Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION - MAHIKENG

CASE NO: 718/2011

In the matter between:

DANIEL BLACK	First Plaintiff
BELINDA BLACK	Second Plaintiff
DARREN-TYLER MCNICOL	Third Plaintiff
JENNIFER BLACK	Fourth Plaintiff

And

TINO GORDON ERASMUS	First Defendant
ANETTE ERASMUS	Second Defendant

JUDGMENT

MAKOTI AJ

[1] What started as a family summer vacation ended in tragedy when the family of Daniel Black (*'Black'*) had to battle torrents on the banks of the Groot Marico river ('the river') in the early hours of **16 December 2010**, (the fateful day). The life of a young child of approximately two (2) years and eight (8) months was lost that morning, when the late Eric Daniel Black[1] (*'the deceased'*) was fatally swept away by floods.

[2] With the parties' agreement, and for the Court's convenience, a separation of liability and *quantum* was granted in terms of the provisions of Rule 33(4) of the Uniform Rules. Only the question of liability is up for determination at this stage of the proceedings. Quantum will be determined if it is found that the Defendants are liable for any of the damages or losses suffered by the Plaintiffs in the floods.

[3] The parties are *ad idem* with regard to most of facts of this matter and, in particular, concerning the events that took place in the evening of **15 December 2010** leading into the early hours of the morning of **16 December 2010**. Some of the important facts which parties are in agreement on or which were not placed in dispute are that:

[3.1] The First Defendant is the owner of Tino Erasmus Farm ('the farm'), and that there are three chalets or lodges that are built on it. The chalets include the one into which the Black family were booked into, the Kingfisher Lodge

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1 Born 07 April 2007.

('the chalet');

[3.2] It is common cause that Black and his family were booked into the chalet for a week's vacation starting **13 – 19 December 2010** and that it is built on the banks of Groot Marico river. The chalet is the closest in proximity to the water course of the river as compared to the two other chalets. Due to its close proximity to the river course, the chalet appears is a great attraction to members of the public or the guests who are visiting the farm for vacation purposes;

[3.3] While the First Defendant is the owner of the chalet, the Second Defendant assists him with the administration of the guest house business. In particular, the Second Defendant assists with bookings or reservations for the guest houses; and

[3.4] Heavy rains fell in the catchment areas of Groot Marico that evening[2], leading to the river bursting its banks and, *inter alia*, flooding the chalet. Evidence led on behalf of the parties, which I shall deal with more elaborately below, reveals that the amount of rainfall that evening was <u>not unusual</u>;

[3.5] Awoken in rising levels water, the family scrambled to exit the chalet for safety. It was in the course of the family struggling for safety that the deceased got swept away by the flood. His remains were found during the morning by a search team that was helping to look for him.

[2] 15- 16 December 2010.

[4] The Defendants use various mediums to attract or invite guests to book into the chalets which are available for lodging by the public. Black discovered the guest house while on duty with a television crew that was recording a [SABC 50/50] production in the area. After he informed his wife, the Second Plaintiff, about the chalets she made contact with the Second Defendant with whom she finalised bookings for the family vacation.

[5] The family arrived at the farm of Monday **13 December 2010** where they were welcomed by the Second Defendant. She gave them the keys to the chalet and directed them how to get to it. When they arrived at the farm the weather was pleasant and the family even enjoyed a stroll before they could off-load their luggage.

<u>PLAINTIFFS' CLAIM AND DEFENDANTS' PLEA</u>

[6] The Plaintiffs' pleaded claim or action for damages against the Defendants is grounded on a number of allegations, which are briefly that:

[6.1] They [Defendants] breached their duty of care towards the Plaintiffs;

[6.2] The Defendant were negligent in that they constructed the Chalet within a 100-year floodline, being a dangerous area located within the First Defendant's farm; and

[6.3] They failed to take the steps that were necessary to prevent dangerous events from occurring or to inform the Plaintiffs of the dangers of flooding.

[7] The Defendants denied the allegations against them, with the mainstay of their plea being that what happened on the **15-16 December 2010** was simply a *freak* of nature, and that it was not foreseeable. Additionally, they contended that although they were sympathetic to the Plaintiffs for their lost son and other assets, they are not liable for any of the loss(es) that were sustained by the family.

[8] Furthermore, the Defendants pleaded that the Plaintiffs have, in booking into the chalet and taking occupation after arriving at the farm, contractually waived their right to sue them for any losses because they have accepted [on the basis of signs that were allegedly sitting on the sides of the entrance into the farm] that they were entering and taking occupation at the farm [of the chalet] at own risk. Thus, the defence was that the Plaintiffs bound themselves that they will not hold the Defendants liable for any losses that they [Plaintiffs] may suffer while staying at the farm.

[9] In addition, the Defendants raised the defence that they had taken all the necessary measures to alert the users of the chalets of the dangers of flooding by erecting warning signs on both sides of the entrance to the farm. An inscription on one of the signs that was tendered as evidence reads as follows: '*The owner will not be held liable for any injuries damage or loss*' that may be incurred by any person using or visiting the farm. The essence of the defence is that all persons who book into the Chalets assume all the risks for personal injury and loss of property.

[10] Concerning the Second Defendant, the plea is that she was married

out of community of property to the First Defendant and is therefore not personally liable as she is not a co-owner of the business. Also, it has been averred that she did not participate in the construction of the chalet, and that she simply assisted with the management of the bookings or reservations in the guest houses. This was not denied by the Plaintiffs. Thus, the First Defendant is vicariously liable for damages that may have been suffered as a result of negligence of the Second Defendant.

[11] Finally, the Defendants pleaded contributory negligence on the part of the Plaintiffs. They alleged that the Plaintiffs contributed to the damages or losses that they have sustained. This defence was not pursued by the Defendants.

[12] The Plaintiffs replied to the plea and disputed that there were any visible signs at the entrance of the farm and, alternatively, if the signs were put up as alleged, they pleaded that such signs were not brought to the Plaintiffs' attention. In addition, that the exemption relied upon by the Defendants was objectively unreasonable to the extent that it sought to deprive the Plaintiffs the right to seek legal redress; that the Plaintiffs could not be expected to have their lives taken into their own hands in circumstances of the flooding; and that the enforcement in terms of the exemption notice would result in injustice.

THE CHALET

[13] Photographic evidence was tendered and used during the trial proceedings in court. The photographs depict the chalet and the

surrounding environment, in particular, its proximity to the river course and they show *inter alia* the following:

[13.1] That the chalet was built on the bank and considerably close to the river course and its floor stands at a height of approximately six (6) meters above the normal level of water in the river;

[13.2] That its wooden balcony almost overhangs into the river course, which was the main attraction for the Black family because the kids could fish while standing on it; and

[13.3] Among the three chalets built on the farm, the Kingfisher Lodge was the closest to the river course.

EVIDENCE

[14] Ms Belinda Black, was the only amongst the Plaintiffs to testify in the proceedings. The rest of the Plaintiffs were in the United Kingdom where the family had relocated to after their tragedy. Taking the costs into account, they could not all travel back into the country to participate in the trial. She was the one to testify as she was instrumental in organising the vacation and who made the bookings.

[15] On Monday **13 December 2010** the family arrived at the farm for their vacation. When they arrived the farm, in fair weather conditions, she did not observe any warning or exemption notices on the sides of the gate. As indicated earlier, they were handed the keys to the chalet by the Second Defendant, who also directed them

on how to get to the chalet. There was no evidence tendered by the Second Defendant as to what exactly did she caution the Plaintiffs about.

[16] Ms Black testified that the Second Defendant only advised them to be cautious when crossing the river's low-water bridge. As indicated, this was not controverted by the Defendants. The witness was shown a sign warning of *occasional flooding* on the side of the low-water bridge and she testified that it was not there when they got onto the farm on the fateful day.

[17] The parties are in agreement that light showers were experienced on Tuesday and that intermittent heavy rains began to fall on Wednesday **15 December 2010**. There was power outage during that evening and they just spent family time. And Ms Black testified that at some point during the day on Wednesday the rain stopped and they were able to take a walk outside their chalet and returned when it started raining again.

[18] Around mid-night the witness woke up and realised that there was large amount of water in the room. She woke Black up and they went into the Third Plaintiff's room and found that it was already flooded, with books that were on the bed side table soaked. By around that time the paraffin lamp that they were using for visibility was put out by the water. The family then began efforts to evacuate from the chalet, trying to use the door on the opposite side of the river, and that they struggled for several hours for their safety. Despite their efforts, they were not able to save the life of the deceased and they also lost valuable assets.

[19] This witness' evidence was quite coherent as to how the events of the evening of **15-16 December 2010** unfolded. She was adamant when cross-examined that there were no indemnity signs on the sides of the gate leading into the farm and, also, that there was no sign warning of occasional flooding on the side of the bridge. She admitted or did not try to deny that:

[19.1] The rain which fell from **15 December 2010** into the early hours of the next morning was a violent storm;

[19.2] The height from normal water level to chalet floor was approximately six (6) meters;

[19.3] She, on behalf of the family, specifically wanted to be booked into the chalet because of its close proximity to the river;

[19.4] The farm and the chalets belong to the First Defendant and that the Second Defendant was helping with bookings and reservations; and

[19.5] The Defendants offered them assistance the next morning from around 10h00, though other people had already arrived and assisted the family to safety.

[20] The Plaintiffs also led the evidence of an expert, Willem G Kriege (*'Kriege'*), who is a qualified and registered[3] aquatic scientist. He testified that he specialises in hydrology, being the study of [naturally] flowing water. He uses a computer software to model floods, and has done this for a number of years and for various

[3] South African National Council for Nature Scientific Professions.

clients. He has done well over 100 floodlines. Also, he has also testified in court as an expert in the field of hydrology.

[21] The witness testified that rainfall for the year **2010** was not higher than the normal rainfall pattern that is usually experienced in the area. He went on the state that the rainfall for the day in question was high but not abnormal. I should point out at this stage that the First Defendant later conceded to this evidence. In addition, the witness testified that the area's rainfall pattern had not changed for the period starting in the year **2005** up to **2012**. To arrive at his conclusions, he relied on *inter alia* data obtained from government website owned by the Department of Water Affairs.

[22] Kriege explained extra-ordinary rainfall as meaning: (1) higher than average rainfall in the area concerned; and (2) that rainfall in the catchment area (upstream) was a deluge or any given extra-ordinary on any given day or occasion. He indicated that the chalet was built within the area of 100-year floodline, with flooding probabilities of 20% (twenty percent) per year. He also explained that, given the area where the chalets are built, there was no escape route should flooding occur. And, that he visited the farm in **2018** and found that there were no mechanisms for early warning of rising water (flooding) levels. He confirmed that, as an example, a pendulum hanging underneath the balcony, could be used to ring a bell inside the chalet to caution occupants of rising levels of water.

[23] When it was put to him in cross-examination that there has never been a record of similar type flooding in the fourty (40) years that the Defendants became aware of the farm, and late became its owner,

he responded that there is always five comma six (5,6%) to five comma nine (5,9) percent chance of similar storm occurring. He conceded that the Defendants, lacking in training and expertise, may not have been aware of the probabilities of flooding happening. However, he indicated that the law required everyone including the Defendants to take precaution.

[24] Kriege contended, when told that this was a freak event, that such event was to be expected every 18 years to happen. He did not want to be drawn into the debate whether the First Defendant was advised by the Municipality that there were no floodline for the area. Also, he resisted the attempt to comment about Municipality's land use scheme by stating that it was not a matter within his area of expertise or knowledge. Concerning the floodlines, he explained that there are no standard floodlines in South Africa and that they are done or mapped as and when they are required or needed.

[25] The witness was steadfast that the investigations that he had conducted were relevant for this case, and that the chalet was built in a dangerous area. He dismissed suggestions that the existence of a dam upstream may have played a role in the Defendants call freak event stating that it is rather a dam that is downstream that would have an impact. The dense forest and the fact that the river is somewhat meandering and not elongated were relevant considerations which led to his findings that the chalet was built within a 100-year floodline. His report also took into consideration the existence of a small farm dam approximately three kilometers downstream, which he explained pushed water back up stream. Properly construed, the evidence of Kriege:

[25.1] Was that the chalet was built in a dangerous place within 100 year floodline;

[25.2] Revealed that the type of floods that occurred on the night in question has return frequency of 17 to 18 years;

[25.3] Sought to dispel as misconception the belief that a 100-year floodline means that the likelihood of such floods occurring is once over a period of one year, explaining that such floods may even occur more than once in a single year. There is a probability of 5.6% to 5.9% that similar flood may happen; and

[25.4] Indicated that flowing water becomes dangerous and may overpower an adult when it gets higher than a knee when it flows at the pace of about 0.5 m/s.

[26] The only witness who testified on behalf of the Defendants was Mr Tino Gordon Erasmus (*'Erasmus'*) the First Defendant. As indicated earlier, he is the sole owner of the farm and the buildings on it. He confirmed the events that took place in the early morning of **16 December 2010**, especially the tragedy that befell the Plaintiffs. He indicated that he purchased the farm, measuring 15 hectares, in **1998**. Then, during **2002** he decided to build houses (chalets) for use by his children and the family.

[27] Prior to building the chalets, his testimony continued, he enquired from the Municipality[4] (accompanied by one Badenhorst) about the floodlines and whether it was required of him to submit plans for

[4] Kgetleng River Local Municipality.

approval. There were no floodlines and he was referred to the Department of Water Affairs' Groot Marico Dam offices to enquire from. Officials of the Department informed him that there were no floodlines. In addition, Erasmus testified that he made further enquiries with the previous owner (Mr Hennie Smit, now deceased) from whom he bought the farm, and that he was shown the highest water or flood marks. Then, he built the chalet some 2.8 meters above the high water mark that was shown to him by the said Hennie Smit. He explained that he made the enquiries because he was concerned about the floodlines because in **2000** there were floods that broke the banks of the river. He indicated that one of the three houses that were built some three (3) kilometres downstream was flooded.

[28] Controverting the evidence of Ms Black, Erasmus testified that during **December 2010** there were two boards erected on the sides of the entrance, warning visitors that the owners were not to be held liable for any damages or losses that they may suffer while in the farm.

[29] The witness testified that the people who were occupying one of the chalets, Blinkwater, arrived at his house at around 20H00 in the evening of Tuesday **15 December 2010** due to the power outage and being concerned of their safety. By that time there was no flooding yet. As the rain intensified, he tried to drive to the other side of the river but could not do so because the low water bridge was washed away by the floods, and he was worried of the safety of the occupants of the chalets. He did not, upfront, indicate why he was concerned about safety of the occupants of the chalet, and

conceded during cross-examination that his worry was because he knew that the area does experience flooding.

[30] When asked about the allegations that he built the chalets in an unsafe area he testified that, from the time when they were built, there was no indication that the area was unsafe and that what happened was merely a freak of nature. This is because, for over 40 years they have never experienced such occurrence in the area. He particularly denied that he broke the law by constructing the chalets in a dangerous place, explaining that he relied on information that was provided to him by amongst others the previous farm owner.

[31] In cross-examination Erasmus conceded that the rain that fell[5] that evening was not extra-ordinary or unusual. He explained that it was just heavy rain. He also conceded that the flooding occurred barely eight years after he had built the chalets. Furthermore, he conceded that there is no message of warning on the business' website, to caution the potential visitors of possible risks flooding. The guest house business is not registered with local authorities. It was also pointed out to Erasmus that the building of the properties breached s 4 of the NHBRC regulations, to which he responded that the Municipality told him that he did not require any plans to build the chalets.

[32] When asked about the fact that he foresaw the possibility of flooding, which is an important consideration in this matter, Erasmus conceded and explained that that was the main reason why he had

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[5] Measured 100 ml.

built the chalet some 2.8 meters higher than the floodlines that the previous owner had shown to him. On the events of the fateful day, he conceded that he was concerned of the safety of the occupants of the chalets when he saw that the bridge had been swept away by the floods, and, importantly, that there would have been no reason for him to be worried if he knew that he had built high above the floodline.

QUESTION OF WRONGFULNESS

[33] It is beyond doubt, on the established facts of this case, that the First Defendant created a situation of danger by building the chalet on the bank of the river. Vivier ADP held in **Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)**[6] regarding the test for the existence of such a duty that:

> *"... An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm."*

[34] The first question in this matter is, therefore, whether there was a legal duty on the First Defendant to have taken steps to protect the Plaintiffs and other users of the lodge(s) against harm arising from the use of the chalet. Prior conduct of the First Defendant and his ownership and control over the object (chalet) are important considerations in determining whether he owned a legal duty to the Plaintiffs.[7] The fact that he makes the chalets available for use by

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6 2003 1 SA 389 (SCA) p 395–396.

7 Holm v Sonland Ontwikkeling, *supra*.

the public can only mean that he owes a legal duty to members of the public or users for their safety.

[35] The First Defendant constructed the chalet on the banks of the river, in close proximity to the course of a river which is known to be susceptible to breaking its banks and flooding. By doing so he created the situation of danger, requiring him to ensure that harm did not occur to the Plaintiffs and other persons using the chalet. It is on record that, prior to building the chalet he was concerned about flooding, based on his knowledge of the area. This, according to him, got him to attend at the Municipality to ask for the floodlines. With this piece of evidence it cannot be denied that the risk of flooding always existed and was foreseeable.

[36] He defended himself by stating that there has never been floods of the same magnitude in a fourty years. In the entire period of fourty years that he referred to, but the chalets have been in existence for only eight (8) years. I am therefore doubtful whether one can contend with conviction that there has never been such flooding, given that the area was for the longest of time without these buildings. What is clear though is that the First Defendant was aware that the area experiences intermittent floods, which is why he was concerned about flood levels before he built the chalets.

[37] The First Defendant could also not deny that the probability of similar floods occurring was between 5.6% and 5.9% a year, and the probability of dangerous floods happening in a period of a year was 20%. It seems to me undeniable that the location where the chalets are constructed is quite hazardous. Relying on the authority in

Naidoo v Birchwood Hotel,[8] Mr Stoop for the Plaintiffs argued that a legal duty rested on a property owner to ensure that a property does not present danger to a member of the public who may enter and use it. He also argues that such legal duty is even higher in circumstances where the property is designed for use by the public.

[38] Save for denying that he was under a legal duty of care, the First Defendant did not address this issue when giving oral testimony nor in the written closing submissions. It seems to me unavoidable that the First Defendant had a legal duty to ensure that the chalets (lodges) on his farm were safe for use by the members of the public, including the Plaintiffs.

QUESTION OF NEGLIGENCE

[39] The test for negligence is well known in our jurisprudence, and has been repetitively stated in a number of decisions by the courts. Both parties have made reference to the formulation in **Kruger v Coetzee**[9] in which the court posed a question as to what a *diligence paterfamilias* in the position of the Defendant would have done, in particular asking the important question whether the Defendant would have:

[39.1] Reasonably foreseen the possibility of his actions resulting in loss or harm to the Plaintiffs, or any person using the chalets; and

[39.2] Taken reasonable measures to guard against the

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8 2012 (6) SA 170 (GSJ) at par [26].
9 Kruger v Coetzee 1966 (2) SA 428 (A).

occurrence.[10]

[40] The Plaintiffs contend that the First Defendant, having foreseen the reasonable possibility of harm occurring, failed to take measures to avoid such harm from happening to the Plaintiffs. Nature has the ability to spring a surprise when least expected. For that reason, the Defendant, when constructing the chalets in an area that was known to him to have the propensity of experiencing heavy rainfalls and floods, in whatever magnitude, ought to have been cautious.

[41] It is trite that the onus of proof rests on the Plaintiffs to establish the Defendants' wrongfulness on a balance of probabilities.[11] On the facts of this case, the foreseeability of heavy flooding was established, and this was so even on the First Defendant's own version. He knew the area to be prone to heavy flooding, just not of the magnitude as what happened on **15-16 December 2010**. The First Defendant called the flooding on that night of catastrophic proportions, and the type and amount that was never experienced before. But then, when confronted with information during cross-examination he said that the rainfall was commonplace in the area and that it was nothing extraordinary.

[42] I also find that there was something that caused the First Defendant to go through the trouble of investigating the floodlines, if he did so, and, on his version, that was his knowledge of the fact that the area

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10 Peri-Urban Areas Health Board v Munarin, 1965 (3) SA 367 (A). Langley Fox Building Partnership (Pty) Ltd v De Valence (647/88) [1990] ZASCA 128; 1991 (1) SA 1 (AD); [1991] 3 All SA 736 (AD) (4 October 1990).

11 Kruger v Coetzee above.

experiences heavy floods. The possibility of heavy flooding was not only foreseeable, the First Defendant actually knew about the area's severe weather or nature conditions. This can be seen from the following established facts:

[42.1] The warning sign that was allegedly installed on the side of the bridge, which the First Defendant said was intended to convey the message of occasional flooding over the bridge itself; and

[42.2] The evidence that when he realised that the bridge had been washed off by the torrents he immediately got worried about the safety of the people occupying the chalets. There would have been no reason for him to worry of anyone's safety as, in his defence, the chalets were build high above the floodline.

[43] I find that the First Defendant ought to have taken measures to mitigate against harm befalling the Plaintiffs, and other members of the public using the chalet, and he failed to do so. His conduct in failing to take the steps is wrongful and renders him liable for the damages or losses suffered by the Plaintiffs.

EXEMPTION FROM LIABILITY NOTICES

[44] At the risk of repetition, the First Defendant conceded that he knew that the place experienced occasional flooding. That is why, according to him, he put up disclaimer notices on the sides of the entrance to the farm to caution visitors that they were entering on their own risks. By entering the farm, the Plaintiffs have agreed to

waive the First Defendant's liability for any damages that they may suffer.

[45] Ms Black disputed that the notices were present on the fateful day, and that she would have seen them if they were already erected. This was disputed by the First Defendant who persisted with his pleaded case that the notices were already put up on both sides of the entrance into the farm. The parties were in agreement that the terms of an exemption or disclaimer clause become contractual terms through the concept of quasi mutual assent.[12]

[46] There is one problem for the First Defendant in this regard, and that is the fact that the notice board would not have been visible when the gate is open. For the agreement to have come into existence the terms of the exemption clause ought to have come to the knowledge of the Plaintiffs. I do not believe that it is the mere existence of the notices that would exonerate the First Defendant from liability. The onus to prove the existence of the exemption notices rested with the First Defendant,[13] which notices ought in my view to have come to the Plaintiffs attention. Only if the Plaintiffs can be said to have become aware of the notices could it be said that they have contractually exonerated the First Defendant from liability for the damages that they have suffered. I struggle to find how that could be the case if one of the notices was obscured by the open gate and the other being illegible.

[47] The court is accordingly sitting with two mutually destructive

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12 Durban's Water Wonderworld (Pty) Ltd v Botha and Another 1999 (1) SA 982 (SCA).
13 *Ibid*. Also, Pillay v Krishna 1946 AD 952.

versions on this issue, being the oral testimonies of the Second Plaintiff and that of the First Defendant. It is now settled that where there are mutually destructive versions, a court will side with the version which is more probable considering the circumstances.

[48] In assessing the evidence, the court had to decide which one of the two mutually destructive versions was more probable. Guidance on how to unravel mutually destructive versions is taken from the case of **National Employers' General Insurance Co Ltd v Jagers**[14] in which the court held that where there are two mutually destructive versions, a party can only succeed if it satisfies the court on a balance of probabilities that its version is true and accurate and thus acceptable, and that the other version advanced by the opposing party is therefore false or mistaken and falls to be rejected.

[49] The credibility of witnesses, including whether their evidence is coherent and consistent, will be taken into account. I have no difficulty accepting the version tendered by Ms Black, whom, as I have already stated earlier, I found to be a credible witness whose evidence was clear, direct and that she did not contradict herself. The same cannot be said about the First Defendant whose testimony was not so credible and lacked lucidity in substantial portions. I am particularly not convinced that he took measures to establish the floodlines as he alleged. His evidence in that regard was not corroborated.

[50] The Plaintiffs took the point further and contended that the First

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[14] 1984 (4) SA 437 (ECD) at 440D.

Defendant's reliance on the exemption notices was, in the circumstances of this case unreasonable, against public policy and unconstitutional. The basis for this contention was that:

[50.1] The chalet was built on a dangerous area on the banks of the river;

[50.2] The danger or possibility of the chalet flooding was never brought to the Plaintiffs attention. The notice that was put up in **2010** was defective in that it did not caution of the risks of flooding and has since been replaced with a new one;

[50.3] Had the Plaintiffs been made aware of the dangers, and consented to the terms of the exemption, they would have cautious when they went to bed that evening. The risks that they consented to were normal risks associated with spending overnight and using amenities on the farm; and

[50.4] The Plaintiffs were not informed that they would be isolated in the event of floods occurring, and that there would be no escape route due to the low water bridge.

[51] Thus, it would be unjust and against the notions of fairness and justice to deny the Plaintiffs judicial redress under the circumstances of this matter. Onus is on the Plaintiffs to demonstrate that the enforcement of the exemption notice would be unfair and unreasonable.[15] That of course, would be the case in the event that

[15] Barkhuizen v Napier 2007 (5) SA 323 (CC) par [69].

the notice was erected and brought to the Plaintiffs attention. It would have resolved the issue if the Second Defendant had testified and indicated to the court as to what information did she bring to the Plaintiffs attention. In **Naidoo v Birchwood Hotel**[16] the court refused to uphold the exemption clauses based on the fact that it would have been unfair and unjust to the Plaintiff who had sustained serious bodily injuries during his stay at the hotel. This doctrine is invoked in cases where the contract assertor had a legal duty to inform the contract denier of the existence of an unusual or unexpected clause in a contract.[17] In some instances the enforcement of exemption clauses appears to produce unfair and disastrous results.

[52] On the facts of this case, I find no difficulty in rejecting reliance on the existence of the exemption clause (notices) to non-suit the Plaintiffs. No evidence exists to show that they were made aware of the disclaimer notices, and their full ambit. The testimony of Ms Black, which stood untrammelled, was that the Second Defendant advised them only to be careful while crossing the low water bridge, nothing more. Thus, to shut the door to their judicial redress would be unjust and unfair for the Plaintiffs who have suffered losses in the floods.

[53] The finding of liability is made only against the First Defendant in that he is the sole owner of the chalet, and in that his evidence that

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16 2012 6 SA 170 (GSJ).

17 Afrox Healthcare Bpk v Strydom 2002 6 SA 21 (SCA); Johannesburg Country Club v Stott 2004 5 SA 511 (SCA); Drifters Adventure Tours CC v Hircock 2007 2 SA 83 (SCA); George v Fairmead 1958 2 SA 465 (A).

the Second Defendant is merely assisting him with reservation for the lodge was not disputed. In other words, even if the finding was that the Second Defendant acted negligently, the First Defendant is still liable on the principles of vicarious or secondary liability.[18]

COSTS

[54] The Plaintiffs have pleaded for costs to be awarded against the Defendants, and that such costs be inclusive of the costs of Ms Black's travelling costs from the United Kingdom into the country and back to the UK. The basis for this was that her evidence could conveniently have been taken through video link, but the Defendants insisted that her evidence must be taken in open court.

[55] It is trite that costs are in the discretion of the court, which discretion must be applied judiciously.[19] I find no reason why the costs should not follow the result, including the costs occasioned by the use of two counsel. This matter was quite complex, took long to be trial ready, and warranted the use of two counsel.

ORDER

[56] I make the following orders:

1. The First Defendant is liable for the proven damages suffered by the Plaintiffs while on vacation and lodging at the Kingfisher Chalet on **15-16 December 2010**, which damages were caused by heavy floods.

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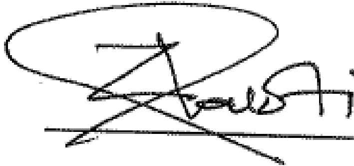
[18] Stalion Security (Pty) Ltd v Van Staden (2019) 40 ILJ 2695 (SCA); 2020 (I) SA 64 (SCA).

[19] Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 88.

2. The First Defendant is ordered to pay the costs of this matter, including the costs occasioned by the employment of two counsel.



MAKOTI M Z

ACTING JUDGE OF THE HIGH COURT

26 / 03 / 2021

<u>APPEARANCES</u>

DATE OF HEARING	:	**09-11 NOVEMBER 2020**
JUDGMENT RESERVED	:	**15 DECEMBER 2020**
DATE OF JUDGMENT	:	**26 MARCH 2021**
COUNSEL FOR APPLICANT	:	**ADV BC STOOP SC with ADV D HEWITT**
COUNSEL FOR RESPONDENTS	:	**ADV S D MARITZ**