IN THE HIGH COURT OF SOUTH AFRICA
(Witwatersrand Local Division)

REPORTABLE
Case No: A5027/2004

In the matter between:

OOSTHUIZEN PETRUS MARTHINUS Appellant
(Plaintiff in the Court *a quo*)

and

SWISSPORT SOUTH AFRICA (PTY) LTD First Respondent
(First Defendant in the Court *a quo*)

IBERIA AEROLINES DE ESPANA SA Second Respondent
(Third Defendant in the Court *a quo*)

JUDGMENT

WILLIS J:

[1] The Appellant appeals to the Full Bench of this Division against the whole of the judgment and the costs orders given by the Court *a quo* (*per* Van Der Walt AJ) on 25 March 2004. I shall for, the sake of convenience, refer to the appellant as the plaintiff, the first respondent as the first defendant and the second respondent as the third defendant respectively. The second defendant in the Court *a quo* is not a party to this appeal. The Court *a quo* dismissed the plaintiff's claim for damages arising from an accident which took place at

Johannesburg International Airport. The plaintiff appeals with the leave of the Court *a quo*.

[2] The plaintiff, a 69 year old businessman at the time, his wife and daughter attended at the Johannesburg International Airport ("the Airport") on 17 June 2001 in order to embark on a flight to Spain (and Portugal) on holiday. They were booked on the third defendant's flight to Spain. They arrived some four hours early in order to obtain better seats and were also accompanied by the plaintiff's two sons and his daughter's fiancé. .

[3] Prior to the plaintiff attending at the Airport and during June 2001, an excess baggage pre-weigh-in process ("the system") was implemented at the third defendant's pre-departure area at the Airport. This entailed the pre-weighing of baggage on a flat scale placed on the floor over which a passenger had to push his or her baggage trolley, the purpose of which was to ascertain in advance, before checking in, whether a passenger's baggage exceeded the prescribed weight. If so, the baggage had either to be removed or a fine paid. .

[4] The first defendant is an expert baggage and passenger handler at the Airport and was contracted by the third defendant to do the excess baggage pre-weighing and passenger handling on its behalf. It is common cause that the first defendant owed passengers at the Airport

a duty of care. In order to implement the system, total control of the pre-departure area was taken by the first defendant. The whole area was confined with corridors consisting of barrier bands – two entrances were created, one for economy class passengers and one for first class passengers. No provision was made for a dedicated exit to return to the main Airport concourse area and there was also no sign prohibiting such exit.

[5] It is general practice (both before, during the implementation of the system and presently), that passengers arriving early would after checking in their baggage, leave the pre-departure area and return to the main Airport concourse area to spend some time with family who came to see them off or for whatever reason, prior to entering the departure area. .

[6] The plaintiff, his wife and daughter, having arrived early, went through the pre-weighing process, had their luggage checked in, were issued boarding passes and returned to those who had accompanied them and who were waiting in the main concourse area of the Airport, in order to have a meal. To do so he had to pass through a temporary passage-way or concourse which had been cordoned off. This went right next to the scale. It was narrow: between 30 and 50 centimeters wide. The plaintiff, when so returning and while he was in the demarcated pre-departure area, tripped over a wheel protruding from the side of a scale used for pre-weighing of baggage, and fell over the

scale. The plaintiff was severely injured in that he broke his hip.

[7] The system at the third defendant's pre-departure area was done away with in its entirety on 9 July 2001.

[8] A videofilm depicting the scene of the incident and related areas was tendered in evidence and handed in as exhibit "A". The video consists of three segments:

(i) The first segment depicts the pre-departure area of the third defendant. This segment was taken about one hour after the incident. It commences by showing the concourse area and the barrier band forming the corridor through which the plaintiff entered on the economy passenger side from right to left of the screen. The scale seen at the commencement of the segment on the right hand side of the screen is the scale across which the plaintiff entered the pre-departure area. The camera then swings to the left and shows the scale on the left hand side of the screen which was the first class passenger scale. In the background are the advertising boards which form the furthest side of the corridor from the camera. The camera then returns to the right hand side and in the process shows the entrance past the ticket clerk towards the proper weigh-in counters The camera then pans to show a close-up of the economy passenger scale behind the person with white pants and with his hands in

his pocket. This is once again the scale over which the plaintiff fell when he returned. The segment ends with a view towards the proper weigh-in counters in the background;

(ii) The second segment depicts the South African Airways pre-departure area which was set up differently and was taken on 21 June 2001. It commences by showing passengers exiting the demarcated area next to the scale in a manner which was described by the witness Gary Stellenboom as dangerous. It proceeds to show that on the right hand side of the screen, behind the person manning the scale, there is a dedicated exit from the demarcated area. It also shows at this point that the scales are manned by four people, two with blue jackets and two with white shirts. It shows a trolley being pushed onto the scale on the left hand side of the screen and the member of the personnel putting his foot onto the scale. This segment ends by showing a young girl in black leaving this demarcated area through the dedicated exit.

(iii) The third segment shows the pre-departure area of the third defendant which was taken on 1 July 2001. It commences with showing passengers entering over the same scale that the plaintiff used to enter. It gives an overview of what the area looks like when it is congested and depicts the same scales used on the day of the incident. It shows that at that time there were three personnel manning the specific scale which was used

> by the plaintiff. It also shows that passengers when entering cross the scale and have their attention fixed on the ticket clerk on their right hand side. It also shows the size of the wheel in relation to the edge.

[9] At the commencement of the trial wherein the plaintiff claimed damages because of the injuries he sustained when he fell, the Court *a quo*, in terms of Rule 33 (4) separated the following issues for determination:

> "Firstly the issue of liability for the Plaintiff's damages. Secondly, whether the plaintiff was contributory negligent and thirdly, whether the second defendant and/or the third defendant owed the plaintiff a duty of care."

[10] The third issue is really part of the liability issue and is not self contained. During the course of the trial, the case against the second defendant (Airports Company South Africa (Pty) Ltd) was withdrawn. Furthermore, the Court *a quo's* finding that the second respondent (the third defendant in the Court *a quo*) was not negligent, has not been appealed against.

[11] The issue on appeal therefore is whether the first defendant was negligent in causing the plaintiff's damages and if so, whether there is any contributory negligence on plaintiff's part.

[12] The Court *a quo* concluded that the plaintiff had not discharged the *onus* of proving causal negligence as far as the first defendant is concerned. The Court *a quo* found that is was improbable that there had been instructions not to use the area between the barrier and the scale as an exit being in force at the Airport. The Court *a quo* said:

> "I cannot accept that there was any instruction at all in stopping passengers walking between the barrier and the scale. The nature of the instruction testified to is improbable and when taxed thereon in cross examination the answers given by Mr Stellenboom were unsatisfactory to say the least. In any respect there is no proof that these instructions were ever conveyed to First or Third Defendants."

[13] Stellenboom said that, in order to safeguard passengers, it was necessary that the scales be manned by three people, one on each side of the scale and one taking the reading and the second defendant gave an instruction to that effect. Stellenboom further testified that the area where the scale was used should not be used as an exit and that passengers attempting to do so should be stopped by the personnel at the scale and warned of the danger in exiting over or on the sides of the scale. His evidence was not contradicted. In my opinion, the Court *a quo was* correctly critical of Stellenboom's evidence. With regard to the staffing of the scales, Stellenboom was initially asked about a specific arrangement ("spesifieke reëling") and then about a general arrangement ("algemene reëling"). His answer to

both questions was vague and unconvincing. He relied on his understanding" with regard to the former and the "usual" in regard to the latter. He conceded that he was not aware that any such arrangement had been reduced to writing and he knew of no such arrangement between any of the parties. He could not confirm that any such arrangement had been conveyed to either the first or the third defendant. He had not done so. He clearly had not been involved with the staffing at the scale in question. He was a contradictory and evasive witness with regard to the question of whether or not there had been restrictions on passengers exiting through the third defendant's departure area. The evidence of Stellenboom was a red herring. This evidence may have distracted the Court *a quo*. Counsel for the parties agreed that the question of the respective negligence, if any, of the parties, could be determined without having regard to his evidence.

[14] The plaintiff was a seasoned traveller and knew that an airport was a busy place with a number of possible obstructions in the way of an inattentive passenger. He knew that he had to look where he put his feet. Before his fall the plaintiff had been very much aware of the presence of the scale. He had seen the scale in question and another being moved about and set up prior to his spending approximately 15 minutes waiting in the queue before pushing his baggage trolley on to the scale to be weighed. Immediately before the accident the plaintiff had been following his wife without paying attention to the scale to his

left, though he knew it was there. He did not look at the ground. He does not know what caused his fall, although the undisputed evidence of his daughter was that he had tripped over a protruding wheel of the scale. Moreover, it is clear from the evidence that innumerable other persons walked past this particular scale without meeting with any misfortune.

[15] It is common cause that it would have been a simple and inexpensive matter for the first defendant to have placed warning boards in the vicinity and even to have placed a barrier by way of poles and tapes to prevent persons from coming near to the scale. It is common cause that the first defendant did not do so.

[16] None of the defendants lead any evidence in rebuttal. The case turns on what one makes of the evidence led on behalf of the plaintiff, including, of course, the answers elicited when these witnesses were under cross examination.

[17] It is trite that the onus of proving negligence on a balance of probabilities rests with the plaintiff. (See, for example, *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 (A) at 574H and 576G; *Sardi v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780C-H and *Madyosi v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (A) at 444D-G)

[18] In the case of *Hammerstrand v Pretoria Municipality* 1913 TPD 374 - which was a full bench decision- it was said at 376-7:

> "The mere fact of a person having fallen into an excavation which has been lawfully dug by another raises no manner of presumption of negligence on the part of the latter; for, in spite of the defendant having taken all reasonable precautions the plaintiff may have fallen into the excavation through gross carelessness on her own part. There is, therefore, no reason to depart from the ordinary rule of law that he who alleges negligence must prove it. "

[19] Counsel for both the plaintiff and the first defendant have both relied on the classic dictum set out in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F as to the requirements for negligence, as did the Court *a quo.* In my view, in a case such as this, the question to be asked is whether a *diligens paterfamilias,* conducting business of the kind which the first defendant did, would have:

(a) foreseen, as a reasonable possibility, the likelihood of accidents of this nature occurring; and

(b) taken reasonable measures to guard against their occurrence? (See also, for the general principle, *Sea Harvest Corporation v Ducan Dock Cold Storage* 2000 (1) SA 827 (SCA) and, more particularly, *Alberts v Engelbrecht* 1961 (2) SA 644 (T) at 646D; *Gordon v Da Mata* 1969 (3) SA 285 (A) at 289H, for example).

[20] It is trite that the test is an objective one and Mr *Stais*, who appeared for the first defendant, fairly and correctly conceded that this was so. Mr *Stais* also conceded that, objectively, the scale created an obstacle and could constitute a danger to a person but submitted that the likelihood of such harm occurring was so remote that a *diligens paterfamilias* in the position of the first defendant would not have taken steps to prevent such harm. Counsel for both the plaintiff and the first defendant, as well as the Court *a quo* relied on *Albert-Morgan v Whyte Bank Farms (Pty) Ltd* 1988 (3) SA 531 (E) from 533F-536A in which a full bench, in my respectful opinion, very helpfully considered the issue of determining whether the risk as so remote as not to be 'real' and the extent to which there is an obligation to take steps to guard against such risks occurring.

[21] It is clear that the Courts must avoid establishing an unrealistic and impossible standard (See, for example, *Hammerstrand v Pretoria Municipality (supra*) at 377; *City of Salisbury v King (supra*) at 529C-D**;** *Jones v Maceys of Salisbury (Pvt) Ltd (supra*) at 142D-E and *Turner v Arding & Hobbs Ltd* (1949) 2 All ER 911 (KB); *Monteoli v Woolworths (Pty Ltd* 2000 (4) SA 735 (W) at para [45].).

[22] In the *Hammerstrand v Pretoria Municipality* case (*supra*) it was said at 377:

> "But the law does not set impossible demands in such cases; it does not make any extravagant demands upon a person. It is entitled to

assume that others will also take reasonable care of themselves, will keep their eyes open, and will not take risks of which they are or ought to be aware. ”

[23] In *Stewart v City Council of Johannesburg* 1947 (4) SA 179 (W), Price J said:

“The ordinary pedestrian does not proceed along a sidewalk with his eyes glued to the ground. He does not expect to walk into excavations and obstructions on a paved sidewalk.”

This was approved in *Wenborn v Cape Town Municipality* 1976 (1) SA 25 (C) at 29E.

[24] In my opinion it is obvious that, at a place like the Airport, the scale could have constituted a danger to persons, especially persons such as young children chasing after each other, as is their wont, or elderly or handicapped persons, using a walking-stick or a wheelchair. As I have already noted, it would have been a simple and inexpensive matter for the first defendant to have placed warning boards in the vicinity and even to have placed a barrier by way of poles and tapes to prevent persons from coming near to the scale. It seems to me that the classic questions posed in *Kruger v Coetzee* (*supra*) have to be answered against the first defendant.

[26] In *Pretoria City Council v De Jager* 1997 (2) SA 46 (A), Scott JA, delivering the judgment of the Court said at 55H:

" The Council was obliged to take no more than reasonable steps to guard against foreseeable harm to the public. Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgment. Nonetheless, over the years various considerations have been isolated which serve as useful guides, particularly in relation to the question whether any steps at all would have been taken by a *diligens paterfamilias*. Four such considerations are identified by Professor J.C. van der Walt in *The Law of South Africa* vol 8 para 43 as influencing the reaction of a reasonable man in a situation involving foreseeable harm to others. They are: '(*a*) the degree or extent of the risk created by the actor's conduct; (*b*) the gravity of the possible consequences if the risk of harm materialises; (*c*) the utility of the actor's conduct; and (*d*) the burden of eliminating the risk of harm' (see *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 776G-777J where reference is made to various cases and authorities in which one or more of these considerations have been considered). In general, the inquiry whether the reasonable man would have taken measures to prevent foreseeable harm involves a balancing of the considerations (*a*) and (*b*) with (*c*) and (*d*)." (See also *Cape Metropolitan Council v Graham* 2001 (1) Sa 1197 (SCA) at para [7])

[26] The consideration of utility favours the first defendant. The other considerations favour the plaintiff. When these considerations are balanced, it seems to me that the plaintiff has indeed established *culpa* on the part of the first defendant. The Court *a quo* was therefore wrong in finding to the contrary.

[27] The question which then arises, is whether there was contributory negligence on the part of the plaintiff which would justify a reduction of the first defendant's liability in terms of the Apportionment of Damages Act No. 34 of 1956? The plaintiff had seen the scale earlier on the day in question. It is clear that he did not keep a proper look-out. On the other hand, the first defendant created a situation in which a throng of people would arise from time to time, and, in such circumstances, the extent of the plaintiff's blameworthiness is less than it would otherwise have been. In my judgment, there was indeed contributory negligence on the part of the plaintiff. I consider an apportionment of damages in the ratio of 75:25 in favour of the plaintiff to be appropriate.

[28] In its pleadings, the defendant raised the issue of there being a ceiling on the *quantum* of the first defendant's liability for damages by reason of the applicability of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, commonly known as the "Warsaw Convention", as amended from time to time. This issue was not argued before us and would more appropriately be

dealt with by the Court having to determine *quantum*. The Order which this Court shall make will leave it open for this issue to be considered by the Court which determines *quantum.*

[29] There is no reason why costs should not follow the result as between the plaintiff and the first defendant. There has been some debate about whether the Court *a quo* was correct in ordering the plaintiff to pay the costs of the third defendant. The plaintiff had apparently issued summons against the third defendant because he "had no way of knowing which of first or third defendant were liable". He claimed against the third defendant in the alternative to his other claims and, further alternatively claimed against the first second and third defendants jointly and severally. The third defendant, in its plea, pleaded that "it contracted the first defendant as an independent contractor to provide certain services at its departure point at Johannesburg International Airport." and annexed a copy of the relevant agreement. In these circumstances, the third defendant would only be liable where there was some duty on it vis-à-vis the plaintiff. (See, for example, *Dukes v Marthinusen* 1937 AD 12*; Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) at 13B; *Minister of Community Development an Another v Koch* 1991 (3) SA 751 (A) at 762C-G; *Munarin v Peri-Urban Areas Health Board* 1965 (1) SA 545 (W) at 549H-550A; *Rhodes Fruit Farms v Cape Town City Council* 1968 (3) SA 514 (C) at 519E.) In its judgment the Court *a quo* said: "The issue of the legal duty on the third defendant to

safeguard the plaintiff as well as the issue of the negligence of the employees of the third defendant will only become relevant if I decide against the plaintiff in respect of the third defendant." The issue of the question of the third defendant's duty of care remained germane right until the end of the trial. The Court *a quo*, having decided against the plaintiff in respect of the third defendant, failed to consider whether or not the third defendant owed the plaintiff a duty of care. In this respect it erred. In any event, as the question of the third defendant's duty of care remained in issue right until the end of the trial, I do not consider that the plaintiff can be criticised for maintaining it as a party. If the plaintiff is substantially successful against the first defendant, I cannot see why he should, in all the circumstances, be burdened with the third defendant's costs. Moreover the first defendant issued a third party notice to the third defendant claiming an indemnity on the basis of the ground handling agreement between them. A trial Court has a discretion as to whether or not to order a litigant to pay the costs of a party who has been joined by another party, taking into account considerations of reasonableness. (See, for example, *Parity Insurance Co. Ltd v Van Den Bergh* 1966 (4) SA 463 (A) at 480H-483D and *Botha v AA Mutual Insurance association Limited and Another* 1968 (4) SA 485 (A) at 491E-492A.) In my opinion, in all the circumstances of the case, I think it reasonable that the first defendant pay the third defendant's costs. The appeal on this aspect of the costs order must succeed as well.

[30] The plaintiff has requested that he be allowed the costs of two counsel. Although the case is mainly concerned with factual issues, we have found this a difficult case and have wrestled hard with it. The case is clearly one of considerable importance to the plaintiff. I do not think that the plaintiff can be criticised for employing two counsel. In my opinion, he was justified in employing two counsel.

[31] The following order is made:

(1) The appeal is upheld;

(2) The order of the Court *a quo* is set aside.

(3) The following is substituted for the order of the Court *a quo*:

"(i) The first defendant is liable to pay the plaintiff 75% of the damages which the plaintiff may prove arising from the accident which occurred at Johannesburg International Airport on 17 June, 2001;

(ii) The aforesaid order shall not prejudice the first defendant from claiming that the *quantum* of such damages is limited by reason of the applicability of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, commonly known as the "Warsaw Convention", as amended from time to time;

(iii) The claim against the third defendant is dismissed;

(iv) The first defendant is to pay the plaintiff's costs of suit, which costs are to include the costs consequent upon the employment of two counsel;

(v) The first defendant is to pay the third defendant's costs in the action. "

(4) The first respondent (the first defendant in the Court *a quo*) is to pay the costs of the appellant in the appeal, which costs are to include the costs consequent upon the employment of two counsel;

(5) The first respondent (the first defendant in the Court *a quo*) is to pay the costs of the second respondent (the third defendant in the Court *a quo*) in the appeal.

DATED AT JOHANNESBURG THIS 30th DAY of MARCH, 2000.

N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree.

J. P. HORN

JUDGE OF THE HIGH COURT

I agree

J.J. REYNEKE

ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant: *J.H. Dreyer* SC (with him, *V. Botha*)

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Date of Hearing: 18th March, 2005
Date of Judgment: 30th March, 2005