REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: A836/2014

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

10/06/16
DATE

SIGNATURE

10/6/2016

In the matter between:

P HECKROODT Appellant

and

T A WALL Respondent

J U D G M E N T

TEFFO, J:

[1] The appellant in this matter, who was the defendant in the court *a quo* appeals against the judgment of the Magistrate Court, Pretoria ordering him to pay the plaintiff's claim. The present respondent was the plaintiff in the court

a quo. The parties shall for convenience be referred to as they were in the court *a quo*.

[2] The plaintiff instituted an action against the defendant which consisted of two claims in the amounts of R100 000,00 and R80 000,00 respectively for damages suffered as a result of failure by the defendant to pay the aforesaid amounts to him. The action was based on contract and in the alternative on delict. The plaintiff eventually proceeded with the delictual claims.

[3] It was alleged in the plaintiff's particulars of claim that the first defendant who became the only defendant in the court *a quo* was appointed to act as a conveyancer to attend to the registration and transfer in two agreements where two immovable properties were sold. In terms of both transactions he was instructed to pay the estate agent commissions in the amounts claimed upon transfer of the properties. The estate agent commissions in both transactions were in terms of the agreement C1 and C2 payable to the second defendant, Anzel Trading 1002 CC t/a Investment@home. The plaintiff purchased the right, title and interest in the estate agent commission earned by the second defendant in the aforesaid transactions. Commission schedules in respect of both transactions were signed by the plaintiff and the second defendant ceding the estate agent commissions in the amounts claimed, due to the second defendant to the plaintiff. On or about 6 August 2010 the defendant was informed in writing that payment was to be made to the plaintiff. This was also confirmed by the

plaintiff in writing on 15 February 2011. The registration took place on 12 January 2011.

[4] Several other defendants which included the sellers and purchasers of the properties in the two transactions were cited in the action but the plaintiff only sought relief against the first defendant.

[5] In the alternative to claim 1 it was alleged that the first defendant in his capacity as conveyancer had a legal duty to act in the interest of all interested parties to the transaction. In breach of this legal duty, the first defendant transferred the property without ensuring that there were sufficient funds to attend to the payment to the plaintiff. As a result of the breach of the legal duty and the first defendant's contractual obligations, the plaintiff suffered damages equal to the amount that the plaintiff would have received in the amount of R100 000,00.

[6] The alternative to claim 2 also emanated from similar circumstances and damages claimed were in the amount of R80 000,00.

[7] The defendant pleaded as follows to the alternative claims: In respect of the alternative to claim 1 he denied the allegations, liability, contended that he had no agreement with the plaintiff and provided no guarantees that he would pay him. He also pleaded that he paid the amount of R70 000,00 to the second defendant as he was obliged to do and that the second defendant received the remaining R30 000,00 directly from the purchaser. He further

pleaded that the plaintiff was never a party to the transaction, that he was never made aware of the existence of the cession agreement and that the plaintiff should seek recourse against the second respondent with whom he contracted. As regards the alternative to claim 2 although he denied that he had a legal duty to act in the interest of all interested parties to the transaction as a conveyancer at all material times, he admitted that he transferred the property without ensuring that there were sufficient funds to attend to the payment of the plaintiff. He also denied liability.

[8] Two witnesses and the plaintiff himself adduced evidence in support of the plaintiff's case and the defendant was the only witness who testified in defence of the allegations against him.

[9] The evidence that was led at the court below was briefly as follows: The plaintiff was the sole proprietor of Omega Finance which business provided bridging finance to among others, the second defendant who traded as an Estate Agent. The plaintiff confirmed the main agreement between Omega Finance and the second defendant as contained in paragraphs 1 to 5 Bundle A in terms of which it was agreed that if the second respondent was entitled to commission from a property transaction, Omega Finance would provide bridging finance to it on condition that the second respondent would cede its right to the commission to it. The second respondent became entitled to the commission from the two property transactions. On page 21 Bundle A there appeared a deed of sale of the first property transaction between one De Witt and Mrs Beaufort which property was sold for R690 000,00 and the

commission payable in respect thereof was the sum of R100 000,00. The plaintiff advanced an amount of R80 000,00 to the second defendant and the second defendant ceded the full R100 000,00 commission to the plaintiff. The plaintiff was therefore entitled to payment of the sum of R100 000,00 commission on registration of property. The second transaction related to the sale of the property of Mr and Mrs Goosen in Magalieskruin for an amount of R850 000,00. The plaintiff provided bridging finance to the second defendant in the sum of R64 000,00 and the second defendant ceded to him a full amount of R80 000,00 which was the commission payable as per the transaction.

[10] Clause 1.1 in both deeds of sale provided that the deposit of the purchase price must be paid either to the conveyancer's trust account or that of the estate agent.

[11] It was common cause between the parties that both amounts of R100 000,00 in the first transaction and R80 000,00 in the second transaction respectively, were paid into the second defendant's trust account. The second defendant only paid the amount of R70 000,00 to the plaintiff in respect of the first transaction leaving a balance of R30 000,00. The parties agreed that the amount payable in respect of the alternative to claim one was R30 000,00 and not R100 000,00 as alleged in the plaintiff's particulars of claim. The plaintiff never received any amount from the second transaction.

[12] Correspondences were sent to the defendant in the form of e-mails by the plaintiff requesting the defendant to furnish guarantees for payment of the commission to him in terms of the cession. A letter from the plaintiff to the defendant giving him the plaintiff's banking details and advising him to pay the amount for the commissions on registration was also referred to. The defendant did not respond to the letters. On 15 November 2010 the plaintiff personally visited the defendant to inform him about the cession. The defendant advised him that he could not give him the undertaking as the funds were not paid to him. The defendant set off the commissions payable against the deposits that were paid directly to the second respondent.

[13] The evidence of Ms Gwen van Aswegen was as follows: She worked as an administrator for the second respondent from August 2010 to March 2011. She also worked for the plaintiff. She was aware of the two property transactions. She explained that the second defendant was entitled to commission in respect of the two property transactions. The plaintiff provided bridging finance to the second defendant on condition that it ceded to the plaintiff the commissions payable to it. In terms of the deeds of sale the commissions were payable on transfer of the properties. She drew up the documents for bridging finance which consisted of the document that sets out the cession, a schedule regarding the commission and a letter that confirmed the cession and requested an undertaking from the defendant who was the transferring attorney to pay the amount to the plaintiff. The letter was sent to the defendant as testified by the plaintiff, no reply was received and another correspondence was sent as a reminder to the defendant to give an

undertaking. She reported the matter to the plaintiff and the plaintiff eventually visited the defendant.

[14] Mr Schalk van der Merwe also gave expert evidence. A summary of his evidence was contained in his R24(9)(b) notice. The relevant paragraph that is pertinent to these proceedings reads:

> "3. *In his opinion the reasonable conveyancing attorney, acting with the general level of skill and diligence possessed and/or exercised by members of the conveyancing profession, would have acted as follows, namely:*
>
> 3.1 *He would have attended to the finances of the transaction in accordance with his client's instructions contained in the deeds of sale referred to above;*
>
> 3.2 *An important part of the conveyancer's duties is to attend to the financial aspects of a transaction: securing and safeguarding payment of the purchase price, attending to payment of various third parties' claims (f.i. the local authority, SARS, the estate agent, settling the existing bond);*
>
> 3.3 *In attending to these financial arrangements, the conveyancer has to give effect to any legal instruction by any of the parties as contained in the agreement of sale, and commission agreement or addendum thereto. Should a third (outsider) party lay a claim to any of the proceeds, the conveyancer should at least obtain his client's instructions with regards thereto and advise the outside party of his instructions;*
>
> 3.4 *He would specifically have ensured that the purchase price would become available for distribution to the seller pari passu with the execution of the transfer of the property in the deeds office;*
>
> 3.5 *As an agent of the seller, and being aware of the cession from the estate agent to the plaintiff, he would have to ensure that the amount of the commission payable to the estate agent would be paid to the plaintiff in accordance with the cession and the seller's instructions referred to in paragraphs 2.2.5 and 2.3.2 above;*

3.6 *Knowing that the estate agent did not have any claim to the money in its trust account as a result of the cessions:*

3.6.1 *He could not have paid the estate agent via set off, and*

3.6.2 *He should have ensured that the Estate Agent pay the amount in its trust account prior to the transfer taking place or at least have obtained an undertaking or guarantee from the Estate Agent that the amount would be paid to him upon registration,*

3.6.3 *He could not have refused or neglected to pay the plaintiff when he had specific instructions from his client to pay the Estate Agent and the Estate Agent had ceded this claim to the plaintiff;*

3.7 *The reasonable conveyancer in the position of the defendant:*

3.7.1 *Would have foreseen that if he fails to make payment of the commission to the plaintiff that the plaintiff could suffer damages;*

3.7.2 *Could easily have taken steps such as paying the plaintiff or ensuring that there were sufficient funds in his account or available for distribution to also cover the claim of the plaintiff;*

3.8 *The defendant owed the plaintiff a legal duty not to act negligently even if the plaintiff was not his client;*

3.9 *The defendant had to deal with money its trust account in such a way that harm is not negligently caused to the plaintiff;*

3.10 *In his opinion the defendant did not act as a reasonable conveyancing attorney, should have acted for the reasons referred to above."*

[15] The defendant testified that he was appointed as a transferring attorney in the two property transactions referred to by the plaintiff. He is not a conveyancer. He takes transfer instructions and passes them to a

conveyancer to assist with the transfers. Ms Geraldine Grundling of the firm Jacobs and Moodley attended to the transfer in both transactions. He only became aware of the cessions when he saw them as attachments to the summons. The only document that was sent to him was the sale agreement. The deed of sale in the first transaction was signed in August 2010. He received e-mails in October 2010, one about the cession, and another one asking for the guarantees and whether the property was transferred or not. He only replied to the e-mail pertaining to the transfers in the second transaction. In reply thereto he stated that he was aware that the deposit was in the second defendant's trust account and asked for it to be transferred in full to his trust account. In the alternative he asked the second defendant to pay him R20 000,00 and also give him a guarantee that it will not utilise the amount of R80 000,00 prior to the registration of the property. He explained that he could not furnish the plaintiff with any guarantees until the full R100 000,00 in respect of the second transaction was paid into his trust account. He conceded that both properties were registered in January and February 2011 and that the plaintiff personally approached him in relation to the cession. According to him the plaintiff should have first approached him as an attorney with the deed of sale and establish if the funds were available. The plaintiff should have obtained the guarantees before he concluded the cession with the second defendant. He informed the plaintiff that he could not issue the guarantees to him because the deposit was with the second defendant and there was no money in his trust account for him to issue the guarantees. He proposed that the plaintiff should go to the second defendant and make arrangements for the deposit to be paid to him so that he can then be able to furnish him with the guarantees. He reiterated that the plaintiff should have first obtained the guarantees from him before he paid out the money to the second defendant in terms of bridging finance. He contended that the plaintiff should have first ensured that he was placed with funds before he provided bridging finance. He was adamant that the plaintiff should not have lent the money solely on a sale agreement. He should have satisfied himself that the attorney was placed with funds.

[16] Under cross-examination he conceded that he should have personally ensured that the money to pay the commission was in his trust account and that he was in a position to pay it on registration of transfer of the properties. He admitted that an attorney who does not act with the necessary care and skill, acts negligently and that the claim of the plaintiff was a delictual claim as the plaintiff suffered damages as a result of his failure to pay him the commission as ceded to him. He also agreed that the claim was not based on contract. After being referred to his firm's website indicating that his firm only handled cases relating to mergers, acquisitions, mining oil and gas, pharmaceutical and health care, he stated that his wife bought the website. He conceded that it was a false misrepresentation to advertise services he was not actually rendering on the website. He admitted that upon registration of the property the funds that were paid to the Agent go to the seller who entrusts them with the attorney and the attorney has to ensure that upon registration the money is utilised as per the seller's instructions. He also admitted that as a conveyancer, there are other parties who look upon him to make payment and safeguard their funds including the estate agent who is

entitled to the commission. He did not dispute that the second defendant ceded the commission payable to him upon registration, to the plaintiff and that the plaintiff therefore had the same rights as those of the second defendant. The defendant further stated that he did not obtain any guarantee or undertaking from the second defendant to pay the money which was in his trust account, on registration. He stated that the reason why he did not call for guarantees was because he relied on a set off of the commission with the deposit of the purchase price that was paid directly in the second defendant's trust account. He conceded that he could not transfer funds he did not have and that the commission was in terms of the cession only payable to the plaintiff upon registration of the properties and not the second defendant. He conceded that notwithstanding that he had full knowledge of the cession which was sent to him through the e-mails from the plaintiff, he proceeded to pay out the amount of R30 000,00 (commission in respect of the first transaction) to the second defendant and also set off the amount of R80 000,00, commission in respect of the second transaction against the deposit that he was supposed to keep in his trust account until the date of registration of the properties.

[17] The appellant relies on the following grounds on appeal: He challenges the trial court's finding that a negligent breach of a term of a contract on the part of a legal professional, gives rise to a delictual claim. He contends that the court *a quo* erred in finding that the Acquilian action has been extended to the duties subsisting between the parties to a contract of professional service and that the cause of action for the respondent's claim

being a delictual claim based on the alleged negligence by an attorney to comply with a contractual term which caused pure economic loss, does exist in our law. According to him the respondent did not disclose a cause of action, no causal link between the alleged negligent behaviour and his conduct was established but despite all this, the trial court held that he was liable and granted judgment against him.

[18] Counsel for the appellant referred the court to the case of *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) and submitted that it is trite law that when pure economic loss is suffered as a result of an omission or a failure by an individual to comply with the terms of the contract, the person who so suffers the loss has no claim in delict against the party who so breached the contract. He went on to argue that this position does not only apply to cases where the person who suffered the loss stood in a direct contractual relationship with each other, but, as stated in *Lillicrap*, "*these considerations did not fall away as a result of the contracts being assigned. The tripartite relationship between Pilkington, Salanc (as main contractor) and Lillicrap (as subcontractor) still had its origin in contract. The only difference was that Pilkington had now to follow the contractual chain via Salanc to Lillicrap*". It was further pointed out on behalf of the appellant that a failure to carry out an obligation in terms of the contract which caused pure economic loss is exactly what the respondent relies upon in his alternative delictual claims and that the respondent's alternative claims do not disclose a cause of action in law.

[19] It is my view that the facts in the Lillicrap matter are distinguishable from the present set of facts. The plaintiff and the defendant in the *Lillicrap* matter initially concluded a contract between each other and the contract was thereafter transferred to a third party unlike in the present matter where the plaintiff did not have any contract with the defendant. At p 496G the court in the *Lillicrap* matter made the following remarks:

> "*There is no objection in principle in our law to recognise that a party may institute a claim for damages based on contract and delict in the alternative and a party can then choose which one of the two he wants to purse.*"

[20] The following was said in *Holtzhauzen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) at 633 with regard to the *Lillicrap* decision *supra*:

> "*Lillicrap decided that no claim is maintainable in delict where the negligence relied on consist in the breach of a term of a contract ... Lillicrap is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. On the contrary Grosskopff JA, was at pains to emphasize (496D-I) that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue.*"

[21] From this reasoning it is clear that where the aggrieved party has more than one remedy, nothing stops him from pursuing any of them.

[22] Reliance by the appellant on the *Lillicrap* matter and the contention that no cause of action was disclosed in the present matter loses sight of what

was stated in paragraphs 20, 21, 22 and 31, 32 and 33 of the plaintiff's particulars of claim. Without repeating para [7] *supra* dealing with these paragraphs, I would like in particular to refer to para [22] (the alternative to claim 1) which is the same as para [33] (the alternative to claim 2). It reads:

> "*As a result of the breach of the legal duty* <u>*and*</u> *the first defendant's contractual obligations, the Plaintiff suffered damages equal to the amount that the Plaintiff should have received in the amount of …*" (my emphasis)

[23] It is evident from paragraphs 22 and 33 of the plaintiff's particulars of claim that the plaintiff did not solely rely on breach of the defendant's terms of the contract in relation to the deeds of sale of the two immovable properties. The plaintiff relied on breach of the defendant's legal duty as a conveyancer as explained by Mr Schalk van der Merwe in para 3 of his expert notice, which evidence the defendant did not contest and his contractual obligations. It was clear from Mr Schalk van der Merwe's evidence that the plaintiff could rely in his delictual claim on the duty of care that the defendant had towards the parties to the conveyancing transaction to properly attend to the finances of the transaction. Such a duty can be seen in the following light as expressed by Neethling and others in Neethling et al:The Law of Delict, 5th editition pg 63:

> " *Sometimes the person's occupation or office he holds places a legal duty upon him to conduct himself in a particular manner in relation to the public or certain people.*"

The following examples were given:

Liquidators in Macadania Finance Ltd v De Wet 1991 (4) SA 273 (T); the Registrar of Deeds in the Cape of Good Hope Bank v Fischer [1986] 4 SC 368.

[24] The defendant never disputed that while he was well aware of the cession between the plaintiff and the second defendant, he proceeded to pay the R30 000,00 in respect of the first transaction to the second defendant and that as at that time the amount was no longer due to the second defendant because of the cession. He also did not dispute that while he was well aware of the cession between the plaintiff and the second defendant, he did not ensure that on registration of transfer of the property there was sufficient money to pay the plaintiff. He did not dispute that despite all this, he proceeded to set off the amount payable to the plaintiff as commission against the deposits held by the second defendant. He conceded under extensive cross-examination that he was negligent in not calling for guarantees or undertakings as a professional who had a duty of care to all other interested parties in the transaction to ensure that on registration of transfer there are sufficient funds for him to exercise his client's mandate. He ignored the cession as sent to him by the plaintiff and failed to respond to the correspondence from the plaintiff. He also did not make sure that the deposits paid into the second defendant's account were transferred to his account for him to utilise them on registration of transfer of the properties.

[25] It is therefore my view under the circumstances that the reliance by the defendant on the *Lillicrap* matter is misplaced for the reasons advanced above.

[26] The court in Jowell v Bramwell-Jones 1998 (1) SA 836 (W) at 894-895 said the following:

"It was also submitted that the professional services of the fifth and sixth defendants as attorneys were governed by a mandate which derived from contract and could or ought not fairly to be extended to the delictual sphere. The fact that the duty imposed on an attorney to exercise due skill and care in the conduct of his client's affairs give rise upon breach to an action on contract… is, in my view, by no means decisive of the rights of a third party who sues an attorney in delict for damages arising from negligence in the performance of his mandate. It is merely one feather in the overall balance of the policy considerations which one must achieve in determining whether wrongfulness exist or not… I agree that there is no conceptual obstacle in our law to an attorney being held liable in delict to a non-client for damages caused by negligence…"

[27] While it is apparent from the pleadings that the issue raised on appeal did not feature anywhere and that it was only canvassed during the closing arguments at the court below, I felt prudent to deal with it and lay it to rest. The defendant did not challenge the plaintiff's case at the trial court. He conceded that he was negligent in the conduct of his duties as a conveyancer. The argument advanced by him that the plaintiff is without a remedy where he

has conceded that his negligence has resulted in the pure economic loss suffered by the plaintiff is without merit. I also do not agree that the cause of action for the delictual claims has not been established as alluded to by the defendant. The findings of the court below are justified given the evidence. I cannot therefore find any misdirection on the part of the court *a quo*.

[26] I am therefore persuaded that this appeal has no merit. It is therefore bound to fail.

[27] In the result I make the following order:

27.1 The appeal is dismissed with costs.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree:

S A THOBANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

FOR THE APPELLANT	W W GIBBS
INSTRUCTED BY	VAN HUYSSTEENS COMMERCIAL ATTORNEYS
FOR THE RESPONDENT	J E FERREIRA
INSTRUCTED BY	B BEZUIDENHOUT INC
DATE OF JUDGMENT	10 JUNE 2016