IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 15211/17

In the matter between:

ANDILE ALBERT APLENI Plaintiff

and

AFRICAN PROCESS SOLUTIONS (PTY) LTD First Defendant

ZANE SALIE Second Defendant

JUDGMENT: 27 NOVEMBER 2018

HENNEY J:

Introduction

[1] During or about 2016 and in Cape Town, the Plaintiff and the First Defendant, alternatively, the Second Defendant or both the First and Second Defendants, concluded an oral agreement ("the agreement"), in terms of which the express, alternatively the tacit, further alternatively, the implied and material terms of the agreement included the following:

1.1 That the Plaintiff would perform certain building works ("the works") on a building site being operated by the First Defendant, alternatively, the Second Defendant, or both at Hyper Psaro Dasani Warehouse, situated in Avenue Des Scieries, Lubumbashi, in the Democratic Republic of Congo, ("the building site");

1.2 That the Plaintiff would perform the works at the building site as an independent contractor, and would be remunerated for his services by the First Defendant, alternatively, the Second Defendant, in an amount of approximately R4080 per week, while the works endured.

[2] The Plaintiff further alleges that it was an implied term of the agreement that the First Defendant, alternatively the Second Defendant, or both, jointly and severally would ensure that the building site was kept safe in order that the Plaintiff would be able to perform the works on the building site without endangering himself, by taking steps:

2.1 that would have ensured that the ceiling on which the Plaintiff was required to perform the works at the building site was properly secured so as to enable the Plaintiff to traverse it in safety;

2.2 by ensuring that appropriate scaffolding was provided in order to afford him safe access to the ceiling of the building site;

2.3 by providing appropriate equipment in the form of harnesses and/or other safety devices to ensure the Plaintiff's safety whilst working on the ceiling of the building site;

2.4 that appropriate briefing sessions were conducted with a duly qualified safety officer before the Plaintiff commenced with the work and or had access to the building site; and

2.5 lastly, by ensuring that the building site complied with all the relevant and applicable legislation and regulations pertaining to the safety of building sites.

[3] As far as the alternative delictual claim is concerned, the Plaintiff alleges that the First Defendant, alternatively, the Second or both jointly and severally had a legal duty to ensure that the works and the building site were kept safe, in order for him (or anyone else working on works and/or the building site with the knowledge and consent of the Defendants) to carry out work on the building without endangering himself, by taking steps that included the following:

3.1 to ensure that the ceiling upon which the Plaintiff was required to perform the works at the building site was properly secured so as to enable the Plaintiff to traverse it in safety;

3.2 by ensuring that the appropriate scaffolding was provided in order to afford the Plaintiff safe access to the ceiling of the building site;

3.3 by providing appropriate equipment in the form of harnesses and/or safety devices to ensure that the Plaintiff's safety whilst he was working on the ceiling of the building site;

3.4 by conducting appropriate briefing sessions with a duly qualified safety officer before the Plaintiff commenced with the works and/or had access to the building site; and

3.5 lastly, by ensuring that the building site complied with all the relevant and applicable legislation and regulations pertaining to the safety of the building sites.

[4] On 14 July 2016, the Plaintiff was injured while engaged in the building works on the building site, when the ceiling on which he was working at the time collapsed.

[5] In the result therefore, the Plaintiff alleges that the incident and the injuries sustained by him as a result of the incident were occasioned by the Defendants jointly and severally breaching the agreement as set out in paragraph 3 above.

[6] Alternatively, that the incident and the injuries sustained by the Plaintiff as a result, were occasioned by the Defendants jointly and severally in breach of a legal duty in that it was reasonably foreseeable that the ceiling on which the Plaintiff was working could collapse and thereby injure persons working thereon. As a result of this, the Defendants jointly and severally wrongfully acted contra *diligens paterfamilias* by negligently omitting to take steps to prevent such injury. And as a result of this, the Plaintiff's injuries are due solely to the negligence of the Defendants jointly and severally in that they failed to take steps as set out in paragraph 3 above.

[7] The Plaintiff claims damages in the amount of R1 400 000 from the Defendants following an incident that occurred during 2016 in the Democratic Republic of the Congo. The Plaintiff's claim is based on contract, and in the alternative, on delict.

[8] The First Defendant has taken exception to the Particulars of Claim on the following two grounds:

a) an action for damages is not maintainable in delict if the negligence relied on by the Plaintiff consists in the breach of a term of the contract; and

b) as far as delictual claim is concerned, the Particulars of Claim lack averments to show that this Court has jurisdiction to adjudicate the Plaintiff's claim.

[9] The Second Defendant plays no role in the exception proceedings.

[10] Adv R Van Wyk appeared for the Plaintiff and Adv D J Coetsee appeared on behalf of First Defendant.

<u>The excipient (First Defendant's) case</u>

<u>The existence of a delictual claim based on the breach of a term in contract ("the first exception")</u>

[11] According to the excipient under the heading 'THE AGREEMENT', the Plaintiff pleads, in paragraphs 4 and 5 of the Particulars of Claim, that he concluded a contract with the First and/or Second Defendant. Under the heading "THE LEGAL

DUTY", the Plaintiff pleads, in paragraph 6 of the Particulars of Claim, that a legal duty rested on the First and/or Second Defendant.

[12] In the Particulars of Claim, the Plaintiff's reliance on the legal duty is introduced or described as follows in the introductory part of paragraph 6 thereof, where he states the following "…*In the alternative, and in any event, at all material times, and by reason of what is pleaded herein above, the First Defendant… had a legal duty to…"*

[13] Then, according to the excipient under the heading 'THE BREACH OF THE AGREEMENT' the Plaintiff pleads that the First and/or Second Defendant/s breached the terms of the agreement. And under the heading 'THE BREACH OF A LEGAL DUTY' the Plaintiff alleges that the First and/or Second Defendant/s breached the legal duty and acted negligently. According to the excipient, the Plaintiff's reliance on a breach of a legal duty is in the alternative to its reliance on a breach of the agreement.

[14] The excipient submits that in the case of ***Lillicrap, Wassenaar & Partners v Pilkington Brothers SA (Pty) Ltd***[1] the then Appellate Division found that no claim is maintainable in delict, where the negligence relied on consists in the breach of a term in a contract. They further submit that this principle was confirmed by the Supreme Court of Appeal in 2008 in ***Holtzhausen v Absa Bank Ltd.***[2]

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[1] 1985 (1) SA 475 (A) at 499A-501H.
[2] 2008 (5) SA 630 (SCA) at 633B (para 6).

[15] They further submit that although it is accepted that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, it is important to recognise that in this particular case that the breaches of contract relied on by the Plaintiff are *in casu* identical to the alleged breaches of the legal duty. According to the excipient, they are in fact word for word identical. Furthermore, it seems that the Plaintiff does not rely on a right arising from a legal duty owed to him that exists independently of the contract. And that it is clear from the pleadings that the Plaintiff relies on the existence of a contract which contains the very same right/s he alleges to form part of the duty of care owed towards him. In other words, the conduct on the part of the First Defendant, which the Plaintiff alleges to have been negligent, constitutes the breaches of the terms of the contact as alleged in paragraphs 8.1 to 8.5 of the Particulars of Claim.

[16] It is therefore the excipient's submission that the following sentence from the ***Holtzhausen*** case, where the Court states that "*Lillicrap decided that no claim is maintainable in delict where the negligence relied on consists in the breach of the contract",* finds application in this case, and based on this, the first exception should be upheld.

Lack of jurisdiction ("the second exception")

[17] The First Defendant further alleges that as per the Particulars of Claim, the Plaintiff alleges that he was injured while engaged in the building works on a building site, which is located in Lumbumbashi, in the Democratic Republic of Congo.

Ordinarily, such as in this case, the existence or otherwise of a court's jurisdiction to consider the case before it will appear from the Particulars of Claim and in those cases, the challenge to jurisdiction could be raised by way of an exception. The First Defendant alleges that the Plaintiff's claim that this Court has jurisdiction is without merit as the allegations made by the Plaintiff do not disclose facts on the basis of which it can be found that this Court has jurisdiction. In this regard, the First Defendant refers to section 21 (1) of Superior Courts Act 10 of 2013 ('the Act'), which reads as follows:

"*A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and of all offences triable within, it's area of jurisdiction…"*

[18] For this submission, the First Defendant relies on the matter of ***Gallo Africa Ltd v Sting Music (Pty) Ltd***,[3] where the Supreme Court of Appeal considered the wording of the predecessor of section 21 of the Act and as far as interpretation of the wording of the section is concerned, Harms DP found as follows:[4]

> '*However, our courts have for more than a century interpreted it to mean no more than that the jurisdiction of the High Court is to be found in the common law. For the purposes of effectiveness the defendant must be or reside within the area of jurisdiction of the court… Although effectiveness "lies at the root of jurisdiction" and is the rationale for jurisdiction, "it is not necessarily the criterion for its existence". What is further required is a ratio jurisdictionis. The*

[3] 2010 (6) SA 329 (SCA).
[4] *Ibid* at 333A-C (para 10).

ratio in turn, may, for instance, be domicile, contract, delict and, relevant for present purposes, ratione rei sitae. It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction. Domicile on its own, for instance, may not be enough.'

[19] Mr Coetzee, in his submission, also made reference to the case of ***Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd***[5] where the then Appellate Division quoted, with approval, a particular passage from the decision of an earlier case of 1912 of the same division, where it was said:

'*The presence of a contemplated defendant would of course be an important element in the enquiry; but the question in each instance would be whether a particular "cause" was one of which the court concerned could, according to the principles of law, rightly take cognisance… The claim being based upon tort and the Provincial Division being neither the forum loci delicti nor the forum rei, it is clear that, apart from the machinery of arrest, the enquiry would have to be answered in the negative.*'[6]

[20] Mr Coetzee, submits that in this case that the *forum loci delicti* of the delict by the Plaintiff referred to as 'tort' in ***Veneta Mineraria*** is not this court. He further relied on the Eastern Cape decision of ***Burchell v Anglin,***[7] where the court had to consider the question of jurisdiction in respect of the claim based on information which arose when publication of defamatory remarks took place in Nebraska, USA. In that case,

[5] 1987 (4) SA 883 (A).
[6] *Ibid* at 893I-J.
[7] 2010 (3) SA 48 (ECG).

the Court referred to the connecting factor in a delictual claim as the place where the delict was committed.[8]

[21] The First Defendant submits that in this particular case, the delict was not committed anywhere other than in Lumbumbashi, in the Democratic Republic of Congo, which is where the connecting factor occurred. The First Defendant submits that in considering the five elements of a delictual claim, the *locus* of four of the elements are the following:

a) the conduct complained of by the applicant, being several instances of omission, is the First Defendant's conduct in the Democratic Republic of Congo;

b) the fault, or *culpa*, on the part of the First Defendant, occurred in the Democratic Republic of Congo;

c) if the First Defendant acted wrongfully, it could not have done so anyway but where the incident occurred, namely the Democratic Republic of Congo; and

d) as far as the factual causality is concerned, the facts giving rise to the Plaintiff's alleged damages occurred in the Democratic Republic of Congo.

[22] They therefore argued that if the Court were to consider the respective elements of the delict, on which the Plaintiff relies, most of the elements, and more importantly, the connecting factor (where the delict was committed), were present or occurred outside the jurisdiction which justifies a finding that this Court does not have jurisdiction to adjudicate the claim based on delict. The First Defendant therefore argues the exception should be upheld with costs.

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[8] *Ibid* at 70I-71A (para 116).

The Plaintiff's case

[23] The Plaintiff submitted that the First Defendant's understanding of the ***Lillicrap*** case, and more particularly its application to the facts of the current case, are misplaced. According to the Plaintiff, the quoted passages from the ***Lillicrap*** case referred to by the Defendant cannot be seen isolation and must be seen in the context of the facts of that particular case. In that particular case, the respondent based its claim in delict only and the Appellate Division was reluctant to extend delictual liability into areas with there was an existing contractual relationship.

[24] According to the Plaintiff, the effect of ***Lillicrap***, as confirmed in the matter of ***Holtzhausen***, is that concurrence of actions can only occur where the independent requirements of the contractual and delictual actions are satisfied. And, thus that the delict claim should be founded independently of the contract, even though it would not exist but for the contract.

[25] The Plaintiff further submitted with reference to the case of ***Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd,***[9] that the understanding should be that parties to a contract are usually in a position to regulate their affairs and to protect themselves against harm and that the law of delict should not be extended beyond those cases except where harm is considered prima facie wrongful. And further submitted that in such instances where concurrence is present, they may choose to claim damages either in contract or in delict and can, of course, claim in the alternative.

[9] 2006 (3) SA 138 (SCA) at par 25.

[26] I will at a later stage during the course of this judgment come back to the applicable passages which were referred to in the ***Holtzhausen*** case. According to the Plaintiff, the First Defendant's characterisation of his case where it submitted that the breaches of contract constitutes the negligent conduct alleged and that the negligent conduct on which the delict is based constitutes the breaches of the contractual duties alleged, is not correct. This is not so because the Plaintiff clearly sets out that the claims based on contract and delict as alternative claims to one another.

[27] The Plaintiff admits that the words used by him in paragraph 6 of these Particulars of Claim, which is… *"In the alternative, and in any event, at all material times and by reason of what is pleaded herein above…"* may appear to be vague, but it most certainly is not of such a nature so as not to sustain an independent cause of action upon which the delict is based.

[28] The Plaintiff further submits that the claim for damages is made out in the alternative, and on any reasonable interpretation any possible confusion is cleared up in paragraph 9 and 11 of the Particulars of Claim, which states…

> "*In the alternative, the incident and the injuries… were occasioned by [the Defendants'] breach of the legal duty pleaded above…."; and*
>
> *"As a result of the breach of agreement, alternatively, the breach of the legal duty…"*

[29] The Plaintiff further submits that it is evident that even though the alleged terms of the agreement, legal duties and its respective breaches stem from the same set of facts or conduct, each alternative claim sustains a cause of action in its own right when viewed independently, as it should.

[30] According to the Plaintiff, the conduct of the First and Second Defendants could, after evidence has been led and every fact has been proven, constitute both an infringement of the Plaintiff's rights *ex contractu* and the rights which he has independently of the contract, which in casu is his right to bodily integrity, dignity and/or personality.

Lack of Jurisdiction

[31] The Plaintiff submits that the Court has jurisdiction based on the provisions of section 21 of Superior Courts Act. According to the Plaintiff, this Court has jurisdiction because a High Court has jurisdiction over all persons residing or being in and, in relation to all causes arising and all offences triable with in its area of jurisdiction. Both the First and Second Defendants reside within the area of jurisdiction of this Court, which clothes this Court with jurisdiction. In support of this submission, the Plaintiff relies on the judgment of ***Bid Industrial Holdings (Pty) Ltd v Strang and Another***[10] where it was held that "*for the purposes of s 19 (1) (a) the court's jurisdiction depends on nothing short of residence, and the Defendant's residence within the jurisdiction is one situation in which a 'cause arises'…".*

[10] 2008 (3) SA 355 (SCA) at para 53.

[32] The Plaintiff submits that the cases on which the First Defendant relies do not find application in this particular matter. The First Defendant's reliance on the case of ***Venetia Mineraria Spa*** is distinguishable from the present matter, because in that case all the parties were *peregrinus* of that Court, where as in this particular case the parties to the delictual claim are *incolae* of this Court, which not only results in section 21 and the common law principle of residence and/or *ratio domicili* having been satisfied and an effective and conveniently enforceable judgment may be given.

[33] The Plaintiff moreover submits that the relief claimed is monetary and against the First and Second Defendant *in personam,* where no third party is involved. According to the Plaintiff, it is therefore enforceable in South Africa and particularly in this Division, where all the parties and their resources are situated. It will be furthermore, convenient in respect of time, travelling and expenses.

[34] According to the Plaintiff, the First Defendant's reliance on the ***Veneta Mineraria Spa*** matter, is incorrect, because in that matter, the question was not whether the *ratione delicti commissi*, is the only applicable jurisdictional ground for delictual claims, but whether consent and arrest to confirm would be necessary because both parties are *incolae*. The Plaintiff submits that the Defendant conveniently neglected to mention the following passage from ***Veneta Mineraria Spa*** supra, where it was said:

"According to our common law and practice under it, the Court will exercise jurisdiction upon any one of the following grounds, viz (1) Ratione domicile (2) res gestae…"[11]

[35] According to the Plaintiff, the First Defendant's reliance on the decision of ***Gallo Africa Limited*** *supra* is also not applicable for the purposes of this matter, because in that matter, although both the appellant and the respondents were *incolae* of the court *a quo*, the right sought to be enforced was a foreign intellectual property right and therefore considered an immovable intangible, for which the common law principle of *forum res sitae* was found to apply. The delictual claim that the Plaintiff seeks to enforce, *inter alia*, is a personal right of the Plaintiff which vests where the person of the Plaintiff is found.

[36] The Plaintiff's additional note argues that, based on the work of CF Forsyth *Private International Law,*[12] this Court will have jurisdiction to determine the delictual claim as long as the Defendants are *incolae*. According to the Plaintiff, it is abundantly clear, in terms of private international law principles, that when determining jurisdiction, the first enquiry to make is where the parties (particularly the Defendant(s)) are resident. Only thereafter if it is established that the Defendants are *not* resident within the area of the court's jurisdiction, does the question pertaining to the place where the cause of action arose become relevant.

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[11] *Veneta Mineraria Spa (supra)* at 890F.
[12] CF Forsyth *Private International Law* (5ed) 2012 (JUTA) at 169-89; and 202-23.

Evaluation

The existence of a delictual claim based on the breach of a term in contract ("the first exception")

[37] I do not agree with the First Defendant's submission that the negligence relied on in the delictual claim consists in the breach of a term in the contract. In my view, both claims exist independently of each other. I agree with the Plaintiff's contention that the ***Lillicrap*** case is not authority that an action cannot be brought in delict if the contractual claim is competent. In this regard, the Plaintiff relied on the case of ***Holtzhausen***, where it was held at paragraph 7 that:

> "*Lillicrap is not authority for the more general proposition that an action cannot be brought in delict if the 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 with the same set of facts can give rise to a claim for damages in delict and in contract and permits the plaintiff in such a case to choose which he wishes to pursue. Thus in Durr v ABSA Bank Ltd 1997 (3) SA 448 (SCA), a case which concerned the duties of an investment advisor recommending investment in debt-financing instruments, Schutz JA found no difficulty in saying (at 453G):*
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> > *'The claim pleaded relied upon contract, alternatively delict, but as the case was presented as one in delict, and as nothing turns upon the precise cause of action, I shall treat it as such.'"*

[38] I furthermore agree with the Plaintiff that in paragraph 6 of its Particulars of Claim, which states the following "…*In the alternative, and in any event, at all material times and by reason of what is here in above…"* may appear to be vague, but is not of such a nature so as not to sustain an independent cause of action. And I furthermore agree, that in any event, on any reasonable interpretation if there was any confusion as to the precise nature of what is stated in the Particulars of Claim, the Plaintiff, in paragraphs 9 and 11 of the Particulars of Claim, states that the incident and the injuries were occasioned by the Defendants' breach of the legal duties pleaded above.

[39] In my view, it is clear that the claim based on delict was clearly pleaded in the alternative to the claim based on contract. It is up to the evidence to show whether the contractual claim would succeed or whether the delictual claim would succeed. The Plaintiff's case is not that it should succeed both on a breach of contract and delict, but on either the one or the other. I am therefore of the view, that the delictual claim exists independently and in the alternative to the claim based in contract and that it fully sustains a cause of action. In the result therefore, I would dismiss this exception.

Lack of jurisdiction

[40] In the determination of the question whether the Plaintiff has made out a case as to whether this court has this jurisdiction, the starting point would be to look at the provisions of section 21 of the Superior Courts Act 10 of 2013:

> **'*Persons over whom and matters in relation to which Divisions have jurisdiction***
>
> *(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance…'*

[41] It is based on the provisions of this section that the Plaintiff submitted that this Court has the necessary jurisdiction, because of the fact that both the Defendants, as well as the Plaintiff resides in this Court's area of jurisdiction. This, however, is not necessarily determinative as noted in *Erasmus: Superior Court Practice*:

> *'The position under this section materially corresponds with the position under s 19(1) of the Supreme Court Act 59 of 1959 prior to the repeal of that Act on the commencement of the Superior Courts Act 10 of 2013 on 23 August 2013. As was the case with s 19 of the now repealed Supreme Court Act 59 of 1959, this section does not contain a 'codification' of the jurisdiction of the High Court. In fact, it has been said that s 19 was deliberately couched in 'indefinite wording' because the intention of the legislature obviously was to interfere with the common law as little as possible. It is submitted that this also applies to s 21 of the Act.'*[13]

[42] And it was held that regard is to be had to the principles of common law relating to jurisdiction when dealing with the interpretation of the provisions of this section, or at least its predecessor, as will be referred to hereunder.

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[13] *Erasmus* at RS 6, 2018, A2-88.

[43] In ***Veneta Mineraria Spa*** *supra,* the Court was called upon to determine whether consent alone was sufficient to confer jurisdiction on the High Court which was faced with two peregrini: a local Defendant and a foreign Plaintiff. In the course of this judgment, the Appellate Division remarked on the traditional reasons and grounds upon which jurisdiction is established:

> *'Insofar as South African Courts are concerned, their jurisdiction is the right or authority of entertaining actions or other legal proceedings which is vested in them by the State.*[14]
> …
> *In view of the indefinite wording of s 19(1) of the Act and its predecessors, no doubt deliberately so couched because the intention of the Legislature obviously was to interfere with the common law as little as possible, recourse must be had to the principles of the common law to ascertain what competency each of the Supreme Courts in the Republic of South Africa possesses to adjudicate effectively and pronounce upon a matter brought before and heard by it.*[15]
> …
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> *A Court can only be said to have jurisdiction in a matter if it has the power not only of taking cognisance of the suit but also of giving effect to its judgment.'*[16]

[44] The Court, at 890E, quoted *Brooks v Maquassi Halls Ltd* 1914 CPD 371, where Kotzé J said at 376-7:

> *"According to our common law and practice under it, the Court will exercise jurisdiction upon any one of the following grounds, viz: (1)*

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[14] *Veneta Mineraria Spa* at 886E.
[15] *Ibid* at 886I.
[16] *Ibid* at 893E.

> *ratione domicilii; (2) ratione rei sitae; (3) ratione contractus; that is, where the contract has either been entered into or has to be executed within the jurisdiction."*

[45] In ***Bisonboard Ltd v K Braun Woodworking Machine (Pty) Ltd***,[17] the Appellate Division held that the nature of the inquiry into whether a court has jurisdiction '*is a dual one: (1) is there a recognised ground of jurisdiction; and, if there is, (2) is the doctrine of effectiveness satisfied - has the Court power to give effect to the judgment sought? See Hugo v Wessels 1987 (3) SA 837 (A)*'[18]

[46] In ***Forbes v Uys*** 1933 TPD 362, the Court was faced with an *incola* defendant who raised an objection to jurisdiction on the grounds that the action for damages arose out of trespass on foreign land. Therein, the Court held that:

> *'No authority in our law has been quoted to us to the effect that the Court will not entertain an action for damages merely because those damages have been caused to the Plaintiff in respect of his ownership of foreign land. Nor does it seem to me that there is any principle for so holding. The guiding principle is that our Courts will not exercise jurisdiction unless effect can be given to the judgment, and there is nothing to prevent the Court giving effect to a judgment for damages where the Defendant is resident within its jurisdiction. The position may be different if the action is in substance one for the purpose of determining the title to the land, but in the present case I have come to the conclusion that the action is merely an action for damages for trespass and therefore the objection is not a sound one."*[19]

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[17] 1991 (1) SA 482 (A)
[18] *Bisonboard Ltd* at 499F.
[19] *Forbes* at 369 (Own emphasis).

[47] Similarly, the Appellate Division in ***Bisonboard Ltd*** supra also held that:

> '*A judgment sounding in money may be put into effect anywhere. From this it follows (see Pollak The South African Law of Jurisdiction (1937) at 22) that in an action for the payment of money "it is a sufficient basis for jurisdiction that the State in whose court the action is brought has power over the Defendant".'*[20]
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> …
>
> *'In my view the legal position is correctly summarised thus by Forsyth Private International Law 2nd ed (1990) at 175-6:*
>
> > *'Provided that the Defendant is an incola of the court's area of jurisdiction, the court will be prepared to hear the case.... Accordingly, if the Defendant is either domiciled or resident in the area, this will be a sufficient jurisdictional connecting factor.'*[21]

[48] In ***Gallo Africa Ltd*** *(supra)*, the Supreme Court of Appeal was ceased with a case concerning an *incola* defendant facing a copyright infringement claim arising in South Africa and in 19 other countries. The Court discussed jurisdiction generally, noting that:

> *'Section 19(1)(a) of the Supreme Court Act provides that a High Court has jurisdiction "over all persons residing or being in and in relation to all causes arising . . . within its area of jurisdiction and all other matters of which it may according to law take cognizance". The section has a long history, which need not be related. However, our courts have for more than a century interpreted it to mean no more than that the*

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[20] *Bisonboard Ltd* at 484F.

[21] *Bisonboard Ltd* at 488B. See also Forsyth *Private International Law* (5ed) Juta (2012) at 169:
> *'For instance, no High Court will hear a dispute between a peregrine (or peregrinus) plaintiff and a peregrine defendant in respect of a breach of contract if the transaction had not been entered into locally and the cause of action (the breach of the contract) had, likewise, arisen outside of South Africa. But if the defendant is an incola, then the local court will hear the dispute even if it arose beyond South Africa.'*

> *jurisdiction of High Courts is to be found in the common law. For purposes of effectiveness the Defendant must be or reside within the area of jurisdiction of the court (or else some form of arrest to found or confirm jurisdiction must take place). Although effectiveness "lies at the root of jurisdiction" and is the rationale for jurisdiction, "it is not necessarily the criterion for its existence". What is further required is a ratio jurisdictionis. The ratio, in turn, may, for instance, be domicile, contract, delict and, relevant for present purposes, ratione rei sitae. It depends on the nature of the right or claim whether the one ground or the other provides a ground for jurisdiction. Domicile on its own, for instance, may not be enough. As Forsyth (at 164) rightly said:*
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> > *"First there is the search for the appropriate ratio jurisdictionis; and then the court asks whether it can give an effective judgment . . . . [and] neither of these is sufficient for jurisdiction, but both are necessary for jurisdiction*."'[22]

[49] The Court went onto hold that intellectual property rights, including copyright, are immovable intangibles and that the principle *forum rei sitae* determines jurisdiction as held in *Eilon v Eilon* 1965 (1) SA 703 (A) at 726H - 727B.[23] Thus, this case is distinguishable from the present matter which is a delictual action sounding in money.

[50] In ***Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd***,[24] the Court was faced with a claim in delict for passing-off where the defendant was an *incola*. In that matter, the court *a quo* "*accepted as correct a statement by Webster*

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[22] *Gallo Africa Ltd* (supra) at para 10.
[23] There it was held that: *'The immovable property situated in Israel is, however, on a different footing. In the case of Rosa's Heirs v Imhambane Sugar Estates Ltd., 1905 T.H. 11, MASON, J., decided that in respect of real actions directly raising the title to property the forum rei sitae is the only Court which has jurisdiction…. I incline to the view preferred by MASON, J.'*
[24] 1998 (3) SA 938 (SCA).

and Page South African Law of Trade Marks 3rd ed at 420 to the effect that, since the ordinary rules relating to jurisdiction apply to an action for passing-off, it is essential for the Plaintiff to prove that the goodwill he seeks to protect extends to the area of jurisdiction of the Court in which he sues." The Court criticised this position, stating that:

> *'It is necessary to pause and consider whether the statement in Webster and Page does not conflate two different matters, namely the elements of the delict of passing-off and the requirements for jurisdiction. The Court below had jurisdiction, I would suggest, because the Defendants reside within its area. Had they not been residents of that Court, the question would have been whether the claim in delict had arisen within its jurisdiction (cf Thomas v BMW South Africa (Pty) Ltd 1996 (2) SA 106 (C) at 127G--H).*[25]

[51] In the last mentioned case of *Thomas v BMW South Africa (Pty) Ltd*,[26] the Plaintiff sued the Defendant in delict for damages arising out of a motor vehicle accident. The Defendant, a local peregrinus, raised a special plea that the Court lacked jurisdiction and thus another jurisdictional ground had to be established. It was for this reason that the Court was seized with the question whether the cause of action arose within the Court's jurisdiction and proceeded to examine each element of the delict in question.

[52] The First Defendant appeared to argue that where the delict occurred together with *lex loci delicti* ("*the law of the place where the delict occurred*")[27] would

[25] *Ibid* at para 13.
[26] 1996 (2) SA 106 (C).
[27] See Burchell (supra) at para 101.

be determinative of the jurisdictional issue. *Lex loci delicti* has found application in choice of laws matters (see *Burchell* above) but does not appear to be directly applicable when examining jurisdiction.[28] As noted by Forsyth in *Private International Law*:[29]

> *"There are, of course, good reason for keeping jurisdiction and choice of law as separate categories and, if we keep to this principle, there can be no question of applying a foreign system of law to ascertain where the ground of jurisdiction is located."*

[53] Furthermore, the First Defendant's reliance on *Burchell* appears to be misplaced as the Court in that matter was of the view that it did not need to decide the issue of jurisdiction as *"[t]he parties were in agreement that I have jurisdiction to hear the matter."*[30] The Court discussed *lex loci delicti* in order to determine whether South African or Nebraskan law applied i.e. a choice of laws issue.

[54] Nevertheless, Forsyth, after having discussed the rationale behind the *lex loci delicti* states the following:[31]

> "*But, of course, the lex loci delicti is not without its own difficulties. In the first place, the locus delicti maybe uncertain, Quid si in suo territoria saggitam emisirit, in alio per eam occiderit? must have seemed an academic question postulating a rare fact complex at the time Paulus Voet asked it,*[32] *but today with the growth of international trade and communications cases analogous to the arrow over the border fact complex are commonplace. Products*

[28] See LAWSA, Vol 2(2) at 341: "…*today it is generally accepted that choice of law is to be kept distinct from choice of jurisdiction."*
[29] Forsyth (supra) at 216.
[30] Burchell (supra) at para 86.
[31] Forsyth (supra) at 354.
[32] This is translated, according to Forsyth, at 354 fn 234, to mean "*what if an arrow is let loose in one territory and kills in another?*"

manufactured in one country cause damage when consumed in another: which country is the locus delicti?"

[55] Then the learned author proceeds to state the following:[33]

"*In the second place, there are other cases in which it is quite clear where the locus delicti is, but it is equally plain that the application of the lex loci delicti rule is inappropriate. A car registered and insured in New York, with driver and passengers resident and domiciled in New York, leaves the road in Ontario during an over-the-border drive. One of the passengers is injured and sues the driver for recompense. Surely it is inappropriate to apply the law of Ontario (which in fact denies recovery) rather than the New York law? The fact that the accident took place in Ontario is, if not fortuitous, less significant than the common residence and domicile of the parties as well as registration of the vehicle. Here the lex loci delicti rule fails to assign an appropriate law. As we have seen, the lex loci delicti rule will not work at all in some cases, and in other cases will not work well. It can clearly not be adopted as a rigid rule, applicable in all cases; but it would be wrong to attempt to formulate a rule without having close regard to it."*

[56] And after the author has done a comparative study of the application of the *lex loci delicti* rule with regards to the appropriateness thereof in all cases, he comes to the following conclusion:[34]

"*It is equally clear… that the lex loci delicti will not do for all cases. Sometimes the locus delicti will be uncertain... at other times it will be inappropriate. In such cases, a displacement of the lex loci delicti rule will be in order. Whether this takes place after a search for the proper law or after determination that there is 'no sufficient link' with the locus delicti appears to be immaterial. This will introduce some uncertainty, but with time – and litigation – in this area, the*

[33] *Ibid* at 355.
[34] *Ibid* at 364.

> *occasions on which the court will deviate from the general rule will become clearer.* ***For the time being it is sufficient to remark that where the plaintiff and defendant have common residence, domicile or nationality, and have some other link between them – such as travelling in the same vehicle – the case for deviation from the lex loci delicti is strong . But in the absence of such a common link the court should be slow to displace the lex loci****: there is real value in being able to predict in advance the law that will be applied in any particular case". (*Emphasis added)

[57] In my view, and after having regard to all the authorities cited, it is clear that the Court should follow a pragmatic approach in order to determine whether it would have jurisdiction over a matter when the delict was caused in a foreign country. The overwhelming wealth of authority seems to suggest that the court may deviate from the *lex loci delicti* rule in cases where there is common link between the parties, which link seems to be that the Plaintiff and Defendant have a common residence, domicile or nationality and some other link between them.

[58] In this particular case, there was an employment relationship that came into existence between the Plaintiff and the Defendants in this country and in this Court's area of jurisdiction. In terms of this employment relationship, the Plaintiff was required to perform services for the First Defendant in the Democratic Republic of Congo, based on an agreement that was concluded between them, within the borders of this country and within the area of jurisdiction of this court. Apart from rendering the services in terms of the employment contract in the Democratic Republic of Congo for the Defendants, there was no other business between the Plaintiff and the First Defendant, and no other link or connection they had with that

country. The Plaintiff could very well have rendered the services inside this country or inside the area of jurisdiction of this Court.

[59] The alleged harm, which the Plaintiff suffered and which resulted in the institution of these proceedings, occurred in the course and scope of his employment with the First Defendant based on the contractual agreement concluded in this country and in this Court's area of jurisdiction. And it was inextricably linked to the exercise of his functions in terms of the agreement between them, when he climbed onto the ceiling of the building site in the Democratic Republic of Congo that collapsed and which resulted in his injuries.

[60] The scenario and factual situation that existed between the Plaintiff and the Defendants apart from the fact that they have common residence, domicile and nationality is the "*other link* "which would justify a deviation from the *lex loci delicti*. It would be grossly unfair, to expect an ordinary working class person, like the Plaintiff who rendered his services as a labourer to a South African company, to institute his claim in a foreign country. This is clearly a case where the application of the *locus delicti* rule is inappropriate and would result in injustice and undue hardship to the Plaintiff. It would also deprive the Plaintiff of his right to have access to a court in this country, and would violate his right in terms of the provisions of section 34 of the Constitution of the Republic of South Africa,1996.[35] Accordingly, the second exception is also dismissed.

[35] Section 34 states: "*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".*

[61] In the result therefore, I make the following order:

1. The first and second exceptions are dismissed with costs.

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R.C.A HENNEY

Judge of the High Court