# DELICTUAL AND CONTRACTUAL LIABILITY OF CONTRACTORS AND ENGINEERS IN THE SOUTH AFRICAN CONSTRUCTION INDUSTRY

by

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**Abstract**

The delictual and contractual liability of contractors and engineers for negligence in the construction industry in South Africa is critically investigated. In most instances of such harm-producing conduct of contractors and engineers, the application of common law principles results in equitable outcomes. Some instances are identified where the application of fault-based delictual principles fails to fully vindicate the interests of prejudiced parties. The legislative adoption of strict liability is considered as a potential solution. Section 61 of the Consumer Protection Act 68 of 2008 has introduced strict liability for a wide range of damage caused by goods, which appears to be defined sufficiently widely to include strict liability of contractors and engineers for harm-producing conduct in the construction industry. On the assumption that progressive application by the Courts of Section 61 will satisfactorily supplement common law principles, no further legislative reform in this field is recommended.

**Key terms:** building industry; construction; contract; contractor; damage to property; delict; engineer; fault; negligence; strict liability; wrongfulness; personal injury

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# CONTENTS

# LIST OF ABBREVIATIONS

| | |
|---|---|
| AFSA | Arbitration Foundation of Southern Africa |
| COIDA | Compensation for Occupational Injuries and Diseases Act 130 of 1993 |
| CPA | Consumer Protection Act 68 of 2008 |
| FIDIC | International Federation of Consulting Engineers Seminar in 1997 |
| GCC | *General Conditions of Contract for Construction Works* |
| NHBRC | National Home Building Registration Council |
| SAICE | *The South African Institution of Civil Engineering* |

# CHAPTER 1: INTRODUCTION

## 1 BACKGROUND

A healthy construction industry is of vital importance for national social and economic development.[1] According to Dosumu and Aigbavboa,[2] the various benefits of sustainable construction are economic, social, and environmental. Economic factors include the following: cost efficiency, affordability of the building project, sustainable construction with minimum cost impact, and job creation. Social factors involve environmentally friendly projects, the safety of the people and environment affected by the building project, social and recreational facilities in public buildings and communities, availability of employment and amenities for occupants of sustainable projects. Environmental factors comprise of energy generation and consumption, reduction of greenhouse carbon emissions, water savings, efficiency and conservation, use and efficiency of building material, use of construction area, waste management, protection and promotion of biodiversity, reduction in the level of noise and air pollution, and the reduction of number of vehicles on the road.[3]

However, the activities of the engineers and the various contractors engaged in the construction industry, such as building contractors, electricians, and plumbers, unfortunately also have the potential to result in harm to other persons.[4] While construction is in progress, construction sites are typically hazardous spaces. Workers on such sites may sustain injuries or be killed. If construction sites are not properly cordoned off, members of the public may enter such sites and sustain serious injuries there.[5] Even the possibility of unauthorised persons trespassing on construction sites[6]

[1] Ofori 2015 *Journal of Construction in Developing Countries* 115.
[2] Dosumu and Aigbavboa *Drivers and effects of sustainable construction in the South African construction industry* 2021 142.
[3] Dosumu and Aigbavboa 2021 142.
[4] See https://www.gov.za/speeches/sa-construction-sector-9-mar-2017-0000.
[5] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A).
[6] *Johannesburg Consolidated Investment Co Ltd v Langleigh Construction (Pty) Ltd* 1991 1 SA 576 (A).

and coming to harm is real, as unemployment and homelessness soar in the current economy.

The danger of harm is not necessarily over when a given construction project is complete. Buildings or bridges may collapse and result in injury or death to the users of such structures. Such incidents usually receive prominent news coverage. Two high-profile South African incidents were the collapse of a building site in Durban during March 2018, resulting in the death of four workers;[7] the collapse of a structure at Hoërskool Driehoek, killing four students on 1 February 2019;[8] and a building in George that collapsed on 6 May 2024, while it was still in the construction stage, trapping 61 construction workers of whom 33 died.[9] These tragedies received much publicity, but other less-publicised incidents may involve serious injuries and often wreak havoc on the prejudiced persons' quality of life.[10] The categories of harm that may result from the activities of contractors and engineers in the construction industry are not confined to injury[11] and death[12] of people; it also extends to property and other forms of financial loss.[13]

## 2 RESEARCH QUESTION, SCOPE OF RESEARCH AND PURPOSE OF THIS DISSERTATION

In this dissertation, a twofold research question is addressed:

> (1) When the activities of contractors and engineers in the South African construction industry cause harm to other persons, how and to what extent does South African private law enable the prejudiced persons to hold such contractors and engineers liable for that harm?
>
> (2) How satisfactory is the said legal position, and is there a need for legal reform in the stated field of private law?

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[7] See https://www.iol.co.za/news/south-africa/kwazulu-natal/expert-witness-called-to-testify-at-inquiry-into-durban-building-collapse-19402061.
[8] See https://www.news24.com/SouthAfrica/Life/update-4-children-dead-after-gauteng-high-school-building-collapse-20190201.
[9] See https://mg.co.za/news/2024-05-16-george-building-collapse-firm-working-with-the-authorities/.
[10] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A).
[11] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D).
[12] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A).
[13] *M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 4 SA 1019 (SCA); *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA).

The scope of research is limited to private law, and does not extend to other fields of law, such as, for example, criminal or administrative law. However, other fields of law are referred to if they can provide insights into the chosen research field.

The research first focuses on the law of delict, which is a part of private law that has an explicit compensatory function, and affords legal remedies to many different classes of prejudiced persons, irrespective of whether they stand in a contractual relationship with the person or persons who caused the harm.[14] Thereafter, the research focuses on the law of contract, and serves to investigate and evaluate the remedies available in contract to those prejudiced persons who do stand in a contractual relationship with the contractors or engineers who caused the harm.[15] In both the law of delict and in contract law, uncodified common law as applied and incrementally developed in case law form the largest part of the study. Nonetheless, important pieces of legislation are also studied.[16]

In this dissertation, only South African law is considered. Comparative legal research into the chosen research topic could conceivably be highly beneficial, but is arguably better suited to doctoral study, and is not pursued further here.

Accordingly, the purpose of this study is to critically analyse the delictual and contractual liability in South African law of contractors and engineers in the local construction industry, and to make recommendations for development and reform of the law where needed.

## 3 RESEARCH METHODOLOGY

This dissertation is a desktop literature study. Legislation, case law, textbooks, and articles in law journals were the main sources consulted.

As indicated above, the literature search was restricted to South African sources, but a few instances where South African cases referred to case law from other jurisdictions have been acknowledged.

[14] Neethling and Potgieter *Law of Delict* 2020 7; Loubser and Midgley eds *Law of Delict in South Africa* 2018 9.
[15] Hutchison and Pretorius eds *The Law of Contract* 2018 22.
[16] Neethling and Potgieter *Law of Delict* 2020 8 *et seq*; Hutchison and Pretorius eds *The Law of Contract* 2018 11.

# CHAPTER 2: DELICTUAL LIABILITY OF CONTRACTORS AND ENGINEERS IN THE SOUTH AFRICAN CONSTRUCTION INDUSTRY

## 1 INTRODUCTION

The activities of contractors and engineers in the construction industry can give rise to damage suffered by several different classes of people.

In this chapter, the application of the principles of the law of delict to harm caused by the activities of contractors and engineers in the construction industry will be critically investigated. The focus will initially be on common law, but important instances of statutory liability will also receive attention.

## 2 DELICTUAL LIABILITY IN THE CONSTRUCTION AND ENGINEERING FIELDS: GENERAL PRINCIPLES

### 2.1 Definitions of delict

According to Van der Merwe and Olivier,[1] delict refers to a wrongful and culpable act that causes patrimonial harm to somebody or infringes on another's personality interest. Neethling and Potgieter[2] define a delict as the act of a person that in a wrongful and culpable way causes harm to another. Van der Walt and Midgley[3] state that “in general terms a delict can be defined as civil wrong. A more narrow definition considers a delict to be wrongful and blameworthy conduct which causes harm to a person.”[4]

[1] Van der Merwe and Olivier *Onregmatige Daad in die Suid-Afrikaanse Reg* 1989 1.
[2] Neethling and Potgieter *Law of Delict* 2020 4.
[3] Van der Walt and Midgley *Principles of Delict* 2016 2.
[4] Loubser and Midgley eds *Law of Delict in South Africa* 2018 8.

From these definitions, it is clear that five requirements or elements, namely conduct, wrongfulness, fault, causation, and harm, must be present before the conduct complained of may be classified as a delict. If one (or more) of these elements is missing there is no question of a delict and accordingly, no delictual liability.[5]

## 2.2 Elements of delictual liability

### *2.2.1 Conduct*

#### 2.2.1.1 General

One of the requirements of a delict is that one person (the doer or actor) must have caused damage or harm to another (the person suffering the loss) by means of an act or conduct. Conduct is therefore a general prerequisite[6] for, or element of, delictual liability.[7] Conduct is usually performed by a human being, but may also be performed by a juristic person, such as a company, which acts through its organs, through the human beings who are its office bearers.[8]

#### 2.2.1.2 Voluntary conduct and the defence of automatism

Conduct must be voluntary. This means that the person should have the ability to control his activity by his will.[9] Authors of delict texts have pointed out that the voluntary nature of a defendant's conduct refers to the extent to which the defendant can make a decision to act or to refrain from acting.[10]

Voluntariness does not mean that a person must have willed or desired his conduct. If, for example, X forgets to warn other people that an electric current has been switched on as in *S v Russell*,[11] and someone is electrocuted, X's conduct is voluntary, because he is able to utter a warning, even though he does not will or desire the harmful outcome. However, if X is unconscious due to an epileptic fit when he must

[5] Neethling and Potgieter *Law of Delict* 2020 4.
[6] Van der Merwe and Olivier *Onregmatige Daad in die Suid-Afrikaanse Reg* 1989 24 *et seq*; Van der Walt and Midgley *Principles of Delict* 2016 64; Boberg the *Law of Delict: Vol I Aquilian Liability* 1984 41 *et seq*.
[7] Neethling and Potgieter *Law of Delict* 2020 27.
[8] Loubser and Midgley eds *Law of Delict in South Africa* 2018 96.
[9] Neethling and Potgieter *Law of Delict* 2020 28.
[10] Loubser and Midgley eds *Law of Delict in South Africa* 2018 96.
[11] *S v Russell* 1967 3 SA 739 (N).

warn the others, the omission is involuntary, because he is unable to control his behaviour and then no conduct is present for the purpose of delictual liability.[12]

2.2.1.3 Commission and omission

Conduct can consist of positive activity, known as a *commissio*, or a failure to take positive action, known as an omission or *omissio*.[13] There are some important distinctions between the concepts, which ought to be taken into account.[14] One distinction is that liability for an omission is in general more restricted than liability for a positive act (a commission).[15] For policy considerations, the law is hesitant to find that there was a legal duty on someone to act positively, and so to prevent damage to another. However, it is often difficult to draw a clear distinction between conduct of a positive nature and conduct by way of an omission and, in addition, omission (as a form of conduct) and negligence (a form of fault) must carefully be distinguished.[16]

Applied to the context of engineering and construction, an example of conduct in the form of a positive act (commission) is found in *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd.*[17] A civil engineering contractor negligently cut a cable supplying electricity to a brick factory and caused harm in the form of loss of production to the factory owner.

An example of an omission in the context of engineering and construction, albeit in a criminal case, is *S v Russell.*[18] The accused, Russell, who was a carpenter, was charged of culpable homicide arising out of the electrocution of an employee at a railway station. Russel was assisting a crane operator in charge of loading pipes onto a lorry from a crane fitted on the back thereof. There was a live electric wire overhead. While the crane operator and his assistants, including the deceased, were not present, the shunter informed the accused that the current was about to be switched on. The accused omitted to inform the crane operator thereof on his return, and the loading continued. The top of the crane touched the wire, and the deceased was electrocuted,

[12] Neethling and Potgieter *Law of Delict* 2020 28.
[13] Neethling and Potgieter *Law of Delict* 2020 32.
[14] Van der Walt and Midgley *Principles of Delict* 2016 67 fn 24.
[15] Van der Walt and Midgley *Principles of Delict* 2016 65.
[16] Van der Walt and Midgley *Principles of Delict* 2016 65-66.
[17] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D).
[18] *S v Russell* 1967 3 SA 739 (N).

and subsequently died. Russel did not perform a commission, such as switching on the electric current, but he acted by way of omission, in not warning the other workers of the imminent switching-on of the current.

A good example of a delictual case involving a contractor in the building industry where the harm-producing conduct took the form of an omission, is *Langley Fox Building Partnership (Pty) Ltd v De Valence.*[19] The defendant builder was working on a building and had given some of the work out on contract to subcontractors. One of the subcontractors had fastened a wooden beam over a public sidewalk, and the plaintiffs hit her head against the beam, and therein sustained serious injuries. The conduct questioned in this case was not the positive activity (commission) of erecting the beam, but the omission on the part of the defendant builder and the subcontractor to take sufficient steps to prevent members of the public from suffering harm on entering the hazardous building site.

### *2.2.2 Wrongfulness*

The South African law of delict recognises wrongfulness or unlawfulness, in addition to conduct, causation, fault and damage, as an essential requirement for a delict, and therefore, for a delictual liability.[20]

#### 2.2.2.1 *Boni mores* as the basic test for wrongfulness

In a broad sense, wrongfulness may be described as the infringement of an interest worthy of legal protection.[21] This means that an act may be described as wrongful only when firstly, it has as its consequence a harmful result, and secondly, when it took place in violation of a legal norm.[22] The basic norm to be employed in determining wrongfulness is the *boni mores,* or the legal convictions of the community. It is considered an objective yardstick, based on reasonableness.[23] The most well-known case in which the then Appellate Division clearly stated the key role of the legal convictions of the community in the determination of wrongfulness, is *Minister van*

[19] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A).
[20] Neethling in Koziol ed *Unification of Tort Law: Wrongfulness* 1998 101.
[21] Loubser and Midgley eds *Law of Delict in South Africa* 2018 8 178.
[22] Neethling in Koziol ed *Unification of Tort Law: Wrongfulness* 1998 101.
[23] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 380; *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 4 SA 378 (D) 380; *S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 4 SA 1019 (SCA) 1024.

*Polisie v Ewels*.[24] The judgment dealt with liability for omission, and Rumpff CJ declared that other criteria to determine wrongfulness were secondary to the legal convictions of the community.[25]

In *Lee v Minister for Correctional Services*, the Constitutional Court confirmed the legal convictions of the community as the fundamental wrongfulness criterion and added that: "[t]his open-ended general criterion has since evolved into the general criterion for establishing wrongfulness in all cases, not only omission cases".[26]

In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd,* which specifically dealt with the liability of a civil engineering contractor, the Court stated that "…in any given situation the question is asked whether the defendant's conduct was *reasonable* according to the legal convictions or feelings of the community".[27] Determining wrongfulness entails an *ex post facto* weighing of the interests which the defendant in fact promoted with his act, and those which he actually infringed.[28] The question is as to whether, according to the legal convictions of the community and in view of all the circumstances of the case, the defendant infringed the interest of the plaintiff in a reasonable or unreasonable manner.[29]

Various factors may play a role in the process of determining the reasonableness of the defendant's conduct. They include the nature and extent of the harm and of the foreseeable or foreseen loss; the possible value to the defendant or to society of the harmful conduct; practical steps which could have been taken by the defendant to prevent the loss; the nature of the relationship between the parties; the fact that the defendant knew that his conduct would cause damage to the plaintiff; the motive of the defendant; the legal position in other countries; ethical and moral issues; the values underlying the Bill of Rights in the Constitution of 1996, as well as other considerations of public interest or public policy.[30]

[24] *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597.
[25] *Minister van Polisie v Ewels* 1975 3 SA 590 (A).
[26] *Lee v Minister for Correctional Services* 2013 2 SA 144 (CC) 167.
[27] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D) 380.
[28] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 384.
[29] Neethling in Koziol ed *Unification of Tort Law: Wrongfulness* 1998 101.
[30] Neethling in Koziol ed *Unification of Tort Law: Wrongfulness* 1998 101.

It is crucially important that any wrongfulness enquiry, and in particular any reference to the legal convictions of the community, must conform to the Constitution[31] and must reflect the values of the Constitution, and in particular those enshrined in the Bill of Rights[32] in the Constitution.[33]

2.2.2.2 Wrongfulness as infringement of a right or breach of a duty

When determining wrongfulness, the courts inquire either into the infringement of a subjective right, or into the non-compliance with, or a breach of a legal duty.[34] These two approaches may be regarded as practical applications of the broad *boni mores* criterion.[35]

In instances where harm is caused by a *commissio* to person or property, the causing of harm is *prima facie* wrongful.[36] In many such instances, wrongfulness may be said to consist in the infringement of a right.[37] The generally recognised categories of subjective rights are real rights, personal rights, intellectual property rights, and personality rights.[38] Real rights and personality rights are of particular importance to determining whether harm-causing conduct of an engineer or contractor in a construction setting can be deemed wrongful. If the conduct of the engineer or contractor caused damage to a building or other immovable property, the inquiry will usually be as to whether a right in property, that is, a real right, was infringed.[39] If such conduct caused injury to a person or persons, the inquiry will usually be as to whether a personality right, most often to the bodily integrity, was infringed.[40] In practice, wrongfulness is usually uncontentious in such cases, and is often not specifically

[31] Constitution of the Republic of South Africa, 1996.
[32] Constitution, 1996 ch 2.
[33] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 953 *et seq*; *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC) 410; Neethling and Potgieter *Law of Delict* 2020 17-24 42-43; Loubser and Midgley eds *Law of Delict in South Africa* 2018 35-59; Van der Walt and Midgley *Principles of Delict* 2016 18-39.
[34] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D) 379; Loubser and Midgley eds *Law of Delict in South Africa* 2018 183.
[35] Neethling and Potgieter *Law of Delict* 2020 51.
[36] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) 143; Neethling and Potgieter *Law of Delict* 2020 49-50.
[37] Neethling and Potgieter *Law of Delict* 2020 55 *et seq*.
[38] Neethling and Potgieter *Law of Delict* 2020 56-57; the authors refer to intellectual property rights as immaterial property and they also recognise a fifth category of rights, viz personal immaterial property rights.
[39] Cf the description of real rights in Neethling and Potgieter *Law of Delict* 2020 56-57.
[40] Cf the description of personality rights and especially the right to *corpus* in Neethling and Potgieter *Law of Delict* 2020 57 392.

discussed in the judgments of the courts. In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd*, for example, the Supreme Court of Appeal declared:[41]

> "In the course of the past 20 years or more this court has repeatedly emphasised that wrongfulness is a requirement of the modern Aquilian action which is distinct from the requirement of fault and that the inquiry into the existence of the one is discrete from the inquiry into the existence of the other. Nonetheless, in many if not most delicts, the issue of wrongfulness is uncontentious as the action is founded upon conduct, which, if held to be culpable, would be *prima facie* wrongful... It is essentially in relation to liability for omissions and pure economic loss that the element of wrongfulness gains importance."

In instances where harm is caused by an omission, or where the harm takes the form of pure economic loss, the harm-producing conduct is not *prima facie* wrongful. In such instances, wrongfulness will be determined by enquiring whether a legal duty was breached.[42]

In respect of omission, this principle is clearly stated in *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)*:[43]

> "An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment, based *inter alia* upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the

[41] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 19.
[42] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 497 B–C; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA).
[43] *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 1 SA 389 (SCA) para 9.

> circumstances of the case and on the interplay of the many factors which have to be considered."

The following factors may, among others, indicate a legal duty not to cause or prevent harm: control over a dangerous object or situation; awareness of danger; prior conduct creating danger; and a relationship imposing responsibility and professional knowledge.[44] These factors are indicators of the existence of a legal duty, and do not form a closed list. All the factors mentioned may frequently be relevant to the liability of contractors and engineers in the construction industry. In the nature of their occupations, contractors and engineers are frequently in control of dangerous objects or situations; have knowledge or awareness of danger in given situations; have created dangerous conditions by their prior positive conduct; and are in relationships that impose responsibility for the safety of others on them.

In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd*, where one of the defendants, viz. the port authority in Table Bay harbour, acting through one of its office bearers, namely the port engineer, omitted to enforce best practice fire prevention measures, the Court made the following statement about the wrongfulness inquiry in a case of omission:[45]

> "[T]he question that has to be answered is whether in all the circumstances the omission can be said to have been wrongful; or, as it is sometimes stated, whether there existed a legal duty to act. (The expression "duty of care" derived from English law can be ambiguous and is less appropriate in this context…) To find the answer the court is obliged to make what in effect is a value judgment based *inter alia* on its perceptions of the legal convictions of the community and on considerations of policy."

In respect of pure economic loss, the legal duty approach to wrongfulness is clearly stated in *Fourway Haulage v SA National Roads Agency*:[46]

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[44] Loubser and Midgley eds *Law of Delict in South Africa* 2018 194.
[45] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 19.
[46] *Fourway Haulage v SA National Roads Agency* 2009 2 SA 150 (SCA) para 12.

> "[N]egligent causation of pure economic loss is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. In the result, conduct causing pure economic loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such conduct, if negligent, should attract legal liability for the resulting damages."

Policy considerations that are taken into account to determine whether the defendant had a legal duty to prevent pure economic loss include: the potential or absence of indeterminate liability (the so-called floodgates argument); whether or not the defendant was protected by other fields of law, such as the law of contract; and whether recognition of a legal duty would impose a too heavy additional burden on the plaintiff, or would constitute an unwarranted limitation of the defendant's activities.[47]

In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd,*[48] a civil engineering contractor negligently cut a cable supplying electricity to a brick factory. Although the cutting of the cable constituted damage to property, the cable was not the property of the plaintiff, who was the owner of the factory. The plaintiff suffered pure economic loss in the form of loss of production. The Court took into account that the defendant knew where the cable was, and that the cutting thereof would cause harm to the defendant, as a factor indicating that a legal duty rested on the defendant to prevent the harm.[49] The court also considered the policy consideration that allowing a claim for pure economic loss could open the floodgates of indeterminate liability, but decided that it was not applicable in that case, because the prejudiced parties were both known, and finite in number.[50]

#### 2.2.2.3 Wrongfulness as the reasonableness of holding a defendant liable

In more recent cases, the courts have often made use of the criterion that wrongfulness consists in the reasonableness of holding a defendant liable.[51] This

[47] *Fourway Haulage v SA National Roads Agency* 2009 2 SA 150 (SCA) paras 23-26.
[48] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D).
[49] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D) 386.
[50] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D) 386-387.
[51] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468; *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *Country Cloud Trading CC v MEC,*

approach places special emphasis on the role of policy factors in the element of wrongfulness.[52] Such factors that may indicate that it would not be reasonable to hold a defendant liable, even though he may have acted with fault, include: the potential of limitless liability, the fact that the plaintiff is protected by fields of law other than delict, the fact that the plaintiff could have protected himself by a contract, and so forth.[53]

Certain authors are highly critical of this approach to wrongfulness and argue that it ought not form part of our law.[54] In some cases, the courts explicitly adopt this approach, but in effect, seem to apply a mix of this approach and the approach that wrongfulness consists in the breach of a legal duty.[55] In other cases, the courts have followed an approach that reconciles the newer test with the older rights and duties approaches. In *Loureiro v Imvula Quality Protection (Pty) Ltd*,[56] for instance, the Constitutional Court declared:

> "The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm - indeed to respect rights - and questions the reasonableness of imposing liability."

It is notable that the Court here refers in a reconciliatory spirit to the newer criterion and the older criteria, namely the legal convictions of the community, rights, and duties. Knobel is of the opinion that this reconciliatory approach is ideal.[57]

Understood in this way, the approach that wrongfulness consists in the reasonableness of holding a defendant liable, has a role to play in the delictual liability of contractors and engineers in the construction industry. Certain older, but still trend-setting, cases may then even be viewed as having applied this criterion, or conform to it. An example is *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty)*

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*Department of Infrastructure Development* 2014 2 SA 214 (SCA) 223; Neethling and Potgieter *Law of Delict* 2020 93 *et seq*.

[52] *Le Roux v Dey* 2011 3 SA 274 (CC) para 122; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 1 SA 1 (CC) para 21.

[53] *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* [2007] 2 All SA 489 (SCA) para 14. As stated above, the same policy factors play a role in the legal duty approach to wrongfulness.

[54] See for example Neethling and Potgieter *Law of Delict* 2020 94-102.

[55] See for example *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* [2007] 2 All SA 489 (SCA) 494; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) paras 11-13; see Neethling and Potgieter *Law of Delict* 2020 97-98.

[56] *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC) 410.

[57] Knobel in *Ars docendi et scribendi* 53-56.

*Ltd*,[58] in which the policy consideration that the plaintiff was adequately protected by the law of contract was taken into account in order to disallow delictual liability of a firm of civil engineers who did not perform their contractual obligations properly.

#### 2.2.2.4 Grounds of justification

Defences that exclude wrongfulness are collectively known as grounds of justification. If a defendant successfully raises a ground of justification, his harm-producing conduct will be lawful, rather than wrongful.[59] Examples include consent, private defence, and necessity.[60] Grounds of justification do not seem to feature frequently in case law on the delictual liability of contractors and engineers in the construction industry and is therefore not discussed further in this dissertation. Consent, particularly in the form of consent to the risk of injury, may be of importance,[61] but contributory fault, particularly in the form of contributory negligence, is more likely to be raised successfully as a defence in cases involving contractors and engineers in the construction industry.[62]

### *2.2.3 Fault*

#### 2.2.3.1 General

Fault, as an element of delictual liability, is concerned with the question of whether a person who caused harm to another can be said to be blameworthy. The Latin term for fault is *culpa* (in the broad sense), where a person's blameworthiness is accordingly referred to as culpability. Fault generally takes two forms, namely: intention (*dolus*), and negligence (*culpa* in the narrow sense).[63]

Accountability constitutes a prerequisite for fault in both its forms.[64] A person is accountable if he has the mental ability to distinguish between right and wrong and can act in accordance with that insight.[65] A person may be rendered *culpae incapax*,

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[58] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A); see discussion in para 3.4 below.
[59] Neethling and Potgieter *Law of Delict* 2020 106.
[60] See Neethling and Potgieter *Law of Delict* 2020 108-147 for a comprehensive discussion.
[61] Neethling and Potgieter *Law of Delict* 2020 128 *et seq*.
[62] It is important to note that contributory negligence is not a ground of justification, but rather a defence aimed at the element of fault; and this is typically not a complete defence, but just a partial one. Contributory negligence is discussed in para 2.2.3.3.3 below.
[63] Neethling and Potgieter *Law of Delict* 2020 155.
[64] Neethling and Potgieter *Law of Delict* 2020 157.
[65] Neethling and Potgieter *Law of Delict* 2020 157.

that is, not accountable, by such factors as youth, mental disease, intoxication, and provocation.[66] Accountability is not usually in issue in reported case law on delictual liability of contractors and engineers in the construction industry.

#### 2.2.3.2 Intention: d*olus*

An accountable person acts intentionally if his will is directed at a result that he causes while conscious of the wrongfulness of his conduct.[67] Intention (*animus iniuriandi, dolus*) therefore has two elements, viz. direction of the will, and consciousness (knowledge) of wrongfulness.[68]

In practice, intention does not seem to play a major role in the delictual liability of contractors and engineers in the construction industry.[69] For this reason, the discussion of fault in this dissertation concentrates on another form of fault, viz. negligence.

#### 2.2.3.3 Negligence: *culpa*

##### 2.2.3.3.1 General

Neethling and Potgieter state that, in the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness, or imprudence because, by giving insufficient attention to his action, he failed to adhere to the standard of care legally required of him.[70] They point out that the criterion adopted by our law to establish whether a person has acted carelessly, and thus negligently, is the objective standard to the reasonable person.[71]

Loubser and Midgley point out that an enquiry into negligence involves evaluating a defendant's conduct according to the standard of a fictitious “reasonable person” that represents society's expectation of adequate and reasonable conduct.[72] It represents an objective standard that all persons must adhere to by paying sufficient attention to

[66] Neethling and Potgieter *Law of Delict* 2020 157-159
[67] Neethling and Potgieter *Law of Delict* 2020 159-160; *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A) 396.
[68] Neethling and Potgieter *Law of Delict* 2020 159-160.
[69] Intention plays a part in fraudulent misrepresentation; discussed in Ch 3 para 4 below.
[70] Neethling and Potgieter *Law of Delict* 2020 164.
[71] Neethling and Potgieter *Law of Delict* 2020 164-167.
[72] Loubser and Midgley eds *Law of Delict in South Africa* 2018 154.

ensure that their conduct is in line with the standard of care that society expects. In such case that defendant's conduct does not conform to the standard of a reasonable person, the conduct is blameworthy in law and the defendant will be considered to be at fault.[73]

2.2.3.3.2 The test for negligence

The negligence test was authoritatively formulated in *Kruger v Coetzee*:[74]

> "For the purposes of liability *culpa* arises if –
>
> (*a*) a *diligens paterfamilias* in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (*b*) the defendant failed to take such steps."

The test entails that a defendant is negligent if a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct causing harm to another person and would take reasonable steps to prevent or lessen it, and the defendant failed to take such steps.

In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd,*[75] the Supreme Court of Appeal reiterated that the true test for negligence is that which a reasonable person would have done in the same circumstances as those in which the defendant found himself. This test was reformulated somewhat differently in *Mukheiber v Raath*[76] to accommodate the so-called concrete approach to negligence,[77] but the Court in the *Sea Harvest* case maintained that these tests are

[73] Loubser and Midgley eds *Law of Delict in South Africa* 2018 154.
[74] *Kruger v Coetzee* 1966 2 SA 428 (A) 430.
[75] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 21.
[76] 1999 3 SA 1065 (SCA) 1077; cited in *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 21.
[77] See para 2.2.3.3.2.2 below.

no more than guidelines or approaches for assessing how a reasonable person would have acted in the circumstances as the true standard of reasonable behaviour.[78]

2.2.3.3.2.1 The test for negligence: The reasonable person

Neethling and Potgieter point out that the so-called 'reasonable person' is a fictitious person, who exists as "a concept created by the law to have a workable objective norm for conduct in society".[79] Accordingly, the reasonable person is neither exceptionally gifted, careful or developed; nor are they underdeveloped, nor do they takes reckless chances.[80] Loubser and Midgley state that this concept represents, in essence, a standard of an ordinary individual who takes reasonable chances and reasonable precautions to protect his interests, while expecting the same conduct from others.[81]

In *S v Burger*[82] the Court described the reasonable person as follows:

> "One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense."

If a person is engaged in a profession or activity that demands special knowledge and skill, that person must not only exercise the care expected from the reasonable person, but must comply with the standard of care of a reasonable expert in that field.[83] Thus, in the case of an expert such as an engineer, the test for negligence in respect of the exercise of the expert activity is the test of the so-called reasonable engineer. The negligence of an expert is sometimes referred to as 'professional negligence'.[84] According to Loubser and Midgley, the test for negligence in cases where professional knowledge or expertise is involved has two components: "the possession of the necessary knowledge or skill, and the exercise of necessary care and diligence".[85]

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[78] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 21.
[79] Neethling and Potgieter *Law of Delict* 2020 169.
[80] Neethling and Potgieter *Law of Delict* 2020 169.
[81] Loubser and Midgley eds *Law of Delict in South Africa* 2018 154.
[82] *S v Burger* 1975 4 SA 877 (A) 879.
[83] Loubser and Midgley eds *Law of Delict in South Africa* 2018 325-327.
[84] Neethling and Potgieter *Law of Delict* 2020 175.
[85] Loubser and Midgley eds *Law of Delict in South Africa* 2018 326.

*Van Wyk v Lewis*[86] refers to "the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which the practitioner belongs". The test in *Van Wyk v Lewis*[87] was also reiterated by Loots,[88] who confirms that this test will also be applicable to the construction industry. Case law provides recognition of a reasonable engineer[89] and reasonable builder or building contractor[90] as versions of the reasonable person test. In *Van Wyk v Lewis*,[91] the test is further qualified, stating that "as far as the medical profession was concerned, the same expertise cannot be expected of a general practitioner as from a specialist." This qualification ought to pertain to experts in the construction and engineering fields too.

The *maxim imperitia culpae adnumeratur* may also be applicable here.[92] In literal terms, this means that ignorance or lack of skill is deemed to be a form of negligence. Neethling and Potgieter point out that this is misleading because our law does not regard mere ignorance as negligence.[93] The maxim applies where a person undertakes an activity for which expert knowledge is required, while he knows or should reasonably know that he lacks such knowledge and should not do that activity. In *Savage and Lovemore Mining v International Shipping Co (Pty) Ltd,*[94] the court held that someone who performs activities that are regulated by legislative provisions, must ensure that he acquires knowledge of such provisions. He is not required to study these provisions in detail, or to consult a lawyer, but must act like a *bonus paterfamilias*, where a reasonable error on his part will be excusable.

2.2.3.3.2.2 The test for negligence: Foreseeability and preventability of harm

The test for negligence stands on two legs, namely the reasonable foreseeability, and reasonable preventability of damage.[95]

[86] *Van Wyk v Lewis* 1924 AD 444.
[87] *Van Wyk v Lewis* 1924 AD 438 444.
[88] Loots *Engineering and Construction Law* 1985 77.
[89] *Randaree v Dixon* 1983 2 SA 1 (A); *Lillicrap, Wassenaar and Partners v Pilkington Bros SA (Pty) Ltd* 1985 1 SA 475 (A); *Tsimatakopoulos v Hemmingway, Isaacs & Coetzee CC* 1993 4 SA 428 (C).
[90] *SM Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 4 SA 1019 (SCA); *Pienaar v Brown* 2010 6 SA 365 (SCA).
[91] *Van Wyk v Lewis* 1924 AD 444.
[92] Neethling and Potgieter *Law of Delict* 2020 176.
[93] Neethling and Potgieter *Law of Delict* 2020 176.
[94] *Savage and Lovemore Mining v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W) 210.
[95] Loubser and Midgley eds *Law of Delict in South Africa* 2018 157.

In respect of the foreseeability of harm, there are two approaches, namely: the abstract or absolute approach; and the concrete or relative approach.[96]

According to the abstract approach, the question of whether someone acted negligently must be answered by determining whether harm to a person was in general reasonably foreseeable; in other words, the question must be asked as to whether his general conduct created an unreasonable risk of harm to others.[97] The extent of the damage[98] or the particular consequence that actually occurred need not have been reasonably foreseeable.[99] Whether a defendant is liable for a specific consequence is then answered with reference to legal causation.[100]

The concrete approach does not require that the reasonable person ought to have foreseen the exact or precise manner in which the harm was caused,[101] but the specific harmful consequence, and not merely damage in general, must have been reasonably foreseeable.[102]

In practice, the two approaches will probably invariably reach the same result in respect of the liability of the defendant. The question may accordingly be seen as mainly an academic one, about the demarcation of the elements of delictual liability.[103]

Once it is established that harm was indeed reasonably foreseeable, the second leg of the test for negligence, namely, whether or not the reasonable person would have taken precautionary steps to prevent the damage from occurring, must be considered. Van der Walt and Midgley[104] identify four factors that are particularly relevant to preventability, and that are considered in case law.

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[96] Neethling and Potgieter *Law of Delict* 2020 176-179.
[97] *Botes v Van Deventer* 1966 3 SA 182 (A) 199; see also *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) 840 845; Neethling and Potgieter *Law of Delict* 2020 176-177.
[98] *Botes v Van Deventer* 1966 3 SA 182 (A) 191.
[99] *Herschel v Mrupe* 1954 3 SA 464 (A).
[100] Van Rensburg *Juridiese Kousaliteit* 1970 250 *et seq*; Van Rensburg *Normatiewe Voorsienbaarheid* 1972 23 *et seq*; Potgieter and Van Rensburg 1977 *THRHR* 383-384; Visser 1977 *De Jure* 393.
[101] Loubser and Midgley eds *Law of Delict in South Africa* 2018 159.
[102] *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077; *Ablort-Morgan v Whyte Bank Farms (Pty) Ltd* 1988 3 SA 531 (E) 536; Neethling and Potgieter *Law of Delict* 2020 177.
[103] Knobel 2006 *SALJ* 588-589.
[104] Van der Walt and Midgley *Principles of Delict* 2016 254; Neethling and Potgieter *Law of Delict* 2020 181-183.

(i) The nature and extent of the risk inherent in the wrongdoer's conduct.

If the nature and extent of the risk are not serious, or if the harm foreseen is slight, the reasonable person may, even though the harm was reasonably foreseeable, not have taken steps to prevent it, and accordingly, the defendant is not negligent if he did not take such steps.[105]

(ii) The seriousness of the damage

If the defendant's conduct creates the possibility that grave and extensive damage may occur, he should take reasonable steps to prevent such damage, even if there is only a slight possibility or chance that the damage will actually materialise.[106]

(iii) The relative importance and objective of the wrongdoer's conduct.

If the interest or purpose served by the conduct is more important than the risk of harm that it creates; the reasonable person would not have taken steps to prevent the harm. The gravity of the risk must be weighed against the utility of the conduct.

(iv) The cost and difficulty of taking precautionary measures.

If the cost and difficulty of taking precautionary measures are greater than the gravity of the risk involved, the reasonable person would clearly not have taken such steps to minimise or reduce the risk.

Van der Walt and Midgley[107] provide the following summary of the above factors:

> "In general, the magnitude of the risk must be balanced against the utility of the conduct and the difficulty, expense or other disadvantage of desisting from the conduct or taking a particular precaution. If the magnitude of the risk outweighs the utility of the conduct, the reasonable person would take measures to prevent the occurrence of harm; if the actor failed to take such measures he or she acted negligently. On the other hand, if the burden of eliminating a risk of harm

[105] *Herschel v Mrupe* 1954 3 SA 464 (A) 477.
[106] *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* 1973 4 SA 523 (RA).
[107] Van der Walt and Midgley *Principles of Delict* 2016 254.

> outweighs the magnitude of the risk, the reasonable person would not take any steps to prevent the occurrence of the foreseeable harm."

*Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson*[108] provides a good example of the application of the negligence test in an engineering and construction context. A landowner contracted a firm of sheet metalling engineers to build a roof on a silo. While the engineers' employee was welding, some sparks ignited bales of stover that were stacked against the silo. The landowner instituted a claim against the engineers based on the alleged negligence of their employee. The Court considered: (a) how real the risk was of the harm eventuating; (b) the likely extent of the damage; and (c) the costs or difficulties involved in guarding against the risk.[109] The risk of the stover igniting was found to not be great but was nonetheless a real possibility. The potential damage was found to be extensive. The cost and difficulty involved in prevention was deemed to be very slight, as it was only necessary to move the bales a small distance back from the silo, and to sweep the space between the bales and the silo in order to remove remnant flammable material.[110] The court held that a reasonable person would have taken steps to prevent the damage and that the engineers' employee was negligent.[111]

The judgment of the Supreme Court of Appeal in S*ea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd*[112] proves instructive. The plaintiff had goods stored in a cold store in Table Bay harbour, and suffered harm when the entire store was destroyed by a fire. The origin of the fire was a distress flare that was fired by an unknown person during New Year celebrations, which landed on the store roof where it set the guttering alight. The plaintiff instituted a delictual action for damages, inter alia against the port authority for the alleged negligence of the port engineer in not requiring an anti-fire sprinkler system to be installed in the roof when the store was built.

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[108] *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* 1973 4 SA 523 (RA).
[109] *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* 1973 4 SA 523 (RA) 525.
[110] *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* 1973 4 SA 523 (RA) 525.
[111] *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson* 1973 4 SA 523 (RA) 525-526.
[112] S*ea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA). Loubser and Midgley eds *Law of Delict in South Africa* 2018 160-161.

Scott JA, who delivered the majority judgment, cited the negligence test as formulated in *Kruger v Coetzee*[113] and *Mukheiber v Raath*,[114] but emphasised that different formulations of the negligence test were only guidelines, and that the ultimate question remained as to whether the conduct of the defendant fell short of the standard of a reasonable person.[115] Applying the negligence test to the facts of the case, Scott JA stated:[116]

> "Having regard to the particular circumstances of the case, it seems to me therefore that the question of culpability must be determined not simply by asking the question whether fire, i.e. any fire, was foreseeable, but whether a reasonable person in the position of Worthington-Smith [one of of the consulting engineers who designed the store and acted as project leader in its construction] or Visser [the port engineer who did not require installation of a sprinkling system] would have foreseen the danger of fire emanating from an external source on the roof of the building with sufficient intensity to ignite the gutter."

The Court held that destruction of the store by fire was foreseeable, but the manner in which it took place, by fire originating from an outside source with sufficient intensity to ignite the guttering of a building largely constructed of non-combustible material, was not. A reasonable person would not have foreseen the manner in which the harm had occurred, and this eliminated any need to discuss the matter of preventability. Neither Worthington-Smith nor Visser was negligent, and this also eliminated the possibility of vicarious liability on the part of the port authority and the owners of the cold store.[117]

In *Kritzinger v Steyn*,[118] the plaintiff trespassed late at night on a building site. In doing so, he entered a house that was still in the process of being built, fell into an open staircase shaft, and sustained serious injury. He instituted a delictual claim against,

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[113] *Kruger v Coetzee* 1966 2 SA 428 (A) 430.
[114] *Mukheiber v Raath* 1999 3 SA 1065 (SCA) 1077.
[115] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 21.
[116] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 24.
[117] *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) para 28.
[118] *Kritzinger v Steyn* 1997 3 SA 686 (C).

among others, the builder. The Court did not regard the fact that the plaintiff had trespassed, on its own, as a bar against liability.[119] However, the Court held that a reasonable person would not have foreseen that a person would visit the building site at 23h00 at night, and the builder was accordingly not negligent.[120]

In *Johannesburg Consolidated Investment v Langleigh Construction*,[121] a township developer had contracted a civil engineering firm to build roads and make excavations for storm water drains. A third person was injured when he rode a scrambler onto the site and fell into an excavation. The third person instituted a delictual action against the developer, alleging negligence on the part of the developer or its servants. The developer settled the action by paying the third person a substantial sum of money. Thereupon, the developer sued the engineering contractor to recover the amounts paid out to the third person, relying on provisions of the contract between them. However, the developer's claim could only succeed if it was obliged in law to pay the third person the amount it wished to recover from the engineering contractor.[122] It was thus necessary to determine whether the developer was delictually liable to the third person, and this required a determination of whether the developer exercised the care expected of a reasonable person in the circumstances.[123] The property was unfenced, but there was no footpath or other thoroughfare across the land, and the terrain was uneven and covered in vegetation. The Supreme Court of Appeal held that, under the circumstances, there was no evidence before the trial court that the excavations presented any danger to persons who might reasonably have been expected by the developer to come onto the land. Accordingly, the Supreme Court of Appeal agreed with the court *a quo* that there was no negligence on the part of the developer.[124]

[119] *Kritzinger v Steyn* 1997 3 SA 686 (C) 700.
[120] *Kritzinger v Steyn* 1997 3 SA 686 (C) 702.
[121] *Johannesburg Consolidated Investment Co Ltd v Langleigh Construction (Pty) Ltd* 1991 1 SA 576 (A).
[122] *Johannesburg Consolidated Investment Co Ltd v Langleigh Construction (Pty) Ltd* 1991 1 SA 576 (A) 579.
[123] *Johannesburg Consolidated Investment Co Ltd v Langleigh Construction (Pty) Ltd* 1991 1 SA 576 (A) 579.
[124] *Johannesburg Consolidated Investment Co Ltd v Langleigh Construction (Pty) Ltd* 1991 1 SA 576 (A) 579-582.

#### 2.2.3.3.3 Contributory negligence

Contributory negligence constitutes negligence on the part of the plaintiff and is a defence that can be raised by the defendant. The Apportionment of Damages Act[125] regulates the position and provides:

> "Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but 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."[126]

This means that if the defendant was negligent and the plaintiff was contributory negligent, the Court will determine the degree to which both parties deviated from the standard of the reasonable person and express their respective degrees of deviation as percentages. The percentages will then be used as a basis for the apportionment of the damages awarded to the plaintiff.[127] Factors other than the plaintiff's degree of fault may also be considered.[128] Contributory fault is, accordingly, not a complete defence that will completely relieve the defendant from liability; it is a partial defence that will result in the plaintiff receiving a reduced amount of damages. A defence of contributory negligence will only succeed if the defendant can show that the negligence of the plaintiff contributed to the damage suffered by the plaintiff.[129]

A good example of a successful reliance on contributory negligence in a construction context is *Wilson v Birt (Pty) Ltd.*[130] Employees of the defendant were removing scaffolding around a building, and in the process, they were dropping long and heavy poles from a height. One of these poles struck the plaintiff, who was a worker on the site, on the back of his head or neck, causing serious injury. The court held that the

[125] The Apportionment of Damages Act 34 of 1956.
[126] The Apportionment of Damages Act 34 of 1956 s 1(1)(A).
[127] Neethling and Potgieter *Law of Delict* 2020 201-204.
[128] *General Accident Versekeringsmaatskappy SA Bpk v Uijs* 1993 4 SA 228 (A); Neethling and Potgieter *Law of Delict* 2020 203.
[129] *Union National South British Insurance Co Ltd v Vitoria* 1982 1 SA 444 (A); Neethling and Potgieter *Law of Delict* 2020 205.
[130] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D).

defendant was negligent,[131] but that the plaintiff was contributorily negligent by entering the dropping zone via a latrine door with crossed planks on it, indicating that it was dangerous to venture into that area. An apportionment of the plaintiff's damages was made, and the damages were assessed at 50 per cent.[132]

In *Langley Fox Building Partnership (Pty) Ltd v De Valence*,[133] a defence of contributory negligence failed. A subcontractor of a builder had erected a wooden beam over a public sidewalk and the plaintiff hit her head against it while walking along the sidewalk. She sustained serious injuries and was unable to continue working. The builder and the subcontractor did not take steps to ensure that the site was safe, and the Court found that the building contractor was negligent. The Court also rejected the contention that the plaintiff had been contributorily negligent:[134]

> "[P]edestrians walking on a city sidewalk are entitled to assume that, in the absence of adequate precautions or warning, the way is clear and safe. Furthermore, according to her uncontroverted evidence, the surface of the sidewalk in the vicinity of the obstruction was broken and uneven and for that reason she was watching the surface of the sidewalk immediately in front of her. In all the circumstances, I am satisfied that the respondent's failure to look up and notice the wooden beam cannot be ascribed to negligence on her part."

The building contractor was held liable for the plaintiff's damage.

### *2.2.4 Causation*

#### 2.2.4.1 General

To find a defendant delictually liable, there must be a causal connection between the harm that the plaintiff suffered and the defendant's conduct. In other words, the defendant's conduct must have caused the plaintiff's harm or loss. Without a causal connection between the harm and the defendant's conduct, there can be no delict.[135] Causation constitutes a two-stage inquiry to determine whether the two components

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[131] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D) 511-513.
[132] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D) 513-514.
[133] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A).
[134] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A) 15.
[135] *Fourway Haulage SA (Pty) Ltd v SA National Road Agency Ltd* 2009 2 SA 150 (SCA) para 12; Loubser and Midgley eds *Law of Delict in South Africa* 2018 101.

of the element of causation, namely factual causation and legal causation, are present.[136] The first inquiry is a factual one, and asks whether the defendant's conduct (act or omission) caused the harm.[137] If the answer is yes, the inquiry into legal causation will take place to determine whether the act or omission is linked to the harm sufficiently closely for legal liability to ensue. If the harm is "too remote", there will be no legal causal link between the conduct and the harm and accordingly no liability. This can be understood to be a juridical problem, where policy considerations play a part.[138]

2.2.4.2 Factual causation and the *conditio sine qua non* test

In *International Shipping Co. (Pty) Ltd v Bentley,*[139] the Supreme Court of Appeal stated the test for factual causation as follows:

> "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."

Applying the 'but for' test, also known as the *conditio sine qua non* test, differs according to whether the conduct constitutes either a positive act, or an omission.[140] For positive conduct, one mentally eliminates the defendant's act from the facts and if the harm would then not have occurred, there was a factual causal link between the

[136] Loubser and Midgley eds *Law of Delict in South Africa* 2018 102.
[137] Neethling and Potgieter *Law of Delict* 2020 215.
[138] Neethling and Potgieter *Law of Delict* 2020 216.
[139] *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700.
[140] Loubser and Midgley eds *Law of Delict in South Africa* 2018 104.

defendant's conduct and the harm.[141] In the case of omissions, one “thinks in” a hypothetical positive act as a substitute for the omission, and if the hypothetical act is likely to have prevented the harm, there can be said to have been a factual causal link between the defendant’s omission and the harm.[142]

Neethling and Potgieter criticise the *conditio sine qua non* test, pointing out that the courts usually determine a factual causal link on the basis of the evidence and probabilities, without really employing the method of the *conditio sine qua non* - although they mention the test in order to affirm the conclusion that a factual causal link is present. They argue that knowledge and experience, as well as reliable evidence, are required to determine a causal link.[143]

The Constitutional Court in *Lee v Minister of Correctional Services* stated that deviation from the ‘but-for’ test is appropriate in some cases, namely when the use of this test would result in injustice, and that a more flexible approach to factual causation must then be used.[144] The majority of the Court proclaimed that nothing prevented a Court from simply asking whether, on the facts of the case, the wrongdoer’s omission probably caused the harm.[145]

#### 2.2.4.3 Legal causation

In addition to a factual causal link, a legal causal link between the defendant’s conduct and the harm suffered by the plaintiff is required. According to *International Shipping Co (Pty) Ltd v Bentley,*[146] this involves an inquiry into whether the wrongful act is linked sufficiently closely or directly to the loss, or whether the loss is too remote for legal liability to ensue.[147] Legal causation is used to limit the liability of the defendant to those harmful consequences of his conduct that one can fairly attribute to him. In respect of those consequences that are not linked closely enough to the defendant's

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[141] *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700; Loubser and Midgley eds *Law of Delict in South Africa* 2018 104.
[142] *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) para 25; Loubser and Midgley eds *Law of Delict in South Africa* 2018 104.
[143] Neethling and Potgieter *Law of Delict* 2020 219-223.
[144] *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) para 45 *et seq*; see also Neethling and Potgieter *Law of Delict* 2020 226-227; Loubser and Midgley eds *Law of Delict in South Africa* 2018 108-109.
[145] *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) para 55; see also Loubser and Midgley eds *Law of Delict in South Africa* 2018 109.
[146] *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700.
[147] *Loubser Introduction to the Law of South Africa* 2004 315.

conduct, the courts find that there is no legal causation, or that the consequences are too remote.[148]

Prior to the *Bentley* case, in the criminal case *S v Mokgethi*, the Supreme Court of Appeal had adopted a flexible approach to legal causation, stating that legal causation is present if the link between the conduct and harmful consequence is sufficiently close in view of policy considerations of reasonableness, justice and fairness. Other criteria, such as reasonable foreseeability, direct consequences, and *novus actus interveniens* became subsidiary criteria to this general, flexible criterion.[149]

In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*[150] the relationship between the flexible approach and the subsidiary tests was explained, but the Court was critical of the use of reasonableness, fairness and justice to determine legal causation.[151] In addition, the Court stated that the policy decision in legal causation is not the same as it is in respect of wrongfulness:[152]

> "Even where negligent conduct resulting in pure economic loss is for reasons of policy found to be wrongful, the loss may…, for other reasons of policy, be found to be too remote and therefore not recoverable."

In the *Fourway Haulage* case, the Court employed reasonable foreseeability and the absence of a *novus actus interveniens* as criteria to determine legal causation.[153]

A *novus actus interveniens* is an independent event, which, after the wrongdoer's act had been concluded, either caused or contributed to the consequence concerned.[154] Such an intervening cause breaks the causal link between the perpetrator's conduct and the ensuing harm. The intervening event could be conduct of the victim, conduct of another person, or it could be due to other factors.[155]

In some cases, a plaintiff may suffer more serious harm than the defendant may be

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[148] Loubser and Midgley eds *Law of Delict in South Africa* 2018 123-124.
[149] *S v Mokgethi* 1990 1 SA 32 (A) 40-41. On the subsidiary criteria for legal causation, see Neethling and Potgieter *Law of Delict* 2020 237-254.
[150] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA).
[151] *Fourway Haulage SA (Pty) Ltd USA National Road Agency Ltd* 2009 2 SA 150 (SCA) para 35.
[152] *Fourway Haulage SA (Pty) Ltd USA National Road Agency Ltd* 2009 2 SA 150 (SCA) para 32.
[153] *Fourway Haulage SA (Pty) Ltd USA National Road Agency Ltd* 2009 2 SA 150 (SCA) para 33.
[154] Neethling and Potgieter *Law of Delict* 2020 250-253.
[155] Neethling and Potgieter *Law of Delict* 2020 252; Loubser and Midgley eds *Law of Delict in South Africa* 2018 134-135.

able to foresee, due to some prior weakness of the victim, which could be physical, psychological, or financial. In such instances, the defendant will be liable for the full extent of the harm in terms of the *talem qualem* rule (also known as the 'thin skull' or 'egg skull' rule), according to which a defendant must take his victim as he finds him.[156]

*Wilson v Birt (Pty) Ltd*[157] provide a good example of an egg-skull case in a construction context. The plaintiff was an employee of a firm of painters subcontracted by the defendant company that was building a hostel. Employees of the defendant were removing scaffolding around the hostel building, when a pole fell and struck the plaintiff on the back of his head or neck. In an earlier incident, the plaintiff had been stabbed in the forehead with a knife, upon which an operation to remove a piece of the blade also removed a part of the plaintiff's skull. The impact of the pole against the head or neck accordingly caused a more serious brain injury than would otherwise have been the case. The Court held that the defendant had to take his victim as found, and the defendant was held liable for the full extent of the injury, subject to an apportionment of damages.

### *2.2.5 Damage*

Damage is an essential element of delictual liability, in addition to conduct, wrongfulness, fault, and causation. This element reflects the fact that the law of delict basically has a compensatory function.[158] Two broad categories of damage exist, namely patrimonial and non-patrimonial loss.[159]

Patrimonial loss may be defined as the detrimental impact on any patrimonial interest deemed worthy of protection of the law.[160] This includes such kinds of damage as damage to property, pure economic loss, and loss of income.[161] Patrimonial loss is assessed by a comparative method. To assess patrimonial loss that has already materialised, the courts prefer to compare the patrimonial position of the prejudiced person before the wrongful act, as well as thereafter.[162] Neethling and Potgieter refer

[156] Neethling and Potgieter *Law of Delict* 2020 253-254; Loubser and Midgley eds *Law of Delict in South Africa* 2018 133-134.
[157] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D) 516-517.
[158] Neethling and Potgieter *Law of Delict* 2020 255.
[159] Neethling and Potgieter *Law of Delict* 2020 257.
[160] Neethling and Potgieter *Law of Delict* 2020 263.
[161] Loubser and Midgley eds *The Law of Delict in South Africa* 2018 81.
[162] *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A) 150; Neethling and Potgieter

to this comparative method as a concrete concept of damage.[163] Prospective patrimonial loss must be assessed by determining the difference between the prejudiced person's patrimonial position after the wrongful act, with the hypothetical position in which the prejudiced person would have been had the wrongful act not taken place. This method is known as the sum-formula approach.[164]

Non-patrimonial loss is defined by Neethling and Potgieter as the detrimental impact on personality interests deemed worthy of protection of the law, and which does not affect the patrimony.[165] It includes injury to the physical body, and other injuries to personality interests, such as good name, privacy, and feelings.[166] In the construction and engineering field, injury to physical integrity constitutes the most prevalent form of non-patrimonial loss. It can take the form of pain and suffering, shock, disfigurement, loss of amenities of life, and shortened life expectancy.[167] Assessment of such loss is theoretically also done using a comparative method.[168] However, financial compensation cannot provide a true equivalent of this kind of loss and serves as an imperfect compensation that can only be arrived at by a process of equitable estimate.[169]

In terms of the so-called once-and-for-all rule, a plaintiff must claim for all damage he has sustained and that may still be expected in future (prospective loss) simultaneously insofar as such damage is based on a single cause of action.[170]

## 3 DELICTUAL LIABILITY IN THE CONSTRUCTION AND ENGINEERING FIELDS: SPECIFIC CATEGORIES

### 3.1 General

In general, and subject to some exceptions, the South African law of delict follows a generalising approach, which entails that liability is determined by general principles, and that there are no large number of independent delicts with their own distinctive

*Law of Delict* 2020 267.
[163] Neethling and Potgieter *Law of Delict* 2020 267.
[164] Neethling and Potgieter *Law of Delict* 2020 266.
[165] Neethling and Potgieter *Law of Delict* 2020 288.
[166] Neethling and Potgieter *Law of Delict* 2020 288.
[167] Neethling and Potgieter *Law of Delict* 2020 291-293.
[168] Neethling and Potgieter *Law of Delict* 2020 289.
[169] Neethling and Potgieter *Law of Delict* 2020 298 *et seq*.
[170] Neethling and Potgieter *Law of Delict* 2020 270 *et seq*.

requirements.[171] Nonetheless, it is instructive to consider special categories of delictual liability that occur frequently in a given field, which, for the purpose of this dissertation, is taken to be the liability of contractors and engineers in the construction industry. For this reason, some illustrative material from South African case law is presented in special categories in the following paragraphs. These examples are not so much intended to introduce new principles supplementing those that have been discussed in the preceding paragraphs, but rather, as examples of their implementation in different factual scenarios.

### 3.2 Damage to property

The activities of contractors and engineers in the construction industry can give rise to damage to property in a variety of ways, such as via errors in design, poor standards in construction, inadequate supervision, and more. The *actio legis Aquiliae* is the appropriate delictual remedy in such instances, and a plaintiff wishing to recover such damage to property in delict must rely on the ordinary principles of Aquilian liability. This would mean, *inter alia*, that conduct, wrongfulness, fault (typically in the form of negligence), damage in the form of patrimonial loss, and causation must be proved, or at least alleged, and not contested by the defendant.[172]

An example from case law is *Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd.*[173] The owner of a hotel and the land on which the hotel was situated, as well as the lessee and operator of the hotel, instituted a delictual action against the building contractor, who was responsible to build the hotel to the architect's design. The contractor built a fireplace in the hotel lobby as designed by the architect, which created a fire hazard, since it did not comply with the installation instructions of the firebox that was built into the fireplace, or with the national building regulations. A fire broke out and caused extensive damage. It was a common cause that any builder would have known that constructing the fireplace according to the architect's design would have created an unsafe fireplace. The building contractor could not rely on the architect's failure to notice that the fireplace was unsafe. The Court accordingly held

[171] Neethling and Potgieter *Law of Delict* 2020 4-6.
[172] Neethling and Potgieter *Law of Delict* 2020 9-12.
[173] *M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 4 SA 1019 (SCA).

that a reasonable builder would have foreseen and prevented the damage and that the building contractor was negligent.[174]

In respect of wrongfulness, the Court held that a builder in general has a legal duty to both the owner and third parties to refrain from building something that is obviously unsafe. The Court also took the foreseeability of the harm into account to determine whether a legal duty existed and found wrongfulness to have been present. In this regard, the building contractor could not rely on the fact that the fireplace was installed according to the contract, or that an architect and a safety consultant were contracted to design, advise the parties and supervise the works.[175] The building contractor was held liable for the loss.[176]

### 3.3 Personal injury and death

An unfortunate result that may flow from the activities of contractors and engineers in the construction industry is personal injury, or even death. A variety of persons working on construction sites, whether as employees or as independent contractors, may suffer injuries or be killed.[177] Third persons may meet with a similar fate, whether they are accessing building sites or completed but defective buildings lawfully, or as trespassers. In delictual litigation, it is not the practice of the South African courts to require the specific remedies to be identified,[178] however, the appropriate actions in instances of injury is usually the action for pain and suffering,[179] with the Aquilian action used to claim patrimonial loss, such as hospital expenses or loss of income, which has flowed from the bodily injuries.[180] In the case of death, the plaintiffs will usually be dependants claiming loss of support due the death of their breadwinner, and such liability is Aquilian, with the important requirement that such an action can only

[174] *M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 4 SA 1019 (SCA) paras 5 and 6; see also Loubser and Midgley eds *The Law of Delict in South Africa* 2018 334-335.
[175] *M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 4 SA 1019 (SCA) paras 7-12.
[176] Loubser and Midgley eds *Law of Delict in South Africa* 2018 334-335.
[177] Important legislation deals with safety in the workplace; see e.g. the Occupational Health and Safety Act 85 of 1993 and the Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993. COIDA excludes common-law delictual claims for injuries in certain instances; see the discussion in para 4.1 below.
[178] Loubser and Midgley eds *The Law of Delict in South Africa* 2018 18.
[179] Neethling and Potgieter *Law of Delict* 2020 16.
[180] Neethling and Potgieter *Law of Delict* 2020 9; Loubser and Midgley eds *The Law of Delict in South Africa* 76.

succeed in instances where a legally recognised duty of support was owed by the deceased persons to the plaintiffs.[181]

*Wilson v Birt (Pty) Ltd*[182] is a good example of a worker sustaining an injury during construction operations. The plaintiff was an employee of a firm of painters subcontracted by the defendant company, which was building a hostel. At the time of the incident, employees of the defendant were removing scaffolding around the hostel building. This entailed dropping long and heavy poles from a height. One of these poles struck the plaintiff on the back of his head or neck, causing serious injury. The Court held that the dropping of poles during the dismantling of the scaffolding was an intrinsically dangerous operation that required a higher standard of diligence from the employees performing the operation.[183] The dropped poles hit the ground with substantial force; while the dropping zone was easily accessible to persons on the site; the employee dropping the poles could not see all the surroundings from his position, and did not inquire from the employees on the ground as to whether any person was approaching the area. The Court accordingly held that the defendant was negligent.[184] On the other hand, the plaintiff was contributorily negligent by entering the danger zone through a door with a warning sign of crossed planks on it.[185] The defendant had had a part of his skull removed in an earlier hospitalisation incident, which made him vulnerable to more serious injury, and the Court applied the rule that the defendant had to take his victim as he finds him, viz. in the plaintiff's favour. The defendant was held liable for the full extent of the plaintiff's injury, subject to a reduction of 50 per cent on account of the plaintiff's contributory negligence.[186]

A good example of a third person gaining lawful access to a construction site and suffering serious injury and concomitant patrimonial loss there, is *Langley Fox Building Partnership (Pty) Ltd v De Valence*.[187] In this instance, the subcontractor of a builder had erected a wooden beam over a public sidewalk. The area was not cordoned off, and the plaintiff hit her head against the beam while walking along the sidewalk. She

[181] Neethling and Potgieter *Law of Delict* 2020 332 *et seq*.
[182] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D).
[183] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D) 511.
[184] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D) 511-513.
[185] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D) 513-514.
[186] *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D) 516-518.
[187] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A).

sustained serious injuries and was unable to continue working. She instituted a claim for damages against the building contractor. The court stated:[188]

> "[T]he existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend in each case upon the facts. It would be relevant to consider the nature of the danger, the context in which the danger may arise, the degree of expertise available to the employer and the independent contractor, respectively, and the means available to the employer to avert the danger."

The Court found that the damage had been both foreseeable and preventable. Erecting a beam on a public sidewalk clearly created a dangerous situation, and the building contractor could not rely solely on the independent contractor to take the necessary safety measures to protect the public from suffering harm on the site. The Court also rejected the contention that the plaintiff had been contributorily negligent. The building contractor was ultimately held liable for the plaintiff's damage, which included serious bodily injury, and concomitant loss of earning capacity.

In *Pienaar v Brown,*[189] the plaintiffs sustained injuries when a balcony on which they were standing collapsed.[190] The owner of the building had approached C as primary building contractor to erect the balcony, and C sub-contracted L to build the balcony.[191] The owner and C did not submit building plans for the balcony, and was accordingly in breach of a statutory provision.[192] The sub-contractor deviated from the specifications, inter alia by using inadequate screws instead of raw bolts, so that the balcony was structurally weaker than originally envisaged.[193] The Supreme Court of Appeal held that there was no causal link between the failure to submit building plans for approval and the collapse of the balcony. Employing the reasonable person test for negligence, the Court found that the owner and C had done what could be expected of them to minimise the risk of injury, but L was negligent and was held liable.[194]

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[188] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A) 13.
[189] *Pienaar v Brown* 2010 6 SA 365 (SCA).
[190] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 1.
[191] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 3.
[192] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 7.
[193] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 6.
[194] *Pienaar v Brown* 2010 6 SA 365 (SCA).

*Kritzinger v Steyn*[195] provide a good example of a person trespassing on a construction site and sustaining personal injuries. The plaintiff entered a not yet completed house late at night and fell into an open staircase shaft. His claim for damages against *inter alia* the builder was unsuccessful, not due to his status as trespasser,[196] but rather because the presence of a person on the site 23h00 at night was not reasonably foreseeable, and that being the case, the builder was accordingly not found negligent.[197]

In *Johannesburg Consolidated Investment v Langleigh Construction*,[198] the plaintiff's conduct was not specifically characterised as trespassing, but he rode a scrambler onto a construction site, unknown to the developer of the land, and the contractor who was building roads and excavating storm drains there. As a result of these actions, he sustained injuries when he fell with his scrambler into an excavation. The Court found that the developer was not negligent in respect of the plaintiff's injuries.[199]

*Peri-Urban Areas Health Board v Munarin*[200] is an example of an action of a dependent for the death of a breadwinner in a construction context. A pipe-layer was killed when a brick wall collapsed on him. The deceased's widow instituted an action for loss of support against the Health Board that had contracted with the deceased's employer for the pipe-laying. The Court held that the Health Board had a duty to prevent harm to the pipe-layer, taking into account provisions of the contract between the board and the pipe-layer's employer, as well as the board's knowledge of the dangerous situation in which the pipe-layers would be working.[201] Under the circumstances, the widow's claim could succeed and she was not obliged to mitigate her loss by finding employment.[202]

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[195] *Kritzinger v Steyn* 1997 3 SA 686 (C).
[196] *Kritzinger v Steyn* 1997 3 SA 686 (C) 700.
[197] *Kritzinger v Steyn* 1997 3 SA 686 (C) 702.
[198] *Johannesburg Consolidated Investment Co Ltd v Langleigh Construction (Pty) Ltd* 1991 1 SA 576 (A).
[199] *Johannesburg Consolidated Investment Co Ltd v Langleigh Construction (Pty) Ltd* 1991 1 SA 576 (A) 579-582.
[200] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A).
[201] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 375.
[202] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376.

## 3.4 Pure economic loss

Pure economic loss may be defined as patrimonial loss that does not arise from damage to person or property. This does not necessarily mean that there was no damage to person of property in the facts of a given case, but simply that the loss that is sought to be recovered did not arise from damage caused by the defendant to the person or property of the plaintiff.[203] In *Telematrix (Pty) Ltd v Advertising Standards Authority SA*, pure economic loss is defined as follows:[204]

> "Pure economic loss" […] connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as loss of profit, being put to extra expenses or the diminution in the value of property."

The activities of contractors and engineers can give rise to pure economic loss in a variety of ways. A good example of pure economic loss in the engineering field is *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd*,[205] where the plaintiff was a brick factory, and the defendant a civil engineering contractor. The engineering contractor negligently cut a cable supplying electricity to the brick factory. Although property had been damaged by the defendant in the form of the cut cable, no damage was caused to the property of the factory owner. The factory owner nevertheless suffered patrimonial loss in the form of loss of production.

Causing pure economic loss is not *prima facie* wrongful, and this means that the element of wrongfulness is more contentious in instances of pure economic loss than in cases where physical damage was caused by positive conduct to the person or property of the plaintiff.[206] The courts usually require the defendant to have breached a legal duty, and have in recent cases placed great emphasis on the question of whether it would have been reasonable, on policy grounds, to hold the defendant liable.[207]

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[203] Neethling and Potgieter *Law of Delict* 2020 349-350.
[204] T*elematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) para 1, quoted in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) para 10.
[205] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D).
[206] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) para 10; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) para 12.
[207] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) paras 10-12;

Policy factors that may be considered when determining whether the causing of pure economic loss was wrongful, include: the fear of boundless indeterminate liability and a multiplicity of actions; conversely, the presence of a single loss suffered by a single identifiable plaintiff; the vulnerability of the defendant to risk where the defendant is unable to protect himself by other means such as contract; or the fact that imposition of liability would impose an unwarranted additional burden on the defendant, or would constitute an unjustified limitation of the defendant's activities.[208]

In the *Coronation Brick* case, the Court emphasised the role of the legal convictions of the community in determining wrongfulness.[209] Two factors were given particular importance in deciding that the engineering contractor had acted wrongfully; the fact that the contractor knew where the cable was, and also knew that the factory would lose production if the cable was cut, and the fact that the defendant would not face a situation where the floodgates would be opened to an overwhelming number claims from a multitude of claimants. [210]

An important qualification in pure economic loss cases is the fact that the courts are reluctant to allow delictual liability for pure economic loss in situations where the parties were in a contractual relationship, with adequate contractual remedies available to them.[211]

In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*,[212] a manufacturer of glass contracted with a firm of consulting and structural engineers to investigate the suitability of a site for building a glass plant, and to design and supervise the construction of the glass plant were the site to be found suitable. The engineers performed the investigation and the construction commenced, but thereafter, the agreement between the parties was assigned to another contractor, changing the engineers' status from that of contractor to subcontractor. Subsequently it transpired that movement in the plant made it unsuitable for the manufacture of

*Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) para 12.

[208] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) paras 23-26.

[209] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D) 380.

[210] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D) 385-388.

[211] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A); *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA); *Holtzhausen v ABSA Bank Ltd* 2008 5 SA 630 (SCA); see discussion in para 3.7 below.

[212] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A).

glass, and the manufacturer instituted a delictual action against the engineers for their alleged negligent failure to carry out their tasks with the necessary care.

Grosskopf AJA pointed out that the glass manufacturer's case was not that its property had been damaged, but that defects in the plant made it unsuitable for its purpose, resulting in pure economic loss.[213] Grosskopf AJA held that it would be undesirable to extend an Aquilian action to duties that arose from a contract for the rendering of professional services between the parties:[214]

> "In considering whether an extension of Aquilian liability is justified in the present case, the first question that arises is whether there is a need therefor. In my view, the answer must be in the negative, at any rate in so far as liability is said to have arisen while there was a contractual *nexus* between the parties. While the contract persisted, each party had adequate and satisfactory remedies if the other were to have committed a breach."

Grosskopf AJA argued that, when parties enter into such a contract, they contemplate that the contract ought to lay down the ambit of their rights and duties.[215] The assignment of the contract did not change this position, and a delictual remedy remained unnecessary. The parties should not be denied their reasonable expectation that their rights and duties would be regulated by their contractual arrangements and would not be circumvented by the law of delict.[216]

In *Trustees, Two Oceans Aquarium Trust v Kantey & Templer*,[217] a firm of structural engineers designed exhibition tanks for a trust that was instituted in order to oversee and operate an aquarium. The exhibition tanks later proved not to be suitable to contain marine water, and the trustees incurred remedial expenses. The trustees wished to recover the loss in delict from the engineers, alleging that their design had been negligent. The trustees argued that the negligence arose prior to the conclusion of a contract between themselves and the engineers, but that, even at that stage,

[213] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 497-498.
[214] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 500.
[215] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 500-501.
[216] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 502-503.
[217] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) para 18.

the engineers were under a legal duty to act without negligence in designing the tanks for the desired use.

The Supreme Court of Appeal reiterated that causing pure economic loss is only wrongful where the defendant is under a legal duty not to act negligently, and that determination of such a legal duty depended on both legal policy and constitutional norm.[218] The Court held that there was no need to extend Aquilian liability in this case, because the parties had intended for the project to be governed by a contractual relationship once the trust had been created, and the trust could not suffer any damages through the negligent conduct of the engineers prior to the conclusion of that contract.[219] In addition, the trust could have protected itself against the risk of harm by appropriate contractual stipulations,[220] and there was in general no reason to extend the Aquilian action in order to rescue a plaintiff, who had been in the position to avoid the risk of harm by contractual means, but who had failed to do so.[221] Accordingly, the engineers were not to be held delictually liable.

In such case that a person acts upon incorrect information supplied by another person and sustains pure economic loss as a result thereof, delictual liability depends on whether the plaintiff had a right to be given correct information, and whether the defendant had a duty to supply such information. This would in turn depend on whether there are policy considerations indicating that a legal duty to provide correct information exists. Liability for negligent misstatements constitutes an important category of liability for pure economic loss.[222]

In the construction industry, reliance of a plaintiff on defective designs on the part of an engineer, or incorrect assurances given by an engineer while performing a supervisory function, may give rise to liability for negligent misstatements. *Tsimatakopoulos v Hemingway, Isaacs & Coetzee*[223] may be considered an apt

[218] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) para 10.
[219] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) para 21.
[220] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) para 23.
[221] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) para 24.
[222] *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); Loubser and Midgley eds *The Law of Delict in South Africa* 2018 269; Neethling and Potgieter *Law of Delict* 2020 357 *et seq*.
[223] *Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC* 1993 4 SA 428 (C).

example of such a case, although the defective design of the engineers involved arguably gave rise to damage to property, rather than to pure economic loss.[224]

### 3.5 Liability towards third persons

Harm caused by the activities of contractors and engineers is not always sustained by persons under contractual relationships with the contractors or engineers. Third persons, without any contractual relations with either the contractor or engineer, may also sustain losses as a result of the activities of the contractors and/or engineers. In such instances, no contractual remedies are available, and the plaintiff's remedy will usually be delictual.

Several examples of liability towards third persons have been discussed in the preceding paragraphs on specific categories of delictual liability in the construction and engineering fields. In respect of damage to property, the Supreme Court of Appeal stated explicitly in *Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd*[225] that a builder, in general, has a legal duty to both the owner and third parties to refrain from building something that can be understood to be obviously unsafe.

In *Tsimatakopoulos v Hemingway, Isaacs & Coetzee*,[226] an engineering firm was contracted to design a retaining wall. The engineers negligently designed an inadequate wall, such that the wall began to lean over under pressure. The party who had contracted the engineers sold the property to the plaintiff, who had to incur a substantial cost to stabilise the retaining wall. There was no contractual relationship between the plaintiff and the engineers. The Court did not regard the *Lillicrap* case as a bar to liability:[227]

> "It is clear therefore that *Lillicrap's* case deals with the question whether the breach of contractual duties not infringing the respondent's rights of property or person can ground Aquilian liability. The case did not decide that, where Aquilian liability co-exists with liability for breach of contract, the person harmed may not elect to bring either a delictual or a contractual action against the

[224] The *Tsimatakopoulos* case is discussed in para 3.5 below.
[225] *M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 4 SA 1019 (SCA) para 7; see discussion in para 3.2 above.
[226] *Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC* 1993 4 SA 428 (C).
[227] *Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC* 1993 4 SA 428 (C) 432.

> wrongdoer. Indeed, Grosskopf AJA went on to say that the many examples in our common law of *concursus actionum* were cases where the acts of the defendant satisfied the independent requirements of both a contractual and an Aquilian action."

The Court was of the view that, if the question of whether the plaintiff had an independent claim in delict against the engineers had to be answered, it was irrelevant that the original client might have had a contractual claim against the engineers, and that the plaintiff might have obtained cession of such a claim.[228] The real issue was as to how far the engineers' legal duty ought to be extended in any given situation.[229] A reasonable engineer should have foreseen that the wall would not remain stable, and negligence in this regard would cause harm to a new owner if the property was sold. The engineer could therefore be held liable in delict to the plaintiff.[230]

In respect of personal injury, *Langley Fox Building Partnership (Pty) Ltd v De Valence*[231] is a good example of a third person who lawfully ventured onto a dangerous construction site and suffered personal injury there. *Kritzinger v Steyn*[232] is a good example of a person trespassing on such a site and sustaining personal injuries. Third persons can also sustain personal injury on completed buildings, not only on patently dangerous construction sites. Thus, in the case of *Pienaar v Brown*,[233] the plaintiffs sustained injuries when a balcony on which they were standing collapsed. The plaintiffs were guests of the owner of the building at the time of the incident, and they were accordingly third persons who were necessarily not in contractual relationship with the contractors who had originally built the balcony.[234]

An example of a third party suffering pure economic loss from the conduct of an engineer can be found in *Coronation Brick (Pty) Ltd v Strachan Construction Co*

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[228] *Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC* 1993 4 SA 428 (C) 433.
[229] *Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC* 1993 4 SA 428 (C) 434.
[230] *Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC* 1993 4 SA 428 (C) 435; Loubser and Midgley eds *Law of Delict in South Africa* 2018 334.
[231] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A); see discussion in para 3.3 above.
[232] *Kritzinger v Steyn* 1997 3 SA 686 (C); see discussion in para 3.3 above. Also see *Johannesburg Consolidated Investment Co Ltd v Langleigh Construction (Pty) Ltd* 1991 1 SA 576 (A); see discussion in para 3.3 above.
[233] *Pienaar v Brown* 2010 6 SA 365 (SCA).
[234] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 1; see discussion in para 3.3 above.

*(Pty)Ltd.*[235] The plaintiff was a brick factory and the defendant a civil engineering contractor and there was no contractual relationship between them, but the plaintiff suffered pure economic loss when the defendant negligently cut a cable supplying electricity to it, and was entitled to recover this loss in a delictual action.

It should be noted that a third person has a better outlook to succeed in a delictual claim for pure economic loss than persons who are in a contractual relationship with the defendant, according to the trend-setting judgments in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*[236] and *Trustees, Two Oceans Aquarium Trust v Kantey & Templer*.[237]

### 3.6 Vicarious liability

Vicarious liability constitutes the strict liability of one person for a delict committed by another person.[238] Common-law vicarious liability arises only in certain specified relationships, the most important of which is the employer-employee relationship.[239] For an employer to be held vicariously liable for the delict of an employee, three basic requirements must be met: (a) an employer-employee relationship must exist at the time of the incident; (b) the employee must commit a delict; and (c) the employee must be acting within the scope of his or her employment at the time when the delict is committed.[240] Contractors and engineering firms usually have employees in employment who undertake the work, and for this reason, vicarious liability is an important component of the delictual liability of contractors and engineers in the construction industry. In practice, a plaintiff will usually elect to hold the employer vicariously liable due to its stronger financial position over that of the employee. The principles of vicarious liability are well-established and are applicable in the construction field without any special exceptions or unusual applications.

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[235] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 4 SA 371 (D); see discussion in para 3.4 above.
[236] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A); see discussion in para 3.4 above.
[237] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA); see discussion in para 3.4 above.
[238] Neethling and Potgieter *Law of Delict* 2020 444 *et seq*.
[239] Neethling and Potgieter *Law of Delict* 2020 444 *et seq*.
[240] Neethling and Potgieter *Law of Delict* 2020 445-453.

## 3.7 Independent contractors

Independent contractors are often involved in the construction industry. Contractors and engineering firms usually perform their professional services as independent contractors, and in turn, they often appoint other contractors as independent contractors to collaborate on construction projects. Clarity is accordingly needed regarding the implications of these relationships on delictual liability for harm arising in construction scenarios. Whereas the position of employers and employees is relatively clear due to the established principles of vicarious liability, the position of independent contractors *vis-à-vis* the persons who have obtained their services, proves to be somewhat more complicated. The applicable principles may be illustrated by examples from case law.

In *Peri-Urban Areas Health Board v Munarin*,[241] the relevant Health Board had instructed an independent contractor to lay pipes in a deep trench. A pipe-layer employed by the independent contractor was killed when a brick wall collapsed on him. The agreement between the Health Board and the independent contractor provided that the sewerage engineer of the Health Board remained in control of the pipe-laying. This agreement and also the Health Board's knowledge of the dangerous situation under which the workers had to work, were important factors to consider, indicating that there was a duty on the part of the Health Board to prevent harm to the pipe-layer.[242] Accordingly, the deceased's widow was entitled to institute a claim for loss of support against the board.

In *Langley Fox Building Partnership (Pty) Ltd v De Valence,*[243] the wooden beam against which the plaintiff injured herself had been erected by an independent subcontractor who had undertaken this work for the defendant builder. The plaintiff instituted a delictual action against the principal contractor, rather than the subcontractor, and subsequently succeeded in her claim. The Appellate Division held that the principal contractor still had a duty to prevent the harm. Liability of the principal

[241] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A).
[242] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 372; see also *De Jager v Taaf Hamman Holdings (Edms) Bpk* 1993 1 SA 281 (O) where neither a contractor nor a sub-contractor, but rather the owner of a shop who had contracted with the principal contractor to perform cleaning and renovation, was held liable for injuries sustained by a customer in the shop.
[243] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A); facts discussed in para 3.3 above.

contractor was not a form of vicarious liability, but direct liability, based on the principal contractor's own negligence.

In *Pienaar v Brown,*[244] the plaintiffs sustained injuries when a balcony on which they were standing collapsed.[245] The owner of the building had approached C as primary building contractor to erect the balcony, and C sub-contracted L to build the balcony.[246] With reference to the judgment in *Langley Fox Building Partnership (Pty) Ltd v De Valence*,[247] the Supreme Court of Appeal stated:[248]

> "[L]iability in these cases is personal not vicarious, and… it is not a question of the liability of the employer being passed to the independent contractor and thence to any sub-contractor, but a question of the respective individual liability of each of them."

The owner and C did not submit building plans for the balcony and were accordingly in breach of a statutory provision.[249] The sub-contractor deviated from the specifications, *inter alia* by using inadequate screws instead of raw bolts, so that the balcony was ultimately rendered structurally weaker than originally envisaged.[250] The Supreme Court of Appeal held that there was no causal link between the failure to submit building plans for approval and the collapse of the balcony. Employing the reasonable person test for negligence, the Court found that the owner and the principal building contractor had done what could be expected of them to minimise the risk of injury, but that the subcontractor had been negligent and was held liable.[251]

Scott points out that joint and several liability[252] becomes a possibility where an independent contractor has caused harm to a third person but is unable to pay damages. If the principal was also negligent in respect of the damage, the principal would have to settle the bill for the entire amount of damages.[253] To mitigate the liability

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[244] *Pienaar v Brown* 2010 6 SA 365 (SCA).
[245] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 1.
[246] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 3.
[247] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A).
[248] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 11.
[249] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 7.
[250] *Pienaar v Brown* 2010 6 SA 365 (SCA) para 6.
[251] *Pienaar v Brown* 2010 6 SA 365 (SCA).
[252] Because they would be joint wrongdoers. On joint and several liability, see Neethling and Potgieter *Law of Delict* 2020 320-321.
[253] Scott 2009 *THRHR* 677.

for building principals, Loots advised that the contractor should be required to take out appropriate employer's liability or workmen's compensation insurance.[254]

An example of joint wrongdoers[255] emerges from case law in the case of *Minister of Community Development v Koch.*[256] The Minister of Community Development appointed consulting engineers to oversee the construction of roads and services in an urban renewal scheme and a contractor to do the physical work. The owner of a pottery store in the vicinity suffered loss of income when the construction work cut off access to his store. The Appellate Division agreed with the trial court that the Aquilian liability of the contractor had been well established.[257] However, the contractor had gone into liquidation, and the liability of the Minister and the consulting engineers were at issue.[258] The Court held that, once the Minister had received a letter of complaint from the pottery store owner, the Minister could not rely on the engineers and the contractor to act reasonably on its behalf. Accordingly, the departmental officials who were acting as employees of the Minister were found negligent.[259] The employee of the consulting engineers who was tasked with the exercise of its supervising duties was also found negligent.[260] Accordingly, the Minister, the consulting engineers and the contractors were joint wrongdoers in respect of the harm suffered by the pottery store owner.[261]

### 3.8 Concurrence with the contractual action

Concurrence of the *actio legis Aquiliae* and a contractual action for damages is possible if the breach of contract also causes patrimonial damage in a wrongful and culpable manner. However, a further qualification in this regard is that the Aquilian action is only available alongside the contractual action if the conduct that constitutes a breach of contract, additionally infringes a legally recognised interest which exists independently of the contract.[262] The plaintiff has a choice between a delictual and

[254] Loots *Construction Law and Related Issues* 1995 559.
[255] Neethling and Potgieter *Law of Delict* 2020 319 *et seq*.
[256] *Minister of Community Development v Koch* 1991 3 SA 751 (SCA).
[257] *Minister of Community Development v Koch* 1991 3 SA 751 (A) 760-761.
[258] *Minister of Community Development v Koch* 1991 3 SA 751 (A) 755.
[259] *Minister of Community Development v Koch* 1991 3 SA 751 (A) 762-763.
[260] *Minister of Community Development v Koch* 1991 3 SA 751 (A) 763.
[261] *Minister of Community Development v Koch* 1991 3 SA 751 (A) 764.
[262] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 496-497; *Cathkin Park Hotel v JD Makesch Architects* 1992 2 SA 98 (W) 102-103; *Visser & Potgieter Law of Damages* 2012 339.

contractual action if a legal duty to prevent harm exists according to the legal convictions of the community, independent of the contractual duty.[263]

Where the harm suffered takes the form of pure economic loss, the courts are hesitant to allow a delictual action in instances where the parties are or were in a contractual relationship. In the leading judgment, *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*,[264] the Court acknowledged the possibility of a concurrence of actions but held that the delictual remedy was not available in that case. The Court was, for reasons of policy, not willing to extend delictual liability if the plaintiff had adequate contractual remedies.[265]

*Trustees, Two Oceans Aquarium Trust v Kantey & Templer*[266] confirmed the approach in *Lillicrap* and emphasised that the existence of a contractual relationship enables the parties to regulate their relationship themselves, including a choice in respect of what remedies would be available to them. Accordingly, policy considerations militate against the availability of a delictual remedy in such a case, and Brand JA stated:[267]

> "Generally speaking, I can see no reason why the Aquilian remedy should be extended to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means, but who failed to do so."

The judgment in the *Two Oceans Aquarium Trust* case is difficult to reconcile with *Holtzhausen v ABSA Bank Ltd*,[268] which stated clearly that *Lillicrap* had decided that no claim is maintainable in delict where the negligence relied on consists in the breach of a term in a contract, but:

> "*Lillicrap* is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. On the contrary, Grosskopf JA was at pains to emphasise (at 496D-I) that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict

[263] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 496-497; *Thatcher v Katz* 2006 6 SA 407 (C) 411-412; *Visser & Potgieter Law of Damages* 3 ed 2012 337.
[264] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 496-497 506.
[265] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 500; Neethling and Potgieter *Law of Delict* 2020 313-314.
[266] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) para 18.
[267] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer* 2006 3 SA 138 (SCA) para 24.
[268] *Holtzhausen v ABSA Bank Ltd* 2008 5 SA 630 (SCA) para 6.

and in contract and permits the plaintiff in such a case to choose which he wishes to pursue."[269]

## 4 STATUTORY COMPENSATION

### 4.1 The Compensation for Occupational Injuries and Diseases Act (COIDA)

The Compensation for Occupational Injuries and Diseases Act (COIDA)[270] abolishes the employee's common-law delictual claim against his or her employer for injuries sustained in the course of the employment that give rise to disablement or permanent injury. Section 35(1) provides as follows:

> "No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

Disablement is defined as "disablement for employment, or permanent injury or serious disfigurement".[271]

In place of the common law delictual claim, the Act creates an administrative compensation system, in terms of which an employee who is disabled by injury or disease in the course the employment can claim compensation from a statutory fund.[272] The compensation system is not fault-based and proof of negligence on the part of the employee or any other person is not required.[273] Only patrimonial loss can be claimed,[274] and a ceiling is placed on the amounts that may be claimed.[275] Because this compensation does not depend on proof of negligence, contributory negligence

[269] *Holtzhausen v ABSA Bank Ltd* 2008 5 SA 630 (SCA) para 7; Neethling and Potgieter *Law of Delict* 2020 315 fn 96.
[270] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993; see Loubser and Midgley eds *Law of Delict in South Africa* 2018 550-555.
[271] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 s 1(xvi).
[272] Loubser and Midgley eds *Law of Delict in South Africa* 2018 551.
[273] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 s 22(1).
[274] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 ss 47–64.
[275] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 Schedule 4.

on the part of the employee will not reduce the compensation.[276] The employee may still institute a common-law delictual claim against wrongdoers other than the employer.[277]

COIDA will be applicable in all instances where the employees of contractors or engineers sustain disabling or permanent injuries in the course of their work. The Act accordingly shields contractors and engineers in their capacity as employers from any such delictual claim. However, as employers, they will be obliged to contribute to the fund from which the claims under COIDA are paid.[278] In instances where contractors or engineers are employees themselves, they themselves will need to claim for disabling or permanent occupational injuries under COIDA. Whether the Act has improved the position of employees proves to be a difficult question. On the one hand, their claims are easier to substantiate because claimants have been relieved from the burden of proving negligence; but on the other hand, their claims are limited by provisions of the Act.[279]

## 4.2 Section 61 of the Consumer Protection Act (CPA)

### *4.2.1 General*

The Consumer Protection Act (CPA)[280] has introduced strict product liability into South African law. Section 61(1) of the Act provides:

> "Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of-
>
> *(a)* supplying any unsafe goods;
>
> *(b)* a product failure, defect or hazard in any goods; or

[276] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 s 22(1).
[277] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 s 36(1)(a).
[278] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 s 87.
[279] See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 2 SA 1 (CC); Loubser and Midgley eds *Law of Delict in South Africa* 2018 552-553.
[280] Consumer Protection Act (CPA) 68 of 2008; Loubser and Midgley eds *Law of Delict in South Africa* 2018 566 *et seq*; Loubser and Reid *Product Liability in South Africa* 2012 56 *et seq*.

> *(c)* inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods,
>
> irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be."

In addition, Section 61(2) provides that:

> "A supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this section."

Several aspects of these provisions are noteworthy. The definition of "goods" is very wide and includes: (a) anything marketed for human consumption; (b) any other tangible object, including any medium on which anything is written or encoded; (c) any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium, or a licence to use any such intangible product; (d) a legal interest in land or any other immovable property, other than an interest that falls within the definition of "service"; and (e) gas, water, and electricity. Loubser and Midgley, commenting on the definition of goods, note the following aspect that proves to be of great importance for liability in the construction industry:[281]

> "The Act also covers land transactions. Its definition of goods includes: a legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section. This involves liability for structural or design defects in buildings and hazards that occur on land. Damage to the product itself – the land or buildings – is apparently also recoverable."

"Unsafe" means that, due to a characteristic, failure, defect, or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer, or to other persons.[282] "Failure" means that the product "did not perform in the intended

[281] Loubser and Midgley eds *Law of Delict in South Africa* 2018 567.
[282] Consumer Protection Act (CPA) 68 of 2008 s 53(1)(d).

manner or to the intended effect".[283] Loubser and Midgley comment that this indicates a typical manufacturing defect, such as a machine tool, that malfunctions and causes injury, or the brakes of a car that fail and cause an accident.[284] In terms of section 53(1)(a) a 'defect' refers to any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or any characteristic of the goods or components that renders the goods or components less useful, practicable, or safe than persons generally would be reasonably entitled to expect in the circumstances.

In terms of 61(2), services involving the application, supply, installation or provision of access to goods, are also covered.[285] Loubser and Reid,[286] commenting on "services involving goods", point out that an electrician who repairs an electrical installation may, for example, supply wiring and parts in the course of his service. In addition, they argue persuasively that professional advice or information is also covered:[287]

> "Where the provision of services entails the supply of information, as in the case of professional advisory services…, such information qualifies as 'goods' as defined in s 1; and the effect of s 61(2) is that illness, injury or damage to property caused by information or advice that suffers from a 'defect' or 'hazard' will result in strict liability. The introduction of strict liability for advisory professional services constitutes a radical departure from the common-law (Aquilian) basis of professional liability."

### *4.2.2 Persons who can claim under section 61*

In general, the Consumer Protection Act is intended to provide protection to consumers. A "consumer" can be a purchaser or merely a user of the product.[288] In *Eskom Holdings Limited v Halstead-Cleak*,[289] the Supreme Court of Appeal held that there should be a supplier and consumer relationship for Eskom to be strictly liable

[283] Consumer Protection Act (CPA) 68 of 2008 s 53(1)(b).
[284] Loubser and Midgley eds *Law of Delict in South Africa* 2018 568-569.
[285] Para 4.2 above.
[286] Loubser and Reid *Product Liability in South Africa* 2012 87.
[287] Loubser and Reid *Product Liability in South Africa* 2012 88.
[288] Consumer Protection Act (CPA) 68 of 2008 s 1.
[289] *Eskom Holdings Limited v Halstead-Cleak* 2017 1 SA 333 (SCA).

under Section 61, because the Act's purpose is to protect consumers.[290] A cyclist who came into contact with a live power line that was hanging low over a path, did not qualify as a consumer in that scenario. The Court stated in this regard:[291]

> "The definition of 'consumer' in s 1 is a person to whom goods or services are marketed in the ordinary course of a supplier's business, or who has entered into a transaction with a supplier in the ordinary course of a supplier's business. The definition includes a person who is a user of the goods or a recipient or beneficiary of the particular service irrespective of whether that person was a party to a transaction concerning the supply of the goods or services. This has the effect that the recipient of a gift from a consumer would also be considered a consumer in terms of the Act. The important features to note are that there must be a transaction to which a consumer is party, or the goods are used by another person consequent on that transaction."

Reference in the *Eskom Holdings* case to the "recipient of a gift from a consumer" as a "user" and hence also a "consumer" presents an example, and not a *numerus clausus*. For instance, a person who borrows a tool from a consumer for temporary use would surely also qualify as a "user", and hence also a "consumer". Taking this line of reasoning somewhat further, a person who gains access to a building, is arguably a "user" of said building, and hence, a "consumer", because such a person is using one of the categories of "goods", namely immovable property, and the building is or was, after all, the subject of a transaction between the owner and builder.

Loubser and Reid argue persuasively that:[292]

> "Section 5(1)*(d)*, read with s 5(5), arguably highlights the intention of the legislature to provide general redress for persons harmed by defective goods,

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[290] *Eskom Holdings Limited v Halstead-Cleak* 2017 1 SA 333 (SCA) para 22.
[291] *Eskom Holdings Limited v Halstead-Cleak* 2017 1 SA 333 (SCA) para 15.
[292] Loubser and Reid "Section 61" in Naudé and Eiselen eds *Commentary on the Consumer Protection Act* (Original Service 2014) 2019 para 2. S5(1)(d) provides that the Act applies to goods that are supplied in terms of a transaction that is exempt from the application of this Act, but only to the extent provided for in s 5(5). S 5(5) provides: "If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to sections 60 and 61."

> even if they did not receive the goods pursuant to a 'transaction' or as a 'consumer' within the meaning of para *(b)* of the definition of 'consumer'."

They accordingly argue that even bystanders who are injured by goods, for example a person injured when touching an open and live electricity cable, or a person who happens to be nearby when a glass container explodes, fall within the category of vulnerable persons protected by the Act against harm caused by defective goods.[293]

### *4.2.3 Persons against whom claims under section 61 may be instituted*

The consumer has an action against the producer, importer, distributor, or retailer of the goods. A "producer" is defined as inter alia a person who "grows, nurtures, harvests, mines, generates, refines, creates, manufactures or otherwise produces the goods within the Republic, or causes any of those things to be done, with the intention of making them available for supply in the ordinary course of business".[294] Section 61(1) explicitly states that this action is not dependent on the negligence of the relevant producer, importer, distributor, or retailer.

### *4.2.4 Categories of harm for which compensation may be claimed*

Section 61(5) makes provision for liability for death, injury, illness; loss of or physical damage to property, including immovable property; and economic loss that results from the aforementioned categories of harm. Damage to property apparently includes damage to the defective product itself.[295] Loubser and Midgley point out that, by allowing compensation for economic loss, the Act potentially opens up a vast area of liability, such as for loss of profit.[296]

### *4.2.5 Limits to scope of application*

The Act places certain limitations on the scope of its application, but in several of these instances, liability under Section 61 is then again shielded from the limitation. Section 5(1)(a) provides that the Act applies to every transaction in South Africa, unless it is exempted by subsections (2), (3) or (4). Two examples of such exemptions are

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[293] Loubser and Reid "Section 61" in Naudé and Eiselen eds *Commentary on the Consumer Protection Act* (Original Service 2014) 2019 para 2.
[294] Consumer Protection Act (CPA) 68 of 2008 s 1.
[295] Loubser and Midgley eds *Law of Delict in South Africa* 2018 573.
[296] Loubser and Midgley eds *Law of Delict in South Africa* 2018 573.

transactions in terms of which goods or services are promoted or supplied to the State;[297] and transactions in which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds a threshold value determined by the Minister, which is currently R 2000 000.[298] However, Section 5(5) then provides:

> "If any goods are supplied within the Republic to any person in terms of a transaction that is exempt from the application of this Act, those goods, and the importer or producer, distributor and retailer of those goods, respectively, are nevertheless subject to section 61."

In addition, Section 5(1)(d) provides that the Act does apply to goods supplied in terms of a transaction that is exempt from the application of the Act, to the extent provided for in Section 5(5).

Other limitations to the scope of application of the Act may be implicit in the definitions in the Act. The phrase "in the ordinary course of business" assumes an important role in the Act, for instance, in the definitions of "transaction" and "supply".[299] It is accordingly clear that the Act does not apply, for instance, to transactions in which a house owner sells his or her home when buying a new one, in a few isolated instances in his or her life, but the Act does apply to the frequent transactions in which a developer sells homes "in the ordinary course of business", and in the last-mentioned instances, the contractors and engineers involved in the construction of the homes will qualify as "producers'' of the "goods" for the purpose of the Act. [300]

Provision is made for several defences, where amongst others, a person will not be liable if the alleged unsafe product characteristic, failure, defect, or hazard did not exist in the goods at the time when the goods were supplied by that person to another person who is alleged to be liable.[301]

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[297] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 s 5(2)(a).
[298] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 s 5(2)(b) read with s 6 and the Schedule in GN 294 in *GG* 34181 of 1 April 2011.
[299] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 s 1.
[300] Consumer Protection Act (CPA) 68 of 2008 ss 1 and 61(1).
[301] Consumer Protection Act (CPA) 68 of 2008 s 61(4)(b)(i).

Another defence arises if it is unreasonable to expect the distributor or retailer to have discovered the product defect, having regard to that person's role in marketing the goods to consumers.[302] Commentators have pointed out that the last-mentioned defence has the potential to allow fault-based liability to return through the back door, because the application of a reasonability test on the conduct of distributors and retailers is similar to the negligence test in common-law delictual liability.[303] Noting that this defence applies to distributors and retailers, Hutchison and Pretorius state that Section 61 introduces strict liability for producers and importers, but not for distributors and retailers. According to their interpretation:[304]

> "Section 61 […] does not introduce strict liability in respect of retailers or distributors, but simply shifts the onus of proving the absence of fault to them."

For the purpose of Section 61, contractors and engineers will usually be producers rather than retailers or distributors, where, even in if the interpretation of Hutchison and Pretorius is correct, it would appear that Section 61 still imposes strict liability on both contractors and engineers.

There is a time limit for claims under section 61. The claimant must bring the claim for damages within three years of certain specified events, or the acquisition of certain specified knowledge.[305]

Loubser and Midgley comment that, because the statutory remedy under section 61 eliminates the need to prove negligence, it is likely in future that claims for damages involving defective goods will in most cases be brought under this section, even though common law Aquilian liability for this manner of harm remains available.[306]

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[302] Consumer Protection Act (CPA) 68 of 2008 s 61(4)(c).
[303] Loubser and Midgley eds *Law of Delict in South Africa* 2018 574.
[304] Hutchison and Pretorius eds *Law of Contract in South Africa* 2018 471.
[305] Consumer Protection Act (CPA) 68 of 2008 s 61(4)(d).
[306] Loubser and Midgley eds *Law of Delict in South Africa* 2018 576. S 2(1) of the Consumer Protection Act provides that a consumer may still exercise their common law rights. Common law delictual liability is accordingly still possible.

### *4.2.6 Application to the liability of contractors and engineers in the construction industry*

The question relevant to this dissertation is as to whether section 61 of the Consumer Protection Act can assist a plaintiff who wishes to hold a contractor or engineer liable for damage sustained. No directly applicable case law has been found and an opinion will be presented without the benefit of such authority. An attempt will nonetheless be made to answer the relevant question in a systematic way.

It has already been pointed out that the definition of "goods" in the CPA is extremely wide and that even immovable property is included, and that services involving the application, supply, installation or provision of access to goods, are also covered.[307] One can, accordingly, argue that most, if not all, of the products and services involving products that contractors and engineers supply or provide access to, appear to be covered by section 61.

When considering the different categories of plaintiff that may be encountered in delictual cases dealing with the liability of contractors and engineers in the construction industry, most appear to be covered by the definition of "consumer" in the Act.[308] Persons who are in contractual relationships with contractors or engineers can certainly qualify as consumers, as can third parties. Because even users of "goods" are defined as consumers, any person who accesses a building or similar construction arguably qualifies as a consumer, as does anyone who trespasses. However, employees of contractors and engineers who sustain injuries in the course of their employment appear to be excluded. As is to be seen, they will be able to claim for disabling and permanent occupational injuries under the Compensation for Occupational Injuries and Diseases Act (COIDA).[309]

When considering the identity of the defendants in typical cases about the delictual liability of contractors and engineers in the construction industry, most, if not all appear to be covered by the definitions of "producer", "importer", "distributor" or "retailer", as

[307] Para 4.2.1 above.
[308] Para 4.2.2 above.
[309] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993; see discussion in para 4.1 above.

well as “supplier”. The said definitions appear to accommodate contractors and engineers, irrespective of whether they are primary or independent sub-contractors.[310]

If one considers the different categories of harm that may be suffered by plaintiffs in typical cases about the delictual liability of contractors and engineers in the construction industry, most, if not all, appear to be covered by Section 61(5), even for pure economic loss.[311]

If one considers the different limits placed on the scope of applicability of the Act in general, and Section 61 in particular, these do not appear to exclude liability under section 61 of contractors and engineers in the construction industry in many instances.[312] In instances where liability is excluded, it usually appears reasonable under the circumstances.

For the sake of argument, the facts of a typical delict case in which the Consumer Protection Act was not considered may be used to illustrate the potential applicability of Section 61; *Pienaar v Brown.*[313] It is notable that the plaintiffs sustained injuries when a balcony on which they were standing collapsed. A primary building contractor and an independent sub-contractor were involved in the building of the balcony. The sub-contractor had used inadequate screws, instead of the required raw bolts, to secure the balcony. The Supreme Court of Appeal held that the owner of the building and the primary contractor were not negligent, but the sub-contractor was considered negligent and was held liable. The question remains as to whether a claim based on these facts could have been brought under section 61 and whether it would have made a difference to the outcome.

Because “goods” are so widely defined, and because injury is included in the kind of harm that may be recovered, reliance on section 61 appears, at face value, to have been possible. In addition, because “consumer” is defined to include users rather than purchasers alone, arguably the plaintiffs would have qualified as “consumers” for the purpose of section 61, just as users of public buildings would have done. Furthermore, both the primary building contractor and the sub-contractor would appear to have

[310] Para 4.2.3 above.
[311] Para 4.2.4 above.
[312] Para 4.2.5 above.
[313] *Pienaar v Brown* 2010 6 SA 365 (SCA); see discussion in para 3.3 above.

qualified as “producers”, because they produced buildings or parts thereof “with the intention of making them available for supply in the ordinary course of business”.[314] Because negligence is not required, it appears feasible that a claim under section 61 could have been instituted against the primary contractor as well as the sub-contractor. If this is correct, the position of the plaintiffs would indeed have been improved under section 61. They would have been relieved of the burden to prove negligence, and an additional defendant would have been liable, which may have been advantageous in such case that the sub-contractor was a ‘man of straw’, and the main contractor had ‘deep pockets’.[315]

It is accordingly submitted that section 61 of the Consumer Protection Act has introduced far-reaching strict liability of contractors and engineers in the construction industry, which is likely to be favoured by claimants above common law fault-based delictual claims in future.

## 5 EVALUATION AND RECOMMENDATIONS

### 5.1 Evaluation

The South African law of delict as applied to harm-causing activities of contractors and engineers in the construction industry, consists mainly of common law. It is, however, supplemented by legislation, of which two notable examples are the Compensation for Occupational Injuries and Diseases Act (COIDA),[316] and the Consumer Protection Act.[317] The impact of the Consumer Protection Act on the liability of contractors and engineers in the construction industry has not yet been fleshed out by the courts, but it is far-reaching.

In general, the application of the common law principles of the South African law of delict enables our courts to dispense justice to plaintiffs and defendants in instances where one party has caused harm to another in a wrongful and culpable manner. This is also the case when the liability of contractors and engineers for harm caused is

[314] See definition of “producer” in Consumer Protection Act (CPA) 68 of 2008 s 1.
[315] Consumer Protection Act (CPA) 68 of 2008 s 61(3) provides that “[i]f, in a particular case, more than one person is liable in terms of this section, their liability is joint and several”.
[316] Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993.
[317] Consumer Protection Act (CPA) 68 of 2008.

considered. Case law reveals that a large number of different scenarios are admirably covered by a judicious application of normal delictual principles.

Nonetheless, a critical analysis of case law dealing with the negligence of contractors and engineers in the building industry reveals instances where the application of normal delictual principles does not lead to results that are entirely satisfactory. In such instances, the prejudiced parties can be observed not to have been fully vindicated, and the outcomes do not fully satisfy a sense of justice. It is ordinarily the case that the source of unease about the fairness of the outcome centres on the application of the negligence test.

*Kritzinger v Steyn*[318] springs to mind as an instance where builders created a very dangerous situation, where a member of the public suffered serious harm, and yet the builders were able to escape liability due to a finding of the Court that the manner in which the harm occurred was not reasonably foreseeable. The Court's finding that it was not foreseeable that the deserted and incomplete building would be entered by a trespasser at 23h00 at night is nowadays debateable if the current realities of unemployment and homelessness in South Africa are considered. In addition, it is a question as to whether it would not have been a simple matter to cordon off the site and post signage warning the public not to enter the premises. For a builder not to take any such precautions, and then to leave such a dangerous site lying vacant while he is absent on vacation,[319] does not appear to comply with the reasonable standard of care. Such judgments appear not to be completely reconcilable with the outcome in *Langley Fox Building Partnership (Pty) Ltd v De Valence*,[320] in which the plaintiff can reasonably be understood to be fully vindicated by the outcome of the case.

## 5.2 Recommendations

### *5.2.1 Statutory strict liability as a potential solution*

A potential solution to the above would be the adoption of strict liability, that is, liability without fault,[321] of contractors and engineers, for harm caused to others in the building

[318] *Kritzinger v Steyn* 1997 3 SA 686 (C); see discussion in para 3.3 above.
[319] *Kritzinger v Steyn* 1997 3 SA 686 (C) 702.
[320] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A); see discussion in para 3.3 above.
[321] On strict liability in general, see Neethling and Potgieter *Law of Delict* 2020 433 *et seq*; Loubser

industry. Strict liability constitutes an exception to the generally held principle that fault is a requisite for delictual liability, and for this reason, the adoption of strict liability should not be undertaken lightly and should always be informed by compelling reasons.[322]

It is generally accepted that the main reason for the existence of instances of strict liability in an otherwise fault-based system of delict is the creation of situations in which the risk of harm to other persons is so high that a deviation from the normal fault-based delictual liability is warranted. In such instances, it is accepted that legal policy requires the party responsible for the creation of that risk-bearing situation to bear an increased responsibility for it, in the sense of being liable for harm caused to other parties, even in the absence of proof of fault on the risk-creator's part.[323] It is submitted that such an increased risk of harm is indeed present in the building industry, where contractors and engineers create structures, such as buildings and bridges, to which members of the public are intended to ultimately have access. If such structures are inadequate in design, or strength of construction, the risk of harm to those who will gain access is extraordinarily high.

A feature that is characteristic of particularly modern instances of strict liability (as opposed to the old forms of strict liability found in, for instance, the Roman actions for damage caused by animals), is the presence of exceptional challenges for plaintiffs to produce convincing evidence of fault on the part of defendants.[324] This is frequently the case due to the highly technical nature of the evidence that would be required. It is submitted that this element is also present in the field of research explored in this dissertation. Modern buildings, bridges and other such similar structures are often highly complex. Evidence that will suffice to establish negligence on the part of the parties who designed and built such structures will usually be of a highly technical nature, and inaccessible to plaintiffs without such expertise. Typically, the evidence of experts in the construction and engineering fields will be essential to determining negligence, and such experts may be wary of supplying such information. It ought to be self-evident that a plaintiff who has suffered injury while accessing a modern

and Midgley 455 *et seq* 541 *et seq*.

[322] Neethling and Potgieter *Law of Delict* 2020 433.

[323] Neethling and Potgieter *Law of Delict* 2020 434.

[324] Loubser and Midgley eds *Law of Delict in South Africa* 2018 546-547; Neethling and Potgieter *Law of Delict* 2020 385-386.

building or other similar structure, could well face an almost insurmountable hurdle to supply a court with evidence that will establish fault on the part of the parties who designed or built that structure. This presents an additional reason for supporting the adoption of strict liability in this field.

The introduction of strict liability is not a merely incremental departure from the general principles of the South African law of delict, and should, accordingly, preferably be implemented by the legislature, rather than the courts.[325] Loubser and Midgley[326] mention several legal and policy considerations supporting the statutory development of the law of delict, such as a need to combat the risk of receiving no compensation; the role of the Constitution, with particular emphasis on the promotion of the right to social security in terms of Section 27; the evidentiary difficulties with proving fault; time and cost-related problems with the system of civil procedure; the ability of the legislature to regulate liability more comprehensively than the judiciary; and the need to prevent arbitrary outcomes. All these considerations are appropriate to take into account when evaluating the delictual liability of contractors and engineers in the construction industry.

A potential counterargument militating against the adoption of strict liability in this field is that it would have a "chilling effect" on engineering and building projects in South Africa, where these are sorely needed. However, the need for such projects and their outcomes to be safe for the people of South Africa ought to be prioritised, and the counterargument is accordingly not supported in this dissertation.

### *5.2.2 The role of Section 61 of the Consumer Protection Act*

As demonstrated, Section 61 of the Consumer Protection Act (CPA)[327] has supplemented common law fault-based delictual liability by introducing strictly liability for harm caused by "goods", in the field traditionally known as product liability.[328] Taken at face value, Section 61 would appear to be a comprehensive introduction of

[325] *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 4 SA 285 (SCA); Loubser and Midgley eds *Law of Delict in South Africa* 2018 548.
[326] Loubser and Midgley eds *Law of Delict in South Africa* 2018 544-549.
[327] Consumer Protection Act (CPA) 68 of 2008; see discussion in para 4.2 above.
[328] Para 4.2 above.

strict liability that might bring relief to claimants who have been prejudiced by the activities of contractors and engineers in the construction field.[329]

This raises the question as to whether Section 61 involves a sufficient implementation of strict liability[330] to this field that serves to adequately address the identified shortcomings of the present case law, as outlined above.[331] To a certain extent, this may depend on how the courts will interpret the Act, and how they will apply it. It is submitted that progressive application by the Courts of Section 61 of the Consumer Protection Act to instances of harm caused by contractors and engineers in the construction industry will satisfactorily supplement the common law delictual principles. In this way, adequate relief can be brought to claimants who would have faced too heavy a burden in proving negligence on the part of the contractor or engineer in a common law delictual claim. For this reason, it is provisionally concluded that it is not necessary to recommend further legislative reform in this field.

It must be reiterated that this evaluation and recommendation are based on an assumption that the Consumer Protection Act will be progressively applied to allow a considered and principle-based deviation from solely fault-based delictual liability of contractors and engineers for negligence in the South African construction industry. If this does not materialise, it may be necessary to revisit this evaluation and to recommend legislative reform to introduce strict liability specifically for the negligence of contractors and engineers in the South African construction industry.

### *5.2.3 The role of res ipsa loquitur in common law liability*

Another question that arises is as to whether case law can improve the position of plaintiffs in cases of common law delictual liability of contractors and engineers in the construction industry, which remains in place as an alternative to strict liability under Section 61. By way of analogy with the history of product liability in South African law, the application of the maxim *res ipsa loquitur* may be beneficial in cases of negligence on the part of contractors and engineers.[332] The maxim *res ipsa loquitur* entails that the facts of cases can, to a certain extent, speak for themselves in demonstrating the

[329] Para 4.2 above.
[330] Para 5(1) above.
[331] Para 5(2)(1) above.
[332] Neethling and Potgieter *Law of Delict* 2020 385-386.

presence of negligence. The maxim does not, however, affect the onus of proof or create a presumption of fault. Neethling and Potgieter explain:[333]

> "[T]he phrase is merely an argument on the probabilities that a plaintiff, who may have little evidence at his disposal, may use in order to convince the court that the defendant acted negligently. If the evidence showed that all the crucial facts were exclusively within the defendant's knowledge, the court is permitted to draw an inference of negligence by applying the doctrine of *res ipsa loquitur*. But the defendant may still submit evidence to show that the occurrence in question bears no relation to any negligent conduct on his part. The maxim is also not applicable if the parties have agreed on certain facts and no evidence has been led."

Nonetheless, the relief provided by application of *res ipsa loquitur* remains relatively limited and should strengthen - rather than weaken - an argument in favour of the application of strict liability in this field. Application of *res ipsa loquitur* should, on its own, not be regarded as a comprehensive solution for the identified shortcomings in the current position in the South African case law.

[333] Neethling and Potgieter *Law of Delict* 2020 192.

# CHAPTER 3: CONTRACTUAL LIABILITY OF CONTRACTORS AND ENGINEERS IN THE SOUTH AFRICAN CONSTRUCTION INDUSTRY

## 1 INTRODUCTION

A contract constitutes an agreement entered into between two or more persons with the intention to create a legally enforceable obligation or obligations.[334] Contracts play a very important role in the construction industry. As stated by Loots:[335]

> "Much of engineering and construction law revolves around the making and administration of contracts. The relationships between engineer and client, employer and contractor, and contractor and subcontractor are contractual and it is both customary and accurate to refer to an engineering or construction project as a contract."

It then follows that, when determining the liability of contractors and engineers in the South African construction industry, the law of contract proves to be of the utmost importance. In this chapter, the applicable principles of the South African law of contract are critically investigated. Focus is placed on common law, but important pieces of legislation will also receive attention.

## 2 BUILDING OR ENGINEERING CONTRACT

Lodigiani aptly describes the engineering contract in a paper presented to the International Federation of Consulting Engineers (FIDIC) Seminar in 1997:[336]

> "[A] contract for civil engineering works is a document establishing an obligation binding three entities, the owner, the engineer and the contractor and it is not only to buy and sell something, but to establish among themselves a relationship in which various factors come together, factors which are not only technical and economic, but largely human as well; this relationship is going to

[334] Hutchison and Pretorius eds *The Law of Contract* 2022 6.
[335] Loots *Construction Law and Related Issues* 1995 13.
[336] Lodigiani *FIDIC Seminar in 1997* 89-90.

> last for a number of years (or months) and is therefore similar to a sort of adventure or to a long journey together, or to a drama which develops in real life."

A distinction is drawn here between building and engineering contracts. This distinction depends upon the nature of the work. Where the work is of the nature of a private residence or commercial premises, the contract is generally referred to as a building contract, the contractor is called a building contractor, the planning is usually done by an architect, and the supervision undertaken by an architect or principal agent. Where the work is of the nature of a civil engineering project, for example, a dam, bridge, or road, the contract is referred to as an engineering contract, the contractor as an engineering contractor, and planning and supervision are usually done by an engineer.[337]

### 2.1 *Locatio conductio operis*

In South Africa, the Roman-Dutch common law of contract governs the different aspects of building contracts,[338] where, in law more generally, this type of contract falls under the category of the letting and hiring of work (*locatio conductio operis*). The importance of building contracts derives, firstly, from the fact that in any major building project, a range of parties are involved, where as a result, the various contractual relationships become intricate, complex, and contingent on careful analysis. Second, over recent years, certain aspects of such contracts and their standard clauses have received frequent scrutiny by the courts, and there is now a considerable volume of case law concerning this type of contract. Third, it unlocks those terms implied automatically by law (*naturalia*) specific to a class of contracts. [339]

## 3 BREACH OF CONTRACT

Reynecke is of the opinion that:[340]

> "The parties to a contract are bound to respect their agreement and to perform all the obligations that it imposes upon them: *pacta sunt servanda*. If either

[337] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 1.
[338] *Smith v Mouton* 1977 3 SA 9 (W) 12.
[339] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 1.
[340] Reynecke 2026 *Stell LR* 309.

party, by an act or omission and without lawful excuse, fails in any way to honour his or her contractual obligations, he or she commits a breach of contract."

The following types of breach are recognised in South African law:

- The debtor fails to discharge his or her obligations in good time (*mora debitoris*);
- The debtor does discharge his duties, but in a deficient or incomplete manner (positive malperformance);
- Either party indicates an unambiguous intention or lack of willingness to honour the agreement (repudiation);
- Either party makes performance of the contract impossible (prevention of performance); and
- The creditor fails to cooperate in time with the debtor so that the latter may perform his or her duties (*mora creditoris*).[341]

A discussion of the various forms of breach will now be discussed with respect to the engineering and construction field, with reference to respective remedies.

### 3.1 *Mora Debitoris* (delay of the debtor)

*Mora debitoris* refers to the failure of a debtor to make performance in time of a positive duty that is both due and enforceable, and which the debtor remains capable of performing, despite such failure.[342]

This distinction is drawn between two types of *mora debitoris,* namely *mora ex re* and *mora ex persona*.[343]

Thus, different forms of breach by delay are distinguished, namely: delay in circumstances where the contract specified a time for performance (*mora ex re*); delay in circumstances where no time has been specified (*mora ex persona*); and possibly

[341] Hutchison and Pretorius (eds) *The Law of Contract* 2022 310.
[342] *LAWSA Contract* § 386.
[343] Hutchison and Pretorius 2022 314.

also delay in circumstances where performance may be considered urgent, although no specific time has been stipulated (*mora ex lege*).[344]

### *3.1.1 Mora ex re*

According to Hutchison and Pretorius:[345]

> "Where the parties have expressly or impliedly stipulated a time for performance in their contract, a culpable failure by the debtor to perform on or before the due date automatically places him *in more* (*ex re*), without the need for any intervention by the creditor."

Time is of essence where this expressly stated to be the case; in addition, it is submitted to be similar to contracts of sale, in such case where the context provides that this was the intention of the parties.[346]

In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration,*[347] the contractor claimed damages against the employer due to alleged failure by the engineer to supply the different drawings and instructions after a reasonable time had elapsed. However, the claim did not succeed because the contractor had not put the employer in *mora* by requesting performance on the part of the engineer. This was therefore not an actual case of *mora ex re*.

A breach by delay, where a time was specified in the contract, can occur only if the time was a "precisely calculable date", with a degree of scope allowed.[348]

In *LTA Construction Ltd v Minister of Public Works and Land Affairs*[349] the construction agreement read that the contractor qualified for final payment when the engineer guaranteed that the work was in order. Due to unforeseen additional work before such

[344] Van Huyssteen *et al Contract General Principles* 2020 392.
[345] Hutchison and Pretorius 2022 314.
[346] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 2 SA 565 (A).
[347] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 4 SA 310 (T) 346-8.
[348] Van Huyssteen *et al Contract General Principles* 2020 394.
[349] *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1995 1 SA 585 (C).

a certificate could be issued, the decision was taken that there had been no agreement regarding an “obtainable calculable” date.[350]

### *3.1.2 Mora ex persona*

The second type of *mora debitoris*, namely *mora ex persona*, is applicable where the contract does not require a specific date for performance thereof. The creditor will have to request performance from the debtor and, in that request, set out an exact time for performance. The reason for this is that a debtor can be late with his or her performance only if an exact time for performance has been fixed. Since a specific time was not specified in the contract itself, it ought to be specified by way of demand. The time set in the demand must be reasonable under the circumstances. The debtor is in *mora* if he does not perform on or before the date set out in the demand.[351]

Where time is not relevant, the creditor can give notice to the debtor to make it so, such that, if the obligation is not performed by a specific date, allowing a reasonable time in this regard, that the former will regard the contract as terminated.

It has frequently been argued that mercantile transactions are time sensitive, especially in a contract that requires prompt delivery or payment in order to allow commerce to run smoothly. Analogically, this also applies in the building industry. In *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd,*[352] focus was placed on an implied term, where the nature of this implied term – when time is of the essence – is that non-performance by the indicated date affords the other party the right to cancel.

The reasonableness of the time for performance specified in a demand ought to be determined based on the circumstances influencing the time of the performance of which the parties were aware when the agreement was signed, or which they could have, in that moment, reasonably foreseen.

The reasonable time is determined without taking into account the time that the debtor had to complete the task before the demand was issued. As held in *Ver Elst v Sabena*

[350] *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1995 1 SA 585 (C).
[351] Nel *Management for Engineers, Technologists and Scientists* 2000 163-164.
[352] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 2 SA 565 (A) 569.

*Belgian World Airlines*,[353] the time that had elapsed before the demand was issued must not be taken into account, but only the progress that was actually made before the demand is of importance.[354]

Should a debtor, without lawful excuse, fail to tender performance as lawfully required in the demand, his failure would amount to breach of contract in the form of delay.[355]

### *3.1.3 Remedies and consequences of mora*

#### 3.1.3.1 Damages

When looking at damages for *mora*, whether due to non-performance or delay in performance, one needs to keep in mind that no damages may be claimed unless breach of contract has been proved. It is incorrect to say that damages may be awarded for delay in itself. They may be awarded only when the delay gives rise to this form of breach and the creditor suffers loss.[356]

#### 3.1.3.2 Rescission

In case of rescission due to *mora*, the creditor who has for a sufficient reason cancelled the contract, qualifies to obtain damages for loss of its bargain, and the *prima facie* amount of damages will be understood as the difference between the value of what the creditor ought to have obtained under the agreement (for example a product or services) and the price it had agreed to pay. In a fluctuating market, this difference between value and price may vary from day to day, so a rule is required to fix the time when the difference must be calculated, and the rule is that the time of cancellation must be taken.[357]

Ever since the influential case of *Nel v Cloete,*[358] the position with respect to the expression “time is of the essence” has been clear. Time is of the essence when:

[353] *Ver Elst v Sabena Belgian World Airlines* 1983 3 SA 637 (A).
[354] Van Huyssteen *et al Contract General Principles* 2020 395-396.
[355] Van Huyssteen *et al Contract General Principles* 2020 396.
[356] Christie and Bradfield *Christie’s law of contract in South Africa* 2016 602.
[357] *Celliers v Papenfus and Rooth* 1904 TS 73 84.
[358] *Nel v Cloete* 1972 2 SA 150 (A) 159 169.

- the parties have unambiguously agreed (express *lex commissoria*), that when the debtor does not perform in time, the creditor will have the right to cancel the agreement;

- the parties have tacitly achieved such a contract (tacit *lex commissoria*);[359] or

- in the absence of the fore-mentioned, the creditor has made time of the essence by sending the debtor a notice of recission.[360]

3.1.3.3 Parties have expressly agreed (express *lex commissoria*)

In *Minister of Public Works and Land Affairs v Group Five Building Ltd*,[361] *mora* was described as a continuous phenomenon.

Should the debtor fail to perform on or before the time stipulated in the contract, the creditor may forthwith cancel the contract by giving the debtor notice to that effect. An offer by the debtor to perform at that later stage cannot deprive the creditor of his or her right of rescission.

A *lex commissoria* is not a resolutive condition on the fulfilment of which the contract is automatically terminated. The creditor is not obliged to exercise his or her right to cancel. The creditor has an election whether to cancel, or to declare the contract and insist on performance.[362]

Delayed performance does not in itself give reason for the right to rescind. The blameless party must prove that time is essential and that the party at fault is in *mora*, since a blameless party obtains a right to cancel after issuing a demand containing a *lex commissoria* and therein giving the guilty party a chance to perform.[363]

[359] Hutchison and Pretorius eds *The Law of Contract* 2022 318.
[360] *LAWSA* Contract at § 393.
[361] *Minister of Public Works and Land Affairs v Group Five Building Ltd* 1996 4 SA 280 (A) 289.
[362] Hutchison and Pretorius eds *The Law of Contract* 2022 318.
[363] *KNS Construction (Pty) Limited v Genesis on Fairmount and Another* (08/31859) [2009] ZAGPJHC 39 (21 August 2009) para 39.

#### 3.1.3.4 Tacit *lex commissoria*

Time can still be of essence even when the contracting parties have not agreed on an express rescission clause as part of their agreement.[364] Whether such a tacit term exists or not is a question of fact to be determined by a consideration of all the relevant and admissible evidence, with the intention of the parties being decisive.[365] The absence of a stipulation indicating a definite time for performance makes it very difficult to establish the contracting parties' intention as to timeous performance as a crucial requirement, such that a delay would grant the creditor a right of rescission.[366]

The right to cancel the agreement is reserved for those breaches that affect the root of the agreement.[367] This can only happen if the delay is out of the ordinary and if the promisor has given notice to perform on or before a stipulated date. This period must be reasonable under the circumstances, and the non-performance within the period given has been considered as repudiation by the promissor.[368]

### 3.2 Positive malperformance by a debtor

There are two types of positive malperformance, namely, defective performance and conduct contrary to a contractual prohibition.[369] It therefore may take one of two forms, depending on whether the duty in question is positive or negative.[370]

Where the responsibility is to fulfil a certain obligation, positive malperformance takes place if the debtor performs timeously, but in a wanting or defective manner.[371] Whether the performance provided is defective, depends mostly on whether it is in accordance with the terms of the contract. Terms of the agreement refer not only to

[364] De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg: Volume 1: Kontraktereg* 1992 165.
[365] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 2 SA 565 (A) 569.
[366] De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 1987 309.
[367] *B & P Foundry Engineers v Cilliers* 1950 1 SA 257 (O) 261.
[368] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 2 SA 565 (A).
[369] Van Huyssteen *et al Contract General Principles* 2020 401.
[370] Hutchison and Pretorius eds *The Law of Contract* 2022 326.
[371] Hutchison and Pretorius eds *The Law of Contract* 2022 326.

the consensual terms (express or tacit), but also to the terms implied by law (*naturalia*).[372]

In *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* the Court explained that "implied term" is often used to describe an unexpressed provision of the contract which the law provides for, irrespective of the actual intention of the parties.[373]

In an engineering or building contract, on the side of the contractor, it is assumed that he will perform the work in a proper and workmanlike manner, and that the material he supplies will be fit for the purpose for which it is to be used, and be of good quality.[374]

In *Kohler Flexible Packaging (Pinetown)(Pty) Ltd v Marianhill Mission Institute & Others*[375] the court held that:

> "Although the full terms of the consulting contract and the construction contract have not been pleaded, it is clear that in each case the alleged duty to design and or construct the buildings with due care, skill, and diligence arose from the contract, that the alleged failure to do so constituted a breach of contract and that the consequent damages allegedly suffered by the plaintiff are those that would place it in position it would have occupied if the contract had been properly performed."

The contractor must also perform in such a way as to conform to the applicable building regulations.[376]

If a party performs an act in contradiction with an express or a tacit prohibition in the agreement, he also commits positive malperformance. In the latter sense, for example, this will be the case where a contracting party who is entrusted with secret information passes the information on to a person not entitled to it. In an extended sense, a contracting party who violates a contractual prohibition also fulfils his duty defectively.

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[372] *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster en Staal Industriele Korporasie Bpk* 1987 2 SA 932 (A).
[373] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531.
[374] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 35.
[375] *Kohler Flexible Packaging (Pinetown)(Pty) Ltd v Marianhill Mission Institute & Others* 2000 1 SA 141 (D) 144.
[376] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 35-36.

Where a contracting party contravenes a contractual prohibition, the victim may have a choice between positive malperformance and prevention of performance.[377]

An example of an express prohibition in an agreement would be a restraint of trade provision, in which somebody's liberty to work in a certain profession, trade or business, is restricted.[378]

According to Hutchison and Pretorius,[379] such provisions are often found in the following contracts:

- contract of employment, where the employee promises not to compete with his or her employer after he or she has left the employer's service;
- sales of the goodwill of a business, where the seller agrees with the purchaser not to continue with a similar business in competition with the purchaser; and
- partnership agreements, where each of the partners undertakes not to compete with the partnership after leaving it.

In *Andritz Delkor (Pty) Ltd v Davis and Another,*[380] the business of the former was in the development of engineering solutions and services. The applicant produced a variety of such products which were subsequently distributed and sold worldwide. The distribution of these products happened in wholesale and retail to a number of engineering companies in South Africa and worldwide. The applicant also provided an after-market sale of replacement parts and servicing of appliances and parts.[381]

The first respondent, Grant Davis, was a market sales engineer, who worked for the applicant. He sold various products and aftermarket spares to the clients of the applicant during his employment. It was claimed that, whilst in the employment of the applicant, he established a relationship with customers and clients of the applicant. Davis also had access to confidential information belong to the applicant company. This information was stored both on his work computer and laptop. He further developed relationships with the company's suppliers.[382]

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[377] Van Huyssteen *et al Contract General Principles* 2020 402.
[378] Van Huyssteen et al *Contract General Principles* 2020 234.
[379] Hutchison and Pretorius eds *The Law of Contract* 2022 219.
[380] *Andritz Delkor (Pty) Ltd v Davis and Another* (J2345/15) [2015] ZALCJHB 427.
[381] *Andritz Delkor (Pty) Ltd v Davis and Another* (J2345/15) [2015] ZALCJHB 427 paras 8 and 9.
[382] *Andritz Delkor (Pty) Ltd v Davis and Another* (J2345/15) [2015] ZALCJHB 427 para 10.

While in the employment of the applicant, Davis agreed to a restraint of trade contract wherein the second respondent, namely F L Smith (Pty) Ltd, was specified as one of the competitors of the applicant.[383] In terms of the restraint agreement, the employee agreed not to compete with his employer after leaving the employer's services.[384] Later, Davis resigned from the applicant. One month after Davis's departure, the applicant found out that he had taken up employment with the second respondent, which was its direct competitor.[385]

In a subsequent investigation, it was established that before his departure, Davis had gained access to the applicant's server, and obtained some confidential information. Davis was found to be in breach of the restraint of trade agreement, and was further ordered to pay the applicant's costs.[386]

### *3.2.1 Requirements for positive malperformance*

Positive malperformance is present if, firstly, the debtor has performed and, secondly, the performance that has been made is defective.[387]

#### 3.2.1.1 Positive performance

In general, performance can only be achieved with the co-operation of the creditor. The debtor will have to tender performance and will only have discharged its obligation if the tender of performance has been accepted. If the debtor provides flawed performance and it is declined by the creditor, performance is not completed; there is merely an attempt at performance. There can only be positive malperformance if at least an attempt at performance has occurred.[388]

Positive malperformance as a form of breach is completed if performance that is flawed has been made. The creditor, after obtaining deficient performance, has no general responsibility to return it to the debtor for repairing the defects.[389]

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[383] *Andritz Delkor (Pty) Ltd v Davis and Another* (J2345/15) [2015] ZALCJHB 427 para 3.
[384] Hutchison and Pretorius eds *The Law of Contract* 2022 219.
[385] *Andritz Delkor (Pty) Ltd v Davis and Another* (J2345/15) [2015] ZALCJHB 427 para 11.
[386] *Andritz Delkor (Pty) Ltd v Davis and Another* (J2345/15) [2015] ZALCJHB 427 para 6.
[387] Van Huyssteen *et al Contract General Principles* 2020 402.
[388] Van Huyssteen *et al Contract General Principles* 2020 402.
[389] *Reid v Springs Motor Metal Works (Pty) Ltd* 1943 TPD 154.

In some cases, performance will not be completed before the creditor has actually given the debtor a reasonable chance to adjust the incomplete object or work.[390] In *Reid v Springs Motor Metal Works (Pty) Ltd,*[391] the creditor had a special responsibility to collaborate with the debtor in order for the debtor to perform properly. If the creditor did not collaborate, he became guilty of breach of contract in his capacity as creditor.[392]

In *Sebenza Construction BK v Nkosi*[393] the appellant was obliged to prove that he had performed all that was necessary to do in terms of the agreement. However, the appellant claimed that he could not finish the work, since he was blocked by the respondent from doing so. The appellant acknowledged that there was outstanding performance to the value of R10 000. In his pleadings, the respondent alleged that another contractor had to be hired to fix and finish the deficient work, however, during the trial, he had argued that the other (first) contractor was supposed to complete the outstanding work. This amounted to a contradiction in terms, and judgement was made in favour of the appellant. The respondent was ordered to pay the appellant an amount of R96 000, with interest.

A contract often provides that if breach of contract has happened, the debtor must rectify the defects within a specified time.[394] Also of importance are maintenance clauses in terms of which a debtor undertakes to maintain for a certain period the performance that has been rendered and rectify defects. Such provisions usually reduce the common-law remedies of the creditor.[395]

Prescription starts when the debt is due, not when it is claimed. For example, when it is specified in an engineering contract that specific rights and remedies will apply during the contract, including the maintenance period, prescription may only begin to run in respect of common-law rights and remedies from the end of the maintenance period.[396]

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[390] Van Huyssteen *et al Contract General Principles* 2020 403.
[391] *Reid v Springs Motor Metal Works (Pty) Ltd* 1943 TPD 154 158.
[392] Van Huyssteen *et al Contract General Principles* 2020 403.
[393] *Sebenza Construction BK v Nkosi* (184/2004) [2007] ZAGPHC 217 para 10.
[394] *Cohen and Another v Lench and Another* 2007 6 SA 132 (SCA).
[395] *Bellville Muncipality v J D Reitz & Geithner and Another* 1996 2 SA 729 (C) 734; *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 3 SA 340 (A).
[396] *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 3 SA 340 (A).

#### 3.2.1.2 Defective performance

The second requirement for positive malperformance is that the performance furnished must be either flawed or defective. Whether or not the performance furnished is flawed mostly depends on whether it is in agreement with the stipulations of the contract. If the performance indeed does not conform to the contract, it constitutes breach of contract, except due to act of God (*vis maior*) or inevitable accident (*casus fortuitus*).[397] When there is a duty to maintain, the risk of damage or destruction usually remains with the contractor, who may be called upon to reconstruct the work if it is destroyed by accident during the maintenance period. Here, the approval of an expert like an architect or an engineer is of extreme importance in establishing whether the performance is flawed.[398] It has been held that where such approval is given, the legal implication is to discharge the builder from liability for defects.[399]

According to the opinion of Van Huyssteen *et al*,[400] in the case of a professional contract, it is likely to be difficult to decide whether the performance conflicts with the terms of the agreement and is therefore legally defective. In extreme cases, one could fall back on the contractual criterion for "wrongfulness" and determine whether the conduct is unreasonable in terms of the principle of good faith (*boni mores*), and therefore amounts to breach of contract.

In *Colin v De Guisti*[401] the Court remarked that, where a builder who supplies the materials undertakes to build a building, he undertakes to do the building work properly, to use suitable materials, and to apply the necessary knowledge and skill to the work. The meaning of words like "properly", "suitable" and "necessary" will often require careful interpretation, and even then, satisfactory solutions will not always be achieved. Analagous to the professional responsibilities of a qualified engineer, in *Bouwer v Harding,*[402] the Court decided that an attorney had failed in his duty to advise his client.

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[397] *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 3 SA 579 (A) 584.
[398] Loots *Construction Law and Related Issues* 1995 427.
[399] *Bellville Municipality v J D Reitz & Geithner and Another* 1996 2 SA 729 (C) 734.
[400] Van Huyssteen *et al Contract General Principles* 2020 343.
[401] *Colin v De Guisti* 1975 4 SA 223 (NC) 225.
[402] *Bouwer v Harding* 1997 4 SA 1023 (SE).

Fault is not a general condition for breach of contract, and this applies with equal force to positive malperformance.[403] However, there is an exception in the case of contracts of mandate. The obligation of a mandate is to carry out his task in good faith, and with due care and diligence.[404]

Fault also plays a role within the context of engineering contracts. The standard of care required by the law in the rendering of professional services was set out in *Randaree and others NNO v W H Dixon and Associates.*[405] In this case, the significant issue pertained to whether the consulting engineer and the firm of architects had executed their function with the necessary degree of care and competence, or whether they were in breach of their duties to provide qualified professional services. The relationship between the litigants was contractual, and the enquiry as to whether the engineer and the architects were in breach of their duties rested on whether they had acted negligently or not.[406]

When an engineer accepts the job to design a structure for reward, he guarantees that the different parts of the project will be correctly designed, with the necessary skill and care required for those parts of the work, and irrespective of whether the skill demanded is solely an engineering skill or not. He guarantees the professional competence of those to whom he elects to delegate his function. However, the engineer will have recourse against his own consultants in such case that there is a design failure.[407]

The case of *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd*[408] considered an engineer and client relationship where professional negligence led to economic loss. The investigation of the ground structure before erecting a glass factory had proved to be insufficient, where the outcome was that the levels inside the factory were faulty, and extended restoration work became unavoidable. Initially, the engineering company was in a direct contractual relationship with the client, but later, it became a subcontractor. The Supreme Court of Appeal decided that the client had

[403] *Gengan v Pathur* 1977 1 SA 826 (D) 830.
[404] *Randaree and Others NNO v W H Dixon and Associates* 1983 2 SA 1 (A) 3.
[405] *Randaree and others NNO v W H Dixon and Associates* 1983 2 SA 1 (A) 3.
[406] Loots *Construction Law and Related Issues* 1995 351.
[407] Loots *Construction Law and Related Issues* 1995 545.
[408] *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 1 SA 475 (A).

a contractual remedy, and no concurrent delictual action. A main consideration was that this matter did not deal with an infringement of a right to property, or of a person. It only dealt with the infringement of a contractual responsibility to execute well-defined professional work with due diligence. There was, therefore, no independent responsibility for the purposes of delictual liability. There is general consensus in the literature that this judgement means that solely a contractual remedy is available if negligent performance of a contractual responsibility leads to pure economic loss (as opposed to physical damage or personal injury), especially in the relationship between a client and a professional person.[409] It may, however, be mentioned that in *Pinshaw v Nexus Securities (Pty) Ltd*[410] the Court held that *Lillicrap* did not apply to quasi-professional contracts, such as where financial service providers upheld themselves as experts, and consequently, that a delictual action for pure economic loss may be concurrent with a contractual action in such instances. Furthermore, the courts confirm that an independent delictual claim for pure economic loss may indeed be apposite where it is not solely based on contractual breach.[411]

In *Moneypenny v Hartland,*[412] an engineer was held to be negligent for not examining the nature of the soil in which to place a foundation for a bridge. This led to grossly underestimating the cost of construction.[413] Moneypenny roughly calculated the cost of the project at £1,700, but at the end of the contract it exceeded this amount by about £3,300. The employer refused to pay Moneypenny's fees, so Moneypenny took him to court. The court ruled that Moneypenny had been negligent in using the site inspection of the previous engineer. It was decided that having negligently given a low estimate, and thus having caused his employer to award the bridge building job to Moneypenny, which he would not otherwise have done, the engineer was not entitled to remuneration.[414]

A duty of care is derived from the terms implied by law, but frequently the parties will expressly or tacitly agree to such a duty as falling under the mandate.[415] An example of such a duty to mandate in engineering is demonstrated in the matter of *Van*

[409] Midgley 1990 *SALJ* 621; Van Aswegen 1992 *THRHR* 273-274.
[410] *Pinshaw v Nexus Securities (Pty) Ltd* 2002 2 SA 510 (C) 518.
[411] See *Holtzhauzen v ABSA Bank Ltd* 2008 5 SA 630 (SCA) 633.
[412] *Moneypenny v Hartland* [1826] 1 C & P 352.
[413] Loots *Construction Law and Related Issues* 1995 295.
[414] *Architects Journal* 26 June 2003 paras 3 and 4.
[415] Van Huyssteen *et al Contract General Principles* 2020 405.

*Immelzeel & Pohl and Another v Samancor Ltd.*[416] In the *Immelzeel* case, a contractor had signed a Civil Professional Services Agreement with the employer for the installation of a water pipeline and pump. The employer also signed a contract with the engineer to provide all professional services needed for supervising the installation of the water pipeline and pump as specified in the construction agreement. Subsequently, certain deficiencies in the building of the pipeline led to the employer suing both the contractor for damages for breach of the Civil Professional Services Contract, and the engineer for breach of the professional services agreement. A few months after the pipeline was certified by the engineer as finished, the pipeline started to leak, and thereafter, leaks were frequent. The leaks in the pipeline resulted from corrosion, which was the result of a low-quality coating and lining of the pipes, where the system installed to prevent erosion was under the circumstances non-functional. Parts of the pipeline were not correctly prepared, as the quality of the coating in these areas was well below the specification requirements. The Court decided that it was obvious from the evidence provided at the trial that the contractor was responsible for: (a) the acquisition and installation of the pipeline with low-quality coating and lining; and (b) the installation of the initially ineffective protection system.

In the *Immelzeel*[417] *case,* the issue of joinder and non-joinder of the construction company was not discussed. However, considering the nature of the relationship between the plaintiffs and the defendants the non-joinder should not stand in the way of determining whether or not the defendants were liable.[418]

In this case, certain defects in the construction of the pipeline resulted in the employer suing both the contractor for damages for breach of the construction contract, and the engineer for breach of the professional services contract.[419]

The circumstances of the *Immelzeel* case clearly demonstrate that it is crucial for an engineer to appropriately oversee and investigate the works with appropriate skill and care.[420] The Court ruled that the contractor was in charge of the requisition and

[416] *Van Immelzeel & Pohl and Another v Samancor Ltd* 2001 2 SA 90 (SCA).
[417] *Van Immelzeel & Pohl and Another v Samancor Ltd* 2001 2 SA 90 (SCA).
[418] *Labuschagne NO and Others v Theron and Another* (14523/09) [2013] ZAGPPHC para 38.
[419] *Labuschagne NO and Others v Theron and Another* (14523/09) [2013] ZAGPPHC para 37.
[420] *Labuschagne NO and Others v Theron and Another* (14523/09) [2013] ZAGPPHC para 39.

installation of the pipeline with the low-quality coating and lining as well as for the installation of the initially defective protection system.[421]

The engineer was thus found to have rendered defective professional services, in contravention of the applicable contract. In this case, both the contractor and the engineer were found responsible.

The facts in *Labuschagne NO and Others v Theron and Another*[422] were similar to the *Immelzeel* case and the engineer was also found liable. The engineer had provided a payment certificate and completion certificate pertaining to sub-standard works and materials. Due to this incorrect certificate, the contractor provided incorrect materials to the plaintiffs, and in this way proved responsible for the plaintiff paying for shoddy workmanship and materials that were of no use. In turn, this required additional repair work on a project at the cost of the plaintiff.[423] In this case, the defendants, namely the contractor and engineer, were jointly and severally held liable to pay the plaintiff's damages arising from their negligence.[424]

If an engineer, as agent for the employer, negligently certifies incomplete or defective work, and on this basis, the employer pays the contractor, the employer may recoup the damages suffered by him from the engineer. The engineer is also guilty of fraud, provided the necessary requirements are met.[425]

The standard clause in building or engineering contracts that makes the architect's or engineer's final certificate conclusive evidence of the sufficiency and value of the works, is nevertheless not against public policy. Nor is it against public policy for the contractor to enforce such a certificate even when incorrect, as the owner or employer would normally have a remedy against any architect or engineer whose duty it was to protect its interest.[426]

In the unreported case of *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects*[427] the alleged failure by the first defendant, Marcus A Smit Architects, to

[421] *Labuschagne NO and Others v Theron and Another* (14523/09) [2013] ZAGPPHC para 37.3
[422] *Labuschagne NO and Others v Theron and Another* (14523/09) [2013] ZAGPPHC 56.
[423] *Labuschagne NO and Others v Theron and Another* (14523/09) [2013] ZAGPPHC 56 para 43.
[424] *Labuschagne NO and Others v Theron and Another* (14523/09) [2013] ZAGPPHC para 44.
[425] *Milne v Padday* 1914 EDL 277.
[426] *Ocean Diners (Pty) Ltd v Golden Hill Construction* CC 1993 3 SA 331 (A) 342-343.
[427] Unreported case number 26612/2009 Western Cape Division, Cape Town, 29 May 2015 paras 2

properly supervise the works performed by the second defendant, Pierre Rossouw Homes Contractors, was at issue. A contract to carry out these works had been originally concluded in December 2003. These works included a main house, with outbuildings, a cellar, a manager's house, and a dam cottage.

The contract set out in great detail the duties of the principal agent. The first defendant was subsequently appointed as principal agent.[428] The plaintiff's witness described the serious defects that the building had suffered as a consequence of shoddy workmanship. The fundamental problem experienced by the plaintiffs was an on-going ingress of water into the structures constructed by the second defendant and the consequent damage to the structure and its finishes; for example, disintegrating brickwork, cracking, and widespread efflorescence.[429] It was further common cause between the parties that the construction works were not carried out in a proper and workmanlike manner, and that as a consequence thereof, the building suffered from material defects that would require rectification and remedial work.[430]

Given the agreement between the parties, the remaining matter to be discussed was as to whether the first defendant, as principal agent and supervisor of the works, could be held partially liable for the damage incurred by the plaintiff in connection with the serious defects in the building.[431] This matter was decided based on what reasonable supervision would have entailed, which could have prevented the defects to the works and, furthermore, whether the first defendant did indeed properly supervise the process of erecting the works.[432] The Court described the appropriate level of supervision in the following terms:[433]

> "In my view, however, any dispute on this issue can be resolved if proper consideration is given to what is contemplated by the term *"supervise".* It is

and 3.

[428] *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects* unreported case number 26612/2009 Western Cape Division, Cape Town, delivered on 29 May 2015 para 5.

[429] *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects* unreported case number 26612/2009 Western Cape Division, Cape Town, delivered on 29 May 2015 para 30.

[430] *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects* unreported case number 26612/2009 Western Cape Division, Cape Town, delivered on 29 May 2015 para 55.

[431] *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects* unreported case number 26612/2009 Western Cape Division, Cape Town, delivered on 29 May 2015 para 87.

[432] *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects* unreported case number 26612/2009 Western Cape Division, Cape Town, delivered on 29 May 2015 para 106.

[433] *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects* unreported case number 26612/2009 Western Cape Division, Cape Town, delivered on 29 May 2015 para 49.

> clearly not intended that the principal agent should supervise the works in the sense of monitoring and directing them on an ongoing or day-to-day basis. What is contemplated is that the principal agent should inspect the works with sufficient frequency and with sufficient care and diligence to enable him to ascertain whether they are being carried out in accordance with the requirements of the contract and its specifications and then, give the contractor such instructions as are necessary to ensure that the works are properly carried out or otherwise rectified."

Given the overwhelming evidence presented in this case, the judge ruled that the nature and extent of the poor workmanship was such that a principal agent exercising reasonable skill, diligence, and care would have taken note and proceeded with steps to have the defects remedied in the course of proper supervision of the works.[434] Therefore, the first defendant (architect) was found not to have satisfied his duties, and was found liable together with the second defendant (contractor).[435]

### *3.2.2 Remedies: positive malperformance by a debtor*

The remedies accessible to the creditor when positive malperformance occurs are aimed either at fulfilment or rescission of the contract.[436]

#### 3.2.2.1 Remedies directed at fulfilment of the contract

According to Hutchison and Pretorius,[437]If the creditor abides by the contract, either because the breach is not sufficiently serious to merit rescission, or simply because he or she prefers not to rescind, the following choice of remedies is available:

- the creditor may accept the defective or incomplete performance as partial performance of the contractual obligation. He can then request compensation to be caluculated as the difference of the value between proper performance and the performance actually rendered, or
- the creditor may discard the broken performance and request either specific

[434] *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects* unreported case number 26612/2009 Western Cape Division, Cape Town, delivered on 29 May 2015 para 63.
[435] *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects* unreported case number 26612/2009 Western Cape Division, Cape Town, delivered on 29 May 2015 para 125.
[436] Hutchison and Pretorius eds *The Law of Contract* 2022 327.
[437] Hutchison and Pretorius eds *The Law of Contract* 2022 329.

performance or damages instead of performance.

(i) The *exceptio non adimpleti contractus*

In *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd,*[438] the Court authoritatively stated the role of the *exceptio non adimpleti contractus* in securing proper performance. In the case of a reciprocal contract, the creditor or innocent party may withhold his or her own performance until the other party has made or tendered complete and perfect performance - a potent weapon to ensure that the contract is specifically performed; if sued for counter-performance, the innocent party may resist the claim with the *exceptio non adimpleti contractus*.

A defendant may rely on the *exceptio non adimpleti contractus* not only when the other party has not performed at all (*mora debitoris*), but also in instances where the other party did not perform properly, or in full (positive malperformance). The faulty or unfinished performance need not be so catastrophic as to give reason for a cancellation of the agreement; the innocent party is allowed to retain his or her own performance and to raise the *exceptio,* even if the deficiency or flaw in the performance is rather inconsequential.[439]

Rejection of the faulty performance should not be confused with rescission of the agreement. When the performance is discarded for being defective, the agreement still exists with the responsibility of the creditor to counter-perform, subject to the right to retain performance in reciprocal contracts until proper performance by the debtor has been made. Some academics are of the opinion that the creditor may reject the debtor's performance only if the flaw is sufficiently serious to justify cancellation.[440] However, the right to reject a defective or incomplete performance is not in fact contingent on the gravity of the deficiency or the extent of the flaw, as precedent bears out.[441]

In *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd*,[442] where engineering work was carried out incorrectly, the one party (original party) was required to

[438] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A) 412.
[439] Hutchison and Pretorius eds *The Law of Contract* 2022 350.
[440] De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg and Handelsreg* 1992 Vol 1 17.
[441] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A) 432 436-437.
[442] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A).

construct some moulds according to rigorous specifications. The moulds were to be used in the production activities of the other party (affected party). After dispatch of the moulds, it was noted by the affected party that these moulds did not conform to the specifications. Subsequently, as a result of the pre-trial, it was found that some of the moulds were actually consistent with the specifications.[443] The affected party then had the moulds changed by a third party. This made it out-of-the-question for the original party to repair the flaw in performance. The original party's subsequent request for payment was met by the *exceptio non adimpleti contractus*. The affected party had, beyond doubt, received the flawed performance, and started using it, but without paying for the work done. The Court decided that, in such circumstances, the party in breach was entitled to a reduced contract price, where the expense of fixing the flaws constituted a reasonable reduction under the circumstances.

The principle of reciprocity:

In *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd*[444] Jansen JA remarked that a contracting party who did not cancel the agreement had to give back the faulty performance received by him in order to allow the debtor to fix the flaws. It is thus recommended that, where a party relies on the defence of reciprocity, and requests full and proper performance, he has to allow the other contracting party to perform or to repair his incorrect performance, where performance by the other party is still feasible under the circumstances. In other words, the defendant can only hold back his performance until the plaintiff has delivered the appropriate performance.

The motivation for this is that a defendant, who maintains the agreement and makes use of the defence of reciprocity, essentially requests proper performance, and therefore only has the right to deny performance insofar as appropriate performance is lacking. In *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk,*[445] Jansen JA refers to in this regard to *Theunissen v Burns*,[446] which has been interpreted to indicate that a party who gave flawed performance can only insist on a chance to rectify the performance if the agreement provided such a chance. It is proposed that

[443] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A).
[444] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A) 412.
[445] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A) 412.
[446] *Theunissen v Burns* (1904) 14 CTR 606.

a party who relies on the defence of reciprocity in order to receive proper performance will have to give the other party another chance to rectify the flawed performance.[447]

Relaxation

When the agreement remains intact, for instance, if the innocent contracting party has accepted and begun to use the flawed performance, the Appellate Division has decided that courts retain discretion to grant a reduced agreement price, depending on the type of the flaw and the cost of repair, replacement, or substitute performance.[448]

It is not immediately obvious what a claim for a "reduced contract price" means, because the parties will not have concurred on such a price. It would seem that, if a plaintiff claims performance from the defendant without having performed in full, the defence of reciprocity may be relaxed, provided the plaintiff compensates the defendant for the shortcomings in his performance (apart from also fulfilling certain other requirements).[449]

If the shortcomings in the plaintiff's malperformance can be rectified, a court may, according to *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd*,[450] grant the plaintiff the agreement price if the cost of lifting the performance up to the adequate level is subtracted from the agreement price. The plaintiff carries the onus of proving what it will cost to bring his unfinished or flawed performance up to the adequate level.[451] The amount by which the agreed performance must be reduced will normally be the amount that it will cost to repair the performance, but the circumstances of a case under discussion may allow the application of a different standard.[452] Such a claim is referred to as a claim for a reduced agreement price. The claim is not due to enrichment, but applies to the contract itself.[453] Consequently, cancellation of the contract will not include a claim for a reduced contract price.[454]

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[447] Van Huyssteen *et al Contract General Principles* 2020 440.
[448] Hutchison and Pretorius eds *The Law of Contract* 2022 342.
[449] *Scholtz v Thompson* 1996 2 SA 409 (C) 417.
[450] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A).
[451] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A) 435.
[452] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A) 423.
[453] *Hauman v Nortje* 1914 AD 293 298 301; *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A) 422-423.
[454] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 (A) 436B-C.

Where the agreement has been legally rescinded, the innocent contracting party who has received some value from the cancelled contract then becomes responsible to the party in breach due to unjustified enrichment.[455]

(ii) Specific performance and damages as a surrogate for performance

A request for specific performance[456] is a claim that the contracting party performs exactly as he undertook to do. Such a claim is due to the contract, and not a breach thereof. Therefore, prior demand is not needed to complete the cause of action of a contracting party who requests specific performance.

A request for specified performance can take any of the three forms listed below:

- a request for the disbursement of a monetary amount;
- a request for the performance of some positive action except for the disbursement of a monetary amount;

a request to enforce a negative responsibility, that is, that the other contracting party should refrain from a certain action.[457] request for the disbursement of a A request for specific enforcement of a negative contractual responsibility takes the form of an interdict and is most frequently found in cases that involve the imposition of agreements in restraint of trade.[458] The courts have come up with specific guidelines to regulate the imposition of such restraints, given the particular considerations of public policy raised by such contract.[459]

According to Van Huyssteen *et al,*[460]A claim for specific performance is only enforceable if the time fixed for performance has arrived or, if no time has been fixed, after the lapse of a reasonable time. However, it should be possible for a court in case of an as yet unenforceable claim to immediately issue an order for specific performance on condition that it may only be executed after a certain time.

[455] Hutchison and Pretorius eds *The Law of Contract* 2022 351.
[456] Du Plessis 1988 *THRHR* 349.
[457] Hutchison and Pretorius eds *The Law of Contract* 2022 354.
[458] *Andritz Delkor (Pty) Ltd v Davis and Another* (J2345/15) [2015] ZALCJHB 427.
[459] Hutchison and Pretorius eds *The Law of Contract* 2022 355.
[460] Van Huyssteen *et al Contract General Principles* 2016 368.

The facts of *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*[461] are as follows. One of the contracting parties leased some land on which he erected certain buildings. The agreement had specified that these buildings had to be demolished by the lessee at the end of the lease. Toward the end of the leasing period, the lessor sold the ground to a third party. The lessee left the land without demolishing the buildings. The lessor lost its claim for the value of the performance, that is, the cost of demolishing the building on the part of the new owner. The evidence before the Court indicated that the purchase price obtained by the original owner was not negatively influenced by the buildings remaining on the ground. Thus, it was decided that the owner was not negatively affected in any way due to the breach of the agreement, and its request therefore did not succeed.[462]

The damages that are granted to finish the performance are known as surrogate replacement damages, to distinguish them from consequential damages. Consequential damages are damages granted due to secondary losses arising beyond the confines of the original contract itself. Surrogate damages are determined by the same foundations that are applicable to the estimation of damages in general; the creditor will have to demonstrate that he or she has been subjected to a loss by not obtaining correct performance, for our law does not acknowledge a claim for the objective value of the performance per se.[463]

Furthermore, in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd,*[464] the majority of the Court was of the opinion that a request for damages as a replacement to performance does not exist as an independent remedy in South African law. Where specific performance is not allowed, the innocent party is restricted to a normal claim for contractual damages.

In *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd,*[465] the Appellate Division took the position that damages as a surrogate for

[461] *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A).
[462] Hutchison and Pretorius eds *The Law of Contract* 2022 348.
[463] *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A).
[464] *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*, 1981 4 SA 1 (A).
[465] *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A).

performance do not constitute an independent remedy unrelated from normal damages. This ruling has, however, been criticised.[466] In a later ruling, the Supreme Court of Appeal in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd,*[467] discussed these criticisms, and conveyed the opinion that a reconsideration of its former ruling was called for. In other words, a claim for damages as surrogate for performance must be considered a separate remedy, because it is dependent on different causes or actions, which can be separated. In *Allen v Scheibert*,[468] a claim for damages as a replacement for performance was further acknowledged.

It has been said that our law complies with a subjective approach regarding the question of damages.[469] The objection raised by Hoexter JA in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*[470] refers, where it was upheld that, in establishing whether damage has taken place, the personal circumstances of the plaintiff must be considered. Thus, where the lessee of a house breaches the lease by damaging the house and it transpires that the lessor intended to demolish the house on the termination of the lease, the lessor cannot recover damages, according to a subjective approach, although the market value of the dwellings has effectively been reduced by the conduct of the lessee.[471]

In *Allen v Scheibert*[472] it was stated:

> "It seems to me that the nature of appellant's claim must be considered within the wider context of the principles underlying the assessment of damages in our law. It is clear from the judgment of Jansen JA in the *ISEP* case that the concept of damages in this context should not be regarded as a separate or distinct kind of damages. He refers inter alia with approval to a statement in De Wet and Van Wyk *Kontraktereg* 4th edition 2000,[473] which is to the effect that the fact that damages are claimed as a surrogate for specific performance does

[466] De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 1992 Vol 1 212; Reinecke 1990 *TSA*R 773; 7 *LAWSA* 'Damages' para 45.
[467] *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA) 186.
[468] *Allen v Scheibert* WCC unreported case 14136/2010.
[469] *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A).
[470] *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A).
[471] Van Huyssteen *et al Contract General Principles* 2020 465.
[472] *Allen v Scheibert* (14136/2010) [2015] ZAWCHC 36 paras 36 and 40.
[473] De Wet and Van Wyk *Kontraktereg* 4 2000.

> not alter the basic principles that apply to the calculation and award of contractual damages."[474]

*Basson and Others v Hanna*[475] was a case involving a dispute about the interest rate applicable to the sale of an interest in a close corporation, which was further connected to a building contract. The first appellant, Basson, was the only member of a closed corporation owning fixed property. In 2002 Basson concluded an oral contract with the respondent Hanna and the second appellant Dreyer, according to which Basson would develop the property by erecting three residential units for occupation by each of them. In return, Hanna and Dreyer would each acquire one third of a member's interest in the close corporation, the purchase price for which would be paid in instalments over 20 years. In addition, Hanna would also pay one third of the monthly costs and operating expenses. In 2007, the relationship between Hanna and Basson broke down, due to which Basson repudiated the contract by considering it null and void because it did not stipulate whether the interest to be paid by Hanna was fixed or fluctuating. Hanna requested an order against Basson for specific performance of the agreement in the High Court, that is, for delivery of one third of a member's interest in the close corporation against disbursement of the outstanding balance.[476]

During the proceedings, Basson sold one third of his member's interest in the close corporation to third parties. Hanna adjusted his plea to request, in the alternative, damages as surrogate of specific performance. Basson maintained that a request for damages as replacement for specific performance was not appropriate in law. The High Court, per Cilliers AJ, upheld Hanna's claim for damages as replacement for specified performance, which resulted in an appeal to the SCA. The appeal was dismissed with costs. Zondi JA held[477] that the contracting parties' failure to agree on the interest rate at which the amount due under the contract was to be determined did not make the contract invalid. If no rate had been settled on, whether expressly or

[474] *Allen v Scheibert* (14136/2010) [2015] ZAWCHC 36 para 36.
[475] *Basson and Others v Hanna* [2017] 1 All SA 669 (SCA).
[476] *Hanna v Basson and Others* (15003/08) [2015] ZAGPJHC 343; [2016] 1 All SA 201 (GJ) paras 1 and 2.
[477] *Basson and Others v Hanna* [2017] 1 All SA 669 (SCA) para 16.

implied, and the rate was not subject to any other law, the Court ruled that the interest should be regulated in terms of the Prescribed Rate of Interest Act.[478]

Previously, the principle that the contracting party who *prima facie* qualified for specific performance would be able to claim, in the alternative, damages as surrogate for specific performance had been consistently adhered to by the courts, until the majority ruling in *ISEP Structural Engineering & Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd.*[479] However, according to the Court in *Basson*, the *ISEP* case was distinct and thus distinguishable from the current one.[480]

In this regard, the Court observed:[481]

> "*ISEP* is distinguishable from the facts of the present matter. There, the Court dealt with a lease and the case concerned the obligation of reinstatement under a lease. What was said there is no more than a ratio in regard to the limited class of contracts of reinstatement under a lease and does not constitute a ratio of general application in the law of contract."

Hanna had been ready to fulfil his own responsibility under the contract, and thus had a right to request either the literal performance or monetary equivalent of the performance from Basson. Hanna's request for damages, insofar as he sought the monetary equivalent of the performance, was similar to a claim for the replacement value of lost property.[482]

The Court further noted that a creditor's (Hanna's) right to request performance from the debtor (Basson) should not be at the debtor's mercy. The exercise of that right should not depend on what the debtor chooses to do with the asset to which the creditor's right is related. To uphold that a claim for damages as surrogate for specific performance is not recognised in law, would dispossess the creditor of the right, where he has chosen to enforce the agreement, to be placed as much as feasible in the position that he would have been in were specific performance to have been

[478] Prescribed Rate of Interest Act 55 of 1975.
[479] *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* [1981] 4 All SA 455 (A).
[480] Matlala *De Rebus* https://www.derebus.org.za/the-law-reports-june-2017 7.
[481] *Basson and Others v Hanna* [2017] 1 All SA 669 (SCA) para 37.
[482] Matlala *De Rebus.* See https://www.derebus.org.za/the-law-reports-june-2017 7.

delivered.[483] Therefore, in this case, the respondent had a right to the relief he sought.[484]

*ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd*[485] does not provide for any exceptions to the premise that, in the law of contract, there are only two alternative remedies for breach of contract available to the injured contracting party, namely: specific performance or damages for breach upon cancellation of the contract. The *Basson* case illustrates that such a foundation cannot be sustained; at least not without qualification. Consequently, the law has been extended by *Basson* to make provision for claiming damages as replacement for specific performance in cases where specific performance has been made impossible.[486]

In the past, the courts were hesitant to grant specific performance of responsibilities in terms of mandate and contracts for services (*locatio conductio operis)*; for example, if a builder has undertaken modifications to a house, or where a lessor is bound to fix the leased property.[487] However, due to the emphasis that our law places on a party's right to specific performance, the matter has been fundamentally changed.[488]

3.2.2.3 Remedies aimed at cancellation of the contract

(i) Cancellation due to positive malperformance

A contracting party may resile from the contract due to positive malperformance, where the contract contains an express or tacit term.[489] If there is no such rescission clause (*lex commissoria*) he can only cancel if the breach of contract is serious.[490] For

[483] *Basson and Others v Hanna* [2017] 1 All SA 669 (SCA) 41.
[484] Matlala *De Rebus.* See https://www.derebus.org.za/the-law-reports-june-2017 7.
[485] *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* [1981] 4 All SA 455 (A).
[486] *Hanna v Basson and Others* [2017] 1 All SA 669 (SCA) para 44.
[487] *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 1 SA 246 (W).
[488] *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd*; *LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others* 1984 3 SA 861 (W) 880-881.
[489] *Labuschagne NO and Others v Theron and Another* (14523/09) [2013] ZAGPPHC para 27.
[490] *Breytenbach v Van Wyk* 1923 AD 541 549.

positive malperformance, a right to cancel cannot be acquired by a notice of intent to cancel.[491]

The case of *Lawson v Schmidhauser Electrical CC*[492] initially appeared for purposes of separation only at the Cape High Court in 2010 and continued in 2012 for judgement at the same court. In this case, the plaintiff alleged a number of breaches committed by the defendant in fulfilling its responsibilities in terms of the contract. The breaches can be split into three types. The first part dealt with the defendant ordering more parts or components than were needed to finish the work. The plaintiff claimed that in addition he ended up paying an additional sum to the suppliers of certain components for finding deficiencies in the system after its flawed installation by the defendant. The defendant was, therefore, liable for the payment of the amount so incurred. As far as the second part was concerned, the defendant invoiced the plaintiff for time in surplus of that reasonably needed by the defendant's employees in order to have done the work. The plaintiff's claim due to overreaching in respect of time was dismissed because the plaintiff had failed to prove the extent of the alleged overreach.[493]

In the third claim, the defendant did not perform all work in a correct, workmanlike way and using components that did not have detectable faults.

In the *Lawson* case, the evidence also demonstrated that the defendant had not assigned members of staff qualified to the level of an artisan for delivering on its contractual obligations. The relevant employees, who charged fees at the same level as artisans, were actually not artisans but only possessed the qualification of domestic electrical installer and electrical construction operators (elconop) at levels 3.2 and 1. This meant that they were electricians below the level of artisans, which, according to the hierarchical scale of the electrical industry in South Africa, affords them the mere designation of semi-skilled.[494] The Court awarded only the overreach in labour costs between the semi-skilled and fully qualified artisans.[495]

[491] Van Huyssteen *et al Contract General Principles* 2020 407.
[492] *Lawson v Schmidhauser Electrical CC* (7596/2007) [2010] ZAWCHC 214; [2011] 2 All SA 565 (WCC) para 5.
[493] *Lawson v Schmidhauser Electrical CC* (7596/2007) [2012] ZAWCHC 146 para 26.
[494] *Lawson v Schmidhauser Electrical CC* (7596/2007) [2012] ZAWCHC 146 para 34.
[495] *Lawson v Schmidhauser Electrical CC* (7596/2007) [2012] ZAWCHC 146 para 27.

This case will now be linked to the following aspects with respect to cancellation.

The test for seriousness of the breach justifying rescission has been set out in a number of different ways. For example, that the breach must affect the root of the agreement, must affect a vital part of the agreement, must link to a material or essential term of the agreement, or there must have been significant non-performance.[496] Moreover, it will not be reasonable to expect the creditor to keep the flawed performance, and be satisfied with damages to compensate for the malperformance.[497]

The competing interests of the contracting party in breach of the contract and the wronged contracting party must be balanced and judged equally. The most satisfactory criterion is where the breach of contract is so catastrophic that it is fair to allow the innocent party to rescind and to be compensated for all the consequences of the agreement.[498] In the last instance, the question as to whether breach of contract justifies rescission proves itself to be a matter of judicial discretion.[499]

A creditor who has the right to rescind may rescind immediately, without giving the debtor a chance to repair his malperformance.[500] If the creditor does not rescind the agreement, but requests damages due to breach of contract, the debtor may not insist on delivering proper performance in lieu of paying damages.[501]

Divisible contract

If only a particular term of an agreement is breached, one does not always have to cancel the whole contract. One should only consider whether the contract is divisible or indivisible. If it is divisible, the breach may justify the cancellation of only the part affected, as in *Vorster Bros v Louw*,[502] where delivery of a seriously defective engine did not justify cancellation in respect of the boiler and mill to be supplied and erected with the engine. By way of contrast, in *Collen v Rietfontein Engineering Works*,[503] a

[496] *Lawson v Schmidhauser Electrical CC* (7596/2007) [2012] ZAWCHC 146 para 7-47 (there were altogether eight claims).
[497] *Lawson v Schmidhauser Electrical CC* (7596/2007) [2012] ZAWCHC 146 para 7.
[498] *Lawson v Schmidhauser Electrical CC* (7596/2007) [2012] ZAWCHC 146 para 5.
[499] *Spies v Lombard* 1950 3 SA 469 (A).
[500] *Lawson v Schmidhauser Electrical CC* (7596/2007) [2012] ZAWCHC 146 para 5.
[501] *Ariefdien v Soeker* 1882 2 SA 570 (C).
[502] *Vorster Bros v Louw* 1910 TPD 1099.
[503] *Collen v Rietfontein Engineering Works*, [1948] 1 All SA 414, 1948 1 SA 413 (A).

contract to supply a pump and engine was held to be indivisible, such that failure to supply a satisfactory pump justified the cancellation of the whole contract. Each matter should be decided upon its own merits.[504]

(ii) Loss of the right to cancel: Election

An election to uphold the contract may be exercised either expressly or tacitly; for example, if a contracting party who knows that she is entitled to resile from a contract nevertheless utilises the defective performance.[505] Thus, continuing to use the defective performance might create the impression that the party has accepted the defective performance, when in fact she did not intend to accept it in finality.[506]

(iii) *Restitutio in integrum* (reciprocal restitution)

Cancellation does not only extinguish an obligation, but it also creates a new obligation, namely the obligation on both parties to reinstate whatever performance has been obtained by the party (restitution).[507] According to Hutchison and Pretorius[508] restitution is a contractual remedy by itself, and not an enrichment claim.[509] According to *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd,*[510] interest on money paid starts at the date of payment.

It is also possible for the innocent party to terminate the agreement where restitution has become partly impossible due to his or her fault, but where redress remains substantially possible, and where the difference can be compensated by the payment of money as a replacement. Where the value obtained comprises services, the party rescinding the contract must provide restitution of the monetary value of such services, as it is not possible to restore the services themselves.[511]

The scope of this principle as applied to a *locatio conductio operis* was debated in *Hauman v Nortje.*[512] It was held that a contracting party who did not finish his work

[504] Christie and Bradfield *Christie's law of contract in South Africa* 2016 610.
[505] *BK Tooling (Pty) Ltd v Scope Precision Engineering (Pty) Ltd* 1979 1 SA 391 A.
[506] Van Huyssteen *et al Contract General Principles* 2020 449.
[507] Hutchison and Pretorius eds *The Law of Contract* 2022 360.
[508] Hutchison and Pretorius eds *The Law of Contract* 2022 360.
[509] *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 6 SA 264 (Ck).
[510] *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22.
[511] *Sackstein NO v Proudfoot SA (Pty) Ltd* 2006 6 SA 358 (SCA).
[512] *Hauman v Nortje* 1914 AD 293.

according to the agreement would have the right to be reimbursed by the owner who had benefited from his labour and materials, if there was no evidence that he had behaved in bad faith. However, if the contractor is guilty of bad faith, he cannot qualify for the benefit, due to the doctrine of equity, for instance, as discussed in *Breslin v Hichens*,[513] if the contractor deviates from the contract, or if he made a fraudulent misrepresentation.

Generally, the rule about restitution is that the contracting parties must be returned to the different positions in which they found themselves when they contracted. This is based on equitable considerations. In the instance of fraudulent misrepresentation, the Court will not in general set aside an agreement and provide consequential relief, except if the representee is able and willing to restore everything that he has obtained under the agreement. The reason for this is that if the representor has committed fraud, the representee would nonetheless be wrongfully advantaged by recovering what he had performed, and either keeping or not returning what he had in turn obtained, and the representor would correspondingly be unjustly financially disadvantaged to the latter extent.[514]

However, an exception to this rule is acknowledged, where the return of the performance received by the innocent party is impossible, and equity still favours restitution. For instance, the case of *North West Provincial Government v Tswaing Consulting CC*[515] dealt with restitution for fraud at the time of the contract. The Supreme Court of Appeal ruled that Tswaing Consulting did not submit any evidence of the services that they had delivered. The Court accordingly denied their equitable remedy for restitution. However, they would be entitled to be recompensed for unjust enrichment in appropriate proceedings where they would have to establish such a claim.

Therefore, no factual basis existed for denying the Province the equitable remedy of restitution. Justice requires that Tswaing be ordered to repay what it received due to the fraud.[516]

[513] *Breslin v Hichens* 1914 AD 315.
[514] Christie and Bradfield *Christie's law of contract in South Africa* 2016 337.
[515] *North West Provincial Government v Tswaing Consulting CC* 2007 4 SA 452 (SCA) para 22.
[516] *North West Provincial Government v Tswaing Consulting CC* 2007 4 SA 452 (SCA) para 21.

If restitution has become impossible due to an inherent defect of the thing itself, or because of *vis maior,* or because of the act of an independent third party, the innocent party is still entitled to cancel the contract and is excused from the responsibility to make restitution.[517]

Where a contracting party is excused from restitution of the whole performance or a part thereof on the grounds that he is not to blame for the loss, he must nevertheless be able and willing to restore whatever remains of the performance or any substitute that he may have received for it.[518]

### 3.3 Repudiation

A party to an agreement commits a breach by repudiation if, whether verbally or by behaviour, and without just excuse, he or she shows an unambiguous intent no longer to be bound by the agreement, or by any duty that is part of the agreement.[519]

The intent to repudiate is judged objectively, with the test being whether the contracting party accused of repudiation has behaved in such a way as to give the impression to a reasonable person to believe that he or she does not plan to satisfy, or fully satisfy, his or her part of the agreement.[520]

An intent to discontinue the agreement is not needed, nor is bad faith or fault, although those elements will often be an indication. If a party misconstrues the true content, meaning, or effect of an agreement, and in good faith denies his or her responsibilities under it, his or her conduct will establish repudiation of the contract if it fulfils the test stated above.[521]

Repudiation can take the following diverse forms:

#### *3.3.1 Unequivocal refusal to carry out the contract*

[517] Hutchison and Pretorius eds *The Law of Contract* 2022 361.
[518] Van Huyssteen *et al Contract General Principles* 2020 451-452.
[519] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) 342.
[520] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294H-I, *B Braun Medical (Pty) Ltd v Ambasaam* CC 2015 3 SA 22 (SCA).
[521] *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 2 SA 835 (A) 845-846.

A contracting party commits the breach of repudiation (and justifies cancellation) if verbally or by behaviour, and without just excuse, he or she explicitly shows an undeniable intent to no longer be subject to the agreement, or by an obligation being part of the agreement.

Repudiation is a behaviour from which a reasonable person in the position of the wronged party would conclude that the other party, without having just excuse, will not comply with his contractual obligations.[522] There must be at least words or other conduct[523] that can reasonably be understood to anticipate subsequent malperformance. For instance, a contracting party commits repudiation if he denies the existence of a valid contract.[524]

In *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou,*[525] the Court ruled that to repudiate a contract no subjective intent is needed to end the contract. Where a party, for example, declines to adhere to a crucial term of the contract, his behaviour could, in law, be equivalent to a repudiation of the contact, even if he should consider that he properly fulfils his duties.

Another example of unequivocal intent is to be found in the case of *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality.*[526] The Municipality denied the other party, Primat, the opportunity to perform, declining Primat access to the work site, employed new contractors, and declaring that the agreement be discontinued. This conduct demonstrated an indisputable intent on the part of the Municipality to no longer be subject to the contract and constituted repudiation.

Repudiation constitutes a type of anticipatory breach of contract. Anticipatory breach of contract is a breach that takes place before performance is provided, in terms of a particular obligation. The most important characteristic of anticipatory breach of contract is that it forecasts the occurrence of positive or negative malperformance or the continuance of negative malperformance, without itself alone constituting

[522] *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 421-422.
[523] *Metalmil (Pty) Ltd v AECI Explosives and Chemicals* Ltd 1994 3 SA 673 (A) 684I-685B.
[524] *Strachan & Co Ltd v Natal Milling Co (Pty) Ltd* 1936 NPD 327; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 421-422.
[525] *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 2 SA 835 (A) 845-846.
[526] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA) para 28. See also discussions under paras 3.3.4 and 3.3.6.

malperformance. ‘Anticipatory’ breach therefore only points to the predicted malperformance, but as a form of breach of contract, it takes place immediately at and before actual performance.[527]

Repudiation may also take place on or after the due date for performance, in which case it will often only reinforce one of the other forms of breach just discussed. A mere delay in providing or obtaining performance should not be considered a repudiation of the agreement; at least some positive conduct is necessary.[528]

The following examples of conduct can amount to repudiation of an engineering contract.

### *3.3.2 Abandonment of the contract*

The desertion or abandonment of the contract without any lawful excuse amounts to repudiation by the contractor.[529]

*In Thomas Construction* (*Pty*) *Ltd (in liquidation) v Grafton Furniture Manufacturers* (*Pty*) *Ltd,*[530] Grafton employed Thomas Construction to perform certain construction works. According to the contract, an interim certificate ought to be issued and paid as the work progressed. During the course of the project, Thomas Construction went bankrupt due to financial strain. Two interim certificates had been issued, but not yet paid. The liquidators chose not to proceed with the contract but argued that Thomas Construction was in any case entitled to be paid in terms of the certificates, because the liquidators argued that the certificates were a self-sufficient matter entirely independent of the rest of the contract. The court disagreed. It held that the claim in terms of the certificates was based on the contract, and that Grafton had the right to raise any defence founded on it. In this case, it was entitled to escape liability because the liquidators had repudiated the contract and put it beyond their power to perform the rest of the work.[531]

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[527] Nienaber 1989 *TSAR* 2.
[528] Hutchison and Pretorius eds *The Law of Contract* 2022 330.
[529] *Hauman v Nortje* 1914 AD 293.
[530] *Thomas Construction* (*Pty*) *Ltd (in liquidation) v Grafton Furniture Manufacturers* (*Pty*) *Ltd* 1988 2 SA 546 (A) 568-569.
[531] Loots *Construction Law and Related Issues* 1995 975.

The decision to terminate may be understood to be equivalent to a legally justified repudiation of the agreement, as in *Thomas Construction* (*Pty*) *Ltd (in liquidation) v Grafton Furniture Manufacturers* (*Pty*) *Ltd,*[532] where a creditor may choose to either accept the repudiation and claim damages, or to reject it.[533]

### *3.3.3 Faulty performance*

Repudiation is different from positive malperformance, in the sense that repudiation takes place before actual performance, although the repudiation may well forecast positive malperformance. In specific circumstances, the behaviour of a contracting party can constitute both positive malperformance and repudiation, given that it conveys the message that the defaulter's intent is not to respect the particular duty in future.[534]

In *Horner Investments CC v General Petroleum Installations CC*,[535] the plaintiff wanted to cancel the contract with the defendant, General Petroleum Installation CC, due to alleged poor workmanship, claiming that a tank was installed in the wrong position. The defendant refused to move the tank because it was not part of the original contract. The High Court found against the plaintiff, rejecting his argument of poor workmanship, noting that the defendant had not repudiated the contract. There was furthermore no reason for a reduction in contract price, as claimed by the plaintiff, due to the initial partial performance on the part of the defendant.

The plaintiff traded under the name Grahamstown Motor Services, running a petrol station, selling fuel and similar products. At first, it was an Engen franchise, but the contract was cancelled. In October 2009, Engen contracted the defendant to de-commission the site, by taking out three underground petrol tanks, islands (on which the petrol dispensers were placed), petrol dispensers, and related piping and installations. The defendant also had to fill up the holes and lay concrete over the areas where the tanks where previously located.[536]

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[532] *Thomas Construction* (*Pty*) *Ltd (in liquidation) v Grafton Furniture Manufacturers* (*Pty*) *Ltd* 1988 2 SA 546 (A) 566-567.
[533] Du Bois *et al Wille's Principles of South African Law* 2007 858.
[534] *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) 342.
[535] *Horner Investments CC* v *General Petroleum Installations CC* (3433/12) [2014] ZAECGHC 19 para 34.
[536] *Horner Investments CC* v *General Petroleum Installations CC* (3433/12) [2014] ZAECGHC 19 para

As the plaintiff, Mr Terrence Horner (sole member and initial owner of an Engen franchise) wanted to continue operating after the end of the Engen franchise, he contacted the defendant, Mr Oscar Mouton (sole member) in order to re-commission the site. An oral contract was thus agreed upon between the plaintiff and the defendant, in terms of which the plaintiff would pay the defendant R415 530 in advance and the defendant would purchase, restore, and install petrol tanks at the site, plus all the other equipment that would allow the plaintiff to continue to operate as a service station.[537]

It is not in dispute that the plaintiff paid the defendant R415 530, nor that tanks were obtained, reconditioned, and installed, and that some parts of the job had been completed by the defendant prior to the breakdown of the relationship between the plaintiff and the defendant, and the final cancellation of the contract by the plaintiff.[538]

It is furthermore undisputed that problems existed. Horner protested that the tanks were not installed to the proper level. They were, in response, taken out and put back by the defendant. A dispute also arose about the placement of one of the diesel tanks.[539]

The issues which arose for decision in the trial were: first, one of the terms of the oral contract was that the re-enabling of the site would be done by the end of November 2009 and, that being the case, whether the defendant breached that term by not finishing the job by then; secondly, whether the defendant breached the contract due to its low quality workmanship; and thirdly, whether the defendant breached the contract by positioning the diesel tank in the incorrect place, and then refusing to move it. Furthermore, the issue was also discussed as to whether the plaintiff had the right to a reduction in price due to the incomplete performance and stemming from the fault of the defendant.[540]

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[537] *Horner Investments CC* v *General Petroleum Installations CC* (3433/12) [2014] ZAECGHC 19 para 3.

[538] *Horner Investments CC* v *General Petroleum Installations CC* (3433/12) [2014] ZAECGHC 19 para 4.

[539] *Horner Investments CC* v *General Petroleum Installations CC* (3433/12) [2014] ZAECGHC 19 para 5.

[540] *Horner Investments CC* v *General Petroleum Installations CC* (3433/12) [2014] ZAECGHC 19 para 7.

By amendment, the plaintiff further brought in an alternative claim to the main claim due to repudiation by the defendant and rescission by the plaintiff. The plaintiff claimed that although he paid the defendant the full agreement price, namely R415 530, in advance, the defendant had only performed in part when the agreement was cancelled. The defendant had, the plaintiff claimed, only performed to the sum of R95 918.56, and he therefore had the right to recover the difference between what it had paid, and this amount.[541]

The High Court ruled against the plaintiff, since the defendant had not repudiated the contract. The plaintiff had not proved a breach by the defendant that was equivalent to a repudiation that would give the plaintiff the right to cancel the agreement. Thus, the plaintiff rescinded the agreement for no legitimate reason. The defendant was willing to perform its duties - and he was doing so - when the plaintiff cancelled the agreement, thus preventing the defendant from finishing the job that he had undertaken to do and was busy doing. To permit the plaintiff's claim for a reduction of the price would be to permit him to profit from his own illegitimate cancellation of the contract.[542] The plaintiff's claim was dismissed with costs.[543]

It is however submitted that faulty workmanship and non-adherence to plans and specifications could reach such a degree as to nullify any honest intention of carrying out the contract, and in such a case, would amount to repudiation.[544] Tendering defective performance as being proper performance can therefore also amount to repudiation.[545]

### *3.3.4 Delay*

Generally, time is not of the essence in a contract.[546] Therefore, delays do not amount to repudiation, because the existence and validity of the contract is still recognised.[547]

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[541] *Horner Investments CC* v *General Petroleum Installations CC* (3433/12) [2014] ZAECGHC 19 para 33.
[542] *Horner Investments CC* v *General Petroleum Installations CC* (3433/12) [2014] ZAECGHC 19 para 34.
[543] *Horner Investments CC* v *General Petroleum Installations CC* (3433/12) [2014] ZAECGHC 19 para 35.
[544] *Hauman v Nortje* 1914 AD 293.
[545] Van Huyssteen *et al Contract General Principles* 2020 405.
[546] *Meltz v Bester* 1920 OPD 98.
[547] Christie and Bradfield *Christie's law of contract in South Africa* 2016 612.

Repudiation may, however, take place on or after the due date for performance, when it will often only strengthen one of the other types of breach previously discussed. As discussed before, a mere delay in providing or obtaining performance ought not to be construed as a repudiation of the agreement; at least some positive behaviour is required.[548]

*Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality*[549] is instructive in this regard. In 2010, the appellant, Primat Construction CC, obtained an agreement for the upgrading of roads in Motherwell, Port Elizabeth, with the respondent, the Nelson Mandela Bay Metropolitan Municipality. Primat was contracted to refurbish roads and source materials. When taken to court by Primat for damages based on breach of agreement, the Municipality claimed that it had repudiated the agreement and that Primat had chosen not to accept the repudiation and to be bound by it, claiming specific performance. Primat, it claimed, was bound by its choice, and could not thereafter cancel the agreement and claim damages. At their pre-trial conference, the contracting parties agreed that only the questions of whether there had been a repudiation of the agreement by the Municipality, and whether Primat was bound to its choice not to accept the repudiation, ought to be determined at trial. The calculation of quantum, if the Municipality was liable for damages, would be determined later.

The work was initially planned to start at April 2010, and end in November 2010.[550] There were many holdups in the progress of the project, due to a number of factors. Amongst these were harsh storm damage, and the delayed payout of an insurance claim to Primat due to the damage. However, delays were also due to non-payment by the Municipality against monthly payment certificates. The finishing date was extended to November 2011. On 10 November 2011, Primat sent a letter to the Municipality, in which it informed the Municipality that it could not proceed with the

[548] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 2 SA 565 (A) 569.
[549] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA). See also discussions under paras 3.3.1 and 3.3.6.
[550] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA) para 4. See also discussions under paras 3.3.1 and 3.3.6

works until its financial difficulties were solved. It undertook to restart the works when matters were resolved.[551]

On 9 February 2012, attorneys Adams & Adams, on behalf of Primat, wrote to the Municipality informing it that the claimed termination by it of the agreement was equivalent to repudiation. They also advised that the letter was equivalent to notice, in terms of s 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, to the Municipality, and that Primat planned to sue for damages in the sum of R22 million.[552]

The Supreme Court of Appeal held that, if a contracting party repudiates a contract, the afflicted party may elect to claim specific performance. Should the repudiating party still persist with its repudiation after this election is made and shows an unequivocal intention not to be bound by the contract, the afflicted party may change its election and cancel the contract and claim damages.[553]

Furthermore, the Supreme Court of Appeal held that the need for a fresh act of repudiation by the municipality before Primat could change its election and proceed to cancel the contract and claim damages, made little or no sense. Primat could reasonably assume that the municipality would not repent its consistent repudiation of the contract.[554]

The appeal was upheld with costs of two counsels.[555]

Where a party repudiates a contract and shows no intention to abide by it, it is redundant to expect the party to change its intention. Where the guilty party makes it clear that it no longer intends to be bound in terms of a contract, the aggrieved party

[551] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA) para 3. See also discussions under paras 3.3.1 and 3.3.6.
[552] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA) para 11.
[553] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA) para 28.
[554] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA) para 26.
[555] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA) para 31(a)(b).

is permitted to change its election to claim specific performance; proceed to cancel the contract and claim damages.[556]

### *3.3.6 Failure to fulfil an essential term*

#### 3.3.5.1 Material breach of an essential term

Terms in a contract do not all carry the same weight. Those that are crucial to the performance of the duty to be performed are called material terms. A material term is one that allows a disadvantaged party to rescind the agreement if it is breached; one that affects the root of the agreement. If a term is considered to be of less relevance to the performance of an agreement, it is said to be a non-material term. For breach of a non-material term, and in the absence of a cancellation clause, an aggrieved party can only claim damages.[557]

The main objective of the building contract is the building and the completion of the works by the applicant and the correlative reciprocal payment for the works by the first respondent. These form the material terms of the contract. Other examples that constitute grounds for cancellation are slow performance, inability to perform, flawed performance, and inadequate or unfinished performance.[558] In this case, the contractor did not complete the outstanding portion of the works in spite of being given another deadline, thus repudiating the contract and allowing the respondent to cancel it.[559] Therefore, the respondent was allowed to invoke the construction guarantee.[560]

The repudiation must, as for all cases of breach, be sufficiently grave to justify cancellation. It is obvious that a repudiation of the entire agreement will always give the innocent contracting party the right to cancel.[561] Until recently, and according to the traditional approach,[562] the law was uncertain as to whether repudiation of an

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[556] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA) para 30.
[557] *Spies v Lombard* 1950 3 SA 469 (A).
[558] *KNS Construction (Pty) Limited v Genesis on Fairmount and Another* (08/31859) [2009] ZAGPJHC 39 (21 August 2009) para 54.
[559] *KNS Construction (Pty) Limited v Genesis on Fairmount and Another* (08/31859) [2009] ZAGPJHC 39 (21 August 2009) para 50
[560] *KNS Construction (Pty) Limited v Genesis on Fairmount and Another* (08/31859) [2009] ZAGPJHC 39 (21 August 2009) para 74.
[561] *Tucker's Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) para 653.
[562] See para 3.3.6 below.

insignificant term of the agreement was equivalent to a breach. However, the right to cancel depends on the nature and seriousness of the non-performance or malperformance threatened by the repudiation. If such a breach was to happen and it would justify cancellation of the contract, the innocent contracting party may immediately cancel.[563]

### *3.3.6 Remedies*

There are two opposing views on repudiation. According to the traditional approach the innocent party can repudiate the agreement if a large part of the agreement is defective, by either accepting the repudiation, thereby terminating the contract; or alternatively, the innocent party can reject the repudiation and keep the contract alive.[564]

According to Hutchison[565] in terms of the new approach, repudiation in itself is automatically equivalent to a breach, since it violates the fundamental obligation to respect and honour the contract. Therefore, the so-called acceptance of repudiation is nothing but an ordinary choice to cancel if the repudiation is sufficiently serious to justify that as a remedy.[566]

This new position was also confirmed in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd.*[567] According to Van Huyssteen *et al.*, it is now settled that repudiation by itself is equivalent to breach of agreement, since the objectionable behaviour is improper, and not because it becomes breach of contract by way of offer and acceptance. “Acceptance” of the repudiation is not necessary in order to complete the repudiation as an act of breach of contract, but is simply equivalent to exercising a choice to resile.[568]

In the *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality*[569] case, acceptance of repudiation was not necessary. There was no doubt that Primat’s

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[563] *Datacolor international (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 294 (SCA).
[564] Hutchison and Pretorius eds *The Law of Contract* 2022 331-332.
[565] Hutchison and Pretorius eds *The Law of Contract* 2022 331-332.
[566] *Tucker’s Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652; *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 2 SA 943 (A) 952-3.
[567] *Datacolor international (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA).
[568] Van Huyssteen *et al Contract General Principles* 2020 412.
[569] *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA) para 30. See the discussion of this case in paras 3.3.1 and 3.3.6 above.

reasonable impression was that the Municipality persisted in its repudiation, where it demonstrated clearly that it would not obey its duties and would not permit Primat to carry on performing. No additional act of repudiation was required.

According to the modern view, the victim of repudiation has the usual remedies for breach of agreement. Thus, he may rescind if the expected malperformance would justify rescission, and he would have the right to claim compensation for damage suffered due to the repudiation. He should also be able to uphold the agreement, claim damages, and even specific performance, although he would only be able to claim implementation of such an order on or after the date set for performance in the agreement.[570]

The creditor will only be able to cancel if the expected malperformance would justify rescission.[571] The right to rescind the agreement for repudiation will be lost if the injured party elects to uphold the agreement, except if the repudiator persists in repudiating the agreement.[572]

### 3.4 Rendering performance impossible and impossibility of performance

One of the requirements for the creation of a contract is that the performance agreed upon be objectively possible when the agreement is concluded. An agreement will therefore not create obligations if performance is initially objectively impossible.[573] The mere fact that circumstances at the conclusion of a contract persist that make the realisation of the objective of the contract impossible does not make the transaction void due to impossibility. The following requirements are necessary in order for an agreement to be considered impossible. [574]

Already in the Roman and Roman-Dutch law, volition was a necessary requirement to the extent that it must be directed at doing that which may have been possible. An

[570] Van Huyssteen *et al Contract General Principles* 2020 410.
[571] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294.
[572] Van Huyssteen *et al Contract General Principles* 2020 416.
[573] *Peters Flamman and Co v Kokstad Municipality* 1919 AD 427 434; *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (A) 336; *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 2 SA 353 (W).
[574] *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 2 SA 353 (W) paras 64 and 66.

undertaking to do the impossible cannot be regarded as a rational choice and would therefore prevent the conclusion of a contract.[575]

The requirement of initial possibility of performance in modern law with respect to contract is based on consensus. Where a contract is based on an objective foundation,[576] it would simply not be reasonable to hold someone to an impossible performance.[577] There is no need to ascribe to the doctrine of a tacit or implied term.[578] Performance may be subjectively (relatively) or objectively (absolutely) impossible.[579]

### 3.4.1 *Subjective impossibility*

A subjective impossibility occurs when one of the parties is not able to perform, but someone else can perform the duty instead.[580] Subjective impossibility thus relates to the inability of a particular debtor to perform.[581]

According to Hutchison and Pretorius:[582]

> "A mere subjective inability to receive or make use of a performance does not entitle a party to escape liability."

In *Hydraulic Engineering Co v McHaffie*[583] A contract in July to produce machinery for delivery at the end of August, and B contracted with him to produce a part of the machinery "as soon as possible". B knew that A's delivery date was August but did not complete his part of the machine until the end of September, and A refused to receive it. The delay by B was because of him not having a foreman sufficiently competent to make the necessary parts at the time of his contract. The court ruled that B was liable: "as soon as possible" meant that, even though he was not required to leave aside all other work, he was to do the work in the shortest time reasonably possible given the resources which A was entitled to expect him to have. B's inability to deliver timeously

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[575] *Cf* Zimmermann *Obligations* 686 *et seq.*
[576] Lubbe and Murray *Contract* 304.
[577] *Cf* Van Huyssteen and Van der Merwe 1990 *Stell* LR 244; Posner and Rosenfield 1977 *Journal of Legal Studies* 83.
[578] *Kennedy v Panama Royal Mail Co* (1987) LR 2 QB 580; *Bell v Lever Bros Ltd* (1932) AC 161.
[579] *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 2 SA 353 (W).
[580] *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 4 SA 308 (LCC); *cf Scoin Trading (Pty) Ltd v Bernstein NO* 2011 2 SA 118 (SCA).
[581] *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 2 SA 118 (SCA).
[582] Hutchison and Pretorius eds *The Law of Contrac*t 2022 231.
[583] *Hydraulic Engineering Co v McHaffie* (1878) 4 QBD 670 A.

was the result of subjective impossibility of performance and therefore would be inexcusable by law.

### 3.4.2 *Performance must be objectively impossible*

An objective impossibility occurs when it is of a serious nature, in the sense that it is impossible for anyone to perform the duties of the contract. This is known as an absolute or objective impossibility.[584]

The test for objective impossibility of performance constitutes a pragmatic standard. While an absolute 'physical' impossibility will pass the test,[585] a performance that might possibly be rendered will nevertheless be considered impossible if demanding performance would be unreasonable in the circumstances.[586]

In *Compagnie Interafricaine de Travaux v South African Transport Services,*[587] the performance of a civil engineering agreement demanding and unforeseeable physical conditions were faced, leading to various claims by the contractor. These claims were summarily rejected by the engineer. Subsequent appeals to the chief engineer resulted in a partial acceptance of these claims by the employer. However, the contractor was still not satisfied with this outcome. It demanded access to arbitration, which was denied. The contractor thus chose to litigate. Initially, the High Court declined his application. The Appellate Division, however, ruled that the employer did not escape liability, despite the frustrating circumstances.[588] This was based on the contract, which provided for exemption only in the case of unforeseeable subsurface conditions. Thus, under these circumstances, the contractor's claims for additional remuneration would be accepted. In this case, the Court ruled these conditions to be satisfied, and therefore, decided in favour of the contractor.[589] For this reason, there was objective impossibility of performance. This case tends to reinforces the idea that unforeseen events can lead to the extinguishing of contractual obligations.[590] However, it ought to be noted in this regard that even a foreseeable event can lead to supervening impossibility of

[584] Hutchison and Pretorius eds *The Law of Contrac*t 2022 230-231.
[585] *Heyneke v Abercrombie* 1974 (3) SA 338 (T).
[586] Van Huyssteen *et al Contract General Principles* 2020 216.
[587] *Compagnie Interafricaine de Travaux v South African Transport Services* 1991 4 SA 217 (A).
[588] *Compagnie Interafricaine de Travaux v South African Transport Services* 1991 4 SA 217 (A) 235.
[589] Loots *Construction Law and Related Issues* 1995 747-748.
[590] Hutchison and Pretorius eds *The Law of Contrac*t 2022 420.

performance if the event is unavoidable by the reasonable person.[591] In *Compagnie,* the contract seems to have focused more intently on the aspect of foreseeability.

### 3.4.3 *Factual and practical impossibility*

The law recognizes that, in some cases, performance may be practically or economically impossible, and that a party should be excused from performance. To apply this test in practice can be tedious, and the courts are hesitant to apply this exception. The criterion for being economically impossible would be that delivering the performance would become much more expensive than the contract would have originally entailed.[592]

To demonstrate this, let us take the example of building parties who enter into an agreement of sale of a wooden door, which is transported in a container on a freight ship. The container fell into the sea, and the wooden door is damaged. The purchase still exists at the time of the conclusion of the contract. Its performance is therefore not factually impossible. Through a major and costly deep-sea investigation, the seller could still retrieve the wooden door. However, the costs in doing so would be totally out of proportion to its value. Under these circumstances, the law recognizes that the performance may be practically or economically impossible and that no obligation arises.[593]

On the other hand, factual impossibility implies that performance is totally impossible.[594]

### 3.4.4 *Performance should be lawful*

A requirement for the creation of a valid agreement is that performance ought to be lawful or legal. If, at the time of the conclusion of the agreement, it is legally impermissible to supply a performance, the agreement will be void *ab initio*.[595] On the

[591] Hutchison and Pretorius eds *The Law of Contrac*t 2022 423.
[592] Hutchison and Pretorius eds *The Law of Contrac*t 2022 231.
[593] Hutchison and Pretorius eds *The Law of Contrac*t 2022 231.
[594] Hutchison and Pretorius eds *The Law of Contrac*t 2022 230-231.
[595] *Rosebank Mall (Pty) Ltd and Another Merrill Lynch (Pty) Ltd v Moosa* [2003] 2 All SA 431 (C) 436.

other hand, in the case of supervening impossibility, performance will become impossible after conclusion the contract.[596]

In *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG,*[597] the appellant, a South African company, contracted in writing to sell respondent, a Swiss corporation, a large quantity of uranium oxide. Performance of the appellant's obligations would have involved the exporting of the material.

A condition for the grant of authority was initially set, which had all been satisfied by the time of signature of the agreement by the respondent.[598] This would have facilitated performance under the agreement. However, thereafter, due to a change in official attitude, different conditions were imposed, which were unachievable, and the authority was consequently refused. This rendered performance under the agreement impossible. The Court decided that absolute impossibility had happened after the contract had been concluded but noted that this did not relieve the appellant of its duties under the agreement, because the appellant had made the incorrect assumption that they would obtain the export authority.[599]

In this case, the Supreme Court of Appeal distinguished between cases where it is impossible to perform, and cases where it will be illegal to perform. The Court ruled that the distinction between supervening impossibility and supervening illegality is one of both substance and importance. The latter emphasises considerations of public policy.[600]

The Court made ample use of the work of Treitel[601] and arrived at the conclusion that, where performance will be illegal, it does not automatically make it impossible. In cases of supervening illegality, one would have to make use of public policy in determining whether or not a party should be bound to perform.[602]

For this reason, public policy will nearly always dictate that parties will be exempted from performance, where such performance will be illegal. However, policy

[596] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 4 SA 1190 (A) para 2.
[597] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 4 SA 1190 (A) paras 35-36.
[598] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 4 SA 1190 (A) paras 35.
[599] *Cf* Van Huyssteen et al *Contract General Principles* 2020 519.
[600] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 4 SA 1190 (A) para 59.
[601] Treitel *Frustration and Force Majeure* 2014.
[602] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 4 SA 1190 (A) para 59.

considerations will not always mandate invalidation of a term or a contract. It can, for example, order the party whose performance would be illegal, to instead pay a sum of money instead of performing.[603]

In the *Nuclear Fuels* case, the Court did not set aside the judgement in the *Peters Flamman* case.[604] It, therefore, may be assumed that, where a party is unable to perform, due to such performance being illegal, it can be considered as both a supervening impossibility, as well as a supervening illegality.

In such instance that *casus fortuitous* and *vis major* are provided for in the contract, parties may be considered to have foreseen the event, and thus, the general principle will not apply. The contract and the agreement will be enforced, because the parties had agreed on what ought to happen in such a situation.[605]

In contrast to a supervening impossibility, in the instance of a supervening illegality, the foreseeability of the illegality was of no importance. If it were contrary to public policy to hold the parties to their contract, it would not matter that they foresaw, or ought to have foreseen the illegality. It will nevertheless still be against public policy.[606] However, the foreseeability element will influence the public policy in deciding whether a party can be excused from performance, or if a party should perform in another way.[607]

### *4.4.5 Liability despite impossibility*

In *Wilson v Smith*,[608] Kuper J confirmed the general principle that no duty can arise in case of supervening impossibility. However, he acknowledged that it is not universally applied. In this regard, it is necessary to consider the nature of the agreement, the relation of the contracting parties, the circumstances of the case, and the type of impossibility pleaded by the defendant, in order to establish whether that general rule in the particular circumstances of the case is to be applied.[609]

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[603] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 4 SA 1190 (A) para 62.
[604] *Peters Flamman and Co v Kokstad Municipality* 1919 AD 427.
[605] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 4 SA 1190 (A) para 38.
[606] *Nuclear Fuels Corporation of SA (Pty) Ltd v Orda AG* 1996 4 SA 1190 (A) para 63.
[607] *Bischofberger v Van Eyk* 1987 2 SA (W) 611 B-D.
[608] *Wilson v Smith* 1956 1 SA 393 (W).
[609] Citing *Hersman v Shapiro & Co* 1926 TPD 367 373.

According to Kuper J, the test is that, if the contracting parties, when concluding the agreement, considered the possibility of an eventuality taking place which would render performance impossible, and no provision was made in the agreement to cover this event, the result would be that the claimant ought not to be relieved of his responsibility due to such an event having taken place.[610]

3.4.5.1 Warranty: guaranteeing performance

It is a term added to an agreement to the benefit of one contracting party to extend the liability of the other, even if performance is objectively impossible. If the warranty is agreed to, the responsibility is created. The contracting party in breach of the warranty would then be liable for the payment of damages.[611]

In the case of *KNS Construction (PTY) Limited v Genesis on Fairmount,*[612] KNS Construction applied for an order preventing the second respondent from paying a construction guarantee to the first.

In November 2006, the applicant and the first respondent signed a written construction agreement, in terms of which the applicant as the principal contractor promised to build a retail and residential development at Erf 219, Fairmount, Extension 2, No. 3 Bradfield Drive, Fairmount, for the first respondent (employer).[613]

The applicant supplied the first respondent with security in the form of a variable Construction Guarantee, provided by the second respondent. By mutual agreement the Construction Guarantee was replaced by a similar one that would expire on 31 December 2008.[614]

During the course of the development, it was agreed that the retail and residential sections ought to be completed on 14 May 2008 and 9 June 2008, respectively. The applicant achieved practical completion of the retail section on 10 July 2008 but had not yet completed the residential section on 15 July 2008, when he was served with a notice of ten working days to bring same to completion. Since this did not happen by

[610] *Wilson v Smith* 1956 1 SA 393 (W) 396.
[611] Hutchison and Pretorius eds *The Law of Contrac*t 2022 232-233.
[612] *KNS Construction (PTY) Limited v Genesis on Fairmount* 2009 JDR 0781 (GSJ).
[613] *KNS Construction (PTY) Limited v Genesis on Fairmount* 2009 JDR 0781 (GSJ) para 3.
[614] *KNS Construction (PTY) Limited v Genesis on Fairmount* 2009 JDR 0781 (GSJ) para 4.

12 September 2008, the first respondent rescinded the agreement, because the applicant had not completed the residential section by 25 July 2008.[615]

The applicant claimed that the respondent was prevented from cancelling the contract due to it being in breach of material terms thereof, namely the various delays in payments of and the issuing of Interim Payment Certificates, missing documentation to explain unilateral recoveries subtracted from Interim Payment Certificates, and unlawfully levied and deducted penalties from such certificates. [616]

However, on inspection of the evidence, the Court concluded that the delays mentioned above were not of a material nature, since the certificates had been provided before a notice of default was issued, and the missing documentation had, in fact, been provided. The judge also dismissed the argument of the applicant that the contract had not been intended to have a fixed completion date. The Court[617] accordingly dismissed the case in favour of the respondents.

In this regard, it may be said that, once performance is guaranteed and the debtor fails to perform in terms of the agreement, it will not escape liability, virtually irrespective of the cause of non-performance.[618] Although in this matter non-performance was not due to objective considerations, it seems apparent that the applicable guarantee would have covered all instances of non-performance, as something which tends to be quite typical of the construction industry.

### 3.4.6 *The consequences of supervening impossibility of performance*

"If a performance is objectively impossible at the time of conclusion of the contract, no obligation arises.[619] If, after the conclusion of the contract, performance becomes objectively impossible, without the fault of the debtor, as a result of an unavoidable and unforeseen event, the obligation to perform is also extinguished. An impossibility that arises after conclusion of the contract is referred to as supervening impossibility of performance. The rationale for extinction of obligations in the event of supervening impossibility of performance is the same as in the event of initial impossibility, where,

[615] *KNS Construction (PTY) Limited v Genesis on Fairmount* 2009 JDR 0781 (GSJ) para 6-9.
[616] *KNS Construction (PTY) Limited v Genesis on Fairmount* 2009 JDR 0781 (GSJ) para 19.
[617] *KNS Construction (PTY) Limited v Genesis on Fairmount* 2009 JDR 0781 (GSJ) para 43.
[618] Hutchison and Pretorius eds *The Law of Contrac*t 2022 232-233.
[619] S 61.

because the impossibility of performance is due to an unavoidable and unforeseen event, and not due to the fault of the debtor, he or she is excused from performing."[620]

The fact that performance has become burdensome will not excuse the debtor insofar as the impossibility only amounts to the inability of that particular debtor to perform. Breach of contract will occur if the debtor eventually does not perform, or performs inadequately, or defectively. In this instance the normal legal consequences would be applicable. [621]

Absolute factual impossibility is not always required. The Court will assist a party whose performance has become so difficult that it clearly cannot reasonably be expected of him or her to perform**.** This is called a 'standard of society' (verkeersmaatstaf) and will be applied to establish whether performance is impossible.[622]

The impossibility must be unavoidable by a reasonable person. This requirement suggests that the impossibility must not be due to the fault of one of the parties; it must be due to an event that was objectively beyond his or her control**.** The impossibility must be the result of *vis maior* or *casus fortuitus*. This includes all unavoidable acts of nature and human beings. Thus, they include not only natural calamities, but also, for example, acts of State, and strikes.[623]

The requirement of objective impossibility implies that, if the purpose of the agreement is merely frustrated, this is not sufficient reason to terminate the contract, unless the parties agreed that that would be the case.[624] Some legal systems recognise mere hardship as a possible cause for the termination or modification of a contract.[625]

In circumstances in which impossibility extinguishes the obligation, it must be the final instance, where the event was unavoidable. An unforeseeable event must under all instances be unavoidable. In the instance of unavoidability, the eventual disadvantages and advantages ought to accrue to both parties equally. In contrast, if

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[620] Hutchison and Pretorius eds *The Law of Contract* 2022 420.
[621] *Crookes Brothers Ltd v Regional Land Claims Commission Mpumalanga and Others* 2013 2 SA 259 (SCA); *Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others* 2010 (4) SA 308 (LCC) and cf *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA).
[622] *Constitution of the Republic of South Africa,* 1996.
[623] Hutchison and Pretorius eds *The Law of Contract* 2022 422.
[624] S 9(3).
[625] Hutchison and Pretorius eds *The Law of Contract* 2022 421.

the event causing the impossibility was foreseeable and could have been avoided, the party who has undertaken to perform should not remain bound to do so.[626]

The nature of the obligation may have an impact on the effect of supervening impossibility, where generic obligation cannot become impossible by fulfilment, since the *genus* is regarded as inextinguishable. An alternative obligation will only be extinguished if all the alternatives become impossible.[627]

The exchange of performances result in such a close relationship between reciprocal obligations that if one obligation is extinguished due to impossibility of performance, its counter-obligation is also extinguished.[628]

In the instance of prevention of performance, it will normally amount to breach of contract.[629] If the performance is made subjectively impossible, the debtor remains liable for the agreed performance. Where objective impossibility occurs, the debtor also remains liable, even though not for the original performance. He will be liable for a sum of money, whether as a surrogate, or as damages.[630]

Under South African law, supervening events will provide an excuse from contractual liability only in the limited and rare instances where performance became impossible. Events that lead to fundamental change in the circumstances that existed when the contract was concluded, but which fall short of impossibility, are legally irrelevant. A performance which becomes much more burdensome, vastly more expensive, or is deprived of all purpose, does not affect the existence of the obligations under a contract. [631] [632]

Many legal systems seek to extend the legal consequences connected to a change in the contractual circumstances beyond the impossibility of performance. For instance,

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[626] In terms of the standard terminology there would be no *vis maior* or *casus fortuitous* involved; Van Huyssteen *et al Contract General Principles* 2020 593.
[627] Van Huyssteen *et al Contract General Principles* 2020 593.
[628] *Peters Flamman and Co v Kokstad Municipality* 1919 AD 427; *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 3 SA 579 (A) and De Wet and Van Wyk *Kontraktereg* 173-174.
[629] *King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd* [2013] 3 All SA 251 (SCA); *Gordon v Pietermaritzburg-Msunduzi Transitional Local Council and Another* 2001 4 SA 972 (N) and *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA).
[630] *Cf Academy of Learning (Pty) Ltd v Hancock and Others* 2001 1 SA 941 (C).
[631] *Beale et al Cases, Material and Tex on Contract Law* 2018 1213; *The Max Planck Encyclopedia of European Private Law* 2012 166.
[632] Hutchison and Pretorius eds *The Law of Contract* 2022 420; Van Huyssteen *et al Contract General Principles* 2020 594-595.

by the recognition that appropriate *naturalia* may be imputed into contracts of the particular class,[633] or by accepting a general rule that contracts are concluded on the assumption that, in principle, circumstances will remain the same. [634]

Specific consensual terms may be inserted into the contract to provide for the specific possible changes.[635] A contract may also be based on more general consensual terms that the initial conditions will not change. Such a term will usually be a speculation. Express consensual terms are not always present, nor can tacit terms always be assumed in the circumstances. Consequences may, on more objective reasons, be connected *ex lege* to a change in contractual circumstances, where falling short of impossibility of performance seems doubtful.[636]

Applying the normal rules of impossibility of performance and specifically the standard of society is flexible enough to accommodate many instances of changed circumstances with respect to contractual circumstances.[637]

According to the law relating to specific performance, "cases do arise where justice demands that a plaintiff be denied his right to performance".[638] An example of this is *Haynes v Kingwilliamstown Municipality,*[639] where the consideration was "would operate unreasonably hardly on the defendant", which poses the question as to whether "the cost to the defendant in being compelled to perform is out of all proportion to the corresponding benefit to the plaintiff".[640]

### 3.5 Summary breach of contract

Generally, the failure by a party to uphold or honour a contractual obligation without lawful excuse amounts to breach of contract.[641]

Recognised forms of breach are the following:

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[633] *BC Plant Hire CC t/a BC Carriers v Grenco (SA) (Pty) Ltd* 2004 4 SA 550 (C)
[634] Cf Feenstra in Watson ed *Daube Noster* 1974 77; Visser 1984 *SALJ* 641; Rossler *Change of Circumstances* 163.
[635] *Mutual and Federal Ltd v Rundel Construction (Pty) Ltd* 2005 2 SA 179 (SCA).
[636] Van Huyssteen *et al Contract General Principles* 2020 597.
[637] *Hersman v Shapiro & Co* 1926 TPD 367; *Bayley v Harwood* 1954 3 SA 498 (A).
[638] *Cohen No and Others v Verwoerdburg Town Council* 1983 1 SA 334 A; Joubert *Contract* 224; *Botha and Another v Rich No and Others* 2014 4 SA 124 (CC).
[639] *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A).
[640] *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378 380; Cf *De Wet Kontraktereg en Handelsreg* 210.
[641] Hutchison and Pretorius eds *The Law of Contract* 2022 310.

- *mora debitoris*
- *mora creditoris*
- positive malperformance
- repudiation; and
- prevention of performance.[642]

Herewith a short summary of each type:

***(i) Mora debitoris***

*Mora debitoris* refers to the non-performance of a contractual obligation by a debtor, without legal justification, that is due and enforceable and still capable of performance, despite such failure. The time for performance must have been fixed, either in the contract, or by a demand for performance, and the debtor must have failed to perform timeously.[643]

***(ii) Mora creditoris***

Breach of agreement by the creditor mostly happens when there is a requirement on the creditor to co-operate with the debtor to allow the latter to perform, and the creditor does not honour his duties.[644]

The cooperation of the creditor must be required for the debtor to perform properly and the creditor must, due to his or her own fault, delay in accepting the debtor's performances. [645]

The following remedies for breach of contract will be available:

Cancellation, damages, specific performance and counter-performance.[646]

The positive cooperation of the creditor is needed in order to enable the debtor to perform his or her obligation.[647]

[642] Hutchison and Pretorius eds *The Law of Contract* 2022 310.
[643] Hutchison and Pretorius eds *The Law of Contract* 2022 313.
[644] Van Huyssteen *et al Contract General Principles* 2020 420.
[645] Hutchison and Pretorius eds *The Law of Contract* 2022 323.
[646] Hutchison and Pretorius eds *The Law of Contract* 2022 324.
[647] Hutchison and Pretorius eds *The Law of Contract* 2022 321.

### (iii) Positive malperformance

There are two types of positive malperformance, namely defective performance, and conduct in contradiction to a contractual prohibition.[648] This may take one of two forms, depending on whether the duty in question is positive or negative.[649]

Where the debtor has a negative obligation (*obligatio non faciendi)*, positive malperformance occurs when the debtor undertakes the act that he or she is bound to refrain from doing.[650]

It is unclear as to whether fault is an element of positive malperformance, although occasionally, it may be required, depending on the circumstances. The remedies available in the event of positive malperformance are either directed toward rescission or fulfilment of the contract.[651]

Where damages are given instead of, or to complete, the performance, there are known as surrogate damages, as opposed to other consequential damages. In the case of positive malperformance of a negative obligation, the creditor also has the right to apply for an interdict to restrain the debtor.[652]

### (iv) Repudiation

A party to an agreement commits breach by repudiation if, verbally or by behaviour, and without just excuse, he or she shows an unequivocal intent no longer to be bound by the agreement or by any duty that is part of the agreement.[653]

The intent to repudiate is judged objectively, [654] where in all serious cases of breach, the innocent party can elect whether or not to cancel or uphold the contract.[655]

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[648] Van Huyssteen *et al Contract General Principles* 2020 401.
[649] Hutchison and Pretorius eds *The Law of Contract* 2022 326.
[650] Hutchison and Pretorius eds *The Law of Contract* 2022 326.
[651] Hutchison and Pretorius eds *The Law of Contract* 2022 327.
[652] Hutchison and Pretorius eds *The Law of Contract* 2022 329.
[653] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) 342.
[654] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 2 SA 284 (SCA) 294H-I, *B Braun Medical (Pty) Ltd v Ambasaam* CC 2015 3 SA 22 (SCA).
[655] Hutchison and Pretorius eds *The Law of Contract* 2022 340.

### (v) Prevention of performance

If performance on either side is rendered impossible after the finalisation of the agreement due to the culpable conduct of either the debtor or the creditor, the contracting party who made performance impossible is guilty of breach by way of prevention of performance. Objective impossibility is not required, where instead, subjective impossibility proves sufficient. Thus, the breach is committed even when the infeasibility is connected only to the particular debtor.[656]

The normal remedies, except for specific performance, are available to the creditor. In the case of material prevention of performance of a divisible obligation, the creditor may only cancel to the extent that performance has been rendered impossible and his or her counter performance will be reduced proportionately.[657]

## 4. BREACH OF CONTRACT BY A CREDITOR (*MORA CREDITORIS*)

Breach of contract by the creditor mostly takes place in cases where there is a duty on the creditor to co-operate with the debtor to enable the latter to perform, and the creditor does not observe this responsibility.[658]

In *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd*[659] Fluor Engineers (SA) (Pty) Ltd) had awarded a contract to Ranch for constructing a pipeline. Ranch shared the job on a subcontracting basis with LMG. The subcontract between Ranch and LMG was, however, not reduced to writing.

On 17 April 1984, Ranch applied for an urgent interdict against LMG, ordering it to vacate the site of “the works” and to block them from returning to the site. Branch motivated for this interdict by claiming that LMG had not correctly done its job. Ranch also claimed that there was a tacit term in the verbal contract between them that gave Ranch the right to unilateral stoppage.[660] In response, LMG denied Ranch’s

[656] Hutchison and Pretorius eds *The Law of Contrac*t 2022 336.
[657] Hutchison and Pretorius eds *The Law of Contract* 2022 337.
[658] Van Huysssteen *et al Contract General Principles* 2020 420.
[659] *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W).
[660] *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W) 239.

allegations, and lodged a counter-application requesting that Ranch be interdicted from interfering with the completion of LMG's work.

During the proceedings Ranch argued at length using cases mostly from Australia, England and other foreign jurisdictions in favour of a right to unilateral stoppage.[661] After considering these cases, the judge came to conclusion that they were of no importance for this case.[662] Reviewing a number of South African cases dealing with this matter, the judge again confirmed that there is no right to unilateral stoppage in South Africa.[663]

The Court declined above contention and granted an interdict against Ranch.[664] It also refused leave to appeal with costs.[665]

Coetzee J in *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd*[666] adopted a wide definition of the concept of *mora creditoris* as failure to co-operate. Coetzee J relied on *De Wet and Yeats* and De Villiers[667] in concluding that an employer has no unilateral right of stopping a building or civil engineering contract. The duty of the creditor to co-operate was enforceable by an order of specific performance or an interdict restraining interference by the debtor.

The judgement contains an emphatic recognition of *mora creditoris* as a distinct form of breach, which is underpinned by a creditor's duty to cooperate to make it possible for the debtor to perform.

Incidentally, the issue of unilateral stoppage has commanded the attention of the courts on more than one occasion. In *Compagnie Inter Africaine de Travaux v South African Transport Services (SATS*),[668] the important question was raised as to whether

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[661] *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W) 243-248.
[662] *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W) 248.
[663] *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W) 249-258(3).
[664] *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W) 258(4).
[665] *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W) 258(5)-258(6).
[666] *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 861 (W).
[667] De Wet and Yeats *Kontraktereg en Handelsreg* 4thed 166, and De Villiers *Mora Creditoris as Vorm van Kontrakbreuk* unpublished Stellenbosch University thesis 1953.
[668] *Compagnie Inter Africaine de Travaux v South African Transport Services (SATS)* 1991 4 SA 217

in our legal system, the contractor in a construction project has a common law right to enforce a construction agreement against the will of the owner. The facts in this case were typical of any large-scale civil-engineering project. The contract was the standard-form contract for civil engineering works. The contractor in the course of construction of the Hex River tunnel in the Cape struck what he claimed were unfortunate physical conditions that were not reasonably foreseeable. Apparently, the quality of the subsurface rock encountered was different from that expected, which resulted in a claim by the contractor for the payment of additional sums of money, *inter alia* because the tunnel became more difficult to construct, while its construction took longer than may have been anticipated.[669]

The employer argued that, in such circumstances, the engineer on its behalf was allowed to elect to terminate the agreement, but the Appellate Division rejected this argument.[670]

The employer or other person acting on his behalf would not typically be entitled without just cause to terminate the agreement. A conflicting contractual purpose would need to be expressly stated or be obvious by implication. It being the case that there was no such manifest provision in the relevant agreement, the Court found no convincing reason for implying one.

The Appellate division further ordered the respondents to cooperate with the appellant in his recovery of the surplus expenses; that is to timeously process his requests for approval, such as to enable him to enter arbitration if necessary.[671]

Van Deventer[672] criticises the ruling by the Appellate Division in *Compagnie InterAfricaine de Travaux v South African Transport Services (SATS*),[673] drawing

(A) 1-5.

669 *Compagnie Inter Africaine de Travaux v South African Transport Services (SATS)* 1991 4 *SA* 217 (A) 46.

670 *Compagnie Inter Africaine de Travaux v South African Transport Services (SATS*) 1991 4 SA 217 (A) 49.

671 *Compagnie Inter Africaine de Travaux v South African Transport Services (SATS)* 1991 4 SA 217 (A) paras 74-76.

672 Van Deventer 1991 *SALJ* 392.

673 *Compagnie Inter Africaine de Travaux v South African Transport Services (SATS*) 1991 4 SA 217 (A).

attention to Pothier,[674] who would allow termination in such circumstances. Pothier is, further, of the opinion that the contractor can be forced to perform where he is in *mora*.[675] Should the contractor fail to commence within the time stipulated, the owner's right is to contract with another contractor, and to claim damages from the defaulting contractor.[676]

In V*an Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration,*[677] it was argued that a termination of the contract would normally yield highly inequitable results from the contractor's perspective. The judge rejected the argument that an owner has any one-sided right of stoppage in a construction project.

This case dealt with a project, where Van Streepen and Germs had been given a contract to erect six hostels at the Pretoria Teachers' Training College in 1981. In January 1982, the employer informed the company of its intention to cancel the contract immediate effect, due to lack of funds. [678]

The trial Judge held, in effect, that: (1) the respondent was not entitled unilaterally to cancel the contract, and that its purported cancellation on 29 January 1982 amounted to an unlawful repudiation of the contract, which repudiation the appellant accepted on 1 February 1982, thereby cancelling the contract: and (2) that appellant's claim for damages for breach of contract was governed by and limited to the provisions of clause 3(6) of the Conditions of Contract. [679]

Most people tend to think that the employer has a unilateral right of stoppage in a construction project, and that when this right is exercised the contractor, it is left solely with an action for damages.[680] This was not favoured in the Appellate Division in *Van*

[674] Pothier *Lease* paras 438-443.
[675] Pothier *Lease* para 443.
[676] See discussion in para 3.4.2.
[677] V*an Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 4 SA 569 (A) 589 C-D 51-53.
[678] V*an Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 4 SA 569 (A) 589 C-D para 2.
[679] V*an Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 4 SA 569 (A) 589 C-D para 9.
[680] *Compagnie InterAfricaine de Travaux v South African Transport Services and Others* 1991 4 SA 217 (A) 235; see also Van Deventer 1991 *SALJ 392.*

*Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*,[681] where it was stated that at common law and without a contractual arrangement to the opposite, a building contractor has the right to finish the contract work as originally specified, and without variation. Van Deventer comments that in practice, however, it would often be extremely tedious for a contractor to proceed without the co-operation of the employer, and where a Court orders specific performance, the contractor's only remedy consists in damages.[682]

## 5 MISREPRESENTATION INDUCING THE CONTRACT

### 5.1 Introduction

The state of mind in which a misrepresentation takes place influences, to a certain degree, the remedies that will be available. Misrepresentations are thus distinguished as fraudulent, negligent or innocent.[683]

As stated in Hutchison and Pretorius:[684]

> A fraudulent misrepresentation is one made:
>
> - knowingly, or
> - without belief in its truth, or
> - recklessly or carelessly irrespective of whether it should prove to be true or false.

Fraudulent misrepresentation takes place without a sincere belief in its correctness.[685] A belief is not sincere which, although indeed entertained by the representor, could have been itself the result of a "fraudulent diligence in ignorance".[686] The test of sincere belief is subjective. Negligence or unreasonableness cannot constitute fraud, though

[681] *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 4 SA 569 (A) 589.
[682] Van Deventer 1991 *SALJ* 392.
[683] Hutchison and Pretorius eds *The Law of Contract* 2022 127.
[684] Hutchison and Pretorius eds *The Law of Contract* 2022 127.
[685] *R v Myers* 1948 1 SA 375 (A) 382-384, citing English authority.
[686] *R v Myers* 1948 1 SA 375 (A) 382.

it may convince a Court that there was a lack of sincerity. This even applies in cases of flagrant or gross negligence.[687]

A negligent misrepresentation is one that took place *bona fide,* but carelessly. An innocent misrepresentation is one made without fraud or negligence. Until fairly recently, the appellation 'innocent' was used indiscriminately for all non-fraudulent misrepresentations but given the recent developments in case law that grant remedies for damages due to negligent misrepresentation, it should be reserved for misrepresentation made without fault.[688]

A distinction is therefore drawn between three different classes, namely: fraudulent, negligent, and innocent misrepresentations. One remedy is common to all three classes, and that is that the contracting party misled may have the right to cancel the agreement. Insofar as he has not performed his obligations, he can rely upon misrepresentation as a defence. If he has rendered performance, he can in suitable circumstances bring an action to set aside the contract and obtain restitution.[689]

## 5.2 Negligent misrepresentation

As discussed by *Wright v Pandell*[690] a misrepresentation is a type of misstatement, while a misstatement is simply a statement that does not agree with the correct facts. In the law of contract, the term "misrepresentation" has a more restricted, more technical meaning - namely an incorrect statement of a past or present fact, not law or opinion, made by one party to another before or at the time of the contract about some matter or circumstance relating to it.[691]

In the past, it was held that South African law does not recognise a claim for damages due to a negligent misrepresentation that induced a party to a contract.[692] Currently,[693] a negligent misrepresentation inducing a person to enter into contract may, in principle, result in a delictual claim for damages. The courts are, however, aware of the risk of unlimited liability for negligent misrepresentation. It will have to be decided

[687] Hutchison and Pretorius eds *The Law of Contract* 2022 127.
[688] Hutchison and Pretorius eds *The Law of Contract* 2022 127.
[689] Loots *Engineering and Construction Law* 1985 28.
[690] *Wright v Pandell* 1949 2 SA 279 (C).
[691] *Wright v Pandell* 1949 2 SA 279 (C).
[692] *Du Plessis v Semmelink* 1976 2 SA 500 (T).
[693] *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A).

on the facts of each case as to whether a legal responsibility not to make the misrepresentation lay with the misrepresentor, and whether the misrepresentor applied reasonable care to establish the correctness of the statement.

In *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd,*[694] engineers negligently suggested a system of waterproofing for aquarium tanks that proved to be insufficient. As a result, expensive supplementary work had to be done on the aquarium tanks. In this case, the engineers did not wrongfully cause harm for the purposes of delict. The work was performed in a pre-contractual phase, and the parties later entered into a detailed agreement, and could have made provision in the contract for liability arising from the pre-contractual work. As the aquarium owners did not do this, the Court decided, on policy grounds, that they could not sue in delict. The facts alleged did not prove the delictual element of wrongfulness.[695]

### 5.3 Fraudulent (intentional) misrepresentation

Deliberate deception that causes a fellow party to a contract financial loss is a delict in our law, corresponding to the English tort or deceit, and is actionable under the *actio legis Aquiliae*. Thus, a representee who has been tricked into concluding a detrimental contract has, in principle, the right to damages in delict.[696]

In *Standard Bank of SA Ltd v Coetsee*[697] the Court declared that the five essential elements of the cause of action are as follows: a representation, which is, to the knowledge of the representor, false; which the representor intended the representee to act upon; which induced the representee to act; and that the representee suffered damage.

The motive of the representor is irrelevant; as long as he or she made the claim without an honest belief in its correctness and expected it to be acted upon, but such damage must have followed as a result of the representee acting upon the misrepresentation.[698]

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[694] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 3 SA 138 (SCA).
[695] Loubser and Midgley eds *The Law of Delict in SA* 2014 144.
[696] Hutchison and Pretorius eds *The Law of Contract* 2022 136.
[697] *Standard Bank of SA Ltd v Coetsee* 1981 1 SA 1131 (A) 1145.
[698] *Standard Bank of SA Ltd v Coetsee* 1981 1 SA 1131 (A) 1145.

The following are examples of fraudulent (intentional) misrepresentation in the field of construction contracts:

The duty of issuing an honest certificate in good faith was dealt with by the Transvaal Provincial Division in the case of *Willson v Roberts.*[699] Here, an architect was sued for damages for deliberately certifying as complete, in a final certificate, work that he knew to be defective. De Villiers JP adopted the following approach in the American case of *Tetz v Butterfield*,[700] In this case, the employer could show that the contractor installed rotten materials where the contract had required him to install sound timber and materials, or that he did other things in direct contradiction to the requirements of the contract. Notwithstanding this, the architect still accepted the work after he had been informed of the facts by the employer, and against the employer's objections. In such an instance where the certification by the architect was final, it goes without saying that this would be sufficient evidence for the jury to conclude that the architect had acted in bad faith by accepting the certificate. De Villiers JP continued to state that fraud, in that context, involved a lack of *bona fides* on the part of the architect. If his attention was drawn by the employer to the fact that the material was not according to the specifications in the contract, and he knew that and still deliberately passed the work, there was clear intention, which made him guilty of fraud.[701]

A certificate will be considered invalid if the principal agent issued it fraudulently. In the case of *Maw v Mackenzie NO,*[702] it was held that the knowing issuing of a false certificate by an architect constituted professional misconduct, which justified an order of suspension from practice for twelve months. Where an architect was in collusion with or had placed himself under the influence of one of the parties to a contract, this also amounted to fraud.[703] Similarly, a certificate is not binding if it has been caused by a criminal misrepresentation by one of the other contracting parties.[704]

The motive of the representor is irrelevant, provided that he or she made the declaration without an honest belief in its truth and intended it to be acted upon. It matters not that

[699] *Willson v Roberts* 1911 TPD 743.
[700] *Tetz v Butterfield* 41 Amer Rep 29.
[701] *Willson v Roberts* 1911 TPD 743 745-746; Van Deventer *The Law of Construction Contracts* 1993 201.
[702] *Maw v Mackenzie NO* 1953 2 SA 391 (A).
[703] *Hoffman v Meyer* 1956 2 SA 752 (C); *Smith v Mouton* 1977 3 SA 9 (W) 13.
[704] *Capstick & Co Ltd v Keen* 1933 NPD 556; Voet 19.2.36.

he or she lacks an intention to cause loss of damage to the representee, but only that such damage must have followed as a result of the representee acting upon the misrepresentation.[705]

Since fraud constitutes a delict, the measure of damages is a delictual, rather than a contractual measure.[706] The fundamental difference between the two measures was clarified by Van den Heever J A in *Trotman v Edwick.*[707] A litigant who sues in contract, sues to have his bargain or its equivalent in money or money-in-kind. The litigant who sues in delict, sues to restore the loss which he has suffered due to the wrongful conduct of another; that is that the amount by which his patrimony has been diminished by such conduct should be returned to him.[708]

The victim of fraudulent misrepresentation thus has the right to be placed in the patrimonial position he or she would have been in had the representation not been made to him or her, but he or she is not able to have the representation "made good" by being placed in the situation he or she would have been in had the representation been true, because that is the contractual measure applicable to breach of warranty.[709]

This principle is easily stated, however in practice, the courts have experienced considerable difficulty in calculating the defrauded party's damages, particularly if the contract is upheld.[710]

There is a tendency for the method of calculation of damages to heavily depend on the particularity of facts relevant to the case under consideration.[711] Nevertheless, various guiding principles are available in case law and academic literature.[712]

Whether the contract is cancelled or upheld, damages may be recovered in respect of the resulting losses due to the fraud, if they are not too remote.[713] Where the contract is cancelled and restitution is ordered, the representee's loss on the transaction itself is generally removed by the process of restitution, and his or her damages are thus

[705] *Standard Bank of SA Ltd v Coetsee* 1981 1 SA 1131 (A) 1145.
[706] *Ranger v Wykerd* 1977 2 SA 976 (A) 989.
[707] *Trotman v Edwick* 1951 1 SA 443 (A) 449.
[708] Hutchison and Pretorius eds *The Law of Contract* 2022 137.
[709] Hutchison 2004 *SALJ* 51.
[710] *Trotman v Edwick* 1951 1 SA 443 (A) 449; *Ranger v Wykerd* 1977 2 SA 976 (A) 989.
[711] *Ranger v Wykerd* 1977 2 SA 976 (A) 992.
[712] De Vos 1964 *Acta Juridica* 26.
[713] *Standard Bank of SA Ltd v Coetsee* 1981 1 SA 1130-40 (A).

normally limited to wasted expenses, and other such resulting losses. Where the agreement is upheld, on the other hand, the representee may experience a loss of the transaction itself (for example by paying more for a thing than it is worth), and it is the assessment of such inherent loss that presents the most difficulty. In this regard, the distinction between *dolus dans* and *dolus incidens* is of importance.[714]

(i) *Dolus dans*

To be compensable, the loss in question must be connected with fraud. Care must be taken to determine the precise effect of the fraud on the conclusion of the contract. In a case of *dolus dans*, there would have been no agreement at all without the fraud. To undo the effect of the delict, the representee should be put in the monetary situation he or she would have been in had he or she not entered into the contract. Thus, he should be given the monetary equivalent of cancellation and restitution, as compensation for his or her performance, minus any benefits that he or she has received from the other party under the contract.[715]

In *Mayes v Noordhof*,[716] the defendant sold property to the plaintiffs, who were married, without letting them know that there was a squatter camp next to the property. When the couple visited the site of the property, they became aware of the squatter camp, and then tried to return the property to the defendant, who declined to accept it.

The plaintiffs then sought the Court's intervention. The Court stated that the plaintiffs could only succeed if they proved that the defendant withheld information based on wrongful intent. The Judge found that, although there was no direct evidence that the defendant intended to defraud the plaintiffs, there existed circumstantial evidence that the defendant on purpose withheld information to defraud the plaintiffs, and therefore granted the application.

The Court classified the present case as a case of *dolus dans,* as the plaintiffs would not have purchased the property had they known the truth. The Court held that, in this case, damages would have to be calculated based on the market value. Furthermore,

[714] Hutchison and Pretorius eds *The Law of Contract* 2022 138.
[715] Hutchison and Pretorius eds *The Law of Contract* 2022 130.
[716] *Mayes v Noordhof* 1992 4 SA 233 (C) 249.

the Court measured the damages by obtaining the difference between the market value of the property with the squatter camp next to it, as well as its value without the squatter camp next to it and awarded the difference to the plaintiffs.[717]

Both losses and benefits have to be taken into account in calculating damages, since both flow directly from the misrepresentation; thus, if in spite of the misrepresentation, the representee has made an overall profit on the transaction, he or she is not entitled to any damages, via the so-called 'swings-and-roundabouts' principle.[718] As explained by Hutchison and Pretorius:[719]

> "For example, if he or she has paid R800 000 for a house worth R900 000, and he or she would not have bought at all but for a misrepresentation that the house had recently been rewired, he or she cannot recover the R20 000 that it has cost to rewire the house, since what he or she loses on the swings (R20 000) is more than compensated by what he or she gains on the roundabouts (R100 000)."

(ii) *Dolus incidens*

In a case of *dolus incidens*, where the fraud would have only influenced the terms of the agreement, such an agreement would have still been finalised. The representee's damages cannot be measured by comparison between the values of the corresponding performances of the contracting parties. Damages are quantified with reference to the degree to which the representation inflated the performance that the representee was willing to make under the agreement. That means, if the representee is a buyer, his or her loss constitutes the difference between the price he or she actually paid, and the price that he or she would have paid but for the misrepresentation.[720]

[717] De Grahl *The assessment of damages for delict in South African and German Law, with special regard to loss of use and fraudulent misrepresentation inducing a contract* Unpublished University of Cape Town LLM short dissertation.
[718] *Ranger v Wykerd and Another* 1977 2 SA 976 (A) 991-992.
[719] Hutchison and Pretorius eds *The Law of Contract* 2022 138.
[720] Hutchison and Pretorius eds *The Law of Contract* 2022 138.

In the case of *Banda and Another v Van Der Spuy and Another,*[721] the sellers were aware that the roof of the house was latently defective and that repairing it had not properly fixed the hidden defect, which they fraudulently concealed.

In their main claim, the purchasers relied on the seller's warranty against latent defects in the *merx* and more specifically the *actio quanti minoris*, in terms of which a reduction in the purchase price was sought, being the cost of repairing the roof. The sellers relied on a voetstoots clause in the contract, excluding such a warranty. However, the presence of fraudulent conduct on the part of the sellers undid the protection afforded by the voetstoots clause, and the sellers were entitled to the difference between the purchase price of the house and its value with the defective roof.[722] Furthermore, the court confirmed that the cost of repairs to the defective roof may be used as a measure of the award to be made, where the actual value of the performance could not be determined or is difficult to determine.[723]

In the alternative, the buyers relied on fraudulent, alternatively negligent, misrepresentation. The sellers misrepresented that a valid guarantee regarding the soundness of the roof was in place, and that the defect had been rectified. However, the sellers were aware that the guarantee had lapsed and the undertaking to provide one was misleading and fraudulent.[724] The Court found that it was quite clear that the purchasers were induced by the fraudulent misrepresentation of the sellers to conclude the sale agreement (which seems to relate to *dolus dans*) or, at least, to pay the purchase price agreed upon (which seems to relate to *dolus incidens*).[725] In this regard, the Court remarked as follows:[726]

> "Whether the fraud of the respondents induced the appellants to conclude the sale agreement, or simply to agree upon the purchase price, it is clear that the fraud did occasion as cause and effect the patrimonial loss sustained by the

[721] *Banda and Another v Van Der Spuy and Another* 2013 4 SA 77 (SCA).
[722] *Banda and Another v Van Der Spuy and Another* 2013 4 SA 77 (SCA) para 25.
[723] *Banda and Another v Van Der Spuy and Another* 2013 4 SA 77 (SCA) para 25 with reference to *Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 2 SA 824 (T).
[724] *Banda and Another v Van Der Spuy and Another* 2013 4 SA 77 (SCA) para 26.
[725] *Banda and Another v Van Der Spuy and Another* 2013 4 SA 77 (SCA) para 28.
[726] *Banda and Another v Van Der Spuy and Another* 2013 4 SA 77 (SCA) para 30.

> appellants. On either basis, the correct manner of computing the appellants' loss is the cost of repairing the roof."

Consequently, the buyers were entitled to the reasonable costs of repairing the roof.[727]

It seems as if the case could have revolved around either *dolus dans* or *dolus incidens*. The Court showed no preference for one measure above the other, and indicated that in either case, the result would be the same. Consequently, this may be viewed as an instance where the measure of damages for *dolus incidens* and *dolus dans* converge - that is, the measure being the price paid for the house less its actual value - which would be the market value of the house with the defective roof.[728] Furhtermore, where the actual value of the house cannot be determined, the cost of repairs to the defective roof may be used as a measure of the award. This incidentally also places the award on the main claim on equal footing with the award on the alternative claim.

A further observation is that in the circumstances fraudulent misrepresentation provided a link between the main and alternative claims and was determinative of the outcome in either case. In this regard in *Van der Merwe v Meades,*[729] the Appellate Division confirmed that a voetstoots (sold 'as is') clause will not assist a seller who has made a misrepresentation. In the case of a misrepresention by omission, the seller will lose the protection of such a clause if the purchaser can prove that the seller was actually aware of a defect in the *merx* at the time of sale, and intentionally remained silent as to its existence with the intention of defrauding the purchaser.

The case of *Uni-Erections v Continental Engineering Company Ltd*[730] dealt with a construction contract, where full and correct performance by the contractor of his duties under the agreement took place, and there was no question of any substandard workmanship. The Court held that the employer who has received the benefits of the manufacturing, selling and erecting of prefabricated structures, but claims that the contract was induced by the fraud of the other contracting party, does not have the right to cancel the contract. His only remedy is to claim what damages he has

[727] *Banda and Another v Van Der Spuy and Another* 2013 4 SA 77 (SCA) para 32.
[728] *Cf* Hutchison and Pretorius eds *The Law of Contract* 2022 139-140.
[729] 1991 2 SA 1 (A).
[730] *Uni-Erections v Continental Engineering Company Ltd* 1981 1 SA 240 (W).

experienced as a result of the fraud. In this case, the performance by the contractor was to erect the structures prefabricated by the employer.

### 5.4 Innocent misrepresentation

The right to rescission on the grounds of innocent misrepresentation seem seldom to have been exercised in the field of building contracts, whether in South Africa or in England. The difficulties sometimes encountered in granting such relief in such circumstances are acutely demonstrated in the English case of *Glasgow and South Western Railway Company v Boyd and Forrest,*[731] where contractors claimed the rescission of a contract for the building of a railway, and a reasonable sum to cover their expenses on a *quantum meruit* basis. The agreement had been entered into under a crucial error induced by the innocent misrepresentation of the railway company regarding the properties through which the railway passed. It was decided that the action had to fail because the contractors had made *restitutio in integrum* impossible.[732] It should, however, be noted that the general considerations applicable to *restitutio in integrum* in South Arican law will apply *mutatis mutandis* to cases of innocent misrepresentation.[733]

It has since been held that in the case of *locatio conductio operis,* where the employer has received a benefit, his obligation to make restoration is not necessarily an essential condition to his right of rescission. Thus, his inability to make restitution is excused if it is not due to his own fault, but due instead to unforeseen circumstances out of his control; for example, where the fruits of the labour have perished due to an unforeseen incident, or where restitution of work and labour were of no benefit to him. For example, in *Hall-Thermotank Natal (Pty) Ltd v Hardman,*[734] a ship owner claimed rescission of a contract to fit refrigeration equipment in his ship, alleging that the contract was induced by misrepresentation. He was unable to make restitution because, without fault on his part, the ship and the refrigeration equipment had been lost in a gale. It was ruled that the ship owner had the right to claim rescission without

[731] *Glasgow and South Western Railway Company v Boyd and Forrest* 1915 AC 524.
[732] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering* 2014 61.
[733] *Parke v Hamman* 1907 TH 47; *Trollip v Jordaan* 1961 1 SA 238 (A) 252; see further Hutchison and Pretorius eds *The Law of Contract* 2022 135.
[734] *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 4 SA 818 (D).

returning the refrigeration equipment that went down with the ship, and without supplying compensation for it or for the work performed.

Furthermore, the fact that a service or building contract has been partially performed is no hurdle to cancelling the contract, because some order for payment of money as a supplement to the order for cancellation will able to bring about a full adjustment of the equitable rights of the parties.[735]

From a general perspective, the Namibian case of *Fischer Seelenbinder Associates CC v Steelforce CC*[736] proves instructive. The plaintiff had concluded an agreement with the defendant according to which the plaintiff would carry out some engineering work for the defendant. The plaintiff claimed payment for the work that he had performed. It transpired during the trial that, Fischer, the person who had done the work, was not a professional engineer. In an application to change its plea, the defendant requested an amendment, based on the Engineering Professions Act (EPA),[737] to the effect that the agreement was deemed void because Fischer was not registered as an engineer. Section 16 of the EPA prescribes a determination of criminal offence in such case where anyone who undertakes work reserved for engineers under pretense of being a registered engineer. Van Niekerk J, however, ruled, that the offence created by s 16(1)(B) of the EPA[738] did not use any words in the negative form, which would tend to support a finding of invalidity. There was no express provision declaring any act or work performed, or agreement entered into, by a person who pretended to be a professional engineer to be invalid.

There was, indeed, a quite severe penalty prescribed for committing the offence, tending to favour the conclusion that the legislature was content to merely punish an offender who transgressed the criminal prohibition. The purpose of the relevant provision appeared to be aimed at protecting the public. Nevertheless, the work performed by Fisher could not be faulted professionally, and the employer lost the case. The application for amendment was, accordingly, dismissed with costs.

[735] *Bouygues Offshore and Another v Owner of the MT Tigr and Another* 1995 4 SA 49 (C).
[736] *Fischer Seelenbinder Associates CC v Steelforce CC* 2010 (2) nr 684 (HC).
[737] Engineering Professions Act (EPA) 18 of 1986.
[738] Engineering Professions Act s 16(1)(B).

### 5.5 Summary: Misrepresentation

A contracting party that has been deceived into contracting by the misrepresentation of the other contracting party may in suitable circumstances set the agreement aside and claim restitution, or use the misrepresentation as a defence when sued upon the agreement and, in addition, has the right to recover damages for any losses caused by a culpable misrepresentation.[739] It follows that within the context of construction agreements, misrepresentation may take on many forms and be addressed with the remedies attendant upon the particular form of misrepresentation.

Whether the agreement is set aside or upheld, the representee may claim losses for any monetary loss that he or she has experienced due to the misrepresentation; but here it makes a difference if the misrepresentation was made fraudulently, negligently or innocently. Since Roman times, it has been acknowledged that fraud is a delict, and that fraudulent misrepresentation therefore leads to a claim for delictual damages. Only quite recently the decision was taken, that the same is applicable to a negligent misrepresentation. These losses, being delictual in nature, are quantified with respect to the plaintiff's negative interest, and include compensation for consequential losses.[740] Damages, including restitutional damages, may not be claimed for an innocent misrepresentation.[741]

## 6 EXEMPTION AND PENALTY CLAUSES

### 6.1 Exemption clauses

Exemption clauses are often included in engineering and building contracts and, consequently, deserve mentioning. According to Van Huyssteen *et al*:[742]

> "Exemption clauses, also called exception clauses or exclusion clauses, are terms which exclude or limit the liability of a contracting party, such as liability for misrepresentation, liability imposed by the *naturalia* of a specific contract, or liability for breach of contract."

[739] Hutchison and Pretorius eds *The Law of Contract* 2022 132.
[740] Hutchison and Pretorius eds *The Law of Contract* 2022 140-141.
[741] Hutchison and Pretorius eds *The Law of Contract* 2022 141-142.
[742] Van Huyssteen *et al Contract General Principles* 2020 344-345

Exception or exclusion clauses in standardised agreements are nowadays the rule rather than the exception.[743] They serve to distribute commercial risks between the contracting parties. The contracting parties will discuss whether certain risks are commercially viable, and if they must be insured against an acceptable premium, and whether the contract includes coverage for the risks to be carried by the parties. Examples are clauses dealing with the reservation of ownership and stipulations about the passing of the risk and the responsibility to insure.[744]

In *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd*[745] the appelant *Elgin* sued the defendant, Industrial Machinery Suppliers, for damages in connection with repair works on a number of maritime diesel engines in the Supreme Court of Appeal. The SCC (Standard Conditions of Contracts) contained in clause 8 a very extensive limitation of liability clause, which was the main topic of this case. Based on this clause, the defendant claimed exclusion of liability for the damages requested by the appellant.[746]

The appellant's counsel argued, that the service provided by the defendant was so deficient, that it should for purposes of this case be treated as total non-performance.[747] However, the judge did not agree with this and ruled that the limitation of liability clause would still hold and the defendant did not have to pay the damages.[748]

An exception clause can provide protection from responsibility for a "fundamental breach" of agreement.[749] The main principle is that the court will not impose contracts found to be contrary to public policy, or rather detrimental to the interests of society.[750] Thus the Constitutional Court[751] has further confirmed that a court will decline to enforce an otherwise valid agreement if its enforcement in the circumstances would be contrary to public policy. It is therefore highly likely that an otherwise perfectly valid

[743] *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) 42.
[744] Hutchison and Pretorius eds *The Law of Contract* 2022 446.
[745] *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 3 SA
[746] *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 3 SA 424 (A) 3
[747] *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 3 SA 424 (A) para 7.
[748] *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 3 SA 424 (A) para 9.
[749] *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 3 SA 424 (A) para 18.
[750] *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) paras 9-10.
[751] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 5 SA 247 (CC) para 2.

exemption clause may actually not be enforced if its enforcement in the particular circumstances would be against public policy.

It is not in conflict with any rule of substantive law, nor is it contrary to public policy, for contracting parties to exclude liability for breach (even serious breach) of contract, although there is a presumption that contracting parties did not intend to do so.[752] When the validity and operation of exemption clauses are considered in the light of public policy, considerations such as good faith, reasonableness and constitutional values must, be taken into account, as in the case of any other contractual terms.[753]

The main authority on the interpretation of disclaimers, indemnities and exception clauses is *Durban's Water Wonderland (Pty) Ltd v Botha.*[754] In this matter, the respondent and her daughter suffered injuries when ejected from a defective jet ride at an amusement park operated by the appellant. Responding to the respondent's claim for damages, the appellant claimed that the respondent was contractually bound to a disclaimer shown at its ticket booths. The disclaimer noted that the appellant was not in a situation to accept liability or responsibility for injury or damage of any nature whatsoever whether due to negligence or any other reason which is sustained by a person who enters the premises and uses the amenities provided. The court decided that the wording was unambiguous and that it served to exempt the appellant from liability.[755]

The court formulated the rules if interpretation applied to exemption clauses - and the like - in the following terms:[756]

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[752] *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 4 SA 818 (D); *Government of the Republic of South Africa (Department of Industries) v Fibre Spinners & Weavers (Pty) Ltd* 1977 2 SA 324 (D) 339 and *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 3 SA 424 (A). The English Law doctrine of 'fundamental breach' has been held not to be part of South African Law; cf apart from the cases referred to, *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 4 SA 91 (W) 103-104.

[752] Van Huyssteen *et al Contract General Principles* 2020 para 1.49-1.59; para 11F and particularly the later cases cited there; also see ch 7.

[753] Van Huyssteen *et al Contract General Principles* 2020 para 1.49-1.59; para 11F and particularly the later cases cited there; also see ch 7.

[754] *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 988D-E.

[755] *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 989.

[756] *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) 989H-I.

> "The correct approach is well established. If the language of a disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens*. (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be 'fanciful' or 'remote' (cf *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 305 (PC) at 310C-D)."

Subsequently, this approach has been reaffirmed[757] and it is quite clear that such clauses are subject to the ordinary rules of interpretation.[758] Exemption clauses are thus perfectly valid and enforceable, unless so harsh and oppressive that the clause in question would be regarded as incompatible with the dictates of public policy[759] - a proviso that of course applies to all contractuaI provisions.

It may further be mentioned that where consumer contracts are involved, the *Consumer Protection Act*[760] curtails the effect of exemption clauses. Section 51 of the Act, for instance, details a list of prohibited terms which will be regarded as void, an example of which is a term excluding liability for gross negligence. Although valid in terms of the common law,[761] such a clause would not be tolerated under the Act under any circumstances. However, as indicated below, a trenchant discussion of this piece of legislation falls outside of the ambit of this study.[762]

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[757] See eg, *First National Bank of SA Ltd v Rosenblum* 2001 4 SA 189 (SCA); *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Van der Westhuizen v Arnold* 2002 6 SA 453 (SCA); *Walker v Redhouse* 2007 3 SA 514 (SCA); *Drifters Adventure Tours CC v Hircock* supra; *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security* 2010 4 SA 455 (SCA) 462-3; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA).

[758] Hutchison and Pretorius eds *The Law of Contract* 2022 301.

[759] See *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 4 SA 276 (SCA) 286F-G.

[760] 68 of 2008.

[761] See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 2 SA 794 (A) 807.

[762] Para 6.

A matter that pertinently dealt with exemption clauses from a construction industry perspective is *Masstores (Pty) Ltd Murray & Roberts Construction (Pty) Ltd.*[763] This case dealt with a claim for damages resulting from the demolition of a warehouse and its contents due to the negligence of a contractor effecting additions to the structure. The appellant (the plaintiff in the High Court and also the employer), Masstores (Pty) Ltd, contracted the first respondent and contractor (the first defendant), Murray & Roberts Construction (Pty) Ltd, to expand one of its branches in Struben's Valley, Roodepoort. The building contract was a standard form published by the Joint Building Contracts Committee - a form normally employed in the South African building industry. The second defendant in the case was a subcontractor of Murray & Roberts but was not party before the Supreme Court of Appeal.[764]

At the time when employees of the second defendant (Roche projects) were cutting the roof of a Masstores' store using an angle grinder, a fire was started which eventually gutted the store and its contents. Masstores sued Murray & Roberts for breach of contract, claiming R169 365 175, the value of the structure which was demolished and its contents.[765]

The breaches claimed by Masstores comprise the following: failure to observe all laws and regulations; failure to perform the work in an error-free and workmanlike manner; failure to ensure that subcontractors appointed by Murray & Roberts act in accordance with safety levels; and failure to ensure that the work was executed safely and in such a way as not to put the lives and property of people in the vicinity of the work in danger. These failures were alleged to have been negligent or grossly negligent.[766]

The agreement between the parties provided that Masstores indemnified Murray & Roberts against claims for damage to the existing structure and its contents. The indemnification in question was far reaching in its ambit, which is not uncommon in commercial agreements. Clause 9.2.7 was of specific importance providing that "[t]he employer indemnifies and holds the contractor harmless against loss in respect of all claims, proceedings, damages, costs and expenses arising from [p]hysical loss or damage to an existing structure and the contents thereof in respect of which this

[763] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA).
[764] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA) para 1.
[765] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA) para 2.
[766] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA) para 3.

agreement is for alteration or addition to the existing structure." Murray & Roberts excepted to the particulars of claim on the basis that clause 9.2.7 of the building contract precluded an action against it and exempted it from liability for causing damage to Masstores' existing structure.[767]

The court of first instance found that this provision exempted Murray & Roberts from liability. The sole question before the Supreme Court of Appeal was whether clause 9.2.7 had the effect of exempting Murray & Roberts from liability for negligent, or grossly negligent, breaches of the building contract. Masstores argued that the clause was "ambiguous, riddled with inconsistency and incoherent," while Murray & Roberts countered that the clause was clear, unambiguous and consonant with the balance of the contract, which pertinently allocated various risks to the parties respectively.[768]

The Supreme Court of Appeal, upholding the decision of the court *a quo*, concluded that the indemnity provision was not uncertain at all and that the contract clearly allocated the risk in the existing structure, irrespective of fault, to Masstores. In dismissing the appeal against the exception with costs,[769] the SCA emphasised that the contract had to be viewed in its commercial setting and duly taking account the structure and purpose of the contract. In so doing the court concluded that scrutiny of the contract did not support the contention that negligent conduct was excluded from the ambit clause 9.2.7.[770] Appropriately, the court noted that the contract anticipated that the parties would insure themselves against risk and the risk in respect of the existing building lay with the employer, Masstores, whose choice it was to insure it.[771]

If an exception clause transparently and unambiguously exempts a party from liability, or indemnifies him or her against any loss, the court must apply it, even when its consequences are harsh, unless the provision is so unjustifiably severe and autocratic that it offends public policy.[772] If there is no ambiguity, the *contra proferentem* rule

[767] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA) para 4.
[768] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA) para 6.
[769] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA) para 31.
[770] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA) para 24.
[771] *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 6 SA 654 (SCA) para 28.
[772] *Swinburne v Newbee Investments (Pty) Ltd* 2010 5 SA 296 (KZD) 312.

does not apply, as in the *Masstores* case. However, the courts have the tendency to look at such clauses with caution, and will normally try to interpret them restrictively.[773]

In conclusion it may be mentioned that in *Government of the Republic of South Africa v Fibre Spinners & Weavers*[774] the court said that there was no reason why a clause eliminating liability for negligence should not also eliminate liability for gross negligence, supposing that there is a difference between degrees of negligence, and that there was no reason why public policy should prevent the enforcement of such a provision. This statement of the law has been affirmed on several occasions.

## 6.2 Penalty clauses

### 6.2.1 *Nature and purpose*

Contractants often include a penalty clause in their contract in which a contractant agrees to render a performance should a breach of contract occur, since it can be difficult for a plaintiff to prove the extent of the damages for which a defendant is liable. For the penalty creditor a penalty clause is advantageous because he may claim the penalty without having to prove that he has suffered damages and the extent of the damages. The penalty clause may also provide for non-patrimonial loss. On the other hand for the penalty debtor, the penalty clause may provide certainty as to the extent of his liability should he commit breach of contract. This advantage will not be applicable where the contract provides for an election between claiming the penalty and claiming damages.[775]

### 6.2.2 *Scope of Act*

Penalty clauses in construction contracts deserve a brief mention because of their prevalence in the industry. Penalty stipulations are generally valid and enforceable, and are governed by the Conventional Penalties Act.[776] A clause will constitute a penalty stipulation in terms of the Act[777] where it;

(i) applies to breach of contract;

[773] *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 1 SA 982 (SCA).
[774] *Government of the Republic of South Africa v Fibre Spinners & Weavers* 1978 2 SA 794 (A).
[775] Van Huyssteen *et al Contract General Principles* 2020 487.
[776] The *Conventional Penalties Act* 15 of 1962.
[777] Sections 1 and 4 of the *Conventional Penalties Act* 15 of 1962.

(i) imposes an obligation on the defaulting party to pay a sum of money or deliver or perform anything for the benefit of another, or provides for forfeiture of the right to claim restitution of anything performed by the defaulting party; and

(ii) functions either as a penalty or as liquidated damages.

6.2.3 *Reduction of the penalty*

Penalty clauses or stipulations are subject to a measure of equitable judicial discretion in that if it appears to a court that a penalty is out of proportion to the prejudice suffered by the creditor, it may reduce the penalty to the extent equitable in the circumstances. In determining the extent of the prejudice, the court may take into consideration not only the creditor's proprietary interests, but also every other rightful interest affected by the relevant conduct of the debtor.[778] In *Van Staden v Central South African Land and Mines*[779] the court gave the following broad description of prejudice within this context:

> "[E]verything that can reasonably be considered to harm or hurt, or be calculated to harm or hurt a creditor in his property, his person, his reputation, his work, his activities, his convenience, his mind, or in any way whatever interferes with his rightful interests as a result of the act or omission of the debtor..."

Furthermore in *JVZ JV and Others v City of Cape Town*[780] the following was decided:

> "If, upon hearing a claim for a penalty, it appears to the court that such a penalty is out of proportion to the prejudice suffered by the creditor because of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty. This has been interpreted to mean a claim for a penalty or the return of a penalty."

The question as to whether the penalty was "*out of proportion"* to the prejudice can be evaluated by three means: firstly, by examining comparable situations where the

[778] Sections 3 of the *Conventional Penalties Act* 15 of 1962**;** *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C).
[779] *Van Staden v Central South African Lands and Mines* 1969 4 SA 349 (W) 352.
[780] (4873/2022) [2023] ZAWCHC 72 (13 April 2023) para 20

required result was achieved; then, by examining the extent of the penalty; and then penalties in general in comparison to the income and expenditure of the defendant.[781]

### 6.2.4 *Specific performance and penalty clauses*

In terms of s 2(2),[782] a party is not entitled to claim both specific performance and the penalty unless this is specifically provided for in the penalty. The penalty stipulation only comes into effect in the instance of the cancellation of the contract. If the innocent party upholds the contract, the innocent party's dependence on the penalty stipulation is excluded, and he or she must prove his or her damages resulting from such breach of contract in the usual manner; except for a situation in which the contract makes specific provision for the penalty being payable under these circumstances.

### 6.2.5 *Penalty clause excludes claim for damages*

A creditor may not claim a penalty in addition to damages calculated in the traditional way.[783] This is because the penalty is intended to take the place of an ordinary action for damages. In *Labuschagne v Northmead Investments Ltd,*[784] for the same reason, the creditor may not claim damages in the ordinary way, instead of the penalty, unless he or she has expressly reserved the right to do so in the contract. This is the case even if the amount of loss actually suffered as a result of the breach far exceeds the amount of the penalty.

In *JVZ JV and Others v City of Cape Town,* the following was decided:

> When a claim is activated according to an extension of time regarding a delay attributable to a breach of the agreement, this operates as a penalty stipulation. Thus, the defendants are consequently prohibited by legislative intervention from receiving both the penalty and damages or the latter instead of the penalty. By elaboration, the plaintiff avers that the court is empowered to reduce the penalty and accordingly seeks a reduction.*[785]*

[781] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 37.
[782] Sections 2(2) of the Conventional Penalties Act 15 of 1962.
[783] Sections 2(1) of the *Conventional Penalties Act* 15 of 1962.
[784] *Labuschagne v Northmead Investments Ltd* 1966 4 SA 120 (W).
[785] (4873/2022) [2023] ZAWCHC 72 (13 April 2023) para 5.

### 6.2.6 *Penalties in respect of defects or delay*

Penalty provisions play quite an important role in the construction industry, and serve as a deterrent to delayed performance by the debtor and as a pre-estimate of damages that the creditor will suffer due to delays occasioned as a result of delayed performance by the debtor.

In *Murcia Lands CC v Erinvale Country Estate Home Owners Association,*[786] the plaintiff, a close corporation, became the registered owner of erven 10939 and 10940 at Erinvale Country Estate, an upmarket development in the area of Somerset West.[787] In this case, before the High Court of the Cape of Good Hope Provincial Division the Plaintiff requested relief from the penalties imposed on him by the Erinvale Country Estate Home Owners Association, due to him not constructing a dwelling on the two erven he had purchased by May 1999 and completing such dwellings within 12 months from this date. By 26 February 2002, the total penalty levies and interest amount to a total of R283 242-72. The penalty levy was ten times the ordinary levy on an erf with a completed dwelling.[788]

In order to be able to sell the erven, the plaintiff had no choice but to pay this amount, which he did under protest.[789] The plaintiff asserted the Conventional Penalties 15 of 1962 to be applicable, where a reduction of this penalty should be expected.[790]

The judge went on to investigate:

(a) whether the penalty was out of proportion to the prejudice suffered by the defendant by reason of the plaintiff's breach of contract, and if so;

(b) whether it would be equitable for the Court to reduce the penalty; and if so,

(c) to what extent?[791]

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[786] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C).
[787] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 1.
[788] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 6.
[789] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 9.
[790] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 10.
[791] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 14.

#### 6.2.6.1 Prejudice

According to the judge, there was little evidence of major prejudice due to the plaintiff's delay in building his dwellings, where one could even go so far as to state that the defendant profited from the late building activities.[792]

#### 6.2.6.2 Every other rightful interest

However, that is not the end of the matter. The prejudice to which the Act refers includes "not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question".[793] This potential prejudice did not materialise, for the reason that most of the homeowners complied with the obligations imposed by the contract.[794] It appears to me that the defendant had a "rightful interest" in ensuring and obtaining compliance with the terms of the contract. It was entitled to impose a penalty clause to compel the homeowners to carry out their obligations under the contract by providing "harsh consequences" should they default.[795]

The fact that the contractual provision is intended as a penalty that creates a deterrent, rather than as a provision that provides compensation for default, does not mean that the defendant suffered no prejudice as a result of the breach of contract. The prejudice was prejudice to its right to enforce concerted action for the common good, and to its interest in obtaining concerted action.[796] Section 3 of the act now required the judge to determine whether the penalty was "out of proportion" to the prejudice suffered by the defendant.[797] This was to be done by comparison with the equivalent penalties charged by other home owner associations. Based on this information, the judge ruled,

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[792] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 20.
[793] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 21.
[794] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 23.
[795] *Western Bank Ltd v Meyer, De Waal, Swart & Another* 1973 4 SA 695 (T) at 699H; *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 24.
[796] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 25.
[797] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 26.

that the penalty is reduced to eight times the monthly levy payable in respect of a single erf at Erinvale.[798]

6.2.7 *Penalties due to delay beyond fixed date*

In *Aveng Africa (Pty) Ltd Applicant and Seventy Five on Maude (Pty) Ltd First Respondent Nugent, R W Second Respondent,*[799] the applicant was seeking the review and setting aside of an arbitiral award in terms of section 33(1) of the Arbitration Act 42 of 1984[800] given by the Second Respondent, the arbitrator on 8 February 2021.The goal was thus to postpone the beginning of the penalty payments.

The general terms of the JBCC agreement provides for a “defects liability period” of 90 days, which started after the fulfillment of Practical Completion, within which period the contractor may be directed by the principal agent to attend to such defects. [801]

The defects liability period was discontinued by the parties and replaced with a “Snagging Period” of two months after the procurement of practical completion date, resulting in a construction period of 32 months.[802]

The dispute referred to adjudication by the Applicant was:

6.2.7.1 whether there is a 60-day penalty free period that extends to the current date for practical completion, which prohibits the first respondent from charging penalties against the applicant for the first 60 days of any delay to the then-agreed date of practical completion.

[798] *Murcia Lands CC v Erinvale Country Estate Home Owners Association* [2004] 4 All SA 656 (C) para 57.
[799] *Aveng Africa (Pty) Ltd Applicant and Seventy Five on Maude (Pty) Ltd First Respondent Nugent, R W Second Respondent,* 24 May 2022 para 1.
[800] Section 33(1) of the *Arbitration Ac*t 42 of 1984.
[801] *Aveng Africa (Pty) Ltd Applicant and Seventy Five on Maude (Pty) Ltd First Respondent Nugent, R W Second Respondent,* 24 May 2022 para 9.
[802] *Aveng Africa (Pty) Ltd Applicant and Seventy Five on Maude (Pty) Ltd First Respondent Nugent, R W Second Respondent,* 24 May 2022 para 10.

6.2.7.2 whether or not the first respondent was entitled to charge penalties from 1 May 2019, due to the penalty free period;

6.2.7.3 whether or not there has been an amendment, discrepancy, or waiver of the penalty free period.[803]

The arbitrator had ruled in favour of the first respondent. The judge, however, ruled that the arbitrating judge had not exceeded its powers or committed a gross irregularity in the conduct of the arbitration proceedings, where as a result, the arbitration rulings would stand.[804]

## 7 THE CONSUMER PROTECTION ACT 68 OF 2008 (CPA) WITH SPECIAL REFERENCE TO BUILDING PROJECTS

In 2008, The Consumer Protection Act (CPA)[805] was approved by parliament with the aim to increase the protection enjoyed by consumers when purchasing goods and services beyond the level provided for by the common law.[806]

It was also motivated by the inequality between South African consumers having widely divergent levels of literacy and numeracy on the one hand, and the suppliers or producers of goods and services on the other. Thus, the weaker party in terms of access to lawyers and the Court is supposed to be strengthened.[807]

The CPA applies to every transaction for the supply of goods or services within South Africa, unless exempted in accordance with sections 5(2), (3), or (4).[808]

The CPA exerts an influence on a wide variety of aspects concerning consumer contracts, and differs from the common law. Although a thorough discussion of the

[803] *Aveng Africa (Pty) Ltd Applicant and Seventy Five on Maude (Pty) Ltd First Respondent Nugent, R W Second Respondent,* 24 May 2022 para 32.
[804] *Aveng Africa (Pty) Ltd Applicant and Seventy Five on Maude (Pty) Ltd First Respondent Nugent, R W Second Respondent,* 24 May 2022 para 41.
[805] Consumer Protection Act 68 of 2008 (CPA).
[806] Hutchison and Pretorius eds *The Law of Contract* 2022 471.
[807] Hutchison and Pretorius eds *The Law of Contract* 2022 473-474.
[808] Consumer Protection Act 68 ss 5(2), (3) or (4).

CPA falls outside the scope of this study, there are a few aspects that may be highlighted.

### 7.1 To which consumers does the act apply?

For purposes of the CPA, a consumer can be either a natural person or a juristic person, such as a small company, provided its asset value or annual turnover at the time of the transaction does not exceed the threshold value determined by the Minister in terms of section 6 of the Act.[809] At the time of writing, the threshold value was set at R2 million. This limitation is quite pertinent to the application of the Act to transactions involving engineers and architects. It is likely that, in the majority of construction matters where these professionals are involved, they will be appointed in terms of an agreement with a juristic entity. These entities will rarely fall within the parameters of the threshold and, consequently, in most cases, the Act will not apply. The CPA will, however, apply to cases where an architect or engineer is directly appointed for a construction project by the employer.

### 7.2 The right to fair value, good quality, and safety

The consumer is entitled to goods and services that are of acceptable quality and safe. The CPA provides the consumer with remedies in instances where low-quality goods are sold.[810]

### 7.3 Quality goods

The CPA deals with the right to good-quality goods in two sections. The first part, which includes Sections 55 and 56,[811] deals with the quality of the goods themselves and makes provision for a guarantee of quality. The second part, section 61,[812] deals with compensating a customer who has experienced damage due to defective goods.[813]

[809] Hutchison and Pretorius eds *The Law of Contract* 2022 473-474.
[810] Hutchison and Pretorius eds *The Law of Contract* 2022 496.
[811] Consumer Protection Act ss 55 and 56.
[812] Consumer Protection Act s 61.
[813] Hutchison and Pretorius eds *The Law of Contract* 2022 496. Liability under s 61 is discussed in detail in the chapter on delictual liability above.

### 7.3.1 *Harm caused by defective goods*

Section 61 of the act holds producers, importers, distributors, and retailers of goods responsible for damage to property or person, and ensuing economic loss caused by goods that are not safe, that exhibit product failure, defect or hazard, or that were not accompanied by a suitable manual or warnings.[814]

The common law of sale generally only places liability on the seller if the seller gave a warranty, made a culpable misrepresentation about the quality of the goods, is also the manufacturer,[815] or, alternatively, a merchant seller, who publicly declares to have attributes of competence and expert knowledge with respect to the type of goods sold. The latter rule is referred to as the Pothier rule.[816]

A prominent example of the liability of the seller is *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd,*[817] where defective bricks were used in the construction of a building, which necessitated the destruction of walls containing these bricks and the rebuilding thereof with new bricks. The seller of the bricks was held liable for the losses incurred in the process by the purchaser.

## 7.4 Good quality services

The services provided by engineers or architects potentially fall under the definition of "services" in terms of the Act, and, more specifically, the general description under (a), which refers to "any work or undertaking performed by one person for the direct or indirect benefit of another."

Section 54 of the Act provides that a consumer is entitled to demand quality services. A consumer has the right to the following:[818]

- timely performance, or if that is not feasible, timely notification of inevitable delays;

[814] Hutchison and Pretorius eds *The Law of Contract* 2022 500.
[815] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) 682-683.
[816] See *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* [2006] 3 All SA 309, 2006 3 SA 593 (SCA).
[817] *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A).
[818] Consumer Protection Act s 54(1); Hutchison and Pretorius eds *The Law of Contract* 2022 502.

- services of the quality that a consumer can expect normally;
- the delivery and installation of goods during the performance of the service that are of an acceptable quality and free of defects; and
- the return of their property in the same condition.

When determining whether these requirements have been met, the circumstances of the supplier and the agreement between the service provider and the consumer will be taken into account. According to section 51, the supplier will not be able to exclude any of these requirements contractually.[819]

Section 54(2) provides the following remedies for a transgression of section 54(1):

> If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to either -
>
> (a) remedy any defect in the quality of the services performed or goods supplied; or
>
> (b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

It follows from the foregoing that where the CPA applies to a particular construction or building project, that the services provided by an engineer or architect potentially fall under the provisions of the Act. Where the engineer or architect provides the services directly in terms of a contract with the employer, it follows that the CPA will apply. Furthermore, this will also be the case where the employer transacts with a contractor, who in turn sub-contracts certain services to an engineer or architect. In the latter instance, the definition of "consumer" stretches the ambit of the CPA to, if the context so requires or permits, a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services. However, an overriding caveat that ought to be underscored is that the CPA must in the first instance apply in the circumstances and, as previously mentioned, under the

[819] Hutchison and Pretorius eds *The Law of Contract* 2022 502.

limitations pertinent to the application of the Act, where whether the consumer is a juristic person will play a deciding role in such case that the professional services of architects and engineers are involved.

### *7.4.1 Housing Consumers Protection Measures Act*

#### 7.4.1.1 Purpose

Another piece of consumer legislation that may briefly be mentioned is the Housing Consumers Protection Measures Act.[820] The objective of the Act is to shield housing consumers from having to seek redress against deficient construction of their homes via expensive Court procedures, by allowing them to refer such disputes to the National Home Building Registration Council (the NHBRC) for resolution.[821] The Acts bestows particular functions and powers on the NHBRC, gives certain statutory warranties to housing consumers, and provides for the establishment and administration of a fund to give help to housing consumers in situations where home builders do not adhere to their responsibilities in terms of section 13(2)(b)(i) (failure to rectify major structural defects).[822]

The Housing Consumers Protection Measures Act is applicable alongside the CPA. If there is any inconsistency between the provisions of the two Acts, both apply concurrently to the extent possible, and if not possible, the provision that grants the greatest protection to the consumer prevails.[823]

#### 7.4.1.2 The scope of transactions

Transactions for home improvements or the acquisition or construction of homes for consumers include transactions where:

- extensions or improvements are made to an existing home;
- an existing home is sold to a consumer by another consumer or by a supplier (for example a home builder or a property developer who is a home builder);

[820] Housing Consumers Protection Measures Act 95 of 1998.
[821] *Maurice Leas t/a Build4You v Van Kerckhoven* [2008] JOL 21875 (W) 10; Van Eeden *Consumer Protection Law in South Africa* 2017 645-646.
[822] Housing Consumers Protection Measures Act 95 of 1998 ss 5(4)(d) and 17; Van Eeden *Consumer Protection Law in South Africa* 2017 646.
[823] CPA ss 2(9)(a) and (b); Van Eeden *Consumer Protection Law in South Africa* 2017 646.

- a consumer contract with a home builder or a property developer who is a home builder for the construction of a home; or
- a consumer contract with a property developer (or home builder) for the sale to the consumer of land and the construction of a home.[824]

#### 7.4.1.3 Claims and recourse

The NHBRC must, as per Section 17(1) and subject to Section 17(2), disburse from the fund set up for that objective in terms of section 15(4), an amount for repair, where:

- within five years of the date of occupation, a substantial structural flaw has become obvious in respect of a dwelling due to lack of compliance with the NHBRC Technical Requirements, and the home builder has been informed accordingly within that period;
- within one year of the date of occupation, a roof had sprung a leak as the result of poor workmanship, design, or materials that manifests in a dwelling and the home builder has been informed accordingly within that period;
- the home builder has violated the home builder's duties in terms of section 13(2)(b)(i) (major structural defects) as far the repair of such defect is concerned;
- the home in question was constructed by a registered home builder, and, at the occupation date, the home was registered with the NHBRC; or
- the home builder does not exist anymore or cannot meet his responsibilities.[825]

In terms of Section 17(2),[826] the NHBRC is allowed to either reduce any amount that may be spent in terms of Section 17(1), or in an exceptional situation, make a payment to a home owner in full and final settlement instead of repairing the flaw, or denial of any claim.[827]

[824] Van Eeden *Consumer Protection Law in South Africa* 2017 645.
[825] Housing Consumers Protection Measures Act 95 of 1998 s 17(1)(a)-(e); Van Eeden *Consumer Protection Law in South Africa* 2017 672-673.
[826] Housing Consumers Protection Measures Act 95 of 1998 s 17(2).
[827] Van Eeden *Consumer Protection Law in South Africa* 2017 673.

7.4.1.3.1 Application in case law: *Stergianos v National Home Builders Registration Council*

*Stergianos v National Home Builders Registration Council*[828] provides a good example of the application of the Housing Consumers Protection Measures Act.

During May 2005, Stergianos signed an agreement with Herrington Construction CC to construct a home for him. The home was constructed with a number of defects. After the construction was completed, the plaintiff took occupation of the house.[829] During the course of the first year of his occupation of the house, cracks began to show up in the concrete floor slab, which worsened over time. Stergianos asked his attorneys for help, and a civil engineer, Mr Retief Kleinhans, was briefed to determine the reason for the cracks. He considered the cause to be structural.[830]

Since Stergianos could not obtain redress against the builder, he issued a summons against the NHBRC according to section 17 of the Act,[831] and requested an order declaring that the NHBRC was liable for the repair of the structural flaws in the home, requiring it to repair the flaws within 180 days and to pay his costs.[832]

The NHBRC declined the Plaintiff's claim. All the parts of the cause of action set out in Section 17(1) of the Act[833] had either been acknowledged by the NHBRC, or there was no disagreement about them. The only contentious element, which had to be ruled on by the Court, was the reason for the flaw. If it could be established that the fractures in the floor slab were due to a major structural flaw, the Plaintiff would obtain the compensation contemplated by Section 17(1),[834] otherwise the action would fail.[835]

The term "major structural defect" is defined in section 1 of the Act to mean "a defect which gives rise or which is likely to give rise to damage of such severity that it affects or is likely to affect the structural integrity of a home and which requires complete or

[828] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP).
[829] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 9.
[830] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 10.
[831] *The Housing Consumers Protection Measures Act 95 of 1998* s 17.
[832] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 11.
[833] *The Housing Consumers Protection Measures Act 95 of 1998* sec 17 (1).
[834] *The Housing Consumers Protection Measures Act 95 of 1998* sec 17 (1).
[835] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 12.

partial rebuilding of the home or extensive repair work to it, subject to the limitations, qualifications or exclusions that may be prescribed by the Minister".[836]

According to the conclusion arrived at by the civil engineer, who gave evidence as an expert for Stergianos, Kleinhans, the flaws in the concrete floor slab of the dwelling were actually due to major structural deficiencies in the substructure of the dwelling and the resulting settling of the slab. The NHBRC's expert, Mr Thabo Mathibeli, noted that the fractures were due to shrinkage, as a result of bad workmanship when the concrete slab was poured, and the builder's failure to put expansion joints in the slab where they ought to have been located. In his opinion, therefore, the flaws in the slab were not structural in nature. Both experts concurred that, irrespective of the reason for the cracking, the standard of workmanship of the builder was of bad quality.[837]

Kleinhans was of the opinion that the location where the home was constructed had, from the very beginning, presented some technical challenges, situated as it was next to the Indian Ocean, and constructed on a primary dune. A builder would necessarily have to take special precautions when constructing a dwelling on a dune due to the fact that it is mobile.[838]

Kleinhans tried to inspect the relevant documentation to establish whether the dwelling was in accordance with the technical requirements and stipulated standards; however, very little documentation could be located. Kleinhans did, however locate three Dynamic Cone Penetrometer (DCP) tests seemingly done prior to construction; most probably to designate a class to the site, as required by the Home Building Manual. According to Kleinhans, these results showed that cause for concern and remedial measures had to be done. According to him, the site classification had probably been incorrect.[839]

Kleinhans then contracted Quteniqua Lab (Pty) to conduct DCP tests in order to measure the density of the fill under the slab, and he provided the instrument and the technician to operate it. After some time had passed, Outeniqua Lab (Pty) Ltd had not yet responded. Kleinhans then did the tests himself, found someone else to do the

[836] Referred to by the court in para 13.
[837] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 14.
[838] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 21.
[839] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 22.

physical work, and another professional for plotting the results. These tests, done in seven places selected by Kleinhans, confirmed his visual analysis of the problem. They showed that the fill under the slab was not sufficiently compacted to support the weight of the slab.[840]

Mr. Thabo Mathibeli who, as Kleinhans, is a structural engineer, was called as an expert witness by the defendant. He checked the home twice, and arrived at a conclusion opposite to that of Kleinhans himself. He examined the walls, both inside and outside, to look for any separation of the walls from the slab and fractures running into the foundations, both of which would, he said, point to sinking of the substructure. He located neither and concluded that the problem had simply been caused by sub-standard workmanship. The builder did not mix the concrete correctly and had not inserted joints to allow for shrinkage. He reasoned that the shrinkage placed stress on the concrete and that had led to the cracks. In other words, according to Mathibeli, the problem was not structural at all, but that the cracks were merely superficial.[841]

The results of the DCP tests done by Kleinhans swayed the probabilities in favour of his opinion.[842] Thus, it was more likely that the cracks in the plaintiff's dwelling were due to a defect in the substructure of the dwelling. The plaintiff thus had evidence that there was a major structural defect.[843]

As a result, the NHBRC was ordered, in terms of section 17 of the Housing Consumer Protection Measures Act,[844] to fix the structural flaws in the plaintiff's home, up to the maximum amount as per regulation 13(1), read with regulation 13(2),[845] of the rules promulgated in terms of the Housing Consumer Protection Measures Act, and the NHBRC was also ordered to pay the plaintiff's costs.[846] This case demonstrates two ways in which the Housing Consumer Protection Measures Act provides additional protection to the consumer, where : first, the consumer may be able to obtain more relief in the case of latent defects; and second, the consumer is provided with the possibility of assistance via the NHBRC in the case of the contractor going bankrupt.

[840] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 25.
[841] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 29.
[842] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 37.
[843] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 38.
[844] The Housing Consumers Protection Measures Act 95 of 1998.
[845] The Housing Consumers Protection Measures Act 95 of 1998 ss 13(1) and 13(2) respectively.
[846] *Stergianos v National Home Builders Registration Council* [2014] JOL 32193 (ECP) para 39.

Unfortunately, it may still very well be the case that despite the laudable implications of the Act, that litigation will be required in order for the consumer to exercise his rights.

## 8. Arbitration

### 8.1 Introduction to arbitration

The *Arbitration Act*[847] and its amendments usually regulate the arbitration process in the construction industry. The parties to the arbitration must have a written agreement in which they undertake to use the process of arbitration to solve any existing or future dispute through arbitration.

It is unlikely that one will nowadays come across a contract which does not include an arbitration clause. These have become standard clauses which are included in different types of contracts.[848] The main objective is to compel the parties to participate in arbitration proceedings if a dispute arises.[849]

Arbitration is a dispute resolution procedure which provides an alternative to litigation proceedings, and which is more expedient, more cost-effective, more confidential and more efficient depending on the experience and expertise of the arbitrator.[850]

The reason for using arbitration is to avoid hefty litigation expenses and to avoid that the litigation becomes public. However, one must consider that the arbitrator must be paid for his services, but, since the arbitrator will often have substantial expertise in technical matters, these expenses will often be more than compensated for by savings due to not having to explain technical details to the arbitrator.[851]

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[847] *Arbitration Act No* 42 of 1965 (the Act).
[848] Watson "*To litigate or to arbitrate? That is the question."* (2015) 15 *Without Prejudice* 38.
[849] Alberts *Arbitration clauses in contracts : a re-evaluation* LLM Dissertation 2019.
[850] Assheton-Smith "*Arbitration rather than litigation?"* (2013) 40 *Pharmaceutical & Cosmetic Review* 18.
[851] *Pretoria City Council v Blom and Another* 1966 2 SA 139 (T). Some delays may be avoided by co-operation between the parties; Act 42 of 1965 s 1; *Mervis Brothers v Interior Acoustics and Another* 1999 3 SA 607 (W).

## 8.2 Arbitration and the Constitution

Section 33 (1) of the Constitution[852] provides that "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair". Section 34 of the Constitution[853] determines that "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum".

Arbitration may be said to have certain general requirements: The first requirement is that arbitration must be consensual. No party should be forced into private arbitration. The second requirement is that the proceedings must not appear in public. The third requirement is that the identity of the arbitrator and the proceedings will be determined by contract. The party who agrees to arbitration will have to abide the consequences.[854]

## 8.3 Arbitration clauses in standard building contracts

Building contracts usually contain arbitration clauses. These clauses differ from contract to contract. The *JBCC Principal Building Agreement* 2014[855] provides that, should there be any dispute between the parties about the contract or its stoppage, both parties may give notice to the other to settle such disagreement. Where such disagreement is not resolved within ten working days of having received this notice, it shall be a dispute and will be referred by the complaining party to either adjudication or arbitration.[856]

The parties may still resolve the disagreement by mediation. If the dispute is referred to adjudication, the adjudicator's decision shall be binding unless either party is unhappy with it, in which instance the dispute must be referred to arbitration.[857]

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[852] Section 33(1) of the Constitution.
[853] Section 34 of the Constitution.
[854] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 233.
[855] *JBCC Principal Building Agreement* 2014.
[856] *Stein v Ott*o 1917 WLD 2; *Heymann's Estate v Featherstone* 1930 EDL 105; *Iscor Pension Fund v Balbern Holdings (Pty) Ltd* 1973 4 SA 515 (T).
[857] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 233.

### 8.3.1 The arbitration agreement

Arbitration clauses are often extremely broad and provide for nearly any dispute arising out of a contract to be resolved by arbitration.[858] Even in instances where there is an arbitration clause, a party cannot necessarily insist on arbitration in all matters connected with the contract. It has been said that the dispute must qualify for a solid formulation and competing arguments must be drafted before any party can demand arbitration.[859] Nevertheless, arbitration will often hinge on alleged breach of the contract in question, and this usually squarely falls within the ambit of virtually all arbitration clauses.

When it is claimed that impending arbitration proceedings will be invalid, a court may grant an order preventing the commencement of such proceedings.[860]

### 8.3.2 Confidentiality

The Arbitration Act[861] does not clearly provide for the privacy and confidentiality of arbitration proceedings in South Africa. However, an arbitration agreement can expressly provide that the proceedings and the award are private and confidential. Even in the absence of an express provision to this effect, such terms may be limited by South African Courts,[862] as it is the case in the English Courts.[863]

### 8.3.3 Validity of contract containing arbitration clause in issue

If the validity of the contract containing an arbitration clause is in question, a party will not be able to rely on the arbitration clause. In this instance the party who contests the

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[858] *JBCC Principal Building Agreement* 2014 clause 30.7; *General Conditions of Contract* 2010 clause 10.7; *FIDIC* 1999 clause 20.6 *Scriven Bros v Rhodesian Hides & Produce Co Ltd and Other*s 1943 AD 393 at 400; *Gardens Hotel (Pty) Ltd and Others v Somadel Investments (Pty) Lt*d 1981 3 SA 911 (W).

[859] *London & Lanchashire Fire Assurance Co v Imperial Cold Storage and Supply Co* 15 CTR 673; *PCL Consulting (Pty) Ltd t /a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 4 SA 68 (SCA).

[860] *Pretoria City Council v Blom and Another* 1966 2 SA 139 (T); *Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industrial Ltd and Another* 1979 3 SA 740 (W).

[861] Arbitration Act No 42 of 1965.

[862] *Replication Technology Group and Others v Gallo Africa Ltd* 2009 5 SA 531 (GSJ).

[863] English *Arbitration Act* 1996.

validity of the contract is likewise denying the existence of the binding agreement to qualify for arbitration.[864]

The position is different where the parties initially accepted that the contract is valid, and a dispute has afterwards arisen in connection with an alleged breach of contract. In such a case the arbitration clause is usually expressed in wide terms and provides, for all disputes arising from the contract to be settled by arbitration.[865]

A 'wide' arbitration clause is sufficient to cover a claim for *restitutio in integrum*.[866] Although as a rule an arbitration clause does not survive the invalidity of the contract containing the clause, the parties may agree that the dispute arising in respect to the validity of the contract may nevertheless be determined by arbitration.[867]

Similarly, where a contract has been terminated by agreement or an existing contract has been substituted by a replacement contract (novation), a party cannot rely on an arbitration clause contained in the original contract.[868] It will be only admissible in instances where the arbitration clause is wide enough to include disputes arising from termination.[869] Likewise, an arbitration clause inserted in a fraudulent agreement that the innocent party has elected to cancel cannot survive the rescission.[870]

An arbitrator has the authority to determine whether the necessary protocols leading to the arbitration have been adhered to.[871]

### 8.3.4 Death or insolvency of parties

The Act provides that unless the agreement otherwise provides, an arbitration agreement is not terminated by the death of a party thereto. [872]

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[864] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 237.
[865] *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 2 SA 388 (W); *Atteridgeville Town Council and Another v Livanos t/a Livanos Brothers Electrical* 1992 1 SA 296 (A).
[866] *Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 1 SA 17 (A).
[867] *North East Finance (Pty) Ltd v Standard Bank of South Africa Lt*d 2013 5 SA 1 (SCA).
[868] *Nochinowitz v Weinrich 1921 EDL* 119; *Rogers v Matthews* 1926 TPD 21; *Turkstra and Another v Massyn* 1958 1 SA 623 (T).
[869] *Gardens Hotel (Pty) Ltd van Others v Somadel Investments (Pty) Ltd* 1981 3 SA 911 (W).
[870] *North West Provincial Government and Another v Tswaing Consulting CC and Others* 2007 4 SA 452 (SCA).
[871] *South African Transport Services v Wilson NO and Anothe*r 1990 3 SA 333 (W).
[872] 36 Section 4 of Act 42 of 1965.

Similarly, sequestration, winding-up or judicial management does not, unless the agreement otherwise provides, terminate an arbitration agreement.[873]

8.3.5 Revocation and setting aside of an arbitration agreement

An arbitration agreement, like any other agreement, cannot be unilaterally repudiated by one of the parties to the agreement.[874] However, the jurisdiction of the courts is not necessarily excluded by an arbitration agreement, for example -

(i) where a party is unable to prove that the arbitration agreement is applicable to the dispute between the parties, or

(ii) where the institution that is supposed to conduct the arbitration lacks authority to grant the relief claimed.[875]

The court may at any time, on the application of any party to an arbitration agreement and on convincing grounds -

(a) Declare null and void the arbitration agreement, or

(b) Demand that a specific dispute mentioned in the arbitration agreement shall not be referred to arbitration; or

(c) Order that the arbitration agreement shall discontinue to have effect with reference to any dispute referred.[876]

A court will decline arbitration only with a valid reason.[877]

[873] 38 Section 5 of Act 42 of 1965; *Goodwin Stable Trust v Duohex (Pty) Ltd and Another* 1998 4 SA 606 (C).
[874] Section 3(1) of Act 42 of 1965; *Gardens Hotel (Pty) Ltd and Others v Somadel Investments (Pty) Ltd* 1981 3 SA 911 (W); *South African Transport Services v Wilson NO and Another* 1990 3 SA 333 (W).
[875] *Peel and Others v Hamon J & C Engineering (Pty) Ltd and Others* 2013 2 SA 331 (GSJ).
[876] Section 3(2) of Act 42 of 1965; *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359; *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 2 SA 388 (W).
[877] *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 375; *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 2 SA 388 (W).

## 8.4 Functions of and proceedings of arbitration tribunals

### 8.4.1 The arbitrator's function

Part of the arbitrator's function is to hold a judicial inquiry into the nature of disputes referred to him. He must also strive to let justice be done in an equal and impartial way.[878] He should hear the respective cases and make a judgement according to the evidence presented to him.[879] An exception exists in the case of an arbitrator who has been appointed because of his technical knowledge. Such an arbitrator may use his knowledge to reach a decision without any evidence having been led.[880]

Standard building and engineering contracts provide for mediation, dispute resolution by amicable settlement, or adjudication usually as a precursor to arbitration.[881] The *JBCC Principal Building Agreement* 2014[882] provides for mediation; the *General Conditions of Contract* 2023[883] provides for adjudication and clause 10.4[884] provides for amicable settlement; and *FIDIC* 1999[885] provides for adjudication and clause 20.5[886] provides for amicable settlement. The above-mentioned procedures will be briefly discussed.[887]

#### 8.4.1.1 Mediation

In the construction industry in South Africa, mediation entails a procedure in which a neutral third-party endeavour to resolve a dispute by conducting an enquiry, similar to but less formal that an arbitration hearing, and giving a non-binding opinion.[888]

The benefit of this type of dispute resolution is a less formal and economic process than arbitration. In this instance the parties make suggestions to the mediator and the mediator must interpret them.[889]

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878 *Graaff-Reinet Municipality v Jansen* 1917 CPD 604 at 607.
879 *Stein v Otto* 1917 WLD 2.
880 McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 143.
881 McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 143.
882 *JBCC Principal Building Agreement* 2014, clause 30.
883 *General Conditions of Contract* 2023, clause 10.3.2.
884 *General Conditions of Contract* 2023, clause 10.4.
885 *FIDIC* 1999, clause 20.4.
886 *FIDIC* 1999, clause 20.5.
887 McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 143.
888 The Association of Arbitrators:*Guidelines for Mediation under Construction Contracts.*
889 McKenzie and Ramsden *Mackenzie's Law of Building and Engineering Contracts* 2014 143.

A mediator must be acquainted with the details of the matter in the dispute, and he should give each party the chance to explain his case, but he should use his own discretion regarding which procedure he recommends accordingly. He is entitled to conduct inspections and to hear evidence unless the parties disagree. According to the *General Condition of Contract* 2023 arbitration is appropriate if one of the parties disagrees or is dissatisfied with the opinion of the mediator.[890]

Where the dispute is initially referred to mediation under a clause with the effect that the opinion of the mediator shall be final and binding, the duty is on the party that opposes the mediator's opinion to refer the matter to arbitration The opposing party has the full right to abide by the mediator's opinion and to enforce it unless the other party within the stipulated time requires the matter to be referred to arbitration.[891]

#### 8.4.1.2 Adjudication

Adjudication is a dispute resolution procedure which main purpose is to resolve the dispute speedily. The adjudicator does not hold a formal hearing but requires the parties to make written submissions. These submissions are usually in the form of affidavits and can accordingly be accepted as evidence. A copy of the contract normally forms part of the plaintiff's submission.[892]

South Africa does not yet have statutory adjudication and adjudication is not governed by the Arbitration Act. The standard construction contract does, however, make provision for adjudication, The *JBCC Principal Building Agreemen*t 2014[893] determines that a resolution suggested by the adjudicator shall be immediately binding and implemented by the parties. If either party is dissatisfied with the determination by the adjudicator, they may give notice to the other party and to the adjudicator within ten working days of receipt of the determination or an extended time period provided in the JBCC Rules for Adjudication. Thereafter such dispute will be referred to arbitration.[894]

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[890] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 143.
[891] *B & E International (Pty) Ltd and Another v Enviroserv Waste Management (Pty) Ltd and Other*s 2000 4 SA 152 (SE).
[892] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 247.
[893] *JBCC Principal Building Agreement* 2014 clause 30.
[894] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 247.

The *General Conditions of Contrac*t 2023[895] determines that either party shall have the right to disagree with any decision of the adjudication board and refer the matter to arbitration or court proceedings, whichever is applicable in terms of the contract. It is also provided that the decision (of the adjudicator) shall be binding on both parties unless and until it is revised by an arbitration award or court judgement, whichever is applicable in terms of the contract.[896]

#### 8.4.1.3 Amicable settlement

The parties to a dispute may settle at any time, irrespective of whether the dispute has been referred to mediation, adjudication or arbitration. The general principles of offer and acceptance apply to a payment 'in full and final settlement'.[897]

### 8.4.2 Who may act as an arbitrator

Any sound minded person over the age of 18 years and purposely chosen by the parties may act as arbitrator.[898] A magistrate[899] may be appointed and in theory a judge.[900] Even the legal representative of one of the parties may act as arbitrator.[901]

In building and engineering contracts an architect or engineer may act as arbitrator with respect to matters in which he may previously have been requested to give a decision when acting on behalf of the employer. Although in such a matter he is basically judge in his own case he is not prevented from sitting as arbitrator, and the court will give full power to such an arbitration ruling.[902]

In practice it is the norm to appoint as arbitrator either a person with legal qualifications or in technical matters, somebody with technical qualifications. If a lawyer or a person

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[895] *General Conditions of Contrac*t 2023 clause 10.6.
[896] McKenzie and Ramsden *Mckenzie's Law of Building and Engineering Contracts* 2014 247.
[897] *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 3 SA 327 (SCA) An offer of compromise has to be strictly interpreted and has to be clear and unambiguous. *Hubbard v Mostert* 2010 2 SA 391 (WCC).
[898] Voet 4.8.6.7.
[899] *Oxland v Ke*y 15 SC 315; *Mostert v Scholtz* 1926 CPD 215.
[900] Voet 4.8.8.
[901] *Claasen v Marillac Brothers 5 Searle* 168; *Marlin v Durban Turf Club and Others* 1942 AD 112 131.
[902] *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 373; *M M Fernandes (Pty) Ltd v Mahomed* 1986 4 SA 383 (W).

with special technical expertise is best qualified to arbitrate depends on the nature of the dispute.[903]

## 8.5 Conclusion

As stated in the introduction, arbitration is an efficient, faster, cheaper and more private procedure.[904] In addition it will prevent many unnecessary court cases saving lots of money and time. It will also prevent disputes from appearing in the media.

Further substantiation is provided by the Arbitration Foundation of Southern Africa (AFSA):[905]

> "The arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings, including the matter of costs."

However, there are exceptions where one still needs to apply the South African Law as mechanism to regulate Arbitration Law.

A party will be able to try to avoid an arbitration agreement where:

- a party accused of fraud wishes to approach the court directly for him to clear his name; or[906]
- where the arbitrator's credibility is questioned.[907]
- where the institution that is supposed to conduct the arbitration lacks authority to grant the relief claimed.[908]

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[903] *Krugersdorp Municipality v Griffin Engineering Co Ltd* 1924 WLD 288; *Dipenta Africa Construction (Pty) Ltd v Cape Provincial Administration* 1973 1 SA 666 (C).
[904] Cf Assheton-Smith *'Arbitration rather than litigation?'* (2013) 40 *Pharmaceutical & Cosmetic Review* 18.
[905] AFSA article 11.1.
[906] *Rawstorne and Another v Hodgen and Another* 2002 3 SA 433 (W).
[907] *Sera v De Wet* 1974 2 SA 645 (T).
[908] *Peel and Others v Hamon J & C Engineering (Pty) Ltd and Others* 2013 2 SA 331 (GSJ); discussed in para 3.6.

Thus, in general you will only be able to avoid arbitration, if this process is clearly unsuited to resolve the dispute. A court will not decline arbitration lightly, there must be compelling reasons.[909]

With respect to the first exception mentioned above, in *Rawstorne and Another v Hodgen and Another*[910] Mr and Mrs Rawstorne sold their interests in a close corporation, which included a residential property in Fourways together with movable assets, to Mr Hodgen. The agreement contained an arbitration clause. Mr Hodgen instituted arbitration proceedings against Mr and Mrs Rawstorne for the value of certain of the movable assets that had not been delivered as agreed. This constituted a breach of contract. Secondly if was also alleged by Mr Hodgen that there were latent defects in the residential property, which apparently the Rawstornes had fraudulently failed to disclose.[911]

The Rawstornes appealed to the court to set aside the arbitration proceedings based on allegations of fraud against them. They argued that the case ought to be properly dealt with in a court of law.[912]

The court opined that the discretion of a court to not uphold an arbitration agreement is a limited one and the onus of persuading a court that it should exercise its discretion is with the party who wishes to set aside the arbitration agreement. It is a discretion that must be exercised judicially.[913]

In the mentioned case, the Rawstornes had been accused of fraud and, as they requested the allegations of fraud to be dealt with in open court, the court found it appropriate to grant the application and ruled that the arbitration agreement would not be applicable to Mr Hodgen's claims.[914]

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[909] *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 375; *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 2 SA 388 (W) 391.
[910] *Rawstorne and Another v Hodgen and Another* 2002 3 SA 433 (W) para 4.
[911] *Rawstorne and Another v Hodgen and Another* 2002 3 SA 433 (W) headnote.
[912] *Rawstorne and Another v Hodgen and Another* 2002 3 SA 433 (W) para 1.
[913] *Rawstorne and Another v Hodgen and Another* 2002 3 SA 433 (W) para 14.
[914] *Rawstorne and Another v Hodgen and Another* 2002 3 SA 433 (W) para 21.

As regards the second example mentioned above, in *Sera v De Wet*[915] De Wet, the respondent (employer) appointed Sera, the applicant (contractor) to carry out certain building works at his house in Pretoria.

De Wet cancelled the contract claiming that the architect had committed fraud. Under those circumstances, Sera claimed that he was entitled to a claim for damages against De Wet.[916]

Sera did not want to pursue his claim for damages via the arbitration clause in the building contract and applied directly to the court for an order that the arbitration agreement should be set aside.[917]

The reasons argued by Sera in support of his application were:

- De Wet brought up serious allegations regarding the honesty and integrity of the architect who had executed the building project.
- the arbitration agreement made provision for the appointment of an architect as arbitrator
- if the architect be appointed as arbitrator, he would be placed in a compromised position to judge the honesty and integrity of a colleague (architect);
- courts of law are better suited to rule upon matters of credibility; and
- the main issue for the contractor was, whether a certificate issued by the architect entitled him to payment, which was a matter best decided upon by a court.[918]

The court upheld the application and ruled that Sera was entitled to pursue his claim in litigation instead of arbitration.[919]

[915] *Sera v De Wet* [1974] 2 All SA 295 (T) 296.
[916] *Sera v De Wet* [1974] 2 All SA 295 (T) 303.
[917] *Sera v De Wet* [1974] 2 All SA 295 (T) 296.
[918] *Sera v De Wet* [1974] 2 All SA 295 (T) 300.
[919] *Sera v De Wet* [1974] 2 All SA 295 (T) 306.

## 9. Professional indemnity Insurance

A professional indemnity policy is an insurance against catastrophic events designed to protect the assets and good name of a professional person.[920]

The relationship between a professional and his client is primarily contractual and a breach of the terms of the contract will result in a liability thereunder.[921]

Certain activities undertaken by some consulting engineers are far more hazardous than others and underwriters will set their terms accordingly.[922]

Vigilant contractors protect their companies from liability arising out of their work on a construction project by maintaining "construction all risk"[115] insurance cover. Such a construction all risk policy does not provide coverage for claims by dissatisfied owners for the cost to repair or replace allegedly defective work. Such claims, which can present a significant risk to a contractor, instead are governed by the contract between the contractor and client. Indemnification clauses can be used to shift the risk of defective work to others and to distribute the risk among multiple parties who may be responsible for the final project. It is therefore essential for contractors to be aware of the limitations of their liability insurance coverage, and to be cautious when drafting their contracts by seeking professional legal assistance. Proper drafting from the beginning can save substantial expenses in the long run.[923]

### 9.1 Fraud and misrepresentation

The professional indemnity policy will not cover claims due to dishonest, criminal or malicious acts or omissions committed by or on behalf of the insured.[924]

With respect to misrepresentation by commission the disadvantaged person (insured) can rescind the contract and or claim damages. The law of delict will be applicable here. A misrepresentation due to a failure to disclose or a silence about a material fact

[920] Loots *Construction Law and Related Issues* 1995 912.
[921] Loots *Construction Law and Related Issues* 1995 912.
[922] Loots *Construction Law and Related Issues* 1995 916.
[923] Maritz and Gerber "Construction Works: Defects Liability before and after the issuing of the Final Completion Certificate" 2016 *THRHR* 38.
[924] Loots *Construction Law and Related Issues* 1995 921.

may entitle the aggrieved party to avoid the contract.[925] The law of delict will be also applicable here.[926]

From a legal viewpoint, an important development in the construction industry has been a strongly recommended framework for contracts, namely the General Conditions of Contract for Construction Works. A discussion will now follow:

## 9.2 *General Conditions of Contract for Construction Works (GCC*) January 2023

*The South African Institution of Civil Engineering (SAICE)*

This document, which will form part of a contract, *inter alia* suggests guidelines on the necessary risks of being insured. This results in indemnifying contractors and employers *via* the use of the required insurances against damages and potential disasters.[927]

### 9.2.1 Indemnity insurances in general:

A few of the important insurances that are discussed are the following:

As a matter of course the contractor will be responsible for indemnity insurance against damage or physical loss to the works, plant and of all materials on the site.[928]

Indemnity insurance covers the employer as well as the contractor against their respective liability for the death of, or injury to any person, or loss of, or damage to any property during their fulfilment of their contract. The insurance will include a cross-liability clause providing that the insurance will apply to the contractor and to the employer as separate insured parties.[929]

Furthermore, if the works involve the risk of removal of, or interference with support to adjoining properties, the contractor will be insured against the death or injury of

[925] *Mutual & Federal Insurance Co Ltd v Oudshoorn Municipality* 1985 1 SA 419 (A) 432.
[926] Loots *Construction Law and Related Issues* 1995 884.
[927] *General Conditions of Contract for Construction Works* January 2023.
[928] *General Conditions of Contract for Construction Works* January 2023 Clause 8.6.1.1.
[929] *General Conditions of Contract for Construction Works* January 2023 Clause 8.6.1.3.

persons, or damage to property consequent on removal or interference with support, until such portion of the works has been completed.[930]

In respect of subcontractors, the contractor must ensure that the subcontractors are covered by the equivalent insurances.[931]

### 9.2.2 Risks associated with the contractor

The contractor must also indemnify the employer against any liability with respect to damage or physical loss of the property of any person, or injury to or death of any person. In this instance the death or injury of any person implies a third party which is not part of the building works.[932]

Another important risk for a contractor to be insured against is for any error or deficiency in any drawing and for any direct losses or damages incurred by the employer. [933]

According to the case of *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd*[934] the cyclone Lizette flooded parts of Mozambique in February 1997. It damaged large parts of the works. The contractor was in the process of handing over the project to its employer, a state-owned Mozambican Company. This damage led to a claim that the appellant (the insurer) declined. The insurer lost in this matter before Gildenhuys J in the Johannesburg High Court, which found that the insurer was liable and ordered him to pay the contractor R2.5m plus VAT. It is against this award that the insurer, with leave from the trial court, appealed.[935]

The contractor's claim was based on an insurance policy which indemnified both the contractor and the employer in respect of unforeseen physical destruction or damage to works to be undertaken by the contractor in the following words:[936]

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[930] *General Conditions of Contract for Construction Works* January 2023 Clause 8.6.1.
[931] *General Conditions of Contract for Construction Works* January 2023 Clause 8.6.3.
[932] *General Conditions of Contract for Construction Works* January 2023 Clause 8.4.1.1
[933] *General Conditions of Contract for Construction Works* January 2023 Clause 4.1.
[934] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 1.
[935] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 1.
[936] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 2.

> "THE COMPANY HEREBY AGREES subject to the terms exceptions limits and conditions contained herein or endorsed hereon that if during the Period of Insurance or during any further period in respect of which the Insured shall have paid and the Company shall have accepted the premium required any part of the Property Insured shall be lost destroyed or damaged as referred to in Part 1 hereof... the Company will indemnify the Insured as provided hereinafter."[937]

Part 1 circumscribes the indemnity:

> "The Company will by payment or at its option by repair or reinstatement indemnify the Insured in respect of fortuitous physical loss or destruction of the Property Insured arising from any cause (other than as provided in the General Exceptions or in the Exceptions to this Part contained hereinafter) whilst at the Situation of the Contract."[938]

The property insured comprised of two rural roads in Nampula province. The contractor sought an indemnity for the repair costs of 101,88 km of the road works that had sustained storm damage. The insurer raised two defenses. Firstly, it maintained that with a proper reading of the building contract it concluded that the contractor was not liable to repair the roads. Therefore, the contractor did not have an insurable interest in the restoration of the road and could not quality for insurance. The works were only covered to the extent of its interest in loss or damage to the works and that it was obliged to make good at its own expense. Secondly it maintained that the roads were defectively designed and that the damage suffered therefore fell outside the policy indemnity. [939]

For the first defense the insurer relied on the terms of the construction contract contained in clauses 10 and 11 thereof:

> "10 Contractor's Risk
>
> 10.1 All risks of loss or of damage to physical property and of personal injury and death which arise during and in consequence of the performance of the Contract other than the excepted risks are the responsibility of the Contractor.

[937] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 2.
[938] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 2.
[939] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 4.

> 11 Employer's Risk
>
> 11.1 The Employer is responsible for the excepted risks which are (a)...the risks of war, or (b) a cause due solely to the design of the Works, other than the Contractor's design."[940]

The judge assumed in favour of the insurer the correctness of its proposition that the contractor insured only its interest in the works. On this assumption it would not be liable to repair damage to the works caused solely by someone other than the contractor. The roads were not designed by the contractor but by the employer. However, the damage to the roads was not caused solely by their design, it was caused by an unusually heavy downpour. The contractor was therefore responsible for their repair. Clause 11 was meant to safeguard the contractor against the cost of remedial work to a defective design by someone other than himself. To try to invoke it in the context of an insurer's liability for storm damage is to misconstrue its scope and purpose. [941]

After some consideration, the judge concluded that none of the usual general exceptions from the indemnity would apply. Also, the one based on defective design, on which the insurer built its defense was not applicable, since the intention had been to provide roads at a low cost and high maintenance, and the insurer was aware of this.[942] Following the insurer's demands would lead to the contractor having to construct the works to the satisfaction of the insurer. The insurer could as a prerequisite to accepting liability demand that the roads should be of a higher quality than the employer was prepared to pay for. [943]

Therefore, the appeal was dismissed with costs. [944]

### 9.2.3 Risk associated with the employers

In the General Conditions of Contract for Construction Works[945] listed under the Employer's risks are also:

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[940] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 5.
[941] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 6.
[942] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 8.
[943] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 12.
[944] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 24.
[945] *General Conditions of Contract for Construction Works* January 2023 Clauses 8.3.1.1 - 8.3.1.7

War, state of emergency, insurrection, rebellion, strikes, riots, destruction of or damage to property by an order of government, or any public or local authority and disconnection of electricity supply not covered by the agreement with the supplying authority.

Most of the above risks are typically not covered by the insurance.

However, indemnification against riots which is insurable with the South African Special Risks Insurance Association at the time of the construction project as is suggested by Loots. [946]

### 9.3 Conclusion

In view of the above it is clear that the judicious selection of insurance policies can greatly reduce the number of unnecessary court cases by providing a robust alternative dispute prevention by indemnifying the employer as well as the contractor against the typical risks present in a construction project. Additionally, the details of the incident stay confidential.

However, if the insurance declines to pay out, whether it is based on supposed violation of the insurance contract[947] or fraud,[948] the South African Courts will have to be approached. Accordingly, law practitioners specializing in construction law still require a thorough knowledge of the Law of Contract.

## 10. EVALUATION AND RECOMMENDATIONS

The South African law of contract appears to be fairly well-equipped to deal with the liability of contractors and engineers in the construction industry. Much of the South African law of contract is common law and is shaped by the judgments of the courts. Where needed, incremental development of the common law principles can take place

[946] Loots *Construction Law and Related Issues* 1995 902.
[947] *Mutual & Federal Ltd v Rumdel Construction (Pty) Ltd* [2004] JOL 12971 (SCA) para 1.
[948] Loots *Construction Law and Related Issues* 1995 921.

in case law. In this dissertation, instances where such beneficial development has indeed recently taken place have been pointed out.[949]

As is evident from the exposition in this chapter, the South African law of contract is rich in principles that can come to the aid of a person who has been prejudiced by the activities of a contractor or engineer with whom he or she stands in a contractual relationship. In addition to time-honoured common law principles, the South African law of contract has also benefited from both important and far-reaching statutory reform.[950]

Accordingly, no specific recommendations for additional reform of the law of contract, insofar as it applies to the liability of contractors and engineers in the construction industry, may be deemed necessary. It is submitted that the application and further incremental development of the law of contract in this field can safely be entrusted to the South African courts.

[949] Eg para 3.2.1.2 above in respect of *Van Immelzeel & Pohl and Another v Samancor Ltd* 2001 2 SA 90 (SCA); *Labuschagne NO and Others v Theron and Another* (14523/09) [2013] ZA GPPHC; and *Turn Around Investments 7 (Pty) Ltd v Marcus A Smit Architects* unreported case no 26612/2009 Western Cape Division, Cape Town, 29 May 2015; and para 3.3.4 above in respect of *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 5 SA 420 (SCA).

[950] Para 6 above.

# CHAPTER 4: CONCLUSIONS AND RECOMMENDATIONS

## 1 GENERAL

In this dissertation, the liability of contractors and engineers in the construction industry in South Africa was critically investigated. More specifically, focus was placed on delictual and contractual liability of such contractors and engineers, mainly in terms of common law, but also in terms of important legislative provisions. Some conclusions and recommendations will now be presented.

## 2 DELICTUAL LIABILITY OF CONTRACTORS AND ENGINEERS IN THE CONSTRUCTION INDUSTRY: CONCLUSIONS AND RECOMMENDATIONS

In most instances of negligent, harm-causing conduct on the part of contractors and engineers in the construction industry, the application of common law principles of the law of delict appears to culminate in equitable outcomes, in which the harm suffered by the prejudiced parties is compensated fairly.[1]

However, a critical analysis reveals instances where the application of normal delictual principles fails to lead to results that are entirely satisfactory. In such instances, the sympathy one has for the prejudiced parties is not fully vindicated, and the outcomes do not fully satisfy one's sense of justice. Usually, the application of the negligence test can be identified as the reason for such unsatisfactory outcomes.[2]

A potential solution would be the adoption of strict liability - that is, liability without fault - of contractors and engineers for harm caused to others in the construction industry. The introduction of new instances of strict liability is a significant break with the traditionally fault-based approach to delictual liability in South African common law,

[1] Ch 2 para 5.1 above.
[2] Ch 2 para 5.1 above.

and for this reason, the adoption of new instances of strict liability should not be undertaken lightly and should always be informed by compelling reasons.[3]

Important considerations that may be cited in support of the introduction of strict liability for harm caused by contractors and engineers in the construction industry include the creation of situations in which the risk of harm to other persons is so high that a deviation from the normal fault-based delictual liability is warranted; as well as exceptional challenges for prejudiced persons to produce convincing evidence of fault on the part of the contractors and engineers in the construction industry, due to the highly technical nature of the evidence that would be required.[4]

A counterargument that must be considered concerns the potential of the adoption of strict liability in this field to have a "chilling effect" on engineering and building projects in South Africa, where such projects are vital for healthy development. A proper response to such a counterargument would be that, whereas engineering and building projects are undeniably needed for a developing and prosperous South Africa, the need for such projects and their outcomes to be safe for the people of South Africa is even more compelling. The counterargument to strict liability is accordingly not supported in this dissertation.[5]

Section 61 of the Consumer Protection Act has already introduced strict liability for a wide range of damage caused by "goods", which is defined very widely to include a legal interest in land, or any other immovable property. Taken at face value, Section 61 has introduced far-reaching strict liability of contractors and engineers in the construction industry, which is likely in future to be favoured by claimants above common law fault-based delictual claims.[6]

This study has demonstrated, without the benefit of directly applicable case law as authority, that Section 61 is conceivably a comprehensive and adequate implementation of strict liability of contractors and engineers in the construction industry, where the Act is capable of application.[7]

[3] Ch 2 para 5.2.1 above.
[4] Ch 2 para 5.2.1 above.
[5] Ch 2 para 5.2.1 above.
[6] Ch 2 para 4.2 above.
[7] Ch 2 para 4.2.6 above.

It is accordingly submitted that progressive application by the Courts of Section 61 of the Consumer Protection Act to instances of harm caused by contractors and engineers in the construction industry will satisfactorily supplement the common law delictual principles. It is submitted that, in this way, adequate relief will be brought to claimants who would have faced a too heavy burden in proving negligence on the part of the contractor or engineer in a common law delictual claim. For this reason, no further legislative reform in this field is recommended.[8]

This recommendation is provisional and conditional on a progressive application of the Consumer Protection Act in this field in future. Should such application not materialise in South African case law, it is recommended that the legislative introduction of targeted strict liability for harm-producing conduct of contractors and engineers in the South African construction industry should be considered.[9]

On a less ambitious scale, when liability is sought in terms of the common law delictual principles, the application of the maxim *res ipsa loquitur* may be beneficial in cases where contractors and engineers caused harm to others, insofar as this may lighten the burden of the prejudiced persons to produce proof of negligence. However, the relief provided by application of *res ipsa loquitur* remains relatively limited and should not be viewed as a comprehensive solution to the identified unfair outcomes of traditional fault-based liability.[10]

## 3 CONTRACTUAL LIABILITY OF CONTRACTORS AND ENGINEERS IN THE CONSTRUCTION INDUSTRY: CONCLUSIONS AND RECOMMENDATIONS

Although failures in construction are plentiful there is disproportionately little case law available on the subject due to the fact that most cases are dealt with either by insurance or arbitration.[11]

The South African law of contract appears to be well-equipped to deal with the liability of contractors and engineers in the construction industry, as it is rich in common law principles, supplemented by far-reaching legislation, that can come to the aid of a

[8] Ch 2 para 5.2.2 above.
[9] Ch 2 para 5.2.2 above.
[10] Ch 2 para 5.2.3 above.
[11] Ch 3 paras 8 and 9 above.

person who has been prejudiced by the activities of a contractor or engineer with whom he or she stands in a contractual relationship.[12]

Accordingly, no specific recommendations are made for additional reform of the law of contract, as applicable to the liability of contractors and engineers in the construction industry. The application and further incremental development of the law of contract in this field can safely be entrusted to the South African courts.[13]

[12] Ch 3 para 7 above.

[13] Ch 3 para 7 above. Despite an adequate remedial scheme in terms of the common law and legislation, the realities of modern commerce and industry will play a telling role in whether a contractor or engineer will in fact have to account for the consequences of poor performance. While defective structures have the potential of causing great harm to person and property, the professional liability of such parties can be significantly mitigated by the presence of professional indemnity insurance. See further Ch 3 paras 8 and 9 above.

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