Case No: 669/92

IN THE SUPREME COURT OF SOUTH AFRICA

In the matter between

P J KNOP — Appellant

and

CITY COUNCIL OF JOHANNESBURG — Respondent

CORAM: BOTHA, HEFER, VIVIER, NIENABER et HOWIE JJA

Heard: 23 September 1994

Delivered: 18 November 1994

J U D G M E N T

BOTHA JA:-

This is an appeal, with the leave of the Court a quo, against a judgment upholding with costs an exception by the respondent to the particulars of claim of the appellant in an action for damages brought by the latter against the former in the Witwatersrand Local Division. I shall refer to the appellant as " the plaintiff" and to the respondent as "the Council".

For the purposes of paraphrasing the particulars of claim the plaintiffs allegations can be divided into three parts, as pertaining respectively to the introductory facts, the basis of the claim, and the damages claimed. The introductory facts alleged are as follows:

1 The Council is a local authority constituted under Ordinance 17 of 1939.

2 On 16 August 1988 the plaintiff applied to the Council for the subdivision of Erf 1793, Triomf ("the property"), in terms of clause 36 of the Johannesburg Town Planning scheme ("the Scheme").

3 The application was made by the plaintiff for the purposes of developing a cluster housing complex ("the project"). 4 The application for subdivision was approved by the Council on 5

December 1988.

5 The Council notified the plaintiff of the approval of the application, and as a result the plaintiff took certain steps with a view to developing the project, inter alia by procuring financing, incurring expense, entering into sales of the units and proceeding with building operations.

6 On 27 April 1990 the Council notified the plaintiff, by means of a letter addressed to the land surveyors who had been appointed by the plaintiff, that approval of the subdivision had been granted in error, contrary to the provisions of clause 36(2) (b) of the Scheme, in that the subdivision as approved allowed erven of a minimum size of 200 square metres, whereas the said clause laid down a minimum size of 250 square metres. (In the letter, which is annexed to the particulars of claim, the Council offered to procure an amendment of the Scheme by rezoning the property so as to allow a density of one dwelling per 200 square metres.)

7 The Council in acting as set out in paragraphs 4,5 and 6 above, was represented by officials who acted within the scope of their employment

and in the performance of their duties on behalf of the Council.

8 The officials were empowered to approve the application in terms of section 92 of the Town-planning and Townships Ordinance 15 of 1986 ("the Ordinance").

The basis of the plaintiffs claim is to be found in allegations that the Council's officials owed certain duties to the plaintiff in connection with the exercise of their statutory powers and that they negligently failed to comply with such duties in certain respects. The alleged duties are as follows: (i) not to exercise their statutory powers in an unreasonable manner, alternatively, when exercising their powers, to take reasonable steps to prevent loss being caused to the plaintiff; (ii) in terms of section 92(5) of the Ordinance, to take all reasonable steps to ensure that the exercise of their powers would not bring about a result which would be in conflict with a provision of the Scheme; (iii) in exercising their powers, to give proper attention to and use reasonable care in the consideration of the application; and (iv) not to make a misstatement to the plaintiff to the effect that the

application was not in conflict with the Scheme, if that were not so.

It is alleged that the officials were negligent in the following respects:

(i) they failed to exercise their statutory powers in a reasonable manner, alternatively, they failed to take all reasonable steps to prevent the loss actually suffered by the plaintiff;

(ii) contrary to section 92(5), they failed to take all reasonable steps to ensure that the approval was not in conflict with the Scheme;

(iii) they failed to give proper attention and to use reasonable care in the consideration of the application;

(iv) they made a misrepresentation to the plaintiff to the effect that the application for 200 square metres per unit was in accordance with the Scheme, whilst that was not the case, and the plaintiff, relying on the representation, took the steps referred to in paragraph 5 above;

(v) they refused for a period of 10 months to allow the plaintiff to proceed with the project, after which it was decided to rezone the property in terms of section 55 read with section 29 of the

Ordinance and to prepare an amended Scheme in order to provide for an erf size of 200 square metres per unit; and (vi) the said refusal was an unreasonable exercise of the officials' powers in terms of the Ordinance, alternatively, the refusal amounted to a failure to take all reasonable steps to prevent the loss actually suffered by the plaintiff.

As to damages, the plaintiff alleges that as a result of the negligent conduct of the officials he was unable to proceed with the development of the project for a period of ten months, during which the development came to a standstill; he was unable to give transfer of erven already sold and could not sell further erven; he was obliged to continue paying interest on the money he had borrowed to finance the project; he was obliged to incur legal expenses in resisting creditors' claims arising from cash flow problems; building costs and the costs of supplying an electricity network escalated; and he suffered a loss of business reputation. In consequence of all this the plaintiff alleges that he suffered loss in an amount of R552 904,73, which is itemized in some detail under various headings, in each of which, with the exception of the claim for

loss of business reputation, the calculation is made with express or implied reference to the period of ten months during which the development of the project was delayed.

It will be seen that the plaintiffs allegations concerning the duties and the negligence of the Council's officials are related to three distinct aspects of their conduct: the approval of the application, the misrepresentation that the subdivision would not be in conflict with the Scheme, and the refusal to allow the development of the project for a period of ten months. The particulars of claim can thus be said to embody three notional causes of action, which can be summarized briefly as follows:

A The Council failed in its duty to exercise reasonable care in considering the application and to prevent loss being caused to the plaintiff, by negligently failing to ensure that the subdivision would not be in conflict with the provisions of the Scheme.

B The Council breached its duty not to make a misrepresentation to the plaintiff that the subdivision would not be in conflict with the Scheme, by negligently making such a misrepresentation concerning the

minimum sizes of erven permissible.

C The Council refused for ten months to allow the development of the project to proceed, pending the amendment of the Scheme, thus exercising its powers unreasonably and failing negligently to prevent loss to the plaintiff.

In argument before this Court it was common cause that the allegations referred to in A and B above fell to be considered separately, on the footing that the particulars of claim postulated two causes of action, each independent of the other. Counsel for the plaintiff suggested that the allegations in C should also be seen as a separate and independently averred cause of action. That suggestion will be considered later.

In the Council's notice of exception it is contended on a number of grounds that the particulars of claim do not disclose a cause of action. It is not necessary, however, to traverse the terms of the notice, for in this Court counsel for the Council reformulated the grounds of exception, condensing them into three, and counsel for the plaintiff declared that he was content to join battle on the grounds as reformulated. They are as follows:

(a) The law confers an immunity from claims for negligence in respect of the decision taken by the local authority.

(b) There was, in any event, no duty of care owed to the plaintiff.

(c) The decision complained of was a nullity in respect of which the plaintiff should have formed his own conclusions and the mere making of such a decision does not imply a representation as to legal validity upon which the plaintiff was entitled to rely.

In the Court a quo MACARTHUR J upheld the exception for reasons which fall within the purview of ground (a) above. In his judgment the learned Judge dealt only with the alleged cause of action reflected in A above; no mention was made of the allegations referred to in B (or C) above. It seems that in the Court below A was, if not the only, at least the main bone of contention. I shall deal with it first.

MACARTHUR J's reasoning was premised on the distinction between a quasi-judicial and an administrative act. He found, on a consideration of the provisions of section 95 of the Ordinance, read with section 19, and with section 35 of the regulations promulgated in terms of the Ordinance, that a

local authority was required to weigh up many facts in deciding upon an application for subdivision; that it did not have an absolute or unfettered discretion, but that its discretion had to be exercised in the best interests of all concerned, taking into account inter alia the convenience and general welfare of the area as well as considerations of efficiency and the economy; and accordingly that a local authority was vested with a quasi-judicial discretion in excerising its powers under section 95. The learned Judge went on to say that judicial officers were exempt from liability for loss caused by mistakes when they carried out their duties, and that this principle was extended to persons exercising quasi-judicial functions, such as local authorities. In this regard he quoted the observation of OGILVIE THOMPSON J in Hoffman v Meyer 1956(2) SA 752 (C) at 756 B that

> ". .. it is clear that our law recognises that a person acting in a judicial or quasi-judicial capacity is not liable for negligence ..."

In the result, MACARTHUR J held that in the present case the Council had exercised a quasi-judicial discretion and that consequently it was not liable for

negligence.

Counsel for the plaintiffs main line of attack against the judgment of the Court a quo was that it had erred in its finding that the Council had exercised a quasi-judicial discretion; the Council's function, it was argued, was purely administrative. Before this argument can be considered, however, it is necessary to examine the validity of using the distinction between quasi-judicial decisions and purely administrative decisions as a test for determining the issue of liability for negligence in a case such as the present.

A convenient starting-point for the discussion is the passing reference in the judgment of the Court a quo to the Council's duty to act in accordance with the rules of natural justice and the reviewability of its decision if it failed to do so. This is, of course, not the issue raised by the particulars of claim and the exception to it, but the distinction between quasi-judicial and purely administrative functions is a more familiar concept in that context than in the present one, and it is instructive to consider the present status of the distinction in its customary setting. With regard to a public authority's duty in decision-making to act in accordance with the requirements of natural justice, Le to act fairly, it was pointed out by CORBETT CJ in Administrator. Transvaal, and

<u>Others v Traub and Others</u> 1989(4) SA 731 (A) at 759 A-C and 762 F-H that the distinction between quasi-judicial and purely administrative decisions appears to have been derived from English law, but that in modern English administrative law it no longer seems to have any relevance. The learned CHIEF JUSTICE, quoting from a number of judgments given in this Court, pointed out also (at 762 H-763 E) that our Courts have warned against a too-ready adoption of this classification as a solution for a particular legal problem; he observed further (at 763 E-I) that one of the difficulties in applying the classification is to determine exactly what is meant by the terms "quasi-judicial" and "purely administrative"; and he concluded (at 763 I-J) that the quasi-judicial/purely administrative classification was not of any material assistance in solving the problem before the Court in that case (extending the scope of judicial review to include cases of legitimate expectation).

If the distinction between quasi-judicial and purely administrative decisions is of little use in solving problems in the context of the justiciability of a decision on the ground of a failure to act fairly, it is equally of little value, in my opinion, in resolving the issue whether negligence in the making of the

decision gives rise to liability for damages in delict. One is still faced with the difficulty of determining the precise meaning of the terms, a difficulty which was highlighted in the course of the argument, when counsel for the plaintiff, while critizing the Court a quo's finding that the Council had exercised a quasi-judicial discretion, was constrained to concede that the Council did have a discretion, but then went on to argue that it was purely administrative. It is apparent that this kind of debate, based as it is on phrases incapable of exact definition, does not contribute to clarity in resolving the issue.

It is of more than passing interest that in the English law of today the distinction under discussion seems to have no relevance also in contexts comparable to that of the present case. In recent years the English Courts have grappled with problems arising from claims for damages against local authorities based on negligence in the exercise of statutory powers relating to the approval of building plans and the inspection of buildings under construction. The application of the concept of a duty of care to such claims gave rise to differences of opinion. In Anns and Others v Merton London Borough Council [1978] A C 728 (H L) at 751-2 LORD WILBERFORCE '

formulated a two-stage approach for determining the existence of a duty of care, in a passage which was quoted and commented upon in Lillicrap. Wassenaarand Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475

(A) at 504 A-G. LORD WILBERFORCE'S approach has since fallen into disfavour in England; the decision in Anns's case was eventually overruled in Murphy v Brentwood District Council [1991] 1 AC 398 (H L). For present purposes, however, the point to be made about the English cases is that in none of the judgments that I have seen was any attempt made to categorize the powers and functions of the local authority as quasi-judicial or administrative for the purpose of determining liability. Instead, the Courts have sought to resolve the question of liability in each case by adopting a flexible approach to the application of the test of a duty of care. This approach is exemplified in the speech of LORD KEITH OF KINKEL in Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd and Others [1985] AC 210 (H L). Expressing the unanimous opinion of the House he declined to apply LORD WILBERFORCE'S approach and said (at 240 F-G):

"The true question in each case is whether the particular defendant

> owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case."

LORD KEITH went on to quote (at 240 H-241 B) the following passage from Home Office v Dorset Yacht Co. Ltd. [1970] A.C. 1004, (HL) at 1039:

> "Apart from this I would conclude that, in the situation stipulated in the present case, it would not only be fair and reasonable that a duty of care should exist but that it would be contrary to the fitness of things were it not so. I doubt whether it is necessary to say, in cases where the court is asked whether in a particular situation a duty existed, that the court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way. If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is fair and reasonable that it should so arise, the court must not shrink for being the arbiter. As Lord Radcliffe said in his speech in Davis Contractors Ltd v Fareham Urban District Council [1956] A C 696, 728, the court is 'the spokesman of the fair and reasonable man.'"

LORD KEITH concluded (at 241 C):

> "So in determining whether or not a duty of care of particular scope was incumbent upon a defendant it is material to take into consideration whether it is just and reasonable that it should be so."

Before I leave Peabody's case, it is instructive, with a view to what is to follow later in this judgment, to see how the test of what is just and reasonable was

applied to the facts of that case. The local authority had approved plans for the construction of a drainage system of a certain design. The drains actually constructed were of a different design. The departure from the approved design came to the knowledge of the local authority's drainage inspector while the installation was in progress, but he took no action to enforce compliance with the approved plans, although the local authority was empowered to do so in terms of para 15 of Part IE of Schedule 9 to the London Government Act 1963. Two years later it was found that the drains were unsatisfactory and they had to be reconstructed, causing loss to the building owner. It was held that the local authority was not liable for the owner's loss. LORD KEITH said, at 241 F-G and 242 E-F, referring to the local authority as Lambeth and to the building owner as Peabody:

> " The purpose for which the powers contained in paragraph 15 of Part III of Schedule 9 have been conferred on Lambeth is not to safeguard building developers against economic loss resulting from their failure to comply with approved plans. It is in my opinion to safeguard the occupiers of houses built in the local authority's area, and also members of the public generally, against dangers to their health which may arise from defective drainage installations. The provisions are public health measures."

> "It is sufficient to hold that Lambeth owed no duty to Peabody to activate their paragraph 15 powers, notwithstanding that they might reasonably have foreseen that failure to do so would result in economic loss to Peabody, because the purpose of avoiding such loss was not one of the purposes for which these powers were vested in them."

In our law there is no justification, in my view, for treating the distinction between quasi-judicial and purely administrative functions as the touchstone for determining a public authority's liability for loss caused by the negligent exercise of statutory powers. The statement in Hoffman v Meyer supra that a person acting in a judicial or quasi-judicial capacity is not liable for negligence was based primarily on passages in the judgment in Matthews and Others v Young 1922 A D 492 at 508-9. To place those passages in proper perspective requires an analysis of the judgment as a whole, an exercise which will be rewarding because it will point to the true criterion for determining liability in a case such as the present.

The facts in Matthews and Others v Young were as follows. The plaintiff was a member of a trade union of which the defendants were the council. The rules of the union empowered the council to exclude a member

from the union after giving him notice of the intention to proceed against him

and of the grounds upon which his exclusion was to be considered. The defendants, purporting to act in terms of the rules, excluded the plaintiff from the union, but did so without giving him notice. As a result of his expulsion he was dismissed from his service with the municipality. In previous proceedings the plaintiff had applied for and obtained an order re-instating him as a member. He then brought an action for damages against the defendants. On appeal, it was held that the defendants were not liable in damages.

The judgment of the Court was delivered by DE VILLIERS JA. The reasoning in the judgment which is relevant for present purposes concluded with the following passage (at 509-510):

> "In my opinion, therefore, in considering plaintiffs conduct and in taking the resolution they took, the council purported to act under the rules of the society, and as in so doing they were performing functions analogous to those performed by a judge, they were acting in a quasi-judicial capacity, and are, therefore, under our law (Groenewegen, de Leg. Abr. Ad. 1.4.5.1; Voet 5.1.58 in fine), as also, I understand, under the English law, not liable for any damage provided they acted bona fide and in the honest discharge of their duties. When once it is established that the defendants were acting in such a capacity under the rules of the society, to which the plaintiff as a member must be taken to have given his full assent, the onus would be upon him to prove that, in taking the resolution and in the further steps they took, they did so not in pursuance of the duty devolving upon them as such council, but

were actuated by some indirect or improper motive."

Earlier, the learned Judge had said (at 508):

> "In my opinion, where, under the rules of an association, there is a duty imposed upon a body of persons under certain circumstances to consider the conduct of a member and in their discretion to take appropriate action, such persons are not liable so long as they, in good faith, act or purport to act under the rules of the association in the interests of the association but through imperitia err in following the rules or in their proper application. To put the duty higher is neither warranted in principle nor would it be in the interests of such associations themselves. I am fortified in this view by the decision in the case of Partridge v General Council of Medical Education (25 Q B 90), where the plaintiff's name had been removed from the dentists' register without his being afforded an opportunity of being heard. The defendants were held not liable, in the absence of mala fides, as, it was said, their duties were discretionary and not merely ministerial. The remarks which in that case were made by Lord ESHER, M.R.: 'I think the defendants were intending, in what they did, to do what they were entitled to do' - exactly describe the position of the defendants in the present case. It has been pointed out that the duty was a statutory one, but in our law, where the duty has been imposed by consent, it is equally binding, at all events as between members inter se."

It is clear from these passages that the Court considered it to be reason for non-suiting the plaintiff that the defendants had acted in a quasi-judicial capacity and that their duties had been discretionary and not merely ministerial. However, when regard is had to the reasoning which preceded these passages,

it becomes apparent that there was another, more fundamental ground, underlying the reasons stated in the passages quoted, for dismissing the plaintiff's claim. DE VILLIERS J A commenced this reasoning by saying at 502 that the parties were in agreement that the plaintiff's action was founded on tort and, on the assumption that that was so, proceeded to examine at some length (at 503-5) the requirements for the actio injuriarum and the actio legis Aquiliae. concluding as follows:

> "The action is, therefore, an Aquilian action for patrimonial loss based upon dolus, an intentional violation of plaintiff's legal rights, as a member, to all the benefits of the society, directly resulting in dismissal from the service of the municipality."

Turning to the judgment of the Court a quo in that case, DE VILLIERS J A (at 506) pointed out that, in allowing the plaintiff's claim, it had relied on an American case, cited as Brennan v United Hatters of NA. (9 L. R. A. (N.S.) 254). The facts in that case resembled those being considered by DE VILLIERS JA. The Court (per PITNEY J) had held that, as the committee which had expelled the plaintiff had not followed the rules of the association and the principles of natural justice, it must be taken to have acted without

jurisdiction. DE VILLIERS JA proceeded to reason as follows (at 506-7):

> "PITNEY, J., strongly relies upon what was said by Lord Justice BOWEN in Mogul S.S. Co. v McGregor (L.R. 23 Q B D 598, at 613): 'Intentionally to do that which is calculated in the ordinary course of events to damage and which does in fact damage another in that other person's property or trade is actionable if done without just cause or excuse.' But I must point out, with great respect to so eminent a judge, that there is no onus upon a defendant until the plaintiff has proved that a legal right of his has been infringed. Under the lex Aquilia there is only an action for damnum injuria datum - for pecuniary loss inflicted through a legal injury, and the defendant is not called upon to answer the plaintiffs case before the plaintiff has proved both the pecuniary loss and that it directly results from what is, in the eye of the law, an injuria.
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> The Court in Brennan's case proceeded upon the assumption that he had a legal right to pursue his trade as a hatter without any unwarranted interference on the part of others. In other words, it held that it was a wrongful act, an injuria, which rendered the delinquents liable in damages, to interfere with another in his trade without justification or excuse. And as the defendants had not proceeded strictly in accordance with the rules of the society, it was considered that they had no jurisdiction to expel the plaintiff, and, therefore, there was no justification or excuse for their action. Now it may be readily confessed the defendants had no jurisdiction, under the circumstances, to take the action they did, but to ignore the fact that they purported to act as the properly constituted tribunal under the rules of the association is to disregard a material fact in the case for the defendants which can hardly be considered irrelevant. A judge who purports to try a case in which he has no jurisdiction would not on that account be liable.
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> In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling, unless he has bound himself to the contrary. But he cannot claim an

> absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such an interference would constitute an injuria for which an action under the lex Aquilia lies if it has directly resulted in loss."

It is plain from these passages that DE VILLIERS JA was emphasizing wrongfulness as an element of delictual liability in our law. The defendants could not be held liable for the loss their act had caused the plaintiff, unless it were shown that the act had been wrongful. Against that background, the purport of the learned Judge's ensuing remarks about the nature of the defendants' duties and the capacity in which they had acted, becomes clear. He was stating the reasons why the defendants' conduct was considered not to have been wrongful. In my view, therefore, the fundamental ground for rejecting the plaintiff's claim, and hence the true ratio decidendi of the judgment, was that the defendants had not been proved to have acted wrongfully. The observations that the defendants had performed discretionary and not merely ministerial duties and had acted in a quasi-judicial capacity constituted steps in the

reasoning yielding that result, it is true, but they cannot be elevated into propositions of law embodying self-contained criteria for determining liability. In the circumstances of that case they were considered to be decisive on the issue of the wrongfulness of the defendants' conduct. Non constat that such a classification of duties or capacity will have the same effect in all other circumstances.

In the present case, if it is assumed that the Council was negligent in exercising its statutory functions, the question whether it is liable in damages to the plaintiff must depend on the answer to the question whether its conduct was wrongful. In considering this question the nature of the Council's functions will certainly require close scrutiny. But in view of what has been said above, two observations must immediately be added. The first is that the nature of the functions is but one of the circumstances calling for consideration in this case; as always, to determine the issue of wrongfulness, all the circumstances of the case fall to be considered. The second is that, to determine the issue of wrongfulness, there is no point in straining to categorize the functions as either quasi-judicial or purely administrative. In this regard I consider particularly

apposite the following remarks made in Mutual Life & Citizens' Assurance Co Ltd and Another v Evatt [1971] 1 All E R 150 at 162, and quoted by RUMPFF C J in Administrates. Natal v Trust Bank van Afrika Bpk 1979 (3) S A 824 (A) at 834 B:

> "In our judgment it is not possible to lay down hard and fast rules as to when a duty of care arises in this or in any other class of case where negligence is alleged. When in the past Judges have attempted to lay down rigid rules or classifications or categories they have later had to be abandoned."

The reference in the passage just quoted to a duty of care leads to the next topic for discussion, which I shall introduce by considering the opening argument addressed to us by counsel for the plaintiff. It was based on a passage in the judgment of CORBETT CJ in Simon's Town Municipality v Dews and Another 1993 (1) S A 191 (A) at 196 B-E. Counsel set great store by what was said in this passage, urging us to find that it established that the allegations contained in the plaintiffs particulars of claim disclosed a perfectly valid cause of action. The passage reads as follows:

> "A further important principle is that, even where the statute does authorise interference with the rights of others, the person or authority vested with the power is under a duty, when exercising the power, to

use due care and to take all reasonable precautions to avoid or minimise injury to others. Failure to carry out this duty has been described as 'negligence', but, as pointed out by Prof J C van der Walt in Joubert (ed) Law of South Africa vol 8 para 30, in this context the word is used in a special sense; and

'(t)he presence of "negligence" in this special sense in the exercise of a statutory power is, however, a conclusive indication that the defendant has exceeded the bounds of his authority and has therefore acted wrongfully.'

See also Neethling, Potgieter and Visser The Law of Delict at 91-2; Van der Merwe en Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 6th ed at 105-6; Boberg The Law of Delict vol 1 at 771-3. In my view, these writers all correctly state that jurisprudentially the consequences of the repository of the statutory power having exercised it without due care and without having taken reasonable precautions to avoid or minimise injury to others, are that the repository must be taken to have exceeded the limits of his authority and accordingly to have acted unlawfully."

An examination of the context in which this passage occurs reveals that it can have no bearing on the facts of the present case. The learned CHIEF JUSTICE was dealing with a totally different kind of situation. The appellant's employees had allowed a fire on the appellant's property to get out of control and to spread to the respondents' property, where it caused damage. The respondents, alleging that the employees had been negligent, had sued the appellant for damages. The appellant had raised as a defence that it was

absolved from liability by section 87 of the Forestry Act 122 of 1984, which provided that no person was liable in respect of anything done in good faith in the exercise of a power or the carrying out of a duty conferred or imposed by or under the Act. The appellant contended that the section created a legal immunity in favour of a person who in good faith exercised a power conferred by or under the Act (as the appellant was alleged to have done, the fire in question having been made for the purpose of clearing a fire belt), even where the person concerned was negligent in having failed to take reasonable precautions to eliminate or minimise the risk of injury to others. It was this contention that was being considered by the learned CHIEF JUSTICE. Immediately before the passage quoted above, he said (at 195H - 196B):

> "As I see it, s 87 is reasonably clear, but it does not mean what appellant contends that it does. It must be interpreted against the general background of the law relating to statutory authority as a defence to a delictual claim. Conduct which would otherwise give rise to delictual liability may be justified and rendered lawful by the fact that it consists of the exercise of a statutory power. Whether a particular statutory enactment in fact authorises interference with or the infringement of the rights or interests of another depends upon the intention of the Legislature, which is determined in accordance with the usual canons of statutory interpretation. Of especial significance in this connection is whether the statutory provision is directory or permissive

> in character. Most of the decisions from which these general principles are derived were referred to by Hoexter JA in the recent case of East London Western Districts Farmers' Association and Others v Minister of Education and Development Aid and Others 1989 (2) S A 63 (A)."

Then, having referred to the views of the writers as reflected in the passage relied on by counsel, the learned CHIEF JUSTICE went on to remark on the absence of specific judicial pronouncement to that effect, and proceeded to say this (at 196 F-G):

> "I am nevertheless satisfied that the analysis is sound and that it accords with modem distinctions in our law of delict between fault and unlawfulness. The principle of statutory authority renders lawful what would otherwise have been unlawful; and if the implied limits of the statutory authority are not observed the repository of the power acts without authority, or in excess of his authority, and consequently unlawfully."

The point of distinction between the situation dealt with in that case and the issue in the present one is this. In that case the negligent causing of a fire to spread to and damage the respondents' properties would undoubtedly have been found to have been wrongful, but for the possibility of a defence under section 87 of the Forestry Act being successfully invoked. Prima facie wrongfulness was manifest in the physical impact the appellant's conduct had

on the corporeal property of the respondents. Similar features were present in all the decisions where a defence of statutory authority was considered and which are referred to in the case mentioned by the CHIEF JUSTICE, the <u>East London Western District Farmers' Association</u> case <u>supra</u> (see also <u>Diepsloot Residents'and Landowners' Association and Anotherv Administrator. Transvaal</u> 1994 (3) S A 336 (A) at 345C - 346J). In the present case there is no such feature. The plaintiff is suing for the recovery of pure economic loss. He is in no position to rely on an inference of wrongfulness flowing from an allegation of physical damage to property (or injury to person). His counsel stressed that for the purposes of deciding the exception all the allegations in the particulars of claim must be assumed to be true, pointing to the allegations pertaining to the Council's negligence, particularly in regard to its breach of the duty to prevent loss being caused to the plaintiff, and argued that it was for the Council to put up a defence to the claim thus <u>prima facie</u> made out. But these contentions miss the real issue raised by the exception. To explain why, it is necessary first to have a closer look at the concept of a duty of care.

In the extract from the <u>Mutual Life & Citizens' Assurance Co</u> case

supra, quoted above, the reference to a duty of care was a reference to that concept in the second sense in which it is used in English Law, as explained by Millner, Negligence in Modem Law (1967) at 26, in a passage quoted in Administrates, Natal v Trust Bank van Afrika Bpk supra at 833 D-H. The phrase was used in this second sense, too, in the line of the English cases exemplified by Peabody's case supra. And it is used in the same sense in paragraph (b) of the grounds of the Council's exception in this case, as paraphrased earlier. For present purposes, with a view to counsel's argument, the difference between the two elements of a duty of care is perhaps more aptly described by Millner in another passage of his work, at 230:

> "The duty concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based. The fact-based duty of care forms part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreeseeability test, and 'duty of care' in this sense is a convenient but dispensable concept.
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> On the other hand, the policy-based or notional duty of care is an organic part of the tort; it is basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by it. Here is a concept entirely divorced from foreseeability and governed by the policy of the law. 'Duty' in this sense is logically antecedent to 'duty' in the fact-determined sense. Until the law acknowledges that a particular interest

> or relationship is capable in principle of supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature."

In the phraseology of our law the "policy-based or notional duty of care" is more appropriately expressed as a "legal duty", in consonance with the requirement of wrongfulness as an element of delictual liability and the underlying concept of legal reprehensibility in respect of the causing of pure economic loss. As is evident from the passage quoted from Millner, and from the clear distinction in our law between fault and unlawfulness referred to by CORBETT CJ in the Simon's Town Municipality case supra at 196 F, the enquiry into the existence of a legal duty is discrete from the enquiry into negligence. Nor can the mere allegation in the particulars of claim that the Council was under a duty to take steps to prevent loss being caused to the plaintiff carry the day for him. The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. The general nature of the enquiry is stated in the well-known passage in Fleming, The Law of Torts (4th edition), quoted in the Administrateur, Natal case supra at 833 in fine - 834 A:

> "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."

The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court (see e.g. Minister van Polisie v Ewels 1975(3) S A 590 (A) at 596 H- 597 F and Lillicrap's case supra at 498 G-H).

The issue raise by paragraph (b) of the grounds of exception is accordingly whether, having regard to the considerations mentioned above, the allegations of fact in the particulars of claim, if assumed to be proved, are susceptible in law of sustaining a finding that the Council was under a legal duty to the plaintiff, by exercising care, to avoid loss being caused to the plaintiff. If they are not, the plaintiff will be unable at the trial to discharge the onus of proving that the Council's conduct was wrongful (see the extracts from the judgment in Matthews and Others v Young supra quoted earlier), and the

exception would be well founded.

Against this background I turn to the facts. The essence of the plaintiffs claim is that the Council caused him loss by the negligent exercise of a statutory power. The source of the power being statutory, it is necessary to examine the legislation by which it was brought into being, for it is self-evident that the intention of the legislature is an important, and may possibly be a decisive, feature of the circumstances material to the determination of whether or not a legal duty existed. The legislative intention is to be ascertained with reference to the nature of the powers conferred, the nature of the duties involved in their exercise, the procedures prescribed for their exercise and for persons aggrieved by it to obtain redress, and the objects sought to be achieved by the legislature. I proceed to consider the relevant provisions of the Ordinance and the regulations made thereunder.

Section 19 of the Ordinance reads as follows:

> "The general purpose of a town-planning scheme shall be the co-ordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote the health, safety, good order, amenity, convenience and general welfare of such area as well as efficiency and economy in the process of such

development."

Section 92 provides:

"92. (1) An owner of-

(a) an erf in an approved township who wishes to subdivide that erf;

(b) two or more erven in an approved township who wishes to consolidate those erven,

may apply in writing to the local authority within whose area of jurisdiction the township is situated and at the same time lodge a plan setting out the proposed subdivision or consolidation, and such an application shall be accompanied by such fees as may be prescribed.

(2) (a) On the receipt of an application in terms of subsection (1) the local authority shall consider the application and it may approve or refuse it.

(b) The local authority shall without delay and in writing notify the applicant referred to in paragraph (a) of its decision and in writing furnish, at the written request of such applicant and on payment of the prescribed fees, the reasons for its decision.

(c) ....

(3) ....

(4) ....

(5) A local authority shall not exercise any power conferred by subsection (2), (3) or (4) if it will bring about a result which is in conflict with-

(a) any condition set out in the schedule contemplated in section 79 on which the township concerned was declared an approved township;

(b) a condition of title imposed in terms of any law;

(c) a provision of an interim or approved scheme applicable to

the erf or erven concerned."

Section 139 lays down the procedure for an appeal against a local authority's decision to the Townships Board. In terms of subsection (1):

"An applicant or objector who is aggrieved by -

(a) a decision of a local authority -

(i) .....

(ii) on any application in terms of -

(aa) any provision of this Ordinance;

(bb) any town-planning scheme,

may, within a period of 28 days from the date he has been notified in writing by such local authority of the decision, . . .

(b) ....

appeal through the Director to the Board by lodging with the Director a notice of appeal setting out the grounds of appeal, and he shall at the same time provide the local authority with a copy of the notice."

Subsection (4) requires the Board to determine a time and place for the hearing of the appeal and to give notice thereof to the parties concerned, including the local authority. In terms of subsection (5) each party and the local authority may state his or its case and adduce evidence in support thereof. Subsection (6) empowers the Board to confirm, amend or set aside the decision of the local authority. Subsections (7) and (8) provide for orders for the payment of

expenses and costs.

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In the regulations, section 35 requires a great deal of detailed information to accompany an application in terms of section 92 (1) (a) of the Ordinance; particularly as set out in subparagraphs (i) to (xv) of paragraph (a). I do not propose to quote all of this, but shall merely select some random examples to show the general nature of what is prescribed. Thus truncated, section 35 reads as follows:

"An application for the subdivision of an erf in terms of section 92 (1) (a) of the Ordinance shall be accompanied by -

(a) so many legible copies as the local authority may require of a sketch plan of the erf concerned and the cadastral information of such erf and each adjoining property, drawn in black on a white background, signed by the applicant and indicating the following:

(i) the name of the township in which the erf to be subdivided is situated and the delineation of the proposed subdivided portions accurately drawn to a scale -

. . . .

(vii) the situation of each building on the erf to be subdivided and the approximate distance between the street boundary and every other boundary of the erf and the nearest wall of the building nearest to such boundary as well as the approximate

distance between the proposed subdivisional line and the nearest wall of the building nearest to such line;

(xi) The approximate location of an existing conductor on the erf to be subdivided used for telephonic or electrical purposes or any transformer, structure or other obstruction relating thereto as well as any tree, fire hydrant or bus shelter on the street reserve adjoining the street frontage of such erf;

(xiv) any natural water course which traverses the erf to be subdivided;

(b) a statement indicating the use and density zoning of the erf to be subdivided in terms of the relevant approved town-planning scheme;

(c) a statement motivating

(i) the need and desirability of the subdivision; (ii) the layout of the purposed subdivision;

(d) a typewritten certified copy or clear and legible photo-copy of the title deed under which the erf to be subdivided is held."

In addition, section 36 of the regulations provides that no application shall be approved unless the local authority is satisfied that each proposed subdivided portion has satisfactory vehicular access to a public street.

The regulations make it clear that the legislature intended the local authority to be placed in possession of the full facts relevant to a decision on the desirability of the subdivision. The Court a quo was right in its view that it is the duty of the local authority to weigh up many facts and to consider all the circumstances. Much of the information referred to in paragraph (a) of

section 35 can be said to relate to the technical aspects of the subdivision. Paragraph (c), however, points to the broader aspects of policy involved, by requiring a motivation to be supplied of the need and the desirability of the subdivision. There can be no doubt that the local authority is obliged, when it is considering an application, to take into account the general principles governing the administration of the town-planning scheme as laid down in section 19 of the Ordinance. Its duty is to ensure that there shall be no deviation from the requirements of the "general purpose" of the scheme as circumscribed in section 19.

In the local authority's consideration of an application there arc potentially conflicting interests at stake: those of the applicant owner who wishes to use his property to his own best advantage; those of neighbouring owners in the locality who may be adversely affected by the subdivision; and those of the local authority itself, which is charged with the supervision of the orderly, harmonious and effective (economically and otherwise) development of the area, "to promote the health, safety, good order, amenity, convenience and general welfare of such area." In coming to a decision on the application,

the local authority must weigh up the conflicting interests involved. In doing so, it must exercise a value judgement. Linguistically and conceptually it can be said that the Council is fulfilling a quasi-judicial function and exercising a quasi-judicial discretion.

The Ordinance does not, however, provide for any hearing to take place before the local authority decides on an application. It will have only the application and accompanying documents before it. Beyond that, it is not obliged to afford an applicant any opportunity to be heard or to make representations. Counsel for the plaintiff relied heavily on the absence of any provision for a hearing in support of his theme that the local authority's function was purely administrative. He contrasted the position under section 92 with that under section 139, in which the legislative intent to provide for a hearing before the Townships Board is clearly expressed. Under section 92, he said, the local authority need not inform the applicant of any objections it might have to the approval of the application, nor of any objections raised by any other interested parties. Section 139, by contrast, provides for a full hearing at which the opposing contentions of all those interested are to be put forward and

adjudicated upon. The inference must be, counsel argued, that the legislature intended the powers conferred on a local authority under section 92 to be i

"purely regulative" (the phrase was used by VAN DEN HEEVER JA in Estate Breet v Peri-Urban Areas Health Board 1955 (3) S A 523 (A) at 533 A) and that a quasi-judicial procedure would commence only with the hearing of an appeal before the Townships Board. For this view of the two stages of the procedure counsel sought to find support in the remarks of LORD GREENE MR in B Johnson & Co (Builders), Ltd v Minister of Health [1947] 2 All E R 395 (C A) at 398 G - 399 H, and in the judgment of MURRAY J in South African Broadcasting Corporation v Transvaal Townships Board and Others 1953 (4) S A 169 (T) at 175 E-176 G.

In my view this argument does not advance the case for the plaintiff, because it loses sight altogether of the purpose of the enquiry upon which we are engaged. The enquiry into the intention of the legislature has as its object to determine whether a local authority owes a legal duty to an applicant to exercise care in exercising the powers conferred upon it by section 92 so as to avoid causing loss to the applicant. The existence of such a duty will entail a

right in the applicant to sue for damages upon its breach. The fundamental

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question, therefore, is this: did the legislature intend that an applicant should have a claim for damages in respect of loss caused by the negligence of the local authority? To find the answer to this question it simply does not help to say that section 92 does not provide for a hearing, nor does it assist to hang labels such as "purely administrative" and "purely regulative" around the local authority's powers and functions. The two cases relied on by counsel do not bring us any closer to the answer either, because they were concerned with wholly different questions.

The answer to the fundamental question posed above is to be found, in my opinion, in the appeal procedure laid down in section 139. Ironically, however, I consider the effect of that section to be exactly the opposite of that contended for by counsel for the plaintiff. Leaving the particular facts of this case aside for the moment, the usual and obvious way in which an applicant for subdivision can be adversely affected by the exercise of the local authority's powers under section 92, is by the refusal of the application. If the application

is refused, the applicant is entitled in terms of section 139 (1) (a) to appeal to

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the Townships Board within a period of 28 days. He thus has available and at his disposal the procedure of an appeal in terms of subsections (4) and (5) and the opportunity of a full hearing for the consideration of any representations he might wish to make. In my judgment it could not have been in the contemplation of the legislature that, apart from the appeal procedure, the refusal of the application was to be regarded as a wrong to the applicant entitling him to bring ah action for damages against the local authority.

In comparable circumstances the Courts in England, applying the approach adopted in Peabody's case supra, have treated the existence of a statutory right of appeal against the decision of a statutory functionary as negativing the existence of a common law duty of care (in the second sense) owed by the functionary to the person aggrieved by the decision. This is well illustrated by the case of Jones v Department of Employment [1989] Q B 1 (C A). The plaintiff was entitled to unemployment benefit in terms of the Social Security Act 1975. In terms of the regulations made under the Act the plaintiff was required to submit his claim to an adjudicating officer employed by the defendant. The officer was empowered to decide the claim. In the case of a

decision adverse to the claimant the regulations provided for a right of appeal to a social security appeal tribunal. The plaintiff had submitted his claim to an adjudication officer, who had disallowed it. In an appeal to the tribunal, the decision had been reversed and the claim allowed. The plaintiff then brought an action for damages against the defendant, alleging that the adjudicating officer had been negligent in disallowing the claim. The Court of Appeal ordered the plaintiffs particulars of claim to be struck out as disclosing no reasonable cause of action. In the main judgment GLIDEWELL LJ, after quoting from the speech of LORD KEITH OF KINKEL in Peabody's case supra, said the following (at 22 B-D):

> "The question thus is whether, taking all these circumstances into account, it is just and reasonable that the adjudication officer should be under a duty of care at common law to the claimant to benefit. Having regard to the non-judicial nature of the adjudication officer's responsibilities, and in particular to the fact that the statutory framework provides a right of appeal which, if a point of law arises, can eventually bring the matter to this court, it is my view that the adjudication officer is not under any common law duty of care. In other words, I agree with Mr Laws that his decision is not susceptible of challenge at common law unless it be shown that he is guilty of misfeasance. Indeed, in my view, it is a general principle that, if a government department or officer, charged with the making of decisions whether certain payments should be made, is subject to a statutory right of

> appeal against his decisions, he owes no duty of care in private law. Misfeasance apart, he is only susceptible in public law to judicial review or to the right of appeal provided by the statute under which he makes his decision."

In his concurring judgment SLADE LJ (at 25 C-F) gave two reasons for considering that it would not be just and reasonable that the alleged duty of care should be held to exist. The first was that

> ". . .the appeal procedure provided for by the Act of 1975 and the Act of 1980 itself for practical purposes provides a disappointed claimant with a perfectly adequate remedy for recovery of unemployment benefit properly due to him ..."

The second reason was expressed as follows:

> "... one logically inevitable consequence of holding that a common law duty of care existed would be this. Immediately following an arguably negligent and erroneous decision of an adjudication officer, a claimant would have the right to pursue an action in negligence against the adjudication officer and/or the department without even pursuing his statutory rights of appeal (albeit at the risk of having any award of damages reduced, though not necessarily eliminated, on the grounds that he had not mitigated his damage by appealing). In the context of this legislation, under which there are likely to be many thousands of citizens who rightly or wrongly consider themselves aggrieved, it would seem to me to make no sense to hold that it is open to a disappointed citizen to challenge the decision in this particular manner."

Stating his agreement with both the other judgments, CAULFIELD J remarked as follows (at 26 A-B):

> "... I conclude that it cannot be right in law that the isolated adjudicating officer should have so many hundreds, possibly thousands, of neighbours to whom the common law says he owes a duty of care when Parliament has provided a whole scheme of legislation to protect the so-called neighbours against a mistake by the adjudicating officer."

In my opinion the reasoning reflected in the above passages can be applied to the legislation under consideration in the present case, in-conformity with the criteria in our law for determining whether or not the local authority owes a legal duty to an applicant for subdivision in respect of pure economic loss. As to the intention of the legislature, the fact that it has prescribed a particular form of procedure by which an aggrieved applicant can obtain relief against the refusal of his application shows by necessary implication that it did not intend a negligently incorrect refusal to give rise to an action for damages. As to the broader considerations of policy, on the one hand an aggrieved applicant does not need an action for damages to protect his interests; he has readily at hand the appeal procedure provided within the legislative framework. On the other hand, considerations of convenience militate strongly against allowing an action for damages; the threat of such an action would unduly hamper the expeditious consideration and disposal of applications by the local

authority in the first instance. That is not to say that the local authority need not exercise due care in dealing with applications; of course it must, but the point is that it would be contrary to the objective criterion of reasonableness to hold the local authority liable for damages if it should turn out that it acted negligently in refusing an application, when the applicant has a convenient remedy at hand to obtain the approval he is seeking. To allow an action for damages in these circumstances would, I am convinced, offend the legal convictions of the community. (Cf Minister of Law and Order v Kadir. unreported judgment of this Court, delivered on 29 September 1994, at pp 11-12 and 17).

In my judgment, therefore, the refusal of an application, through an error due to negligence, is not a wrongful act giving rise to a delictual claim for damages.

That being so, I turn once again to the facts alleged in the plaintiff's particulars of claim. A curious feature of them is that the plaintiff is not complaining about a refusal of his application by the Council. His complaint is that the Council negligently granted it. In effect, his case is that the Council

committed a wrongful act by giving him what he was asking for. The answer to this somewhat startling proposition would seem to be quite simply this: if the Council would not have been liable to the plaintiff if it had wrongly refused the application (as I have been at pains to show), it is inconceivable that it could be held liable for having incorrectly allowed it. Nevertheless counsel for the plaintiff sought to justify the alleged cause of action on a twofold basis. He argued, firstly, that the plaintiff could not have availed himself of the appeal procedure of section 139 in order to recover the kind of loss alleged to have been sustained by him; and, secondly, that the Council had breached its duty to the plaintiff, arising by virtue of section 92 (5), to ensure that the proposed subdivision was not in conflict with the provisions of the Scheme. The argument's first part may be accepted, but it breaks down on the second part. Section 92 (5), it will be recalled, prohibits a local authority from exercising its powers under section 92 (2) if it will bring about a result which is in conflict with a provision of a scheme applicable to the erf concerned. The section no doubt imposes a duty on the local authority to ensure that the proposed subdivision will not fall foul of the provisions of the scheme in

question, but it is not a duty owed by the local authority to the applicant for subdivision. The object of the provision is certainly not to protect an applicant against economic loss. Its object is to promote public order by ensuring that township development takes place in accordance with the applicable scheme, in the interests of the inhabitants of the area as a whole and in the furtherance of the precepts governing the general purpose of the scheme as set out in section 19.

An analogous situation can once again be found in an English case. In Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council [1986] 0 B 1034 (CA) the facts were briefly as follows. The plaintiff, a building owner, had submitted drawings and plans of the foundations for a structure to be erected to a local authority, which had approved them. During the course of installation inspectors employed by the local authority had inspected and approved the foundation bases. It later transpired that the relevant building regulations had not been complied with. The plaintiff sued for damages, alleging that the local authrity had been negligent in respect of the statutory duties imposed on it by the Public Health Acts 1936 and 1961.

SLADE LJ, delivering the unanimous judgment of the Court of Appeal, after an extensive analysis of Peabody's case supra, said (at 1061 F/G);

> ". . . in deciding whether or not the alleged duly of care exists in the present case, we are, on the authority of the Peabody case [1985] A C 210, entitled and bound to take into considertion whether it is just and reasonable that it should exist. We feel no doubt that it is not just and reasonable."

The reasons given for this view include the folowing (at 1062 C-D and F-G, and 1063 F-G):

> "The purpose for which the legislature has conferred the supervisory powers over building operations on local authorities is to protect the occupiers of buildings built in the local authority's area and also members of the public generally against dangers to health or personal safety. It is not to safeguard the building developer himself against economic loss incurred in the course of a building project, or indeed anyone else against purely economic loss."

> "On the basis of the Peabody case [1985] A C 210, however, a local authority, in exercising these supervisory powers, will normally owe no duly to an original building owner, because it is normally incumbent on the building owner himself to ensure that the building is erected in accordance with the relevant building regulations, and it cannot have been the intention of the legislature that, save perhaps in exceptional circumstances, a local authority could owe a duty to a person who is in such breach."

> "We are firmly of the view that the legislature, in imposing on local authorities for the general protection of the public the relevant statutory

obligations under section 64 of the Public Health Act, cannot have been intending to protect a building developer such as the plaintiffs against damage which they themselves may suffer through their failure to comply with the relevant building regulations - or to entitle them to an indemnity from their fellow ratepayers against the consequences of any such failure."

By like reasoning, the plaintiff in the present case himself failed to ensure that his proposed subdivision complied with the provisions of the Scheme. The purpose of the supervisory powers conferred on the Council by section 92 (5) is to promote orderly township development in the public interest, and not to safeguard the plaintiff against pure economic loss flowing from the approval of a subdivision which is in conflict with the Scheme. The Council's approval of the defective application was not in breach of any legal duty owed by it to the plaintiff. It did not act wrongfully.

In the result, the Court a quo was correct in upholding the exception in so far as it related to the cause of action summarized under A earlier in this judgment.

It remains to deal with the causes of action reflected under B and C above. In view of what has already been said in this judgment, they can be

disposed of in a few words.

As to B, the misstatement relied upon was stated by counsel for the plaintiff in argument to have been implied in the Council's notification to the plaintiff that the application had been approved. It is thus inextricably intertwined with the approval itself. From the finding that the approval was not wrongful it must necessarily follow, in my opinion, that the communication of the fact of the approval was not wrongful either. If there was no breach of a legal duty in the one instance, these was none in the other. The tests are the same, and their application leads to the same answer. In the context of the alleged misstatement I would just add these observations. The plaintiff had access to the Scheme, and it could reasonably be expected of him to consult its provisions, either personally or through his professional or technical advisers, when preparing the application before its submission for approval. The plaintiff himself did not heed the Scheme and neglected to comply with its requirements. In these circumstances it would not accord with the sense of justice of the community to hold the Council liable in damages to the plaintiff for the negligent misstatement that the subdivision would not be in conflict

with the Scheme.

As to C, I mentioned earlier that it was suggested on the plaintiffs behalf that this was intended to be an independent cause of action. I doubt whether the particulars of claim arc susceptible of such an interpretation, but it is not necessary now, in view again of what has already been said, to dwell on the point. Viewed independently, the allegations summarized under C are incapable of sustaining a valid cause of action, for reasons corresponding to those stated in regard to A and B. I would merely add that the Council's approval of the application, having been in violation of the prohibition of section 92(5) and hence beyond it powers, was a nullity. Consequently it could not have acted in breach of any legal duty to the plaintiff by refusing to allow him to proceed with the development of the project.

In the final result, the appeal is dismissed with costs, including the costs of two counsel.

A S BOTHA
JUDGE OF APPEAL

HEFER JA }
VIVIER JA } CONCUR
NIENABER JA }
HOWIE JA }