THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 305/10

In the matter between:

DORMAC MARINE AND ENGINEERING (PTY) LIMITED **Appellant**

and

CALMIN ANDREW HENNEBERRY **Respondent**

Neutral citation: *Dormac Marine and Engineering (Pty) Ltd v C A Henneberry* (305/10) [2011] ZASCA 63 (01 April 2011)

Coram: MPATI P, MAYA, CACHALIA, SHONGWE and SERITI JJA

Heard 10 March 2011

Delivered: 01 April 2011

Summary: Damages – claim based on negligent omission – claimant alleging defendant failed to provide proper and safe equipment – chain block breaking on job resulting in injury – defendant contracting with independent contractor to inspect and test equipment – negligence not proved.

ORDER

On appeal from: KwaZulu-Natal High Court (Durban) (Msimang J, sitting as court of first instance):

1. The appeal is upheld with costs, such costs to exclude the costs of preparing volume 2 of the record.
2. The order of the court below is set aside and the following is substituted:

'Absolution from the instance is granted, with costs.'

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JUDGMENT

MPATI P (MAYA, CACHALIA, SHONGWE and SERITI JJA .....):

[1] The respondent (as plaintiff) sued the appellant (as defendant) in the Durban High Court for damages for bodily injuries he sustained while working on a shipping vessel at the Durban dry dock. The appellant denied liability. At the commencement of the trial an order was made, by agreement between the parties, that the issues of the liability and quantum be separated in terms of rule 33(4) of the Uniform Rules. The trial thus proceeded on the issue of liability only, the issue of quantum standing over for later determination.

[2] At the end of the trial the court (Msimang J) was faced with two mutually destructive versions on how the respondent came to be injured. After analyzing the evidence he concluded that the respondent's version was preferable and held the appellant liable for the respondent's damages. The learned judge subsequently refused the appellant's application for leave to appeal. This appeal is with leave of this court. For convenience I shall refer to the appellant as 'Dormac'.

[3] Dormac is an incorporated company that operates a ship repair business based in Durban. The actual ship repairs are, however, carried out by Dormac's sub-contractors, one of whom is Camrod Engineering CC (Camrod). At the time relevant to this matter the respondent was employed by Camrod as a boilermaker. His work entailed fitting steel plates onto the hulls of ships damaged out at sea. A ship that requires such repairs is steered into position above certain blocks after the dry dock has been filled with water. The water is then pumped out, allowing the ship to rest on the blocks approximately 1.5 meters above the surface of the dry dock.

[4] On 3 July 2002 the respondent reported for duty at 18h00. He was on night shift, which was to end at 07h00 on 4 July 2002. He testified that upon reporting for duty he was instructed by a Mr George Joubert (Joubert), who was employed by Camrod as a foreman, 'to fit a length of [steel] plate to the bottom of the ship' known as Maud, which was already in position in the dry dock. The damaged part of the ship had been removed during the day and a sheet of metal from which the replacement steel plate was to be cut was on the ground below the ship. The respondent marked out the size of the plate he required from the metal sheet. One of his team members, Mr Wayne Johnson (Johnson), a burner, cut out the required piece, using an oxyacetylene gas cutting torch. The steel plate was 7.8 meters long. On one end it was 1.2 meters wide while the width on the opposite side was 980 millimeters. The wider side of the steel plate, was thus heavier than the other.

[5] After Johnson had cut out the steel plate the respondent welded three lugs[1] onto it, one towards each end of the length of the steel plate and one in the middle. He then proceeded to the mobile store where he requisitioned three chain blocks which he required to lift the steel plate. The respondent testified that he asked for three 2-ton chain blocks but the storeman gave him two 2-ton and one 3-ton chain blocks, which he

1 Lugs are metal rings by which the steel plate was to be lifted into place by means of chain blocks or lifting equipment.

carried separately

back to the ship.[2] It appears that the steel plate weighed 1080 kilograms (approximately 1ton). Back at the ship he hooked the chain blocks onto frames on the ship and to the steel plate.[3] The two 2-ton chain blocks were hooked onto the lugs on the opposite sides of the steel plate and the 3-ton chain block onto the centre lug. However, the respondent said that Joubert instructed an assistant to remove the 3-ton chain block from the centre lug and from the ship because, in his view, the two on the sides of the steel plate were sufficient. This angered the respondent. He reacted by telling Joubert to lift the plate himself. Joubert then instructed Johnson and the assistant to lift the plate into position, using the two 2-ton chain blocks. According to the respondent the centre chain block was meant to ensure that the plate, when pulled up into position, would remain straight and not curve out in the middle.

[6] The respondent testified further that once the plate was in position Joubert instructed him to continue with his work. His duty was to secure the plate in its position after which a welder would weld it into place right around. To secure the plate into position the respondent had to use pieces of metal referred to as 'dogs', which had to be welded onto the body of the ship close to the plate so that part of the pieces (dogs) protruded beyond the edge against which the new plate is fitted. In this way the 'dogs' help to keep the plate in position. But before the respondent could commence with the operation and because the use of only two chain blocks resulted in the plate curving out in the centre area causing the plate not to fit flush at the seam, he took a hydraulic jack which was at the scene, placed it on a piece of wood directly below the centre of the plate. His intention was to lift the curved centre of the plate by means of the jack, but he discovered that the jack was faulty. When he could not find another one he proceeded to attach 'dogs' as indicated above. He started from the broader or wider side of the plate and worked backwards towards the narrow side. He was thus facing the back of the ship with his back towards the front.

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2 The reference to 'tonnage' relates to the weight the chain blocks are meant to lift although they are able to lift heavier items. The breaking strength of a 1-ton chain block is said to be 4.9 tons.
3 A chain block has two hooks. One is hooked onto a stable structure so as to support the weight of the object to be lifted and one onto the object itself.

[7] It is not clear from the respondent's evidence how far apart the 'dogs' were welded

onto the ship, but he testified that after he had secured three of them and, as he lifted his left hand 'to fit [a] wedge'[4] into a 'dog' the chain block on his side of the plate snapped, causing the steel plate 'to whip out' onto his left hand, crushing it and his left wrist. It then whipped back up before crashing down, bumping Joubert on his head. When the plate on the side where the respondent had been working hit the ground its impact caused the lug on the narrower side to 'sheer off'' causing the whole plate to fall to the ground. The respondent realized that the lug had sheered off because it was still attached to the hook of the chain block, while the hook of the other chain block on the wider side of the plate was still hooked onto the lug, which remained welded onto the plate. A link in the chain had broken off above the hook. The respondent realized the extent of his injuries only when he removed the glove he had been wearing over his left hand. He was taken to Entabeni Hospital by his supervisor, Mr Faeez Sookool, and his brother, Mr Kerwin Henneberry, who had also been working on the ship. His hand, regrettably, could not be saved and was amputated.

[8] Johnson supported the respondent's version in all material respects. He testified that he had to assist the respondent to remove the centre chain block, which was a 3-ton chain block, from the steel plate. The respondent told him that the nightshift foreman, Joubert, had instructed him to do so. He also assisted in pulling up the steel plate into position and, while inside the ship, trimmed the plate so that it fitted properly into the space where the damaged piece had been cut out. When he finished trimming the plate he came out of the ship through a hole left open in its hull by boilermakers for that purpose. He then sat on a paint drum directly below the steel plate but close to the narrow end. He said that the respondent had his back to him as he was welding 'dogs' onto the ship. He was busy cleaning some 'dogs' which the respondent had thrown to him when, suddenly, the side of the plate on which the respondent was working 'whipped out' and hit the latter's hand. He saw the plate 'whip up' and at that moment he moved away. The side that had whipped up came down again and when it hit the ground the other side (narrow side) also fell out and the whole plate landed on the ground. Johnson then 'walked the length of the plate' and saw that 'the hook of the chain block was still in

4 A wedge is apparently also used in the process of keeping the plate flush in position.

the lug on the aft side with a couple of (chain) links still on the hook.'[5] He said that the lug on the narrow side of the plate was hanging 'in mid-air', but was still attached to the hook of the other chain block. When the respondent was taken to hospital he (Johnson) sat down until, after about an hour, he was instructed by Joubert to fit the plate, which he did.

[9] When the incident happened the respondent's brother, Kerwin, was working approximately four meters away from the respondent towards the front of the ship. He testified that his attention was drawn by a loud banging noise. When he looked up in the respondent's direction towards the rear of the ship he saw the steel plate the respondent was fitting onto the ship 'break free from the ship' on one side. The whole plate then dropped to the floor. He saw the respondent holding his left arm and rushed to help him. Like Johnson, he observed that the lug on the forward (narrow) side of the plate had come off and was hanging on the chain block above the plate, while the one on the rear side was still on the plate with a few chain links hooked onto it.

[10] It is common cause that the chain blocks (and certain other equipment or tools) used by the artisans employed by Camrod when repairing ships were owned by Dormac. The equipment or tools used by artisans were requisitioned from Dormac's stores at their premises or from a mobile store in which tools were brought to the quayside. But Camrod also had a container, also referred to as a mobile store, where their tools and other equipment which has already been requisitioned from Dormac and taken out of the Dormac's stores were kept. Like the Dormac mobile store, Camrod's was also manned by a storeman. On the respondent's version the chain blocks that he used on the evening in question were obtained from Camrod's mobile store.

[11] In his amended particulars of claim the respondent alleged that the incident (which resulted in the injuries to his left hand and wrist) was caused solely by the negligence of Dormac. The alleged grounds of negligence were listed in paragraph 6 as follows:

5 The term 'aft' refers to the rear of the ship.

'(a) The Defendant failed to provide proper and safe equipment for use on site. On the day of the incident the hydraulic jack normally used was damaged which was why the chain blocks were used. The chain block and all equipment used on the project were provided by the Defendant. Three chain blocks being used were old, unsafe and defective however no safety precautions were implemented which ultimately led to the chain block snapping and injuring Plaintiff.

b) The Defendant failed to provide safety personnel to inspect equipment utilized. There were three different contracting crews on the project on that specific date and only one safety officer available. There were no qualified safety officers available to inspect safety conditions or check equipment. The Defendant failed to provide quality supervisors.

c) The Defendant failed to avoid the incident when, by the exercise of reasonable care, the defendant could and should have done so.

6 [bis]

(a) There was an obligation upon the defendant and who owed the plaintiff a duty of care to provide proper and safe equipment for use on site, to provide safety personnel to inspect the equipment which were being utilized at the time of the incident and to provide qualified supervisors;

(b) The Defendant failed to carry out its said obligation and breached such duty of care in omitting to provide proper and safe equipment for use on the site, omitting to provide safety personnel to inspect the equipment which were utilized at the time of the incident and omitted to provide qualified supervisors;

(c) . . . .'

[12] Dormac admitted in its plea that only one safety officer was available on the night in question and that it had an obligation to provide proper and safe equipment for use on site, but pleaded that it is not the obligation of its safety officer to check equipment; that

the responsibility to check the equipment while it was being used rested on Camrod; that the equipment supplied was in good condition and had been checked and certified as such; that the reason a link in the chain block failed, causing injury to the respondent, was the failure of the lug which had been welded by the respondent and that in turn led to unexpected excessive force on the chain block; and that chain blocks were the usual equipment used for the work that was being carried out and therefore appropriate.

[13] Three witnesses testified on behalf of Dormac, namely Joubert, Mr Gerald Wayne Blenner-Hasset, who had been attached to a company that manufactured chain blocks and later to companies that repaired and tested chain blocks, and Mr Clinton Elton Cochoran, a safety officer employed by Dormac. A summary of Joubert's evidence follows. The sole member of Camrod is his brother, Mr Jerome Joubert. He (Joubert) was on duty on the night of the incident. As foreman he would compile a list of the equipment that would be required for work to be done. The list would then be handed to the storeman on duty at Dormac's stores who would make an entry in their requisition records. The storeman would thereafter draw the equipment and place it at the front of the store where he (Joubert) would personally check it. The equipment would then be loaded on a Dormac truck and taken to the dry dock.

[14] On the evening in question he showed the respondent the plate that had to be fitted onto the ship and gave him a one 2-ton and two 1-ton chain blocks. He also made available to the respondent one burner and a welder. However, the respondent told him that he (respondent) did not require a welder as he did not trust anyone but himself. The respondent then welded two lifting lugs onto the plate, one on the 'forward' side, ie the side that was closest to the front of the ship, and the other on the 'aft' side. The respondent also welded lifting lugs inside the ship, 'on the tank top', according to Joubert. The respondent then hooked a 2-ton chain block onto the lug on the narrow side of the plate and a 1-ton chain block onto the lug on the wider side. Joubert said that he advised the respondent to weld another lug onto the centre of the plate, otherwise the plate would not 'lift up square'. The respondent obliged and after he had welded another lug to the centre of the plate he hooked the third chain block (1-ton) onto that lug. When

all three chain blocks had also been hooked inside the ship the plate was pulled up into position by the two assistants. Once the plate was properly aligned to the hole in the ship he (Joubert) instructed the respondent to start 'dogging the plate in and tacking it up'[6] from the side closest to the rear of the ship.

[15] Joubert further testified that when the respondent had welded on strong backs[7] he continued 'dogging and wedging' the plate, moving backwards towards the narrow end of the plate. When he reached the centre of the plate the narrow end suddenly fell down to the ground brushing the witness on his shoulder as it went down. The respondent then 'came out from underneath the ship holding his hand', so Joubert continued. The side of the plate to rear of the ship was still up against the ship, he said. When the respondent removed his glove they noticed a lot of blood on his hand although they could not see 'what was the damage to [the] hand'. He thereafter instructed Sookool to take the respondent to hospital. The latter was accompanied to hospital by his brother.

[16] Joubert's testimony continues that he then inspected the plate and noticed that the lug on the front side 'had torn off the plate'. It was dangling in the air on the hook of the chain block. He noticed that the centre chain block had snapped and its hook was still attached to the centre lug. He then inspected the wider side of the plate and saw that the chain block was still hooked onto the lug. Contrary to the testimony of the respondent and Johnson, Joubert said that only the front side of the plate fell to the ground, with the side to the rear still held up by a chain block. A burner, a Mr Labuschagne, who had been inside the ship, trimming the plate, then slid out of the ship. Joubert said that at the time that part of the plate fell Johnson was cutting strong backs from a metal sheet which he had rested on a paint tin 'underneath the plate'. However, he came out from underneath the plate seconds before it fell.

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6 'Tacking' is to keep the plate into position by means of small welds in the seam that hold it firmly together with the hull.

7 Apparently strong backs are welded onto both the new plate and the body or hull of the ship so as to keep the new plate and hull in line. When strong backs have been welded on the dogs and wedges can be removed.

[17] After he had done his inspection Joubert called another welder, Mr Eric van Wyk, who welded the lug that had 'torn off' back onto the narrow side of the plate. The centre chain block, which had snapped, was replaced with another 1-ton chain block and the plate was pulled up into position again. He called Johnson back and instructed him to continue with what the respondent had been doing, i.e. fitting the plate.

[18] From what he saw as the incident occurred and upon inspecting the scene Joubert concluded that the cause of the narrow side of the plate falling was the lug that tore off, causing a 'whiplash effect snapping the centre chain block'. He testified that it was not his duty to check or to ensure that boilermakers can adequately weld lugs onto a metal sheet, but that it was his duty to 'give them a welder'. In this case the respondent specifically said he would do the welding of the lugs himself.

[19] Clinton Cochoran testified that on 4 July 2002 he saw a 1-ton chain block marked number '6' in a cardboard box on the floor of Dormac's stores. It was dirty and 'one of the chains was broken'. It was together with other equipment that was to be sent to Nu Quip CC, a close corporation that supplied and tested lifting equipment. He said that upon being returned to Dormac, rigging and lifting equipment, such as chain blocks, is placed or kept in a separate area for collection by someone from Nu Quip for testing and service, after which a certificate would be issued by Nu Quip in respect of each piece of equipment, certifying that it may be 'put back into service'. A document to which Cochoran was referred, headed 'CONSUMABLE/EQUIPMENT STORES REQUISITION', indicates that among the equipment issued by Dormac on 28 June 2002 were five 1-ton chain blocks, two of which were recorded as numbers '5' and '6'. Those numbers are encircled, which meant they had been returned to Dormac's stores. (According to Cochoran, Dormac's chain blocks and other equipment have tags attached to them and a number appears on each tag for Dormac's own internal identification.) The 'returned by' column on the document reflects that chain block number 6 was returned to Dormac on 4 July 2002. Only one 2-ton chain block is recorded on the document as having been issued together with the five 1-ton chain blocks and other equipment on 28

June 2002.

[20] Cochoran's further testimony was that the document was given to him during the morning of 4 July 2002 by the stores supervisor, a Mr McDonald, who instructed him to draw the certificates for chain blocks numbers '5' and '6'. This was after they had received information about the accident at the dry dock. He was also instructed to highlight, on the document, equipment that had been returned, for the attention of the safety officer, a Mr Beyleveld, who was commonly known as 'Rocky'. He accordingly wrote the following on the document:

'1 x 1T chain block – H5
1 x 1T chain block – H6
1 x 1.5T Come-A-Long – H1
Broke on job. Dry Dock
1 x I.O.D.'

According to Cochoran the '1x I.O.D' is an abbreviation for 'one injured on duty'.

[21] Mr Blenner-Hasset's evidence may be summarized thus. His experience in dealing with lifting equipment, particularly chain blocks, stretches from 1967. In that period he had been involved in the manufacturing, repairs and testing of chain blocks. He has personally done repairs and testing. At the time of the trial he was attached to Nu Quip where he held a member's interest. On Friday, 5 July 2002, Dormac's safety officer, Rocky (Beyleveld), delivered a 1-ton chain block with serial number 82529 and bearing the number '6' at Nu Quip's offices. Beyleveld alleged, he said, that the chain block 'had failed and snapped under a load'. Beyleveld asked him to inspect the chain block in his presence. A length of chain was cut above the break and tested by pulling it 'to destruction' by means of a hydraulically operated machine. (The chain block broke at a recorded break load of 4.9 tons.) He compiled a report in the form of a letter dated 8 July 2002 addressed to Dormac, for attention 'Rocky – Safety Officer'. Inspection of the chain block, according to the report, which Blenner-Hasset confirmed in his evidence, revealed that 'it had in fact elongated' immediately before and after the failed

link. This was a 'clear indication of an overload or shock load'.

[22] There are three material differences in the versions of the respondent on the one hand and Joubert on the other. They relate to these issues: (1) whether only two chain blocks were used in pulling up the metal plate, i.e. whether or not a chain block was hooked onto the centre lug, after which Joubert instructed that it be removed; (2) whether only one side of the length of the plate fell to the ground or whether the whole plate did; and (3) the lifting capacity of the chain blocks that were used on the job during the evening of the incident.

[23] After analyzing the evidence and having referred to what was said by Coetzee J in *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) the learned judge a quo held that 'the facts of this case admit to no probabilities one way or the other' and that, therefore, if he were to find in favour of one party he 'must be satisfied that the evidence advanced on behalf of that party is true and that [that] tendered on behalf of the other is false'. The learned judge continued:

'Having considered and evaluated the evidence which was presented by the parties against the factors set out by Nienaber JA in *SFW Group Ltd & Another v Martell et cie & others* [2003 (1) SA 11 (SCA) 14 para 5], I have been driven to the conclusion that the plaintiff's version of the events that unfolded during the relevant incident is a preferable one.'[8]

[24] With regard to the chain block that was tested by Blenner-Hasset on 5 July 2002 the court below reasoned thus:

'The first shortfall in the chain is lack of the particulars of the identity of the person who had removed the relevant chain block from the scene and gave it to Beyleveld. Also, the court is kept in the dark as to when and by whom was the said chain block placed on the floor at the

8 Para 103 of the judgment.

stores. Finally, the person who had allegedly retrieved the chain block from the scene and who had allegedly delivered it at the offices of Nu Quip on 7 July 2002 was not called to testify. This Court is accordingly not satisfied from this chain of evidence that the 1-ton broken chain hoist, which was delivered for inspection at Nu Quip and on the basis of which that firm had compiled a report, is the same chain block that had snapped during the occurrence of the incident in question.'[9]

[25] In my view, this reasoning is erroneous. It is true that during his testimony Joubert asserted that he would have requisitioned the chain blocks that were used during the evening in question, while the documentary evidence clearly indicates that chain block number '6' was requisitioned on 28 June 2002. It seems to me that Joubert may very well be mistaken in this regard, or even untruthful. (It will be recalled that the respondent testified that he went to fetch the three chain blocks from Camrod's mobile store at the bottom of the dry dock.) On the other hand, the probabilities point to the respondent and Johnson also being mistaken, if not untruthful, when they said that the two chain blocks the respondent used to lift the plate were 2-ton chain blocks. The probabilities appear to me to favour Dormac's version that 1-ton chain blocks were used, leaving aside the question whether or not a third chain block was used on the centre lug of the plate. Joubert testified that when 'the day shift came on shift in the morning the damaged chain block was handed to the dayshift safety officer', Mr Beyleveld. Even though Cochoran's testimony was that he saw a dirty, broken chain block in a box on the floor of Dormac stores, which he identified and noted down as chain block number '6', that very same chain block was delivered personally to Nu Quip by Beyleveld. Cochoran identified it as a 1-ton chain block and Blenner-Hasset, who inspected and tested it, also identified it as such. There was no evidence whatsoever to suggest that a second chain block had broken during that same evening (of the accident) or the previous day. And some elaborate scheme would have had to have been hatched, involving more than one person, to hide the chain block that broke while being used by the respondent and to replace it with another broken chain block. No reason was suggested as to why Dormac, or anyone else, would have found it necessary to hatch such a scheme. After all, the evidence was that two 1-ton chain

9 Para 92 of the judgment.

blocks would have been sufficient to lift the metal plate.

[26] In my view, the probabilities point to the 1-ton chain block that was tested by Blenner-Hasset being the same one that broke or snapped. It does not follow, however, that the version of the respondent on how the accident occurred must be rejected. But the finding that I have just made, albeit not necessarily affecting the decision of the court below to accept the respondent's version of events (except for the 'size' of the chain block), does affect its further reasoning relating to its finding on liability.

[27] The result of the court a quo's finding that the chain block that was tested by Blenner-Hasset was not the same chain block 'that had snapped during the occurrence of the incident in question' was a further finding that the link (of the 2-ton chain block according to its finding) that snapped would not have broken 'in the ordinary course of things without negligence on the part of somebody other than the [respondent]'. The court accordingly held that 'the surrounding circumstances . . . point to the probability that the chain block was defective at the time when it was supplied to the [respondent]'. The finding of negligence was thus based on the principle *res ipsa loquitur*, the court inferring negligence on the part of Dormac from the failure of a chain block that should not have failed had it been in proper working condition.

[28] Counsel for Dormac submitted that the court a quo erred in rejecting Joubert's evidence which, according to counsel, was corroborated to some extent by the evidence of Blenner-Hasset that the chain block that he had tested was a 1-ton chain block. Joubert's version, counsel contended, was accordingly not improbable. There are certain other aspects of the judgment of the court a quo that counsel for Dormac criticized, one being the learned judge's approach to the evidence and his alleged interference during the trial, which, so it was submitted, affected the court's assessment of the evidence and its credibility findings.

[29] In the view I take of the matter, it is not necessary for me to embark upon an assessment of all the evidence so as to arrive at a finding as to which version is true

and which is false. I shall assume, for purposes of this judgment, that the respondent's version is true, subject to my earlier finding that the chain block that broke while being used by the respondent was the same one that was tested by Blenner-Hasset. I shall, later in the judgment, if necessary, deal briefly with counsel's submission on the alleged interference by the trial judge during the trial.

[30] The question whether the appellant was or was not the wrong defendant in the respondent's claim is not in issue here. Nor do questions of vicarious liability come into the picture. The essence of the respondent's case is that Dormac owed him a duty of care to provide proper and safe equipment (in this case chain blocks) for use on site and that it breached such duty of care by failing or omitting to provide proper and safe equipment. It was also alleged that Dormac omitted to provide safety personnel and qualified supervisors to inspect the equipment which was utilized at the time of the incident. The court a quo did not deal with this issue and before us counsel did not advance any argument on it. Nothing more need be said on this issue.

[31] In view of the finding that I have made that the chain block that was inspected and tested by Blenner-Hasset was the same chain block that broke while being used by the respondent, it becomes necessary to consider whether the respondent succeeded in establishing negligence on the part of Dormac on the grounds alleged in the particulars of claim. In *McIntosh v Premier, KwaZulu-Natal & another* 2008 (6) SA 1 (SCA). Scott JA said the following:

'As is apparent from the much quoted dictum of Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 E-F, the issue of negligence itself involves a twofold enquiry. The first is: was the harm reasonably foreseeable? The second is: would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to

do so amounted to a breach of that duty.'[10]

The learned judge was at pains to warn that the word 'duty' should not be confused with the concept of 'legal duty' in the context of wrongfulness which, he said, is distinct from the issue of negligence.[11]

[32] As I have mentioned above, Dormac admitted in its plea that it had an obligation to provide proper and safe equipment for use on the site to Camrod, but denied that the chain blocks used were old, or unsafe, or defective. It pleaded further that the equipment supplied to Camrod 'was in good condition and had been checked and certified as such'. From this it seems not to have been in issue that a *diligens paterfamilias* in the position of Dormac would have foreseen the possibility of old, unsafe or defective chain blocks causing harm to artisans who might use them to lift heavy objects in the performance of their duties at the dry dock. Dormac's allegation in its plea that the equipment it supplied was in good condition and had been checked and certified as being in good condition presupposes, in my view, an acceptance of the existence of a duty on its part to take reasonable steps to guard against such harm. Indeed, there was no evidence, nor argument advanced before us, to suggest that no such duty existed. The next question, then, is whether Dormac did take precautions to guard against harm and, if so, whether those precautions can be regarded as reasonable.

[33] The respondent's father, Mr Gerald Ferdinand Henneberry, an engineer and boilermaker with forty years' experience, testified as an expert witness on behalf of the respondent. His evidence was based on the respondent's version that two 2-ton chain blocks were used to lift the metal plate. He never inspected or tested the broken chain block, but gave an opinion on the reason why it would have snapped. He said the plate would have been under stress and there would have been 'something defective with the chain block that snapped'; there would possibly have been a weak link which could

10 Para 12.
11 Ibid.

have had a hairline crack ‘that’s not visible with the naked eye’. I do not think much store can be placed on this piece of evidence, especially when compared with the evidence of Blenner-Hasset, who was clear in his testimony that the elongation of links immediately before and after the broken one and the fact that the break in what he called the ‘shoulder’ of the link indicate that the chain block had been overloaded and stretched ‘beyond its point of elasticity’. He also expressed the opinion that gouges which he had discovered on some of the links of the chain block were evidence of abuse.

[34] Cochoran’s uncontradicted evidence was that when chain blocks are returned to Dormac’s stores after they had been used, they are ‘signed off the requisition’ (as having been returned) and then sent to Nu Quip for inspection. The equipment is not placed back on the shelf as it has to have ‘a register and a certificate’ issued by Nu Quip ‘before it can be put back into service’. It is not issued out to another job before it is tested by Nu Quip. If a piece of rigging equipment is not used it still has to be tested by Nu Quip once a year. Cochoran confirmed that a certificate issued and signed on behalf of Nu Quip in respect of a chain block described as a ‘1 TON YALE CHAIN HOIST REPAIRED AND TESTED’, with the reference ‘BLOCK 6’ and distinguishing mark 82529 (serial number), relates to the broken chain block. The certificate indicates that the chain block was repaired and tested approximately on the date appearing on the certificate, viz 7 December 2001. He agreed with the proposition, in cross-examination, that if the chain block was used in July 2002 when the accident occurred, this means that it was never used after it had been tested until July 2002. It should be remembered, to avoid confusion, that the respondent obtained the chain block (with two others) from Camrod’s mobile store during the early hours of 4 July 2002. The chain block had been booked out to Camrod on 28 June 2002, approximately six days before it was used by the respondent. The possibility that it had been used elsewhere, or by someone else, before it was used by the respondent cannot be excluded, especially if regard is had to Blenner-Hasset’s observation that certain links in the chain block had gouges.

[35] Cochoran is supported by Blenner-Hasset, who testified that in terms of the Occupational Health and Safety Act[12] chain hoists have to be tested at least once a year and that the certificate issued on 7 December 2001 was in compliance with that legislative requirement. He also said that Dormac's chain blocks generally appeared to go to Nu Quip on a regular basis where 'each batch of hoists that came in get inspected on arrival and they get stripped down so that they get re-greased and any working parts within the block that might be damaged can be checked'. After a chain block has been assembled again it is tested and another certificate is issued which he referred to as a proof load certificate 'to say that it has been proof loaded again'.

[36] I mention, as a matter of interest, that Cochoran and Blenner-Hasset were indirectly supported by Henneberry senior. He said that in a company for whom he worked (at the time of the trial) a register was kept 'of all our lifting equipment and they get tested annually or even six months'. When they had a slack period the equipment was tested 'six months at a time'.

[37] In *Cape Metropolitan Council v Graham* 2001(1) SA 1197 (SCA) Scott JA said:

'[I]t is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depends on a consideration of all other relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be:

"*(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 776H-J, where J C van der Walt in Joubert (ed) *The Law of South Africa* vol 8 para 43 is quoted with approval; *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) at 55H-56C.) If a reasonable person in the position of the defendant would have done no more than was actually done there is, of course,

12 85 of 1993.

no negligence.'[13]

13 Para 7.

And in *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) at 55I the same judge observed that 'merely because the harm which was foreseeable did eventuate does not even mean that the steps taken were necessarily unreasonable'.

[38] In *Chartaprops 16 (Pty) Ltd and another v Silberman* 2009 (1) SA 265 (SCA) the respondent, while visiting a shopping mall in Johannesburg, slipped on a slippery substance in one of the passageways of the mall and was injured. She subsequently sued Chartaprops, the owner of the mall, and another entity, Advanced Cleaning, which had been contracted by Chartaprops to keep the floors of the shopping mall clean, for damages. The basis of the claim against the appellants was that they, or those for whose conduct they were legally responsible, had created the hazard in that they or their employees negligently omitted to detect and remove the hazard. It was not in dispute that Chartaprops itself kept a regular check on advanced cleaning's performance, its centre manager consulting each morning with the cleaning supervisor and personally inspecting the floors of the shopping mall daily to ensure that they had been properly cleaned. He would arrange for the immediate removal of litter or spillage that he encountered. The trial court found for the respondent, holding that Chartaprops' liability arose vicariously for what was said to be negligence on the part of Advanced Cleaning.

[39] In allowing the appeal Ponnan JA, writing for the majority, and after alluding to the general rule that a principal is not liable for the wrongs committed by an independent contractor or its employees, said the following:

'Chartaprops did not merely content itself with contracting Advanced Cleaning to perform the cleaning services in the shopping mall. It did more. Its centre manager consulted with the cleaning supervisor each morning and personally inspected the floors of the shopping mall on a regular basis to ensure that they had been properly cleaned. If any spillage or litter was observed, he ensured its immediate removal. That being so it seems to me that Chartaprops did all that a reasonable person could do towards seeing that the floors of the shopping mall

were safe. Where, as here, the duty is to take care that the premises are safe I cannot see how it can be discharged better than by the employment of a competent contractor. That was done by Chartaprops in this case, who had no means of knowing that the work of Advanced Cleaning was defective. Chartaprops, as a matter of fact, had taken the care which was incumbent on it to make the premises reasonably safe.'[14]

The learned judge reasoned further that Chartaprops 'was obliged to take no more than reasonable steps to guard against foreseeable harm to the public'.[15]

[40] Assuming, for present purposes, that in this case the chain block that broke was not rendered defective while it was in Camrod's custody after it had been booked out on 28 June 2002, I am of the view that the steps taken by Dormac to guard against foreseeable harm by sending all rigging equipment returned to it after use by Camrod and other contractors to Nu Quip, an independent contractor, for inspection and testing before being put to use again, were reasonable. The specific chain block had not been used after it was repaired and tested on or about 7 December 2001 until it was booked out to Camrod on 28 June 2002. It would therefore not have been sent back to Nu Quip for another test without having been put to use before 28 June 2002. It has not been suggested that Dormac, upon receipt of the chain block following repair and testing, should itself have checked or tested it for defects. Nor was it suggested that Dormac had any personnel qualified, or the machinery, to test chain blocks as a safety precaution after they had been tested by Nu Quip. But, in any event, it was not suggested that Dormac could and should have taken any other steps or action to guard against foreseeable harm. It follows that the respondent failed to discharge the onus resting upon it of proving negligence on the part of Dormac. It follows further that the court a quo erred in saddling Dormac with liability on the basis of the principle *res ipsa loquitur*. The appeal must therefore succeed.

14 Para 46.
15 Para 48.

[41] I return to the contention by counsel for Dormac that the trial judge 'constantly interrupted the flow of evidence by seeking clarification, passing comments, making jokes and, not infrequently, rebuking the witness or counsel'. A perusal of the record reveals that counsel's submission is not unfounded. But in view of the conclusion I have reached it is not necessary to deal with the contention that the learned judge's credibility findings were influenced by his alleged interference and questioning of the appellant's witnesses.

[42] There remains the question of costs. Volume 2 of the record, which consists of 90 pages, contains a few documents which were of relevance in the appeal. Some of them were duplications as they were also contained in other volumes. In my view, the rest (two or three) of those relevant documents could have been included in other volumes, thereby rendering volume 2 totally unnecessary. Counsel for the appellant (Dormac) conceded that costs pertaining to the preparation of it are not justifiable.

[43] In the result:

1. The appeal is upheld with costs, such costs to exclude the costs of preparing volume 2 of the record.
2. The order of the court below is set aside and the following is substituted:

'Absolution from the instance is granted, with costs.'

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L Mpati

President

APPEARANCES

APPELLANTS:	M Pillemer SC Instructed by Berkowitz Cohen Wartski, Durban; Rosendorff Reitz Barry., Bloemfontein
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