


**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

25/1/16

**CASE NO:84775/2014**

(1)	REPORTABLE: <del>YES</del> / NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> /NO
(3)	REVISED.
	25/01/2016
	DATE
	
	SIGNATURE

In the matter between:

**VINCENT VAN ROOYEN**

**Plaintiff**

**And**

**TRINAMIC CONSULTING ENGINEERS (PTY) LTD**

**1ST Defendant**

**SOLID BUILDING CONTRACTING CC**

**2ND Defendant**

**DASHDOT ARCHITECTS**

**3RD Defendant**

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**JUDGMENT**

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**KGANYAGO,AJ:**

- [1] This is an exception in terms of s23(1) of the Uniform Rules of Court, in terms of which the second defendant complains that the plaintiff's claim do not disclose the cause of action. The facts are briefly as follows:- The plaintiff contracted Riverpray Lifestyle Estate (Pty) Ltd ("Riverspray") to construct a house for him. Riverspray in turn subcontracted the three defendants. The first defendant was subcontracted as a structural engineer, the second defendant as a builder, and the third defendant as an architects for designing the house. Riverspray has now been liquidated, and is not a party to the action. The plaintiff alleges that the house built is so defective, and structurally unsound, that it will be demolished and rebuilt. The plaintiff sues the three defendants jointly and severally, alleging that each of them was either individually or jointly and materially responsible for the alleged defects on the house.
- [2] On the 6th February 2015, the second defendant served the plaintiff with a notice in terms of rule 23(1) of the Uniform Rules of Court in which it is claimed that the plaintiff's particulars of claim lacks averments necessary to sustain a cause of action. The plaintiff delivered a notice to oppose the second defendant's exception.
- [3] The plaintiff does not allege that there was any contractual relationship between him and any of the defendants. He contends, however, that each of the defendants, had a legal duty in respect of all of aspects involved in the construction of the house towards whomsoever would become the owner of the house. Accordingly, the plaintiff's claim against the defendants is a delictual one.
- [4] The second defendant contends that as a subcontractor, it had no direct contract with the plaintiff. Accordingly, so asserts the second defendant that the plaintiff cannot recover damages, for alleged defective work directly from it. According to the second defendant, it is only Riverspray which can exercise its contractual remedies against it.
- [5] It is trite that in order to succeed, an excipient must persuade the court that upon every interpretation with the pleading in question and, in particular the document

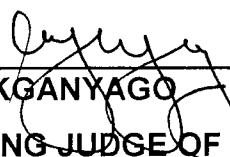
on which it is based, can reasonable bear, no cause of action is disclosed, failing this, the exception ought not be upheld. (See *Sun Packing (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 183 E and *Living Hands (Pty) Ltd No and Another v Ditz and Others* 2013 (2) SA 368 (GSJ).

- [6] In *Lillicrap, Wassenaar & Partners v Pilkington Brothers* 1985 (1) SA 475(A) the court was faced with a similar situation. The court held that the fundamental question is whether the respondent has alleged sufficient facts to constitute a cause of action for damages in delict. The court held further that in order to succeed on a claim for pecuniary loss the plaintiff must allege and prove that the defendant has been guilty of conduct which is both wrongful and culpable, and which caused a patrimonial damage to the plaintiff. The court also held that our law adopts a conservative approach to the extension of remedies under the *lex Acqulia*. The court held that it did not consider that policy considerations, require that delictual liability be imposed for negligent breach of a contract of professional employment like in that case, and that it is undesirable to extend the Aquilian action to the duties subsisting between the parties to a contract of a professional service. The relationship of the three parties is still one which has its origin in a contract and their wishes must be respected. (See also *Country Cloud Trading v MFC, Department of Infrastructure Development* 2015 (1) SA 1 (CC).
- [7] In his argument counsel for the second defendant submitted that the recognition of delictual liability by the second defendant to the plaintiff is not called for in the present case. To do so, argued counsel, would amount to the imposition of delictual warranties on remote parties under circumstances where there is a contractual chain in existence designed by the parties to regulate their rights and obligations in the context of a contractual chain in existence designed by the parties to regulate their rights and obligations in the context of a construction project.
- [8] Counsel for the plaintiff conceding that there was never a contract between the plaintiff and second defendant, and that the plaintiff's claim is a delictual one,

nevertheless argued that the contention by the second defendant that the existence of a “contractual matrix” prevents or disallows a delictual claim is not in accordance with the prevailing law.

- [9] According to the plaintiff, the second defendant is sued as a joint wrongdoer with two other defendants who have not taken any exception to the particulars of claim. Therefore, the contention is that for the mere fact of the second defendant being held jointly and severally, the second defendant should remain as a defendant.
- [10] The plaintiff further contends that there will be dire consequences should the second defendant be released from the present proceedings on the basis that no such claim is recognizable in our law and that other defendants will merely blame the second defendant for failing to have executed their plans and/or designs and/or instructions as a result of which the house was structurally unsound. According to the plaintiff, in their particulars of claim, they are contending that the second defendant has failed to comply with designs and has constructed the house incorrectly.
- [11] It is common cause that the plaintiff’s claim is based on pure economic loss. The principle developed in the *Lillicrap’s* case was restated by the Constitutional Court in *Country Cloud Trading supra* when it held that our law is generally reluctant to recognize pure economic loss claims, especially where it would constitute an extension of the law of delict.
- [12] The plaintiff had a contractual relationship with Riverspray. The mere fact that Riverspray has been liquidated, does not automatically absolve it from its liabilities. In my view, the plaintiff’s case is not distinguishable from the *Lillicrap’s* case. It is common cause that the plaintiff’s claim is based on pure economic loss, and there was no contractual relationship between him and the second defendant.

- [13] Counsel for the plaintiff in his heard of arguments has argued that the plaintiff falls within a foreseeable class of victims. According to the counsel for the plaintiff, the *bonis mores* of the community will always regard the conduct of a builder who fails to build according to design and instructions of a professional team as a wrongful conduct which should lead to liability where damages should flow from.
- [14] Now I have to determine whether I should extend the Aquilian remedy in the present situation. It determining whether to extend liability in the present case it necessary to determine whether there is a need for that. In Lillicrap's case it was held that the court should be loath to extend the law of delict in a situation like the present case and thereby eliminate provisions which the parties considered necessary or desirable for their own protection.
- [15] It is common cause that the second defendant had neither direct dealings, nor any contractual relationship with the plaintiff, but was contracted to Riverspray. The contract between the plaintiff and Riverspray has defined the nature of their relationship and what performance was required from each party. Therefore, in my view, I do not consider that policy considerations, require that delictual liability be extended in the present situation.
- [16] In the result I make the following order.
- 16.1 The second defendant's exception is upheld.
- 16.2. The claim against the second defendant is struck out.
- 16.3. Plaintiff to pay defendant's costs including the costs of employment of the senior counsel.

  
MF KGANYAGO  
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 03 November 2015

Judgment delivered:

Appearances:

For the Plaintiff: Adv TA LL Potgieter SC

Pieter Moolman Attorneys

C/O Couzy Hertzog & Horak, Pretoria.

For the second defendant: Adv L J van der Linde SC

Instructed by: Tim du Toit Co Inc, Pretoria