



IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE 15/2/2013	SIGNATURE 

15/2/2013

CASE NO: 14523/09

IN THE MATTER BETWEEN

LABUSCHAGNE GS N.O

First Plaintiff

LABUSCHAGNE CL N.O

Second Plaintiff

NEL AHG N.O

Third Plaintiff

and

THERON BC

First Defendant

THERON BC N.O

Second Defendant

JUDGMENT

LEDWABA J:

[1] The plaintiffs, property developers, instituted an action against the defendants jointly and severally for the damages they suffered as a result of the defendants' breach of contract and /or alternatively the defendants' negligent performance or non-performance of their professional services in a proper manner.

[2] When the trial commenced the plaintiffs applied for the separation of merits and quantum proceedings and for the trial to continue on the merits only. The defendant opposed the application. After considering submissions by the parties' legal representatives I ruled that the trial would proceed on the merits and the quantum proceedings would stand over.

[3] The citation and *locus standi* of the parties in the pleadings were not an issue. For convenience the plaintiffs would hereafter be referred to as plaintiffs, unless it is necessary to make specific reference to each of them. The first defendant is the second defendant's employee and he is a registered practicing engineer. The first defendant *at all material times in casu acted within the course of the second defendant's business.*

[4] The important facts which are not in dispute are the following:

4.1 During or about June 2005, the first defendant, alternatively the first defendant on behalf of the second defendant, orally accepted a mandate from the plaintiffs, in accordance with the provisions of a contract to be concluded for construction works, to be the plaintiffs' agent and to render professional services as an engineer. The first defendant's duties and responsibilities included to manage and/or monitor the project.

4.2 The plaintiffs concluded a contract with a construction company, Rent-A-Dozer (PTY) Ltd (the construction company) on 5 May 2006 at Groblersdal. The said contract allowed the first defendant to act as an agent for the plaintiffs.

[5] The facts which are in dispute are the following:

5.1 Whether the first defendant failed to inspect and to ensure that the domestic water pipelines on the property were SABS approved;

5.2 whether the first defendant failed to ensure that the sewerage system on the property was properly constructed to suit its purpose;

5.3 whether the first defendant failed to ensure that the kerb stones in the streets on the property are of a sufficient quality;

5.4 whether the first defendant failed to ensure that the road surfaces were properly tarred with the correct material;

5.5 whether the first defendant failed to ensure that the storm water drainage system was correctly constructed to allow proper drainage and flow of storm water;

5.6 ~~whether the plaintiffs would be entitled to claim damages in the event of~~ the first defendant, failed to perform his mandate in a proper and professional manner and without negligence.

[6] Basically the plaintiffs' project involved the construction of houses, roads, sewerage and storm water pipes and the water reticulation as per the approved design plans, see Bundle M. The Construction commenced in May 2006.

[7] The third plaintiff testified and the plaintiffs called two expert witnesses Mr Andre Fullard and Mr Phlippie C Viljoen, both are professional engineers. Their curriculum vitae and reports were handed in and their expertise was not placed in dispute. The first defendant testified and called one expert witness Mr Fitz whose qualifications and expertise was also not placed in dispute. The evidence of the witnesses will be summarized and be dealt with in the course of this judgment.

[8] Mr Viljoen testified that, on the plaintiffs' instructions, in February 2008 he went to the site to inspect the project that the first defendant managed which the construction company constructed.

[9] The plaintiffs showed him the problems that they identified on the constructed works that the first defendant had to manage.

[10] Briefly the problems related to the sewerage system that did not function properly according to how it was designed, the water pipes that burst because substandard pipes were used on the project, the kerb stones that were of a poor quality, the road surface that was not properly constructed and the drainage system was not properly erected.

[11] The works that were not properly executed needed to be fixed and the substandard quality of the material used needed to be replaced.

Re: PIPES

[12] Mr Viljoen testified that during his inspection he discovered that all the house connection pipes, which connected the individual water meter on each stand to the main water line were of a substandard quality. Upon closer inspection he realised that the pipes were not SABS approved, but instead the pipes used were made of a recycled plastic, which burst easily. He recommended to the Plaintiffs to replace all the house connection pipes with SABS approved pipes. Thereafter no leakages or bursting occurred.

[13] Mr Viljoen also testified that it was glaringly obvious that the pipes were of substandard quality, and that he could see it with the naked eye upon first glance and that any experienced engineer, would have realized immediately that the pipes were of sub-standard quality. He further testified that no reasonable consulting engineer would have approved the use of pipes not specified, and that, if he was approached regarding the installation of pipes not complying with the specifications, he would have insisted that the contractor supply him with a certificate to show that non-SABS pipes were of a sufficient quality to be fit for the purpose it was intended to fulfill.

[14] The first defendant's testimony on the pipes was that the construction company enquired from him whether pipes other than the approved SABS pipes

could be used for the house connections. He approved the use thereof on the basis that the construction company would be liable should any problems arise. He further said he approved the use of pipes not SABS approved, as he did not expect the construction company to be so "stupid" as to use substandard quality pipes. Importantly, this is a direct contradiction of what the first defendant obviously told his first attorney of record who informed the plaintiffs, in a letter dated 15 February 2008, that:

"Ons kliënt stem saam dat die waterpype nie SABS goedgekeur is nie, maar wys ons u daarop dat hierdie pype deur die kontrakteur aangekoop en geïnstalleer is sonder dat ons kliënt op daardie stadium daarvan bewus was."

[15] Mr Fitz the defendants' witness testified as to the probable causes of the pipes bursting. It is clear from the evidence that he never inspected the site or the pipes that were used by the construction company. *In my view, his testimony in this regard amounts to mere speculation. Furthermore his version was in any event not put to Mr Viljoen to enable him to comment on it.*

Re: SEWERAGE LINE

[16] Mr Viljoen testified that the sewerage line, had been laid at such an angle that at the point where it was to be connected to the Municipal main sewerage line, it was about one metre too low for the connection to be made. The sewerage line had to be reconstructed and an additional pipeline of about 800m had to be installed to connect it with another municipal main line, so that the sewer line should function properly.

[17] During cross-examination, it was put to Mr Viljoen that the first defendant would testify that he based his calculations regarding the depth of the sewerage line that was to be connected to the municipal main line on a surveyor's report which was provided to him by the plaintiffs, and that the surveyors report indicated the depths of the municipal main line incorrectly. It was a result of this erroneous information that

the sewer pipe to be connected to the municipal main line ended up at the wrong depth.

[18] However, the first defendant, during his evidence in chief and during cross-examination, then retracted this version and contended that the reason why the connection could not function properly was as a result of blockages and too high flow in the municipal main line. This new version was never put to Mr Viljoen. When the third plaintiff testified he said the first defendant never told him that there was a problem with the report of the surveyor and that it was difficult to do a proper connection.

Re: KERB STONES

[19] Mr Viljoen stated in his report, and testified that the kerb stones which were installed were of a very inferior quality. Properly constructed kerb stones life span is *about 25 – 30 years and all of the kerb stones had to be replaced because they had some cracks.*

[20] The first defendant testified that the construction company assured him that the kerb stones complied with the required specifications and during October 2006 test results were submitted to him. Mr Viljoen said that the tests done by Civillab were not correctly done, in that the concrete was tested on the 69th day instead of the 28th day. This was so because concrete rapidly gains strength within the first 28 days thereafter gains strength very slowly, so that concrete which tested to 27 mpa or 30 mpa after 69 days may well have had a strength of lower than the specified 25mpa on the 28th day. It was only put to Mr Viljoen that the first defendant never allowed wrong or low quality kerb stones to be installed.

[21] According to Mr Fitz such a test is still valid as the strength after 28 days could be extrapolated from the strength after 69 days. However, both Mr Fitz and the first defendant failed to do such extrapolation.

Re: ROAD DEVELOPMENT

[22] Mr Viljoen testified, he found that the size of the crushed stones used was only 6.7mm, instead of 19mm together with two coats of bitumen. The final coat of tar had not been applied. He further said as a result of improper coating the stones did not adhere to the road surface. He further said it was clearly visible with the naked eye that the coating was not properly done. No test needed to be performed as the substandard condition of the tarred surfaces were so obviously visible. Mr Viljoen also said that the life expectancy of a properly tarred road surface is about 25 – 30 years.

[23] To fix the roads the plaintiff's had to remove the loose stones, apply the required layers and quantity of bitumen, put 13,7 mm crushed stone and the stones had to be sealed properly.

Re: STORM WATER

[24] Mr Viljoen said water was damming and to fix the problem the plaintiffs had to install pipes which were to be connected properly to fix the damming.

[25] It was put to Mr Viljoen that the first defendant's version is that he was not on site when the storm water pipes were constructed and his services were terminated before the problem could be fixed.

LIABILITY FOR DAMAGES

[26] The first defendant, as an engineer, is bound by the provisions of the Engineering Profession Act 46 of 2000 and he is registered within the Bargaining Council of South Africa (The Council). The code of conduct drawn by The Council provides the following in respect of registered engineers that they:

"1(b) Execute their work with integrity and sincerity and in accordance with generally accepted norms of professional conduct.

2(b) *Must discharge their duties to the respective employers of clients effectively and competently.*

2(c) *Must discharge their duties to their respective employers or clients with integrity, fidelity and honesty.*

2(f) *Must provide work or service of a quality and scope, and to a level, which are commensurate with accepted standards and practices in the profession."*

[27] The aforesaid code of conduct forms part or regulates the relationship between the engineer and the client even if such relationship has not been reduced to writing it is an implied relationship. In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 A at 531 this court explained and articulated how the implied relationship should be viewed in the following:

"In legal parlance the expression "implied term"... is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provision of the contract. On the other hand it does not originate in the contractual consensus: it is imposed by the law from without. Indeed, terms are often implied by the law in cases where it is by no means clear that the parties would have agreed to incorporate them in their contracts. Such implied terms may derive from the common law, trade usage or custom, or from statute. In a sense "implied term" is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative right) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is naturalium of the contract in question."

[28] The plaintiffs and the defendants did not sign a detailed contract setting out the duties and responsibilities of the defendants. In the guidelines document used to determine the duties of an engineer, the defendants on the circumstances of this case should be categorized under 'Level' Monitoring as it was agreed between the parties, further taking into account the fees they charged. See exhibit J Guideline

Scope of Services and Tariffs of Fees for Persons Registered in terms of the Engineering Profession Act No 46 of 2000 (Government Gazette No 27422 1 April 2005) section 2.1.5 thereof reads as follows:

"2.1.5 Constructing Stage.

The overall contract administration and co-ordination, as well as the construction monitoring of the execution of the works in accordance with the contract, including all or any of the following:

2.1.5 (3) Overall contract administration and co-ordination, as well as construction monitoring of the execution of the works for compliance with the contract and attending site meetings on a combined average frequency of at least one day every two weeks for the duration of the construction of the specific works for which the consulting engineer is engaged or at such more frequent intervals as the consulting engineer may deem necessary.

2.1.5 (4) Directing construction monitoring operations, but excluding detail day to day construction monitoring of the works and contract administration as provided for under clause 2.2.2.

2.1.5 (8) Issuing instructions to contractors on behalf of the client.

2.1.5 (9) Issuing certificates or recommendations for payment of contractors and submitting regular reports regarding works finances and anticipated completion dates and final costs.

2.1.5 (12) General inspection of materials and equipment for compliance with the original design and tender, including checking of marks or documentation for adherence to national and international standards and advice to the client regarding further inspection and testing of such materials and equipment as may be necessary and arranging for such inspection and testing to be carried out on behalf of and at the client's expense.

2.1.5 (14) Agreeing final quantities with contractors, compiling final accounts and issuing final payment certificates.

2.1.5 (16) Evaluating results of contractors commissioning procedures and tests and witnessing final performance or acceptance tests on site, only, but excluding day to day routine tests."

[29] The first defendant, as the plaintiffs' agent had to administer and co-ordinate the execution of the works so that the construction company should be in compliance with the contract.

[30] He had to, *inter alia*, direct and issue instructions to the construction company, submit regular reports regarding the works, finances and anticipated completion dates.

[31] ~~The first defendant did not submit a written report nor testify that he reported to the plaintiffs that there was a problem with the connection of the connection of the sewerage line to the main sewer and make recommendations or give instructions as to how the said problem could be solved.~~

[32] The first defendant dismally failed, in my view, to inspect the pipes and neglected his responsibilities because the construction company told him that it would be liable should problems arise.

[33] If the kerb stones were properly tested, the roads were properly tarred and the correct material was used the roads and the kerb stones would not have deteriorated so soon as Mr Viljoen testified.

[34] After the plaintiffs noted the problems and Mr Viljoen did an inspection to check what could have caused the said problems. Mr Viljoen was a credible witness and he had no reason to fabricate his evidence, for instance, if the storm water was flowing smoothly there would not be any reason that there should be a reconstruction.

[35] The first defendant did not keep a so-called 'entry-book' which according to the evidence and the general operating standards of engineers had to be kept on site to record the activities on site. The first defendant's failure to adhere to the general level of skill and diligence exercised by engineers constitutes negligence.

[36] In *Kohler Flexible Packaging (Pinetown)(Pty) Ltd v Marianhill Mission Institute & Others 2000 (1) SA 141 (D)* at 144E The court held that:

"Although the full terms of the consulting contract and the construction contract have not been pleaded, it is clear that in each case the alleged duty to design and/or construct the buildings with due care, skill and diligence arose from the contract, that the alleged failure to do so constituted a breach of contract and that the consequent damages allegedly suffered by the plaintiff are those which would place it in position it would have occupied if the contract had been properly performed."

[37] In the matter of *Van Immerzeel & Pohl and Another v Samancor Ltd 2001 (2) SA 90 (SCA)* a contractor had entered into a Civil Professional Services Contract with the employer for the construction of a water pipeline and pump installation. The employer also concluded a contract with the engineer for the rendering by the engineer of all professional services required for the supervision of the installation of the water pipeline and pump installation in terms of the construction contract. Certain defects in the construction of the pipeline resulted in the employer suing both the contractor for damages for breach of the construction contract and the engineer for breach of the professional services contract. It is necessary to refer to the following facts in that judgment in some detail:

37.1 Some months after the pipeline was certified by the engineer as complete the pipeline started leaking and leaks occurred thereafter at regular intervals.

37.2 The leaks in the pipeline were caused by corrosion which resulted from the substandard coating and lining of the pipes and the fact that the system installed to preclude corrosion was in the circumstances ineffective. Sections of

the pipeline were not properly prepared as the coating on sections of the pipeline was well below the specification requirements.

37.3 The Court held that it was clear on the evidence led at the trial that the contractor was responsible (a) for the purchase and installation of the pipeline with substandard coating and lining and (b) for the installation of the initial ineffective protection system. It was common cause that the parties to the construction contract were the firm "The contractor" and the employer and that the parties to the Professional Services contract were the engineer and the employer.

[38] *In casu* the issue of joinder and non-joinder of the construction company was not raised. However, I think having regard to the nature of the relationship between the plaintiffs and the defendants the non-joinder should not be an obstacle to determine whether the defendants are liable or not.

[39] *The facts of this case clearly show that it is important for an engineer to properly supervise and inspect the works with due skill and care.*

[40] The first defendant cannot rely on the competence and/or experience of the construction company to do the job. The reason why the plaintiffs appointed them as agents is because they had special knowledge and skill to do the work.

[41] On the evidence and documents before me I think the plaintiff succeeded on the balance of probabilities that the defendants did not perform their professional duties properly with due skill and diligence as the plaintiffs' agents and were therefore negligent. Their negligence caused the plaintiff to suffer damages.

[42] The defendants were negligent in their conduct and/or omission in that:

42.1 They failed to inspect and ensure that the domestic pipeline on the property known as Groblersdal Ext 23 (the "Property") were SABS approved.

42.2 They failed to ensure that the sewerage system on the property complies with the minimum requirements as set out in the Guidelines for Provision of Engineering Services in Residential Township.

42.3 They failed to ensure that that kerb stones in the streets on the Property are of sufficient quality.

42.4 They failed to ensure that the road surfaces were prepared sufficiently and/or correctly.

42.5 They failed to ensure that the storm water drainage system was constructed in such a manner as to allow for proper drainage of storm water.

42.6 they failed to perform their duties pertaining to construction monitoring in a manner that is expected of a professional engineer.

42.7 *They failed to ensure that the contract executed the construction works in compliance with the construction contract.*

[43] The engineer issued a payment certificate and completion certificate in respect of defective works and materials provided by the contractor and so caused the Plaintiffs to pay for defective workmanship and materials which were useless to the plaintiffs, which in turn necessitated additional remedial work at the cost of the Plaintiffs.

[44] I therefore make the following order:

The defendants are jointly and severally liable to pay the plaintiffs' proven or agreed damages arising from their negligence in respect of what is set out in paragraph 42.1 – 42.7.



A P LEDWABA
JUDGE OF THE HIGH COURT

HEARD ON: 11 April 2012

FOR THE PLAINTIFF: Adv R Strydom

INSTRUCTED BY: M Wentzel Inc, Groblersdal

FOR THE FIRST DEFENDANT: Adv Maunatlala

INSTRUCTED BY: Andrew Miller and Associates, Pretoria