THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 280/03
Reportable

In the matter between :

F F HOLTZHAUSEN APPELLANT

and

ABSA BANK LIMITED RESPONDENT

CORAM : HARMS, NAVSA, BRAND, CLOETE, HEHER JJA

HEARD : 7 SEPTEMBER 2004

DELIVERED : 17 SEPTEMBER 2004

Summary: An action is maintainable in delict for a negligent misstatement causing pure pecuniary loss even if a concurrent action is available in contract. The denial of an action in delict in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty)* Ltd 1985 (1) SA 475 (A) is limited to the case where the negligence alleged consists in the breach of a term of a contract.

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The appellant as the plaintiff sued the respondent bank as the defendant for damages. At the end of the plaintiff's case the learned trial judge (Van Coppenhagen J) absolved the bank from the instance. The plaintiff was ordered to pay the bank's costs up to the date of delivery of the plea because the court considered that the particulars of claim were excipiable. This appeal is with the leave of the trial court.

[2] The factual background of the claim, as testified to by the plaintiff, was the following. The plaintiff proposed delivering a quantity of cut diamonds which he owned to a person, whom he had met casually, as the agent for an unidentified purchaser, who would pay R500 000 for them. The plaintiff undertook to pay the agent a commission of R20 000 if the transaction was concluded. In due course the agent advised the plaintiff that the amount of R500 000 had been paid into a Johannesburg bank for the credit of the plaintiff's bank account. He provided the plaintiff with three telephone numbers to verify the information. The plaintiff obtained a copy of his bank statement, which showed that such an amount had indeed been credited to his account. He assumed (correctly, as it transpired) that the deposit in the Johannesburg bank had been by

cheque. He then approached the manager of the defendant bank where he kept his account, to ascertain whether he could safely proceed with the transaction and hand over the diamonds. The manager was apprised of the reason for the enquiry. The plaintiff furnished the manager with the three telephone numbers given to him. Although the plaintiff's evidence was not always consistent on this point, there are passages in his evidence where he said that after making several telephone calls, the manager gave him the assurance that the money was safe and that he could indeed proceed with the transaction. The manager also personally authorised the withdrawal by the plaintiff of the R20 000 commission payable to the agent. It subsequently transpired that a fraud had been perpetrated and the credit to the plaintiff's bank account was reversed.

[3] The basis of the plaintiff's pleaded claim is not clear. The plaintiff alleged that the bank manager undertook to, and did, have the cheque cleared. The plaintiff also alleged that the bank manager was under a legal obligation not to make a misrepresentation to him and that the bank manager did so by representing that the cheque had been honoured, whereas it had not. One thing is, however, clear from the pleadings and the evidence and that is that the plaintiff did not rely on the breach of any contract between himself and the bank as constituting negligence for a

claim based in delict. In this court the plaintiff's counsel nailed his colours to the mast by disavowing any reliance on a claim based in contract, and advancing only a claim in delict for pure economic loss suffered in consequence of a negligent misstatement.

[4] In its judgment the trial court stated that according to the plaintiff's counsel the plaintiff's claim was for damages in delict based on the breach of a contractual term or obligation, and granted absolution because of the decision of this court in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A). But that was neither the plaintiff's pleaded case nor the basis upon which the trial was conducted.

[5] Counsel who represented the bank when the heads of argument were delivered (not the counsel who appeared to argue the appeal) sought to justify the order made by the trial court by submitting that a claim for pure economic loss is not maintainable in delict when a claim can be maintained in contract. That, wrote counsel, is the effect of *Lillicrap*. But it is not, as is apparent from *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A). In *Bayer*, this court decided that in principle a negligent misstatement inducing the representee to enter into a contract with the respresentor may, depending on the circumstances, give rise to a

delictual claim for damages at the suit of the representee. In reaching this conclusion, Corbett CJ said at 569I-570D:

'Before us appellants' counsel referred to the case of *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) in which, so it was submitted, a conservative approach to the extension of remedies under the *lex Aquilia* was stressed; and to the case of *Ericsen v Germie Motors (Edms) Bpk* 1986 (4) SA 67 (A) at 91E-G where, counsel said, the "apparent conflict" between the *Kern Trust* case *supra* [*Kern Trust (Edms) Bpk v Hurter* 1981 (3) SA 607 (C)] and the *Lillicrap* case was left open. The words, "apparent conflict", are counsel's. The Court in *Ericsen's* case merely stated that the plaintiff's advocate, in advancing a case based upon negligent misstatement inducing a contract, relied upon *Kern's* case and that defendant's advocate, in opposing it on legal grounds, cited *Lillicrap's* case; and that because the misstatement had not been shown to be negligent it was not necessary to decide this legal issue. *Lillicrap's* case itself was concerned with an entirely different issue, viz whether the breach of a contractual duty to perform professional work with due diligence is *per se* a wrongful act for the purposes of Aquilian liability, with the corollary that if the breach were negligent damages could be claimed *ex delicto*. The Court decided, mainly for reasons of policy, that it was not desirable to extend the Aquilian action to the duties subsisting between the parties to such a contract of professional service. *Kern's* case was not discussed in either the majority judgment or the minority judgment in *Lillicrap's* case and I do not consider the latter case to constitute any impediment to the recognition of a cause of action founded upon a negligent misstatement inducing a contract.'

Counsel who appeared to argue the appeal for the bank was accordingly correct in not persisting in the argument advanced by his predecessor.

[6] *Lillicrap* decided that no claim is maintainable in delict where the negligence relied on consists in the breach of a term in a contract. That is quite apparent from what was said by Grosskopff AJA at 499A-501H. The passage begins:

'In applying the test of reasonableness to the facts of the present case, the first consideration to be borne in mind is that the respondent does not contend that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded requiring it to perform professional services.'

The learned judge emphasized at 499D-F:

'The only infringement of which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those which would place it in the position it would have occupied if the contract had been properly performed. In determining the present appeal we accordingly have to decide whether the infringement of this duty is a wrongful act for purposes of Aquilian liability.'

The following passage written by J C van der Walt in *LAWSA* vol 8 para 5 was approved (at 499I):

'The same conduct may constitute both a breach of contract and a delict. This is the case where the conduct of the defendant constitutes both an infringement of the

plaintiff's rights *ex contractu* and *a right which he had independently of the contract*.' (The italics were added by the learned judge.)

The judgment went on to point out (at 500A-B) that:

'Apart from the judgments in *Van Wyk v Lewis (supra)* this Court has never pronounced on whether the negligent performance of professional services, rendered pursuant to a contract, can give rise to the *actio legis Aquiliae*.'

The learned judge then gave reasons why Aquilian liability should not be extended to cover the respondent's claim (at 500F-501G) and concluded (at 501G-H):

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

[7] *Lillicrap* is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. On the contrary, Grosskopff JA was at pains to emphasize (at 496D-I) that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue. Thus in *Durr v ABSA Bank Ltd* 1997 (3) SA 448 (SCA), a case which concerned the duties of an investment advisor recommending investment in debt-financing instruments, Schutz JA found no difficulty in saying (at

453G):

'The claim pleaded relied upon contract, alternatively delict, but as the case was presented as one in delict, and as nothing turns upon the precise cause of action, I shall treat it as such.'

[8] In the present matter the pleadings cover a claim for damages for negligent misstatement. The plaintiff does not rely on the breach of any contractual obligation which the defendant or its servants may have owed him, as constituting the negligence for this claim. The plaintiff's case as it was presented in evidence was that a right which he had independently of any such contract, was infringed. The decision in *Lillicrap* is accordingly of no application.

[9] The same conclusion ought to have been reached in *Pinshaw v Nexus Securities (Pty) Ltd* 2002 (2) SA 510 (C). In that matter the plaintiff sued (as the second defendant) a director of an investment company (Nexus, the first defendant) in delict for pure economic loss occasioned by the bad investment by him of funds she had entrusted to the company. The court correctly recognised (at 534J-535A) that a legal duty giving rise to an action in delict can exist independently of a contract. The court went on, however, to say the following (at 535F-I):

'*Lillicrap's* case *supra*, was concerned with professional engineers rendering their

professional services in terms of a contract with *Pilkington Brothers* and later in terms of a sub-contract. In my respectful opinion, *Lillicrap* should not be extended to *quasi*-professionals, such as Nexus, offering financial services and holding themselves out, expressly or by implication, as possessing appropriate skills. Nor should *Lillicrap* be extended to the employees of such quasi-professionals. This is not to say that companies offering financial services, or their employees, will always attract a legal duty of care to their clients. That must depend on the circumstances. It is more than 15 years since *Lillicrap* was decided. The cases in this developing area of the law, in this country and elsewhere, do not indicate a need to extend the *Lillicrap* embargo to a broader class of defendants. On the contrary, the case law in my view supports the need to retain flexibility.'

This finding, with respect, misinterprets the effect of the judgment in *Lillicrap* and in particular, the remarks of Grosskopff JA at 501G-H which I have already quoted (at the end of para [6] above). The court in *Pinshaw* erred in two respects. First, the premise underlying the reasoning is that *Lillicrap* decided that where delictual liability coexists with liability for breach of contract, the aggrieved party is limited to a claim in contract. That premise is wrong, as I have already shown. Second, the remarks of Grosskopff AJA in the passage just referred to reflect the facts of the case before the court which concerned a contract of professional employment, and must not be interpreted as limiting the principle laid down in that case to such contracts.

[10] It would also be desirable to deal briefly with the decision in *Erasmus v Inch* 1997 (4) SA 584 (W) where the court, as a part of an extended *obiter dictum*, said at 595B-D:

'The Supreme Court of Appeal will one day have to reconcile *Standard Chartered Bank of Canada v Nedperm Bank Ltd (supra)* [1994 (4) SA 747 (A)], where a party which contracted to perform a service was held liable in delict, with *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd (supra)*, in which a concurrent delictual remedy was denied.'

The difference between the two cases is simply this. In *Standard Chartered Bank* the negligence relied on did not consist in the breach of a contractual term. In *Lillicrap*, it did.

[11] Two arguments were advanced by counsel who appeared for the bank to argue the appeal in an attempt to justify the order made by the trial court. The first was that the conduct of the bank manager could not be found to have been unlawful; the second, that the bank manager could not be found to have been negligent. It is true that the plaintiff's evidence can be subjected to a number of criticisms which could possibly lead to its rejection at the end of the case as a whole. But absolution was granted at the end of the plaintiff's case. The test applicable is set out in *Gordon Lloyd Page and Associates v Rivera* 2001 (1) SA 88 (SCA) para [2]. In my

judgment there are reasonable inferences and there is evidence which, considered reasonably, could or might (not should or ought to) lead to a finding for the plaintiff.

[12] So far as unlawfulness is concerned, the following findings might be made on the evidence led thus far: That the statement by the bank manager was made in response to a serious request; that the plaintiff approached the bank manager because of his expertise and knowledge of banking matters; and that the plaintiff's purpose in making the enquiry was, to the knowledge of the bank manager, to ascertain whether he could safely proceed with the transaction. It could be inferred that the bank manager realised that the plaintiff would rely on his answer. On the evidence led thus far, it might further be found that there are no considerations of public policy, fairness or equity to deny the plaintiff a claim; that no question of limitless liability could arise; and that an unfair burden would not be placed on the manager or the bank if liability were to be imposed — inasmuch as the manager could have refused to act on the plaintiff's request and could have protected himself and the bank against the consequences of any negligence on his part by a disclaimer. See *Standard Chartered Bank* at 770B-771B. Of course it goes without saying

that at the end of the case, the trial court might come to the conclusion that no legal duty rested upon the bank manager to take reasonable steps to ensure that any representation which he may have made, was correct.

[13] So far as negligence is concerned, the defendant's counsel submitted that there was no evidence to support a finding that the bank manager made a misstatement to the plaintiff in the terms pleaded, namely, that the cheque would be honoured; and that at best for the plaintiff, all the bank manager did was to give an honest answer to the plaintiff's enquiry which, submitted counsel, only required the bank manager to telephone the three numbers provided to him by the plaintiff in order to ascertain whether the purchaser had sufficient funds. It is true that on the plaintiff's evidence the bank manager did not say in so many words that the cheque would be honoured; and, as I have said, his evidence as to what precisely he was told by the bank manager was not entirely consistent. But the plaintiff did testify in cross-examination that the bank manager had said that the money was safe and that he could proceed with the transaction; and it appears to be common cause that the bank manager also authorised the withdrawal of R20 000 when he knew that unless the cheque was honoured, there would be no or insufficient funds in the plaintiff's bank account to meet this liability. It might be found

on this evidence that there was a misrepresentation. It might also be found that if the information elicited by the bank manager by telephoning the three numbers furnished to him by the plaintiff was not sufficient to justify this representation, the bank manager should not, without making further enquiries, have made it.

[14] To sum up: The trial court was incorrect in granting absolution from the instance on the basis which it did; and the bank's counsel has been unable to justify that order on any other grounds.

[15] The appeal is allowed, with costs. The order of the court below is set aside and the following order substituted:

'The application for absolution from the instance is dismissed, with costs.

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T D CLOETE
JUDGE OF APPEAL

Concur: Harms JA
Navsa JA
Brand JA
Heher JA