

1/3/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVIEWED: YES / NO

27.02.2017 H.Hadiade

DATE SIGNATURE

**MORITING LIFE ADMINISTRATORS LIMITED
(IN LIQUIDATION)**

Applicant/Plaintiff

**CENTRIQ LIFE INSURANCE COMPANY
(CF) LIMITED**

1st Respondent/1st Defendant

CENTRIQ INSURANCE HOLDINGS LIMITED

2nd Respondent /2nd Defendant

JUDGMENT

1

- 1 The Applicant (referred to herein as “Moriting” or “the Plaintiff”) applies for leave to amend its particulars of claim. The Respondents (“the Defendants”) oppose the proposed amendment primarily on the grounds that the amendment would render the pleadings excipiable.
- 2 The Plaintiff issued summons against the Defendants on 16 February 2015. The Defendants delivered a notice of intention to defend the action and subsequently, during April 2015, delivered a Rule 35(12) and 35 (14) notice calling for various documents. On 29 June 2015, the Defendants delivered a notice of exception in terms of Rule 23(1). In the exception, the Defendants contended that the Plaintiff’s particulars of claim lacked averments necessary to sustain a cause of action, alternatively, that they were vague and embarrassing, on eight separate grounds.
- 3 The Plaintiff delivered a notice of intention to amend on 31 July 2015 in terms of Rule 28(1) to which the Defendants objected on seven grounds resulting in the present application. The Defendants only persisted with three of those grounds of objection at the hearing of this matter. I therefore do not deal with the remaining grounds of objection in this judgment.

Background

- 4 Central to this dispute is an agreement concluded during 2001, between the parties (“the subscriber agreement”). Clause 3 of the subscriber agreement records that Moriting wishes to develop and market and/or administer long term insurance products under the first defendant’s

insurance licence and that the first defendant is agreeable to doing so. In effect, the purpose of the agreement was to allow Moriting to conduct a funeral insurance business under its licence, as Moriting lacked the necessary regulatory approval to do so under its own name. To this end, a specific "insurance cell" was created within the business structure of the first defendant. The first defendant essentially performed an administrative function in respect of the insurance cell, in exchange for which it was entitled to an administration fee of 3% of gross premiums received.

- 5 According to the Plaintiff, it was the party bearing the risk of profit and loss in the insurance business conducted through the insurance cell. Certain defined costs would be deducted from the reserves standing to the credit of the insurance cell, and from the balance thereof (the distributable earnings) dividends would from time to time be paid to Moriting.
- 6 Moriting was provisionally wound up by order of court on 12 August 2011 and the final order was granted on 14 November 2012. The effective date of the winding up was 6 April 2011.
- 7 The subscriber agreement was terminated, on the Plaintiff's version, by the joint liquidators on 1 February 2012 alternatively during November 2012.

8 The Plaintiff's claims against the Defendant in the action are:

8.1 A claim for payment of dividends declared in the amount of R4,236,000.00, during the period December 2009 to July 2010 (prior to the liquidation of the Plaintiff and termination of the subscriber agreement). The Plaintiff alleges that the Defendant failed to make payment of such dividends to it and instead, paid the dividends into a different bank account at the instruction of unauthorised third parties after the Defendant had been informed of the third party's lack of authority.

8.2 A claim for payment of R3, 748, 596.00 in relation to the payment of dividends which the Defendant is allege to have owed to the Plaintiff but which the Defendant purported to set off/deduct post liquidation of the Plaintiff.

8.3 Certain delictual claims for damages in the alternative to the above.

9 Subsequent to the Plaintiff delivering its heads of argument, the Defendants delivered their heads of argument. Thereafter, the Defendants delivered a further supplementary answering affidavit. The parties agreed that the further supplementary affidavit would form part of the papers in this matter. I have considered the issues set out in the further supplementary affidavit and in the supplementary heads of argument filed by both parties.

10 The Defendants object to the proposed amendment on the following grounds:

10.1 First, the Defendants object to the introduction of a tacit or implied term of the subscriber agreement in the amended particulars of claim;

10.2 Second, they object to the Plaintiff's reliance on section 341(2) of the Companies Act, 61 of 1973 ("the old Companies Act") as the basis for certain of the claims which the Plaintiff seeks to advance;

10.3 Third, the Defendants object to the introduction of a delictual claim for damages in the amended particulars of claim on the basis *inter alia* that the Plaintiff is precluded from making such a claim in the context of a contractual relationship between the parties where no legal duty exists between the parties in terms of the contract.

11 I deal with each of these objections in turn. However, it is instructive to first consider the governing principles of law with respect to the amendment of pleadings.

The Correct Approach to Amendments and Exceptions

12 It is trite that our courts are inclined to grant amendments to pleadings unless there is some prejudice caused to the other party or where the amendment would render the pleadings excipiable. Moreover, it is generally accepted that a court will allow an amendment unless the application to amend is *mala fide*, unless the amendment would cause an injustice to the other side which cannot be compensated by an order

of costs, or unless the parties cannot be put back in the same position as they were when the pleading which is sought to be amended was filed. (*Moolman v Estate Moolman* 1927 CPD 27 at 29; *Macduff & Co Ltd (in Liquidation) v Johannesburg Consolidated Investment Company Ltd* 1923 TPD 309; *Imperial Bank Ltd v Barnard and Others* NNO 2013 (5) SA 612 (SCA) at para 8).

- 13 The main grounds of objection in this case are that the proposed amendments would render the particulars of claim excipiable. Therefore, in determining whether to grant leave to amend, I must have regard to the principle laid down by our courts in relation to exceptions. In this regard, the Courts are, reluctant to decide upon exception questions concerning the interpretation of a contract (*Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 186J). In other words, the test on exception is whether on all possible readings of the facts no cause of action may be made out. (*H v Fetal Assessment Centre* 2015 (2) SA 193 (CC); *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) para 36.)

- 14 It is for the excipient to satisfy the court that the conclusion of law for which the Plaintiff contends cannot be supported on every interpretation that can be put upon the facts. This Court therefore must accept as correct the allegations contained in the particulars of claim, incorporating the proposed amendment, and determine whether those allegations are capable of supporting the Plaintiff's cause of action. (*Minister of Law*

and Order v Kadir 1995 (1) SA 303 (A) at 318D-E, Stewart and Another v Botha and Another 2008 (6) SA 310 (SCA) para 4).

15 Our courts have also tended to allow amendments in order to obtain a proper ventilation of the dispute between the parties and to advance good and efficient conduct of litigation. In the present case, the Defendant objects to the amendment on the basis that the amendment would render the pleadings excipiable. In this regard, it is clear that a court will not allow amendments where their effect would render such a pleading excipiable or where it does not cure an excipiable pleading.

16 The defect in the pleadings must appear *ex facie* the pleadings and no extraneous facts may be adduced to show that the pleading is excipiable (***Barnard v Barnard 2000 (3) SA 741 (C) para 10***). An excipient may, moreover, not go beyond the record to establish that the pleadings are excipiable.

17 In ***Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18***, the SCA described the correct approach to the interpretative process as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one

meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made.

The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. . .

...one considers the context and the language together, with neither predominating over the other.

This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate."

- 18 In light of the above principles, I now turn to consider the grounds of objections raised by the Defendants.

The Grounds of Objection: The First Ground

- 19 The first ground of objection to the proposed objection is the inclusion of a tacit term to the subscriber agreement. The proposed tacit term is to be introduced as paragraph 5.42 of the particulars of claim. It reads as follows:

"It was a tacit or implied term of the Subscriber Agreement that upon termination of the Subscriber Agreement a final dividend in respect of distributable earnings available for distribution to the subscriber as defined in clause 2.1.9 of the

Subscriber Agreement, would within a reasonable time be declared and calculated in terms of clause 9.1 and paid to the subscriber.”

- 20 The defendants contend that the proposed tacit term must be read in the context of paragraph 41 of the amended particulars of claim where it is alleged that upon termination of the subscriber agreement the first defendant, acting in terms of clause 9.1 declared a final dividend of R8 500,116.00. They contend further that that allegation must in turn be read with paragraph 45 of the particulars of claim where the Plaintiff alleges that the final dividend was incorrect because amongst others the first defendant's discretion was a narrow discretion, the first defendant unreasonably failed to correctly calculate the amount available as distributable earnings, the first defendant unreasonably failed to take into account the correct financial condition and business position of the insurance, the first defendant incorrectly deducted amounts from the dividend and the first defendant failed to take into account that the Plaintiff was in winding up. The defendants contend that it is clear from the papers that a statutory actuary's determination was made as to the amount of the dividend that had to be paid to the Plaintiff upon termination of the subscriber agreement. This determination of the dividend to be paid to the Plaintiff upon termination of the subscriber agreement was dealt with in clause 14.6 of the subscriber agreement. Clause 14.6 provides as follows:

“Where the cell being wound up still has obligations to customers under existing policies of insurance, Nova without derogating from its rights under this agreement, will be obliged to meet such obligations. In this regard, Nova shall retain in the cell sufficient funds to meet all capital Adequacy

Requirements and policy liabilities as determined by the actuary irrespective of whether the policy holders are third parties or the subscriber as the first party.¹"

21 In this regard clause 14.6 clearly provides that the first defendant must retain in the insurance cell the amount determined by the statutory actuary. The defendants argue that the purpose of this clause is to ensure that the statutory actuary will determine how much can be paid out so that the amount determined by the statutory actuary is retained in the insurance cell. The defendants therefore argue that there is no place in the subscriber agreement for the existence of the tacit term proposed by the Plaintiff nor can the qualifications to the first defendant's discretion in respect of dividends have any place in regard to the final dividend. The defendants argue that all of this is dealt with by the statutory actuary and not by the first defendant. It flows therefore, they contend, that paragraphs 2, 13, 15 and 17 of the notice of amendment must be disallowed.

22 The Plaintiff contends in response to this ground of objection, that in order to determine the existence and validity of a tacit term, a trial court would have to consider the question along with evidence of admissible surrounding circumstances. (***Wilkins NO v Voges 1994 (3) SA 130 (A) at 144C***) Therefore, the Plaintiff contends that the question of the existence or validity of the tacit term is something to be determined by the trial court and not by this Court.

¹ Nova subsequently changed its name to Centriq Life Insurance Company Limited (the First Defendant.)

23 Moreover, the Plaintiff contends that the Subscriber Agreement does not exclude the tacit or implied term proposed in the amendment. In this regard, it refers to clause 9.1 which provides:

“it is intended that Nova shall, at its sole discretion, be entitled to declare dividends in respect of the subscription shares and any other ordinary shares subscribed for by the Subscriber at the dividend intervals described in the schedule. In exercising its discretion whether or not to declare dividends as aforesaid, Nova shall have regard to the provisions of the Companies Act, the Insurance Act and the guidelines set out by the Actuarial Society of South Africa...relating to the declaration of dividends by a long term insurer, the availability of suitable distributable earnings, the financial condition and business position of the insurance cell at the time and any other factors which, it, in its sole discretion, or which may be brought to its attention by the Subscriber, deems to be relevant in exercising its discretion.”

24 Clause 14.6 must be read with Clause 14.2 of the Subscriber Agreement, which provides:

“On termination of this agreement, Nova shall, subject to compliance by it with the relevant provisions of the Companies Act and the Insurance Act, and subject to the passing of the appropriate shareholders resolution, acquire all the subscription shares and other B ordinary shares held by the subscriber at a price equal to the price of subscription shares and B ordinary shares, as may be determined by Nova’s statutory actuary, less the cost of such valuation, less all other costs incurred by Nova associated with such valuation and acquisition process and subsection 14.6. Any determination by Nova’s statutory actuary shall be done on the basis that Nova’s statutory actual shall act as an expert and not as an arbitrator or quasi-arbitrator and his determination shall be final and binding on the parties.”

25 In other words, the price of the shares is contemplated to be determined by the statutory actuary. Mr Brett SC pointed out in argument on behalf of the Plaintiff, that the effect of the judgment of the SCA in **Natal Joint**

Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593

(SCA) is that the process of interpretation requires a consideration of all relevant and admissible evidence, in context. This, he contended, is a matter for the trial court and not for this Court.

26 Mr Green SC, on behalf of the Defendants contended that there were two reasons why the Plaintiff's allegations of a tacit term are without merit. These are:

26.1 The alleged tacit term conflicts with the express language of the contract and therefore does not raise a triable issue; and

26.2 The Plaintiff has not failed to place any evidence before this Court to support the allegation of a tacit term. In contrast, the Defendants place the affidavit of Mr Blanc before the Court in which Mr Blanc denies the existence of a tacit term.

27 In relation to the argument that the tacit terms conflict with the express terms of the agreement:

27.1 The argument made on behalf of the Defendants effectively requires me to decide on the proper interpretation and effect of a contractual term, in the context of an exception. Our courts have made clear that this is generally not permissible and that the interpretation of a contract is a matter best left to a trial court. (*Sun Packaging (Pty) Ltd v Vreulink 1996 (4) SA 176 (A) at 186J*). The decision of the SCA in *Endumeni* strengthens this position because it speaks of the need to take into account the

overall context in interpreting an agreement. That is manifestly best done at trial. Even if this is not correct as a general proposition, it would seem to me to apply with particular force in this case, where the language of the agreement is ambiguous, and in the context of a claim based on a tacit term which is inherently linked to the evidence of facts which will have to be led at trial.

28 Moreover, I am not persuaded of the argument that the Plaintiff ought to have put up evidence to support the tacit term as part of its amendment application. The objection raised to the amendment was that it was excipiable. Therefore, the test I must consider is whether the pleading as amended is excipiable. Our courts have made clear that in determining this issue, this Court must assume that all of the facts pleaded by the Plaintiff are true. I therefore do not consider that in the context of an amendment and objection of this type, that the Plaintiff was required to put up evidence in order for the amendment to be granted. If the Plaintiff cannot demonstrate the relevant evidence at trial, then its claim will be dismissed but it is not for this Court to prejudge in the context of an amendment application whether that evidence will be forthcoming at trial.

29 In the circumstances, I decline to uphold the first ground of objection.

The Second Ground of Objection

30 The second ground on which the Defendants object deals with the fact that the amended particulars of claim include an allegation that the

Plaintiff was and remains unable to pay its debts. The Defendant contends that this amounts to the Plaintiff invoking section 341(2) of the 1973 Companies Act ("the old Companies Act"). Section 341(2) deals with dispositions and share transfers after winding up and provides that

"every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding up, shall be void unless the Court orders otherwise."

31 The Defendants contend that section 341(2) is only operative if the Plaintiff is unable to pay its debts but the financial statements attached to the particulars of claim indicate that the Plaintiff is in fact presently in a position to pay its debts.

32 According to the Defendant:

32.1 The Plaintiff was finally wound up on 14 November 2012.

32.2 On 4 July 2013, the joint liquidators signed their report in terms of section 402 of the old Companies Act. In the report, the joint liquidators state that the Plaintiff's liabilities include a claim by Manthata for R5 064 916.00, a claim by Ross for R3 160 645.00 and a further claim of R2 252 162.00 (the disputed claims) and that the assets of the Plaintiff are R10 385 986.00

32.3 On 1 August 2014, one of the joint liquidators applied for the expungement of the disputed claims and on 5 June 2015 the Master confirmed that the disputed claims had been expunged.

32.4 As a result of this, the Plaintiff's liabilities, according to the Defendant, are only R674 802.00.

32.5 The assets of the Plaintiff as at 21 May 2013 were R10 385 960.00, as confirmed by the joint liquidators. This amount is admitted by the Plaintiff.

33 However, according to the Plaintiff when it issued summons against the Defendants on 16 February 2015:

33.1 none of the claims proved against Moriting had been expunged yet;

33.2 the Plaintiff's liabilities exceeded its assets;

33.3 the joint liquidators could not turn their backs on the claims and other disputes involving Moriting and could consequently not discharge any concurrent debts;

33.4 The present L&D account is only a *first* account.

34 In short, at the time that the summons was issued, Moriting was unable to pay its debts. This is not disputed by the Defendants.

35 The Plaintiff further contends that it is not the amendment which seeks to introduce reliance on section 341(2) of the old Companies Act into the particulars but that this was done in the original particulars of claim at paragraph 49.2. This is indeed so. The original particulars of claim refer to section 341(2) of the old Companies Act in relation to the purported

set off or deductions by the Defendant. In this regard, paragraph 49 of the original particulars of claim provides:

"49. However, in law the purported set-off or deduction by Centriq Life is invalid for inter alia the following reasons:-

49.1 a purported set-off of a claim against a company in liquidation after the institution of a concursus creditorum is invalid;

49.2 the purported set-off amounts to one or more dispositions of property of Moriting (including rights of action) as contemplated in Section 341(2) of the 1973 Companies Act, after the effective date of the winding-up of Moriting.

36 The Plaintiff contends that notwithstanding the above, there is no bar to it relying on Section 341(2) and that it has laid the relevant factual premise for doing so.

37 The dispute between the parties in relation to this ground of objection has therefore developed into a question of precisely when the Plaintiff's ability to pay its debt is to be assessed. The Plaintiff relies on the judgment of the Supreme Court of Appeal ("SCA") in **Sackstein No v Proudfoot SA (Pty) Ltd 2006 (6) SA 358 (SCA)** as authority for the proposition that the relevant time is when the proceedings are instituted. The Defendants contend, in contrast, relying on **Taylor and Steyn NNO v Koekemoer 1982 (1) SA 374 (T)** that the relevant time is when a court is called upon to decide whether there is a sustainable claim based on section 341(2). *Taylor and Steyn's* case concerned the winding up of a company and the applicability of section 415(1) of the 1973 Companies Act. This section contains, as a jurisdictional fact, that the company

must be *unable to pay its debts*. Mr Green SC on behalf of the Defendants argued that the effect of the Full Bench decision in *Taylor and Steyn* is that the relevant time is when the section is invoked by the liquidator, in other words, when the liquidator actually enforces the section or when the decision is taken. The relevant section of the judgment is as follows:

"In my opinion, therefore, the expression in s 415(1), "a company which is being wound up and is unable to pay its debts", bears its ordinary meaning, namely a company which is unable to pay its debts at the time that the section is invoked by the liquidator or by a creditor who has proved a claim."

38 He also argued that *Taylor and Steyn* concerned a situation more akin to the present one than that which faced the SCA in *Sackstein*. This, he argued, is because the SCA did not consider a shifting ability to pay post the issuing of a summons as was the case in *Taylor*.

39 In *Sackstein*, the SCA was also faced with a provision of the old Companies Act, namely, section 340(1) of that Act, which has language similar to section 341(2). The SCA was called upon to decide *inter alia* when a company must be unable to pay all its debts for the purposes of section 340(1). The SCA considered *Taylor and Steyn's* case and held that the same construction must be applied to those sections of the Companies Act which contain the identical or substantially similar phrase, and ultimately concluded that the relevant time at which the company must have been unable to pay its debts was "*at the time that the present action was instituted.*" In so doing, the SCA referred to an earlier decision of that Court in *Standard Bank of South Africa v The*

Master and Others 1999 (2) SA257 (SCA) at 263B. In that case, the SCA was faced with an enquiry by the Master in terms of section 415 of the old Companies Act, after the approval of final liquidation and distribution account and after payment of dividends in terms thereof but before the company had been dissolved in terms of section 419 of the Act. The question in that case was whether the Master had acted *ultra vires* his powers in conducting the enquiry at that stage. The Court in *Standard Bank* placed weight on the practical consideration that “*there would be no call, for instance, to conduct an examination of directors and others at an enquiry contemplated in ss415 or 417 where the company which is being wound up is able to meet all its commitments.*” The Court went on to state that the real purpose of the inclusion of the phrase “*being wound up and unable to pay its debts*” is designed to address the type of company hit by the provision and rather than impose a timescale within which the holding of an examination by the Master is to take place. In the present case, the purpose of section 341(2) is clearly to prevent and invalidate dispositions of assets after the concursus.

- 40 In line with *Sackstein*, I am of the view that the phrase “*at the time that the present action was instituted*” means at the time that the summons was issued in this case. The phrase cannot mean, as the Defendants contend, that the relevant time, is when the court is called upon to decide whether there is a sustainable claim based on section 341(2). The effect of the *Sackstein* decision is to draw a line as to when the ability of a company to pay its debts must be evaluated. The absence of

such a line would result in uncertainty and render section 341(2) unenforceable by a litigant who will often not know whether the company in question will be able to pay its debts at the time that the decision is taken. In other words, if the relevant time at which a company must be unable to pay its debts, is when the court decides that question, a litigant could never satisfy the jurisdictional requirements of the section when instituting proceedings because the inability of the company to pay its debts would be unknown.

41 I am therefore of the view that there is no merit in the Defendant's argument that the Plaintiff failed to meet the jurisdictional requirement of being unable to pay its debts in terms of section 341(2) of the old Companies Act.

The Third Ground of Objection: The alternative delictual claims

42 The amended particulars of claims contain two alternative delictual claims in which damages are claimed. The first alternative delictual claim is advanced as an alternative to the set off claim and on the premise that the R2 million loans to the Plaintiff were validly concluded.

43 The Plaintiff alleges that it suffered damages of R2 million as a result of the first defendant's negligence in breach of a duty of care owed by the first defendant to the Plaintiff to ensure that any payment made to the plaintiff was made to the Plaintiff on the instruction of an authorised representative of the Plaintiff. The duty arose, it is alleged, from the first

defendant's knowledge that Mr Manthata was not a director and was not authorised to represent the Plaintiff in nominating a bank account.

44 The second delictual claim is made in the alternative to the Subscriber Agreement claim. The Plaintiff is alleged to have suffered damages of R4.2 million as a result of the First Defendant's negligence and breach of a duty of care owed by the First Defendant to the Plaintiff to ensure that any payment made to the Plaintiff was paid to the Plaintiff on the instruction of an authorised representative of the Plaintiff.

45 I deal with each in turn.

The R2 million delictual claim

46 The amended particulars of claim allege that the alleged loans totalling R2 million were advanced by the First Defendant as follows:

46.1 On 22 November 2010, the sum of R500 000.00 was paid to Reed Hope Phillips Attorneys;

46.2 On 21 April 2011, after the effective date of winding up of the Plaintiff, the sum of R500 000.00 was paid to Reed Hope Phillips Attorneys;

46.3 On 30 May 2011, after the effective date of winding up of the Plaintiff, the sum of R500 000.00 was paid to Reed Hope Phillips Attorneys;

- 46.4 On 29 June 2011, after the effective date of winding up of the Plaintiff, the sum of R300 000.00 was paid to an entity described as Inyezi, controlled by Manthata, Ross and/or Deon Smith;
- 46.5 On 24 August 2011, after the effective date of winding up of the Plaintiff, the sum of R200 000.00 was paid to an entity described as Inyezi, controlled by Manthata, Ross and/or Deon Smith;
- 47 The amended particulars of claim further alleged that the loans advanced after the effective date of the winding up of the Plaintiff totalling R1.5 million are per se invalid due to the concursus creditorum having been instituted. Such loans were also void, according to the Plaintiff because they were concluded by individuals who lacked authority to represent the Plaintiff, to the knowledge of the Defendants. In addition, the loans were paid not to the Plaintiff but to third parties.
- 48 The Defendant objects to paragraph 23 of the amendment. This paragraph of the amendment deals with paragraph 67 of the amended particulars of claim and inserts the following:
- “and in the event of it being found that one or more of the purported loans referred to in 58 to 61 above were validly concluded then...”*
- 49 The Defendants’ objection is that if the R2 million loans were validly concluded then the Plaintiff cannot advance a sustainable delictual claim. They say so because the Plaintiff alleges that Mr Manthata concluded the R2 million loans but that he was not authorised to do so and hence the loans were invalid.

50 According to the Defendant, the premise of the delictual claim requires a postulation that Manthata was authorised to represent the Plaintiff in concluding the agreements and hence the R2 million loans are valid. The Defendants go further to argue that it is the postulate that Manthata was authorised that presents the difficulty for the delictual claim. Even if the legal duty relied on by the Plaintiff exists, that duty could not have been breached by the First Defendant in paying the loans on the instructions of Manthata as the unauthorised representative of the Plaintiff because that postulate of the delictual claim is that Manthata was authorised to represent the Plaintiff and conclude the R2 million loans.

51 The Defendants are correct, in my view, that if the loans were validly concluded, then there is an implied acceptance that Mr Manthata who concluded the loans on behalf of the Plaintiff, was authorised to do so. However, the Plaintiff argues that its case in the alternative is not about whether the loans were validly concluded but whether the pay out of the loans was valid. Therefore, although Mr Manthata may be found to have been authorised to conclude the loan on behalf of the Plaintiff, the subsequent pay out of the loan to parties other than the Plaintiff, was invalid and the Defendants had a duty not to make such invalid pay out to third parties. I note that the loan agreements do not specify the bank accounts into which the payment of monies must be made. In the circumstances, I am persuaded by the Plaintiff's argument that this is best dealt with by a trial court and not on exception. There may well be

evidence to be led on the context in which the loans were concluded and the implications for the pay out of the loans.

52 In the supplementary heads of argument, the Defendants address the issues raised in their further supplementary answering affidavit. Of relevance to the objection to the R2 million delictual claims, the Defendants state that it is factually incorrect that the Plaintiff suffered a loss of R2 million because it is now common cause that three separate amounts of R500 000.00 each were paid to Reed Hope Phillips and that those payments were *per se* invalid. The amount of R1.5 million paid to Reed Hope Phillips forms part of the Plaintiff's alternative delictual claims advanced in paragraph 67 of the particulars of claim. Having now seen the liquidation and distribution account and the liquidator's affidavit, the Defendants contend that the Plaintiff has not suffered damages of R2 million because it has recovered an amount of R534 491.14. That, it is contended means that the Plaintiff has failed to raise a triable issue. The Defendants, in my view, miss the point in this regard.

53 The implication of Liquidation and Distribution Accounts and the invalid payments to Reed Hope Phillips do not go to the question of whether there is a triable issue or not. Rather, these facts go to the question of quantum. If the Defendant is correct, the Plaintiff will not be able to prove its alternative claim for R2 million. That is a question of fact to be determined at trial and not on exception. (*Living Hands (Pty) Ltd and Another v Ditz and Others 2013 (2) SA 368 (GSJ) at para 17*).

The second alternative delictual claim

54 In relation to the second alternative delictual claim, the Defendants primary objection is that the particulars do not contain sufficient allegations to justify the existence of a legal duty relied on by the Plaintiff and that the alternative delictual claims should accordingly be disallowed. They say so for the following reasons:

54.1 In order to sustain the alternative delictual claims, the Plaintiff must plead facts that support the alleged legal duty. The facts alleged by the Plaintiff relate to the first defendant's alleged knowledge that Manthata had been removed as a director and that he could not instruct where the proceeds of the loans or the dividends had to be paid to. This, amounts to an allegation that the terms of the Subscriber Agreement or the Loan Agreement were not complied with by the first defendant. In other words, that the first defendant breached the terms of the contract. Therefore, according to the Defendant, there is no need for the existence of a separate legal duty outside of the contract and the Plaintiff ought not to be allowed to avoid its contractual claim.

55 Both parties rely on the judgment of the SCA in ***Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security 2010 (4) SA 455 (SCA)*** in support of their arguments. In that case, the SCA held:

"Where economic loss arises from a breach of contract, loss will of course be limited. But a negligent breach of contract will not necessarily give rise to delictual liability. This court

has held that where there is a concurrent action in contract an action in delict may be precluded: Lillcrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd. But that case held only that no claim is maintainable in delict when the negligence relied on consists solely in the breach of the contract. Where the claim exists independently of the contract (but would not exist, but for the existence of the contract), a delictual claim for economic loss may certainly lie. This is made clear by Bayer South Africa (Pty) Ltd v Frost; and Holtzhausen v Absa Bank Ltd.

[8] Accordingly it is possible that the assumption of contractual duties is capable of giving rise to delictual liability. The question is whether there are considerations of public or legal policy that require the imposition of liability to cover pure economic loss in the particular case."

56 Mr Green SC, on behalf of the Defendants argued that *Viv's Tippers*, is authority for the proposition that where parties have concluded a contract which regulates their relationship there is no need to recognise separate legal duties outside the contractual matrix. This is particularly so where the damages sought to be claimed are of pure economic loss as in the present case.

57 Mr Brett SC, on behalf of the Plaintiff argued that *Viv's Tippers* is authority for the proposition that the alternative delictual claims should not be dismissed. He contended that the Plaintiff had both a contractual and delictual claim, arising from the contract and from the conduct of the Defendant in relation to the implementation of the contract. He argued further that the principles of public policy and legal policy dictate that liability should be imposed. In relation to the Defendants' argument that *Manthata* was authorised, Mr Brett SC argued that sufficient facts had been pleaded to establish that there was a legal duty on the Defendants

not to make payments to or deal with Manthata. It is correct that the particulars do allege a series of facts around the notifications to the Defendants that Manthata was not authorised to represent the Plaintiff and that despite this, the Defendants proceeded to engage with him. The Plaintiff has, in my view, laid a sufficient factual basis at the stage of exception for the assertion that the Defendants bore a legal duty to the Plaintiff.

58 Our courts have long grappled with questions of delictual liability for pure economic loss. *Viv's Tippers* is but one in a series of cases that bear mentioning.

59 In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A)*, the then Appellate Division held that a delictual remedy is not available to a Plaintiff where the negligence relied upon arises from a breach of a contractual term. In *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 138 (SCA)*, the SCA went a step further and dismissed a claim for damages in finding that there was no reason for legal liability for financial loss caused by negligence to be extended to a party who was in the position to avoid the risk of harm by contractual means but failed to do so. This was confirmed by the SCA in *AB Ventures Ltd v Siemens Ltd 2011 (4) SA 614 (SCA)*, where the Court warned all parties to ensure that before they undertake any contractual liability, they must carefully consider whether the contract could expose them to losses caused by other parties working on the same project. In that case, the

SCA held that the appellant had failed to avail itself of the protections afforded by a contract where it could have stipulated that it would not be liable for delays caused by other contractors. The appellant in that case was held not to be able to recover the losses incurred by third parties' delays, from the respondent, under the law of delict.

- 60 In *Viv's Tippers*, Lewis JA found that public policy would not allow the undermining of the contract between the owner of the premises and the security firm by allowing a claim by a third party in a situation where the owner of the premises was excluded from claiming from the security firm. The Court made an attempt to curtail the circumstances in which one can succeed in a claim in delict for pure economic loss. In ***Country Cloud Trading CC v MEC, Department of Infrastructure Development 2014 (2) SA 214 (SCA)***, the SCA again made clear that delictual claims arising from damages sustained to parties flowing from the terms of a contract, would be disallowed. On appeal to the Constitutional Court in ***Country Cloud Trading CC v MEC, Department of Infrastructure Development 2015 (1) SA 1 (CC)***, the Constitutional Court held at para 65:

*"Where parties take care to delineate their relationship by contractual boundaries, the law should hesitate before scrubbing out the lines they have laid down by superimposing delictual liability. That could subvert their autonomous dealings. This underscores the broader point made by this court in *Barkhuizen* that, within bounds, contractual autonomy claims some measure of respect."*

- 61 In relation to questions of whether public and legal policy required a recognition of Country Cloud's delictual claims, the Court held that

Country Cloud's non-vulnerability was highly significant and militates against recognising its claim.

62 Applying these principles to the present case, the Plaintiff's case is that the Defendants were instructed not to deal with Manthata and that he was not authorised to represent the Plaintiff. Notwithstanding that, the Defendant dealt with Manthata to the financial detriment of the Plaintiff.

63 The Plaintiff alleges that it is extremely vulnerable because of the lack of protections afforded by the contract in relation to the accounts into which the monies ought to have been paid into. That, it appears to me, is not especially persuasive because it was entirely within the province of the Plaintiff to determine what terms were included in the Subscriber Agreement. The fact that it failed to ensure that it was adequately protected does not easily justify this Court allowing it to enforce a delictual claim in such circumstances. Nevertheless, the dicta in *Viv's Tippers* suggest that where the delict arises separately but in the context of the contract, it can still possibly give rise to a delictual claim. Lewis JA recognised that this would turn on questions of public policy which are to be decided by a court on a case to case basis. "*The question is whether there are considerations of public or legal policy that require the imposition of liability to cover pure economic loss in the particular case.*" (*Viv's Tippers* at para 8.)

64 Questions of legal and public policy are therefore relevant to the question before this Court as to whether the proposed amendments are will render the particulars of claim excipiable.

65 In *Living Hands*, in the context of an exception, the Court held:

“A court must be apprised of all the factors and circumstances relevant to the enquiry. Although public policy considerations can in some instances be decided without a detailed factual matrix, if this cannot be done, the issue of wrongfulness cannot be decided on exception.” (at para 17)

66 In the present case, I am not persuaded that the public policy issues can be decided without additional factual material. There are difficulties confronting the Plaintiffs and their claim which may ultimately fail at trial. However, I am not satisfied that the proposed amendment so clearly fails to raise a triable issue that it can be precluded at this stage, on exception.

67 My conclusion is strengthened by the fact that one of the purposes of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient, should make out a very clear case before it would be allowed to succeed. (*Living Hands* at para 15). An exception taken against the present alternative claims for damages will not substantially dispose of the dispute between the parties. In the circumstances, I am not inclined to uphold the objection.

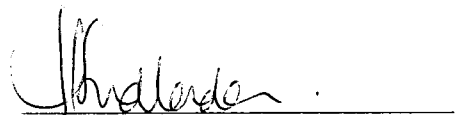
Order

68 I therefore make the following order:

68.1 The application for leave to amend the Plaintiff's particulars of claim in the respects set out in the Plaintiff's notice of intention to amend dated 31 July 2015, is granted.

68.2 The Plaintiff is directed to deliver its amended pages within ten days from date of this Order.

68.3 The Defendants are directed to pay the cost of this application, including the costs of two counsel.



N. RAJAB-BUDLENDER
ACTING JUDGE OF THE GAUTENG
DIVISION OF THE HIGH COURT,
PRETORIA

Date of Judgment:

27 February 2017

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Adv. Ernst Kromhout

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