

SOUTH AFRICA / JUDGMENT

## Trio Engineering Products Inc v Pilot Crushtec International (Pty) Ltd (16/16836) [2018] ZAGPJHC 61; 2019 (3) SA 580 (GJ) (22 March 2018) [2018] ZAGPJHC 61

COURT

South Gauteng High Court, Johannesburg

BEFORE

Unterhalter

CASE / FILE NUMBER

16/16836

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REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG  
CASE NO: 16/16836

In the matter between:      TRIO  
ENGINEERED PRODUCTS  
INC Plaintiff  
and  
PILOT  
CRUSHTEC INTERNATIONAL (PTY)  
LTD Defendant

### JUDGMENT

UNTERHALTER J:

### INTRODUCTION

The Plaintiff, Trio Engineered Products Inc (“Trio”) claims payment of \$ 636 626.17 from the Defendant, Pilot Crushtec

International (Pty) Limited. (“Pilot”).

Pilot brings a counterclaim made up of three claims. Pilot alleges that it entered into an exclusive dealership agreement with Trio in terms of which Pilot enjoyed the sole and exclusive right to sell and distribute the products of Trio in defined exclusive territories. The agreement is styled the exclusive strategic distribution agreement.

In its first claim, Pilot says that it entered into negotiations with a client in one of the exclusive territories, Zambia, to supply a crushing and screening plant. Trio and an associated company, Weir Minerals (Pty) Ltd (“Weir Minerals”), usurped this commercial prospect and entered into an agreement with Pilot’s client to supply the plant to the client in breach of the exclusive strategic dealership agreement. Pilot claims damages for this breach. Trio does not except to this first claim.

Pilot’s second claim (referred to in the counterclaim as the “Second Instance”) avers that in consequence of the exclusive strategic distribution agreement, Trio and Pilot developed a mutually beneficial and continuing business relationship in which Pilot enjoyed the sole and exclusive right continuously and indefinitely to sell and distribute the products of Trio, to the parties’ mutual benefit. Trio, it is said, breached the agreement, in essence, by replacing Pilot with Weir as its strategic partner. Trio competed with Pilot, through Weir. Trio required Pilot to enter into a new distribution agreement, on terms less favourable than the subsisting exclusive strategic distribution agreement. Pilot declined to enter into the new agreement, treated the requirement to do so as a repudiation of the existing agreement, and claims damages. Pilot avers also in its second claim that Trio, by reason of the business relationship with Pilot, obtained knowledge and access to Pilot’s confidential information and customer connections. Trio also acquired the territories of Pilot in circumstances where Pilot had developed markets for Trio’s products but was dependent upon Trio for the supply of these products.

Pilot pleads an alternative to its second claim (referred to in the pleadings as the “Alternative to the Second Instance”).

The essential components of this alternative claim are as follows. The agreement between Trio and Pilot formed the basis of a close commercial and business relationship between the parties. The relationship permitted Trio to obtain confidential information as to the manner in which Pilot conducted its business. Trio and Pilot increased their sales and distribution in the territories allocated to Pilot under the agreement. During 2014, the Weir Group acquired the entire share capital of Trio. Thereafter, Trio engaged in an unlawful stratagem to undermine the position of Pilot and the exclusive strategic distribution agreement by (amongst other things) interfering with Pilot’s goodwill, interfering with Pilot’s business opportunities, seeking to offer employment to employees of Pilot, and allowing the Weir Group to transact with Pilot’s clients and potential clients. This unlawful conduct, it is pleaded, caused Pilot to suffer damages because the Weir Group, in essence, usurped the business opportunities that Pilot had developed and enjoyed in the territories.

Trio complains that Pilot’s second claim and its alternative second claim are excipiable on various grounds.

## THE COMPLAINT AS TO TERMINATION

Trio excepts to Pilot's second claim on the basis that Pilot has failed to allege how the exclusive dealership agreement could be terminated. Trio contends that the second claim fails to disclose a cause of action in that, although the agreement relied upon by Pilot is alleged to be of unspecified duration, the pleading is defective in failing to allege how the agreement could be terminated. Relying upon *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A), Trio submits that absent a specific averment that the agreement was not terminable, the agreement must be taken to be silent as to its duration, and is then construed to be terminable on reasonable notice. Pilot, it is contended, having failed to plead the duration of the agreement or whether it is terminable on notice, cannot sustain its cause of action because the pleading does not rely on any term of the agreement that would prevent Trio from terminating the agreement and requiring Pilot to enter into a new distribution agreement.

It is common ground between the parties that an agreement of unspecified duration is a valid agreement. Such an agreement cannot

be terminated unless it contains a clause to that effect, express or tacit.[1]

The second claim plainly avers that the agreement conferred upon Pilot the exclusive right continuously and indefinitely to sell and distribute the product of Trio (see paragraph 13 of the counterclaim).

The exception proceeds from an incorrect premise. As the *Pillman* case makes plain, absent a term of the agreement permitting of termination (which is a question of construction), there is no

presumption that a contract of unspecified duration is terminable on reasonable notice.[2] If the agreement is one in perpetuity, then the parties will be held to that bargain.

Pilot pleads that the agreement was continuous and indefinite. The agreement is thus not of unspecified duration in the sense that it is silent on the matter of duration, rather it is specified to be indefinite. Once that averment is made, the agreement must be understood to endure in perpetuity, and there is no requirement to plead that the agreement is not terminable. There is no presumption that an agreement expressed to be of indefinite duration must be taken to be tacitly subject to termination on reasonable notice. On the contrary, once the agreement is expressed to endure in perpetuity, it is for the party relying on reasonable notice to make the case for such a construction. No such burden rests upon Pilot.

This conclusion is not at odds with the holding in *Putco*. [3] In *Putco*, the express language of the agreement stipulated that it was a temporary interim arrangement and hence the intention of the parties

could not have been that the agreement continue indefinitely. As the Court in *Putco* made plain: [4] where the agreement is silent as to duration, it is terminable on reasonable notice, in the absence of a conclusion that it was

intended to continue indefinitely.

Pilot has pleaded an agreement of indefinite duration. It has not pleaded an agreement silent as to duration. There is accordingly an express averment that the agreement was intended to continue indefinitely, and consequently the rule of construction in Putco is not of application.

The exception taken by Trio, thus, cannot succeed. The pleading of Pilot is not silent as to whether the agreement is terminable, it states that the agreement is of indefinite duration. There is no requirement to go further and say that the agreement is not

terminable – this simply follows from the positive averment that the agreement is indefinite. Once it is plain that the pleading of Pilot specifies the duration of the agreement, the agreement is not silent on this matter. And the agreement cannot then be taken to permit termination on reasonable notice.

It follows also that on the pleaded case of Pilot, there is no failure to plead a term that prevented Trio from terminating the agreement. Once the averment is made that the agreement stands in perpetuity, the agreement precludes Trio from terminating it.

Furthermore, the complaint that the pleading is defective because no term is pleaded that would prevent Trio from requiring Pilot to enter into a new distribution agreement must also fail. Pilot relies on an agreement that conferred on it rights of exclusive distribution. Absent some clause to the contrary, a party cannot insist that its exclusive distributor must relinquish its existing rights and enter into a new agreement. So to act makes out a cause of action for breach. The injured party is not required to plead that there was no term of the agreement preventing Trio from requiring a new agreement. It is the alleged conduct of Trio in seeking to extinguish the existing rights of Pilot under the agreement that makes out a cause of action for breach.

Trio's exception to the second claim of Pilot must accordingly be dismissed.

#### THE COMPLAINTS AS TO THE ALTERNATIVE CAUSE OF ACTION

Trio's complaints concerning the alternative cause of action are more wide ranging. Trio's exceptions, in essence, contend that the pleading does not disclose a cause of action or is vague and embarrassing in five respects. First, it is said that it is not clear whether the alternative claim is based upon a breach of contract or rests upon a delict. Second, Trio contends that insofar as the alternative claim lies in delict, no cause of action can be sustained because the breach of duty is contractual in nature. Third, insofar as the alternative claim is a delictual claim, Pilot has failed to allege facts that support the duty of care said to be owed by Trio. Fourth, Trio complains that the pleading fails to advance any facts in support of the conclusion that Trio wrongfully allowed Pilot's confidential information to be used by the Weir Group to the detriment of Pilot. Finally, Trio contends that the damages pleaded are insufficiently specified to permit Trio to make a reasonable assessment of these damages. The pleading as to damages is said to be defective in that it is vague and embarrassing.

It will be observed that the first three exceptions turn upon whether Pilot is confined to a claim in contract or whether, at least in the alternative, a delictual cause of action may be sustained. It is to this legal question of concurrence that I now turn.

#### THE CONCURRENCE OF CONTRACT AND DELICT

Few areas of private law have given rise to as much conceptual uncertainty as the circumstances in which a breach of contract may subsist alongside an actionable delict. Once our law recognized an action in delict for pure economic loss, the question of concurrent liability in contract and delict was brought into sharp relief. As academic commentary has explained,[5] the law in this area has sought to demarcate a middle ground between two unappealing positions. The first position is that every breach of contract is an actionable delict. This is unsustainable since it would collapse any distinction between duties in contract and delict, which duties have distinct foundations and justifications. The second position is that a breach of contract excludes an actionable delict. Such a position would unwarrantably leave uncompensated all persons who may be harmed by a breach of contract

but are not in privity of contract with the party in breach. Inevitably, then our law seeks to navigate the territory between

these two positions to determine which breaches of contract may also give rise to an actionable delict.

In *Lillicrap*[6], the majority recognized that the mere fact that a plaintiff has a claim in contract does not mean that such a plaintiff may not also have a claim in delict. The question is whether there are pleaded facts that can establish a cause of action in delict.[7] In *Lillicrap*, the following propositions defined the relationship between a breach of contract and the recognition of a duty of care in delict. First, a breach of contract of itself and without more is not a wrongful act for the purposes of *Acquilian* liability.[8] Second, where the duty of care arises independently of any contractual duty, there is a concurrence of actions in contract and

delict (provided the other requirements for liability are satisfied).[9] Third, where the duty arises strictly in contract and where the contract subsists, there is no need to extend liability beyond that arising under the contract because the remedy in contract suffices and the extension of liability into the realm of delict would infringe the autonomy of parties in framing their rights and obligations under the contract.

Subsequent cases have sought to elucidate this framework. In *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA)[10], the Appeal Court emphasized that *Lillicrap* is not authority for the general proposition that an action cannot be brought in delict if a contractual claim is competent. The same facts may support an action in contract and in delict, permitting a plaintiff to elect which action to pursue, or to pursue each, but in the alternative. This reasoning endorses the concurrence of actions in contract and delict, but would seem to stand against the cumulation of actions, in the sense that a plaintiff may not pursue both actions simultaneously but must elect which to pursue. The holding in *Lillicrap* is thus, following *Holtzhausen*, rather modest in what it

restricts. It simply precludes a plaintiff from relying on a breach of contract, without more, as a delict.

In *Country Cloud*,<sup>[11]</sup> the Constitutional Court appears to have given *Lillicrap* rather wider significance. The Court made a number of general observations as to the scope of an action in delict for conduct causing pure economic loss. The Court has set its face against an expansive recognition of this class of delict. Conduct causing pure economic loss is not *prima facie* wrongful. It must be positively established, and the categories thus far recognized are limited.

The Court<sup>[12]</sup> then proceeded to consider whether, on the facts of the case, the Department, which had terminated a building contract with a

construction company *iLima*, owed any duty to *Country Cloud*. The Department had no contract with *Country Cloud*. But the termination

of the building contract caused loss to *Country Cloud*, which had lent money to *iLima*. The Court found there to be no duty owed, in the absence of any direct dealings or direct contractual relationship between the Department and *Country Cloud*. Citing *Lillicrap*, the Court warned that courts should be wary of extending the law of delict where there are existing contractual relationships because to do so may subvert the autonomy of parties to regulate their rights and duties. The principle was put thus:

*“Where parties take care to delineate their relationship by contractual boundaries, the law should hesitate before scrubbing out the lines they have laid down by superimposing delictual liability”.*<sup>[13]</sup>

*Country Cloud* had obtained certain undertakings from the Department but the Department had assumed no liability for any loss to *Country Cloud*, and hence its claim failed.

The position adopted in *Country Cloud* would appear to exclude concurrent liability in contract and delict, at least in so far as parties are in privity and agree to

contractual rights and obligations or could have done so. Once parties have chosen to frame their relationship in contract, respect

for the autonomy of the parties precludes the imposition of duties in delict that may be different and have different consequences.<sup>[14]</sup>

What *Country Cloud* does not make plain is whether it means to overrule in any measure the dicta in *Lillicrap*,<sup>[15]</sup> affirmed in *Holtzhausen*, that

Concurrent liability may occur when the duty in delict arises independently of the contract.

The facts of a case may support concurrent claims in contract and delict.

In my view, *Country Cloud* does not do so. Not only does the case not reference the case law, of some pedigree, that upholds the recognition in delict of duties established independently of the contract, but it would appear untenable to adopt so strict a position that a contractual

relationship displaces every duty of care in delict. There seems no warrant to move from the unattractive proposition that every

contractual duty attracts a co-extensive duty in delict (merging contract and delict), to the position that the assumption of a contractual duty is repugnant to the recognition of any delictual duty. Our law, like those of many comparative jurisdictions,

occupies the middle ground.[16] Duties may arise by reason of statute or at common law that compliment or are not repugnant to contractual obligations and hence

may be concurrent. Thus, a surgeon owes duties of care to her patient, even though the surgeon has undertaken contractual duties

to operate.[17]

In many contexts, our law recognises duties that co-habit with contractual duties. A director owes a fiduciary duty to his company

not to profit at the expense of the company as a result of a breach of duty. The company's action for disgorgement is recognised,

quite apart from any contractual duty the director may owe to the company.[18] Like duties have been extended to senior managers occupying a position of trust,[19] and these duties are not a result of the contract of employment. It would seem anomalous to recognise this claim of duty as co-existing

with contractual claims but adopt a more parsimonious position where there is conduct no less warranting of condemnation as unlawful

competition that also arises within a contractual setting.

The position in our law may I think be summarized as follows:

A breach of contract is not, without more, a delict.

Where parties have chosen to regulate their relationship under a contract, the contractual rights and obligations undertaken will not ordinarily permit of the recognition of a delictual duty at variance with the contract.

Parties to a contract may have additional or complimentary duties that arise independently in delict.

In determining wrongfulness, one must proceed with caution when assessing whether a third party, harmed by a breach of contract, can sue a party to the contract for such harm, outside well defined causes of action.

#### THE MERITS OF THE EXCEPTIONS TO THE ALTERNATIVE CLAIM

I proceed to consider the exceptions to the alternative claim in light of the law.

### The First Exception

Pilot, in its alternative claim, references the exclusive distribution agreement; but not to rely on a breach of that agreement to found its cause of action. That is what it does in its second claim. Rather the exclusive distribution agreement is referenced as the basis upon which a “strategic commercial and business relationship developed”. That relationship is also said to have afforded Trio access to Pilot’s confidential information and to have given rise to obligations on the part of Trio not to compete with Pilot and to supply product to Pilot.

Pilot does plead that after Trio was acquired by the Weir Group, Trio was party to a wrongful stratagem to undermine Pilot and the exclusive strategic distribution agreement in various ways that permitted the Weir Group to compete with Pilot and usurp business opportunities that Pilot would have pursued as part of its relationship with Trio. In addition, Trio permitted Pilot’s confidential information to be used by the Weir Group to advance the business interests of the Weir Group.

Although Pilot pleads that the relationship between Trio and Pilot gave rise to an increase in sales in circumstances where Trio would not breach the exclusive strategic distribution agreement and business relationship (para 24), it does not appear to me that Pilot relies on a breach of contract to found its cause of action. The allegation is simply offered to substantiate how the business relationship flourished. So too in paragraph 28, Pilot does not say that Trio acted unlawfully in breach of contract but rather that the conduct of Trio undermined the exclusive distribution agreement and Pilot. The exclusive strategic distribution agreement is relied upon simply as a foundation for the business relationship that developed between Trio and Pilot and the duties that are said to flow from that relationship. Since the relationship was built on the agreement, inevitably the stratagem in undermining Pilot would also undermine the substratum of Pilot’s business relationship- the distribution agreement.

On a fair reading of the pleading, the cause of action is not founded on a breach of contract but rather on a delict. The references to the agreement form part of the relationship between the parties that is said to give rise to duties on the part of Trio not to engage in unlawful competition. The undermining of Pilot and its agreement with Trio is a consequence of the unlawful strategy embarked upon by Trio. The reference to the agreement is not a disguised action for breach of contract. Rather the alternative case rests on delictual foundations.

I do not find that the alternative claim is thus unclear as to whether it relies on a delict or a breach of contract, and accordingly the first exception to the alternative claim must fail.

### The Second Exception

The second exception complains that if the alternative claim is founded in delict, no duty is owed by Trio because any duty owed can only arise from the agreement between Trio and Pilot, and hence Pilot is confined to a claim in contract.

This complaint goes to the very heart of the scope in our law to bring an alternative claim in delict when it is pleaded that the parties had entered into the exclusive distribution agreement. In my view, the alternative claim does not offend against the strictures in our law that discipline concurrency. These causes of action are well-recognised.[20]

First, as I have found, the alternative claim does not make a claim in delict invoking a breach of contract. Second, there is nothing about the terms of the exclusive distribution agreement that are at odds with the duties not to compete that Pilot contends form part of Trio's duties deriving from its business relationship with Pilot. It is this relationship that founds the basis of Pilot's cause of action based on unlawful competition and breach of duty in respect of the preservation of confidential information.

Plainly an exclusive distribution agreement requires that the grantor will not permit another to enter defined territory to compete. But the alternative claim is based on the averment that the agreement formed part of a larger relationship that gave rise to certain duties that went beyond what the exclusive distribution agreement provided for.

I recognize that the duties that are said to arise from the business relationship do not, on the pleaded case, arise independently of the agreement (since the agreement is pleaded to be foundational to the relationship). Nevertheless where the business relationship is built upon an agreement but extends beyond the agreement and is complimentary to it, I see no reason why a cause of action in delict cannot be pursued in the alternative as a claim that subsists concurrently with the claim based on a breach of contract.

The facts pleaded reflect a business relationship that precludes one party to the relationship from allowing a third party to benefit from the commercial opportunities that are said to be for the benefit of the business conducted within the relationship, a case is made out that a duty in delict may be recognised, separate from the agreement that is said to have given rise to the business relationship. Thus, a duty in delict which is separate from the agreement is properly pleaded.

This is so for these principal reasons. First, the delictual duties relied upon by Pilot as an incident of the business relationship are not repugnant to the agreement subsisting between Pilot and Trio. Rather these duties complement and expand upon the contractual obligations undertaken by the parties. For example, the duty not to impart confidential information to a third party goes beyond the terms of the agreement.

Second, although the delictual duties may not have come into being independently of the agreement, it is not the causal origin of the duties that signify. They are duties that arise separately from the agreement by reason of a business relationship subsisting between the parties.

Third, the business relationship that is said to give rise to the duties in delict is not at variance with the autonomy principle but an extension of it. It is a relationship voluntarily assumed by the parties.

It is true that the content of some of the duties overlap. But it is not my understanding that this alone confines a party to a claim in contract. As long as the duties in delict rest upon a distinct foundation (the business relationship) and are not repugnant to the contract or the choice of the parties to define their relationship in contract, there is no reason of principle to exclude a concurrency of contract and delictual duties.

In my view, the averments made in the alternative second claim suffice to make out a cause of action in delict.

Accordingly, I do not uphold the second exception to the alternative claim.

### The Third Exception

Trio's third exception contends that the alternative claim fails to allege sufficient facts to support a duty of care owed by Trio to Pilot in delict. This contention cannot in my view prevail. Pilot founds its claim upon the business relationship that it alleges developed to the mutual advantage of Trio and Pilot and that this relationship did not permit others to compete with Pilot so as to undermine the relationship. In addition, it is pleaded that Trio was given access to the confidential information of Pilot in the course of their business relationship which it then used to the detriment of Pilot by allowing the information to be used by the Weir Group.

These averments suffice to found a duty not to compete unlawfully, nor to utilize confidential information imparted for one purpose so as to undermine the position of Pilot in the market.

### The Fourth Exception

By way of its fourth exception, Trio complains that Pilot's allegation that Trio wrongfully permitted the confidential information of Pilot to be used by the Weir Group to the detriment of Pilot is unsupported by any facts.

Paragraph 24 of the amended alternative second claim states that by reason of the commercial and business relationship that had developed between Trio and Pilot, Trio was provided with and acquired stated categories of confidential information. The information identified is defined in the pleading as the "confidential information". This confidential information includes information concerning the clients of Pilot in both the exclusive and non-exclusive territories.

In paragraph 28.8 the allegation is made that Trio allowed the "confidential information" of Pilot to be used by the

Weir Group to advance the business interests of the Weir Group to the detriment of Pilot.

The fourth exception is itself somewhat imprecise as to the nature of the complaint. Is it the absence of any allegations concerning the information which was made available to the Weir Group or is the complaint that it is not stated why it was wrongful for Trio to make the confidential information available that is problematic?

The alternative claim defines what it takes to be confidential information. It is this information that is said to have been made

available to the Weir Group. The claim may be expansive but there is no absence of pleaded facts as to the information that was made available: it is the “confidential information”, as defined. The information is identified and the complaint on this score cannot succeed.

As to why it is that it was wrongful to make the information available, the pleading does not, in plain terms, specify what duty of confidence rested upon Trio. The pleading fails to say, as it might have, that a duty of confidence was an aspect of the business

relationship between the parties. However, the wrongfulness is said to come about because the making of confidential information

available undermines Pilot. On a generous reading of paragraph 28, the specific allegations concerning what Trio did to make

confidential information available must be understood with the other averments in that paragraph. So understood, it is sufficiently clear that the confidential information was made available to permit the Weir Group to take business and prospective business from Pilot, to its detriment. Given the pleaded case as to the nature of the business relationship that subsisted between Pilot and Trio, the averments suffice to make out a cause of action as to wrongfulness.

The pleading is certainly somewhat unspecific as to whether “the stratagem to undermine” Pilot was intentional or negligent. It is not clear to me that a stratagem can be negligent. If a person has a strategy to undermine, the very point of their actions is to achieve the end defined by the strategy, and hence the conduct is intentional. This seems to me the natural reading of the pleading at paragraph 28. In so far as the pleading may nevertheless residually rely on negligence, this may be taken to be surplusage.

I find therefore that this exception too must fail.

#### The Fifth Exception

By its fifth exception to the alternative claim, Trio complains that in paragraph 31 of the alternative claim Pilot alleges that it suffered damages by way of a loss of gross profit for two financial periods but that this pleading does not permit Trio reasonably to assess the quantum claimed. Trio submits that the pleading fails to comply with the requirements of Rule 18(10).

The manner in which Pilot computes its loss is as follows. It claims that transactions associated with the sale of Trio’s products represented some 19% of Pilot’s turnover. This figure is then used to estimate Pilot’s loss of turnover over two financial periods, being an accumulated loss of turnover of R135 234 701.00. Pilot then pleads in paragraph 31.1 that:

*“the Defendants (sic) general gross profit component resulted the loss of a gross profit for the two financial periods in the amount of R 60 855 615.00 “.*

Pilot then goes on to plead at paragraph 31.1.3 that:

‘the loss of the 19% over the aforementioned periods was in the amount of R 60 855 615,00 “.

This pleading could certainly have been more precise as to how the gross profit is derived. But the methodology used is sufficiently clear. The loss of turnover is derived from using 19% of sales over the two periods. Pilot’s gross profit is also stated as an amount calculated over the two periods. It is then simply a matter of arithmetic to derive the gross profit margin. Although the pleading in paragraph 31.1.3 is somewhat ambiguous, its sense is sufficiently conveyed. The reference to 19%, given the averments in paragraph 31.1.1 must be understood as the basis for determining loss of turnover from which the amount claimed as lost gross profits is derived.

It is an entirely different question as to whether a loss of profits of this kind can be claimed in a cause of action in delict for pure economic loss. But this question forms no part of the exceptions taken by Trio.

The complaint that is made by way of the fifth exception must for these reasons fail.

## CONCLUSION

In the result, I make the following order:

The exceptions are dismissed with costs, the costs to include the costs of employing two counsel.

In respect of the two earlier appearances in this matter on 20 July 2016 and 6 July 2017, by agreement, no order as to costs is made.

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David Unterhalter

Justice of the High Court

Gauteng Local Division: Johannesburg.

Date of Hearing: 05 – 09 March 2018

Judgment delivered: 22 March 2018

Appearances:

Advocate for the Plaintiff: Paul Strathern SC instructed by Norton Rose Fulbright South Africa Inc

Advocate for the Defendant: Henk Louw instructed by Gerings Attorneys

[1] Trident Sales v AH Pillman & Son (Pty) Ltd 1984 (1) SA 433 (W) (Trident Sales).at 436

[2] Id at 441.

[3] Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1985 (4) SA 809 (A) (Putco).

[4] Id at 827.

- [5] D Hutchinson & B Van Heerden ‘The tort/contract divide seen from the South African perspective’
- (1997) 98 Acta Juridica.
- [6] Lillicrap, Wassenaar & Partners v Pilkington Brothers SA (Pty) Ltd 1985 (1) SA 475 (A) (Lillicrap).
- [7] Id at 496.
- [8] Id at 499.
- [9] Id at 499.
- [10] Holtzhausen v ABSA Bank Ltd 2008 (5) SA 630 (SCA) at 633-634.
- [11] Country Cloud Trading CC v MEC, Department of Infrastructure Development 2016 (1) SA 1 (CC) (Country Cloud) paras 20-26. See also Masstores (Pty) Ltd v Pic ‘n Pay Retailers (Pty) Ltd and Another 2016 (2) SA 586 (CC) para 42.
- [12] Country Cloud above n 11 at paras 62-64.
- [13] Country Cloud above n 11 at para 65.
- [14] This position is consistent with the position taken by the Privy Council in Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank and Others
- [1986] AC 80 para 107.
- [15] Lillicrap above n 6 at 499.
- [16] For an account of some of the comparative law on concurrency see Henderson v Merrett [1994] UKHL 5; [1995] 2 AC 145.
- [17] Van Wyk v Lewis 1924 AD 443-444 and Lillicrap above n 6 at 488.
- [18] Symington and Others v Pretoria OOs Privaat Hospital Bedryfs (Pty) Ltd 2005 5 SA 550 (SCA) at para 24.
- [19] Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC and Others 1988 (2) SA 54 (T) at 65-66.
- [20] See Atlas Organic Fertilizer (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 175 (T).

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