**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION – GRAHAMSTOWN)**

**CASE NO: 634/2010**

**DATE HEARD: 25/11/2013**

**DATE DELIVERED: 31/01/2014**

In the matter between

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| **GEORGE BREMNER MINNAAR N.O** | **1ST PLAINTIFF** |
| **CHASE DENNIS MINNAAR N.O** | **2ND PLAINTIFF** |
| **JOHANNES JOSIAS VAN WYK N.O** | **3RD PLAINTIFF** |

And

| | |
|---|---|
| **HENRI McNAUGHTON & PARTNERS** | **1ST DEFENDANT** |
| **ROLAND GRAHAM McNAUGHTON** | **2ND DEFENDANT** |
| **ADRIAN GRAHAM McNAUGHTON** | **3RD DEFENDANT** |

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**JUDGMENT**

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**ROBERSON J:-**

[1] The plaintiffs are the trustees of the G B Minnaar Family Trust (the Trust). The second and third defendants are the partners of the first defendant partnership. The Trust's claim is for damages arising from a veld fire which occurred on a farm leased by the Trust to the first defendant. The main cause of action is in delict, and the alternative is in contract. The defendants have excepted to the plaintiffs' particulars of claim on the basis that they lack the necessary averments to sustain the main cause of action.

[2] The relevant portion of the particulars of claim read as follows (including the claim in the alternative):

> "5. At all times material of the Plaintiff's claims herein:
>
> 5.1 The Second and Third Defendants were members of the partnership of the First Defendant.
>
> 5.2 The Plaintiff, duly represented by the First Plaintiff, and the First Defendant, duly represented by the Second and Third Defendants, concluded a written agreement of lease at Graaff Reinet, a copy of which annexed marked "A" ("the lease")
>
> 5.3 The material provisions of the lease provide that:
>
> 5.3.1 The First Defendant leased from the Plaintiff, the farms Kleinfontein and Houdconstant in the district of Graaff Reinet for the purpose of stock farming, more particularly grazing during the period of 1 September 2007 to 31 August 2013.
>
> 5.3.2 "16.3 The Lessee hereby indemnify the Lessor against all loss, damage costs and expenses which may be sustained or incurred as a result of the burning of the property, or any other act of whichever nature, and hereby specifically accepts full responsibility for any loss or damage sustained whether it be to the infrastructure on the property

or to any person or persons thereof or affected thereby"

5.3.3 The Second and Third Defendants individually bound themselves to the Plaintiff as sureties and co-principal debtors for all the obligations of the First Defendant in terms of the lease.

5.3.4 The Lessee shall:....

"11.5 Refrain from interfering with the electrical installations or systems serving any of improvements, except as may be necessary to enable the Lessee to carry out their obligations of maintenance and repairs in terms of this lease."

5.3.5 "12.2 The Lessee shall at their own expenses and without recourse to the Lessor

12.2.1 throughout the Lease Period maintain in good order and condition the farm and all parts (excluding those parts and improvements excluded from the lease) thereof inclusive of, but not limited to, the windmills, fences and roads thereon;

12.2.2 Promptly repair or make good all damage occurring to the above improvements at their own expense;"

5.4 The lease was of full force and effect and the First Defendant conducted farming on the farms Kleinfontein and Houdconstant in terms thereof.

6. On or about 11 February 2009 and while the First Defendant was conducting farming operations on the farm Kleinfontein, the First Defendant's employees, acting within the course and scope of their employment with First Defendant, activated overhead electricity cables which short circuited, sparked and caused a veld fire ("the incident").

7. The said incident was caused by the negligence of the First Defendant's employees, acting as aforesaid, who were negligent in one or more of the following respects:

7.1 They failed to ensure the integrity of the electrical cables before activation.

7.2 They failed to take any or adequate steps to ensure that the electrical cables did not touch.

7.3 They activated the electrical cables in windy conditions.

7.4 They activated the electrical cables by gaining access to a locked Eskom meter kiosk and resetting the circuit breaker, which they were prohibited from doing.

8. Alternatively to paragraph 7 above the incident was caused by the negligence of the First Defendant who was negligent in one or more of the following respects:

8.1 The Second alternatively the Third Defendant, failed to instruct the said employees not to activate the electrical cables without ensuring that the cables were properly tensioned, that the cables could not touch and that still wind conditions prevailed.

8.2 The said Defendants failed to provide any or adequate supervision.

8.3 The said Defendants failed to take any or adequate steps or precautions to avoid the cables touching when by the exercise of reasonable care and skill they could and should have done so.

8.4 The said Defendants failed to take any or adequate steps or precautions to avoid a veld fire.

8.5 The said Defendants failed to maintain the overhead electricity cable line structures in good order and condition as they were obliged to do;

8.6 The said Defendants instructed, alternatively, permitted, the First Defendant's employees to activate the electrical cables in the unlawful manner set out in 7.4 above, whilst they should not have done so.

9. When the incident occurred the Defendants knew, or ought to have know that:

9.1 Access to the locked Eskom metre kiosk where the electrical cables were activated was prohibited to the Defendants and their employees.

9.2 The electrical cables had previously touched, caused sparks and ignited a veld fire when activated in windy conditions.

9.3 The veld under and around the electrical cables would ignite and the fire would spread over the farm if the electrical cables touched and sparked.

9.4 If the veld ignited the veld would burn and destroy the Plaintiff's property.

9.5 The Plaintiff would suffer damages including a loss of production from the Plaintiffs' factory which manufactured timber products.

10. As a direct and foreseeable consequence of the said incident and said negligence:

10.1 the Plaintiffs' farm, Kleinfontein, was burnt out by fire and the Plaintiffs' property was destroyed;

10.2 the Plaintiffs suffered a loss of production and consequently suffered damages.

11. Alternatively to 10 above, by the reason of the provisions of paragraph 16.3 of the Lease, the Defendants are liable to the Plaintiffs in damages."

[3] Further clauses of the lease relevant to the exception were clauses 3, 4.2, 9 and 11.1 which were as follows:

"3. **LETTING AND HIRING:**

3.1 The Lessor lets and the Lessee hires the farm on the terms of this lease.

3.2 The farm is let to the Lessee for the purpose of grazing only, and the following activities are *inter alia* expressly excluded namely:

3.2.1 the use of any buildings on the property;

3.2.2 the hunting of any animal on the property;

3.2.3 the utilisation of any timber on the property.

4. **USE OF THE FARM:**

4.1 .....

4.2 The farm is let to the Lessee for the purpose of grazing of veld, and the utilisation of any of the existing cultivated pastures which the Lessee in their discretion see fit to utilise.

9. **INSURANCE**

9.1 The Lessee shall not keep or do in about the farm anything which is liable to enhance any of the risks against which any of the improvements are insured for the time being or that would have the effect that such insurance is rendered void or voidable or the premiums of such insurance are, or become liable to be, increased.

9.2 Without prejudice to any other right of action or remedy which the Lessor may have arising out of a breach of the aforegoing provision, the Lessor may recover from the Lessee, on demand, the full amount of any increase in insurance premiums in respect of their improvements attributable to such breach.

9.3 For the purpose of the above provisions, the Lessee shall be entitled to assume that the improvements are at all material times insured against such risks, on such terms, for such amounts, and at such premiums as are for the time being usual in respect of similar improvements on other farms in similar locations."

11. **SUNDRY DUTIES OF THE LESSEE:**

The Lessee shall:

11.1 Conduct the farming activities for which the farm is let in a diligent manner and follow correct farming and husbanding practice in general, but shall also follow accepted farming practice in the district in which the farm is situated;

[4] There were two grounds of exception but only the first ground was argued. It was framed as follows:

"**FIRST GROUND**

1.1 The terms of the contract relied on by the Plaintiffs in the main claim solely determines the ambit and the extent of the consensual rights and obligations in respect of the subject matter the contract relied on by the Plaintiffs.

1.2 The contract relied on by the Plaintiffs provides in express terms, in particular in clause 9.3 and 16, for the ambit and the extent of the liability of the Defendant in the event of the occurrence of a fire on the property leased.

1.3 Consequently no claim for damages, other than that contemplated in terms of the contract, lies against the Defendants as a result of the exercise of any of the rights or the failure to perform any of the obligations in terms of the contract."

[5] For the purposes of deciding the exception, it is accepted that the allegations in the particulars of claim are true.

[6] The legal foundation for the arguments in this exception was the so-called "vexed" question of delictual liability in a contractual context. In *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 (1) SA 475 (AD) at 496G-I Grosskopf AJA (as he then was) said:

> "In modern South African law we are of course no longer bound by the formal *actiones* of Roman law, but our law also acknowledges that the same facts may give rise to a claim for damages *ex delicto* as well as one *ex contractu*, and allows the plaintiff to choose which he wishes to pursue. See *Van Wyk v Lewis* 1924 AD 438; *Hosten* (*op cit* at 262; R G McKerron *Law of Delict* 7th ed at 3; J C van der Walt in Joubert *The Law of South Africa* vol 8 para 5 at 7-11. The mere fact that the respondent might have framed his action in contract does not *per se* bar him from claiming in delict. All that he need show is that the facts pleaded establish a cause of action in delict. That the relevant facts may have been pleaded establish a cause of action in delict. That the relevant facts may have been pleaded in a different manner so as to raise a claim for contractual, damages is in principle irrelevant.
>
> The fundamental question for decision is accordingly whether the respondent has alleged sufficient facts to constitute a cause of action for damages in delict."

[7] The defendants accepted this position but maintained that in view of the particular terms of the lease a claim in delict was not available to the Trust. The defendants relied on a number of authorities dealing with the issue of a delictual claim in a contractual context which they claimed supported the exception, and I shall refer to passages in some of those authorities. *Lillicrap* (*supra*) dealt on exception with a claim in delict

where the plaintiff's complaint was the infringement by the defendant of its contractual duty to perform professional work with due diligence. It was found that the claim was not based on wrongful damage to property. The plaintiff did not contend that the defendant would have been under a duty to the plaintiff to exercise diligence if no contract had been concluded, and the damages which were claimed were those which would place the plaintiff in the position it would have occupied if the contract had been properly performed. The court had to decide whether the infringement by the defendant was a wrongful act for purposes of Aquilian liability. The court decided this question against the plaintiff and found that while the contract persisted the parties had adequate and satisfactory remedies if the other committed a breach. At 500G-501E Grosskopf AJA said the following:

> "Moreover, the Aquilian action does not fit comfortably in a contractual setting like the present. When parties enter into such a contract, they normally regulate those features which they consider important for the purpose of the relationship which they are creating. This does not of course mean that the law may not impose additional obligations by way of *naturalia* arising by implication of law, or, as I have indicated above, those arising *ex delicto* independently of the contract. However, in general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly, the nature and quality of the performance required from each party. If the Aquilian action were generally available for defective performance of contractual obligations, a party's performance would presumably have to be tested not only against the definition of his duties in the contract, but also by applying the standard of the *bonus paterfamilias*. How is the latter standard to be determined? Could it conceivably be higher or lower than the contractual one? If the standard imposed by law differed in theory from the contractual one, the result must surely be that the parties agreed to be bound by a particular standard of care and thereby excluded any standard other than the contractual one. If, on the other hand, it were to be argued that the *bonus paterfamilias* would always comply with the

> standard laid down by a contract to which he is a party, one would in effect be saying that the law of delict can be invoked to reinforce the law of contract. I can think of no policy consideration to justify such a conclusion. …… In the present case, the respondent repeatedly emphasized in its pleadings that it was its detailed requirements, as laid down in the contract between the parties, which defined the ambit of the appellant's obligations. It is these requirements which, according to the respondent, set the standard by which negligence falls to be determined. …….. It seems anomalous that the delictual standard of *culpa* or fault should be governed by what was contractually agreed upon by the parties.
>
> Apart from defining the parties' respective duties (including the standard of performance required) a contract may regulate other aspects of the relationship between the parties. Thus, for instance, it may limit or extend liability, impose penalties or grant indemnities, provide special methods of settling disputes (eg by arbitration) etc. A Court should therefore in my view be loath to extend the law of delict into this area and thereby eliminate provisions which the parties considered necessary or desirable for their own protection. The possible counter to this argument, viz that the parties are in general entitled to couch their contract in such terms that delictual liability is also excluded or qualified, does not in my view carry conviction. Contracts are for the most part concluded by businessmen. Why should the law of delict introduce an unwanted liability which, unless excluded, could provide a trap for the unwary?"

[8] In *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) para [6] Cloete JA stated:

> *"Lillicrap* decided that no claim is maintainable in delict where the negligence relied on consists in the breach of a term in a contract."

In so stating, Cloete JA referred to the passages in *Lillicrap* where it was said that the respondent did not contend that the appellant would have been under a duty to exercise diligence if no contract had been concluded and that the only infringement of which the respondent complained was the appellant's infringement of its contractual duty to perform diligently.

[9] In *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para [18] Brand JA said:

> "The point underlying the decision in *Lillicrap* was that the existence of a contractual relationship enables the parties to regulate their relationship themselves, including provisions as to their respective remedies. There is thus no policy imperative for the law to superimpose a further remedy."

[10] Both *Holzhausen* and *Two Oceans* dealt with claims for pure economic loss. In *Two Oceans*, as in *Lillicrap*, the court declined to extend the Aquilian action.

[11] Further reference was made to *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Napier v Barkhuizen* 2006 (4) SA 1 (SCA). In *Napier v Barkhuizen* at para [13] Cameron JA said:

> "As stated in *Brisley* (at para [95]), the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of regulating their own lives."

[12] Relying on these and other authorities it was submitted on behalf of the defendants that: (i) the negligence relied upon by the Trust consisted in the breach of terms of the contract, specifically clauses 11.1, 11.5, and 12.2.2; and (ii) that the Trust and the first defendant had regulated their relationship themselves and included provisions relating to the inclusion and exclusion of remedies relating to damage to the property, namely clauses 9.3 and 16.3.

[13] Mr. Cilliers SC, who appeared on behalf of the defendants, examined the grounds of negligence pleaded by the Trust and linked them to the terms of the contract. He referred to the purpose for which the property was leased, namely grazing, and the allegation in the particulars of claim that the first defendants' employees activated the cables while the first defendant was conducting farming operations. It followed, so it was submitted, that the conduct of the employees in activating the cables with the ensuing result was lawful because it was authorised by the contract. Their failure to ensure the integrity of the cables, their failure to ensure that the cables did not touch, and the activation of the cables in windy conditions were omissions and amounted to breaches of the first defendant's contractual obligations in terms of clauses 11.1, 11.5, and 12.2.2. None of these grounds of negligence would have existed had it not been for the contract. Mr. Cilliers submitted that the prohibited act of gaining access to the Eskom box was an act which was not negligent, alternatively that it too was a breach of contractual obligations. He submitted further that a duty of care on the part of the first defendant was not pleaded.

[14] Mr. Cilliers submitted that clauses 9.3 and 16.3 were inconsistent with delictual liability, and relied on the authorities to the effect that one should not impose an additional remedy where the parties have agreed on their remedies. With regard to clause 9.3, he relied on the matter of *Commercial Union Assurance Co of South Africa Ltd v Golden Era Printers and Stationers (Bophuthatswana) (Pty) Ltd* 1998 (2) SA 718 (BPD). That case involved the

lease of an industrial site and the buildings thereon. In terms of the lease the lessor was obliged to insure the buildings against fire and storm. Waddington AJP found that in effect the insurance premiums were borne by the lessee and that both parties intended the premises to be insured and each had an insurable interest. He went on to say at 728G:

> "Where, as in this case, two contracting parties specifically agreed that the leased premises should be insured against fire and each has an insurable interest in the premises, the clear implication in my view flowing from the agreement is that, unless the contrary is clearly indicated, each intended that both would be protected against the relevant possibility of loss."

It followed, so it was submitted, that in the present case the insurance of the improvements was for the benefit of the Trust and the first defendant, and that both had an insurable interest in the improvements. The intention was therefore that both would be protected against the possibility of loss of the improvements. Clause 9.3 was to be interpreted to the effect that the first defendant was entitled to assume that the improvements were insured and that it and the Trust were protected.

[15] With regard to clause 16.3, Mr. Cilliers submitted that the parties had agreed on the remedy of an indemnity and although precisely what the clause includes and excludes still has to be determined, the test will not be that of the *bonus paterfamilias*.

[16] Mr. Alberts SC, who appeared for the plaintiff, stressed that the present case involves damage to property and patrimonial loss, to which the Aquilian action from its origin was applicable, and that the authorities relied upon by the first defendant did not concern damage to property and involved an extension of the Aquilian action. An Aquilian action is available to a plaintiff provided the traditional delictual requirements are present. With regard to the absence of an allegation in the particulars of claim that the first defendant owed a duty of care to the Trust, he referred to the following passage in *Lillicrap* at 497B-C:

> "The element of wrongfulness in the requirements for delictual liability is sometimes overlooked, because most delictual actions arise from acts which are, *prima facie*, clearly wrongful, such as the causing of damage to property or injury to the person."

[17] Mr. Alberts relied on the matter of *Cathkin Park Hotel and Others v J D Makesch Architects and Others* 1993 (2) SA 98 (WLD), where the plaintiff claimed in delict for damages for patrimonial loss arising from physical damage to property. The first plaintiff had a contractual relationship with the defendants. The first and second defendants excepted to the particulars of claim on similar grounds to those in the present case, namely to the effect that the alleged breaches of a duty of care were breaches of contractual obligations and that the plaintiff was limited to its contractual rights.

At 100D-E Coetzee J said:

> "The duty of care arose in relation to obligations assumed by the defendants pursuant to a contractual relationship. It merely sets out the field of origin of the duty of care. Mr. *Browde* correctly contends that this in no way results in the plaintiff being confined to remedies framed in terms of a breach of contract."

At 102C he said:

> "In *Lillicrap* the Court was concerned with the question of whether an extension to the Aquilian action should be permitted. It is clear that, where there is a case of physical injury to person or property, the Aquilian action clearly lies and no extension is necessary."

And at 102H-I:

> "The Appellate Division has said that, if the breach of the duty is accompanied by *culpa*, damages can be claimed *ex delicto*. No doubt there was a duty owed to the first plaintiff. This duty is clearly spelled out, it is a contractual duty. This has been breached accompanied by *culpa*. Consequently the exceptions must fail."

[18 In dealing with the conduct of the first defendant's employees, Mr. Alberts submitted that it did not consist of mere omissions. There was prior conduct on the part of the first defendant's employees in that they gained access to the Eskom box and reset the circuit breaker, with the consequence that the cables short-circuited and sparked, causing the fire. Further, the first defendant had control over the electricity cables, which are inherently hazardous. There was thus an overriding duty on the first defendant which existed independently of the lease. The employees' negligence lay in exercising this control at a dangerous and inopportune time. When a cable short-circuits, it is foreseeable that sparks will fall on combustible material such as dry grass and a fire will result.

[19] Mr. Alberts also did not agree with the defendants' reliance on a breach of clause 11.1 of the lease. He submitted that correct farming practice had nothing to do with the control of a dangerous object and there were more appropriate clauses which could have been inserted in the contract dealing with such a situation.

[20] Mr. Alberts differed from Mr. Cilliers in his interpretation of clause 9.3. He pointed out that the improvements which were insured were excluded from the lease. The intention of the clause was to allow the lessee to know how to conduct itself so as not to be in breach of clause 9.1. Clause 9, so it was submitted, did not mean there was an obligation on the Trust to insure the improvements.

[21] Applying the reasoning in the *Cathkin Park* matter (*supra*), in the present matter the lease agreement was the "field of origin" of the duty of care owed by the first defendant to the Trust. The claim arises from damage to property and no extension of the Aqulian action is necessary. The Aquilian action clearly lies. Applying *Lillicrap*, the facts pleaded by the Trust establish a cause of action in delict. It alleged wrongful and negligent conduct which caused patrimonial loss. The conduct as pleaded did not, as was submitted, amount to mere omissions but rather, at the least, prior positive conduct or control of a hazardous object giving rise to a duty to avert consequential harm. I think it could be argued that

all the conduct pleaded could be regarded as positive conduct, and what happened is no different from the example given by Mr. Cilliers of the defendants having a braai on the property and causing a fire. However it is not necessary to go that far.

[22] I do not agree that the terms of the lease are such that a claim in delict is not available to the Trust. I think that the defendants' contention that the conduct of the first defendant's employees consisted solely of breaches of the contract, and that no further duty existed, is a strained and artificial way of classifying their conduct. I agree with Mr. Alberts that the conduct complained of is far removed from what was envisaged in clause 11.1, and for that matter, in clauses 11.5 and 12.2.2. Unlawfully gaining access to an Eskom box and negligently handling cables in dangerous conditions is not, as Mr. Alberts expressed it, "inefficient stock farming", nor is it mere interference with electrical installations serving the improvements on the property in order to carry out maintenance and repairs. The first defendant was only allowed to interfere with the electrical installations serving the improvements on the property for these specific purposes. Once its employees set about such interference, even if it was permitted by the contract, the first defendant bore a duty to avert damage to the Trust property. I am of the view therefore that the conduct of the first defendant's employees fell outside of what was intended in these clauses and was rather a breach of the overriding duty of care which existed independently of the contract.

[23] I cannot agree with the defendant's interpretation of clause 9.3. The opening words "for the purposes of the above provisions" clearly refer to clauses 9.1 and 9.2. In my view clause 9.3 protects the first defendant in the event of the Trust seeking to enforce its remedy in terms of clause 9.2. In other words, the first defendant is sufficiently informed about the terms of insurance so as not to be in breach of clause 9.1. The situation cannot be equated with that in the *Commercial Union Assurance* case (*supra*) where the premises leased were to be insured by the lessor and the premiums effectively were paid by the lessee. The specific remedy in clause 9.2 only allows the Trust to recover an **increase** in premiums.

[24] Mr. Cilliers himself submitted that the precise extent of damage covered by clause 16.3 still has to be determined. In that case, for the purpose of an exception, an interpretation of clause 16.3 would be undesirable. (See *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (AD) at 186J.) It follows in my view, that it cannot be said at this stage that a claim in delict would introduce an "unwanted liability".

[25] I am therefore of the view that the facts as pleaded in the main claim, which include the terms of the lease, are sufficient to sustain a claim in delict.

[26] The exception is dismissed with costs.

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**J M ROBERSON**
**JUDGE OF THE HIGH COURT**

**Appearances:**

**For the Plaintiffs: Adv G W Alberts SC, instructed by Netteltons Attorneys, Grahamstown**

**For the Defendants: Adv P G Cilliers SC and Adv J L Myburg, instructed by Neville Borman & Botha Attorneys, Grahamstown**