THE SUPREME COURT OF APPEALOF SOUTH AFRICA

JUDGMENT

Case No: 883/2011
Reportable

In the matter between:

MEIR MARGALIT **Appellant**

and

STANDARD BANK OF SOUTH AFRICA LTD **First Respondent**

NELSON BORMAN & PARTNERS INC **Second Respondent**

Neutral citation: *Margalit v Standard Bank of SA Ltd* (883/2011) [2012] ZASCA 208 (3 December 2012)

Coram: Nugent, Leach and Pillay JJA and Southwood and Erasmus AJJA

Heard: 21 November 2012

Delivered: 03 December 2012

Summary: Conveyancing attorney – transfer delayed due to conveyancer's negligence – conveyancer liable for damages suffered by seller of property due to the delay.

O R D E R

On appeal from: South Gauteng High Court, Johannesburg (Mbha J and Levenberg AJ sitting as court of appeal):

'1. The appeal is upheld with costs.

2. The order of the high court is set aside and is replaced with the following:

'The appeal is dismissed, with costs.'

J U D G M E N T

LEACH JA (NUGENT and PILLAY JJA, SOUTHWOOD and ERASMUS AJJA concurring)

[1] The appellant is the former owner of a certain piece of immovable property situated in Sandton, more fully described as Erf 300, Morningside Manor, Extension One ('the property'). In May 2007 he sold the property to a third party at an agreed purchase price of R3 million. Of this, he was to receive R2.9 million with the balance of R100 000 being paid to an estate agent as commission. At the time of the sale Standard Bank, the first respondent, held two mortgage bonds over the property which had to be cancelled before it could be transferred to the purchaser. Standard Bank appointed the second respondent, a Johannesburg firm of attorneys, to act on its behalf in cancelling the bonds. Unfortunately, it took more than a year, until 16 July 2008, before the bonds were cancelled, the property was transferred to the purchaser, and the appellant was paid. Understandably annoyed by this delay, the appellant instituted a magistrates' court action against the respondents in which he claimed damages in respect of interest lost on the net price of R2.9 million, alleging that at least some of the delay had been attributable to the second respondent's unprofessional conduct.

[2] On 23 April 2010, the trial magistrate upheld the claim and granted judgment against both respondents in the sum of R42 713,42 being the amount of damages the parties had agreed should be awarded in the event of the claim succeeding. However, the respondents successfully appealed to the South Gauteng High Court which, on 20 May 2011, set the magistrate's order aside and substituted an order absolving the respondents from the instance, with costs. The further appeal to this court is with the high court's leave.

[3] As a general rule, the overall process of effecting the transfer of immovable property is driven by the seller's conveyancing attorney (referred to in evidence as 'the transferring attorney'). The appellant appointed Warrender Attorneys ('Warrender') to do the necessary to transfer the property to the purchaser. As no transfer may be registered without what is commonly referred to as a 'rates and taxes clearance certificate' from the relevant local authority[1] (in the present case the City of Johannesburg Metropolitan Municipality), the initial step was for Warrender to obtain such a certificate. In the present case, although Warrender applied for the requisite certificate almost immediately after the property had been sold, it only came to hand on 30 April 2008.

[4] The appellant, who subsequently also instituted action for damages against the City of Johannesburg (we are unaware of the outcome of that litigation), does not allege that the respondents were in any way to blame for this lamentable delay. Instead, his claim against them relates to a portion of the two and half months that elapsed after the rates and taxes clearance certificate was issued before transfer of the property occurred on 16 July 2008.

[5] As mentioned at the outset, at the time of the sale there were two mortgage bonds registered over the property in favour of Standard Bank as security for loans previously advanced to the appellant – the first being bond B45584/89 registered on 3 July 1989 securing a loan of R250 000; the second being bond B39663/91 registered on 5 June 1991 as security for a further loan of R100 000 – which both had to be cancelled in order for transfer to be effected.[2] It is also common cause that the purchaser, in turn, intended to mortgage the property as security for a loan he had negotiated with Nedbank in order

[1] Section 92(1) of the Deeds Registries Act 47 of 1937.
[2] Section 56(1) of the Act.

to pay for the property. This required Nedbank to provide a guarantee to pay the outstanding sum secured by the existing mortgage bonds in order to obtain Standard Bank's consent to cancellation.

[6] The parties are agreed that it was a term of each of the Standard Bank's bonds that, on providing a guarantee for payment of the amount secured, the appellant would be entitled to cancellation of the bond, and that such cancellation would be effected by either Standard Bank or its agent in a professional and businesslike manner. As appears from what follows, there were certain delays that occurred in the transfer process after the rates clearance certificate finally became available. These the appellant seeks to ascribe to the second respondent's negligent failure to act in a professional and businesslike manner which, it alleges, not only rendered the second respondent liable in delict but constituted a contractual breach of the terms of the bonds.

[7] In order to evaluate the second respondent's conduct, it is necessary to bear in mind the process followed to obtain the registration of transfer in a case such as this where the immovable property sold is burdened by a mortgage bond and the purchaser, too, requires to mortgage the property as security for a loan. Three different transactions in the deeds registry are involved: the first is the transfer of ownership of the property from the seller to the purchaser; the second is the cancellation of the existing bondholder's mortgage bond over the property; and the third is the registration of the mortgage bond of the new bondholder over the property. The three transactions take place simultaneously. Although a particular conveyancing attorney may represent more than one of the interested parties in this process, in most cases, (as was the case in the present matter) three attorneys are involved. Here Warrender was the transferring attorney, charged with effecting transfer from the appellant to the purchaser; the second respondent represented Standard Bank to ensure that, upon suitable guarantees for payments of the amounts secured being provided, its bonds were properly cancelled; and another attorney represented Nedbank to ensure that a mortgage bond in its favour was passed over the property when Standard Bank's existing bonds were cancelled, thereby securing the amount advanced to the purchaser.

[8] When the appellant approached Warrender to attend to transfer on his behalf he appears to have forgotten that there were in fact two bonds in favour of Standard Bank

registered over the property. He had checked the balance of his bond account over the internet, which reflected that he owed the bank about R1 201. This was the total amount owing in respect of a number of different mortgage bonds passed over different properties as security for various loans made to him, but without the amounts in respect of each particular bond being indicated. He then instructed Warrender to arrange for the property to be transferred and the bond over the property to be cancelled.

[9] Consequently, on 11 June 2007, Warrender wrote to Standard Bank to inform it that they had been instructed to attend to the transfer of the property which was 'presently bonded to yourselves' and requested it to provide details of its guarantee requirements and the name of the attorney who would attend to 'the cancellation on your behalf'. Presumably in response to this, the second respondent wrote to Warrender on 14 September 2007 to notify them that it was acting on behalf of Standard Bank, and enclosed a copy of the deed of transfer relating to the property as well as a document dated 12 June 2007 setting out Standard Bank's guarantee requirements (in a sum of R1204.40). The second respondent went on to call for a guarantee in that sum, and stated 'We are cancelling One Bond….'

[10] The various parties proceeded to prepare their transfer documents and to arrange for the appropriate guarantees. In the light of the almost trifling amount required by Standard Bank, a guarantee for payment of the amount still due to it was of no real concern and, on 17 July 2007, Nedbank issued a guarantee to Standard Bank in the amount of R1201.40. However transfer was placed in limbo awaiting the rates and taxes clearance certificate and it was only in April the following year, after it had arrived, that Warrender was finally in a position to lodge the documents necessary for registration of transfer of the property into the name of the purchaser. As already explained, this required the simultaneous lodging by both the second respondent of Standard Bank's consents to cancel its mortgage bonds and Nedbank's conveyancer of the documents needed to register its new mortgage bond. However the matter was made somewhat more complicated by reason of Standard Bank having lost both its copy of the property's title deed (which it was holding as security) and its mortgage bonds over the property. According to the evidence, banks losing documents of this nature is an almost everyday occurrence. Fortunately for parties in this position, help is to hand in the form of regs

68(1) and (6) of the regulations promulgated under the Deeds Registries Act 47 of 1937, which provide:

'(1) If any deed conferring title to land or any interest therein or any real right, or any registered lease or sublease or registered cession thereof or any mortgage or notarial bond, is lost or destroyed and a copy is required for any purpose other than one of those mentioned in either of the last two preceding regulations, the registered holder thereof or his duly authorised agent may make written application for such copy, which application shall be accompanied by an affidavit describing the deed and stating that it has not been pledged and it is not being detained by any one as security for debt or otherwise, but that it has been actually lost or destroyed and cannot be found through diligent search has been made therefor, and further setting forth where possible the circumstances under which it was lost or destroyed . . . .

. . . .

(6) On compliance with the provisions of this regulation the Registrar shall, if he is satisfied that no good reason to the contrary exists, issue the certified copy asked for: provided that no such copy shall be issued until the Registrar has searched the registers and has made suitable endorsements regarding transactions, if any, registered therein in connection with the deed or bond concerned.'

[11] In order for Standard Bank to cancel its bonds, it was necessary for the second respondent to avail itself of reg 68(1) to apply to the Registrar of Deeds for a certified copy of both the appellant's deed of transfer and the missing mortgage bonds. This required the second appellant to prepare the necessary application under the regulation which was to be lodged simultaneously with and linked to the other three transactions (viz the registration of transfer, cancellation of the existing Standard Bank bonds and registration of Nedbank's bond).

[12] However, at that stage the second respondent appears to have been in possession of a copy of a title deed of the property that bore an endorsement of a single mortgage bond registered over the property, bond B39663/91. There is a suggestion that this was due to an error in the deeds office, but how the second respondent came into possession of this document (which was not introduced into evidence) is unclear as, inexplicably, neither the conveyancer of the second respondent nor the conveyancing secretary charged with handling the matter gave evidence. Instead the second respondent contented itself with calling another conveyancing secretary, who had not been involved

in the matter in any way, to interpret the contents of its file. This highly undesirable state of affairs may well have resulted in crucial information not being placed before court.

[13] Be that as it may, Warrender, Standard Bank and the second respondent, all laboured under the mistaken impression that there was but a single mortgage bond registered over the property when they prepared their papers to be lodged in the deeds office, and did not refer to the second bond, B45584/89. Not only did that bond have to be cancelled but as it, too, was lost, the second respondent needed to prepare a reg 68 application for it as well. It failed to do so.

[14] On 13 May 2008, the respective transactions, including an application under reg 68(1) in respect bond B39663/91, were simultaneously lodged at the Pretoria deeds office and 'linked' in order for them to be registered together. It has been agreed between the parties that if all the papers had been in order, transfer to the purchaser would have been registered (and the appellant paid his purchase price) by no later than 29 May 2008.

[15] Instead, a deeds office examiner ascertained that bond B45584/89 in respect of which Standard Bank had not consented to cancellation, was also registered over the property. Transfer could therefore not be registered and, on 22 May 2008, all the linked documents relating to the property and its transfer were rejected.

[16] The problem was rectified in haste. By 30 May 2008, the second respondent had obtained both Standard Bank's consent to cancellation of bond B45584/89 and a reg 68 affidavit signed by a bank official relating thereto, and on 2 June 2008 the transfer documents were once more lodged at the deeds office. This attempt to obtain transfer was singularly unsuccessful as the application was almost immediately rejected for 'non-linking' as the attorneys acting for Nedbank failed to lodge their documents (whether this rejection occurred on 2 June 2008 when the papers were lodged or the following day is not clear, but nothing turns on this). The delay caused by this rejection was really inconsequential as the necessary documents of all parties, properly linked, were duly lodged for a third time on 5 June 2008.

[17] Once again, this attempt to effect transfer ended in failure. The second respondent had initially prepared Standard Bank's bond cancellation documents in 2007 while awaiting the issue of the rates clearance certificate. Those papers included a reg 68(1) application in respect of bond B39663/91. The second respondent practises in Johannesburg, and the practice of the deeds office in that city at the time was to permit an attorney acting on behalf of a bondholder to sign the affidavit required for an application under reg 68(1). The practice in Pretoria, where registration of transfer was to be effected, was different. It required the affidavit to be signed by a representative of the bondholder, and not by the attorney. The application in respect of bond B39663/91, prepared in 2007, had followed the Johannesburg practice. At the end of that year, at a conference of the registrars of the various deeds registries countrywide, it was agreed to adopt the Pretoria practice as a uniform practice throughout the country. This resolution was recorded in the Chief Registrar's Circular RCR 20 of 2007 and was implemented at the beginning of 2008. The reg 68(1) application in respect of bond B45584/89, which was later prepared in May 2008 in the circumstances already mentioned, followed this new uniform practice. But as the application in respect of bond B39663/91, did not, and on 13 June 2008, it was rejected as deficient. This caused the other linked transactions required to effect transfer to be similarly rejected.

[18] Consequently, the second respondent was required to prepare a fresh application under reg 68(1) relating to bond B39663/91 in which the affidavit was properly signed by an official of Standard Bank. Once that had been done, all the papers were lodged once more by the various parties on 2 July 2008. This time the various registrations were effected and, on 16 July 2008, Standard Bank's bonds over the property were cancelled and transfer was effected to the purchaser of the property.

[19] In the light of this background, the appellant alleged that the second respondent's negligent and unprofessional conduct had resulted in a delay in transfer from 29 May 2008 (when it was agreed that the transfer would have gone through if the papers as they were initially lodged had been in order) until it was eventually registered on 16 July 2008. The appellant contended that the second respondent's conduct not only resulted in Standard Bank having breached its contract with him but led to the second respondent being liable to him in delict.

[20] Before dealing with that contention, I should mention that the original guarantee issued by Nedbank for payment of the amounts owing in respect of the loans secured by the Standard Bank bonds had expired well before the transfer documents were lodged in July 2008 but that, immediately before transfer on 16 July 2008, Nedbank had furnished Standard Bank with a second guarantee in an amount of R4713.38 being the amount then outstanding in respect of the bonds. As a result of this, the high court reasoned that the obligation to cancel the bonds had been reciprocal to and dependent upon the appellant providing a guarantee for payment of the outstanding amounts secured. It further reasoned that the appellant had not been entitled to rely upon the first guarantee which had lapsed and, as a second guarantee was only provided on 16 July 2008 (the date of transfer) when the bonds were cancelled, Standard Bank was entitled to avail itself of the *exceptio non adimpleti contractus* and the appellant had not acquired a right to cancellation of the bonds before the date of transfer. It accordingly held that as there had been no contractual obligation to cancel the bond before then, the appellant's claim should have failed on that ground alone.

[21] This reasoning was also adopted by counsel for the respondents, albeit tentatively, on appeal to this court. Counsel's diffidence was justified. Not only was the *exceptio* not raised or pleaded by the respondents as a defence, as it ought to have been if they had wished to rely upon it,[3] but neither respondent had sought to delay or attempt to withhold performance by reason of any failure of the appellant to perform. On the contrary, they attempted to perform their obligations by doing whatever was necessary to effect cancellation of the bonds. The second respondent proceeded to lodge the bond cancellation consents without the necessary guarantee, and accepted the guarantee from Nedbank at the eleventh hour before transfer was registered. The decision of the high court in this issue was clearly wrong.

[22] I turn to consider the crucial issue of the second respondent's alleged negligence. I preface my remarks by observing that of course not every act which causes harm to another is actionable in delict. The action complained of must also be wrongful, the concept of which has been authoritatively dealt with in cases such as *Le Roux v Dey* 2011 (3) SA 274 (CC) para 122 and the various judgments referred to therein. It is unnecessary to deal further with this issue as counsel for the respondents conceded that,

[3] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 163.

should the delays in transfer, effecting that occurred after the rates clearance certificate had been provided, have been due to the second respondent's negligence, both respondents should be held liable for the agreed damages and the appeal should succeed. Negligence on the part of the second respondent, and not wrongfulness, is therefore the crucial issue that has to be decided.

[23] A conveyancer is of course 'an attorney who has specialised in the preparation of deeds and documents which by law or custom are registerable in a deeds office and who is permitted to do so after practical examination and admission . . .'[4] Like any other professional, a conveyancer may make mistakes. But not every mistake is to be equated with negligence, and in a claim against a conveyancer based on negligence it must be shown that the conveyancer's mistake resulted from a failure to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position. As was remarked many years ago by De Villiers CJ, in a dictum recently followed by this court:[5]

'I do not dispute the doctrine that an attorney is liable for negligence and want of skill. Every attorney is supposed to be proficient in his calling, and if he does not bestow sufficient care and attention in the conduct of business entrusted to him, he is liable, and where this is proved the Court will give damages against him.'[6]

[24] Although at times a court may need expert evidence on a particular professional practice to determine whether a professional person acted negligently, that is not a fixed and inflexible rule and the views of a professional, while often helpful, are not necessarily decisive. The nature of the conduct complained of may well be such that a court, even without the benefit of professional opinion, may determine that the conduct complained of was of such a nature that it clearly falls below the mark of what can be regarded as reasonable. This in my view is such a case (I should mention that the expert evidence called by the parties in this case, while extremely helpful in explaining the mysteries of certain procedures in the deeds office, did not deal pertinently with all the issues relevant to the second respondent's negligence).

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[4] Nel *Jones Conveyancing in South Africa* (4 ed) at 16.
[5] *Steyn v Ronald Bobroff & Partners* (025/12) [2012] ZASCA 184 para 3.
[6] *Van der Spuy v Pillans* 1875 Buch 133 at 135.

[25] Of course the gravity and likelihood of potential harm will determine the steps, if any, which a reasonable person should take to prevent such harm occurring. Moreover, the more likely the harm the greater is the obligation to take such steps. No hard and fast rules can be prescribed. Each case is to be determined in the light of the particular facts and circumstances. But in the case of a conveyancer, it is necessary to remember that any mistakes which may lead to a transaction in the deeds office being delayed will almost inevitably cause adverse financial consequences for one or other of the parties to the transaction. It is for that reason that in Christie: *Fourie's Conveyancing Practice Guide* (2 ed) it is observed that the financial aspects of a transfer of property are of great importance and that negligence or mistakes on the part of a conveyancer can lead to financial loss to clients rendering the conveyancer liable for damages.[7]

[26] To avoid causing such harm, conveyancers should therefore be fastidious in their work and take great care in the preparation of their documents. Not only is that no more than common sense, but it is the inevitable consequence of the obligations imposed by s 15(A) of the Act as read with reg 44, both of which oblige conveyancers to accept responsibility for the correctness of the facts stated in the deeds or documents prepared by them in connection with any application they file in the deeds office.

[27] I turn to the deal with the various delays that occurred. As I have mentioned, the rejection on 22 May 2008 was based on the failure to apply for a cancellation of bond B45584/89. Relying on a deeds office note made at the time, it was contended that the second respondent must have been in possession of a copy of the title deed of the property on which only one bond was endorsed. Miss Venter, the conveyancing secretary employed by the second respondent (who, as I mentioned earlier, had not personally dealt with the transaction) also explained that the deeds office had subsequently informed them that for some unexplained reason one of the copies of the title deed it held was endorsed with only one bond. This provided the foundation for an argument that the second respondent could not have known of the second bond and had not acted unreasonably in applying only for a single bond it to be cancelled. On the other hand, the appellant argued that the second respondent ought to have done a proper

[7] At 18.

deeds office search immediately it received its instructions from Standard Bank and that, had it done so, it would have learned of the second bond.

[28] All of this is something of a red herring. As I have already mentioned, on 14 September 2007 the second respondent wrote to Warrender, the appellant's attorneys, advising them that it had been instructed by Standard Bank to attend to the bond cancellation and enclosing a copy of the deed of transfer relating to the property. Both that letter and the deed of transfer bear a stamp showing that they were sent to Warrender by telefax on 14 September 2007. Each page of the deed of transfer is stamped 'FOR INFORMATION ONLY'. Absent the failure to testify of any person on behalf of the second respondent who had personal knowledge of the matter, one is left in the dark as to where this copy of the title deed came from - although as Standard Bank had lost the original that it was holding as security, it presumably was obtained from the deeds office. But in any event, whatever its source may have been, the two mortgage bonds B45584/89 and B39663/91 are both clearly endorsed upon this copy. It is therefore clear that from the outset the second respondent was in possession of a copy of the title deed which showed both bonds registered over the property. How it came about that the second respondent prepared papers relating to the cancellation of only one bond, (or indeed stated in its letter of 14 September 2007 that it was only going to cancel one bond) is not explained. But the inference that the second bond was simply overlooked is irresistible.

[29] In the absence of an explanation, the inevitable conclusion to be drawn from this is that whoever acted for the second respondent to obtain cancellation of Standard Bank's bonds over the property, did so negligently. The potential of harm caused by a delay in the event of the application for cancellation being defective was obvious. That harm could have been simply averted. A glance at the copy of the deed of transfer in the second respondent's possession would have shown that it was necessary to cancel two mortgage bonds registered over the property. As I have said, a conveyancer should fastidiously examine all relevant documents. That was clearly not done by the second respondent. The standard of care it exercised fell well short of what is expected of a reasonable conveyancer, and I have no hesitation in finding that the delay caused by the rejection on 22 May 2008 was due to negligence on the part of the second respondent.

[30] That brings me to consider the 13 June 2008 rejection of the applications due to the one reg 68 affidavit not having been properly attested by an official of Standard Bank. One of the issues upon which some time was spent at the trial was whether the contents of the Chief Registrar's Circular RCR 20 of 2007, which prescribed that a reg 68 affidavit could not be signed by the bondholder's attorney, would have been known to practitioners. Again this amounted to a red herring. Not only was there no evidence that the responsible conveyancer of the second respondent did not know of this 'new' practice requirement but, when the linked applications were rejected on 22 May 2008, the second respondent immediately arranged for the necessary reg 68(1) application relating to bond B45584/89 to be obtained from a Standard Bank official. The necessary inference to be drawn is that the second respondent knew of the practice prescribed by RCR 20 of 2007 by that stage.

[31] In addition, a cursory examination of the papers before they were lodged in May 2008 would have revealed that the application prepared in respect of bond B39663/91 in 2007 did not meet the new practice and would be rejected. Once more the inference is irresistible that the second respondent failed to check the documents to see if they would pass muster before they were lodged in 2008. This evidences a slothful approach to the important task of ensuring that documents accord with the deeds office's current practices and requirements. The excuse offered by the second respondent, that the papers in regard to bond B396631/91 had been prepared in 2007 before RCR 20 of 2007 came into operation, is lame in the extreme. Not only were the papers not prepared in accordance with the 2007 Pretoria practice where the deeds were to be registered but, in any event, the documents were only lodged in 2008 after the introduction of new uniform practice prescribed by RCR 20 of 2007 of which the second respondent was well aware. It was the second respondent's obligation, when it lodged its documents, to ensure that they met the requirements of the deeds office at that time. The second respondent's failure in that regard also falls short of the high standard of care expected of a prudent practitioner.

[32] Consequently, both the initial rejection on 22 May 2008 and the third rejection on 15 June 2008 were due to negligence on the part of the second respondent. The second

rejection on 3 June 2008 was inconsequential, as I have said, and the parties in any event agreed on the quantum of damages should it be found that the second respondent acted negligently. In the light of the finding of negligence on the part of the second respondent, the high court erred in reaching the conclusion it did. This appeal must therefore succeed.

[33] There is no reason for costs not to follow the event. The appellant asked for the costs of two counsel. However, the amount in issue was fairly meagre, the law in no way unsettled, and the facts straightforward. In my view, under these circumstances, an order for the costs of two counsel is not justified.

[34] The following order will therefore issue:

1. The appeal is upheld with costs.
2. The order of the high court is set aside and is replaced with the following:

‘The appeal is dismissed, with costs.’

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L E Leach

Judge of Appeal

APPEARANCES:

For Appellant:	R STOCKWELL SC (with him B D Hitchings) Instructed by: Warrender Attorneys, Fairland Honey Attorneys, Bloemfontein
For Respondent:	J J ROESTORF Instructed by: Borman Duma Zitha Attorneys, Johannesburg Naudes, Bloemfontein

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