16 AUGUST 2004

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 31089/2004

In the matter between:

Qing-He-Shan Plaintiff

and

Tsogo Sun Holdings Defendant

Kai Rong Shoa Third Party

JUDGMENT

BOSIELO J

[1] On 20 June 2001 plaintiff, accompanied by his wife went to Monte Casino complex at the corner of William Nicol and Witkoppen roads in the north of Johannesburg. Both plaintiff and his wife are of Chinese extraction. Upon arrival at the Monte Casino complex, plaintiff's wife left

plaintiff at the spa-bath where he was delivering some snacks and / or sandwiches and went to the VIP gaming area to gamble. Some few hours after she had left for the gaming area, plaintiff was alerted to the fact that she was involved in an altercation with someone at the gaming room. Upon arrival at the Privè, plaintiff observed that his wife was involved in a heated argument with the third party (SHOA). Predictably plaintiff entered the fray in defence of his wife. A number of security personnel working for Monte Casino intervened and defused the volatile situation. A while later, plaintiff returned to the third party (SHOA) where he was seated at the bar at the Privè. They later left the casino through the staircase to the VIP parking area and towards the exit of the casino. Whilst at or near the boom at the exit of the VIP parking area, the third party (SHOA) unexpectedly produced a fire-arm and shot plaintiff three times. Plaintiff was seriously injured and was hospitalised for a lengthy period.

[2] Arising from the incident described above, plaintiff issued summons against the defendant for damages arising from the shooting incident of 21 June 2001. It is not in dispute that the defendant owns and operates the Monte Casino complex. Plaintiff avers that the defendant's employees were negligent and that their negligence caused his damages. The grounds of negligence relied upon by plaintiff are fully set out in paragraphs 4 and 5 of his particulars of claim. The defendant filed a multi-faceted plea. Inter alia, defendant vehemently denies that his employees were negligent or that their negligence (which is denied) is the cause of the plaintiff's damages. Defendant alleges that plaintiff's damages are the direct result of the intentional shooting by the third party (SHOA). Furthermore defendant denies that he is vicariously liable for the alleged negligence of the security personnel who were employed at the complex as these securities belonged to an independent contractor. Defendant raised as another defence, the existence of various notices or sign boards placed prominently at all the entrances of the casino which contained exclusionary clauses (the so-called disclaimers). Lastly, and in the alternative, defendant averred that should this court find that he was negligent (which is still denied) that plaintiff was also negligent and that his negligence contributed to the damages which he suffered from the shooting, principally because he was the aggressor who initiated the ultimate fight.

[3] I interpose to state that the defendant issued a third party notice against one Kai Rong Shoa, who is the person who shot and injured plaintiff. In his plea, the third party (SHOA) avers that he is not liable to plaintiff for any amount in excess of R 200 000-00 (two-hundred thousand rand) as plaintiff voluntarily assessed and accepted R 200 000-00 from him as his

damages. In addition hereto, the third party relies on the defendant's plea and asks that it be incorporated into his plea as if specifically pleaded. I record that the third party was in default and no version was adduced in his defence at the trial.

[4] I pause to observe that I had the benefit and advantage of watching, before any viva voce evidence was tendered, the video recording of all the incidents leading to and including the actual shooting incident. It was as if I was transposed from the tranquillity of the courtroom to the hurly-burly of the casino. This video recording was accepted as Exhibit 1 by mutual consent. I find it necessary to state that except for minor discrepancies, the viva voce evidence tendered by plaintiff amply corroborated what I observed on the video recording (Exhibit 1). It is common cause that both plaintiff and the third party (SHOA) are of Chinese extraction. According to plaintiff, notwithstanding the fact that he has been resident in South Africa for the past fourteen years, he is unable to read or speak English. Based on the evidence of plaintiff and what I saw on the video recording (Exhibit 1) the following facts are common cause:

(a) That plaintiff and the third party were embroiled in a heated altercation on the night of 20/21 June 2001 inside the Privè at Monte Casino;

(b) That a number of various security personnel employed at Monte Casino intervened and defused the volatile situation;

(c) That plaintiff and his wife left the third party (SHOA) and went away to the VIP gaming area;

(d) That after an argument with his wife, plaintiff returned to the third party where he was seated at the Privè;

(e) That plaintiff invited and led the third party (SHOA) from the Privè through the VIP parking area to the boom gate;

(f) That as plaintiff and the third party, left the Privè, it was clear that they were still arguing fiercely;

(g) At the door of the VIP entrance, there were two APS security members who saw plaintiff and the third party as they continued to argue;

(h) That whilst plaintiff and the third party continued to argue at the boom gate, there was one APS security man who was near them and watching them;

(i) That either at or near the boom gate at the exit point of the VIP parking area, the third party (SHOA) shot plaintiff thrice with his fire-arm in the vicinity of and in full view of a security man from APS;

(j) That plaintiff suffered serious bodily injuries as a result of the shooting by the third party (SHOA).

[5] According to plaintiff, which fact is corroborated by the video recording (EXH 1), it is clear that upon entering the complex through the VIP parking area, the third party (SHOA) was not searched by the security men who were manning the VIP entrance. The video recording (Exhibit 1) shows clearly that upon request, the third party (SHOA) merely lifted his jacket, apparently to show the security men that he had no weapon(s) or fire-arms. It is furthermore clear from Exhibit 1, (the video recording) that there are various notices or sign boards at all VIP entrances and the three bridge entrances to the gaming area of the casino which have the following warnings:

1. "Right of Admission Reserved
The company does not accept any responsibility for loss or damage to property, nor any injury to any person on the premises. Firearms are not permitted on the gaming area."
It is furthermore common cause that the following notices were placed at each of the VIP entrances and bridge entrances to the gaming area of the casino:
" Persons entering these premises do so entirely at their own risk. Neither the landowner or management, contractors or their employees shall be responsible or liable in any way for any injury or for death of any person or any harm caused to them or for the loss or destruction of or damage to any property of whatsoever nature by whatsoever cause arising from any access to the premises."

[6] A more elaborate notice or signboard with somewhat similar exclusions was placed at the notice board adjacent to the boom controlling access to the parking area at the casino. It is furthermore not disputed that all entrances into the casino were manned by security personnel belonging to an independent contractor, Associated Preventative Service and (APS). What is furthermore common cause is that inside the casino and at the gaming area, there are other security personnel called Men in Black (MIB) employed by defendant as well as the so-called Public relations officers, who, according to the evidence, are the ladies who are specifically employed by defendant to assist the Chinese gamblers to understand the English language. In a nutshell this is the background against which the event of the night in question unfolded. Suffice to state that the evidence of one Mr Andrew William Hudson (Hudson), who testified for the defendant does not differ much from either the plaintiff's evidence or what I observed independently from the video recording (Exhibit 1). I will deal with the salient aspects of his evidence later in my judgment.

[7.1] I have already alluded to the fact that defendant filed a multi-pronged if not a hydra- headed plea. As a starting point, defendant denied that he was negligent in the manner in which the third party (SHOA) was allowed to enter the casino. It was argued, quite zealously by Mr Stais for defendant, that defendant did everything reasonable, which a reasonable man in its position, could have done to exclude the risk of harm either to visitors, patrons or even defendant's own staff on its premises. In this regard, Mr Stais argued that an extensive network of surveillance cameras (both static and mobile) are strategically mounted at Monte Casino to ensure that every movement on the premises is effectively monitored and every threat dealt with. Furthermore, it was argued on behalf of defendant that there is adequate security put in place, in the form of in-house security as well as security personnel posted at all entrances to the casino which is provided by independent contractors. In response to the irrefutable evidence that the third party (SHOA) was not searched when he entered the casino through the VIP-entrance, Mr Stais submitted that, in view of the fact that the third party (SHOA) was well-known to the defendant, further that he was a very important person who carried a platinum card and who visited the casino frequently (according to defendant's record as at 21 June 2001, the third party had visited the casino 78 times) that there was no need for the security personnel to search him before he entered. Relying on Herschel v Mrupe 1954 (3) SA 464 (AD), Mr Stais submitted that the risk of the third party (SHOA) entering the casino with a firearm which could later be used to cause harm to other people (including plaintiff) was so remote that the reasonable man would not have taken steps to guard against it. By logical reasoning, he asserted that the failure of the security men at the VIP-entrance to search the third party (SHOA) at all or properly does not amount to negligence. Notwithstanding the zeal with which this argument was presented, I find it devoid of any merit and merely sophistic.

[7.2] Of crucial importance is the evidence of Hudson, the head of security at Monte Casino, that due to a robbery which took place at the casino during February 2001, the defendant contracted and deployed security personnel at all entrances to the casino with specific instructions to prevent people from entering the casino with fire-arms or dangerous weapons. In order to facilitate this, there were metal detectors which were used to search patrons for fire-arms. In my view, this is clear proof of the fact that defendant appreciated the grave danger or risk posed by patrons who entered the casino with fire-arms or dangerous weapons. In addition, it is important to pay special attention to clause 6 of the contract which governed the relationship between APS and the defendant Exhibit A which provides that:

"General Obligations

6.1 The Contractor undertakes to provide the Service to Tsogo Sun such that is shall watch over and safeguard Montecasino to the best of its ability, so as to prevent, as far as is reasonably possible any loss or damage (whether direct or consequential) and prevent as far as is reasonably possible the death or injury to management, guests, employees casual visitors, Montecasino patrons, invitees, tenants and all other persons. Any challenge to any person suspected of unlawful conduct shall be done politely and advised to the General and/or Deputy Manager of Montecasino forthwith." Undoubtedly all these various security measures were put in place to ensure that no person was allowed to enter the casino with a fire-arm(s) and / or any dangerous weapons. The conclusion is both logical and inescapable that the failure by the security men at the VIP entrance to search the third party (SHOA) when he entered the casino was contrary to instructions and contractual obligations. In my view such failure amounts to, negligence. Evidently it is this negligence which allowed the third party (SHOA) to enter the casino with a fire-arm which he later used to shoot at plaintiff unlawfully. Undoubtedly the failure to search the third party (SHOA) when he entered through the VIP-entrance is closely if not inextricably connected with the eventual shooting of plaintiff by the third party (SHOA).

[8.1] Mr Haskins, for the plaintiff argued forcefully that I must find defendant liable for the damages suffered by plaintiff in the shooting incident. As a starting point, he submitted that it is clear from the proven evidence, supported by the video recording (Exhibit 1) that the security personnel who manned the entrance from the VIP parking area into the casino failed to search the third party (SHOA) when he entered the casino. He submitted that, had the security personnel conducted a proper search on the third party (SHOA) they would or should have detected the fire-arm which, they would have been entitled to take away from the third party (SHOA) for safe-keeping. This failure, so he argued, allowed the third party (SHOA) to enter the casino with a firearm which he later used to shoot and injure plaintiff.

[8.2] As to the argument premised on the fact that the security personnel at the VIP entrance were employed by and worked for an independent contractor (APS) and that as a result, defendant could not be held vicariously liable, Mr Haskins countered this argument by reference to the written security service agreement which was signed by defendant and the independent contractor. The undisputed evidence of Hudson is that although there was no formal security service agreement with APS as at 21 June 2001, their contractual relationship and obligations were exactly the same as that entered into with Khulani Fidelity Services Group (Pty) Ltd (Khulani Security) which appears at page 18 of Exhibit A. Mr Haskins submitted that in terms of this agreement, it is clear that the independent contractor

operated under the direct supervision and approval of the defendant, to an extent that the security personnel can never be described as having been independent. For this submission Mr Haskins relied primarily on Langley Fox Building Partnership (Pty) Ltd v De Valence 1991 (1) SA 1 (AD) and Midway Two Engineering & Constructions Services BK b Transnet BPK 1998 (3) SA 17 (SCA). I have found the following passage in Langley Fox (supra) at page 13 A -B to be apposite and illuminating:

".....It follows from the aforegoing that the existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend in each case upon the facts. It would be relevant to consider the nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and the independent contractor respectively; and the means available to the employer to avert the danger. This list is in no way intended to be comprehensive."

[8.3] In response to the further submissions by Mr Stais for the defendant that defendant did not owe plaintiff a duty of care in the circumstances, alternatively that the risk of the harm occurring to plaintiff was so remote that defendant, as a reasonable man (the so-called bonus paterfamilias) could not have and did not in fact foresee the harm which occurred, Mr Haskins countered with reference to the recent case of Carmichele v Minister of Safety and Security and Another 2001 (1) SA 489 (SCA) page 494 C where the learned Vivier JA stated:

"The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the court."

Based on the above dicta, I am of the view that, given the peculiar circumstances of this case, the defendant owed all the patrons, guests, invitees, casual visitors including employees and management at or inside the casino a duty of care. On the proven evidence, it is clear, in my view, that the defendant failed to observe that duty of care. As to whether the risk of harm was reasonably foreseeable, it is clear on the evidence that such risk was clearly foreseeable to defendant. Evidently this is the reason why there were elaborate security measures put in place complimented by surveillance cameras which were placed at all strategic places to carefully monitor and control all activities within the casino.

[9.1] Mr Stais argued, further that even if I were to find negligence on the part of the security men at the VIP entrance and further that it contributed causally to the shooting of plaintiff, that defendant is absolved from liability by the exclusionary clauses (i.e. the disclaimers) which were reflected in all the notices or sign-boards which were posted at

all the entrances to the casino. I pause to observe that this plea, prompted plaintiff to replicate in the following terms:
"2.2 Without derogating from the generality of the aforegoing the plaintiff specifically denies that:
2.2.1 the alleged sign boards were prominently displayed;
2.2.2 the alleged sign boards and the contents thereof were brought to his attention;
2.2.3 the contents of and the implications of the contents of the alleged sign boards were explained or known to him;
2.2.4 he understood or read the alleged sign boards."

[9.2] It is common cause that plaintiff and his wife are of Chinese extraction. Significantly, plaintiff was never challenged in cross-examination about his inability to read, write or speak English. Moreover during the entire trial plaintiff relied on a Chinese interpreter to assist him to testify and understand the proceedings. Although the various photographs taken at various entrances to the casino show clearly that the sign boards were prominently displayed at all entrances to the casino, the vexed question still remains whether, given his linguistic disabilities to read and understand English, the notices of disclaimer were effectively brought to the attention of the plaintiff. In other words whether it is fair and reasonable, in the light of the peculiar facts of this case, to conclude that the plaintiff knowingly and freely entered the casino at his own risk.

[9.3] Mr Stais for the defended cautioned me graciously against adopting the attitude of an arm-chair critic always wiser after the event. He submitted with force that I must be realistic and mindful of the real and serious problems caused by a plethora of languages which are used in this country, which are compounded further by the influx of foreigners with their own peculiar dialects. In his view, it would be expecting the impossible from the defendant to be expected to have the notices/sign boards written in every language to cater for the idiosyncratic linguistic needs of all the various patrons who patronise Monte Casino. Lamentably, no evidence was adduced of what would make it difficult or impossible for the defendant to have the said notices written or interpreted in Chinese. Mr Stais relied on the dictum in Lawrence v Konotel Inus (Pty) Ltd 1989 (1) SA 44 (D & CLD), particularly at page 48 C - D. Having given this matter careful consideration, I am of the view that the facts of this case differ from those in Lawrence's case (Supra). Unlike in Lawrence's case, plaintiff in casu, testified that he was not aware of such notices as he had not seen them, and neither did he understand them as they are written in a language

which he does not understand. The other important fact which deserves proper consideration, is the concession by Hudson, that due to a significant presence of Chinese patrons at the casino, defendant supplied interpreters (the so-called public relations officers) at the gaming area to assist the Chinese patrons to communicate. Moreover there is irrefutable evidence that, presumably in order to make it easy for Chinese patrons to gamble, some of the gaming rules at the gaming area were written in Chinese. The concession by Hudson that it was not impossible for defendant to have the serious warnings and exclusions on the sign boards written in Chinese to cater for the many Chinese patrons who patronise Monte Casino, becomes of great moment
in determining whether the action of the defendant in putting up notices or sign boards containing exclusionary clauses (disclaimers), with patently serious consequences, written in English only was reasonably sufficient in the circumstances.

[10.1] In trying to resolve this controversial issue, I found the views of Franklin J in Micor Shipping v Trevor Golf and Sports 1977(2) SA 709 (WLD) at page 713 H to be illuminating:
"I turn now to deal with the questions whether the standard trading conditions apply to this contract. The law relating to this issue is reasonably well settled. If a person receiving a document knows that there is writing on it and that it contains conditions relative to the contract, he is bound whether he reads it or not; if he knows that there is writing but does not know that it contains conditions relative to the contract, he is not bound, unless the other party had done what is reasonably necessary to bring the conditions to his notice." (my own underlining)
In King's Car Hire (Pty) Ltd v Wakeling, 1970 (4) SA 640 (N) at 644 A Harcourt, J stated the following:
" It furthermore appears to me to follow that, in judging of what is reasonably sufficient, the party bearing the onus of establishing the incorporation of the condition in question should bear in mind the degree or magnitude of the risk that the steps he has taken may not prove sufficient to convey the necessary notice to persons acting reasonably. He must (as in the case of the negligence) bear in mind the extent of the risk of non-observation by the other party in relation to the steps which he has taken and the degree of probability that such steps will bring to the notice of such other party, if acting reasonably, the existence of the condition sought to be implied in the contract."

[10.2] Given the practical exigencies of this matter, I am of the view that as the exclusionary clauses herein are patently onerous, concomitant with the patently great risk inherent therein, in particular the omnipresent

reality that the steps adopted by defendant may prove to be insufficient to convey the real import of the necessary notices, warnings or exclusions to the persons likely to be adversely affected thereby, viz the Chinese community in casu, that the steps taken by the defendant were, in the circumstances of this case, and objectively considered, insufficient and in my view unreasonable. If the defendant could have the gaming rules at the gaming tables translated into Chinese, I cannot think of any good reason, why the defendant cannot be expected to have the disclaimers translated into Chinese as well. I am fortified in my view by simple logic, common sense, justice and reasonableness. I therefore find that it would be grossly unfair to hold plaintiff bound by the conditions embodied in the exclusionary clauses which were never effectively brought to his notice.

[11] As a last alternative, defendant raised the fact that by his conduct, which is clearly set out in par 4 of his plea, plaintiff was also negligent and that his negligence contributed to the ultimate damages which he suffered. The essential premise of this plea is that plaintiff was the aggressor who initiated and perpetuated the fight with the third party (SHOA) and further that even after he had initiated the fight with the third party (SHOA), plaintiff remained in the third party's company even when the third party became aggressive. This plea, in my view has no merit. It is a trite principle of our law that nobody has the right to shoot or injure another person unless there is a ground of justification for such conduct. There is no evidence that plaintiff had, by any act, placed the third party's life or bodily integrity either in actual or imminent danger which called for the third party (SHOA) to act in self-defence. The fact that the plaintiff was in the company of the third party (SHOA) who was aggressive, cannot support any finding of negligence on the part of plaintiff. This defence falls to be rejected.

[12] Having given this matter serious consideration, I am of the view that plaintiff has proved that defendant and / or his employees or agents, in the circumstances of this case, owed him a duty of care which they failed to discharge. Furthermore I find that the defendant's failure, either through himself or his employees or agents to take reasonable steps to guard against the danger or harm, ultimately caused harm to the plaintiff. It follows that the defendant is therefore liable for whatever damages which the plaintiff can prove in respect of the shooting incident. As the parties had agreed to separate the issue of merit from quantum in terms of Rule 33(4) of the Uniform Rules, I hereby make the following order:

(a) That the defendant is liable to the plaintiff for such

damages which the plaintiff may prove in respect of injuries sustained from the shooting incident which occurred at Monte Casino an 20-21 June 2001;

(b) The defendant to pay the costs for the trial on the merits;

(c) The case is adjourned to a date to be arranged with Registrar of this Court.

L. O. BOSIELO
JUDGE OF THE HIGH COURT