REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG HIGH COURT, PRETORIA)

A235/2015

15/12/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE 2016/12/15
SIGNATURE

In the matter between:

DIE REGSPERSOON VAN VILLA PORTUS SALUS Appellant

and

SCOPEFUL 66 (EDMS) BPK 1st Respondent

MATTHYS MACHIEL KRUGER 2nd Respondent

JUDGMENT

MAUMELA J

[1] The appellant is appealing against the order and judgment of Magistrate E.C Eckley of the Tlokwe District Court (the court *a quo)*, which was handed down on 9th of December 2014. The court *a quo* dismissed the appellant's claim against the respondents for payment of a certain amounts of money.

[2] At the trial, the second respondent admitted the quantum claimed but denied liability.

[3] The appellant is a sectional title development ("the development") which is situated in Potchefstroom. The first respondent was appointed as the developer when the development was constructed. The second respondent was the sole director of the first respondent and a trustee of the appellant.

[4] Appellant contends that the court *a quo* erred in not finding that it suffered damages. It submits that the court *a quo* erred in finding that it was not necessary for the appellant to replace the wooden stairs erected at the property of the appellant. Appellant contends further that the court *a quo* erred in finding that the conduct of the Municipality condoned the conduct of the second respondent. Further the appellant contends that the learned magistrate erred in relying on inadmissible evidence, more especially the evidence of the respondent's expert witness, Mr Booysen who testified outside of the scope of his expert notice. This was notwithstanding an objection by the appellant. Lastly, the appellant contends that the court *a quo* erred in not considering the provisions of section 23 of the National Building Regulations and Building Standards Act 103 of 1977.

[5] Appellant also raised issues with the fact that the magistrate incorrectly amplified his reasons further after the appeal had been filed. The appellant contends that after handing down its judgment, the court *a quo* becomes *functus officio*. As such the amplification should be regarded as irrelevant for purposes of this appeal.

Brief Factual Background

[6] In his capacity as director of the first respondent, second respondent was responsible to have the building plans of the development approved.

[7] In terms of the plans approved by the Tlokwe Municipality ("the Municipality") in 2003, the set of stairs leading to a fire escape door was indicated to be made of steel. However, after the building was completed, the said stairs were made of wood. As a result, the Municipality insisted that the set of access stairs made of wood should be replaced with steel ones as per the approved plan. The reason for the removal was that the approved building plan and the records of the Municipality reflected that these stairs should have been made of steel. On 14th April 2010 the Municipality wrote a letter to the appellant in which it insisted that the set of stairs consisting of a wooden structure be replaced by one made of steel in order to render it compliant with the applicable building plans which were approved. Despite the appellant requesting the respondents to replace the stairs, they did not. The appellant ended up replacing the stairs and paying the costs for the replacement.

[8] The appellant holds the second respondent liable in terms of section 40 of the Sectional Titles Act[1] in his capacity as a former trustee and more specifically on the basis that he was grossly negligent, alternatively, *mala fide* by erecting a structure contrary to the specifications indicated in the approved buildings plan, alternatively, in erecting a structure for which there were no properly approved buildings plans.

[9] The appellant argues that the second respondent should not be considered a layman in the field of construction. Appellant further contends that the second respondent was duty bound to exercise all care in all his involvement concerning the stairs fitted to the building of the development.

[10] Appellant alleges further that the second respondent, based on his fiduciary duties created by section 40, was obliged to disclose to the appellant that the structure was not erected in terms of the approved building plans. Appellant contends that at no stage did the second respondent indicate that there is a second building plan which has been approved and which provides for stairs made of wood.

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[1] Act 95 of 1986.

[11] Initially the second respondent relied on an occupancy certificate annexed to the papers herein as "X". At the start of the trial it disclosed a plan apparently approved in July 2004. According to the specifications in this particular plan the stairs fitted are to be wooden.

[12] The second respondent further sought to rely on the principle of estoppel. In that particular regard second respondent argues that by issuing an occupancy certificate, the Municipality made a negligent representation to the second respondent and that the second respondent acted on that misrepresentation to his detriment. The second respondent makes the point that the amended plans were approved and could be relied on for purposes of construction. It has to be noted that the occupancy certificate applies only to three of the six units built in the development. This too is common cause. Second respondent could not provide any occupancy certificate for the remainder of the units.

[13] On behalf of the appellant, Mr DJ Van Rooyen testified. He told the court *a quo* that he is employed by the Municipality. His position within the Municipality is that of "Boubeheersbeampte". According to him there was only one version of a building plan within the Municipality records and that plan has been approved. In that plan, the stairs specified for the building are made of steel.

[14] Dr Van Rooyen confirmed that the occupancy certificate available only relates to three of the six units. He referred to section 23 of the National Building Regulations and Building Standards Act[2]. This section provides as follows:

> *"No approval, permission, report, certificate act granted, issued or performed in terms of this Act by or on behalf of any local authority or the Board in with a building or the design, erection, demolition or alteration thereof, shall have the effect that-*

[2] Act No 103 of 1977.

(a) *such local authority or the Board be liable to any person for any loss, damage, injury or death resulting from or arising out of or in any way connected with the manner in which such building was designed, erected, demolished or altered or the material used in the erection of such building or the quality of workmanship in the erection, demolition or alteration of such building;*

(b) *the owner of such building be exempted from the duty to take care and to ensure that such building be designed, erected, completed, occupied and used or demolished or altered in accordance with the provisions of this Act and any other applicable law;*

(c) *any person be exempted from the provisions of any other law applicable in the area of jurisdiction of such local authority.*

[15] Van Rooyen told court further that there is a dispute with regard to which of the plans applies to a specific property. According to him the plan which is approved is numbered 103/0238 and it was approved on 12th June 2003. He said that the additional building plan is numbered 105-0030. The date on which the plan was stamped is indicated as 2nd January 2005. It is labelled "herindiening" which means "re-submission." According to him an approval of a plan remains valid for one year. Thereafter it is to be resubmitted whereupon the building period is extended for a year.

[16] Van Rooyen told court that in instances where a plan is put as an amended plan, the Municipality has to apply its mind anew. It must consider the plan in its entirety to see whether it accords with the building regulations. In instances where a plan is merely resubmitted as a "herindiening", the procedure followed is a mere formality with a view to extend the period over which the plan is to remain a subject of consideration and no consideration is given to the merits and the specifications of the plan.

[17] He stated that in this case where the additional plan introduced an evaluation in the sense of replacing steel-made stairs with wooden ones, the safety of the wooden stairs would have been considered. Amongst others, input would have had to be sought from the Fire Department. In this case that was not done. As matters stand the second plan providing for wooden stairs was

never approved notwithstanding the fact that it is stamped.

[18] The second witness to be called by the appellant was Mr Werner Kaiser. He is the chairperson of the appellant. He told court that the appellant was requested by the Municipality to replace the wooden stairs in order to render the building to be compliant with the approved building plan. He was under the impression that the managing agent requested second respondent to assist him in doing so.

[19] The second respondent denied liability. In doing so it did not reveal that there is an additional plan which provides for wooden stairs. Kaiser pointed out that the additional plan providing for wooden stairs emerged at the start of the trial. Appellant contends that this approach demonstrates recklessness and negligence on the part of the second respondent. Kaiser submits that it should be borne in mind that the second respondent was a trustee of the appellant over a considerable period of time.

[20] The second respondent testified that he is relatively new to the aspect of development. He argued that he did not attempt to mislead anyone when he changed the material comprising the stairs mounted in the building from steel to wood. He maintained that the issuing of the occupancy certificate led him to believe that no problems would arise due to the nature of the material of which the stairs are made.

[21] However second respondent offered no plausible comment concerning the fact that the occupancy certificate is in respect of only three units. There is no document validating the additional three units built at the premises. When confronted by reality second respondent changed his evidence and stated that there is a second occupancy certificate but did not produce any proof in this regard.

[22] Second respondent testified that although he only realised that at the resubmission of the plan a lesser fee was payable, his intention was not to mislead anyone when he did what is known as "herindiening". He also argued

that the wooden stairs comply with the plan. He pointed out that the wooden stairs are thick enough to ensure safety. To that end, he stated that: *"Omdat hout as hy 'n sekere dikte voldoen, dan word hy beskou as te voldoen".*

[23] Second respondent gave the impression in his evidence that what matters is the thickness of the material and nothing else. He admitted that once he was satisfied with the thickness of the wood, he need not make further efforts to find out on the compliance or otherwise of the wooden stairs.

[24] Mr AJ Booysen testified on behalf of the second respondent. He testified that he is the Assistant Head of the Fire Department of the Municipality. His expertise was not disputed. He maintained that wooden stairs would be safe to use in the building. While the appellant did not necessarily dispute the assertion that wooden stairs would be safe to use, it disputed the assertion that the specific stairs fitted to the building in issue comply with requirements. Appellant viewed that the wooden stairs fitted are not suitable because they do not conform to the required specifications.

[25] Under cross-examination, Mr Booysen conceded that the stairs fitted in the building in issue are inadequate. The specifications on the stairs fitted measured at 32 mm where the applicable regulations prescribed specifications measuring at 50 mm. It was also indicated that in the event where the stairs would have been made of solid wood a reduction of the size of the wood down to 40 mm could be allowable. Initially the appellant objected when Mr Booysen sought to indicate the effect of some fire retarding material but this objection was later withdrawn.

[26] Evidence regarding the fire retarding material did not form part of the notice of the second respondent. The said notice relied only on the thickness of the material comprising the stairs. Even where fire retarding material is used, it is a requirement that testing be done. In this case testing was not done.

[27] It is clear that the court *a quo* took into consideration the evidence presented by the second respondent to the effect that the wooden stairs have sufficient

thickness to ensure safety, and that with fire retarding material applied to them, the adequate safety is sufficiently ensured.

[28] In order to arrive at this conclusion, the learned magistrate admitted evidence into the record which did not form part of the second respondent's notice. This the magistrate did despite the objection on the part of the appellant. This inadmissible evidence contributed in the magistrate arriving at his decision to the effect that the stairs do comply with safety requirements. For that reason the magistrate found that it was not necessary for the appellant to replace the stairs.

[29] Over and above, the magistrate found that the thickness of the stairs is indicated as 38 mm whereas in reality it measured at 32 mm. Even if it measured at 38 mm, evidence proves that it would still be inadequate. From the above evidence the appellant presented sufficient motivation for the need to reconstruct the stairs if safety was to be insured. In correcting this anomaly appellant incurred expenses. In terms of section 40 of the Sectional Titles Act[3], appellant is entitled to claim the said expenses. It means therefore that where the appellant suffered damages as a result of fittings to the building that did not comply with the applicable regulations, that establishes a valid claim for the benefit of the appellant.

[30] Section 40 of the Sectional Titles Act reads as follows:

> *(1) A trustee of the body corporate shall stand in a fiduciary relationship to the body corporate.*
>
> *(2) Without prejudice to the generality of the expression 'fiduciary relationship' the provisions of subsection (1)shall imply that a trustee:*
>
> *(a) Shall in relation to a body corporate act honestly and in good faith, and in particular,*

[3]. 1986: (Act No 95 of 1986).

(i) *Shall exercise such powers as he may have to manage or represent the public operate in the interests and for the benefit of the body corporate; and*

(ii) *Shall not act without or exceed the powers aforesaid; and*

(b) *So in material conflict between his own interests and those of the body cooperate in particular,*

(i) *Shall not derive any personal economic benefit to which it is not entitled by reason of his office as trustee of the body corporate, from the body cooperate or any other person in circumstances in which that benefit is obtained in conflict with the interests of the body corporate;*

(ii) *Shall notify every other trustee, at the earliest opportunity practicable in the circumstances of the nature and extent of any direct or indirect material interest which he may have in any contract of the body corporate.*

(3)(a) *A trustee of a body cooperate was mala or grossly negligent act or omission has breached any duty arising from his fiduciary relationship, shall be liable to the body corporate for,*

(i) *Any loss suffered as a result thereof by the body corporate; or*

(ii) *Any economic benefit derived by the trustee by reason thereof.*

[31] In LAWSA 2nd Edition, Vol 24, at paragraph 451, the fiduciary duties of trustees are discussed as follows: *"This is in accordance with the common law principle that the person, or controls the asset of another, holds the power on behalf of another, almost a fiduciary duty towards that person. In terms of the act, the fiduciary relationship implies firstly that the trustee must act honestly and in good faith towards the body cooperate: the trustee must not exceed his or her powers of management and he or she must positively exercise them in the interests and for the benefit of the body cooperate."*

[32] In the case of *Rosenthal v Marks*[4] the court stated: *"Gross negligence..... connotes recklessness, an* ***entire file to give*** *consideration to the consequences of his actions, a total disregard of duty".* Appellant argues that the second respondent should not be treated as a layperson for purposes of deciding this case. He was a developer. He therefore has to be assessed on a scale of a reasonable developer. Appellant submits that the second respondent should be treated as an expert in the field of development.

[33] In LAWSA 2nd Edition, Volume 8, Part 1 at paragraph 125, the following stands written on negligence of an expert: *"The general test of negligence is adapted to accommodate situations where skill, being a special competence which is the result of aptitude developed by special training and experience is acquired. A person who engages in a profession, trade, calling or any other activity which demands special knowledge and skill, must not only exercise reasonable care, but measure up to the standard of competence of a reasonable person professing such knowledge and skill. The* ***diligens paterfamilias*** *is placed by the reasonable expert and, in assessing the attributes required, the court will have regard to the general level of diligence possessed and exercised at the time by members of the branch of the profession to which the practitioner belongs."* It states further: *"The test has two components: the possession of necessary knowledge and the exercise of necessary care, skill and diligence."*

[34] Appellant argues that as a developer the second respondent gave himself out as an expert, and a developer with the necessary skill and competence, not only to do development, but also to do it within the provisions of the National Building Regulations and Building Standards Act. Applicant contends that the second respondent failed to give consideration to the consequences of his action, thereby rendering himself to be in total disregard of his duty. It is argued that the conduct of the second respondent deviated to a great extent, from the appellant's duty of care that should be expected of him.

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[4] 1944 TPD 172 at page 180.

[35] In this case it has been found that the second respondent deviated from an existing plan which was approved. He was duty-bound to resubmit the building plans in order to underline (not sure what you mean by this) the development to the plans. He failed to provide occupancy certificate for the totality of the units built. By virtue of not having complied with the prescribed standards, the stairs erected compromised the safety of users. In that way it endangered public safety.

[36] When called upon to rectify the anomaly the second respondent exhibited a care-free attitude. Concerning the defence raised by the second respondent in the form of estoppel the following deserves consideration. The occupancy certificate does not cover all the units erected within the premises. As such, even if the second respondent were to succeed in relying on estoppel, there would still be a problem with regard to the additional units not covered by the occupancy certificate produced. On that basis the defence of estoppel does not answer for the entirety of the case the second respondent is to answer for.

[37] On the basis of the above the court finds that in not finding that the appellant suffered damages, the court *a quo* erred. The magistrate ought to have found the second respondent have been bound to replace the stairs due to the fact that they were not compliant with the specifications indicated in the approved building plans.

[38] In the result, the appeal must succeed and the following order is made:

1. The appeal is upheld.
2. The order of the court a quo handed down on 9th December 2014 is set aside and substituted by the following order:

   'The second respondent is to pay the appellant the amount of R 61, 690-00'.
3. The second respondent is to pay interest on the said amount of R 61, 690-00 at the rate of 15.5% per annum calculated from 14 July 2011.

4. The second respondent is to pay plaintiff's costs, which costs shall include the cost of counsel on a Magistrate's Court scale.

5. Second respondent is to pay the costs of the appeal.

T. A. Maumela
Judge of the High Court

I agree

N P Mngqibisa-Thusi
Judge of the High Court

Appearances:

For Appellant: Adv
Instructed by:
For Second Respondent: Adv
Instructed by: