

SOUTH AFRICA / JUDGMENT

Lillicrap Wassenaar and Partners v Pilkington Brothers (S.A) (Pty) Ltd. (410/82) [1984] ZASCA 132; [1985] 1 All SA 347 (A) (20 November 1984)

[1984] ZASCA 132

COURT

Supreme Court of Appeal

BEFORE

Kotzé, Cillié, Van Heerden, Smuts, Grosskopf

CASE / FILE NUMBER

410/82

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Case no 410/82

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IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

Between: LILLCRAP WASSENAAR AND PARTNERS Appellant

- and - PILKINGTON BROTHERS (SOUTH AFRICA)

(PROPRIETARY) LIMITED Respondent

CORAM: KOTZÉ, CILLIÉ, VAN HEERDEN JJA et SMUTS, GROSSKOPF AJJA.

HEARD: 15 MAY 1984

DELIVERED: 20 NOVEMBER 1984

JUDGMENT

2.

SMUTS AJA: I have had the advantage of reading the judgment of Grosskopf AJA. I do not however, with respect, share the view that appellant, a firm of consulting and structural engineers, is not liable in delict for the negligent performance of a duty contractually undertaken by

it in its professional capacity or for negligent mis-statements made in the course of performing/contractual

obligations. As this is a minority judgment I will

express my views as briefly as the arguments advanced will allow.

The relevant pleadings are to be found in the

judgment of the Court a quo which, as appears from the judgment of Grosskopf AJA, has been reported as Pilkington

Brothers /

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Brothers S.A. (Pty) Ltd vs Lillicrap, Wassenaar and

Partners 1983 (2) S.A. 157 (W).

At page 169 of the reported judgment Margo J

in my respectful view correctly states the following:

"In principle there is no obstacle to Aquilian liability on the ground, only that the wrongful and negligent acts or omissions necessary to sustain a claim in delict also constitute breach of an express or implied contractual obligation owed by the defendant to the plaintiff."

Support for this view is to be found in the

decisions referred to by the learned Judge which are

van Wyk vs Lewis 1924 A.D. 438; Tomkwani Sawmill Co Ltd vs Filmalter 1975 (2) S.A. 453 (W); Rampal Pty Ltd and another vs Brett, Wills and Partners 1981 (4) S.A. 360 (D) at p. 366 D. Yet another decision in which an

action /

4 action in delict was recognised, although an action in contract also lay, is Western Alarm Systems Pty Ltd vs Corni & Co 1944 C.P.D. 271.

I see no reason for limiting this statement to cases where there would be liability for damages in delict independently of the contractual relationship entered into by the parties. The decisions referred to above certainly do not support such a view. The cases of Tomkwani, (supra), and Rampal Pty Ltd, (supra), are in fact cases where no action in delict could ever have arisen in the absence of a contract whereby the services of the defendants, as professional people, were engaged. In the Tomkwani case the defendant was an auditor who was sued in delict for alleged negligence in the performance / 5. formance of the duties he had been employed to perform. In the Rampal case the defendants were attorneys whose services had been engaged by the plaintiff for the investment of money. The fact that these professional men could have been sued in contract for the negligent performance of their duties did not debar an action in delict based on the same negligence. Had they not been employed in their professional capacities there could of course never have been any cause for an independent action in delict.

I / 6. I can see no reason why the fact that a party to a contract has an action for damages in contract for the negligent performance of a contractual obligation should exclude an action for damages in delict based on the same negligent act or acts. The following extract from the judgment of Spence J in the Canadian case of

J Nunes / 7. J Nunes Diamonds Ltd vs Dominion Electric Protection Co 1972 26 D.L.R. 3rd 649 at 727-8, is apposite in this regard. "The agreement between the parties is of importance insofar as it established a relationship between them, and thus provided a basis upon which, in the light of subsequent events, the appellant could rightly assess that the negligent misrepresentations of the respondent were made in breach of a duty of care to the appellant. I cannot agree that the mere existence of an antecedent contract foreclosed tort liability under the Medley Byrne principle." I share the view expressed by Margo J that this statement is in accord with the legal position in this country.

It was contended that where, as in the present

case / 8. case, the appellant's contractual duties have been set out in detail in clauses 2 and 3 in the agreement of June 1975, it is implicit that the parties intended the

contractual definition of their rights and obligations

to be exclusive of any other liabilities. There is certainly no express stipulation in the agreement which limits appellant's liability to breach of contract or which excludes liability in delict.

Applying the test for an implied term stated in *Reigate vs The Union Manufacturing Co* 118 L.T. 483, and approved by this Court in *Barnabas Plein & Co vs Sol Jacobson & Sons* 1928 A.D. 25 at p. 31 and *Mullin Pty Ltd vs Benade Ltd* 1952 (1) S.A. 211 at p. 215, it can certainly not be said that had respondent been asked whether the agreement between the

parties / 9. parties excluded delictual liability, the reply would have been "of course, that is the case. We did not trouble to say that; it is too clear".

Policy considerations do not, to my mind, require

that liability in delict on the part of a person render-

ing professional services pursuant to a contract of the

nature presently under consideration, be not recognised. In the present case the respondent has not alleged that fraudulent misstatements were made. It relies on negligent misstatements. Were it to have relied on fraudulent misstatement or misstatements made as the result of gross negligence, considerations of policy appear to me to demand the recognition of a claim in "delict notwithstanding that a remedy in contract was at an earlier stage

available. / 10. available. I say "an earlier stage" as the Court was informed by Mr Maisels that the reason why the present action was framed in delict by respondent was that its cause of action in contract had become prescribed. One of the advantages to be gained by the recognition of a claim in delict is therefore that it will enable a plaintiff whose contractual claim has become

prescribed to proceed in delict. Where the delictual claim is based on fraud or gross negligence it appears to me to be unarguable that policy considerations, and those of fairness and justice, require that such a claim be recognised. A party to a contract cannot validly contract out of fraud. See D. 9.2.27.29, 2.14.27.3, 50.17.23.

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I can accordingly see no reason for denying, as a matter of law, an action in delict on the ground of fraud in the case of a professional person simply because he has contractually bound himself to render professional services. I can also see no valid reason why an action in delict based on negligent misstatement or negligent [breach of an obligation undertaken in a contract should be treated differently as a matter of policy or for any other reason. Any contracting party who wishes to protect himself against an action in delict has a remedy readily available. He can simply have a clause inserted excluding liability in delict for negligence.

The facts alleged by respondent fall, to my mind

within /

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within the recognised principles which give rise to

delictual liability where the claim is based on negligence. In Cape Town Municipality vs Paine 1923 A.D. 207 Innes CJ stated the requisites for liability in delict as follows at p. 216-217:

"It has repeatedly been laid down in this Court that accountability for unintentioned injury depends upon culpa, - the failure to observe that degree of care which a reasonable man would have observed. I use the term reasonable man to denote the diligens paterfamilias of Roman law, - the average prudent person. Every man has a right not to be injured in his person or property by the negligence of another, -and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the

danger /

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danger would have been foreseen and guarded against by the diligens paterfamilias, the duty to take care is established, and it only remains to ascertain whether it has been discharged."

In Herschel vs Mrupe 1954 (3) SA. 464 (A) van den Heever JA pointed out at p. 485 that the essential element of unlawfulness was omitted by Innes CJ in this statement, perhaps because it was so obvious] that it was unnecessary to mention it. This passage has also been criticised as unnecessarily incorporating the concept of a duty of care. Bearing in mind these two respects in

which the said statement of the law may be said to be incomplete or inaccurate, it is nevertheless clear therefrom that where a person is by circumstances, which may include the conclusion of contract with another, placed

in / 14 . in a position where it would be clear to a reasonable man that a failure to exercise care is likely to result in unlawful harm being done to another, a failure to exercise that care, with resultant harm to the other, will entail delictual liability. See also *Union Government vs National Bank of South Africa Ltd* 1921 A.D. 121 at p. 128.

As appears from the judgment of Grosskopf AJA "(i)t is clear that in our law Aquilian liability has long outgrown its earlier limitation to damages arising from physical damage or personal injury". This view is in accord with the decision of this Court in *Administrator, Natal vs Trust Bank van Afrika Bpk* 1979 (3) S.A. 824 (A) where it was held that liability in delict could in

principle / 15. principle arise from negligent misstatements which cause pure financial loss unrelated to physical damage to property or injury to a person. It was also the view of Mr Justice van den Heever that all patrimonial loss unlawfully suffered is recoverable under the Aquilian law in its developed form. See his work "Aquilian Damages in South African Law" at p. 31. See further *Matthews and others vs Young* 1922 A.D. 492 at p. 504. To cause patrimonial or economic loss can therefore, for the purposes of Aquilian liability, be as wrongful as to inflict physical damage to corporeal property or injury to a person. In the present case it is alleged that appellant,

who / 16 . who held itself out to respondent as having expert knowledge and the professional skill necessary and required for the carrying out of site investigations including subsoil investigation, and the analysis of the results thereof, in relation to the suitability or otherwise of a particular site for a civil engineering project such as the one which respondent intended having

respondent erected, was employed by respondent to do the necessary investigation and to design and erect the works required by respondent on the site in conformity with the results of the analysis carried out by it on the said site. It follows that a reasonable man, on the basis of the facts alleged, would have foreseen that a proper analysis was essential and that a faulty analysis resulting in

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an inadequate structure being erected would in all

probability cause respondent patrimonial loss. Respondent alleges that the analysis carried out by appellant was done negligently in the respects stated in paragraph 10 (d) (i) (aa) to (ff) of the further particulars dated 19 August.

1981. It is further alleged that appellant negligently advised respondent that the site was suitable for the purpose of erecting the works which respondent contemplated erecting; it is also alleged that appellant knew that respondent would rely upon and intended that respondent should rely upon such advice and the designs prepared by appellant pursuant to and in conformity with the results of the analysis which it had undertaken to do. On the basis of these allegations

it / ...

18. it follows that a reasonable man, in the position of appellant, would have realised that faulty advice tendered by him to a person in the position of respondent, was likely to cause patrimonial loss and he would have guarded against giving faulty advice. To avoid that danger it would be necessary to ensure that the site investigation and analysis was performed without negligence.

To my mind the factual allegations made by respondent bring its case within the principles of the developed Aquilian law and will, if proved, entail

liability for any patrimonial loss suffered by respondent as the result of the negligence alleged. The contract is the factor which resulted in appellant being

placed / 19. placed in a position wherein a failure to exercise reasonable care could cause respondent reasonably foreseeable patrimonial loss. All the requisites for Aquilian liability are present. A failure to exercise due care in the soil analysis which in turn would result in wrong advice being given, would result in loss being caused to respondent unlawfully and as a result of culpa. Respondent need allege and prove no more than that to succeed against appellant. For the reasons I have already stated I do not think that the mere fact that respondent at an earlier stage could have recovered the same loss by suing in contract deprives him of the right to invoke the Aquilian principles in order to recover the

loss sustained by him. The considerations which have

resulted / ...

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resulted in the Courts exercising care in applying, to new situations, the principles which give rise to Aquilian liability are the fear of opening the door of liability too wide and creating an unmanageable situation or indeterminate liability. See *Greenfield Engineering Works vs N K R Construction* 1978 (4) S.A. 90 1 (N) at pp. 916 and 917. To grant a party in the position of respondent a remedy in delict cannot result in indeterminate liability or an unmanageable situation. Whether respondent's claim is based on negligent misstatement, as was contended on behalf of appellant, or on negligent conduct, makes no difference. Even if it is to be regarded as based on negligent misstatement, it discloses a cause of action. Margo J dealt fully

with / 21. with this aspect of the matter at pp. 163 et seq of his judgment and I am in respectful agreement with his reasons and the conclusions reached by him. I think that the argument that respondent's cause is based on negligent misstatement is in any event an unjustifiably narrow interpretation of the pleadings. Respondent is clearly also relying on negligent conduct in that appellant failed to exercise due care in making the soil and site analysis. That in turn gave rise to the subsequent misstatements and was the root cause of respondent's alleged patrimonial loss.

To my mind respondent's pleadings disclose a cause of action for damages sustained prior to the assignment of the contract in 1976. After the assignment respondent's /

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dent's position could not be worse than it was beforehand. Respondent was thereafter in the position it would have been in had appellant initially been a sub-contractor to the later assignee. As a sub-con-

tractor with no contractual privity with respondent, it would certainly have been foreseeable that negligence in the execution of its contractual duties with the contractor could result in patrimonial loss to respondent. A failure to exercise due care would have resulted in Aquilian liability to respondent. It was argued that appellant's position has been worsened by the assignment since the contract between appellant and respondent contained an arbitration clause and that had the contract not been assigned respondent would have

been / 23. been bound to submit the present dispute to arbitration. It was however open to appellant, when the assignment was effected, to have inserted a clause to the effect that any claim by respondent against it would still be subject to arbitration. It failed to do so and respondent rights under the Aquilian principles can accordingly be enforced in the ordinary way. It was contended that the possibility of appellant, as a sub-contractor, being sued by both the owner and the main contractor is a reason for refusing an action against appellant. I agree with Margo J that the prospect of appellant being held liable twice for the same loss is too remote to justify a denial of a remedy in delict.

The / 24. The other considerations already referred to, which have influenced Courts not to apply the principles of Aquilian liability to new sets of facts, are also not present in the case of a claim of the nature presently being considered. To allow a claim against appellant after the assignment will not create a situation "fraught with an overwhelming potential liability". See the Greenfield case (supra), at p. 917 A. In my view respondent's pleadings disclose a cause of action for damages suffered also after assignment took place.

The contention that the damages claimed are in any event not such as are recoverable in delict can in my /

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my view also not be upheld. The difference in the method of computing damages for, respectively, breach of contract and delict was stated by van den Heever JA

in *Trotman vs Edwick* 1951 (1) S.A. 443 (A) at p. 449

B-C as follows:

"A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him."

The fact that respondent seeks to recover the cost

of the work done, and yet to be done, as detailed in the judgment of Margo J at p. 159 paragraphs (c) to

(h) /

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(h) and that the performance of this work might result in the plant being brought into the condition it ought to have been in had appellant performed its obligation under the contract adequately, does not necessarily mean that respondent's claim is framed with the object or for the purpose of being placed in the position it would have been in had appellant fully performed its obligations under the contract, in other words, that the damages claimed are contractual. In *Ranger vs Wykerd* 1977 (2) S.A. 976 (A) this Court dealt with an action framed in delict. The plaintiff had bought a property on which was a house and a swimming bath. He had paid R22 000,00 for the property and thereafter

found /

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found that the swimming bath was defective. As damages she claimed the cost of repairing the swimming bath which was found to be R1 000,00. It was argued on behalf of the defendant that the damages thus computed were really contractual and not delictual in that the plaintiff was

thereby seeking to be placed in the position he would have been in had the contract been properly performed by the delivery of a sound swimming bath. In regard to

this argument the following was said by Trollip JA, whose

judgment was concurred in by de Villiers JA, Kotzé JA

and Miller JA:

"It is also objected, however, that the damages so computed are really contractual

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and not delictual. That objection, in my view, is not well founded. It is true that awarding the reasonable cost of repairing the swimming bath has also the effect of making good the representation as to its soundness and condition as if it were an express or implied contractual warranty in similar terms (see *Maennel v. Garage Continental Ltd.*, 1910 A.D. 137; *Crawley v. Frank Pepper (Pty.) Ltd.*, 1970 (1) S.A. 29 (M)). But it does not follow that such damages are therefore exclusively contractual and cannot also be delictual, any more than it can be said that they are purely delictual and cannot also be contractual. It has never been held, or even suggested as far as I know, that, in the case of a wrongful act causing physical damage to property, the reasonable cost of repairs should not be taken as measuring the claimant's patrimonial loss because it results in contractual and not delictual damages being awarded. It just so coincidentally happens that in one case such cost of repairs may represent the amount required to make good the warranty in a contract, and in another case it also measures the patrimonial loss caused by a delict."

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29. In the present case respondent is entitled to be placed in the position in which it was before it suffered loss due to appellant's negligent acta. If, prior to the contract it possessed, say, ten million rand and spent this amount to construct the works which appellant designed for it and the structure was on account of the negligent advice in regard to the suitability of the site and the inadequacy of the structural design done by appellant worth not R10 million but only R5 million rand respondent would be entitled to claim that difference as damages. That would be the amount required to restore respondent to the position it occupied before the delict was committed by appellant. Respondent would, however, be bound to mitigate its loss by all reasonable

means / ...

30. means at its disposal. If by spending three million rand it could restore the value of its patrimony to what it was before the delict it would be entitled, in fact obliged, to do so and it could then claim the amount of three million rand as damages. In the present case respondent has not pleaded the value of its patrimony before and after the commission of the delict and then stated the amount it claims to be the necessary expense to mitigate its loss. The failure to do so will however not disentitle it to lead that evidence. In *Erasmus vs Davis* 1969 (2) S.A. 1 (A) it was stated by Muller JA at pp 15 to 16 that "I cannot agree with the submission that a plaintiff, who has particularised his claim on the basis of one method

of / ...

31 of calculating damages, is prevented at the trial from employing instead or in addition another method; provided, of course, that such other method is appropriate in the particular circumstances". This statement was applied by this Court in *Ranger's case*, (supra), at p. 995. It was there argued that the plaintiff was precluded from claiming, as the measure of his damages,

the cost of repairing the swimming bath because the measure of damages alleged in the pleadings was the difference between the price which the plaintiff was induced to pay for the property and the price he would have been prepared to pay but for the defendant's fraud. In regard to this argument Trollip JA stated the following at p. 995:

"Here /

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"Here it suffices to say simply that a similar point concerning pleadings was raised in *Erasmus v. Davis*, 1969 (2) S.A. 1 (A.D.). There the measure of damages plaintiff had claimed in her pleadings for damage to her motor car caused by the negligence of the defendant was the difference between the pre-accident and the post-accident values of the vehicle. She failed to prove the latter value, but she proved the reasonable cost of repairing the vehicle. The award of the latter amount as her damages was approved by four Judges of this Court, but all were unanimous that the form of her pleadings did not preclude that amount from being awarded as damages. See especially pp.5C-F, 8-9 , 11B-C, and 16A."

The reference to p 8-9 is a reference to the following

words by Potgieter JA,:

"I am in entire agreement with my Brother MULLER that plaintiff was at the trial not prevented from proving his damages by establishing the estimated reasonable and necessary....

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necessary cost of repairs to the body of the vehicle in spite of the way the alleged damages were particularised in the summons, should the circumstances show that proof of such cost was an inappropriate yardstick to measure the damages. I also agree with his reasons for coming to that conclusion."

In the present case it is not even clear that an inappropriate yardstick is being employed; the most that can be said is that more should have been averred to obtain clarity. The complaint against the respondent's particulars of claim is however not that it is vague and embarrassing but that it discloses no cause of action. It may be that evidence will show that the building as it was constructed can be used as a parking garage and that its value as such is the equivalent of what respondent paid out. If those be the facts respondent will

have / ...

34. have failed to prove damages. It may however also be proved that owing to its situation and structure the building, in its present condition, is of no use at all or merely of limited use with the result that respondent's patrimony has been substantially diminished.

The exception can accordingly also not succeed on this ground.

In regard to the cross-appeal I am of the view that if it was necessary to have the site, the soil and the sub-soil property investigated and for that purpose to have all the other work, referred to in paragraphs (a) and (b) of the first set of further particulars, done in order to be able to take the necessary steps to mitigate respondent's loss, those expenses are recoverable as part

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of respondent's damages. To my mind these are not contractual damages and paragraphs 8 (a) and (b) should accordingly not have been struck out.

I would accordingly dismiss the appeal with costs and allow the cross-appeal with costs. I would alter

paragraph 2 of the order of the Court a quo to read:

"The application to strike out is dismissed with costs."

I would further delete paragraphs 2 and 4 of the said order and substitute therefor an order that the defendant - appellant - is to pay the costs of the exception and the application to strike out.

F S SMUTS AJA.

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Prepared on 13 October 2026 · Esheria