

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 20/44564

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED YES/NO

SIGNATURE

DATE

3/10/2022

In the matter between:

MICHAEL DELROY GAMMIE N.O.

First Plaintiff

RONALD JOHAN TAMBOER N.O.

Second Plaintiff

ALAN JAMES FLYNN MANDELL N.O.

Third Plaintiff

RIA SAYANVALA N.O.

Fourth Plaintiff

and

CREATIVE COUNSEL (PTY) LTD

First Defendant/Excipient

PUBLICIS GROUPE HOLDINGS B.V.

Second Defendant/Excipient

JUDGMENT

STRYDOM, J

- [1] This is an exception taken by the defendants against the plaintiff's particulars of claim.
- [2] The first to fourth plaintiffs are trustees ("the plaintiffs") of the Corlett Drive Trust ("the Trust"). In this judgment the plaintiffs will be referred to as such or as "the Trust".
- [3] The first and second defendants are TCC and Publicis, respectively and will be referred to collectively as "the defendants".
- [4] The Trust owns a commercial building located on Corlett Drive, Bramely, Johannesburg ("the property") which building was leased to TCC.
- [5] The Trust has commenced action against TCC on the grounds that TCC is liable to the Trust to pay arrear rental and the costs of repairing the building situated on the property, and against Publicis on the basis that it is liable in terms of the guarantee to secure the obligations of TCC towards the Trust.
- [6] The exception was preceded by a notice calling on the Trust to remove the causes of complaint.
- [7] Before this exception was set down for hearing, the Trust had amended its particulars of claim on three occasions in response to notices in terms of Rule 23(1) of the Uniform Rules of Court, or exceptions delivered by the excipients. The latest particulars of claim is the pleading against which exception has been taken. The court was asked on behalf of the defendants to consider the previous notices to obtain the factual background to the current exception.
- [8] Before dealing with the exception, a short summary of the claims as contained in the amended particulars of claim should be discussed.
- [9] In the particulars of claim, the Trust, as its first claim, relies on a written lease agreement ("the Lease Agreement") in terms of which TCC leased the property from the Trust. The terms of the Lease Agreement were extensively referred to in the pleading. For purposes of this judgment the court will only refer to the relevant clauses.

- [10] In the Lease Agreement, the commencement date was defined to be 1 April 2012. The lease period was for 10 years. The Lease Agreement was, *inter alia*, subject to a suspensive condition that prior to the commencement date, the Trust should take transfer of the property. In the event of a suspensive condition not being fulfilled, the Lease Agreement would have become null and void *ab initio*.
- [11] In terms of clause 27.2 of the Lease Agreement, the suspensive condition was in favour of the Trust only and the Trust could, on written notice to TCC, waive, in whole or in part, its rights under the suspensive conditions, or extend the time period within which the suspensive conditions were to be fulfilled.
- [12] The Lease Agreement contained a non-variation and non-waiver clause, clause 1.6, that provided that unless a variation or waiver were not reduced to a non-electronic hard copy written amendment signed by means of handwritten signature by or on behalf of the parties, such variation or waiver would be ineffective (the "non-variation clause").
- [13] In paragraph 12 of the particulars of claim, the Trust relies on a written addendum, dated 18 August 2011, of the Lease Agreement ("the Addendum"). It is averred that this Addendum was signed by all parties thereto. As far as representation goes it was stated as follows:

"...the Trust, represented by Shaun Hurwitz and/or Ron Goldstein, and TCC, represented by Ran Neu Ner and/or Gill Oved..."

- [14] In paragraph 12.1 the Trust specifically pleaded as follows:

"Although the Addendum was duly reduced to a non-electronic written hard copy and signed by means of a handwritten signature by all parties thereto, after a diligent search, neither the original nor a copy of the signed document is in the Trust's possession, nor under its control, nor otherwise available to it. The Trust is accordingly unable to attach a true copy of the Addendum but an unsigned copy, being the best available evidence, and which accords in every respect with the signed copy but for the presence of the signatures, is annexed hereto marked "**POC1.1**".

- [15] In paragraph 12.2, it was pleaded that notwithstanding, the Trust, TCC, as well as third parties involved in the development of the property, all conducted themselves in accordance with the terms of the Addendum.
- [16] It was then pleaded in paragraph 12.3 that the Addendum expressly amended the commencement date of the Lease Agreement to 10 December 2012, thereby extending the time period within which the suspensive conditions were to be fulfilled, to such date.
- [17] In the alternative, it was pleaded that if it may be found that the Addendum was not reduced to a non-electronic written hard copy and signed by means of a handwritten signature by all parties then, and in such event, the Trust pleaded that on or about 18 August 2011, the unsigned Addendum was sent by the Trust to TCC and that the despatch of the unsigned Addendum constituted notice in writing of the Trust's intention to extend the time period within which the suspensive conditions were to be fulfilled to 10 December 2012, by which date the suspensive condition was fulfilled.
- [18] The Trust pleaded that TCC received notice and further, and in the alternative, it was pleaded that in the event of a finding that the Lease Agreement was as a result of non-fulfilment of the suspensive conditions null and void, then the parties conducted themselves in accordance with the terms of the Lease Agreement and therefore revived the lease agreement.
- [19] As a further alternative, it was pleaded that an oral, alternatively, a tacit agreement was concluded. The terms of this oral or tacit lease agreement correspond with the terms of the Lease Agreement.
- [20] A guarantee agreement is then pleaded in terms of which Publicis guaranteed the performance of TCC in terms of the Lease Agreement.
- [21] Claim A is a claim made in terms of the Lease Agreement, or the alternatives pleaded creating a lease agreement, for payment of arrear rentals suffered against TCC and Publicis, jointly and severally, one paying the other to be absolved.

- [22] Claim B is an enrichment claim in the alternative to Claim A against TCC in the event that it is found that no lease agreement was concluded between the parties. This is based on the occupation by TCC of the property.
- [23] Claim C is a claim for damages to the property premised on an allegation that TCC owed to the Trust a duty of care not to cause damage to the property or to take reasonable steps to ensure that the property was not damaged. It is alleged that the duty was negligently breached causing damages to the Trust.
- [24] The defendants raised an exception to the amended particulars of claim identifying three exceptions. The defendants attached email correspondence between the parties to their notice of exception and sought to rely on extraneous evidence which does not form part of the particulars of claim which they seek to impugn.

The First Exception

- [25] The first exception is directed against the allegations contained in paragraph 12.1 of the particulars of claim alleging an addendum to the Lease Agreement which was reduced to a non-electronic written copy and signed by means of handwritten signature by all parties thereto.
- [26] The defendants' first exception comprised, in essence, of more than one complaint. Broadly, the complaint is that the pleading is vague and embarrassing as it lacks particularity which causes embarrassment of such a nature that the defendants are prejudiced as they do not know what claim they are to meet. The first exception challenges the sufficiency of the allegations made by the Trust to sustainably plead that the commencement date in the Lease Agreement was amended.
- [27] It was argued that paragraph 12 of the particulars of claim does not state which of the Trust's representatives signed the Addendum, as required by the non-variation clause contained in the Lease Agreement. The Trust pleaded that it was represented by Shaun Hurwitz and/or Ron Goldstein and TCC, was represented by Ran Neu Ner and/or Gil Oved. It was not stated which one of the two, or both mentioned representatives of the Trust or TCC signed the Addendum. It was

argued that since the Trust was not able to attach the Addendum it should have at least mentioned the names of the specific representatives on both sides.

- [28] The non-variation clause determines that an amendment needs to be signed “*by means of handwritten signatures by and on behalf of the parties*” and in paragraph 12.1, it was stated that the Addendum was signed *by all parties thereto*. In my view, the allegation in the pleading is in line with the requirement stipulated in the Lease Agreement and the fact that the names of representatives who signed on behalf of a party is stated as “*and/or*” does not render the pleading excipiable. Certainly this would not affect the defendant’s ability to prepare to meet the case of the Trust. The case of the Trust is clear. The Lease Agreement was amended by a written non-electronic addendum signed by a party representing the Trust. It was signed by one of two representatives or both. This allegation meets the requirements for an amendment contained in the Lease Agreement. In my view there is nothing wrong with pleading in the alternative that any one of the representatives could have signed the Addendum.
- [29] The mere fact that the attached unsigned Addendum made provision for the signature of only one of the representatives of the parties is neither here nor there. The relevant question is who signed the Addendum on behalf of the parties, not whether provision was made in the document for such signature. A signature or signatures of representatives signing an agreement need not to be appended on the proverbial dotted line whilst the requirement is that they should sign an agreement. In my view, these complaints are meritless.
- [30] The exception went further to state that in the absence of the Trust having attached a copy of the signed Addendum to its particulars of claim, the allegations in paragraph 12 of the amended particulars of claim do not meet the requirements of the Rule 18(6) which require a party who relies on a contract to state when, where and by whom the contract relied on was concluded. The defendants go on to state that the Trust ought to have alleged the identity of the authorised representatives of each of the Trust and TCC who concluded the Addendum. This is exactly what the Trust did, albeit, in the alternative. It should be noted that in the defendants’ exception, they did not complain that the Trust has failed to comply with the provisions of Rule 18(6) which requires a party who

relies upon a contract to attach the contract. Their complaint was confined to an alleged failure to comply with the provisions of the rule which requires a party who relies on a contract to state when, where and by whom the contract relied on was concluded. It was alleged by the plaintiffs when, where and by whom the contract relied upon was concluded and there is no merit in this part of the exception.

- [31] In the defendants' heads of argument, however, they seek to introduce additional complaints arising from the Trust's failure to attach the signed Addendum, namely, that the Trust has not alleged that it ever had a copy of the Addendum in its possession but has now lost it; has not alleged that TCC is in possession of the Addendum; has not alleged how it "lost" the Addendum if it was ever in possession of it and has made no attempt to plead how it will prove the conclusion of the Addendum.
- [32] The defendants have never given notice of these complaints to the Trust as required by Rule 23(1) and they are accordingly precluded from raising the complaint.
- [33] Although Rule 18(6) requires that a written agreement relied upon should be attached to a pleading, the fact that it was not done does not mean it is the end of the road for party relying on such a written contract. Where a party states that it is unable to attach a written agreement to a pleading because it is lost, or it is not in its possession and cannot be found despite a search, then it can still prove the existence of a document by means of evidence other than the production of the document itself. This is part of our substantive law of evidence which allows secondary evidence if the original document cannot be produced. The rules of court may only regulate matters of procedure but cannot make or alter substantive law.¹
- [34] In *casu*, if the Trust cannot not find the document, it will have to prove that the agreement was concluded and the terms thereof. It was alleged in the pleading that the terms are what is contained in the unsigned Addendum. All that the

¹ In this regard see *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W).

plaintiffs will have to prove is that the Addendum contained similar terms as the unsigned Addendum and that it was in fact signed by the parties as required in the Lease Agreement. This can be done at the trial.²

- [35] The court was referred to the matter of *Nedbank Ltd v Yacoob*³ by counsel for the defendants. In that matter the court found that the failure to attach the written contract was not a bar to a plaintiff proceeding to place reliance on a written contract but remarked as follows at paragraph [25]:

“The process to be adopted where the pleader is unable to attach the contract on which the claim is founded is obviously fact-specific. At very least, the reason for this inability should be fully pleaded. The date, place, parties and circumstances of the conclusion of the contract should also be properly set out to the extent possible as these are procedural requirements. It is important also that the salient terms relied on be properly pleaded. The manner in which the plaintiff will seek to establish the terms also requires to be fully pleaded. If this is not properly done, the pleadings may be attacked as excipiable for being vague or irregular. As we have said, they are not, however, excipiable for disclosing no cause of action merely because of the absent agreement.”

- [36] Mr Green, acting for the defendants, argued that “*the manner in which the plaintiff will seek to establish the terms also requires to be fully pleaded*”, and since that was not done, the pleading has been rendered vague and embarrassing. It was argued that the *manner* of establishing the terms required the Trust to have pleaded that it previously had a signed copy in its possession but lost it and explained how it lost the copy; further, that it should have stated whether TCC had a copy. It was argued that the Trust made no attempt to plead how it will prove the conclusion of the Addendum. I do not agree with this submission. In *Yacoob* the requirement mentioned was that a plaintiff has to plead the manner in which the terms of the agreement will be proven, not whether the plaintiffs previously had a copy in its possession and how it is going to prove the conclusion of the agreement. The plaintiffs specifically stated that the Trust has in its possession an unsigned copy, being the best evidence available. The

² See *Absa Bank Ltd v Zalvest Twenty (Pty) Ltd and Another* 2014 (2) SA 119 (WCC) para [20].

³ 2022 (2) SA 230 (GJ).

intention of the Trust is made clear with sufficient particularity that it wants to prove the terms of the Addendum to be the same as the unsigned copy and to do that, it will rely on the best evidence available. This in my view, meets the threshold mentioned in *Yacoob*.

- [37] Moreover, and as alluded to hereinabove, the defendants did not give notice to the Trust that it should have provided more information pertaining to whether it previously had a copy of the Addendum in its possession which was lost, whether TCC is in possession of the Addendum, how it was lost and how it will go about to prove the conclusion of the Addendum.
- [38] The defendants should have given notice to the plaintiffs to remove the cause of this complaint. This was never done and it cannot now be relied upon as part of the exception against the pleading.⁴
- [39] An excipient is obliged to confine its complaint to the stated grounds of his exception.⁵
- [40] The defendants' failure to articulate their complaint in this regard in the Rule 23 notice or in their exception precludes them from raising it.
- [41] I am in any event in agreement with the argument advanced on behalf of the plaintiffs that these further allegations which the defendants aver should have been contained in the pleading are not necessary allegations.
- [42] If a party states that a document is lost, it is to be implied that it previously was in possession of same. There is no need to make a specific allegation that the document was in his possession. Furthermore, the plaintiffs allege that the document was signed by their representative or representatives. This would imply that they had a copy of this document in their possession. It is also not clear how it could be pleaded the manner in which a document got lost. This matter is to be distinguished from the *Zalvest* matter where the allegation was made that the document was destroyed in a fire. This was a known fact and could

⁴ *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 753F; see also *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (2) SA 680 (T) 688D.

⁵ *Absa Bank Ltd v Cohen* (32870/12) [2014] ZAGPJHC 250 (3 June 2014); see also *Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) para [7].

have been pleaded. In a case where a document merely got lost, this cannot necessarily be explained with any degree of certainty how it happened.

- [43] Importantly, the allegation was made that the Addendum was concluded and was signed. In my view, all further evidence relating to the allegation that it got lost can be proven by way of evidence during a trial. The lack of further particularity does not render the defendants incapable of properly preparing for trial or to meet the case of the Trust.⁶ What difference would it make to know how and when the document was lost? If this allegation is denied, or not believed, it could be challenged during a trial where the Trust will bear the onus to rely on secondary evidence.
- [44] The defendants' reliance on correspondence which was not attached to the particulars of claim in an effort, seemingly, to disprove the Trust's allegation that the Addendum was concluded is wholly impermissible at the exception stage. The defendants failed to refer this court to any authority to consider evidence outside the ambit of the impugned pleading and its annexes, in this instance, correspondence between the parties, attached to its notice of exception, on the basis that this correspondence is "*plainly authentic and is part of the pleadings before court*". Firstly, the court hearing the exception is not concerned with evidence or the standard of proof. It is trite that the allegations in the impugned pleading must be accepted as proven.⁷
- [45] Secondly, in considering the exception, the court will confine itself to what is contained in the impugned pleading. No facts outside those stated in a pleading can be brought into issue and no reference to any other documents is permissible.⁸
- [46] To allow the introduction of such evidence because an excipient has attached it to his exception would completely undermine the principle which requires the court to consider the impugned pleading as it stands without reference to any other document. This will open the floodgates for an excipient to introduce evidence through its own notice of exception to bolster its case. A party who

⁶ *Levitan v Newhaven Holiday Enterprise* CC 1991 (2) SA 297 (C) at 298.

⁷ *Glaser v Millward* 1949 (2) SA 853 (W) at 862.

⁸ *Baliso v FirstRand Bank* 2017 (1) SA 292 (CC) at 303D-E.

wants to oppose the exception will not have an opportunity to answer to evidence attached to a notice of exception. As a plaintiff is limited to the pleading which is the subject of an exception so is the excipient to find its grounds of exception, based on factual allegations or legal conclusions, within the four corners of the impugned pleading. For purposes of considering an exception, the court must accept the truth of all the allegations contained in the pleading. In this case of the Trust, the court must accept that a written addendum was signed by the parties within the requirements of the Lease Agreement and that this document has been lost.

[47] In the premises, there is no merit in the first exception and it ought to be dismissed.

The Second Exception

[48] The second exception is directed at the Trust's reliance on sending a "notice" which allegedly did not comply with the provisions of the Lease Agreement.

[49] As set out above, the plaintiffs' second claim is an alternative claim premised on a finding that the Addendum was not properly concluded in terms of the Lease Agreement. The plaintiffs allege that the unsigned Addendum which was sent to TCC constituted a notice in writing of the Trust's intention to extend the time period within which the suspensive conditions were to be fulfilled. What underpins this second exception is that the notice failed to comply with provisions of the Lease Agreement.

[50] Clause 25 contains the chosen *domicilium citandi et executandi* of the parties to the Lease Agreement. Clause 25.2 provides that any notice must be addressed to the *domicilium* of any party and must either be sent by prepaid registered post or facsimile or be delivered by hand.

[51] As evidenced by annexure POC1.1, the Addendum was sent to TCC by email, which is not the chosen *domicilium* noted in the Lease Agreement. On this basis an exception was raised by the defendants that the amended particulars of claim do not contain allegations sufficient to sustain a cause of action based on the

plaintiffs having given notice to TCC to extend the date by which the suspensive conditions could be fulfilled.

- [52] It was submitted on behalf of the defendants that the amended particulars of claim only allege that the notice was sent by the Trust to TCC and that this does not constitute notice in writing of the Trust's intention to extend the time period within which the suspensive conditions were to be fulfilled. This would mean that no cause of action was established as no valid notice was given within the terms of the Lease Agreement.
- [53] It was argued by Mr Subel on behalf of the Trust that the particulars of claim do not state that the notice was given by way of email or, indeed, that it was given in any manner which differs with the notice provisions contained in clause 25 of the Lease Agreement. That it was sent by way of email is inferred by the defendants with reference to annexure POC1.1. The particulars of claim allege that the notice was sent by the Trust to TCC.
- [54] I am in agreement with the argument on behalf of the plaintiffs that the particulars of claim need not state the manner in which notice was given as the defendants could plead that notice was not effectively given as required by the terms of the Lease Agreement. It is a matter for evidence to ultimately establish whether notice of the extension was validly given in terms of the requirements of the Lease Agreement.
- [55] In view of this court's finding it is not necessary to deal with the alternative arguments raised by the Trust that service by email, in law, is deemed to have taken place at the defendant's chosen *domicilium citandi and executandi* or the argument that service on the "wrong" address is nonetheless effective provided that the notice has actually been served and received by responsible officers of the recipient.
- [56] The defendants' second exception is dismissed.

The Third Exception

- [57] This exception is underpinned by the allegation that the Lease Agreement between the parties was not alleged to be terminated according to the particulars of claim. Consequently, in the consideration of this exception, the court must accept that the Lease Agreement is still in place. This exception is aimed at Claim C, which is not an alternative claim but, as was submitted on behalf of the Trust, a self-standing claim made outside the ambit of the context of the applicable lease agreement between the parties. It is also not a conditional claim which is dependent on any one of the alternative contractual claims alleged to be the contractual claim between LCC and the Trust, nor is it conditional upon a finding that the Lease Agreement became null and void.
- [58] Claim C is a delictual claim wherein it is alleged that TCC owed to the Trust, as owner of the property, a duty of care which required it not to cause damage to the property and to take reasonable steps to ensure that the property was not damaged. It is alleged that TCC negligently breached the aforesaid duty of care which caused damage to the Trust.
- [59] In this exception, reference is made to clause 10 which deals with TCC's maintenance obligations during the term of the lease. Should TCC not maintain the property then the Trust can step in and do the maintenance at the expense of TCC. Reference was also made to clauses 10.5.1 and 10.5.2 of the Lease Agreement which deals with the obligations of TCC upon expiration or early termination of the lease stipulating the condition the property must be returned to the Trust. Should the property be found to require any repairs or renovation, fair wear and tear excepted, such repair or renovation shall be undertaken by the Trust at the cost of TCC.
- [60] The exception was taken on the basis that that the plaintiffs have not alleged that the Lease Agreement has terminated. Consequently, the argument goes, TCC's obligations in clause 10.5.1 have not yet arisen, nor can the Trust rely on clause 10.5.2 to undertake the repairs to the property. The Trust could however rely on the maintenance obligations whilst the Lease Agreement was still intact.

- [61] The crux of the exception lies in the averment that because the parties have agreed to contractually regulate TCC's obligation to repair the property, and to return the property to the Trust in a particular condition, which latter obligation has not yet arisen as the Lease Agreement has not yet, on the pleaded version, been terminated, the Trust circumvented the Lease Agreement by invoking a legal duty which encompasses precisely the same obligation that has been contractually agreed to. This, so the exception reads, could not legally be done and accordingly, the Trust has failed to disclose a cause of action in respect of Claim C.
- [62] It was argued on behalf of the defendants that it is clear from the allegations in respect of breach of the legal duty that the Trust's claim is not one where it alleges that TCC damaged the property by its own actions, but rather that the damage is alleged to be as a result of flooding and vandalism.
- [63] The legal question for consideration is whether the Trust can, in the face of the express terms of the written lease, which the Trust alleges is still in existence, ignore those contractual terms and rely on a legal duty to claim delictual damages.
- [64] On behalf of the defendants, it was argued that this cannot be done considering the legal position as confirmed in the Supreme Court of Appeal and the Constitutional Court.
- [65] The court was referred to the matter of *Lillicrap, Wassenaar Partners v Pilkington Bros SA (Pty) Ltd*⁹ where the court found:

"In considering whether the extension of Aquilian liability is justified... the answer must be in the negative, at any rate in so far as liability is said to have arisen while there was a contractual nexus between the parties. While the contract persisted, each party had adequate and satisfactory remedies if the other were to have committed a breach. Indeed the very relief claimed by the respondent could have been granted in an action based on breach of contract.

⁹ 1985 (1) SA 475 (A).

Moreover, the Aquilian action does not fit comfortably in a contractual setting like the present. When parties enter into such a contract, they normally regulate those features which they consider important for the purpose of 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, contracting parties contemplate that their contracts 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.”¹⁰

[66] *Lillicrap* was followed more recently by the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*¹¹. In this matter it was found as follows:

“Where parties take care to delineate their relationship by contractual boundaries, the law should hesitate before scrubbing out the lines they have laid down by superimposing delictual liability. That could subvert their autonomous dealings. This underscores the broader point made by this court in *Barkhuizen* that, within bounds, contractual autonomy claims some measure of respect.”¹²

[67] The court was further referred to the matter of *AB Ventures Ltd v Siemens Ltd*¹³ where the court followed the decision in *Lillicrap* and was not willing to extend delictual liability in a matter where parties are in a contractual relationship. Nugent JA found as follows at para [16]:

“It seems to me that there would be major implications for a multi-partied project of this kind if each of the participants was to be bound not only to adhere strictly to the terms of its specific contractual relationship, but, in addition, it was held bound to all the other participants by a general regime of reasonableness.”

¹⁰ At 500F-I.

¹¹ 2015 (1) SA 1 (CC).

¹² At para [65].

¹³ 2011 (4) SA 614 (SCA).

And further in para [21]:

“The principle that emerged from *Pilkington Brothers* [*Lillicrap*] 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.”

[68] On the strength of these decisions, the defendants argued that the Trust cannot prosecute a delictual claim where the very thing that is claimed is regulated by the Lease Agreement which the Trust alleges was concluded and still subsists. It was argued that on this basis, the third exception should be upheld.

[69] In reply to these submissions made on behalf of the defendants, it was pointed out by Mr Subel, acting for the Trust, that Claim C is a claim for damages arising out of physical damage to property and is therefore not a claim for pure economic loss. It was argued that this distinction is important because of the defendants' reliance on the judgments of *Lillicrap* and *Country Cloud Trading*.

[70] On behalf of the Trust it was then argued that the *Lillicrap* matter is to be distinguished on the facts as it was held in that matter that it was not desirable to extend the Aquilian action to a breach of a contractual duty to perform professional work with due diligence, when the breach has caused pure economic loss. However, if the breach has caused physical injury to a person or property, the Aquilian action applies and no question of extending it arises, provided the injury infringes a legal recognised interest that exists independently of the contract.

[71] It was argued that the injury to the Trust's property infringed a legally recognised interest that exists independently of the Lease Agreement. The obligation to repair the property upon termination of the lease and to restore it in the same condition in which it was given, are additional to and not in substitution of TCC's common law obligations not to damage the Trust's property or to permit the property to be damaged whilst in its custody. Accordingly, it was submitted that for these reasons, the defendants' reliance on the *Lillicrap* and *Country Clouds* judgments are misplaced. It was requested from this court that the third exception should also be dismissed.

[72] In the particulars of claim it is stated that whilst TCC was in occupation of the property, TCC owed to the Trust, as owner of the property, a duty of care not to cause damage to the property and to take reasonable steps to ensure that the property was not damaged. TCC negligently breached the aforesaid duty of care by causing or deliberately, or negligently, permitted damage to occur on the property and further failed to take reasonable steps to ensure that the property was not damaged. As a result of the breach the property was damaged due to flooding and vandalism. It is then stated in paragraph 41 of the particulars of claim that the monetary damage to the property corresponding to the fair, reasonable and necessary cost of repairing the aforesaid damage is an amount of R16,145,869.60 (excluding VAT).

[73] Claim C is a claim for damages to property and is not a claim for pure economic loss. In *Country Cloud* at para [22] the following was found to be a factor that distinguishes a claim in cases of positive conduct that harms a person or property and a case of pure economic loss:

“Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is *prima facie* wrongful. However, in cases of pure economic loss—that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property – the criterion of wrongfulness assumes special importance. In contrast to cases of physical harm, conduct causing pure economic loss is not *prima facie* wrongful. Our law of delict protects rights and, in cases of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss.”

[74] What the court is dealing with in this matter is damage to property. It is *per se* wrongful to damage or to cause damage to the property of another. This is what the Constitutional Court found in *Country Cloud* as quoted above. The claim for damages to property is not a claim for pure economic loss. As there is no general right not to be caused damages pursuant to pure economic loss, wrongfulness should be considered. This would entail an enquiry whether the action complained about was wrongful and whether policy considerations and fairness requires the broadening of the applicability of the Aquillian action in light of the specific facts of a matter. In cases where a claim is made for pure economic loss,

the wrongfulness element of the delict should be considered. This is not a matter where wrongfulness has to be established by an extension of the Aquilian action.

- [75] This not to say that the Trust would not have to prove that TCC owed a duty towards it. It is rather a matter of onus. As the damage alleged is damage to property, wrongfulness will be assumed but can be rebutted at a trial.
- [76] In *Country Cloud Kampepe J* (in footnote 9) gave an explanation what is meant by “*prima facie wrongful*” and I quote:

“To say that conduct is ‘*prima facie wrongful*’ means that to prove the fact of conduct alone is sufficient, absent indications to the contrary, to establish wrongfulness. In other words, wrongfulness need not be positively established by the plaintiff; wrongfulness is presumed, but may be rebutted by the defendant.”

- [77] In my view the reliance placed by TCC on *Lillicrap* is also misplaced. The facts of this matter are to be distinguished from the facts of *Lillicrap*. *Lillicrap* was concerned with a question whether the breach of a contractual duty to perform professional work with due diligence is *per se* a wrongful act for the purposes of Aquilian liability, with the corollary that if the breach were negligent, damages could be claimed *ex delicto*. The court decided, mainly for the reasons of policy, that it was not desirable to extend the Aquilian action to the duties subsisting between the parties to such a contract of professional service. In *Holtzhausen v ABSA Bank Ltd*¹⁴ the ambit of *Lillicrap* was discussed and considered in detail. The SCA recognised that an action is maintainable in delict for a negligent misstatement causing even pure pecuniary loss even if a concurrent action is available in contract.

- [78] In *Lillicrap* the court recognised that a claim, depending on the circumstances, could be made in contract or delict despite the existence of a contractual *nexus* between parties. At page 499G-I of this judgment it was stated as follows:

“The examples in our common law of *concursum actionum* to which I referred to above were all case where the acts of the defendant satisfied the

¹⁴ 2008 (5) SA 630 (SCA).

independent requirement of both the contractual and Aquilian action. Where, for instance, a lessee negligently damages the leased property which he is under a contractual obligation to return in an undamaged state he would be liable *ex delicto* for negligently causing damage to the lessor's property, and *ex contractu* for failing to return the property in a proper state pursuant to the lease. The former liability would, however, have arisen even in the absence of a contract of lease.” (my underlining)

[79] In a case where a claim lies in contract and in delict and it is not a claim for pure economic loss where wrongfulness is not assumed, a claimant has an election either to sue in contract or in delict.¹⁵ The authors stated with reference to *Lillicrap* and *Van Wyk v Lewis*¹⁶ that any uncertainty about whether or not our law permits concurrent liability between contractual actions and claims based upon the *Lex Aquilia* was removed by these decisions.

[80] The *Lillicrap* decision is thus not authority for a general proposition that where parties are in a contractual relationship, a claim in delict, if the requirements of such a claim are met, could not be advanced, independently or in the alternative, to a contractual claim. The nature of the claim should be considered, particularly if a delictual duty existed, or first had to be established having regard to policy considerations. In *Lillicrap*, the SCA accepted the availability of both actions despite a contractual *nexus* between parties but, on the facts of the matter, was not prepared to find that a delictual action was available to the appellant. The finding was based on whether wrongfulness was established. The court found that it was not as it was not prepared to extend such liability in a case where parties regulated their relationship in terms of a contractual relationship.

[81] In my view, despite the existence of a contractual *nexus* between the Trust and TCC, the plaintiffs could have made an election to proceed by way of an independent delictual claim.

[82] I am of the view that the third exception should be dismissed.

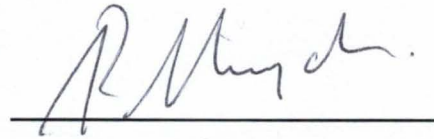
¹⁵ See in this regard the detailed discussion in JR Midgley & JC van der Walt “Delict” in *LAWSA* 2ed Vol 8(1) para 53.

¹⁶ 1924 AD 438.

[83] The following order is made:

[1] The First, Second and Third exceptions are dismissed.

[2] The defendants are to pay the cost of the exceptions.



RÉAN. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

APPEARANCES:

For the Plaintiffs:

A. Subel SC

D. Mahon

Instructed by:

RD Lomax: Herbert Smith Freehills
Attorneys South Africa

For the Defendants/Excipients:

I. Green SC

Instructed by:

Schindlers Attorneys

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