

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2023-045953

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

13 MARCH 2025

DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED

Excipient / Defendant

and

ELSON JOSEPH MASHABA

First Respondent / First Plaintiff

NOMUSA DOLLY NKASA

Second Respondent / Second Plaintiff

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 13 March 2025.

DE OLIVEIRA, AJ

- [1] The plaintiffs seek to hold the defendant liable for damages allegedly sustained by the plaintiffs as a result of (i) the defendant selling to the first plaintiff, on instalment sale, a motor vehicle which the defendant had previously reported to the South African Police Services as being stolen, (ii) issuing a letter to the first plaintiff authorising him to travel across the South African / Mozambican border and (iii) failing to withdraw the report of theft after either selling the vehicle to the first plaintiff or issuing the aforesaid letter to him.
- [2] The plaintiffs allege that, as result of the aforesaid,¹ they were arrested by the SAPS when attempting to travel across the South African / Mozambican border, and that notwithstanding the presentation of the aforesaid permission letter, they were detained in “dreadful”, “traumatizing” and “appalling” conditions.
- [3] The plaintiffs claim to have suffered damages in the sums of R300 000.00 and R210 000.00 respectively, which allegedly comprise “legal expenses”, “medical expenses” and general damages.
- [4] The defendant excepts to the plaintiffs’ particulars of claim on three grounds:
- (a) First, the defendant contends that there are no or insufficient allegations in the particulars of claim upon which wrongfulness can be established or inferred. I will refer to this as the “wrongfulness exception”.
 - (b) Secondly, the defendant contends that there are insufficient facts pleaded to establish causation (at least legal causation) or upon which it causation can be established at trial. I will refer to this as the “causation exception”.

¹ This reference to causation is on a charitable reading of the particulars of claim.

- (c) Lastly, the defendant contends that there are insufficient *facta probanda* pleaded in the particulars of claim to support the allegations of damages allegedly suffered, in particular in the categories alluded to in paragraph [3] above.

[5] The defendant's exception is taken on the basis that the particulars of claim lack the averments necessary to sustain a cause of action.

The Applicable Legal Principles

[6] The principles applicable to the determination of exception proceedings are trite. A brief summary will suffice.

[7] An exception is a legal objection to pleadings.² It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be.³

[8] An exception should be dealt with sensibly. It serves as a useful mechanism for the expeditious disposal of cases with no legal merit. An over-technical approach to an exception destroys its utility.⁴ The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party

² *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) at [1].

³ See generally D E Van Loggerenberg *Erasmus: Superior Court Practice* (Jutastat E-Publication) at RS25, 2024, D1 Rule 23-2 and the authorities referred to in footnote 3 therein.

⁴ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 (1) SA 461 (SCA) at [3].

against an embarrassment which is so serious as to merit the costs even of an exception.⁵

[9] For an exception to succeed, the particulars must be excipiable on every reasonable interpretation or construction,⁶ considering the pleading as a whole.⁷ The exception should dispose of the case, in whole or in part, and avoid the leading of unnecessary evidence at trial.⁸

[10] To succeed in an exception for failure to disclose a cause of action, a defendant must show that no possible evidence led on the particulars of claim could disclose a cause of action.⁹

The Wrongfulness Exception

[11] It is trite to state that the *actio legis Aquiliae* enables a plaintiff to recover patrimonial loss (including purely economic loss) suffered through a wrongful and negligent (or intention) act or omission.¹⁰ A plaintiff is required to allege and prove each element in order to sustain a claim for damages.

[12] The first principle of the law of delict is that everyone has to bear the loss he suffers.¹¹ Aquilian liability provides for an exception. To be liable for the loss of

⁵ *Erasmus* (note 3 above) at RS25, 2024, D1 Rule 23-5 and the authorities referred to in footnote 14 therein.

⁶ *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893.

⁷ *Nel and Others NNO v McArthur* 2003 (4) SA 142 (T) at 149F.

⁸ *Barclays' National Bank Ltd v Thompson* 1989 (1) SA 547 (A) 553.

⁹ *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) 526.

¹⁰ As articulated by LTC Harms and M R Townsend in *Amler's Pleadings* (10th Edition) at 159.

¹¹ *Telematrix* (note 3 above) at [12].

someone else, the act or omission of the defendant must have been wrongful, negligent (or intentional) and caused the loss.¹²

[13] Where the negligent conduct takes the form of a positive act which causes physical harm, such conduct is *prima facie* wrongful. Liability for the negligent causation of pure economic loss, on the other hand, is more troublesome.¹³ “Pure economic loss” connotes loss that does not arise directly from damage to the plaintiff’s person or property, but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses, or the diminution in the value of property.¹⁴ *In casu*, the plaintiffs’ claim is a claim for pure economic loss.

[14] Conduct which takes the form of an omission, or which results in pure economic loss, is not *prima facie* wrongful. In such cases, it becomes necessary to determine whether there is a legal duty owed by the defendant to the plaintiff to act without negligence,¹⁵ or as the inquiry has also been formulated, whether, if the defendant was negligent, it would be reasonable to impose liability on him for such negligence. This, in turn, is a matter for judicial determination, involving criteria of reasonableness, the legal convictions of the community, policy and where appropriate, constitutional norms. Precedent may also play a role.¹⁶

[15] In *Kantey & Templer (Pty) Ltd and Another v Van Zyl NO*,¹⁷ a Full Bench of the Cape Provincial Division (as it was then known) put it thus (an appeal against the decision was subsequently dismissed by the Supreme Court of Appeal):¹⁸

¹² *Ibid.*

¹³ *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at [10] and the authorities referred to therein.

¹⁴ *Id* at [1].

¹⁵ See for example *Peterson NO and Another NNO v Absa Bank Ltd* 2011 (5) SA 484 (GNP) at [4].

¹⁶ *MV MSC Spain; Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA) at [14].

¹⁷ 2007 (1) SA 610 (C) at [1].

¹⁸ *Two Oceans Aquarium Trust* (note 13 above).

“...where the conduct constitutes negligent omissions or negligent misrepresentations causing pure economic loss, wrongfulness depends on a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. When a court is requested to accept the existence of a legal duty in the absence of any precedent, as in the instant case, it is in reality asked to extend delictual liability to a situation where none existed before. The crucial question in such event is whether there are any considerations of public or legal policy which require that extension. In answering the latter question, what is called for is not an intuitive reaction to a collection of arbitrary factors, but rather a balancing against one another of identifiable norms.”

[16] Whilst reference to a “legal duty” as a criterion for wrongfulness can lead one astray,¹⁹ for such a legal duty must not be confused with the “duty of care” in English Law, which straddles the elements of wrongfulness and negligence,²⁰ the “legal duty” in the present context must be a “legal duty not to act negligently”, for without such duty, a defendant enjoys immunity against liability for negligent conduct, i.e., the question of fault does not arise.²¹ To put it differently:²²

“Perhaps it would have been better, in the context of wrongfulness, to have referred to a 'legal duty not to be negligent', thereby clarifying that the question being asked is whether in the particular circumstances negligent conduct is actionable, instead of just to a 'legal duty'. I say this in passing and without any intention to change settled terminology. As long as we know what we are talking about. When a court is requested in the present context to accept the existence of a 'legal duty', in the absence of any precedent, it is in reality asked to extend delictual liability to a situation where none existed before. The crucial question in that event is whether there are any considerations of public or legal policy which require that extension.” (Emphasis added)

¹⁹ *Telematrix* (note 3 above) at [14].

²⁰ *Two Oceans Aquarium Trust* (note 13 above) at [11].

²¹ *Id* at [12].

²² *Id* at [11] and [12].

[17] Our law is reluctant to recognise pure economic loss claims, especially where such claims constitute an extension of the law of delict.²³ This is because if claims are too freely recognised, there is the risk of liability in an indeterminate amount for an indeterminate time to an indeterminate class.²⁴

[18] It is with the above in mind that I turn to determine the wrongfulness exception.

[19] Our courts have often determined matters of pure economic loss and, *inter alia*, the requisite element of wrongfulness, on exception.²⁵ In *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others*,²⁶ for example, the Supreme Court of Appeal stated that:²⁷

“In this case, as in all cases in which a plaintiff claims damages for pure economic loss, it is incumbent that the facts upon which such a plaintiff relies for its contention that the loss was wrongfully caused be pleaded.” (Emphasis added)

[20] In *Meechan and Maguwada*,²⁸ not only were the courts prepared to determine wrongfulness on exception, they were disinclined to extend delictual liability based on the pleaded cases of the plaintiffs, i.e., the exceptions were upheld. As this Court held in *Meechan*:²⁹

²³ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC).

²⁴ *Id* at [24].

²⁵ In *Telematrix* (note 3 above) at [22], for example, the Supreme Court of Appeal noted that courts have often determined wrongfulness on exception. Our courts are increasingly inclined to deciding pure economic loss claims (and in particular the delictual element of wrongfulness) on exception - see in this regard *Meechan v VGA Chartered Accountants Partnership* 2020 JDR 0365 (GJ); *Maguwada v KPMG Services (Pty) Limited* SA 2021 JDR 0920 (GP). Compare *Peterson NO and Another NNO v Absa Bank Ltd* 2011 (5) SA 484 (GNP) and *Commissioner, South African Revenue Service, and Another v Absa Bank Ltd and Another* 2003 (2) SA 96 (W).

²⁶ 2020 (5) SA 419 (SCA).

²⁷ At [64].

²⁸ Note 25 above.

²⁹ *Meechan* (note 25 above) at paras 35 - 36.

“Whether the allegations in the particulars of claim are sufficient or insufficient to establish the element of wrongfulness is a legal question which is eminently suitable to be decided at exception stage, more about that later. The allegations in the particulars of claim ‘represent the high-watermark of the factual basis on which the court will be required to decide the question. Therefore, if those facts do not *prima facie* support the legal duty contended for, there is no reason why the exception should not succeed.’

Wrongfulness is quintessentially a matter capable of decision on exception. The notional possibility that evidence of surrounding circumstances may influence the issue should not operate to debar the court from deciding the issue of wrongfulness on exception.”

[21] *In casu*, not only is there no reference in the particulars of claim to wrongfulness, or even to a legal duty or some other duty of care on the part of the defendant, there are in my view no facts pleaded from which wrongfulness can be inferred, and by implication upon which wrongfulness can be established at trial.

[22] Whilst the particulars of claim are replete with allegations pertaining to the defendant’s alleged negligence, these do not, in my view, support an arguable inference that the defendant’s alleged omission was wrongful. I find the example given by Harms JA in *Telematrix* to be most helpful:³⁰

“To formulate the issue in terms of a ‘duty of care’ may lead one astray. It cannot be doubted that the ASA owed a duty towards the plaintiff to consider and arrive at a decision without negligence, in a manner that was fair, justifiable and reasonable, and within the ambit of the complaint, but it does not follow that a failure to have done so created an obligation to compensate. To illustrate: there is obviously a duty - even a legal duty - on a judicial officer to adjudicate cases correctly and not to err negligently. That does not mean that a judicial officer who fails in the duty, because of negligence, acted wrongfully. Put in direct terms: can it be unlawful, in the sense that the wronged party is entitled to monetary compensation, for an incorrect judgment given negligently by a judicial officer, whether in exercising a discretion or making a value judgment, assessing the facts or in finding, interpreting or applying the appropriate legal principle? Public or legal policy considerations require that there should be no liability, ie, that the potential defendant

³⁰ *Telematrix* (note 3 above) at [14].

should be afforded immunity against a damages claim, even from third parties affected by the judgment.”

[23] *In casu*, the plaintiffs’ particulars of claim are clearly lacking in regard to the delictual element of wrongfulness and accordingly I find that there is merit in the defendant’s first exception.

The Causation Exception

[24] It is trite to state that a plaintiff must *allege* and prove a causal connection between the negligent act and the damages suffered.³¹

[25] Causation comprises a factual and a legal component. Factual causation relates to the question whether the act or omission caused or materially contributed to the harm. This is often formulated with reference to the “but for” test, i.e., but for X, would Y have occurred?

[26] Legal causation, on the other hand, operates so as to temper what may otherwise be the absurd consequences of applying only the “but for” test. It enquires into whether the wrongful act is sufficiently closely linked to the harm for liability to arise. Questions of remoteness, foreseeability and public policy play a role in determining legal causation.³²

[27] In the matter before me, the plaintiffs do, at a minimum, plead that, as a result of the defendant’s alleged failure to withdraw its report of theft at the time of selling the vehicle to the first plaintiff, or at the time of issuing the permission letter to

³¹ See for example *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC).

³² See for example *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700 - 701.

him, the plaintiffs suffered the damages alluded to above. In view of the applicable test, I am prepared to accept that this is sufficient for purposes of establishing factual causation.

[28] As far as legal causation is concerned, however, Mr. Alli, who appeared before me on behalf of the defendant, correctly pointed out that there is no causal link, at least without more, between the defendant's alleged conduct and the damages allegedly suffered. On their own pleaded version, for example, the permission letter did not have the effect of avoiding their arrest and detention, nor does it follow that the SAPS would not have arrested and detained the plaintiffs were it not for the defendant's report of theft. Differently put, we are not told that the SAPS are only under a duty to intervene in and investigate cases of theft that are reported, or that the withdrawal of the complaint would have resulted in the SAPS not arresting and detaining the plaintiffs (it may be, for example, and merely to illustrate, that the withdrawal of a complaint of theft does *not* result in the vehicle in question being flagged as stolen).

[29] I accordingly agree with Mr. Alli that there are insufficient facts pleaded upon which legal causation can, in due course, be established.

The Damages Exception

[30] Predominantly, the point is not taken by the defendant that the damages are not pleaded with sufficient clarity as is required in terms of rule 18(10) of the Uniform Rules of Court. For that, Mr. Alli correctly conceded, the defendant would have needed to act in terms of rule 30 or 23(1).

[31] The point, rather, and so far as I understood it, is that there are no or insufficient facts pleaded to support the categories of damages pleaded by the plaintiffs. To illustrate, whilst the first plaintiff claims, *inter alia*, damages in the sum of R40

000.00 for “travelling expenses”, nothing more than this is pleaded, i.e., there is no factual allegation, no *facta probanda* to support such an allegation.

[32] I put to Mr. Alli that, if the plaintiffs had not categorised their damages, the damages exception could not be taken. At most, the defendant would have been able to raise rule 30 or 23(1) proceedings to the extent that the damages were not sufficiently particularised. Whilst Mr. Alli did not concede that to be the case, I venture to say that he accepted as much.

[33] In my view, if a “no cause of action” exception could not be raised in relation to the globular damages amount, a “no cause of action” exception cannot be raised merely because the plaintiffs have gone further to categorise their damages. They are saying no more than that their globular damages are made up of various categories, rightly or wrongly. Having elected to take an exception on the basis that the particulars of claim lack the averments necessary to sustain a cause of action, as opposed to contending that the particulars of claim are vague and embarrassing or are not compliant with rule 18(10), the defendant I think will be constrained to obtain further particularity in relation to the damages in terms of rule 21.

[34] I accordingly find that there is no merit in the damages exception and I intend to dismiss it.

[35] Two final issues merit consideration. First, the defendant, if successful, seeks an order dismissing the plaintiffs’ claim *in toto*. I understood Mr. Alli to submit that this order should follow because I can, and should find that wrongfulness can *never* be established in a case like this. I quite obviously cannot make such a finding on the material before me. I have done no more than to find that the particulars of claim, as they are currently pleaded, lack the averments necessary

to establish that the defendant's conduct was wrongful. I accordingly decline to dismiss the plaintiffs' claim and I intend to grant the plaintiffs leave to amend their particulars of claim, which I point is the invariable practice of the courts.³³

[36] Secondly, whilst both the plaintiffs and the defendant sought costs on an attorney and client scale, I can see no reason why costs on that scale are warranted. In the end, Mr. Alli submitted to me that costs on Scale B were appropriate, and Mr. Baloyi, who appeared before on behalf of the plaintiffs, agreed. I can so no reason why costs on that Scale should not be ordered. In view of the fact that the defendant was, save for the damages exception, successful, costs ought to be granted in its favour.

Order

[37] In the circumstances, I make the following order:

- (a) The defendant's first and second exception are upheld.
- (b) The defendant's third exception is dismissed.
- (c) The plaintiffs are granted leave to amend their particulars of claim within 15 (fifteen) days of the granting hereof.
- (d) The plaintiffs shall pay the costs of the exception, such costs to include the costs of counsel on Scale B.



DE OLIVEIRA AJ

ACTING JUDGE OF THE HIGH COURT

³³ See for example *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at [79].

JOHANNESBURG

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