



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal.

Nelson Attorneys v Smit N O & Others (532/2024) ZASCA 162(24 October 2025)

Today the Supreme Court of Appeal (SCA) upheld, with costs, an appeal against the judgment of a full bench of the Eastern Cape Division of the High Court, Makhandla (Mjali J, Norman J and Govindjee J, sitting as court of appeal).

During 2005 Mr and Mrs van den Berg (second and third respondents) saw a small development under construction in their area, Westering, Port Elizabeth (now Gqeberha), which sparked the idea that they could do a development on half of their property. The developer of the site they saw was Status Homes Developers (Status). They obtained the contact details for Mr Lamour, the sole member and director of Status. Mr van den Berg contacted Mr Lamour, who reacted positively and suggested that it would be more viable to build a larger development, of about 20 units, over not only the Van den Berg property, but also over the two adjoining erven, owned at the time by Mrs Kelbrick and by Mr Jonker and his wife. All preliminary discussions were between Mr van den Berg and Mr Lamour, on behalf of Status, and between Mr Lamour and the other owners. Broad agreement was reached on important aspects of the agreements. It was an unusual property transaction. Crucially, in lieu of a cash payment, the owners of the three erven were to take transfer of some of the new units in the development. Nelson Attorneys (the appellant), who was acting for Mr Lamour at the time, was not part of the initial discussions, but was involved in the finalisation of the terms of the deed of sale. The Jonkers signed the first deed of sale with Status in September 2005. Mrs Kelbrick and the Van den Bergs signed their respective deeds of sale a year later, in September 2006. The deeds of sale also determined that transfer of the property was to be effected by the appellant as soon as possible and provision was made for compensation for alternative accommodation. As security for Status' obligations under the agreement, Mr Lamour bound himself as surety and co-principal debtor. For various reasons, the development took a considerable period to get off the ground. Transfer of the respondents' properties to Status was only registered in July 2007. Progress was slow. Construction work on the development could only properly begin after the removal of restrictive conditions of title, which approval was only granted in approximately August 2008.

Dissatisfied, the Van den Bergs and Mrs Kelbrick, after seeking legal advice, issued summons against Status and Mr Lamour in October 2008, based on a breach of the deeds of sale. They claimed payment of the purchase consideration under the deeds of sale, as well as the amounts due in respect of rentals for alternative accommodation. In November 2008, the respondents filed an application for summary judgment, but only in respect of the claim for outstanding rentals, and not for the purchase price. Summary judgment was granted for the rental claims on 7 July 2009. In February 2009, due to a combination of construction being delayed until the restrictive title deed conditions had been removed, together with a slump in the property market, construction ceased completely and the builders left the site after further drawdowns from the development bond were refused. Status was liquidated in June 2010 and Mr Lamour was also sequestered.

Unable to recover the equivalent purchase price from either Status or Mr Lamour, the respondents instituted action against the appellant in August 2011 in the Eastern Cape Division of the High Court, Makhanda (the high court). The respondents sought to hold the appellant liable for their pure economic loss, based on his role as the drafter of the deeds of sale and the conveyancer responsible for the transfers of property involved. There was no contractual nexus between them and the appellant. Nor did they allege that Mr Nelson bore any responsibility for the development failing. Ruganan J (the trial court) dismissed the action, but, on appeal, the full bench of the high court (the full court) set aside that decision. The full court directed the appellant to pay delictual damages to the respondents in the amounts claimed. In the SCA proceedings, the estate of Mrs Kelbrick, who is since deceased, was represented by the first respondent. Mr Jonker instituted, and settled, separate proceedings against Status, Mr Lamour and the appellant in September 2009 and was not a party to this appeal.

The central issue for determination by the SCA was whether all elements of Aquilian liability, being wrongfulness, negligence, causation and damages have been established in order to hold the appellant liable for the pure economic loss of the respondents. One of the preliminary questions raised was whether, on the pleadings, wrongfulness was admitted and hence established, as argued by the respondents and confirmed by the full court.

The SCA emphasised that the Aquilian action is an exception to the first principle of delict, which states that everyone must bear the loss they suffer. The exception entails that a negligent act or omission that causes the loss may result in Aquilian liability only if that negligent act or omission is also wrongful. Invoking the SCA case of *Two Oceans Aquarium*, the SCA held that claims for pure economic loss involved a different approach to the element of wrongfulness, with a considerable onus on the plaintiff. The SCA cautioned practitioners and courts not to treat the wrongfulness inquiry as involving a consideration of factors that correctly belong to the fault inquiry and not to assume that conduct must be wrongful because it is negligent. Relying on the Constitutional Court case of *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*, the SCA reiterated that there is no general right not to be caused pure economic loss. The SCA held that conduct causing pure economic loss is only wrongful if public or legal policy considerations require that such conduct, if negligent, is actionable, and that legal liability for the resulting damages should follow. Applying these principles to the pleadings in this case, the SCA found that the respondents, who argued that Mr Nelson admitted to acting wrongfully because he conceded he had a duty of care towards the respondents as conveyancer in the various property transactions associated with the development, confused the elements of wrongfulness and negligence. The SCA also considered vulnerability to risk, as an important factor mitigating against a finding of wrongfulness in pure economic loss cases and found that the respondents were not vulnerable to risk. The SCA therefore held that the trial court was correct in finding that the admission of a duty of care did not constitute an admission of wrongfulness, that the respondents still bore the onus to satisfy the element of wrongfulness and failed to do so.

While the absence of wrongfulness was dispositive of the appeal, the SCA, as a precaution, nonetheless proceeded to consider the elements of negligence and causation. In considering the element of negligence, the SCA evaluated the expert evidence provided in the trial court, concluding that the trial court was correct in finding the expert's opinion unpersuasive on the question of negligence. When the deeds of sale were entered into it was not reasonably foreseeable that the development would collapse, and that both Status and Mr Lamour would be insolvent. Furthermore Mr van den Berg was happy with Mr Lamour's suretyship and decided not to take advice before signing the contract. Because he was committed to the deal and believed in Mr Lamour, it was unlikely that he would have walked away from signing the agreement because of contrary advice from Mr Nelson.

The SCA drew attention to the fact that the full court failed to consider the element of causation while it should have done so. After traversing the components of factual causation, often expressed as the 'but-for' test, and legal causation, sometimes referred to as the remoteness of damage, the SCA found that neither factual nor legal causation was established in this case.

As a result, the SCA upheld the appeal with costs, including the cost of two counsel, and set aside and substituted the order of the full court.