79/56

G.P.-S.103675—1954-5—1,000. U.D.J. 219.

79/56

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Division).
(Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

GERMISTON CITY COUNCIL ..... Appellant.

versus

CHUBB & SONS LOCK & SAFE CO. (SA) (PTY) LTD ..... Respondent.

Appellant's Attorney / *Prokureur vir Appellant* Kerk Kotze

Respondent's Attorney / *Prokureur vir Respondent* Kerk-Berry & Penny

Appellant's Advocate / *Advokaat vir Appellant* J. Hanna, Q.C. (& H.C. Nicholas)

Respondent's Advocate / *Advokaat vir Respondent* A. Simpson Q.C. (& T.S. Sievers)

Set down for hearing on / *Op die rol geplaas vir verhoor op* Mon. — Fri, 12th to 16th Nov., 1956.

(WLD) 4.10.

2.4.56 ~~9.45 — 12.50 (5.15)~~ ~~— 4.25~~

6/11/56 — 9.45 — 12.50 (5.10)
2.15 — 4.25

14/11/56 — 9.45 — 12.50 (5.20)
2.15 — 4.25

15/11/56 — 9.45 — 12.55
2.15 — 4.25

16/11/56 — 9.45 — 11.45 — C.A.V.

Posted:

The appeal is allowed with costs and the judgment is altered to one of absolution from the instance with costs

[signature]
22/11/56

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

GERMISTON CITY COUNCIL Appellant

and

CHUBB & SONS LOCK AND SAFE COMPANY(S.A.) (PTY) LTD. Respondent

Coram: Schreiner, Fagan, de Beer, Reynolds et Beyers JJ.A. et ~~Hall, A.J.A.~~

Heard: 12th, 13th, 14th, 15th and 16th November, 1956.

Delivered: 22nd. November. 1956

J U D G M E N T

SCHREINER J.A. :- In the year 1946 the appellant, which I shall call "the municipality", established the industrial township of Wadeville (absit omen) on land belonging to it. In the following year the municipality began to make roads and drains in the township, the work being done in sections. In one portion of the township Rendell Road, running approximately east and west, intersects Naginton Road, which runs in a curve but generally from north to south. Some distance to the south of Rendell Road Esander Road meets Naginton Road from

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the east but does not intersect it. Still further to the south Nagington Road is intersected by Osborne Road. Nagington Road has a tarred surface edged with a row of stones six inches high, called in the evidence a haunching. The exact date of the completion of Nagington Road is in dispute; the only direct evidence is that it took place shortly before the 19th July 1948. The general slope of the ground in this part of the township is downwards from west to east. Two adjoining stands, numbered 105 and 106, face Nagington Road on its eastern or lower side. On that side only one stand, No.107, lies between stand No. 106 and Rendell Road to the north, but there are a number of stands between stand No. 105 and Esander Road to the south. In August 1948 the municipality sold stands 105 and 106 to Leon Motors, which firm in 1949 caused a factory building to be erected thereon. The respondent, which I shall call "the company", acquired the two stands from Leon Motors, taking transfer in January 1952 and entering into occupation at the end of that year. It carried on in the factory the business of manufacturing safes, locks and security and strong room equipment. The factory,

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which is made of corrugated iron, lies on the eastern half of the stands; it is rectangular, with its longer sides running north and south. In March 1953 an administrative building, of brick, was erected on the western half of the stands, close to Nagington Road.

On the night of the 11th/12th October 1953 there was a heavy fall of rain in the area and a quantity of muddy water entered the factory building through spaces under certain large doors on its western side. The floor of the factory was covered to a depth of about four inches by silt-bearing water, and damage was thereby done to the machinery and stock. The company sued the municipality in the Witwatersrand Local Division for the loss incurred by it, claiming that the water which caused the damage would not have reached the factory if the ground to the west had remained in its natural state; this alien water, it was contended, was diverted ~~into~~ on to the company's property as a result of the construction of Nagington Road. The company alleged that the municipality had been negligent and in particular had negligently failed to protect the company's property by suitable drainage. RUMPFF J. awarded the company £4, 696. 13. 2 and costs, and the municipality

now/.....

now appeals to this Court.

The pleadings, with the particulars thereto, are lengthy and it is unnecessary to do more than summarise them. The company's main claim rested upon an allegation that the municipality had wrongfully and unlawfully constructed and graded Nagington Road in such a way as to discharge upon stands 105 and 106 storm-water which would not otherwise have reached them and to concentrate and increase the natural flow on to and over those stands. The municipality in the first place denied that it had diverted on to the stands water that would not naturally have reached them and also denied that if any such water was so diverted it caused the damage complained of. Secondly, the municipality relied upon the allegation that, having laid out the township, it constructed Nagington Road before it sold the stands to Leon Motors; in these circumstances, so it was contended, it was not in law liable for any damage that might have been caused to the company, whatever faults there might be in the construction or drainage of Nagington Road. In the third place, the municipality relied upon the statutory authority to make roads and streets

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which is granted to it under the Transvaal Local Government Ordinance, 1939. This third defence the company sought to meet by alleging that the municipality had been negligent in that it had failed to provide any or adequate ~~storm~~ storm water drainage, the provision of which was reasonably practicable.

In the alternative, the company based its claim on an allegation that the municipality "negligently failed to provide and/or maintain any adequate "drainage in respect of water flowing onto and falling upon" Nagington Road. It particularised the negligence by alleging that in 1948 the municipality made an earth drain eastwards from Nagington Road along the northern boundary of stand 104, which adjoins stand 105 on the south; and that in 1952 the owner of stand 104 with the knowledge and consent of the municipality obstructed the drain by the erection of a building at the north-west corner of stand 104. Alternatively, the company alleged that the municipality was negligent in failing to provide alternative drainage after the earth drain was obstructed.

The municipality contended that the alternative claim disclosed no cause of action on the ground that, if it had not rendered itself liable under the

main/.....

main claim, it would not be liable for a mere failure to carry out the permissive power of making drains. It also denied that it had been negligent, and said further that the company had itself been the author of any loss caused to it by flooding from Nagington Road, in that (a) it, or someone acting with its knowledge and consent, had filled in an earth drain which the municipality had made on the eastern pavement of Nagington Road to lead water from that road into the abovementioned earth drain running along the boundary between stands 104 and 105; and (b) it lowered or allowed to be lowered the surface of the roadway over the eastern pavement of Nagington Road so as to make a spillway into its property for water in that road. There were finally a number of issues relating to the items making up the claim for damages.

The appeal clearly involves questions of law and fact. Some of the questions of fact may conveniently be discussed when the law has been considered, but certain basic issues of fact can be dealt with more satisfactorily at once. As is indicated above the municipality contends that the company failed to prove (a) that alien water entered the factory, and (b) that, if it did, it was the cause of the damage.

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The company relied largely on the highly evidence of Mr. Scott, a very qualified and experienced consulting engineer. He had prepared a plan of the locality and gave evidence that it correctly showed the flow lines of water over the area in question and that it also correctly showed that the construction of Nagington Road had increased the area draining to the western boundary of stands 105 and 106 from about 4 1/3 acres to 27½ acres. Subject to a query regarding the effect produced by a certain strip of railway line, into which it is unnecessary to enter, counsel for the municipality did not question these figures. The increase in the area draining onto Nagington Road where it is bounded by the two stands was due to the fact that the road was graded so that a catchpit and a storm-water drain, to be constructed in accordance with a drainage scheme which had been prepared, would carry the storm-water reaching this part of Nagington Road eastwards along the boundary between stands 104 and 105. The effect of making the road before the drains at this spot was to create what may be termed a long shallow dam in the roadway opposite stands 105 and 106, the wall of which dam was, first, the haunching and, afterwards, if the water rose above the haunching, the

eastern/?.....

eastern pavement itself. It was proved by levels taken along the boundary of the stands, which would generally provide a fair guide to the height of the dam wall, that in this vicinity water would first spill out of the dam at the gateway into the company's property, which is near its north-eastern corner. The next lowest point would be at or near the corner of Rendell Road. The third lowest point would be at the south-western corner of the company's property. RUMPFF J. found that the fourth lowest point would be across the pavement between the gateway and the administrative block.

There was no evidence from any one who saw the water on the company's property at the time of the storm; the evidence consisted of what was seen the next day and inferences drawn therefrom. It was not disputed by the municipality that there was a heavy storm that night, when probably about two inches of rain fell, and that water escaped from the dam through the gateway. In regard to that water the municipality contended that the company was itself to blame, for it should have kept the level of the entrance up to that of the pavement, or else should have asked the municipality to put in a concrete entrance up to the pavement level, which it was accustomed

to do on request. If it was only water from the gateway that entered the stands on the night of the storm the municipality relied also upon the flow lines shown on Mr. Scott's plan, which indicated that such water would pass to the north of the factory building and would not enter it. The municipality also contended that the evidence did not prove that the second lowest exit, at Rendell Road, would fail to carry off all the water in excess of that carried off by the gateway. There was barely a scintilla of evidence that water had entered at the third lowest point - the south-west corner of the stands. After an earlier storm, in March 1953, an employee of the company had seen signs of a flow of water from that corner towards the north-western entrance to the factory, which tends to confirm the inference to be drawn from Mr. Scott's flow lines that water from the gateway would pass to the north of the factory. The low place where the water entered at the south-western corner during the storm in March 1953 was filled up shortly afterwards.

The existence of what RUMPFF J. found to be the fourth lowest point of discharge, i.e. between the gateway and the administrative block, was disputed in the course of argument. There was evidence that a

low/.....

low unmortared wall fringing a car park north of the administrative block was seen after the storm to be broken down, with its materials carried eastwards for some twenty feet, and it was contended, and RUMPFF J. found, that a considerable body of water had crossed the pavement opposite the break in the wall and had gone on to enter the factory. There was no evidence of any signs of a wash-away over the pavement itself at this point, and there was some evidence that the part of the pavement opposite the place where the wall was said to have been broken by storm-water was not, relatively, very low. The measurements from which the various low points are ascertained seem to show that the fourth lowest point, where the haunching had been removed to make the earth drain on the pavement, the filling up of which is relied on in the plea, was in fact directly opposite the entrance to the administrative block and not opposite the place where the low wall was found to have been broken. No signs of water having carried debris through the entrance in question were apparently seen after the storm.

The municipality contended that the water found in the factory might well have been accounted for by the rain that fell on so much of the two

stands/.....

stands as lay west of the ridge of the factory roof. The west half of that roof was one-third of an acre in extent and at the time of the storm it had no guttering. The company countered this contention by evidence that there was a drain round the factory against the concrete apron, which protruded outside the building at the level of the factory floor and formed one wall of the drain. Mr. Scott testified that this factory drain, as it was called in the evidence, when he examined it about eighteen months after the storm, could, if clean, cope with the water from the stands even if the rainfall were 5½ inches per hour, and with the water from the area of natural drainage of the fall were 3½ inches per hour. Evidence was also adduced as to the state of this drain, and it was argued for the municipality that, even if it was clear and unobstructed at the beginning of a storm, it would silt up quite soon if the conditions favoured silting. RUMPFF J. found that it was probable that the factory drain was not obstructed on the night of the storm and that it was sufficient to protect the factory against all water that would have reached its western side from the natural drainage area and the stands themselves. Consequently he concluded that but for the additional water introduced by the grading of Nagington Road, the factory

would/.....

would not have been flooded.

The enquiry into the facts was certainly a difficult one. Apart from other considerations there is the factor that, until its level was overtopped, Nagington Road provided protection against the flow of water, including the natural drainage water, onto the two stands. Alien water certainly entered the stands at the gateway, but in view of the protective effect of the dam it may be doubted whether the evidence proved that the total water that entered exceeded that which would have entered, had the natural state of the ground not been disturbed by the construction of the road. This aspect does not appear to have been fully investigated in the court below. It is not necessary for this Court to decide whether it would have reached the same conclusions on the facts as was reached by RUMPFF J. The learned judge was in some respects in a better position to assess the various factors correctly than is this Court, but there are certainly weighty considerations favouring the municipality on the facts. In view, however, of the conclusion that I have reached on the responsibility of the municipality in law, it is unnecessary to decide the factual issues relating to the cause of the flooding of the factory. I shall assume that the munici-

-cipality's roadmaking operations led to more water being in the factory than would otherwise have been there and that this addition ~~contributed~~ helped to cause the damage.

It was, however, further argued for the municipality that there was undoubtedly a substantial volume of water from the natural drainage area and from the stands themselves, which at any rate must have helped the alien water to overwhelm the factory drain and flood the factory. There should accordingly, it was argued, have been an apportionment on the lines followed in the New Heriot case (1916 A.D. 415). It was submitted that in the absence of evidence from which an apportionment could be made the company had not proved an essential part of its case. But this aspect of the matter also does not seem to have been fully investigated at the trial - the learned judge does not deal with it - and it would be unsatisfactory to base any conclusion upon it at the appeal stage if this can be avoided. I do not think that in the circumstances we should disturb the assumption which RUMPFF J. must have made that the case was not one for apportionment.

Of the two points in respect of which the municipality pleaded that the company had itself caused any flooding that had occurred, the filling in of

the earth drain on the pavement was not persisted in. The lowering of the gateway was however pressed. RUMPFF J. held that the municipality should have provided for this when it made the road and that the company was not under any duty to prevent the wearing down of the pavement or restore its level when worn down. The learned judge also held that in view of the probable volume of water, even if the gateway had not been lowered below the pavement level, there would have been "a flooding causing the damage." Since normally the road would be made before the position of the gates was decided upon by the purchasers of stands, and that was certainly the case here, I have some difficulty in seeing how the municipality could be expected to make provision against the wearing away of the gateway. Nor, in view of the evidence of the levels, does it seem to have been shown that Rendell Road would not have been able to carry off all the storm-water, if the gateway had been up to pavement height. Whether it could do so would presumably depend on the intensity of the storm, that is on the rate at which the dam was filling up, and on this aspect there was, unavoidably no doubt, no evidence.

In view, however, of the conclusion that I have reached on the remainder of the case it is unnecessary to deal further with the defence that the lowering

of the gateway itself caused any damage that resulted from the flooding of Nagington Road.

This brings me to the question of the municipality's responsibility in law for any damage suffered by the company. As appears from the summary of the pleadings which I have given, there were two distinct legal grounds on which the municipality claimed that it was not liable on the main claim. I propose to deal first with the defence of statutory authority. The discussion of this defence to the main claim will also, inevitably, bear upon the alternative claim.

As was pointed out by INNES C.J. in Johannesburg Municipality v. African Realty Trust (1927 A.D. 163 at page 172), when the exercise of statutory powers has caused injury to another the enquiry must always be - what was the intention of the legislature ? Some difficulty has been experienced in stating the position in regard to the onus of proof in cases of this kind. In the African Realty Trust case INNES C.J. said at page 177, "It was for the municipality in the first place to satisfy "the Court that the Legislature contemplated an interference "with private rights and then it was for the company to "prove that the municipality was not entitled to the pro-

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"-tection of the statute because the injury complained of "was due to a negligent exercise of its powers. At that stage "the case depended on the existence of negligence, and it lay "upon the plaintiff in the action to establish it." In Bloemfontein Town Council v. Richter (1938 A.D. 195) STRATFORD J.A. dealt with the question at pages 230 and 231. The learned judge remarked upon the difficulty of reconciling the burden resting on the defendant of proving, in order to show that the legislature contemplated interference with private rights, that injury to others must ensue even if the powers were exercised in every reasonably practicable way, with the burden that would then be cast upon the plaintiff to prove that the defendant had been negligent, in the sense in which that term is used in this connection, namely, that it had not adopted a reasonably practicable way of avoiding the injury to the plaintiff. There seemed to the learned judge to be, prima facie, a conflict, which he considered should be resolved by holding that the plaintiff's burden is to show that by reasonably practicable means "the extent of the interference will be "lessened - not entirely avoided, for, if the defendant has "discharged his onus avoidance is impossible." It appears from pages 235 and 236 of the report of the case that CURLEWIS C.J., while agreeing with the conclusion of STRATFORD J.A. on the facts, did not experience the same difficulty in the

interpretation of the judgment in the African Realty Trust case. As appears from the original record, however, the remaining members of the Court concurred with STRATFORD J.A. only.

It appears from page 387 of the report of Johannesburg City Council v. Mucinovich (1940 A.D. 365), and this is confirmed by the original record on appeal, that the trial judge, RAMSBOTTOM J., had applied the view of STRATFORD J.A. that the onus upon the plaintiff to prove negligence is an onus to show that by the adoption of reasonably practicable precautions the extent of the interference would be lessened, and that such precautions had not been adopted. It may be, as was suggested by counsel for the municipality, that STRATFORD J.A. had in mind the exercise of a statutory authority of the kind in issue in Richter's case, where the rights of an individual plaintiff, or possibly a group of similarly placed individuals, alone could be affected. In such a case a conflict might seem to be unavoidable unless the notion of lessening the extent of interference, as opposed to avoiding it, were introduced. The abovementioned passage in the judgment of STRATFORD J.A. was quoted in Reddy v. Durban Corporation (1939 A.D.293) without comment,/.....

comment, but the quotation followed immediately upon one from the judgment of de VILLIERS J.A. in Breede Rivier Irrigation Board v. Brink (1936 A.D.359), at pages 365 and 366, where the law as expounded in the African Realty Trust case was restated and somewhat elaborated; no reference was made in Brink's case to the conflict on which STRATFORD J.A. commented two years later.

It is, however, unnecessary to pursue this matter further. In regard to the roadmaking powers of local authorities the general position is made clear by the abovementioned cases. In the first place it is established, not as a rule of law but as an unescapable conclusion of fact, that the making of roads on sloping ground necessarily modifies the natural drainage of the locality and so to some extent interferes with the rights of the adjoining landowners. (cf. African Realty Trust case at pages 174 and 175; Reddy's case at page 300). The interference may/often will be slight but inevitably the properties will receive, or run the risk of receiving, more or less water than before. The velocity and direction of flow, and with them the risks of flooding, will certainly be changed, to the advantage of some landowners perhaps but unquestionably to the detriment of others. So in a case based on flooding as a result of roadmaking operations the discharge of the initial onus by the local authority is in effect automatic. The second point, which appears from the African Realty Trust case at page 179 and in Reddy's case at page 299, quoting Brink's case, and which is most important for this case, is that in deciding what

measures/.....

measures are reasonably practicable regard must be had to the total requirements and resources of the local authority and not merely to the means of providing protection to an individual landowner. I assume that in particular circumstances there may have to be special treatment by the local authority of the risks to a particular small area or even to a single stand in a township. In regard to flooding for instance the risk might conceivably be so grave and so pressing that there might conceivably be a legal and not merely a moral duty upon the municipality to give it precedence over other drainage problems. But apart from such a possibility the position of any one plaintiff in regard to protection against flooding owing to roadmaking cannot be dealt with in isolation from the requirements of the whole area and the resources available to meet them.

These general considerations were gone into very fully by the municipality's city engineer, Mr. Peddie, in his evidence. He described the storm-water drainage scheme for Wadeville, which was started at the same time that the roads were begun. But the works obviously could not be carried out literally side by side. The drainage would begin, generally speaking, from the bottom of the slope

upwards/.....

upwards, while the roads would be made presumably on a different time table based on other considerations. Mr. Peddie gave evidence as to the considerable sums that were spent on drainage each year and as to the difficulties, particularly in relation to staffing, that were encountered. The call for drainage was general in the municipal area and was being met as fast as was reasonably possible. Complaints of flooding were in the rainy season innumerable. In the area in which the company's property was situated some drainage delay had been caused by the need to obtain a servitude at the outfall end of the system, but after this was overcome the work had been proceeded with with all due despatch.

This evidence was not seriously challenged and RUMPFF J. did not find that the municipality was to blame for not having established a permanent drainage system sufficient to protect the company's property before the storm in October 1953. But the learned judge, though he assumed that it had not been reasonably practicable to complete the permanent drainage system in time to protect the company's property, held that the municipality was negligent in not putting in and maintaining a temporary drain or drains to provide such protection. The learned judge referred to a letter addressed in January 1949 by the municipality's

engineer/.....

engineer to the then owner of stand 104 asking for a servitude for a stormwater pipe along the northern boundary of that stand. The letter began, "In order to avoid flooding "of your property in Wadeville", and there was some suggestion , it could hardly be called evidence, that there was a complaint about flooding at the same place about the same time. But the letter was not really relevant to the question whether the municipality was obliged to introduce temporary drainage at this place. In fact the municipality did not at the time obtain a servitude. It made a temporary earth drain slanting across the pavement opposite stand 105 and then passing down the northern boundary of stand 104. In 1952 the owner of the latter stand closed it by a building and the municipality, through one of its clerks was informed of the proposed obstruction, did nothing to prevent this taking place. It had no servitude and could not, without obtaining one, prevent the closing of the drain. The drain on the pavement then became useless ~~as~~ and such ~~as~~ was allowed to fill up with soil. These are the facts on which the company relies for the alternative basis of its claim, namely, that the municipality caused it damage, apart from the diversion of alien water, by failing to make temporary drains or keep the one it had

made/.....

made in proper repair.

It seems to me that in dealing with the question of temporary drainage RUMPFF J. failed to give effect, mutatis mutandis, to the same considerations that he assumed to be applicable to the execution of the permanent drainage system. It was of course relatively simple and inexpensive to make a temporary drain to meet the risk of flooding stands 105 and 106. But these could not be taken in isolation. Again I assume that there may be cases where it may be negligence in a municipality not to provide some urgently required but temporary work to meet an emergency. But this was not such a case. There was, as in many parts of the municipal area, some risk of flooding. That was unfortunate but it was not shown that it was reasonably practicable to meet the risk by a system of temporary drains, which in any event unless linked with a permanent system would only have the effect of throwing the water onto other properties. In this connection it may be observed that though the municipality has power to secure compulsorily the necessary servitudes for its permanent drainage system it might not be possible to employ compulsory powers for the purpose of making temporary open drains. RUMPFF J. said that the municipality had created a source of danger of flooding in Nagington Road and should have put in a drain to prevent that

flooding/.....

flooding. But I do not think that the solution of the question is advanced by calling the construction of the road a source of danger. Making the road changed the gradients and led to the diversion of storm-water, but it was not contended that this was negligently done. I do not consider it possible to uphold the view that once there is such diversion, with increased risk of flooding to some properties, corresponding to decreased risk to others, there is negligence in not at the same time providing protective drainage. Temporary drainage, like permanent drainage, must be considered in the light of the total drainage position. Some temporary drainage may be a very good thing but it does not follow that the municipality is obliged to introduce it at any particular place. Generally speaking the advantages gained from immediate protection as a result of temporary measures must be weighed against the disadvantages, the most obvious of which would be the wasted effort and expense if it should prove to have been unnecessary. It was not shown, nor was any attempt made to show, that it was reasonably practicable for the municipality to use a general system of temporary protective drains in Wadeville or elsewhere in its area. It did make a temporary drain on the pavement

opposite/.....

opposite stand 105 and down the boundary of ~~of~~ stand 104, but this action did not prove that the situation was such that the municipality was under any legal duty to make such a drain or to restore the temporary drainage when it became obstructed.

In my view the company failed to prove negligence on the part of the municipality for the purposes either of its main claim or of its alternative claim.

This view makes it unnecessary to examine the interesting question whether the fact, assuming it to be a fact, that the municipality laid out the township and made Nagington Road before it sold stands 105 and 106 would alone be sufficient to free it from any responsibility for damage by flood water, whether resulting from unskilful roadmaking or other blameworthiness. Apart from the authorities (Voet 39.3.5, Donellus Vol. IV Col. 569 and Pothier Pandects 39.3.~~1~~.15.) quoted by counsel, there appears to be a measure of common sense in the view than when land is sold by a municipality below an existing road which it has made in the interests of the public, including landowners, and where the natural drainage has certainly and indeed

obviously/.....

obviously been interfered with, the natural drainage, for the purposes of deciding whether there has been an improper diversion of alien water, should be regarded as the drainage as so modified. It is, however, not necessary to examine this line of argument further for I am satisfied that, even if stands 105 and 106 had been sold before the construction of Nagington Road, the municipality would, for the reasons above stated, not have been liable. In view of the conclusion that I have reached the investigation of the quantum of damages becomes unnecessary.

The appeal is allowed with costs and the judgment is altered to one of absolution from the instance with costs.

E.D. Schreiner
21.11.56

Fagan J.A.
de Beer, J.A.
Reynolds, J.A.
Beyers, J.A.
} Concur