IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOHANNESBURG CONSOLIDATED INVESTMENT

COMPANY LIMITED Appellant

and

LANGLEIGH CONSTRUCTION (PTY) LIMITED Respondent

CORAM: JOUBERT, ACJ, E M GROSSKOPF, STEYN, EKSTEEN et

GOLDSTONE, JJA

HEARD: 9 November 1990

DELIVERED: 28 November 1990

J U D G M E N T

E M GROSSKOPF, JA

The appellant, a township developer, was the owner of certain undeveloped land near Germiston known as Elspark Extension 3. During September and October 1980 the appellant arranged with the respondent, a civil engineering contractor, that the respondent would build roads and carry out excavations for storm water drains on the said land. These works would constitute the first steps in the development of a township. The arrangements between the parties were confirmed in a contract dated 12 February 1981.

The excavations were completed by July 1981. On 18 October 1981 a young man called Stephen Gibson ("Gibson") rode across the appellant's property on a motorcycle (a so-called scrambler ) and fell into the excavations. He was seriously injured. Gibson instituted action against the appellant, claiming damages on the grounds of negligence by the appellant or its servants. The appellant settled Gibson's action by paying

him R150 000 plus costs on the attorney and client scale.

Having settled with Gibson, the appellant sued the respondent in the Witwatersrand Local Division to recover the amounts paid out to Gibson. In doing so it relied upon certain provisions of the contract of 12 February 1981, with which I shall deal in greater detail later. The Court (LABE AJ) dismissed the appellant's claim with costs. With leave granted pursuant to a petition to the Chief Justice the appellant now appeals to this Court.

The basis of the appellant's claim is to be found in clauses 19 and 22 of the contract. The "contractor" referred to in the contract is the respondent. Clause 19 reads as follows:

> "19. The Contractor shall in connection with the Works provide and maintain at his own cost all lights, guards, fencing and watching when and where necessary or required by the Engineer or by any competent statutory or other authority for the protection of the Works or for the safety and convenience of the public or others."

It is common cause that neither the engineer (who,

according to the definitions clause of the contract was the appellant or somebody appointed by it) nor any statutory or otherauthority required any protection or warning devices to be provided at the excavations. The appellant's case was that such devices were "necessary" in terms of the clause, that the respondent had failed to provide them, and that the appellant had suffered loss by reason of this failure, being the amount it was compelled to pay to Gibson.

The second clause upon which the appellant relied, was clause 22. This clause provides that the respondent ("the contractor") "shall ... indemnify ... the Employer (the appellant) against all ... claims for injuries or damage to any person ... which may arise out of or in consequence of the construction and maintenance of the Works and against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto ..." The appellant alleged that the respondent was obliged in terms of clause 22 to indemnify it for the amounts it had paid to Gibson.

Although the causes of action based respectively on clause 19 and clause 22 of the contract differ in some respects, they have one feature in common: to succeed on either cause of action the appellant must establish that it was obliged in law to pay Gibson the amounts which it now seeks to recover from the respondent. It was on this common feature that the Court a quo based its judgment. It held that the appellant did not succeed in showing that it was obliged to compensate Gibson. That finding disposed of the case, rendering it unnecessary for the Court a quo to decide various other matters raised by the respondent.

I propose following the same course as the Court a quo. It is clear and, indeed, common cause, that the question to be decided is whether the appellant was guilty of culpa. This requires a determination whether, on all the facts of the case, the appellant exercised the care expected of a reasonable man in the circumstances. See Transvaal and Rhodesian Estates Ltd. v. Golding 1917 AD 18 at pp. 27-8 and Farmer v. Robinson Gold Mining

Company Limited 1917 AD 501 at pp. 521-4 and 537-543.

This then brings me to the facts. The property in question belonged to the appellant. It was unfenced, so that any member of the public could gain access to it. From photographs handed in as exhibits it appears that the terrain was bare veld - uneven and covered with vegetation. According to Mr. Kydd, the appellant's township development manager, it was mostly low-lying land and rather swampy. The scene of the accident was approximately 300-500 m from the nearest dwelling. There was no footpath or other thoroughfare across the land.

The excavations comprised the following. There was a main drain, running from east to west. It was an open channel,approximately 1400 m long, with sloping sides. Then there were subsidiary drains running into the main drain from north to south at regular intervals. These drains were at the relevant time merely earthen channels. It was into one of these that Mr. Gibson fell, and at the scene of the accident the drain was, judging from the photographs handed in, approximately 2 m

deep and 2 m wide, with steeply sloping sides. The soil recovered from the excavation was placed on the eastern side of the subsidiary drain. In the course of time it had become compacted and overgrown, and it formed a slight rise next to the drain.

There was little evidence to suggest that members of the public used to go onto the land in question. Mr. Kydd visited the property, he said, maybe once before the respondent started working on it, and a couple of times a week while they were busy. He never saw any people, other than workmen, on the property. Mr. De Necker, who happened to be present when the accident occurred, testified that he was at that time looking for a plot to buy, and used to drive around the area. He said the following:

> "...verskeie kere het ons kinders by die groot voor onder, kyk dit is klei-agtig daarso, hulle het blykbaar met die klei, ons het hulle gesien kleilat speel ook daar, het daar kinders gespeel daar. Daar het swartes, ons het swartes gesien loop oor die veld of deur die veld. Ek meen mens het nie altyd so spesifiek opgelet vir mense nie maar ons het verskeie kere kinders wel

> by die groot voor gesien en swartes oor die veld gesien loop."

The lady who was Gibson's fiancée at the time of the accident (and is now his wife) also testified. According to her evidence she accompanied Gibson on the fateful day, 18 October 1981. She said the following:

> "Now Mrs Gibson, as you were travelling along in the motor car before you saw Stephen (ie, Gibson) falling in, was there anybody else in the veld in the vicinity? --- There were children.
> What were they, what were these children doing? ---Running bicycles and running around.
> How many approximately were there? ---- There were about four of five children."

Gibson's evidence on how the accident occurred was as follows. At the time he was 23 years old, and had been riding a scrambler for about 10 years. A scrambler, he explained, is a motorcycle designed for off-road riding, ie, riding across the veld or in the bush. On the day in question, which was a Sunday, he was visiting his fiancée. During the afternoon her brother-in-law wanted to ride Gibson's scrambler, and suggested that they go to this open piece of ground. Gibson drove the scrambler, and

his fiancée and others accompanied him by car. Gibson went onto the land and rode in a southerly direction until he reached the main drain. He then turned and continued in an westerly direction, parallel to the main drain. He was driving at 15 to 20 kms per hour. He described what then happened as follows:

> "I was riding along a couple of metres from the bank of the main canal and all I can recollect was that at the last moment I just saw the ditch right in front of me."

(The "ditch" to which he refers was, it is common cause, one of the subsidiary drains running from north to south into the main drain). His evidence continues:

> "And how do you account for the fact that you didn't see the ditch? --- It just wasn't visible, I just didn't see it. I was riding along and all of a sudden it was there. I couldn't stop.
> COURT: But why could you not see it? --- I can't answer that question now, I can't remember back, I just, all I remember is just not being able to see the ditch."

When asked how far he was from the "ditch" when he saw it, he replied " maybe 2 metres at the most."

Gibson was not able to clear up why he saw the drain

only at the last moment. He agreed in cross-examination that the grass was relatively low and that the height of grass did not prevent him seeing the drain. This was taken up again in re-examination, where the following passage occurs:

> "And the height of the grass, you say that it didn't prevent you from seeing the ground as such but how far could you see in front of you clearly? --- I would say I could see quite a few metres in front of me.
> A few metres in front of you? --- Quite a few."

In the light of the evidence summarized above, the Court a quo held as follows:

> "The plaintiff's liability to compensate Mr Gibson depends on whether it could reasonably have foreseen that harm would have come to a person riding a motorbike designed for scrambling by reason of such person having fallen into the subsidiary drain. The only evidence before me as to the use of the veld where the drains were, was that children were to be seen playing thereon occasionally with bicycles and that pedestrians used the veld. There was no evidence that the veld was used for scrambling or that it was particularly suited for scrambling. No facts were placed before the court on the basis of which it could be found that the plaintiff could reasonably have foreseen that the veld would be used for the purpose of scrambling. While the plaintiff may have had a duty to prevent harm to certain persons the plaintiff had to establish that it had a duty to prevent harm to Mr

> Gibson. That is the only duty relevant for the purpose of the case."

This reasoning was criticized by the appellant's counsel. He submitted that it was irrelevant whether there was evidence that the veld was used for scrambling or that it was particularly suited for scrambling. Once the evidence disclosed that children were seen to be playing on the property, that children were seen on bicycles on the property and that pedestrians used the property, so the argument proceeded, the fact that Gibson came onto the property with his scrambler was simply a reasonable and necessary extension of what the reasonable man ought to have foreseen in regard to children or bicycles or pedestrians.

This argument accepts, correctly, in my view, that the appellant could not reasonably have foreseen that persons would drive scramblers across the land. The degree of care which the appellant should have exercised, so it was contended, was that which would have been appropriate to prevent injury to

pedestrians, children and cyclists. At the very least the appellant should accordingly have shown on the evidence that the appellant was required to take precautions against possible injury to pedestrians, children and cyclists. I turn now to consider whether this has been proved.

The only evidence that cyclists ventured onto the land was that given by Mrs. Gibson. Her evidence related to a single occasion, namely the day of the accident, and there is nothing to suggest that it had happened before. Mr. Kydd and Mr. De Necker, who visited the area more often, do not mention cyclists. Mrs. Gibson was also very vague about what the cyclists were doing. She certainly did not say that they were riding their cycles across the veld, and it is unlikely that they were doing so. The terrain was most unsuitable for cycling, and it is more likely that they were riding on the roads newly constructed by the respondent some distance from the excavations. But even if one or two adventurous cyclists were riding in the veld on 18 October 1981 this was not something which the appellant could,

in my view, reasonably have foreseen.

The evidence about pedestrians and children emanated from Mrs. Gibson and De Necker (Kydd, it will be recalled, saw no children or pedestrians). De Necker referred to children playing in the drains. The first point to be noted is that there is nothing to suggest that the appellant knew or should have known of this. I do not think a reasonable man would have foreseen that children would walk at least 300 to 500 metres (which is the distance of the nearest houses) in order to play in the mud at the bottom of the drains. But in any event there is no evidence to suggest that the drains posed a risk to these children. They obviously knew the drains were there, and there was no danger of the type of accident which befell Gibson. I assume that a child may be hurt in clambering in or out of a drain, but the danger of this happening does not seem greater than the risk of injury associated with many other normal childhood games or sports. Moreover, the only reliable protection would have been a childproof fence around the drains,

the expense of which seems out of proportion to the risk involved. In all these circumstances I do not think that the evidence of children playing in the drains assists the appellant in any way.

Finally there is the matter of pedestrians, including children other than those to whom De Necker referred. As I have already said, there was no footpath or other thoroughfare across the land. There is no apparent reason why any pedestrian should have gone onto the land, or why any child should have come 300-500 metres from the nearest dwelling to play on the land. Certainly no toddler or small child would be expected to do this. There is no evidence to suggest that the appellant knew that persons were walking across the land, or that children were playing there. Even if the presence of pedestrians or children during the daytime might have been foreseen there is no reason to suppose that anybody would have wanted to go onto the land after dark - at least, the evidence suggests no such reason. During the daytime there would have been no danger. The drains

were large, obvious and clearly visible. Any person walking or running over the veld paying even the minimum of attention to where he was going would have seen the drains long before therewas any danger of falling in (except, possibly a very small child, whose presence there could in any event not reasonably have been foreseen).

In sum, there was no evidence before the Court a quo to suggest that the drains presented any danger to persons who might reasonably have been expected by the appellant to come onto the land. The Court a quo was accordingly correct, in my view, in holding that no culpa on the part of the appellant had been established. This conclusion renders it unnecessary for us, as it was for the Court a quo, to consider various other grounds on which the respondent denied liability.

The following order is made:

> The appeal is dismissed with costs including the costs of the application for leave to appeal in the Court a quo and of the petition for leave to appeal to the Chief Justice.

E M GROSSKOPF, JA

JOUBERT, ACJ
STEYN, JA
EKSTEEN, JA
GOLDSTONE,JA
Concur