



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

JUDGMENT

Reportable

Case no: 22182/2024

In the matter between:

UPTOWN TRADING 803 (PTY) LTD

t/a WATERLOO PLUMBING

PLAINTIFF

and

CHRIS STUMKE QUANTITY SURVEYING

(PTY) LTD

FIRST DEFENDANT

TYRIS CONSTRUCTION (PTY) LTD

SECOND DEFENDANT

Coram: Morrissey AJ

Heard: 20 August 2025

Delivered: 27 November 2025

ORDER

The first defendant's exceptions are dismissed with costs, such costs to include the costs of counsel on scale C.

JUDGMENT

MORRISSEY AJ:

- [1] This matter concerns seven exceptions the first defendant (*"the QS"*) has raised in respect of the plaintiff's particulars of claim.
- [2] Those particulars of claim allege that the plaintiff concluded a sub-contract with the second defendant (*"the Contractor"*) to undertake plumbing work at a construction project for a certain fee. The sub-contract contained a term that made the Contractor's obligation to pay the plaintiff conditional upon it receiving payment from its employer (*"the Employer"*) under the principal building contract. The plaintiff described that as a *"pay when paid clause"*. I adopt that description in this judgment.

- [3] The particulars of claim go on to allege that at the time of concluding the sub-contract the defendants were aware that the Employer had not made any payments to the Contractor for several months; that there were significant financial difficulties and risks associated with the construction project; and that it was highly likely that the plaintiff would not be paid. I will refer to those facts collectively as “*the financial issues*”. The plaintiff says that, to the knowledge of the defendants, it was not and could not have been aware of the financial issues and that it concluded the sub-contract in ignorance of them. It says the pay when paid clause was inserted with the intention of “*shielding*” the defendants from the likely non-payment by the Employer.
- [4] While the QS is not a party to the sub-contract, it is alleged that it was prepared on its instructions “... *acting on behalf of both [the Employer] and [the Contractor]*”. The plaintiff alleges that the Contractor and the QS, being the main contractor and the quantity surveyor for the construction project respectively, were obliged to disclose to the plaintiff the “*special knowledge*” they had concerning the financial issues prior to the sub-contract being concluded. The plaintiff says that the defendants’ non-compliance with their disclosure obligations caused it to suffer damages representing the value of the work it did under the sub-contract and for which it has not been paid, a sum of approximately R1.4 million.
- [5] There was consensus between the parties regarding the approach to be adopted at the exception stage. They accepted that I am required to

approach the matter on the basis that the allegations in the particulars of claim will be established at the trial and that I must construe them benevolently, in the sense that they must be excipiable on every reasonable interpretation that can be attributed to them before an exception will be upheld.¹

- [6] Insofar as the QS excepted on the basis that the particulars were vague and embarrassing (all exceptions were advanced on the basis that the particulars of claim failed to disclose a cause of action or were vague and embarrassing), the vagary must be such that the QS was seriously prejudiced, in the sense that it was left guessing as to the case it had to meet.²

The first six exceptions

- [7] I consider that the first six exceptions can be disposed of in relatively short order.
- [8] The first exception was that only a portion of the sub-contract was attached to the particulars of claim. I do not consider that was a basis to except to a delictual claim based on a pre-contractual non-disclosure, as opposed to a claim based on the contract it is alleged to have induced.
- [9] In my view it was adequate for the plaintiff to allege that the contract contained the pay when paid clause and to attach the relevant portion of the agreement where it appeared. I mention that the plaintiff did in

¹ *Living's Hands (Pty) Ltd and Another v Ditz and Others* 2013 (3) SA 368 (GSJ) at [15].

² *Trope v South African Reserve Bank and Another* 1992 (3) SA 208 (T) at 211B-E.

fact attach the entire agreement, and the objection by the QS was that it did not attach a copy of another document that it incorporated by reference.

[10] The second exception is that there is no allegation in the particulars of claim that the Contractor has not been paid by the plaintiff. The reference to the plaintiff is obviously intended to be a reference to the Employer. The point the QS advances is that if the Employer has paid the Contractor, then the existence of the pay when paid clause has no causal connection to the plaintiff's loss, and it must simply sue the Contractor to perform under the sub-contract.

[11] It is so that there is no express allegation that the Contractor has resisted paying the plaintiff on reliance on the pay when paid clause, as opposed to some other reason. The plaintiff does however allege that the Employer is in such serious financial straits that there is no prospect of it being paid by the Contractor. Reading the particulars of claim as a whole, I think it is sufficiently clear for purposes of considering the exceptions that the plaintiff is contending that: (i) it would not have agreed to the pay when paid clause had the financial issues been disclosed to it; and (ii) the Contractor has not been paid by the Employer, and is relying on the pay when paid clause not to pay the plaintiff.

[12] The third exception is a denial of the QS's involvement in the drafting of the sub-contract, in particular, the pay when paid clause. The point advanced is that there was thus no causal connection between any

non-disclosure by the QS and the existence of the pay when paid clause.

[13] I also do not consider that that exception can be sustained. In my view, the particulars of claim are sufficiently widely worded to advance a case that the non-disclosure of material information by the QS resulted in the plaintiff agreeing to the pay when paid clause, something it would not have done had the relevant disclosure been made. It thus matters not whether the QS was involved in the drafting or negotiation of the sub-contract, or the pay when paid clause. The material allegation is the non-disclosure of the financial issues.

[14] In any event, the plaintiff expressly avers that the defendants inserted the pay when paid clause into the sub-contract. I must accept that assertion for the purposes of determining the exception. If the QS wishes to challenge it, it may do so in its plea and then by leading evidence to that effect at the trial.

[15] The fourth exception is that the sub-contract contains a no-representations clause. The point advanced is that the plaintiff is precluded by that clause from setting up a case based on negligent misrepresentations.

[16] The difficulty I have with that exception is twofold. First, the QS was not a party to the sub-contract, and I thus consider it is precluded from relying on its terms to resist the claim pursued against it. Secondly, the plaintiff advances claims in both fraud and negligence. Even if the claim in negligence could be excepted to, in my view doing so

would not serve to substantially curtail the proceedings, that being the principal practical purpose of exception proceedings.³

[17] The fifth exception is that the plaintiff has not pleaded that it complied with certain obligations that were a precondition to it receiving any payment under the sub-contract. Those requirements included matters such as furnishing tax clearance certificates, confirmation of banking details and the like. In a sense this exception is similar to the second exception, in that it contends that the plaintiff has not ruled out reasons for its non-payment other than the pay when paid clause.

[18] While the particulars of claim could have been more clearly drafted to make it plain that the only reason the plaintiff had not been paid was because the Contractor was able to rely on the pay when paid clause, I think that is sufficiently clear from the pleading as a whole to resist a challenge at the exception stage.

[19] The sixth exception is like the fourth in that it relies on a clause in the sub-contract, namely, an arbitration clause.

[20] In my view that exception is misplaced for the same reason as the fourth exception: While the Contractor might be able to rely on it as a party to the sub-contract, the QS is not. I would also add that because resistance to a claim based on an arbitration clause involves an allegation of material additional to that appearing in the particulars of

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

claim, such an objection should properly be raised by way of a special plea, not an exception.

[21] For these reasons the first six exceptions must be dismissed.

The seventh exception

[22] The seventh exception was raised subsequently to the first six. It advances the objection that the particulars of claim do not establish a cause of action against the QS because the non-disclosure that the plaintiff says caused its loss was not wrongful. Stated differently, the QS says that it was under no legal obligation to disclose the financial issues to the plaintiff and that it is thus not liable to the plaintiff for any loss it may have suffered resulting from that non-disclosure. I turn now to a consideration of that issue.

[23] The plaintiff seeks delictual damages for pure economic loss caused by an omission (in this case, a failure to speak). Causing another pure economic loss (that is loss other than harm to a plaintiff's person or patrimony) is not *prima facie* wrongful.⁴ Nor is harm caused by an omission.⁵ In order for the plaintiff to succeed with its claim it will need to establish facts supporting the conclusion of wrongfulness it alleges.

[24] At its highest level, wrongfulness will be present when the legal convictions of the community conclude that it is reasonable for certain

⁴ *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) at [21].

⁵ *Minister of Law and Order v Kadir* 1995 (1) SA 303 (AD) at 317C-F.

acts or omissions to be visited with a legally enforceable award of damages.⁶

- [25] What the legal convictions of the community require in a given case is often contentious. As stated, positive conduct that causes damage to the patrimony of another is *prima facie* wrongful. All that means is that, on the face of it, the legal convictions of the community consider that such conduct is wrongful and that the harm-causing party should compensate the harmed party.
- [26] Such a *prima facie* conclusion on wrongfulness is capable of being rebutted. For example, the defendant may have acted with the consent of the owner of the damaged property, or in circumstances that necessitated the damage. Permitting those reasons to excuse the harm-causing party from compensating the injured party is because the legal convictions of the community consider that no remedy should lie in those circumstances.
- [27] Questions of wrongfulness are thus an expression of legal policy. Given the scope, complexity and richness of human interaction, questions of wrongfulness may be fraught with difficulty. What is important is that wrongfulness is not the same as morality; and that its determination must be founded on identifiable factors that accord with constitutional norms, as opposed to an arbitrary or purely emotive response to the facts of a given case.⁷

⁶ *ZA v Smith* 2015 (3) SA 574 (SCA) at [15]-[16].

⁷ *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at [12].

- [28] Whether there is a duty to speak in a pre-contractual setting is a situation that often involves difficult questions of wrongfulness. In my view, much of that difficulty arises because of the competing policy considerations relevant to the wrongfulness enquiry that tend to arise in such cases.
- [29] On the one hand there is the fact that parties to a contractual negotiation are often in a form of a contest. In such a case, each party is trying to secure the best possible outcome for themselves, even if doing so is at the expense of the other. Neither party expects any assistance from the other, and will typically receive even positive representations from the other side with a healthy dose of cynicism. Whatever one may think of negotiating in that way from a moral perspective, it is an accepted commercial reality. In my view it is a factor militating against a duty to speak. Indeed, it is a factor that may justify parties intentionally withholding material information from each other.
- [30] On the other hand, not every negotiation is a zero-sum game. It may be that there is some pre-existing relationship between the parties or other circumstances present that creates a reasonable or legally justifiable belief that they are co-operating to conclude a fair deal. In such a case one party might be required to disclose facts to the other, even if they are adverse to its negotiating position.⁸
- [31] Determining into which of the above two scenarios a particular case falls may be a difficult exercise. Even hostile negotiations can be

⁸ *Hulett and Others v Hulett* 1992 (4) SA 291 (AD) at 311D-E;

conducted in a civil manner, and that civility may create an impression that the parties contemplated a fair deal situation as opposed to a zero-sum game. Or it may emerge that the negotiation falls somewhere between those extremes, which may have an impact on what the parties could justifiably expect from each other by way of disclosure. It might also emerge that the parties were not on the same page, with one considering they were negotiating selflessly and the other considering they were negotiating selfishly, which would in turn require a determination on which position was more acceptable in the circumstances and based on the evidence available.

- [32] What is important for present purposes is that issues such as the nature of the negotiation and the relationship(s) between parties have a bearing on whether a pre-contractual non-disclosure is wrongful.
- [33] The fact that one party is aware of material facts that the counterparty cannot access may also be a relevant factor in the wrongfulness enquiry.⁹ This policy consideration may to some extent be a reflection of those underlying the common law principles regarding latent defects in contracts of sale.
- [34] Very generally speaking, and without more, a seller must disclose latent defects and may not conceal patent ones with a view to concluding a sale. Part of the rationale underlying those principles may be that a seller is expected to have a far more detailed knowledge of the *merx* and its defects than a potential purchaser, and is thus

⁹ *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) at [5].

precluded from exploiting the latter's justifiable ignorance of those defects.

[35] That consideration must be contrasted with the general principle that a purchaser is not required to disclose latent attributes they are aware of in the object of the sale, even if they know the seller is ignorant of them.¹⁰ That may be permitted because a windfall for a buyer due to latent attributes is different from a loss caused by latent defects.¹¹ Or it may be that economic loss caused by a seller's ignorance of latent attributes does not justify a remedy at law because, as owner, they are assumed to know the *merx* better than anyone else.

[36] There are a number of reported cases that consider the question of a duty to speak in pre-contractual negotiations. Two that I have found to be particularly helpful in this case and that were referred to by both parties during argument are *Absa Bank Limited v Fouche*¹² and *McCann v Goodall Group Operations (Pty) Ltd*.¹³ I can do no better than to repeat the relevant *dicta* here.

[37] Per *Absa* (citations omitted):¹⁴

“The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context - a non-disclosure - have been synthesised into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he

¹⁰ *Meskin v Anglo-American Corporation of SA Ltd* 1968 (4) SA 793 (W) at 796D-E; *Speight v Glass & Another* 1961 (1) SA 778 (D&CLD) at 781H-782E; *Joseph v Parks* 1906 EDC 138 at 141.

¹¹ As suggested in *Christie's Law of Contract in South Africa* (8th ed) at 339.

¹² *Supra*.

¹³ 1995 (2) SA 718 (C).

¹⁴ *Supra* at [5].

knows about anything that may be material. That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie lawful. A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances'”

[38] Per McCann:¹⁵

From the foregoing exposition of the law the following principles emerge:

- (a) A negligent misrepresentation may give rise to delictual liability and to a claim for damages, provided the prerequisites for such liability are complied with.*
- (b) A negligent misrepresentation may be constituted by an omission, provided the defendant breaches a legal duty, established by policy considerations, to act positively in order to prevent the plaintiff's suffering loss.*
- (c) A negligent misrepresentation by way of an omission may occur in the form of a non-disclosure where there is a legal duty on the defendant to disclose some or other material fact to the plaintiff and he fails to do so.*
- (d) Silence or inaction as such cannot constitute a misrepresentation of any kind unless there is a duty to speak or act as aforesaid.*

Examples of a duty of this nature include the following:

¹⁵ *Supra* at 726A-G.

- (i) *A duty to disclose a material fact arises when the fact in question falls within the exclusive knowledge of the defendant and the plaintiff relies on the frank disclosure thereof in accordance with the legal convictions of the community.*
- (ii) *Such duty likewise arises if the defendant has knowledge of certain unusual characteristics relating to or circumstances surrounding the transaction in question and policy considerations require that the plaintiff be apprised thereof.*
- (iii) *Similarly there is a duty to make a full disclosure if a previous statement or representation of the defendant constitutes an incomplete or vague disclosure which requires to be supplemented or elucidated.*

These examples cannot be regarded as a numerus clausus of the occurrence of a duty to disclose, as may possibly be inferred from the authorities mentioned above. There may be any number of similar factual situations which could give rise to such duty.”

[39] As helpful as they are in identifying factors that may point to a failure to speak being wrongful, those *dicta* make it clear that those factors alone are not conclusive of the enquiry.

[40] In *Absa* the Supreme Court of Appeal stressed that in addition to one party having exclusive knowledge of material facts, a duty to speak would also need to be “... *mutually recognised by honest men in the circumstances*”. In my respectful view, this is a reference to the wrongfulness enquiry.

[41] Similarly, in *McCann* the Court identified “*exclusive knowledge*” and “*knowledge of unusual circumstances and characteristics*” as factors

that might suggest wrongfulness, but also indicated that wrongfulness would only be present if “*the legal convictions of the community*” or “*policy considerations*” demanded disclosure of the knowledge in question.

[42] I make these observations not as a criticism but because they confirm my view that the existence of a duty to speak in a pre-contractual setting may often turn on a fine analysis of the evidence of the particular case, including the nature of the negotiations, the nature of the contract being negotiated, the information available (and unavailable) to the parties, and the relationships between them (and possibly others).

[43] Turning to the case at hand, it is clear that the drafter of the particulars of claim was aware that the non-disclosure relied on was not *prima facie* wrongful, and that it was necessary to plead facts indicative of policy reasons that would support a finding of wrongfulness.

[44] To illustrate this I set out what is pleaded in paragraphs 9 and 10 of the particulars of claim:

“9. *The Plaintiff avers that:*

9.1. *The Defendants knew, or ought reasonably to have known, that the Plaintiff had no independent means of ascertaining the financial status of the Project of the payment issues with... [the Employer].*

9.2. *The information regarding the Project’s financial difficulties and the non-payment by ... [the Employer] was exclusively within the*

knowledge of the Defendants and/or ... [the Employer].

9.3. *The plaintiff, as a subcontractor, had no direct contractual relationship with ... [the Employer] and therefore no access to information about its financial status or payment history.*

9.4. *The Defendant's knew, or ought reasonably to have known, that the Plaintiff would rely on the implied representation that the Project was financially sound and that payments would be made in the ordinary course of business.*

9.5. *The Defendants, by virtue of their positions as Quantity Surveyors and Main Contractor respectively, had special knowledge of the Project's financial status and payment issues.*

9.6. *The Defendants knew, or ought reasonably to have known, that the information regarding the payment issues was material to the Plaintiff's decision to enter into the Agreement and to commence work on the Project.*

10. *In light of the above, the Defendants were under a legal and ethical duty to disclose to the plaintiff:*

10.1. *The fact that ...[the Employer] had not made any payments to the Second Defendant since February 2023;*

10.2. *The significant financial difficulties and risks associated with the Project;*

10.3. *The high likelihood that the Plaintiff would not receive timely payment, if at all, for work performed on the Project.*

- [45] It is manifest from the quoted text that heavy reliance is placed on the alleged exclusive knowledge the defendants had of facts material to the plaintiff's decision to agree to the pay when paid clause, and the plaintiff's inability to access that information. That is a factor tending towards wrongfulness, as identified in *Fouche* and *McCann* (I consider the reference to the "*ethical duty*" in paragraph 10 to be mistaken, on the basis that any such duty is at best indirectly relevant to the wrongfulness enquiry).
- [46] A benevolent reading of the cited passages also reveals that another factor is relied upon. In paragraph 9.4 it is alleged that there was an implied representation that the construction project was financially sound, and in paragraphs 9.3 and 9.5 reliance is placed on the roles the parties occupied in respect of the construction project (subcontractor, main contractor and quantity surveyor).
- [47] It is not entirely clear to me what the "*implied representation*" in paragraph 9.4 refers to, but I consider that on a reasonable interpretation of the particulars of claim it is a reference to sub-contract offered to the plaintiff.
- [48] What the plaintiff is thus saying, albeit in a roundabout way, is that the relationship between the parties as potential sub-contractor, main contractor and quantity surveyor was such that if the defendants knew that the construction project was not financially sound, they were obliged to notify the plaintiff of that fact, and that their failure to do so amounted to a tacit representation as to its financial soundness.

[49] *Mr De Wet*, who appeared for the QS, resisted the existence of such a duty of disclosure and implied representation. He submitted that there was no relationship between the QS and the plaintiff and that the QS assumed no responsibility for the plaintiff's affairs. He also pointed out that the QS was an agent of the Employer, and in that fiduciary position it would not be inclined to disclose information to the plaintiff about the Employer's financial means.

[50] In my view, those submissions have merit in the consideration of the wrongfulness enquiry. Fundamentally, the plaintiff's case is that the QS was legally obliged to furnish it with information that would assist it in its negotiation of the sub-contract with the Contractor, in particular, regarding its decision to agree to the pay when paid clause.

[51] Absent some form of relationship obliging the QS to advise the plaintiff, it may well be that its alleged non-disclosure was not wrongful. That would be all the more so if, as the plaintiff avers, the sub-contract was prepared on the QS's instructions on behalf of the Contractor and Employer.

[52] As the plaintiff has expressly pleaded, the pay when paid clause was to the Contractor's benefit. If the QS was acting on the Contractor's behalf, it would be unusual for it to be required to make disclosures to the plaintiff that would prejudice the Contractor's negotiating position. A finding that there was an obligation on the QS to disclose the financial issues in those circumstances could place the QS in a conflict of interest situation. In my view, such an unusual consequence militates against a finding of wrongfulness unless it

could also be shown that the Contractor was obliged to make the relevant disclosure and that the QS could be expected to have been aware of that obligation.

[53] Another consideration supporting an absence of wrongfulness is that even if the plaintiff did not know about the Contractor's financial situation, it knew that was something it was ignorant of. Being in that position the plaintiff could have protected itself from the "*known unknown*" by either seeking the removal of the pay when paid clause, the inclusion of some other stipulation to protect itself, or by declining to contract.¹⁶ I should mention that there is nothing in the particulars of claim to suggest that the plaintiff was unaware of the pay when paid clause when concluding the sub-contract, or that it had no real option but to conclude it.

[54] On the other hand, and as I understood *Mr Tredoux* to argue on behalf of the plaintiff, both the relationship between the QS and the plaintiff and the role the QS played in the negotiation served to encumber it with the duty of disclosure alleged. *Mr Tredoux* also emphasised the plaintiff's allegation that the defendants were in possession of material information that they knew the plaintiff did not have and could not access.

[55] Although neither of the parties referred me to any cases on the issue, it seems to me that as a matter of principle that the relationships between parties to a construction project may be relevant to questions

¹⁶ Compare *Cape Empowerment Trust*, *supra* at [28].

of wrongfulness regarding delictual claims advanced between them, be it in respect of pre-contractual non-disclosures or other omissions.

[56] For example, it may well be that on facts of a given case the parties involved in a construction project justifiably considered each other to be teammates working towards a common goal and who would look out for each other when working on the project. The existence and scope of the support that could be expected would depend on the unique facts of the case: In one project it might be that team members worked entirely independently and it was accepted that each of them was solely responsible for the tasks allocated to them. On another project (or part of it) it might be the case that there was a more collaborative approach, and an expectation that mistakes spotted by one team member would be communicated to the person responsible for them. To succeed with a claim would of course require all the other elements of a delictual claim to be established.

[57] In pursuing the seventh exception the QS asks me to resolve the issue of the wrongfulness of its conduct at this stage of the proceedings. The argument was essentially presented on the basis that the factors against a finding of wrongfulness outweigh those relied on by the plaintiff in favour of it.

[58] While it is so that in some cases wrongfulness can be determined in anticipation of a trial,¹⁷ I do not consider this to be such a case. As will be apparent from the preceding discussion, my difficulty with the seventh exception is that I do not consider that the factors relevant to

¹⁷ *Telematrix*, *supra* at [15]-[16].

the wrongfulness enquiry can be weighed without the benefit of any evidence led at the trial.

[59] While the starting position is that the non-disclosure was not wrongful, the plaintiff may be able to put up evidence establishing that the circumstances of the negotiation or the relationship between the QS were such that it could justifiably expect disclosure is says was not made.

[60] I consider that this view is endorsed by the inconclusive way the statements of law in *Absa* and *McCann* are made: Those Courts had to beg the question of wrongfulness in the way I have explained above because, when it comes to pre-contractual non-disclosures, the outcome of a wrongfulness enquiry will typically depend on the *facta probantia* of the case in question.

[61] For those reasons the only material consideration at this stage is whether the plaintiff has pleaded factors that might establish a finding of wrongfulness on the part of the QS. I consider that it has done so by relying on the following two factors:

- a. The exclusive knowledge of the QS and the lack thereof on the part of the plaintiff (as contemplated in *Absa* and *McCann*).
- b. The relationships between the parties, including those between the QS and the plaintiff and the QS and the employer.

[62] Whether those considerations will ultimately prevail in establishing wrongfulness will depend on the evidence led at the trial, as considered with any other evidence supporting factors against a finding of wrongfulness. That cannot be decided at this stage, and for that reason I consider that the seventh exception must thus also be dismissed.

[63] As regards the question of costs, *Mr De Wet* submitted that if I were minded to dismiss the exceptions it would be appropriate for costs of the exception proceedings to stand over for later determination. I asked *Mr De Wet* to prepare supplementary submissions on that question, which he duly did. In those submissions he referred to a line of cases that warn a defendant to except to a defective claim advanced by a plaintiff, at the risk being mulcted in the costs of a trial if it does not.

[64] Despite those submissions, and while I appreciate that the QS may yet establish its wrongfulness challenge, I do not think that the costs of these proceedings should be deferred to the trial court.

[65] I say so because I have found that the first six exceptions were bad and that the seventh was premature, in the sense that I consider the question of wrongfulness should properly be determined at the trial. Permitting the costs of the exception to stand over in the face of those findings would be to encourage the taking what might be referred to as *bona fide* but debateable exceptions. While litigants are entitled to raise such exceptions, where the debate is decided against them they

should ordinarily be required to cover the costs of the investigation. That is different from the position where a defendant does not except in a case where it is clearly appropriate to do so, the situation contemplated in the line of cases *Mr De Wet* referred me to in his supplementary submissions.

[66] Lest there be any uncertainty on the question, my impression was that the exceptions raised by the QS were advanced in good faith. The costs order I have decided to make should not be seen to suggest anything to the contrary.

[67] The legal issues raised in the proceedings were relatively complex, something reflected in the fact that both parties retained experienced counsel. I thus consider that counsel's fees should be determined on scale C.

[68] In the circumstances there will be an Order dismissing the first defendant's exceptions with costs, such costs to include the costs of counsel on scale C. As the second defendant did not participate in these proceedings (it has filed a plea), my order as to costs pertains only to the plaintiff's costs.

MORRISSEY AJ
Acting Judge of the High Court

APPEARANCES

Counsel for the Excipient:
Instructed by:

Adv H N De Wet
Ward Brink Attorneys.

Counsel for Plaintiff:
Instructed by:

Adv P Tredoux
Neville R Cohen & Associates.