IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

CASE NUMBER: A129/2021

In the matter between:

AV THERON AND SWANEPOEL INC FIRST APPELLANT

MATTHYS SWANEPOEL SECOND APPELLANT

and

NEILL SEAN KNOTT RESPONDENT

CORAM: **C REINDERS ADJP *et EM* BALOYI-MERE AJ**

JUDGMENT BY: **EM BALOYI-MERE, AJ**

HEARD ON: **16 OCTOBER 2023**

DELIVERED ON: **19 OCTOBER 2023**

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[1] In this judgment I will refer to the Defendants in the *court a quo* as the Appellants ("First and Second Appellant") and the Plaintiff in the *court a quo* as the Respondent. This is an appeal by the Appellants and a cross appeal by the Respondent against the order of the Honourable Magistrate A Mnguni handed down in the Magistrates Court of the District of Sasolburg on the 21st September 2021. The order by the Magistrate reads as follows:

1. The First and Second Respondents are ordered, jointly and severally, the one paying the other to be absolved to:

   (a) Pay the Plaintiff a sum of R150 000.00 (one hundred and fifty thousand rands); and

   (b) Interest thereon at a rate of 10.5% per annum from date of summons to date of final payment; and

   (c) To pay Plaintiff cost of suit at a party and party scale.

[2] Both the Appellants and the Respondent assail the findings of the Honourable Magistrate in this judgment, albeit for different reasons. The findings of the Magistrate are as follows:

"[17.1] There is overwhelming evidence that second defendant accepted a mandate from the plaintiff to perform certain legal services in the area in which the defendants were regarded as experts for him.

[17.2] Evidence also shows that the defendants rendered some advice which turned out to be erroneous and/or negligent.

[17.3] Evidence also show that as a result of such erroneous and/or negligent advise, the sale agreement between the plaintiff and Blue Dot was cancelled;

[17.4] Plaintiff was eventually able to sell his property to a third party at a later stage at a reduced price.

[17.5] The sale agreement with the third party (Trymore Investments) referred to the sale of the immovable property together with certain moveable assets which were specifically named. No amounts were placed on the said included movables.

[18] The agreement between the plaintiffs Blue Dot has specifically spelled out that the purchase price was R1 300 000.00 made up R700 000.00, for the fixed property, R500 000.00 for furniture and R100 000.00 for boat and trailer.

[19] For all intense and purposes it remains obvious that the difference between the agreements is a sum of R250 000.00. The defendants argued that this amount cannot be read to be representing the damages or loss suffered by plaintiff mainly because there was no proper assessment of the damages suffered. It is also the defendants' position that; the question whether such erroneous legal advice is connected to the loss remains unanswered.

[19.1] The inexorable conclusion in my judgment is that the plaintiff lost a deal as a direct result of incorrect legal advice he received from the defendants, in this regard, the defendants are naturally

guilty of dereliction of duty and were negligent. The argument that there is lack of proximity to the wrongdoing by the defendants and the damages suffered cannot be sustained as such argument is not based on facts but only on hypothesis and innuendos.

[20] The only question that remains is, to what extent did the plaintiff suffer the damages? The glaring reality is that it is unknown where the boat and the trailer ended. Although the plaintiff insists it went with the second contract, this assertion remains suspicious. I see no reason why same was not specifically included in the agreement with the buyer. For obvious reasons any damages awarded in the plaintiff's favour must take into account this question.

[21] It is my finding that the defendants breached the mandate from the plaintiff in that they rendered incorrect advise to the plaintiff which was detriment to him. In so doing, defendants are liable for the consequences of such negligence. The damages suffered are easily quantifiable in view of the documentary and oral evidence received."

A Brief Background of the Facts

[3] The Respondent entered into an oral professional service agreement on or around April 2014 with the Appellants wherein the Appellants would provide expert advice in respect of the sale

and transfer of his property from Respondent to the entity Blue Dot Properties 1784 CC ("Blue Dot").[1]

[4] The Appellants were also instructed to draw the relevant offer to purchase, which, when accepted, would serve as a deed of sale and to attend to all necessary actions in order to ensure the effective sale and transfer of the property from Respondent to Blue Dot.[2]

[5] The Appellants accepted the mandate. By accepting the mandate, and by implication, Second Appellant held himself out as a specialist practitioner having the relevant expertise, knowledge and skill in that field of legal practice and that he would competently handle Respondent's mandate with the required care, diligence and skill. This much was not disputed by either of the parties.[3]

[6] On the 08th April 2014 the Respondent and Blue Dot signed a deed of sale in respect of immovable property and a conditional movable property sale.[4]

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[1] Record volume 1 page 8 para 6.
[2] Record volume 1 pages 8 – 9 para 7.
[3] Record volume 1 page 9 para 8.
[4] Record volume 1 page 12 para 16.

[7] The Blue Dot deed of sale lapsed on the 08th May 2014 for failure to comply with the suspensive clause[5] within 30 days of the signing of the agreement. The purchase price for the Blue Dot deed of sale was R1 300 000.00[6].

[8] The Respondent was informed by the Appellants on the 16th May 2014 that the agreement with Blue Dot was cancelled.[7] Subsequent to the cancellation of the agreement between the Respondent and Blue Dot, the Respondent continued to try and sell the property in the market while still labouring under the impression that he needed the consent of 100% of all owners in order to extend the floor area of the property.

[9] On or about the 21st September 2015 the Respondent sold the property to Trymore Investment 690 CC for a lesser amount of R1 050 000.00, that is R250 000.00 less than the original amount offered by Blue Dot in terms of the first deed of sale.[8]

[10] An annual general meeting of the Riverside Residence was held on the 31st October 2015 where it was clarified that an owner needs consent of 75% of home owners in order to extend the floor area of his or her unit onto the common property. The

[5] Record volume 1 page 11 para 13.
[6] Record volume 1 page 13 para 17.
[7] Record volume 1 page 14 para 20.
[8] Record volume 1 page 25 para 22.

Respondent then realized he had suffered a loss of R250 000.00 by following the erroneous advise of the Second Appellant.[9]

[11] Appellants were alerted to their breach of the mandate by the Respondent and on the 30th October 2015 the Respondent alleges that the Appellants admitted that they erred in the advise on the percentage on consent and apologized and further waived the fees levied for attending to the mandate.[10] This was denied by the Appellant.[11]

[12] The fact that the Second Appellant admitted and apologized to the Respondent for the erroneous advise was also put in a letter addressed to the Appellants and dated the 09th February 2016[12] by the Respondent's attorneys. The Appellants simply sent a letter with a bare denial[13] the same as their plea referred to herein above.

Common Cause Facts

[13] It is common cause between the parties that an oral mandate in respect of the sale of both the immovable and some moveable property was concluded between the Respondent and the

[9] Record volume 1 page 15 para 23 and 24 and page 117 – 1120.
[10] Record volume 1 page 17 para 28.
[11] Record volume 1 page 82 para 28.
[12] Record volume 1 pages 125 – 131.
[13] Record volume 1 page 132.

Appellants. The Respondent's immovable property encroached over the common property of Riverside Beach Club.

[14] Although it was later confirmed by the AGM that the Respondent required consent from 75% of the owners of Riverside Beach Club to formalize the extension of the floor area of his unit onto the common property, the Second Appellant had erroneously advised the Respondent that he was required to obtain the consent of 100% of the owners at Riverside Beach Club in the event of him wanting to formalize the transfer of the encroachment of his property.

[15] In the Blue Dot Properties' deed of sale the purchase price of the immovable property was stated as R700 000.00 and the proposed sale of the property to Blue Dot Properties was conditional on the sale of furniture plus a boat and trailer valued at R500 000.00 and R100 000.00 respectively.

[16] The sale of the property to Blue Dot Properties fell through and the Respondent eventually sold the immovable property and some of the movable property to Trymore Investment 690 CC at a price of R1 050 000.00.

Findings of the Court

[17] As this was originally an action, the Honourable Magistrate heard evidence when the trial was conducted. I have already referred to the findings by the Honourable Magistrate in the *court a quo* in the preceding paragraphs and it is not necessary for me to repeat the findings as mentioned in the judgment.

[18] It is trite that an Appellate Court will not likely interfere with the decision of a lower court exercising a discretion when determining an issue unless the discretion was not exercised judicially and properly. Put differently, when a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an Appellate Court to interfere unless it is satisfied that this discretion was not exercised judicially, or that it had been influenced by wrong principles or a misdirection of the facts. The Constitutional Court held as follows in relation to the discretion exercised by a lower court in **Trencon Construction v Industrial Development Corporation of South Africa Limited and Another**[14]:

"A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by the Court in many instances, including matters of costs, damages and in the award of a remedy

[14] 2015 (5) SA 245 (CC) at para 85.

in terms of section 35 of their Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible. …"

[19] The Respondent in their heads of argument at paragraph 8 correctly submitted that the *court a quo's* order is unassailable. This court agrees with this submission. Both the Appellants and Respondent take issue with whether the suspensive clause was included in the contract on the insistence of the Respondent or of the Appellant. The *court a quo* did not find that the inclusion of the suspensive clause is the trigger to the loss or damages suffered by the Respondent. Instead the loss or damages suffered by the Respondent are triggered by the negligent advise given by the Appellant to the Respondent. Therefore the consequences flow from the incorrect advise given to the Respondent and in breach of the contractual agreement entered into between the Respondent and the Appellant. The question to be asked in this respect is aptly explained in **Life Healthcare Group (Pty) Ltd v Suliman**[15] as follows:

"16. In my considered view the court a quo, with due respect, asked the wrong question in respect of factual causation. The correct question should have been: Was it more probable than

[15] 2019 (2) SA 185 (SCA) at para 16 and 17.

not that the birth injuries suffered by the baby could have been avoided if Doctor Suliman had attended the hospital earlier, after the 18h35 phone call?....

17. All the evidence shows that it is more probable than not that had Doctor Suliman attended the hospital earlier the injuries would have been avoided. For that reason the hospital succeeded in proving factual causation on a balance of probabilities."

[20] Further, the "but-for test" was also considered in the matter of **ZA v Smith and Another**[16]:

"In this regard this court has said on more than one occasion that the application of the "but-for test" is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his/her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty."

[21] In this present matter, the question to be asked is would the Respondent have suffered any loss if the Second Appellant had given him the correct advise, that is, he needed 75% consent from all the owners of the units in that complex. Put differently, would the Respondent still have sold his moveable and

[16] 2015 (4) SA 574 (SCA) at para 30.

immovable property at a lesser price if he knew that he only needed 75% consent. The answer to this question is in the negative. It is therefore clear that the Respondent took the decision to sell his property for less than what he could have received from Blue Dot because he knew that he could not get 100% consent.

[22] I am in agreement with the evaluation of the evidence and the conclusion that the *court a quo* reached in that due to the Second Appellant's erroneous advise that the Respondent was required to obtain 100% consent from all owners of the communal property, the Respondent having failed to obtain same as he stopped after failing to obtain consent from one of the members, then the suspensive condition could not be met which led to the ultimate cancellation of the contract between the Respondent and Blue Dot. It is also not rocket science to conclude that the Second Appellant, in ill advising the Respondent, committed an inexcusable breach of the contract between attorney and client and that rendered the Appellant guilty of dereliction of duty of care as attorney specializing in property law. This fact was admitted by the Appellants.

[23] The Appellants now approached the court and submits that this negligence is “negligence in the air” in that no consequences or sanction can flow from that type of negligent advice. In considering this argument by the Appellants, the court in the matter of **Rose Lillian Judd v Nelson Mandela Bay Municipality**[17] per Justice Alkema at paragraph 9:

“[9] Because our law does not recognize negligence “in the air”, it is now trite that the issue of wrongfulness must be determined anterior to the question of fault. The element of fault is only capable of being legally recognized if the act or omission can be termed as legally wrong. In the absence of wrongfulness, the issue of fault does not even arise. These are two separate and distinct elements of the same delict, each requiring its own test and approach, and not to be confused or conflicted.”

[24] And more recently, in the matter of **Minister of Safety and Security v Van Duivenboden**[18] Justice Nugent formulated the principle on negligence as follows:

“Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful and thus actionable, only if it occurs in circumstances that the law recognizes as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in a case of a negligent omission. A negligent omission is unlawful

[17] (CA149/2010) [2011] ZAECP EHC 4 (17 February 2011).
[18] 2002 (6) SA 431 (SCA) at para 12.

only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognizes the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in Kruger v Coetzee namely whether a reasonable person in the position of the defendant would not only have foreseen the harm that would also have acted to avert it."

[25] In this present case we are not dealing with an omission but we are dealing with a positive act where a legal practitioner incorrectly advised a layperson and consequent to that advise the layperson acted and suffered damages.

[26] I am therefore in agreement with the *court a quo* that the Respondent has suffered damages as a result of the negligent advice that he received from the Appellants.

[27] On the issue of the sale of the boat, the Respondent failed to give any evidence that the boat was sold. The deed of sale signed between the Respondent and Trymore Investment specify that included in the sale of the immovable property, is the moveable properties that are specifically stipulated in section A9 and 12 of

the agreement. The agreement does not make any provision for the inclusion of the boat in the sale agreement. I therefore agree with the finding by the *court a quo* that on a balance of probabilities the boat was not part of the deal.

[28] I therefore propose the following order:

1. Both the appeal and the counter-appeal are dismissed.
2. The order of the court a quo is confirmed.
3. Each party to pay its own costs.

EM BALOYI-MERE AJ

I concur.

C REINDERS ADJP

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