THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 294/10

In the matter between:

AB VENTURES LIMITED **Appellant**

and

SIEMENS LIMITED **Respondent**

Neutral citation: *AB Ventures v Siemens* (294/10) [2011] ZASCA 58 (31 March 2011)

Coram: NUGENT, CLOETE, PONNAN, SNYDERS and BOSIELO JJA

Heard: **10 MARCH 2011**

Delivered: **31 MARCH 2011**

Summary: **Delict – pure economic loss – negligence of an associated contractor – plaintiff capable of having avoided the loss contractually – no grounds to extend Aquilian liability.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Fabricius AJ sitting as court of first instance)

The appeal is dismissed with costs that include the costs of two counsel.

JUDGMENT

NUGENT JA (CLOETE, PONNAN, SNYDERS and BOSIELO JJA concurring)

[1] The appellant (AB Ventures) sued the respondent (Siemens) in the North Gauteng High Court for damages in delict. Siemens excepted to the particulars of claim on the grounds that they lacked averments necessary to found an action. The exception was upheld by Fabricius AJ and AB Ventures now appeals with the leave of that court.

[2] An exception of this kind must be determined as if the allegations of fact in the particulars of claim have been established. I do not intend setting out those allegations in detail. It is sufficient for present purposes for them to be summarized.

[3] AB Ventures concluded a written agreement with Lumwana

Mining Company Limited (Lumwana) under which AB Ventures undertook to construct to completion the Lumwana Copper Mine in northern Zambia. A joint venture between Ausenco Americas LLC and Bateman International Projects BV was to supply four specialized electrical units (referred to in the particulars of claim as 'the drives') that were to be used by AB Ventures in the project. The joint venture concluded a written agreement with Siemens under which Siemens undertook to engineer, design, manufacture, supply and commission the drives.

[4] Siemens delivered, installed and commissioned the drives at the construction site. After the drives had been commissioned they malfunctioned, resulting in a failure of the transformers in which the drives were used. That caused the completion of the project to be delayed, in consequence of which, AB Ventures alleged, it became liable to Lumwana for penalties or damages under the construction contract, and it also incurred additional expenses. AB Ventures alleged that the malfunction of the drives and the resultant loss was caused by negligence on the part of Siemens and it claimed damages to compensate for its loss.

[5] Although not elegantly expressed the issue that was presented by the exception was whether the conduct of Siemens – which must be accepted to have been negligent for present purposes – was wrongful and thus actionable at the hands of AB Ventures. That is quintessentially a matter that is capable of being decided on exception.[1]

[6] Liability for negligent conduct has been developed and continues to develop incrementally as the expectations and needs of society evolve.

1 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.

The law has for long recognised that physical loss caused by a positive act of negligence is actionable. It is now 32 years since this court in *Administrateur, Natal v Trust Bank van Afrika Bpk*[2] took a significant step in the development of the law when it placed its imprimatur[3] on the recognition of a claim for recovery of damages for pure economic loss caused by a misstatement that is made negligently.[4] Since then the law has been developed further to recognize that a bank may be liable to the true owner of a cheque that it collects negligently,[5] and to recognise claims for pure economic loss in other diverse circumstances,[6] and no doubt the law will continue its development to include other circumstances. This is one such case in which we are asked to take another step in that direction.

[7] Various epithets have been used to express the nature of the enquiry to be made when the law is sought to be developed in that way[7] – whether the 'legal convictions of the community' call for the recognition of liability, whether the plaintiff's interest falls within 'the range of interests that the law sees fit to protect against negligence', the 'boni mores' of society, the 'general criterion of reasonableness' – but in each case the expression is so wide as not to be a true test at all. They

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2 *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).

3 Approving the views expressed in *Suid-Afrikaanse Bantoetrust v Ross & Jacobz* 1977 (3) SA 184 (T) and in the court below reported as *Administrator, Natal v Bijo* 1978 (2) SA 256 (N) at 260B-261B. The claim was nonetheless dismissed on its facts.

4 See, too, *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A), *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A), *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A), *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A).

5 *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A). The matter was decided on exception.

6*Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar & others* 2010 (5) SA 499 (SCA) and *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA). *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 (4) SA 455 (SCA) purports to be such a claim but Prof Neethling has said that in truth it is not: J Neethling 'Delictual Liability of a Security Firm for the Theft of a Vehicle Guarded by its Employees' *74 THRH 169*.

7The same considerations apply when the law is developed to encompass new cases arising from negligent omissions.

nonetheless help to direct attention to the nature of the enquiry.

[8] Cases that have been decided in this court for thirty years and more make it clear that the enquiry underlying those expressions is whether contemporary social and legal policy calls for the law to be extended to the exigencies of the particular case.[8] Thus as early as *Trust Bank* Rumpff JA said that when 'legal duty' (wrongfulness) is under consideration 'policy considerations' come into play.[9] He likened it to the 'duty concept' in the English tort of negligence, which Millner, *Negligence in Modern Law*[10], described as 'a device of judicial control over the area of actionable negligence *on grounds of policy*'. He went on to cite the description by Fleming, *The Law of Torts*[11] of the nature of that policy enquiry:

'In short, recognition of a duty of care [in the parlance of this country, whether the conduct is wrongful] 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 of 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.'

[9] For in each such case a court is being asked to extend the common law, and all of the common law, from its beginnings, is the product of

8*Trust Bank*, above, 833D-834A; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) 797E-G; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 26J-27I; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 16; *Road Accident Fund v Shabangu* 2005 (1) SA 265 (SCA) para 12; *Gouda Boerdery BK v Transnet* 2005 (5) SCA 490 (SCA) para 12; *Local Transitional Council of Delmas & another v Boshoff* 2005 (5) SA 514 (SCA) para 19; *Telematrix,* above, para 13; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 1; *Trustees Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 12. And see generally MM Corbett, Aspects of the Role of Policy in the Evolution of our Common Law' (1987) 104 *SALJ* 52.
9 At 833C-D.
10 (1967) p 24.
11 4 ed p 136.

contemporaneous social and legal policy. That was aptly captured by the famous statement of Oliver Wendell Holmes Jr in the introduction to his lectures on the common law – 'the life of the common law has not been logic: it has been experience' – and from what followed:[12]

'The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become . . . The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient . . .'.

[10] Thus by the very nature of the enquiry it will generally not be helpful in a particular case to look to what has been decided in other cases of an altogether different kind. Where the case is not one that fits within the social and legal policy that has led to liability being recognised in other cases, then what is called for instead is reflection upon what considerations there might be that necessitate the law also being advanced to meet the new case. That calls not for a mere intuitive reaction to the facts of the particular case but for the balancing of identifiable norms.[13]

[11] For in *Telematrix (Pty) Ltd v Advertising Standards Authority SA AB Ventures*[14] Harms JA reminded us that the first principle of the law of delict is that loss ordinarily lies where it falls and that Aquilian liability provides an exception to that rule. He went on to say that

'[w]hen dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not *prima facie* wrongful . . . and that more is

12 O.W. Holmes Jr. *The Common Law* (Little, Brown and Company 1881) pp 1-2.
13 *Van Duivenboden,* above, para 21, *Telematrix*, above, para 16, *Fourway Haulage,* above, para 22.
14 Above.

needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered . . .. In other words, conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant.'

[12] In this case counsel for AB Ventures placed heavy reliance upon cases that fall under the rubric of what has come to be called 'products' or 'manufacturer's' liability. It was submitted that, analogous to those cases, Siemens held itself out as having special skill and knowledge relating to the design and manufacture of units of the kind that are now in issue, and is thus liable for loss caused to the user by a defect in the product. The submission aligned itself with what was said in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*:[15]

'[A] manufacturer who distributes a product commercially, which, in the course of its intended use, and as the result of a defect, causes damage to the consumer thereof, acts wrongfully and thus unlawfully . . .'..[16]

[13] The landmark case that commenced that form of liability in England was the famous case of the snail in the bottle of ginger beer (*Donoghue v Stevenson*[17]) and in the United States the case of the defective motor vehicle (*MacPherson v Buick Motor Co*[18]). The significance of those cases was that they loosened the contractual nexus that until then had been required for liability. Professor Boberg[19] has pointed out that there has been no such landmark judgment in this country in which the more flexible principles of our law have allowed for

152002 (2) SA 447 (SCA).
16 The quotation is taken from the headnote, which accurately paraphrases and translates what was said at 470F-G.
17[1932] AC 562 (HL).
18217 NY 382.
19 PQR Boberg *The Law of Delict* Vol 1 (1984).

its development to encompass those circumstances.[20]

[14] I do not find it necessary to deal with the cases of that kind that we were referred to[21] or to examine the elements of 'products liability' generally.[22] Liability has been recognized in cases of that kind for reasons that have no application in this case. Professor Boberg points out that they are founded on the perceived need to protect consumers against the risks to which they are exposed by the impersonal distribution of consumer goods in modern society:

'The manufacture and sale of goods that is the essence of an industrialized capitalist economy is an activity potentially harmful to others. For the ultimate purchaser or a third party may suffer damage to his person, property or purse through a product that is defective or even through one that is not. He will demand legal redress, and the law must determine under what conditions it should be given to him. In so doing the individual's interest will have to be weighed against the socio-economic utility of the damage-producing activity, and the ensuing liability so fashioned that it affords adequate protection without stifling beneficial industrial progress . . .. The growth of mass-production and technology tends to increase consumer risk (identical products suffer from identical defects) and to relegate the intermediate dealer to a position of mere distributorship, focusing attention upon the manufacturer as the appropriate defendant. His liability to those with whom he has not contracted can only be found in delict.'[23]

To the same effect Professor Neethling et al[24] say that the problem that

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20P 194.

21Amongst which were *Cooper & Nephews v Visser* 1920 AD 111, *A Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd* 1975 (2) SA 457 (W) and *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*, above. In those cases the claim was for physical loss but a claim for pure economic loss was allowed in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (1) 8 (GSJ). Subsequent to the hearing of the appeal in this case judgment was handed down by this court on appeal against that decision: *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* [2011] ZASCA 22. The quite different facts of that case, and the basis upon which the claim was upheld, make it unhelpful to deciding this case. Reliance was also placed on the decision of this court in *Chartaprops 16 (Pty) Ltd & another v Silberman* 2009 (1) SA 265 (SCA). In that case the defendant was held vicariously liable for the act of its servant and it has no application.

22J Neethling, JM Potgieter, PJ Visser *Law of Delict* 5ed (translated and edited by JC Knobel), pp 291-301.

23Pp 193-194.

24*Law of Delict*, above.

has given rise to products liability

'is inherent in modern highly industrialised communities. Increasing industrialisation and mechanisation have brought about a constant and daily potential of prejudice in the form of the unavoidable risk which defective consumer products create for the individual.'[25]

[15] The considerations of policy that underlie cases of products liability have no bearing upon a case of the present kind. We are not concerned in this case with anonymous consumers of mass-produced goods. We are concerned with a major construction project involving a multiplicity of contractors and sub-contractors whose co-operation was defined through a web of inter-related contractual rights and obligations. That bears no resemblance to the distant and impersonal relationship that characterises the distribution of bottles of ginger beer and motor vehicles.

[16] It seems to me that there would be major implications for a multi-partied project of this kind if each of the participants was to be bound not only to adhere strictly to the terms of its specific contractual relationship but, in addition, it was to be held bound to all the other participants by a general regime of reasonableness. As pointed out in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd,*[26] in a related context that finds equal application in this case:

'[In] general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly, the nature and quality of the performance required from each party. If the Aquilian action were generally available for defective performance of contractual obligations, a party's performance would presumably have to be tested not only against the definition of his duties in the contract, but also by applying the standard of the *bonus paterfamilias*. How is the latter standard to be determined?

25P 292.
261985 (1) SA 475 (A) at 500H-I.

Could it conceivably be higher or lower than the contractual one?'

In this case in which Siemens bound itself to the joint venture to conform to the standards specified in its contract, it would be most anomalous if it was to be bound to a stranger to conform to a different standard.

[17] That points to why it is fallacious to align a case of this kind to cases concerning products liability. In those cases it is not possible in any practical sense for a consumer to protect himself or herself against harm caused by the negligence of the manufacturer. But where an activity is engaged in that is itself the product of a contractual arrangement then generally the very contract that brought about the engagement will be capable of regulating exposure to loss. That is the ground upon which the claim failed in *Pilkington Brothers* and why it must similarly fail in this case.

[18] *Pilkington Brothers* was also decided on exception. The facts alleged were that Pilkington Brothers (the plaintiff) appointed Lillicrap, Wassenaar and Partners (the defendant) as its consultant engineer to investigate the suitability of a site for the construction of a glass manufacturing plant. If the site was found to be suitable then the defendant was to design and supervise construction of the plant. The defendant advised the plaintiff that the site was suitable and it proceeded to design the works. A formal agreement was then executed confirming the appointment. (The rights and duties under the agreement were later assigned to a third party but for present purposes I need deal only with the position before that occurred.) The plaintiff alleged that the defendant was negligent in failing to incorporate in its design sufficient safeguards against soil movement and that it was negligent in its supervision of the works and it claimed loss alleged to have been incurred through such

negligence. Its claim was brought in delict and an exception was taken to the particulars of claim on the same grounds that the exception was taken in this case – that the conduct complained of was not wrongful for purposes of delictual liability.[27]

[19] Pointing out that our law 'does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations which favour such an extension,'[28] Grosskopf AJA said that the first question to be asked was whether there was a need for the law to be extended to protect the plaintiff against negligence. He concluded that there was no such need because the existing law enabled the plaintiff to protect itself through the contract that it had concluded. He reasoned as follows:

'In my view, the answer [to the question whether an extension of Aquilian liability is justified in the present case] must be in the negative, at any rate in so far as liability is said to have arisen while there was a contractual *nexus* between the parties. While the contract persisted, each party had adequate and satisfactory remedies if the other were to have committed a breach . . .. When parties enter into such a contract, they normally regulate those features which they consider important for the purpose of the relationship which they are creating . . .. [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.' [29]

And later:

'Apart from defining the parties' respective duties (including the standard of performance required) a contract may regulate other aspects of the relationship between the parties. Thus, for instance, it may limit or extend liability, impose penalties or grant indemnities, provide special methods of settling disputes (eg by arbitration) etc. A Court should therefore in my view be loath to extend the law of

27At 496I-497B. There were further grounds for the exception that are not relevant to this case.
28At 504G.
29At 500F-I.

delict into this area and thereby eliminate provisions which the parties considered necessary or desirable for their own protection. The possible counter to this argument, viz that the parties are in general entitled to couch their contract in such terms that delictual liability is also excluded or qualified, does not in my view carry conviction. Contracts are for the most part concluded by businessmen. Why should be law of delict introduce an unwanted liability which, unless excluded, could provide a trap for the unwary?' [30]

In conclusion:

'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.' [31]

[20] Counsel for AB Ventures pointed out, correctly, that in that case a contractual nexus existed between the plaintiff and the defendant, but that in this case AB Ventures and Siemens are not in contractual privity. He submitted that in those circumstances AB Ventures was not capable of protecting itself against the negligence of Siemens in the same way.

[21] The principle that emerged from *Pilkington Brothers* was that there was no call for the law to be extended when the existing law provided adequate means for the plaintiff to protect itself against loss.[32] There is no principial distinction between the two cases. The distinction lies only in the form in which each plaintiff might have protected itself.

[22] If AB Ventures indeed sustained loss then the reason that it did so was because it attracted the loss to itself in its contract with Lumwana. By its own contractual act it took upon itself the risk of liability arising from delay and expenses that might be caused by the default of other

30At 501E-G.
31At 501G-H.
32Followed in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA).

contractors. The act of Siemens in causing delay and expense was no more than the trigger for that liability to arise. Had AB Ventures not contracted to accept that risk in the first place then it would not have suffered the loss at all. That it had no contractual nexus with Siemens means only that it was not capable of shifting the loss that it had brought upon itself to Siemens contractually but that is beside the point. We are concerned with whether it was capable of avoiding the loss, and not whether it was capable of shifting it elsewhere, and clearly it was capable of doing so.

[23] Indeed, the standard-form general conditions of the construction contract that AB Ventures concluded with Lumwana anticipated that there might be delay caused by defective performance by other contractors and clause 8.4 entitled AB Ventures to an extension of time for completion if that came about. Whether or not that clause protected AB Ventures in the present circumstances is not an issue that is before us. I refer to it only to illustrate how it might have protected itself. No doubt it could also have protected itself against additional expenses in a similar way. The only reason that the case is before us is that AB Ventures took liability upon itself when it might just as well not have done so.

[24] It was submitted that there is no certainty that AB Ventures would have secured the contract had it insisted on excluding liability caused by the default of other contractors or sub-contractors and that evidence should be required on that point. Whether or not it would have secured the contract is immaterial. It is not entitled as of right to secure a contract and has no cause for complaint if it chooses to contract on unfavourable terms. The question to be asked is only whether the law calls for extension to recover loss where the law already provides a means for it to

be avoided. *Pilkington Brothers* answered that in the negative and the same must be said for this case.

[25] In my view the exception was correctly upheld and the appeal should be dismissed with costs that include the costs of two counsel.

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R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	D M Fine SC A W T Rowan
	Instructed by: Rudolph, Bernstein & Associates, Sandhurst; Naudes, Bloemfontein
For respondent:	J J Reyneke SC
	Instructed by: Tiffenthaler Attorneys, Rivonia; Honey Attorneys Inc, Bloemfontein