



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A118/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
_____	_____
DATE	SIGNATURE

In the matter between:

VAW BELINGSINGS (PTY) Limited LIQUIDATION

Appellant

EJ JANSE VAN RENSBURG, AND AN NYMABARA JM

NGOASHENG N.O

and

MKD PROPERTIES (PTY) LIMITED

Respondent

Delivered: This judgment was prepared and authorised by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. the date and for hand-down is deemed to be 14 December 2023.

JUDGMENT

MOGOTSI AJ (with Van der Westhuizen J & Coetzee AJ concurring)

Introduction:

[1] This is an appeal against the whole order and judgment delivered on 19 November 2021 by Mthimunye AJ. The appeal is with leave of the court a quo.

[2] The court a quo made the following order:

- “1. *The agreement of sale between the plaintiff and the first defendant entered into on 22 June 2016 is cancelled.*
2. *The first defendant is ordered to repay the purchase price of R3 800 000 (Three Million, Eight Hundred Thousand Rand) to the plaintiff.*
3. *The first defendant is ordered to repay the plaintiff all transfer costs related to the transfer of the immovable property from the names of the joint liquidators of the first defendant into the plaintiff's name.*
4. *The plaintiff must take all necessary steps to effect the retransfer of the immovable property into the names of the joint liquidators of the (first) defendant, upon payment of the purchase price stated above.*
5. *The first defendant is ordered to pay all transfer costs related to the retransfer of the immovable property form (sic) the plaintiff's name into the name of the joint liquidators of the first defendant.*
6. *The first defendant shall pay the plaintiff's cost of suit, including the cost consequent upon the employment of two counsel, and including the cost of the urgent application.”*

Background:

[3] The appeal originates from a public auction held on 22 June 2016, conducted by Van's Auctioneers acting on the appellant's mandate. The bidding process was

conducted by Mr Pretorius. The respondent purchased several properties inclusive of Holding 53, Water Glen Agricultural Holdings, Ext 1, registration division JQ North West Province, measuring 15,1243 hectares which is the subject matter *in casu* (herein referred to the lot).

The Issues:

[4] Whether or not the Respondent made out a case for intentional representation justifying the cancellation of the sale of the lot, and, if not, whether clause 8 of the written Agreement of Sale affords the Appellant a valid defence.

[5] Whether or not the court quo should have drawn an adverse inference against the respondent's failure to call Mr Pretorius who conducted the auction to shed light on his state of mind at the time of the auction.

Common Cause Issues:

[6] The record of the auction proceedings is common cause and the apposite part thereof is quoted hereunder:

“ Right gents, last three lots. We have lot number 14, which is holding 53 Waterglen, Agricultural Holdings. An appropriate name, gentlemen, Waterglen Agricultural Holdings, look at that dam. Almost a 4-ha dam. Unbelievable dam. Gerard told me when I asked him this morning how much it would cost to build that dam, he said he did not know, but many millions. Almost a 4 ha dam, beautiful, full to the brim, it gets its water from the Olifantsnek Dam. You have irrigation rights on that piece of land. 15 ha agricultural water as they call it.’ One of the attendants questioned Pretorius’ statement that the water came from the Olifantsnek Dam, whereafter Pretorius assured him that his source of information was none other than the Irrigation Board itself. During the auction, Pretorius was asked whether one would have to give irrigation rights connected to the dam to other people. Pretorius replied that he did not know and continued with the auction by emphasising that it was a piece of land 15 ha in extent with 15 ha of irrigation rights which, according to Pretorius, actually did not make sense, because 4 ha of the 15 ha consisted of a dam. Pretorius then

proceeded to look at the title deed of the specific property and informed the attendees that there were indeed servitudes connected to the dam. A brief discussion then followed between the auctioneer and some of the attendees as to the nature of the servitudes without reaching a definite conclusion and then the auctioneer cut the discussion short by saying the following: 'Jan (one of the attendees) the punchline is, there is more water on this property than what this property could ever utilise, so it does not matter if there are a few servitudes'. De Kock then asked whether the water on that property could be utilised for that property and Pretorius' answer was in the affirmative he repeated that rights were registered for 15 ha and he added that the property was only 15 hectares in extent minus the dam, which equated to wearing belt and braces. Pretorius then proceeded to state that the property valuation of R2 million was very conservative because the dam on the property could not be built for less than R2 million and he even suggested that one could 'baie lekker' plant lucern or something similar on that property."

[7] Clause 8 of the conditions of sale is a "voetstoots" clause, and the apposite subparagraphs thereof, which are relevant, are quoted below:

"8.1 The property is sold voetstoots, and neither the auctioneer nor the seller gives any guarantee as to the extent, patent or latent defects, the nature, quality or legality of improvements, or the legality of any activities practised thereon, and will not be held liable for any damages arising from same. The property is sold subject to all conditions, servitudes, current or forthcoming land claims, legal or illegal occupants and/or expropriation applicable to the property and evidence in the existing title deed of the specific property.

8.2 The auctioneer and/or seller is not obliged to point out any beckons or boundaries, and any description or information, whether by way of advertising, brochures or verbal communication is done in good faith and the purchaser acknowledges that he was not induced into this contract by any explicit or implied representations.

8.3 It is agreed by the purchaser that neither the seller, nor the auctioneer purport to be experts about defects in immovable property, and consequently that their failure to specifically point out a specific defect cannot be seen as any form of misrepresentation.

8.4 ...

8.5 *Bidders should refrain from either bidding at the auction or making an offer for the property if they have not familiarised themselves with all of the clauses of this conditions of sale and the condition and status of the property, and neither the seller nor the auctioneer accepts any liability towards the purchaser in this regard. It is therefore acknowledged that if a bidder becomes the purchaser in this agreement he/she has not been induced or influenced to enter into this agreement by any warranties representations statements made or information given by either the seller(s) or the auctioneer”*

[8] It is common cause that clause 8 of the Agreement of Sale offers the appellant protection only in the event of a finding that the representations made by Mr Pretorius were made negligently.

The Plaintiff's Case:

[9] The plaintiff called four witnesses, namely, Mr Magiel Daniel De Kok, Mr Johannes Jurgens Koen, Mr Mark Ernst Mulh and Mr Artie Daniel Petrus Pienaar. The appellant elected not to call any witnesses.

[10] Magiel Daniel De Kok, a civil engineering contractor and a farmer, testified that he attended an auction on 22 June 2016 where he purchased 5 lots. An auction brochure, with coloured pictures of a piece of land with a beautiful dam, was made available to him in the morning before he could purchase the lot. Before the auction, he did not inspect the property. What moved him to purchase the lot was that according to the brochure and the explanation from Mr Pretorius, it had an abundance of water.

[11] He further testified that Mr Pretorius, the auctioneer, at the time of the bidding process, explained that the water in that dam was for that piece of land, that the dam was 4 hectares of the 15 hectares and according to the information he received, it would cost more than R2 million rand to build the dam. He also mentioned that the

dam was supplied by Olifantsnek Dam. He asked if had to supply water to anyone else from the dam, and Mr Pretorius said there were a few servitudes but there was enough water for this piece of land.

[12] He was very happy with the property and intended to irrigate 11 hectares of the 15 hectares and that it was his dam. The purchase price was paid within a couple of days and the registration thereof took place on 4 October 2016. In mid-October 2016, he issued one of his employees, Mr JJ Koen, instructions to start fencing off the property. At some stage, the latter informed him that he was contacted and informed that the dam was not part of the land and could not be fenced off. He requested him to investigate the averments.

[13] According to him, had he known beforehand that there was no physical connection between the Olifantsnek Dam and that particular property, that the dam was controlled by other people, the other people would have access to the property and to administer the dam he would not have purchased it.

[14] Johannes Jurgens Koen testified that after the registration of the property, he was instructed to appoint a fencing team to fence off the boundaries of the lot. When they were about to fence off the dam, he spoke to Neils Erickson telephonically enquiring whether or not they were closing off the dam and he responded in the affirmative indicating that the dam is part of the property. Neils Erickson told him that they do not have any specific rights to the dam. He made a report to Mr. de Kok and he was instructed to investigate the issue.

[15] He approached Van's Auctioneers and came into contact with a certain lady who informed him that she could not assist him. He requested the recording of the auction on that specific day. He approached the water board in Hartebeespoort Dam. They could not assist him and he called Neils Erickson and requested him to arrange

a meeting on an urgent basis. The latter informed him that the chairman of the board was Mr Attie Pienaar.

[16] On 30 January 2017, he met Mr Attie Pienaar and Mr Neils Erickson. They informed him that there were 13 or 15 irrigators or water rights to that specific dam and he was issued with a servitude notary. He was informed that Mr de Kok could purchase a right to the dam for an amount between R250 000,00 to R320 000,00. After three days he was informed that Mr Tom Rowlinscroft is selling one of his rights.

[17] Mark Ernst Muhl, testified that he has been a member of Olifantsnek Irrigation Board with effect from 1993 and became its chairperson in 2016. According to him, the board generates income by raising levies from irrigators. The board is duty-bound to deliver water to a specific property by constructing infrastructure for the delivery of the water from the dam. 55% of allocated water has been delivered over 64 years.

[18] Mr Artie Daniel Petrus Pienaar testified that he bought a property in 1979 and has been involved with the Lakeside Irrigation Board since 1980 and at some stage, he served as its chairperson. He testified that a quota is allocated per plot holder per week depending on whether they have a full or half right and the level of water available. To maintain the water level, sleuze gates are used to regulate the water. The owner of the plot where the dam in issue is situated is entitled to surplus water from the dam during rainy seasons and only for about two weeks after good rain.

The Law

[19] The Court in *Kruger v. Coetzee*¹ described negligence as follows:

“For purposes of liability culpa arises if –

¹ 1966 (2) SA 428 (A)

(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 occurrences; and

(b) the defendant failed to take such steps.”

[20] There may be degrees of negligence. Gross negligence is concerned with someone who does not care for the consequences of their actions.² Their actions are far outside the scope of what a prudent individual in their position would act. In essence, it is a question of the extent of the negligence and thus requires no separate test. Both degrees of negligence require reasonable foreseeability.³ Gross negligence may be a requirement to attract certain types of liability.

[21] Director of Public Prosecutions, Gauteng v Pistorius⁴;

“It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act ‘recklessly as to the consequences’ (a phrase that has caused some confusion as some have interpreted it to mean gross negligence) or must have been ‘reconciled’ with the foreseeable outcome.”

[22] In considering the difference between *dolus eventualis* and *culpa* the court in *S v Humphreys*⁵ held as follows:

“For the first component of *dolus eventualis*, it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be

² *S v Dhlamini* 1998 (3) SA 302 (A) 308 D-E

³ *S v van Zyl* 1969 (1) SA 553 (A) 557 A-E

⁴ 2016 (2) SA 317 (SCA) at para 26

⁵ 2013 (2) SACR (1) SCA

concluded that he did. That would conflate the different tests for dolus and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.”

“Voetstoets clause”

[23] “Voetstoets” means that the property is sold “as is” or “as it stands”. Accordingly, the Purchaser purchases the property with all the patent and latent defects. Simply put patent defects refers to defects that are visible to the naked eye and don’t require expert inspection whereas latent defects refer to defects that one would not normally discover with normal inspection e.g. in this matter the underground pipelines connecting water to the dam. The Purchaser is always liable for patent defects unless the contract provides otherwise, as per clause 8 of the Conditions of Sale mentioned above.

[24] In the matter of *Van der Merwe v Meads*,⁶ the following was said to be the main criteria when analysing the Seller’s liability in respect of property sold voetstoets and states that a Seller is deprived of protection under the said clause in the following circumstances:

- a) Where the Seller was aware of the defects in the property when entering into the contract; and
- b) The Seller (*dolo malo*) intentionally conceals the existence of the defect to defraud the Purchaser.

⁶ 1991 (2) SA 1 (A)

Accordingly, to successfully negate the Appellant's protection under the voetstoets clause, the Respondent should have proved the Appellant's awareness of the defect but also the Appellant's deliberate intention to defraud.

[25] In the matter of *Waller and Another v Pienaar and Another*,⁷ the court deals with the second leg mentioned in the *Van der Merwe v Meads* matter and held that for Purchasers to be successful in their claim they had to prove that:

1. The defects were latent.
2. The Sellers were aware of the defects at the time of the sale.
3. The Sellers had a duty to disclose the existence of the defects to the Purchasers at the time of sale.
4. The Sellers fraudulently concealed the existence of the defects, thereby inducing the contract, alternatively, the Sellers fraudulently misrepresented that there were no defects.

Analysis:

[26] I shall commence my analysis by considering whether or not an adverse inference could have been drawn as a result of the respondent's failure to call Mr Pretorius who conducted the auction.

[27] Firstly, the Appellant's counsel submitted that the Respondent interviewed Mr Pretorius who furnished him with all the required information and could have called

⁷ 2006 (6) SA 303 (A)

him as a witness. Secondly, Counsel further submitted that if the Respondent was of the view that it could not have called him because, in reality, he is the First Defendant, he could have placed evidence before the trial court advancing reasons why he failed to do so by demonstrating that he engaged him and consulted with him in preparation of the trial and that it became apparent that he was a hostile witness.

[28] The respondent's counsel submitted firstly, that the respondent elected not to call Mr. Pretorius because there was sufficient circumstantial evidence in the form of the record of the auction which could shed light on his state of mind at the relevant time. Secondly, there was no certainty that he would testify under oath that he defrauded the plaintiff and that he is fact the respondent's adversary. Lastly, counsel submitted that it was put to the respondent during cross-examination that Mr Pretorius would if necessary testify that he acted in good faith and for this reason, an adverse inference should be drawn against the appellant for failing to call Mr Pretorius.

[29] The record of the auction, in my view, provided sufficient evidence from which the state of mind of Mr Pretorius could be inferred and no court can draw an adverse inference against the respondent's failure to call Mr Pretorius.

[30] In the matter of *Eebranchek v Jacobs & Co*,⁸ the court held as follows:

"In *Elgin Fireclays Ltd v Webb* (1947 (4), S.A.L.R. 744 at p. 749) the learned CHIEF JUSTICE, in dealing with a similar argument, observed: '. . . it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. (See *Wigmore*, secs. 285 and 286.) But the inference is only a proper one if the evidence is available and it would elucidate the facts.'

⁸ 1948 (4) SA 671 (A)

At the trial of this case, Beretta was available to both parties, he was waiting outside the Court, all witnesses having been ordered out of Court. What *Wigmore* says in sec. 288 is very apposite. That author states:

'It is commonly said that no inference is allowable where the person in question is *equally available* to both parties; particularly where he is actually in court; though there seems to be no disposition to accept such a limitation absolutely or to enforce it strictly. Yet the more logical view is that the failure to produce is *open* to an inference *against both parties*, the particular strength of the inference against either depending on the circumstances.'

[31] Johannes Jurgens Koen interacted with Mr Pretorius during his investigations and found no joy. This fortifies the respondent's uncertainty as to whether or not Mr Pretorius would admit that he defrauded the respondent.

[32] It was put to the respondent that if necessary Mr Pretorius would testify that he acted in good faith. I am persuaded by the submissions of counsel for the respondent that Mr Pretorius is the adversary of the respondent. Therefore, I am of the view that it is disingenuous of the appellant to raise this issue.

[33] In *Galante v Dickson*⁹ it was held as follows:"

"In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination."

[34] No such inference can be drawn against a party's failure to call evidence in refutation of a weak or improbable case against him.¹⁰ Therefore, I am not

⁹ 1950 (2) SA 460 (A) at 465

¹⁰ See *Putter v Provincial Assurance Co. Ltd* 1963 (3) SA 145 (W).

persuaded that there were reasons for drawing an adverse inference from the respondent's failure to call the Mr Pretorius. The inference must be drawn against the appellant who elected not to call any witnesses inclusive of Mr Pretorius despite the existence of a probable case.

[35] I now turn to the issue of whether or not the Mr Pretorius acted intentionally or negligently and whether the Appellant's has any protection under the "voetstoots" clause. The Appellant's counsel submitted that there was an intention in the form of *dolus eventualis* on the part of Mr Pretorius when making the representation. The Respondent's counsel, on the other hand, submitted Mr. Pretorius was grossly negligent when making the representations.

[36] In *S v Sigwahla*¹¹ the court held follows:

"The fact that objectively the accused ought reasonably to have foreseen such possibility is not sufficient. The distinction must be observed between what went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred."

[37] The events leading to the bidding process are relevant and provide a point of departure in determining whether or not Mr Pretorius acted intentionally/fraudulently or negligently. Before bidding, Mr Pretorius had a discussion with one Gerald about the cost of building this dam. This consultation, in my view, indicates that Mr Pretorius intended to use the dam to make to offer for the lot to look good and to lure the prospective buyers or secure a higher amount in respect of the sale thereof.

[38] I now consider the events as they unfolded at the time of the bidding. At the commencement of the auction, the auctioneer amongst others said "Look at the

¹¹ 1967 (4) SA 566 (A) at 570 C - D

dam. Almost a 4-ha dam ... full to the brim, it gets its water from Olifantsnek Dam. You have irrigation rights on the piece of land. 15 ha agricultural water as they call it". It is clear, in my view, that by saying this he was furthering his initial intention of using the dam as a strong point for his presentation.

[35] After the initial presentation mentioned supra, other attendees engaged Mr Pretorius on the issues relating to the status of the rights to the dam and its source of water. From the said engagement it is apparent that he did not have, inter alia, the following further information, where the water from the dam came from, whether or not the dam added value to the property, how many canals were linked to the dam, what impact the servitudes and orders of the Water Court had on the owners of lot 53, 5, whether one would give irrigation rights connected to the dam to other people. Despite this apparent lack of knowledge, he cut the discussion short and said "Jan the punchline is there is more water in the property than what this property could ever utilise." He proceeded to mention that the value of the property is R2 million rand which is very conservative because the dam could not be built for less than R2 million.

[39] In *Rex v Myers*¹² Greenburg JA held as follows:

"The grounds upon which an alleged belief is founded are the most important test of its reality; see *Derry v Peek* (*supra*, at p. 375). Mere suspicion not amounting to conviction or belief is not knowledge; see *Rex v Patz* (1946 AD 845); but shutting one's eyes to the facts or purposely abstaining from inquiring into them, shows the absence of an honest intention; see *Derry v Peek* (*supra*, at p. 375). A statement is fraudulent when it is made deliberately, either knowingly or without belief in its truth, or recklessly whether it is true or false."

[38] Mr Pretorius realised that he did not have the correct information relating to the dam. He wittingly decided to cut off the discussions around the issue instead of adjourning the bidding process to ascertain the same. He proceeded with the sale

¹² 1948 (1) SA 375 (A)

regardless of the consequences of his actions. By cutting off the discussion between him and other attendees around the rights to the dam he reconciled himself with any eventuality that might occur. Therefore, I find that Mr Pretorius' conduct at the time of the bidding falls squarely within the definition of intention in the form of *dolus eventualis*.

[40] Having determined that a case for intentional misrepresentation has been made out, it follows that clause 8 of the Agreement of Sale does not afford the appellant protection. In the premises, the appeal falls to be dismissed.

[41] The costs shall follow the results.

Order

1. Appeal is dismissed.
2. The Appellant is ordered to pay the costs, including all reserved costs, inclusive of the cost of two counsels.

J. P. M MOGOTSI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances
For the Appellant:

Adv. A Rossouw SC
Adv. JA Du Plessis

Instructed by:

Van den Berg Attorneys

For the Respondent:

Adv. MP van der Merwe SC
Adv. J. Saunders

Instructed by

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