THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No 459/04

In the matter between:

TELIMATRIX (PTY) LTD
t/a MATRIX VEHICLE TRACKING **Appellant**

and

ADVERTISING STANDARDS AUTHORITY SA **Respondent**

Coram: HARMS, CAMERON, VAN HEERDEN, MLAMBO JJA and CACHALIA AJA
Heard: 22 AUGUST 2005
Delivered: 9 SEPTEMBER 2005

Subject: Delict – wrongfulness – liability of adjudicating body for negligent incorrect decisions

---

J U D G M E N T

HARMS JA:

[1] At stake is the liability for damages of the respondent, the Advertising Standards Authority of SA ('the ASA'), to an advertiser who suffered a loss because of an incorrect decision by one of its organs. The ASA filed an exception against the particulars of claim of the plaintiff (the present appellant) in which the ASA pertinently raised the question whether such a negligent decision, which prohibited the publication of two advertisements, and which gave rise to pure economic loss can be 'wrongful' in the delictual sense. 'Pure economic loss' in this context 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 a loss of profit, being put to extra expenses, or the diminution in the value of property.[1] In the court below Snyders J upheld the exception and found that the plaintiff's particulars of claim did not disclose a cause of action.[2] Later she granted leave to appeal to this court.

[2] The plaintiff's particulars of claim, with annexures, runs to 158 pages and contains a full exposition of the events surrounding the Directorate's decision. In addition we were provided with the ASA's *Code of Advertising Practice and Procedural Guide* and the parties prudently were content that regard could be had to it even though it does not form part of the pleadings. The case does not therefore have to be decided on bare allegations only but

[1] J Neethling, JM Potgieter and PJ Visser *Law of Delict* 4 ed p 295 et seq; Stair Memorial Encyclopaedia *The Laws of Scotland* (1996) vol 15 para 273.
[2] The judgment is reported: 2005 (2) SA 264 (W).

on allegations that were fleshed out by means of annexures that tell a story. This assists in assessing whether or not there may be other relevant evidence that can throw light on the issue of wrongfulness. I mention this because, relying on the majority decision in *Axiam Holdings Ltd v Deloitte & Touche*,[3] the plaintiff argued that it is inappropriate to decide the issue of wrongfulness on exception because the issue is fact bound. That is not true in all cases. This court for one has on many occasions decided matters of this sort on exception. Three important judgments that spring to mind are *Lillicrap, Indac* and *Kadir*.[4] Some public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation.

[3] Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that 'cuts through the tissue of which the exception is compounded and exposes its vulnerability.'[5] Dealing with an interpretation issue, he added:

'Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from

---

[3] SCA case 303/04 of 1 June 2005.
[4] *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A); *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A).
[5] *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) 715H.

deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts.'[6]

[4] The ASA, according to the particulars of claim, is an independent body set up and sponsored by the advertising industry to ensure that the industry's system of self-regulation works 'in the public interest'. The ASA has a self-contained code that is based on an internationally accepted model and determines its terms of reference and defines its scope of authority. Advertisers such as the plaintiff are 'indirectly bound' to observe the code because their advertising agents belong to a constituent member of the ASA. The main purpose of the code is to protect consumers and to ensure fair play among advertisers. Its procedural guide provides for the lodging of complaints and the method of disposition.

[5] The facts that gave rise to the plaintiff's claim for damages of some R6.5m are these. A competitor, Netstar (Pty) Ltd, lodged a complaint against an advertisement campaign ran by the plaintiff. After receiving written

[6] At 716C-E. Partially quoted with approval in *Gardner v Richardt* 1974 (3) SA 768 (C) 773D-E.

submissions from both parties the Directorate, whose function this was, upheld one ground of complaint and ordered the immediate withdrawal of the offending advertisements. The plaintiff complied grudgingly but appealed to the ASA's internal appeal body, namely the Advertising Industry Tribunal, which upheld the appeal, basically because the complainant during the appeal hearing withdrew the particular objection on which the Directorate's decision was based.

[6] Against that background the plaintiff in summary alleged that the Directorate ought to have been aware that its ruling would have far-reaching implications for the plaintiff, who was bound to comply with the ruling, and that such a ruling could cause the plaintiff to suffer damages. The implication of these allegations is that the plaintiff was a foreseeable plaintiff and the loss was foreseeable. Further, the Directorate –

'owed the plaintiff a duty of care to consider and arrive at a decision

(i) without negligence;

(ii) in a manner which is fair, justifiable and reasonable;

(iii) within the ambit of the terms of the complaint; and

(iv) in a manner that is not arbitrary.'

[7] This duty of care, the plaintiff's pleading asserts, was breached because in arriving at its decision and in publishing and communicating it, the Directorate acted –

‘(a) negligently in that the part of the ruling upholding the complaint ought not reasonably to have been arrived at, not being justifiable or reasonable in any respect;

(b) outside the ambit of the terms of the complaint in that the basis upon which the complaint was upheld had not been part of the complaint;

(c) arbitrarily, not having called for nor having received representations or submissions in respect of the issue upon which the Directorate ruled against the [plaintiff].’

[8] The premise of the exception was that the ruling of the Directorate, in the circumstances alleged, did not amount to a wrongful act that could have given rise to a delictual claim and that the ASA did not breach any duty owed by it to the plaintiff.

[9] If regard is had to the documents incorporated into the pleadings, the complaints listed in (b) and (c) have no factual basis. The Directorate upheld the complaint because it found that the plaintiff was promoting its product (an electronic vehicle tracking system) by capitalising ‘on the fear factor’, contrary to clause 3.1 of the code that provides that ‘advertisements should not without justifiable reason play on fear.’ The problem is that instead of mentioning clause 3.1 the complainant had relied in its original submission to the ASA on a non-existent clause 2.1. The plaintiff itself perceived that this was a typographical error, pointed it out to the Directorate, quoted clause 3.1, and made its submissions on that basis. The procedural guide in any event requires of the Directorate, if ‘the sections of the Code to which the

complaint relates' are not identified in the complaint lodged with it, to consider the complaint in terms of the sections of the code it regards as relevant, and to deal with the complaint as if it had been lodged in terms of those sections.

[10] Counsel for the plaintiff strenuously objected to our having regard to the totality of the pleadings and wished to confine the court to a consideration of the facts alleged in the body of the particulars of claim in isolation. His objection was ill-founded. Pleadings must be read as a whole and in deciding an exception a court is not playing games, blindfolding itself.[7] In any event, as will become apparent, these allegations, even if meritorious, make no difference to the case.

[11] In spite of a spate of judicial pronouncements on 'wrongfulness' by different panels of this court, all stating more or less the same in more or less the same terminology a restatement using the words of others is sometimes inevitable. This is because, depending on the issues in the case, different matters have to be emphasised.

[12] The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers.[8] The Afrikaans aphorism is that 'skade rus waar dit val.' Aquilian liability

[7] Cf *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 26H-I.
[8] C Asser *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht: Verbintenissenrecht* 9 ed (1994) part III p 12: 'In beginsel moet ieder de door hem zelf geleden schade dragen.'

provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful[9] although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful.[10] To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it.[11]

[13] When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not prima facie wrongful ('unlawful' is the synonym and is less of a euphemism) and that more is needed.[12] Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered[13] (and not the converse as Goldstone J once implied[14] unless it is a case of prima facie wrongfulness, such as where the loss was due to damage caused to the person or property of the plaintiff). In other words, conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff

---

[9] *Indac Electronics (Pty) ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) 793I-J; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [12].
[10] *Government of the RSA v Basdeo & another* 1996 (1) SA 355 (A) 368H.
[11] There are a number of informative articles dealing with wrongfulness that have been helpful by Francois du Bois, Anton Fagan, Johan Potgieter, JR Midgley, Jonathan Burchell and Dale Hutchison in TJ Scott & Daniel Visser (ed) *Developing Delict: Essays in Honour of Robert Feenstra* also published in the 2000 edition of *Acta Juridica*.
[12] *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) para [12]-[13].
[13] *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 501G-H.
[14] Quoted in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 694F-G. So, too, Davis J in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2002 (6) SA 180 (C) 191 in fine.

has to be compensated for the loss caused by the negligent act or omission of the defendant.[15] It is then that it can be said that the legal convictions of society regard the conduct as wrongful,[16] something akin to and perhaps derived from the modern Dutch test 'in strijd . . . met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt' (contrary to what is acceptable in social relations according to unwritten law).[17]

[14] To formulate the issue in terms of a 'duty of care' may lead one astray. It cannot be doubted that the ASA owed a duty towards the plaintiff to consider and arrive at a decision without negligence, in a manner that was fair, justifiable and reasonable, and within the ambit of the complaint, but it does not follow that a failure to have done so created an obligation to compensate. To illustrate: there is obviously a duty – even a legal duty – on a judicial officer to adjudicate cases correctly and not to err negligently. That does not mean that a judicial officer who fails in the duty, because of negligence, acted wrongfully. Put in direct terms: can it be unlawful, in the sense that the wronged party is entitled to monetary compensation, for an incorrect judgment given negligently by a judicial officer, whether in exercising a discretion or making a value judgment, assessing the facts or in finding, interpreting or applying the appropriate legal principle? Public or

[15] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B: 'dat die gelede skade vergoed behoort te word'. Cf *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA) para [12]; *Pretorius en andere v McCallum* 2002 (2) SA 423 (C) 427E. See for a full treatment of the proposition: Anton Fagan 'Rethinking wrongfulness in the law of delict' 2005 *SALJ* 90 at 107-108.

[16] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B.

[17] Asser op cit p 36-37.

legal policy considerations require that there should be no liability, ie, that the potential defendant should be afforded immunity against a damages claim, even from third parties affected by the judgment.[18] As Botha JA said in somewhat similar circumstances:[19]

'That is not to say that the local authority need not exercise due care in dealing with applications; of course it must, but the point is that it would be contrary to the objective criterion of reasonableness to hold the local authority liable for damages if it should turn out that it acted negligently in refusing an application, when the applicant has a convenient remedy at hand to obtain the approval he is seeking. To allow an action for damages in these circumstances would, I am convinced, offend the legal convictions of the community.'

[15] Stating that there are no general rules determining wrongfulness and that it always depends on 'the facts of the particular case' is accordingly somewhat of an overstatement[20] because there are also some 'categories fixed by the law'.[21] For example, since the judgment in *Indac*,[22] which held that a collecting bank owes a legal duty to the owner of a cheque, it is well-nigh impossible to argue that a collecting bank has no such duty,[23] and all that may remain is to consider whether *vis-à-vis* the particular plaintiff the

---

[18] *Local Transitional Council of Delmas & another v Boshoff* (SCA case 302/04) 31 May 2005 unreported para [19].
[19] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 33D-E.
[20] *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para 14.
[21] Tony Honore *Responsibility and Fault* (1999) p 101 quoted in *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA) para [11].
[22] *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A).
[23] Cf *Standard Bank of SA Ltd v Harris & another NNO (JA du Toit Inc intervening)* 2003 (2) SA 23 (SCA).

duty existed.[24] However, as public policy considerations change, these categories may change, whether by expansion or contraction.[25]

[16] Many policy considerations can be determined without evidence, but if evidence is required, it has to be 'relevant', ie, relevant to policy considerations.[26] As Nugent JA said,[27]

'When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.'

[17] Since the present case deals with the wrongfulness of a decision reached in a process that may properly be described as adjudicative, it will be useful to consider in more detail the immunity given to judicial officers against damages claims. Johannes Voet in his *Commentary on the Pandects* 5.1.58 said (Gane's translation somewhat adapted):

'But in our customs and those of many other nations it is rather rare for the judge to [bear the responsibility for the outcome] by ill judging. That is because the trite rule that he is not made liable by mere lack of knowledge or [lack of skill], but by fraud only, which is commonly difficult of proof. It would be a bad business with judges, especially lower judges who have no skill in law, if in so widespread a science of law and practice, such a variety of views, and such a crowd of cases which will not brook but sweep aside delay, they should be held personally liable to the risk of individual suits, when their

---

[24] *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) para [26].
[25] *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) para [25].
[26] *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) 797F-G.
[27] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [21].

unfair judgment springs not from fraud, but from mistake, lack of knowledge or [lack of skill].'

This statement reflects the current legal position.[28]

[18] The different judgments in *R v Kumalo & others*[29] are in this regard instructive. A chief, who had civil jurisdiction but did not have the necessary jurisdiction to impose corporal punishment, imposed it on the complainant for contempt of his court. The chief and some others were then criminally charged with assault. Van den Heever JA thought that the chief was entitled to the indemnity mentioned by Voet and in addition quoted an 1886 judgment of Lord de Villiers[30] holding that judicial officers are also not liable in damages in relation to administrative functions performed by them in good faith in the course of their duties. Hoexter JA, speaking on behalf of the majority, confirmed the conviction on the ground that the chief knew that he was acting outside the terms of his judicial authority. Schreiner JA also confirmed the conviction but on another ground, namely that the chief was personally instrumental in inflicting the punishment – his intervention did not stop at the judicial act. More of interest though is Schreiner JA's finding (concordant with that of van den Heever JA) that the fact that the chief had

---

[28] *Penrice v Dickinson* 1945 AD 6 at 14-15. Similar considerations apply to defamation claims: *May v Udwin* 1981 (1) SA 1 (A) 19E-F.
[29] 1952 (1) SA 381 (A).
[30] *The Cape of Good Hope Bank v Fischer* (1885-1886) 4 SC 368 at 375.

exceeded his jurisdiction on its own would not have made him liable.[31] This, I would suggest, in the ordinary course of things makes good sense because a wrong assumption of jurisdiction does not differ in kind from any other wrong decision.

[19] The decisive policy underlying the immunity of the judiciary is the protection of its independence to enable it to adjudicate fearlessly.[32] Litigants (like those depending on an administrative process) are not 'entitled to a perfect process, free from innocent [ie, non *mala fide*] errors'.[33] The threat of an action for damages would 'unduly hamper the expeditious consideration and disposal' of litigation.[34] In each and every case there is at least one disgruntled litigant. Although damages and the plaintiff are foreseeable, and although damages are not indeterminate in any particular case, the 'floodgate' argument (with all its holes) does find application.

[20] Similar considerations apply to the immunity afforded to arbitrators and quasi-arbitrators, ie, persons who (usually by virtue of a contract) are entrusted with an adjudicative function that imposes on them a duty to act impartially.[35]

---

[31] At 386F-H. The conclusion finds support in *Matthews & others v Young* 1922 AD 492 at 507 quoted later. English law may be different in this regard: *Halsbury's Laws of England* 4 ed reissue vol 33 para 620. But see *Abbott v Sullivan & others* [1952] 1 All ER 226 (CA).
[32] *Sutcliffe v Thackrah & others* [1974] 1 All ER 859 (HL) 862g-h.
[33] *Logbro Properties CC v Bedderson NO & others* 2003 (2) SA 460 (SCA) para [17].
[34] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 33C-D in another context.
[35] *Hoffman v Meyer* 1956 (2) SA 752 (C); *Sutcliffe v Thackrah & others* [1974] 1 All ER 859 (HL).

[21] The facts and conclusion in *Matthews & others v Young*[36] provide a useful analogy. Young was a member of a trade union. Membership was a precondition for employment by the local municipality. The trade union terminated his membership, the municipality dismissed him, and he then sued the officials of the union for damages. The court held that the expulsion had been invalid because it was not in terms of the union's constitution. Jacob de Villiers JA pointed out (at 507) that –

'there is no onus upon a defendant until the plaintiff has proved that a legal right of his has been infringed. Under the *lex Aquilia* there is only an action for *damnum injuria datum* – for pecuniary loss inflicted through a legal injury, and the defendant is not called upon to answer the plaintiff's case before the plaintiff has proved both the pecuniary loss and that it directly results from what is, in the eye of the law, an *injuria*.'

He held that the trade union had not proceeded strictly in accordance with the rules of the society and that the officials had no jurisdiction, under the circumstances, to take the action they did, but he held (at 507) –

'to ignore the fact that they purported to act as the properly constituted tribunal under the rules of the association is to disregard a material fact in the case for the defendants which can hardly be considered irrelevant. A judge who purports to try a case in which he has no jurisdiction would not on that account be liable.'

The comparison with a judicial determination was taken further in the conclusion (at 509-510):

---

[36] 1922 AD 492.

'In my opinion, therefore, in considering plaintiff's conduct and in taking the resolution they took, the council purported to act under the rules of the society, and as in so doing they were performing functions analogous to those performed by a judge, they were acting in a quasi-judicial capacity, and are, therefore under our law (Groenewegen, *de Leg. Abr. Ad*. 1.4.5.1; Voet 5. 1.58 *in fine*), as also, I understand, under the English law, not liable for any damage provided they acted *bona fide* and in the honest discharge of their duties. When once it is established that the defendants were acting in such a capacity under the rules of the society, to which the plaintiff as a member must be taken to have given his full assent, the *onus* would be upon him to prove that, in taking the resolution and in the further steps they took, they did so not in pursuance of the duty devolving upon them as such council, but were actuated by some indirect or improper motive.'

[22] Plaintiff's counsel submitted that the outcome of *Matthews v Young* depended on the fact that Young 'as a member must be taken to have given his full assent' to the proceedings and absent a contractual relationship (like that created by joining a voluntary association), the case is distinguishable from the present and that the underlying principles are inapplicable. I disagree. The contract in the form of the constitution of the union was no doubt a factor deemed relevant but it appears to me that the true ratio of the judgment lies in the analogy drawn with judicial functions. That is how Botha JA understood it in *Knop* when he said that the observations that the trade union officials had performed discretionary and not merely ministerial duties and had acted in a quasi-judicial capacity constituted steps in the

reasoning which in the circumstances of the case were considered to be decisive on the issue of wrongfulness.[37]

[23] Botha JA (at 20C-F and 24I-J) in his judgment in *Knop* doubted the usefulness of drawing a distinction between purely administrative and quasi-judicial decisions in determining the question of wrongfulness (thereby implying, I think, that an incorrect administrative decision is not *per se* wrongful and that the same approach may apply in relation to both types of decisions). In any event, where a local authority has to weigh up conflicting interests and exercise a value judgment (at 30G) –

'Linguistically and conceptually it can be said that the Council is fulfilling a quasi-judicial function and exercising a quasi-judicial discretion.'

[24] Counsel stressed that the *mores* of society have changed since 1922 and that constitutional values have to be considered as part of the present-day *mores*. All this is true but the question is rather whether there has been a change in public policy in relation to the considerations that underpin *Matthews v Young*. Reference was made during argument to accountability, an important constitutional value but the judiciary, at least, is still accountable only to the law for their decisions[38] and public accountability, as

[37] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 24E-G.
[38] *Judges' Charter in Europe* para 2.

far as organs of state are concerned, has not evolved into a general liability for damages for imperfect administrative actions.[39]

[25] Whether an organ of state is liable for damages because of negligent non-judicial decisions with a statutory basis depends often on the intention of the legislature and on an interpretation of the statutory instrument concerned. This happened ultimately in *Knop*, where a local authority approved a subdivision of property contrary to the provisions of a town planning scheme. Realising its mistake, the municipality informed the applicant who then sued the local authority for financial losses suffered as a result of the steps he had taken after the grant of the approval. Botha JA's judgment first dealt at length with the general principles underlying delictual liability and he found that considerations of convenience militate strongly against allowing an action for damages, the reason being that the threat of litigation would unduly hamper the expeditious consideration and disposal of applications by a local authority (at 33C-D). With that in mind he set out to interpret the statute in question in order to determine whether the legislature intended another result. He concluded it did not (at 31D-E), an answer fortified by the fact that the legislation in question provided for an appeal procedure (at 31E-F). The importance of an internal appeal procedure is that it may be indicative of an intention that that is the only available remedy for

---

[39] *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA).

an incorrect decision. For an incorrect decision on appeal there is then no remedy except a judicial review.

[26] To sum up: In different situations courts have found that public policy considerations require that adjudicators of disputes are immune to damages claims in respect of their incorrect and negligent decisions. The overriding consideration has always been that, by the very nature of the adjudication process, rights will be affected and that the process will bog down unless decisions can be made without fear of damages claims, something that must impact on the independence of the adjudicator. Decisions made in bad faith are, however, unlawful and can give rise to damages claims.

[27] What remains for consideration is whether a decision of a body such as the ASA should be denied immunity. The only aspect raised on the plaintiff's behalf was the fact that the plaintiff was not a member of the ASA but was nevertheless 'indirectly bound' by its rulings because its advertising agent was a member of a constituent body of the ASA. In *Matthews v Young*, counsel reminded us, by joining the union Young bound himself to its process. The answer is really this. If the plaintiff was not legally bound to the ruling through those whose services it engaged, the plaintiff could have ignored the ASA's decision but, if it chose to abide by it, its loss would have been caused by its election and not by the incorrect decision. By engaging the services of someone who is a member of a professional organisation, one

has to accept the consequences of that person's professional rules and standards.

[28] An incorrect decision which was arrived at negligently during an adjudicative process which purports to serve the public interest cannot in my judgment be regarded as being unlawful. This applies even if the process is not based on legislation or contract and the principle is hence not dependent on consent. The public policy considerations mentioned in relation to the immunity of the judiciary apply equally. The process in this case purported to serve the public good and incorrect decisions, some based on wrong legal concepts, and others involving the erroneous exercise of a discretion or value judgment, some because of mistaken factual findings, are to be expected and have to be accepted by those affected by them, directly or indirectly.

[29] The appeal is dismissed with costs, including the costs of two counsel.

L T C HARMS
JUDGE OF APPEAL

AGREE:

CAMERON JA
VAN HEERDEN JA
MLAMBO JA
CACHALIA AJA