IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: A5021/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED.

01 DECEMBER 2017 C Nicholls
DATE SIGNATURE

In the matter between:

QUISPIAM CC	**First Appellant**
ANTONY VAN TIL	**Second Appellant**
DANA VAN DEN BERG	**Third Appellant**

and

THE JOHANNESBURG STOCK EXCHANGE LTD	**Respondent**

JUDGMENT

NICHOLLS J:

[1] Everyone has a right to a fair trial in terms of section 34 of the Constitution. Thus commenced argument on behalf of both parties to this appeal. The issue which is said to be determinative of the fair trial right is whether the claim in question is a delictual one or a contractual one. The complaint of the appellants is that there is a disconnect between the case as pleaded, which they contend is contractual in

nature, and the case decided upon by the court *a quo* (per Claassen J). The crisp question is whether the appellants were denied a fair trial in that the claim which they came to court to meet was one for contractual damages. However, the court *a quo* upheld a claim in delict and awarded delictual damages.

[2] Application for leave to appeal was refused by the court *a quo*. This appeal comes before this court pursuant to a petition to the Supreme Court of Appeal, which referred the matter back to a full court of this division.

[3] The claim is in respect of a consultancy agreement (the agreement), together with Confirmations of Engagement (confirmations) entered into by the first appellant, Quispiam CC (Quispiam), and the Johannesburg Stock Exchange Ltd (JSE), the respondent. The second and third appellants respectively are Antony Van Til (Van Til), the sole member of Quispiam, and Dana Van den Berg (Van den Berg), an employee of the JSE during the relevant period.

[4] As per a court order dated 18 May 2016, the reason for Van Til's failure to attend court on that day was dealt with first. It appears that he was imprisoned in Oman at the time. The explanation was accepted by the respondents. This court will take the matter no further.

[5] The opening paragraph of the judgment reads as follows:

> "This is a delictual claim for damages arising from the alleged fraud committed during the conclusion and execution of a consultancy contract between the parties. The [respondent] alleges that the three [appellants'] collusive conduct surrounding the conclusion of a contract ... amounted to fraud perpetrated to the detriment of the respondent. At the outset it is necessary to mention that the "Lillicrap" principle[1] does not apply (nor did counsel for the [appellants] rely in argument thereon) as the parties never intended to regulate fraudulent conduct by either party in the contract concluded between the [respondent] and the first [appellant]."

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[1] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A)

[6] There can therefore be no doubt that the claim that was upheld by the court *a quo* was one in delict. The question is whether the pleadings and evidence sustain a claim in delict and whether the appellants' fair trial rights have been eroded in any respect.

The Agreement

[7] The conclusion of the consultancy agreement[2], which lies at the heart of the appeal, is not in dispute. Neither are its terms. The agreement, which was concluded in November 2009, was in respect of Information Technology Asset Management (ITAM). It was a new area and was described by Mr Anthony Trollip, the appellants' expert, as being *"very very complicated"*, to be distinguished from general IT asset management. It was said to be a holistic practice that recognises process, procedure and policies and links these to IT asset management and IT asset tracking and other disciplines in the IT sphere. It combines the usage of software and hardware. At the time of concluding the agreement expertise in this field was a rare commodity.

[8] The designated representatives in terms of the agreement were Van den Berg for the JSE and Van Til in the case of Quispiam. The services to be provided by Quispiam were *"professional consulting services to be performed by the Consultant to the JSE, as more fully described in a Confirmation of Engagement."* A consultant was defined as "*a skilled person from Quispiam who will provide the services."* Quispiam was obliged to *"ensure that the Consultants will have the necessary skills and expertise to provide the Services"*.

[9] Three confirmations, which are also common cause, were subsequently issued and signed. The first confirmation ran for a period of 13 months from 23 November 2009. The second confirmation was an extension of the consultancy agreement from 24 December 2010 to 31 December 2011. In terms of both these confirmations, Quispiam was to provide two so-called 'junior resources' for 180 hours each per month and 40 hours per month for a 'senior resource'. The junior resources were named as Yasteel Ragubeer and Vuyo Sithoga. The senior was merely described as an "ad hoc senior resource". The monthly fee in respect of the first

[2] Consultancy Agreement between JSE Limited and Quispiam CC dated 23 November 2009, annexure POC 3 to the Particulars of Claim.

confirmation was R90 000 and the second was increased slightly to R95 400. The task to be performed in respect of both was the *"development of IT Asset Management Program and associated deliverables."*

[10] The third confirmation differed in that the task to be performed was to provide *"a summary of all the software EULA'S (End User License Agreements) to ensure compliance of [JSE's] assets standards list"*. The duration of this agreement would be three months from 1 August 2010 and the consultants to be assigned to this task were to be *"external legal council (sic) on a part time fixed scope basis"*.

[11] The JSE was unaware of anything untoward regarding the agreement and the performance thereof until a member of the legal department by chance queried why JSE's own attorneys were not attending to the EULAs referred to in the third confirmation. This led to an investigation into the agreement with Quispiam. The JSE, once it uncovered the collusive conduct of Van den Berg and Van Til, held an internal disciplinary enquiry which resulted in the summary dismissal of Van den Berg. Thereafter this action was instituted against the appellants. The JSE submits that because it was still investigating the extent of the scheme, the particulars of claim were purposely framed very broadly with various causes of action, of which fraudulent conduct was one.

Factual Findings of the Court a quo

[12] It is significant that the damning factual findings of the court *a quo* were not the subject matter of the appeal. As previously stated, the appellant's case is that the court erred in upholding a case in delict when the case pleaded and pursued was a claim in contract. Essentially what the court *a quo* found was that Van den Berg and Van Til, who had known each other for some time, colluded to defraud the JSE and the contract concluded was not at arm's length. The further findings are set out hereunder.

[13] Initially Quispiam had not been on the JSE list of labour brokers but as a favour to Van Til, Van den Berg ensured that Quispiam was on the preferred list of suppliers. This was done contrary to procedure and without any knowledge of Quispiam's track record. When a senior ITAM resource was required, only Quispiam

was approached without approaching any other labour brokers. The agreement made provision for payments of less than R100 000 per month, which meant that Van den Berg could approve payments to Quispiam without the necessity of further signatories. It is no coincidence that R100 000 per month was the ceiling of Van den Berg's mandate to approve. The court concluded that the established procurement requirements, which had in fact been drafted by Van den Berg, had been circumvented and that there was no basis for contracting with Quispiam without obtaining competitive tenders.

[14] As far as the contract itself was concerned, the agreement clearly contemplated the provision of skilled ITAM consultants both at a junior and senior level. What was in fact provided were new graduates who did their best under difficult circumstances as the junior resources. Van Til was appointed as the senior resource for the bulk of the period. He was "*self-confessedly not an ITAM expert*"[3] although he had acquired certain useful IT skills during the course of his career.

[15] Mr Gorelick was initially identified as the senior resource with the appropriate skills, but he contributed only 10 hours before Van den Berg decided that he was unsuitable and added no value. For the rest of the period, Van Til acted as the senior resource. The evidence of Sithonga was that Van Til provided minimal input and the junior resources did their own internet research on ITAM. Van den Berg conceded that he was no more than a useful sounding board. Based on this evidence it was concluded that Van Til did not fulfil the requirements of a senior resource as envisaged by the agreement. Significantly, no records whatsoever were kept of Van Til's hours.

[16] Notwithstanding that Gorelick was removed after working only 10 hours, the full 40 hours per month was billed to the JSE. The monthly fee of R90 000 was itself a manifestation of the fraud, so said the court *a quo*. The respondent's expert said that the fee was patently unreasonably excessive in light of the services actually

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[3] Judgment at [36.1]

provided. In accepting this evidence it was found that the conduct was more consistent with an intention to defraud rather than merely overcharging.[4]

[17] What proved conclusive in the finding of fraud was Quispiam's employment of Van den Berg's wife. Despite having never worked in the industry, she was the recipient of a lucrative signing-on fee as well as a bonus. Her role in Quispiam was unclear and her employment status changed during her alleged period of employment. The timing of the payments made to Mrs van den Berg supports the version of the JSE that these were merely disguised payments by Van Til to Van den Berg (via Mrs Van den Berg's bank account), of Van den Berg's share of the proceeds from the consultancy agreement.[5] It was concluded that of the R90 00 paid to Quispiam, R30 000 would be paid to the junior resources, R30 000 to Van Den Berg via Mrs Van den Berg and R30 000 would be for Van Til. Despite the improbabilities put to the witnesses in respect of Mrs Van den Berg, she was not called to testify by the appellants.

[18] In respect of the third confirmation it is common cause that no external legal counsel were employed. As stated by the court *a quo*, no real defence was put up in respect of the return of the R270 000 plus vat. The explanation put up for paying this amount, that the budget for that year was closing, was found to be patently ridiculous. If no services were going to be rendered there would be no need to incorporate any amount into the budget. Van den Berg admitted that any amounts paid in respect of the third confirmation should be paid back, but Van Til insisted that some of the EULA summaries had been completed.

[19] There is no reason to question the above findings, which were borne out by the evidence.

Damages payable

[20] The court *a quo* found that Van den Berg and Van Til having colluded to defraud the JSE, it would be entitled to repayments of all amounts paid to it, save to the extent that the JSE benefitted therefrom, namely the negative *interesse* payable

[4] Judgment at [36.6]
[5] Judgment at [42]

in delictual claims. The court held that the only real benefit to the JSE were the services rendered by the two junior resources. The salaries paid to them were accordingly deducted from the total amount paid to Quispiam. Any mark-up on their salaries was disallowed on the basis that Quispiam should not be entitled to reap the benefit of its fraud. Accordingly, to calculate the damages arrived at, the court took into account the full amount paid in respect of the agreement being R1 636 200, less salaries totalling R582 000 paid to the junior resources. This amounted to R1 324 200, which the court ordered be paid by the appellants jointly and severally.

[21] The first obvious error in this award is that the amount ordered is R73 200 more than that which was claimed by the respondents. The respondents claimed R1 251 000, which they calculated by adding the amounts claimed in respect of the senior resources for the first and second confirmations, and the full amount paid in respect of the third confirmation. The amounts invoiced for the junior resources were not claimed by the JSE, presumably on the basis that they accepted that Quispiam was entitled to all amounts invoiced with the exception of the senior resource. The calculation of damages was pleaded as follows[6]:

> "30.1 The overpayment in respect of the senior ITAM resource for the thirteen month period from November 2009 to December 2010 at the rate of R54 000 per month, a total of R702 000;
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> 30.2 The overpayment in respect of the senior ITAM resource for the five month period from December 2010 to April 2011 at the rate of R55 800 per month, a total of R279 000;
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> 30.3 The R270 000 which the plaintiff paid to the first defendant under the auspices of the Third Confirmation, in respect of the Services of an external legal counsel which were never rendered or received."

[22] That the court *a quo* erred in awarding more than the amount claimed is conceded by the JSE, but described as merely a technicality. Counsel for the JSE submitted that the damages in cases of fraud are based on negative *interesse* and stated that the court a quo correctly applied itself to a proper assessment of the damages. Further, that the court *a quo* was correct in finding that the JSE was

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[6] Particulars of Claim at [30]

entitled to repayments of all amounts paid to Quispiam save to the extent it benefitted. The conclusion is that the restitution due to the appellants was properly held to be the salaries of the junior resources.

[23] How damages are computed is an important indicator in establishing whether a claim is contractual or delictual in nature. The difference is described by Van den Heever JA in *Trotman and Another v Edwick*[7] and cited with approval in *Lillicrap*[8] and *Cathkin Park Hotel and Others v J D Makesch Architects and Others*[9], in the following manner:

> "A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and in 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 "[10]

[24] The appellants' argument is that the court erred in focusing on the value of what the JSE did not receive, as opposed to value of the services that were in fact received. The retention of the ITAM system provided by the appellants led to a conflation of contractual and delictual remedies. This retention, argue the appellants, is consistent with a claim based in contract and not one based in delict. This led to a damages formulation that bore no resemblance to the pleaded case.

[25] It is trite that delictual damage amounts to the negative difference caused by a delict, namely to place the party in the position it would have been absent the delict. In a contractual context there can be both positive and negative *interesse*.[11] The positive *interesse* usually refers to the total interest which a contractual party has in the other fulfilling his contractual obligations, namely the damage already suffered and likely to be suffered in future as a result of the breach. Negative *interesse* is usually determined with reference to the position of a party immediately before the conclusion of a contract, or in the case of delict, before the breach was committed.

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[7] *Trotman and Another v Edwick* 1951 (1) SA 443 (A)
[8] *Lillicrap* (supra) at 505H – 506C
[9] 1993 (2) SA 98 (W)
[10] *Trotman and Another v Edwick* 1951 (1) SA 443 (A) at 449B-C
[11] Joubert (ed) *The Law of South* Africa (2ed) vol 7 p 20

[26] In the present matter, what the JSE sought to claim was the repayment of that portion of the contract that was unfilled; that is, the costs of the senior resource and the legal counsel in terms of the third confirmation. On the face of it, it would appear that the claim was purely a contractual one. However, as has been observed by the Supreme Court of Appeal,[12] this distinction is often not easy to apply.

Applicability of the *Lillicrap* principle

[27] *Lillicrap* is frequently cited as authority that where a contractual claim lies, it is inappropriate to claim delictual damages. This is a somewhat simplistic interpretation. *Lillicrap* concerned the planning and construction of a glass plant by a firm of structural engineers. Their performance was allegedly deficient in various aspects. A delictual claim based on the engineers' duty of care to perform their contractual obligations with the necessary professional skill and care, which they negligently failed to do, was pleaded. In finding that the claim was contractual in nature, it was pointed out that the patrimony of the claimant may well have been enhanced by the erection of the plant, despite its defects. The damages claimed were not the value of the plant less what was paid for it. Instead the amount claimed was the sum that would have to be spent to bring the plant up to the standard laid down in the contract.

[28] The court concluded that there was no need to extend *Aquilian* liability in this case as the relief sought could have been granted in an action based in contract. It was held that there was no authority that the breach to perform a professional duty with due diligence constituted a wrongful act for purposes of *Aquilian* liability. This duty must arise *ex delicto* independent of the contract. In this instance it was held that policy considerations did not require that delictual liability be imposed for negligent breach of a contract of professional employment.[13]

[29] However, I do not understand *Lillicrap* to prohibit delictual liability in all contractual situations. To the contrary, the court was at pains to point out that this was not the case. Grosskopf AJA held that:

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[12] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (AD)
[13] *Lillicrap* page 500D – 501H

> "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 Aquilian action were generally available for defective performance of contractual obligations, a party's performance would 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*."[14]

[30] But it was explicitly recognised that the particular facts of a case could give rise to both causes of action and Grosskopf AJA went on to state:

> "In principle there would be no objection in our law to such a situation. Roman Law recognised the possibility of a *concursus actionum*, i.e. the possibility that different actions could arise from the same set of facts ... The mere fact that the respondent might have framed his action in contract therefore does not *per se* debar 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 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" [15](my underlining)

[31] It is therefore incorrect to characterise *Lillicrap* as placing a blanket prohibition on delictual liability in contractual settings. Later decisions have clarified this position further. That our law permits concurrent actions where the same conduct constitutes both a delict and a breach of contract, has been confirmed time and again.[16] In *Cathkin Park Hotel and Others v J D Makesch Architects and Others*[17] a claim was pleaded in delict on the basis that the architects had breached their duty of care towards the plaintiff in respect of the construction of a hotel. The defendants raised an exception on the grounds that negligence did not give rise to a duty of care in light

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[14] *Lillicrap* page 500H – I
[15] *Lillicrap* page 496
[16] *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) at [8]; *Cathkin Peak Hotel and Others v J D Makesch Architects and Others* 1993 (2) SA 98 (W); *Durr v Absa Bank Ltd and Another* 1997 (3) SA 448 (SCA); *Van Wyk v Lewis* 1924 AD 438 page 443
[17] 1993 (2) SA 98 (W)

of the contractual relationship between the parties, and that its duty to the plaintiff arose pursuant to a contract. Therefore it was contended that no cause of action arose out of *Lex Aquilia* and the plaintiff was limited to pursuing its contractual rights. Coetzee J found that the duty of care arose in relation to obligations assumed by the defendants pursuant to a contractual relationship but the contract merely set out the field of origin of the duty of care, rather than limiting the plaintiffs to contractual relief only.[18] Although the fact that the damages had been pleaded in delict rather than contract was an important consideration in the dismissal of the exception, it was held that if a contractual duty is accompanied by *culpa*, the damages can be claimed *ex delicto*.

[32] Similarly Cloete JA in *Holtzhausen* [19]confirmed that where delictual liability co-exists with a contractual claim, the premise that the aggrieved party is limited to contractual damages is incorrect. The court stated:

> "*Lillicrap* is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. On the contrary, Grosskopf AJA was at pains to emphasise (at 496D – I) that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and thus permits the plaintiff in such a case to choose which he wishes to pursue. Thus in *Durr v Absa Bank Ltd* 1997 (3) SA 448 (SCA), a case which concerned the duties of an investment advisor recommending investment in debt-financing instruments, Schutz JA found no difficulty in saying (at 453G):
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> > 'The claim pleaded relied upon contract, alternatively delict, but as the case was presented as one in delict, and as nothing turns upon the precise cause of action, I shall treat it as such.'"

[33] The situation was further clarified by Lewis JA in *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security*[20] where she stated:

> [7] Where economic loss arises from a breach of contract, loss will of course be limited. But a negligent breach of contract will not necessarily give rise to delictual

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[18] *Cathkin Park Hotel* (supra) at 100D
[19] *Holtzhausen* (supra) at [7]
[20] 2010 (4) SA 455 (SCA) at [7] – [9]

liability. This court has held that where there is a concurrent action in contract an action in delict may be precluded: *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd.* But that case held only that no claim is maintainable in delict when the negligence relied upon consists solely in the breach of the contract. Where the claim exists independently of the contract (but would not exist, but for the existence of the contract), a delictual claim for economic loss may certainly lie. This is made clear by *Bayer South Africa (Pty) Ltd v Frost*[21] and *Holtzhausen v Absa Bank Ltd*[22].

[8] Accordingly it is possible that the assumption of contractual duties is capable of giving rise to delictual liability. The question is whether there are considerations of public or legal policy that require the imposition of liability to cover pure economic loss in the particular case."

[34] It is noteworthy that all the cases referred to above deal with situations of negligent conduct or negligent misstatement. In the present case we are dealing with fraudulent conduct. It can hardly be said that considerations of public policy would militate against delictual liability in instances of fraud. In fact in *Lillicrap* the minority dissenting judgment of Smuts AJA disagreed that policy considerations militate against delictual liability being imposed on professional service providers in situations of negligence. In coming to this conclusion, he emphasised that where the delictual claim is based on fraud or gross negligence, it is "*unarguable that policy considerations, and those of fairness and justice, require that such a claim be recognised.*"

[35] In the present matter there can be no doubt that if the pleadings sustain it, a delictual claim for fraud lies independently of any contractual claim (albeit that it may not exist but for the existence of the contract).The real issue then is whether a case of fraud has been pleaded.

Do the pleadings sustain a cause of action for delictual liability?

[36] The case pleaded against Van Til and Quispiam is that a consultancy agreement together with three confirmations was concluded between the JSE and Quispiam. In terms of the first two confirmations, 360 hours per month would be

[21] 1991 (4) SA 599 (A)
[22] 2008 (5) SA 630 (SCA)

provided by two junior resources Ragubeer and Sithonga, and a further 40 hours by an unidentified ad hoc senior ITAM resource. In consideration of the total services, the JSE would pay R90 000 per month plus vat. The third confirmation required services to be performed by an external legal counsel to summarise the EULAs and ensure compliance. This would be for a period of 3 months and Quispiam would be paid R270 000 plus vat for the total duration. Copies of the consultancy agreement and the three confirmations are attached to the particulars of claim. There can be no dispute that the claim pleaded is contractual in nature. However, the real issue for determination then is whether there are sufficient allegations pleaded, not only for a contractual breach, but also for delictual liability.

[37] In respect of Van den Berg, a contract of employment with the JSE is pleaded in terms of which it was expressly stipulated, inter alia, that personal interests should not influence employees when engaging in business dealings on behalf of the JSE. Further, that Van den Berg was contractually obliged to exercise a duty of care as well as an additional duty, independent of his contractual obligations not to defraud or allow the JSE to be defrauded and not to collude with any other person to defraud the JSE or to pay out monies that were not due. The employment contract was annexed to the particulars of claim.

[38] The breach pleaded was that Quispiam rendered invoices to the JSE for the full amounts in respect of all three confirmations, which invoices were duly paid. The pleadings then state[23]:

> "THE DEFENDANTS' BREACHES AND THEIR LIABILITY TO THE PLAINTIFF
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> ....
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> 24. In submitting the aforesaid invoices, as detailed on paragraphs 21 to 23 above to the plaintiff, the first defendant, duly represented by the second defendant, represented to the plaintiff that all of the Services provided for in each of the First, Second and Third Confirmations had indeed been rendered and, more particularly, that:

[23] Particulars of Claim at [24]

24.1 The senior ITAM resource, as provided for in the First and Second Confirmations, had indeed been assigned to the Plaintiff and had rendered 40 hours of Service per month to the plaintiff; and

24.2 The external legal counsel for whom provision had been made in the Third Confirmation had indeed been engaged and had rendered the Services which were provided for in the Third Confirmation.

25. To the knowledge of the first and second defendants, the representations as described in paragraph 24 above were false.

26. The aforesaid representations were made fraudulently, alternatively negligently.

27. More particularly to the knowledge of the first, second and third defendants (the knowledge of the second defendant being attributable to the first defendant):

27.1 No senior ITAM resource, as contemplated by the First and Second Confirmations, was ever assigned to the plaintiff;

27.2 The plaintiff did not receive or derive a benefit of 40 hours of service per month from (or indeed any amount) from a senior ITAM resource;

27.3 The services of an external legal counsel (as provided for in the Third Confirmation) had never been engaged;

27.4 Despite having paid therefor, the plaintiff never received or derived the benefit of the services of an external legal counsel to provide the services as contemplated by and provided for in the Third Confirmation.

28. The value of the senior ITAM resource for which the plaintiff paid, but did not receive:

28.1 In terms of the First Confirmation, was the sum of R54 000,00 per month excluding VAT; and

28.2 In terms of the Second Confirmation, was the sum of R55 800,00 per month Excluding VAT;

29. Upon discovering the facts as detailed in paragraphs 24 to 28 above:

29.1 on or about 9 June 2011 the plaintiff terminated the Consultancy Agreement and the Second and Third Confirmations;

29.2 on or about 21 June 2011. And pursuant to a disciplinary hearing which had been convened and conducted, the plaintiff terminated the third defendant's employment contract.

30. In the circumstances, and in consequence of that which has been detailed in paragraphs 24 to 28 above, the plaintiff has suffered damages in the total amount of R1 251 000,00, which amount comprises and is calculated as follows:

30.1 The overpayment in respect of the senior ITAM resource for the thirteen month period from November 2009 to December 2010 at the rate of R54 000,00 per month, a total of R702 000,00;

30.2 The overpayment in respect of the senior ITAM resource for the five month period from December 2010 to April 2011 at the rate of R55 800,00 per month, a total of R279 000,00; and

30.3 The R270 000,00 which the plaintiff paid to the first defendant under the auspices of the Third Confirmation, in respect of the Services of an external legal counsel which were never rendered or received.

31. The plaintiff's aforesaid damages arose by virtue of the following:

31.1 The first, second and third defendants having colluded with one another to defraud the plaintiff out of the monies which are more fully detailed in paragraph 30 above;

31.2 The first defendant having breached the terms of the Consultancy Agreement and the First, Second and Third Confirmations by:

31.2.1 failing to provide a senior ITAM resource to render Services to the plaintiff;

31.2.2 charging for the Services of a senior ITAM resource which had never been provided;

31.2.3 failing to ensure that a senior ITAM resource, with the necessary skills and expertise to provide the requisite Services, was, firstly, appointed and provided and, secondly, rendered the requisite Services;

31.2.4 failing to ensure that the requisite and stipulated weekly time sheets were either produced or submitted;

31.2.5 failing to ensure that the invoices which it submitted to the plaintiff were sufficiently detailed and included the necessary supporting documentation, as detailed in paragraph 11.10 above;

31.2.6 failing to appoint or engage the services of an external legal counsel as contemplated by and provided for in the Third Confirmation;

31.2.7 failing to ensure that any such external legal counsel in fact rendered the Services which he or she was oblige to render in terms of the Third Confirmation;

31.3 The third defendant having breached his contract of employment with the plaintiff in one or more or all of the following respects:

31.3.1 influencing, either directly or indirectly, the appointment of the first defendant and the conclusion of the Consultancy Agreement and each of the Confirmations in circumstances where he had a conflict of interest regarding such appointment, particularly given that he had a personal relationship with the second defendant;

31.3.2 acting negligently in the performance and execution of his duties as the plaintiff's employee;

31.3.3 failing to ensure that the Services for which the plaintiff had contracted in terms of the First, Second and Third Confirmations (and for which the plaintiff paid) had indeed been rendered;

31.3.4 failing to insist upon the production and receipt of all supporting documentation in substantiation of the aforesaid amounts which the first defendant invoiced to the plaintiff, and which the plaintiff paid;

31.3.5 deliberately and wrongfully, alternatively negligently approving all of the first defendant's aforesaid invoices for payment in full, and authorising such payment to the first defendant;

31.3.6 causing and/or allowing the first defendant's aforesaid invoices to be paid in full under circumstances where he ought not to have done so;

31.3.7 conducting himself in the manner as more fully detailed in paragraphs 31.3.3 to 31.3.6 above, which conduct amounted to and had the effect of falsifying the process of the relevant transactions;

31.4 The third defendant having breached his duty of care as more fully detailed in paragraph 8 above by:

31.4.1 defrauding the plaintiff, alternatively allowing the plaintiff to be so defrauded;

31.4.2 colluding with the first and second defendants, as detailed in paragraph 31.1 above;

31.4.3 failing to exercise due and reasonable care;

31.4.4 causing and/or allowing the plaintiff to suffer the aforesaid damages when, by the exercise of due and reasonable care, he could and should have prevented such losses from occurring;

31.4.5 approving and authorising the first defendant's aforesaid invoices for payment in full, thereby fraudulently, alternatively negligently misrepresenting to the plaintiff that such payments were indeed due to the first defendant; and/or

31.5 The facts as detailed in paragraphs 24 to 27 above.

32. The conduct of the first, second and third defendants, as detailed in paragraph 31 above, jointly caused the plaintiff to suffer its aforesaid damages.

33. Alternatively to paragraph 32 above, the independent conduct of the first, second and third defendants, as detailed above, combined to produce the same damage and loss to the plaintiff and, in the circumstances;

33.1 The first, second and third defendants were concurrent wrongdoers in having caused the plaintiff to suffer its aforesaid damages and loss; and

33.2 The first, second and third defendants are each liable, *in solidum,* to compensate the plaintiff for such damages."

[39] The essential allegations for a claim based on fraud are[24]: (a) a representation by a party which is (b) fraudulent in that the representor knew it to be false and intended that the other party would act upon it; (c) causation in that the representation induced the other party to act on it; and (d) damages were suffered as a result of the fraud.

[40] The particulars of claim in paragraph 24 reflect that, by submitting invoices for a senior ITAM resource and for legal counsel, a representation was made by Quispiam and Van Til. In paragraphs 25 and 26 it is pleaded that the representations were to the knowledge of Quispiam and Van Til, false and were fraudulent, alternatively negligent. Causation is pleaded extensively in paragraphs 27 and 28 in that the JSE paid for services it did not receive. In paragraph 30 the damages are

[24] LTC Harms *Amler's Precedents of Pleadings* 8 ed (2015) at 201-203

pleaded. In paragraph 31 the damages are said to have arisen from Van den Berg and Quispiam having colluded to defraud the JSE. In respect of Van den Berg, it is pleaded at paragraph 8 that he owed the JSE a duty of care, independent of his duties as an employee, not to defraud or allow the JSE to be defrauded or to collude with any other persons to defraud the JSE.

[41] What is immediately clear is that the JSE has pleaded not only breach of contract but also fraud. While the court *a quo* may have erred in characterising it solely as a delictual claim, the delictual claim for fraudulent misrepresentation was pleaded. As concurrent claims are permissible, the finding of delictual liability was not incorrect. It may well be so that the remedy pleaded, particularly in respect of the first and second appellants, lies more easily in contract, but this does not preclude a finding in delict if the facts permit.

Were the appellants deprived of a fair trial?

[42] The argument put forward by the appellants is that they came to meet a case in contract as pleaded, but instead the court *a quo* found against them in delict. As such they were deprived of a fair trial, which is their constitutional right.

[43] The appellants correctly state that pleadings define the parameters of a case and where a particular cause of action has been chosen it is not open to a court, of its own accord, to choose a different cause of action and find in favour of a losing litigant.[25] What is incorrect is to state that the respondents made a contractual election to which the court *a quo* should have been bound. It is unambiguously stated that the primary allegation is one of fraudulent breach of contract.

[44] Over and above the pleadings which make it clear that fraud is alleged, the appellants were at all times aware that the case they were to meet was one of fraud. This is evident from the respondent's further particulars and their replication to the special plea raised by the appellants. In their request for further particulars, the appellants specifically asked when they allegedly colluded with each other. The question itself is indicative of an understanding that collusion and fraud was alleged

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[25] *MEC for Education v Governing Body, Rivonia Primary School* 2013 (6) SA 582 (CC) at [100]; *Gcaba v Minister of Safety and Security and Others* 2010 (1) SA 238 (CC) at [75]

against them. In response to the special plea that the matter should be referred to arbitration in terms of the consultancy agreement, the JSE's response was that a referral would be inappropriate in circumstances where fraud and collusion were alleged. Significantly no exception was raised.

[45] Not only is the above indicative of knowledge of the case against them but it was stated in so many words in the opening address of the JSE (as plaintiff) in the trial. In their heads of argument at the trial, the appellants (as defendants) themselves refer to the opening address of the JSE in which it was stated that the agreement was merely a sham and that Van Til and Van den Berg colluded to defraud the JSE as a result of which it suffered substantial damages. The heads of argument also state that the JSE as plaintiff pleaded *"a whole array of causes of action"*, one of which was a delict based on the alleged fraudulent collusion between the defendants.

[46] The appellants were never in any doubt as to the case they had to meet. This was evident during the pleadings stage, at the commencement of the trial and during closing argument. To now claim that the case they came to meet on the pleadings was different to the case pursued and decided, depriving them of a fair trial is, frankly, disingenuous.

[47] In conclusion, the case pleaded by the JSE was capable of sustaining a cause of action in delict. The appellants were on their own version always aware that at least one of the causes of action they came to meet, was a delictual claim for fraudulent misconduct. There can be no question that the appellants were afforded a fair trial.

In the result I make the following order:

1. The appeal succeeds only to the extent that the quantum is reduced to R1 251 000.00
2. The appellants are to pay the costs, including the costs of two counsel.

C. H. NICHOLLS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

L. ADAMS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

S. MIA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the 1st and 2nd appellants	:	Adv. I L Posthumus
Counsel for the 3rd appellants	:	Adv. R Stockwell SC
		Adv. H H Cowley
Instructing Attorneys	:	Martin Hennig Attorneys
		c/o Rosslee Lion Cachet
Counsel for the respondent	:	Adv. J P V McNally SC
		Adv. T R Mafukidze

Instructing Attorneys	: Webber Wentzel
Date of hearing	: 13 October 2017
Date of judgment	: 01 December 2017