

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case No: HC-NLD-CIV-ACT-DEL-2018/00262

In the matter between:

MARTIN SHIPANDENI NAKAMBUNDA

PLAINTIFF

and

PHILLEPS KAPUTU MWETULUNDILA

DEFENDANT

Neutral citation: *Nakambunda v Mwetulundila* (HC-NLD-CIV-ACT-DEL-2018/00262) [2020] NAHCNLD 98 (30 July 2020)

Coram: DIERGAARDT AJ

Heard: 1 - 3 July 2020 and 10 July 2020

Delivered: 30 July 2020

Flynote: Civil Procedure-Neighbour Law - Duty of care- Need to prove Damages - defendant found liable for the collapse of the wall - Plaintiff failed to lead evidence in support of his quantum-Court cannot grant an unsubstantiated amount.

Summary: The plaintiff and defendant are neighbours that shared a western boundary. The defendant allegedly commenced construction on his property by

excavating a hole along the boundary wall that borders the plaintiff's property which allegedly caused the plaintiff's boundary wall to collapse as a result the plaintiff allegedly suffered damages in the amount of N\$ 56,509.35.

The defendant alleges that the wall collapsed as a result of poor workmanship and not meeting the standards required by the Ondangwa Town Council.

The court *held*: The Plaintiff made out a case to establish liability on the part of the defendant, however failed to make out a case for quantum.

Court further *held* that the defendant is accordingly liable for the collapse of the plaintiff's wall however cannot order damages as no evidence was lead in support of the claim for quantum.

ORDER

1. The Defendant is hereby held liable for the collapse of the Plaintiff's boundary wall.
 2. Cost of suit is awarded to the Plaintiff.
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JUDGMENT

DIERGAARDT AJ:

Introduction

[1] The plaintiff is Mr Nakambunda the owner of Erf 3180 Extension 14, Ondangwa and the defendant is Mr Mwetulundila, who is plaintiff's neighbour and the owner of Erf 3179 extension 14, Ondangwa. These two respective Erfs are adjoined along their western boundary. The cause of action arose when the defendant allegedly commenced construction of his property by excavating a hole along the boundary wall that borders the plaintiff's property which allegedly caused the plaintiff's boundary wall to collapse.

[2] The plaintiff alleges that by excavating the hole along the western boundary of plaintiff's property, it removed the lateral support of the wall and caused the land to subside causing the plaintiffs wall to collapse. The plaintiff now claims an amount of N\$ 56,509.35.

[3] The defendant did not offer a counterclaim he however alleges in his plea that the excavation was not the cause of the collapse of the wall. The wall collapsed as a result of poor workmanship and not meeting the standards required by the Ondangwa Town Council.

Issues to be resolved at trial

[4] The court was called on to adjudicate of the following issues of law:

1. Whether there was non-compliance with statutory provisions on the part of the Defendant and or Plaintiff when the parties erected their respective boundary walls;
2. Whether, if found that the Defendant did not comply with statutory provisions, whether Plaintiff is, as a result entitled to claim from the defendant the amount of N\$56 509.35; and
3. Whether the Defendant is liable for the collapse of the Plaintiffs western boundary wall.

The Law

[5] The court in this particular matter is dealing with the concept of neighbour law or the duty of care towards neighbours. Professor SK Amoo¹ states at pages 94-95 that, Neighbour law is based on the principles of reasonableness and fairness. The principle of reasonableness means that although landowners, and occupiers of land, can do with their property as they like, they must exercise their rights with due regard to the rights of neighbours. The principle of fairness means that landowners can only be held responsible for damage caused to a neighbour in the use of their land when or where it is fair to expect them to avert the damage in question. This implies that owners of land are not only liable for any nuisance caused by themselves but also by others on their property. (own emphasis).

¹ Prof SK Amoo, (2014) Property Law in Namibia, Juta pp 94-95.

[6] *Ayoub v Jobs* (HC-MD-CIV-ACT-OTH-2017/02383) [2019] NAHCMD 149 (16 May 2019), the court stated that ‘. . . that it is the burden of plaintiffs in the position of the present plaintiffs to produce sufficient evidence to sustain the exact amount resulting from curing the damage. . . . where a plaintiff, as is in the instant proceeding, has proved patrimonial loss but has not placed before the court sufficient evidence or no evidence at all (as is the situation in the instant proceeding) to enable precise assessment of the damages, the court may in the circumstances in some instances estimate the damage on the best evidence available. But where evidence was in a general sense available to the plaintiffs, as is in the instant case, as I have demonstrated, and he or she fails to produce it, the court will not attempt to assess plaintiff’s loss out of pity for plaintiffs or out of suchlike extraneous considerations’.

[7] The Supreme Court in the matter of *Motor Vehicle Accident Fund of Namibia v Lukatezi Kulubone* Case No SA 13/2008, delivered on 09 February 2009 (at page 16 – 17, paragraph 24), states that even where there is no counterclaim but each party alleges negligence on the part of the other, each such party must prove what it alleges. (own emphasis).

Plaintiff's case

[8] Plaintiff’s statement was read into record and amplified his statement during examination in chief, in stating that he never conceded to the building of either a firewall or a border wall. He never signed any relaxation border line. The building plans of his house were approved according to municipal regulations. The builder built according to the plan and he bona fide believes that he built the house according to plan. The building inspectors inspected in phases and approved the said plans for the house including the boundary walls. A completion certificate was issued based on these approved plans. He maintains that the wall was built in accordance with municipal regulations and the wall collapsed as a result of the defendant’s excavation that went too deep underneath the foundation of the wall. He is of the opinion that the defendant built the firewall without consulting him and built it for himself and not for them to share. The wall is not neatly built. On his side there is a protruding wall and the wall is not plastered or painted, definitely not in the condition his wall was before it collapsed.

[9] Mr Ujombala, plaintiff's second witness disputed signing the consent form and testified that he referred the defendant to the plaintiff for permission. He further testified that he is an experienced contractor and he was the contractor who constructed the plaintiff's house and he followed the building plan and laid the foundation of the wall according to the plan and applicable regulations. The digging was 60 cm down and the building was built on top of the foundation which is 60cm wide and 60 cm down. According to his observation and experience the defendant wanted to build a wall next to the plaintiff's wall and dug very deep, cutting off concrete from the plaintiff's wall foundation. The removal of the plaintiff's wall support caused the wall to collapse. He testified that he found then cutting the concrete and they said they wanted the concrete to be very deep. This was not disputed by the defence.

[10] Mr Shipanga, plaintiff's third witness testified that he is an employee of Ondangwa Town Council employed as manager of Infrastructure, planning and technical services and he oversees the planning, layout extension, future development, inspection of buildings, approval of building plans, construction of infrastructure, maintenance and rehabilitation, he states that he is also an engineer by profession . He testified on the procedures for the submission and approval of building plans. He indicated that according to his observation the foundation exceeded the other erf and the material of 3179-was removed and lead to a weak support beneath the other one. That weakness below boundary wall of the plaintiff as a result of the excavation could have resulted in the wall collapsing. He was asked a question as to whether the wall would have collapsed if there was no excavation and he replied *'No the whole length of the boundary is brick but the only portion that collapsed was where excavation was. The wall collapsed as a result of external forces'*.

Defendant's case

[11] The defendant's statement was read into the record and he indicated that he obtained permission from the Plaintiff who at the time he thought was Mr Ujombala. According to him Mr Ujombala signed the consent form. He never meet the owner He was instructed to stop construction after the wall fell. The trench was already excavated and it started to rain and the trenches were filled with water and they

stopped for seven days, at the time the foundation was already laid .He does not dispute that he was requested by the town council in various letters to stop construction until the issue of the wall was resolved. He continued construction as his building plans were approved and he wanted to finish his house. He built a fire wall and considered it a replacement for the plaintiff's wall as this wall is constructed on the boundary line but in line with municipal regulations. He agreed that there was a settlement agreement with conditions for both parties. The settlement agreement stipulated that the plaintiff had to produce invoices for the electric fence to be replaced and the condition for him was for building plans to be approved. According to the defendant the plaintiff did not produce such invoices and he did not proceed in replacing the electrical fence. The plaintiff agreed that he did not provide invoices but replaced the electrical fence on his own.

[12] The defendant called Mr Mugadza as his only witness, a structural engineer. He testified that he was called in by the plaintiff to make an assessment and finding on the probable cause of collapse on part of the 110 mm wall that collapsed. He compiled a photo plan and a report that was handed in to the court and formed part of the exhibits. His investigation was conducted 19 months after the incident and he only visited the site after the defendant's fire-wall was constructed. His finding was based on a site investigation whereby he found debris including blocks of concrete from the wall that fell as well as blocks of concrete he removed from the existing wall after he excavated for purpose of his investigation. The debris that he allegedly found after 19 months was disputed by the plaintiff.

[13] His conclusion was that the thickness of the existing 110 wall was below the minimum requirement. He indicates that the wall was 100mm and was less than 250mm .The spacing of the piers was more than the minimum required and the quality of the workmanship of the existing 110mm is questionable. His conclusion was that the wall collapsed as a result of poor workmanship.

[14] He was asked under cross examination whether other factors could have contributed to the collapse of the wall and he confirmed same.

[15] It was put to him whether the heavy rain in the trench contributed and he confirmed. It was also put to him whether the fact that big pieces of concrete that

was cut off from the foundation of the existing wall together with the wet soil that filtered in the trenches could have contributed to the collapse of the wall and he confirmed the possibility. It was also put to him that if there was no excavation whether the wall would still have collapsed by itself. He could not answer the question.

Submissions

[16] The parties waived their rights to oral submissions and they were ordered to file their receptive heads of arguments on or before 15 July 2020, the court received the plaintiff's heads at 22:39 on 15 July 2020, the court does not take issue with the hours of late filing. The defendant on the other hand filed its respective heads of argument on 21 July 2020 accompanied by a condonation application for the late filing.

[17] The court accepts the reasons advanced in the condonation application and proceeds to use both the heads as complied by both parties. The court applauds both parties for their efforts.

[18] Ms Samuel in her written submissions referred to the case of *King v Dykes*² where MacDonalld laid down the general principle of an occupier's duty with regard to his neighbour as follows:

'when an owner knows that there is a danger present on his land, not placed there by him, but which he foresees will cause his neighbour damage (natural danger is not discussed here), there rests a duty upon him in my view to act as long as it is reasonably possible to render the danger harmless' Whether in a particular case such as those mentioned in Goldman's case - knowledge of hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it ... and balanced consideration of what could be expected of the particular occupier as compared with the consequences of inaction'.

[19] Ms Samuel proceeds to submit that, it is imperative to note that plaintiff's claim is founded in delict and one has to establish first, the conduct of the defendant of which he complained; second, the wrongfulness of that conduct; third, fault on the part of the defendant (in this case in the form of negligence); fourth, that he had

² *King v Dykes* 1971 (2) RLR 151; 1971 (3) SA 540 (RA).

suffered harm; and fifth, a causal connection between such harm and the defendant's conduct that is the subject of its complaint.

[20] Ms Samuel is adamant that the conduct complained of, is the fact that no consent was obtained from the plaintiff despite it being a legal requirement and responsibility of the defendant who was conducting works on the plaintiff's borderline. The defendant was requested to stop when the wall collapsed, he neglected to do so. He proceeded to construct his boundary wall and the rest of his house despite there being no permission to do so and without complying with the requirements from the Town Council.

[21] Regulation 4 of the National Building Regulations Standards Act No 103 of 1977 (as amended) read with the Town Planning Scheme of Ondangwa Town Council. The aforesaid regulation reads as follows as cited by both parties:

'4. Approval by Local Authorities of Applications in Respect of Erection of Buildings

(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.

(2) Any application for approval referred to in subsection (1) shall be in writing on a form made available for that purpose by the local authority in question.

(3) Any application referred to in subsection (2) shall- (a) contain the name and address of the applicant and, if the applicant is not the owner of the land on which the building in question is to be erected, of the owner of such land; (b) be accompanied by such plans, specifications, documents and information as may be required by or under this Act, and by such particulars as may be required by the local authority in question for the carrying out of the objects and purposes of this Act.

(4) Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building.'

[22] Ms Amupolo for the defendant is her written submission submitted that in *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-35D,

'There are two distinct questions in the causation enquiry. *The first is a factual one and relates to the question whether the relevant conduct caused or materially contributed to*

the harm giving rise to the claim. If it did not, then no legal liability can arise. If it did, then the second question becomes relevant, namely whether the conduct is linked to the harm sufficiently closely or directly for legal liability to ensue, or stated differently, whether the harm is too remote from the conduct. The causa sine qua non (the 'but for' test) is ordinarily applied to determine factual causation.

[23] Ms Amupolo further stated and I quote:

The central theme of the defendant's case is that the wall collapsed due to multiplicity of factors, of which the excavation on his property was but one'.

Quantum

[24] The Plaintiff relied on a quotation to prove his claim. The popular maxim of he who alleges must prove bears a heavy weight on the determination of damages. Ms Amupolo correctly states in her submissions that 'In the absence of proof of damages suffered as in the present case, the court is not in a position to determine damages and hence the *quantum* suffered by the plaintiff. It is the duty of the plaintiff to prove that he incurred expenses and not to fish for future expenses'.

[25] In the case of *Musoni v Cosmas* (HC-NLD-CIV-ACT-DEL-2016/00301) [2018] NAHCNLD 67 (23 July 2018) Cheda J stated that:

'In the absence of such proof the court cannot pluck figures from the air, as it were. It is trite that in our law, he/she who asserts must prove all the damages. . .'

Analysis of the evidence

[26] *Ueitele J, in Western Administration Services (Pty) Ltd vs Shifotoka* (HC-MD-CIV-ACT-OTH-2018/00470) [2019] NAHCMD 103 (16 April 2019) stated:

'For more than 110 years, the courts have consistently stated that for the purposes of liability, *culpa* arises if -

(a) *A diligens paterfamilias* in the position of the defendant -

- (i) would foresee the reasonable possibility of his or her conduct injuring another in his person or property and causing him or her patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps.¹³

[27] The court is now called on to adjudicate if there is liability on the part of the defendant, the principles as indicated in the case of *Western Administration Services (Pty) Ltd vs Shifotoka* lead this court.

[28] It is common cause that there was a duty of care on the part of the defendant. The wall only collapsed after excavation and that only a part of the wall where it was excavated collapsed. Both plans were approved by the municipality and completion certificates were issued after construction of both houses. It is thus assumed that both parties complied with municipal regulations.

[29] It is also common cause that the wall only collapsed after heavy rains filled the trenches with water and infiltrated the soil in the trenches. Although the defendant maintains that the water and soil that filtrated the trenches did not contribute to the collapse of the wall.

[30] I found Mr Ujombala to be a reliable and trustworthy witness. What is significant about his evidence is that he testified that he observed how the builders removed dry concrete from the plaintiff's wall foundation and that they informed him that they wanted their concrete to be deeper than that of the existing wall of the plaintiff. This part of his evidence was not disputed by the defendant. Mr Ujombala also testified about the material he used and the measurements of the foundation when he laid the foundation.

[31] Mr Ujombala works for the Ondangwa town council and he is a well-known contractor within this region. I find it highly improbable that he would pretend as if he is the owner of a house and sign a form well known to him whereas he is not the owner. The court is convinced that Mr Ujombala indeed did not sign the consent for relaxation of boundary.

[32] Defendant version is therefore questionable as far as the consent form is concerned. It takes me to the next point as to how he could not establish who his neighbour was, the real owner of the erf. Thus the qualifying the first requirement need to establish liability, by failing to ascertain the true identity of his neighbour and by further cutting the foundation of his neighbours wall in an attempt to make his own

³ *Kruger v Coetzee* 1966 (2) SA 428 (A) at p 430.

foundation deeper and not having any regard to what this will do to the wall of his neighbour.

[33] What makes the defendant's version more doubtful is the fact that he first stated to the court that he did not see any of the neighbours with two walls which brought under the impression that he intended to construct one wall but it became apparent during the trial from his evidence that he intended to build a fire wall next to the plaintiffs wall .It was the court's observation of his demeanour that it was with great difficulty for the defendant to admit that he indeed build the firewall for his benefit .

[34] The defendant under cross examination conceded that he had no problem in replacing the wall for the plaintiff but his only problem was that the plaintiff's quotation was too high and he could not afford it.

Conclusion

[35] I accept the version of the plaintiff as the correct version, in that the accident is attributable to the negligent conduct of the defendant. Furthermore, the defendant did not take the necessary care when excavating next to the plaintiffs wall and the defendant did not show reasonable consideration to the plaintiff being his neighbour.

[36] Had the defendant not excavated next to the plaintiffs wall and cut off the dry concrete next to the plaintiff's foundation which removed the support structure of the plaintiffs foundation, coupled with the open trench that absorbed water and sand the wall would not have collapsed.

[37] The primary cause of the wall that collapsed was a result of the defendant's negligent conduct. The defendant is thus held liable for the collapse of plaintiff's wall.

[38] As stated in the case of *Musoni v Cosmas*, in the absence of proof when it comes to alleging damages, the court cannot pluck figures from the air. The plaintiff has failed tremendously in proving all the quantum.

[39] In the result, I make the following order:

3. The Defendant is hereby held liable for the collapse of the Plaintiff's boundary wall.

4. Cost of suit is awarded to the Plaintiff.

A Diergaardt
Acting Judge

APPEARANCES

PLAINTIFF: Ms A Samuel
Of Samuel & Company Legal Practitioners,
Ongwediva

DEFENDANT: Ms M Amupolo
Of Amupolo & Company Inc.,
Ongwediva