

**THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

CASE NO. 2645/2011

In the matter between:

LINDA NIENAABER N.O.

First Plaintiff

(in her capacity as executrix of the
estate of the late Leonie Logie Kelbrick)

ANTONIUS GERHARDUS VAN DEN BERG

Second Plaintiff

MARGIE VAN DEN BERG

Third Plaintiff

and

NELSON ATTORNEYS

First Defendant

PIERRE KITCHING ATTORNEYS

Second Defendant

JUDGMENT

RUGUNANAN, J

- [1] The plaintiffs' claim, which proceeds in delict, in essence alleges that the first defendant ("the defendant") owed them a duty of care and acting negligently and in breach thereof, plaintiffs have suffered damages. The first plaintiff, Leonie Kelbrick, died post *litis contestatio* and has been substituted by Linda Nienaaber N.O as the executrix of her estate. The

second defendant is not a party to these proceedings. The second and third plaintiffs are married to each other and, where convenient, will be referred to as the Van den Bergs. Liability and quantum are in issue.

- [2] The background to the matter is evident from the pleadings and referenced from various exhibits.¹ In the period September to November 2006, in Gqeberha (formerly Port Elizabeth), a series of separate agreements were concluded by the plaintiffs with a developer known as Headline Trading 124 CC t/a Status Homes ("Status"). The agreements were for the sale of abutting immovable properties ("the properties") registered as erven 679, 680 and 681. The driving force in Status was Alphonso Lamour, its sole member. Kelbrick concluded the sale in respect of erf 681 on 4 September 2006. Simultaneously on that date, the Van den Bergs jointly concluded the sale in respect of erf 679. As for erf 680, one Jonker, initially entered into an agreement during September 2005 but subsequently concluded a new agreement with Status on 27 November 2006, which agreement was the *causa* for the transfer of his property to Status. Albeit that these facts are common cause, Jonker does not feature in these proceedings.
- [3] The agreements were prepared by the defendant, represented at all times by Charles Nelson, a conveyancer. The defendant was also the attorney of Status.
- [4] In terms of the agreements² each plaintiff would sell their property to Status for the amount of R1. 4 million. The properties would be transferred to Status and thereafter consolidated for the construction of a new sectional title development ("the development") on the consolidated erven. Kelbrick, in lieu of payment of the purchase price, would receive one new unit valued at R1 million with the remaining R400 000.00 to be paid to her by Status.

¹ Exhibit A Plaintiffs' Opening Address; Exhibit B Timeline of Events; Exhibit C Transcript of proceedings on 15 November 2016 before Tshiki J; Exhibit D Timeline Conveyancing; Exhibit E, Timeline of Events (updated); Exhibit F.

² POC paragraphs 7 and 13

- [5] The Van den Bergs would receive two newly constructed units against payment of R300 000.00, being the difference between the combined value of the two units, less the purchase price.
- [6] Status, in addition, assumed liability for the costs of cancelling any existing bonds over the properties.
- [7] Moreover, in the event of the plaintiffs' substitute units not being constructed as soon as possible³, Status undertook to pay the difference between rent payable by Kelbrick for alternative accommodation and repayment of her previous mortgage bond and rates. For the Van den Bergs, Status agreed to pay the cost for their alternative accommodation.
- [8] In the event that construction of the plaintiffs' units did not materialise at all, Status would be obliged to effect payment of the full purchase price to them.
- [9] For payment of any amounts owing or any obligation of Status towards the plaintiffs, Lamour bound himself as surety and co-principal debtor with Status. The exact date is unclear though it appears that this occurred simultaneously with the signing of the sale agreements.⁴ For the proposed development, Status obtained financing from Standard Bank Ltd ("the bank") through registration, in July 2007, of a developer's bond in the extent of R8 706 950 together with an additional R2 176 737.50. In January and in May 2007 (prior to the transfer of the properties), Lamour, bound himself as surety for Status in favour of the bank for amounts of R10 883 687.50 and R2 125 000.00, respectively.
- [10] The transaction was unusual, entailing a substantial risk in that it involved the plaintiff's homes being demolished to allow for the new development.

³ POC, Annexure LLK2, clause 4.5

⁴ Exhibit B

- [11] On 27 July 2007, the plaintiffs' properties (including Jonker's) were registered and transferred to Status and simultaneously consolidated into erf 2757. The transfer was handled by Nelson. Status settled the plaintiffs' existing bonds. At the time, the outstanding bond of the Van den Bergs was in the amount of R207 343.20.
- [12] However, prior to the transfer of the properties, the property market had crashed. Status had also been involved in other projects, which from a financial point of view, impacted on the development.
- [13] In January 2008, Nelson, on behalf of Status, launched an application for the removal of title deed restrictions on the consolidated erf. In June 2008, while the application was pending, the plaintiffs' homes were demolished and Status commenced excavation on the building site. A final order in the application was granted in August 2008. By September 2008 the defendant had ceased representing Status. In October 2008, and although construction on the site was underway, the plaintiffs instructed Attorneys Pierre Kitching to institute action to recover the purchase prices of R1.4 million plus other amounts for arrear rental that arose from the failure by Status and Lamour (as surety) to comply with their agreed obligations.⁵
- [14] In the period December 2008 to February 2009 construction on the site continued; but in February 2009 when Status put in a claim with the bank against the bond, the bank declined to pay because all the units in the development had not been sold. The factor here was that the market crashed and stakeholders who elected to purchase, cancelled.⁶ Barring the amount of R1.4 million, the Van den Bergs only obtained a judgment for R23 500.00 against Status and Lamour in April 2009. In July 2009, Status, as a result of being substantially indebted to the bank, stopped making payments in reduction of its indebtedness to the bank. This set off an application by the bank for the provisional liquidation of Status. A final order

⁵ POC paragraphs 18, 19

⁶ Transcript, Exhibit C, 18

issued in June 2010. The bank was a major creditor and its claims against Status were secured and ranked preferentially to any claims by the plaintiffs. Lamour was sequestered but the plaintiffs were unable to recover any monies due to them under the judgment that they obtained.⁷ The development imploded, it was never completed except for foundations and a unit that achieved roof height; the plaintiffs lost their homes and never received the purchase price of R1.4 million for their properties.

- [15] At the trial the plaintiffs called two witnesses. Daryl Burman a conveyancing attorney was called as an expert witness. The second plaintiff (Van den Berg) testified as second witness. The plaintiffs closed their case and so did the defendant.

THE PLEADINGS AND THE ISSUES

- [16] In the particulars of claim it is alleged that the defendant owed the plaintiffs' a duty of care which Nelson had negligently breached.
- [17] The duty of care is pleaded as follows:⁸

"By virtue of the defendant drafting the agreements Annexures LLK1 and LLK2 hereto and acting as conveyancer with instructions to attend to the transfer of the properties of the Plaintiffs to the close corporation in terms of Annexures LLK1 and LLK2 hereto, the cancellation of the bonds of the property over the First Plaintiff's property and subsequent appointment to register a development bond over the property as consolidated with other immovable properties and the defendant's appointment as conveyancer to attend to the transfer of the completed units in the development to the respective Plaintiffs, the defendant owed the Plaintiffs a duty of care."

- [18] The grounds of negligence, pleaded as a combination of misrepresentations and omissions, are longwinded and in several

⁷ POC paragraph 22

⁸ Paragraph 23

instances tautologous.⁹ These are not repeated herein, it suffices to say that the defendant put the plaintiff to the proof thereof.

- [19] In its plea the defendant has admitted that it owed the plaintiffs a duty of care but denied negligence. In argument its counsel contended that the admission of the duty of care was ring-fenced within the parameters of what was pleaded. On the merits, Nelson did not testify in his defence, but did so in the course of the hearing of a special issue in which he pleaded prescription. By way of a brief excursus, the special plea was upheld but subsequently overturned by the Supreme Court of Appeal.
- [20] At the commencement of the trial the transcript containing Nelson's testimony was placed before this court as evidence.¹⁰ Nelson acknowledged that his duty of care was not limited to transferring the plaintiffs' properties to Status; it included communicating with them and advising them of problems or events in the completion of the development; it extended to transferring the completed units to them, and so too in the event that the likelihood of transfer did not exist.¹¹ Although this acknowledgement seemed to have broadened the scope of the duty beyond what the plaintiffs have pleaded, its effect (as will be seen from the enquiry into wrongfulness dealt with below), is neutral where liability is concerned.
- [21] It is fundamental to the judicial process that the material facts which underlie an allegation in a pleading must be established - see *Buchner and Another v Johannesburg Consolidated Investment Co Ltd 1995 (1) SA 215 (T) at 216 I – J*). In this regard it is important to be mindful of the distinction between *facta probanda* or primary factual allegations which a plaintiff must make and the *facta probantia* which are secondary allegations or evidence upon which the plaintiff will rely to prove the primary allegations. In this

⁹ POC paragraph 25

¹⁰ Transcript Exhibit C

¹¹ Transcript Exhibit C 41, 45, 47

context, a duty of care does not arise by responses to leading questions in cross-examination – it arises from material facts that must be pleaded.

- [22] Adverting to the particulars of claim. A negligent omission as relied on by the plaintiffs is not necessarily regarded as *prima facie* wrongful, as opposed to a positive act that causes physical harm to a person or property – see *Stedall v Aspeling* 2018 (2) SA 75 (SCA) at 80H. Conspicuously absent in the particulars of claim is a bare allegation of wrongfulness on the part of the defendant. Seemingly incognisant that a necessary element of delictual liability had not been mentioned in their pleading the plaintiffs proceeded to litigate on the footing that the averment of a duty of care¹² rendered it implicit that the defendant's alleged negligence encompassed wrongfulness.
- [23] When argument in the matter commenced, counsel for the plaintiffs submitted that the admission of the duty of care renders an enquiry into wrongfulness unnecessary and that negligence falls to be the sole issue for determination. This approach is unsound; it conflates the two elements and presumes that liability may be extant without wrongfulness being considered at all.
- [24] The duty of care does not encompass wrongfulness and negligence (*Stedall supra* at 81B). Wrongfulness and negligence have different features that do not coincide.¹³ The touchstone for wrongfulness is that it is concerned with the reasonableness of imposing liability on a defendant, the judicial determination of which is dependent on considerations of public and legal policy and is informed by constitutional norms – see *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) at paragraph [122]. It functions as 'a brake on liability'.¹⁴ The duty as pleaded above is indicative of what Nelson was mandated to do. It means no more than that a judicial determination

¹² and its admission by the defendant

¹³ See R W Nugent "Yes It Is A Bad Thing For The Law: A Reply To Professor Neethling" 2006 SALJ at 557

¹⁴ *Stedall v Aspeling* 2018 (2) SA 75 (SCA) 75 at 79E

must be made as to whether or not the conduct set out therein is tainted by wrongfulness.

- [25] Negligence, on the other hand, is essentially about the failure to guard and take steps against the occurrence of harm where the following preliminary attributes are present:¹⁵ a reasonable person would have foreseen harm; and a reasonable person would have guarded against it (*Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F¹⁶). Conduct comprising of only those features is legally neutral and does not occasion liability.¹⁷ To attract liability the conduct must also be wrongful - see *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 320B-C quoted with approval in *Stedall supra* at paragraph [13].
- [26] Wrongfulness and negligence are discrete elements, neither one is capable of being identified by reference to the attributes of the other, and each element must be established for delictual liability to ensue – see *Stedall supra* at 79C and the authorities cited therein.¹⁸ Where the particulars of claim makes reference to foreseeability of harm¹⁹, it finds no place in the enquiry into wrongfulness - it is an element of negligence (*Stedall supra* at paragraph [14]).
- [27] Regard being had to the above, the only practical course for doing justice in the matter is to determine the issue of wrongfulness in the light of the facts of the case.²⁰ This commences with the evidence of Van den Berg. Before proceeding therewith it is acknowledged that no judgment can ever be all embracing of the facts, hence this judgment will not be burdened by a repetition of gratuitous evidential material except to the extent of underscoring aspects considered relevant for determining the issues

¹⁵ The test is truncated for convenience

¹⁶ At 430E-F. The test was reformulated in *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1077E-F

¹⁷ Nugent, *op cit* at 559

¹⁸ Also Nugent *op cit* at 561

¹⁹ POC paragraph 25.4

²⁰ *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 469G; *Stedall v Aspeling* 2018 (2) SA 75 (SCA) at 82C

attracting an *onus*. At the outset Van den Berg, in argument, was correctly criticised as an unsatisfactory witness.

- [28] The genesis of the agreement with Lamour was explained by Van den Berg when he testified:²¹

“We actually saw or walked through a small development in Westering, and my wife and I thought it would be a good idea to get rid of half of our property if they could build something on it. We approached one of the builders. He put us in touch with Mr [Lamour], and so it went on.”

- [29] Van den Berg contacted Lamour.²² They met and discussed the possibility of demolishing the Van den Berg property and developing 8 or 9 units thereon. The whole idea of the development came from Van den Berg and his wife.²³ To make the development “*more viable*”, Lamour undertook to negotiate with Van den Berg’s neighbours, Kelbrick and Jonker. The notion was to develop a 20 unit complex and Kelbrick and Jonker agreed to come on board.²⁴

- [30] At that point everyone had a broad understanding of what the development entailed.²⁵ Roundabout July 2006 there were plans in a consolidated diagram,²⁶ and according to Van den Berg, “*it looked good*”.²⁷ Van den Berg knew that his house was going to be demolished, that his property would be consolidated with that of his neighbours²⁸; but in exchange, Lamour would deliver to him two units worth R1.4 million each.²⁹ The exchange was specifically negotiated between him and Lamour, and Van den Berg was confident that Lamour could perform and obtain finance for the

²¹ Transcript, 26 March 2019, 60:10-15

²² Transcript, 26 March 2019, 62:1-3

²³ Transcript, 26 March 2019, 60-61

²⁴ Transcript, 26 March 2019, 62-65

²⁵ Transcript, 26 March 2019, 65

²⁶ Exhibit B - timeline

²⁷ Transcript, 26 March 2019, 72:10-11

²⁸ Transcript, 26 March 2019, 63:1-9

²⁹ Transcript, 26 March 2019, 66:14-67:9

development.³⁰ Indeed, through Lamour, Status obtained development finance. Objectively considered this would not have been possible if the bank did not undertake its own due diligence in assessing the viability of the development.³¹ This coincided with a boom in the local property market, which Van den Berg refused to acknowledge, although he readily conceded that he would have gone the route of developing 8 units on his own property if he could have financed it and if Lamour could have built them.³²

- [31] The evidence further indicates that Lamour was to commence building operations immediately after the sale agreements were signed, and that within 4 months the agreed number of units would be delivered to Van den Berg.³³ In cross-examination Van den Berg had no difficulty in acknowledging (regard being had to his career experience), and being a prudent businessman³⁴ that the concept of a contract is not anything foreign to him.³⁵
- [32] Van den Berg conceded that the above events occurred before Nelson came onto the scene.³⁶ In fact, he confirmed that the deal was initially put together with Lamour (though it is apparent that the clauses in the agreement originated with Lamour³⁷) and Van den Berg was confident and happy to do so without independent input from an attorney³⁸ mindful that his house was his most valuable asset. When Nelson eventually drafted the agreements, Van den Berg conceded that this was done on the basis of instructions from himself and Lamour.³⁹ When he signed the agreement drafted by Nelson, Van den Berg knew well what it entailed but denied

³⁰ Transcript, 26 March 2019, 70:13-20; 71:17-72:6

³¹ Transcript, 27 March 2019, 41

³² Transcript, 26 March 2019, 63:20-25

³³ Transcript, 26 March 2019, 67:10-16

³⁴ Transcript, 26 March 2019, 76:19-20

³⁵ Transcript, 26 March 2019, 56-57

³⁶ Transcript, 26 March 2019, 66:1-3

³⁷ Transcript, 27 March 2019, 19-23

³⁸ Transcript, 26 March 2019, 69:1-13

³⁹ Transcript, 26 March 2019, 78

being aware of any risk(s).⁴⁰ This is improbable considering his business acumen. He maintained that it was Nelson's duty to advise thereof and to prevent him from suffering any loss.⁴¹ In this context he asserted that Nelson had a duty "*creating financing and guarantees*"⁴² (sic).

- [33] Following the execution of the agreement, the development proceeded very slowly. Van den Berg was motivated to make a profit from the units that would be handed over to him, and never considered Nelson to be responsible for the delay during the lengthy period in which he waited for the development to reach fruition. He stated:⁴³

"The complex proceeded at snail's pace. At the end after a long, long time there were foundations laid, there were units up to roof height and there was a unit with the roof on already. And we kept on hoping and hoping and hoping that this whole project would carry on. And that was our big mistake. And even the builder was on site. I mean he testified in this court, he also said that the building was still going on, and we accepted it, it is going, it is going, and then it just collapsed. And that took a long time."

- [34] The delay was at the instance of Lamour. Van den Berg was acutely aware of this and was unable to comment on what was expected of Nelson in the light of Lamour's assurances that the development was on track despite delay(s).⁴⁴ The incentive to make a profit out of the development was the factor that drove Van den Berg to "*carry on*". He conceded that Nelson could not guarantee completion of the development;⁴⁵ and on being probed about why an allegation to the contrary was made in the particulars of claim, he avoided a direct answer to the question.⁴⁶ In addition his evidence indicates that nothing Nelson "*could put on the table*"⁴⁷, or "*what he could*

⁴⁰ Transcript, 26 March 2019, 80:10-12

⁴¹ Transcript, 26 March 2019, 77

⁴² Transcript, 26 March 2019, 78

⁴³ Transcript, 27 March 2019, 37:23-38:6

⁴⁴ Transcript, 27 March 2019, 28

⁴⁵ Transcript, 27 March 2019, 38:18-25

⁴⁶ Transcript, 27 March 2019, 71:4-72:4

⁴⁷ Transcript, 27 March 2019, 34:11-15

*do or could not do*⁴⁸ would have made a difference in the process. And upon the question being pertinently put to him “*Was the profit motive here so big that you lost all rationale, understanding of the reality?*”, he responded, “*Could be*”.⁴⁹

[35] As his testimony proceeded in cross-examination, Van den Berg consistently retracted and attempted to avoid these concessions by maintaining that he was unable to recall the details of events in terms of a timeline as it was a long time ago.⁵⁰ In heads of argument defendant’s counsel correctly criticised him as a recalcitrant witness who repeatedly sought to avoid the consequences of his earlier concessions by contending that he could not remember events and by refusing to answer questions and being argumentative. Notably, when pressed in cross-examination with the assertion that he signed an agreement and acceded to proposals conceptualised by Lamour, he exclaimed “*I do not know, I am not listening*”.⁵¹ The court’s own assessment of Van den Berg is that he was a blatantly sarcastic and evasive witness.⁵²

[36] Daryl Burman, a conveyancer, testified as an expert witness on behalf of the plaintiffs.⁵³

[37] In *Rhooode v City of Cape Town*⁵⁴, and quoting only where relevant, the duties of an expert witness were set out as follows:

- “1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

⁴⁸ Transcript, 27 March 2019, 34:10-15

⁴⁹ Transcript, 27 March 2019, 38:14-17

⁵⁰ Transcript, 26 March 2019, 67:20-68:3

⁵¹ Transcript, 27 March 2019, 5:19-6:5

⁵² This is self-evident from a reading of the transcript of the trial proceedings, a courtesy copy of which had been made available to the court by the defendant’s attorneys

⁵³ Notification under rule 36(9)(a) and (b) was filed.

⁵⁴ [2018] JOL 39716 (WCC)

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in matters within his expertise...
An expert witness should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. ...”

[38] A court will accept the evidence of a witness if and when it is satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached a defensible conclusion. The precept is that, what is required in the evaluation of expert evidence is to determine whether and to what extent an expert’s opinion is advanced or founded on logical reasoning - see *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*.⁵⁵

[39] Burman’s professional qualifications and experience were not placed in issue. It must immediately be stated that Burman testified before Van den Berg, and did not have regard to Van den Berg’s evidence and the factual concessions made by him. In argument it was correctly submitted that Van den Berg’s evidence and the concessions made by him would have had a material effect on the conclusion / opinion expressed by Burman. In the light of the court’s view of Burman’s testimony, it is considered unnecessary to recapitulate his evidence in its entirety.

[40] The crux of Burman’s evidence is that:⁵⁶

⁵⁵ 2001 (3) SA 1188 (SCA) at paragraph [37]

⁵⁶ Transcript, 26 March 2019, 28:9-19

“... ex facie the [deed of sale], it was sadly lacking in providing proper security against transfer, and the word of one individual was not proper security I did not consult with the parties. I was given a document, two documents, two deeds of sale, and some evidence given by my colleague⁵⁷ at the end of the matter.... I know nothing about the background to the transaction. All I know is, and I have said it over and over again ... that agreement should have contained a clause that the sellers should obtain independent [advice].”

- [41] In the context of the above, Burman expressed the opinion that Nelson breached his duty of care in failing to ensure that the plaintiffs had adequate security in their favour in the event of the development not succeeding. He stated that the personal suretyship obtained from Lamour was inadequate⁵⁸, and that the sale agreement should have contained an advice clause. The ‘dot-connection’ with this evidence does not track with the pleaded duty of care nor with Van den Berg’s testimony.
- [42] In the defendant’s heads of argument, Burman’s evidence was trenchantly subjected to criticism in several respects. These are recapitulated as succinctly as circumstances permit. To begin with, it emerged in evidence that Burman never consulted with Van den Berg before formulating his opinion. Burman was unaware that the idea of the development sprouted from the Van den Bergs, and that Nelson was merely approached to formulate in writing what had already been agreed between the parties and Lamour. Burman did not know that Van Den Berg’s role was integral to the agreement with Lamour, this at a time when the property market was buoyant and Van den Berg was driven by a profit motive. Nor was Burman aware that the plaintiffs’ outstanding bonds were settled by Status (a further motivating factor to hold onto the agreement). Moreover, Burman’s assertion of inadequate security is vacuous considering that Van den Berg signed the agreement and was satisfied with the suretyship offered by Lamour. Van den Berg himself acknowledged that once the properties

⁵⁷ Presumably, the transcript containing Nelson’s evidence

⁵⁸ Transcript, 25 March 2019, 22:8-21; Notice, rule 36(9)(b), paragraph [4]

were consolidated a second bond in his favour would not have provided a safety net⁵⁹, and even if such a bond was registered its value would have been quenched by the bank's secured interest in the development, and the implosion of the project would still have occurred.⁶⁰

- [43] In short, and without appreciation of these facts, Burman's evidence is irreconcilable with the evidence of Van den Berg and is unreliable. While attributing esteem to his professional standing, his opinion and the reasoning implicit therein offends the strictures in *Rhooide*. It is not informed by the correct facts and a proper appraisal of the circumstances. There is no logical basis underpinning it (*Linksfeld*), and his explanations in defence thereof plainly suggests being influenced by the exigencies of the litigation. Of these criticisms against his evidence, no attempt was made to refute them.
- [44] During argument plaintiffs' counsel referred to *Coetzee v Wilsenach Van Wyk Goosen & Bekker Inc.*,⁶¹ as authority for the proposition that a conveyancer has a duty to point out risks. In that matter the cause of action was formulated on a misrepresentation by a conveyancer to a purchaser. The misrepresentation was to the effect that a non-refundable deposit could safely be paid directly into the bank account of the seller and that the seller would be in a position to repay the amount should the sale transaction not proceed. Consequent to the seller's failure to settle arrear rates and taxes for which the requisite clearance certificate could not be obtained, the plaintiff cancelled the agreement. Save for what was paid into the conveyancer's trust account, the plaintiff was unable to recover the initial deposit from the seller and successfully sued the conveyancer. The correctness of the decision, on the facts informing it, is not doubted. But it is questionable if the proposition contended for assumes a comfortable fit in the present factual context. In *Coetzee*, expert input that bore relevance

⁵⁹ Transcript, 27 March 2019, 60:8-15

⁶⁰ Transcript, 27 March 2019, 44:15-24

⁶¹ 2013 JDR 2849 (GNP)

to the facts was placed before the court. This is not the case in the present matter.

[45] In extension of the proposition in *Coetzee*, counsel had recourse to the matter of *ABSA Bank Ltd v Fouche*,⁶² and contended that a conveyancer has a duty to impart information within his personal knowledge to parties who will only have him as a source of the information. *Fouche* dealt specifically with the relationship between a banker and a client wherein a negligent misstatement pertaining to security in the bank induced the conclusion of a written agreement. Without undue elaboration of the facts, the principle therein is not second-guessed. The case dealt with the duty of pre-contractual disclosure in a factual scenario distinguishable from the present. Here we have the situation in which the agreement between Van den Berg and Lamour had been worked out prior to the involvement of Nelson, who merely prepared the agreements to give effect to what had already been agreed between the parties.

[46] What serves to be emphasised from the foregoing, is that the duty contended for the plaintiffs is not anything generic – it is not all-encompassing⁶³, it is fact specific; and the facts informing that duty must of necessity be pleaded having regard to the exigencies of a particular case.

[47] Before moving onto Nelson's evidence, it is feasible to set out the criterion by which the duties of a conveyancer are evaluated. *Margalit v Standard Bank of South Africa Ltd*⁶⁴ succinctly summarised the position as follows (footnotes omitted):

“A conveyancer is of course ‘an attorney who has specialised in the preparation of deeds and documents which by law or custom are registrable in a deeds office and who is permitted to do so after practical examination and admission...’ Like any other professional, a conveyancer may make mistakes.

⁶² 2003 (1) SA 176 (SCA)

⁶³ *RAF v Shabangu and Another* [2004] ZASCA 23 at paragraph [12]

⁶⁴ 2013 (2) SA 466 (SCA) at paragraph [23]

But not every mistake is equated with negligence, and in a claim against a conveyancer based on negligence it must be shown that the conveyancer's mistake resulted from a failure to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position..."

- [48] Elsewhere in *Margalit*⁶⁵ it is articulated that conveyancers should be fastidious in their work and take great care in the preparation of their documents to avoid causing harm.⁶⁶
- [49] Nelson testified that in 2005 the local property market was buoyant with lots of opportunities for development and money being made through the purchase and sale of property. It was roundabout that time that he started acting for Lamour who had a good reputation for building good homes.⁶⁷ The agreements between the plaintiffs and Status were “*put together*”. Everybody understood that there was a risk involved, that the risk was explained to them, that it was made clear that the plaintiffs’ homes would be demolished, and there would be a period when they would not have a home while waiting for Status to build.⁶⁸ Prior to the signing of the agreements in September 2006 he proffered advice, and once the agreements were signed, a contract had come into existence between the plaintiffs and Lamour.⁶⁹
- [50] As for the suretyships, Nelson considered it prudent to protect the plaintiff’s by having Lamour stand personal surety - he had a fair idea of the financial position of Status and was satisfied that this was the best way that he could protect them. Objectively, this should be accepted considering that Status had secured a developer’s bond from Standard Bank which would not have

⁶⁵ At paragraphs [25] and [26]

⁶⁶ The gravity and “*likelihood*” of potential harm will determine the steps which a reasonable person in the position of the conveyancer should take to prevent such harm occurring. Moreover, the more “*likely*” the harm, the greater is the obligation to take such steps. (The connotation of the words “*likely*” and “*likelihood*” is that of “*probability*” – see *BTR Industries (Pty) Ltd and Others v Metal and Allied Workers Union and Another* 1992 (3) SA 673 (AD) at 690E

⁶⁷ Transcript, Exhibit C, 16

⁶⁸ Transcript, Exhibit C, 17:14-19; 19:18-24

⁶⁹ Transcript, Exhibit C, 20:5-16

been possible had the Bank entertained doubt regarding the standing and reputation of Status, or the viability of the development. As for registration of a bond over fixed property owned by Lamour, Nelson stated that he was, as far as he knew, unaware of any other unencumbered properties owned by Lamour. This was Nelson's testimony at the hearing of the special plea. He did not testify during the trial of the matter and whatever emerged from his testimony could not be pursued with him in cross-examination.

[51] Unfortunately, it happened at the time the plaintiffs' properties were transferred to Status, that the property market crashed and Status found itself in the difficult position that it was unable to sell all the units in the development. This evidence must be seen in combination with the refusal by Standard Bank to release funds to Status because the Bank insisted on the sale of all units in the development.⁷⁰ By way of a brief excursus, Van den Berg knew that Status had to sell units to enable it to acquire financing from the bank but refused to concede that he knew of this before the involvement of Nelson.⁷¹ Although Nelson attributes the plaintiff's losses to the failure of the property market, he maintained in the same vein that there was a significant financial gain for them if the development "*went through*".⁷²

[52] Turning to Nelson's duty of care, its specific terms were pleaded in paragraph 23 of the particulars of claim, the composition whereof reflects the following:

- (a) Nelson was appointed as the conveyancing attorney;
- (b) He was duty-bound to:
 - (i) pass transfer of the plaintiffs' properties to status;

⁷⁰ Transcript, Exhibit C, 17:22-18:11

⁷¹ Transcript, 26 March 2019, 72-73

⁷² Transcript, Exhibit C, 19:5-6 and 40:1-6

- (ii) cancel the bonds over the properties;
- (iii) register a development bond over the consolidated property;
and
- (iv) transfer the completed units to the plaintiffs.

[53] The defendant's admission of the pleaded duty covered all aspects of its composition which Nelson duly fulfilled. The evidence however indicates that the market went down, the development imploded, Status was liquidated, and hence transfer of completed units to the plaintiffs did not occur. Significantly, any indication that Nelson failed to comply with the duty of care for want of diligence in the preparation of the relevant documents for the deeds office, is absent. Relevant to that task entrusted to Nelson, the plaintiffs failed to establish any negligent breach (*Margalit supra*), nor in any event, is that their case on the pleadings. To suggest that there was an omniscient and all-encompassing duty that was breached (a theme in Van den Berg's testimony) over and above what was specifically pleaded, is a fallacy since no additional facts were pleaded to broaden the scope of that duty. From the terms of the pleaded duty nothing emerges to suggest that Nelson had a duty to prevent the plaintiffs from losing money; that he piloted the development, or that he could guarantee its completion. And in so far as Van den Berg contended that Nelson did not proffer proper advice as to risks, the exact ambit thereof has not been identified in his pleadings.

[54] All things considered, there is merit in the submission by counsel for the defendant that it is highly probable Van den Berg instituted the present action against Nelson as an afterthought after consulting with his present attorney to see if there was "*anything to be salvaged*"- and after becoming aware that the claim against Nelson instituted by Jonker (and which is of

no relevance to this matter) had become settled.⁷³ From this perspective it is not improbable that the claim against Nelson is manufactured.

- [55] Before concluding the enquiry into the wrongfulness, it is convenient at this point to deal with the Kelbrick claim, this in view of the opening statement by plaintiffs' counsel that the claim is pursued. Other than what was stated by Van den Berg, no factual evidence was tendered in support of the Kelbrick claim. The scope of the evidence relevant to that claim is limited to the testimony by Van and Berg that Kelbrick was initially hesitant but agreed to go along with the proposed development.⁷⁴ That is where the matter ends.
- [56] The limitation in the particulars of claim overlooks the fact that it was at all times the plaintiffs who bore the *onus* to allege and prove wrongfulness. An assessment of the evidence, on the appropriate test, invites the conclusion that Nelson did not wrongfully breach the duty of care, as alleged. In these circumstances the defendant could not be expected to establish a 'defence' to a claim based on wrongfulness that had not been explicitly alleged against it. In all the circumstances the plaintiffs have failed to establish this element and that being so, their claims must fail on this basis alone.
- [57] In view of this conclusion it is unnecessary to consider the negligence issue. Although it is not intended to dwell on this in any detail it should be mentioned that on this aspect as well, the plaintiffs have failed to establish their claims. The test for negligence essentially encompasses elements of foreseeability, preventability, and a failure to take steps (*Kruger v Coetzee supra*). It is only once foreseeability is established that the need arises to consider whether a reasonable conveyancer in the position of Nelson would have guarded against any foreseeable occurrence and failed to do so. The inquiry postulated in the first leg of the test is wide but the answer,

⁷³ Transcript, 27 March 2019, 55-57

⁷⁴ Transcript, 26 March 2019, 65

inevitably, will only emerge from a consideration of all the facts of each case and will ultimately be the product of a sensible judicial approach to the facts and circumstances that bear on the matter at hand. Where the enquiry proceeds to preventability and a failure to take steps, an unduly rigid approach in borderline cases could result in attributing culpability to conduct which has sometimes been called negligence “in the air”. Of note, what is required to satisfy the test for negligence is foresight of the reasonable possibility of harm – foresight of a mere possibility of harm will not suffice.⁷⁵

- [58] At the outset the pleaded grounds of negligence posited on Burman’s opinion pertaining to: the protection of the plaintiffs’ interests which could have been done by delaying transfer of their properties to Status; the incorporation of an advice clause in the agreement(s) of sale; the inadequacy of suretyships; and the alleged failure to provide security such as bank guarantees, bonds and the like, are unsustainable due to the finding made in respect of his evidence.⁷⁶
- [59] In all other instances pertaining to the remaining grounds of negligence⁷⁷ the plaintiffs have failed on the first leg of the test. There can be no question that Van den Berg knew what he was getting into. The agreement with Lamour had already been conceived before Nelson’s involvement; Van den Berg understood that the risk entailed demolishing his home and he would have to wait for Status to build the new units; he held on with no intention of backing out because he stood to benefit handsomely from the development. On these facts it could not reasonably be expected of Nelson to have guaranteed the completion of the development nor could he have predicted the decline in the market; a due diligence by him prior to the parties signing the agreements would in all probability not have made a

⁷⁵ See generally *Mkhatswa v Minister of Defence* [2000] 1 All SA 188 (A) at paragraphs [19]-[21]

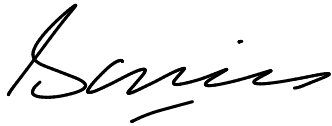
⁷⁶ POC paragraphs 25.1; 25.3

⁷⁷ POC paragraphs 25.2; 25.4; 25.5; 25.6 and 25.7

difference. These are some of the evidential indicators that detract from the foreseeability requirement in the negligence enquiry.

[60] Except for what has been put out above it is unnecessary to traverse the negligence enquiry in greater detail. In the final analysis, the principle in delict that everyone has to bear the loss he or she suffers (the Afrikaans aphorism is "*skade rus waar dit val*"), must apply in the circumstances of this matter.

[61] In the result it is ordered that the plaintiffs' claims are dismissed with costs, including the costs of two counsel.



S. RUGUNANAN
JUDGE OF THE HIGH COURT

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Date heard: 26, 26, 27, 28 March 2019; and 23 August 2021

Date Delivered: 18 January 2022

This judgment was handed down electronically by circulation to the abovementioned legal representatives by email. The date and time for hand-down is deemed to be 09h30 on 18 January 2022.