

# **CIVIL LITIGATION: THE BLURRED LINE BETWEEN CONTRACTUAL LIABILITY AND DELICTUAL LIABILITY**



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## **INTRODUCTION**

The purpose of the law, in particular private law, is to regulate relations between individuals in a community.<sup>1</sup>The fundamental premise in private law is that damage (harm) rests where it falls, that is, each person must bear the damage he suffers(*res perit domino*)<sup>2</sup>. However it is of paramount importance to note that, there are exceptions to this general rule since there are certain legally recognised instances in which the burden of damage does not rest where it falls, but is shifted from one individual to another. In those instances, the other party (herein after referred to as respondent) incurs an obligation to bear the applicant's damages and is legally liable to compensate the applicant.

As an attorney or a self-actor, it is prudent to know before instituting proceedings in court or claiming damages whether the liability in question arises from contract, delict or both. The line of division on whether to sue in contract or delict is not always easily drawn. In each case, one has to identify any legal relationships between the various parties involved and the nature of the relationship between the applicant and the respondent. The particulars of claim must distinguish clearly between the allegations relating to the alleged breaches of the agreement for the purposes of the contractual claim and those relating to wrongfulness, fault

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<sup>1</sup> Neethling Potgieter, Law of Delict, LexisNexis publications, 7<sup>th</sup> Edition 2015

<sup>2</sup> Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 1 SA 461 SCA 468.

and causation for the purposes of delictual claim. The aim of this brief article is to set out some key aspects of contract and delict.

It is first necessary to provide a definition of contract and delict. One of the leading contract law academic writer, R H Christie defines a **contract** as an agreement entered into with the intention of creating legal obligations.<sup>3</sup> People enter into contracts to create legally binding rights and duties. A valid contract therefore creates personal rights. A **delict** is the act of a person that wrongfully and culpably causes harm to another<sup>4</sup>.

## **DIFFERENCES**

The two areas of the law have fundamental differences that litigators must take into cognisance before deciding whether presented facts warrant delictual action or contractual action. This distinction is clearly apparent from the fact that one and the same act may render the wrongdoer liable *ex contractu* as well as *ex delicto*<sup>5</sup>. The differences include, but not limited to:

- The primary purpose of a contractual remedy to enforce an agreement, or compensate for the non-fulfilment of its terms, whereas delictual remedy on the other hand, is directed primarily at compensation for the infringement of a legally recognised interest which exists independently from a contractual obligation.
- The liability in contract flows from breach of the material terms of a contract whereas in delict the nature of the obligation is not agreed between the parties but rather is imposed by operation *ex lege* ( *operation of the law*).
- Delictual remedies can compensate for patrimonial and non-patrimonial harm whereas contractual liability does not.
- Liability for breach of contract is not based on fault whereas fault is a requirement for delictual liability.
- Apportionment of Damages Act <sup>6</sup>applies to delictual remedies and does not apply in contractual breach.
- In delict the respondent must owe the claimant a duty of care and in contract the duty of care does not arise.

In the case of *Sutherland v Drake Flemmer & Orsmond Incorporated and Another*<sup>7</sup> the defendants, emphasized the difference between contract and delict in the context of awarding

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<sup>3</sup> Christie RH Contract in JA Joubert (Ed) LAWSA Vol 5 (1) (1994) par 124

<sup>4</sup> Neethling Potgieter, Law of Delict, LexisNexis publications, 7<sup>th</sup> Edition 2015 page 6

<sup>5</sup> Neethling Potgieter, Law of Delict, LexisNexis publications, 7<sup>th</sup> Edition 2015 page 7

<sup>6</sup> Act 34 of 1956

<sup>7</sup> (1576/2015) [2015] ZACPEHC 65

damages, and in this regard relied on the following passage from the judgment in *Trotman & Another v Edwick*<sup>8</sup>

*“A litigant who sues on contract sues his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.”*

### **SIMILARITIES**

There are apparent similarities between a delict and breach of contract but despite the similarities mentioned below, these concepts differ as discussed above. The notable similarities include but not limited to that:

- they are both areas of civil law
- both are species of the genus ‘wrongful conduct’ in private law.
- the claimant will bring an action against the respondent and must prove the case on the balance of probabilities(BOP).
- remedies may be awarded provided that the claimant’s loss is not too remote a consequence of the defendant’s breach.
- the remedies are generally intended to compensate the claimant rather than to punish the Respondent.

In conclusion, the law of contract and delict are separate concepts which are often mixed up. At law, the applicant can elect to sue in delict or contract in the alternative or concurrently, having regard to what is advantageous to him or her. One has to bear in mind that one cannot claim damages arising out of breach of contract where the parties did not enter into any legal binding agreement but same can be done in delictual claims thus litigators needs to understand the similarities and differences between the two in order to seek appropriate and advantageous remedy to the damage suffered.

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<sup>8</sup> 1951 (1) SA 443 (A) at 449 B-C.