

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 3471/2007

In the matter between:-

ABSA BANK LIMITED

Plaintiff

and

MRS PHUTI JOYCE TLALE N.O.

First Defendant

MRS PHUTI JOYCE TLALE

Second Defendant

MOMENTUM GROUP LIMITED

Third Party

HEARD ON: 15 OCTOBER 2010

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 11 NOVEMBER 2010

[1] As is explained below, this judgment deals with both an exception to a third party notice and a subsequent application to amend the third party notice.

[2] The plaintiff sued the second defendant and her late husband, Mr. M.M. Tlale ("the deceased") to whom she was married in community of property, for repayment of a loan made by the plaintiff to the deceased and the second

defendant and secured by a first mortgage bond over fixed property owned by the common estate. The plaintiff also prays for an order declaring the said fixed property executable. After the death of the deceased, the second defendant in her capacity as duly appointed representative of the estate of the deceased, was substituted as the first defendant by order of this court.

- [3] In the second defendant's plea to the plaintiff's claim, she states that during 1996 the deceased entered into a life insurance agreement ("the policy") with the legal predecessor of the third party. In terms of the policy, the lives of the deceased and the second defendant were assured. The second defendant further states that the policy was procured especially with the intention that the aforesaid debt owed to the plaintiff would be extinguished in the event of the death of either the deceased or the second defendant. The second defendant further pleads that on or about 9 July 1997 the policy was ceded to the plaintiff. It can be gathered from the context that the proceeds of the policy was ceded to the plaintiff *in securitatem debiti*. The plea further proceeds by stating that after the death of the deceased the plaintiff in

fact claimed the proceeds of the policy from the third party and received payment thereof. In the premises it is pleaded that the debt owed by the deceased and the second defendant to the plaintiff was extinguished when payment of the proceeds of the policy was made by the third party to the plaintiff.

- [4] In the third party notice issued by the defendants, the aforesaid allegations contained in the plea were repeated. However, in the third party notice a claim is instituted by the defendants against the third party on the basis that payment of the proceeds of the policy to the plaintiff did not take place. The third party excepted to the third party notice. Subsequently the defendants filed a notice of amendment of the third party notice, to which the third party lodged a notice of objection on the basis that the notice of amendment does not cure the defects in the third party notice mentioned in the exception to the third party notice. In the result the defendants also filed an application for leave to amend in accordance with the notice of amendment.

- [5] The defendants insist that the exception to the third party

notice should not succeed and that the application for leave to amend was filed merely *ex abundanti cautela*. The third party agrees that the proposed amendment does not change the substance of the claim instituted in terms of the third party notice and contends therefore that the exception must succeed and that the application for leave to amend must be refused. In the circumstances the parties before me by agreement requested that both the exception to the third party and the application for leave to amend be adjudicated upon simultaneously. As this approach appeared to me to be both practical and cost effective, I acceded to this request.

- [6] In the circumstances it is convenient to consider the third party notice as it is proposed to be amended. (The proposed amendments thereof are set out in italics.)

“7. In the event where it is held that:

- 7.1 the plaintiff lodged a claim,
- 7.2 the third party did not meet the claim, and
- 7.3 the defendants are liable to the plaintiff as claimed by it, then the defendants claim that:

7.3.1 such failure was unlawful as there was no legal basis for the third party's failure to meet the plaintiff's claim,

7.3.2 the third party should have foreseen that:

7.3.2.1 *the policy had been ceded to the plaintiff in order to secure a debt that was owed by the defendants to a bank, being the plaintiff;*

7.3.2.2 *its failure to meet the claim submitted by the plaintiff would result in harm to the second defendant and the deceased in that their joint indebtedness to the plaintiff would probably remain unpaid;*

7.2.2.3 *the third party should have foreseen that should the debt to the plaintiff, a bank, remain unpaid, the defendants would be liable to the plaintiff for any interest, bank charges, and other charges that may be raised in accordance with the*

agreement between the defendants and the plaintiff.

7.3.3 *The third party owed the second defendant and the deceased, who is now represented by the first defendant, a duty of care not to do anything that would cause their account with the plaintiff to remain unpaid and thereby expose them to any additional charges that the plaintiff might be lawfully entitled to raise against the defendants' account as a result of their account remaining unpaid.*

7.3.4 *the third party failed to take reasonable steps to prevent the harm referred to in paragraph 7.3.2.1 to 7.3.2.3 above to the defendants, and*

7.3.5 *as a result of the third party's wrongful conduct aforesaid, the defendants suffered harm in that their account with the plaintiff fell in arrears which gave rise to their indebtedness as claimed by the plaintiff, alternatively, as might be determined by a Court of law on the date of judgment.*

8. 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 defendant's indebtedness to the plaintiff.

9. *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. **WHEREFORE** the defendants pray for judgment against the third party in the following terms:

(a) *the third party is ordered to satisfy the judgment entered against the defendants in favour of the plaintiff.*

(b) *the third party is ordered to pay the defendants a sum of money that would have represented the balance of the proceeds of the insurance policy that was ceded by the deceased to the plaintiff, had the third party met the plaintiff's claim within one month after the plaintiff lodged the claim against the third party.*

(c) *Interest on the amount arrived at in terms of prayer (b) at the rate of 15,5% per annum from a date commencing 30 days after the date when the plaintiff lodged its claim against the third party to date of payment.*

(d) *Costs.*

(e) *Further and alternative relief.”*

[7] From the above appears that the cause of action of the defendants against the third party that is put forward in the third party notice, is a delict. This was repeatedly confirmed during argument by counsel for the defendants. It appears to be alleged that by failing to pay the proceeds of the policy to the plaintiff, the third party negligently failed to comply with a legal duty to take reasonable steps to prevent harm to the defendants.

[8] It appears therefore that the claim of the defendants against the third party is based on a failure by the third party to comply with a valid and enforceable obligation in terms of a life insurance contract and session *in securitatem debiti*. Whether a delictual claim is available in such circumstances is not necessary for me to decide, as counsel for the third party confirmed that that is not the exception taken. The exception does raise the question whether on the allegations of the defendants the relief claimed can be granted in law.

- [9] The alleged harm suffered can only be regarded as patrimonial loss or pure economic loss. The appropriate delictual remedy is therefore the *actio legis Aquiliae*. Apart from an interdict in an appropriate case, the only remedy in an *acquilian* action is a claim for damages. The relief claimed by the defendants is however quite different. Firstly the relief claimed is that the third party be ordered to pay to the plaintiff what is owed to the plaintiff by the defendants in terms of the judgment against the defendants in favour of the plaintiff, apparently irrespective of what the proceeds of the policy was or would have been. The defendants therefore in the first place effectively claim an indemnification which, as counsel for the third party pointed out, is the converse of a claim for damages. Secondly, although this is not very clear, it is claimed in addition that the third party be ordered to pay to the defendants an amount representing any balance of the proceeds of the policy that would have remained had the debt been paid timeously from the proceeds of the policy. There is no allegation however that such balance would in fact have remained and therefor no allegation that damages were suffered.

[10] The relief claimed is not payment of damages and cannot in law be claimed in delict in the circumstances. On this ground the exception must succeed and the application for leave to amend be dismissed. Costs must follow the result. The parties before me are *ad idem* that leave be granted to the defendants to amend the third party notice, if so advised.

[11] In the result the following orders are 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.

C.H.G. VAN DER MERWE, J

On behalf of the third party: Adv. S.J. Reinders
With him:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of the defendants: Adv. F.R. Memani
Instructed by:
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