

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. 2328/2002

In the matter between:-

ALLAN HENRY NEWSTADT Appellant

and

H. AMM (PTY) LTD Respondent

CORAM: CILLIÉ J *et* EBRAHIM J *et* VAN DER MERWE J

JUDGMENT BY: VAN DER MERWE J

HEARD ON: 21 AUGUST 2006

DELIVERED ON: 14 DECEMBER 2006

[1] I have read the judgments prepared in this matter by Cillie J and Ebrahim

J. I agree that the appeal must fail and with the order proposed.

However, I consider it necessary to briefly set out the reasons for my conclusion.

[2] In my view, the appellant's claim is clearly based on delict, although it

arose in a contractual setting. The trial court found however, that on the

appellant's own evidence, the respondent was not contractually obliged

to supply the appellant with ladders required for the performance of the work in terms of the contract. I agree with the trial court, for the reasons stated by him. In my judgment the respondent gave permission to the appellant to use the respondent's ladders, but did not give an undertaking *animo contrahendi* to provide ladders. I make reference to this as the questions of wrongfulness and negligence must be determined in this context.

[3] For purposes hereof I accept that the ladder in question was unsuitable or unsafe for the purpose for which it was required by the appellant. I also assume, without deciding, that if the respondent was negligent in making the ladder available as alleged, its conduct would be wrongful.

[4] The question then is whether negligence attributable to the respondent was proved. On appeal the appellant relied in this regard on two aspects, namely first, that the respondent's employee Mr. Maile provided the appellant with a dangerous ladder and second, that the ladder in question was defective as a result of poor manufacturing thereof by the respondent.

[5] The trial court found that at the time Mr. Maile was employed by the respondent and acted in the course and within the scope of his employment as such. This finding was not challenged on appeal.

According to the evidence the appellant's assistant, Mr. Miya, requested Mr. Maile to provide a ladder. I accept that Mr. Maile made the ladder in question available, either in person or through another employee of the respondent. I am not satisfied that Mr. Maile acted negligently in providing the ladder in question. There is no evidence that Mr. Miya told Mr. Maile what the ladder was to be used for. To the appellant, a man with approximately 18 years experience of regular use of ladders, the ladder in question appeared to be functional and in reasonable condition. A reasonable man in the position of Mr. Maile could therefore not be faulted for having the same impression. Moreover, Mr. Maile could in the circumstances reasonably expect that the appellant would not make use of the ladder in conditions that are unsafe or if the ladder appeared to be dangerous.

[6] The question of the negligent manufacture of the ladder was not raised in the pleadings. I am also not sure that a firm finding can be made on the evidence that the ladder in question was actually manufactured by the respondent. It matters not however, as in my judgment it was not shown by the appellant that the ladder was manufactured defectively.

C.H.G. VAN DER MERWE, J