THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 302/2004

In the matter between:

THE LOCAL TRANSITIONAL COUNCIL OF DELMAS	**FIRST APPELLANT**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT: MPUMALANGA PROVINCE	**SECOND APPELLANT**
and	
WILHELM ABRAHAM BOSHOFF	**RESPONDENT**

CORAM:	**MPATI DP, SCOTT, BRAND, NUGENT *et* CLOETE JJA**
HEARD:	**10 MAY 2005**
DELIVERED:	**31 MAY 2005**

Summary: Informal township established by the predecessors of the appellants under Act 13 of 1991 on the respondent's neighbouring property – claim for loss suffered through conduct of inhabitants of township – alleged omission by the appellants' predecessors to protect the respondent against such loss – separation of issues not properly circumscribed – confusion of wrongfulness and fault resulting in inadequate consideration of real issues involved.

JUDGMENT

BRAND JA/

BRAND JA:

[1] In the previous political dispensation the black inhabitants of Delmas lived on the outskirts of the town in the township of Botleng. The local government responsible for Botleng was not the Municipality of Delmas but a separate entity called the Botleng town committee. When Botleng became hugely over-populated, the town committee found a locality for the establishment of a new township, six kilometres outside Delmas on a property known as division 4 of the farm Middelburg.

[2] With the approval and active assistance of the then Transvaal Provincial Administration, the town committee acquired the farm and proceeded to utilise it for the establishment of a township pursuant to the provisions of the Less Formal Township Establishment Act 13 of 1991 ('the Act'). The township later became known as Botleng Extension 3, or Botleng 3 for short. In October 1993 the town committee, again with the approval and assistance of the Transvaal Provincial Administration, commenced allocating erven in Botleng 3 to approved occupiers and permitted them to erect their informal dwellings on these erven.

[3] The respondent ('plaintiff') is the owner of the remainder of the farm Middelburg in the district of Delmas. It borders on division 4 of the farm Middelburg which eventually became Botleng 3. The boundary

between the two properties is over 2 kilometres long and the nearest informal structures in Botleng 3 are only 300 metres from the boundary. The plaintiff acquired his farm in 1988. After that, he conducted his agricultural activities on the farm where he also lived with his family. All this came to an end, the plaintiff alleged, when in June 1994 he was effectively driven from his farm, together with his family, through the conduct of some of the inhabitants of Botleng 3.

[4] Based on these allegations, the plaintiff instituted action against the two appellants in the Pretoria High Court for the damage that he suffered through the loss of his farm. The first appellant was sued in its capacity as the statutory successor to the rights and obligations of the former Botleng town committee while the case against the second appellant was based on its succession to the rights and obligations of the erstwhile Provincial Administration of Transvaal. For the sake of convenience I will refer to the first appellant and its predecessor as 'the town committee'; to the second appellant and its predecessor as 'the province'; and to the two appellants jointly as 'the defendants'.

[5] At the commencement of the trial, the court *a quo* (Southwood J), at the behest of the parties, ordered a separation of issues in terms of rule 33(4). It was accordingly ordered that the merits of the defendants' liability for the plaintiff's damages were to be decided first while all other issues, including those pertaining to the quantum of such damages,

were to stand over for determination at a later stage. Though this formulation of the separated issues may sound simple enough, it will soon transpire that no-one actually appreciated what it meant. At the end of the separate proceedings, the court *a quo* held that the defendants were liable for the plaintiff's damages in the amount that he could prove in the next stage of the proceedings. The appeal against that judgment is with the leave of this court.

[6] The facts are largely common cause. The plaintiff's own testimony was that, prior to October 1993, the agricultural activities on his farm consisted of cultivating wheat crops and grazing for his livestock, including cattle and sheep. He also sold timber from the trees on the farm. After October 1993 when the inhabitants of Botleng 3 started moving in, the plaintiff testified, life gradually became intolerable for him and his family. First, there was the smoke pollution from many open fires. Then the contamination of his water – both underground and in the river on his farm – with raw sewerage. His livestock was stolen and died from consuming plastic bags originating from Botleng 3 so that, in the end, he was compelled to sell all his cattle and sheep. His crops were destroyed by livestock straying from Botleng 3 while the trees which he formerly sold were cut down for firewood. His outbuildings were burnt down and other improvements on the farm either removed or destroyed. Eventually he and his family were subjected to threats of violence and even of death. As a consequence

of all this, he was forced, together with his family, to leave his farm in June 1994 and he has never been able to return.

[7] The procedures followed for the establishment of Botleng 3 appear from the evidence of a town planner, Mr S A R Ferero, who was called to testify on behalf of the plaintiff. His evidence was mainly based on information that he gathered from the files of the province. Chapter 2 of the Act required two applications for the establishment of a less formal township in terms of the Act, both to be directed at the erstwhile Administrator. First an application, in terms of s 10 of the Act, for his approval, in principle that the establishment of such a township was necessary. Then, if successful, an application in terms of s 11 for his formal permission to establish the township. The latter application had to comply with the regulations promulgated under the Act. One of the requirements of these regulations was a so-called impact study to determine the effect of the proposed township on properties situated within one kilometre of its location.

[8] According to Ferero, both the s 10 and the s 11 applications were handled on behalf of the town committee by a firm of urban development consultants, called Terraplan. The application in terms of s 10 was approved by the Administrator of the Transvaal on 3 March 1993. Terraplan then proceeded with the s 11 application. It is common cause that this application did not comply with the regulations in that an

impact study of the effect on neighbouring properties had not been done. Despite these shortcomings in the s 11 application, the establishment of Botleng 3 was formally approved by the Administrator on 17 March 1995.

[9] The Administrator's approval of a township did not in itself authorise the town committee to permit occupation of the erven or to allow the erection of structures in Botleng 3. On the contrary, s 13 of the Act specifically provides that no person shall allocate any erven or erect any building in the proposed township before a township register has been opened in accordance with s 17 of the Act. The township register in respect of Botleng 3 was only opened on 27 September 1996. Despite these provisions, the township committee allowed the inhabitants of Botleng 3 to take possession of the erven allocated to them and to erect their informal structures on these erven from as early as October 1993. These contraventions of the Act by the town committee were not only condoned, but actively supported by the province.

[10] The reason why the town committee and the province acted in this way appears from the evidence of Mr Ampie Roux who was called to testify on behalf of the defendants. From 1990 until 1994 Roux was appointed as so-called 'administrator' of Botleng, essentially to take over all the functions of the town committee. In reality he therefore

acted in the town committee's stead. During the period of his administration, Roux testified, the overpopulation of the original Botleng took on crisis proportions. This is borne out by the numbers that he gave. The original Botleng, he said, consisted of 1 841 erven of 240m² which were intended for 1 841 housing units. At the time in question, however, there were more than 5 000 housing structures in the township that were occupied by about 60 000 to 65 000 people. The problems that arose are not difficult to imagine. So, for example, the sewerage system could not cope, which led to regular outbreaks of typhoid. As a result Roux was under extreme pressure from various sources, including influential politicians, initially to secure the establishment of Botleng 3 and then to move people out of the original Botleng to the newly established township as serviced erven became available.

[11] The plaintiff suggested various ways in which the defendants could have avoided or at least have reduced the damage that he admittedly suffered through the conduct of some of the inhabitants of Botleng 3. Included amongst the suggested measures was the erection of a fence, 2 metres high, along the 2 kilometre boundary between the plaintiff's farm and Botleng 3. If it proved necessary to protect this fence, the plaintiff suggested, the defendants could have achieved this by electrifying the fence or by having it patrolled by guards on horseback or on motorcycles. A further suggestion by the plaintiff was that the river

running through his farm could have been dammed by means of weirs which would then create some kind of water barrier between him and Botleng 3. As a further alternative the plaintiff suggested that the defendants could have prohibited the keeping of livestock in Botleng 3.

[12] In cross-examination of the plaintiff, neither the potential efficacy nor the affordability of the methods that he suggested was seriously challenged. Nor was any evidence presented on behalf of the defendants to the effect that the preventative measures suggested by the plaintiff would not have been affordable or that they would have made little or no practical difference. When the defendants' only witness, Roux, was asked in cross-examination what preventative methods he had considered, his response was twofold. First, that he had left the consideration of possible impact reducing measures in the hands of Terraplan. Second, that in any event, there was simply no money available to the town committee for preventative measures since all available funds were utilised for the improvement of services in Botleng 3.

[13] In the court *a quo* as well as in this court, the two defendants were represented by the same legal team who advanced the defences of both their clients on the same grounds. In the circumstances the court *a quo* did not find it necessary, in considering the liability of the defendants, to differentiate between the two. Neither do I.

[14] According to the judgment of the court *a quo,* the parties understood the issues between them as being confined to the element of wrongfulness. That categorisation was also adopted by the court itself. The question for determination, as formulated in the judgment, was therefore perceived to be 'whether the defendants were under a legal duty to take reasonable steps to protect the plaintiff from the harm that he suffered through the conduct of the inhabitants of Botleng 3'. That is not a correct formulation of the question relating to wrongfulness. The correct formulation, as will appear from what follows, is whether the defendants were under a legal duty not to act negligently; in other words, whether there was a legal duty to take such steps, if any, as may have been reasonable in the circumstances to prevent reasonably foreseeable harm.

[15] The defendants' argument as to why the law imposed no such duty upon them was founded mainly on the proposition that, since the establishment of Botleng 3 had been authorised by the provisions of the Act, neither the establishment of the township itself nor the consequences of such establishment could be regarded as wrongful. Support for the proposition was sought in the judgment of this court in *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1994 (3) SA 336 (A). Moreover, the defendants contended, the law could not impose a duty on them to take preventative methods for which they had no funds.

[16] The defendant's reliance on the provisions of the Act did not find favour with the court *a quo*. Statutory authority, so the court held, cannot be relied upon by someone who acted in conflict with the provisions of the statute itself. Consequently, the court found that, because the defendants had acted in direct contravention of s 13 of the Act by allowing the occupation of Botleng 3 before the opening of the township register, they were precluded from relying on the authority of the Act.

[17] Furthermore, so the court held with reference to the well known criterion established in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-C, the legal convictions of the community required the defendants (a) to have done an impact study on neighbouring land prior to the establishment of the township and (b) to have taken all reasonable preventative steps to protect the plaintiff against the activities of the inhabitants of Botleng 3. According to *Ewels*, the court concluded, the defendants were therefore under a legal duty to do these things and because they had failed to do so, they were liable for plaintiff's damages in the amount that he could prove.

[18] The approach to the matter advanced by the parties and adopted by the court *a quo* gave rise to confusion between the elements of wrongfulness and negligence which eventually resulted in a failure on the part of all concerned to recognise the real issues involved. In order

to unravel this confusion it is necessary again to emphasise the distinction between these two elements of Aquilian liability, despite the fact that this has been done regularly by this court in the recent past (see eg *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and another* 2000 (1) SA 827 (SCA) par 19; *Cape Metropolitan Council v Graham* 2001 (1 SA 1197 (SCA) par 6; *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) pars 12 and 13; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 631 (SCA) par 12; *Gouda Boerdery BK v Transnet*, [2004] 4 All SA 500 (SCA) par 12).

[19] A convenient starting point is the established principle of our law that negligent conduct giving rise to loss is not actionable, unless it is also wrongful. However, as also frequently stated, where negligent conduct manifests itself in a positive act that causes physical harm, wrongfulness is more often than not, uncontentious. In such a case the culpable conduct would be prima facie wrongful. With negligent omissions the position is somewhat different. An omission will be wrongful only when it occurs in circumstances where the law regards it such as to attract liability. Otherwise stated, it is not wrongful when the law, for reasons of legal policy, affords an immunity against liability for such an omission, whether negligent or not. In these circumstances the question of fault does not even arise. The defendant enjoys an immunity. *Cadit quaestio*. See eg *Knop v Johannesburg City Council*

1995 (2) SA 1 (A) and *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) 321H-322D.

[20] In the passage from the judgment of Rumpff CJ in *Minister van Polisie v Ewels* supra 597A-B referred to by the court *a quo,* it was held that a negligent omission will be regarded as wrongful and therefore actionable only when the legal convictions of the community impose a legal duty, as opposed to a mere moral duty, to avoid harm to others through positive action. However, as the learned Chief Justice immediately proceeded to point out, this legal duty has nothing to do with fault (negligence). It is therefore not to be confused with the duty of care in English law which is usually associated with negligence (see eg *Knop v Johannesburg City Council* supra 27B-G). Depending on the circumstances it may be appropriate to enquire first into the question of wrongfulness, in which event it may be convenient to assume negligence for the purpose of the inquiry (see eg *Van Duivenboden* 442A-B). On the other hand, it may be convenient to assume wrongfulness and then consider the question of negligence (See *Gouda Boerdery Bpk* par 12).

[21] The separate test for the determination of negligence to be applied will be that formulated by Holmes JA in *Kruger v Coetzee* 1966

(2) SA 428 (A) 430E-G. According to this test, negligence will be established if:

'(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case.'

[22] In applying these principles it is apparent that the finding by the court *a quo,* that the defendants were obliged to take preventative measures, extended beyond the sphere of wrongfulness and into the preserve of negligence. In fact, only one of the court's findings seems to relate directly to the element of wrongfulness. It is the finding that the defendants acted in contravention of s 13 of the Act by allowing the occupation of Botleng 3 before the opening of the township register. This finding, however, appears to be without any consequence. Central

to the plaintiff's case was the theme that in the absence of any preventative measures by the defendants, the harm that he suffered through the establishment of Botleng 3 was not only foreseeable but indeed inevitable. It follows that, barring such measures, he would have suffered the same harm, even if the defendants had awaited the opening of the township register. Compliance with the provisions of the Act would therefore have resulted in no more than a postponement of the evil day. As Botleng 3 had eventually been approved in terms of the Act, it follows that the establishment of the township had been authorised by statute and that, consequently, the establishment of the township per se could not be regarded as unlawful. That much was decided in *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* supra 353G-H.

[23] However, the substance of the plaintiff's case against the defendants was not that they had established a township, but that they had failed to take such steps as they could have taken to prevent or reduce the loss that he had suffered through the conduct of the inhabitants of the township. In order to succeed, he therefore had to establish, first, that the omissions he complained of were wrongful, second, that they were negligent and, third, that these omissions were causally connected to his loss.

[24] The court *a quo*'s unqualified conclusion, without any proper investigation of the three aforementioned elements involved, that the defendants were liable for all the damages that the plaintiff could prove on the broad basis that they should have taken preventative measures, originated from the confusion between the elements of wrongfulness and fault. The enquiry pertaining to wrongfulness was simply this: assuming that the defendants' omissions to avoid the plaintiff's loss were negligent, did the legal convictions of the community require them to be held liable? In so far as the court *a quo* implicitly answered this question in favour of the plaintiff, I agree with that finding. No reason has been suggested and I can think of none why in all the circumstances of this case the legal convictions of the community would require the defendants to be afforded immunity from any negligent acts or omissions that might have caused loss to the plaintiff.

[25] On the contrary, as was decided in *Diepsloot Residents' and Land Owners' Association v Administrator, Transvaal* supra 351E-G, the fact that the power to establish a township is conferred upon a public authority by the provisions of the Act, does not mean that it will not be liable for 'failing to take reasonably practical measures to lessen the harm that will be caused by the exercise of such powers'. Or, translated into the language of the aforegoing analysis, a public authority will, in a situation such as this be held liable for its omissions, provided, of course, that all the other requirements of delictual liability, including

those of negligence and causation, are satisfied. (See also *East London Western Districts Farmers' Association and others v Minister of Education and Development Aid and others* 1989 (2) SA 63 (A) 75H-76B and *Minister of Safety and Security v Van Duivenboden* supra par 19.)

[26] The further issues raised by the parties and decided by the court *a quo,* relating to the nature of the preventative measures that should have been taken by the defendants, were relevant to the element of negligence. In the confusion the second enquiry formulated in *Kruger v Coetzee* supra 430F-G, namely what steps, if any, the reasonable person in the position of the defendant would have taken, was passed over entirely. If this enquiry had been made, the following questions would have revealed themselves with reference to each of the various preventative measures suggested by the plaintiff: How effective would a two kilometre fence along the common boundary between the properties have been? What difference would a dam have made? How practical was the suggestion that the fence be patrolled on motorcycles or horseback? What would be the expense involved in implementing these measures? In balancing the costs involved against their relative effectiveness, which of these measures, if any, would have been taken by the reasonable person? How effective would the prohibition against the keeping of livestock in Botleng 3 have been? In what way and at what expense could such a prohibition be enforced?

[27] Because these questions were not asked, another crucial element went unnoticed. That was the element of causation. Had this element been recognised, the court *a quo* could not possibly have made the bald finding that the defendants were liable simply for not taking preventative measures without considering (a) what measures could have been taken and (b) what difference those measures would have made. This enquiry would ultimately have led to appreciation of the further fact that in a case such as this it is virtually impossible to separate the elements of causation and quantum of damages.

[28] The flaws in the approach adopted in the court *a quo* can be illustrated by reference to the plaintiff's suggestion of the erection of a fence as a practical example. The first question would be what difference the fence would have made. Say the answer was that it would have protected the plaintiff against livestock straying from Botleng 3, but not against criminal activities. That would lead to the following question: Having regard to the cost of such a fence, would the reasonable person have put up a fence? A positive answer would mean that both negligence and causation had been established. In principle the defendants would then be liable to the plaintiff for the damages that he suffered through straying livestock. But it could not possibly mean that they were also liable to him for damage caused by criminal activity if it is clear that the fence would not have protected the plaintiff against these activities.

[29] The inevitable conclusion therefore appears to be that the separation of issues agreed upon had not been properly considered. Parties to litigation will be well advised to heed the lesson learnt from experience in this court, referred to by Nugent JA in *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) 485A-E, that a separation of issues which has not been properly considered and then carefully circumscribed will almost inevitably come back to haunt those responsible at a later stage.

[30] It is clear that the decision of the court *a quo* cannot stand. The only issues that could properly have been determined on the facts before the court were those relating to wrongfulness. Issues regarding the elements of negligence and causation were not properly investigated and should not have been finally decided against the defendants. When this became clear during argument in this court, the parties agreed that the issues regarding negligence and causation should stand over for determination, together with the issues relating to the quantum of the plaintiff's damages, at the subsequent stage of the proceedings.

[31] It is also clear that the question whether the defendants' alleged omissions, if negligent, would be wrongful was, in my view, rightly decided in favour of the plaintiff. It was formally conceded on behalf of the defendants that in the event of such a finding, they would be liable

for the plaintiff's costs, both with reference to the proceedings in the court *a quo* and on appeal. In consequence that is the order I propose to make.

[32] A peripheral ground of appeal raised by the defendants related to the court *a quo*'s finding that they are to be held liable for the qualifying expenses of the expert witness, Ferero. Their contention was that Ferero was not an expert properly so called. I find it unnecessary to dwell on this contention. Suffice it to say that, in my view, it has no merit. Ferero qualified himself as an expert and, without any objection by the defendants, conveyed his expert views to the court *a quo*.

[33] The following order is made:

(a) The appeal is upheld.

(b) The appellants are ordered, jointly and severally, to pay the respondent's costs of appeal, including the costs of two counsel.

(c) The following order is substituted for the order made by the court *a quo* :

(i) It is declared that, in the circumstances, negligent omissions on the part of the defendants would have been wrongful and that, consequently, the defendants would be liable in damages to the plaintiff resulting from any such omission.

(ii) All other issues, including those relating to the elements of negligence, causation and the quantum of the plaintiff's alleged damages are to stand over for later determination.

(iii) The defendants are ordered, jointly and severally, to pay the plaintiff's costs, including the costs of two counsel and the qualifying expenses of Mr S A R Ferero.

(iv) The matter is postponed *sine die* for determination of the outstanding issues.

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F D J BRAND
JUDGE OF APPEAL

Concur:

MPATI DP
SCOTT JA
NUGENT JA
CLOETE JA