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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: 1803/2023

In the matter between:

JAN ZEELIE OLIVIER

Plaintiff/Respondent

and

TRANSNET SOC

Defendant/ Excipient

Heard on: 25 /10/2024

Delivered on: 17/01/2025

Summary: Pleading. Exception. Whether plaintiff's Particulars of Claim lack averments necessary to sustain a claim in delict.

ORDER

In the result the following order is made:

The exception is dismissed with costs.

JUDGMENT: EXCEPTION

MAMOSEBO ADJP

- [1] The excipient (defendant), Transnet SOC Limited, excepted to the plaintiff's particulars of claim on 31 October 2023 contending that they lack averments necessary to sustain an action. For convenience I refer to the parties as plaintiff and defendant.
- [2] Plaintiff is Jan Zeelie Olivier, a farmer acting in his capacity as a trustee of the Erich Olivier Trust (IT423/2002) who resides on the Remaining Portion of Farm R[...] No 5[...] in the district of Postmasburg, Northern Cape. On 22 September 2023 he issued summons against the defendant for damages in the amount of R566 797.00 allegedly caused by fire to the vegetation in the railway reserve on the farm, which ignited on at least two spots, originating from overheated metal fragments, and/or brake blocks and/or mechanical fragments and/or sparks and/or hot carbon particles being deposited from a locomotive and/or wagons and/or equipment operated negligently by the defendant or its employees acting in the course and within the scope of their employment.
- [3] The grounds upon which the defendant relies for its contention that the particulars lack averments essential to sustain a cause of action are: First, that the plaintiff has failed to plead the nexus between the defendant's alleged conduct and damages suffered; secondly, that the

plaintiff has failed to plead wrongfulness and fault on the part of the defendant with sufficient particularity; and further failed to plead with sufficient particularity the geographical proximity between the railway reserve and the location where the purported hot carbon particulars were deposited as well as the basis of the quantum for damages to determine the extent of the damages the trust allegedly suffered.

- [4] Plaintiff served and filed a Notice to oppose the exception on 30 November 2023 together with a Notice of intention to amend the particulars of claim in terms of Rule 28 of the Uniform Rules of Court affording the defendant 10 days within which to object, failing which the amendment was to be effected. This attracted a letter from Majang Attorneys, the instructing attorneys for the defendant, dated 1 December 2023 requesting the withdrawal of such a notice as an irregular step in the proceedings. Oosthuizen Sweetnam Reitz & Fourie responded to that letter on 4 December 2023 and said in relevant part:

- ‘3. It is our interpretation of the rules that the plaintiff is within the rules of court to file his notice to amend regardless of the exception raised.
- 4. Taking above into consideration we are not going to withdraw the plaintiff’s notice to amend and will oppose any application brought against the plaintiff with regards thereto.’

- [5] In the plaintiff’s notice of intention to amend dated 30 November 2023 the following relief is sought:

‘Kindly take notice that the plaintiff intends amending its particulars of claim as follows:

- 1. By deletion of paragraph 11 and replacing it with the following:

Damage

As a result of the spread of the veld fire onto the farm R[...] the Erich Olivier Trust suffered damages in the total amount of R566 797.00 as set out in the quantum calculation appended hereto and marked as annexure A.”

2. By accordingly appending the Quantum Evaluation of Agri Assessors dated 22 October 2021, annexed hereto, to the Particulars of Claim as Annexure A.

Take notice further that unless objection to the proposed amendment is made in writing within 10 (Ten) days of the date of receipt hereof, the Particulars of Claim shall be amended accordingly.

- [6] This is what the plaintiff has pleaded in the original para 11 of the particulars:

‘Damage

As a result of the spread of the fire (the veld fires) onto R[...], the Elrich Olivier Trust has suffered damages in the total amount of R566 797. 00 which amount is calculated as follows:

11.1 Damage to natural grazing vegetation	R258 687.00
11.2 Damage to natural trees	R160 000.00
11.3 Damage to infrastructure	R114 945.00
11.4 Supplements feeding	<u>R 33 165.00</u>
TOTAL	R566 797.00’

- [7] On 14 December 2023 the defendant filed a notice in terms of Rule 30 of the Uniform Rules requesting the plaintiff to withdraw the notice to amend the particulars. Counsel for the plaintiff, Mr Knoetze SC, refrained from arguing the point and only confined himself to the exception. The action by the plaintiff’s attorneys pertaining to this irregular step was misconceived because an exception was already taken and had to be adjudicated upon first. Plaintiff cannot on the one hand oppose the exception and on the other seek to amend the particulars.

Furthermore, leave was not granted to effect such changes as the ruling on the exception taken was still pending.

[8] Where an exception is taken, the court must look at the pleadings excepted to as it intersects with the facts agreed to by the parties, if any. No facts outside those stated in the pleadings may be brought into issue – except in the case of inconsistency.¹

[9] I align myself with the pronouncement by Maier-Fawley J in *Merb (Pty) Ltd and Others v Matthews and Others*²:

‘Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (facta probanda). The facta probanda necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the facta probantia) but every fact which is necessary to be proved.’

[10] As enunciated by Hoexter JA in *Dharumpal Transport (Pty) Ltd v Dharumpal*³ the main purpose of the exception that a declaration discloses no cause of action is to avoid the leading of unnecessary evidence.

[11] The plaintiff’s case is based on the *actio legis aquiliae* for the recovery of his patrimonial loss, which may include pure economic loss, suffered through the wrongful and negligent act of the defendant. It is settled that

¹ Erasmus, *Superior Court Practice*, Second Edition, Volume 2 Juta, [Service 21, 2023] D1-295

² *Merb (Pty) Ltd and Others v Matthews and Others* (2020/15069) [2021] ZAGPJHC 693 (16 November 2021) para 12

³ *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 706D – E

for the plaintiff to succeed in his claim for delictual liability, he must allege and prove these elements: (i) the harm that was sustained; (ii) the wrongful conduct on the part of the defendant; (iii) the causal connection between the conduct and the harm done to the plaintiff; and (iv) fault or blameworthiness on the part of the defendant.

- [12] The defendant's first ground is that plaintiff (Olivier) has failed to plead the nexus between the purported conduct of the defendant and the damages allegedly suffered which lacks the necessary averments to sustain an action. In this respect the answer lies in the following principle propounded by Corbett JA in *Minister of Police v Skosana*⁴ in respect of causation:

'Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to (see *Silva's Fishing Corporation (Pty.) Ltd. v Maweza*, 1957 (2) SA 256 (AD) at p. 264; *Kakamas Bestuusraad v Louw*, 1960 (2) SA 202 (AD) at p. 222) the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part. The distinction between these two enquiries is well explained by Prof. Fleming, *The Law of Torts*, 4th ed., p. 169, as follows:

"...The first involves what may broadly be called the 'factual' question whether the relation between the defendant's breach of duty and the plaintiff's injury is one of cause and effect in accordance with 'scientific' or 'objective' notions of physical sequence. If such a causal relation does not exist, that puts an end to the plaintiff's case, because no policy can be strong enough to

⁴ *Minister of Police v Skosana* 1977 (1) SA 31 (AD) at 34E – 35A

warrant the imposition of liability for loss to which the defendant's conduct has not in fact contributed.

The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. There must be a reasonable connection between the harm threatened and the harm done. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. The task is to select those factors which are of sufficient significance to justify the imposition of liability and to draw a boundary along the line of consequences beyond which the injured party must either shoulder the loss himself or seek reparation from another source.”

See also *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA) at para 55 and *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) at para 38.

- [13] The plaintiff's particulars as they stand and in as far as the nexus is concerned the following was pleaded: that the Elrich Olivier Trust is the owner of the farm Roscoe; Transnet owns or is in control of the railway reserve in the vicinity of Roscoe; on 30 September 2020 vegetation in the railway reserve on Roscoe was ignited on at least two spots; the fire originated from the metal fragments and/or brake blocks and/or mechanical fragments and/or sparks and/or carbon particles deposited from the locomotive and/or wagons and/or equipment operated by Transnet; the fire spread within the farm Roscoe from the points of ignition and caused damage to natural grazing vegetation, trees and infrastructure.

- [14] The defendant also places wrongfulness in issue. However, this is what appears at para 4 of the plaintiff's particulars.

‘The defendant’s legal duty

At all times material hereto, the defendant:

- 4.1 was the owner of, or alternatively, in control of the railway reserve and railway tracks in the vicinity of Roscoe;
- 4.2 was responsible for the operation and maintenance of the locomotives wagons and equipment which travelled through the sites of ignition.’

[15] I am not persuaded that the defendant’s submission in the above regard has substance. In *AB Ventures Ltd v Siemens Ltd*⁵ Nugent JA remarked as follows:

‘...Thus as early as *Trust Bank Rumpff* JA said that when 'legal duty' (wrongfulness) is under consideration 'policy considerations' come into play. He likened it to the 'duty concept' in the English tort of negligence, which Millner Negligence in Modern Law described as 'a device of judicial control over the area of actionable negligence on grounds of policy'.

[16] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*⁶ Harms JA made these insightful pronouncements pertaining to determining wrongfulness:

‘[13] When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not prima facie wrongful ('unlawful' is the synonym and is less of a euphemism) and that more is needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered (and not the converse as Goldstone J once implied unless it is a case of prima facie wrongfulness, such as where the loss was due to damage caused to the person or property of the plaintiff). In other words, conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the

⁵ *AB Ventures Ltd v Siemens Ltd* 2011 (4) SA 614 (SCA) para 8

⁶ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 13

loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful, something akin to and perhaps derived from the modern Dutch test “in strijd ...met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt” (contrary to what is acceptable in social relations according to unwritten law).’

It is my view, therefore, that the plaintiff has pleaded wrongfulness with sufficient particularity to enable the defendant to plead thereto.

- [17] The defendant further placed fault in issue contending that plaintiff has failed to plead fault on the part of the defendant as one of the elements of delict. In *Kruger v Coetzee*⁷ Holmes JA authoritatively set out the principle in these terms:

‘For the purposes of liability culpa arises if -

- (a) a *diligens paterfamilias* in the position of the defendant -
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.’

See also *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) para 31.

- [18] The question that will have to be established in due course in evidence is whether a *diligens paterfamilias* in the position of the defendant foresaw the harm and took reasonable steps to prevent it. This, therefore, means that the contention that fault was not pleaded with sufficient particularity to enable the defendant to plead cannot be sustained.

⁷ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E – G

- [19] In his written submissions Mr Maodi argued that the manner in which the plaintiff has set out the damages does not comply with Rule 18(10) since it does not enable the defendant to reasonably assess the quantum and it would be prejudiced if it were to be forced to plead to the particulars as pleaded. Counsel relied on *National Director of Public Prosecutions v Phillips and Others*⁸ where Heher J stated:

‘Pleadings must be lucid, logical and intelligible. A litigant must plead his cause of action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet. A litigant who fails to do so may not thereafter advance a contention of law or fact if its determination may depend on evidence which his opponent has failed to place before the court because he was not sufficiently alerted to its relevance.’

Regard being had to the original para 11 in respect of the damages claimed, without even having regard to its amendment, I am of the view that it is sufficient to enable the defendant to plead.

- [20] Transnet has further excepted to the alleged failure by the plaintiff to specify the geographical proximity between the railway reserve and the location where the purported hot carbon particles were deposited. The plaintiff’s response, correctly so, was that this contention does not form part of the elements of a delict that he has to establish in order to succeed in a delictual claim. This submission is fortified by the fact that geographical proximity is part of the evidential material to be led during the trial and does not form part of the elements of a delictual claim that the plaintiff must allege and prove. As Harms JA cautioned in *Telematrix*⁹:

⁸ *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) at 106E – H

⁹ *Ibid* para 3

‘Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that “cuts through the tissue of which the exception is compounded and exposes its vulnerability.”’

[21] The plaintiff’s particulars consequently contain averments necessary to sustain a claim in delict. It follows that this exception should accordingly fail.

[22] In the result the following order is made:

The exception is dismissed with costs.

**MC MAMOSEBO
ACTING DEPUTY JUDGE PRESIDENT
NORTHERN CAPE DIVISION**

For the plaintiff/respondent	Adv. B Knoetze SC
Instructed by:	Oosthuizen Sweetnam Reitz & Fourie Attorneys c/o Elliot Maris Attorneys

For the defendant/excipient:	Adv. W Maodi
Instructed by:	Majang Inc Attorneys c/o Roux Welgemoed & Du Plooy Attorneys

