



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 14495/2023

In the matter between:

ASANTE BODY CORPORATE

Plaintiff

(SS: 231/2019)

and

PORTLAND BELEGGINGS (PTY) LTD

First Defendant

(Registration no. 2008/001357/07)

REMEY CONSTRUCTION (PTY) LTD

Second Defendant

(Registration no. 2000/007960/07)

Coram: Parker, AJ

Matter heard on Friday 30 August 2024

Judgment delivered on **Friday 20 September 2024**, electronically by circulation to the parties' representatives via email.

JUDGMENT

PARKER, AJ**Introduction**

[1] This is a delictual action for damages wherein the First Defendant has raised an exception after it was put under a bar by Plaintiff, alleging that the Plaintiff has failed to plead sufficient facts to sustain a cause of action against it. The claim by the Plaintiff is for pure economic loss emanating from a construction to a residential sectional title scheme, known as Asante “*the scheme*” which manifested defects in the common property of the scheme.

[2] According to Plaintiff, First Defendant was responsible for the development of the scheme including the design and construction, had a legal duty to guard against causing the losses that confront the Plaintiff in its failure to discharge the duty, First Defendant is liable for damages quantified with the reference to the cost of repairing the common property in the sum of R3 122 410.00 being Plaintiffs reasonable and necessary costs of attending to the defects.

[3] According to Plaintiff the Second defendant is a building contractor who was appointed by the First Defendant to construct the scheme. Plaintiff has withdrawn its claim and action against the Second Defendant.

The exception

[4] At the outset I need to mention that the exception did not contain relief to allow Plaintiff to remove the cause of the complaint. The First Defendant attacks clauses 5, 6, 7, 11 and 13 of the Plaintiff's Particulars of Claim (“POC”) and has raised three exceptions, namely

- 4.1 Plaintiff failed to provide sufficient facts to sustain the legal conclusion that the First Defendant's alleged conduct was negligent and wrongful and that it caused damages.
- 4.2 The Plaintiff is said to have failed to give sufficient facts to sustain the legal conclusion that the First Defendant was responsible for developing the scheme including the design and construction and that it owed it a legal duty to Plaintiff.
- 4.3 The Plaintiff is said to have failed to sustain the conclusion that the reasonable and necessary costs of attending to the defects are the damages for which Plaintiff contends.

The legal principles

[5] In *Theunissen v Transvaalse Lewendehawe Koop Bpk*, the Supreme Court of Appeal (SCA) has held that an excipient has the duty to persuade the court that on every reasonable interpretation the impugned pleading does not disclose a cause of action.¹ An excipient must show that the Plaintiff's claim is-not may be- bad in law having a regard to the allegations made in the particulars of claim and any other document upon which the Plaintiff's claim is based.² It is trite that a party has to plead – with sufficient clarity and particularity – the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts.³ It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it.⁴

[6] It has been quoted in a plethora of case law following *Telematrix* that exceptions are a useful mechanism to weed out cases without legal merit however they should not

¹ *Theunissen v Transvaalse Lewendehawe Koop Bpk* 1988 (2) SA 493 (A) at 500 E – F.

² *Vermeulen v Goose Valley Investments (Pty) Ltd* [2001] 3 All SA 350 (A) at para [7].

³ *Mabaso v Felix* 1981 (3) SA 865 (A) at 875 A-H; Rule 18 (4))

⁴ *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 792 J-793G.

be approached in an overly technical manner but dealt with sensibly.⁵

[7] Thus the court should not be looking at the pleading with a magnifying glass of too high a power, for it is the duty of the court when an exception is taken to see if there is a point of law which will dispose of the case in whole or in part. The judgment by Van Heerden J (as she then was) in *South African National Parks v Ras*⁶ is instructive:

“The court should not look at a pleading with a magnifying glass of too high a power. It is the duty of the court when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is embarrassment which is real as a result of the faults in the pleadings to which exception is taken. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment the exception should be dismissed.”

[8] It follows that an excipient is required to show that the Plaintiff has not pleaded a cognizable or sustainable case. In order to succeed with a no cause of action exception, the exception must persuade the court that upon every interpretation of the particulars of claim as formulated can reasonably be that no cause of action is disclosed. In *McKenzie v Farmer’ Co-operative Meat Industries Ltd*⁷

“... every fact which it would be necessary for the plaintiff to prove, if the traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

[9] It is not sufficient therefore to raise a point of law without giving rise to it if the alleged complaint is merely arguable or can be cured by the furnishing of particulars

⁵ *Telematrix (Pty) Ltd t/a Matric Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 465H.

⁶ *South African National Parks v Ras* 2002 (2) SA 537 (C) 21 at 541 J-542A.

⁷ *McKenzie v Farmer’ Co-operative Meat Industries Ltd* 1922 AD 16.

then it is appropriate to dismiss the exception. This means, that an excipient must make out a clear and strong case before it should be allowed to succeed.

Pure economic loss

[10] Pure economic loss denotes loss that does not arise directly from the damage to the Plaintiff's person or property but rather in consequence of the negligent act itself such as loss of profit, being put to extra expenses or the diminution in the value of the property.⁸

[11] Thus, since Plaintiff's claim is based on delict, the Plaintiff is required to plead all the elements of delict that being conduct, negligence or fault, wrongfulness, causation and the loss suffered.

[12] With the negligent causation of pure economic loss, the act or omission is not *prima facie* wrongful – more is needed.⁹ Accordingly, a Plaintiff suing for the recovery of pure economic loss, is in no position to rely on an inference of wrongfulness flowing from an allegation of physical damage to property (or injury to person), because the negligent causation of pure economic loss is *prima facie* not wrongful in the delictual sense and does not give rise to liability for damages unless policy considerations require that the Plaintiff should be recompensed by the Defendant for the loss suffered.

[13] Turning to wrongfulness, according to the First Defendant, Plaintiff merely alleged wrongfulness in its POC and that the First Defendant had a legal duty not to cause such harm or loss. In this regard if Plaintiff alleges that First Defendant was negligent, it failed in setting out the nature of conduct of the First Defendant was, in addition wrongful.

⁸ *Telematrix (Pty) Ltd t/a Matric Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) 465 A-D.

⁹ *Telematrix supra*, at 468 C-D referring to *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) [2002] 2 All SA 247 paras [12] – [13].

[14] Where liability is indeterminate, the SCA has warned against imposing delictual liability in instances where there is not a contractual relationship between the parties due to the danger of indeterminate liability.¹⁰ What the Plaintiff alleges is that the First Defendant knew, or ought to have known that the negligence as aforesaid may result in the defects which were reasonably foreseeable.¹¹

[15] As to the foreseeability of the harm, First Defendant submits that Plaintiff's POC is expiable in that it does not meet the allegations necessary to establish a delictual claim for pure economic loss,¹² *AB Ventures Ltd v Siemens Ltd*:

"Wrongfulness functions in practice to distinguish cases in which there is liability for negligence, from cases in which there is no liability for negligence. If such conduct is wrongful, the claim will succeed, if such conduct is not wrongful, the claim will fail. Wrongfulness is incapable of performing its only practical function, which is to distinguish cases of negligence from one another, if its attributes are the features of negligence. Thus, the fact, that a reasonable person would have foreseen the harm, or that a reasonable person would have guarded against the harm, cannot be the measure of wrongfulness."

[16] At paragraph 8 of the POC, the Plaintiff alleges that the First Defendant owed the Plaintiff a *"legal duty to guard against defects, which duty the First Defendant negligently and wrongfully breached"*. According to First Defendant and the case law it relied upon, if wrongfulness cannot naturally be inferred from the nature of the loss, which will certainly be the case where the Plaintiff's claim for loss resulting from an omission or for pure economic loss (both of which apply in the present scenario), the First Defendant's legal duty towards the plaintiff must be *"defined"* and the *"breach"* alleged.¹³

¹⁰ *Country Cloud Trading v Department of Infrastructure Development* 2014 (2) SA 214 SCA.

¹¹ Bundle: 7 POC at para 14.

¹² 2011 (1) SA 586 (GNP) at 600 C-H.

¹³ See the requirements postulated in Amler's Precedents of Pleadings for claims under the mantle of the Lex Aquila and the cases cited therein; refer also to *Smolka v The Body Corporate of Ondangwa* 2020

[17] On close scrutiny of the POC, Plaintiff does not adequately allege a legal duty owed to the Plaintiff by the First Defendant and instead as argued by First Defendant, makes a bald legal conclusion regarding the existence of such duty.

[18] First Defendant in its heads of argument is of the view that Plaintiff made allegations that First Defendant was under a duty of care which itself is insufficient because the existence of a duty to prevent loss is a conclusion of law which depends on the circumstances of the case particularly that which Plaintiff had pleaded at paragraph 17 of POC being *“The Plaintiff’s damages are quantified with reference to the reasonable and necessary costs of attending to the defects”*.

[19] Much was made of the First Defendant’s failure to appreciate the implications of the nature of the Plaintiff’s claim and the basis on which it relies for the reasonable costs of *“attending to the defects”*. The Plaintiff sues in delict. As such, and all else being equal, it seeks to be put in the position in which it would have been in had the delict not been committed. The measure of damages the Plaintiff relies upon to quantify its loss is, essentially, the cost of repairs. Plaintiff says that is quite permissible. Furthermore, that it need not plead or prove that it actually paid or intends paying the claimed amount (or any amount). I do not agree. On the contrary, First Defendant needed more particulars to support this claim for damages.

[20] Plaintiff misconstrues what the First Defendant is alleging. What the First Defendant is excepting to, is that the Plaintiff need to plead sufficient facts to sustain the cause of action which in their view is not apparent from the POC. Plaintiff remains firm that the Exception as raised is the language of a vague-and-embarrassing exception, not a no-cause-of-action exception. Moreover, argues that the First Defendant seeks to particularise its new complaint with reference to considerations that are irrelevant to the Plaintiff’s cause of action, such as *“When exactly”* the scheme was built and *“how”* the

Defendant's came to design the scheme. This, says the Plaintiff is for trial.

[21] Moving to wrongfulness, First Defendant states it is of no assistance to the Plaintiff to merely allege wrongfulness in it's POC and that the First Defendant had a legal duty not to cause such harm or loss, without setting a basis for it.

[22] First Defendant argue that most of the complaints levelled against it are repeated against the Second Defendant, however the action against Second Defendant has been withdrawn. Furthermore, that Plaintiff has not pleaded sufficient facts or any facts at all, to sustain the conclusion that the First Defendant was responsible for the development of the scheme including the design and construction.

Damages

[23] According to the First Defendant the POC, do not contain any facts to sustain the conclusion that the reasonable and necessary costs of repair to rectify the defects or damage suffered by the Plaintiff. The Plaintiff must allege and prove the extent of the loss suffered as a result of the unlawful conduct.

[24] First Defendant relied on Rule 18(10) states that:

"A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof"

[25] The object of Rule 18(10) is that the plaintiff should provide the First Defendant with reasonably sufficient information to enable it to assess the quantum of the claim and to make a reasonable tender or payment into court which, upon acceptance, will bring the litigation to an end.¹⁴

¹⁴ *Durban Picture Frame Co (Pty) Ltd v Jeena & Another* 1976 (1) SA 329 (D&CLD) 333H-334B.

[26] In its POC, the Plaintiff fails to prove that it has suffered any damage and has failed to set out the quantum thereof or provide any proof, to enable the First Defendant to reasonably assess the quantum thereof.

Conclusion

[27] It is so that the POC do not contain sufficient averments that would justify the extension of the aquillian liability to cover a claim for pure economic loss for breach of the alleged legal duty as alleged by the Plaintiff.

[28] Whilst it is so that certain facts are plainly matters for evidence, I disagree that what Plaintiff has pleaded is sufficient, as material facts have not been pleaded sufficiently to sustain a cause of action and in the circumstances fails to disclose vital *facta probanda* to sustain a cause of action against the First Defendant.

[29] In instances where substantial exceptions against POC are upheld on the basis that the pleadings concerned are bad in law, an invariable rule of practice has been adopted by our Courts, to order that the pleadings be set aside to allow the party whose pleadings is struck down an opportunity to amend.¹⁵ The First Defendant, from the wording of the exception, shows no indication that the First Defendant requested Plaintiff to consider an amendment.

[30] As for costs, this was not a complex matter warranting an award of fees higher than scale A.

[31] In the circumstances, having duly considered that arguments it is ordered that:

¹⁵ See, for instance, *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 602C-D – as well as *Ocean Echo Prop 327 CC v Old Mutual Life Assurance Co (SA) Ltd* 2018 (3) SA 405 (SCA) para [8]; *Constantaras v BCE Foodservices Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA) paras [30] – [31]; *Trope and Others v South African Reserve Bank* 1993 (3) SA 264 (A) at 269G-I.

- a. The First Defendant's exception is upheld.
- b. The Plaintiff is given leave to deliver its amended Particulars of Claim within 10 (ten) days from the date of this order.
- c. The Plaintiff is to pay the cost of this exception, such costs to include the costs of counsel where so employed on scale A.

R K PARKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for Plaintiff : Adv. CJ Quinn

Instructing Attorney : Rianna Willemse Solms Inc. – Ms R Solms
c/o De Klerk en Van Gend Inc

Counsel for First Defendant : Adv. PJ Rabie

Instructing Attorney : Bornman & Hayward Inc – Mr JH Meyer
c/o Walkers Inc