

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A5026/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED:

In the appeal of:

THE MEC FOR EDUCATION

First Appellant

MINISTER OF EDUCATION

Second Appellant

And

SARAPHINA FIKILE ZWANE

Respondent

Coram: KATHREE-SETILOANE et WEPENER et MASHILE JJJ

Heard: 23 November 2016

Delivered: 25 November 2016

Summary:

JUDGMENT

WEPENER J:

[1] This is an appeal against a judgment of the Francis J with leave having being granted by the learned judge.

[2] After hearing evidence from the respondent and the appellants' witnesses, the court a quo held that the appellants were liable for the damages that the plaintiff may be able to prove and ordered the appellants to pay the costs of the action.

[3] The facts of the matter are briefly that the respondent who was in the employ of the appellants, stayed away from work for a lengthy period of time. Because of this, the appellants stopped paying the respondent's salary. It is not clear whether she was dismissed because of illness or whether she absconded but the appellants applied the policy of 'no work and no pay', which resulted in the respondent not receiving remuneration for a period of some years.

[4] The respondent had purchased a property and took a bond with a bank. As a result of the respondent's failure to repay the bond instalments, the bank foreclosed in 2008, took judgment against her, attached the property and arranged for a sale in execution to be held.¹ The auction of the house, as it was referred to by the respondent, was to be held at 10h00 on 22 January 2010. It is common cause that the respondent's relationship with the bank was of her own making and had nothing to do with her employers, the appellants.

[5] On the morning of the proposed sale in execution, the respondent approached employees of the appellants and requested them to issue a letter which should state

¹ During argument counsel for the respondent said that it is accepted that the bank foreclosed and that the respondent owed the bank money and that the bank had the right to sell the house.

that she was to receive arrear salary in the immediate future. She also had heard over a telephone which was on speaker phone, that the auctioneer had said that if a letter was sent to them stating that the respondent would receive her money the following Thursday, the auction would not proceed. The auctioneer who allegedly said this was not called as a witness and it has not been shown why this hearsay evidence should be admitted into evidence against the appellants.

[6] According to the respondent's evidence she visited her employer's offices on the morning of the sale and requested her employer to issue such a letter and forward it to the auctioneer before 10h00. The appellants' employees agreed to do so but sent the letter too late - after the sale in execution had already taken place.

[7] Based on these facts, the learned judge found that if the letter was sent before 10h00 the bank would not have sold the house. This is a factual finding based on the evidence before the court. The finding is, in my view, not sustainable. The court a quo held that it need not consider the question of causation. That finding which may have led to the erroneous view that, had the letter been sent, the house would not have been sold, is wrong in law.

[8] In order to succeed in a claim based on the *lex aquilia*, a plaintiff is required to prove a wrongful act or an omission. But wrongfulness will not be inferred where a plaintiff' claims for a loss resulting from an omission is for pure economic loss. In such cases the plaintiff must establish an infringement of a right or a breach of a legal duty resting on the defendant.² The respondent did not establish any right. The only question is whether the appellants acted in breach of a legal duty.

[9] Wrongfulness is indeed an element of the cause of action and, in this matter, the question whether the appellants owed the respondent a duty of care to act and write the letter should have been determined by the court a quo. In my view, no such duty

² *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 378; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty). Ltd* 1985 (1) SA 475 (A) at 496-498.

existed. Nor was any evidence led to show that such a duty existed and that it was breached.³

[10] The facts advanced by the respondent are, in my view, insufficient to support the existence of a legal duty of the appellants to the respondent.⁴ The failure of the appellants' employees to send the letter cannot simpliciter give rise to a claim being instituted against the appellants. The claim being one for pure economic loss, the conduct of the appellants' employees is not *prima facie* wrongful.⁵ They had no duty to assist the respondent in her civil litigation.⁶ They had no duty to issue the letter. They undertook to issue it as a courtesy to the respondent.⁷

[11] Over and above the requirement of wrongfulness and in this case a legal duty, the respondent was obliged to plead and prove the nature of the duty.⁸ There is no reference to such a duty in the particulars of claim, nor was any evidence led in the court *a quo* that such a duty existed. The respondent abandoned all allegations of negligence and only relied on the following:

‘the staff members of your department were negligent in handling this matter in the following respect: that the authorities and staff members of your Department ought to have replied timeously to a request of a letter from the bank and they failed and / or refused to act timeously which constitutes gross negligence on the part of your staff members’

There was no allegation that the appellants owed the respondent a duty of care or any evidence led to support a conclusion that such a duty existed. In the circumstances, I am of the view that the question of wrongfulness was not proved.

[12] Just as wrongfulness, the question of causation is an element which a plaintiff must prove – the causal connection between the negligent act or a breach of duty and the damages suffered. The court *a quo* desisted from deciding the causal connection

³ *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A); *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 47A.

⁴ *Minister of Law and Order v Kadir* at 318I-J.

⁵ *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) para 82; *Country Cloud Trading CC v MEC Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) para 22.

⁶ *Minister of Law and Order v Kadir* at 321H-J.

⁷ *BOE* at 47D-E.

⁸ *South African Railways and Harbours v Marais* 1950 (4) SA 610 (A) at 621-622.

between the failure to write and send the letter before 10h00 and the sale in execution of the respondent's house. It is for a plaintiff to allege and prove the causal connection between the act relied upon and the damages suffered.⁹ Counsel for the respondent persisted with a submission that it was not necessary to prove causation at the hearing in the court a quo because the question of liability and quantum was separated. Counsel could not furnish any authority for this proposition and I find accordingly that the element of causation is an integral part of the *lex aquilia* that has to be proved by a plaintiff before a defendant can be held liable. The legal position is that only causal negligence, and in this case a causal breach of duty, can give rise to legal responsibility.¹⁰

[13] In my view, there is no admissible evidence on record to show that, had the letter been sent by 10h00 on the morning of the sale, the plaintiff's house would not have been sold in execution. The appropriate witness to give such evidence would have been someone from the bank, but no such evidence was led. In my view, there are no probabilities favouring the respondent's case that, had the letter been sent to the auctioneer, that the bank would have stopped the sale in execution and waited for the respondent to pay the outstanding balance at some future date. The factual basis for a finding of causation is absent.

[14] Causation is thus indeed an element which a plaintiff must prove – the causal connection between the negligent act or breach of duty and the damages suffered. The court a quo desisted from deciding the causal connection between the failure to write and send the letter before 10h00 and the sale of the house and the alleged consequent damages suffered by the respondent. In my view the sale of the house was a *fait accompli* from the date when the bank took judgment and foreclosed on the property. The respondent failed to demonstrate that the letter would have played a role in the resulting sale.

⁹ *Minister of Police v Skosana* 1977 (1) SA 3 (A); *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Kotze and Others* 2010 (5) SA 499 (SCA).

¹⁰ *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) paras 37 and 39.

[15] In the circumstances, the respondent failed to prove the elements of wrongfulness and of causation in order to succeed in her claim against the appellants.

[16] The appeal is upheld with costs and the order of the court a quo is set aside and substituted with the following order:

‘The plaintiff’s claim is dismissed with costs.’

W.L. Wepener

I agree.

F. Kathree-Setiloane

I agree.

B. Mashile

Counsel for Appellants: V.S. Notshe SC with B. Shabalala

Attorneys for Appellants: The State Attorney

Counsel for Respondents: L.P. Mkize

Attorneys for Respondent: Dudula Inc