Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 11909/2017

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 7 March2019
Date of judgment: 13 March 2019

In the matter between:

JAKE TRADING CC Plaintiff/Respondent

and

RAMBORE (PTY) LTD t/a RAMBORE SPECIALIST CONTRACTORS First Defendant

LUCCA DEVELOPMENTS CC t/a DRILLWERX Second Defendant/Excipient

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JUDGMENT

BINNS-WARD J:

[1] Jake Trading CC has instituted action proceedings against Rambore (Pty) Ltd t/a Rambore Specialist Contactors and Lucca Developments CC t/a Drillwerx, respectively, for payment in damages in the sum of R722 053,41. The second defendant has noted an exception to the plaintiff's particulars of claim on the grounds that they fail to disclose a cause of action against the second defendant; alternatively, that they are vague and embarrassing.

[2] According to the pleading (which on any approach is not a model of draftsmanship[1]), the plaintiff engaged the professional services of the first defendant as a nominated sub-contractor to effect certain work in terms of a works contract between the plaintiff and the City of Cape Town. The principal contract between the City, qua employer, and the plaintiff, qua principal contractor, provided for the plaintiff to render certain 'repair and installation services of electrical equipment for the Koeberg to Broad Road Number 1 66KV Oil Filled Feeder'. It is alleged (somewhat opaquely) that the services to be rendered by the first defendant in terms of the sub-contract included, but were not limited to, 'drilling and complying with the way-leave stipulations and instructions from Electricity Department of the City of Cape Town'. The specified services to be rendered by the first defendant were labelled by the pleader as '*the professional services*'.

[3] It may be deduced from the pleading that it was appreciated that the execution of the professional services by the first defendant would place certain underground cables at risk. The plaintiff alleged in this regard (at para. 4.4 of the particulars of claim) that it was a term of the sub-contract between the plaintiff and the first defendant (defined in para. 4 of the pleading as '*the agreement*') that '*The First Defendant would bear the risk of damage and/or loss being sustained to cables, provided that the cables were pointed out*'. It will come as no surprise in the context of what I have recorded thus far that the action concerns the consequences of a cable having been damaged.

[4] It may be inferred from paragraph 23 of the pleading, which reads –

> As a result of the damage caused to the … cable, the Plaintiff is liable to the Employer, the City of Cape Town, for damages in the sum of R722 053.41 being the reasonable and necessary cost of repair of the … cable, …

that the so-called 'risk of damage' liability was in point of fact undertaken by the plaintiff in favour of the City in the principal contract. In the given context, the pleaded allegation in para. 4.4 seems to imply the existence of an undertaking in the subcontract by the first defendant in favour of the plaintiff to indemnify the latter in respect of its contingent liability to the City in respect of damage caused to cables in the execution of the contract work. The pleading would have been much clearer if the pleader had attached copies of the contracts, or the pertinent parts thereof, as contemplated by Uniform Rule 18(6); alternatively, quoted the relevant terms *ipsissimis verbis*. I shall do the best I can in the circumstances by proceeding

[1] The pleading was not drawn by counsel who appeared for the plaintiff at the hearing of the exception.

on the basis of my stated understanding of the pleaded case with reference to paras 4.4 and 23 read in the context of the rest of the document.[2]

[5] At paras. 7-8 of its particulars of claim, the plaintiff alleges:

> 7. During or about June 2014, the First Defendant employed the Second Defendant, (sic) as an employee and sub-contractor under the First Defendant, for the purpose of rendering the professional services for reward (Hereinafter (sic) referred to as "**the sub-contract**").
>
> 8. The full and further particulars of the Second Defendant's employment as a sub-contractor under the First Defendant, and the terms of the sub-contract, (sic) are unknown to the Plaintiff.

The reference in paragraph 7 to the second defendant as 'an employee' is confusing, but the thrust of the allegations, when the pleading is read as a whole, appears to be that the first defendant engaged the second defendant as an independent sub-contractor. (I say 'appears to be' advisedly, because there are further confusing references (in para. 5 of the pleading) to the second defendant, which is a juristic person, as part of the 'staff' - i.e. an employee - of the first defendant.) Furthermore, what the pleader has chosen to label as '*the sub-contract*' must, in the context that I have described, actually be a sub-subcontract.

[6] The facts giving rise to the claim are pleaded as follows in paras. 15-19 of the particulars of claim:

> 15.2 During [a] site inspection … two … cables were found in the way of drilling operations. As a result the position of the drill had to be moved.
>
> 15.3 A site meeting was subsequently called to determine a safe option for the drill position.
>
> 15.4 The position of the cables was pointed out to the representatives of the Second Defendant by the representatives of the City of Cape Town …
>
> 15.5 As a result, the Second Defendant was fully aware of the position of the cables …
>
> 15.6 Pursuant to the site meeting, the council staff of the City of Cape Town caused the cables to be exposed, which cables were at a depth of about two metres, which hole (sic) would remain open throughout the drill process, thus exposing the … cables.
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> 16. On 3 July 2014, and subsequent to the cables being exposed, a pilot bore was successfully drilled at the site rendering the … cables unharmed (sic).

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[2] It is usual for sub-contracts in building and works related matters to replicate, as between contractor and sub-contractor, any applicable onerous provisions in the principal contract that burden the contractor in favour of the employer; cf. *Minister of Public Works and Land Affairs v Group Five Building Ltd* [1999] ZASCA 36; 1999 (4) SA 12 (SCA), [1999] 3 All SA 467 (A) (per Schutz JA). This is ordinarily simply a manifestation of businesslike astuteness and common sense. And, in the case of a nominated sub-contractor, the employer usually stipulates that the contract between the contractor and the sub-contractor must be the same, at least in regard to the performance of the relevant part of the principal contract, as that concluded between it and the contractor.

17. On 9 July 2014 the Second Defendant unilaterally, and without notification to any of the parties concerned, changed the drilling direction and commenced drilling from a new launch position.
18. At the new launch position, [a] … cable was at a depth of approximately 1.1 metres.
19. As a result of the Second Defendant (sic) unilateral deviation by drilling from a new launch position, [a] … cable was damaged.

[7] In para. 20 of the particulars of claim it is alleged that –

The damage to the … cable was caused by:

20.1 A wrongful breach by each of the Defendants of their aforesaid legal duties (and where applicable, a breach of contract by the First Defendant);

20.2 The joint negligence of the First and Second Defendants (and the employees, alternatively authorised representatives of the First and Second Defendant (sic));

20.2.1 Alternatively by the negligence of the First Defendant (and its employees, alternatively authorised representatives);

20.2.2 Further alternatively the negligence of the Second Defendant (and its employees, alternatively authorised representatives).

[8] Insofar as the second defendant is concerned, the nature of the 'aforesaid legal duties' referred to in para. 20 of the pleading is pleaded in paras. 10-11 of the document as follows:

10. By reason of and flowing from the sub-contract and, independently from the agreement, by reason of and flowing from the fact that the Second Defendant would be rendering the professional services, the Second Defendant was at all material times hereto under a legal duty to render the professional services with such skill, care and diligence as could reasonably be expected of a specialist sub-contractor in similar circumstances (which duty included, but was not limited to, the obligations undertaken by the Second Defendant and referred to in paragraph 4 above).
11. As between the Second Defendant and the Plaintiff, (sic) there is a sufficient relationship of proximity that, in the reasonable contemplation of the Second Defendant, carelessness and/or negligence on its part may be likely to cause damage to the Plaintiff, in which case a *prima facie* duty of care arises.

(Paragraph 4 of the pleading, referred to in para. 10 thereof quoted above, sets out the terms of '*the agreement*' – i.e. the subcontract between the plaintiff and the first defendant, *not* the terms of 'th*e subcontract*' – i.e. the sub-subcontract between the first defendant and the second defendant.)

[9] It is reasonably clear therefore that the plaintiff's claim against the second defendant purports to be pleaded in delict, and that the damages claimed by it constitute the amount by which it is allegedly out of pocket in consequence of its contractual liability to the City of

Cape Town under the principal contract. Its claim is not of the type falling under the traditional Aquilian action – a claim for compensation for patrimonial loss occasioned negligently by the defendant physically harming the claimant's person or corporeal property – but rather for what is generally referred to as 'pure economic loss', that is patrimonial loss that is not caused by injury to persons or corporeal property. In the seminal judgment in *Administrateur, Natal v Trust Bank van Afrika Beperk* 1979 (3) SA 824 (A), [1979] 2 All SA 270, the late Appellate Division put its seal of approval on the recognition in principle of a basis for the advancement of such claims under what is termed 'the extended Aquilian action'.[3]

[10] The appeal court addressed the concern that the extension of the delictual remedy might conduce to an unwholesome situation of potentially boundless or indeterminate liability by reaffirming that the extended action would retain the elements of the traditional Aquilian action, thereby requiring claimants to prove both negligence and wrongfulness on the part of the defendant in order to succeed. These requirements, it held, would rein in any spectre of limitless liability.

[11] Inasmuch as wrongfulness in the relevant sense implies a breach by the defendant of a duty in law (Afr. *regsplig*) to the claimant in the given circumstances, whether the act or omission in question in a claim for compensation for pure economic loss was wrongful would fall to be determined on a case-by-case basis.[4] Absent the establishment by the claimant of the breach of a pertinent legal duty by the defendant, proof of wrongfulness would be wanting. The determination whether a 'legal duty' in the relevant sense[5] exists in a given situation involves deciding what legal policy should reflect. The exercise is sometimes described as determining what the legal convictions (appropriately informed by the norms and values embodied in the Constitution) of the community would expect. In essence it is directed at determining whether, objectively, it would be reasonable in the circumstances for liability in law to be imposed on the defendant.[6] It is material to be mindful in undertaking

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[3] Rumpff CJ spoke, in *Administrateur, Natal* (SALR at 832 *in fine*), of placing claims for pure economic loss 'in die uitgebreide trefgebied van die *lex Aquilia*'.

[4] *Administrateur, Natal* (SALR at 833).

[5] See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [2005] ZASCA 73; [2006] 1 All SA 6 (SCA), 2006 (1) SA 461 at para. 14 and *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; [2007] 1 All SA 240 (SCA) at para. 11, where certain drawbacks in the use of the term are identified. Its use is nonetheless well entrenched in practice.

[6] The following statement in Fleming *The Law of Torts* 4th ed at 136:

> *In short, recognition of a duty of care 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*

the exercise that acts causing pure economic loss, unlike those causing physical harm or injury, are not *prima facie* unlawful. The approach to determining whether a breach of a legal duty has occurred in a pure economic loss case is essentially the same as that in cases arising out of negligent omissions. The following pithily worded observation by Lord Hoffmann in *Stovin v. Wise* [1996] UKHL 15, [1996] 3 All ER 801 (HL), [1996] AC 923 at 949 (AC), which was a negligent omission case, illustrates that the position here in this respect is the same in English law: '*The trend of authorities has been to discourage the assumption that anyone who suffers* [pure economic] *loss is prima facie entitled to compensation from the person … whose act or omission can be said to have caused it. The default position is that he is not.*' This emphasis on the proper point of departure in the required analysis highlights the incidence of the requirement that a plaintiff in delictual claims for pure economic loss must plead in his statement of claim sufficient allegations, which if accepted, would sustain a finding that the defendant had negligently breached a duty in law to the plaintiff.

[12] In the current case the question that arises on the plaintiff's particulars of claim is 'Does legal policy favour the extension of a delictual claim to the plaintiff to recover damages for having to perform under a contractual obligation to indemnify the City of Cape Town for the costs of repair to property damaged in the course of the execution of a works contract entered into between the City and the plaintiff, to which the second defendant is not privy?'. The pleaded basis for the delictual liability is the fact that second defendant had been employed by the plaintiff's subcontractor to carry out part of the work, and failed to do so with 'such skill, care and diligence as could reasonably be expected of a specialist sub-contractor in similar circumstances' when there was 'a sufficient relationship of proximity'

> *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 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.*

has been endorsed in a number of judgments as correctly setting out the general nature of the indicated enquiry; see e.g. *Lillicrap* at 498I, *Knop v Johannesburg City Council* [1994] ZASCA 159; 1995 (2) SA 1 (A) at 27G-I and *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; [2002] 3 All SA 741 (SCA) (a negligent omission case) at para. 13. See also *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) at para. 122, where Brand AJ noted:

> *In the more recent past our courts have come to recognise, … that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.* (Footnotes omitted.)

between the second defendant and the plaintiff that the second defendant should have foreseen that its negligent execution of the sub-subcontract work might cause the plaintiff to suffer loss.

[13] The centrality of the second respondent's role as a party carrying out the part of the *contracted* work as the basis of its alleged delictual liability is emphasised by the pleaded introduction to para. 10 of the particulars of claim: '*By reason of and flowing from the sub-contract and, independently from the agreement,* [?and] *by reason of and flowing from the fact that the Second Defendant would be rendering the professional services, the Second Defendant was at all material times hereto under a legal duty to …*'.

[14] The judgment in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A), [1985] 1 All SA 347 serves as an illuminating example of the considerations that fall to be weighed in the balance in any determination of whether a delictual remedy should be extended where the legal duty contended for arises in a matrix of obligationary relationships based on contract. It is therefore useful to dwell on it in some detail. *Lillicrap* was also decided on exception.

[15] Grosskopf AJA summarised the factual context of the matter in *Lillicrap* as follows:

> In or about July 1974 the [plaintiff] appointed the [defendant] as its consulting engineer to investigate a site in Springs (which investigation would include a soil investigation and an analysis of its results) in order to determine the suitability of the site for the erection of a glass plant thereon. If the site were found to be suitable, the [defendant] was further appointed to design and supervise the construction of the civil engineering and building works for a glass plant which the [plaintiff] wished to have erected there. The [defendant] had at all relevant times held itself out as having the expert knowledge and professional skill necessary for the performance of these duties, and it knew what the [plaintiff's] specific requirements were for the work.
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> The [defendant] purported to carry out the site investigation and advised the [plaintiff] that the site was suitable for the construction of the works in conformity with the [plaintiff's] requirements. Thereafter the [defendant] purported to design the works with due regard to the conditions on site (as determined by the [defendant]) so as to give effect to the requirements of the [plaintiff]. In June 1975 a formal agreement was executed by the parties which *inter alia* confirmed the appointment of the [defendant] as consulting engineer in respect of the design and supervision of the works. The [plaintiff] had then already paid the [defendant] a sum of R100 051-72 in respect of professional services rendered prior to the date of the formal agreement.
>
> Initially therefore there was a contractual *nexus* between the parties. This situation changed in or about May 1976, when the parties agreed that the formal agreement of June 1975 would

> be assigned to Salanc Contractors (Pty) Limited ("Salanc"). Salanc was in a direct contractual relationship with the [plaintiff], and the effect of the assignment was therefore to change the appellant's status to that of a sub-contractor *vis-à-vis* the [plaintiff]. The [defendant] was aware that, despite the assignment, the works were to be constructed for the benefit of the [plaintiff] as the owner thereof.

The glass plant was in due course erected, but it became apparent that, because of certain adverse site conditions that had not been identified by the defendant, it was subject to movement, which rendered it unsuitable for its purpose. The site conditions, had they been identified beforehand, could have been addressed in the construction of the building. The cost of remediation work ran to R3 605 511, which was the amount of the plaintiff's claim.

[16] The plaintiff in *Lillicrap*'s case alleged that, in the light of the circumstances described above, the defendant owed the respondent a duty in law, both before and after the assignment of the contract, to carry out properly and with professional skill and care the various tasks which it purported to perform. It alleged that the defendant, in breach of the said duty, had negligently failed to carry out those tasks properly and with the necessary professional skill and care, thereby causing the plaintiff damages in the sum of R3 605 511.

[17] The following contentions were advanced in support of the exception noted in *Lillicrap*:

a) That, on the facts alleged, the defendant did not owe the plaintiff a delictual duty of care, more particularly in the light of the contractual relationship between the parties prior to May 1976, and the assignment in 1976 of the contract of June 1975 to Salanc;

   and

b) That the facts alleged by the plaintiff did not give rise to any claim for damages in respect of pecuniary or financial loss only, more particularly in the light of the circumstances mentioned in (a) above (i.e. the contractual relationship between the parties and the assignment of the contract).

[18] The appeal court pointed out in *Lillicrap* that our law adopts a conservative approach to the extension of remedies under the *lex Aquilia*;[7] the first question always being whether there is a need for an extension in the given circumstances. The essential bases for the

[7] Cf. the remarks to equivalent effect by Howie P in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA), at paragraph [30].

court's decision to uphold the exception on appeal were that no need had been shown in the circumstances for an extension of the Aquilian remedy, and that the court of first instance had been wrong to follow what it considered to be the relatively liberal approach to the extension of delictual remedies then followed under English law in accordance with the decision in *Anns v. Merton London Borough Council* [1977] UKHL 4 [1978] A.C. 728, [1977] 2 All ER 118 (HL), to which I shall refer in more detail presently.

[19] In the exception in issue in the current matter the second defendant contends that the particulars of claim fail to make out a cause of action in support of the claim for compensation for pure economic loss because the '*mere conclusion of a subcontract* [as mentioned, actually a sub-subcontract] *and the defendant rendering the professional services under it* [negligently] *does not serve to make the second defendant's conduct wrongful vis-a vis the plaintiff*'. Thus, the essence of the main ground of the second defendant's exception is that the mere undertaking by it of the sub-subcontractual obligations to the first defendant in respect of the works commissioned by the City of Cape Town did not impose on it a duty in law to the plaintiff to perform its sub-subcontractual obligations to the first defendant in a manner that would not render the plaintiff liable in terms of the strict liability clause in the principal contract between the latter and the City, to which the second defendant was a stranger.

[20] In my view there is no cogent basis in legal policy to extend a delictual remedy to the plaintiff against the second defendant in the given circumstances. The evident reason for the contractual remedy stipulated by the City of Cape Town in its contract with the plaintiff was to transfer to the plaintiff the responsibility to ensure that anyone carrying out the contract work did so in a manner so as not to damage the cables, and to put the risk of damage on the plaintiff if the work was not done in that manner. It was within the plaintiff's power to regulate its exposure to liability for damage to the cables contractually, just as the employer had done in regard to the plaintiff in the principal contract. Indeed, as described by Schutz JA in *Minister of Public Works and Land Affairs v Group Five Building Ltd* [1999] ZASCA 36; [1999] 3 All SA 467 (A) in the closely analogous context of building contracts, 'The entire machinery [of building sub-contracting], evolved over many years, is designed to avoid privity between the employer and the nominated sub-contractor, whilst retaining substantial control over the sub-contract works in the employer's hands. Anyone who has had experience of the electrician driving a hole through the wall after the plasterer has completed his work, or the installer of the alarm lights putting nails into the handiwork of the

waterproofer, will understand the frustrations caused by everybody blaming someone else, in the absence of a single contractor to whom one may look to sort out such matters. This is the main motive behind the avoidance of privity with sub-contractors. But the machinery does have disadvantages for the contractor, who has to put up with a sub-contractor whom he might not himself have selected.'

[21] In the current case, the plaintiff contractually imposed the risk of damage to what appear to have been the employer's cables on the first defendant as the nominated sub-contractor. In doing so it was stipulating for an indemnity in respect of its own contractually undertaken exposure to strict liability to the employer under the principal contract. It could just as easily, had it wished to extend the ambit of parties against which it could seek redress if a cable were damaged in circumstances that rendered it liable to the employer under the principal contract, have imposed an obligation on the first defendant not to engage a sub-subcontractor to render the professional services without the inclusion in the sub-subcontract of an undertaking by the sub-subcontractor in its (the plaintiff's) favour to undertake joint and several liability with the first defendant in respect of the said risk.

[22] High authority holds that the ability of a plaintiff to avoid the need for resort to a remedy involving an extension of the Aquilian action is a weighty legal policy consideration. The consideration, which bears on the effect of the plaintiff's ability to manage its vulnerability to risk, is closely related to the well-recognised dissuasive effect of the existence of other established means of redress in given circumstances on the readiness of the courts to extend the law to provide a new and additional remedy.[8] The observation by

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[8] Cf. the observations of Nugent JA in *Van Duivenboden* supra, at para. 21. And see the following remarks of McHugh J to similar effect in *Perre v Apand Pty Ltd* 1999 HCA 36, (1999) 198 CLR 180, [1999] 73 ALJR 1190 at paras. 118-120 (part of which was quoted with approval by Brand JA in *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* [2013] ZASCA 16, [2013] 2 All SA 629 (SCA), 2013 (5) SA 183 at para. 28 and in *Country Cloud Trading CC v MEC: Department of Infrastructure Development* [2013] ZASCA 161, 2014 (2) SA 214 (SCA); [2014] 1 All SA 267 at para. 30):

> *118. Cases where a plaintiff will fail to establish a duty of care in cases of pure economic loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interfere with its legitimate acts of trade. In many cases, there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.*
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> *119. In Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* [(1997) 188 CLR 241], *an important factor in denying a duty of care was that the plaintiffs were sophisticated investors well able in the circumstances to protect themselves. On the other hand, this Court found a duty in Hill v Van Erp* [(1997) 188 CLR 159] *and in Pyrenees Shire Council v Day* [(1998) 192 CLR 330] *partly because of the defendant's control (and knowledge) and relative inability of the plaintiffs to protect themselves.*

Brand JA in *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; [2007] 1 All SA 240 (SCA) at para. 18, as to one of the important points underpinning the policy decision against recognising the availability of a delictual action to the plaintiff in *Lillicrap* seems to me very much in point: '*The point underlying the decision in Lillicrap was that the existence of a contractual relationship enables the parties to regulate their relationship themselves, including provisions as to their respective remedies. There is thus no policy imperative for the law to superimpose a further remedy. Consequently, the mere absence of a contractual remedy in the present case does not by itself distinguish it materially from Lillicrap.*' Just as in the current matter, there was no contractual remedy actually available to the plaintiff in *Two Oceans Aquarium Trust v Kantey & Templer*, but there could have been had the plaintiff thought to protect itself by stipulating for one.

[23] The fact that there was no relationship of contractual privity between the plaintiff and the second defendant does not avail the plaintiff in contending for an action in delict to be afforded to it in the circumstances of the current case. As the appeal court held in analogous circumstances in *Two Oceans Aquarium Trust v Kantey & Templer* supra, '*Generally speaking, I can see no reason why the Aquilian remedy should be extended to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means, but who failed to do so*'.[9] It makes no difference in principle that in this case it not the risk of harm that could have been avoided, but a contractual undertaking essentially identical to that extracted from the first defendant that could have been stipulated.

[24] Moreover, the imposition of a delictual duty on the second defendant in the current circumstances would, in my view, also raise difficulties of the sort posited by Grosskopf AJA in the following passage in *Lillicrap* at 500G-501B:

> 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. This does not of course mean that the law may not impose additional obligations by way of *naturalia* arising by implication of law, or, as I have indicated above, those arising *ex delicto* independently of the contract. However, in general,

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120. ..... *Pecuniary losses are one of the ordinary risks of business and, for that matter, ordinary life. Business people frequently take, or are easily able to take, steps to minimise their business or economic losses. Taking these steps will often be a more efficient way of dealing with the risk of these losses than requiring defendants to have regard to the risk that others may suffer economic loss. The economic efficiency of a society requires that the person best able to deal with or avoid the consequences of an economic risk from a cost view should be responsible for the risk and its consequences.*'

[9] At para. 24.

> 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? Could it conceivably be higher or lower than the contractual one? If the standard imposed by law differed in theory from the contractual one, the result must surely be that the parties agreed to be bound by a particular standard of care and thereby excluded any standard other than the contractual one. If, on the other hand, it were to be argued that the *bonus paterfamilias* would always comply with the standards laid down by a contract to which he is a party, one would in effect be saying that the law of delict can be invoked to reinforce the law of contract. I can think of no policy consideration to justify such a conclusion.

[25] I appreciate that, unlike the position in *Lillicrap*, there was no, and never had been any, contractual privity between the plaintiff and the second defendant, but the plaintiff expressly relies in its particulars of claim on the second defendant's '*vicarious obligations to the First Defendant as sub-contractor, and as a consequence in fulfilment of the First Defendant's vicarious obligations to the Plaintiff to render the professional services of the required standard …*' It is plain therefore that, notwithstanding the absence of contractual privity, the plaintiff is predicating its allegation that the second defendant was in breach of a delictual duty towards it on the failure by the second defendant to have executed the contract work in accordance with the standards stipulated in the contract between the plaintiff and the first defendant.

[26] The allegation in para. 11 of the particulars of claim, premised on 'a sufficient relationship of proximity',[10] is on all fours, including the language employed in pleading it, with the first leg of the two-leg test for delictual liability formulated by the House of Lords in *Anns* case supra. Indeed, the plaintiff's case against the second defendant is pleaded in a very closely comparable manner to that which, on analogous facts, was recognised by the majority in *Junior Books Ltd v Veitchi Co Ltd* [1982] UKHL 4, [1983] AC 520, [1982] 3 All ER 201 (HL), in which the *Anns* test was applied, as making out a case in tort by an employer against a sub-contractor for damages arising out of the negligent execution by the latter of the contract works. The facts of the matter and legal relationship of the parties in *Junior Books* were more in line with those in the present matter than was the position in *Lillicrap*, and so the attention paid to that case in the judgment in *Lillicrap* is significant.

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[10] See paragraph [8] above.

[27] The first leg of the *Anns* test held that if there was a sufficient relationship of proximity or neighbourhood between the claimant and the alleged wrongdoer such that, in the reasonable contemplation of the former, carelessness on its part might be likely to cause damage to the latter, a duty of care was established *prima facie,* which required an enquiry, in the second leg of the test, whether any considerations pertained that ought to negative or reduce or limit the scope of the duty, or the class of person to whom it was owed, or the damages to which a breach of it might give rise . It was an approach that was soon discarded in England, and never adopted in South Africa. The Appellate Division acknowledged that were it to follow the approach of the majority in *Junior Books,* which, as already mentioned, was predicated on the aforementioned *Anns* test, the exception in *Lillicrap* would fall to be dismissed. The reasons for the court's unwillingness to follow *Junior Books* are fully set out in *Lillicrap* at 504E-505F, and do not require reiteration. Suffice it to say that insofar as the plaintiff's case against the second defendant is expressly pleaded consistently with the incidence of the first leg of the *Anns* test, it does not sustain a claim under the extended Aquilian action. Our law does not presume a duty of law to arise from the pleaded degree of proximity. On the contrary, it requires the plaintiff to establish the existence of considerations to show why the degree of proximity should in the given circumstances give rise to a pertinent duty in law to it by the defendant. In the current case, the only consideration that has been pleaded in the particulars of claim is the applicable contractual matrix and the standard of workmanship imposed by it.

[28] I also did not find any basis in the jurisprudence in cases such as *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4, 2014 (3) SA 394 (CC), 2014 (5) BCLR 511 and *Chartaprops 16 (Pty) Ltd and Another v Silberman* [2008] ZASCA 171; 2009 (1) SA 265 (SCA), [2009] 1 All SA 197 (SCA); (2009) 30 ILJ 497 (SCA)), to which reference was made by counsel in argument, to hold that the second defendant's alleged negligent conduct was wrongful. The factual context of those cases and the pertinent policy considerations were materially distinguishable from the current matter. Both cases involved the defendants in those matters having voluntarily entered into undertakings for reward in circumstances that if they were to discharge their functions negligently, bodily harm to persons in the position of the respective plaintiffs in those cases was eminently foreseeable. As pointed out in *Loureiro* at para. 56, the constitutional right of everyone to personal safety or physical integrity is a 'compelling normative consideration' in such situations. It does not present in the current matter.

[29] It was not argued on behalf of the plaintiff that the circumstances of the current case gave rise to a need to develop the common law as provided for in terms of s 39(2) of the Constitution. Indeed, I am unable myself to conceive of a cogent basis for any such argument.

[30] The plaintiff's counsel did argue, however, that because of the potentially wide range of considerations that can be weighed in the balance in determining legal policy, the matter did not lend itself to determination on exception. Relying on the following dicta of Hefer JA in *Minister if Law and Order v Kadir* 1995 (1) SA 303 (A) at 318E-I:

> As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which "shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people" (per M M Corbett in a lecture reported *sub nom* "*Aspects of the Role of Policy in the Evolution of the Common Law*" in (1987) SALJ 104 at 67). What is in effect required is that, not merely the interests of the parties inter se, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands. (Corbett (op cit at 68); J C van der Walt "*Duty of care: Tendense in die Suid-Afrikaanse en Engelse regspraak*"1993 (56) THRHR at 563-4.) Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited earlier Fleming rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of all the circumstances of the case and of every other relevant factor.,

counsel contended that the question of the existence or not of a legal duty by the second defendant to the plaintiff should rather be determined at the end of a trial, with the benefit of evidence, than on exception.

[31] The plaintiff's counsel did not support his argument with any adumbration of the nature of the evidence that might affect the required determination of legal policy. He pointed out that the plaintiff had pleaded that it had no knowledge of the terms of the contract between the first and second defendants, and seemed to imply that insight into that contract might affect matters. But litigation is not meant to proceed on an uncharted fishing expedition basis. A claimant should know its case sufficiently at the inception to be able to competently plead its claim.

[32] I am not persuaded that it is not possible or proper in this case to decide the issue of whether a case for wrongfulness has been made out on the pleadings on exception. In

Telematrix (Pty) Ltd v Advertising Standards Authority SA [2005] ZASCA 73; [2006] 1 All SA 6 (SCA), 2006 (1) SA 46, Harms JA referred to a similar argument that had been addressed in *Axiam Holdings Ltd v Deloitte & Touche* [2005] ZASCA 61; [2005] 4 All SA 157 (SCA) to the effect that it is inappropriate to decide the issue of wrongfulness on exception because the issue is fact bound, and pointed out (at para. 2), '*That is not true in all cases. This court for one has on many occasions decided matters of this sort on exception. Three important judgments that spring to mind are Lillicrap, Indac*[11] *and Kadir. Some public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation.*' The learned judge proceeded (at para. 3), '*Exceptions should be dealt with sensibly. They provide a useful tool to weed out cases without legal merit.*'

[33] For all these reasons I consider that the second respondent's exception to the plaintiff's pleaded claim against it is well taken. In circumstances in which the pleaded claim against the first defendant (which is founded in contract) is unaffected by the exception, the proper course would be to strike out from the particulars of claim those parts of it that pertain to the claim sought to be advanced in support of the relief against the second defendant. An order to that effect will issue.

[34] The following order is made:

1. The second defendant's exception to the plaintiff's particulars of claim is upheld with costs.

2. Pursuant to paragraph 1 of this order, the following parts of the plaintiff's particulars of claim are struck out: paragraphs 7-11; paragraph 20.1 insofar as it relates to the alleged 'legal duties' of the second defendant, paragraph 22 insofar as it alleges a breach by the second defendant 'of its aforesaid legal duty', paragraph 24 insofar as it refers to the second defendant, and the prayers for judgment against the second defendant jointly and severally with the first defendant.

3. The plaintiff is afforded a period of 15 days from the date of this order within which to deliver notice of its intention to amend its particulars of claim in respect of any claim it might wish to pursue against the second defendant, failing which its claim against the second defendant shall be deemed to have been dismissed with costs.

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[11] *Indac Electronics (Pty) Ltd. v Volkskas Bank Ltd.* [1991] ZASCA 190; 1992 (1) SA 783 (AD); [1992] 1 All SA 411 (A).

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Excipient / Second Defendant's counsel:	**Andrew Morrissey**
Excipient / Second Defendant's attorneys:	**Everinghams Attorneys** **Cape Town**
Respondent / Plaintiff's counsel:	**R.A.J. Acton**
Respondent / Plaintiff's attorneys:	**Norton Rose Fulbright South Africa Inc** **Sandton and Cape Town**