in the context of the so-called relative theory of negligence which he advances as being more logical and convenient than what has sometimes been called the absolute or abstract theory. Broadly speaking, the former involves a narrower test for foreseeability, relating it to the consequences which the conduct in question produces, and serves in effect to conflate the test for negligence and what has been called "legal causation" (*cf Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 914 F - H) so as, it is contended, to eliminate the problems associated with remoteness. I do not read the judgment in the *Mukheiber* case to have unequivocally embraced the relative theory of negligence. Indeed, elsewhere in the judgment and when dealing with the issue of causation the court appears to have applied the test of "legal causation" which the strict application of the relative theory would have rendered unnecessary. (See par 36 -par 52.) Having said this, it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue.

[22] It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case. As Lord Oliver observed in *Caparo Industries PLC v Dickman and Others* [1990] 2 AC 605 (HL) at 633 F - G,

> "the attempt to state some general principle which will determine liability in an infinite variety of circumstances serves not to clarify the law but merely to bedevil its development in a way which corresponds with practicality and common sense."

I agree. A rigid adherence to what is in reality no more than a formula for determining negligence must inevitably open the way to injustice in unusual cases. Whether one adopts a formula which is said to reflect the abstract theory of negligence or some other formula there must always be, I think, a measure of flexibility to accommodate the "grey area" case. Notwithstanding the wide nature of the inquiry postulated in paragraph (a)(i) of Holmes JA's formula - and which has earned the tag of the absolute or abstract theory of negligence - this court has both prior and subsequent to the decision in *Kruger v Coetzee* acknowledged the

need for various limitations to the broadness of the inquiry where the circumstances have so demanded. For example, it has been recognized that while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable. (See generally: *Kruger v Van der Merwe* and Another 1966 (2) SA 266 (A), *Minister van Polisie en Binnelandse Sake v Van Aswegen* 1974 (2) SA 101 (A) at 108 E - F and also *Robinson v Roseman* 1964 (1) SA 710 (T) at 715 G - H. For examples of where the manner in which the harm occurred was held not to have been reasonably foreseeable, see *S v Bochris Investments (Pty) Ltd and Another* 1988(1) SA 861 (A); *Stratton v Spoornet* 1994(1) SA 803 (T).) The problem is always to decide where to draw the line, particularly in those cases where the result is readily foreseeable but not the cause. This is more likely to arise in situations where, for example, one is dealing with a genus of potential danger which is extensive, such as fire, or where it is common cause there is another person whose wrongdoing is more obvious than that of the chosen defendant. It is here that a degree of flexibility is called for. Just where the inquiry as to culpability ends and the inquiry as to remoteness (or legal causation) begins - both of which may involve the question of foreseeability - must therefore to some extent depend on the circumstances. (Compare, for instance, *S v Bochris Investments (Pty) Ltd, supra,* with *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A).) In many cases the facts will be such as to render the distinction clear, but not always. Too rigid an approach in borderline cases could result in attributing culpability to conduct which has sometimes been called negligence "in the air". As observed by Macdonald ACJ in *King v Dykes* 1971 (3) SA 540 (RAD) at 542 G - H:

> "Once inflexible rules are adopted as the test of the existence of negligence, either generally or in a special type of case, a quite unwarranted inroad is made into the basic concept underlying the law."

Inevitably the answer will only emerge from a close consideration of the facts of each case and ultimately will have to be determined by judicial judgment.

[23] There can be no doubt that as a general possibility a fire in the cold store at Duncan Dock was reasonably foreseeable. Indeed, fire extinguishers and hose-reels were installed at various places within the building to guard against such an eventuality. It is also true that the causes of fire are varied and many. Nonetheless, it is axiomatic that what is reasonably foreseeable must necessarily be confined to those fires, whatever their cause, which fall within the parameters of reasonable possibility. Typically, what would have been reasonably foreseeable in the present case would have been the possibility of a fire starting somewhere in the building itself. Whether in such an event the fire fighting equipment actually

installed would have been sufficient to control it or whether sprinklers would have been required is, of course, a matter of speculation. But what actually occurred was something entirely different. To simply equate it for the purpose of determining culpability with just any fire could have the effect of attributing culpability for damage resulting from a danger which in truth was not foreseeable as a reasonable possibility. . Expressed in abstract terms, the fire was the consequence of something in the nature of a projectile falling onto the roof from above and burning at a temperature sufficient to ignite the fibreglass gutter. Only the gutter was combustible. The roof sheeting and the outer shell of the building was not. According to the evidence it is the resin in the fibreglass that burns. It constitutes about 35% of the material and once it has set, requires what was described as a "high calorific value" or "fairly substantial heat source" to ignite. Indeed, Basson in the course of an experiment he conducted in his laboratory experienced some difficulty igniting a fibreglass gutter with a bundle of burning newspaper. However, we are told that distress flares produce a sustained flame and burn at a relatively high temperature; in other words, just the thing to ignite a fibreglass gutter. With the benefit of hindsight the obvious and reasonable step to guard against the danger of such an ignition source would have been to instal wholly non-combustible gutters. But fibreglass gutters were commonly used in the harbour area and elsewhere. According to Visser his investigation subsequent to the fire revealed that something like 50% of the gutters in the harbour area were of fibreglass.

[24] Having regard to the particular circumstances of the case, it seems to me therefore that the question of culpability must be determined not simply by asking the question whether fire, ie any fire, was foreseeable but whether a reasonable person in the position of Worthington-Smith or Visser would have foreseen the danger of fire emanating from an external source on the roof of the building with sufficient intensity to ignite the gutter. This is the question to which I now turn.

[25] As previously mentioned, the building was relatively isolated in the sense that there were no other buildings in the immediate vicinity from which a fire could readily spread to the cold store; nor was there anything about its locality in the harbour which rendered it more vulnerable to fire. The region was not prone to lightning of the kind that would set fire to buildings. Save for a burning flare, which was the actual cause of the fire, it is therefore difficult to conceive of any other source of fire which could have set the roof alight from above.

[26] It was not in dispute that the firing of distress flares at midnight on New Year's eve was a regular occurrence and that it had been so for many years. However, both Worthington-Smith and Visser testified that they were unaware of

the practice and I did not understand their evidence in this regard to have been challenged. Counsel for the appellants suggested in argument that Worthington-Smith ought to have made inquiries at the port captain's office (which presumably would have been aware of the practice) to ascertain if buildings erected in the harbour were subject to any particular fire risk such as that arising from the firing of flares. With hindsight it is no doubt possible to think of all sorts of steps that could have been taken or inquiries that may have been made. But what has to be postulated is the foresight and conduct of a reasonable person at the relevant time, ie in 1992 prior to the fire. The plans for the building, including precautions against fire, were required to be approved ultimately by the port engineer. In these circumstances, to expect Worthington-Smith in addition to have made inquiries of the port captain as to the possibility of some unforeseen source of fire, such as distress flares, is in my view expecting too much. Had the cold store been situated in close proximity to the tanker basin or oil storage tanks or some other reasonably foreseeable source of danger, the position may have been otherwise; but it was not. I do not think his failure to make such an inquiry was unreasonable.

[27] It should not, of course, be overlooked that notwithstanding the long standing practice of firing off flares in celebration of the New Year there had never been a fire caused in this way. According to the evidence flares are designed and required by regulation to ignite at a height of not less than 600 feet and to burn out at a height of not less than 150 feet. In the course of some 20 years Mr Mory, who had apparently spent every New Year's eve at the yacht club, and who testified on behalf of the appellants, had seen flares land on the ground still burning no more than "a couple of times". Mr Woodend, who became port captain subsequent to the fire, testified that in the course of more than 30 years experience working in various harbours around the country he had never once seen a flare fall to the ground still burning. Even if Worthington-Smith and Visser knew or ought to have known of the practice of setting off flares at New Year, the possibility of a flare landing while still burning and setting fire to the gutter of a building with an otherwise non-combustible shell strikes me as so remote as not to have been reasonably foreseeable. With the benefit of hindsight the situation may seem otherwise; it usually does. But that is not the test. In *S v Bochris Investments (Pty) Ltd and Another, supra*, at 866 J - 867 B Nicholas AJA said the following:

> "In considering this question [what was reasonably foreseeable], one must guard against what Williamson JA called 'the insidious subconscious influence of *ex post facto* knowledge' (in *S v Mini* 1963 (3) SA 188 (A) at 196E-F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *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 Burger* (*supra* at 879D).) In *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* 1961 AC 388 (PC) ([1961] 1 All ER 404) Viscount Simonds said at 424 (AC) and at 414G - H (in All ER):
>
> > '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.'"

I respectfully agree. Worthington-Smith testified that had he been aware of the practice of firing flares he would have taken some precaution against the danger such as installing a different kind of gutter. Visser's attitude was much the same. (Neither thought that a sprinkler system was called for.) But, yet again, it is easy to be wise after the event and having regard to what had happened it would perhaps have been surprising had their attitude been different. By the time they testified the cold store had been rebuilt with a non-combustible gutter. I do not think this concession on their part is of any significance.

[28] It follows that in my view the evidence establishes that the danger of fire emanating from an external source on the roof of the building with sufficient intensity to ignite the gutter was not reasonably foreseeable; or, expressed differently, a reasonable person in the position of Worthington-Smith or Visser would not in my view have foreseen the danger as real enough to warrant precautionary measures. The conclusion that Worthington-Smith and Visser were not negligent renders it unnecessary to consider the further question of whether their negligence could give rise to vicarious liability on the part of the respondents.

[29] A further ground relied upon by the appellants for contending that the first respondent was negligent related to the conduct of Mr Bell who, it was not in dispute, was at all material times acting in the course and scope of his employment with the first respondent. The facts relating to the conduct in question were largely common cause.

[30] At the time of the fire Bell was employed as the engineering manager at the cold store. His principal function was to monitor the refrigeration equipment which was then still under guarantee. On the evening of 31 December 1992 he went with his wife and two sons to the Waterfront for a meal. On his way home he stopped at the cold store to check the plant. By doing so then, he hoped to get away a little earlier the next day which was a public holiday. The register kept by the security guard at the gate records that he arrived at 11.10 pm. He testified that he first went to his office where he conducted a check on the computer system which gave him certain information such as, for example, the temperatures in the

refrigeration chambers. Thereafter he went on a tour of inspection along the catwalk to which I have previously referred. Finding all was in order he left the building just before midnight. Once outside he heard ships in the harbour sounding their sirens and observed distress flares being fired off from several ships. He testified that he and his family stopped to watch the display. While doing so, he observed two flares which were obviously defective rise no more than a metre or two. Both were fired from a nearby ship. One landed burning on the deck of the ship. The other landed on the repair jetty some 300 metres from the cold store. For the rest, the flares were shot up into the night sky where they burnt out. Bell considered it prudent, as he put it, to stay around a little bit longer. He was concerned that a defective flare could set fire to the wooden pallets in the yard and also to a gas installation. By 12.10 am the noise had stopped; so had the flares. He waited a few more minutes and then decided it was safe to leave. On arriving at the main gate he was met by a warden from the security firm which provided protection for the building. The latter informed him that a panic button had been pressed. Bell returned to the building with the warden. They examined the alarm panel and saw that all was in order. The register kept at the gate records that Bell left at 12.18 am. Before doing so he requested the warden to check on the security guard who was on duty at the rear of the building.

[31] Shortly after retiring to bed Bell was woken up by the beeping of his computer at home which was linked to the computer at the cold store. The signal indicated a fault in the cooling machinery. At the same time he received a telephone call from the security firm to report that the building was on fire. A further call informed him that the burglar alarms on various channels were going off simultaneously. It was then 1.05 am. Bell hurried back to the cold store where he remained until the afternoon of 1 January rendering such assistance as he could to the fire brigade.

[32] The appellants alleged in their particulars of claim that Bell had been negligent in a number of respects. In this court only one was advanced, namely that Bell had been negligent in leaving the premises shortly after midnight without first having carried out an inspection of the roof himself or without having instructed one of the security guards or other personnel to do so. I do not think there is merit in this contention. Mory testified that he saw smoke coming from the roof of the cold store, but he was far from certain that this was before 12:18 am. Bell testified that had a burning flare landed on the roof while he was there he would have been aware of it. If the flare ultimately came to rest in the valley gutter, as was agreed had happened, it would seem unlikely that Bell would have failed to see it if this occurred before he left. In any event, Bell's main concern was the wooden pallets and the gas installation. At the time he was unaware that fibreglass was combustible. This he learned later. Once the firing of flares had stopped and no

harm had befallen the pallets and gas installation it would not have been unreasonable for him to have thought that the danger had passed. Even so, he did not leave the building unattended. A guard was posted both at the front and the rear of the building. To have expected him in these circumstances to have climbed onto the roof or ordered someone else to do so before leaving would be to require of him a standard which in my judgment is beyond that required of the ordinary reasonable person. It follows that in my view Bell was not negligent.

[33] Finally it is necessary to deal with a ground of negligence which related solely to the appellants' claim against Portnet. Stated shortly, it is that the port captain acting in the course and scope of his employment with Portnet had negligently failed to apprise either the first respondent or its consultants or the port engineer of the danger of fire resulting from the practice of firing flares in and around the Cape Town harbour on New Year's eve.

[34] The only evidence advanced on behalf of the appellants in support of this allegation was of the practice of firing flares at midnight on New Year's eve. That evidence, however, did give rise to the inference that the port captain would or ought to have been aware of the practice. The appellants bore the onus of proof. What does appear from the evidence is that to the extent that the flares constituted a potential ignition source, the "first worry" as Woodend expressed it, would have been the tanker basin where oil is loaded and discharged 24 hours a day throughout the year and where there is always the possibility of gas on deck even after loading or discharging. Other potential danger spots would have included the oil storage tanks and combustible cargo or timber not under cover. Presumably it was because of the vulnerability of these areas to fire that the firing of flares is prohibited in the harbour area. By comparison the danger to ordinary buildings was minimal. The only practicable manner of averting the risk of fire at the danger areas would have been to enforce the regulation prohibiting the firing of flares. Woodend, who became port captain after the fire, used to send out reminders of the prohibition to the ships' agents on 31 December. Whether this was done by his predecessors is unknown; but whatever steps were taken, I am unpersuaded that, without the benefit of hindsight, those steps ought reasonably to have extended to warning the port engineer or anyone erecting a building in the harbour area that the prohibition against the firing of flares in the harbour area was invariably breached at midnight on New Year's eve.

[35] It follows that the appeal must fail. The appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

D G SCOTT JA

SMALBERGER JA
HOWIE JA - Concur
MARAIS JA

STREICHER JA:

[1] I agree that the appeal should be dismissed with costs including the costs of two counsel but for slightly different reasons which I shall state briefly.

[2] In *Kruger v Coetzee* 1966 (2) SA 428 (A) Holmes JA stated at 430E-F:

> "For the purposes of liability *culpa* arises if -
> (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."

[3] In *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) at 1112 I it was said that fault would be established "if a reasonable person in the position of the defendant would have realised that harm to the plaintiff might be caused by [his] conduct even if he would not have realised that the consequences of that conduct would be to cause the plaintiff the very harm she actually suffered or harm of that general nature". It was said, furthermore, that once fault in this way is attributed to the defendant one proceeds to determine for what consequences caused to the plaintiff in consequence of the defendant's conduct the defendant is liable in damages to the plaintiff (see 1112J to 1113A). This approach to the problem of determining delictual liability has been criticized by Boberg, *The Law of Delict*, at 381 to 382. He refers to the approach as the traditional approach. Boberg is a proponent of what has been referred to as the relative view of negligence, according to which the requirement of "culpability is satisfied only where the defendant intended or ought reasonably to have foreseen and guarded against harm of the kind that actually occurred". According to Boberg those who adopt this relative approach have no need to postulate a further requirement that the plaintiff's damage be not 'too remote' (see Boberg loc. *cit.*). The two approaches have recently been discussed in *Mukheiber v Raath* 1999 (3) SA 1065 (SCA). A number of cases where this court has in recent times applied "the test of so-called legal causation" to determine whether damages should not be allowed for being too remote, were referred to (see 1078J to 1079B). *Groenewald* is one of the cases referred to.

Unfortunately, the test for negligence was formulated in *Mukheiber* in accordance with the relative view of negligence without reference to the fact that a different formulation applies when what Boberg calls the traditional approach, is followed.

[4] I shall follow the approach followed in *Groenewald.* As will become apparent the same result is arrived at as would be reached if the relative view of negligence is applied. In the circumstances I do not consider it necessary to embark on a discussion as to the respective merits or demerits of the two approaches.

[5] The appellants allege that the respondents were negligent in having failed to instal or to have installed a sprinkler system in the cold store. In my view a fire in the cold store at Duncan Dock was reasonably foreseeable by a reasonable person in the position of Worthington-Smith and Visser. I shall assume that reasonable steps to guard against a fire at the cold store included the installation of a sprinkler system and that a reasonable person in the position of Worthington-Smith and Visser would have required the installation of such a system. Assuming further as I do that if Worthington-Smith was negligent such negligence can be attributed to the first respondent and that the second respondent in the circumstances owed a legal duty to the appellants not to approve plans unless provision was made for such a sprinkler system, it follows that the failure to instal a sprinkler system in the cold store was due to the negligence of the first and the second respondents.

[6] The question then arises whether the respondents should be compelled to compensate the appellants for the damage caused by the particular fire that occurred. That will only be the case if it can be said that the aforesaid negligence caused the damage claimed. In the law of delict causation involves two distinct inquiries. In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-I Corbett CJ formulated them as follows:

> "The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any

> event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[7] As stated by Scott JA it was not in dispute that a sprinkler system would have extinguished the fire or at least served to control it. I shall once again assume that for this reason at least some of the damages suffered by the appellant's would have been prevented. It follows that had the first and the second respondents not been negligent the appellants would not have suffered the damages they actually suffered. Subject to the correctness of the assumption the test for factual causation has been satisfied.

[8] The test to determine legal causation

> "is a flexible one in which factors such as reasonable foreseeability, directness, absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play a part".

(See *Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A) at 765A to 765B.*)

[8] For the reasons stated by him, I agree with Scott JA that "the evidence establishes that the danger of fire emanating from an external source on the roof of the building with sufficient intensity to ignite the gutter was not reasonably foreseeable; or expressed differently, a reasonable person in the position of Worthington-Smith or Visser would not . . . have foreseen the danger as real enough to warrant precautionary measures". For this reason the wrongful acts by the first and second appellants, assuming that they acted wrongfully, is not linked sufficiently closely or directly to the loss suffered by the appellants for legal liability to ensue. There are in my view no considerations of reasonableness, fairness or justice which militate against this finding.

[9] It was submitted that Bell had been negligent in leaving the premises shortly after midnight without first having carried out an inspection of the roof himself or without having instructed one of the security guards or other personnel to do so. Implicit in this submission is a submission that Bell should have foreseen the possibility of a flare having fallen on the roof and of that flare causing a fire. I agree with Scott JA, for the reasons given by him, that it would not have been unreasonable for Bell to have thought that the danger had passed when he left. I therefore agree that a reasonable person in the position of Bell would not have considered it necessary to carry out an inspection of the roof or to instruct one of the security or other personnel to do so. For these reasons negligence on the part of Bell has not been established.

[10] It remains only to deal with the alleged negligence of the port captain. It is alleged that he, acting in the course and scope of his employment with Portnet, had negligently failed to apprise either the first respondent or its consultants or the port engineer of the danger of fire resulting from the practice of firing flares in and around Cape Town harbour on New Year's eve. It is implicit in this allegation that a reasonable person in the position of the port captain would have foreseen the possibility of flares causing fire to buildings in the harbour, in the position where the cold store was erected, as such a real risk that he would have considered it necessary to warn the people involved in the erection of the building against that danger. In the light of the facts stated in paragraph 27 of the judgment by Scott JA it can in my view not be found that

a reasonable person in the position of the port captain would have done so.

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P E STREICHER
JUDGE OF APPEAL.