



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 1802/2020

In the matter between:

RUHAN KNOETZE

PLAINTIFF

and

GYSBERTUS JOHANNES BOTES N.O.

DEFENDANT

(in his capacity as trustee for the time-being
of the JRB Trust)

JUDGMENT

Rugunanan J

[1] On 27 February 2024, reasons incorporating a ruling were handed down in which the defendant's application for absolution from the instance at the close of the plaintiff's case was dismissed. Subsequent to the ruling the defendant's case was closed without leading evidence.

[2] What follows is the Court's judgment on the separated issue of liability on the merits. The evidential matrix comprises of the testimony of the plaintiff Mr Ruan

Knoetze, his father Mr Antonie Knoetze Snr, and their expert witnesses, Mr Richard Heny and Mr Gerhardus Kemp, respectively a master builder and a forensic fire investigator. Their professional qualifications, accreditation and experience were not matters that were seriously placed in issue. The defendant filed an expert summary dated 22 September 2021 and a supplementary summary dated 8 May 2023 by its forensic expert Mr André De Beer but led no oral testimony from him. Referred to where necessary during trial, the documentary evidence comprised of: the plaintiff's trial bundle marked A and A1, the defendant's trial bundle marked B, and a joint minute dated 30 May 2023 between the parties' forensic experts Mr Kemp and Mr De Beer marked as Exhibit B. Barring matters of opinion, the joint minute binds the experts in respect of their agreement on facts and the Court is bound by such agreement to the same extent as facts which are common cause on the pleadings.¹

[3] Where the defendant closed its case without leading rebutting evidence the assessment of the plaintiff's case is undertaken purely on the consideration of the evidence presented without having regard to evidence which may or may not have been adduced in rebuttal². Although no general rule can be laid down as to the effect that may properly be given to the failure of a party to adduce evidence³, the question to which the Court is required to direct itself in the present matter is whether there is evidence upon which judgment should be given in favour of the plaintiff. In other words, at the end of the case it must be determined whether on the evidence presented the probabilities and inferences that may reasonably be drawn as a matter of common sense, logic and experience⁴ are such that the plaintiff may be found to have discharged the onus or duty of proving its pleaded case on a preponderance of probability⁵.

[4] The plaintiff's cause of action is founded on an alleged fraudulent non-disclosure of a latent defect upon the purchase from the defendant, the JRB Trust, during July 2018 of a dual-level freestanding residential townhouse known as Unit 2

¹ *Bee v Road Accident Fund* [2018] ZASCA 52 para 64; *HAL obo MML v MEC for Health, Free State* [2021] ZASCA 149 para 220.

² *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (AD) at 976E-H.

³ *Galante v Dickenson* 1950 (2) SA 460 (AD) at 465.

⁴ Schwikkard, Van Der Merwe, *Principles of Evidence* 3rd Ed p527.

⁵ See generally *Sardie and Others v Standard & General Insurance Co Ltd* 1977 (3) SA 776 (AD) at 780G-H.

(the unit), within the Tikwe Housing Development of which the defendant was the developer. The purchase price was for the amount of R1.2 million secured by way of a registered bond, the outstanding amount on which is currently R970 000. The agreement was in writing. The plaintiff sues the Trust duly represented by its only trustee for damages in delict.

[5] On 24 June 2019, a winter's evening, the upper floor of the unit was impinged by fire when the plaintiff's father, Mr Knoetze Snr lit a wood fire in the freestanding open stove⁶ located in a corner of the lounge on the ground floor. The steel fireplace stove was installed in the left corner of the lounge. Directionally, it is the north-western corner. The unit is built of brick-and-mortar walls with a roof structure comprising of timber rafters covered with cement tiles. The dividing element between the ground floor and the first level is a reinforced concrete slab. On the upper level of the unit is a television/office area and three bedrooms with en-suite bathrooms. The ceilings on the upper level are constructed of gypsum lined with polystyrene corncicing. The affected bedroom (the spare room) is much smaller than the others. It faces north-west and is located at the front-left of the unit above the lounge. The room was fitted with built-in cupboards and had a single bed covered with a duvet below a curtained window. The roof collapsed over much of the first floor and the most extensive fire damage was evident in the interior of the spare room.

[6] A brick-and-mortar chimney was routed upwards from the ground floor fireplace at the left-front outside corner of the unit. The chimney was capped with a steel flue pipe extending up through the chimney to a rotating wind vane. This was similar to another unit known as unit 1 (an identically constructed mirror image of unit 2) which similarly features a brick-and-mortar chimney, also capped with a rotating vane and routed up along the right corner of the lounge (directionally understood to be the north-eastern corner of unit 1).

[7] The plaintiff is currently the registered owner of unit 2. No alterations were effected to the property neither before nor since its purchase. At the time of the fire the plaintiff's parents were residing in the unit and had been living there for several

⁶ Photographs on file indicate that it is a pyramid-shaped metal stove with a half-hexagonal fashioned base.

years since February 2015, initially having leased the property prior to its purchase by the plaintiff. The fireplace was installed before the plaintiff's parents occupied the unit. Both Mr Knoetze Snr and his wife are smokers but purportedly not inside the house on the evening in question. In its current state the unit is uninhabitable.

[8] Outlining the plaintiff's case in his opening address, plaintiff's counsel indicated that the action is posited on a deliberate and fraudulent non-disclosure of 'a timber roof truss beam that passed through the brick-and mortar chimney into or near the steel flue pipe of the chimney' and despite 'not enough information to pinpoint the origin of the fire', expert evidence will be led on causation in that 'the most probable cause of the fire was what the plaintiff has pleaded⁷ and that is exposure of the timber joist to heating and drying over years until it ignited when all of the factors necessary to make perfect circumstances for something to catch alight came together'. It was further indicated that the plaintiff would show on a balance of probabilities that the defendant was aware of the latent defect at the time of the sale of the unit, and that the failure to disclose it induced the plaintiff to conclude the agreement on the terms that he did.

[9] To attribute context and to illuminate the framework within which the evidence must be assessed, the material portions of the plaintiff's case as formulated in the particulars of claim are extrapolated as follows:

'6. At the time of the conclusion of the agreement of sale the Unit suffered from the following latent defects:

6.1 The Unit had been constructed so that timber roof-truss beams passed through the brick and mortar chimney into the chimney flue and into or near to the steel pipe flue.

6.2 As a result the Unit did not comply with the requirements set out in the National Building Regulations and Standards Act 103 of 1977 read with

⁷ In this regard specific reference was made to paragraph 16 of the particulars of claim.

South African National Standards (SANS) 10400 Code of Practice for the Application of National Building Regulations which provides that:

6.2.1 Combustible material such as a timber floor joist, trimmer or roof truss shall not be built within 200mm of the inside of a chimney; and

6.2.2 No flue pipe shall be designed and installed in such a manner that it will cause a fire hazard to any adjacent material.

(“the latent defects”)

[10] It is the plaintiff’s case that the defendant was aware of the alleged latent defects. In that regard the plaintiff alleged:

- ‘7. At all material times the Trust was aware of the latent defects. Moreover, the Trust was aware or ought reasonably to have been aware that the latent defects constituted a fire hazard, rendered the Unit unfit for purpose and constituted a safety hazard to those living therein.
8. The Trust did foresee, or ought reasonably [to] have foreseen that, given the latent defects, a fire could be caused by an occupant of the Unit utilising the fireplace and chimney in the normal and reasonable manner.
9. The Trust had a duty to act faithfully, honestly and with due care and diligence in [its] dealings with the plaintiff.
10. Prior to the conclusion of the agreement of sale with the plaintiff and during negotiations pertaining thereto the Trust deliberately and fraudulently refrained from disclosing the latent defects to the plaintiff.’

[11] As to the cause of the fire the plaintiff pleaded:

‘16. The fire was caused by the latent defects and more particularly by the roof timbers which passed through the brick-and-mortar chimney, being repeatedly exposed to heat, drying out and eventually catching alight.’

[12] The defendant admitted the conclusion of the written agreement but pleaded it was exempted from any liability towards the plaintiff on account of the following specific provisions (the exemption clause):

‘3 The seller hereby sells to the purchaser who hereby purchases the property subject to the terms and conditions set out in the agreement.

...

12.1 The purchaser hereby acknowledges that he has inspected the property, is satisfied therewith and that he buys it free of any warranties.

12.2 The purchaser binds himself and declares that he will not be entitled to institute any action arising from this agreement against the seller or his agent, for any defect (whether latent or patent) to the property, or any improvements thereon, or as a result of any representation made or guarantees given by the seller or his agent in respect of the property.’

[13] The alleged latent defects and as well as the allegations that the defendant was aware thereof, that it did not disclose same, or ought reasonably to have been aware that the defects constituted a fire hazard, and deliberately and/or fraudulently and in breach of a duty owed to the plaintiff refrained from disclosing them, were denied by the defendant.

[14] The plaintiff’s seriatim response to a request for trial particulars filed at the instance of the defendant discloses the following information proffered by the plaintiff:

Question 2.1: How many timber roof truss beams allegedly passed through the brick-and-mortar chimney into the flue chimney?

Answer: One timber beam of the corner roof beam structure passed through the brick-and-mortar into the chimney.

Question 2.2: Were the alleged timber roof truss beams in contact with the steel flue pipe?

Answer: The issues are a matter of evidence.

Question 2.3: If not, how far away from the steel flue pipe were the alleged timber roof beams removed? The exact distance/s are required.

Answer: These issues are a matter of evidence.

Question 3.1: Who on behalf of the Trust was allegedly aware of the alleged latent defects?

Answer: The representative of the Trust who oversaw the development, alternatively the Trust agent(s).

Question 4.3: [W]ho on behalf of the Trust allegedly deliberately and fraudulently refrained from disclosing the alleged latent defects to the plaintiff?

Answer: The trustee of the Trust and/or the agents of the Trust.

Question 6.3: Where, with reference to exact location did the fire allegedly start or break out?

Answer: At the roof timber which passed through the chimney flue.

[15] The sketched framework of the pleadings is augmented by the recordial in a supplementary pre-trial minute of observations made on 5 November 2021 during an inspection in loco. The relevant portions read as follows:

‘3.3.3 The plaintiff pointed out the brick-and-mortar chimney situated in the north western corner of the room. The plaintiff recorded that the chimney structure was not drawn on the approved building plan for unit 2. This was admitted by the defendant.

3.4.1 The plaintiff recorded that the fireplace has a flue pipe which extends up into the concrete steel reinforced ceiling, which separates the ground floor and the first floor (“the concrete floor”).

3.4.2 The plaintiff recorded that the flue pipe enters the concrete floor, then bends outwards towards the outside of the building where it enters into the

brick-and-mortar chimney situated on the north-western corner of the building which extends upwards past the first floor of unit 2 (“the chimney”).’

[16] On the pleadings, except for the defendant’s reliance on the exemption clause in the agreement, the duty rests squarely on the plaintiff to prove on the required standard: (a) the alleged latent defect/s; (b) the defendant’s knowledge thereof in that the Trust deliberately and fraudulently refrained from disclosing same and; (c) the cause of the fire. It is on these issues that the plaintiff bears the onus – in order to be successful – of satisfying the Court as a matter of probability that he is entitled to succeed on his claim.⁸ What is required to be shown is that, on the probabilities, a particular state of affairs existed.⁹ In that regard, on the issues affecting causation and proof of the latent defect/s, the plaintiff relied on the assistance of expert testimony.

[17] Before dealing with the aforementioned issues it is feasible to preliminarily address the contention raised by the defendant concerning the plaintiff’s entitlement to sue for damages. The defendant argued that the plaintiff has no *locus standi* and *prima facie* has not suffered damage. The contention is advanced on the following evidence.

[18] The plaintiff and his father Mr Knoetze Snr, intended to purchase the property in the plaintiff’s name because his status as a graduate and the fact of being a first time home buyer rendered him eligible for a favourable interest rate for servicing repayment of the bond. It was also agreed that the plaintiff’s parents would live in the unit and that Mr Knoetze Snr would pay the plaintiff a monthly rental of R15 000 that would be used by the plaintiff to repay the bond much faster. Once the bond was repaid, Mr Knoetze Snr would acquire ownership of the unit having paid therefor by

⁸ *Pillay v Krishna and Another* 1946 AD at 952-3.

⁹ Quoting the learned authors Schwikkard, Van Der Merwe *op cit*, the court in *Madolo v Road Accident Fund* [2023] ZAECKHC 63 para 16 endorsed the following precept: ‘In civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a “balance of probabilities” but that should not be understood as requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.’

way of rental payments. As mentioned earlier, there is an outstanding amount due on the bond.

[19] The evidence discloses that the property was insured in the name of the plaintiff and that he is currently its registered owner. Plainly, it is he who has a direct and substantial interest in the subject matter of this litigation and has the requisite legal standing for instituting this action.

[20] In its written argument the defendant submits that although the unit is registered in the name of the plaintiff, it is clear from the evidence that the true owner of the unit was at all relevant times Mr Knoetze Snr who carried the risk of damage to the property and for that reason there appears to have been collusion between the plaintiff and his father.

[21] In our law, collusion is akin to connivance. It suggests an agreement or mutual understanding between the parties concerned that one of them shall commit or pretend to commit an act so that the other may obtain a remedy at law as for a real injury.¹⁰ Collusive contracts are unlawful because they are designed to subvert the law by way of some deceit for the purpose of obtaining a legally unwarranted benefit.¹¹

[22] There is merit in the plaintiff's argument that there is no suggestion (nor can there be) that an agreement to purchase a property and to lease it out with the intention ultimately of selling it to his father amounts to an unlawful collusive agreement designed to subvert the law to obtain a legally unwarranted benefit.

[23] The defendant's contention is spurious and the issue raised has no merit. Both the plaintiff and Mr Knoetze Snr struck me as modest individuals who testified unpretentiously and straightforwardly on the matters that they did. That said, focus shifts to addressing the more substantial issues identified for determination. As indicated, to a considerable extent the plaintiff relied on expert input.

¹⁰ See in this regard Christie, *The Law of Contract in South Africa*, 8th Ed p 434 where reference is made to the judgment in *Bevan v Bevan and Ward* 1908 TH 193 at 197.

¹¹ Christie *ibid* p434 and the cases mentioned.

[24] As to the approach to be taken in the evaluation of expert evidence, this is underscored by logical reasoning and does not involve considerations of credibility.¹² In *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schadlingsbekämpfung MBH*¹³ it is authoritatively stated that:

‘[A]n expert’s opinion represents their reasoned conclusion based on certain facts or data, which are either common cause, or established by their own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert’s bald statement of their opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.’

[25] Expressed another way, a conclusion arrived at by an expert – whether conveyed as an opinion or an assumption¹⁴ – must be informed by logical reasoning underpinned by admissible facts (see generally *Michael v Linksfield Park Clinic*¹⁵). In simpler terms expert witnesses are required to lay a factual basis for their conclusions and to explain their reasoning to the Court.¹⁶

[26] The evidence in its entirety including the pleadings, reports and joint minutes of the various experts is extensive and is a matter of record. For that reason it is intended only to accentuate and focus on the most salient aspects for purposes of this judgment without repeating the totality of the testimonies by each of the

¹² *Michael and Another v Linksfield Park Clinic* [2001] ZASCA 12 paras 34-26.

¹³ 1976 (3) SA 352 (A) at 371F-G.

¹⁴ *Twine and Another v Naidoo and Another* [2017] ZAGPJHC 288 para 18h.

¹⁵ [2001] ZASCA 12 paras 36-37. As for the duties of an expert see *PriceWaterhouseCoopers Inc & Others v National Potato Co-operative Ltd & Another* [2015] 2 All SA 403 (SCA) para 98 the Supreme Court of Appeal cited with approval the English case of *National Justice Compana Naviera SA v Prudential Assurance Co Ltd (‘The Ikarian Reefer’)* [1993] 2 Lloyd’s Rep 68 [QB (Com Ct)] at 81-82 in which the duties of an expert witness were set out, namely; (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...; (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise... An expert witness in the High Court should never assume the role of an advocate; (3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion; (4) An expert witness should make it clear when a particular question falls outside his expertise.

¹⁶ *Bee v Road Accident Fund* [2018] ZASCA 52 para 22.

witnesses – to do so would be a dissertation of titanic proportion that would escape the essential reasoning employed in arriving at the order at the conclusion of this exercise.

[27] On the pleadings, proof of the latent defects is the fact in issue that is logically anterior to the enquiry into causation. The plaintiff relied on the evidence of Mr Kemp and Mr Heney. Mr Kemp conceded that he holds no qualification that renders him competent to testify on aspects relating to building requirements. He is not a building inspector or a building engineer. In compiling his report of 30 June 2019 and the (supplemented) expert summary filed on his behalf on 22 September 2022, no input from a structural engineer or a building inspector was relied upon – his brief was limited to determining the origin and cause of the fire which included *inter alia* internal and external examination of the unit and its surrounds and witness interviews.

[28] Focus shifts to the evidence of Mr Heny. He has 30 years' experience as a building contractor. He visited the unit in April or May 2021 to furnish a cost estimate for its restoration. He walked around the entire building and went up to the top floor to look at the chimney, his exchange with plaintiff's counsel is on record as follows:

'Mr Brown: And what did you see particularly with respect to the chimney?

Mr Heny: Obviously a lot of fire damage in that area, but I could see some burnt out sections of brickwork where I assume the timber from the roof trusses [trusses] would have gone into that chimney and obviously just a lot of fire damage and water damage.'

[29] Moving ahead somewhat to his cross-examination, counsel for the defendant specifically asked:

'Mr Cilliers: You have made reference to a roof truss. How do you know there was a reference to a roof truss at the chimney:

Mr Heny: Because the position of the chimney is right on the corner of the building and as the roof sort of changes around... on that 90 degrees bend, there would be what we call a hip [joint] and the

chimney happened to be right on that corner and the angle of the opening in the brickwork coincided with the angle of what a roof truss I would expect to see there.'

[30] Elsewhere in his testimony Mr Heny went on to say:

'[I]t looked like there were two places where the timber went in. One would have been the hip timber coming down on the corner of the roof and another would have been one of the rafters that joined into that hip timber. But that is the standard timber size that would have been used in a roof truss which is probably a 38 by 152 millimetre pine part of the roof truss.'

[31] He confirmed his knowledge of the building standards regulations and on being asked to express his opinion on the construction of the chimney (of which he testified there were no approved building plans) he stated:

'So the chimney is built with a solid brick structure, two courses thick which is, if it is two courses thick, a brick is 110 [millimetres] thick so... with a bit of *dagha* in between, we would have a brick structure of 230 millimetres, which is greater than the 190 millimetres required by the building regulations. However, the timber in two parts of the roof structure does protrude within, into that wall all the way through to the other side. So, it does not comply, in my opinion, to the regulations because... the timber is built into the solid brickwork structure where it should not be, it should be cut short and be fitted to the brick structure with a trash hanger or some kind of a bracket to hold that timber. It should not be embedded into the brickwork to hold it.'

[32] Mr Heny testified that he observed the presence of 'a hole' where the timber was built into the solid brick structure. He indicated that the hole in the brick structure is of the standard timber size 'and you can see right through the wall to the steel flue pipe'. The hypothesis or assumption of a roof truss that entered the brick-and-mortar chimney is therefore formulated on evidence signifying the presence of a hole or cavity (described by Mr Kemp as a channel) that matches the standard dimensions

of a roof truss. Mr Heny identified the hole by reference to a photograph¹⁷ shown to him.

[33] Dealing with his inspection and photographs shown to him, Mr Kemp's engagement with counsel is on record as follows:

'Mr Kemp: There is a corner truss that enters the wall at a diagonal into the corner and then on this photograph for 35 just left of it but if you facing the building, slightly right of it, there is a channel passing through the outer brickwork into the chimney void which is installed behind it and on photograph 36 you can see the flue pipe directly behind the channel.

Mr Brown: And what would that channel have been?

Mr Kemp: [T]hat channel would have been the seat of the roof truss coming down at an angle, passing a bend, cemented into the brick and mortar.'

[34] It is not in dispute that unit 2 and unit 1 of the Tikwe Housing Development are identically inverted in construction, being mirror images of each other. Mr Kemp was allowed by the owner of unit 1 to climb into its roof void. He observed corner roof truss beams passing through the brick-and-mortar chimney into the chimney flue and observed evidence of charring. From his examination of the chimney of unit 2 it was evident that a roof timber also passed through the brick-and-mortar chimney into the chimney flue. The steel flue pipe was visible through the channel where the wooden truss had been prior to the fire.

[35] The defendant argued that the plaintiff failed to establish that a latent defect existed in accordance with the building specifications, as pleaded. It was contended that there is no evidence indicating the measurement as to how far the alleged roof truss may have protruded into the brick-and-mortar chimney or its measured distance from the steel flue pipe. On being questioned about this in cross-examination Mr Heny explained that 'there was no timber on site, so I could not

¹⁷ Incorporated as item 7 into the plaintiff's trial bundle of documents marked 'Bundle A' at page 36.

measure. It was all burnt or washed away'. Mr Heney had no hesitation in accepting that high pressurised spraying of water by the fire-fighting services could have removed such evidence from the scene.

[36] In further pursuit of the contention that a latent defect was not proven, it is mentioned in the defendant's written argument that the joint minute by the fire experts indicated agreement that it is not possible to determine whether a timber roof truss entered the chimney void of the unit. There are two factors that are dispositive of this aspect. First, Mr Heny was not privy to the joint minute; and second, none of these experts were shown to have had any qualifications in building construction – in fact, they agree in their joint minute that they are both 'not building fire code specialists' competent to comment on the building regulations and the code.

[37] Parenthetically, and at this point it is well to record their agreement that the construction of the chimney with a wooden roof timber passing through it constitutes a fire hazard. This aspect will be addressed when dealing with causation.

[38] In summary, acknowledging that there is no mathematical evidence of the measurements or clearance intervals aforementioned, Mr Heny's assumption does not lose traction. The standard dimensions of a roof truss is a data set that accords with the existing manifestation of a hole. The latter is an objective fact that positively lends credence to Mr Heny's assumption that at least one roof truss entered the brick-and-mortar chimney and was embedded into the brickwork within the void. This is not consistent with the manifestation of an imprint of a truss in the cement, as suggested by the defendant. Mr Heny's assumption is not irreconcilable with the legal prescripts for evaluating expert testimony. It is based on the convergence of fact and data that substantiates his reasoned conclusion. Moreover, his estimation of the truss dimensions was undisputed. In that regard it was never suggested by the defendant that the dimensions accorded with an object other than a timber truss utilised for building purposes.

[39] Mr Henry's expert testimony was presented without obfuscation or vagueness. It is supported by the evidence of another competent witness – Mr Kemp¹⁸. And even if the latter's evidence is disregarded, Mr Henry's evidence stands on its own merits. It assists the Court in determining the fact in issue and lends justification for the probable inference¹⁹ that the plaintiff adduced sufficient evidence to prove a latent defect. Taken further, and since the construction of the chimney was not compliant with the prescribed building standards the evidence not only establishes a latent defect, but additionally that the defect constituted a fire hazard.

[40] Causation is an element of delictual liability. In this matter its proof is largely dependent on the evidence of Mr Kemp emanating from his initial report and supplemental summary that followed. In *Minister of Safety and Security v Van Duivenboden*²⁰ the Supreme Court of Appeal stated:

'A plaintiff is not required to establish a causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.'

[41] It is worth noting that in arriving at their conclusions experts frequently employ a scientific or mathematical level of proof approaching certainty. Courts must guard against adopting this standard²¹ for it is not the expert who determines the fact/s in

¹⁸ *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schadlingsbekämpfung MBH* 1976 (3) SA 352 (AD) at 371B.

¹⁹ In civil proceedings it is a principle of evidence that that the inference sought to be drawn must be consistent with the proven facts but need not be the only reasonable inference – it is sufficient that it is the most probable inference: *Govan v Skidmore* 1952 (1) SA 732 (N) at 733H-734D; *Katz v Katz* [2004] All SA 545 (C) paras 93-94.

²⁰ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 26.

²¹ See *Maqubela v S* [2017] ZASCA 137; 2017 (2) SACR 690 (SCA) para 5, where it was said:

'In *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* 2001 (3) SA 1188 (SCA) para 40, the important distinction to be drawn between the scientific and judicial measures of proof when assessing expert scientific evidence, was emphasised:

"Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D-E that:

issue²². That determination is in the domain of the judicial officer who would come to an independent conclusion but with the assistance of the special knowledge and skill possessed by the expert. Although the Court would pay high regard to the views of the expert, it will assess the evidence – not by applying scientific standards – but by applying the balance of probabilities as the legal standard.²³

[42] In the defendant's written argument Mr Kemp's testimony was subjected to criticism in numerous respects – among them, the context surrounding the postponement of the proceedings which led to the filing a supplementary expert summary and with that, his accusation against his legal team in respect of the formulation of his summary; and in some instances his defence of assumptions on facts not in evidence; and particularly reference being made to occasions when the Court admonished him to answer straightforwardly to direct questions. Although some of the criticisms are justified, the witness stand can be stressful for many witnesses, experts and laypersons alike. Mr Kemp's demeanour is not a relevant consideration in the assessment of his evidence. His unchallenged *curriculum vitae* shows him to be a highly qualified practitioner with some 30 years' experience in his field with an investigation track record of 775 cases. In argument plaintiff's counsel correctly submitted that as long as there is some admissible evidence on which Mr Kemp's testimony is based, and where the reasons therefor have been satisfactorily explained, it cannot be ignored from assessment.²⁴

[43] A feature of the methodological approach in the investigation undertaken by Mr Kemp entailed an interview with Mr Knoetze Snr. Before addressing Mr Kemp's hypothesis on the cause and origin of the fire it is appropriate to summarise the testimony of Mr Knoetze Snr. As will be seen from what follows his experience of the

'[O]ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.'

The scientific measure of proof is the ascertainment of scientific certainty, whereas the judicial measure of proof is the assessment of probability.'

²² *Twine supra* para 18.

²³ *MM V Netcare Hospitals (Pty) Ltd and Others* [2017] ZAGPPHC 474 para 81; see generally *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schadlingsbekämpfung MBH* 1976 (3) SA 352 (AD) at 352C.

²⁴ *AM and Another v MEC for Health, Western Cape* [2020] ZASCA 89 para 20; *S v Venter* 1996 (1) SACR 664 (A) at 666F-J.

circumstances in which the fire started and his observations are significant for Mr Kemp's ultimate conclusions.

[44] In summary, Mr Knoetze Snr testified that each year since having moved into the unit the fireplace was used approximately 10, 15, or 20 times during the winter season. On the day in question both he and his wife arrived home from work shortly after 17h00. It was cold and raining. He lit a fire at about 17h15 and later at about 19h30 more wood was added. The light in the spare room was switched off and no appliances were in use in the room. At some time between 20h00 and 20h30, while both he and his wife were downstairs watching television in the lounge, they heard a very loud crack almost as loud as a gunshot. It was dark on the top floor. When he got to the staircase he looked up and noticed a glow. He discovered fire in the spare room. He thinks he switched on the light. He noticed that the top of the curtains were alight and that both sides of the curtains were burning. A burning curtain closest to the left corner of the room had already fallen onto the bed setting alight the duvet. Believing that the fire could be smothered, he considered wrapping the burning curtain in the duvet but heard a loud roar above him. As he retreated, he noticed flames rolling under the cornice between the ceiling and the wall above the bed. He exited the room and shouted out to his wife to gather their pets and to call for assistance whereafter they hastened outside. The fire department arrived approximately 25 minutes later.

[45] The version presented by Mr Knoetze Snr was not materially contradicted. He was the only eyewitness who testified as to the events aforementioned.

[46] The agreed principle between the forensic experts is that the cause of a fire cannot be determined without establishing its origin. Other than having inspected the unit, Mr Kemp was criticised for not investigating 'the evidence [that] showed many ignition sources that could have caused the fire, i.e. the presence of electrical geysers; the presence of electrical sockets; the presence of an alarm system; the fact that Mr Knoetze Snr and his wife smoked'²⁵. The evidence by Mr Knoetze Snr indicates that the alarm system was not armed at the time of the fire, that the light

²⁵ Defendant's written argument para 15.27.

switches and electrical plug socket in the spare room were not in use, that the room was last used by him for morning ablutions though it was likely that he used the bathroom on returning from work, and that he and his wife smoked outside on the veranda to avoid odour inside the unit. Mr Kemp observed that switches and socket were damaged beyond practical examination. The short shrift approach to these aspects is that they were not pleaded as defences, nor were they explicated in oral testimony by the defendant's own expert to illuminate his thesis of the probability that the fire originated underneath the ceiling of the spare room, which he attributes in his report to *inter alia*: failure of an electrical appliance connected to the electrical socket outlet; internal failure of the electrical socket outlet; or failure of the ceiling mounted light fitting. Cumulatively, the propositions were speculative in testing Mr Kemp's investigative method and to an extent contributed to protracted cross-examination. It is particularly concerning that Mr De Beer provided an extended but prickly condemnation of the findings in Mr Kemp's supplementary summary but did not testify to validate any of the aforementioned propositions despite being present in Court during part of the proceedings.

[47] Referring to his hypothesis on the cause of the fire, Mr Kemp explained:

[W]e know that a fire was lit in the fireplace below in the lounge or TV room by Mr Knoetze. The heat from that fire would have travelled up into the chimney void built up against the exterior of Tikwe 2. A roof truss which passed into that void would have become heated, repeatedly every time the fire was lit to the point where it burned through the brick wall through which it passed, igniting material below it, which could include the polystyrene cornice which would have dropped burning droplets down onto articles below which could include the curtain and duvet on the bed ...'

[48] This deduction is not anything far from Mr Knoetze Snr's first hand evidence both in terms of frequency of use of the fireplace during winter occasioning the roof truss to become repeatedly heated, and in terms of observing the fallen curtain setting alight the duvet.

[49] In explanation of his hypothesis on the origin or ignition source of the fire Mr Kemp went on to say:

[T]he fire ... cause requires an origin ... in terms of a competent ignition source material first ignited in circumstances that bring them together. So a fire involving just a duvet and curtain on a bed would need a competent ignition source [which] could be anything from a malfunctioning electrical device to being lit with a cigarette lighter for that matter and none were apparent in the immediate vicinity of the items involved in the fire as observed by Mr Knoetze which drove me to consider alternative fire origins and a mechanism of spread between what is considered potential fire origin above ceiling and the observed items involved below ceiling.

[50] Referring to the summary compiled on his behalf he confirmed the following extracts pertaining to the origin and ignition source of the fire:

‘19.5 Mr Kemp will testify that in his view the fire originated in the roof void and close to the chimney above the left spare room.

20. In his expert opinion the fire was caused by exposure of roof timbers passing through the chimney brick and mortar wall being exposed to heat from the fire lit below. The heat which accumulated under the chimney cap caused the roof timber to dry out, to char and eventually to ignite.’

[51] His definitive view is thus:

‘Mr Brown: What was the competent ignition source?

Mr Kemp: The timber burning through the brick wall from the chimney just above the corner.’

[52] Recapitulating briefly the contents of the joint minute, the experts agree that:
(a) the three mechanisms of heat transfer are convection, conduction and radiation;
(b) construction of the chimney with a wooden roof timber passing through it

constituted a fire hazard; and (c) there is no physical evidence that the truss in question of unit 2 had charred prior to the fire.

[53] The import of the joint minute does not require extended deliberation. The latent defect manifest by a wooden roof truss passing through the chimney irrefutably constitutes a fire hazard. A fire was made. There was heat in the chimney. As plaintiff's counsel plainly put it in his opening address 'all of the factors necessary to make perfect circumstances for something to catch alight came together' The absence of physical evidence of charring takes the matter nowhere.

[54] Turning for a moment somewhat discursively to Mr De Beer, his supplementary summary reveals that a roof truss that protruded into the masonry of the chimney of unit 1 was removed. On examining it he found slight evidence of charring on its surface that faced the chimney flue pipe where an imperfection in the wood was present. Considering that Mr De Beer did not testify, this aspect of his summary assumes neutral status.

[55] In the light of the propositions advanced by Mr De Beer in his report and summary, it was argued that Mr Kemp failed to scientifically establish the origin and cause of the fire and that his report and expert summary stands to be rejected. On the evidence presented, it is my view that the scientific standard of proof gives way to the legal standard. Proof of the fact in issue ought not be an exercise in metaphysics. On the probabilities, the exercise must be undertaken with common sense and logic in concluding that a particular state of affairs occurred having regard to the evidence that has been adduced. In other words, it is the wrong approach in so far as it is expected of the Court to disregard Mr Kemp's view as to what is most probable because his hypothesis is not scientifically beyond doubt. In the circumstances it is highly probable that the timber passing through the chimney void was the ignition source and that the below ceiling fire in the spare room is best explained by the dripping of burning polystyrene from the cornices onto the curtains and onto the duvet covering the bed below.

[56] To the extent that the defendant has led no countervailing opinion evidence, the Court is limited to the evidence presented by the plaintiff. There may well have

been merit in the submission that Mr Kemp's evidence does not bear scrutiny from a scientific approach, particularly on technical aspects such as whether the flue pipe in the unit was continuous or non-continuous, the specific mode of heat transfer, and the temperature within the flue. On the facts and probabilities, the outcome on the causation issue is not based on that approach. In that regard it is unnecessary to venture into the terrain of the literature referenced by Mr Kemp dealing with the research on the phenomenon of 'pyrophoric carbon'. The literature deals with the temperature ignition of wood in the instance of steam pipes that passed through wooden members.

[57] I turn to address the remaining issue for determination. The essence of the particulars of claim is that at the time of the sale of the unit, non-disclosure of the latent defect by the defendant was deliberate and fraudulent.

[58] In the conclusion of the sale agreement the Trust was represented by an agent. Mr Knoetze Snr dealt with the agent in the process leading up to the plaintiff's purchase of the unit. Although her mother, who is the sister of the trustee Mr Botes (who is cited in his representative capacity in these proceedings), was residing in the Tikwe Housing Development at the time, there is no evidence indicating that the agent was aware of the latent defect when the unit was sold. Regarding the trustee Mr Botes, the evidence of the plaintiff and Mr Knoetze Snr, was clearly that they had no interaction with him and that he never made any representation to them about the qualities of the unit.

[59] In the process leading up to the sale of the unit, Mr Knoetze Snr requested a civil engineer to inspect it because he was concerned about a crack in the dividing wall between the dining room and the kitchen. The engineer took a walk through the whole building and informed him that the crack posed no danger to its structural integrity and could be repaired.

[60] Testifying about the conclusion of the sale agreement, the plaintiff confirmed that he understood the import of the exemption clauses and that he was willing to sign the agreement on that basis. He testified, however, that he purchased the unit without knowledge of the latent defect; that if he had known thereof beforehand he

would have asked the defendant to fix the defect or he would have declined to purchase the unit. The essence of the plaintiff's evidence is that it was the failure to disclose the defect that induced him to buy the unit on the terms which he did.

[61] Against the backdrop of the evidence, the case advanced by the defendant is underscored by the contentions that it could not have fraudulently misrepresented facts to the plaintiff because neither the plaintiff nor Mr Knoetze Snr met or engaged directly with the trustee. And further, in terms of the exemption clause the plaintiff is precluded from pursuing a claim for any defect against the defendant, whether latent or patent, because the property was inspected before concluding the sale agreement.

[62] In my view there is no justification for the latter contention. The nature of the latent defect (i.e. a timber roof truss that entered the brick-and-mortar chimney and embedded into the brickwork within the void) was such that it was not ordinarily discernible, whether to the engineer solicited by Mr Knoetze Snr, or to any other person of normal intelligence.²⁶ Reliance on the exemption clause fails.

[63] As for the defendant's former contention, it is correct that there is no evidence of the plaintiff or Mr Knoetze Snr having met or engaged directly with the trustee. It is, however, not in dispute that the defendant is the developer that sold the unit to the plaintiff. Tritely, it is the duty of the seller to deliver the thing sold to the buyer without any defects. Our law has consistently applied the principle that a person who manufactures something which is sold will be considered to have been aware of the defect and will be liable for consequential losses arising therefrom even if the manufacturer does not profess to have expert knowledge and skill²⁷.

[64] In the plaintiff's written argument the submission is made that the word 'manufacture' (and by necessary implication the word 'manufacturer') should be given a wide meaning to include a developer such as the defendant.²⁸ In cross-

²⁶ *Schwarzer v John Roderick's Motors (Pty) Ltd* 1940 OPD 170 at 179-180.

²⁷ *Kroonstad Westerlike Boere Ko-op Vereniging v Botha* 1963 (3) SA 561 (AD) at 568A-570H; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 686C.

²⁸ *Secretary for Inland Revenue v Safranmark (Pty) Ltd* 1982 (1) SA 113 (A) at 122E; see also the useful discussion in Glover, *Kerr's Law of Sale and Lease*, 4th Ed para 8.2.5.2 p202.

examination the following factual evidence emerged by way of a question put to of Mr Knoetze Snr:

‘Mr Cilliers: You were not involved at all with the building of these units?

Mr Knoetze: No, not at all.

Mr Cilliers: So, if I put it to you that the Trust, the JRB Trust was assisted by Hekkie van Vuuren that would be in 2006, that area 2008, to build these, these units you cannot dispute that?

Mr Knoetze: I cannot dispute it, no.’

[65] It is not asserted that the defendant Trust did not build the units in the development. The positive assertion that the Trust built the units with assistance suggests that the Trust was involved in the building process. As the Trust was also the seller of the unit this puts the Trust on the same footing as a manufacturer-seller on the proposition of a wide meaning as contended for by the plaintiff. On this premise, that is the nature of the business of the Trust.

[66] In principle, a ‘voetstoots’ seller (in this instance, one who relies on an exemption clause) attracts no liability for latent defects unless aware of them at the time of the sale and did not disclose them to the buyer. This raises the issue whether the defendant knew of the latent defect at the time of the sale. The nature of the seller’s business²⁹ is one of the factors upon which proof of the issue depends.

[67] As contended in written argument, if for no other reason than by virtue of the fact that the Trust is the developer, it must be accepted that it was aware of the latent defect in the construction of the chimney. While mindful that fraud will not lightly be inferred³⁰, the fact that the chimney was not represented on the approved building plans occasions the reasonable inference that it fraudulently concealed the defect. In point, it was never put to any of the plaintiff’s witnesses that updated plans were submitted to and approved by the municipality.

²⁹ *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors* 1936 TPD 209 quoted with approval in *Glaston House (Pty) Ltd v Inag (Pty) Ltd* [1977] 3 All SA 88 (A) at 106.

³⁰ *Mashile v Gauteng Liquor Board and Others* [2024] ZAGPPHC 243 para 22. *Gates v Gates* 1939 AD 150 at 155.

[68] To conclude, it is the plaintiff who bears the overall *onus* of establishing his entitlement to the relief claimed (*Pillay v Krishna and Another* 1946 AD 946 at 952-953). He adduced evidence that accords substantially with his pleaded case. The defendant led no evidence in rebuttal to substantiate exculpatory assertions put to the plaintiff and his witnesses in cross-examination when indubitably there was an obligation to have pleaded them. In these circumstances there can be no weighing of probabilities on conflicting versions and the matter cannot be determined by weighing exculpatory assertions put to the plaintiff or any of his witnesses in cross-examination, where the defendant itself has not opened its version, or that of its own expert, to scrutiny under cross-examination.

[69] In the circumstances, I make the following order:

1. The defendant is liable for all such damages as the plaintiff may prove arising from the fire in Unit 2, Tikwe Housing Development on 24 June 2019.
2. The quantification of the plaintiff's claims for damages is postponed *sine die*.
3. On the separated issue of liability on the merits the defendant shall pay the plaintiff's costs on the scale as between party and party together with interest thereon at the legal rate from a date 14 (fourteen) days after *allocatur* and/or agreement to date of payment – such costs shall include the fees of counsel on scale B in terms of uniform rule 67A, and shall furthermore include:
 - 3.1 The costs attendant upon obtaining the expert reports by Mr Richard Heny and Mr Gerhardus Kemp.
 - 3.2 The reservation fees, if any, together with the qualifying fees, if any, of the plaintiff's expert witnesses together with travelling costs and accommodation costs, if any, in respect of whom notices in terms of rule 36(9)(a) and (b) have been filed of record.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff: *G Brown*, Instructed by Audie Attorneys c/o Netteltons Attorneys,
Makhanda (Ref: *R Hart*).

For the Defendant: *H J Cilliers*, Instructed by Symington De Kok Inc., c/o Nolte Smit
Inc., Makhanda (Ref: *T Kingwell*)

Date Delivered: 15 April 2025.