REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	Reportable: Yes
(2)	Of Interest to other judges: Yes
(3)	REVISED.

Case number: **14/43457**

In the matter between:

Kingdom Films	**First Excipient**
Mandy Richardson	**Second Excipient**
Kevin Rene Richardson	**Third Excipient**
Kevin Richardson Wildlife Sanctuary (Pty) Ltd	**Fourth Excipient**
The Lion Whisperer	**Fifth Excipient**
Sid Howell Investments (Pty) Ltd	**Sixth Excipient**
Gerald Howell	**Seventh Excipient**
Lynne Robertson	**Eighth Excipient**
Kevin Rene Richardson NO	**Ninth Excipient**
Mandy Richardson	**Tenth Excipient**
Craig Rossel NO	**Eleventh Excipient**
Deadly Predator Challenge (Pty) Ltd	**Twelfth Excipient**

And

Harry Kaplan NO	**First Respondent**
Mmatlou Hellen Phaleng	**Second Respondent**

JUDGMENT

Introduction

[1] Kingdom Wildlife Sanctuary (Pty) Ltd (KWS) is a company presently in liquidation. It was placed under final liquidation by the Gauteng High Court, Provincial Division on 30 May 2013. Pursuant thereto, the two respondents in this matter were appointed the joint final liquidators of KWS. They continue to hold this position. Acting in that capacity they brought an *Aquilian* action against eleven defendants in this court. Having delivered their particulars of claim (POC) against the eleven defendants they were served with a notice of exception from all the defendants, indicating that it is a firmly held opinion of all the defendants the POC failed to disclose a cause of action. They were offered an opportunity to reconsider the POC and amend it appropriately. The respondents do not share that opinion and therefore declined the invitation to amend their POC. They informed the defendants accordingly. Consequently, the defendants raised an exception to the POC. This judgment is the outcome of that exception.[1]

<u>The facts</u>

[2] Prior to being placed under final liquidation KWS primarily conducted the business of tourism venture. The third excipient, Kevin Richardson (Richardson), was a director of KWS. He held fifty percent (50%) of the issued share capital of KWS. The other fifty percent (50%) was held by Alan Friedland (Friedland).

[1] Accordingly, the defendants in the principal case are the "excipients" here, and the plaintiffs there are the "respondents" here.

[3] The excipients all stand accused of acting unlawfully, or unlawfully failing to act, with fault and thereby causing harm to KWS, which harm is identified as prospective financial loss. This potential financial loss is the "*damage*" they seek to recover from the excipients. They seek other relief too. However, while the claim for monetary compensation for the damages is by no means the only relief they seek, it is a crucial aspect of the relief claimed. It is this aspect of the claim, as reflected in the POC,that forms the subject matter of the exception. To understand the POC as well as the exception it is necessary to have regard to details of the excipients.

[4] Richardson,

a. is married to the second excipient, Mandy Richardson (Mandy);

b. accepted appointment as the sole director of the first excipient, Kingdom Films (Pty) Ltd, as from 27 August 2012 or thereabouts;

c. is employed by Kevin Richardson Wildlife Sanctuary (Pty) Ltd, the fourth excipient, (KRWS) as from 17 May 2013;

d. is a trustee of the Kevin and Mandy Richardson Family Trust (the family trust).

[5] Mandy was, at all material times,

a. the sole director of the fifth excipient, the Lion Whisperer (Pty) Ltd (the Lion Whisperer) as from about 26 July 2013;

b. the sole director of KRWS as from 17 May 2013 (the same date that her husband, Richardson, became an employee of this company);

c. a director of Deadly Predator Challenge (Pty) Ltd (Predator), the twelfth excipient;

d. providing services to KWS prior to its liquidation pursuant to a contract between her and KWS;

e. together with Richardson and Craig Rossel (Rossel) a trustee of the family trust.

[6] Richardson N.O. Mandy N.O. and Rossel N.O. are, by virtue of their appointments as trustees of the family trust, the ninth, tenth and eleventh excipients in this matter. During 2013 the family trust was the sole shareholder of the entire issued share capital of KRWS.

[7] Those then are the first, second, third, fourth, fifth, ninth, tenth, eleventh and twelfth excipients. Together they form one cluster of excipients. They were all represented by the same firm of attorneys and the same counsel. The other cluster of excipients are the sixth, seventh and eighth excipients. The sixth excipient, Sid Howell Investments (Pty) Ltd (SHI), is a company that concluded a contract with KWS. SHI and KWS were represented by Gerald Howell, the seventh excipient (Howell) and Richardson respectively. The sixth, seventh and eighth excipients, too, were all represented by a single firm of attorneys and the same counsel. As can be seen from the above account of the excipients the main defendants in the principal case are Richardson and his wife Mandy. With the exception of the sixth, seventh and eighth excipients their role and involvement in the affairs of the other excipients is so significant as to be overwhelmingly influential, if not determinative, of those affairs. The sixth, seventh and eighth excipients have no role to play in the other affairs of all the other excipients, and *vice versa*. They are completely independent of the other excipients. They are cited because of certain commercial transactions they concluded with one or more of the other excipients, which commercial transactions lie at the core of the delictual action brought by the respondents. The details of the delictual action are spelt out in the POC, to which I now turn.

<u>The relevant portions of the POC</u>

[8] Having identified the parties to the litigation in the POC, the respondents proceed to explain what their cause of action is. According to them KWS, represented by Richardson, concluded a written agreement with SHI represented by Howell. SHI was at the time trading as the Welgedacht Game Reserve. In essence, the agreement provided for SHI to provide services to KWS in return for a certain sum of money, and to lease certain property to KWS also in return for a certain sum of money.[2] This agreement (the Welgedacht agreement) provided Richardson with an opportunity to extricate himself from his co-shareholder, Friedland, by destroying the business of KWS while at the same time diverting all its business and business opportunities to some of the other excipients. In particular diverting to KRWS, The Lion Whisperer (the fifth excipient), Predator (the twelfth excipient), and thus affording them an opportunity to enjoy all the income and profits that would have been due to KWS. The manner in which this was done was, *inter alia* as follows:

a. Richardson misappropriated monies and other assets belonging to KWS;

b. Richardson misappropriated income or other benefits of KWS and essentially had these transmitted to Kingdom Films, KRWS, The Lion Whisperer and Predator;

[2] The payment for the services as well as for the right to use the property of SHI is calculated as a share of profits. For purposes of this judgment those calculations are not relevant.

c. Richardson fraudulently orchestrated the cancellation of the Welgedacht agreement;

d. Richardson engineered a situation where KWS found itself unable to pay its debts so that KWS is liquidated;

e. Richardson and/or Kingdom Films, KWRS, The Lion Whisperer and Predator unlawfully and improperly competed with KWS;

f. On or about 1 March 2013, SHI served a letter of demand on KWS for payment of R26 257.61. Richardson deliberately failed to pay this amount to SHI even though KWS was in a financial position to do so. As a result of his deliberate unlawful omission to pay this amount, KWS was placed in final liquidation.

[9] Much of the above, and especially the contrived cancellation of the Welgedacht agreement, was done by Richardson with the connivance or collusion of Mandy, Howell, SHI, and Robertson. This cancellation, as mentioned above, resulted from

a. an unlawful intentional misrepresentation made by Richardson and these four excipients, which had the potential of causing KWS harm; and,

b. an unlawful intentional interference in the contractual relationship between KWS and SHI.

[10] It is then alleged that "*had Richardson and one or more or all of Mandy, SHI, Howell and Robertson not conducted themselves as set out above, the value of the business owned by KWS would be R68 402 797.00 (Sixty Eight Million, Four Hundred and Two Thousand, Seven Hundred and Ninety Seven Rand). As a result of such conduct, the business of KWS was irreparably damaged and the value of KWS' business has been reduced to nil. KWS has, in the result, suffered damages in the aforesaid amount of R68 402 797.00 (Sixty Eight Million, Four Hundred and Two Thousand, Seven Hundred and Ninety Seven Rand).*" The alleged loss of R68 402 797.00 reflects the "*potential value of the business of KWS*". It is not an actual loss incurred by KWS. It is a loss of profits for twenty (20) years from the date the Welgedacht agreement was cancelled. The amount of R 68 402 797.00 represents the present-day monetary value of the profits. The amount, at this stage, is arrived at by utilising a simplistic accounting tool of firstly, projecting sales for a year, then subtracting the projected cost of sales, other projected expenses, projected taxation and then a projected amount for depreciation of assets, thus arriving at a projected net annual profit. The calculation is done for each year of the twenty (20) year period. Finally, the projected net profit for each of the years is summed up to arrive at R 68 402 797.00. This is the loss they claim KWS suffered. It is a pure economic loss.

[11] The respondents claim this amount from Richardson, Mandy, Howell and Robertson (the second, third, seventh and eighth excipients, respectively). It is their main claim and referred in the POC as Claim A. It is their contention that the facts averred by them, (the material ones are captured above and are at this stage accepted as having been proven), sufficiently establishes a cause of action in their favour against the four excipients.

[12] The respondents proceed to claim in the alternative against the SHI (the sixth excipient) on the basis that it unlawfully repudiated the Welgedacht agreement. The amount claimed is identical to that claimed in Claim A. It, to repeat, is R68 402 797.00. It is the amount by which the alleged "*potential value of the business of KWS*" was diminished. This is referred to as Claim B in the POC. The respondents do not, in the POC as it is presently constructed, claim that, as at the date when the Welgedacht agreement was cancelled, the existing patrimony of KWS was diminished as a result of the said cancellation.

[13] There are further claims brought in the alternative to Claim A and Claim B, but which for the purposes of this exception are not relevant, save to say that they too are founded upon the factual averments identified above, and they are brought against all the other excipients as

well. By virtue of the inclusion of these claims, the respondents have ensured that relief is sought against all the excipients.

[14] As noted above all the excipients have challenged the respondents to either amend their POC or demonstrate that on the facts as averred in the POC they are entitled to the relief claimed, be it the primary or the alternative relief. The challenge is based on the contention that even if those facts are established at trial they do not disclose a cause of action.

The exception

[15] Before detailing with the exception it is necessary to remind ourselves that it is the excipients who bear the onus to show that the respondents have failed to disclose a cause of action in their POC. And, they will only discharge this onus if they are able to demonstrate on every possible interpretation that the POC, read as a whole, fails to disclose a cause of action.[3] Of necessity this finding would have to be made on the basis that all the factual averments in the POC are true.[4]

[16] The essence of the exception is that the law of delict only recognises a claim for damages if the plaintiff had suffered at least some of the damages as at the date when the POC are delivered. As at that date the plaintiff must show that its patrimony has been diminished. Until

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[3] *Theunissen v Transvaalse Lewendehawe Koőp Bpk* 1988 (2) SA 493 (A) at 500D; *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F
[4] *Living Hands (Pty) Ltd v Ditz and Others* 2013 (2) SA 368 (GSJ) at [15](a)

its patrimony has actually been diminished there is no claim recognisable in law. The excipients point out that the POC shows no diminution in the patrimony of KWS as at the date of the alleged unlawful culpable conduct or unlawful culpable omission of the excipients. No part of Claim A or Claim B represents a diminution in the patrimony of KWS as at the date of the unlawful conduct or omission of any of the excipients. Put differently, no part of the claim for R68 402 797.00 represents an actual loss suffered by KWS. On the respondents' own version, the loss suffered by KWS is purely "*a potential loss*": it is no more than a future or prospective loss, not an actual loss. As a result, the respondents have failed to establish a claim recognisable in law. The claim for potential or prospective loss without any concomitant claim for actual loss is legally untenable. On this basis and in these terms the exception revolves solely around a substantive point of law. It is an issue ideally suited for determination on exception.

<u>The law regarding a claim for damages in delict</u>

[17] Damage or loss is one element of an *Aquilian* action. The other four are act or omission, unlawfulness, fault and causation. Each element has to be proven on a balance of probabilities by the plaintiff for the claimant to succeed in its claim. An *Aquilian* action is incomplete if one of the elements of the action is absent from the claim. In other words, a cause of action only arises when every element is present.[5] Whether a plaintiff has suffered damage or not is part of the *facta probanda* that has

[5] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838H-839C

to be proven by the plaintiff. The proof required does not have to meet the scientific standard of precision or exactness. Once it is shown to be present, the court will, if necessary, do its best to quantify it, even if it is required to draw on estimates. However, failure to prove any damage or loss already suffered will doubtlessly result in the claim failing, and should the element be absent *ab initio* then the claim is legally untenable *ab initio*: there is no cause of action because the entire set of facts which gives rise to an enforceable claim is not, as yet, present.

[18] The question posed here is this: can KWS's claim for solely prospective damage in the form of pure economic loss suffice for purposes of establishing that the KWS suffered damage as a result of the unlawful culpable conduct of the excipients? If not, the respondent's POC, according to the excipients, fails to disclose a cause of action.

[19] Our law has no difficulty with recognising prospective pure economic loss as part of the damages sustained by a plaintiff that calls for compensation. At least not since *Administrateur, Natal v Trust Bank van Afrika Bpk.*[6] Pure economic loss "*…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.*"[7] The respondents here only claim a potential loss of profits. They do not claim

[6] 1979 (3) SA (A) 824
[7] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at [1]

that KWS was put to extra expenses or that it suffered a diminution in the value of its property.

[20] It bears reminding what the concept "*cause of action*" means in the legal sense. It is "*every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.*"[8] Watermeyer J in *Abrahamse & Sons,* explains the concept in slightly more detail:

> "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."[9]

[21] Relying on this understanding of the concept, Gardiner JP in the case of *Coetzee v SA Railways and Harbours*[10] came to the conclusion that a claim for prospective damage as the only form of damage in an *Aquilian* action is legally incompetent. His reasoning is based on the principle that unless the last of all facts that make up the action occurs, no cause of action arises or accrues. The reasoning is clear and simple: assuming all the other factual elements of the action are present but, as the damage has yet to occur, the last of the factual elements is absent,

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[8] *Cook v Gill* (L.R., 8 C.P. 107) quoted with approval by Maasdorp JA in *Mckenzie v Farmers' Co-operative Meat Industries* 1922 A.D. at 23
[9] *Abrahamse & Sons v S A Railways and Harbours* 1933 CPD 626 at 637. See also, *Evins* (*supra*) at 838F-G and 839F
[10] 1933 CPD 565 at 576

therefore, no cause of action accrues. The *dicta* of Gardiner JP is worth repeating:

> "It seems to me that the award of prospective damages in an action based primarily on accrued damages is an exception to the rule that in an action one can recover only what one can prove. The exception is grafted on this rule to avoid multiplicity of actions. The cases, as far as I have ascertained, go only to this extent, that if a person sues for accrued damages, he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future. Prospective damages may be awarded as ancillary to accrued damages, but they have no separate, independent force as ground for action."[11]

[22] That is, and for centuries has been, our common law. The principle has been the subject of some trenchant criticism by academic writers, but has received the endorsement, albeit in an *obiter dictum*, of the SCA in *Jowell v Bramwell-Jones and others.*[12] It is, in any event, a rule of the common law and unless it can be shown that it is in conflict with a right in in the Bill of Rights, and therefore requires to be developed in order to be consistent with or, to put it differently, in order that it "*promotes the spirit, purport and objects of the Bill of Rights,*"[13] it should be applied. In this case there is no suggestion that this common law rule conflicts with any right in the Bill of Rights.

[23] The rule is consistent with the principle that the date for determining the extent of the damages concerned is the date on which the impugned conduct caused the plaintiff's damage. In terms of this principle

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[11] *Id*.
[12] 2000 (3) SA 274 (SCA) at [22]. The sources of the criticism are listed in this paragraph.
[13] Section 39(2) of the *Constitution of the Republic of South Africa, Act 108 of 1996*

the damage must be caused before a claim can be brought. Once damage has been caused, there is no reason to deprive the plaintiff of any other damage that may arise in the future, but which is caused by the same unlawful culpable conduct or omission of the defendant. This is because:

> "…in an action at common law for damages for injuries sustained by an accident the plaintiff is only entitled to sue once and for all … It may be that after he has recovered damages, it may transpire that the injuries are far more severe than appeared at the date of trial, but he is nevertheless precluded from claiming further damages in a subsequent action. As Lord Halsbury said, in the case of Darley Main Colliery Co. v Mitchell (11 A.C. 132): "No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever."[14]

[24] Thus, our law, by virtue of the 'once and for all' rule requires the plaintiff to bring the claim for the latter damages simultaneously with her claim for the former damages: all damages, past present and future, caused by the same unlawful culpable conduct or omission must be raised in a single action.

[25] In this case the respondents' claim that the date at which they calculate the damages suffered by KWS is the date of the impugned conduct of the excipients. This is manifest in the POC and, as a result, they submit, the POC as it stands most certainly discloses a cause of action. I am unable to agree with this submission. It fails to appreciate that the requirement to prove damages already suffered has to be shown before any future damages can be claimed for. These damages may occur at a date much later than the date when the impugned unlawful conduct or

[14] *Cape Town Council v Jacobs* 1917 (A.D.) 615 at 620

omission took place. As soon as those damages arise, a cause of action is born[15] and only from that moment would prescription begin to run. Until then there is none. At present the respondents do not prove (the facts alleged in the POC are for the present purposes taken as proven) that KWS has suffered any damage, and therefore a significant element of their Aquilian action is absent. It has to be remembered that, in terms of the Aquilian action, damages have to be suffered (not, as yet to be suffered) for a cause of action to be complete. The allowance of prospective damages by the 'once and for all rule' is an exception to this principle. It was only introduced in order to prevent plaintiffs and defendants from having to face a multiplicity of actions for damages caused by the same unlawful culpable act or omission and to ensure that a single judgment on the issues is rendered. Further it carries the advantage of bringing both certainty and finality to disputes brought to court for resolution. Certainty and finality are two important structures upon which the edifice of the rule of law is constructed. In a sentence, the 'once and for all rule' has not amended the *lex Aquiliae,* which has as one of its elements the requirement that some damage has already been caused to the plaintiff by the unlawful culpable conduct or omission of the defendant, and that like every other element its absence deprives the plaintiff of a cause of action, for "(t)*he element of damage or loss is fundamental to the Aquilian action and the right of action is incomplete until damage is caused to the plaintiff by reason of the defendant's wrongful conduct.*"[16]

[15] Assuming, of course, that the elements of fault and causation, too, are present.
[16] *Jowell v Bramwell-Jones and others* (*supra*) at [22]

Conclusion

[26] As KWS has yet to suffer any damage, it does not have a cause of action. The exception, therefore, is well-taken. It may be that KWS has already suffered damages, but has failed or neglected to identify these in the POC. For this reason it would be inappropriate to non-suit the respondents. Rather, they should be given an opportunity to remedy this failing or negligence. Finally, having failed to defend the POC, the respondents should bear the costs of the exception.

Order[17]

[27] The following order is made:

1. The exceptions to Claim A and Claim B are upheld.
2. The plaintiffs are afforded a period of ten (10) days from the date of this order to initiate such amendment to their Particulars of Claim as they deem fit in order to remove the grounds of the exceptions.
3. Should the plaintiffs fail to initiate an amendment to remove the grounds of the exceptions the defendants may enrol the matter on the same papers with appropriate amplifications, if necessary, to have Claim A and Claim B dismissed.

[17] In this order, for purposes of avoiding any confusion, I will describe the parties as they are reflected in the principal case

4. The plaintiffs are to pay the costs of the exception, which costs are to include those of two counsel where two counsel were employed.

VALLY J

Counsel for 1st to 5th and 9th to 12th excipients:	S Wagener SC assisted by W Gibbs
Instructed by	Weavind & Weavind Inc
Counsel for 6th to 8th excipients	F Dippenaar SC assisted by N Dandadzi
Instructed by	Ric Martin Inc
Counsel for respondents	J Brett SC
Instructed by	Schindlers Attorneys
Date of hearing	28 January 2016
Date of judgment	7 March 2016