IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOODHOPE PROVINCIAL DIVISION)

"REPORTABLE"
CASE NO. A966/2005

In the matter between:

RAYMOND BLACK
APPELLANT

AND

RONALD JOFFE **RESPONDENT**

JUDGMENT DELIVERED ON 26 OCTOBER 2006

DLODLO, J

INTRODUCTION

(1) The crisp issue for decision in this matter is whether a witness who, without having been suborned to do so, deliberately testifies falsely incurs delictual liability to the unsuccessful litigant. The matter emanated from the Magistrate's Court and has indeed a certain history. On appeal before us, Mr. R. J. Tee and Mr. Paul Tredoux appeared for the Appellant and the Respondent respectively.

FACTUAL BACKGROUND

(2) During 1992 the Respondent purchased a dwelling house from a Mr. Conlin in terms of a written agreement of sale which contained the usual "voetstoots" clause. Prior to the conclusion of the aforementioned sale Mr. Conlin had caused certain building works to be done on the property. That entailed the construction of a retaining wall and the placement of a deck. This retaining wall and

deck were to have been constructed in compliance with certain approved building plans particularly the following:

i) As is the usual practice the City Council caused Mr. Conlin to appoint an engineer to oversee the work and to ensure that the approved building plans were adhered to.

ii) The engineer was to have issued a completion certificate in order to certify that the works were properly done.

(3) Mr. Conlin appointed Mr. Richard Eagen as the engineer, but Mr. Eagen was never summoned to the site by either Mr. Conlin (who was an owner builder) or the Appellant (who was Mr. Conlin's builder). At the time of the conclusion of the agreement the Respondent was not aware:

i) that the works did not comply with the approved plans; and

ii) that a completion certificate had not been issued.

Upon the expiration of some months after the Respondent had taken transfer of the property, the City Council drew the fact that there was no completion certificate in respect of the works to the Respondent's attention, and the Respondent unsuccessfully attempted to obtain the said certificate from Mr. Conlin. Mr. Eagen attended at the premises and indicated his preparedness to issue the necessary completion certificate provided that he was satisfied that the work had been performed in accordance with the Approved Plans. For this purpose two exploratory holes were dug in the retaining wall, but these revealed that the wall constructed did not comply with the Approved Plans. In fact, the deviations from the Approved Plans were so gross that an entirely different wall unsuitable for the purpose of serving as a retaining wall had been built. This necessitated extensive remedial work.

ISSUES IN THE FIRST MAGISTRATE'S COURT ACTION

(4) The Respondent instituted an action against Mr. Conlin based on the above factual scenario. Mr. Conlin, however, relied on the "voetstoots" clause. In response thereto, the Respondent relied on the rule in ***Van der Merwe v Meades*** 1991 (2) SA 1 (A), which is to the effect that a party cannot rely on a "voetstoots" clause where there has been a deliberate concealment or non disclosure.

(5) Mr. Conlin testified at the trial and denied having any knowledge of any deviations from the Plans save in respect of one minor aspect, namely the recession of the foundations to accommodate a planter (that is a seedbox). The Appellant was called as a witness by Mr. Conlin, and he, in essence, corroborated Mr. Conlin's version. The following aspects of the Appellant's testimony deserve mentioning:

i) Engineers always go overboard when designing retaining walls and they include in the design specifications (a number of elements) which are unnecessary;

ii) The Appellant had taken it upon himself to deviate from the Approved Plans, and he had not informed Mr. Conlin of this as it was "unnecessary";

iii) Mr. Conlin and the Appellant had not decided to alter the specifications; Mr. Conlin had not instructed the Appellant to vary the thickness of the concrete infill;

iv) It was his (Appellant's) duty as the builder to ensure that the consulting engineer was apprised of the fact that the works had commenced, and he, (Appellant) had simply failed to notify the engineer thereof, and this was his fault.

(6) The Magistrate in deciding the matter rejected Mr. Conlin's version and held that he must have been aware of the deviations from the approved plans and accordingly found for the Respondent. Mr.

Conlin, however, took the matter on appeal. The Appeal was heard by Conradie and Blignault JJ. Judgment of the appeal Court was written by Blignault J. The learned Judge noted that it was an "important factor" that Black's testimony corroborated that of Mr. Conlin's. The result was that the Appeal was upheld.

(7) Consequent to losing the Appeal the Respondent suffered damages namely:

i) The quantum he had claimed in respect of remedial work undertaken;

ii) His own costs in respect of the Magistrate's Court action;

iii) Mr. Conlin's costs in respect of the Magistrate's Court action;

iv) His own costs in respect of the High Court Appeal;

v) Mr. Conlin's costs in respect of the High Court Appeal.

THE ISSUES IN THE SECOND ACTION

(8) Upon losing the Appeal as foresaid, the Respondent instituted an action against the Appellant in which he claimed damages from the latter. The present Appeal concerns the Judgment which is at issue in these proceedings. The Respondent initially relied on the Appellant's deliberate deviations from the approved building plans. The Appellant responded by filing a Special Plea and a Plea Over on the merits. The Special Plea raised the question of prescription. It is not necessary to canvass the Special Plea for purposes of this Appeal. The Plea Over contained an averment to the effect that the Appellant had been instructed by Mr. Conlin to deviate from the Approved Plans. This directly contradicted the testimony which the Appellant had given under oath in the first Magistrate's Court action. This moved the Respondent to amend his Particulars of Claim. In terms of the amended Particulars of Claim the Respondent claimed the damages which had flowed

from the false testimony which Mr. Black had given. The Magistrate observed in his Judgment that:

"This is an unprecedented claim in our law and I must first decide if Plaintiff has a cause of action."

Of note is the following finding by the Magistrate:

"The gravamen of Plaintiff's complaint is that Defendant deliberately lied in the Magistrate's Court case, not that he was mistaken, confused, careless, unable to recall or otherwise subject to the normal problems associated with witnesses. I cannot see any grounds for not holding a person liable for a deliberate action which causes another loss. It will surely not be against public policy, not open the floodgates of litigation, nor tend to discourage persons from testifying, if only deliberate misstatements are targeted."

(9) It would appear that the aforesaid finding by the Court *a quo* was not appealed against and is not the subject matter in this Appeal. It needs to be mentioned that the aforementioned finding by the Court *a quo* found justification on Mr. Eagen's testimony as well. The latter had testified that the departure from his specifications were material and must have been deliberate. Before embarking on the vexed question in issue in the instant matter, I consider it prudent to refer to what obtains in other Countries.

A COMPARATIVE SURVEY OF DEVELOPMENTS IN FOREIGN JURISDICTIONS

English Courts

(10) It is said in English law that; "an action will not lie against a witness for giving false evidence in a court of justice (***Revis v***

Smith (1856) 18 CB 126 at 144.) Effectively then "no action lies, whether against judges', counsel, jury, witnesses or parties for words spoken in the ordinary course of any proceedings before any court or tribunal recognized by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, oral or written, relevant or irrelevant, malicious or not." (**Halsbury 4th Edition Volume 28**)
"Thus no civil action lies against a witness for perjury at the suit of the person damnified by the false evidence. This immunity is immunity from any form of civil action." (**Clerk and Lindsell on Torts**, 18th edition, 2000)

(11) This general immunity from civil liability attaches "to all persons in respect of their participation in proceedings before a court of justice, judges, court officials, witnesses, parties, counsel and solicitors alike..."
"Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists not because the conduct of those persons ought not to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases, where they had not spoken with malice, in which they had not spoken with falsehood." (***Munster v Lamb*** (1883) 11 QBD, 588. 607)

(12) The immunity of a witness from suit in respect of evidence given in court was described by Simon Brown LJ in ***Silcott v Commissioner of Police for the Metropolis*** (1996) 8 Admin Law 633 at 636, as a fundamental rule of law. The origins of the rule were traced in the judgment of Kelly CB in ***Dawkins v Lord***

Rokeby (1873) LR 8 QB at 263-265 where the following appears: "upon all these authorities it may now be taken to be settled law that no action lies against a witness upon any evidence given before any court or tribunal constituted according to law."

The basis of immunity in respect of evidence given in court was explained by Lord Halsbury in ***Watson v M'Ewan, Watson v Jones*** [1905] AC 480 at 486,

> "…the conduct of legal procedure by Courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of the evidence they have given. In my view, it is absolutely inarguable, it is settled law and cannot be doubted."

(13) The immunity given to a witness or potential witness in civil or criminal proceedings is based on the reasoning that,

> "The administration of justice would be greatly impeded if witnesses were to be in fear that persons against whom they gave evidence might subsequently involve them in costly litigation." (See per Salmon LJ in ***Marrinan v Vibart*** [1962] 1 All ER 869 at 871.)

Additional reasons why immunity is traditionally conferred upon witnesses in respect of evidence given in court include the need to ensure that witnesses,

"may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover the trial process contains in itself, in the subjection to cross examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence." (***Roy v Prior*** [1970] 2 All ER 729 at 736,

[1971] AC 470 at 480.).

(14) It is not only the need to stop matters being litigated over and over again by disgruntled parties (***Roy v Prior*** [1970] 2 All ER 729), but also the need to protect witnesses themselves from suits stemming from the evidence they are to give (***Munster v Lamb*** (1883) 11 QBD, 588), "a *fortiori* the need to encourage witnesses to come forward and say what they have to say in court." (***Stanton v Callaghan*** [2000] 1 Q.B.75.) The immunity extends to any civil proceedings brought against a defendant that are based on the evidence that he or she gives in court. Consequently, immunity from suit extends to the honest as well as the dishonest witnesses,

> "immunity is not granted primarily for the benefit of the individuals who seek it. They themselves are the beneficiaries of the overarching public interest, which can be expressed as the need to ensure that the administration of justice is not impeded (***Stanton v Callaghan*** [2000] 1 Q.B.75.) Immunity is granted "on the basis of a supervening public interest which transcends the need to provide a remedy in an individual case." (***Stanton*** *(supra)* at 88.)

(15) Collins J pointed out in ***Meadow v General Medical Council*** [2006] EWCH 146 that the dishonest witness may then be guilty of the criminal offence of perjury and can be prosecuted if sufficient evidence exists, however, if such evidence is not available the immunity exists because of the requirement that a witness should be able to give evidence free from fear of any reprisal. Public policy states that there is a need to protect the honest witness. This may result in immunity for the dishonest

witness. Nonetheless, the balance between the right of the individual to make a claim and the need, in the interests of the administration of justice, to ensure that witnesses give evidence in the knowledge that they cannot be subjected to action which may seek to penalize them is struck by giving priority to the latter.

(16) In ***Darkur v Chief Constable of the West Midlands*** 2001 1 AC 435 at p464D, Lord Hutton stated that the rule was necessary,

> "in order to shield honest witnesses from the vexation of having to defend actions against them and to rebut an allegation that they were activated by malice the courts have decided that it is necessary to grant absolute immunity to witnesses in respect of their words in court though this means that the shield covers the malicious and dishonest witness as well as the honest one."

Although Lord Hutton was referring specifically to actions for defamation, it is clear that the public policy, which grants immunity, extends for the same reason to any action brought, whether or not it alleges malice, bad faith or dishonesty. The Court continued in Darkur v Chief Constable of the West Midlands *supra* and concluded thus:

> "By complete authority, including the authority of this house (see ***Dawkins v Lord Rokeby*** (1875) LR 7HL 744) it has been decided that the privilege of a witness, the immunity from responsibility in an action where evidence has been given by him in a court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable – it is settled law and cannot be doubted. The remedy against a witness who has

given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions brought against them in respect of evidence they have given."

Scottish Courts

(17) "On the immunity from suit of witnesses in respect of evidence they have given before courts of justice and tribunals acting in a matter similar to courts of justice there is no difference between the laws of Scotland and the laws of England. That absolute privilege attaches to words spoken or written in the course of giving evidence in proceedings in a court of justice is a rule of law based on public policy that has been established since the earliest times." (***Trapp v Mackie*** [1979] 1 All ER 489) (See also the case of ***Karling v Purdue*** [2004] Scot CS 221 (29 September 2004), "the underlying rationale of the immunity is that witnesses should speak freely, and the desirability of avoided repeated litigation on the same issue.")

Irish Courts

(18) In the case, of ***Fagan v Burgess*** [1998] IEHC 52, O'Higgins J quoted from the case of ***Looney v Bank of Ireland*** [1996] 1 IR 157 ,

"at no stage, as far as I am aware, has it ever been doubted or questioned in any jurisdiction that there is absolute privilege in relation to matters in issue in legal proceedings."

On appeal to the Supreme Court the judgment of the High Court in ***Looney v Bank of Ireland*** (*supra*) was affirmed. In his *ex tempore* judgment O'Flaherty J said,

> "there is at issue a far more fundamental point which is the need to give witnesses (and also indeed, the judge) in Court a privilege in respect of oral testimony and also with regard to affidavits and documents produced in the course of a hearing. Such persons, either witnesses or those swearing affidavits, are given immunity from suit. Otherwise, no judge could go out on the bench and feel that she or he could render a judgment or say anything without risk of a suit. Similarly, witnesses would be inhibited in the way they could give evidence. The price that has to be paid is that civil actions cannot be brought against witnesses even in a very blatant case, which of course in this case is not, but even in a case of perjury – which would be such a case – the law says that an action cannot lie."

(19) In Ireland,

> "the constitution implicitly recognizes that every citizen should have a right of access to the courts to determine the existence or breach of a legal obligation owed to him by any potential defendant. On the other hand, the Constitution expressly recognizes the need for finality in the judicial process. Moreover, it is recognised that justice is more likely to be achieved where parties participating in litigation whether as parties, witnesses, judges, jurors or lawyers, can discharge their function without the fear of being held to account, at the suit, perhaps of a disgruntled litigant for the manner in which he performs his

role."(***E. O'K v M.N., P.C., Erinville Hospital and the Southern Health Board*** [2001] 3 IR 568.) The court in this particular case did consider that there may be a limit to the immunity but only in cases of 'flagrant abuse' of the court process. The Civil Liability and Courts Act, No 31 of 2004, which became law in Ireland on the 21st July 2004, makes wide ranging new provisions for the regulation of civil claims for compensation. It creates a new offence of giving false evidence; however, this is limited to personal injuries actions.

US Courts

(20) Except when authorized by statute, no civil action lies to recover damages caused by the giving of false testimony. (The only jurisdiction that recognises a civil action for perjury is Maine, which has a statute authorizing such an action) In ***Eikelberger v Tolotti*,** 96 Nev, 525, 531, 611 P.2d 1086, 1090 (1980) at 531.1 the Nevada Supreme Court noted, "it is uniformly held that the giving of false testimony is not civilly actionable." Thus, a party injured by perjured testimony cannot bring a civil action against the opposing party or a witness who has offered perjured testimony, even if the perjury has affected the final judgment in the case. The court went on to say that, "it is important to the administration of justice that full disclosure by a witness be not hampered by a possible future damage suit. Consequently, perjury is an offence against the public only, and subject only to the criminal law".

(21) Absolute immunity from civil liability for damages was affirmed by the Supreme Court in ***Briscoe v LaHue***, 460 US. 325, 103 S

Ct.1108 75 L.Ed 2nd 96 (1983),

> "in damages suits against witnesses, 'the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of the truth should be left as free and unobstructed as possible. A witness's apprehension of subsequent damages liability might induce two forms of self-censorship. First witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability."

(22) In ***US v Parra-Garcia*** 2001 10Cir 13 242 F.3d 392 the court held that,

> "Public policy reasons for the rule include: (1) the absolute immunity for witnesses in judicial proceedings as discussed in ***Briscoe v Lahue*** (*supra*), i.e. encourages witnesses to speak freely without fear of civil liability, (2) perjury is a public offence and subject only to the criminal law, (3) the need for finality in judgments, (4) possibility of a multiplicity of suits by parties dissatisfied by the outcomes of trials, and (5) lack of precedent for such actions."

THE ISSUES AND SUBMISSIONS

(23) Mr. Tee submitted that it is not clear, or even probable that the Appellant's evidence (in first trial) conclusively influenced the outcome of the appeal. In his view, it is, however, clear from the Judgment of the Court of Appeal that the Appellant's evidence was regarded as corroboration of Conlin's evidence. Concluding on this aspect Mr. Tee submitted that the Court of Appeal was of the view that, even without the Appellant's evidence, the

Respondent had failed to establish fraud on the part of Mr. Conlin. It is indeed so that the Appellant's testimony was found to have corroborated that of Mr. Conlin by the Court of Appeal. But it is of importance also to pay attention to what the Learned Judges held, namely:

> "If respondent's contentions in this matter were correct, then (Conlin) and (Appellant) must have colluded in producing the defective building work and also in giving false evidence in this matter."

It is therefore, in my view, not completely correct to submit that the Court of Appeal held the view that even without the Appellant's evidence, the Respondent had failed to establish fraud on the part of Mr. Conlin.

(24) The Plea which is clearly in variance with the testimony given in the first action was obviously prepared on the instructions of the Appellant. The latter has not denied that. In any event regard needs to be had to the provisions of section 15 of the Civil Proceedings Evidence Act 25 of 1965, namely:

> "It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings."

(25) Mr. Tee submitted further that the Appellant's failure to testify in the second trial had the effect of leaving the evidence led on behalf of the Respondent uncontradicted. Relying on ***Marine & Trade Insurance Co. Ltd. v Van der Schyff*** 1972 (1) SA 26 (A) at 39-40; 48-49, ***Gericke v Sack*** 1978 (1) SA 82 (A) at 824, ***Olifant v Shield Insurance Co.*** 1980 (1) SA 903 at 907 he concluded that facts established *prima facie* could be held to be

proved on a balance of probabilities but that, however, failure by one of the litigants to testify (as *in casu*) does not affect the question of onus such that the Respondent (in order to succeed) still bore the onus to establish all the elements of his cause of action. I have no quarrel with this submission. The Appellant who reasonably could have been expected to testify elected not to do so. The result is that the Respondent was rendered unable to traverse the issues about what really happened between the Appellant and Mr. Conlin. Mr. Tredoux is correct in holding the view that the Respondent must be taken to have derived some assistance in the rule enunciated in ***Gericke v Sack*** 1978 (1) SA 821 (A) at 827 which reads thus:

"It is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the burden of proof cannot be altered merely because the facts happen to be within the knowledge of the other party. See *R v Cohen*, 1933 TPD 128. however, the Courts take cognizance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed out by Innes, J, in Union Government (Minister of Railways) v Sykes, 1913 AD 156 at p.173, that:

> *"less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required."*

(26) In Mr. Tee's submission it is inappropriate to sue the dishonest witness under the circumstances prevailing in the instant case as

it should be borne in mind that a witness does not testify of his own volition, one of the litigants must call him to give evidence. In his view, it is that decision (whether or not to call him) which could affect the Court's judgment. Whilst there may be merit on this submission, it must be borne in mind that the Respondent could no longer sue Mr. Conlin at the time when it came to light that the Appellant testified in his (Conlin's) favour untruthfully.

(27) I support the view that witnesses should not be discouraged by the potential threat of a damages action from testifying voluntarily. In South African law, there is no absolute immunity for witnesses in civil proceedings instead there is a qualified privilege for statements made by a witness while giving evidence under oath. However, this is quite distinct from the absolute privilege awarded through the English courts.

"While a witness or a person making an affidavit does not by our law enjoy the same amount of privilege which, according to the books, such persons possess by English law, yet a qualified privilege is accorded to a witness, who in judicial proceedings gives evidence upon oath."(***Rubel v Katznellenbogen*** *1915 CPD)*

"Under Roman Dutch law the privilege enjoyed by a witness giving evidence in a court of law, in reply to questions regularly and properly put to him, was a very real one. But it was not absolute." (***Macgregor v Sayles*** 1909 554.)

(28) In ***Preston v Luyt*** 1911 EDL 298, Kotze JP at p319 noted,

"the great importance to the administration of justice that witnesses should testify with minds absolutely free from the apprehension of being annoyed by civil actions for anything they may say as such, has already been pointed out. They are brought into court by the mandate of the law and compelled to testify, usually for the benefit of others."

In the **Preston** case *supra* at 310 the court recognised,

> "the privilege which by our law a witness, who gives evidence at some judicial enquiry, enjoys is a fairly wide one. It is necessary for the protection of the witness who is compelled to appear and give evidence, as well as for the due and proper administration of justice. But it does not go so far as to amount to what in the English law is known as the absolute privilege of a witness. By that system of law it is held that a witness is absolutely privileged as to anything he may say as a witness, having reference to the inquiry, in which he is called."

(29) This qualified privilege protects the witness, until it is shown that the limits of the privilege have been exceeded, by proof on the part of the plaintiff that the witness made a defamatory statement, actuated by malice or an intent to injure or insult him or her. In such instances,

"a witness may be proceeded against for statements made in the course of the evidence he gives in a judicial proceeding but only in case it is proved that the statements he made were <u>false, malicious and made without probable cause"</u>.(***Dippenaar v Hauman***, 1878.Buch 135)- (my underlining). It may then be sufficient to deprive a witness of this qualified privilege where malice,

> "has induced the witness, in answering questions put to him, to make for the purpose of injuring the plaintiff, statements injurious to him which the witness knew when he made them to be false or such malice as has induced the witness to introduce in the course of his evidence for

the purpose of injuring the plaintiff some statement injurious to him, irrelevant and not pertinent to any of the subject matters as to which his evidence was required, even although when he made it he believed it to be true." (***Norden v Oppenheim*** 1846 3 Menzies 42.))

(30) Although perjury is a criminal offence in South African law, there are no specific statutory provisions providing for civil claims (personal injury or otherwise) where the plaintiff knowingly gives false or misleading evidence. (**South Africa: Can Our Courts Shoot Down Liars?** 17 February 2005, Cliffe Dekker Inc, T Fletcher.) It is sometimes said that the criterion for the determination of wrongfulness is 'a general criterion of reasonableness', i e whether it would be reasonable to impose a legal duty on the defendant (see e.g. ***Government of the Republic of South Africa v Basdeo and another*** 1996 (1) SA 355 (A) 367E-G).

(31) In the words of Brand JA in the case of ***Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*** 2006 (3) SA 138 (SCA),

"It is to be borne in mind that what is meant by reasonableness in the context of wrongfulness is something different from the reasonableness of the conduct itself, which is an element of negligence. It concerns the reasonableness of imposing liability on the defendant (see e.g. Anton Fagan '*Rethinking wrongfulness in the law of delict*' 2005 *SALJ* 90 at 109). Likewise, the 'legal duty' referred to in this context must not be confused with the 'duty of care' in English Law which straddles both elements of wrongfulness and negligence (see e.g. ***Knop v***

> ***Johannesburg City Council*** 1995 (2) SA 1 (A) 27BG; ***Local Transitional Council of Delmas v Boshoff*** 2005 (5) SA 514 (SCA) para 20). In fact, with hindsight, even the reference to 'a legal duty' in the context of wrongfulness was somewhat unfortunate. As was pointed out by Harms JA in ***Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority*** *SA* 2006 (1) SA 461 (SCA) para 14), reference to a 'legal duty' as a criterion for wrongfulness can lead the unwary astray."

Furthermore,

> "When a court is requested, in the present context, to accept the existence of a 'legal duty', in the absence of any precedent, it is in reality asked to extend delictual liability to a situation where none existed before. The crucial question in that event is whether there are any considerations of public or legal policy, which require that extension. And as pointed out by Nugent JA in ***Minister of Safety and Security v Van Duivenboden*** *2002 (6) SA 431 (SCA)* at para [21] and endorsed in ***Telematrix*** (*supra* para [6]) in answering that question.
>
> 'When determining whether the law should recognise the existence of a legal duty in any particular circumstances 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.'

(32) Delictual liability arises if the essential requirements have been satisfied. These are:

i) The wrongful conduct on the part of the Appellant;

ii) Harm sustained by the Respondent;

iii) A causal connection/ link between the said conduct and the Respondent's harm; and

iv) Fault or blameworthiness on the part of the Appellant.

(See ***Edouard v Administrator Natal*** 1989 (2) SA 368 (D) at 391.

I intend to discuss wrongful conduct and the causal link as they relate to the fact of this case. The other delictual requirements will merely be referred to in passing because they appear to be self-evident.

(33) **Whether the Appellant acted wrongfully** is a conclusion of law which a court draws from the facts which have been placed before it. (See: ***Mabaso v Felix*** 1981 (3) SA 865 (A) at 875) However, the wrongfulness element is antecedent to the requirement that the Appellant's conduct must have been intentional or negligent. Once it has been established that the conduct has been wrongful the question arises as to whether the Appellant was at fault i.e. whether the objectively wrongful conduct can be imputed to the Appellant in the sense that he conducted himself negligently or intentionally. ***Administrateur, Transvaal v Van der Merwe*** 1994 (4) SA 347 (A) at 364. As mentioned earlier on in this judgment wrongfulness is determined according to the general criterion of reasonableness. Conduct is wrongful or unlawful if it is unreasonable, in other words, when in the light of all the circumstances the Appellant is expected to behave in a manner which will not harm the Respondent.

See: ***Minister van Polisie v Ewels*** 1975 (3) SA 590 (A) at 596-597; ***Marais v Richard*** 1981 (1) SA 1157 (A) at 1168

(34) In determining the wrongfulness element Courts also refer to concepts such as the *boni mores* of the community, the prevailing conceptions in a particular community at a given time, or the legal convictions of the community. Each of these is but a different expression of the general criterion of reasonableness. In considering whether conduct was wrongful the Courts must consider and balance:

i) the particular conflicting interests of the parties;

ii) the parties' reaction to each other;

iii) the particular circumstances of the case;

iv) whether any superior legal rights exist;

v) appropriate considerations of social policy.

(***Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd*** 1990 (4) SA (N) 753-754). Considerations of public and legal policy are important and the Courts are required to determine what society's notions of justice demands. In other words, the courts are required to make a value judgment. (***Administrateur, Natal v Trust Bank van Afrika Bpk*** 1979 (3) SA 824 (A) at 833-834). Public policy is closely associated with, and cannot be separated from, the community's perception of justice, equity, good faith and reasonableness. (***Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*** 1990 (2) SA 520 (W) at 528-529). The problem can be approached either from the point of view of either the Respondent or the Appellant. In ***Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd*** 1982 (4) SA 371 (D) Booysen J held thus:

> "Those authorities who approach the matter from the point of view of the Respondent state that any infringement of a subjective right of the Respondent is unlawful and then proceed to enquire whether Respondent had the right in any given case not to be injured in the circumstances of that case. Those authorities who approach the matter from the point of view of

the Appellant state that a breach of a duty of care owed to the Respondent is unlawful and then proceed to enquire in each case whether such a duty existed. Logically speaking these two approaches should arrive at the same criterion for unlawfulness and it seems to be that they do."

Simply put the question is whether the Appellant's conduct interfered with the respondent's subjective right in a legally unacceptable way or constituted the breach of a duty owed by the Appellant to the Respondent (recognized in law for purposes of liability).

(35) In the instant appeal the complaint against the Appellant is that he clearly deliberately testified falsely in the action which the Respondent instituted against Mr. Conlin. It is not the Respondent's case that the Appellant mistakenly or inaccurately testified. The Respondent's contention is that the Appellant deliberately lied in order to defeat the Respondent's action instituted against Mr. Conlin. I pause and rhetorically ask whether the community's perception of justice, equity, good faith and reasonableness require a witness to refrain from deliberately testifying falsely. Witnesses are required to testify under oath or affirmation (Section 112 of **Magistrate's Courts Act 32 of 1994**). A witness who makes a statement under oath which he knows or foresees to be false, commit the crime of perjury. (See: PMA Hunt-**South African Criminal Law and Procedure** Vol II (2nd ed. By JRL Milton p. 110). Our law does not countenance fraud and perjury is a species of fraud (***R v du Toit*** 1950 (2) SA 469 (A). The Respondent would have no remedy because it is only if it can be proved that a successful party was party to the misdeed that a judgment obtained by fraud, forgery or perjury, will be set aside at the suit of a party affected by such judgment

(***Makings & Makings*** 1958 (1) SA 338 (A). ***Boswell v Minister of Police*** 1978 (3) SA 268 (E) at 273-275 is authority for the proposition that, although there is inclination to curb liability for misstatements, a statement made with the intention to cause harm will normally lead to liability because the intention to injure is an overriding factor in favour of imposing liability.

(36) There is most certainly no consideration of public policy, fairness and equity which indicate that a remedy should be denied. I fully agree that witnesses should be encouraged to testify, and that they should not be unduly restricted by potential liability arising out of inaccurate or incorrect statements. This judgment is thus no authority for imposing liability to such witnesses. The fact of the matter, however, is that perjury is a very different thing. I agree with Mr. Tredoux that the conduct complained of in the instant matter was wrongful in that it constituted the breach of a duty owed by the Appellant to the Court which is recognized in law for purposes of liability, namely, the duty to refrain from telling deliberate untruths during his testimony. Whether or not there is **a causal link between this wrongful conduct and the harm suffered** is a different question for determination. As far as causation is concerned, one needs to bear in mind what was held in ***Minister of Police v Skosana*** 1977 (1) SA 31(A) at 34-35, namely:

> "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 *caedit 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 ensure 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."

(37) The enquiry as to the factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the Appellant. (See: ***Siman & Co. (Pty) Ltd*** 1984 (2) SA 888 (A) at 914-918). It is trite as Van Reenen J correctly pointed out in ***Moses v Minister of Safety and Security*** 2000 (3) SA 106 (C) that the existence of a causal nexus between a defendant's conduct and the loss sustained by a plaintiff is an essential element of delictual liability and that the onus to have shown the presence of such a causal connection rested on the plaintiff. As regards the factual element Corbett CJ reaffirmed the approach when he made the following authoritative statement in ***International Shipping Co (Pty) Ltd v Bentley*** 1990 (1) SA 680 (A) at 700 E-H:

> 'As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question.

In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise.'

(38) It is not therefore the correct approach to consider the matter on the basis of what would have happened had the defendant not testified and not to consider it on the basis of what would have happened had the Appellant told the truth. There is a clear distinction between 'commission' and 'omission' and therefore different considerations apply to each one. It is clear that had the Appellant testified in the matter between the Respondent and Mr. Conlin that the latter had instructed him to deviate from the Approved Plans, it would no doubt have been held that Mr. Conlin was aware of the defects. This would have brought the rule in ***Van der Merwe v Meades*** 1991 (2) SA 1 (A) into play and Mr. Conlin would have been precluded from relying on the voetstoots clause. The result would have been that the Respondent would have been the successful party in the first Magistrate's Court action.

(39) **Fault** can take the form of intention *(dolus)* or negligence (*culpa*). The Appellant's intention can either be *dolus directus*

(i.e. the attainment of a particular consequence which the Appellant intends to bring about, *dolus indirectus* (i.e. a secondary result which was a necessary consequence of the intended conduct) or *dolus eventualis* (i.e. where one acts with the intention of attaining a particular object but subjectively realizes or appreciates that another consequence may reasonably result and one reconciles oneself with this possibility, and recklessly proceeds with the conduct nevertheless. (See: ***Wentzel v SA Yster en Staalbedryfsvereniging, Wentzel v Blanke Motorwerkersvereniging*** 1967 (3) SA 91 (T) at 98). In the present appeal the Appellant must have known that the effect of his testimony would be to cause the Respondent to lose the case he had against Mr. Conlin. He nevertheless proceeded to testify falsely. That he intended a particular consequence is beyond question.

(40) Van Reenen J in ***Moses v Minister of Safety and Security*** 2000 (3) SA 106 (C) at 113G-114D dealt with a situation involving an omission but in the instant case, I am faced with a situation which involves a commission. In the instant matter, I simply ask myself a rhetoric question, namely, would the Respondent have suffered the loss he sustained had the Appellant not deliberately falsely testified in favour of Mr. Conlin? The answer is clearly no. I hold the view that before a witness is held civilly liable for damages suffered consequent to his deliberate false testimony, it must be established that the witness acted *mala fide*. In the present case the Appellant clearly colluded with Mr. Conlin to testify falsely in favour of the latter. Malice on the part of the Appellant can be inferred from his conduct, namely to testify falsely to the prejudice of another person despite the existence of a duty on him to speak the truth.

He, despite the oath he took, testified falsely and that was deliberate.

(42) In my view all elements of a delictual claim were satisfied. I am particularly satisfied that there was malice on the part of the Appellant. It is in the interests of justice that where all the elements of a delictual claim have been met and where malice on the part of the witness is found to have existed, such a witness must be held to be liable for the damages occasioned by his deliberate false testimony. It is my view therefore that this appeal stands to be dismissed with costs. I would thus propose the dismissal of this appeal and that the Appellant must bear the costs hereof.

DLODLO, J

I agree and it is so ordered.

TRAVERSO, DJP