IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 21262/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

12/2/16 — DATE

SIGNATURE

12/2/2016

In the matter between:

ABSA BANK LTD	1ST DEFENDANT/EXCIPIENT
ABSA BANK NOMINEES	2ND DEFENDANT/EXCIPIENT

And

PIETER HENDRIK STRYDOM NO	1ST PLAINTIFF/RESPONDENT
JOHN RODERICK GRAEME POLSON NO	2ND PLAINTIFF/RESPONDENT
LOUIS STRYDOM NO	3RD PLAINTIFF/RESPONDENT
ALTRON GROUP PENSION FUND	4TH PLAINTIFF/RESPONDENT

JUDGMENT

Fabricius J,

1.

Defendants took a number of exceptions against Plaintiffs' amended Particulars of Claim, and before dealing with them it is necessary to set out the background to this action and the description of the parties thereto. For that purpose I will refer to the allegations made in the Plaintiffs' Particulars of Claim, which must be taken to be correct in that context.

See: ***Herbstein and Van Winsen, The Civil Practice of the High Courts and The Supreme Court of Appeal of South Africa, 5^TH^ Edition, Juta, at 633 (herein after 'Herbstein')***

2.

First to Third Plaintiffs are joint curators of the whole of the business of what is commonly known and described as the CMM Group of Companies, comprising, inter alia the CMM Cash Management Fund ("The CMF"), the Corporate Money Managers (Pty) Ltd ("CMM") and a number of other companies. The Fourth Plaintiff, "Altron", was an investor in the CMM Cash Management Fund ("The CMF") and a creditor of Corporate Money Managers (Pty) Ltd ("CMM").

3.

A collective investment scheme, named "mCUBED Unit Trust Scheme" ("The Scheme") was created by a Deed concluded on 10 March 2003 between mCUBED Unit Management Company Ltd ("mCUBED") as manager, and the First Defendant as custodian and Trustee ("The Custodian"). One of the portfolios created under the scheme was the CMM Cash Management Fund ("The CMF"). mCUBED, as manager of the scheme, which included the CMF as a portfolio under a so-called "White Label Agreement", appointed Corporate Money Managers (Pty) Ltd ("CMM") as manager of the CMF. Members of the public ("investors") acquired participation interests in the CMF in consideration for delivery of money to CMM as manager of the CMF.

4.

A number of statutes regulate the regime created, in particular the ***Collective Investments Schemes Act No. 45 of 2002 ("CISCA")***, the ***Financial Advisory and Intermediary Service Act No. 37 of 2002 ("The FAIS Act")***, and the ***Financial Institutions (Protection of Funds) Act 28 of 2001 ("FI Act")***. Certain of the regulations promulgated in terms of the statutes also apply.

5.

The regime thus created under ***CISCA*** thus comprised the creation of a collective investment scheme by Deed between mCUBED as manager and the First Defendant as custodian, the creation of a portfolio ("The CMF") as part of the Scheme and having CMM as manager of that portfolio, the duties created for mCUBED and CMF as manager of the CMF, and the duties created for the First Defendant as custodian of the CMF.

6.

The Second Defendant was said to be duly authorized to conduct the business of a nominee of First Defendant with regard to any trustee or custodian duties which could arise in terms of "*CISKA*" as read with clause 14 of the Deed, and was duly authorized to act as nominee of a discretionary financial service provider as envisaged in ***Regulation 6 (2) of the FAIS Regulations*** promulgated in terms of that ***Act,*** and was also duly authorized to act as independent nominee of an administrative financial services provider as envisaged in ***Regulation 7 of the FAIS Regulations.***

7.

The duties resting upon the manager are set out in ***s. 4 of CISKA,*** and the duties vested upon a custodian are set out principly in s. 70. It is also noteworthy that according to the provisions of s. 70 (6), that a Trustee or custodian of a collective investment scheme which fails to perform any of its duties referred to in that section, will be guilty of an offence. ***CISKA*** provided certain specific protections for investors in collective investment schemes which included at least the following:

7.1

Assets received from an investor, and portfolio assets which were acquired with receipts from investors, would remain trust property for the purposes of ***s. 71 of CISKA***. The manager and custodian had to deal with money and other assets received from an investor in terms of ***CISKA*** and the relevant Deed. A person, which included a manager and a custodian who contravened - or failed to comply with ***CISKA*** would be liable to another person, who suffered loss or damage as a result of such contravention or failure, subject to their defences applicable to actions for breach of statutory duty in terms of ***s. 109 (1) of CISKA.***

8.

The deed that I referred to was a written trust deed dated 10 March 2003, and was concluded between mCUBED, which later changed its name to Ayanda Collective Investment Solutions Ltd ("Ayanda"), and the First Defendant. On 27 May 2003, the Registrar of Collective Investment Schemes approved this Deed. As a result, so the Particulars of Claim continue, the First Defendant and the Second Defendant as its nominee were subject to ***CISKA***, the Deed and any supplemental deed, appointed as a Trustee and custodian of the Scheme. First Defendant and the Second Defendant as its nominee were vested with all the powers necessary to protect the interests of investors in terms of ***CISKA***, the Deed and any supplemental Deed and the Defendants were also vested with all the powers necessary to perform their functions to achieve the objectives of the Scheme and its portfolios. On 13 April 2004, mCUBED and the First Defendant concluded a written supplemental Deed which established the CMF that I have referred to. This CMF would accordingly be a collective investment scheme in securities as defined in ***s. 39 of CISKA***. The CMF was a specialist portfolio and the manager, in selecting securities, would follow an investment policy which would seek to provide investors with a level of income in excess of that of a money market portfolio while maintaining a high level of liquidity and capital preservation and where capital gain would be of an incidental nature. A further supplemental Deed was approved in terms of ***CISKA*** by the Registrar on 28 April 2004.

9.

Plaintiffs' locus standi:

With the above mentioned as background Plaintiffs allege in the Particulars of Claim that they were appointed as joint curators of the CMM Group in terms of five Court orders during the period of 28 April 2009 to 25 January 2010. The powers granted to them by these orders appear from the provisions of ***s. 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001***. Furthermore, in terms of another Court order granted on 5 February 2010, the Plaintiffs were vested with the following additional powers in terms of the said s. 5, namely to liquidate, alienate or dispose of assets acquired with investor funds, and, on application to Court, alienate or dispose of any assets in which investor funds had been converted. First to Third Plaintiffs then allege that on a proper construction of the ***Financial Institutions Act*** as read with the various Court orders, the curators are entitled to take all steps necessary in relation to the business of the CMF and to recover any losses "caused to it" by any party and are permitted to act in the best interests of the business of the CMF and its investors as they may deem necessary, including the institution of legal proceedings. "In the premises", so Plaintiffs alleged, they are duly authorized and empowered to recover monies owing to and "damages suffered by the CMF".

10.

Plaintiffs furthermore allege "alternatively, and in addition to" that persons identified in a particular annexure, being persons that have invested monies with CMM and in the CMF and have claims against CMM and/or the CMF and/or the Defendants for repayment of their respective investments, have ceded their respective rights, title and interest in and to all claims arising from the investments to the Plaintiffs. The standard cession was annexed to the Particulars of Claim, and a schedule was also annexed indicating the investors' identity, and the alleged values of their respective claims that had been ceded to the Plaintiffs. It was also alleged that the respective investments were made in the CMF in terms of written mandates concluded between the investors, although no details whatsoever are pleaded in this context. It is then pleaded that the claims identified and reflected in the said annexure represent the value of those investors' claims for repayment of their respective investments in the CMF as at 3 April 2009 which was the closure date of the Fund. It was not pleaded on which basis a repayment of respective investments was claimed.

11.

It is therefore clear that as far as *locus standi* is concerned Plaintiffs rely on the mentioned statutes and the Deed and Court orders on the one hand, and the cession on the other. Plaintiffs then pleaded First Defendant's duties as Trustees and custodian in great detail having regard to the provisions of the statutes and certain of their regulations, as well as the Deed. They then relied as the first cause of action on First Defendant's breach of a number of *CISKA* duties. Having pleaded such breaches of *CISKA* in great detail whilst mainly referring to provisions of s. 70, 71 and 105 thereof, they then pleaded also in great detail the breaches that First Defendant committed in terms of the Deed.

12.

Having then referred to the provisions of ***s. 109 of CISKA,*** the Plaintiffs then also rely on a "delictual claim". This delictual claim was formulated as follows: "The breaches of the provisions of CISKA and the Deed read with the supplemental Deed... amounted to a breach of First Defendant's legal duty to the investors in the CMF, including Altron, jointly and severally, and to the CMF, and consequently to the Plaintiffs, as the joint curators of the whole business of the CMF, to deal with the assets and money of the CMF in the best interests of the investors, to protect the interests of the investors in the CMF and to prevent any loss or damage to the CMF and the investors including Altron". First Defendant's alleged breaches of this legal duty were then pleaded, and under the heading "Loss or Damages", the following is alleged: "Accordingly, as a result of the First Defendant's negligent and unlawful acts and omissions, and specifically the breaches as more fully particularized ..., alternatively, by virtue of s. 109 of CISKA, the First Defendant is liable to the CMF, and consequently to the Plaintiffs, as the joint curators of the whole business of the CMF, and the investors, including Altron, for any loss or damage suffered as a result of the First Defendant's aforesaid breaches". It is then alleged that as a result of the First Defendant's wrongful and negligent acts and omissions and the breaches particularized by the Plaintiffs, excluding Altron, have suffered damages in the amount of R 1, 095 234 990.49, being the value of the investors claims for repayment of their investments as at 3 April 2009, being the date of the closure of the Fund. Another alternative is pleaded and as far as the Fourth Plaintiff is concerned, it is alleged that it has suffered damages in the amount of R 56 925 127.28, being the value of its claim for repayment of its investment in the CMF also as at 3 April 2009. It is then alleged that the Plaintiffs and the investors and

Altron's claims against the First Defendant would be reduced by any amount recovered by the Plaintiffs from the Fund under curatorship.

13.

As far as the Second Defendant's liability was concerned it is alleged that it owed the investors of CMM and Altron and the CMF and consequently the Plaintiffs as joint curators of the whole of the business of CMF all of their duties previously laid at the door of the First Defendant. Plaintiffs also rely on a breach of duties enumerated in ***s. 109 of CISKA*** in this context and the common law legal duty allegedly owed by First Defendant.

14.

The Exceptions:

The Defendants took nine exceptions to the Plaintiffs' amended Particulars of Claim. The first ground of exception related to the ceded claims (as per its heading) and it was alleged that *ex facie* the various Court orders read with ***s. 5 of the Financial Institutions Act***, the appointment of the curators and the powers which the curators are vested with in relation to such appointment are limited, and do not extend to taking cession of any of the claims of the investors and/or funding the recovery of any such claim and/or indemnify investors as appears from the cession document. I do not intend repeating all the grounds of objection in this context, but the result and conclusion was that the cessions relied on are invalid and/or that the curators were acting beyond their powers in instituting claims based on such cessions, and that the curators lack *locus standi* in respect of this alternative claim against the First Defendant. The amended Particulars of Claim therefore insofar as they relate to this alternative basis for *locus standi* lack averments necessary to sustain an action and do not disclose a cause of action. I may just add in this context that Plaintiff's Counsel conceded during argument that the cessions did not found a cause of action against Second Defendant. This was the second ground of exception. The third ground of exception related to the "Segregated portfolios allegations" and it was said that there were insufficient particularities given which would enable the

Defendants to properly plead thereto and as a result the amended particulars of claim were vague and embarrassing in that context. The Fourth ground of exception related to the allegations made in the context of ***s. 2 of the Financial Institutions Act,*** and it was said that the Plaintiffs had not made any allegations of fact to support the allegation that the First Defendant had the legal duty posed by s. 2 of this ***Act.*** The Defendants were accordingly unable to establish for the purposes of pleading on what factual basis the Plaintiffs pleaded relevant conclusions. The fifth ground related to the allegation that First Defendant had made "express representations" to investors and the public. It was said that insufficient particulars were given in this regard which enable the Defendants to plead thereto and accordingly in this context the amended Particulars of Claim were vague and embarrassing. The sixth ground of exception related to allegations pertaining to an approved written mandate and it was also said that insufficient particulars were given in this context and accordingly the amended Particulars of Claim were vague and embarrassing. The seventh ground of exception related to the conduct by the manager of the business of a bank. It was also said that insufficient particulars were given in this context and accordingly that the Particulars of Claim were again vague and embarrassing.

15.

The eighth ground of exception is formulated as follows by the excipient: "Having regard to the allegations made in the amended Particulars of Claim (including the obligations and duties which arise on the part of the First Defendant in terms of the Deed and the relevant legislation), the Plaintiffs' delictual claim against the First Defendant, which is a claim for the negligent causation of pure economic loss, is based upon allegations of fact which do not as a matter of law found a conclusion of unlawfulness. Accordingly, the Plaintiffs' delictual claim against the First Defendant is bad in law and the amended Particulars of Claim do not found a cause of action against the First Defendant in this respect".

The ninth ground of exception relates to the delictual claim against Second Defendant and similar grounds of exception in that regard were raised.

A number of exceptions, as I have said, relate to the lack of particularity in the context of First Defendant's alleged unlawful acts or omissions. At first glance they seem to be of the kind that do not go to the root of the matter and where the providing of those particulars would be sufficient, with a result that those objections should not be upheld. However, the allegations contained in the Particulars of Claim must be read in their proper context, the Pleading must be read as a whole, and although certain allegations may in themselves disclose insufficient particularity, when read together with the others, such as has to be done in this case, their absence have a much greater impact: where they are so interrelated to the cause of action that is sought to be established, for instance in the context of grounds of negligence by an act or omissions, they can be said to go to the root of the case, and would then be dealt with on a different basis. In this context Mr Cilliers SC on behalf of the excipients said that I should not be expected to trawl the waters as it were, hoping that my net is wide enough to catch the particulars missing in the Pleading. In this context he relied on ***Herbstein supra at 637 foot note 45***. For reasons that will become apparent I do not intend dealing in detail with the exceptions relating to the lack of particularity, but I will deal with them, and the proper approach hereunder.

17.

The ninth ground of exception relates to the delictual claim against Second Defendant and the same allegation that is made was in respect of such claim against the First Defendant.

18.

Defendants' arguments:

The Plaintiffs' locus standi:

In this regard Mr Cilliers SC suggested that I in the main should deal with the lack of *locus standi* by the Plaintiffs and the Fourth Plaintiff, and set aside the Particulars of Claim on that basis. Alternatively he submitted that if these Plaintiffs have *locus standi,* that I set aside the delictual claims against both Defendants because each claim for breach of a common law duty committed by the Defendants, if it exists at all, will require allegations of fact giving rise to such duty not to cause pure financial loss.

19.

He then gave an overview of the substantive issues at which the specific grounds of exception were directed:

19.1

There are a number of averments which are fundamental to the Plaintiffs' causes of action but which are made by spraying the target with a mosaic of allegations which result in the Particulars of Claim being vague and embarrassing (in addition to lacking averments necessary to sustain a cause of action).

19.2

These issues include –

19.1 The lack of *locus standi* of the curators, and whether it can be overcome by the purported cessions;

19.2 To which party was the duty that was allegedly breached, owed?

19.3 Which party allegedly suffered the damages which the curators seek to recover?

19.4 Insofar as the Plaintiffs, in addition to relying on a breach of statutory duty both under *CISKA* and the *FI Act* rely on a common law legal duty allegedly owed by the Defendants to the Plaintiffs, what facts gave rise to such a common law duty?

19.5 Which damages are alleged to have been suffered in respect of assets which the First Defendant, under its custodial duties, controlled?

19.6 Apart from any grounds of liability alleged against the First Defendant, what grounds of liability are alleged against Second Defendant?

19.7 Is the measure of damages, as formulated and claimed, recoverable in law?

In his submission these were the fundamental flaws contained in the Particulars of Claim.

20.

The duties resting upon the manager are set out in *CISKA* primarily in s. 4 thereof. The duties resting upon a custodian are set out in *CISKA* primarily in s. 70 thereof. *CISKA* provides certain specific protections for participants in collective investment schemes being the following:

20.1 Assets received from an investor, and portfolio assets (acquired with receipts from investors), remain Trust property for the purpose of *CISKA* as per s. 71;

20.2 The manager and custodian must deal with money or other assets received from an investor in terms of *CISKA* and the Deed as per s. 71;

20.3 A person (which includes a manager and custodian) who contravenes or fails to comply with *CISKA* is liable to another person who suffers loss or damage as a result of such contravention or failure, subject to defences applicable to actions for breach of statutory duty (***s. 109 (1) of CISKA***).

21.

Mr Cilliers SC submitted that an action to recover loss or damage for breach of statutory duty created by *CISKA* can thus lie against the Defendants with the following limitations:

21.1 The breach must be a breach of duty which *CISKA* placed upon a custodian;

21.2 The loss or damage must be suffered by the Plaintiff;

21.3 The loss or damage must be suffered by the Plaintiff as a result of a breach of duty towards the Plaintiff.

22.

The Particulars of Claim, if they are to make out a cause of action at all, must allege –

a. The specific statutory or common law duties relied upon by the Plaintiffs;

b. Which of these duties arise from statute and which arise from common law;

c. To whom these duties were owed;

d. The scope of these duties;

e. The alleged breaches falling within the scope of these duties;

f. Who suffered the damages allegedly caused by the breach of these duties?

Mr Cilliers SC argued that essential to the *locus standi* of the curators, i. e. to show that the alleged claim vests in them, are the requisites referred to in par. c and f above, i. e. that there was a breach of duty owed to the claimant, and that the claimant suffered the damages resulting from such breach. To meet these requisites the curators have alleged *inter alia* that the duties were owed to the investors; that breaches of duties owed to the investors occurred and the damages resulting from such breaches were suffered by the investors, and that the curators have taken cession of the claims of the investors.

23.

Having regard to the various Court orders and ***s. 5 of the FI Act*** the curators say the following:

23.1

They are the curators of the CMM Group of Companies comprising *inter alia* CMF and CMM, i. e. they sue in their capacity as curators of the scheme portfolio known as CMF and as curators of the manager of that portfolio namely CMM;

23.2

The duties were owed to the investors and to the CMF and consequently to them *qua curators*;

23.3

The duties were breached and that, as a result of such breaches, the curators, alternatively the investors, and Altron, have suffered damages and that the First Defendant is liable for damages suffered by CMF and consequently the curators, and by the investors.

Mr Cilliers SC submitted that the spraying of the target by referring to alleged duties owed to, and breaches of such, and damages suffered by, first CMF, and secondly, curators, and thirdly the investors or the curators as cessionaries of the investors, is vague and embarrassing and in any event cannot sustain their action.

His argument then proceeded as follows:

24.1 The First Defendant does not owe CMF a statutory duty to avoid CMF suffering pure economic loss. Under ***CISKA,*** the First Defendant, as custodian has certain statutory obligations set out in particular in ***s. 70 of the Act,*** and under s. 109 liability is imposed, for breach or failure to comply with the provisions of ***CISKA***, in favour of any "person" who suffers loss or damage as a result thereof. The portfolio, described as CMF, is only a group of assets in which participants in that portfolio of the Collective Investment Scheme have participating interests. The CMF portfolio as well as the Scheme itself is not even a legal persona, and is therefore not a "person" as contemplated in s. 109. It was therefore meaningless to allege that a statutory duty was owed by the custodian to the portfolio or even to the Scheme as the custodian is merely a participant in the statutory regime created by the Act.

24.2 Therefore, the curators' whole premise, that the CMF portfolio was owed a legal duty, and that the CMF portfolio suffered a loss, and that they, as curators of CMF, became vested with any claims for breach of statutory duty which may become vested in CMF, is fatally flawed.

24.3 For the same reason no common law duty towards CMF existed, and no claim for breach of a common law duty, or any damages alleged to have been suffered by CMF, could have arisen.

24.4 The allegations of any duty having been owed to CMF, and having been breached, and such breach having caused loss or damages to be suffered by CMF, should therefore be struck out.

25.

The only basis other than the cession on which the curators contend the claim against the First Defendant vests in them *qua curators*, is that they have been appointed as curators of CMF. The foundation of this contention fails in the light of the argument just referred to above. The circumstance that the curators are also the curators of CMM, a company which exists separately from its curators, takes the curators claim no further: it is not alleged, and could not have been alleged, that the First Defendant, as custodian, owed CMM, as manager of the Scheme, a duty to prevent the manager causing loss or damage in the management of the Scheme or any of its portfolios. For this reason the allegations of any duty having been owed to the curators, and having been breached, and that such breach caused loss or damage to have been suffered by the curators, should be struck out.

26.

26.1 The only statutory duties resting upon a custodian, such as the First Defendant, are the statutory duties to third parties, i. e. investors. These would be primarily the duties set out by s. 70 of the *Act*. Breach of such duties may cause a "person" who invested monies or other assets in the portfolio in which he acquired a participatory interest, to suffer loss for damages as a result of such breach.

26.2 A claim of such investor is not a claim for repurchase of the investor's participatory interest as provided for by clause 34 of the Deed; variation in the value of a participatory interest is a risk inherent in the collective investment schemes. A claim of an investor against a custodian based on a breach of statutory duty would be a claim for such loss or damage as the investor may have suffered as a result of the custodian's breach of its duties under s. 70 of the *Act* and under the Deed. This however is not a claim brought by the Plaintiffs: they all seek to recover from the First Defendant, as custodian of CMF portfolio, the amount the manager would be obliged to pay them on repurchase of their participatory interest at the date of the closure of the Fund.

26.3 Hence, no competent claim is made by the curators or the Fourth Plaintiff in their own right.

26.4 For the same reason the claim, as formulated in the Particulars of Claim, founded upon breach of an alleged common law duty, is also not a competent claim.

27.

The curators have sought to salvage their *locus standi*, as it was put, by alleging that they had taken cession of the investors' claims and therefore sue as cessionaries of the investors. These claims also cannot be claims to recover the amounts the manager would be obliged to pay the investors for repurchase of their participatory interests at the date of closure of the Fund. No such claim against the custodian vested in the investors, and no such claim could have been ceded to the curators by the investors. As I have said also, the cession does not even purport to cede to the curators any claims against the Second Defendant.

28.

Furthermore, the curators do not have the power to accept and enforce claims for damages based on breach of the statutory duty, or on common law, which may have vested in investors (this submission did not apply to the Altron claim).

Curators were appointed under ***s. 5 of the FI Act***. Sections 5 (1) and 5 (2) set out the purposes for which a curator may be appointed and even the powers of the Court to make an order in the context of s. 5 (5) (b) and (f) are also limited to those specified. Mr Cilliers SC therefore submitted that nothing in the Court orders purport to authorize the curators to recover claims which vested not in the relevant entities, but in the investors. Thus, neither ***CISKA*** nor the Court orders made under ***s. 5 of the FI Act*** conferred upon the curators the power to acquire and to seek to recover claims for damages or losses suffered by persons other than the entities. In the result, the curators have no statutory power to acquire or seek to enforce claims which may have vested in the investors. In the absence of an express statutory power to claim for losses suffered by another, no one can in his own right sue to recover loss or damage suffered by another person: a Plaintiff would simply have no *locus standi* to pursue a claim which does not vest in him.

29.

This contention was further sought to be illustrated by the feature that the curators now seek to enforce over 500 individual delictual claims against the Defendants. Each such claim would turn on its own merits and they do not depend on substantially the same questions of law and fact. The joinder of each of these causes of actions cannot be justified merely by the cessionary in all of these cases being the same.

30.

The same point was further illustrated by the curators purporting to undertake obligations to litigate, pay legal fees and indemnify the cedants against any claims against them, without any corresponding benefits other than seeking to bolster their own *locus standi* to pursue claims for damages which they contend vest in them. Indeed, so it was submitted, in respect of whatever claim the curators may have, their powers and duties extend to pursuing claims for entities under curatorship, which is inconsistent with pursuing claims for the investors. The curators' alternative basis for their claims, i. e. the cession, involves competing claims between the curators and the investors to the alleged rights against the First Defendant – which was clearly not contemplated and allowed for by the powers conferred on the curators.

31.

It was therefore contended that in the result, the curators simply have no powers to acquire and seek to enforce claims vested in others, namely the individual investors. Hence, any reliance on cessions to have acquired such claims is futile, and cannot vest the investors' claims – and consequently *locus standi* – in the curators. The relevant paragraphs of the Particulars of Claim should therefore be struck out and the allegations that the curators have a claim against the Defendants on the basis of the cession should also be struck out. The real thrust of the exception lies in the first ground (the *locus standi* of the curators, and the fifth, eighth and ninth grounds, no common law duty on the Defendants and certainly not towards the Plaintiffs). These grounds are fundamental to the viability of the action, and permeate the structure of the Particulars of Claim as a whole.

It is therefore clear that the crux of the excipients' case relating to *locus standi* is that damages were not suffered by any person of which the Plaintiffs were the curators. That would be the end of their case. If I did not uphold that argument then I would have to strike out the Particulars of Claim relating to the common law cause of action relied on. There is some overlapping between the lack of *locus standi* argument and the argument relating to the non-existence of a legal duty, or at least the absence of facts which had to be pleaded to found such a cause of action, inasmuch as in the latter instance the legal duty that is relied upon must at the very least be owed to the particular Plaintiff. In this context Mr *Cilliers* SC submitted that conduct was only unlawful if there was a breach of a legal duty by the Defendant and that duty had to be owed to the Plaintiff and not to some other party. Reliance was placed on the dictum of Lewis JA in ***Premier Western Cape v Fair Cape Property Developers (Pty) Ltd 2003 (6) SA 13 (SCA) par. 41***, where the following was said: "For an act or an omission to be actionable, it must constitute an infringement of a legal interest. Just as there could not be negligence in the air, so, too, there could not be wrongfulness (the breach of a legal duty) in the air; 'it is as well to remember that conduct which was lawful to one person may be unlawful towards another' – Per Harms JA in ***SM Goldstein & Company (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd and Another*** ... See also: ***BOE Bank Ltd v Ries***, where Schulz JA stated: 'The Court has to be persuaded that the Defendant owes a legal duty and not only a moral duty to the Plaintiff'.

33.

This is obviously so, but at this stage it is advisable to have regard to basic considerations relating to exceptions. They are dealt with in ***Herbstein supra in Chapter 22. Rule 23 (3) of the Uniform Rules*** is particularly relevant in this context according to Terblanche SC acting for the Plaintiffs: "Wherever an exception is taken to any pleading the grounds upon which the exception is founded shall be clearly and concisely stated". An exception is a pleading and must also contain a prayer for the relief sought. The nine exceptions are contained in one document and read separately do not contain a prayer for the relief sought.

See: ***Barclays National Bank Ltd v Thompson 1989 (1) SA 547 AD at 552 H.***

Such all-embracing prayer is contained at the end of the exception where an order is sought that the exceptions be upheld with costs and that the Particulars of Claim be struck out, alternatively allegations in respect of which the exceptions are upheld, be struck out. No formal complaint was raised by Plaintiffs in this context except at the argument stage, and the irregularity, if indeed it is one in this instance, is not one which prejudiced the Plaintiffs. Mr Terblanche's other objection to Mr Cilliers' argument was that the latter had 'smuggled in' arguments not covered by the actual exceptions taken. In this context he particularly referred to the first exception (see par. 14 of this judgment), relating to *locus standi*, but which confined itself to the claim based on the ceded claims, and which did not in its own terms except to the allegations under the heading "Plaintiffs' *locus standi*" contained in par. 2.1 to 2.7 of the Particulars of Claim. The allegations regarding the cession are made in par. 2.8 to 2.12 the concluding paragraph of the first exception relates only to the alternative claim based on the cession. The same argument applies to the second exception, i.

e. the claim against Second Defendant based on the cession. (He also concluded however that the relevant cession did not disclose a cause of action against the Second Defendant, which had to succeed therefore). The result was that I could not simply strike out the Particulars of Claim in toto, based on the lack of *locus standi* of the curators. ***Herbstein supra at 642***, say the following in this context: "The importance of the proper framing of an exception was stressed by Heher J in ***Jowell v Bramwell-Jones*** where he stated that a party is free to frame his exception in any way he chooses, but is bound by the terms in which it is framed and by the issues which it raises. He also agreed that the general statements in ***Jacob and Goldrein*** in ***Pleadings: Principles and Practice*** at 8 – 9 apply to exceptions, including the statement that –

The Court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'any other business' in the sense that points other than those specified in the pleadings may be raised without notice.

An exception is a pleading, if an excipient wishes to argue some exception other than that taken, he should apply to amend the exception."

I agree that this is the proper approach. The result is that I cannot strike out the Particulars of Claim in toto as contended for by Mr Cilliers, on the basis of lack of *locus standi.* The exceptions as formulated do not allow for this approach.

As far as the argument relating to the cession is concerned, Mr Terblanche reminded me that this would involve an interpretation, not without difficulty, of a number of Statutes, Deeds and Court Orders. Paragraph 1.12 of the first exception alleges that the cessions are invalid, and that the Particulars of Claim lack averments necessary to sustain an action and do not disclose a cause of action. I need to be persuaded that upon every interpretation which the pleading can reasonably bear (obviously read together with its annexures), no cause of action is disclosed. It may well be that evidence of background circumstances would be of assistance, but in my overall view this whole question should be left to trial Court. A Court has in any event the discretion, if it is in the interest of fairness and justice, that an exception stand over for a decision of the trial Court.

See: ***Versluis v Greenblatt 1973 (2) SA 271 NC at 278.***

It is my view that this would be the appropriate order.

See also: ***Erasmus, Supreme Court Practice, 2ND Edition, Juta, at D1 - 297.***

34.

Exceptions 3 to 7 in the main are that the relevant allegations are vague and embarrassing. Exception 4 goes a step further and states that no cause of action is disclosed as well. The wording of the Statute referred to has indeed been amended, but this aspect can sensibly be left for argument at the trial stage. No doubt an amendment and further particulars will resolve this point, and there will be little saving of time if I had to adopt a strict approach now. Exceptions raised on the basis that a pleading is vague and embarrassing cannot be founded on the mere averment of lack of particularity. This whole topic is again admirably dealt with in ***Herbstein***

supra at 634 - 638. I do agree that further particulars are required, but I cannot say that the lack complained of strikes at the root of the claim. Again, the relief sought in respect of each of these exceptions is of a general nature only. I am unable to say that the whole cause of action is vague and embarrassing. Neither can I say that Defendants would be seriously prejudiced if the offending allegations were not expunged. Defendants will be able to properly prepare for trial if the relevant further particulars are furnished; and I note that Mr Terblanche SC has tendered to supply such. Exceptions 3 to 7 can therefore not be upheld.

35.

<u>The claims based on common law (delictual) claims: exceptions 8 and 9:</u>

It is clear that in the formulation of these claims the Plaintiffs have relied on the same breaches of statutory duties. The particular exceptions state that the claim for the negligent causation of pure economic loss, is based on allegations of fact which do not as a matter of law found the conclusion of unlawfulness. The claim is therefore bad in law and cannot found a cause of action. Mr Cilliers SC launched an impressive frontal attack on the formulation of this common law claim and disavowed its very existence. He relied on well-known decided cases such as ***Steenkamp N.O. v Provincial Tender Board Eastern Cape 2006 (3) SA 151 SCA and 2007 (3) SA 121 (CC), BOE Bank Ltd v Ries 2002 (2) 39 SCA, Fourway Haulage (SA) (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 SCA*** amongst others, and a number of applicable English authorities. Viewed in pure isolation, on an Arctic polar-bear approach, his reasoning cannot be faulted. The Particulars of Claim lack many pertinent allegations. These however, can be dealt with by Further Particulars for trial. The allegations contained in the Particulars of Claim which allegedly support a cause of action in common law overlap to a great extent with those pertaining to the statutory claim. There will be no substantial saving in time and costs if I had to decide this exception now, not knowing how the trial Court will deal with the statutory claim after relevant evidence. The factual matrix relevant to both claims must be established before a final pronouncement can be on the existence or otherwise of both of these claims. In deciding whether or not a common law claim exists, a particularly relevant consideration would be whether the statutory claim services the onslaught of the Defendants, and if so, to which extent.

I am therefore of the view that I should follow the approach adopted in ***Axiam Holdings Ltd v Deloitte & Touche 2006 (1) SA 237 SCA*** especially at par. 25 relating to the first exception, namely that in the exercise of my discretion I deem it just and fair that the trial Court decides this issue after all the relevant evidence. I am unable to say now that I need to weed out Plaintiffs' common law claim, because on all possible readings of the facts no cause of action has been made out. See: ***Telematrix (Pty) Ltd v Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 SCA at par. 3.***

The factual situation is complex and the legal position is likely to depend on the evidence.

See for instance also the reasoning of Kirby J referred to by the Constitutional Court in foot-note 16 p.200 of the judgment ***in H v Fetal Assessment Centre 2015 (2) SA 193.***

36.

Having regard to the orders below, I deem it fair that each party pays its own costs.

37.

The following order is made:

37.1 Exceptions 1, 8 and 9 stand over for a decision of the trial Court;

37.2 Exceptions 3 to 7 are not upheld;

37.3 Exception 2 is upheld;

37.4 No order as to costs is made.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 21262/12

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Instructed by: Baker & McKenzie

Date of Hearing: 7 December 2015

Date of Judgment: 12 February 2016 at 10:00