'Not Reportable'

CASE NO.: (T) I 2281/2002
(P) I 1296/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GERNOT MAXIMILIAN PIEPMEYER **Plaintiff**

and

THE MUNICIPALITY OF SWAKOPMUND **Defendant**

***CORAM*: SILUNGWE AJ**

Heard on: 2006 November 15th – 17th

Delivered on: 2011 September 16

JUDGMENT

SILUNGWE AJ: [1] In this case, the Defendant applied for absolution from the instance at the close of the Plaintiff's case.

[2] The Plaintiff and the Defendant are represented by Messrs Nel and Heathcote, respectively.

[3] The plaintiff's case is based on delict, namely, that Mr Victor – the defendant's deputy building inspector – negligently pointed out to Mr Boucher – the plaintiff's builder – a wrong Erf (i.e Erf 4013), and further, that the respondent negligently installed a water meter on the said incorrect Erf (the correct Erf being 4014). Mr Boucher commenced the plaintiff's building project on June 6, 2000. As a resulting of the alleged negligence by the defendant, through Victor's wrong pointing out of Erf 4013, instead of Erf 4014, and the installation of the water metre on Erf 4013, the plaintiff built a dwelling house on the wrong Erf. When this fact came to light after the plaintiff had sold the constructed house to a third party. The plaintiff entered into negotiations with his purchaser, the owner of Erf 4013 and the defendant to resolve the issue. The issue was resolved by, *inter alia,* the purchaser buying Erf 4013 from the owner thereof. The plaintiff claimed that, as a result of the defendant's negligence, he suffered damages for which the defendant is allegedly liable to him.

[4] A synopsis of this case is that, in December 1999, at an auction held at Swakopmund, the plaintiff bought from the defendant an unimproved immovable property known as Erf 4014. The transaction was subsequently confirmed in terms of a Deed of Sale which was signed by the parties on February 14, 2000. In response to the defendant's Request for Further Particulars for Trial Purposes dated May 17, 2006, the plaintiff stated as follows:

> "Ad paragraph 1.1.1
>
> (a) The first time that the situation of Erf 4014, Swakopmund was ascertained by Plaintiff was when it was identified and pointed out by Defendant by way of a marker and beacons for few days prior to and on the day of the auction at which the Plaintiff purchased the Erf …"

In evidence, the plaintiff testified that, subsequent to the auction, he visited the Erf (Erf 4014) three or four times, "if not more", during the 1999 December holidays.

[5] In June, at the hearing of this case, Mr Victor (Victor), the first witness for the Plaintiff, testified that when he, as the Plaintiff's builder, went with the plaintiff to visit the building site, the latter showed him Erf 4014. Victor added:

> "Mr Piepmeyer showed me the site, he didn't say it was Erf 4014 but he said that it is my property and that is where we have to build."

According to Mr Boucher (Boucher), there were no indications to the effect that that was Erf 4014 but the Plaintiff told him that a member of his (the plaintiff's) family was living at the back of his erf. He went on to say that there were no "beacons to identify the plot". The question-and-answer in cross-examination, progressed (*inter alia*) as follows. (see pp. 91 – 94 of the record):

> "Q: Yes so Mr Piepmeyer who was without the assistance of beacons had no difficulty … whatsoever to point this plot to you?
>
> A: Yes but he also said later on that he wasn't, when I asked him, are you sure, he said maybe you must just go to the …
>
> Q: No, you suggested, you said in-chief that you will go to the Municipality?
>
> A: Yes."

The question narrative continued at pp 106 – 107 in these terms:

"Q: Now if you suggested it, can you remember how long before the water meter was installed, you made this visit with Mr Piepmeyer?

A: Well the water meter was installed afterwards.

Q: Yes I know.

A: No I can't remember.

Q: And you know the first time according to the latest version, that there was a so called pointing out by virtue of the water meter, isn't that so?

A: Yes.

Q: There was according to you now, the visit together with Mr Piepmeyer, then the next thing that happened as to the physical situation, as I understand your evidence now is the water meter being installed?

A: That's right."

[6] Later on, during the cross-examination of Boucher, learned counsel for the defendant referred to, and read out, the provisions of Clause 20(1) of the Deed of Sale, and continued as follows (pp 190 – 191):

"But then, the most important part, the purchaser shall at his own risk ascertain the situation of the Erf and the seller shall not be liable to the purchaser for any erroneous indication or pointing out of the situation of the Erf, whether such erroneous indication or pointing out is due to an innocent or negligent misrepresentation on the part of the seller. Now the only question that I want to ask you about this is, when you said to Mr Piepmeyer that you will go and ask the Municipality to assist. Did he say to you about this clause?

A: No.

Q: Nothing?

A: No.

Q: And if he, now we read it Mr Boucher, can I take it that you understand it, the effect of it?

A: Yes.

Q: If he did tell you and he said, you know you can ask the Municipality, then you know … there is a problem because they said even if they do it so negligently, we can't hold them responsible, what would you have done?

A: Well if I knew that at that stage, I wouldn't go to the Municipality.

Q: Yes? To ask them?

A: Yes …

Q: Would you still have been satisfied or would you not have then rather said, if you were not certain, to get a Surveyor?

A: Yes if I knew that at that stage I would have done it, yes.

Q: A Surveyor rather?

A: Yes."

Later, Boucher agreed that it could be that Mr Piepmeyer pointed out the wrong erf to him. When Boucher was testifying in cross-examination about the installed water metre, he was asked (at 152):

"Q: You say, well they were on the same line, the marker and the water metre, ok. So if that was the case, that they were on the same line as the one of your marker, there could have been no doubt in your mind that it was exactly the same Erf that was pointed out by Mr Piepmeyer. Do you agree with that logic?

A: Yes. "

[7] When the plaintiff gave evidence in-chief, he told the Court about his visit to the erf in the company of Boucher to show him the location of the erf. He continued as follows (at 365):

> "Q: Very well. Now in a nutshell explain … what transpired between you and Mr Boucher at that visit?
>
> A: Alright firstly I had to identify my Erf and I utilized again, and as no other beacons were available anymore I utilized the method of taking 117B Lazarett Street or Anton Lubowski.
>
> Court: Yes repeat that as no natural beacons were available, what method did you use?
>
> A: I said I used Anton Lubowski address 117B as my reference point and I counted the three erven so the back of 117B and the next one to identify my Erf."

The plaintiff then showed "the Erf" to Boucher. He just showed the wall where his Erf was; he "could identify only those two beacons to him". Whereupon, Boucher told the plaintiff that, to find other beacons would not be a problem because they would have to dig up and be utilized in order to set out a foundation. He continued that he would have no problem if the erf did not have beacons to the road as it was very important to have two beacons at the backside.

[8] Its against, *inter alia*, the aforegoing backdrop, that the question before the Court is whether or not the defendant is entitled to absolution from the instance, as claimed.

[9] The correct approach to an application for absolution from the instance was expediently set out by the Supreme Court of Appeal (per Harms JA) in *Gordon*

Lloyd Page and Associates v Rivera and Another 2001 (1) SA 88 (SCA) at 92E-93A:

> "The test for absolution to be applied by a trial Court at the end of a plaintiff's case was formulated in *Claude Neon Lights (Sa) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:
>
> > '… [W]hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but 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. (*Gascoyne Paul and Hunter* 917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)).'
>
> This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no Court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Shmidt Bewysreg 4th ed. At 91-2).
>
> As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the Court must consider whether there is evidence upon which a reasonable man might find for the plaintiff (Gascoyne (*loc cit*)) – a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury. (*Buto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or Court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but if the occasion arises, a Court should order it in the interests of justice. Although Winsh, J was conscious of the correct test, I am not convinced that he always applied it correctly although, as will appear, his final conclusion was correct."

(Cf. *Bidoli v Ellistron t/a Elliston Truck & Plant* 2002 NR 451 at 453D-G).

[10] In the light of the principles set out above, it is clear that the test for absolution to be applied by a trial Court at the close of the plaintiff's case is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but 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. Hoffmann and Zefferf; *The South African Law of Evidence*, 4th ed. at 508 comments that:

> "The Courts have frequently emphasized that absolution should not be granted at the end of the plaintiff's evidence except in very clear cases and the questions of credibility should not normally be investigated until the Court has heard all the evidence which both sides have to offer."

See also Herbstein & Van Winsen, *The Civil Practice of the High Court of South Africa*, 5th ed. at 923: *Gafoor v Uni Versekerings adviseurs (Edms) Bpk* 1961 (1) SA 335 (A) at 340D."

[11] The defendant's first ground for the absolution application is based on Clause 20 of the Deed of sale between the parties. That Clause provides:

> "20.1 The ERF is sold according to the General Plan or diagram, referred to in paragraph 6 of Annexure "A" hereto, and the SELLER shall not be responsible for any differences or deficiency in area which may be shown by re-survey of the ERF and likewise renounces any excess. The PURCHASER shall at his own risk ascertain the situation of the ERF and the SELLER shall not be liable to the PURCHASER for any erroneous indication, or pointing out of the situation of the ERF, whether such erroneous indication or pointing out is due to innocent or (negligent) misrepresentation on the part of the SELLER. The PURCHASER shall ascertain the proposed final level of all roads which border on the ERF and the SELLER accepts no responsibility for any

> costs or loss arising from any innocent or negligent misrepresentation on the part of the PURCHASER in this respect."

[12] Mr Heathcote for the defendant argued that, in terms of the contract, the defendant has the right to rely on Clause 20 and the plaintiff has the obligation to identify and pinpoint the erf that he bought. In support of his argument, he cited *Soobramoney and Another v Acutt & Sons (Pty) Ltd* 1965 (2) SA 899D, in which the plaintiff perceived he was buying Plot 8 whereas, according to a plan, the erf for sale was actually Plot 9! Clause 8 of the sale agreement read:

> "The property with all improvements thereon is purchased as it stands, with all defects, whether patent or latent, and subject to all servitudes and additions (if any) contained in the title deeds or which have been otherwise imposed on the property, and I am deemed to have made myself acquainted with the nature, condition, beacons, extent and locality of the property, the seller and/or his agents being entirely free from all liability in respect thereof."

The Court held as follows at 906D-F:

> "Now, clause 8 of the offer signed by the plaintiffs clearly provides that, the purchasers' being 'deemed' to have made themselves acquainted with the 'nature, condition, beacons, extent and locality of the property', the seller and/or his agents' are entirely free from all liability in respect thereof'. This, to my mind, means that if the seller or his agent should innocently misrepresent the extent of 'the property' (i.e the property described in the offer, viz. sub 8), or should mistakenly indicate the beacons or boundaries of the property, the purchasers would have no claim against them, for the purchasers have, in effect, undertaken to verify those matters for themselves and to hold the 'seller and/or his agent' harmless in respect of shortcomings in any of those respects."

The Court continued at 907C-D:

> "There is in my opinion a high degree of probability that it was the intention of plaintiffs and of defendant that, upon conclusion of the contract of sale in terms of the offer, the defendant would be entitled to the benefit of, and plaintiffs would be bound to defendant by, the undertaking to hold it free from liability in respect of the matters referred to in clause 8."

[13] In response, Mr Nel's counter argument, on behalf of the plaintiff, was that, the particular part of clause 20 upon which the defendant relied pertained to the sale of the erf agreement. That agreement, he continued, was fully concluded and wrapped up, adding that the agreement was never intended to have any life beyond the sale itself. In Mr Nel's submission, the authorities relied upon by the defendant all dealt with errors made in identifying the erf during the conclusion of the sales agreement which, he claimed, was not what had happened in this instance. He stressed that, it was a period of many months after the sale had been completely wrapped up and completed when the plaintiff made use of a service that the defendant renders to the general public, and that, at that stage the parties were no longer in a seller-purchaser relationship.

[14] Having given consideration to what the learned counsel on both sides submitted in respect of clause 20 aforesaid, I have no hesitation in accepting Mr Heathcote's submissions which I find to be weighty. Mr Nel's argument is flawed because the plaintiff's (perceived) cause of action arose, not at the fall of the hammer in December 1999 or when the Deed of Sale was signed in February 2000, but when the plaintiff – acting through his contractor/agent (Boucher) – commenced construction of a dwelling house on someone's erf (Erf 4013), not on his own erf (Erf 4014). In my view, the provisions of the Deed of Sale had not gone dead but were alive and binding on both parties' at all material times.

[15] Counsel for the plaintiff further submitted that, in so far as the defendant's reliance on the provisions of clause 20 was concerned, the authorities make it clear that a decision as to the meaning/interpretation of a document should very seldomly be made at the closure of the plaintiff's case. It will only happen, the counsel continues, in exceptional cases where the interpretation upon which the defendant relies is virtually beyond doubt, adding that a decision on the meaning of a document is preferably reached only at the end of a case.

[16] In making the submission in the preceding paragraph (para 15), it is apparent that counsel lost sight of the fact that there was no dispute on the interpretation of clause 20. His submission can thus be applicable only to a case where an interpretation of a document or a provision thereof is in dispute. In such a case, guidance is to be found in Schmidt Rademeyer, *Lexis Nexis Law of Evidence* Issue 8, at 3-17 to 3-18 which reads:

> "If the plaintiff's case is based on a document, and the interpretation of the document is in dispute, the interpretation on which the defendant relies must be virtually beyond doubt before his application for absolution can succeed. A decision on the meaning of a document is preferably reached only at the end of a case."

(See also: *Gafoor v Unie Verseringsadviseurs (EDMS) & PK*, *supra*, at 340B-C.

[17] *In casu*, the defendant's case is, *inter alia,* based upon the provisions of clause 20 aforesaid. However, the interpretation of that clause is discernibly not in dispute. Hence, the argument on behalf of the plaintiff, in this regard, is inapplicable.

[18] In any case, the interpretation of clause 20 is not only straightforward, but it is also beyond doubt.

[19] The defendant's second ground for the absolution application relates to whether the defendant acted unlawfully by pointing out the wrong erf and installing the water metre on the wrong erf?

[20] In so far as the pointing out of the wrong erf is concerned, not only was there no statutory duty imposed on the defendant to perform such pointing out, there is also evidence to show that the plaintiff knew where Erf 4014 was located and pointed it out to his builder, Boucher. The evidence further shows that, out of an abundance of caution, Boucher suggested to the plaintiff that he approaches the defendant to assist him with the pointing out of the Erf. In any case, clause 20, whose interpretation is not in dispute, is available for the benefit of the defendant and against the plaintiff.

[21] The installation of the water metre upon the wrong erf is, however, a different kettle of fish. It is not in dispute and, indeed, it is conceded, that the defendant owes a statutory duty to install water metres where such facilities are required. It is thus not surprising that para 31 of the defendant's Heads of Argument reads:

> "31.6 for purposes of this argument, it may be accepted (although it is not conceded) that the Municipality was negligent when it installed the water metre ..."

To compound the situation against the defendant, the interpretation of section 33 of the Local Authorities Act No. 23 of 1992, on which the defendant relies, is in dispute. The section provides as follows:

> "33. Subject to the provisions of this Act, no compensation shall be payable by a Local Authority Council, any member of a local authority council or any officer or employee employed in carrying out the provisions of this Act in respect of any act done in good faith under this Act."

Counsel for the defendant was at pains to demonstrate that the defendant owed no duty of care to the plaintiff in installing (at the plaintiff's request) the water metre, not upon the plaintiff's erf – Erf 4014 – but wrongly upon an adjacent erf – Erf 4013 – belonging to someone else.

[22] Counsel for the plaintiff argued that the defendant's reliance upon the said section 33 could not assist the defendant. The section, he continued, could never have intended to absolve local authorities from liability for their negligent conduct. He ingeniously illustrated the point by giving the following example: "If a local authority negligently leaves open a live electric wire, which then kills a father of 5 children – will they (the bereaved family) then be left without any claim for compensation for having lost their breadwinner?" He went on to say that this would be untenable and against public policy, adding that such an interpretation of the section (33) will also not stand up to constitutional scrutiny.

[23] As section 33 of the Local Authorities Act is in dispute, and the interpretation on which the defendant relies is thus not "virtually beyond doubt", the application for absolution cannot succeed. This conclusion renders it unnecessary to deal with other grounds raised by the defendant.

[24] In consequence of the aforegoing, I make the following order:

1. The application for absolution from the instance is refused, with costs.

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SILUNGWE AJ

COUNSEL ON BEHALF OF THE PLAINTIFF:

Mr Nel

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