

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

28 August 2023

DATE

SIGNATURE

Case no.: **22014/19**

In the matter between:

KPMG SERVICES (PTY LIMITED) SA

Applicant / Excipient

And

NDITSHENI NELLY MAGUWADA & 59 OTHERS

First to Sixtieth Respondents

In re:

NDITSHENI NELLY MAGUWADA & 59 OTHERS

First to Sixtieth Plaintiffs

KPMG SERVICES (PTY LIMITED) SA

Defendant

Coram: Dlamini J

Date of hearing: 17 May 2023

Date of delivery of judgment: 28 August 2023

The Judgment is deemed to have been delivered electronically by circulation to the parties' representatives via email and the same shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

- [1] This is an exception application brought by the defendant against the plaintiff's second amended Particulars of Claim.

TEST FOR EXCEPTION

- [2] In dealing with the exception it is trite that the pleadings must be looked at as a whole. An excipient must show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it.
- [3] The test on exception is whether on all reasonable readings of the facts pleaded, no cause of action maybe be made out.
- [4] The well-established principle of our law is that the *onus* rest upon the excipient who alleges that a summons discloses no cause of action or is vague

and embarrassing. The duty rest upon the excipient to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it.

[5] In *H v Fetal Assessment Center*,¹ the Court said "*The test on an exception is whether, on all possible readings of the facts, no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law from which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.*"

[6] The trite principle of our law is that an excipient is obliged to confine his complaint to the stated grounds of his exception,

[7] The test applicable in deciding exceptions based on vagueness and embarrassment are now well established and have been consistently applied by our Courts. In *Trope v South African Reserve Bank*,² it was held at (201-211) that an exception to a pleading of it being vague and embarrassing involves two primary considerations namely;

7.1 whether it is vague, and;

7.2 whether it causes embarrassment of such a nature that the excipient is prejudiced

[8] The *Trope* decision was approved in *Jowell v Bramwell –Jones*,³ at 899-903. In the *Jowell* – judgment it was also held that it was incumbent upon a plaintiff to plead a complete cause of action that identifies the issues upon which it seeks to rely and on which evidence will be led in an intelligible, lucid form that allows the defendant to plead to it.

¹ 2015 (2) SA 193 (CC)

² 1992 (3) SA 208 (T)

³ 1988 (1) SA 836 (W)

BACKGROUND FACTS

- [9] The matter has a long history. The plaintiffs who are all former employees of Venda Building Society "VBS" Mutual Bank brought a claim against the defendant KPMG Services (Pty) Ltd "KPMG" claiming damages arising out of an alleged negligent audit by KPMG for the financial statements of VBS for the year ending 2017. Initially, in what I shall for the sake of convenience refer to as *Maguwada v KPMG 1*, the defendant filed an exception to the plaintiff's Particulars of Claim.
- [10] On 10 May 2021, this Court in *Maguwada v KPMG1* upheld the defendant's exception based on wrongfulness and granted the plaintiffs leave to amend their Particulars of Claim.
- [11] The plaintiffs filed a conditional direct application for leave to appeal to the Constitutional Court. On 22 September 2021, the Constitutional Court dismissed this application for direct appeal.
- [12] On 26 January 2022, the plaintiff's leave to appeal in *Maguwada v KPMG 1* was dismissed by the Court.
- [13] Not satisfied with the Court's decision, the plaintiffs applied for leave to appeal to the Supreme Court of Appeal.
- [14] On 28 February 2022, the Supreme Court of Appeal dismissed the plaintiff's leave to appeal.
- [15] On 9 June 2022, the plaintiffs filed their amended Particulars of Claim.
- [16] On 8 July 2022, the defendant filed its exception to the plaintiff's second amended Particulars of Claim.

LIABILITY OF AUDITORS

- [17] The principles relating to the liability of auditors are now well established and have been pronounced upon in numerous judgments.
- [18] Negligent misstatements by auditors have been held by our courts not to be wrongful for the purposes of the claims for pure economic loss. In *Hlumisa Investments Holdings(RF) Ltd and Another v Kirkinis and Others*.⁴ this principle was eloquently explained thus "*It is universally accepted in common-law countries that auditors ought not to bear liability simply because it might be foreseen in general that audit reports and financial statements are frequently used in commercial transaction involving the party for whom the audit was conducted (and audit reports completed) and third parties. In general, auditors have no duty to third parties with whom there is no relationship or where the factors set out in the Standard Chartered Bank case ... are absent.*" See also, *Magudwa v KPMG Services (Pty) Limited* 2021 (1) SA 442 (GJ). *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* SA 2021 JDR 0920.
- [19] The law is clear in this regard, auditors owe their legal duties to the companies they audit and not to the company's shareholders. To do so will in my view, as was held in *Hlumisa supra*, "*expose the auditors to liability in an undeterminable amount for an undeterminable time to an undeterminable class.*" The Court went on and held "*that if an action were to be granted to claim compensation from wrongdoers, the Bank's creditors would demand the same facility and particularly*" as in our present case if it [the company] is insolvent.
- [20] The plaintiff's claim against the defendant is a delictual claim to recover pure economic loss. Primarily, this claim is based on the alleged duty which the plaintiffs claim KPMG as the statutory auditor of VBS owed to the plaintiffs.

⁴ 2020 (5) SA 419 (SCA)

- [21] It is so that claims for pure economic loss are not *prima facie* wrongful, and the law of delict does not allow for the recovery of pure economic loss as a general rule. The plaintiff in such a claim bears the onus of proving the wrongfulness of the conduct.
- [22] In upholding the defendant's first exception this Court in *Maguwada v KPMG 1* at [30] held as follows "The court is of the firm view that to recognise the claim of the employees would go against the caution raised by the SCA in Fourway Haulage mentioned above where the SCA held that "[t]he first policy consideration is the law's concern to avoid the imposition of liability in an indeterminable amount for an indeterminable time to an indeterminable class, and that liability would be more readily imposed for a single loss of a single identifiable plaintiff occurring but once and which is unlikely to bring in its train multiplicity of action."
- [23] The Court went on and held at [31] that " *When applying the above principles and case law. I am of the view that just on the exception of wrongfulness the facts pleaded, as I have outlined above, for the reasons stated, the excipient /defendant owes the plaintiffs no legal duty in law and the plaintiff's claim is convoluted and prejudicial to the excipient and untenable at the level of law.*
- [24] Taking into account all the circumstances of this case, I agree with the above Court's finding. This Court is bound by this decision as confirmed by the SCA. This should thus have been the end of this case. However, for the sake of brevity and completeness, I shall deal with the rest of the defendant's exceptions.

WRONGFULNESS

- [25] It is contended by the defendant that auditors do not owe a legal duty not to cause pure economic loss to the employees of the entities to which they provide auditing services. That there is no allegation of a special relationship between the defendant and the employees of the VBS as no facts have been pleaded by the plaintiffs to support such an allegation.

[26] In resisting the exception, the plaintiffs contend that they relied upon the positive act of the defendant of deliberately giving material misstatements in the auditor's report which did not fairly present the VBS financial statement, in instances where the plaintiffs would believe that VBS financial position was healthy. In sum, the plaintiffs insist that in considering the financial reports the defendant owed the plaintiffs a legal duty and therefore the conduct of Mr. Malaba is wrongful. That public policy consideration and the Constitution justify adapting or extending common law delict pertaining to the liability of auditors.

[27] This contention by the plaintiffs is meritless and stands to be dismissed. The principles relating to the liability of auditors are now well settled and have been endorsed by numerous judgments, see *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA). The trite principle of our law is that negligent misstatements by auditors are not wrongful for the purposes of claims for pure economic loss. Auditors owe their legal duties to the companies they audit and not to the company's shareholders and not the company's employees as held by the Court in *Maguwade v KPMG 1*. Accordingly, the defendant's exception must succeed.

FACTUAL CAUSATION: SECOND GROUND

[28] In this regard it is contended by the plaintiffs, that defendant knew that the plaintiffs as minority shareholders of VBS will rely on their regulatory audit opinion and unqualified audit report in laboring under the impression that VBS's financial position was healthy and that their jobs were secured. Therefore insist the plaintiffs, that if the defendant had filed a correct regulatory report, VBS would not have been liquidated and consequently the plaintiffs would have not suffered harm in the form of emotional shock and loss of earning capacity.

[29] In this regard, it is submitted by the defendant that the plaintiffs do not allege material facts upon which it is claimed that placing VBS under curatorship in

July 2017 would have prevented its liquidation and thereby saved the plaintiff's employment. Further, the plaintiffs have not made the necessary allegations that KPMG was the factual cause of their loss of earnings capacity and their emotional shock.

- [30] In my view, the defendant's exception must succeed, the plaintiffs have not set out succinctly the necessary averments how the defendant was the factual cause of their loss of earning capacity and the resultant emotional shock. The mismanagement and fraudulent conduct that resulted in the collapse of VBS as it is apparent, was caused by its erstwhile management, and not the submission of financial reports by the KPMG.

LEGAL CAUSATION: THIRD GROUND

- [31] It is insisted upon by the defendant that the plaintiff's particulars of claim make no factual allegation that seeks to establish the proximity of KPMG's conduct to the loss that the plaintiffs allegedly suffered. Thus the harm is too remote in relation to the defendant to be found to be liable in delict.
- [32] The relevant submission by the plaintiffs is to the effect that the emotional shock and loss of employment are a result of the conduct of Mr. Mashaba who ought to have presented the correct financial position of VBS to the shareholder, the Reserve Bank, and the employees of the audited Mutual Bank. Consequently, insists the plaintiffs that all the plaintiffs will not be able to secure employment in the banking sector owing to the defendant failing to discharge its duty and filling incorrect financial reports.
- [33] The plaintiff's submissions in this regard are unsustainable. The settled law in this regard is that auditors owe their duty to the shareholders of the company sitting in its general meeting. There is no legal nexus between the failure of the defendant to submit the financial reports and the loss of employment suffered by the plaintiffs. The defendant's exception should thus stand.

EMOTIONAL SHOCK: FOURTH GROUND

- [34] In their amended particulars of claim, the plaintiffs have pleaded that when they heard the event that led to the perpetration of fraud by the executives of VBS as contained in the VBS Mutual Investigation Report to the Prudential Authority, they suffered a detectable psychiatric injury because of their close connection with VBS. This they further contend was a result of Mr. Mashaba expressing an unqualified audit report.
- [35] The defendant insists that the plaintiffs have not pleaded the material facts upon which they allege that they have suffered the emotional shock of a sufficiently serious nature to affect the general health of VBS employees and to require treatment.
- [36] The plaintiff's submission in this regard has no merit, the plaintiffs have not with sufficient particularity, pleaded how it could have been expected of an auditor that by simply conducting his auditing duties, this would have resulted in the employees of that company suffering emotional shock. The exception is allowed.

LOSS OF EARNING CAPACITY: FIFTH GROUND

- [37] The defendant contends that the damages for loss of earning capacity by the plaintiffs are not competent, in the sense that it was not reasonably foreseeable to the defendant that the employees of the company that it audited would be rendered incapable of working again and further that the plaintiffs have not pleaded the material facts upon which they allege it was reasonably foreseeable.
- [38] The plaintiffs submit that their claim for damages for loss of earning capacity resulted from damages to the plaintiff's property in the form of loss of earning capacity and psychological harm in the form of emotional shock. As a result, the plaintiffs contend, that they will now be unable to secure employment in the banking sector as a result of the alleged misstatements of VBS's financial standing by KPMG.

- [39] The defendant's exception must succeed, simply because the plaintiffs have not pleaded with sufficient clarity, the material facts upon which they allege that it was reasonably foreseeable to the defendant that the employees of the company that it audited, purely by conducting its audit that such employees will be rendered incapable of working again.

DEVELOPMENT OF COMMON LAW

- [40] The plaintiffs seek the development of common to the extent that auditors are not only accountable to the audited Mutual Bank but that such accountability should extend to the Prudential Authority and the employees of the audited Mutual Bank as the employees of the bank have no other remedy in the event of liquidation. That, this Court is requested to develop the question of whether the auditors are liable to employees who happened to be the shareholders of VBS.
- [41] No case has been made by the plaintiffs that this Court should develop the common law to hold auditors liable to employees of the companies that they audit. This much has been confirmed by this Court in *Maguwade v KPMG*. This legal position is now settled as confirmed by the Supreme Court of Appeal. See also *Hlumisa*, *Axiam*, and *Cape Empowerment*.
- [42] Taking into account all the circumstances that I have mentioned above, It is thus my view that the plaintiff's particulars of claim lack the averments necessary to sustain a cause of action for the relief of the plaintiff's claim against the defendant. The defendant's exceptions are allowed.

I make the following order.

ORDER

1. The defendant's exceptions are upheld.

2. The plaintiffs are granted leave to amend their particulars of claim within 30 days of the date of this order.
3. Should the plaintiffs fail to amend their particulars of claim, their claims against the defendant are struck out.



DLAMINI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Date of hearing:	17 May 2023
Delivered:	28 August 2023
Applicant / Excipient:	Steven Budlender SC Adv. Michael Mbikiwa
Instructed by:	BOWMAN GILFILLAN INC
For the Respondents:	SO Ravele Inc, Makhado