IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 8293/10

In the matter between:

HYDE CONSTRUCTION CC	**Plaintiff**
and	
BLUE CLOUD INVESTMENTS 40 (PTY) LTD	**First Defendant**
BARRY ST LEGER-DENNY	**Second Defendant**

JUDGE	:	**P.A.L. GAMBLE**
FOR PLAINTIFF	:	**Adv. E.C.D. Bruwer**
INSTRUCTED BY	:	**Mosdell Pama Cox Attorneys**
FOR FIRST DEFENDANT	:	**Adv. Dawid Welgemoed**
INSTRUCTED BY	:	**Shepstone and Wylie**
FOR SECOND DEFENDANT	:	
INSTRUCTED BY	:	**Andrew Miller and Associates**
DATES OF HEARINGS	:	**10 February 2010**
DATE OF JUDGMENT	:	**1 August 2011**

REPORTABLE

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JUDGMENT : 1 AUGUST 2011

GAMBLE, J:

INTRODUCTION

[1] This exception is concerned with the potential delictual liability of a person appointed as an agent under a building contract for damages to one of the parties to that contract.

[2] The principal dispute in this litigation is between the Plaintiff ("the contractor") and the First Defendant ("the employer"). It is alleged in the particulars of claim that on 25 July 2005 these parties concluded a written agreement in terms whereof the

contractor would undertake certain building work at the employer's premises in Knysna, including alterations and additions to an existing shopping centre.

[3] The building contract concluded between the contractor and the employer is contained in a recognised standard form agreement prepared by the Joint Building Contracts Committee Incorporated and is more commonly known as the "JBCC Series 2000, Third Edition Code 2101" ("The JBCC 2000").

[4] The relevant JBCC 2000 makes provision, *inter alia*, for the appointment by the employer of a so-called "principal agent". Second Defendant, a registered professional architect from Durban, was appointed in that capacity..

[5] The contractor alleges in its particulars of claim that it has duly performed its obligations under the JBCC 2000 and that the owner is indebted to it in various amounts, the total whereof exceeds R7m. That sum comprises capital allegedly due to it of some R4,4m together with various interest components calculated under the JBCC 2000. For present purposes it will suffice to refer in this regard to so-called "compensatory interest" and "default interest" as defined in the JBCC 2000 and which the contractor alleges is due to it.

[6] The contractor's claim against the Second Defendant is brought in the alternative: it is alleged that in the event that the Court finds that the owner is not liable to the contractor for the compensatory and/or default interest, then (and only then) the Second Defendant is liable to it in these amounts.

[7] After the contractor's application for summary judgment against the owner was withdrawn pursuant to the filing of an opposing affidavit, the owner filed its plea and claim in reconvention.

[8] After the conclusion of these summary judgment proceedings the Second Defendant entered the fray and filed an exception to the contractor's particulars of claim. It is that step which is the subject of these proceedings.

THE EXCEPTION

[9] It is common cause that the contractor's claim against the Second Defendant is brought in delict and is one for pure economic loss.

[10] In the notice of exception the Second Defendant's objection to the claim brought against him is set out as follows:

> *"5. In such alternative claim the Plaintiff alleges that:*
>
> *5.1 'In terms of clause 38.5.7 and/or 38.5.4 and/or clause 34.5 of the principal building agreement there was a legal duty incumbent upon the Second Defendant…';*
>
> *5.2 The Second Defendant breached such legal duty by negligently failing to comply with its (sic) alleged contractual obligations;*
>
> *5.3 As a result of such negligent omission the Plaintiff has suffered damages as a result of the alleged loss of the compensatory interest and the default interest.*

6. *The Second Defendant in the capacity as the First Defendant's principal agent, does not have locus standi in judicio to be sued in his own name.*

7. *The "legal duty" alleged by the Plaintiff is not competent in law.*
8. *In the premises the Plaintiff's particulars of claim lack averments necessary to sustain a cause of action against the Second Defendant."*

[11] It will be observed that therefore that the exception raises two points of law:

11.1 Firstly, it is alleged that the Second Defendant cannot be sued due to his lack of *"locus standi"*;

11.2 Secondly, it is contended that the alleged legal duty owed to the Plaintiff by the Second Defendant is bad in law.

It will further be noted that the Second Defendant does not complain that the factual allegations in the particulars of claim are insufficient to sustain the cause of action.

"LOCUS STANDI" OF SECOND DEFENDANT?

[12] The term *locus standi in judicio* is generally used to describe the capacity or ability of a party to litigate and, in particular, to initiate proceedings. It is not often employed in relation to the capacity of a party to be sued, although there are some limited categories of defendants who may only be sued in specific circumstances after the completion of certain procedural steps (e.g. Judges, Members of Parliament and diplomats), or who may only be sued in a representative capacity (e.g. minors,

mentally disordered persons, insolvents and partnerships, firms or associations).[1] I suppose that in such circumstances one could have regard to the "locus standi" of a defendant.

[13] However, the objection of the Second Defendant to the suit brought against him appears to be based on the fact that, in terms of the JBCC 2000, he was at all material times acting as agent for the owner. Hence, the argument goes, the suit should more properly be brought against his principal, the owner.

[14] In my view there is no substance in this argument. It amounts to what Flemming DJP referred to in Harnischfeger Corporation and Another v Appleton and Another [2] as the "inversion" of the accepted principles of vicarious liability. By way of analogy, the employee who commits a delict while on duty (be it the negligent driving of a motor vehicle or the excessive force of a police officer in effecting an arrest) will always be personally liable. In such circumstances the injured party enjoys the additional benefit of a right of recovery as against the employer if the employee was acting within the scope and course of his/her employment. But the existence of a relationship of vicarious liability does not absolve the actual wrongdoer from delictual liability.

[15] Accordingly the first leg of the exception must fail.

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[1] LAWSA (2nd Ed) Volume 3 Part 1 para 38-53
[2] 1993 (4) SA 479 (W) at 487C

LIABILITY FOR PURE ECONOMIC LOSS

[16] Aquilian liability for damages for pure economic loss has been recognised in our law for more than four decades following the decision in Administrateur, Natal v Trust Bank van Afrika Bpk [3]. In Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd [4] Brand JA collected the relevant authorities in South Africa and carefully analysed the state of the law in that regard. His Lordship noted, *inter alia*, that our law has developed along similar lines to other international jurisdictions and has encountered similar problems along that growth-path.

[17] Fundamental to a delictual claim for pure economic loss is the necessity to plead and prove wrongfulness and it is this concept which most often has troubled courts, both here and abroad, for it touches on issues of legal policy. Brand JA summarized the conundrum thus in the Fourway Haulage case[5]:

> *"[12] Recognition that we are dealing with a claim for pure economic loss brings in its wake a different approach to the element of wrongfulness. This results from the principles which have been formulated by the Court so many times in the recent past that I believe they can by now be regarded as trite. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. By contrast, negligent causation of pure economic loss is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public or legal policy*

[3] 1979 (3) SA 824 (A)
[4] 2009 (2) SA 150 (SCA) at 158-161
[5] p156F

consistent with constitutional norms. In the result, conduct causing pure economic loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such conduct, if negligent, should attract legal liability for the resulting damages."

[18] The learned judge proceeded [6] to tackle the nub of the problem:

"[16] The enquiry, whether as a matter of policy Fourway should be held liable for the pure economic loss suffered by the Agency, raises a question which is logically anterior: what are the considerations of policy that should be taken into account for the purposes of the enquiry? In accordance with what criteria should the relevant considerations of policy be identified? Must we accept that policy considerations are by their very nature incapable of predetermination and that the identification of the policy considerations that should find application in a particular case is to be left to the discretion of the individual judge? Does this mean that in the context of pure economic loss the imposition of liability will depend on what every individual judge regards as fair and reasonable? I believe the answer to the last two questions must be "no". Liability cannot depend on the idiosyncratic views of an individual judge. That would cloud the outcome of every case in uncertainty. In matters of contract, for example, this court has turned its face against the notion that judges can refuse to enforce a contractual provision purely on the basis that it offends their personal sense of fairness and equity. Because, so it was said, that notion will give rise to legal and commercial uncertainty

[6] p158B

(see e.g. Brisley v Drotsky 2002 (4) SA 1 (SCA)... paras 21-25; South African Forestry Company Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) ...para 27). I can see no reason why the same principle should not apply with equal force in matters of delict. A legal system in which the outcome of litigation cannot be predicted with some measure of certainty would fail in its purpose..."

[19] The learned judge went on to consider whether a so-called "*bright line of absolute certainty*" could be laid down in order that courts could have some yardstick against which to measure whether liability should be imposed in any given case. After a thorough study of a number of Commonwealth jurisdictions, the court found that this was not feasible. However, the learned judge did suggest the identification of criteria which might be considered before it could be determined whether wrongfulness (in the form of breach of a legal duty) had been established.

[20] The first of these was said to be the identification of particular categories in which liability would be imposed [7]. Such circumstances would include, for example, the duty of care imposed on a collecting banker or liability for negligent misstatements in circumstances where a party was expected to furnish accurate information or advice.

[21] Then, said the learned judge, consideration had to be given to the following criteria discussed by Nugent JA in the case of Minister of Safety and Security v Van Duivenboden [8]:

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[7] p160 para [21]
[8] 2002 (6) SA 431 (SCA) at 446F

"[21] When determining whether the law should recognise the existence of a legal duty in any particular circumstances 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."

[22] Brand JA continues: –

"[22]....In a case like the present where the claim for pure economic loss falls outside the ambit of any recognised category of liability, the first step is therefore to identify the considerations of policy that are of relevance. As part of the identification process assistance can of course be gained from previous decisions, both at home and abroad, as well as from the helpful analysis by academic authors...

[24]....(L)iability will more readily be imposed for a single loss of a single identifiable plaintiff occurring but once and which is unlikely to bring in its train a multiplicity of actions ...[In the present case] the loss claimed was suffered by a single plaintiff and is finite in its extent. To illustrate the point: the position could very well be different if the plaintiff was a businessman who claimed for the loss he suffered because of a missed flight to London, being the loss of a lucrative business opportunity, owing to the closure of the road.

[25] But the absence of indeterminate liability itself will not automatically give rise to the imposition of liability. That much was expressly held in Trustees, Two Oceans Aquarium Trust [9] para 20. The reason why this court refused to come to the aid of the plaintiff in that case, despite the absence of indeterminate liability, was that the plaintiff was in a position to avoid the risk of the loss claimed by contractual means (see para 24). Conversely, the plaintiff's inability to protect itself by contract was one of the policy reasons why this court decided in Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783(A) at 799 H-J to impose liability on a collecting bank. Support for the same consideration is to be found in Australian cases where delictual liability was extended to plaintiffs who were said to be "vulnerable to

[9] Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd 2006 (3) SA 138 (SCA)

risk" because they were unable to protect themselves against the risk of the particular loss by other means…

[26] Another policy reason why the extension of delictual liability is sometimes refused is that it would impose an additional burden on the defendant which would be unwarranted or which would constitute an unjustified limitation of the defendant's activities…The converse of this consideration appears from the statements of Mc Hugh J in Perre v Apand [10] para 50 that the imposition of liability would not 'unreasonably interfere with Apand's commercial freedom because it was already under a duty to [a third party] to take reasonable care.'"

[23] In the recent decision of the Supreme Court of Appeal in AB Ventures Ltd v Siemens Ltd [11] Nugent JA expounded further on the approach to be adopted in the incremental development of this area of the law.

"[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 – whether the 'legal convictions of the community' call for the recognition of liability, whether the plaintiffs' 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 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 is whether contemporary social and legal policy calls for the law to be extended to the exigencies of the particular case…

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[10] (1999) 1978 CLR 180 (HC of A)
[11] [2011] ZASCA 58 (31 March 2011)

> *[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 contemporaneous social and legal policy…*
>
> *[10] Thus by the very nature of the enquiry it will not be helpful in a particular case to look at 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."*

[24] The facts in the AB Ventures ("AB") case were briefly that a joint venture had been set up by two overseas companies to supply four specialised electrical units to be installed at a copper mine in Zambia. The joint venture concluded an agreement with Siemens which was to engineer, design, manufacture, supply and commission the units.

[25] Siemens having delivered and installed the units on site, they thereafter malfunctioned causing the completion of the project to be delayed. As a consequence of that delay AB became liable to the owner of the mine for penalties and additional expenses under the construction contract with the owner. AB alleged that the malfunction of the units and the resultant loss was attributable to negligence on the part of Siemens and it sued for damages.

[26] Siemens excepted to AB's particulars of claim on the ground that they lacked averments necessary to found an action. The issue before the trial court was

whether Siemens' conduct (which was accepted for the purposes of exception to have been negligent) was wrongful and therefore actionable. The exception was upheld by the Court *a quo*.

[27] In analysing AB's case on appeal, Nugent JA noted that AB had relied heavily on the so-called "product liability cases" – that Siemens, as a company claiming to have special skill and knowledge relating to the design and manufacture of such units was liable for loss caused to the user by a defect in the product.

[28] After discussing various authorities on the question of product liability, Nugent JA commented as follows on the applicability of that area of the law to the facts before the Court:

> *"[15] The considerations of policy that underlie cases of products liability have no bearing upon a case of 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* [12] *and motor vehicles* [13]"

[29] After referring in detail to the decision of the erstwhile Appellate Division in the Pilkinton Brothers case [14] in which the Court declined to impose delictual liability

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[12] Cf Donoghue v Stevenson [1932] AC 562 (HL)
[13] Cf MacPherson v Buick Motor Co 217 NY 382
[14] Lillicrap, Wassenaar and Partners v Pilkinton Brothers (SA) Pty Ltd 1985 (1) SA 475(A)

for the negligent breach of a contract of professional employment, Nugent JA said the following:

> *"[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 Pilkinton 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. There is no principle 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 [the mine owner]. 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 contractors. The act of Siemens in causing delay and expenses 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 loss, and not whether it was capable of shifting it elsewhere, and clearly it was capable of doing 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. Pilkinton Brothers answered that in the negative and the same must be said for this case."*

[30] Against that background I turn now to consider whether the contractor has made out a case for the extension of Aquilian liability in this matter. To do so it is necessary to consider the JBCC 2000 in some detail.

BACKGROUND TO, AND GENESIS OF, THE JBCC SERIES 2000 CONTRACT

[31] In his book The Building Contract (2nd edition), Eyvind Finsen points out that for the better part of the 20th century architects practising in South Africa made use of a standard form building contract issued in 1909 by the Royal Institute of British Architects (the so-called "RIBA" contract). Over the years this document was altered and amended as the building industry developed and as commercial needs demanded differently.

[32] In 1984 the Joint Building Contracts Committee (or JBCC as it became known) was established. This body was representative of the various principle players in the construction industry and set about drafting a new agreement acceptable to all of the stakeholders and, most importantly, the State in the form of the Department of Public Works. The first version of the JBCC contract was published in 1991. The second edition eventually evolved (through a number of

revisions) into the JBCC Series 2000 contract which has the support of the Department of Public Works.

[33] The current JBCC 2000 is described as follows by Finsen [15]

> *"The JBCC Series 2000 is a suite of documents that comprise the Principle Building Agreement and the Minor Works Agreement, which define the legal rights and obligations of the employer and the contractor, the Nominated/Selected Subcontract Agreement, which regulates the relationship between the contractor and a nominated or selected sub-contractor, and a variety of ancillary documents which facilitate the administration of the contract. These included the Preliminaries, the Contract Price Adjustment Provisions, the Construction Guarantee, the Payment Guarantee, the Advance Payment Guarantee, the Payment Certificate, the Completion Certificate, etc.*
>
> *These documents are intended to be used in conjunction with each other. On no account should they be used in conjunction with any of the previous generation of JBCC documents because the various provisions will be mismanaged and ambiguities and con confusion will ensue."*

[34] From the aforegoing it is evident that the current JBCC 2000 is a product of many years of industry-wide debate, consideration and ultimately consensus. All of the role players in the construction industry know its ambit and terms and it is important that there be consistency in its application.

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[15] Op cit p 43 para 4.2

THE ROLE OF THE PRINCIPAL AGENT IN THE JBCC 2000

[35] Clause 5.0 of the JBCC 2000 requires the employer to appoint a named person as the principal agent under the contract:

> *"5.0* ***Employer's Agents***
>
> *5.1 The employer shall appoint the principal agent as stated in the schedule. The employer warrants that the principal agent has full authority and obligation to act in terms of the agreement, and where appropriate, the associated nominated and selected subcontract agreements.*
>
> *5.2 The employer may appoint agents as stated in the schedule and may appoint further agents with the contractor being notified thereof.*
>
> *5.3 The principal agent shall be the only person who shall have the authority to bind the employer, except where agents issue contract instructions under delegated authority in terms of 5.3.2. Without detracting from the above, the principal agent shall be the only person empowered to:*
>
> *5.3.1 Issue contract instructions, except as provided in terms of 5.3.2;*
>
> *5.3.2 Delegate to the other agents authority to issue contract instructions and perform such duties as may be required for specific aspects of the works, provided that the contractor is given notice of such delegation;*
>
> *5.3.3 Receive notices on behalf of the employer.*
>
> *5.4 Should the principal agent or any agent be unable to act or cease to be an agent, the employer shall notify the contractor of the new principal agent to be appointed. The employer shall not appoint such principal agent or agent against whom the contractor makes a reasonable objection in writing within five (5) working days of receipt of such notice."*

It will be observed, therefore, that the principal agent who fulfils a variety of roles and functions under the JBCC contract, is an agent in every sense of the word that our law understands that relationship.[16] As such he is, of course, liable to the employer for any negligence on his part which may cause financial loss to that party [17]

[36] The functions and duties of the principal agent are extensive. As Finsen [18] points out:

> *"The employer surrenders many of his contractual rights to his principal agent: inter alia, the right to approve work (clause 26.6) to order additional work (clause 17.1.1), to determine the value of variations to the nature and extent of the works (clause 32.1), to extend the construction period in appropriate circumstances (clause 29.7), and to determine the amounts of payments to be made under an interim (clause 31.1) or final payment certificate (clause 34.5), and in doing so, the principal agent binds the employer (clause 5.3). It is submitted that this arrangement is right and proper; it would be inappropriate for the employer to be judge in his own cause in these matters.*
>
> *...(The) principal agent may delegate some of his duties to other agents, and must inform the contractor accordingly. But only the principal agent shall have the power to bind the employer (clause 5.3) or to receive notices on behalf of the employer (clause 5.3.3), or to issue contract instructions, except that he may delegate to another agent the authority to issue contract instructions for specific aspects of the works (clause 5.3.2)...*
>
> *The principal agent and the other agents have a limited function in the sub-contract agreements. The principal agent, or another agent under delegated*

[16] LAWSA (2nd Ed) Vol 1 pp 169-170. See also Randcon (Natal) Ltd v Florida Twin Estates Ltd 1973 (4) SA 181 (D+C) at 188F.

[17]

[18] Op cit p64

powers, approves the sub-contract work and values variations and determines the amount to be paid to a sub-contractor under an interim or final payment certificate, and prepares the sub-contract final account."

[37] One of the important functions then of the principal agent is the preparation of the final account for submission to the contractor within ninety days of practical completion of the works (clause 34.1). In the event that there is no objection from the contractor to the final account, the principal agent is required to issue a final payment certificate within seven days (clause 34.5).

[38] In terms of clause 34.11 the employer is obliged to pay the contractor so-called "compensatory interest" on the net amount certified by the principal agent in the final payment certificate. The principal agent is charged with the function of calculating such interest in accordance with an agreed formula.

[39] In the event that the contractor does not receive timeous payment of the amount due in the final payment certificate, the employer is liable for so-called "default interest" which is similarly payable in terms of an agreed formula to be calculated by the principal agent (clause 34.12). This amount is recoverable by the contractor from the employer's payment guarantee which the contractor is entitled to request in terms of clause 15.4.2.

[40] As indicated above, the complaint of the contractor as formulated in the particulars of claim is that the principal agent not only failed to issue further interim payment certificates after 3 May 2007 but also failed to issue the final account and/or

the final payment certificate. These negligent omissions, says the Plaintiff, resulted in it suffering damages in the form of lost interest.

[41] It is trite that for the purposes of adjudicating an exception all of the factual allegations made by a plaintiff in the particulars of claim must be taken to be correct.[19] Further, the excipient must persuade the Court that the exception is sustainable on any possible interpretation of the pleading [20] and, also, that there is no evidence that can be led on the pleading to disclose a cause of action [21].

[42] This judgment must therefore proceed on the assumption that the Second Defendant did not issue any payment certificates (neither interim nor final) after 3 May 2007. The effect of such failure is that the contractor has not been able to recover from the employer what it alleges is finally due to it under the contract, notwithstanding the fact that the Second Defendant certified practical completion of the works on 19 October 2006. (The latter allegation is made in paragraph 9 of the particulars of claim).

[43] In consequence of such inability to recover, the contractor calculated the total loss of interest (both compensatory and default) due to it by the owner under the JBCC 200 at the time of institution of these proceedings, as the sum of R2 642 828. This amount is claimed in the alternative from the Second Defendant on the basis that he was negligent in failing to exercise his obligations under the JBCC 2000 resulting in a loss of interest by the contractor which is alleged to have been

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[19] Marney v Watson 1978 (4) SA 140(C) at 144
[20] Vermeulen v Goose Valley Investments (Pty) Ltd 2001 (3) SA 986 (SCA) at 997
[21] McKelvey v Cowan N.O. 1980 (4) SA 525(Z) at 526

reasonably foreseeable, and which the Second Defendant is alleged to have failed, by reasonable conduct, to have prevented.

DOES THE SECOND DEFENDANT HAVE A LEGAL DUTY TO AWARD THE PLAINTIFF?

[44] Just as in the AB Ventures case there is no privity of contract between the Second Defendant and the contractor. Accordingly, in formulating a delictual claim against the Second Defendant, the contractor has sought to rely on a legal duty owed to it by the Second Defendant.

[45] Mr. Bruwer, counsel for the contractor, did not argue the case on the basis of decisions such as Van Duivenboden, Fourways and AB Ventures, nor did he advance any reasons for the extension of liability by virtue of "*contemporary social and legal policy*" based upon the consideration of a "*balancing of identifiable norms*."

[46] Rather, counsel relied heavily on the decision in Hoffman v Meyer [22] as direct support for the proposition that the failure by the principal agent (*in casu*, also an architect) to certify (whether properly, or at all) in terms of clause 38 of the JBCC 2000, constituted the breach of a legal duty owed to the contractor. Central to the argument was the contention that by breaching his contract with his employer the principal agent was in breach of that legal duty owed to the Second Defendant.

[47] It is therefore necessary to consider that case in some detail. Hoffman v Meyer concerned a delictual claim by the employer against the architect who was charged (under the contract in question) with, *inter alia*, the function of issuing the

[22] 1956 (2) SA 752 (C)

final certificate (The architect was employed in his professional capacity as such and not as principal agent). The employer complained that the architect's premature issue of such certificate was wrongful and resulted in him paying more than was due to the contractor. The employer then sought to claim from the architect damages in delict for the overpayment on the contract price and for the costs of rectifying certain defects in the workmanship which the architect had wrongfully certified as being complete.

[48] The basis for the claim in that case was argued on exception before a Full Court of this division. In his judgment Ogilvie Thompson J dealt extensively with the liability of an architect (not a principal agent) in relation to the issuing of a final certificate but it must be stressed at the outset that the claim was brought by the employer against the architect who had been appointed by the employer to perform certain professional functions in terms of a building contract which was wholly different in nature to the JBCC 2000. The case is therefore distinguishable on two basis - firstly, the present claim is brought against the architect by the contractor and not the employer, and, secondly, the contractual provisions were materially different.

[49] Nevertheless, for reasons which will appear shortly, there are certain *dicta* in the case which are relevant to the enquiry which must be conducted in the present case. The first is that -

> *"The duties of an architect may – depending always upon the wording of the particular contract – embrace both those of agent for the building owner and*

arbitrator or quasi – arbitrator between the building owner and the contractor…" [23]

[50] Then, it is said that –

"The duty of the architect to employ a competent degree of skill is applicable only in the exercise of his functions as agent of the employer, and not in the exercise of his functions as arbitrator or quasi-*arbitrator: in the latter capacities he 'is not liable either for want of skill or negligence"*[24]

[51] But it was stressed that the –

"critical question, however, remains as to whether, when functioning under…[the relevant clause]…of the contract… [the architect]… can rightly be said to have been acting as a quasi-arbitrator. That is, I think, a correct way to pose the question, since in these matters it is always necessary to have regard to the wording of the particular contract under consideration." [25]

[52] The Court found in Hoffman's case that the architect was not acting in a *quasi*-arbitral function when he issued the relevant final certificate and concluded that he could be held liable to the **employer** –

"for the damage resulting from the latter from the architect's proved negligence in and about the issue of such certificate" [26]

[53] Under the JBCC 2000 the principal agent need not necessarily be an architect – it could just as well be a quantity surveyor, project manager, or other suitably

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[23] p756 E-F
[24] p756 G
[25] p756 H
[26] p759 C-D

qualified party. In fulfilling the functions and duties under clause 31 of the JBCC 2000 the principal agent assesses *inter alia* the value of the work done by the contractor since the last interim payment certificate, has regard to the reasonable value of goods and materials used by the contractor and must consider adjustments for escalation, tax and interest before issuing a monthly interim payment certificate. The contractor is required to co-operate in this exercise by providing the principal agent with the necessary documentation and information required.

[54] Similarly, when performing the functions and duties prescribed by clause 34 of the JBCC 2000, the principal agent must prepare a final account within ninety working days of practical completion of the works. This exercise follows a similar methodology to the issue of an interim payment certificate, and culminates in the issue of a final account to the contractor under clause 34.3. The contractor has forty five working days within which to accept the final account. In the event that the contractor does not object to the final account within the said period, the principal agent is obliged to ("*shall*") issue the final payment certificate.

[55] Should the contractor accept the final account (or not object thereto within the forty five day period) the principal agent must ("*shall*") issue the final payment certificate within seven working days. If the final account is disputed by the contractor during the forty five day period allowed for, and that dispute has not been resolved within that period (or such extended period as the principal agent may have granted) the principal agent must issue a final payment certificate in terms of the final account.

[56] In terms of clause 40 of the JBCC contract, the principal agent may be requested by the contractor to "determine" any dispute between it and the employer or the employer's agent. The principal agent's decision must be given in writing within ten days and is final and binding on the parties unless either party disputes that decision. In such event the dispute is referred to arbitration under clause 40.4.

[57] In my view, the aforementioned provisions of the JBCC contract clearly cloak the principal agent with *quasi*-arbitral powers in circumstances where he/she is required by the contractor under clause 40.1 to determine the correctness of the final account issued under clause 34.3, or the final payment certificate under clause 34.5. However, where the principal agent acts, for example, under clause 31 the function is similar to that of a "certifier", a role in which he/she draws on professional skill, expertise and/or experience.

[58] In Hoffmans' case [27], Ogilve Thompson J observed as follows regarding the duty of an architect when acting as a certifier:

> *"Ordinarily speaking, one of the duties which the architect – who, as already noted, has no privity of contract with the contractor – undertakes to his employer, the building owner, is to issue final certificates ... The architect's function in issuing the final certificate is to determine what is finally due and owing by his employer, the building owner to the contractor. In discharging that function the architect is, so it seems to me, primarily still acting in the protection of his employer's interest. He must, of course – as also in the case of interim certificates – be honest and impartial in determining what is the contractor's due. The circumstance that he is engaged by the owner does not entitle him to cheat the contractor. If honesty is not to be expected of everybody, it certainly is to be expected of a professional man like an*

[27] p758 B-G

architect. The determination of whether or not the building operations have been completed according to the contract, and of the final amount due to be paid therefore by the building owner to the contractor, is something which calls for the trained skill of the architect: it is one of the essential skilled services for which the building owner has engaged the architect. The circumstance that in determining these matters the architect must be impartial – in the sense that he must not cheat the contractor but must certify the amount to which the contractor is in terms of his contract entitled – is not, in my judgment, any sufficient warrant for investing the architect, when carrying out the duty of issuing the final certificate, with the character of an arbitrator or quasi-arbitrator. Nor, in my opinion, is the mere circumstance that, in terms of the contract between the building owner and the contractor, the final certificate is stipulated to be 'conclusive' any sufficient reason why the function of the architect under clause 25(f) should be elevated into that of a quasi-arbitrator who is relieved from reliability for his negligence....When once the dispute stage is reached and the architect functions as provided under clause 26 in the present case, there is greater reason to regard him as a quasi-arbitrator; but at all material earlier stages the architect appears to me to be more identified with his employer than is a quasi-arbitrator and in particular, when functioning under clause 25 the architect should, in my judgment, remain liable to the building owner for the consequences of his proved negligence."

[59] The conclusion to which the learned Judge came in that case was –

"That – subject always to the particular terms of the particular contract – an architect issuing a final certificate, which in terms of a contract between the building owner and the contractor is rendered conclusive, is not to be regarded as being in the position of a quasi-arbitrator, but is liable to the building owner for the damage resulting to the latter from the architect's proved negligence in and about the issue of such certificate"[28].

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[28] p759 C-D

[60] As I have already remarked that conclusion was based on a fundamentally different factual matrix to the present case *viz* that the architect was being sued by the entity that had employed him to render professional services to it. The case is therefore not direct authority for the contention that the principal agent is liable to the contractor when he is negligent in his function as a "*certifier*". Assuming, however, that the principal agent appointed under the JBCC 2000 performs a similar professional function to the architect in Hoffman v Meyer, the question that follows is whether the liability which the Court found to exist in that case should be extended to a case such as the present where there is no privity of contract. The answer to that question lies in the application of the approach suggested by the Supreme Court of Appeal in, *inter alia*, the judgments of Nugent and Brand JJA to which I have referred above.

[61] In my view the first issue for consideration is that as a matter of fact the claim against the Second Defendant is brought only in the alternative. Clearly the contractor is not without legal recourse to recover the lost interest and has a contractual claim (which it has sought to enforce) against the owner under the JBCC 2000. This factor mitigates against the necessity to impose a general liability on the principal agent *vis-a-vis* the contractor. [29] There does not appear to be any compelling social need or legal policy consideration which demands the extension of such liability.

[62] Next, there is the issue of the principal agent's general standing in the JBCC 2000 contractual milieu. In the instant case the Second Defendant functions by

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[29] See the AB Ventures judgment at para 22 cited in para 29 above.

virtue of his appointment as the agent of the employer. This appointment is not coincidental or fortuitous, but consensual and in terms of an agreement with the employer. When he accepted the appointment as principal agent Second Defendant (a professional person nonetheless) knew that he would have to make decisions on behalf of his principal which would directly affect other contracting parties. As such he would have known that he was required to behave impartially and could not be seen to be "*cheating*" (to use the analogy in Hoffman v Meyer) either the employer, the contractor or any of the sub-contractors to the project. Similarly, those other parties would have been entitled to look to the principal agent to discharge his functions professionally, fairly and in accordance with accepted practices.

[63] In clause 9 of the JBCC contract provision is made for various forms of indemnity. Of particular relevance to the present case is the following:

> *"9.2 The employer indemnifies and holds the contractor harmless against loss in respect of all claims, proceedings, damages, costs and expenses arising from:*
>
> *9.2.1 An act or omission of the employer, the employer's servants or agents and those for whose acts or omissions they are responsible."*

[64] Given the provisions of clause 9.2.1 of the JBCC 2000, the parties would have known that any act or omission of the principal agent in the course and scope of his employment as such would have rendered the employer liable to them under the indemnity afforded by that clause for any loss suffered as a consequence of any such act or omission. The contractor, in particular, would have known that it enjoyed

the benefits of such an indemnity under the JBCC 2000 and would not have considered it necessary to secure any further protection against the principal agent in the event of the latter's negligence. In argument Mr. Bruwer was unable to refer to any facts which suggested that the indemnity would not adequately cover the contractor's alleged losses. The indemnity is of course in accordance with the common law principle of vicarious liability. Accordingly in my view the indemnity in clause 9 militates against the extension of liability as contended for by the Plaintiff.

[65] Then there is the fact that we are dealing with a contract that has very wide (some may say almost universal) application in the construction industry in our country. When the contractor elected to contract with the employer on the basis of the JBCC 2000 it knew of the merits and demerits inherent in that form of agreement. The contractor was not obliged to contract in terms of the JBCC 2000 and had it wished to protect itself against the principal agent's potential negligence, it was free to contract on that basis.

[66] In Fourway Haulage [30] Brand JA referred to the fact that delictual liability may more readily be extended in "*one off*" cases, involving a single party. That is not the situation in the present case which involves a contract used very regularly in the construction industry. To extend the liability of the principal agent in the context of such a widely used construction contract could lead to a plethora of delictual actions arising against such an agent, which in turn may lead to commercial uncertainty with consequences which the constituent parties to the Joint Building Contract

[30] See para [24] cited in para 22 *supra*

Committee neither contemplated nor intended. As Nugent JA put it in AB Ventures at paragraph 15:

> *"...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."*

[67] Furthermore, there is the consideration that by imposing liability on the principal agent vis-a-vis the contracting parties to the JBCC 2000 with whom he has no contractual privacy, such an extension may lead to principal agents either refusing to accept appointments under the JBCC 2000, or to them having to take special professional insurance cover to deal with that eventuality. Such consequences could hamper the efficiency of the implementation of JBCC 2000 contracts and also effects the cost parameters thereof.

[68] Finally, the Court is enjoined to apply a "*balancing of identifiable norms.*" [31]. In this case the principal agent may be held liable to his employer, the First Defendant, either in terms of their contractual arrangement embodied in the JBCC 2000, or in delict. [32] In those circumstances it seems to me to be an unneccessarily burdensome on the Second Defendant to expose him to potential liability to a further delictual claim by the contractor, who, as I have already pointed out has adequate other legal redress.

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[31] cf Van Duivenboden's case at p 446G para 21 cited in para 21 above; the AB Ventures judgment at para 10 cited in para 23 above;

[32] cf the Pilkington Brothers case.

CONCLUSION

[69] In the light of the aforegoing I am of the view that the Plaintiff has advanced no cogent grounds for the extension of delictual liability to the Second Defendant in the circumstances under consideration. It follows therefore that the claim against the Second Defendant is bad in law to the extent that it is alleged that Second Defendant bore a legal duty towards the Plaintiff to take the steps set out in paragraph 22.3 of the particulars of claim.

ORDER

[70] The exception to the Plaintiff's particulars of claim as formulated in paragraphs 7 and 8 of the notice of exception dated 8 June 2010 is accordingly upheld with costs.

P.A.L. GAMBLE