NAMIBIA BREWERIES LTD V SEELENBINDER, HENNING & PARTNERS

CASE NO. (P) I 1606/1999

2002/02/12

Maritz, J.

PRACTICE
ACTIO LEGIS AQUILIA

Practice – exceptions – court to assume pleaded facts are true and capable of proof – excipient has the duty to satisfy the Court that on all reasonable constructions to be given to the pleadings and on all possible evidence that may be led thereon, no cause of action is or can be disclosed – final evaluation and balancing of policy considerations for extension Aquilian action not to be considered at that stage – Court only to be satisfied that Actio provide basis and that there are

considerations of policy and convenience that prima facie indicates extension may be allowed by trial Court.

Pleadings – meaning of "cause of action" – entire set of facts that gives rise to an enforceable claim – cause of action does not accrue until the occurrence of the last of such facts.

Damages – when arising - professional negligence resulting in damage to pipes underneath building – damage not patent – damage manifested itself only when leakage from reticulation system discovered – patrimonial damages suffered only when defect became apparent – cause of action arising only then – plaintiff at that stage owner of property.

Delict - Actio Legis Aquilia – breach of contractual duty – claim for pure economic loss – wrongfulness of breach raised in exception but abandoned during argument - plaintiff not owner of property at time wrong committed but acquires property later – extension of Actio to afford redress for breach of professional duty to subsequent owners – such extension of Actio *prima facie* shown.

CASE NO. (P) I 1606/1999

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAMIBIA BREWERIES LTD **Plaintiff/Respondent**

versus

SEELENBINDER, HENNING & PARTNERS **Defendant/Excipient**

CORAM: MARITZ, J.

Heard on: 1999/11/19

Delivered on: 2002/02/12

JUDGMENT

MARITZ, J.: The defendant has excepted to plaintiff's particulars of claim as being bad in law and lacking in averments which are necessary to sustain a cause of action *ex delicto* arising from defendant's alleged breach of a duty to perform professional work in the execution of its mandate with the diligence, skill and care of a reasonable professional engineer in its position.

The facts pleaded by the plaintiff, which I must assume for purposes of the exception as true and capable of proof (cf. *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd,* 1999 (1) SA 624 (W) at 632C; *Marney v Watson and Another,* 1978 (4) SA 140 (C) at 144F) are these: The plaintiff is a subsidiary of Olthaver & List Finance and Trading Corporation Ltd (hereinafter "O&L"). From 1 June 1980 O&L leased a property in the in the municipal area of Windhoek from the local authority council under a notarial deed of lease. In terms of the contract, it committed itself to construct a brewery on the property to

the value of at least N$3.5 million; to maintain and repair the improved property at it own expense and to return it at the expiry of the lease without any compensation for the improvements. It was, however, expressly agreed that O&L would have an option to purchase the improved property during the subsistence of the lease. The purchase price would be the difference between the fair market value of the improved property and that of the improvements on the property to be assessed when the option is exercised. Furthermore, it was either an implied or a tacit term of the lease that the right to acquire ownership of the property could be ceded by O&L. These terms and conditions were known to the defendant at all times relevant to the action.

On 16 July 1982 O&L subleased the property to the plaintiff. On 14 April 1993 O&L ceded all its rights, title and interests in and to the lease agreement with the Municipality (including the right to acquire the property) to the plaintiff and the latter subsequently acquired the property. However, prior to (and probably in anticipation of) the conclusion of that sublease, cession and subsequent acquisition of the property, the plaintiff instructed the defendant, a firm of professional consulting engineers, to design and supervise the construction of a new bottling plant on the property - specifically including in its mandate the effluent drainage system thereof. It was an implied or

tacit term of the defendant's mandate that it would execute its duties with the skill and care of a reasonable professional engineer in its position. Concurrently with this contractual duty, the defendant owed the plaintiff a duty of care in carrying out work on the property. A reasonable person in the same position than defendant would have foreseen the possibility of harm occurring to the plaintiff should he/she fail to execute those duties with due skill and care and would have taken measures to guard against the occurrence thereof.

In breach of this duty of care, the defendant acted negligently by specifying pipes whose properties were inadequate or inappropriate for the required purpose and by failing to properly supervise the installation of the pipes. As a result the pipes failed: They were unable to withstand the compaction applied by the upper stabilized layer during construction in 1981; they cracked and a number of joints in the pipes were grossly mis-aligned. Consequently, large quantities of effluent leaked out of the reticulation system beneath the bottling plant. As a consequence, the plaintiff sustained damage to its property in the sum of N$2 298 638,90 - being the reasonable costs incurred to repair the drainage system of the bottling plant.

The defendant's exception is broadly divided into two parts: The first dealing with the delictual element of wrongfulness and the second with that of loss. In the first part, the defendant pleads that the plaintiff sues in delict, not for any damage to its property or for injury to any person, but for pure economic loss resulting from the breach of a contractual duty to render professional services with due skill. It alleges that the breach of such a duty is not wrongful for purposes of Aquilian liability and does not give rise to a claim founded in delict. In the second part is divided into two sections: the plaintiff failed to allege that it had any proprietary interest in the property or bottling plant at the time the delict, in respect of which it sues, was committed or, for that matter, that it bore the risk of or was liable to any third party in respect of damage thereto. As a result, it did not suffer any loss. The second part alleges that the plaintiff pleaded a contractual, not a delictual, measure of damages in the calculation of its claim.

At the outset of his argument, Mr Loxton SC (assisted by Mr Franklin) informed the Court that, for purposes of this exception, the defendant would no longer pursue the issue of wrongfulness but only those of loss and the measure thereof. It is therefore not necessary for this Court to decide the issue raised in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd,* 1985 (1) SA 475 (A), i.e. whether the

breach of a contractual duty to perform professional work with due diligence is *per se* a wrongful act. Having so limited the scope of the defendant's exception, he argues it along the following lines: The plaintiff pleads that it was the owner of the property at the time the leakage of effluent from the reticulation system beneath the bottling plant was discovered. In the absence of any allegation that it was or became the owner of the property on any earlier date, the Court may not infer from the pleadings that it was also the owner when the damage occurred. Although discovery of the leakage may be relevant to the issue of prescription, it is irrelevant in the determination of the date on which the delict has been committed, i.e. when the damage, causally connected to the defendant's wrongful act or omission, manifested itself. That, he argues, happened during construction of the bottling plant in 1981. On that date and for many years thereafter the Municipality of Windhoek was and remained the owner of the property. In the absence of a legally recognised relationship between the plaintiff and the property when the latter was damage as a result of the defendant's breach, the plaintiff has failed to make out a case that it suffered patrimonial loss. Consequently it is precluded under common law from recovering any in a delictual action. In addition, the defendant pleaded a contractual measure of its damages whereas, instead, it should have calculated it with due regard to the extent to which its

patrimony has been diminished by the defendant's wrongful and culpable conduct. As the damage occurred before the plaintiff acquired the property, it cannot be said that its patrimony was diminished subsequently to the acquisition thereof.

The plaintiff, represented by Mr Gauntlett SC and Mr Smuts, took issue with defendant's submissions. In a well-researched, helpful and extensive argument (but mainly focusing on the issue of wrongfulness) they submit that the property was damaged whilst being owned by the plaintiff; that the plaintiff's claim is not for pure economic loss; that even if it is, such loss is *prima facie* recoverable on an extended application of the Aquilian action; that, regard being had to local and international authorities and the legal convictions of the community, such an extension is justified in the circumstances of this case and that it is entitled to recover the reasonable costs incurred to repair the damages occasioned by the defendants breach of duty.

The merits of the exception fall to be judged against the legal matrix of the principles governing the extended Aquilian action in our law. In that context, the Court must consider the defendants principal proposition, i.e. that the plaintiff was not the owner of the property at the time the claim for damages arose. In deciding that point, the Court must remind

itself that, having taken the exception, the defendant must satisfy the Court that, on all reasonable constructions of the plaintiff's particulars of claim as amplified and amended (cf. *Kennedy v Steenkamp,* 1936 CPD 113 at 115; *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd,* 1948 (2) SA 891 (C) at 893; *Callender-Easby and Another v Grahamstown Municipality and Others,* 1981 (2) SA 810 (E) at 812H--813A); *Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk,* 1988 (2) SA 493 (A) at 500E; *Lewis v Oneanate (Pty) Ltd And Another,* 1992 (4) SA 811 (A) at 817F-G and *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd*, *supra* at 632D) and on all possible evidence that may be led on the pleadings (see: *McKelvey v Cowan NO*, 1980 (4) SA 525 (Z) at 526D-G), no cause of action is or can be disclosed.

The most beneficial construction that can be given to the pleadings is that the plaintiff became the owner of the property at some time during the period 14 April 1993 (when O&L ceded its right, title and interest in and to the lease to the plaintiff) and the first week of July 1994 (when it discovered the damage). It is with this in mind that the allegation that the pipes were damaged "after or upon the installation during the construction of the bottling plant in 1981" must be read. That phrase, so the defendant contends, allows for one construction only: whether the pipes were damaged "after or upon installation", the

damage occurred at the latest during the construction of the bottling plant in 1981. That construction is supported by the further allegation that the pipes were unable to withstand the compaction applied to the upper stabilised layer and that they cracked as a consequence.

The plaintiff's answer to this contention is twofold: There is nothing to show, on the pleadings, that *damnum* was suffered in a single event. The defendant's negligence could well have given rise to a cumulative and interactive failure. When, as a matter of law, the loss was sustained, cannot be determined without evidence. In any event, no cause of action could have accrued in an instance such as this – involving underground piping beneath the bottling plant - until the potential plaintiff has knowledge of the essential elements of his claim. This is because only then that can he be said to be able to prove the facts necessary to support his right to judgment of the Court.

Plaintiff's submission that the *damnum* may not have been suffered in a single event does not appear to be a complete answer to the defendant's assertion that the cause of action arose at a time when the plaintiff was not the owner of the property. As Goldstone AJ pointed out in *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd,* 1979 (4) SA 905 (W) at 909H "our law recognises a distinction between

the case of a single completed wrongful act, on the one hand, and a continuance of a wrongful act causing fresh damage from day to day on the other hand" and that in "the case of a single completed wrongful act, once a loss has been sustained there is only a single cause of action in respect of such wrongful act." Although the whole of the damage suffered by a litigant might not have manifested itself at the time an action is instituted, the "once and for all"-rule demands that, in the case of a single wrongful act, both actual and prospective damages should be claimed in the same action (See: *Oslo Land Co Ltd v Union Government,* 1938 AD 584 at 591; *Symmonds v Rhodesia Railways Ltd,* 1917 AD 582 at 588 and *Evins V Shield Insurance Co. Ltd,* 1980(2) SA 814 (A) at 835). The "wrongful act" that underlies the plaintiff's cause of action is the defendant's breach of duty to specify pipes suitable for their required purpose and/or to supervise their installation. All the damages that might have resulted followed upon that single act (compare e.g. *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd, supra,* at 909A). Once damage, which is in a legal sense causally connected to the wrongful act, has occurred and manifested itself, the threshold requirement for a cause of action to arise has been met and the delict becomes actionable. Whether further damage may or will follow upon the "threshold damage" because of a "cumulative or interactive failure" or for any other reason is irrelevant

in the determination of the time at which the cause of action has arisen.

The plaintiff's submission that the Court cannot determine without evidence when, as a matter of law, the loss was sustained, requires closer scrutiny. Although the defendant's construction of the phrase "after or upon the installation during the construction of the bottling plant in 1981" appears to be the most likely, it is not necessary the "most beneficial". The phrase may also mean "upon the installation during the construction of the bottling plant in 1981 or thereafter." So construed, the possibility remains that the evidence to be adduced during the trial may not establish that the pipes failed or were damaged during construction of the bottling plant but only later, i.e. on or after the date on which the plaintiff acquired the property. This construction is supported by the allegation that the plaintiff suffered damages to "its property" as a consequence of the defendant's negligence and the *sequelae* thereof. If that is the case, the defendant's principal attack must fail - at least, at this stage of the proceedings.

But even if the interpretation contended for by the respondent is accepted, the Court must consider plaintiff's argument that no cause of

action could have accrued in the circumstances of this case until the potential plaintiff has knowledge of the essential elements of his claim. That only happened when the plaintiff discovered the leak in the pipeline of the effluent drainage system during 1994. At that time, it was the owner of the property.

When did the plaintiff's cause of action arise? In *Abrahamse & Sons v SA Railways and Harbours,* 1933 CPD 626 Watermeyer, J examined the meaning of the expression "cause of action" and concluded:

> "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause action."

See also: *McKenzie v Farmers' Co-op Meat Industries Ltd,* 1922 AD 16 at 23.

There is ample authority for the proposition a "wrongful act" by itself does not make a delict (*Coetzee v SAR & H,* 1933 CPD 565 at 570-1;

Van Der Merwe & Olivier "*Die Onregmatige Daad in die Suid Afrikaanse Reg*" at p 286). The Aquilian action exists for the purpose of recovering damages. Without actionable damages, it has no practical application in law. Therefore, the remedy under the Actio becomes available only if and when the facts and circumstances of a particular case satisfy all the elements of the delict.

In most instances where a wrongful act causes physical damage to the property of or personal injury to the plaintiff, damage follows immediately. But the Aquilian action in its extended form is no longer limited to damages of that nature (compare e.g. the remarks of Grosskopf AJA in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd, supra,* at 498C). It has been extended to include pure economic loss (See: *Administrateur, Natal v Trust Bank van Afrika Bpk,* 1979 (3) SA 824 (A)) It is especially within the realm of loss of that nature that the question when damages occurred becomes more difficult to answer and the answer may well differ depending on the causa of that loss.

In this exception, the Court is concerned with damage caused both by the breach of a duty of care owed by a professional engineer to the plaintiff to perform professional work with due skill and diligence and a

concurrent contractual duty to render the services in such manner. To the extent that the plaintiff relies on the latter, the damage suffered is normally regarded as purely financial in nature (see: *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd, supra,* at 499E) – that is, unless it is established that the financial loss has been caused through physical injury or damage. Assuming for the moment in favour of the defendant that the damages claimed by the plaintiff is purely economic and that the pipes in the reticulation system were damaged during construction, does it follow that the plaintiff is non-suited in delict because it only became the owner at a later date? I think not.

It must be borne in mind that by the use of the word “damages” in the delictual sense “is meant not the injury to the property injured, but *damnum*, that is loss suffered by the plaintiff by reason of the negligent act” (per Watermeyer JA in *Oslo Land Co. Ltd. v Union Government*, supra, at 590). *Damnum*, in that sense refers to the patrimonial or pecuniary loss suffered by the plaintiff as a consequence of the wrongful conduct of another. It is measured with reference to the plaintiff’s patrimonial position but for the delict (*Ranger v Wykerd and Another,* 1977 (2) SA 976 (A) at 987C).

In *Sasfin (Pty) Ltd v Jessop and Another,* 1997 (1) SA 675 (W), Wunsch J grappled with the problem (albeit in a different context) as to precisely when such damage results and, on the analysis of a number of authorities (at 692I) remarked:

> "Liability for pure economic loss caused by negligence is in a state of evolution in England. It was recognised in *Administrateur, Natal v Trust Bank van Afrika Bpk,* 1979 (3) SA 824 (A) that it will undergo a process of development in South Africa as well."

Although there are authorities that seem to suggest otherwise (at least as far as the breach of a contractual obligation is concerned – compare *Bullock Bros v Bloemfontein Town Council,* 1915 OPD 56 at 57; *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd, supra,* at 909E), it does not seem to me that damage of a purely financial nature occurs until it has manifested itself. In the speech of Lord Lloyd of Berwick in *Invercargill City Council v Hamlin* [1996] 1 All ER 756 (PC) at 772f-h) the Privy Council held as follows:

> "The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case

> the occurrence of the loss and the discovery of the loss will coincide…
>
> In other words, the cause of action accrues when the cracks become do bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: see *Ruxley Electronics and Construction Ltd v Forsyth* [1994] 3 All ER 801…"

The plaintiff expressly alleges in the further particulars to its claim that it discovered the damage to the pipes during the first week of 1994 and that it was the owner of the property at the time. Furthermore, it is evident that the pipes are part of the "reticulation system beneath the bottling plant" and that they were damaged because they could not withstand compaction applied to the upper stabilised layer. The damage was therefore not obvious from the outset. Read in context, the damage to the pipes remained latent until discovered when the plaintiff acquired the property. Only upon discovery did they become patent to the plaintiff and would they have been apparent to a prospective buyer or his or her expert. That is the moment when the

plaintiff's patrimony was reduced; when it suffered damages and when its cause of action arose.

There is, however, another aspect to consider even if the damage to the pipes of the reticulation system of the bottling plant on the property was sustained during the construction thereof and "*damnum*" resulted at a time when the plaintiff was not yet the owner of the property: Did the plaintiff make out a *prima facie* case for a reasonable extension of the Aquilian action by the trial court to afford a remedy to a plaintiff against a defendant who has rendered professional services in connection with improvements to be constructed on a property in breach of a contractual or other duty of care at a time when the plaintiff was not the owner of the property at the time and only later acquired it?

I appreciate, as Van Den Heever JA stated in *Herschel v Mrupe,* 1954 (3) SA 464 (A) at 490A that "law in a community is a means of effecting a compromise between conflicting interests and … that according to the principles of Roman-Dutch law the Aquilian action in respect of *damnum injuria datum* can be instituted by a plaintiff against a defendant only if the latter has made an invasion of rights recognised by the law as pertaining to the plaintiff; apart from that,

loss lies where it falls." But the remedies afforded by the Actio are not cast in stone. Its scope and sweep are intimately connected to the demands of fairness, reasonableness and justice of the community within which it is applied. To that end, it has evolved over the ages (compare for example the discussion in *Smit v Saipem,* 1974 (4) SA 918 (A) at 929F-931C and the reference in *Chawanda v Zimnat Insurance Co Ltd,* 1990 (1) SA 1019 (ZH) at 1024E-1025A) and has been judicially and judiciously extended in modern jurisprudence (cf. *Joubert v Impala Platinum Limited,* 1998 (1) SA 463 (BHC) at 474 I – 477 F) on a number of occasions. It is, by its nature, a flexible remedy. It is that characteristic that has ensured its continued relevance in our law.

When it comes to the recovery of pure economic loss, our Courts have been mindful not to open the door to a plethora of actions for the recovery of pecuniary loss resulting from the imperfect performance of their everyday duties by others. Justification for a degree of judicial reluctance against an unrestricted extension is given by Marais, J (as he then was) in *Arthur E Abrahams & Gross v Cohen and Others,* 1991 (2) SA 301 (C) at 308A-C:

> "Fear of introducing what Cardozo J in *Ultramares Corporation v Touche* (1931) 255 NY 170 at 179 (74 ALR 1139 at 1145) called 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' has deterred Courts from upholding too readily claims for damages for pure economic loss unassociated with physical damage. Thus, the mere fact that the loss which has occurred was reasonably foreseeable by the defendant is not necessarily per se sufficient to have given rise to a legal duty to act or to abstain from acting in order to avoid the loss. Support for these propositions will be found in cases such as *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 498C; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 832H; *Yuen Kun-yeu and Others v Attorney General of Hong Kong* [1987] 2 All ER 705 (PC) at 710g - h, *Hawkins v Clayton* 1988 ALJ 240."

Instead, our Courts have opted for an "incremental approach" (per Hannah, J in *Namibia Machine Tools (Pty) Ltd v Minister of Works and Transport* 1997 NR 18 at 26F) earlier adopted by Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* [1985] 60 ALR 1. Whether it should be extended in any particular case, depends on whether it is the legal conviction of the community that the breach of duty "ought to be regarded as unlawful and that the damage ought to be made good by the defendant" (to use the words of Booysen, J in *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd,* 1982 (4) SA 371 (D) at 384D). Which criteria to use when giving content to

"the legal conviction of the community" are virtually impossible to capture in an all-inclusive list: In the *Namibia Machine Tools* – case (*supra* at 26 I) this Court referred to considerations of "fairness, justice and reasonableness"; In *Hawkins v Clayton,* 1988 ALJ 240 at 247B Brennan J mentions "the nature of the activity which causes the loss, the relationship between the parties and contemporary community standards (especially where liability for breach of the proposed duty would be disproportionate to the risk which a person might reasonably be expected to bear as an incident of engaging in the particular activity if no limiting factor were identified) and in *Carparo Industries plc v Dickman* [1990] 1 All ER 568 at 585f Lord Oliver says a "'relationship of proximity' between plaintiff and defendant and by the imposition of a further requirement that the attachment of liability for harm which has occurred be 'just and reasonable'".

In assessing what the "attitude of the community" is regarding the wrongfulness of the breach or whether the plaintiff should be afforded a remedy, Eloff JP in *Bowley Steels (Pty) Ltd v Dalian Engineering (Pty) Ltd,* 1996 (2) SA 393 (T) at 399A-C refers to the remarks of the then Chief Justice in his Oliver Schreiner Memorial Lecture (published in (1987) 104 SALJ 52 at 67-8):

> 'It is these values and norms that the Judge must apply in making his decision. And in doing so he must become "the living voice of the people"; he must "know us better than we know ourselves"; he must interpret society to itself.
>
> In this process the Judge would no doubt be influenced by concepts of natural law, by international law norms and by the way in which the particular problem is handled in other comparable systems of jurisprudence. He would draw upon his knowledge and experience gained as an educated, responsible and enlightened member of society, upon the contact with and insight into his fellow humans which his professional career has given him; and he would draw upon his continuing perceptions of the attitudes of the community around him."

Given the dynamics in society, its ever-changing values and the fresh demands made by development and technology in business, industry and the manner in which its members interact with one another, the Aquilian action is likely to be extended further in future. Lillicrap's case is and was never intended to be the last word on a professional person's liability for pure economic loss resulting from the breach of a contractual duty to render professional services with due care and diligence. Moreover, however persuasive the majority view in that case may be, this Court is not bound by it. The majority judgment in that case may not even be the last word on whether, independently from a contractual duty, a professional person does not also owe a duty of care to the owner and subsequent owners of a building (or sections

thereof) to render services in connection with the construction or maintenance thereof with due diligence (contra: *Kohler Flexible Packaging (Pinetown) (Pty) Ltd v Marianhill Mission Institute And Others*, 2000 (1) SA 141 (D)).

It is within the context of these remarks that the exception falls to be considered. The Court should be careful not to stifle the further development of the extended Aquilian action by applying a narrow and formalistic approach when exceptions are taken against a more extended application thereof. If an exception is allowed in every instance where relief is sought outside the scope of recognised remedies, the action will lose its flexibility and capacity to evolve and remain relevant to the demands of a changing society. Whether it should be extended in any particular case, depends to the then prevailing legal convictions of the community. The assessment thereof should best be left for the trial court to determine at a later stage. As Vivier J remarked in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd,* 1992 (1) SA 783 (A) at 801B-D " ...at the stage of deciding an exception a final evaluation and balancing of the relevant policy considerations ... should not be undertaken." At this stage of the proceedings the Court should ask itself whether a case has been made out upon which the trial court, acting reasonably, may extend the

Aquilian action to provide the remedy prayed for. In so doing, the Court will examine whether the lex Aquilia provide a basis for such liability and whether there are considerations of policy and convenience in the case which *prima facie* indicate the existence of a legal duty towards the plaintiff to conduct him or herself in a particular manner?

Given the increasing tendency in modern times to construct multi-storied buildings in urban areas for business and residential purposes; the legislative accommodation of proprietary interests in sections of such buildings; the complexity of industrial buildings to comply with technical demands; the manner in which developments of that nature is undertaken in the building industry; the complexity of relationships between owner, developer, builder, architect, engineer and other professionals involved in the design and construction process; the difficulty that an owner or subsequent owners may have to detect latent defects in the construction process; the significant investment owners or sectional owners make in such properties; the public interest in the safety of those structures; the frequency with which latent design and construction defects have manifested themselves (sometimes years after the construction) and the granting of relief in other jurisdictions to subsequent owners in like circumstances are all considerations that may well persuade the trial court that the legal

convictions of the community require that a person rendering professional services in relation to the construction or maintenance of a building has a duty of care (unrelated to a contractual duty) to the owner or subsequent owners of that property - the breach whereof would be wrongful and render such a person liable for economic loss suffered as a consequence thereof.

Such a court is even more likely to hold that where there is a duty of care based in contract between such a professional and a client who later becomes owner of the improved property, the relationship is so proximate in nature that the remedy should be extended to afford the latter redress for breach thereof. It is unlikely that an extension of the remedy to include recovery of pure economic loss in those circumstances will bring in train a multiplicity of actions.

In the result, I am satisfied that the Aquilian action forms a basis for such a remedy and that there are considerations of policy and convenience which *prima facie* allows for an extension in the circumstances I have mentioned earlier.

The last ground on which the defendant is seeking to except to the plaintiff’s claim it that the wrong measure for the calculation of

damages is pleaded. The defendant argues that, inasmuch as the plaintiff claims “the reasonable costs of repair to the drainage system of the bottling plant” the measure is contractual in nature. This attack is without merit. As Visser and Potgieter point out in “*Law of Damages*” at p.68:

> “The idea that positive interesse in the law of contract differs fundamentally from negative interesse in delict cannot be supported. Positive interesse may also be defined with reference to the position in which the plaintiff would have been if a breach of contract had not occurred. This definition reveals the common ground between contractual positive interesse and delictual negative interesse. Both measures contain a comparison between the present patrimonial position of the plaintiff and the position he would have occupied but for the damage-causing event (be it in delict or breach of contract).

The plaintiff made it clear in its further particulars that it is not seeking damages in respect of the diminution of the market value. It limits it claim for damages to the reasonable costs of repair thereto (which is less than any replacement or market value that may conceivably be attached to the property) and alleges that its patrimony has been diminished to that extent. If the costs of repair to the plaintiff’s immovable property by another person’s delict are less than the value of the improvements thereon, it is, in my view, permissible to quantify

such damages with reference to the reasonable and necessary costs of repair thereof. The fact that, so limited, it has common ground with the calculation with contractual damages is irrelevant.

In the result, the exception must fail and the following order is made:

> "The defendant's exception is dismissed with costs, such costs to include the costs consequent upon the employment of two instructed counsel".

_____

MARITZ, J.

ON BEHALF OF THE PLAINTIFF:

Instructed by:

ON BEHALF OF DEFENDANT:

Instructed by: