THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 188/05
REPORTABLE

In the matter between

FIRST NATIONAL BANK OF SOUTHERN AFRICA LTD **APPELLANT**

and

KAREN ELEANORE DUVENHAGE **RESPONDENT**

Coram:	HARMS, CAMERON, NAVSA, BRAND AND NUGENT JJA
Heard:	17 MARCH 2006
Delivered:	30 MARCH 2006
Summary:	Claim in delict – causal connection of the loss – value of enquiring into its existence before embarking on the remaining enquiries.
Neutral citation:	This judgment may be referred to as First National Bank v Duvenhage [2006] SCA 47 (RSA).

JUDGMENT

NUGENT JA

NUGENT JA

[1] Of the three elements that combine to constitute a delict founded on negligence – a legal duty in the circumstances to conform with the standard of the reasonable person,[1] conduct that falls short of that standard,[2] and loss consequent upon that conduct – the last often receives the least attention. Yet it is as essential as the others for without it there is no delictual liability. Indeed, in a recent illuminating note J C Knobel suggests, on doctrinal grounds, that loss, and its causal connection, might even be the proper starting point for the enquiry.[3]

[2] But whatever sequence doctrinal logic dictates[4] the human mind is sufficiently flexible to be capable of enquiring into each element separately, in any order, with appropriate assumptions being made in relation to the others, and that is often done in practice to avoid prolonging litigation.[5] For though the elements are naturally interrelated each involves a distinct enquiry. The first element (in the sequence I have described) is directed to whether in the circumstances the law should recognise an action for the recovery of loss caused negligently. That is a question of legal policy in relation to which, in the often-quoted words of Fleming *The Law of Torts*,[6] 'the hand of history, our ideals of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall', interplay, and is often capable of being disposed of on exception.[7] The

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[1] *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) 797E; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 27J-28A; *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) para 6; *Minister of Safety and Security v van Duivenboden* 2002 (6) SA 431 (SCA) para 12; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12; *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 19; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 13.

[2] *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-G, which has been applied by this court in countless cases.

[3] JC Knobel 'Die Samehang Tussen Onregmatigheid en Skade' 2005 (68) *THRHR* 645.

[4] For example, Millner *Negligence in Modern Law* 230, points out that '[u]ntil the law acknowledges that a particular interest or relationship is capable in principle of supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature.'

[5] But see the criticisms by J Neethling and JM Potgieter 'Die Toets vir Deliktuele Nalatigheid Onder die Soeklig' 2001 (64) *THRHR* 476;

[6] 4th ed 136.

[7] *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) 797E-801D; *Telematrix*, above, para 16.

second is directed to whether the defendant's conduct conforms with the standard expected of the reasonable person in the circumstances,[8] which (and this is often overlooked) might not require the defendant to have taken any steps at all.[9] That question is quite capable of being asked on the assumption that the defendant was legally bound to conform with that standard. And the third is directed to whether there were causally-connected consequences, which is a factual enquiry initially (though the outcome will sometimes need to be tempered so as to contain liability within reasonable bounds)[10] that is also capable of being asked on the assumption that the conduct that is complained of was both wrongful and negligent.

[3] The present appeal demonstrates why in practice it is useful at times to consider whether the loss for which damages are claimed is causally connected to the allegedly unlawful conduct before addressing the more abstract normative questions. It concerns a farming venture that was embarked upon by Mrs Duvenhage and her husband, which they intended conducting through the medium of a close corporation in which they had the sole interest. (It is not necessary for present purposes to determine which of those parties was properly vested with the claim.)

[4] The Duvenhages hired a farm in the KwaZulu-Natal midlands intending to cultivate cash crops. They soon discovered, in about the middle of 1996, that two permits had been issued in terms of s 7(2) of the Forest Act 122 of 1984 for the afforestation of 288 hectares of the farm.[11] After making enquiries they also

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[8] *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-G.
[9] Despite the remarks of Holmes JA in *Kruger v Coetzee*, above, at 430G, it continues often to be overlooked .
[10] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700E-701F.
[11] '7(1) Without the prior written approval of the director-general no land…may be used for the planting of trees to produce timber for commercial or industrial purposes.
(2) An owner who intends to establish a commercial timber plantation on any land, shall apply in the prescribed manner for the approval required in terms of subsection (1), and the director-general may in his discretion grant the approval on such conditions as he may deem fit.'

established that SAPPI (a company with timber interests) would be willing to provide financial assistance – free seedlings and a loan of up to R1 200 per hectare – to establish plantations on the farm.

[5] The Duvenhages decided to embark upon that venture but time was against them. The two permits (one permitting the afforestation of 200 hectares and the other 88 hectares) were due to expire on 15 May 1997 and 28 August 1997 respectively, and enquiries they made of the forestry department revealed that it was unlikely that the periods would be extended. But planting is possible only during the summer rainfall months commencing in about September or October and ending in February. There was no prospect of preparing the land and completing the planting before the season ended in February 1997. But what was required at least, as the Duvenhages understood the terms of the permits, was that the land should be prepared before the permits expired, whereupon planting would then be permissible during the next season.

[6] The owner of the farm was willing to extend the period of the lease for the period required for the timber to mature. The Duvenhages commenced immediately to prepare the land so as to complete the preparation before the permits expired, financing the work with money advanced to Mrs Duvenhage on overdraft by the appellant bank. In the course of preparing the land they also planted a relatively small number of seedlings that they obtained from SAPPI on credit.

[7] In about November 1996 the owner of the farm offered to sell it to the Duvenhages on favourable terms. At that time the Land Bank held a mortgage bond over the farm as security for a loan that had been advanced to the owner. Mr Duvenhage enquired of the Land Bank whether it would be willing to transfer the loan, which would enable the Duvenhages to acquire the farm, but the Land Bank

was unwilling to do so. The Land Bank suggested instead that the Duvenhages obtain finance from a commercial bank to acquire the farm, that they then establish the plantation with the financial assistance of SAPPI, and that therefore it would consider extending a loan with which the commercial bank could be repaid. This appealed to the Duvenhages and they approached Mr Roux, the manager of the appellant's Greytown branch, where Mrs Duvenhage had an account.

[8] They met with Roux on 9 December 1996. The evidence as to what occurred at the meeting is contentious. What was found by the full court in that regard (those findings are not on appeal before us) is not altogether clear but I have accepted for present purposes the submission by Mrs Duvenhage's counsel that Roux undertook to submit an application for a loan to the relevant department of the bank, but told them that that was a mere formality, and assured them that the loan would be advanced. He also suggested that the Duvenhages should in any event establish whether SAPPI might be willing to grant a loan for the acquisition of the farm because they would then benefit from a lower rate of interest.

[9] During January 1997 Mr Duvenhage discussed the matter with SAPPI but was told that SAPPI was not interested in financing the acquisition of land. What he did secure from SAPPI, however, was an undertaking to provide the assistance that had been discussed earlier, if the Duvenhages acquired the property, permitted a second bond to be registered as security for repayment of the loan, and completed the planting by the end of January 1998.

[10] Meanwhile the Duvenhages continued preparing the land, with money that Roux continued to advance to Mrs Duvenhage on overdraft, in the expectation that they would receive a loan from the bank and acquire the farm, which would in turn give them access to the loan from SAPPI with which the overdraft would be repaid.

[11] So matters continued through the winter. Enquiries were made of Roux from time to time, who assured them that the formalities for the advance of a loan were in hand, but when summer arrived it had not materialised. By then Mrs Duvenhage was in debt to the bank, SAPPI was unwilling to supply the seedlings that needed to be planted until it had the security of a second bond, and Roux was fobbing off enquiries. In January 1998 Mrs Duvenhage insisted on seeing somebody at the bank's head office. Before Roux could arrange a meeting he was removed from his post. In early February 1998 Mrs Duvenhage made contact with the regional office and ultimately she met with the credit manager at the bank's head office in Johannesburg. There she learned for the first time that Roux had never submitted the request for a loan in the first place. (Roux's explanation for not having done so is not now material but the bank did nothing to defend his conduct, which both the trial court and the full court subjected to well-justified criticism.)

[12] But by then the planting season was almost over, the permission to plant had all but lapsed (on the Duvenhage's understanding of its terms), SAPPI's undertaking to provide assistance had lapsed, and SAPPI was demanding payment for the seedlings that had been advanced on credit. The venture was at an end and the stage was set for the present litigation. (An attempt was made the following year to have the permits extended but that was unsuccessful.)

[13] The bank sued Mrs Duvenhage for repayment of the money that had been advanced on overdraft. To that claim she had no defence. But she responded with a counterclaim for damages for breach of contract. Mrs Duvenhage alleged that Roux, on behalf of the bank, had agreed to advance a loan with which to acquire the farm, and that the bank had breached the agreement. In consequence, so Mrs Duvenhage alleged, she had lost the opportunity to make profits, both from the sale

of timber and from other farming activities, and to recover the expenditure she had incurred in preparing the land. Later her pleadings were amended to introduce an alternative claim in delict in which it was alleged that the losses were caused by Roux's negligence and that the bank was vicariously liable for the consequent damages. The bank pleaded, amongst other things, that the counterclaims had prescribed.

[14] The action was tried by P C Combrinck J in the High Court at Pietermaritzburg. At the outset of the trial he ruled that 'the issue of liability on the counterclaim will be decided as a first issue and all the other issues will stand over.' Ultimately he found that the evidence did not establish the agreement upon which the main counterclaim was founded (that finding is not contentious and nothing more need be said about it) and that the alternative claim had prescribed. The counterclaim was dismissed and judgment was entered for the money that was owed to the bank.

[15] On appeal to the full court (J Combrink, Magid and Nicholson JJ) the finding on prescription was reversed and the delictual claim succeeded. (The judgment is reported as *Duvenhage v Eerste Nasionale Bank van SA Bpk* [2005] 4 All SA 41 (N).) It was held that Roux, acting in the course and scope of his employment, had conducted himself wrongfully and negligently and that his conduct was the cause of the losses for which the damages were sought. The orders of the trial court were set aside and substituted with a declaration that the bank was liable for such damages as might have been suffered. (What remained was only for a court in due course to determine the amount of the damages, if they could not be agreed upon, by assessing the extent of the losses and attaching to them a monetary value, in accordance with the trial court's ruling.) This appeal against that declaratory order is before us with the special leave of this court, which was limited to the question

whether the losses that Mrs Duvenhage suffered were caused by Roux's unlawful conduct.

[16] On that issue the conclusions of the full court were perfunctory:

'Applied to the present facts factual causality presents little problem. If it had not been for Roux's wrongful and negligent conduct the purchase of the farm would not have fallen through and the SAPPI financing would not have lapsed and [Duvenhage] would not have suffered any loss of profit and the expenditure … would not have been needlessly incurred.'

[17] The approach to causation, both in contract and in delict, is well established. In both cases the wronged party is entitled to be compensated for the consequences of the unlawful conduct. In the former case the unlawful conduct lies in the breach and the wronged party is to be placed in the position that he or she would have been in had it not occurred and the promise had instead been fulfilled. In the latter case the wronged party is to be placed in the position that he or she would have been in had the wrongful and negligent conduct not occurred.[12] And in determining that question

'… 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.' [13]

[18] It goes without saying that when the venture was abandoned in January 1998 Mrs Duvenhage lost the opportunity to make profits from the venture and the opportunity to recover the expenditure she had incurred. But it was not because

[12] *Trotman v Edwick* 1951 (1) SA 443 (A) 449B-C.
[13] *International Shipping Co (Pty) Ltd v Bentley*, above, 700F-H.

Roux failed to submit the application for a loan (as he ought to have done), nor because he assured the Duvenhages that a loan would be advanced (which he ought not to have done), that the venture failed. It failed because a loan was not secured, and the farm was not thereby acquired, before time ran out. There is no direct evidence that the Duvenhages would indeed have secured a loan from the bank had the application been submitted, and thereby acquired the farm. Nor is there direct evidence that they would have secured a loan from an alternative source had the bank refused to grant a loan. Despite the efforts of Mrs Duvenhage's counsel to persuade us to the contrary the evidence also does not permit of the inference that a loan would have been forthcoming from either source. And without a loan to acquire the farm in time for the 1997 planting season the project would necessarily have failed, irrespective of Roux's conduct, with consequent loss of the opportunity to profit and to recover the expenditure.

[19] It was also submitted on behalf of Mrs Duvenhage that she would not have expended the money in the first place if not for the assurance that was given by Roux and that at least that portion of the loss was recoverable irrespective of whether they would have secured a loan and acquired the farm. But that, too, was not established by the evidence. On the contrary, the evidence suggests that they would have incurred the expenditure in any event. For Mrs Duvenhage said that even if Roux had positively refused a loan (had he told her that he did not intend to submit her application that would have come to the same thing) she would not have abandoned the project but would have sought finance elsewhere. Bearing in mind that they had only until 15 May 1997 to prepare the land before the expiry of the permit to plant 200 hectares, and then until 28 August 1997 to prepare the land for the remaining 88 hectares, which was essential to the success of the project (on their understanding of the permits) it is most unlikely that preparations would have stopped while alternative finance was sought. Indeed, they had commenced

incurring the expenditure in about November 1996, before Roux had uttered a word, and there is no reason to think that they would not have continued to do so.

[20] Yet even had it been established that a loan would have been secured there is a further insuperable hurdle to establishing the causal connection between the negligent conduct and the loss, which is that the venture was in any event doomed from the start, although the Duvenhages did not know it at the time. Clearly it was not possible to acquire the farm and complete planting by the end of February 1997, which was when that planting season ended, even if the bank had immediately advanced a loan. And on a proper construction of the permits – the undisputed evidence of an official of the Department of Water Affairs and Forestry was to the same effect – it would have been illegal to plant once the permits expired on 15 May 1997 and 28 August 1997 respectively, which was before the next planting season commenced. The project was thus always bound to fail.

[21] The true cause of the expenditure of the money, and the loss of the opportunity to recover it and to profit, was that the Duvenhages embarked upon the venture when, unbeknown to them because they misunderstood the terms of the permits, it was not capable of being completed before the permits expired. Even the contractual claim was bound to fail for want of a causal connection between the breach and the loss. And if the contractual claim was bound to fail the claim in delict was bound to follow.

[22] At times it is worth giving thought to causation at the outset, as suggested by Knobel, even if not on doctrinal grounds, because in practice claims often fail for want of a causal connection between the unlawful conduct and the loss.

[23] The appeal is upheld with costs. The order of the court below is set aside and substituted with an order dismissing the appeal with costs.

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R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

HARMS JA)

CAMERON JA)

NAVSA JA)

BRAND JA)