THE HIGH COURT OF SOUTH AFRICA

REPORTABLE

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

Case No: A867/05

In the matter between:

KANTEY & TEMPLER (PTY) LIMITED	First Appellant
PETER WORTHINGTON-SMITH	Second Appellant

and

CHRISTOPHER PETER VAN ZYL N.O.	First Respondent
EILEEN FEY N.O.	Second Respondent

JUDGMENT DELIVERED ON THURSDAY 31ST AUGUST 2006

FOURIE, J:

INTRODUCTION

[1] This appeal concerns the liability in delict for so-called pure economic loss, resulting from the representation by project managers who were responsible for the appointment of contractors for the erection of a cold storage fruit terminal, that they were acting on behalf of an existing principal, while such principal did not exist and never came into

existence.

[2] Respondents are the joint liquidators of Gransteel (Pty) Limited ("Gransteel") who sued appellants jointly and severally for damages caused by the economic loss suffered by Gransteel prior to its liquidation. Respondents initially claimed R2 333 127-67 as damages, which amount was reduced to R1 616 366-00 at the trial. The court *a quo* (Yekiso J) found that appellants are jointly and severally liable to compensate respondents for the loss incurred by Gransteel, but that Gransteel had been equally to blame for the loss and accordingly awarded respondents the sum of R808 183-00 as damages, with interest and costs.

[3] Appellants, with the leave of the court *a quo*, appeal against the whole of the judgment and order made by Yekiso J. Respondents, also with leave of the court *a quo*, cross-appeal against the apportionment of the damages and the costs order allowing the costs of one counsel only.

THE RELEVANT FACTS

[4] The facts relevant to respondents' cause of action are largely common cause or at least not disputed, given that appellants did

themselves not lead any evidence. These facts appear from the admissions made on the pleadings and the evidence of Messrs. **PJ McCoy** (the chairman of Gransteel), **G Ellis** (the managing director of Gransteel) and **B Gutman** (the receiver in a scheme of arrangement involving a company known as DTL Shipping and Customs Services (SA) (Pty) Limited (“DTL”)).

[5] Gransteel was a relatively small company with **McCoy** and his wife as the only shareholders. It was founded in 1972 and involved in the manufacture and erection of structural steelwork. It was wound up in 2001. First appellant is a large and well established consulting engineering practice. Second appellant is a leading applied refrigeration consultant. Gransteel, **McCoy** and **Ellis** had a longstanding business association with first appellant (in particular **Dr. Twemlow** of first appellant) and second appellant. Over a period of some thirty years Gransteel was involved in a number of successful contracts for the manufacturing and erection of steelwork in conjunction with first and second appellants. **McCoy** and **Ellis** had great respect for **Twemlow** and second appellant, both of whom they regarded as brilliant engineers and leaders in their field.

[6] During October 1998, second appellant assisted DTL with a proposal relating to a fruit terminal to be constructed on land belonging to Spoornet in the harbour area of Port Elizabeth. This involved the erection of a building of ten thousand square meters in size at an estimated project cost of R23 million. At the same time first appellant accepted an appointment from DTL to act as engineers in respect of the construction of the fruit terminal, with responsibilities including the conclusion of contracts between the developer and contractors and, jointly with second appellant, the co-ordination of contractors and consultants. First appellant also engaged second appellant in terms of an oral agreement to act as a refrigeration consultant in relation to the project and second appellant thereafter acted in the course and scope of first appellant's employ. The developer of the project was to be a consortium comprising Spoornet, DTL and overseas investors.

[7] At the end of October 1998, second appellant informed **Ellis** that he wanted Gransteel to manufacture and erect the structural steelwork for the project. **Ellis** and **McCoy** understood second appellant to be acting on behalf of a consortium of which Spoornet was a member. **Ellis** was

informed that the project was very urgent and had to be completed by 12 April 1999, in time for the citrus fruit season. This was the reason that a negotiated contract, rather than a tender process, was preferred. Second appellant provided **Ellis** with a line drawing of the proposed building prepared by first appellant. This drawing was used by **Ellis** to prepare a budget quotation for the steelwork and after further meetings with **Twemlow** and second appellant, Gransteel provided more detailed drawings and a further quotation for the steelwork. On 17 November 1998, and at the request of second appellant, **Ellis** provided a proposed program for the steelwork, commencing on 7 December 1998 and ending approximately 22 February 1999. **Ellis** was shortly thereafter telephonically advised by second appellant, or possibly by first appellant, to proceed with the construction of the steelwork.

[8] Gransteel ordered the steel required for the construction of the steelwork shortly after 17 November 1998, and it arrived at Gransteel's premises on 23 November 1998. Gransteel commenced work immediately. According to **McCoy** and **Ellis** they would under no circumstances have commenced the work without an instruction to proceed. On 30 November 1998, Gransteel provided a further quotation

for additional work required. Approximately one week after Gransteel had commenced work, second appellant telephonically requested **Ellis** to stop work as there might be some problem. He did not indicate what the problem was. Gransteel stopped work, but approximately one week later, second appellant telephoned **Ellis** and reported that everything had been sorted out. He requested Gransteel to continue, which it did. Details of the structural steelwork carried out by Gransteel appear from annexures PPC4, PPC5 and PPC6.1, to the amended particulars of claim.

[9] However, on 26 January 1999, the building contractor, LTA Building (Eastern Cape) (Pty) Limited ("LTA"), advised Gransteel that all work on the site had to be suspended with immediate effect. All work on the construction of the fruit terminal ceased and did not thereafter resume. After LTA had given the final order to stop the work, LTA presented Gransteel with a written contract appointing Gransteel as the sub-contractor of LTA. Gransteel signed the contract, but notwithstanding the efforts of various parties to salvage the project, same was abandoned. Gransteel received no payment for the work performed by it in respect of the construction of the fruit terminal. This was instrumental in Gransteel's subsequent liquidation in 2001. **McCoy** testified that he

believed that had Gransteel been paid, its liquidation would have been avoided.

[10] Although appellants adduced no evidence, their knowledge of the consortium which was to be the developer of the project, appears from certain documentation and questions put in cross-examination on their behalf. I refer to the following:

a) **Twemlow** discussed the formation of the consortium with Mr. **Pickstone-Taylor** of DTL, and was made aware that the consortium still had to be formed and that until such time as it was finalised, DTL would stand good for any costs incurred with the erection of the fruit terminal. This was not conveyed to the representatives of Gransteel. **Ellis** testified that had he been aware of it, he would not have ordered any materials or continued with the contract.

b) On 25 November 1998, second appellant wrote to DTL raising concerns regarding the project. He recorded that expenses were being incurred with DTL "standing security for these on behalf of the ultimate client". He also explained that it was difficult to answer questions as to whether the project was going ahead. The reference to the "ultimate client" is obviously a reference to the consortium to be formed. These concerns of second appellant were not conveyed to Gransteel nor was Gransteel informed that the "ultimate client" was not in existence.

c) A chronology prepared by **Twemlow**, records the following: On 27 November 1998 **Pickstone-Taylor** advised that "our client will be a company to be formed in which DTL, Spoornet and some European operations will be the shareholders" and that "agreement between the shareholders is being finalised"; on 30 November 1998 **Pickstone-Taylor** instructed first appellant to proceed; on 18 December 1998 reference is made to first appellant's appointment letter being revised to refer to Fruit Terminal Port Elizabeth (Pty) Ltd, after DTL had advised that this company would undertake the development and it is recorded that there were various discussions with **Pickstone-Taylor** in December 1998 who "advised that negotiations with the various potential shareholders were proceeding; that funds would be in place by 31 December 1998 and that until then DTL would fund the development"; on 8 January 1999 **Pickstone-Taylor** "promises that progress is being made with negotiations and payment will be by Wednesday 13 January" and during January 1999 **Pickstone-Taylor** "continues to promise finance from overseas investors is imminent".

From this chronology of **Twemlow** it appears that appellants instructed Gransteel to proceed with the work even before they had received such an instruction from DTL. In addition, the factual position regarding the consortium and its finances was not conveyed to the representatives of Gransteel. As testified by **McCoy** and **Ellis**, had they known these facts they would never have undertaken the steelwork.

[11] On 8 December 1998, **Twemlow** wrote to DTL and copied his letter to second appellant, but not to Gransteel. In this letter he confirmed DTL's verbal instruction to accept the contract with Gransteel. It will be recalled that appellants had already shortly after 17 November 1998, given Gransteel the instruction to proceed. The letter also records that as the ultimate client company was not in place, Gransteel required a

payment guarantee for R1.4 million being their anticipated expenditure during December 1998. As I have already mentioned, Gransteel was unaware that the ultimate client was not in place. The statement that Gransteel required a payment guarantee was also untrue. As testified by the representatives of Gransteel, had they known the true state of affairs, Gransteel would not have requested a payment guarantee, but would simply not have taken on the contract at all.

[12] Appellants advised certain other contractors that although DTL had given the instruction to proceed, DTL would not be the final contracting party. Appellants, however, failed to convey this to Gransteel.

RESPONDENTS' CASE

[13] Respondents sued appellants in delict on the basis of the *actio legis Aquiliae*. It was accordingly necessary for respondents to prove, on a preponderance of probabilities, conduct on the part of the appellants, in the form of a misrepresentation and/or omission, which was wrongful and negligent and which caused economic loss to Gransteel.

[14] In their particulars of claim, as amended, respondents allege that in

concluding the structural steelwork contract and thereafter instructing Gransteel to proceed with the structural steelwork, appellants represented to Gransteel that:

a) they were acting on behalf of the developer of the project;

b) the joint venture developer (consortium) had been established; and

c) the necessary financial arrangements were in place to enable the project to proceed.

Respondents allege that the aforesaid representations were false in that the developer did not exist, no joint venture had been established and the necessary financial arrangements to enable the project to proceed were not in place.

[15] Respondents further allege that appellants knew, alternatively ought in the circumstances to have known, that Gransteel would rely on the said representations and that Gransteel in fact relied on same in concluding the structural steelwork contract and in proceeding with the steelwork. Respondents aver that in the circumstances appellants owed Gransteel a duty of care not to make the said representations.

[16] Finally, it is alleged that the representations were made deliberately, alternatively negligently, inter alia, in that:

a) appellants failed to advise Gransteel of the fact that the joint venture had not been established and no developer existed;

b) appellants failed to take reasonable steps to establish whether a joint venture had been established and whether a developer existed; and

c) appellants failed to advise Gransteel that the necessary financial arrangements to enable the project to proceed were not in place and that should Gransteel proceed with the structural steelwork, it would do so at its own risk.

Respondents concluded by alleging that had Gransteel been aware of the true facts, it would not have undertaken the steelwork at all and as a consequence thereof Gransteel sustained damages as set out in the annexures to the particulars of claim.

[17] I should add that although deliberate misrepresentations had been pleaded by respondents, their case at the trial was advanced only on the basis of the said misrepresentations having been made negligently.

THE JUDGMENT OF THE COURT A QUO

[18] Yekiso J held that having regard to the previous business dealings between the parties and appellants' knowledge of the financial arrangements required to enable the fruit terminal project to proceed, appellants owed Gransteel a duty of care to disclose to Gransteel the true state of affairs relating to the ultimate client and, in particular, whether the necessary financial arrangements were in place to enable the envisaged project to proceed. He further held that appellants' failure to disclose these facts to Gransteel constituted wrongful conduct.

[19] With regard to the requirement of negligence, the learned judge *a quo* found that by "instructing Gransteel to proceed with the contract without the ultimate client being in place and with a clear knowledge that financial arrangements were not in place to enable the fruit terminal project to proceed, both appellants ought to have foreseen the reasonable possibility of their conduct causing Gransteel to suffer financial loss, which eventuality they were in a position to guard against". He accordingly held that the failure by both appellants to guard against this eventuality constituted negligence on their part.

[20] The court *a quo* found that the misrepresentations made by

appellants induced Gransteel to conclude the structural steelwork contract. The learned judge further held that had it not been for the misrepresentations, Gransteel would not have proceeded with the contract and incurred the expenses which resulted in its financial loss. He accordingly found that the requirements of causation had been met and that the amount of R1 616 366-00 accurately reflected Gransteel's loss.

[21] With regard to the finding of contributory negligence on the part of Gransteel, the court *a quo* held that Gransteel ought to have exercised caution as regards the party with whom it was entering into a contractual relationship, particularly where it was invited to participate in a project of this magnitude where there had been no general call for tenders. He found that it was not reasonable of Gransteel "to have deliberately shut its eyes, refrained from making enquiries in circumstances where it would have been reasonable to do so". In addition, the court *a quo* alluded to the fact that after the initial instruction to commence the work, Gransteel was instructed to stop and later instructed to proceed, and this "ought to have excited suspicion on the part of Gransteel which would have warranted a diligent enquiry". The court *a quo* accordingly found that Gransteel was equally to blame for the economic loss it suffered.

[22] The court *a quo* did not deal with respondents' request for the costs of two counsel at all. The learned judge merely ordered appellants to pay respondents' costs of suit, duly taxed or as agreed.

SUBMISSIONS ON APPEAL

[23] Appellants submit that respondents failed to establish conduct on the part of appellants, in the form of an act or omission, which was wrongful and negligent and which caused loss to Gransteel. In regard to the quantum of damages, appellants submit that respondents failed to place sufficient evidence before the court *a quo* to enable it to compute the damages allegedly suffered by Gransteel.

[24] Respondents support the findings of the court *a quo*, save in regard to the finding that Gransteel was contributory negligent. They submit that Gransteel was practically and contractually prevented from making the independent enquiries which the court *a quo* required of them. In regard to costs, respondents submit that the court *a quo* ought to have awarded the costs of two counsel, as the case involves an unusual claim in delict justifying the employment of two counsel.

EVALUATION

[25] I proceed to consider whether respondents satisfied the requirements for a delictual claim and also deal with the ancillary issues of contributory negligence, costs and interest.

CONDUCT ON THE PART OF APPELLANTS

[26] It is not in dispute that appellants represented to Gransteel that they were acting on behalf of a consortium, but never informed Gransteel that the consortium was not yet in existence, nor that the necessary financial arrangements were not in place to enable the project to proceed.

WRONGFULNESS

[27] Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another, is *prima facie* wrongful. However, where the conduct constitutes negligent omissions or negligent misrepresentations causing pure economic loss, wrongfulness depends on a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. When a court is requested to accept the existence of a legal duty in the absence of any precedent, as in the instant case, it is in reality asked to extend delictual liability to a situation where none existed before. The

crucial question in such event is whether there are any considerations of public or legal policy which require that extension. In answering the latter question, what is called for is not an intuitive reaction to a collection of arbitrary factors, but rather a balancing against one another of identifiable norms. See **Administrateur, Natal v Trust Bank van Afrika Bpk** 1979 (3) SA 824 (A) at 833 A; **Gouda Boerdery Bk v Transnet** 2005 (5) SA 490 (SCA) in para 12; **Minister of Safety and Security v Van Duivenboden** 2002 (6) SA 431 (SCA) in para 12, 21 and 22; **Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA** 2006 (1) SA 461 (SCA) in para 6 and 14; **Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd** 2006 (3) SA 138 (SCA) in para 10 – 12.

[28] As was pointed out by Navsa JA, in **Axiam Holdings Ltd v Deloitte and Touche** 2006 (1) SA 237 (SCA) in para. 11, the factors to be taken into account in considering whether a party, in making a misrepresentation causing pure economic loss, acted in breach of a legal duty not to act negligently, were set out with customary clarity by Corbett CJ in **Standard Chartered Bank of Canada v Nedperm Bank Ltd** 1994 (4) SA 747 (A) at 770. These include the context in which the

statement was made; the nature of the statement; the purpose of the statement; the reliance by the other party on the statement; the relationship between the parties and considerations of public policy, fairness and equity. In the latter regard the spectre of limitless liability or the placing of an unfair or undue burden on the defendant, come into play. In my view similar considerations would, *mutatis mutandis*, apply when considering whether an omission causing pure economic loss, constitutes a breach of a legal duty not to act negligently.

[29] In the instant case it is common cause that there had been a long-standing business relationship between appellants and Gransteel, prior to the engagement of Gransteel by appellants to manufacture and erect the steelwork for this project. It is clear from the evidence, that due to their successful previous dealings, **McCoy** and **Ellis** had absolute faith in the ability of appellants to properly carry out their duties as project managers. This was clearly justified as Gransteel had successfully completed several cold stores in tandem with appellants as engineers or project managers and had always received payment. **McCoy** and **Ellis** testified that in their past business dealings with appellants they also did not meet the clients before contracting.

[30] The duties of first appellant included the conclusion of contracts between the developer and the contractors and, jointly with second appellant, the co-ordination of contractors and consultants. It follows, as had been the case throughout the longstanding business relationship of Gransteel and appellants, that Gransteel would not deal directly with the ultimate client or developer of the fruit terminal project. All the negotiations leading up to, as well as the conclusion of a contractual relationship, would be conducted by Gransteel and appellants, the latter acting on behalf of the developer (the consortium). The evidence of Gransteel's representatives shows that in their previous dealings with appellants, the ultimate clients always met their financial obligations to Gransteel and it can accordingly reasonably be inferred that such clients were in existence.

[31] Appellants were aware when they contracted with Gransteel to do the structural steelwork for the fruit terminal, that the ultimate client, the envisaged consortium, had not yet been established. That notwithstanding, appellants represented to Gransteel that they were acting on behalf of the consortium, thereby representing that the consortium was already in existence and, by necessary implication, that the necessary

financial arrangements were in place to enable the project to proceed. **McCoy** and **Ellis** had no reason to doubt that they were contracted by appellants on behalf of a consortium which consisted of financially powerful entities, with the result that they would, as in the past, be paid their contractual remuneration.

[32] Appellants were at all material times aware that the project was dependent on foreign funding by members of the envisaged consortium. Budget control and liaison with the ultimate client were part of their responsibilities. They also knew that while the consortium was not finalised, DTL would have to stand good for the costs of the project. DTL did not have the financial capacity to fund the project and according to **Gutman** it was well known within the industry that DTL was experiencing financial difficulties. On the probabilities this would have been known to appellants; in fact first appellant appears to have considered the situation so serious that he requested a payment guarantee from DTL in respect of work done by Gransteel and falsely represented to DTL that Gransteel required same.

[33] Appellants did not only represent to Gransteel that they were acting on behalf of a consortium, which, unbeknown to Gransteel, was non-

existent and in fact never came into existence, but also concealed their concerns regarding the consortium and the required finance, from Gransteel. In addition, they required Gransteel to commence with the steelwork as a matter of urgency. In my view there is clearly merit in respondents' submission that appellants withheld this crucial information from Gransteel knowing that had Gransteel been aware of the true position at the time it was requested to undertake the structural steelwork, it would in all probability have declined to do so.

[34] It will be recalled that approximately one week after Gransteel had commenced the work, it was requested by second appellant to stop as there was a problem. About one week later second appellant gave the green light for Gransteel to continue with the work. He did not inform Gransteel of the reason for the stoppage, but merely said that the problem had been sorted out. This conduct of second appellant no doubt confirmed the impression of **McCoy** and **Ellis** that the state of affairs relative to the consortium and its finances was in order. It is significant that at this stage appellants persisted in their failure to advise Gransteel that the consortium had not yet been formed or that there were concerns regarding the finances of the project.

[35] It was submitted on behalf of appellants that **McCoy** and **Ellis** were, particularly in view of the comforting presence of Spoornet, so unconcerned as to the nature of the consortium and the identities of its constituents, that these factors cannot have been material to them. In fact, it was argued that the probabilities favour the conclusion that even if they had been made aware of the non-existence of the consortium, they would have entered into the contract and commenced with the erection of the steelwork for the project. It was also argued that in the circumstances **Ellis** and **McCoy** paid no heed to the financial arrangements being in place and in any event confirmed that neither **Twemlow** nor second appellant ever gave them any express assurance about the financial ability of the consortium. In the circumstances, and as appellants were unaware of the identity of the prospective participants in the consortium, it was argued that appellants were under no duty to reveal to Gransteel that the consortium had not yet been finalised.

[36] In my view the aforesaid contention of appellants fails to take proper account of the long-standing relationship between Gransteel and appellants and the extent to which **McCoy** and **Ellis** relied upon the highly regarded **Twemlow** and second appellant. The clear and

uncontradicted evidence of **McCoy** and **Ellis** is that had they been made aware of the non-existence of the consortium, they would definitely not have entered into the contract and commenced with the erection of the steelwork. On the strength of what was conveyed to them by **Twemlow** and second appellant, they assumed that the consortium had been finalised and that financial arrangements were in place. Appellants did not tender any evidence to gainsay this evidence of **McCoy** and **Ellis** or to show that their assumption was unreasonable. In my view there is no merit in the submission that had **McCoy** and **Ellis** been made aware of the non-existence of the consortium, they would still have concluded the contract.

[37] I have no hesitation in finding that the probabilities overwhelmingly show that had **McCoy** and **Ellis** been made aware of the non-existence of the consortium they would not have concluded the contract and commenced with the steelwork for the project. I am further of the view that there is no merit in the submission of appellants that in the light of Spoornet's presence and the assurances of **Pickstone-Taylor** of DTL, appellants could not reasonably have foreseen the possibility of the project not going ahead and the finance not being available. As

submitted by respondents, this is entirely at odds with the factual position and it is in any event clear that, to appellants' knowledge, Spoornet's involvement was limited to the provision of a site. To this should be added the fact that appellants did not testify, with the result that there is no factual basis for this submission.

[38] In considering the relationship between appellants and Gransteel, it should in my view be borne in mind that appellants' own documentation shows that at the time they engaged Gransteel to do the steelwork for the project, they had no reasonable grounds for believing that the consortium was already in existence. They were accordingly fully aware of the fact that they did not have the necessary authority to represent an existing consortium and to conclude a contract with Gransteel on behalf of such a consortium. Where a person represents to a third party that he or she has authority to conclude a contract on behalf of a principal, but does not have the necessary authority to do so, or where the principal is in fact non-existent, no contract can come into existence between the third party and the principal (or fictitious principal), nor is the would-be agent personally liable as principal. I obviously exclude the case where pre-incorporation contracts of a company to be formed, are ratified in terms of section 35 of the Companies Act No. 61 of 1973.

[39] In **Blower v Van Noorden** 1909 TS 890, Innes CJ held that a person who concludes a contract in the name of another but without authority, "must be held to have impliedly promised that his principal should be bound by it, and that if not he would make good to the other party the damages resulting from that fact". This is known as the agent's liability for breach of his implied warranty of authority. The extent of the agent's liability will be to put the third party in the position in which the latter would have been if the agent had had authority to conclude the specific act. That position will depend on the financial stability of the person on whose behalf the agent professed to act and on the terms of the professed contract. It was, however, held in **Indrieri v Du Preez** 1989 (2) SA 721 (C) that where the agent's alleged principal is in fact non-existent, no liability based upon the breach of the agent's implied warranty of authority, arises. The reason for the non-availability of this cause of action was convincingly explained as follows by Scott AJ (as he then was), Friedman J (as he then was) concurring, at 728E:

> "This cause of action is clearly inappropriate in a case such as the present where the principal on whose behalf an agent purported to enter into a contract is non-existent. If for no other reason, this is because any attempt to determine what a non-existent party would have been able to pay had he existed is not

possible."

See also, Kerr, **The Law of Agency**, 3rd Edition, page 318.

[40] It follows from the aforesaid, that were a third party contracting with the "agent" of a non-existent principal, to be denied a claim in delict, he or she would be left without a remedy to recover loss suffered as a consequence of the agent's misrepresentation of authority or omission to advise the third party of his lack of authority. In fact, a claim in delict appears to be the only available remedy for the innocent third party contracting with the would-be agent of a non-existent principal. In this regard Scott AJ said the following in **Indrieri v Du Preez**, supra, at 728F:

> "It does not follow, of course, that a party in the position of the plaintiff in the present case is necessarily without a remedy. Indeed, it is difficult to conceive of a case in which a would-be agent who purports to act on behalf of an existent, but in truth non-existent, principal would not have acted either negligently or fraudulently."

[41] I am of the view that in the peculiar circumstances of the instant case, set out hereinbefore, considerations of public policy, fairness and equity demand the imposition of a legal duty which required appellants not to negligently represent to Gransteel that they had the necessary

authority to act on behalf of a consortium, while such consortium was not yet in existence (or a legal duty not to negligently omit to inform Gransteel that the consortium was not yet in existence). In my opinion the representatives of Gransteel had the right to have it communicated to them that the consortium was not yet in existence, which right "would be mutually recognised by honest men in the circumstances". (**Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management**) 1965 (3) SA 410 (W) at 418E-F). The relationship between Gransteel and appellants was, in my view, such that the representatives of Gransteel were entitled to rely on the frank disclosure by appellants of material matters within the latters' exclusive knowledge regarding the formation of the consortium and its ability to finance the project. (**McCann v Goodall Group Operations (Pty) Ltd** 1995 (2) SA 718 (C) at 723E-G).

[42] In imposing a legal duty of this nature on appellants, there is also no concern for the creation of limitless liability, as the duty will only affect the present parties and apply in the peculiar circumstances of this case. While realising that our courts adopt a cautious approach to the extension of the scope of the Aquilian action to new situations, I am of

the view that in the circumstances set out hereinbefore, there are sufficient positive policy considerations for the extension of delictual liability in the instant case, by finding that appellants were subject to a duty to avoid negligently causing Gransteel harm.

NEGLIGENCE

[43] In view of my finding that appellants owed Gransteel the aforementioned duty of care, the next inquiry is whether appellants negligently breached this duty. The test to be applied is that formulated in **Kruger v Coetzee** 1966 (2) SA 428 (A) at 431, namely:

a) whether a reasonable person in the position of appellants would have foreseen the reasonable possibility of economic loss being caused to Gransteel if appellants were to represent to Gransteel that they acted on behalf of a consortium, while omitting to inform Gransteel that the consortium was not yet in existence; and

b) whether a reasonable person would have taken steps to guard against such occurrence; and

c) appellants failed to take such steps.

[44] In my opinion a reasonable person in the position of appellants would have realised that in view of the manner in which these parties conducted their long-standing business relationship, Gransteel would have depended upon appellants to inform them of any material matters regarding the formation of the consortium or its ability to afford the project. The reasonable person would, in my opinion, also have realised that as this was a very big contract for Gransteel, which had to commence as a matter of urgency, Gransteel would have been even more reliant upon appellants to advise them of any material fact within their knowledge, which may reasonably indicate that Gransteel may not be able to recover the expenses which they were required to incur. In the prevailing circumstances a reasonable person would, in my view, have foreseen the reasonable possibility of the consortium not coming into existence and the resultant loss that Gransteel would then perforce suffer. As I have already mentioned, there is in my view much to be said for the contention that appellants withheld this crucial information from Gransteel, knowing that had Gransteel been aware of the true position, it would have declined to do the steelwork. Their reason for declining would obviously be a concern that a loss may be incurred if work is done by Gransteel prior to the formation of the consortium.

[45] It follows, in my view, that a reasonable person would in the circumstances have guarded against the resulting loss suffered by Gransteel, by making full disclosure to Gransteel of the fact that the consortium was not yet in existence at the time when the contract was entered into. As it is common cause that appellants failed to make such disclosure, I am in agreement with the court *a quo* that appellants negligently breached the duty of care which they owed Gransteel.

CAUSATION

[46] In **Minister of Police v Skosana** 1977 (1) SA 31 (A) at 34F-G, Corbett JA (as he then was), authoritatively stated the requirement of causation as follows:

> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question whether the negligent act or omission in question caused or materially contributed to…the harm giving rise to the claim. If it did not, then no legal liability can arise and cadit quaestio. If it did, then the second problem becomes relevant, viz whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part".

[47] I have already found that had appellants made **McCoy** and **Ellis**

aware of the non-existence of the consortium, Gransteel would not have entered into the contract and commenced with the erection of the steelwork. In such event Gransteel would not have suffered the loss which respondents now seek to recover from appellants. This satisfies the requirement of factual causation. Appellants, however, argued that once Gransteel became contracted to LTA, as mentioned in paragraph 9 above, it was entitled to look to LTA for payment. In view thereof appellants contend that the causal link between any negligent misrepresentation or omission on their part, and the loss suffered by Gransteel, was legally severed. As I understand this contention of appellants, it relates to the requirement of legal causation, in the sense that the intervention of LTA could be regarded as a *novus actus* which sufficiently interrupted the chain of causality to absolve appellants from liability.

[48] As remarked by Neethling *et al*, **Law of Delict**, 4th edition, page 185, legal causation is normally only problematic where a whole chain of consecutive or remote consequences results from the wrongdoer's conduct, and where it is alleged that he should not be held legally responsible for all the consequences. In the instant case the consequence of the negligent misrepresentation or omission by appellants, was that Gransteel embarked upon the project. That establishes the causal nexus

between the conduct of appellants and the conclusion and performance of the contract by Gransteel, which led to Gransteel suffering economic loss. As explained by JC Van Der Walt and JR Midgley, **Principles of Delict**, 3rd edition, page 207, the remaining question then is whether the intervention of LTA had the effect of completely neutralising the causative potency of appellants' original conduct, which would render the link between appellants' conduct and the harm too tenuous. In my view this question has to be answered in the negative. Even if one accepts that respondents have a claim against LTA based upon the subsequent appointment of Gransteel as LTA's subcontractor, I fail to see why this should impact negatively upon their claim which they may have against appellants in delict. It is not a case of concurrent claims that are available to respondents, but two separate causes of action based on separate facts, which entitled respondents to choose whether to sue appellants in delict or resort to a contractual claim against LTA. The existence of a contractual claim against LTA, can accordingly not, in my opinion, result in a finding that the link between appellants' negligent conduct and the loss suffered by Gransteel, has been rendered too tenuous to support a delictual claim against appellants.

[49] In any event, a perusal of the written subcontract concluded

between Gransteel and LTA after the work had finally been stopped, leaves me in serious doubt as to whether it affords respondents a contractual claim against LTA. Clause 12.2 of the appendix to this subcontract, provides that LTA would make payment to Gransteel "within two days of either the due date of payment to, or receipt of payment by, the contractor (LTA), whichever is the latest." This indicates that Gransteel's entitlement to payment from LTA was dependent upon the receipt of payment by LTA from the ultimate client. As the consortium as ultimate client never came into existence, it is doubtful whether respondents would be able to recover any payment from LTA.

[50] I accordingly find that respondents satisfied the requirement of causation for their delictual claim against appellants.

<u>QUANTUM OF DAMAGES</u>

[51] It is trite that the nature of delictual damages is that of negative interesse, which is usually determined with reference to a person's position immediately before a delict was committed against him or her (or his or her position if a delict had not been committed). The object of an award of damages in the instant case, must accordingly be to place respondents in the position in which Gransteel would have been, but for

the misrepresentation of appellants that they represented an existing consortium and their concomitant failure to apprise Gransteel of the true state of affairs relative to the non-existent consortium whom they purported to represent. See Visser and Potgieter's **Law of Damages**, Second Edition, Part III.

[52] The basis upon which respondents calculated the damages suffered by Gransteel, is set out in annexure PPC6 to the particulars of claim, read with Gransteel's revised written quotation, dated 23 November 1998. This comprises wasted expenses incurred by Gransteel in respect of the steelwork done and the profits foregone by Gransteel, as a result of the negligent conduct of appellants. Appellants contend that respondents simply adduced the various components which made up the basis for preparing Gransteel's contractual quotation and accordingly failed to place sufficient evidence before the court *a quo* of the amounts which Gransteel had actually expended. In addition, appellants maintain that respondents have failed to prove that had Gransteel not undertaken this project, it would have done other work which would have rendered it a profit. In fact, appellants argue that all that respondents did was to claim the contractual award to which Gransteel was entitled, which would represent the positive interesse, and not the negative interesse to which

they are entitled as delictual damages.

[53] The evidence of **Ellis** in regard to the final quotation dated 29 November 1998, is that it represents an accurate computation of the costs and expenses incurred by Gransteel in performing its contractual obligations. According to **Ellis** this represented the cost of material obtained from suppliers and the standard rate per hour paid to workers for the erection of the steelwork. The latter is based on an hourly rate per ton. His evidence further shows that, save for the miscellaneous steelwork not done as set out in annexure PPC6, the rest of the steelwork which Gransteel contracted for, was completed. In arriving at the net figure in regard to costs and expenses incurred by Gransteel, the cost of the miscellaneous steelwork not done, is deducted. In my opinion this evidence of **Ellis**, which was in any event not challenged, provides sufficient proof of the costs and expenses actually incurred by Gransteel in partially completing the steelwork for the project. It was accordingly not necessary for respondents, as submitted by appellants, to provide independent documentary proof from the suppliers of Gransteel and other sources, that such costs were actually incurred.

[54] Appellants further contend that respondents failed to provide acceptable evidence to show that had Gransteel not been involved in the Port Elizabeth project, it would have done other work of the same magnitude which would have covered their fixed overhead costs and earned the same profit. In this regard **Ellis** testified that had Gransteel not been employed on the Port Elizabeth project, it is likely that it would have performed other work which would have rendered the same profit and covered its overhead costs. This evidence of **Ellis** pertained to the period during which the Port Elizabeth project was performed. According to him the Gransteel factory was fairly busy at the time and there was not a shortage of work. Appellants argue that this evidence of **Ellis** was contradicted by **McCoy** in his affidavit in support of the application for the winding up of Gransteel, where he stated that "the construction industry has, in the last few years, suffered a downturn and (Gransteel) has not been immune". I do, however, agree with the submission of respondents, that this statement of **McCoy** was a sweeping and general one, made in the context of an overall assessment for the purposes of winding up. It does not in my view detract from the evidence tendered by **Ellis**.

[55] Appellants criticised the aforesaid evidence of **Ellis** by submitting that it was not specific and insufficient to show that Gransteel woud have been able to secure other work of the magnitude of the Port Elizabeth contract. I do not agree. It has to be borne in mind that there will necessarily be uncertainty and speculation in assessing this leg of the damages claimed by respondents. The fact of the matter is that Gransteel was involved in the Port Elizabeth project from mid November 1998 to approximately the end of January 1999, with the result that no particular attention would have been paid to alternative tender opportunities which came up during this period. It should also in regard to the availability of alternative work, be borne in mind that **Ellis** testified that due to the collapse of the Port Elizabeth project, Gransteel subsequently had to work a little bit harder to get more work in, which they in fact succeeded in doing. This underscores the view of **Ellis** that had Gransteel not been involved in the Port Elizabeth project, it would probably have been able to obtain sufficient alternative work. Finally, in regard to the issue of damages, I am satisfied that the nature of the damages proved by respondents is that of negative interesse, consisting of wasted expenses incurred and profits foregone by Gransteel. As stated in Visser and Potgieter's **Law Damages**, supra, page 75, negative interesse includes

loss of prospective profits or income. I accordingly conclude that respondents proved on a balance of probabilities that they are entitled to delictual damages in the sum of R1 616 366-00.

CONTRIBUTORY NEGLIGENCE

[56] Section 1 (1) (a) of the Apportionment of Damages Act No. 34 of 1956, provides that where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage. As pointed out by Van Der Walt and Midgley, **Principles of Delict**, supra, page 240, the provisions of section 1 of the Act clearly relate only to cases where a plaintiff has suffered harm partly as a consequence of his or her fault, and partly as a consequence of the fault of the defendant. A defendant may, therefore, not raise the contributory fault of a person other than the plaintiff, except in cases based on vicarious liability. At first blush it would appear that respondents' claim as plaintiffs in the instant action is not subject to the provisions of section 1 of the Act, as there was no contributory negligence on the part of respondents. The contributory negligence on which appellants rely, is the contributory

negligence of Gransteel. I also doubt whether the relationship between respondents and Gransteel can be considered to be vicarious in nature, so as to enable appellants to rely on the alleged negligence of Gransteel in reduction of respondents' claim. However, in view of respondents' concession that the provisions of section 1 of Act No. 34 of 1956, are applicable in the instant matter and the conclusion which I have reached in regard to the allegation of negligence on the part of Gransteel, I proceed to consider the issue of contributory negligence on the basis that section 1(1)(a) of the said Act is applicable.

[57] I am of the opinion that the court *a quo* erred in finding that there was contributory negligence on the part of Gransteel. As I have already mentioned, the task of liaison with the ultimate client was that of appellants. This was in line with the long-standing business relationship between appellants and Gransteel. To this should be added the faith that **McCoy** and **Ellis** had in appellants and their right to rely on appellants to advise them of any material matters relating to the formation of the consortium and its ability to finance the project. This resulted in appellants being subject to a duty of care not to negligently cause Gransteel harm. In the peculiar circumstances of this case, appellants were Gransteel's sole source of knowledge pertaining to the envisaged

consortium and Gransteel's representatives were accordingly practically and contractually precluded from making independent enquiries regarding the consortium. I am accordingly satisfied that a reasonable person in the position of Gransteel would not in the prevailing circumstances have conducted the enquiry suggested by the learned judge *a quo*.

[58] Finally, in regard to the issue of contributory negligence, I should refer to the finding of the court *a quo*, that the instruction given to Gransteel to stop the work and later to proceed, ought to have excited suspicion on the part of Gransteel which would have warranted a diligent enquiry. This failure of Gransteel to enquire, is a post-delictual ground of negligence, ie it occurred after the misrepresentation and/or omission which induced Gransteel to enter into the contract. As held in **Gibson v Berkowitz** 1996 (4) SA 1029 (W) at 1052D, only the pre-delictual negligence of a plaintiff will trigger the application of contributory negligence to reduce his or her damages. See also Neethling *et al* **Law of Delict**, supra, page 166-167.

[59] I conclude that the court *a quo* ought not to have found any contributory negligence on the part of Gransteel.

COSTS AND INTEREST

[60] As mentioned above, the court *a quo* did not deal with respondents' request for the costs of two counsel at all. The learned judge did accordingly not exercise his discretion not to allow the costs of two counsel and this court is therefore at large to consider respondents' request afresh. In my view it was a wise and reasonable precaution on the part of respondents to employ two counsel in this matter. In particular, as it involves an unusual claim in delict for the recovery of pure economic loss.

[61] In regard to respondents' prayer for interest, the court *a quo* awarded them interest on the damages at the rate of 15,5% per annum from date of judgment. Respondents correctly contend that in terms of section 2A (2) (a) of the Prescribed Rate of Interest Act No.55 of 1975, as amended, they are entitled to interest as from date of service of summons.

CONCLUSION

[62] In view of the aforesaid, I conclude that the appeal falls to be dismissed, while the cross-appeal should succeed.

[63] In the result I would make the following order:

1. The appeal is dismissed with costs, including the costs of two counsel.

2. The cross-appeal succeeds with costs, including the costs of two counsel.

3. The order of the court *a quo* is amended to read as follows:

   (i) First and second defendants are ordered, jointly and severally, to pay to plaintiffs, in their capacity as liquidators of Gransteel (Pty) Ltd (in liquidation), an amount of R1 616 366-00, as damages;

   (ii) Interest is awarded on the said damages at the rate of 15, 5% per annum, calculated from date of service of summons to date of final payment.

   (iii) First and second defendants are ordered, jointly and severally, to pay plaintiffs' costs of suit, including the costs of two counsel.

P B Fourie, J

I agree

S Desai, J

I agree and it is ordered accordingly.

JHM Traverso, DJP