REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES:
~~YES~~ / NO
[3] REVISED
DATE 4/12/16 SIGNATURE

7/12/2016

CASE NO: A673/2015

In the matter between:

M F COCHRANE First Appellant
N E S COCHRANE Second Appellant

and

K P BEZUIDENHOUT First Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY Second Respondent

JUDGMENT

J W LOUW, J

[1] The first and second appellants, to whom I shall refer as the plaintiffs, instituted an action against the first respondent, to whom I shall refer as

the defendant, in which the plaintiffs claimed an order directing the defendant to reconstruct the service road within the Northview Country Estate and the boundary wall surrounding the estate in a proper and workmanlike manner and in accordance with proper engineering standards, alternatively an order for payment of damages. The plaintiffs had each purchased a vacant piece of land in the estate from the defendant on which they have each built a dwelling house. The plaintiffs' cause of action was that it was an implied, alternatively tacit, term of their respective sale agreements that the defendant would, or would have, ensured that the service road and boundary wall were constructed in a proper workmanlike manner and according to proper engineering standards, and that they were not so constructed.

[2] In his plea, the defendant did not expressly deny that he would have ensured that the boundary wall and the service road were constructed in a proper workmanlike manner and according to proper engineering standards. What was pleaded in respect of the boundary wall, was that it was erected long before the sub-division of the farm (from which the estate was sub-divided); that it was only erected for the simple purpose of demarcation of the general boundary of the farm; and that it was erected in accordance with the policy, structural requirements and approved building plans required by the Peri Urban Health Board. In respect of the service road, it was pleaded that the conditions of sub-

division do not specifically state any particular engineering or construction standards or requirements to which such road must comply.

[3] The background facts which appeared from the evidence given by each of the husbands of the plaintiffs was that the estate was marketed as an exclusive, fully enclosed and walled estate; that they inspected the estate with their wives before the respective properties were purchased by their wives; that the boundary wall was important for them as it provided security; that the wall appeared to be in pristine condition and to have been recently sand-bagged; and that the service road was relatively new and in top condition.

[4] The plaintiffs presented the evidence of a civil structural engineer that the boundary wall was unsafe and non-compliant with the requirements of the National Building Standards and Building Regulations Act 103 of 1977 and, in his opinion, required to be demolished and reconstructed. He testified that the internal roads were not built according to acceptable engineering standards and were breaking up as a result of the unacceptable pavement method which had been used.

[5] At the close of the appellants' case, the defendant applied for absolution from the instance, which was granted by the trial court. Leave to appeal to the Full Court was granted on petition to the Supreme Court of Appeal.

[6] The court *a quo* said in its judgment that the plaintiffs' cause of action as pleaded was that the conditions of subdivision are implied or tacit terms of the written agreements of sale which the defendant failed or neglected to fulfil. Insofar as this statement may refer to something else than the plaintiffs' pleaded cause of action mentioned in para. [1] above, it is incorrect.

[7] The judgment further states that the two obligations of the defendant which were in issue were to provide and maintain the perimeter wall in proper condition and applicable standards and to provide and maintain the service road in proper condition. The court held that the perimeter wall and the service road were not part of what the plaintiffs had bought and that they can only be aspects in which the plaintiffs share a communal interest with other owners or members of the home owners association. Consequently, so the court held, the terms sought to be implied by the plaintiffs cannot be implied as necessary terms as they would import obligations on the defendant which are expressly provided to rest with the home owners association.

[8] In my view, the court erred in its finding that the terms which the plaintiffs sought to import were expressly provided to rest with the home owners association. It is so that the home owners association has the obligation in terms of the conditions of sale, which form part of the sale

agreements, to maintain the "general area" as defined in the conditions of sale, which includes the boundary wall and the internal (service) road, but it has no obligation to provide or construct anything. It was common cause that the obligation to provide and construct the wall and the road was that of the defendant. The defendant, on the other hand, has no obligation to do any maintenance of those facilities.

[9] The *ratio* of the decision of the court *a quo* was that the internal road and the perimeter wall were not part of what the plaintiffs bought. That is obviously correct. But does it follow that the terms contended for by the plaintiffs could not be found to have been tacit terms of the sale agreements?

[10] In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*[1] the following was said by Corbett AJA at 533A–B:

"The practical test to be applied - and one which has been consistently approved and adopted in this Court - is that formulated by SCRUTTON, L.J., in the well-known case of Reigate v Union Manufacturing Co., 118 L.T. 479 at p. 483:

"You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would have both replied: 'Of course, so-and-so. We did not trouble to say that; it is too clear.'"

[1] 1974 (3) SA 506 (A)

This is often referred to as the "bystander test".

[11] I have referred to the evidence of the plaintiffs' husbands relating to the background facts and circumstances attendant upon the sales agreements coming into existence. Having regard to those facts and circumstances, if a bystander had at the time asked whether the defendant would ensure, or would have ensured, that the service road and boundary wall were constructed in a proper workmanlike manner and according to proper engineering standards, I have little doubt that the plaintiffs and the defendant would have replied: *'Of course. We did not trouble to say that; it is too clear.'*

[12] As a consequence of the trial court's finding that the internal road and the perimeter wall were not part of what the plaintiffs bought and that the terms sought to be implied could therefore not be implied as they would import obligations on the defendant which rested with the home owners association, it did not consider the bystander question (whether in respect of its statement that the conditions of subdivision were the implied term contended for by the appellants, or the implied term as pleaded by the plaintiffs).

[13] In my view, the court erred in its reasoning. The appellants bought properties in an upmarket estate and in terms of the conditions of sale would automatically become members of the home owners association

and be entitled to the benefits and use of the common facilities. Even though the plaintiffs did not buy the wall or the road, there is no reason why the tacit term contended for by the plaintiffs cannot in these circumstances be imported into the contract. One may ask the question: What would have happened if the defendant failed to construct the road which, although not expressly mentioned in the sale agreements, was clearly a tacit term and was common cause to be an obligation of the defendant? The answer is obvious: The plaintiffs would have been entitled to approach the court for an order directing the defendant to construct the road. If it was a tacit term that the defendant would construct the road, why would it not also be a tacit term that the road would be constructed in a proper workmanlike manner and according to acceptable engineering standards?

[14] The test to be applied where absolution is sought at the close of a plaintiff's case is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.[2] A further consideration that is important in the present matter, is that where a plaintiff's case depends on the interpretation of a contract, a court would normally refuse absolution unless the proper interpretation is clear and beyond question.[3] The trial court's interpretation of the sales agreements was that, because the plaintiffs had not purchased the service road or the boundary wall, the

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[2] *Claude Neon Lights (S.A.) Ltd v Daniel* 1976 (4) SA 403 (A) 409G-H
[3] *Botha v Minister van Lande* 1967 (1) SA 72 (A) E-F

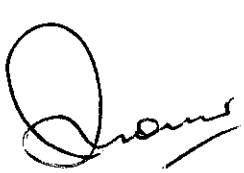
tacit term contended for by the plaintiffs could not be imported into the agreements. That finding, as I have indicated, was wrong. A court, applying its mind reasonably to the evidence presented by the plaintiffs, could or might have found for the plaintiffs at the close of their case.

[15] It follows that the appeal must succeed. The order which I make is the following:

[a] The appeal is upheld with costs, such costs to include the costs of the appellants' application for leave to appeal in the Supreme Court of Appeal and the court *a quo*.

[b] The order of the court *a quo* is set aside and replaced with the following order:

The defendant's application for absolution from the instance is dismissed with costs.



J W LOUW
JUDGE OF THE HIGH COURT

I agree

L M MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree

P M MABUSE
JUDGE OF THE HHIGH COURT

Counsel for appellants: Adv. G F Porteous

Instructed by: Stokes Attorneys, Randburg

Counsel for first respondent: Adv. E P van Rensburg; Adv. W J Dreyer

Instructed by: Van Zyl le Roux Inc, Pretoria