

REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

APPEAL CASE NO: A3080/2010

CASE NO: 25966/06

DATE:21/05/2011

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD

First Appellant

(First Defendant *a quo*)

NELSON BORMAN & PARTNERS INC

Second Appellant

(Second Defendant *a quo*)

and

MEIR MARGALIT

Respondent

JUDGMENT

INTRODUCTION

- [1] This is an appeal from a judgment of the Magistrate's Court dated 23 April 2010 ("the judgment"). The Plaintiff in the Court *a quo*, and the Respondent in this Court, Meir Margalit ("Margalit" or "the Respondent"), obtained a judgment against the defendants in that Court (collectively "the Appellants") for payment of damages in the sum of R42 713.42.
- [2] The First Appellant and the First Defendant in the Court *a quo* is Standard Bank of South Africa Ltd ("the Bank"). The Second Appellant and Second Defendant in the Court *a quo* is Nelson Borman & Partners Inc ("Nelson Borman"), a firm of conveyancing attorneys.

- [3] The Respondent's claim arises out of the sale by the Respondent, and the subsequent transfer to the purchaser, of a property previously owned by the Respondent, located in Morningside, Sandton ("the property") for a purchase price of R3 million.
- [4] The Respondent experienced certain delays in the transfer, which he blames on the alleged negligence of the Bank and Nelson Borman in failing to cancel the Bank's bonds over the property timeously. The Respondent alleges that, as a result of the negligence of the Appellants, and the consequent delays, he suffered damages in the amount of R42 713.42, being the interest that would have accrued to him on the proceeds of the purchase price had the delays in transfer not occurred.

- [5] The Bank was the mortgagee in respect of two mortgages registered over the property by Margalit. Nelson Borman were the conveyancing attorneys appointed by the Bank to attend to the cancellation of the Bank's mortgage(s) over the property.
- [6] The Respondent's claim against the Bank is contractual. His claim against Nelson Borman is delictual.
- [7] This appeal centres around the issue of liability of the Appellants. There is no dispute concerning quantum.

SUMMARY OF THE FACTS

- [8] The Respondent acquired ownership of the property by deed of transfer dated 10 July 1987. The events that gave rise to the present claim occurred some 30 years later during the period 2007 – 2008.

A. THE PLEADINGS

- [9] It is common cause on the pleadings that the Plaintiff sold the property to a third party for a price of R3 million on 24 May 2007. In terms of the sale agreement, the Plaintiff was to be paid the proceeds of the sale on the date of registration of transfer. The net proceeds, after payment of commission, that would accrue to the Respondent would be the sum of R2 900 000.
- [10] The following allegation in the Respondent's particulars of claim has been admitted by the Appellants:

“6. It was an express, alternatively an implied alternatively tacit term of the said mortgage bond [registered over the property in favour of the Bank] that the plaintiff would be entitled to the cancellation thereof against the guarantee of payment of the amount secured in terms of such mortgage bond, and such cancellation would be affected by the 1st defendant, alternatively its agent, in a professional and businesslike manner.”

[11] I note that, although there were in fact two mortgage bonds over the property, the allegation in this paragraph refers to only one mortgage bond. For purposes of the judgment I assume in favour of the Respondent that the Respondent’s allegations concerning the terms of the mortgage embrace both mortgage bonds and that it is common cause that both mortgage bonds had the same terms and conditions.

[12] The underlying loan agreement(s) between the Bank and the Respondent was not placed before the Court. Nor were any of the mortgage bonds. In the result, I am compelled to decide this appeal based upon the admitted allegation contained in paragraph 6 of the particulars of claim.

[13] The particulars of claim then contain the following allegations:

“10. At all times material to (sic) the 2nd defendant owed the plaintiff a duty of care to carry out its mandate to procure the cancellation of the said mortgage bond¹ simultaneously with the transfer of the property to the third party in a professional and businesslike manner.

¹ Once again, the Respondent refers only to a single mortgage bond. It is significant that, even after the events that gave rise to this action, the Plaintiff (who was represented in these proceedings by his own conveyancing attorneys) continues to refer to a single mortgage bond.

11. In breach of the mortgage agreement² between the Plaintiff and the 1st defendant, the 1st defendant failed to procure the cancellation of the said mortgage bond in a professional and businesslike manner, as a result whereof transfer of the property and the simultaneous cancellation of the said mortgage bond was delayed until 16 July 2008.

12. In breach of its duty of care to the plaintiff, the 2nd defendant failed to carry out its mandate to procure the cancellation of the said mortgage bond in a professional and businesslike manner, as a result whereof the transfer and simultaneous cancellation of the said mortgage bond was delayed until 16 July 2008.”

[14] The particulars of claim are not a model of clarity. Among other things, they do not set out:

² Once again, there is a reference only to a single agreement and a single mortgage bond.

14.1 the factual basis upon which the legal duty not to be negligent is sought to be imposed upon Nelson Borman; or

14.2 the precise respects in which the Appellants were allegedly negligent.

B. THE EVENTS LEADING UP TO THE TRANSFER

[15] The conveyancing attorneys appointed by the seller to take care of the transfer, were Warrender Attorneys ("Warrender"). Warrender also represented the Respondent in the Court *a quo* and in this appeal. As noted above, Nelson Borman was appointed by the Bank to attend to the cancellation of the Bank's bond(s).

[16] The purchaser obtained financing from Absa Bank Ltd ("Absa"). Absa appointed a third set of attorneys to attend to the registration of the bond in its favour. In the result, there were three sets of conveyancing attorneys involved in the transaction.

- [17] Although the sale agreement was concluded on 24 May 2007, there was a significant delay as a result of the City of Johannesburg's failure to issue a rates clearance certificate in accordance with Section 118 of the Local Government Municipal Systems Act 32 of 2000 ("the Municipal Systems Act"). In terms of the Municipal Systems Act, transfer cannot occur until a rates clearance certificate has been issued by the City of Johannesburg. Apparently, as a consequence of a dispute that arose between the Respondent and the City concerning the correct clearance figures, no clearance certificate was available until 30 April 2008. It is therefore common cause that the transfer could not proceed until 13 May 2008.
- [18] The Respondent has also separately instituted action against the City of Johannesburg for damages arising out of the delay in issuing the clearance certificate.

- [19] At the time that the sale agreement was concluded, the various conveyancing attorneys had not anticipated such a long delay in issuing the rates clearance certificate. Consequently, they took a number of the preliminary steps required for transfer during the year 2007.
- [20] The unexpected delay in obtaining the issue of a rates clearance certificate had a knock-on effect on other steps that had to be taken to bring about the transfer. It is possible that, if the rates clearance certificate had been issued sooner, some of the subsequent delays might not have occurred.
- [21] On 11 June 2007, Warrender addressed a letter to Standard Bank referring only to a single bond account number. In that letter, Warrender stated:

“We have been instructed to attend to the registration of the above transfer and understand the properties are presently bonded to yourselves.

Please advise us of your guarantee requirements and also the name of the attorneys who will be attending to the cancellation on your behalf.”

[22] Warrender’s letter does not allude to the fact that there are **two bonds**. On a plain reading of the letter, the Bank would have been entitled to assume that there was only one bond registered over the property and that cancellation figures were being requested only for one bond.

[23] The Respondent testified that he himself had been unaware that he had taken out a second bond over the property. It was also apparent from the evidence that Warrender was also unaware that there were two bonds until mid-2008.

- [24] Margalit blames the Appellants for not realising much sooner that there were in fact two bonds over the property. It is difficult to see how he can blame the Bank for its ignorance, given his own unexplained ignorance of his own affairs.
- [25] Warrender wrote two further letters to the Bank dated 26 June 2007 and 30 July 2007 requesting cancellation figures.
- [26] The Bank then appointed Nelson Borman to attend to the cancellation of the bond. Nelson Borman provided cancellation figures on 14 September 2007.
- [27] We do not have to decide whether this initial delay in providing cancellation figures was culpable because no transfer could have occurred until the rates clearance certificate was issued.

- [28] The letter of 14 September 2007 from Nelson Borman indicated that, in order to cancel the bond, the Bank would require a guarantee of R1 201.40. It was common cause that this is an extremely low cancellation figure.
- [29] The correspondence from Nelson Borman and the Bank relating to the cancellation of the bond indicated clearly that the bond cancellation figure of R1 201.40 was valid for a period of only three months. Accordingly, if the transfer did not occur within 90 days after the cancellation figure had been furnished, a new guarantee would be required.
- [30] It was also common cause that it is normal conveyancing practice for the Bank's cancellation figures to be valid for a limited period of three months. This is because interest may accrue on the outstanding bond. In addition, a mortgagor who anticipates transfer, may stop paying instalments on the bond until the transfer occurs.

[31] On 14 July 2007, a guarantee was issued by Nedbank, at the instance of the Respondent, in favour of the Bank, in an amount of R1 201.40 ("the first guarantee"). It is not clear to me how that guarantee could have been issued on 14 July 2007 in view of the fact that cancellation figures were not furnished until 14 September 2007.

[32] By the time that the rates clearance certificate had been issued, making it possible for the parties to effect transfer, the three month period stipulated in Nelson Borman's letter of 14 September 2007 had expired. Further cancellation figures were requested. These figures totalled R4 713.38. This necessitated the issue of a further guarantee ("the second guarantee") in an amount of R4 713.38 before transfer could occur.

[33] The second guarantee was not issued until **16 July 2008**.

[34] Upon issue of the rates clearance certificate on 30 April 2008, the Plaintiff lodged the transfer documents with the Registrar of Deeds in Pretoria on 13 May 2008.

[35] The transfer documents were rejected by the Registrar of Deeds three times before transfer finally took place on 16 July 2008. Each rejection took place for a different reason.

- [36] The testimony of the parties' experts was that, when the Registrar of Deeds finds a particular problem with the lodged documents, the Registrar will issue a rejection for that reason. However, once the Registrar finds a problem, the Registrar rarely examines the documents to ensure that they are otherwise in order. This means papers that are lodged with the Registrar may be rejected several times before they are finally in order.
- [37] This practice by the Registrar is undesirable. One can see how buyers and sellers involved in a transfer feel that they are being subjected to a game of cat and mouse. Repeated delays can result in clearance certificates and mortgages becoming obsolete and can cause further significant additional delays. These delays can have serious negative financial implications for homeowners and commercial property owners alike.

- [38] The Registrar is a public servant. It is preferable that he examine the documents lodged for defects and catalogue all of the defects at once so that the conveyancing attorneys will know exactly what has to be done in order to facilitate transfer.
- [39] In the present case, the Registrar's three rejections resulted in delays totalling 48 days. Although the parties do not suggest that the Registrar was not entitled to reject the lodged documents on the three occasions that he did so, had the Registrar conducted a full inspection of all of the documents at the outset, the delays would have been significantly reduced.
- [40] The Respondent blames each rejection upon the failure of the Bank and Nelson Borman to attend to the various steps necessary to affect cancellation of the bond timeously and with due diligence. Among other things, delays resulted from the following:

- 40.1 The Bank had lost the original title deed and mortgages. Apparently this is not uncommon, given the protracted period of many mortgages. In this case, the mortgages were 30 years old.
- 40.2 As a result of the fact that the bonds were lost, the Bank was obliged to execute and submit to the Registrar of Deeds a lost document affidavit.
- 40.3 The lost document affidavit was rejected on at least one occasion because it was deposed to by the Bank's attorney, Nelson Borman, and not an officer of the Bank itself.
- 40.4 The Deeds Office in Pretoria had different requirements for lost document affidavits from the Deeds Office in Johannesburg. Johannesburg accepted an affidavit from the mortgagee's attorney, while Pretoria did not.³

³ Nelson Borman maintains that, because it is a Johannesburg based attorneys firm, it was unaware of the practice in Pretoria. Accordingly, it maintains that it was not culpable in failing to submit an affidavit deposed to by an officer of the Bank from the outset. In the view that we take of this matter, nothing turns on this.

40.5 There is some uncertainty about whether the practice in Pretoria of requiring that the lost document affidavit be executed by a representative of the Bank (and not an attorney) existed in 2007 when the lost document affidavit was initially lodged.

40.6 There was also a rejection resulting from the fact that the parties were unaware that there were two bonds which required two lost document affidavits.

40.7 It took 14 days for a representative of the Bank to execute the lost document affidavit.

[41] The above is simply a summary of some of the difficulties that arose. In the view that we take of this matter, it is not necessary to analyse in detail every single delay and the cause of each delay.

**THE CONSEQUENCES OF THE RESPONDENT'S FAILURE TO
OBTAIN THE SECOND GUARANTEE BEFORE 14 JULY 2008**

[42] It is clear from paragraph 6 of the particulars of claim that it is common cause that the obligation to cancel the bond is reciprocal to, and dependent upon, the mortgagor providing a simultaneous guarantee for payment of the outstanding amount secured by the bond. In the absence of such a guarantee, the Respondent had no right to cancellation of the bond.⁴

[43] It is common cause that, by May 2008⁵, the Respondent was no longer entitled to rely upon the first guarantee. It was therefore necessary for the Respondent to put up a second guarantee based upon current figures in order to obtain cancellation of the bond.

[44] In fact, the second guarantee was not available until 14 July 2008. That was the date upon which registration occurred.

[45] It follows that, until 14 July 2008, the Respondent had no right to cancellation of the bond. On 14 July 2008, when he acquired a right to cancellation of the bond, cancellation occurred *simul ac semel* with the furnishing of the guarantee.

⁴ *Man Truck & Bus SA (Pty) Ltd v Dorbyl (Pty) Ltd* 2004 (5) SA 226 (SCA) para [12].

⁵ The Respondent offers no explanation for his failure (and that of his conveyancer) to request revised settlement figures and to provide the second guarantee prior to lodgement in May 2008.

- [46] Until such time as there was a valid and current guarantee in force, the Bank had no obligation to effect cancellation whether in a proper and businesslike manner, or at all. The Bank is entitled to avail itself of the *exceptio non adimpleti contractus* until 14 July 2008.
- [47] The Respondent argued that the provision of a guarantee was not a requirement of the Registrar for cancellation of the bonds. The Registrar's requirement is in this respect irrelevant. The Respondent's claim is a contractual claim and unless he had a contractual right to cancellation of the bond, he cannot complain about any delays that occurred prior to the date upon which his contractual right matured.
- [48] As the Bank had no contractual obligation to cancel the bond prior to 14 July 2008, the Respondent's claim against the Bank should have failed on that ground alone.

[49] Moreover, on the face of the particulars of claim, Nelson Borman, who allegedly “*acted as the agent*” of the Bank, could not, on any version, have been expected to cancel the bond before his principal’s contractual obligation to do so had matured. It follows that, because the second guarantee was not provided until 14 July 2008, there is also no liability on Nelson Borman.

**FAILURE TO DEMONSTRATE THAT THE BANK ACTED
NEGLIGENTLY**

[50] Even if the late furnishing of the second guarantee were not dispositive, the Plaintiff’s claim against the Bank must fail for a further reason. The Plaintiff proffered no evidence as to how a reasonable bank should conduct itself in such circumstances.

[51] The expert evidence tendered by the Respondent concerns the obligations of **conveyancers**. The Respondent made no attempt to demonstrate how a reasonable bank should have conducted itself in the circumstances.

[52] In *Durr v ABSA Bank Ltd & Another* 1997 (3) SA 448 (SCA) 460F, Schutz JA held:

“Imperitia culpa adnumerator ... – lack of skill is regarded as culpable. That much is accepted by the respondents. But how much skill, they say. We have shown all the skill that an ‘ordinary’ or ‘average’ broker, or a bank employing such a one, needs show. What more can be asked of us?

The questions arise in this case. (1) In general, what is the level of skill and what is required? (2) Is the standard required in judging that level that of the ordinary or average broker at large, or is it that of the regional manager of the broking division of a bank professing investment skills and offering expert investment advice?

The answer to the first question is found in the judgment of Innes CJ in *Van Wyk v Lewis* 1924 AD 438 at 444 with reference, as it happens, to medical practitioners:

“... [A] medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care”. And in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by *the members of the branch of the profession to which the practitioner belongs*. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that level.’

‘But the decision of what is reasonable under the circumstances is for the Court; it will pay high regard to the views of the profession, but it is not bound to adopt them’ ...

In dealing with the question *whose* standard is the relevant one, I have dealt with the opinions of the experts and some of the facts at some length. This is because in real life negligence is not a mere legal abstraction, but must be related to particular facts.”

[emphasis added].

[53] Accordingly, while it is ultimately the function of the Court to determine the appropriate standard of care, that must be decided based upon evidence upon the manner in which a reasonable bank would conduct itself in the circumstances.⁶ No such evidence was forthcoming.

[54] A large part of the Respondent's claim is based upon the notion that it was negligent of the Bank not to know that there were two bonds in existence. In light of the fact that the Respondent himself was not aware that he had taken out two bonds on the property it is difficult to charge the Bank with negligence in the absence of evidence that the Bank should have known better.

⁶ See *Columbus Joint Venture v Absa Bank Ltd* 2002 (1) SA 90 (SCA) para [8].

[55] It is also alleged that it was negligent of the Bank to take 14 days to execute the lost bond affidavit. Once again, in the absence of evidence as to what would be reasonable for a Bank in those circumstances, it is hard to conclude the Bank was negligent.

[56] The claim against the Bank must therefore also fail because of the Respondent's failure to adduce evidence as to the appropriate standard of care required of a commercial bank in these circumstances.

**THE FAILURE TO PROVIDE EVIDENCE IN SUPPORT OF THE
CONTENTION THAT THE BANK'S BOND CANCELLATION
ATTORNEY OWED A DUTY OF CARE TO THE RESPONDENT**

[57] There was no contractual relationship between the Respondent and Nelson Borman. The Appellant's contractual relationship was with the Bank only. For this reason, the Respondent's claim against Nelson Borman is delictual.

[58] In *Trustees, Two Oceans Aquarium Trust v Kantey & Templar (Pty) Limited* 2006 (3) SA 138 (SCA), at 143I, Brandt JA held:

“[10] The exception raises the issue of wrongfulness which is one of the essential elements of the *Aquilian* action. ... Negligence giving rise to damages is not,

however, actionable *per se*. It is only actionable if the law recognises it as wrongful. Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently causing pure economic loss. ... In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. ...

- [11] It is sometimes said that the criterion for the determination of wrongfulness is 'a general criterion of reasonableness', i.e. whether it would be reasonable to impose a legal duty on the defendant. ... Where the terminology is employed, however, it is to be borne in mind that what is meant by reasonable in the context of wrongfulness is something different from the reasonableness of the conduct itself which is an element of negligence. It concerns the reasonableness of imposing liability on the

defendant. ... Likewise, the 'legal duty' referred to in the context must not be confused with the 'duty of care' in English law which straddles both elements of wrongfulness and negligence. In fact, with hindsight, even the reference to 'a legal duty' in the context of wrongfulness was somewhat unfortunate. ...

[12] **When we see that a particular omission or conduct causing pure economic loss is 'wrongful', we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resultant damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not ... Perhaps it would have been better, in the context of wrongfulness, to have referred to a 'legal**

duty not to be negligent', thereby clarifying that the question being asked is whether in the particular circumstances negligent conduct is actionable, instead of just a 'legal duty'. I say this in passing and without any intention to change settled terminology. As long as we know what we are talking about.

When a court is requested in the present context to accept the existence of a 'legal duty', in the absence of any precedent, it is in reality asked to extend delictual liability to a situation when none existed before. The crucial question in that event is whether there are any considerations of public or legal policy which require that extension. And as pointed out in *Van Duivenboden* ... and endorsed in *Telematrix* ... in answering that question

'what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.'

[emphasis added].

[59] Where the Court is asked to recognise a duty not to be negligent in circumstances that have not previously been considered, it is usually

necessary for the plaintiff to adduce evidence that would support the need to extend delictual liability to the defendant in question.⁷

[60] Accordingly, the claim cannot succeed in the absence of evidence justifying the conclusion that Nelson Borman owed a legal duty to the Respondent to act with due care in cancelling the bonds. To put it another way, evidence is required that Nelson Borman acted unlawfully *vis-a-vis* the Respondent in allegedly failing to take due care with regard to the cancellation of the bond. No such evidence was adduced.

⁷ *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) 318H-J; *Axiam Holdings Limited v Deloitte & Touche* 2006 (1) SA 237 (SCA) para [32]; *Kwamashu Bakery Limited v Standard Bank of South Africa Limited* 1995 (1) SA 377 (D & CLD) 390 H-I.

[61] There is no indication of a special relationship (or indeed any relationship at all) between the Respondent and Nelson Borman or that there was any special reliance by the Respondent on the expertise of Nelson Borman.⁸ The only evidence before us relevant to the duty of care militates against the imposition of one:

61.1 It is common cause between the parties that the Respondent had a contractual claim against the Bank for damages in the event of the Bank failing to act with reasonable care in cancelling the bond. In those circumstances there is no reason to impose additional liability upon the Bank's agent, the bond cancellation attorneys. While the existence of a contractual remedy is not always a bar to the assertion of a valid delictual claim, it is an important factor to take into account in determining whether it is necessary to extend a delictual remedy to the aggrieved plaintiff.⁹

⁸ *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559A – 575D; *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) 1076; *Standard Chartered Bank of Canada v NedPerm Bank Ltd* 1994 (3) SA 747 (A) 769I – 771A.

⁹ *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA) 633 para [7]; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 496.

61.2 The seller's conveyancer, Warrender, was engaged to represent the Respondent's interests in the transaction. As a seller has an attorney to take care of his interests in a typical conveyancing transaction, there does not seem to be any reason to afford the seller an additional claim against the conveyancer engaged by the mortgagor to cancel the bond.

[62] I emphasise that in concluding that there is no evidence to support the extension of a delictual remedy against the bond cancellation attorneys in this matter, I am not making a general finding that the mortgagee's conveyancer never has a duty to the seller in a conveyancing transaction not to be negligent. I am simply finding that, in this instance, there is no evidence to support the recognition of such a duty.

CONCLUSION

[63] In the result, I conclude that the Respondent's claim should have failed. As certain of my findings relate to the insufficiency of evidence, I consider that absolution from the instance would be the appropriate outcome.

[64] In the result, I make the following order:

1. The appeal is upheld with costs.
2. The judgment of the learned magistrate dated 23 April 2010 is hereby set aside and I substitute the following order therefor:

“1. The Defendants are granted absolution from the instance.

2. The Plaintiff is ordered to pay the Defendants’ costs of suit.”

P.N. LEVENBERG, AJ

Acting Judge of the High Court

Mbha J:

I agree. It is so ordered.

MBHA, J

Judge of the High Court

Counsel for the Appellants: JJ Roestorf

Attorney for the Appellants: Borman Duma Zitha Attorneys

Counsel for the Respondent: BD Hitchings

Attorneys for the Respondent: Warrender Attorneys

Judgment Date: 21st May 2011