IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No:18959/2024P

In the matter between:

CAPITAL PROPFUND FIRST	**PLAINTIFF**
LUSSINDALE INVESTMENTS (PTY) LTD	**SECOND PLAINTIFF**

and

UPL SOUTH AFRICA (PTY) LTD	**DEFENDANT**

In Re

UPL SOUTH AFRICA (PTY) LTD	**EXCIPIENT**

and

CAPITAL PROPFUND	**FIRST RESPONDENT**
LUSSINDALE INVESTMENTS (PTY) LTD	**SECOND RESPONDENT**

ORDER

The following order is granted:

1. The exception is dismissed.
2. The defendant is ordered to pay the plaintiff's costs of on Scale C
3. The costs shall include costs occasioned by employment of two counsel where so employed.

JUDGMENT

Siwendu J

Introduction

[1] The court is called upon to determine an exception brought by the defendant against the plaintiffs' cause of action and particulars of claim. The plaintiffs, Capital Propfund (Pty) Ltd and Lussindale Investments (Pty) Ltd (collectively, 'the plaintiffs'), are property-owning entities conducting business in the Gauteng Province. They are joint registered owners of a warehouse situated in the Cornubia Ridge Logistic Park, KwaZulu-Natal ('the warehouse').

[2] The plaintiffs instituted an action against the defendant, UPL South Africa (Pty) Ltd ('UPL'), in December 2024. They allege that on 12 July 2021, while UPL occupied a portion of the warehouse, UPL introduced substantial quantities of agrochemical and pesticide products containing hazardous and toxic

substances into the warehouse. The plaintiffs were unaware of the chemical composition of these products.

[3] Fire broke out at the warehouse and was extinguished using water. The firefighting runoff water is alleged to have mixed with the chemicals, permeating the sediment beneath the warehouse slab and the soil. Toxic elements in the chemicals contaminated and polluted the soil.

[4] Except for the slab, the warehouse was demolished after the fire and the rubble removed from the property. The plaintiffs state that the contamination of the soil has rendered the property permanently unfit for human occupation and commercial use. They allege that the property will not generate an income for the plaintiffs and has been rendered valueless for a period projected to 12 July 2031.

[5] The plaintiffs aver that had the property on which the warehouse stands not been polluted and contaminated on 12 July 2021, the plaintiffs would have reconstructed the warehouse within approximately twelve months, by 12 July 2022, and afterward leased it to generate income until at least 12 July 2031.

Cause of action

[6] It is necessary to outline the structure of the particulars and cause of action set out by the plaintiffs to understand the exception. The plaintiffs framed their action based on the 'positive act', alternatively based on an 'omission' by UPL, created by:

(a) bringing chemicals to the warehouse, which were washed into the soil causing damage to the property, and,

(b) in the alternative, UPL's failure to take measures to prevent the contamination of the soil by the chemicals in its possession, stored at the warehouse.

[7] They allege that UPL's conduct or omission was wrongful due to the damage to their property, which caused them to suffer loss. The particulars state that UPL knew that:

(a) the chemicals brought into the warehouse contained toxins which, if they were to enter the soil, would contaminate and damage same,

(b) the water used to extinguish a fire in the warehouse would wash some of the chemicals out of the warehouse or through the slab and into the sediment and soil below the warehouse,

(c) it could have refrained from bringing chemicals containing toxins, alternatively taken steps to prevent them entering the soil; and

(d) it owed the plaintiffs a legal duty to ensure there is no damage the property or warehouse that would cause a loss to the plaintiffs.

[8] Specifically, it is alleged that UPL could and should have refrained from bringing chemicals containing toxins into the warehouse, alternatively, it should have taken steps to prevent the chemicals from entering the soil. UPL owed the plaintiffs a legal duty to ensure they don't suffer loss due to chemicals brought on the property.

[9] Regarding UPL's fault, the plaintiffs pleaded that it was:

(a) reasonably foreseeable that chemicals containing toxins brought into the warehouse could be washed from the warehouse by firefighting runoff water into the sediment and the soil below the warehouse, and

(b) reasonable steps could be taken to avoid such contamination including not bringing such chemicals into the warehouse at all or alternatively, placing them in containers from which they could not spill or placing the containers onto surfaces or receptacles which would prevent the contamination should a spill occur;

(c) it was at all relevant times before and on 12 July 2021 foreseeable that if the warehouse and its contents including the chemicals would burn, the fire combatting systems in the warehouse, including the sprinkler systems, would discharge substantial volumes of water into the warehouse which would wash the chemicals into the soil; and,

(d) a reasonable manager and operator of a warehouse would either have refrained from bringing such chemicals into the warehouse or would have taken steps to avoid contamination.

[10] As to the causation and loss, the plaintiffs pleaded that UPL's negligent and wrongful acts referred to above caused the plaintiffs to suffer loss in that the 'property can probably not again, alternatively for the foreseeable future but probably until 12 July 2031, be used to generate rental income for the plaintiffs.'

[11] The plaintiffs computed their damages of R99 million by subtracting the reasonable market value of the property with the contamination, which they found to be R1 million from its previous market value immediately before the contamination and before improvements which was R99 million. The alternative basis for the damages claim of R81 million was based on a loss of reasonable monthly rental of R7,5 million per month, the plaintiffs claim they would have earned for the period from 12 July 2022 to 12 July 2031, had the property not been damaged.

The exception and applicable principles

[12] UPL initially sought an order striking out the plaintiffs' particulars of claim as an irregular step in terms of Uniform rule 30(1),[1] simultaneously delivered a notice calling upon the plaintiffs to remove the cause of complaint in terms of

[1] Rule 30(1) reads: 'A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.'

Uniform rule 30(2)*(b)*.[2] In the alternative, UPL sought an order upholding its exception in terms of Uniform rule 23(1), with leave granted to the plaintiffs to amend their particulars of claim within 15 days of the order.

[13] Although the notice of exception in terms of Uniform rule 23(1), together with the notice to remove the cause of complaint in terms of Uniform rule 30(2)*(b)*, was delivered in February 2025, the rule 30(1) and 30(2)*(b)* applications were not pursued. At the hearing, the matter proceeded solely on UPL's grounds of exception.

[14] It also bears mentioning that the joint practice note filed states that UPL no longer persisted with the fourth and sixth ground for exception. The fourth ground pertains to the allegation of the conduct or omission flowing from the storage of the chemicals causing damage and loss to the property. The sixth ground of exception which was abandoned pertains to the reference and meaning of 'dangerous goods' stored at the warehouse.

[15] During the hearing both counsels devoted extensive argument on only two exception grounds, namely (a) the permissibility of a delictual claim as a cause of action where a contract is alleged to exist and, (b) the concomitant question of wrongfulness. Although the fourth ground of exception was purportedly abandoned, ie whether the plaintiffs' claim is for physical damage or for pure economic loss, it nonetheless formed a part of the issues originally raised under that ground. Given that the determination of an exception is a 'useful mechanism to weed out cases without legal merit',[3] and to enable the court 'to dispose of the

[2] Rule 30(2)*(b)* states that 'the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days'.
[3] *Telematrix (Pty) Ltd t/a Matrix Vehicle T racking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) (*Telematrix*) para 3.

case in whole or in part' and avoid the unnecessary leading of evidence, that issue could not be extricated from the exception.[4]

[16] While on the above point, it is useful to stress that both parties were *ad idem* about the applicable principles governing adjudication of an exception as these are well-established. Relevant to the present matter is that only material facts need to be pleaded, not legal conclusions. The court may not rely on extrinsic evidence, as the defects must appear *ex facie* the pleading. The court accepts the pleaded facts as true, and all the facts pleaded by the plaintiffs are taken as admitted.

[17] Although each ground of exception must be considered on its merits, as held by the court in *Living Hands (Pty) Ltd and Another v Ditz and Others*,[5] an over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. Ultimately, the test when determining whether a vague-and-embarrassing exception should be upheld is to establish (a) whether the pleading lacks particularity to the extent that it is vague; and (b) whether the vagueness causes prejudice to the excipient.[6] Against these principles, I turn to each of the exceptions raised.

Is the plaintiffs' delictual claim excipiable?

[18] It is not disputed that UPL occupied and was in possession of a portion of the warehouse. UPL's first complaint is that *ex facie* paragraphs 4, 5, and 13 of the particulars of claim:

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[4] *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F-I.

[5] *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) (*Living Hands*) para 15. A summary of the applicable principles is also referred to in *Merb (Pty) Ltd and Others v Matthews and Others* [2021] ZAGPJHC 693 paras 8-13.

[6] *Trope v South African Reserve Bank* 1992 (3) SA 208 (T); *Tembani and Others v President of the Republic of South Africa and Another* [2022] ZASCA 70; 2023 (1) SA 432 (SCA) paras 14-20.

(a) there was until at least 12 July 2021, a contractual relationship between the plaintiffs and UPL, pursuant to which the plaintiffs leased part of the warehouse to UPL to generate income.

(b) the plaintiffs' claim is based solely on a delictual cause of action. As a matter of law, it is impermissible for the plaintiffs to bring a delictual claim in a manner that 'circumvents or undermines the contractual arrangement between the parties'. Accordingly, the particulars of claim lack the necessary averments to sustain an action.

[19] Both parties agreed that, properly characterised, the plaintiffs' claim is delictual in nature. UPL contends however that the particulars of claim indicate that its occupation of the premises arose pursuant to a contract which the plaintiffs now seek to avoid. The particulars of claim do not disclose the basis upon which UPL came to occupy the premises, nor the terms governing such occupation.

[20] The plaintiffs expressly contended that they do not seek to enforce any contractual right, nor do they allege defective or negligent performance of a contract, or breach of any contractual obligation owed to them by UPL. On the pleadings as they stand, the claim is framed exclusively in delict.

[21] UPL's stance is that the delictual claim is incompetent, as its conduct cannot be wrongful in delict where the parties' relationship is governed by a contract. It further argues that the pleading is excipiable because it constitutes an impermissible attempt to circumvent a contractual relationship by recasting a contractual dispute as a delictual claim.

[22] In support of this contention, UPL relies on the decision in *Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd*,[7] as endorsed by the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*.[8] The authorities caution against *extending* delictual liability to cases involving the negligent performance of contractual obligations, particularly where contractual remedies are adequate and the parties have freely allocated risk and responsibility by agreement. Generally referred to as the 'concurrence problem', the authorities emphasise that where parties have deliberately structured their relationship by contract, the law should hesitate before superimposing delictual liability in a manner that undermines their agreed allocation of risk. On this footing, UPL submits that it is impermissible for the plaintiffs to subvert their contractual dealings by advancing a delictual claim.

[23] UPL also relies on the decision of the Supreme Court of Appeal (SCA) in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*.[9] In that matter, the plaintiff pleaded alternative causes of action arising from structural failure, alleging both breach of the contractual obligations and, in the alternative, delictual liability for negligent design. The SCA held that the plaintiff had failed to establish the existence of a legally cognisable duty in respect of the alleged negligent decision and that the delictual claim was therefore unsustainable. The thrust of these authorities, according to UPL, is that wrongfulness in delict is not established merely by alleging negligent conduct where the parties' relationship is, in substance, regulated by contract.

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[7] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) (*Lillicrap*) at.501F-G the court held that: '
'A Court should therefore in my view be loath to extend the law of delict into this area and thereby eliminate provisions which the parties considered necessary or desirable for their own protection. The possible counter to this argument, viz that the parties are in general entitled to couch their contract in such terms that delictual liability is also excluded or qualified, does not in my view carry conviction. Contracts are for the most part concluded by businessmen. Why should the law of delict introduce an unwanted liability which, unless excluded, could provide a trap for the unwary?'

[8] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) (*Country Cloud*) para 63.

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

[24] These cases emphasise that the determination of wrongfulness requires careful consideration of public and legal policy, including whether the harm complained of constitutes pure economic loss or physical damage. At the stage of exception, the enquiry is whether the particulars of claim disclose facts which, if proved, would establish wrongfulness. UPL's complaint is that the plaintiffs' pleading fails to do so.

[25] Properly understood, however, the principle articulated in *Lillicrap* does not operate as a blanket prohibition on delictual claims between parties who may be contractually linked. The same conduct may constitute both a breach of contract and a delict, giving rise to a concurrence of actions and affording the plaintiff an election as to which remedy to pursue. The authorities establish only that where a claim is grounded in the improper performance of a contractual obligation, and the parties have deliberately structured their relationship through contract, delictual liability should not ordinarily be superimposed in a manner that undermines their agreed allocation of risk.

[26] UPL submits that the court is not asked to infer the existence of a contract. The submission is with respect correct, because the pleadings must be accepted to be correct as they stand. Even so, the exclusionary rule in *Lillicrap* applies only where the claim is founded on a breach of a contractual duty, and not where the conduct complained of constitutes a breach of an independent delictual duty imposed by law. As the SCA made it clear in *Holtzhausen v Absa Bank*,[10] *Lillicrap* is not authority for the general proposition that an action in delict is precluded whenever a contractual claim is competent. Contrary to the assertions

[10] *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA).

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by UPL, where the same conduct gives rise to both contractual and delictual liability, the plaintiff is free to elect which cause of action to pursue.

[27] Accepted *ex facie*, the plaintiffs' particulars of claim allege physical damage to their property. The claim is rooted in the alleged breach of a legal duty imposed by the law of delict, namely the duty not to cause physical damage to another's property through negligent conduct or omission. The existence of a contractual relationship does not extinguish nor diminish UPL's independent delictual duty not to cause such harm. As stated in *Two Oceans*,[11] 'Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. In those cases, wrongfulness is therefore seldom contentious.'

[28] Although UPL criticises the plaintiffs for electing to pursue a delictual claim, there is no legal bar to such an election. The plaintiffs' claim, as pleaded, falls outside the narrow exclusionary rule articulated in *Lillicrap* and affirmed in *Country Cloud*. The duty not to cause physical damage exists independently of any contractual relationship and is owed to all persons who may reasonably be harmed by such conduct. The claim is directed at preventing physical harm to property rather than protecting purely contractual interests. The plaintiffs are therefore not precluded from pursuing a delictual remedy, and this ground of exception falls to be dismissed.

Failure to plead reasonable foreseeability of the setting alight of the warehouse and lack of clarity on which event caused the damage

[11] *Two Oceans* para 10.

[29] The second and third themes of exception concern an alleged failure to plead foreseeability in relation to the setting alight of the warehouse, as well as the absence of precise particulars of the actual cause of the damage from the series of the chain of acts after the fire broke out. Even though these grounds were not pursued with vigour during argument, it is nonetheless necessary to address them, since their thrust forms part of the broader conspectus of alleged deficiencies in the pleading of the essential elements of the delict. Ultimately, they are not merely about foreseeability but whether causation was pleaded.

[30] UPL complains that:

(a) it is not alleged that the setting alight of the warehouse, or the use of water to extinguish the fire, was reasonably foreseeable. Accordingly, the particulars lack the averments necessary to sustain an action.

(b) Moreover, in any event, the setting alight of the warehouse and/or the use of water constituted a *novus actus interveniens*, breaking the chain of causation.

[31] Connected to the above is the claim of irregularity, alternatively vagueness, which UPL contend is embarrassing, and alternatively lack the averments necessary to sustain an action because: The allegation in paragraph 15 that 'the bringing of the chemicals into the warehouse and onto the subject property was a positive act which caused the aforesaid damage to the subject property' was irreconcilable with the allegations in paragraphs 7 to 10, which refer to other events, namely the (a) setting of the warehouse alight, (b) the runoff firefighting water entering the sediment permeating the slab below; (c) the toxic elements chemicals polluting the soil and (d) the contamination of the and pollution of the soil as the alleged cause of the damage.

[32] The compliant is that it is unclear which event is said to have caused the damage, and the defendant would be prejudiced and embarrassed in having to

plead to the allegation. Paragraphs 14, 15, 16, and 18 allege that there was 'damage' to the property. It is not apparent from the particulars of claim what damage, if any, was caused.

[33] As I understand it, this second aspect to the complaint is about factual causation, aptly expressed by the court in *International Shipping Co (Pty) Ltd v Bentley*[12] as an inquiry into the 'but for' test. The court held, it is designed to determine whether the postulated cause is the *causa sine qua non* of the loss in question. Consequently, if the wrongful conduct was not the cause of plaintiffs' loss, then no legal liability can arise. The plaintiffs pleaded the overarching cause of the damage, namely the presence of toxic chemicals brought onto the property, the composition and nature of which they allege could only have been known to UPL. They further pleaded a series of factual averments, commencing with the outbreak of the fire and extending to a chain of subsequent conduct, which they allege caused the damage to the property referred to in paragraph 31 above. It is for the trial court, on the evidence before it, to evaluate what would have occurred but for the wrongful conduct or, alternatively, the omission pleaded.

[34] Before dealing with the complaint relating to foreseeability, it is necessary to interpose consideration of the alleged failure to plead a *novus actus interveniens (novus)*, since that allegation implicates causation and my finding above. As pointed by the court in *International Shipping,*[13] a demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. A court must consider the second enquiry of legal causation, which examines whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote. The court further held that legal causation is a juridical problem, in the resolution of which

[12] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) (*International Shipping*) at 700G-H.
[13] *International Shipping* at 700H-701F.

considerations of policy *may* play a role. Its essence thus lies in policy-based limits on the extent of liability. (Own emphasis.)

[35] Regarding the alleged failure by the plaintiffs to plead a *novus actus interveniens*, and the effect of the complaint calls for a revisit of the meaning of a *novus.* The court in *Fourie NO v Hansen and Another*,[14] which referred, with approval, to the description in *Lawsa* has relevance. The court held that:

'The law relating to subsequent independent causes excusing a defendant from liability from his initial negligent act has been succinctly summed up by the authors of Joubert (ed) The Law of South Africa . . . where it is stated:

> "An intervening cause is an independent, unconnected and extraneous factor or event which is not foreseeable, and which actively contributes to the occurrence of harm after the defendant's original conduct has occurred. Such an independent force can take the form of an intervening natural phenomenon, conduct by a third party, or even the plaintiff's own conduct . . . A novus actus has the effect of completely neutralising the causative potency of the defendant's original conduct, for it indicates that, even though the causative link remains factually intact, the link between the conduct and the harm is too tenuous."'

[36] The existence of a *novus* would potentially serve to limit UPL's liability to the plaintiffs. The absence of those factual averments from the particulars can hardly render the particulars excipiable. It is open to UPL to plead those facts in its defence.

[37] Turning to the exception based on the failure to plead foreseeability, *ex facie* the particulars, the plaintiffs traversed 'foreseeability' as an element of 'fault'. As demonstrated in respect of the causation discussion above, the express overarching allegation is that it was foreseeable that the chemicals could be washed from the warehouse fire-fighting run-off water into the sediment below

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[14] *Fourie NO v Hansen and Another* 2001 (2) SA 823 (W) at 842E=H.

the soil below the warehouse. The particulars allege that UPL failed to take reasonable steps or measures to avoid contamination or spillage.

[38] The above must be read in context, and in conjunction with the assertion in paragraph 23 of the particulars alleging that:

'it was at all relevant times before and on 12 July 2021 foreseeable that if the warehouse and its contents including the chemicals would burn, the fire combatting systems in the warehouse, including the sprinkler systems, would discharge substantial volumes of water into the warehouse which would wash the chemicals into the soil and a reasonable manager and operator of a warehouse would either have refrained from bringing such chemicals into the warehouse or would have taken steps to avoid contamination.'

[39] A proper approach is to assess whether the particulars, read as a whole, give sufficient notice of the basis of the plaintiffs' claim, rather than dissecting each aspect of the chain in isolation. As pointed out by the court in *Home Talk v Ekurhuleni Municipality*,[15]

'What is important is that the pleadings should make clear the general nature of the case of the pleader. They are meant to mark out the parameters of the case sought to be advanced and define the issues between the litigants. In that regard, it is a basic principle that a pleading should be so framed as to enable the other party to fairly and reasonably know the case he or she is called upon to meet. These requirements in respect of pleadings are the very essence of the adversarial system.' (Footnotes omitted.)

[40] UPL's complaint fails to properly consider the averments in paragraph 23 of the particulars. UPL imposes a rigid standard to pleadings by effectively requiring the plaintiffs to plead that each event in the alleged chain of fault and to pre-emptively "prove" that each detail across multiple links in the chain of causation and that each of the details were foreseeable.[16] This is inconsistent with

[15] *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; 2018 (1) SA 391 (SCA) para 28.
[16] *Kruger v Van Der Merwe and Another* 1966 (2) SA 266 (A) clarifies in the headnote that the doctrine of foreseeability in relation to the remoteness of damage does not require foresight as to the exact nature and extent

established pleading standards, which recognises that plaintiffs are not required to anticipate every technical objection or to provide exhaustive proof of causation at the pleading stage. That is for the trial court to evaluate.

[41] Imposing such a standard would elevate form over substance, contrary to the court's injunction in in *Living Hands* and the injunction to deal with exceptions 'sensibly' and not in an overly technical or formalistic manner.[17] The plaintiffs' pleadings, as drafted, provide adequate facts as to the nature of their claim and sufficiently allege sequence of the cause(s) of the damage and foreseeability in a manner consistent with the principles of pleading. Accordingly, UPL's complaint is overly technical and should be rejected.

Is the claim one for pure economic loss?

[42] As already alluded to, the joint practice notes stated that aspects of the fourth ground of the exception were no longer persisted with. The contention was that although paragraphs 14, 15, 16 and 18 of the particulars of claim refer to damage to the property it is 'not apparent whether from the plaintiffs' claim is for physical damage or pure economic loss, and the defendant would be embarrassed in having to plead to these allegations'.

[43] It was submitted that the plaintiffs' claim is, in substance, one for pure economic loss in delict, notwithstanding the contractual relationship between the parties. On that characterisation, UPL contended that the particulars of claim lack the averments necessary to sustain a cause of action and are therefore excipiable.

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of the damage. It is sufficient if the person sought to be held liable should reasonably have foreseen the general nature of the harm that might because of his conduct befall the person exposed to a risk of harm.

[17] *Living Hands* para 15. See also *Telematrix* para 3.

[44] As traversed and disposed of in the section dealing with the delictual nature of the claim, it is well established in our law that a claim for pure economic loss, being financial loss unaccompanied by physical harm to person or property or the infringement of a recognised legal interest is not *prima facie* actionable because the law of delict treats conduct causing physical damage to property differently to conduct causing pure economic loss.[18] Liability for such loss arises only where the plaintiff establishes that the defendant's conduct was wrongful, in the sense that public or legal policy considerations justify the imposition of delictual liability. I had found that the harm suffered by the plaintiffs is for physical damage to the property, which constitutes a recognised and established category of delictual damages.

[45] The plaintiffs' damages claim is framed as follows:

'The market value of the subject property without any improvement prior to the contamination on 12 July 2021 was R100 million. After the contamination the market value was R1 million with the result that the plaintiffs suffered damages in the amount of R99 million, alternatively, the loss of the reasonable monthly rental which the plaintiffs could have earned was R81 million being the product of the reasonable rental at R750 000 per month multiplied by 108 months (12 July 2022 to 12 July 2031)'.

[46] I observe that the claim for R99 million relates to an alleged loss or diminution in the value of the property following the contamination ('the main damages claim'). The rental the plaintiffs would have realised is pleaded in the alternative ('rental claim'). The latter must be considered against the averments in the particulars of claim that the plaintiffs utilised a portion of the warehouse to conduct a letting business; that UPL was in occupation of a portion of the warehouse; and that the plaintiffs would, but for the alleged contamination, have leased the reconstructed warehouse to generate income until at least 12 July 2031.

[18] *Two Oceans* para 10.

[47] The legal principles governing the nature of the damages that the plaintiffs may lawfully recover, and the distinction between the main damages claim for the alleged loss or diminution in the value of the property on the one hand, compared with the alternative claim pleaded for the loss of rental were not traversed fully either during the hearing or in the heads of argument. I accordingly invited both parties to file supplementary submissions on the question whether the plaintiffs' damages claim is, in essence, one for pure economic loss.

[48] The debate as to whether the damages, as presently framed, constitutes a claim for pure economic loss was obscured by two factors: the first was the exception premised on the existence of a contractual relationship, and the dispute about whether the plaintiffs have pleaded wrongfulness. That debate has been put to rest because I have found the element of wrongfulness is presumed and will generally not be controversial in cases as the present one.[19]

[49] To my mind, the second obscuration arises from the correct measure of damages in the circumstances of the present case. The starting point is in *Trotman and Another v Edwick*[20] which set out the difference between contractual and delictual damages, and held that:

'A litigant who sues on contract sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.'

[50] There can be no dispute in principle that the plaintiffs would be entitled to recover the amount by which it suffered patrimonial loss. The main claim falls in

[19] *Two Oceans* para 10.
[20] *Trotman and Another v Edwick* 1951 (1) SA 443 (A) at 449B-C.

this category. That being so, the main damages claim for R99 million is based on the difference between the pre-delict value and the post delict value of the property. Damages based on the pre-delict value is one of the acceptable methods for computing same.[21] It is up to UPL to dispute the measure chosen to prove the damages and the duty of the plaintiffs to demonstrate prove it through evidence at the trial.

[51] With regards to the alternative claim for loss of rental. The fact that the plaintiffs elected to bring a claim in delict does not mean the property was not utilised for value. In my view, the claim for rental qualifies as one for pecuniary loss. The plaintiffs seek to be recompensed for their prospective loss as an alternative measure of their damages. The *dictum* of the Court in *Jowell v Bramwell-Jones and Others*[22] is of assistance and states that:

'There is no doubt that a plaintiff who has been the victim of a delict and has suffered some damage will not be barred from suing for such damages, including prospective loss, merely because the measure of damages is very difficult to assess. The Court will do its best on such evidence as can be presented to it, and in so doing will weigh up probabilities and make do allowance for uncertainties and contingent factors, having regard to the opinions of expects. [sic]'

On appeal, the SCA accepted this *dictum* that a claim for prospective loss is competent and albeit fact dependent.[23] What is required by Uniform rule 18(10) is for the plaintiffs to set out their damages claim in a manner that will enable the defendant reasonably to assess the quantum thereof. I find the plaintiffs to have adequately set out the basis of their damages in respect of the main claim and the alternative claim. It will be for the trial court in due course to assess whether the

[21] *De La Rey's Transport (Edms) Bpk v Lewis* 1978 (1) SA 797 (A) at 803F, where the court held that there is no good reason for rejecting the finding of the magistrate that 'the value before conveyance was R500 - a finding which was accepted by the Court *a quo*.'
[22] *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 902I-903E.
[23] *Jowell v Bramwell-Jones and Others* 2000 (3) SA 274 (SCA) para 22.

benchmark utilised by the plaintiff for the value of the loss is the amount quantified on a balance of probabilities.

Other exception grounds

[52] As already alluded to during argument, little reliance was placed on the remaining grounds of exception, which concerned:

(a) whether the fire was extinguished by the plaintiffs or UPL and is a matter capable of resolution by a request for further particulars for trial or by the leading of evidence;

(b) the particulars of the measures allegedly not taken by a reasonable manager to prevent the harm caused by the fire, was in my view adequately pleaded;

(c) whether the cause of action is founded on conduct or an omission, which was pleaded in the alternative as demonstrated above, is permissible and does not render the particulars excipiable; and,

(d) the identity of the relevant authorities that have not granted permission to reconstruct the warehouse, is likewise capable of being addressed by a request for further particulars for trial or by the leading of evidence.

Conclusion

[53] For the reasons stated above, the exception application falls to be dismissed as the particulars reveal a cognisable cause of action and are not vague and embarrassing. They are of sufficient particularity to enable UPL to plead. UPL is not prejudiced thereby.

[54] There is no reason why the costs should not follow the results. In view of the quantum of the claim, the degree of complexity and importance of the case to both parties, they engaged the services of senior counsel. I can find no cogent reasons to limit the costs. Accordingly, UPL is liable to pay the costs of the plaintiffs on scale C.

Order

[55] In the result, I make the following order:

1. The exception is dismissed

2. The defendant is ordered to pay the plaintiffs costs of on scale C

3. The costs shall include costs occasioned by employment of two counsel where so employed.

NTY SIWENDU J

Date of Hearing:	21 October 2025
Additional submissions:	3 and 10 November 2025
Delivery:	26 January 2026

Appearances:

For the Plaintiffs:	Mr P F Louw SC
Instructed by:	Kokinis Inc.
Locally represented by:	ER Browne Incorporated
For the Defendant:	Mr Alfred Cockrell SC,
With him:	Mr Adrian Friedman
Instructed by:	Bowman Gilfillan Inc.
Locally represented by:	Hay & Scott Attorneys