



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN
(EXERCISING ITS ADMIRALTY JURISDICTION)**

Case No: AR 83/2020

In the matter between:

REPORTABLE

**KOREA SHIPPING CORPORATION
KOREA TONNAGE NO 27 SHIPPING COMPANY**

**FIRST PLAINTIFF
SECOND PLAINTIFF**

and

SOUTH AFRICAN WEATHER SERVICE

DEFENDANT

ORDER

It is ordered:

The exceptions raised by the defendant in its notice of exception in terms of Admiralty Rule 9(5) dated June 2021, are dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

Khan AJ:

Introduction

[1] In this case, the first plaintiff is Korea Shipping Corporation, a company duly incorporated in accordance with the company laws of South Korea, which conducts business at 25 Gukjegeumyung-ro-2-gil, Yeongdeungpogu, Seoul, South Korea, as the Bareboat Charterer of the mv *"SM New York"* ("the Vessel"). The second plaintiff is Korea Tonnage NO 27 Shipping Company, a company duly incorporated and registered with limited liability in accordance with the company laws of South Korea, and the owner of the Vessel, which conducts business from the same address as the first plaintiff.

[2] The first and second plaintiffs sued the defendant, the South African Weather Service, which is a juristic person established under the South African Weather Service Act 8 of 2001 ("SAWS Act"), with its principal place of business at King Shaka International Weather Office, King Shaka International Airport, La Mercy, KwaZulu-Natal, for the payment of the sums of Korean Won 235 284 691 and US Dollars 129 815.8; mora interest and costs.

Plaintiffs' claim

[3] In their particulars of claim, the plaintiffs allege that on 10th October 2017, and in consequence of the then prevailing severe weather conditions, the Vessel broke free of her mooring at her berth at the Container Terminal in the Port of Durban. At approximately the same time, the mv *"MSC Ines"* also broke free of her mooring and collided with the Vessel. The amount claimed is for damages which the plaintiffs allegedly suffered as a result of that collision.

[4] The plaintiffs' claims are founded on the alleged breach of the defendant's statutory duties to provide "public good services" to all South Africans as defined in schedule 1 of the SAWS Act. They allege that this includes the obligation to:

- (a) warn ships of gales, storms and tropical storms, inter alia, by the issue of radio messages;

- (b) issue weather bulletins suitable for shipping, containing data of existing weather, waves, ice and forecast;
- (c) provide weather and climatic forecasting and warning services intended for the general benefit of the population and the safety of life and property;
- (d) provide meteorological support for aviation and maritime search and rescue activities in accordance with international obligations of the Government; and
- (e) issue "severe weather warnings" in respect of "severe weather" over South Africa. "Severe weather" is defined in the Act as 'an extreme meteorological event or phenomenon, which represents a real hazard to human life or property and has the potential to cause damage, serious social disruption, loss of human life, or economic loss', and "severe weather warning" is defined as 'an alert issued by the [defendant] with regard to severe weather which includes an advisory, watch or warning alert'.

[5] The plaintiffs allege in their particulars of claim that in addition to such statutory duties, the defendant owed them a duty of care which arose both from such statutory duties and from the following:

- (a) the defendant was the only entity authorised to issue severe weather-related warnings over South Africa and the plaintiffs were obliged to rely on it for such warnings;
- (b) in order for such severe warnings to be effective, it is necessary that the defendant issues same as soon as reasonably possible, having regard to the reasonable likelihood of the occurrence of severe weather; and
- (c) the plaintiffs and other owners and operators of ships rely on such timeous notice to enable them to take steps to prevent or minimise the risk of damage to their property during a severe weather event, which includes but is not limited to:
 - (i) ensuring that the mooring lines which keep ships moored in the Port are adequate in type and number to ensure that ships remain safely moored;
 - (ii) ships having sufficient time to start their engines and ensure that they have the means of self-propulsion and adequate self-navigation to exit the Port in advance of a severe weather event at the Port; and

- (iii) ships having sufficient time to call upon the assistance of tugs, pilot boats, radio services, and other facilities and services at the Port.

[6] The defendant, so the plaintiffs allege in their particulars of claim, and/or its employees and/or its officials acting within the course and scope of their employment, wrongfully and negligently breached its duties by failing to:

- (a) employ or retain the services of suitably qualified and/or trained weather specialists for the analysis and interpretation of weather data so as to forecast severe weather conditions and issue severe weather warnings;
- (b) keep and maintain equipment and infrastructure necessary to capture, analyse and interpret weather data so as to forecast severe weather conditions;
- (c) properly analyse and interpret the weather data available to it on 8th and 9th October 2017, which weather data indicated that severe weather conditions were likely to be experienced along the Kwazulu-Natal coastline (including the locality of the Port) during the course of the morning of 10th October 2017 as a consequence of a cut-off low pressure system;
- (d) forecast that there was a reasonable likelihood of severe weather conditions at the Port during the morning of 10th October 2017; and
- (e) timeously issue a severe weather warning in advance of the severe weather conditions experienced at the Port during the morning of 10th October 2017.

[7] The plaintiffs allege further that but for the defendant's negligence:

- (a) the plaintiffs would have been notified in advance of the severe weather conditions on 10th October 2017;
- (b) the plaintiffs would have been able to take adequate steps in advance of the severe weather conditions reaching the Port;
- (c) the Vessel would not have broken free from her mooring; and
- (d) the plaintiffs would not have suffered damages.

[8] The plaintiffs also allege that their claim is a maritime claim as defined in the Admiralty Jurisdiction Regulation Act 105 of 1983 and that this court has jurisdiction to hear such action in terms of s 2(1) of such Act.

The exceptions

[9] The defendant excepted to the plaintiffs' particulars of claim on the ground that it lacks averments which are necessary to sustain a cause of action in terms of Admiralty Rule 9(5).

[10] In its notice of exception, the defendant claims that it:

- (a) is a s 3(a) public entity under the Ministry of Environmental Affairs and is governed by a Board;
- (b) became a public entity on 15th July 2001, in terms of the SAWS Act, as amended in 2013;
- (c) is an authoritative voice for weather and climate forecasting in South Africa and, as a member of the World Meteorological Organisation, it complies with international meteorological standards;
- (d) is designated by the State as an Aviation Meteorological Authority to provide weather services to the aviation industry, marine and a range of other identified clients and to fulfil a range of international obligations of the Government; and
- (e) is thus an organ of State and creature of statute that performs its functions and powers in terms of enabling statutes.

[11] It argues, therefore, that the plaintiffs' claim against it is subject to the notice requirements in the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("Act 40 of 2002"), and raises as its first exception the argument that not only have the plaintiffs failed to give such notice to it, but they have also not sought condonation for their failure to do so.

[12] The second exception it raises is that there is no duty of care owed by it to the plaintiffs in that the plaintiffs' claim against it is a delictual claim for pure economic loss and

the law confers an immunity from claims for negligence in respect of decisions and/or actions taken or not taken by the defendant in the exercise of its statutory powers or performance of its statutory duties. It claims that it cannot be held liable for the alleged negligent failure to perform its statutory duties in the absence of *malá fides*, which the plaintiffs do not allege.

[13] The defendant also argues that the plaintiffs failed to plead facts which demonstrate that the defendant owed them a legal duty. It avers that the case pleaded by the plaintiffs consists in legal conclusions, inferences and/or deductions sought to be drawn by the plaintiffs from the statutory duty which they claim the defendant owes to them and others.

[14] The defendant also claims that our law requires that wrongfulness be positively established in claims for pure economic loss. As its third exception, it claims that even if the allegations of fact in the particulars of claim made against it are assumed to be true, they are not susceptible in law of sustaining a finding that the defendant was a legal cause of the plaintiffs' losses ie. there is no causal relationship in law between the defendant's alleged wrongful acts and the plaintiffs' losses. The defendant argues that its alleged wrongful conduct and the plaintiffs' losses are not reasonably connected and are too remote to give rise to delictual liability.

Response to the first exception

[15] An "organ of State" is defined in Act 40 of 2002 as follows:

- (a) any national or provincial or local department;
- (b) a municipality contemplated in section 151 of the Constitution;
- (c) any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution;
- (d) the South African Maritime Safety Authority established by section 2 of the South African Maritime Safety Authority Act, 1998 (Act 5 of 1998);
- (e) The South African National Roads Agency Limited contemplated in section 3 of The South African National Roads Agency Limited and National Roads Act, 1998 (Act 7 of 1998);
- (f) National Ports Authority Limited, contemplated in section 4 of the National Ports Act, 2005 and any entity deemed to be the National Ports Authority in terms of section 3 of that Act;

(g) any person for whose debt an organ of state contemplated in paragraphs (a) to (f) is liable;'

[16] It is axiomatic that for the exception grounded on the plaintiffs' alleged non-compliance with the provisions of Act 40 of 2002 to succeed, I must find that the defendant falls within the definition of the words "organ of State" as contained in that Act. Mr *Mokoena* SC, for the defendant, argued that the defendant falls within the ambit of subsection (c) of that definition viz. 'any functionary or institution exercising a power or performing a function in terms of the Constitution, or a provincial constitution referred to in section 142 of the Constitution', just as it falls within the definition of those words under the Constitution and the Public Finance Management Act 1 of 1999 (as amended) ("the PFMA").

[17] I am not persuaded by Mr *Mokoena*'s argument that because the defendant falls within the definition of an organ of State under the Constitution and the PFMA, that it falls within the meaning of organ of State under Act 40 of 2002. I referred him to the case of *Haigh v Transnet Ltd* 2012 (1) SA 623 (NCK), particularly paras 23 and 24, on which the plaintiffs place some reliance and, in which Olivier J held that the legislature quite clearly chose to limit the group of functionaries to which Act 40 of 2002 would apply. The use of the word "Certain" in the title of the Act verifies this. Mr *Mokoena*'s argument that *Haigh* is distinguishable from this case does not, unfortunately for the defendant, apply to the principles governing the issue of whether SAWS qualifies as an organ of State.

[18] That Act came into being long after the commencement of the Constitution and the legislature must be deemed to have been aware of the wider definition of the term "organ of State" in the Constitution when it enacted Act 40 of 2002, Olivier J said. What should also be kept in mind was that the legislature quite clearly intended to exclude some organs of State from the operation of Act 40 of 2002.

[19] In short, had the legislature intended the defendant to be regarded as an organ of State within the meaning of Act 40 of 2002, it would have provided for this in the SAWS Act and if not there, then in Act 40 of 2002. It did not do so and therefore it intended the defendant to be excluded from the operation of, inter alia, the notice provisions contained in

Act 40 of 2002. This is in consonance with Oliver J's dictum in *Haigh* supra. The argument of Mr *Irish* SC, for the plaintiffs, that the SAWS Act classification of the defendant as a juristic entity in the context of other State departments not being so classified, advanced in support of the plaintiffs' case that the defendant does not fall within the definition of organ of State, fortifies this conclusion.

Response to the second exception

[20] The second exception is founded on the alleged absence of any duty of care by the defendant towards the plaintiffs. The critical question, so the defendant argues, is whether the considerations of public and legal policy dictate that the defendant be held liable to the plaintiffs for its alleged negligent failure to perform its statutory functions by issuing a severe weather warning in terms of the SAWS Act. The defendant argues that even if the allegations of negligence pleaded by the plaintiffs are found to be correct factually, the defendant would still not be liable to the plaintiffs as the alleged negligent conduct was not wrongful and therefore cannot give rise to delictual liability on its part.

[21] It also relies on the immunity embodied in s 27 of the SAWS Act, which it claims exempts it from claims for negligence in respect of decisions and/or actions taken or not taken by it in the exercise of its statutory powers or performance of statutory duties.

[22] The plaintiffs' response to this is that the defendant's argument based on s 27(1) is misconceived in that their pleaded case is that the defendant failed to transmit a severe weather warning when it should have done so ie. an omission and not a commission, whereas the immunity from liability is for an act perpetrated ie. a commission. Furthermore, that the s 27 provision, like equivalent statutory provisions, introduces a ground for justification or a defence for conduct which is otherwise wrongful and that it does not extinguish a cause of action. Any party claiming immunity, they argue, bears the onus to plead and prove such defence and that it is not possible to determine whether such defence is available to the defendant without reference to pleadings and evidence.

[23] In *Minister of Water and Environmental Affairs and another v Really Useful Investments 219 (Pty) Ltd and another* 2017 (1) SA 505 (SCA) paras 43 and 45, to which I was referred by the plaintiffs' counsel, the Supreme Court of Appeal held that an analogous provision viz. 'no person, including the state, shall be liable in respect of anything done in good faith in the exercise of a power or the performance of a duty conferred or imposed in terms of the Act', can only be relied on where the power in question was exercised or the duty performed in good faith and without negligence.

[24] I agree with the argument advanced by the plaintiffs on the authority of the *Children's Resource Centre Trust and others v Pioneer Food (Pty) Ltd and others* 2013 (2) SA 213 (SCA) para 37, that where a novel legal duty is asserted:

'... its existence... depends on the facts of the case and a range of policy issues. The need for the court to be fully informed in regard to the policy elements of the enquiry militates against that decision being taken without evidence.'

[25] The issue of remoteness likewise falls into the same category and it entails determination of, inter alia, foreseeability and reasonableness, which necessitate the assessment of evidence to determine as to whether the imposition of liability is appropriate. These are not issues that can properly be determined by way of exception.

[26] I am not persuaded that the plaintiffs' particulars of claim is excipiable. A plain reading of the plaintiffs' particulars of claim does not evoke the perception that it lacks averments which are necessary to sustain a cause of action.

[27] In *Southernport Developments (Pty) Ltd Tsogo Sun Ebhayi (Pty) Ltd v Transnet Ltd* 2003 (5) SA 665 (W) para 6, the court formulated the test on exceptions as follows:

- '(i) In order for an exception to succeed, the excipient must establish that the pleading is excipiable on every interpretation that can reasonably be attached to it. . .
- (ii) A charitable test is used on exception, especially in deciding whether a cause of action is established, and the pleader is entitled to a benevolent interpretation. . .
- (iii) The Court should not look at a pleading "with a magnifying glass of too high power".

(iv) The pleadings must be read as a whole; no paragraph can be read in isolation.'

[28] Although the court properly formulated the test for exceptions, it appears not to have applied it the way it should have as its upholding of the exception was overturned by the Supreme Court of Appeal.

[29] It is trite that the excipient has to satisfy the court that it would be seriously prejudiced should the exception not be upheld. Mr *Mokoena*'s argument that the defendant will be severely prejudiced should its exceptions be dismissed as it will then be constrained to argue its defences, it expects successfully, at trial but at substantial costs to itself and this would be avoided should the exceptions be upheld, is not persuasive. It fails to take account of the right of the plaintiffs to the *audi alteram partem* principle of our law. They too are entitled to access to a fair hearing and a proper ventilation of their claims and they too will incur costs pursuant thereto. Such are the vagaries of litigation and ultimately "the winner will take all".

[30] In *Jugwanth v MTN* (Case no 529/2020) [2021] ZASCA 114 (9 September 2021) para 3, the Supreme Court of Appeal said:

'The approach to an exception that a pleading does not disclose a cause of action was reiterated by Marais JA in *Vermeulen v Goose Valley Investments (Pty) Ltd* [[2001] 3 All SA 350 (A) para 7]:

"It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law."

An exception sets out why the excipient says that the facts pleaded by a plaintiff are insufficient. Only if the facts pleaded by a plaintiff could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the particulars of claim and any other facts agreed to by the parties can be taken into account.' (Footnote omitted.)

[31] In *Cook v Gill* L.R., 8 CP 107, referred to with approval by the Supreme Court of Appeal in *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23, it was held that a cause of action is disclosed when the pleading contains:

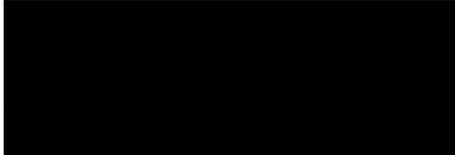
'[E]very fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'

[32] Save for the first ground of exception, I do not intend to, nor do I believe I have pronounced on the merits of the claims which form the subject matter of the remaining grounds of exception.

Order

[33] Consequently, the following order shall issue:

The exceptions raised by the defendant in its notice of exception in terms of Admiralty Rule 9(5) dated June 2021, are dismissed with costs, such costs to include the costs of two counsel.



Khan AJ

Counsel for the Plaintiffs	:	MR IRISH SC and MR KELLY CHAMBERS, CAPE TOWN
Plaintiffs' Attorneys	:	EDWARD NATHAN SONNENBERG per TONY NORTON 1 RICHEFOND CIRCLE, RIDGESIDE OFFICE PARK UMHLANGA
Counsel for the Defendant	:	MR MOKOENA SC and MR SCOTT
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Date of hearing	:	21 st October 2022
Date of judgment	:	11 th NOVEMBER 2022