



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 1386/2014

In the matter between:

JOHANN JACOBUS CILLIERS

First Plaintiff

ROBERT PHILLIPS & OTHERS

Second to Thirty-fourth Plaintiffs

v

JURGEN JOHANNES STEENKAMP

First Defendant

ALBERT IVAN SURMANY & OTHERS

Second to Sixth Defendants

Court: Justice J Cloete

Heard: 14 October 2015

Delivered: 25 November 2015

JUDGMENT

CLOETE J:**Introduction**

- [1] The 34 plaintiffs are shareholders in a company, Kimberley Consolidated Mining (Pty) Ltd (*'KCM'*). The first and seventeenth plaintiffs are also concurrent creditors of KCM. This company was placed in provisional liquidation on 12 November 2010 and in final liquidation on 9 December 2010.
- [2] The first to third defendants are the duly appointed liquidators of KCM and for convenience they will collectively be referred to as *'the liquidators'*. They are individually employed by the fourth to sixth defendants respectively.
- [3] Prior to its liquidation the sole business of KCM was its 100% shareholding in two subsidiaries, namely Bo-Karoo Diamond Mining (Pty) Ltd (*'Bo-Karoo'*) and Channal Mining (Pty) Ltd (*'Channal'*).
- [4] On 30 January 2014 the plaintiffs issued summons against the liquidators and the fourth to sixth defendants (the latter on the basis of vicarious liability for alleged acts or omissions on the part of the individual liquidators during the course and scope of their respective employment). The plaintiffs' particulars of claim were subsequently amended on 20 May 2014. The plaintiffs claim payment of the total sum of R101 957 995.78 as shareholders, pro rata to their respective shareholding in KCM. In their capacities as concurrent creditors the first plaintiff

claims R215 000 and the seventeenth plaintiff R33 000 as the shortfall on their respective creditors claims. Interest is also claimed together with costs.

- [5] The third and sixth defendants have excepted to the amended particulars of claim (and the other defendants have apparently advanced similar objections to the pleading in its current form). The third and sixth defendants contend that the claims advanced by the plaintiffs, as currently pleaded, fail to disclose a cause of action, alternatively are vague and embarrassing and that they are severely prejudiced as a result.

The plaintiffs' claims as pleaded

- [6] The plaintiffs have advanced four claims which may be conveniently categorised as follows:

6.1 Claim A: the diamond proceeds claim;

6.2 Claim B: the mining proceeds claim;

6.3 Claim C: the sale claim; and

6.4 Claim D: the approval claim.

Claim A: the diamond proceeds claim

- [7] The plaintiffs allege that on 3 November 2010 KCM published a SENS announcement in which it notified its shareholders that *'the subcontractor working on its Bo-Karoo mining site recovered a 27 carat light-pink diamond'* (*'the diamond'*). Shareholders were advised that the diamond would be placed on tender and that, in terms of the relevant subcontract agreement, KCM would receive a royalty of 15% of the diamond's gross selling price.
- [8] The first plaintiff discovered that the diamond was to be sold by an entity known as Pico Diamonds (*'Pico'*) and not its owner, Bo-Karoo, and that the sale proceeds were to be appropriated by Pico or its controlling director and shareholder, one Trevor Pikwane (*'Pikwane'*). The first plaintiff thus obtained an interdict on 22 November 2010 prohibiting this sale, but in contempt of the interdict Pikwane nonetheless went ahead with the sale at a price of some R43.9 million. In the interim Pikwane had caused KCM to be placed in provisional liquidation (he is alleged to have done so on the basis of various fraudulent averments).
- [9] On the same date that the provisional liquidation order was made final (i.e. 9 December 2010) the first plaintiff obtained an order freezing R30 million of the sale proceeds of the diamond:

‘To enable the liquidators and / or any other interested party to institute proceedings...for the recovery of the proceeds of the sale of the diamond, and for further interim relief pertaining to the protection or preservation of such proceeds...’

[10] The aforementioned order further stipulated that the envisaged steps had to be taken by 24 January 2011, failing which its terms would lapse. The deadline was subsequently extended at the instance of the liquidators to 7 February 2011 in a further order granted in similar terms on 21 January 2011.

[11] The liquidators failed to institute proceedings by 7 February 2011, the freezing order lapsed, and the sum of R30 million was returned to Pico on 7 February 2011 or shortly thereafter and has not been recovered.

[12] The cause of action is found at paragraphs 52 and 55 of the pleading where it is alleged in essence that:

12.1 The liquidators had a fiduciary duty to act in the interests of KCM, its members and creditors and in the exercise of such duty were obliged to:

- (a) assume control of the assets of KCM, including any of its wholly owned subsidiaries (and thus including Bo-Karoo); (b) assume proper control over all the affairs of KCM and of any subsidiaries over which it exercised control; and (c) take such steps as were necessary to properly and timeously investigate the facts concerning the sale of the diamond and ensure that action was instituted before the freezing order deadline;

12.2 The liquidators failed to institute the proceedings timeously and thus wrongfully, unlawfully and negligently failed to discharge their aforementioned duties which, it was alleged, were imposed upon them by s 391 and s 386, more specifically ss 386(1)(e) and 386(4)(a), (f), (g), (h) and (i) of the Companies Act 61 of 1973.

[13] It is alleged that the failure to discharge their aforementioned duties directly caused the plaintiffs to suffer damages in the form of pecuniary loss.

Claim B: the mining proceeds claim

[14] The plaintiffs allege that Bo-Karoo was the holder of prospecting and mining rights entitling it to mine and sell precious stones or minerals found on the properties over which the rights were registered for its own benefit.

[15] During 2009 a so-called subcontract agreement was purportedly concluded between Bo-Karoo and Pico at a time when the same individual, Pikwane, was also a director of KCM. The subcontract agreement authorised Pico to conduct Bo-Karoo's mining activities as an '*independent subcontractor*' for which Pico would receive, on a sliding scale, up to 90% of revenue generated and Bo-Karoo the remainder, with Pico paying a monthly rental to Bo-Karoo for equipment used. However Pico retained all the revenue and failed to pay any rental whatsoever.

[16] It is alleged that the subcontract was void, alternatively voidable on various specified grounds.

[17] The cause of action is pleaded on the basis of the same fiduciary duty or duties which are alleged to have fallen on the liquidators in Claim A (but without any mention of the sections of the Companies Act relied upon in Claim A). The plaintiffs rely upon a breach of these duties (essentially a failure to properly and timeously investigate and to take the necessary steps to set the subcontract agreement aside) which, it is alleged, directly caused them to similarly suffer damages in the form of pecuniary loss.

Claim C: the sale claim

[18] The plaintiffs plead that subsequent to the appointment of the liquidators Bo-Karoo sold its mineral rights and equipment to Bondeo 140 CC for the sum of R14 million, which was never paid.

[19] It is alleged that there was a legal duty on the liquidators (described as '*a duty of care*') to recover the purchase price or to compel the directors of Bo-Karoo to do so.

[20] It is pleaded that in breach of this duty of care the liquidators did not recover the purchase price, nor did they take any steps to compel the directors of Bo-Karoo

to do so, and that as a direct result the plaintiffs again suffered damages in the form of pecuniary loss.

Claim D: the approval claim

[21] The plaintiffs plead that the sale of Bo-Karoo's mineral rights and equipment which is the subject of Claim C constituted the sale of the greater part of its assets. As such it required the approval, by special resolution, of the liquidators of KCM which was the sole shareholder in Bo-Karoo (which would be in terms of s 228 of the old Companies Act 61 of 1973, or s 112 as read with s 115 of the Companies Act 71 of 2008, as the case may be).

[22] It is similarly alleged that there was a legal duty on the liquidators (also described as '*a duty of care*') to ensure that the assets were not sold for a price substantially less than market value; that these assets had a value of at least R75 million; and that in approving the sale at a price of R14 million the liquidators breached their duty of care, again directly causing the plaintiffs to suffer damages in the form of pecuniary loss.

Relevant requirements for pleadings and exceptions

[23] A pleader is required to allege the primary facts upon which he or she relies as well as the conclusion sought to be drawn from those facts. A pleading will be defective if a conclusion is asserted without pleading the primary facts to support

it: see *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (AD) at 273A-B.

[24] The particular facts that a party must plead in order to disclose the cause of action relied upon pertain not to matters of procedure but to substantive law, given that they must form the foundation for the legal conclusion which in the ordinary course would support the party's right to judgment: see *McKenzie v Farmers' Co-Operative Meat Industries Ltd* 1922 AD 16 at 23 (which has consistently been followed); *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T) at 245D. If this is not done the pleading will be excipiable for failing to disclose a cause of action.

[25] An exception on the ground that a pleading is vague and embarrassing is aimed at the formulation of the cause of action rather than its legal validity per se, but this type of exception can only be taken if the vagueness goes to the cause of action itself, and will only be allowed if the excipient will be seriously prejudiced as a result: see e.g. *Gallagher Group Ltd v I O Tech Manufacturing (Pty) Ltd* 2014 (2) SA 157 (GNP) at para [54].

The grounds of exception

[26] The exception hinges on the following central grounds:

- 26.1 The assertion by the plaintiffs of the existence of a duty on the liquidators of KCM to take control of its wholly owned subsidiary Bo-Karoo as pleaded in Claims A and B;
- 26.2 The absence of the assertion of any such duty as pleaded in Claim C (an unspecified duty of care is instead relied upon); and
- 26.3 The claims are all for pure economic loss but lack averments necessary to sustain same.

Discussion

- [27] The excipients' fundamental attack on the duty to take control in Claims A and B is that the pleading alleges a failure to discharge such a duty, but does not allege any primary facts from which a conclusion of the duty to take control can be drawn.
- [28] In the pleading under scrutiny the plaintiffs allege that the duty to take control had as its source the fiduciary duty of the liquidators of KCM and that such a duty (at least in respect of Claim A) was imposed on the liquidators by the following sections of the old Companies Act 61 of 1973: s 391 places a duty on a liquidator to recover and take into possession all the assets and property of the company, to apply them in satisfaction of the costs of the winding-up and the claims of creditors, and to distribute the balance among those who are entitled thereto;

s 386(1)(e) empowers a liquidator *inter alia* to take steps for the protection of the property of the company; s 386(4)(a) to institute legal proceedings; s 386(4)(f) to continue or discontinue any business of the company; s 386(4)(g) to enforce or abandon any contract relating to the acquisition of immovable property by the company prior to registration of transfer, or to terminate any lease concluded by the company; s 386(4)(h) to sell the company's movable and immovable property; and s 386(4)(i) to perform any other act or exercise any power for which he or she is not expressly required by the Act to first obtain leave of the court.

[29] During argument counsel for the plaintiffs also referred to various authorities which emphasise (as pleaded) that a liquidator stands in a fiduciary relationship to the company of which he or she is the liquidator as well as to the body of creditors of that company and members of that company as a whole.

[30] He stressed that for purposes of deciding this particular issue on exception the court is duty bound to accept as correct (unless palpably untrue or improbable) the primary facts alleged *ex facie* the pleading itself. However the primary facts alleged are those pertaining to the direct consequences of the failure by the liquidators of KCM to fulfil their duty to take control of Bo-Karoo.

[31] To my mind therefore the flaw in this argument is that these "primary facts" presuppose the existence of such a duty on the part of the liquidators in the first place, and that duty is pleaded as being a matter of law which either does or does not exist.

[32] The excipients contend that Bo-Karoo, although a wholly owned subsidiary of KCM, is a separate legal persona. The liquidators have no powers that supersede the powers of the directors of KCM's subsidiary, even if it is wholly owned. It is common cause that the entity whose assets are in issue in this matter is Bo-Karoo. That is (or was) a company with its own directors and controlling board. KCM was merely the shareholder of Bo-Karoo, and could not itself control the affairs of Bo-Karoo. Although shareholders may have rights of intervention under shareholder agreements, the plaintiffs do not rely on any such agreements, nor do they rely on any other power of control or any statutory or common law derivative action (certainly none is pleaded). They have pinned their colours to the sole mast that the fiduciary duty imposed upon the liquidators includes the duty to take control of KCM's wholly owned subsidiary. The excipients submit that not only have the plaintiffs failed to allege any primary facts to support that legal conclusion, but the conclusion itself is wrong in law.

[33] In support of this argument the excipients place principal reliance on *Macadamia Finance BK en 'n Ander v De Wet en Andere NNO* 1993 (2) SA 743 (AA). In that matter the plaintiffs sued the defendants as liquidators of two companies in liquidation, contending that they were liable for damage caused by fire to a plantation of macadamia nut trees on a farm belonging to the second plaintiff, because the defendants had negligently failed to insure the assets of the second plaintiff. At the time of the fire only the first plaintiff was in liquidation, the second plaintiff only having been placed in liquidation about five months after the fire.

The second plaintiff was one of a number of wholly owned subsidiaries of the first plaintiff and the plaintiffs based their claim on the relationship between these companies. It appeared that the first plaintiff was the only active company in the group; the directors of all the companies were the same and all decisions were effectively taken by the first plaintiff, although after the liquidation of the first plaintiff the second plaintiff had continued to exist with its own board of directors. The court *a quo* dismissed the action, finding that although there was in general a duty on a liquidator to insure the assets of a company, no such duty arose in respect of the assets of the second plaintiff because at the time of the fire the liquidators were not appointed as such in respect of the second plaintiff. The close relationship between the two companies did not affect the legal distinction between the first plaintiff as holding company and the second plaintiff as its wholly owned subsidiary.

- [34] On appeal the then Appellate Division agreed with the court *a quo*, finding as follows at 747C – 784A:

‘Om mee to begin: ’n likwidateur het die bevoegdhede en verpligtings wat aan hom toegeken word deur die bepalinge van die Maatskappywet 61 van 1973. Hy is verplig, onder meer, volgens artikel 391 van die Wet, om die bates van die maatskappy aan te wend ter vereffening van die eise van die skuldeisers van die maatskappy. Daar is geen bepaling wat hom magtig om die bates van die maatskappy onder sy beheer aan te wend ter versekering van die bates van ’n ander maatskappy waarvan hy nie die likwidateur is nie. Dié probleem het die appellante se advokaat probeer oorbrug deur te wys op die feit dat die eerste appellant se aandeelhouding in die tweede appellant ’n bate van die eerste appellant was en aan te voer dat die respondente verplig was om die eerste

appellant se bates te beskerm (vgl artikel 386(1)(e) van die Wet). Die argument slaan die bal mis. Die appellante se saak is nie dat die eerste appellant 'n eis teen die respondente het weens die verbreking van 'n verpligting teenoor die eerste appellant ten opsigte van sy bates nie. Daar is geen poging aangewend om aan te toon wat die omvang van die eerste appellant se versekerbare belang in sy aandeelhouing was, of watter skade die eerste appellant sou gely het nie. Die appellante se saak is dat die respondente 'n regsplig teenoor die tweede appellant verbreek het, met betrekking tot die tweede appellant se bates. Die bestaan van so 'n regsplig is onversoenbaar met die bepalings van die Wet. Die respondente as die likwidadeurs van die eerste appellant het nie oor enige magte buite die bepalings van die Wet beskik ten opsigte van bates anders as dié van die maatskappy onder sy beheer nie. Gevolglik is daar geen ruimte vir die gedagte dat die respondente die beheer en bestuur van die tweede appellant “oorgeneem” het nie.

Vervolgens: afgesien van die bepalings van die Wet, is daar in ieder geval geen regsfiguur of –beginsel waarvolgens dit denkbaar is dat die beheer en die bestuur van die tweede appellant op die respondent oorgegaan het nie. Die feit dat die eerste en tweede appellante voor eersgenoemde se likwidasie dieselfde direkteure gehad het, het opgehou om van enige betekenis te wees met die likwidasie van die eerste appellant en die aanstelling van die respondente as sy likwidadeurs. Voor die likwidasie het die direkteure opgetree in twee verskillende hoedanighede, met verwysing onderskeidelik na die beheer en bestuur van die eerste appellant, en die beheer en bestuur van die tweede appellant. Vanweë die likwidasie is die direkteure ontdaan van die een hoedanigheid, maar seer sekerlik nie van die ander nie. Die posisie is geensins verskillend van wat dit sou gewees het as die twee appellante verskillende direkteure sou gehad het nie. Die gedagte dat die respondente die beheer en bestuur van die tweede appellant sou oorgeneem het van die direkteure van die eerste appellant is onbestaanbaar.’

- [35] Moreover to the extent that the pleading in the present matter might seek to allege some form of *de facto* control by KCM over Bo-Karoo, the findings in

Macadamia Finance are equally decisive. In any event no primary facts are alleged by the plaintiffs to support a conclusion of *de facto* control.

[36] The same difficulties lie with Claims B and C but with these claims the position is worse, because in Claim B no mention is made of the statutory provisions relied upon in Claim A, and in Claim C there is only a bald allegation of a duty of care without any primary facts being alleged to support it.

[37] Having regard to the foregoing I am persuaded that in respect of this particular issue the pleading fails to disclose a cause of action in respect of Claims A, B and C, or alternatively is vague and embarrassing and the excipients are severely prejudiced thereby.

[38] As stated above, the excipients' remaining attack is directed at the fact that all of the claims (i.e. including Claim D) are for pure economic loss. In Claim A the allegation is made that the liquidators acted '*wrongfully, unlawfully and negligently*' in failing to discharge a particular legal duty which, on my understanding of *Macadamia Finance*, does not exist. To add to what has been stated above Claims B and C do not even allege negligence on the part of the liquidators but simply that by omission they breached an unspecified '*duty of care*'. Claim D on the other hand relies on positive conduct on the part of the liquidators causing pure economic loss.

[39] As submitted by counsel for the excipients, in contrast to cases of physical harm, conduct causing loss is not *prima facie* wrongful and there is no general right not to be caused such loss: see *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at para [22]. Furthermore, the fact that an act is negligent does not make it wrongful, and to elevate negligence as the determining factor confuses wrongfulness with negligence: see *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at paras [12] and [13].

[40] While accepting this to be the legal position counsel for the plaintiffs argued that, given that liability for pure economic loss is a matter of judicial determination involving criteria of public and legal policy, and that there is no *numerus clausus* in which such liability arises, it would be inappropriate to decide this particular issue on exception and before any evidence is led. He argued that the facts to be adduced by way of evidence at the trial will indicate whether, on the applicable legal and policy considerations of the facts, the liquidators should be held liable.

[41] In *Telematrix* it was held at paras [2] and [3] that:

[2] ...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....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...” ’

[Miller J in *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) at 715H.]

[42] In my view the argument for the plaintiffs overlooks the following, namely that the difficulty arising from the manner in which the duty to take control has been pleaded (as dealt with above) impacts also on this part of their case. If it is not discernible how control lies or could be exercised, it is entirely unclear how the omission to take control which caused economic loss is wrongful (as pleaded in Claims A, B and C). I agree with the submission made for the excipients that the plaintiffs’ argument is essentially as follows: because of the (as yet unidentified) control that might have been exercised, certain steps (as yet unidentified) ought to have been taken, and had they been taken (on dates and in circumstances not clearly pleaded) economic loss to the plaintiffs would have been prevented.

[43] Given the absence of pleaded foundational facts which could ultimately lead a court to find them sustaining the conclusion of wrongfulness, I am similarly persuaded that the pleading in its current form does not pass muster and fails to

disclose a cause of action on this particular issue, alternatively is vague and embarrassing and the excipients are severely prejudiced thereby.

[44] As far as Claim D is concerned, the parties are *ad idem* that fault is a necessary element of the cause of action and that it has not been specifically pleaded.

[45] The argument advanced for the plaintiffs however is that the liquidators' duty to ensure that assets were not sold for a price substantially less than market value has been pleaded, as has the fact that they approved the sale. It is contended that because s 391 of the old Companies Act imposes what it does, this logically extends to the required approval of any sale, and positive conduct in breach thereof establishes fault which gives rise to a valid cause of action for pure economic loss.

[46] However, as pointed out for the excipients, this argument does not deal with the fundamental problem. The mere fact that assets were sold for less than their market value is not of itself actionable. The cause of action (which the plaintiffs accept) lies in delict. Being in delict, fault must be alleged and proved. If, for example, the liquidators authorised the sale without negligence, as a matter of law the claim would not stand.

[47] As stated in Harms: *Amler's Precedents of Pleadings*, 8th ed. at p352, a party relying on a breach of statutory duty as a cause of action must satisfy the court that:

- 47.1 the statute, properly interpreted, gives a right of action;
- 47.2 the plaintiff is a person for whose benefit the duty was imposed;
- 47.3 the damage suffered is of the kind contemplated by the statute;
- 47.4 the defendant's conduct constituted a breach of the statutory duty; and
- 47.5 the breach was causally linked to the damage.

[48] The absence of these allegations renders Claim D excipiable, on the basis that it does not disclose a cause of action, alternatively that it is vague and embarrassing and the excipients are severely prejudiced thereby.

Conclusion

[49] Although I have found that the exception must succeed on all three grounds, I am nonetheless mindful of the fact that a considerable sum of money is involved in this matter and that it is one which is of great importance to the parties. The usual order would be to afford the plaintiffs 10 days to amend their particulars of claim, but in the particular circumstances I am of the view that the interests of justice would be served by giving them a longer period in which to do so, and that a deadline of 29 January 2016 would be appropriate.

[50] In the result the following order is made:

1. The third and sixth defendants' exception is upheld.
2. The plaintiffs are given leave, if so advised, to further amend the particulars of claim by not later than 29 January 2016. Failing any amendment, the third and sixth defendants are given leave to apply to strike out the claims, or for similar relief.
3. The plaintiffs shall pay the third and sixth defendants' costs on the scale as between party and party, jointly and severally, as taxed or agreed.

J I CLOETE