



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

CASE NO: 2016/40817

(1) (2) (3)	REPORTABLE: NO OF INTEREST TO OTHER JUDGES: YES REVISED.
18 October 2018 DATE	 SIGNATURE

In the matter between:

APPLIED MEDICAL NUTRITION (PTY) LTD

Plaintiff

and

**DSM NUTRITIONAL PRODUCTS SOUTH AFRICA
(PTY) LTD**

First
Defendant/Excipient

CHEMPURE (PTY) LTD

JUDGMENT

SPILG, J:

INTRODUCTION

1. The plaintiff contends that a premix ingredient in a nutritional product it supplies to the medical industry was incorrectly formulated as a consequence of which there was a significant reduction in both the yield of the final nutritional product the plaintiff was able

to supply to its customers and its suitability for consumption. As a consequence the plaintiff alleged that it suffered loss of production of the product it supplied which in turn resulted in the cancelation of orders by its customers.

2. The plaintiff's product is marketed as KetoVOLVE 4:1. It is a high fat, adequate protein and low carbohydrate formula designed to maintain high levels of ketosis required for the control of drug resistant epilepsy. The plaintiff supplies KetoVOLVE both locally and abroad. As a result of the incorrect formulation of the premix the plaintiff claims that it suffered;
 - a. loss of production in an amount of some R202 760, and
 - b. loss of income in the sum of US\$210 756.
3. The plaintiff instituted action initially against only the manufacturer of certain raw materials that were specific to the premix used in the production of KetoVOLVE. It subsequently successfully joined the supplier of the premix.
4. The plaintiff's cause of action against its supplier, *Chempure (Pty) Ltd* is based on the terms of an oral contract. It is alleged that the contract included a term that the premix formulation required a specific consistency or ratio to be maintained of chlorine bitartrate and dicalcium chloride per kilogram of premix. It is alleged that the premix supplied contained an almost 8% increase in the former and a 30.23% increase in the latter. Chempure is the second defendant. The claim against Chempure is claim A to the summons
5. Chempure in turn had a distribution agreement with the manufacturer of the raw materials, DSM Nutritional Products South Africa (Pty) Ltd, specific to the premix used in the production of KetoVOLVE.

The plaintiff may not have been confident that Chempure would join DSM in the action or it may have concern about whether it would recover the full extent of its loss, if proven, against Chempure. The reason is irrelevant. As a fact the plaintiff also sued DSM as the first defendant. This is to be found in claim B of the particulars.

6. It is evident that the plaintiff struggled with the formulation of its case against DSM and amended its claim. DSM however contends that the claim against it remains excipiable as it does not disclose a cause of action and also because it is vague and embarrassing. DSM gave the required notice to remove cause of complaint in regard to the latter.
7. The issue before me is whether DSM's exception to the amended claim is good.

GROUND OF EXCEPTION

8. DSM's exception in relation to the claim being bad in law as it fails to set out sufficient grounds to sustain a cause of action.
 - a. There is no allegation of negligence although the case is one that can only be one made out in delict;
 - b. There are insufficient allegations from which it can be concluded that a duty of care was owed by DSM to the plaintiff;
9. In addition DSM excepts to the claim on the ground that it is vague and embarrassing in that;
 - a. It is not alleged that DSM was provided with the plaintiff's formulation or by virtue of what or how it could or should have obtained the plaintiff's formulation;
 - b. There are insufficient allegations from which it can be drawn that DSM owed a duty of care to the plaintiff. It will be seen that this is a fall-back position to the contention that there is insufficient pleaded top support a duty of care
 - c. The plaintiff relies on a written instruction it gave to DSM not to deviate from the specifications when manufacturing the raw materials. However the email is not addressed to DSM. The recipients are 3 individuals and appears to be a response to a previous communication which does not impute any manufacturing function to DSM.
10. I proceed to deal with each exception

NEGLIGENCE NOT ALLEGED

11. DSM readily accepts that the case it has to meet is founded in delict.

12. In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000(1) SA 827 (SCA) the Supreme Court of Appeal held that the enquiry into the existence of negligence is separate from that into the existence of a legal duty although in cases other than that of omission wrongfulness will be *prima facie* established if the conduct is found to be culpable. The court said this at para 19:

“In the course of the past 20 years or more this Court has repeatedly emphasised that wrongfulness is a requirement of the modern Aquilian action which is distinct from the requirement of fault and that the inquiry into the existence of the one is discrete from the inquiry into the existence of the other. Nonetheless, in many if not most delicts the issue of wrongfulness is uncontentious as the action is founded upon conduct which, if held to be culpable, would be prima facie wrongful.”

See also Harms Amler’s *Precedents of Pleadings* (8th ed) at 237.

13. Adv. Bitter on behalf of the plaintiff argues that an allegation that DSM breached the duty of care was sufficient to satisfy the requirement of pleading wrongfulness.

14. Although not referred to by the parties, I believe that the following passage by Ponnar JA in the recent decision of *Home Talk Developments (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) at para 19 is decisive of the point (albeit that the court was dealing with a duty of care arising from an administrative act):

“The breach of every legal duty, especially one imposed by administrative law, does not necessarily translate into the breach of a delictual duty”

*See also Steenkamp NO v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA) at para 19.*¹

15. The plaintiff has done no more than allege the breach of a duty of care, not that the breach was wrongful. In view of the *Home Talk* decision the amended claim lacks sufficient allegations. This may appear to be a triviality which can be imputed from a consideration of the pleading as a whole. While I prefer to take a benevolent look at pleadings I believe that the nature of this case requires the plaintiff to positively contend that the breach was negligent. It will also compel the plaintiff to consider, by way of illustration, whether the grounds upon which the duty of care rests is not just the failure to ensure that the correct ratios were adhered to but also that it ought to have established what they were by reason of the industry it was in, or for which it knew or ought to know it was manufacturing.
16. The first exception is therefore good, but not fatal and the plaintiff is therefore not precluding from further amending its claim.

DUTY OF CARE

17. The plaintiff did not simply allege that DSM owed it a duty of care. It set out grounds from which it drew this conclusion.
18. The question however is whether enough is stated from which such a conclusion can be drawn. This would be the inevitable consequence of the reasoning in *n Knop v Johannesburg City Council* 1995(2) SA 1 (A) at p27 where the court held that the mere allegation of the existence of a duty of care owed by a defendant to a plaintiff was insufficient because the existence of such a duty to prevent loss is “a conclusion of law depending on all the circumstances of the case”
19. The plaintiff does not allege that DSM held out to possess specialised skill or knowledge in manufacturing premixes or compounds of this nature or that it relied on its good name and reputation in the industry. It does however allege that DSM was aware of the

¹ Per Harms JA (at the time) at para 19:

“A useful starting point in considering the nature of the legal duty of the board towards tenderers in general is to remind oneself a legal duty may have its origin in either statute law or the common law and that the breach of every legal duty, especially one imposed by administrative law, does not translate by necessity into the breach of a delictual duty, ie a duty to compensate by means of the payment of damages. Because the term 'legal duty' is inherently ambiguous, it is therefore important to have due regard to the exact nature of the legal duty in issue.”

properties of the ingredients and the consequences to the final product if the levels of concentration of one of the ingredients or compounds was increased.

20. This may not necessarily amount to a holding out of specialised knowledge or inherent risk in production process but it appears sufficient in the context of even a lower standard of being a manufacturer who undertakes production of this nature even if the end user or intermediary is not known. While that goes to foreseeability it also is relevant to the question of whether the duty of care would result in unlimited liability to the world at large. In the circumstances of the specialised nature of the mix I believe that it can be assumed that creating a situation of unlimited liability is unlikely to arise.

DSM's argument would otherwise result in every end user who may be affected by an incorrect mix not being able to found a delictual action against the producer of the mix but confined to a claim against intermediaries in the manufacturing and distribution chain who would plead that they were entitled to rely on the regularity of the mix provided by it.

21. While the plaintiff may have confined itself to a narrow basis to allege a duty of care I believe enough can be inferred for the basis upon which the conclusion is sought to be drawn to pass muster.
22. It was contended by *Adv. Wesley* that a duty of care cannot arise if there is a contractual relationship between the person claiming loss and another person in circumstances where the liability would be covered by a breach of contract. The issue involves the question of multiplicity of actions.

One may use the simple example of the owner of a car holding the manufacturer for defects where the distributor may also be liable in contract. If the point is good then it would also mean that if the distributor is insolvent no remedy lies against the party who was actually responsible for the defect. While the contractual relationship between distributor and manufacturer may disentitle a claim as between them, it is unnecessary to consider whether a manufacturer can contend that it compensated the distributor who failed to pass on the amount to the car owner. The reason is that here the plaintiff has sued both parties in the alternative. Accordingly the concern of a multiplicity of actions does not arise.

THE VAGUE AND EMBARRASING GROUNDS

23. The first ground relied upon is that the plaintiff does not allege that DSM was provided with the plaintiff's formulation of the premix or how it could or should have obtained it.

In my view the allegation that DSM was aware or should have been aware of the formulation is based on inferences that can be drawn from the pleading and does not amount to a simple conclusion.

24. The second ground is that the plaintiff has not set out sufficient allegations regarding the duty of care it contends was owed to it by DSM and therefore the claim is vague and embarrassing with the result that it is prejudiced.

I have partially dealt with this earlier. I am satisfied that the basis for alleging a duty of care is adequately identified in the amended claim; albeit on a narrow front. But that is the risk the plaintiff runs if DSM objects to evidence being led which goes beyond the four corners of its pleading.

25. The final ground raised by DSM is that the plaintiff has not expressly stated whether any of the persons who received the written instruction did so on its behalf since, *ex facie* the document relied upon, DSM is not identified as a recipient nor does the name DSM appear in any part the recipients' email addresses.

It may well be that one of the recipients of the email was an employee or representative of DSM. If not then attributing knowledge of the contents of the email to DSM must be laid. DSM is prejudiced as it does not know the basis relied on. At present it is a mere conclusion which cannot be inferred and consequently is devoid of a foundation.

While the case as pleaded suggests that DSM owed the plaintiff a duty to have enquired about the required formulation for the premix there is not at present a direct allegation of negligence based on a failure to enquire about the formulation before the manufacture process.

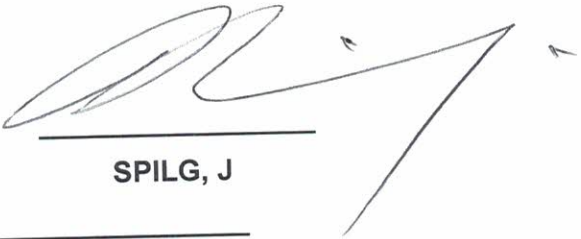
In the circumstances of this case I consider that the plaintiff is obliged to set out the *nexus* it contends for between DSM and the individuals identified as the recipients of the written instruction that would establish knowledge and wrongfulness.

ORDER

26. It was agreed between the parties that the costs would be in the cause as I indicated that the plaintiff would only succeed to a very limited extent having regard to the number of exceptions taken.

27. In the result and because there has been a failure to plead negligence, I make the following order:

- a. *The plaintiff is afforded 15 days from the date of this order to amend its particulars so as to properly allege the ground of wrongfulness relied upon, failing which the claim will be struck out with costs;*
- b. *The plaintiff is afforded 15 days from the date of this order to amend para 12 by identifying the link between DSM and the recipients of the written instruction marked "POC1" thereto, failing which the contents of that para will be struck out with costs.*
- c. No order as to the costs of the exception



SPILG, J

DATE OF HEARING:	15 October 2018
DATE OF JUDGMENT:	18 October 2018
FOR EXCIPIENT/FIRST DEFENDANT:	Adv. CP Wesley Friedland Hart Solomon & Nicolson
FOR DEFENDANT/RESPONDENT:	Adv. JJ Bitter Darryl Ackerman Attorneys