IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: 380/2012

- REPORTABLE: **NO**
- CIRCULATE TO JUDGES: **YES**
- CIRCULATE TO MAGISTRATES: **NO**
- CIRCULATE TO REGIONAL MAGISTRATES: **NO**

22 June 2018
DATE SIGNATURE

Heard on: 22 March 2018

Delivered on: 22 June 2018

In the matter between:

FRANCIS OBAKENG LONDON	**1st APPLICANT**
MOTSAMI PETRUS RANTHO	**2nd APPLICANT**
MALEBOGO LOUIS MOKWENA	**3rd APPLICANT**
NTHABISENG CONSTANCE KEMANE	**4th APPLICANT**

and

THE DEPARTMENT OF TRANSPORT ROADS & PUBLIC WORKS OF THE NORTHERN CAPE	**1st RESPONDENT**
THE PREMIER OF THE NORTHERN CAPE	**2nd RESPONDENT**
COUNCIL OF THE NORTHERN CAPE FOR TRANSPORT, ROADS & PUBLIC WORKS	**3rd RESPONDENT**

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] On 10 February 2017 Matlapeng AJ handed down a judgment in terms of which he gave a directive that the issue regarding the question of law whether the respondents' ("plaintiffs")'s Particulars of Claim disclose a cause of action be decided separately in terms of Rule 33(4) of the Uniform Rules of Court. The Learned Justice further ordered that the proceedings in the main action be stayed until the disposal of this issue. The relief sought by the applicants ("defendants") is that the Exception they raise subsequent to the above be upheld with costs.

FACTIUAL BACKGROUND

[2] The three respondents (the plaintiffs in the main action) are the shareholders of a company in liquidation, namely, Canton Trading 159 (Pty) Limited t/a Nyumbane Investments ("the company").

[3] Before Matlapeng AJ' judgment, the defendants had raised two special pleas in terms of section 23(1) of the Uniform Rules of Court and pleaded over the plaintiffs' particulars of claim on the merits of the case. The two special pleas raised were lack of *locus standi* and non-joinder in relation to the absence of the liquidators of the company. The question in respect of these two special pleas was heard before Williams J on 12 June 2014 and the Learned Judge dismissed both special pleas in her judgment in handed down on 6 February 2015.

[4] The plaintiffs' particulars of claim reads as follows:

"*8. At all material times hereto:*

8.1 *Canton Trading 159 (Pty) Limited t/a Nyumbane Investments ("the company") was a company which has been duly incorporated and registered with limited liability in accordance with the Company Laws of the Republic of South Africa.*

8.2 *The plaintiffs were shareholders in the company in the following proportions:*

8.2.1 *The First Plaintiff – 22$^{1}/_{2\%}$*

8.2.2 *The second Plaintiff – 35%*

8.2.3 *The Third Plaintiff - 22$^{1}/_{2\%}$*

8.2.4 *The Fourth Plaintiff – 15%*

8.2.5 .....

9. *On or about 27th January 2009 at Kimberley the company and the First Defendant entered into a public private partnership fleet agreement ('the agreement'); a copy of the agreement is annexed hereto marked 'A'.*

....

17. *In view of the agreement and the availability of finance, the company at all material times operated a viable and profitable business. However the refusal of the Department to comply with its obligation to consent the Finance Direct Agreement prevented the company from finalizing the grant of finance to it and this eventually caused the winding-up of the company. However at all material times prior thereto the business of the company was in operation in a successful and effective manner and substantial profits were generated.*

18. *In so refusing the Defendant acted unreasonably.*

19. *In consequence of such refusal the company was not able to obtain finance which would enable it to fulfill its obligations under the agreement.*

19.1 The company was not able to fulfill its obligations under the agreement.

19.2 The company was wound-up on the ground that it was unable to pay its debts.

19.3 The Plaintiffs' shares in the company were rendered worthless.

21. *If the First Defendant had not unreasonably refused to give its consent to the FDA*

21.1 The company would have fulfilled its obligations under agreement.

21.2 The agreement would have endured until at least the end of 2015.

21.3 The company would have made a profit as follows:

21.3.1 2011 – R257 761-00

21.3.2 2012 – R7 917 803-00

21.3.3 2013 – R5 046 323-00

21.3.4 2014 – R6 921 497-00

21.3.5 2015 – R8 944 108-00

23. *The Plaintiffs would have received such profit as a dividend in accordance with their shareholding in the company.*

24. *The Plaintiffs would have received the following dividend:*

24.1 The First Plaintiff – R6 544 685-70

24.1 The Second Plaintiff – R10 180 622-20

24.1 The Third Plaintiff – R6 544 685-70

24.1 The Fourth Plaintiff – R4 363 173-80".

SUBMISSIONS BY THE DEFENDANTS

[5] The defendants' complaint against the plaintiffs' particulars of claim is that it lacks the necessary averments to found a cause of action since it fails to set out a cause of action for the following reasons:

5.1 The plaintiffs' claim is derivative;

5.2 The claim against the defendants should have been pursued by the the company and not by the four shareholders;

5.3 The shareholders' claim is not against other shareholders who makes it impossible for the plaintiffs to enable the company to claim from a third party, but is rather a claim directly by the shareholders against a third party;

5.4 The contractual relationship was one between the company and the defendants and not between the shareholders and the defendants;

5.5 In so far as the claim constitutes a delictual claim, the injury was against the company and not against the shareholders.

[6] With regard to the second ground for the exception as appears in paragraph 6.2 above, the defendants submitted that in paragraph 9 of their particulars of claim, the plaintiffs rely on a contract between the company and the defendants and further allege in paragraph 27 thereof that the first defendant was under a duty of care to them and therefore should not have refused its consent to the Finance Direct Agreement unreasonably. The defendants submit that accordingly it is impermissible as same does not disclose a cause of action where the parties are

in a direct contractual relationship for a party to rely on an action based on delict and a breach of duty of care and to base its claim on the *actio legis aquiliae* instead of relying on their contractual remedies.

[7] They hinge their conclusion that the plaintiffs' particulars of claim does not disclose a cause of action on what is held in the matter of **Itzikowitz v ABSA Bank Ltd** 2016 (4) SA 432 (SCA) where the issue related to whether a shareholder can sue for the diminution of value of shares due to a wrong committed against a company, the SCA held that it was a delictual claim for pure economic loss which was not *prima facie* wrongful and that the claimant, being no more than a shareholder, could not sue to recover its loss as he had not been wronged by ABSA. The SCA held further that the fundamental company law principle that a company is a separate entity had to be kept in mind. It held further that a claimant could only recover damages, firstly, where he could establish that the wrongdoer's conduct constituted a breach of a legal duty owed to him personally. Secondly, the SCA held that where on an assessment of facts, a court is satisfied that the breach of duty caused the claimant personal loss that is distinct from that of the company as a separate corporate entity, he could sue as a shareholder.

[8] The defendants further submitted that the plaintiffs cannot sue on an agreement to which they were not a party without joining the liquidators, as was held on the rule in **Foss v Harbottle** (1843) 2 Hare 461 (67 ER 189). They disputed the contention by the plaintiffs that since the issue of non-joinder was one of the special pleas decided upon and thus was *res judicata*, stating that Williams J's remarks thereon

were *orbiter*, especially since she was not invited to decide upon the question whether the plaintiffs' particulars of claim disclose a cause of action.

[9] Regarding the plaintiffs' cause of action, the defendants further submitted that for delict, wrongfulness must be clearly established as was held by the Constitutional Court ("CC") in Country Cloud Trading CC v MEC Department of Infrastructure Development 2015 (1) 1 para 23 (CC) and that the delictual claim must be able to stand on its own. They submitted that the plaintiffs' submission regarding the doctor-patient claims were distinguishable from this matter since such delictual claims could stand on their own feet, which is a requirement. It was further submitted that the plaintiffs' particulars of claim, on their own, cannot prove what is set out therein.

SUBMISSIONS BY THE PLAINTIFFS

[10] In resisting the defendants' rule 33(4) application (and despite Matlapeng AJ's finding that there was nothing untoward in the defendants raising this issue in terms of rule 33(4) and not rule 23(1) since they (the defendants) had raised the issue with sufficient particularity to enable the plaintiffs to deal with them), the plaintiffs submitted that the defendant's invocation of rule 33(4) was inappropriate.

[11] Regarding the issue of *res* judicata in respect of Williams J judgment, the plaintiffs submitted that despite Matlapeng AJ's finding that the SCA's decision in **Itzikowitz** above was simply a restatement of the law as it has always been, that Williams J's judgment in respect of the two special pleas put the issues raised

therein to bed. They submitted that the issue before court is whether, on the pleadings, the plaintiffs' case is made out. Adding to this, the plaintiffs submitted that the other issues for determination related to *res judicata*, the delictual issue and whether or not the Foss v Harbottle rule was applicable.

[12] *Re* **Foss v Harbottle** rule, they submitted that as was held by Williams J, it was not applicable in light of the liquidators' categorical letter stating that they will not be pursuing action against the defendants which justified their *locus standi.* Williams J made this finding after the finding that there was no risk of double jeopardy given the lack of intention letter from the liquidators. With regard to the other two issues raised before William J as special pleas, they submitted that same res judicata, the latter's remarks were not made in passing and the *ratio* of her judgment and not *orbiter.* It was neither interlocutory but an order which has finality between the parties. They argued that this therefore mean that the matter was ripe for trial between the parties on the pleadings and thus the trial court, at the beginning thereof, will not have to decide if a cause of action has been made out given the pronouncement already made out by Williams J.

[13] Regarding delictual claims, they submitted that the issue therein was 1) whether the defendant breached the contract between first defendant and the company, whether the defendant had a duty of care towards the plaintiff which determination was essential for a delictual claim; and 3) whether the defendant's breach was wrongful. They submit that once these three are determined, the rest can be determined on trial after hearing evidence.

[14] The plaintiffs further submitted that the plaintiffs could refer to the existence of a contractual relationship in order to prove the relationship between the defendants and the plaintiffs necessary to give rise to a delictual duty. They further submitted that a proper basis for a delictual claim has been set out in the plaintiffs' particulars of claim and therefore it cannot be contended that such particulars of claim do not set out a cause of action.

ISSUES

[15] Based on the above, this court is called upon to make a determination in respect of the following issues, namely:

15.1 Whether the plaintiffs' particulars of claim establish a cause of action;

15.2 Whether the plaintiffs' claim can stand separately on the allegations made as a delictual claim independent from the contractual relationship between the company and defendants.

15.3 Whether the plaintiffs can rely on any exceptions to the Rule laid down in **Foss v Harbottle** which have been confirmed in the matter of **Itzikowitz v ABSA Bank Limited 2006 (4) SA 432 (SCA).**

15.4 Whether Williams J's findings are res judicata in relation hereto.

THE LAW AND THE APPLICABLE LEGAL PRINCIPLES

[16] Rule 33(4) provides as follows:

"*33 Special Cases and Adjudication upon Points of Law*"

(4) If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[17] In **Foss v Harbottle** (1843) 2 Hare 461 (67 ER 189) it was held that a company as a legal person, separate and distinct from its directors and shareholders with its own rights and interests to which it alone is entitled, is the only person to sue for the damage should a wrong be done to it. It was further held that a shareholder should not be allowed to institute action where he complains that as a result of the wrong done to the company, his shares have diminished in value, if the company itself has a claim against the wrongdoer for the loss suffered by it as a result of the wrong. The rule in **Foss v Harbottle** is aimed at preventing the risk of double jeopardy or double recovery which is clearly unacceptable and contrary to all basic principles of justice.

[18] In the matter of **Itzikowitz v ABSA Bank Ltd** 2016 (4) SA 432 (SCA), where the issue related to whether a shareholder can sue for the diminution of value of shares due to a wrong committed against a company, the SCA held that it was a delictual claim for pure economic loss which was not *prima facie* wrongful and that the claimant, being no more than a shareholder, could not sue to recover its loss as he had not been wronged by ABSA. The SCA held further that the

fundamental company law principle that a company is a separate entity had to be kept in mind. It held further that a claimant could only recover damages, firstly, where he could establish that the wrongdoer's conduct constituted a breach of a legal duty owed to him personally. The SCA further held that where on an assessment of facts, a court is satisfied that the breach of duty caused the claimant personal loss that is distinct from that of the company as a separate corporate entity, he could sue as a shareholder.

[19] In **Mclelland v Hullett and Others** 1992 (1) SA 456 (D & CLD) at 467 B-H, it was held that the rule in **Foss v Harbottle** is however not absolute and is subject to considerations of justice. It was held that where the risk of double jeopardy is non-existent and the shareholder is left with diminished patrimony, the continued application of the rule in **Foss v Harbottle** would amount to an unwarranted and technical obstruction to the course of justice.

[20] In **Lillicrap, Wassesnaar and Partners v Pilkington Brothers** (SA) (Pty) Ltd 1985 (1) SA 475 (A) the court held that the plaintiff could not sue in delict but in contract and thus had no claim. It was further held that a delictual remedy was not necessary and that the parties should not be denied their reasonable expectation that their rights and obligations would be governed by their contractual arrangements.

[21] Derivative action is an exception to the rule in **Foss v Harbottle** which is available under the common law to minority shareholders to act on behalf of a company against wrongdoers within the company and who control its affairs.

[22] Section 165 of the Companies Act has replaced the shareholders' common law derivative action and provides for a procedure whereby certain persons may "*commence or continue legal proceedings, or take related steps, to protect the legal interests of the company*' on behalf of the company.

ANALYSIS

[23] Foremost the defendants concede that the issue whether the plaintiffs' cause of action should have been raised as an exception and not brought in terms of rule 33(4), but that, regardless and as was held by Matlapeng AJ, there was nothing that precludes them from availing to themselves rule 33(4) provisions since they raised the issues with sufficient particularity to enable the plaintiffs to deal with. Save for the issue of costs that arise given the non-exhaustion of the exception as a resort provided to the defendants by rule 23(1) of the Uniform Rules of Court, the issue in *casu* can be determined in terms of rule 33(4).

[24] It is common cause that the parties agree that the plaintiffs based their claim on a delict and not a contractual relationship.

[25] Regarding the question whether remarks or findings made by Williams J in her February 2015 judgment regarding the special pleas *in re* locus standi and non-joinder, were orbiter or *ratio* and thus making such issues *rei judicata*, I am of the view that since no appeal was lodged by the defendants, that her findings are thus binding but limited to the extent of the directive made by Matlapeng AJ *re* this rule 33(4) application.

[26] I am of the view that since the plaintiffs instituted the action their action?? not on behalf of the company based on the agreement, but in their personal capacities and in delict, for the losses they alleged to have suffered as a result of the alleged breach of the duty of care by the first defendant towards them, the company's shareholders, that neither does their claim amount to a derivative action entitling them to the **Foss v Harbottle** principle nor the provisions of section 165 of the Companies Act.

[27] However, when regard is had to the facts in *casu,* I am of the further view that the **Foss v Harbottle** rule is not applicable in light of what was held in **Mclelland v Hullett and Others** (above) that the rule in **Foss v Harbottle** is not absolute but is subject to considerations of justice. I therefore find that despite the liquidators having availed their indication that they will not be pursuing any damages claim against the defendants after summons had already been issued, that the fact remains that it is common cause that the risk of double jeopardy is non-existent and the shareholder is left with diminished patrimony. To continue to apply the rule in **Foss v Harbottle** would amount to an unwarranted and technical obstruction to the course of justice.

[28] The above view is borne by the fact that since the company's liquidators' express letter in which they state that they have no intention to institute an action for damages against the defendant. As a result of the said letter the risk of double recovery against the defendants is therefore non-existent and therefore renders the rule in **Foss v Harbottle** inapplicable.

[29] As stated above, it is common cause that for an action based on a delict to disclose a cause of action, the allegation of wrongfulness and or unlawfulness must be made and that in *casu* no such unlawfulness or wrongfulness allegation was made. Instead the plaintiffs make allegations pertaining to the contract which approach is untenable since a cause can only be based either on a delict or a contract and not on both. Although the plaintiffs submit that the alleged defects in their particulars of claim can be cured by evidence and thus the defendants' exception should be dismissed, the defendants' submitted that either their exception be upheld or an order directing the plaintiffs to amend their particulars of claim within 20 days thereof be made. I am of the view that to uphold the defendants' exception would be too crass an order which would at all levels defeat the interest of justice. I am of an equal view that the argument that the issues raised by the defendants can be cured by the evidence during trial would invariably defeat the purpose of rule 33(4) the purport of which is to put to bed issues best dealt with separately before a trial can be commenced to circumvent unnecessary, *inter* alia, costs and time wastage.

[30] Curtly, I am of the view that the plaintiffs' particulars of claim establish a cause of action nor that same can stand separately on the allegations made as a delictual claim independent from the contractual relationship between the company and defendants. I am of the further view that despite the Foss v Harbottle rule being confirmed by the SCA in Itzikowitz v ABSA Bank Limited given that the plaintiffs' action is a derivative one, the latter can rely on the exception created in **Mclelland v Hullett and Others** above **Mclelland v Hullett and Others** above in the interest of justice.

COSTS

[31] Several points were raised by the defendants. The main one has been upheld. Those not upheld related to peripheral issues. On the whole, the defendants have substantially succeeded with their exception and there is no reasons why the costs of the exception should not follow the result.

RESULT

[32] In the result the plaintiffs should be allowed to proceed with their claims and the following Order is made:

ORDER

1. The Exception is upheld
2. The plaintiffs are to file their amended particulars of claim within 20 days hereof.
3. Costs, including costs of counsel, are awarded to the defendants.

L Vuma

Acting Judge
Northern Cape High Court

Appearances

For Applicants:	Adv. J.G. Rautenbach SC
Instructed by:	Mjila & Partners
For Respondents:	Adv. N. Segal
Instructed by:	Cranko Karp & Associates