THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number : 545/04

In the matter between :

TRUSTEES FOR THE TIME BEING OF TWO OCEANS AQUARIUM TRUST **APPELLANT**

and

KANTEY & TEMPLER (PTY) LTD **RESPONDENT**

CORAM : **HOWIE P, BRAND, NUGENT, JAFTA JJA *et***

MAYA AJA

HEARD : **3 NOVEMBER 2005**

DELIVERED : **25 NOVEMBER 2005**

Summary: Delictual liability for pure economic loss – allegation that trust suffered damages as a result of the respondent's negligence in the design of an aquarium – issue whether alleged negligent conduct was wrongful

JUDGMENT

BRAND JA/

BRAND JA:

[1] This appeal raises questions of liability in delict for so-called pure economic loss resulting from a negligent design by structural engineers. The appellants are the trustees of the Two Oceans Aquarium Trust ('the trust') which leases and operates the Two Oceans Aquarium at the Victoria and Alfred Waterfront in Cape Town. The respondent is a company of consulting engineers. The appellants instituted action, on behalf of the trust, against the respondent and five further defendants in the Cape High Court for damages of R14 924 395,00 arising out of certain failures which had developed in the exhibit tanks at the aquarium.

[2] The respondent noted three exceptions to the appellants' particulars of claim on the basis, inter alia, that they lacked averments necessary to sustain an action. In addition, it applied for certain allegations in the particulars to be struck out. Two of the three exceptions were dismissed by the court *a quo* (Veldhuizen J and Hockey AJ). The remaining exception was, however, upheld and the application to strike out granted with costs. With the leave of the court *a quo*, the

appellants now appeal against the upholding of the exception as well as the costs order in favour of the respondent.

[3] The nature of the exception and the resulting issues can best be understood against the background of the facts pleaded in the appellants' particulars of claim. The damages claimed allegedly resulted from the deterioration of the polyurethane lining used for waterproofing the exhibit tanks in the aquarium. More particularly, so it was alleged, the lining material used subsequently turned out to be porous, allowing penetration of seawater from the tanks into the surrounding concrete, thereby causing corrosion in the steel reinforcement. As a result, it was said, remedial work had to be done, which included the replacement of the waterproof lining with a more suitable one. The costs of the required remedial work accounted for part of the claim. The balance related to the estimated cost of constructing an additional tank in order to mitigate the trust's anticipated loss of revenue for the duration of the remedial work.

[4] The six defendants joined in the action were those responsible, in one or other capacity, for the design and construction of the tanks. While the respondent – cited as second defendant – was the structural engineering consultant, the first defendant was the project manager. Other defendants included the supplier of the waterproofing material used for the lining; the builder of the tanks as well as the company

responsible, as subcontractor to the builder, for the actual application of the waterproof lining. Since the respondent was the only defendant who filed an exception, the other defendants are not involved in the present proceedings.

[5] In broad terms the particulars of claim proposed two causes, in alternative form, for the ultimate failure of the tanks. The first proposition is that it was due to the wrong option taken by the first defendant, as the project manager, and the respondent, as the structural engineer, in the design of the aquarium, to waterproof the tanks by means of a lining rather than to design water retaining concrete structures. The case against the first defendant and the respondent is essentially that they had acted negligently in taking this wrong option. The alternative proposition is that the tanks had failed because the waterproofing material was either unsuitable or had not been properly applied. These propositions constitute the basis of the alternative claim against the four other defendants. Because we are not concerned with the other defendants, we must assume for present purposes that the respondent's decision to choose the waterproofing option, was the cause of the damages ultimately suffered by the trust.

[6] According to the particulars of claim, the trust was formed in July 1994 with the specific objective of developing and operating the

aquarium. Subsequent to the formation of the trust, so it was alleged, a contractual nexus came into existence between the respondent and the trust when the respondent was appointed as structural engineering consultant to advise the trust, inter alia, on the design and construction of the exhibit tanks. The respondent's decision to take the wrong option was alleged to have taken place in one of two contexts; namely

(a) in the course of rendering professional services pursuant to the contract between the parties which came into existence after the formation of the trust, when the respondent was appointed as its engineering consultant; or

(b) prior to the conclusion of that contract in circumstances to which I shall presently return.

[7] Building on these allegations, the appellants' case is that in so far as the wrong option was decided upon by the respondent after the conclusion of its agreement with the trust, it was in breach of its contractual obligations and therefore liable to the trust in contract. To the extent that the wrong option was decided upon prior to the conclusion of the agreement with the trust, the contention is that the respondent is liable to the trust in delict for the consequences of its negligent decision. This is so, the particulars of claim alleged, because the respondent was

under a legal duty, even prior to the conclusion of its contract with the trust, to act without negligence in deciding upon an appropriate design.

[8] As to the factual basis for the alleged legal duty, the particulars of claim commenced by referring to a joint venture agreement between two potential investors in the aquarium project, which was concluded in 1993, i e prior to the formation of the trust, with the object of investigating the feasibility of developing and operating an aquarium in the Waterfront. Proceeding from this starting point, paras 10 – 14 of the particulars of claim continued as follows:

'10. It was at all material times contemplated by the joint venture that the aquarium was to be developed and operated by a trust to be formed, and the first defendant [i e the project manager] and the second defendant [i e the respondent] were aware thereof and dealt with the joint venture on such basis.

11. In pursuance of the joint venture's objective as aforesaid, the first defendant and the second defendant both agreed with the joint venture … that they would assist, in their capacities as project managers and consulting engineers, respectively, in the process of investigating the feasibility of developing and operating the aquarium ('the project') and in the process of investigating appropriate design options for the aquarium, with a view to their formal appointment in the event of the project going ahead.

12. …

13. In so agreeing to assist the joint venture, first and second defendants knew, alternatively ought reasonably to have known, that the joint venture (and the trust

upon its formation) would rely upon their professional expertise and advice and the assistance to be furnished by each of them.

14. In the circumstances, the first defendant and the second defendant owed a legal duty to the joint venture (and to the trust upon its formation) when assisting in the process of investigating the feasibility of developing and operating the aquarium, and in the process of investigating appropriate design options for the aquarium and proffering their professional expertise and skill in this regard, to do so in a proper and professional manner and without negligence.'

[9] The exception upheld by the court *a quo* – which therefore constitutes the subject matter of this appeal – did not relate to the appellants' claim founded in contract. It was solely aimed at the delictual claim, essentially on the basis that, on the facts pleaded in the particulars of claim, the appellants have failed to establish the existence of the 'legal duty' upon which their case in delict depends. The declared object of the exception was to preclude the appellants from relying on any conduct by the respondent in deciding on the wrong option prior to the conclusion of its agreement with the trust.

[10] The exception raises the issue of wrongfulness which is one of the essential elements of the Aquilian action. From the nature of exception proceedings, we must assume that the respondent's decision to adopt the waterproofing option in its design was wrong. We must also assume that the wrong decision was negligently taken. Negligent conduct giving

rise to damages is, however, not actionable *per se*. It is only actionable if the law recognises it as wrongful. Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. In those cases wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see eg *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12). In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms (see eg *Administrator, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) 833A; *Van Duivenboden* supra para 22 and *Gouda Boerdery BK* supra para 12).

[11] It is sometimes said that the criterion for the determination of wrongfulness is 'a general criterion of reasonableness', i e whether it would be reasonable to impose a legal duty on the defendant (see eg *Government of the Republic of South Africa v Basdeo and another* 1996 (1) SA 355 (A) 367E-G; *Gouda Boerdery BK* supra para 12). Where that terminology is employed, however, it is to be borne in mind that what is

meant by reasonableness in the context of wrongfulness is something different from the reasonableness of the conduct itself which is an element of negligence. It concerns the reasonableness of imposing liability on the defendant (see eg Anton Fagan *'Rethinking wrongfulness in the law of delict'* 2005 *SALJ* 90 at 109). Likewise, the 'legal duty' referred to in this context must not be confused with the 'duty of care' in English Law which straddles both elements of wrongfulness and negligence (see eg *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 27B-G; *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 20). In fact, with hindsight, even the reference to 'a legal duty' in the context of wrongfulness was somewhat unfortunate. As was pointed out by Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* (SCA case 459/04 9 September 2005, para 14), reference to a 'legal duty' as a criterion for wrongfulness can lead the unwary astray. To illustrate, he gives the following example:

'[T]here is obviously a duty – even a legal duty – on a judicial officer to adjudicate cases correctly and not negligently. That does not mean that the judicial officer who fails in the duty because of negligence, acted wrongfully.' (See also *Knop v Johannesburg City Council* supra 33D-E.)

[12] When we say that a particular omission or conduct causing pure economic loss is 'wrongful' we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not (see eg *Telematrix (Pty) Ltd* supra para 14; *Local Transitional Council of Delmas* supra para 19; Anton Fagan *op cit* 107-109). Perhaps it would have been better in the context of wrongfulness to have referred to a 'legal duty not to be negligent', thereby clarifying that the question being asked is whether in the particular circumstances negligent conduct is actionable, instead of just to a 'legal duty'. I say this in passing and without any intention to change settled terminology. As long as we know what we are talking about. When a court is requested, in the present context, to accept the existence of a 'legal duty', in the absence of any precedent, it is in reality asked to extend delictual liability to a situation where none existed before. The crucial question in that event is whether there are any

considerations of public or legal policy which require that extension. And as pointed out in *Van Duivenboden* (para 21) and endorsed in *Telematrix* (para 6) in answering that question

'… what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.'

[13] Against that background, I revert to the present dispute. The court *a quo*'s reasons for upholding the exception were essentially twofold. First, that on a proper analysis of the appellants' particulars of claim, the 'legal duty' pleaded (in para 14 – quoted in para [8] above) relies on a contract between the respondent and the joint venture. Second, that by virtue of the decision of this court in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd* 1985 (1) SA 475 (A):

'a plaintiff must allege and prove the existence of a legal duty without having recourse to the terms of a contract'

and that

'once it becomes necessary for a plaintiff to rely on the terms of a contract to prove the legal duty, his claim does not arise *ex delicto*.'

[14] The appellants' contention was, however, that the court *a quo* erred in not recognising that *Lillicrap* was distinguishable from the present matter on the facts. Their first argument in support of this contention, which was somewhat obliquely raised, was that while the claim in *Lillicrap* was for pure economic loss, the trust's claim resulted

from physical damage to the aquarium caused by the respondent's negligent design. Of course, if the appellants' claim could be construed as one resulting from physical damage to property, questions regarding the extension of Aquilian liability would not arise. In such circumstances wrongfulness will be presumed. The possibility of a concurrence of contractual and delictual liability on the same facts, would be of no consequence. That much was pertinently decided in *Lillicrap* (at 496D-I). But, it is apparent, in my view, that the appellants' claim cannot possibly be construed as one based on physical damage to property. It is clearly a claim for pure economic loss. As was pointed out by Grosskopf AJA in *Lillicrap* (at 497I-498H), with reference to a similar argument in that case, the appellants' allegation is not that as a result of the respondent's negligent conduct the aquarium was 'damaged'. Their case is that, as a result of the respondent's negligent design, the aquarium was defective from the start. It was always of inferior quality. No conduct on the part of the respondent had caused it to deteriorate in any way (see also *Murphy v Brentwood District Council* [1990] 2 All ER 908 (HL) 919 and *Woolcock Street Investments (Pty) Ltd v C D G (Pty) Ltd (formerly Cardno & Davies Australia (Pty) Ltd* [2004] HCA 16 para 20).

[15] The appellants' second argument as to why *Lillicrap* is distinguishable from the present matter is to be understood against the

background of the facts in *Lillicrap*, which, for present purposes, can be stated in the following broad terms. The appellant in that matter, Lillicrap, was a firm of structural engineers. The respondent, Pilkington, was a manufacturer of glass products. In mid 1975 Lillicrap was formally appointed by Pilkington as consulting engineers to design and supervise the construction of a glass plant on a particular site. Salanc Contractors (Pty) Ltd was employed as the building contractor for the construction of the plant. In mid 1976 Pilkington assigned its contract with Lillicrap to Salanc. As a result of the assignment, there was no longer any direct contractual relationship between Pilkington and Lillicrap. Instead, Lillicrap's status was changed to that of a subcontractor for Salanc. When the completed plant was put into operation, it became apparent that as a result of soil instability on the site, there were slight movements between crucial components in the plant which rendered it unsuitable for the manufacturing of glass. Pilkington sought to recover the cost of remedying these defects from Lillicrap on the basis that it resulted from its professional negligence in the design and supervision of the construction of the plant.

[16] On these facts two scenarios therefore arose. In the one there was a direct contractual nexus between the parties. In the other there was no such contractual privity between them. The question presented for

decision was whether policy considerations favoured an extension of Aquilian liability in either case. Grosskopf AJA, writing for the majority, held that there was no need for such extension. The appellants contended that Grosskopf AJA's underlying reasoning amounted to this: while there was a contractual nexus between the parties, each had adequate and satisfactory remedies if the other were to have committed a breach. In fact, the very relief claimed by Pilkington could have been founded on the contract. These considerations did not fall away as a result of the contract being assigned. The tripartite relationship between Pilkington, Salanc (as main contractor) and Lillicrap (as subcontractor) still had its origin in contract. The only difference was that Pilkington now had to follow the contractual chain via Salanc to Lillicrap.

[17] Thus understood, so the appellants contended, *Lillicrap* is plainly distinguishable from the present matter. In *Lillicrap* the presence of satisfactory and adequate contractual remedies was the principal reason why this court held that an extension of Aquilian liability was not justified. In the present matter, there is no question of contractual remedies because there was no contract between the respondent and the trust when the negligent conduct occurred. In fact, the trust was not even capable of creating those remedies because it had not yet been formed when the negligent conduct occurred. But for the extension of Aquilian

liability, so the argument went, the trust would be without any remedy and have not been capable of creating one.

[18] In *Lillicrap* the plaintiff in fact had a remedy emanating from the contract that coincided with its claim in delict. But I do not think it was intended to suggest that if there had been no such contractual remedy a delictual remedy would have been granted. On the contrary, the observations (at 500G-501B) concerning the difficulties that would emerge if delictual liability were to be imposed and the delictual and contractual standard were not to coincide, shows the converse. The point underlying the decision in *Lillicrap* was that the existence of a contractual relationship enables the parties to regulate their relationship themselves, including provisions as to their respective remedies. There is thus no policy imperative for the law to superimpose a further remedy. Consequently, the mere absence of a contractual remedy in the present case does not by itself distinguish it materially from *Lillicrap.*

[19] I nonetheless agree that *Lillicrap* is distinguishable from the present matter on another basis, which is that, unlike in *Lillicrap,* the negligent conduct in this matter occurred prior to the inception of any contractual relationship between the parties. The essential enquiry is, however, whether this difference on the facts justifies the extension of delictual liability which was denied in *Lillicrap.*

[20] The approach to this enquiry contended for by the appellants, was whether there is any consideration indicated by public or legal policy why delictual liability should not be extended to the damages resulting from the respondent's negligent conduct in this case. Departing from this premise, they argued that no such consideration, such as, for example, a concern for indeterminate liability as to amount or class, exists. That may or may not be so. I do not believe, however, that the approach to the enquiry contended for is open to us. It is in direct conflict with the following statement by Grosskopf AJA in *Lillicrap* (at 504D-H), with reference to the judgment of the House of Lords in *Anns v Merton London Borough Council* (1978) AC 728 (HL) (which was subsequently overruled in *Murphy v Brentwood District Council* (1990) 2 All ER 908 (HL)):

'No doubt the application of the principle stated in *Anns'* case, … 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 be different from ours. … English law adopts a liberal approach to the extension of a duty of care. … 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 considerations which favour such an extension.'

[21] In accordance with this cautious approach, so Grosskopf AJA held (at 500F of *Lillicrap*), the first question in a case such as this is whether

there is any need for the extension sought. On the facts of this matter that question should, in my view, for considerations not dissimilar to those that applied in *Lillicrap*, again be answered in the negative. It is true that in this matter there was as yet no contract between the parties when the negligent conduct giving rise to the trust's damages occurred, and that until it came into existence the trust was not capable of contractually regulating the relationship. Nevertheless, it is clear from the facts pleaded that it was intended from the outset by all concerned that, if the aquarium project was to proceed at all, it would be governed by a contractual relationship that would be created once the trust was formed. It was also foreseen from the outset that the trust could not possibly suffer any damages through the negligent conduct of the respondent, unless and until that contractual nexus was brought into existence, through the formal appointment of the respondent, by or on behalf of the trust, as its consultant engineer.

[22] I say this because it is pleaded (in para 10 of the particulars of claim – quoted in para [8] above) that it was at all times contemplated by the joint venture, as well as by the respondent and the project managers that the aquarium project would be conducted through the vehicle of a trust. It is further alleged (in para 11 – also quoted in para [8] above) that the respondent had 'agreed with the joint venture that it would assist in

its capacity as consulting engineer in investigating the feasibility of the aquarium project with a view to its formal appointment in the event of the project going ahead.' Consequently there would either be no trust and no project that could give rise to any damages or there would be a relationship between the trust and the respondent governed by contract. These were the only two possibilities. There was no other.

[23] In these circumstances I can see no reason why the trust could not have been covered against the risk of harm due to the respondent's negligent conduct by appropriate contractual stipulations covering even conduct that occurred before the trust was formed. This, so it seems, could have been done on two occasions. First, by way of a *stipulatio alteri* in favour of the trust (to be formed) in the agreement between the joint venture and the respondent (see eg *McCullogh v Fernwood Estate Ltd* 1920 AD 204 at 208). Or, by the insertion of apposite provisions relating to any decisions which might already have been taken by the respondent, in the contract of formal appointment. I find support for this consideration in the judgment of the High Court of Australia in *Woolcock Street Investments (Pty) Ltd v C D G (Pty) Ltd (formerly Cardno & Davies* [2004] HCA 16, in which 'vulnerability to risk' was held to be a critical issue in deciding whether delictual liability should be extended in a particular situation (see eg McHugh J in para 80 of the judgment). In

this regard it is to be noted that the concept of 'vulnerability' as developed in Australian jurisprudence is something distinct from potential exposure to risk and that the criterion of 'vulnerability' will ordinarily only be satisfied where the plaintiff could not reasonably have avoided the risk by other means – for example by obtaining a contractual warranty or a cession of rights. I find the Australian reasoning to be in accordance with the cautious approach of our law with regard to the extension of Aquilian liability that I have referred to.

[24] Generally speaking, I can see no reason why the Aquilian remedy should be extended to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means, but who failed to do so. In argument the only answer to this difficulty proffered by the appellants' counsel was that the insertion of appropriate contractual provisions would require a great deal of wisdom before the event by those acting on behalf of the trust, which could not be reasonably expected at the time. In support of this answer counsel placed particular reliance on the minority judgment of Kirby J (para 173) in the *Woolcock* case. Though I obviously express no opinion on the facts of *Woolcock,* I do not think that answer is supported by the facts of this case. First, the trust was represented, not only by presumably able trustees, but also by professional project managers. Second, it appears from the way in which

the appellants' case was pleaded that it should have been plain to everybody concerned that the respondent could opt for a particular design prior to its formal appointment and that if it was negligent in doing so, the trust would suffer damages when that wrong option was eventually implemented.

[25] Other considerations alluded to by Grosskopf AJA as to why Aquilian liability does not fit comfortably in a contractual setting (cf *Lillicrap* 500G-501G) also find application in this case. To illustrate – what would happen if the respondent's design, which was eventually implemented, complied with its obligations undertaken in terms of its formal agreement of appointment, but not with the standards of the notional reasonable engineer? Would it then make any difference that the design was decided upon prior to the appointment? Or, what if the appointment contract is construed to relate to the design as eventually implemented, irrespective of whether it was decided upon by the respondent before or after its formal appointment. Would the respondents conduct then be measured by two different standards – one contractual and the other delictual? Or, what if the respondent had been asked, but refused to give a contractual warranty in respect of the work that it had done on a speculative basis and without any remuneration prior to its formal appointment. Would it still be held liable in delict if that

work was negligently done? In short, I believe that the following statement by Grosskopf AJA in *Lillicrap* (at 500H-I) is equally apposite in this case:

'[I]n 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.'

[26] Finally, the appellants argued that the position of the trust *vis-à-vis* the respondent is analogous to that of the relationship between the subsequent owner of a building and the builder responsible for its construction. They therefore sought support for the extension of Aquilian liability in the present context in those cases where the subsequent owner was afforded a remedy in delict against the builder for damages resulting from the negligent execution of the building contract to which the subsequent owner was not a party. Authorities referred to in this regard included judgments of the High Court of Australia (in *Bryan v Maloney* 1995 (128) A.L.R. 163) and the Supreme Court of Canada (in *Winnipeg Condominium Corp No 36 v Bird Construction & Co* (1995) s 12(1) D.L.R. (4th) 193). The respondent's reply to this argument was based on equally weighty authorities going the other way (see eg *D & F Estates Ltd v Church Commissioners for England* (1988) 2 All ER 992 (HL); *Murphy v Brentwood District Council* (1990) 2 All ER 908 (HL) and

Woolcock Street Investments (Pty) Ltd v C D G (Pty) Ltd (formerly Cardno & Davies Australia (Pty) Ltd) supra).

[27] In the light of the view that I hold on the facts of this matter, I find it unnecessary to enter into the rather complex debate regarding the extension of delictual liability to afford a remedy in the subsequent purchaser situation. Unlike the relationship between the trust and the respondent in this matter, there is never any direct contractual relationship between the builder and the subsequent purchaser. Unlike the trust, the subsequent purchaser would therefore not have had any opportunity to arrange the features of that relationship by way of contract. That, as far as I am concerned, is a material difference. Whether that material difference will lead to a different result in the subsequent purchaser situation, is one we do not have to decide.

[28] It follows that in my view the exception was rightly upheld. In the result –

'The appeal is dismissed with costs, including the costs of two counsel.'

…….
F D J BRAND
JUDGE OF APPEAL

Concur:

HOWIE P
NUGENT JA
JAFTA JA
MAYA AJA