FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3471/2007

In the case between:

PHUTI JOYCE TLALE N.O.	1st Applicant
PHUTI JOYCE TLALE	2nd Applicant

and

MOMENTUM GROUP LIMITED	Respondent

JUDGMENT: VAN DER MERWE, J

HEARD ON: 11 FEBRUARY 2011

DELIVERED ON: 17 FEBRUARY 2011

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[1] This is an application for leave to appeal against the judgment delivered on 11 November 2010. For convenience, I will refer to the parties as in the action.

[2] On 11 November 2010 the following orders were made:

> "1. The exception against the third party notice is upheld.
>
> 2. The third party notice is struck out.
>
> 3. The application for leave to amend is dismissed.
>
> 4. The defendants are granted leave to amend the third party

notice within ten days of date of this judgment.

5. The defendants are ordered to pay the costs of the exception and the notice of amendment and application for leave to amend the third party notice."

[3] The defendants intend to attack all these orders on appeal. I prefer not to decide this application on the basis that paragraph 3 of the order is not appealable and I assume that it is. The test to be applied is well known, namely whether there are reasonable prospects of success on appeal.

[4] The judgment recognises that the claim of the defendants against the third party is based on delict. The problem lies with the relief claimed. The judgment holds that the third party notice is excipiable, and would remain so even if amended as proposed, on two grounds, each dealing with a substantive prayer. The first ground is that an order that the third party is obliged to make payment to the defendants' creditor in order to extinguish the debt of the defendants, cannot in law be claimed in delict. The second ground is that the third party notice contains no allegation that the defendants suffered damages consisting of a remaining balance of the proceeds of the policy had the proceeds been

timeously utilised to extinguish the debt owed to the plaintiff.

[5] The argument that the first ground was not covered by the exception or argued before me, is without substance.

In part of the exception the claim of the defendants was misconceived as one in terms of the policy, but to this was added that the defendants

> "… also have no claim in law that the third party is liable to pay the plaintiff" and
>
> "… have not pleaded any basis in fact or law to substantiate the allegation that the third party is liable to pay '*any amount that is required in law to extinguish the defendant's indebtedness to the plaintiff*', such being a different amount to the sum assured in terms of the policy."

The point was argued before me *inter* alia with reference to **DODD v ESTATE CLOETE AND ANOTHER** 1971 (1) SA 376 (EC) specifically at 379G where the following is stated:

> "My conclusion therefore is that, if the respondents have any claim against the excipient at all, their claim is for the payment

> of damages. Such a right cannot be equated to a right to claim indemnity. It is the converse of such right."

[6] Counsel for the defendants did not contest the legal position in this regard. There can be no doubt that an order that a third party must satisfy the judgment entered against the defendants in favour of the plaintiff, would oblige the third party to make payment to the plaintiff. It was argued however that the third party notice and the application to amend it should have been considered separately and that the unamended third party notice contains reference to payment to the defendants in the following paragraph:

> "In the premises, the third party is liable to pay to the plaintiff, *alternatively*, the defendants any amount that is required in law to extinguish the defendants' indebtedness to the plaintiff."

[7] There are two difficulties with this argument. The first is that the third party notice does not state any relief or remedy claimed. It therefore falls foul of rule 13(2) and this point was specifically taken in the exception. The third party notice can therefore not stand on its own. The second is that this paragraph is retained in the third party notice as

proposed to be amended but not followed by a prayer for payment of damages to the defendants.

[8] The defendants are also not without any remedy. The plaintiff claims from the defendants payment of the amount of R322 344,37 together with interest thereon calculated at the rate of 13% per annum from 13 June 2007 to date of payment thereof. The claim against the third party is expressly premised thereon that the defendants are liable to the plaintiff for payment of this amount and interest. That would therefore represent the defendants' damages as a result of the delict pleaded. The defendants should simply claim payment to them by the third party of damages in this amount and interest thereon.

[9] Regarding the second ground counsel for the defendants could only refer to paragraph 6.8 of the third party notice as proposed to be amended. In paragraph 6.7 thereof it is alleged that the plaintiff received payment in the amount of R172 902,30. In paragraph 6.8 it is alleged that this amount was equal to or exceeded the amount that was owed to the plaintiff by the defendants. This is followed by paragraph 6.9

in which it is stated that in the premises the debt that was owed by the defendants to the plaintiff was extinguished when the payment referred to in paragraph 6.7 was made. Then follows paragraph 7 quoted in the judgement. In paragraph 9 it is stated:

> "The amount payable in terms of the insurance policy as at the date of the deceased's death and the amount that was claimed by the plaintiff from the third party, and the balance of the bond account as at the date of the death of the deceased are known to the third party and the plaintiff, but are not known to the defendants."

[10] Apart from the provisions of rule 18(10), there is clearly no allegation that the defendants suffered damages because a balance of the proceeds of the policy would have remained after payment of the debt.

[11] It was argued that paragraphs 2 and 4 of the order are inconsistent. I do not understand how an appeal on this point can have any practical effect or result. But in any event in terms of a longstanding practice of our courts, a pleading that has been struck down or set aside on

exception, may be amended, because the pleading nevertheless remains on the file and in existence. See **GROUP FIVE BUILDING LTD v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA (MINISTER OF PUBLIC WORKS AND LAND AFFAIRS)** 1993 (2) SA 593 (A) at 603E – H and **CONSTANTARAS v BCE FOODSERVICE EQUIPMENT (PTY) LTD** 2007 (6) SA 338 (SCA) at 348 to 349.

[13] There is no merit in an appeal against costs only and certainly no exceptional circumstances within the meaning of section 21A(3) of the Supreme Court Act, nr 59 of 1959.

[14] The application is dismissed with costs.

C. H. G. VAN DER MERWE, J

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