IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 2/02/2007
Case No: 30700/2003

UNREPORTABLE

In the matter between:

MOUNTAIN SANCTUARY PARK CC Plaintiff

and

AVALON BRAAIS AND FIREPLACES CC Defendant

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JUDGMENT

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FABRICIUS: AJ

1 .

Plaintiff is the owner of a hospitality facility in the Magaliesburg at which wooden chalets are let to tourists. Defendant designs and sells freestanding fireplaces, and, in the present instance, also installed them. It is not in dispute that defendant also professes to be an expert in such installations.

2.

During April 2003 plaintiff, represented by O Sutton, and defendant represented by G Watt, concluded an oral agreement, the relevant terms of which were the following:

2.1 Defendant would sell and deliver certain freestanding fireplaces, including two such corner places;

2.2 Defendant would install these in plaintiff's chalets, some of them being wooden chalets, at an agreed price per installation;

2.3 To achieve this defendant would supply all the necessary materials and labour;

2.4 Defendant would exercise the necessary skill and care expected of a professed expert in this field, and would install such fireplaces without negligence;

2.5 The installations would comply with the necessary statutory requirements in respect of such fireplaces, chimneys and hearths, and would be fit for the purpose installed and would be safe to use by the plaintiff's guests.

3.

It is also not in dispute that defendant professed to be an expert in the supplying and installation of such fireplaces, and that at the time of the conclusion of the agreement the parties knew that such fireplaces would be used in plaintiff's tourist business, and that plaintiff would suffer damages if the fireplaces were incorrectly designed or installed. Defendant duly installed six of such fireplaces, five in wooden chalets, and one in a brick chalet, as well as installing four hearths.

4.

One of the wooden chalets fitted with a corner unit caught fire on 30 May 2003 at about 00:30. The chalet was occupied by guests at the time and was completely destroyed. As a result the plaintiff instituted action against defendant alleging a breach of the agreed-upon terms and alleging that as a result of defendant's wrongful and negligent conduct, it suffered damages. The determination of the quantum was separated from the present issue before me, namely whether or not the defendant negligently breached the terms of the agreement between the parties, and was therefore liable for proven damages suffered by the plaintiff.

5.

Plaintiff pleaded that defendant breached its obligations in terms of the said agreement, acted wrongfully and negligently in a number of respects, including a failure to comply with certain statutory fire safety requirements and regulations, installing the fireplaces too close to the wooden combustible walls, and failing to provide or install any or sufficient insulation.

6.

Plaintiff presented its evidence through the owner Mr Sutton, one of the guests in the particular chalet at the time, Mrs Hammer, and an admitted expert, Mr J Strydom, who had 24 years experience in building technology with specific reference to fire science and technology at the CSIR. He conducted certain tests to which I will refer later. The relevance of his tests and resultant conclusions were disputed by defendant, which alleged that the particular fire had not been caused by the fireplace and its use that particular evening.

7.

It will be convenient to first deal with the evidence of Mr Strydom. In his summary in terms of rule 36(9)(b) the crux of his findings and conclusions was stated to be the following:

7.1 Defendant failed to comply with certain statutory fire safety requirements and regulations in a number of respects;

7.2 It designed and installed the fireplaces and fluepipe in such a manner that it caused a fire hazard to adjacent material;

7.3 The fireplace and fluepipe was installed too close to the combustible walls of the log cabin, without sufficient or any insulation to ensure that they would not be exposed to radiant heat to such an extent that it would result in spontaneous combustion;

7.4 The installation of the fireplace was responsible for the fire that resulted in the loss of the cabin and its contents, and that such loss could have been prevented by defendant with the use of appropriate material and proper installation.

8.

The expertise of Mr Strydom was admitted by defendant. He had conducted a made-up fire test intended to simulate the circumstances surrounding the relevant incident, and this had been performed during January 2007. A summary of this experiment had been

attached to his expert notice. It was stated that the experimental set up consisted of a timber panel wall constructed for form a corner section. A corner fireplace unit flue configuration was place in this corner approximately 50mm from each wall. The installation resembled the actual installation that was reportedly involved in the fire incident in question.

9.

It was stated that the test was conducted by using one commercially purchased bag of black wattle wood (approximately 6kg). After one hour another bag was added to the fireplace, and subsequently a portion of a bag, approximately half by mass, was added every 30 minutes or as seemed appropriate based on the condition of the fire. After about 75 minutes smoke was observed from behind the fireplace which initially subsided, but reappeared after approximately 95 minutes. At this point some glowing was also observed in the wooded wall which gradually increased from this point onwards. After 244 minutes flaming combustion occurred on the wall on the right-hand side. The flame propagated very rapidly and grew in intensity which required that the fire be extinguished. Various temperatures were recorded during the relevant process.

10.

Mr Strydom testified that after the incident he inspected the other fireplaces installed by defendant and assumed that they had been installed in the same manner as the corner unit in the burnt-out log cabin. The same people had done the installation. He stated that the installation did not comply with the relevant statutory requirements in terms of the National Building Regulations and Building Standards Act, No 103 of 1977 nor the National Building Regulations Code of Practice emanating from the Standards Act, No 30 of 1982.

11 .

There had been no proper installation as the unit had been installed too close to the combustible wooden wall of the log cabin, quite apart from any regulations or the code of practice. The installation was not safe, applying common sense and his expertise and knowledge. The defendant professed to have the necessary expertise in this regard and therefore the installations of the other fireplaces was not acceptable. He had also found charring in other log cabins behind the fireplace and the fluepipe. This was significant as it was the start of a combustion process. Such process takes place in stages, and as the heat increased over a period of time, glowing will start, volatiles are given off and flaming becomes visible. The duration of such process would depend amongst others on relevant air patterns within

such cabin, how much wood was used and how frequently, and how far a fireplace was from the particular wooden wall. Treated wood would also extend the duration of the process. He himself had bought the particular corner unit with which he conducted the experiment from defendant. He was given no instructions as to the installation or the safety aspects thereof. At a certain stage in the process flaming would appear within a matter of seconds, accompanied by a noise akin to the blowing of wind. After the fire the other units had been attended to and insulation had been installed. It was put to him that defendant's witness Mr Watt would say that all the fireplaces had been installed at a distance of 200mm from the particular wooden walls and he stated that even if this was so, the installation was nevertheless not safe in the absence of any insulation.

12.

He agreed that the distance from a wooden wall would make a difference. Firstly, it would give a wider area of exposure, and secondly the duration of the process would be extended. Even if he had no knowledge of the installation of other fireplaces, he would have used a process of rational reasoning to establish the cause of this particular fire in the light of his experience. He would have

looked at the probabilities and all relevant facts to come to a finding. Even an installation at 200mm would not be safe in the absence of insulation and it was still so close that a danger would be created.

13.

Mr Sutton testified on behalf of plaintiff. He gave evidence as to the nature of the plaintiff's business and the details about the various chalets. The particular chalet had been completed about one week before the fire. Defendant's Mr George Watt inspected the relevant cabins whereafter it was decided which units be appropriate and in which area they were to be placed. He identified certain photo's and also identified the insulation inserted after the particular fire in the other cabins. He was assured by Mr G Watt that the fireplace was far enough away from the wall. He accepted all his advices. On the particular evening two ladies and a child had occupied the cabin. They were the first persons to have stayed there. A week prior to that a fire had been lit to enable them to take a photograph for advertising purposes, and this fire had burned for approximately 1 hour. He referred to photograph exhibit G in this context, which showed the relevant fireplace unit standing in a corner of the log cabin, almost against the wooden wall.

14.

That particular evening he visited the guests, a fire was lit at about 18:00 using seringa wood which he had supplied, for approximately 1 % to 2 hours. Logs were added from time to time, and when he left at about 20:00 the fire had still been burning. At about 00:30 he received a call that the cabin was on fire and went to the particular unit, finding the cabin aflame. One of the occupants informed him that she had added logs to the fire before going to bed, that she head a "whoosh" sound sometime thereafter, and saw flames behind the fireplace. Flames were running up the thatch from behind the unit. Objection was raised as to the admissibility of this evidence, and after argument, and after the completion of the evidence of this witness, I ruled that evidence was not admissible in terms of section 3 of the Law of Evidence Amendment Act, No 45 of 1988. I was not satisfied that, in terms of section 3(1)(c)(v), the evidence could not have been given by the person upon whose credibility the value of such evidence pended. I was also not satisfied that the evidence should be admitted in the interests of justice.

15.

He admitted that he had told Mr Strydom that he had assumed that the fireplace had caused the incident. He gave evidence about the furniture in the cabin and its proximity to the fireplace. At the time of

the fire the curtains portrayed in exhibit "G", were certainly not as close to the fireplace as indicated therein. They were about half a meter away. There were no carpets in the log cabin. He admitted that the wooden walls had been treated for insects and the reduction of ignition time.

16.

Thereafter Mr Strydomand Mrs D Hammer had testified. She was one of the ladies in the log cabin that night, together with her friend who had since moved to Germany, and her one year old son. It was a cold evening, confirming what Mr Sutton had said. After he left they sat around the fireplace, feeding the fire from time to time from wood taken from the premises. They went to bed at about 23:30. She slept upstairs with her son. She was awakened by her friend shouting "fire". She ran to the railing to look down and saw the fire shooting up from behind the fluepipe (colloquially speaking the "chimney") on the wall very fast. Her first view had been the burning of the wall behind the fireplace towards the roof. It was very fast and very hot. Her friend did most of the talking afterwards. Before she retired the fire had been "a good warm fire" which they had kept going from time to time. She had fetched about one arm full of wood, and Mr Sutton may also have brought some at an earlier stage. The child fell asleep earlier that evening, and thereafter she cleaned the cabin of his toys

and items that may have been lying around. The furniture was about 1 % to 2 meters away from the fireplace. She didn't see any curtains ablaze when she looked down, didn't see any couch on fire, she hadn't left any paper near the fire, the doors had been closed, and no windows were open except possibly and most likely the bathroom window. This was plaintiff's case.

17.

On behalf of defendant Mr de Wet asked for absolution from the instance in respect of claims referred to in paragraphs 11.1 to 11.4 of the particulars of claim. He submitted that defendant had no case to answer regarding the cause of the fire and whether the fireplace had at all been involved in the destruction of the cabin. He adopted the mathematical approach, if I can call it that, in the context of the evidence of Mr Strydom, with the result that one had to envisage the burning of about 60kg of wood for 7% hours to achieve the relevant result. He also referred to the fact that Mr Sutton had agreed that the fireplace had been installed 200mm from the wooden wall. In essence his argument was that on the evidence of Mr Sutton and Mrs Hammer not enough wood had been burnt to cause the heat required for the combustion process to take place. It could also not be argued that because other fireplaces had been installed incorrectly, this particular fireplace had been installed in the same manner.

18.

Mr Havenga on behalf of plaintiff argued that the evidence of Hammer fitted in with that of Mr Strydom and sensibly excluded all other probabilities as to the cause of the fire. In his submission the probabilities were overwhelmingly in favour of the conclusion that the fire had been caused by the fireplace that evening. Absolution from the instance was refused inasmuch as I was of the view that there was sufficient evidence upon which a reasonable court could find for the plaintiff.

See: Claude Neon Lights (SA) (Pty) Ltd v Daniel 1976 (4) SA 403 (A)

19.

Mr Strydom was recalled after the evidence of Mrs Hammer. He confirmed that what Mrs Hammer had seen had been in line with his own experiment.

20.

Defendant called Mr G Watt who confirmed that defendant designed, manufactured, marketed and installed the relevant fireplaces. The models and quantity of the units were according to Mr Sutton's requirements. Mr Sutton showed him more or less where he had wanted them, and they were delivered and installed shortly

thereafter. They were installed 200mm from the wooden flammable walls. He in fact had measured this distance with a measuring tape. The hearth had been placed on the ground with the fireplace on top at the required place, the distance was then measured and thereafter the unit was installed, and the fluepipe fitted through the roof. The necessary insulation was inserted in the roof area through which the pipe protruded. In the case of all the log cabins the unit had been installed 200mm from the wall and in the brick cabin 50mm. He admitted that defendant professed to be an expert in installation and that they also designed and manufactured the units. They were tested. No insulation had been placed behind the fireplace. There was only an open space between the unit and the wooden wall. He did not dispute expert evidence that wood combusts at 220 degrees after 15-20 minutes but that it would take a bit longer if the wood had been treated. He knew that the unit would be installed in log cabins to be used by tourists. No instructions at their installation or use had been given. He knew that the stove would give off a radiant heat, and he took this into consideration when moving the unit from the wall to the distance of 200mm. He regarded this to be a safe distance. The test results were in his view not relevant having regard to the actual installation in the log cabin. He was responsible for the final installation and had decided how far from the wall the unit had to be placed. I n the structure with the brick wall the distance has been

50mm but in all other instances, he insists, the distance had been 200mm. He denied that the installation had to comply with certain statutory requirements although this had been admitted in the defendant's plea. As far as he was concerned the actual installation was safe, and therefore well within the ambit of the "Deemed-to Satisfy Rules" contained in Part V of the regulations relating to Space Heating. The actual regulation and the "Deemed-to-Satisfy' rule had not been satisfied. Actual installation was however safe and, in his view, in sufficient compliance. He agreed that there had been no insulation except at roof level, but believed that the whole of the installation had been fit for the purpose. He also agreed that the charring of the wooden wall was part of the combustion process. He did not agree that charring had been found in other cabins and stated that any evidence to the contrary by Mr Strydom and Mr Sutton should not be accepted by me. He didn't see any charring but would have seen it if it had been there. He could not explain why the evidence of Sutton and Strydom had not been disputed in this particular context. He agreed that charring was a good sign that the fireplace was too close to the particular wall and that disaster was waiting in that regard. He agreed that if I had to accept the evidence of Sutton and Strydom relating to the visibility of the charring in the other cabins, that the installation had not been safe. In the context of the installation in the particular chalet that burnt down, he denied that

it had not been safe, that the unsafe installation caused the fire and that defendant had negligently breached the relevant agreement. He was asked what probably had caused the fire, and made reference to "something" behind the fireplace that would have carried heat to the wall.

That was the case for defendant.

21.

M r de Wet on behalf of defendant again argued that there was no evidence that the relevant fire in the particular fireplace had caused the destruction of the log cabin that evening. In the context of the evidence of Mrs Hammer he submitted that logs could have been near the fireplace, that one didn't know what had been behind the fireplace, that charring had been irrelevant, that one did not know how much wood had been used, and, that at the end of the day, on the evidence of Mr Strydom, a fire had to burn consistently for 71'2 hours for the radiant heat to cause combustion. He essentially repeated his argument propounded in his application for absolution from the instance.

22.

I have analysed all the relevant evidence and considered it in its

totally as I do not believe that any piecemeal analysis in isolation is justified. In arriving at my finding I proceed from the conclusion that I believe I am justified in reaching, namely that I accept the evidence of both Mr Sutton and Mr Strydom relating to the visibility of the charring behind the fireplaces in the other units on plaintiff's premises. This evidence was never challenged by defendant except at a late stage, and then rather out of the blue as it were. Photograph "G" also indicates charring. The inescapable conclusion on that basis would be that the relevant installations of the fireplaces were not safe. This defendant admitted. Added to this unsatisfactory aspect of defendant's evidence, is the further point disputed by Mr Watt that had previously been admitted in defendant's plea, namely that any installation had to comply with statutory requirements. Mr Watt is not a credible witness in the context of these two issues. With this in mind I turn to the evidence of plaintiff's witnesses. The following approach is apposite:

> "I *accept that plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and*
> *what can be expected to occur in the ordinary course of human affairs, rather than an exercise in metaphysics."*

See: Minister of Safety & Security v Van Duivenboden 2002 (6) A 431 (SCA) at 449E-F, and

The South African Law of Evidence, DT Zeffertt, Butterworths, 2003, 306

23.

On the totality of the evidence I accept the following:

23.1 That there had been charring visible on the wooden walls prior to that particular evening;

23.2 That charring is an important and relevant step in the combustion process;

23.3 That such charring was caused by the fireplaces being too close to the wooden walls and that this is not a safe installation;

23.4 That the relevant installation must be safe having regard to its purpose;

23.5 That radiant heat will after some time lead to combustion;

23.6 That on that particular night there had been continues heat in the fireplace from 18:00 - 00:30;

23.7 That such radiant heat will in due course lead to combustion depending on the:

realistic suggestions of any other cause on the probabilities was put before me, and any such attempts by Mr De Wet on behalf of defendant, amounted to pure speculation as to what could be possible (rather than probable as is the test in civil litigation). I n my view there is no evidence at all to reasonably support any other probable cause of the fire that night.

25.

Accordingly it is declared that defendant is liable to plaintiff for the proven damages caused by the destruction of the log cabin. Plaintiff's notice of amendment relating to the insertion of the further paragraph 11.7 dated 5 February 2007 is granted. It is declared that Mr Strydom was a necessary witness. Defendant is to pay the costs of this action.

In essence I accept the opinion of the expert as to cause and effect and in my view it is clear that if the inherent probabilities are considered in the light of the evidence of Mr Sutton and Mrs Hammer, that the fireplace caused the fire that evening. It is my view that even that particular cabin without any insulation between the fireplace and inserted in all the other chalets. The direct evidence of Mrs Hammer was that the fire emanated from the area behind the fireplace. There is no reason to doubt that on the totality of the evidence. No plausible

H J FABRICUIS SC
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

19 FEBRUARY 2007