129/84

Case no 410/82

MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

Between:

LILLICRAP WASSENAAR AND PARTNERS — Appellant

- and -

PILKINGTON BROTHERS (SOUTH AFRICA)
(PROPRIETARY) LIMITED — Respondent

CORAM: KOTZé, CILLIé, VAN HEERDEN JJA et
SMUTS, GROSSKOPF AJJA.

HEARD: 15 MAY 1984

DELIVERED: 20 NOVEMBER 1984

J U D G M E N T

SMUTS AJA:-

I have had the advantage of reading the judgment of Grosskopf AJA. I do not however, with respect, share the view that appellant, a firm of consulting and structural engineers, is not liable in delict for the negligent performance of a duty contractually undertaken by it in its professional capacity or for negligent misstatements made in the course of performing its contractual obligations. As this is a minority judgment I will express my views as briefly as the arguments advanced will allow.

The relevant pleadings are to be found in the judgment of the Court a quo which, as appears from the judgment of Grosskopf AJA, has been reported as Pilkington

Brothers S.A. (Pty) Ltd vs Lillicrap, Wassenaar and Partners 1983 (2) S.A. 157 (W).

At page 169 of the reported judgment Margo J in my respectful view correctly states the following:

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

Support for this view is to be found in the decisions referred to by the learned Judge which are van Wyk vs Lewis 1924 A.D. 438; Tomkwani Sawmill Co Ltd vs Filmalter 1975 (2) S.A. 453 (W); Rampal Pty Ltd and another vs Brett, Wills and Partners 1981 (4) S.A. 360 (D) at p. 366 D. Yet another decision in which an

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

I see no reason for limiting this statement to cases where there would be liability for damages in delict independently of the contractual relationship entered into by the parties. The decisions referred to above certainly do not support such a view. The cases of Tomkwani, (supra), and Rampal Pty Ltd, (supra), are in fact cases where no action in delict could ever have arisen in the absence of a contract whereby the services of the defendants, as professional people, were engaged. In the Tomkwani case the defendant was an auditor who was sued in delict for alleged negligence in the per-

formance of the duties he had been employed to perform. In the Rampal case the defendants were attorneys whose services had been engaged by the plaintiff for the investment of money. The fact that these professional men could have been sued in contract for the negligent performance of their duties did not debar an action in delict based on the same negligence. Had they not been employed in their professional capacities there could of course never have been any cause for an independent action in delict.

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

J Nunes Diamonds Ltd vs Dominion Electric Protection Co

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

It was contended that where, as in the present

case, the appellant's contractual duties have been set out in detail in clauses 2 and 3 in the agreement of June 1975, it is implicit that the parties intended the contractual definition of their rights and obligations to be exclusive of any other liabilities. There is certainly no express stipulation in the agreement which limits appellant's liability to breach of contract or which excludes liability in delict. Applying the test for an implied term stated in Reigate vs The Union Manufacturing Co 118 L.T. 483, and approved by this Court in Barnabas Plein & Co vs Sol Jacobson & Sons 1928 A.D. 25 at p. 31 and Mullin Pty Ltd vs Benade Ltd 1952 (1) S.A. 211 at p. 215, it can certainly not be said that had respondent been asked whether the agreement between the

parties / .....

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

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

available. I say "an earlier stage" as the Court was informed by Mr Maisels that the reason why the present action was framed in delict by respondent was that its cause of action in contract had become prescribed. One of the advantages to be gained by the recognition of a claim in delict is therefore that it will enable a plaintiff whose contractual claim has become prescribed to proceed in delict. Where the delictual claim is based on fraud or gross negligence it appears to me to be unarguable that policy considerations, and those of fairness and justice, require that such a claim be recognised. A party to a contract cannot validly contract out of fraud. See D. 9.2.27.29, 2.14.27.3, 50.17.23.

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

The facts alleged by respondent fall, to my mind

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

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

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

In Herschel vs Mrupe 1954 (3) S.A. 464 (A) van den Heever JA pointed out at p. 485 that the essential element of unlawfulness was omitted by Innes CJ in this statement, perhaps because it was so obvious that it was unnecessary to mention it. This passage has also been criticised as unnecessarily incorporating the concept of a duty of care. Bearing in mind these two respects in which the said statement of the law may be said to be incomplete or inaccurate, it is nevertheless clear therefrom that where a person is by circumstances, which may include the conclusion of contract with another, placed

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

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

principle arise from negligent misstatements which cause pure financial loss unrelated to physical damage to property or injury to a person. It was also the view of Mr Justice van den Heever that all patrimonial loss unlawfully suffered is recoverable under the Aquilian law in its developed form. See his work "Aquilian Damages in South African Law" at p. 31. See further Matthews and others vs Young 1922 A.D. 492 at p. 504.

To cause patrimonial or economic loss can therefore, for the purposes of Aquilian liability, be as wrongful as to inflict physical damage to corporeal property or injury to a person.

In the present case it is alleged that appellant,

who held itself out to respondent as having expert knowledge and the professional skill necessary and required for the carrying out of site investigations including subsoil investigation and the analysis of the results thereof, in relation to the suitability or otherwise of a particular site for a civil engineering project such as the one which respondent intended having erected, was employed by respondent / to do the necessary investigation and to design and erect the works required by respondent on the site in comformity with the results of the analysis carried out by it on the said site. It follows that a reasonable man, on the basis of the facts alleged, would have foreseen that a proper analysis was essential and that a faulty analysis resulting in

an inadequate structure being erected would in all probability cause respondent patrimonial loss. Respondent alleges that the analysis carried out by appellant was done negligently in the respects stated in paragraph 10 (d) (i) (aa) to (ff) of the further particulars dated 19 August 1981. It is further alleged that appellant negligently advised respondent that the site was suitable for the purpose of erecting the works which respondent contemplated erecting; it is also alleged that appellant knew that respondent would rely upon and intended that respondent should rely upon such advice and the designs prepared by appellant pursuant to and in conformity with the results of the analysis which it had undertaken to do. On the basis of these allegations

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

To my mind the factual allegations made by respondent bring its case within the principles of the developed Aquilian law and will, if proved, entail liability for any patrimonial loss suffered by respondent as the result of the negligence alleged. The contract is the factor which resulted in appellant being

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

resulted in the Courts exercising care in applying, to new situations, the principles which give rise to Aquilian liability are the fear of opening the door of liability too wide and creating an unmanageable situation or indeterminate liability. See Greenfield Engineering Works vs N K R Construction 1978 (4) S.A. 901 (N) at pp. 916 and 917. To grant a party in the position of respondent a remedy in delict cannot result in indeterminate liability or an unmanageable situation.

Whether respondent's claim is based on negligent misstatement, as was contended on behalf of appellant, or on negligent conduct, makes no difference. Even if it is to be regarded as based on negligent misstatement, it discloses a cause of action. Margo J dealt fully

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

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

dent's position could not be worse than it was before-hand. Respondent was thereafter in the position it would have been in had appellant initially been a sub-contractor to the later assignee. As a sub-contractor with no contractual privity with respondent, it would certainly have been foreseeable that negligence in the execution of its contractual duties with the contractor could result in patrimonial loss to respondent. A failure to exercise due care would have resulted in Aquilian liability to respondent. It was argued that appellant's position has been worsened by the assignment since the contract between appellant and respondent contained an arbitration clause and that had the contract not been assigned respondent would have

been bound to submit the present dispute to arbitration. It was however open to appellant, when the assignment was effected, to have inserted a clause to the effect that any claim by respondent against it would still be subject to arbitration. It failed to do so and respondent rights under the Aquilian principles can accordingly be enforced in the ordinary way.

It was contended that the possibility of appellant, as a sub-contractor, being sued by both the owner and the main contractor is a reason for refusing an action against appellant. I agree with Margo J that the prospect of appellant being held liable twice for the same loss is too remote to justify a denial of a remedy in delict.

The other considerations already referred to, which have influenced Courts not to apply the principles of Aquilian liability to new sets of facts, are also not present in the case of a claim of the nature presently being considered. To allow a claim against appellant after the assignment will not create a situation "fraught with an overwhelming potential liability". See the Greenfield case (supra), at p. 917 A.

In my view respondent's pleadings disclose a cause of action for damages suffered also after assignment took place.

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

my / .....

my view also not be upheld. The difference in the method of computing damages for, respectively, breach of contract and delict was stated by van den Heever JA in Trotman vs Edwick 1951 (1) S.A. 443 (A) at p. 449 B-C as follows:

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

The fact that respondent seeks to recover the cost of the work done, and yet to be done, as detailed in the judgment of Margo J at p. 159 paragraphs (c) to

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

found / .....

found that the swimming bath was defective. As damages he claimed the cost of repairing the swimming bath which was found to be R1 000,00. It was argued on behalf of the defendant that the damages thus computed were really contractual and not delictual in that the plaintiff was thereby seeking to be placed in the position he would have been in had the contract been properly performed by the delivery of a sound swimming bath. In regard to this argument the following was said by Trollip JA, whose judgment was concurred in by de Villiers JA, Kotze JA and Miller JA:

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

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

In / ...

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

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

of calculating damages, is prevented at the trial from employing instead or in addition another method; provided, of course, that such other method is appropriate in the particular circumstances". This statement was applied by this Court in Ranger's case, (supra), at p. 995. It was there argued that the plaintiff was precluded from claiming, as the measure of his damages, the cost of repairing the swimming bath because the measure of damages alleged in the pleadings was the difference between the price which the plaintiff was induced to pay for the property and the price he would have been prepared to pay but for the defendant's fraud. In regard to this argument Trollip JA stated the following at p. 995:

"Here / .....

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

The reference to p 8-9 is a reference to the following words by Potgieter JA,:

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

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

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

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

The exception can accordingly also not succeed on this ground.

In regard to the cross-appeal I am of the view that if it was necessary to have the site, the soil and the sub-soil property investigated and for that purpose to have all the other work, referred to in paragraphs 8 (a) and (b) of the first set of further particulars, done in order to be ableto take the necessary stepsto mitigate respondent's loss, those expenses are recoverable as part

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

I would accordingly dismiss the appeal with costs and allow the cross-appeal with costs. I would alter paragraph 2 of the order of the Court a quo to read:

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

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

F S SMUTS AJA.

129/84

Case no 410/82
M C

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

LILLICRAP WASSENAAR AND PARTNERS Appellant

- and -

PILKINGTON BROTHERS (SOUTH AFRICA)
(PROPRIETARY) LIMITED Respondent

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

HEARD: 15 MAY 1984.

DELIVERED: 20 NOVEMBER 1984.

J U D G M E N T

GROSSKOPF AJA:-

The respondent is a glass manufacturer. The appellant, a firm of consulting and structural engineers, performed professional services in connection with the planning and construction of a glass plant for the respondent. The respondent was not satisfied with the manner in which the appellant performed its duties, and issued summons in the Witwatersrand Local Division in which it claimed compensation for damages which it had allegedly suffered as a result of the appellant's professional negligence. After two sets of further particulars had been furnished, and the respondent's particulars of claim had been substan= tially amended, the appellant excepted to the particulars

of claim, as amended and amplified, on the grounds that they lacked averments necessary to sustain an action. In the alternative the appellant applied for the striking out, as being irrelevant, of one or more of the individual heads of damage set out in the respondent's further particulars. The matter came before MARGO J, who dismissed the exception, but ordered certain paragraphs of the respondent's further particulars to be struck out.

Having obtained the necessary leave and given the necessary consents, both parties now appeal to this Court: the appellant against the dismissal of the exception, and the respondent against the granting of the striking out order.

The judgment of the court a quo was reported as Pilkington Brothers (SA) (Pty) Ltd. v Lillicrap, Wassenaar and Partners 1983 (2) SA 157 (W) and, when dealing with that judgment, I propose providing references to the published text. Moreover, inasmuch as the judgment of the court a quo contains a full summary of the relevant pleadings, I propose doing no more than to set out herein the aspects thereof which I consider necessary for an understanding of this judgment.

The facts alleged by the respondent are broadly as follows. In or about July 1974 the respondent appointed the appellant as its consulting engineer to investigate a site in Springs (which investigation would include a soil investigation and an analysis of its

results) ....

results) in order to determine the suitability of the site for the erection of a glass plant thereon. If the site were found to be suitable, the appellant was further appointed to design and supervise the construction of the civil engineering and building works for a glass plant which the respondent wished to have erected there. The appellant had at all relevant times held itself out as having the expert knowledge and professional skill necessary for the performance of these duties, and it knew what the respondent's specific requirements were for the work.

The appellant purported to carry out the site investigation and advised the respondent that the site was suitable for the construction of the works in conformity with the respondent's requirements. There=

after /.....

after the appellant purported to design the works with due regard to the conditions on site (as determined by the appellant) so as to give effect to the requirements of the respondent. In June 1975 a formal agreement was executed by the parties which inter alia confirmed the appointment of the appellant as consulting engineer in respect of the design and supervision of the works. The respondent had then already paid the appellant a sum of R100 051-72 in respect of professional services rendered prior to the date of the formal agreement.

Initially therefore there was a contractual nexus between the parties. This situation changed in or about May 1976, when the parties agreed that the formal agreement of June 1975 would be assigned to Salanc

Contractors (Pty) Limited ("Salanc"). Salanc was in a direct contractual relationship with the respondent, and the effect of the assignment was therefore to change the appellant's status to that of a sub-contractor vis-a-vis the respondent. The appellant was aware that, despite the assignment, the works were to be constructed for the benefit of the respondent as the owner thereof.

The respondent contends in its particulars of claim that, in the light of the circumstances set out above, the appellant owed the respondent a duty of care, both before and after the assignment of the contract, to carry out properly and with professional skill and care the various tasks which it purported to perform.

However, / ....

However, so the respondent alleges, the appellant, in breach of the said duty of care, negligently failed to carry out these tasks properly and with the necessary professional skill and care, thereby causing the respondent damages in the sum of R3 605 511-00.

Further particulars in respect of the appellant's alleged negligence were furnished and are set out at p. 160 A to E of the judgment of the court a quo. They may be summarised by saying that the plaintiff negligently failed to ascertain the extent to which precautions were necessary when building on the site to prevent movement of the works; that its designs did not incorporate sufficient precautions against such movement; and that its supervision was deficient in not recognising the occurrence

of such movement or not taking or advising appropriate steps to counteract it. Also the items of damage were particularised by the respondent (see the judgment of the court a quo at p. 159 D in fin.). They encompass the costs relating to the following:

(a) a proper soil investigation

(b) relevelling certain parts of the works and securing them at their correct levels

(c) breaking out and relaying a certain drain

(d) wear and tear and additional melting costs.

It is common cause that the respondent's case is based on delict, and, more particularly, the actio legis Aquiliae as it has been extended and applied in our law. The appellant's exception places in question whether the averments in the particulars

of / .....

of claim (as amended and amplified) sufficiently allege the elements of the cause of action in delict on which the respondent relies. The particulars of the grounds of the exception, as amended, are set out at p. 160 F *in fin.* of the judgment *a quo*. Two specific contentions are advanced, viz.,

(a) that, on the facts alleged, the appellant did not owe the respondent a delictual duty of care, more particularly in the light of the contractual relationship between the parties prior to May 1976, and the assignment in 1976 of the contract of June 1975 to Salanc; and

(b) that the facts alleged by the respondent did not give rise to any claim for damages in respect of pecuniary or financial loss only, more particularly in

the light of the circumstances mentioned in (a) above (i.e., the contractual relationship between the parties and the assignment of the contract).

As has been noted, the court a quo dismissed the exception, but struck out certain paragraphs relating to individual heads of damage. These were the paragraphs which, in effect, claimed the cost of a proper soil investigation.

The basis of the cross-appeal is that the paragraphs which were ordered to be struck out, did not allege heads of damage which differed in principle from those which were regarded as unobjection= able. In their context, it was contended, the

particulars were capable of meaning that the costs of a proper soil investigation formed a part of the remedial work required in order to repair the damage caused by the negligent acts or omissions of the appellant, and their fate should accordingly be the same as that of other remedial expenses. Whether any of the remedial expenses claimed by the respondent are recoverable in a delictual action forms the subject matter of the appellant's appeal.

The present case thus raises fundamental questions relating to delictual liability, and,

more / .....

more particularly, its relationship with liability for breach of contract. At the outset I may note in passing that the nature and legal basis of the liability arising from breach of contract is to some extent controversial, and the view has been propounded that it is itself scarcely distinguishable, if distinguishable at all, from delictual liability. See, for instance, the discussions by W.J. Hosten, Concursus Actionum of Keuse van Aksies, 1960 THRHR 251 at pp. 253-255; J. Holyoak, Tort and Contract after Junior Books 99 LQR 591; N.J. van der Merwe

and P.J.J. Olivier, Die Onregmatige Daad in die Suid-Afrikaanse Reg, 4th ed. at p. 484. Interesting as these discussions may be, they do not in my view bear on the present issue. Even if a breach of contract should properly be classified as a form of delict, that would not alter its essential characte= ristics or eliminate the differences which exist between an action for damages arising ex contractu and liability pursuant to the extended Aquilian action which the respondent has sought to invoke in the present case. See, for instance, Hosten, op cit /....

op cit., pp. 256-7; O.K. Bazaars (1929) Ltd. and Others v Stern & Ekermans 1976 (2) SA 521(C); Holyoak, op cit., at p. 599. Even if one were to classify a claim for damages for breach of contract as delictual in nature, one would still have to determine whether there is a line of demarcation between this form of liability and that arising from the lex Aquilia, and, if so, where this line is to be drawn.

In the present case it is common cause that the damages which the respondent is claiming pursuant to the Aquilian action, could, in so far as they arose before the assignment of the contract to Salanc, have

been / .....

been claimed on the basis of breach of contract. The respondent's contention is that in the circumstances of the present case the facts gave rise to both causes of action. In principle there would be no objection in our law to such a situation. Roman law recognized the possibility of a "concursus actionum", i.e., the possibility that different actions could arise from the same set of facts. More particularly, the facts giving rise to a claim for damages under the lex Aquilia could overlap with those founding an action under certain types of contract such as deposit, commodatum, lease, partnership, pledge, etc. In such a case a plaintiff was in general entitled to elect which actio to employ (although he could of course not receive compensation

under both). See e.g. Dig. 9.2.7.8; 9.2.18; 9.2.27.11; 9.2.27.34; 9.2.42 and 44.7.34. The same principles were accepted and applied in Roman-Dutch law. See Voet, Commentarius ad Pandectas 9.2.31 (Gane's translation, Vol. 2, pp. 592-4). 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., 262; R.G. McKerron, Law of Delict (7th ed.) p. 3; J.C. van der Walt, LAWSA Vol. 8, para. 5, pp. 7-11. 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. In the present case we are concerned with a delictual claim for pecuniary loss, and, as mentioned above, it is common cause that the claim was founded on the principles of the extended Aquilian action. It is trite law that, to succeed in such a claim, a plaintiff must allege and

prove that the defendant has been guilty of conduct which is both wrongful and culpable; and which caused patrimonial damage to the plaintiff (see e.g. Van der Walt, op cit., para. 2, p. 2). What has been placed in issue by the appellant is whether, on the facts pleaded, the appellant's conduct was wrongful for purposes of delictual liability, and whether the damages alleged to have been suffered, are recoverable in a delictual action. I deal with these two aspects in turn.

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. And, indeed, Mr Maisels, who appeared for the respondent, contended that the present is a case of damage to property. In this regard he supported a finding of the court a quo, which reads as follows (at p. 162 F to 163 C) :-

" In / .....

"In Dutton v Bognor Regis Urban District Council (1972) 1 QB 373 (CA) LORD DENNING MR at 396, dealing with the claim by a house-owner against a local authority for damages in tort for the cost of investigating and repairing defects in the house, by reason of the negligence of the latter's building inspector in failing to check faulty foundations during construction, in consequence of which serious defects developed in the internal structure of the house, said this:

'Mr Tapp submitted that the liability of the Council would, in any case, be limited to those who suffered bodily harm: and did not extend to those who only suffered economic loss. He suggested, therefore, that, although the Council might be liable if the ceiling fell down and injured a visitor, they would not be liable simply because the house was diminished in value. He referred to the recent case of SCM (United Kingdom Ltd v W J Whittall & Son Ltd (1971) 1 QB 337.

I cannot accept this submission. The damage done here was not solely economic loss. It was physical damage to the house. If Mr Tapp's submission were right, it would mean that, if the inspector negligently passes the

house as properly built and it collapses and injures a person, the Council are liable: but if the owner discovers the defect in time to repair it - and he does repair it - the Council are not liable. That is an impossible distinction. They are liable in either case.

I would say the same about the manufacturer of an article. If he makes it negligently, with a latent defect (so that it breaks to pieces and injures someone), he is undoubtedly liable. Suppose that the defect is discovered in time to prevent the injury. Surely he is liable for the cost of repair.'

I am in respectful agreement with that approach. See Dundan Wallace on 'Tort Demolishes Contract in New Construction' (1978) LQR 60 and see also Peter F Cane on 'Physical Loss, Economic Loss and Products Liability' (1979) LQR 117 at 129 et seq, under the heading of 'The cost of repairing defects per se'. See further the speech of LORD WILBERFORCE in Anns v London Borough of Merton (1977) 2 All ER 492 (HL). In my view, it is a question of fact whether a defect in the construction of a building or plant is such as to constitute physical damage. A constructional defect, in a building housing a glassmaking plant, which has to be

> removed or remedied because it threatens to cause injury to persons or damage to property, is clearly to be equated to physical damage, as LORD DENNING indicated in the Dutton-case supra. On the pleadings there are sufficient allegations to support the inference that the defects in construction, unless removed or remedied, create the danger of damage to the plaintiff's property."

With respect, I cannot agree with this finding by the learned judge a quo. I could find nothing in the respondents' pleadings which alleged or implied that the defects in the construction of the plant created a danger of damage to the respondent's property. The respondent's sole case seems to be that the defects in the construction of the plant rendered it unsuitable or less suitable for its purpose. If I may adopt the language of LORD KEITH of Kinkel in Junior Books Ltd. v

Veitchi Ltd. 1983 AC 520 at p. 536 (a case to which I shall revert later), the plant had, according to the allegations in the respondent's particulars of claim, inherent defects in it from the start. The appellants did not, in any sense consistent with the ordinary use of language, damage the respondent's property, or create a risk of damage thereto. I need accordingly not consider whether and in what circum= stances the creation of "the danger of damage" by a defendant would be sufficient to found an action for damages against him.

If the respondent's case is not based on wrongful damage to property, what then is the nature of the wrongfulness upon which the respondent relies? It is clear that in our law Aquilian liability has long outgrown its earlier limitation to damages arising from physical damage or personal injury. Thus, for instance, in Administrateur, Natal v Trust Bank van

Afrika Bpk. 1979 (3) SA 824 (A) this Court held that Aquilian liability could in principle arise from negligent misstatements which caused pure financial loss, i.e., loss which was caused without the interposition of a physical lesion or injury to a person or corporeal property (see Van der Walt, op cit., para. 24, p. 35). The Court (per RUMPFF CJ) however added the following cautionary remarks at p. 832 H - 833 A :-

> "Na my mening kan en behoort die eisgrond in die onderhawige saak in die uitgebreide tref= gebied van die lex Aquilia geplaas te word. Hieruit sou volg dat, volgens ons heersende norme, daar onregmatigheid vereis word en skuld. Die vrees van die sg. 'oewerlose aanspreeklikheid' kan ook alleen dan besweer word, indien by elke gegewe geval dit die taak van die Hof is om te beslis of daar in die besondere omstandighede 'n regsplig op die

> verweerder gerus het om nie 'n wanbewering teenoor eiser te doen nie, en ook of die verweerder in die lig van al die omstandig= hede, redelik sorg uitgeoefen het, onder andere, om die korrektheid van sy voorstelling vas te stel. By afwesigheid van 'n regsplig, is daar geen onregmatigheid nie."

And at p. 835 the Court found that, in the circumstances of that case, the defendant was not under a legal duty to exercise care in making the statement which it did.

In so doing this Court applied what JANSEN JA (in Marais v Richard 1981 (1) SA 1157(A) at p. 1168 C to E) called the "algemene redelikheidsmaatstaf" (general criterion of reasonableness) in determining whether an act or omission is to be regarded as wrongful for the purposes of delictual liability. See Marais v Richard loc. cit. and authorities there quoted; particularly Minister van Polisie v Ewels

1975 (3) SA 590 (A) at p. 596 F to 597 F. This criterion of reasonableness involves policy considerations, and in Administrateur, Natal v Trust Bank van Afrika Bpk. (supra, at p. 833-4) RUMPFF CJ quoted the following passage from Fleming, Law of Torts as being relevant also to our law:-

> "In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes."

In applying the test of reasonableness to the facts of the present case, the first consideration to be borne in mind is that the respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services. In this respect the present case differs from Van Wyk v Lewis (supra) upon which Mr. Maisels placed much reliance. In Van Wyk's case the defendant, dr. Lewis, was accused of professional negligence in the performance of an operation. Although there was a contract between the parties in that case, dr. Lewis would have been liable to his patient for professional negligence even in the absence of a contract between the parties, e.g. if he had

operated on a person found unconscious in the street, or if he had contracted with a third person to perform an operation on the patient. The wrongfulness of his conduct would have arisen (at least *prima facie*) from his infringement of the patient's bodily integrity; and if the other elements of the *actio legis Aquilia* had been present (more particularly culpa and resultant damage) an action by the patient would have been competent. In the present case we do not have an infringement of any of the respondent's rights of property or person. The only infringement of which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those

which would place it in the position it would have occupied if the contract had been properly performed. In determining the present appeal we accordingly have to decide whether the infringement of this duty is a wrongful act for purposes of Aquilian liability. No authority in Roman or Roman-Dutch law has been quoted, nor have I found any, for the proposition that the breach of such a contractual duty is per se a wrongful act for purposes of Aquilian liability (with the corollary that, if the breach were accompanied by culpa, damages could be claimed ex delicto). The examples in our common law of concursus actionum to which I have referred above were all cases where the acts of the defendant satisfied the independent requirements of both a contractual and an Aquilian action. Where, for instance,

a lessee / .....

a lessee negligently damages the leased property which he is under a contractual obligation to return in an undamaged state he would be liable ex delicto for negligently causing damage to the lessor's property, and ex contractu for failing to return the property in a proper state pursuant to the lease. The former liability would, however, have arisen even in the absence of a contract of lease. As noted above, Van Wyk v Lewis (supra) was a similar case. As Van der Walt states (op cit., para. 5, p. 7):-

> "The same conduct may constitute both a breach of contract and a delict. This is the case where the conduct of the defendant constitutes both an infringement of the plaintiff's rights ex contractu and a right which he had independently of the contract." (italics added).

This passage was strongly relied upon by Mr. Maisels, but if proper regard is had to the italicized words it seems to me to be against him. I propose dealing later with certain dicta in the judgments in Van Wyk v Lewis (supra) which may at first blush appear incon= sistent with what I have said.

Apart from the judgments in Van Wyk v Lewis (supra) this Court has never pronounced on whether the negligent performance of professional services, rendered pursuant to a contract, can give rise to the actio legis Aquiliae. Although an attorney's liability was in issue in Mouton v Die Mynwerkersunie 1977(1) SA 119(A), the court did not decide whether such liability is based on contract, delict, or both. Divergent views on this

issue / ....

issue have been expressed in some provincial divisions. Compare, for instance, Rampal (Pty) Ltd. & Another v Brett, Wills & Partners 1981(4) SA 360(D) at 365 E to 366 E with Bruce N.O. v Berman 1963(3) SA 21(T) at p. 23 F-H. See also Honey & Blanckenberg v Law 1966(2) SA 43(R) at p. 46 E. As far as this Court is concerned, it would accordingly be breaking fresh ground if it were to recognize the respondent's cause of action as valid, at any rate in so far as the cause of action arose prior to the assignment of the contract of June 1975. Our law adopts a conservative approach to the extension of remedies under the lex Aquilia. See Herschel v Mrupe 1954(3) SA 464(A) at p. 478 C; Union Government v

Ocean / .....

Ocean Accident and Guarantee Corporation Ltd. 1956(1) SA 577(A) at p. 584 H; Hamman v Moolman 1968(4) SA 340 (A) at p. 348 D in fin.; Administrateur, Natal v Trust Bank van Afrika Beperk, supra, at pp. 831 B and 832 H to 833 A; Shell & BP South African Petroleum Refineries (Pty) Ltd. and Others v Osborne Panama SA 1980(3) SA 653 (N) at pp. 659 D-E, 660 A, confirmed on appeal sub. nom.; Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd & Others 1982(4) SA 890 (A) at pp. 900 H to 901 A.

In considering whether an extension of Aquilian liability is justified in the present case, the first question that arises is whether there is a need therefor. In my view, the answer must be in the

negative /.....

negative,at any rate in so far as liability is said to have arisen while there was a contractual nexus between the parties. While the contract persisted, each party had adequate and satisfactory remedies if the other were to have committed a breach. Indeed the very relief claimed by the respondent could have been granted in an action based on breach of contract.

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 / .....

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 standards 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. See in this regard the dissenting speech of Lord Brandon in the Junior Books-case (supra) at p. 551 E to 552 E with which Lord Keith

of Kinkel agreed at pp. 536 G to 537 D of the report.

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. See para. 4(b) of the respondent's Amended Particulars of Claim read with para. 1(a) of the respondent's Further Particulars dated 19 August 1981, as also paragraphs 5, 6 and 7 of the Particulars of Claim and para. 10(d) of the said Further Particulars. 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 relation= ship between the parties. Thus, for instance, it may limit or extend liability, impose penalties or grant indemnities, provide special methods of settling disputes (e.g. 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?

To sum up, I do not consider that policy considerations require that delictual liability be imposed for the negligent breach of a contract of professional employment of the sort with which we are here concerned.

The respondent, in arguing the contrary, relied heavily on Van Wyk v Lewis 1924 AD 438, and I now turn to a closer discussion of the judgments in that case. The case, as I have said, concerned the performance of an operation by a doctor, and the allegation was that he had acted negligently. At p. 443 INNES CJ said the following :-

> "There was some discussion during the argument as to whether the action had been framed in contract or in tort. One of the appellant's contentions indeed assumed that the basis of her claim was contractual. Now the line of division where negligence is alleged is not always easy to draw, for negligence underlies the field both of contract and of tort. Cases are conceivable where it may be important to decide on which side of that line the cause of action lies. But the present is not such a case; no mere omission is relied on, nor is the basis upon which damages should be calculated

> in dispute. But as the point has been raised I must say that, in my opinion, the claim is based on tort. The compensation demanded is in respect of injury alleged to have been sustained by reason of the respondent's negligence and lack of skill. No doubt the duty to take care arose from the contractual relationship between the parties; but it was a duty the breach of which was actionable under the Aquilian procedure."
>
> It seems clear that these remarks were obiter dicta.

This is apparent from the learned Chief Justice's statement that the case before him did not require a decision on which side of the line between contract and tort the cause of action lay. Nevertheless even an obiter dictum by a lawyer of such eminence as INNES CJ must be accorded high authority. In the present case the words which present difficulty are : "No doubt the duty to take

care arose from the contractual relationship between the parties ..... ". Taken literally, these words seem, in my respectful opinion, to justify the criticism expressed as follows by Van der Walt (supra) in footnote 2 at p. 9. :-

> "The view expressed in the Van Wyk case .... that the delictual duty arose from the contract between the parties, leads to a confusion of delictual liability and liability flowing from a breach of contract. The delictual duty is imposed by law, not by the contract."

However, as Van der Walt himself points out in footnote 16 at p. 10 of the same work, INNES CJ may

have / .....

have regarded the contractual relationship merely as a fact which brought the plaintiff within the class of persons towards whom the defendant was under a duty to perform his professional duties with due skill. This interpretation seems probable if one has regard to the unlikelihood that INNES CJ would have intended to suggest that a medical doctor could not be delictually liable for his negligence unless there was a contractual relationship between him and his patient. It con= sequently seems to me that the obiter dicta quoted above do not provide authority for either the proposition that medical negligence can found an action in delict only where there is a contractual relationship between

the parties, or for the proposition that a legal duty in the delictual sense would necessarily arise from every contract which requires one of the parties to exercise care or diligence, whether or not it relates to the property or person of the other. The same comments apply to the dicta of WESSELS JA at pp. 455-6, as to which see also Hosten, op cit., at pp. 262-3.

Up to the present I have considered the policy considerations which, in my view, render it undesirable to extend the Aquilian action to the duties subsisting between the parties to a contract of pro= fessional service like the present. Would these considerations fall away if the contract were assigned,

as happened in 1976 ? In my view the answer must be in the negative. The relationship between the three parties is still one which has its origin in contract. One must assume that their respective rights and obligations were regulated to accord with their wishes, and that the contractual remedies which would be available were those which the parties desired to have at their disposal. The same arguments which militate against a delictual duty where the parties are in a direct contractual relationship, apply, in my view, to the situation where the relationship is tripartite, namely, that a delictual remedy is unnecessary and that the parties should not be denied their reasonable expectation that their reciprocal rights and obligations would be

regulated by their contractual arrangements and would not be circumvented by the application of the law of delict.

The conclusion which I have reached is at variance with that of the learned judge a quo, and I propose indicating briefly the grounds on which we differ. I have already pointed out that I cannot, with respect, agree with his finding (at p. 163 C) that there are sufficient allegations in the respondent's pleadings to support the inference that the defects in construction, unless removed or remedied, create a danger of damage to the respondent's property. The danger of damage to the respondent's property formed the basis upon which the decision of the court a quo

rested /.....

rested in dismissing the exception. To the extent that the respondent claimed damages for what the court a quo considered not to constitute damage to property, the relevant items of damage were ordered to be struck out. As noted above, these related to the costs of carrying out a proper soil investigation (p. 163 C-D read with p. 172 H in fin.) In the result, therefore, the court's reasoning relating to non-material damage or loss must be regarded as obiter dicta which the judge a quo pronounced, with commendable thoroughness, to assist the parties in the future conduct of the case (see the judgment at p. 163 G in fin.) This part of the judgment assumes that the respondent's case was

based / .....

based upon negligent misstatement causing purely economic loss. After a full review of the authorities, both here and in some other countries, the court a quo concluded that such a claim was competent in the circumstances of this case (save, of course, for the items of damage which were ordered to be struck out).

At the outset I should state in parenthesis that in my view no useful purpose would be served by considering whether the claim in the present case should be categorized as one based upon negligent misstatement. It is true that the judgment in Administrateur, Natal v Trust Bank van Afrika Beperk 1979(3) SA 824(A) removed whatever doubt there may have been about the validity of such a claim as a matter of principle, but the same case rendered it clear that

liability in a concrete case would depend inter alia on whether the defendant's conduct was wrongful in the delictual sense, which in turn involves policy considera= tions, as I have attempted to demonstrate above. In this respect misstatements do not differ, in principle, from other forms of allegedly wrongful conduct. In assessing the relevant policy considerations I have not in fact found it helpful in the present case to determine to what extent the appellant's conduct which is alleged to be wrongful should be regarded as misstatements, as distinct from other forms of conduct. Nor, indeed, do I read the judgment of the court a quo as having placed undue emphasis on the fact (which the court assumed) that the respondent's case was based upon misstatements by the

appellant.

Whether or not the respondent's case is based on alleged misstatements is accordingly not fundamental to the difference between my judgment and that of the court a quo. The main point of difference relates to the court's approach to the question of wrongfulness, which involves the extension of delictual liability in the present case to circumstances not covered by existing authority. In this regard the court a quo adopted the following pronouncement of LORD WILBERFORCE in Anns v Merton London Borough Council (1978) AC 728 at 751 (judgment of the court a quo at p. 167 F to H) :-

> "Through the trilogy of cases in this House, Donoghue v Stevenson, Hedley Byrne & Co Ltd v Heller & Partners Ltd and Home Office v Dorset Yacht Company Ltd, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist.

> Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ....." (italics added).

This pronouncement is authoritative in Britain, and was recently again followed in Junior Books Ltd. v Veitchi Company Ltd. (1983) AC 520. No doubt the application of the principle stated in Anns' case, as applied in the Junior Books case by the majority of the

court, might lead to the dismissal of the appellant's exception in the present case, as was indeed found by the court a quo. However, the approach of English law seems to me to be different from ours. As appears from the italicized portion in the above quoted passage, English law adopts a liberal approach to the extension of a duty of care. If there is a sufficient relation= ship of proximity between the parties such that, in the reasonable contemplation of the alleged wrongdoer, carelessness on his part may be likely to cause damage to the plaintiff, there is a prima facie duty of care, which is excluded only if the court considers that there are considera= tions which ought to negative, reduce or limit the scope of the duty. South African law approaches the matter

in a more cautious way, as I have indicated, and does not extend the scope of the Aquilian action to new situations unless there are positive policy considera= tions which favour such an extension.

Not only is there thus a difference of approach between English law and South African law to the extension of delictual remedies to new situations, but there is also no reason to assume that the actual policy considerations which led the majority of the court in the Junior Books case (supra) to favour the extension of delictual liability to a case very much like the present, should also apply in South Africa. As Mr. Kentridge, who appeared for the appellant, pointed out, there were several forceful dissents among members of the court in the Junior Books case (see the speeches of LORD KEITH at p. 534 and LORD

BRANDON at p. 547). Academic comment has not been entirely uncritical (see, e.g., Tort and Contract after Junior Books, J. Holyoak, 99 LQR 591; Sub-contractors - Privity and Negligence, A.J.E. Jaffey, 1983 Cambridge Law Journal, 37). We were also referred to earlier decisions in Britain and other common law jurisdictions in which views different to that in the Junior Books case had been expressed. Some of these cases are discussed in the judgment of the court a quo (see p. 171 E to H). I do not propose analysing these cases. They show that prior to the decision in the Junior Books case there was no unanimity, even in common law jurisdictions on the need to extend the concept of a duty of care as far as has now been done in the Junior Books case. In view of the different principles applicable in different

legal / .....

legal systems, I do not however consider that the views prevailing in common law systems can carry great weight in deciding what policy considerations should be applied by this Court. As mr. Kentridge demonstrated, the development in English law of liability in tort for professional negligence was, to some extent at least, influenced by the rule of English law that, in general, an agreement is not enforceable unless there is "valuable consideration". Thus in Hedley Byrne & Co. Ltd. v Heller & Partners Ltd., (1964) AC 465 LORD DEVLIN described the problem of professional negligence in that case as "a by-product of the doctrine of consideration" (p. 525). And at p. 526 he said :-

> "The respondents in this case cannot deny that they were performing a service. Their sheet anchor is that they were performing it

> gratuitously and therefore no liability for its performance can arise. My Lords, in my opinion this is not the law. A promise given without consideration to perform a service cannot be enforced as a contract by the promisee; but if the service is in fact performed and done negligently, the promisee can recover in an action in tort."

This illustrates the danger of assuming that policy considerations which may be valid in one legal system would necessarily also be applicable elsewhere.

To sum up, therefore, I differ from the learned judge a quo firstly by approaching the extension of Aquilian liability in a more conservative manner, and secondly in considering that there are valid policy considerations why such liability should not be extended to a case like the present.

Up / .....

Up to the present I have been dealing with the first leg of the appellant's argument, viz., that the respondent's allegations do not disclose that the appellant's conduct was wrongful for purposes of Aquilian liability. In view of the conclusion which I have reached, it may not be strictly necessary to deal with the second leg of the argument, viz., that the damages claimed are in any event not such as are recoverable in delict. For the sake of completeness, and also because the computation of damages has some relevance to the possible extension of the Aquilian action to the facts of the present case, I propose dealing briefly with this aspect.

The essential difference between computing

damages for, respectively, breach of contract and delict was succinctly stated as follows by VAN DEN HEEVER JA in Trotman v Edwick 1951(1) SA 443(A) at p. 449 B to C :-

> "A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he had 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."

Although this principle has not always been easy to apply (see Ranger v Wykerd and Another 1977(2) SA 976(A) and earlier cases discussed therein at pp. 986 B to 987 H (per JANSEN JA); pp. 991 B to 994 (A); 995 H to 998 B (per TROLLIP JA; DE VILLIERS JA,

KOTZé JA and MILLER JA concurring) its authority remains unimpaired and unquestioned in the field of Aquilian liability. The question to be asked in a case like the present is accordingly: what loss has the respondent sustained because of the appellant's alleged negligent conduct? The respondent computes its loss, broadly speeking, as being the amount which would have to be spent to bring the plant up to the standard laid down by the contract. This amount does not, however, in my view represent a loss in the ordinary sense of the word. For all we know the respondent's patrimony may have been enhanced by the erection of the plant despite its alleged defects. The respondent has not alleged that the value of the

plant is less than the respondent has paid for it. What the respondent does, in effect, is to sue for the equivalent in money of its bargain. That is the con= tractual measure of damages.

That the wrong measure has been applied in computing damages would, by itself, be a further reason for allowing the appeal. Moreover, the reason why the wrong measure has been applied illustrates why I consider this not to be an appropriate case for an extension of Aquilian liability. The respondent's complaint is that its glass manufacturing plant does not comply with its requirements. This complaint cannot be met by pointing out (if those be the facts) that the respondent has not suffered any loss but has been

enriched by obtaining at a low cost, a building which is ideally suitable, say, for a motor vehicle assembly plant or a textile factory. To remedy the wrong of which the respondent complains, its damages must be computed according to the contractual measure because the wrong itself is essentially a breach of contract, not a delict.

I am accordingly of the view that the exception should have been allowed. If such an order had been made, there would have been no room for the striking out order, which forms the subject of the cross-appeal. The appeal is accordingly allowed with costs, including the costs of two counsel. The cross-appeal is dismissed with costs. The order of the Witwatersrand Local

Division / .....

Division is altered to read as follows :-

1. The exception is allowed with costs, including the costs of two counsel.

2. The plaintiff is given leave to amend its particulars of claim and further particulars, if it so wishes, within six (6) weeks of the date of the order of the Appellate Division in this matter.

E.M. GROSSKOPF AJA.

KOTZé JA.
CILLIÉ JA. Stem saam.
VAN HEERDEN JA.