In the High Court of South Africa
(Western Cape Division, Cape Town)

CASE NUMBER: 14900/2020

In the matter between:

ETTIENE DU TOIT **PLAINTIFF**

And

FARM FILM PRODUCTIONS (PTY) LTD **FIRST DEFENDANT**

ROAD ACCIDENT FUND **SECOND DEFENDANT**

Delivered Electronically: 26 October 2023

JUDGMENT

RALARALA, AJ

INTRODUCTION

[1] The second defendant raised an exception to the plaintiff's amended particulars of claim dated 3 December 2021. The exception is on the basis that the alternative claim does not disclose a cause of action against the second defendant ('the RAF'). The plaintiff's claim for damages against the second defendant is pleaded in the alternative. The claim against the first defendant ('Farm Film Productions'), which is a film production service company is for damages in the sum of R20 000 000. The plaintiff (Mr 'Du Toit") a professional stuntman, concluded a written Stunt Services Agreement with Farm Film Productions. During the performance of the stunt services, an accident occurred and Mr Du Toit was injured while driving a modified ice cream truck.

[2] Subsequent thereto, Mr. Du Toit filed a damages claim against Farm Film Productions. Later, he amended his claim and filed an alternative damages claim against the RAF. The exception is predicated on the alternative claim.

FACTUAL BACKGROUND

[3] On 4 January 2019, Mr Du Toit entered into an agreement with the Farm Film Productions and a close corporation, Stunt Services Network, in which he agreed to perform stunt services for the Farm Film Productions' television commercial. The agreement required Mr Du Toit to "jump or ramp" a vehicle modified to resemble an ice cream truck over Long and Leeuwen Streets in Cape Town. The agreement further required Farm Film Productions to maintain a personal accident insurance to cover Mr Du Toit in the course and scope of the services contracted for. Farm Film Productions also indemnified Mr Du Toit as being harmless against any loss, damage or injury committed by Farm Film Productions. Inter alia, Farm Films Productions warranted that:

3.1 Mr Du Toit would be comprehensively insured for any loss, damage or injury sustained in connection with rendering the services contracted for.

3.2 The filming location of the commercial would be safe.

3.3 All persons on the set would be sufficiently trained in the handling of the relevant equipment that Mr Du Toit would encounter.

3.4 Mr Du Toit would be made aware of all hazards on the set that may affect him.

3.5 There would be sufficient risk control measures in place to protect Mr Du Toit during the performance of his duties.

[4] Manifestly, Mr Du Toit rendered the agreed services on the same day that the contract was concluded [4 January 2019]. He drove the modified ice cream truck over a ramp at the designated film location, at a speed and trajectory determined by the first defendant. Mr Du Toit alleges that he was injured when the vehicle's chassis and/or steering column and/or suspension and/ or driver's seat collapsed upon landing or impact. Mr Du Toit alleges that he sustained spinal and head injuries, inter alia, because:

4.1 Farm Film Productions failed to ensure that the vehicle was suitably modified for purposes of the stunt; and

4.2 the set–up of the ramp was incorrectly determined, and the trajectory and speed of the vehicle was incorrectly calculated. In the result the accident occurred leaving him with a significant spinal injury.

[5] Subsequently, Mr Du Toit issued summons against Farm Film Productions on 15 October 2020, in which he seeks damages in the amount of R20 million for injuries sustained as a result of the Farm Film Productions' breach of the stunt service agreement and or negligence towards Mr Du Toit. On 11 December 2020, Farm Film Production responding to Mr Du Toit's particulars of claim, filed a special plea in which it was alleged that Mr Du Toit's claim stands to be directed at the Road Accident Fund rather than Farm Film Productions. Pursuant thereto, Mr Du Toit sought the joinder of the Road Accident Fund as the second defendant in the action, which application was not opposed. The order joining the Road Accident Fund ("the RAF") was granted on 12 October 2021.

THE RAF'S EXCEPTION

[6] The RAF noted an exception to Du Toit's alternative claim contained in his amended particulars of claim. The grounds that underpin the exception are as follows:

6.1 Firstly, the plaintiff's amended particulars of claim lack averments necessary to sustain a cause of action that would render section 17(1) (a) of the Road Accident Fund Act 56 of 1996 applicable.

6.2 The plaintiff does not allege that:

(a) he was driving for the purposes of the Act;

(b) on a road contemplated by the Act; and

(c) in a motor vehicle for the purposes of the Act.

6.3 Each of those three averments are necessary in order to trigger the RAF's liability. Instead, the plaintiff avers he drove a specially modified vehicle which was designed to 'ramp' or 'jump' at a speed and location determined by the first defendant for purposes of producing a television commercial.

6.4 Secondly, the plaintiff's amended particulars of claim is not capable of sustaining a cause of action in delict. In order to succeed with the alternative claim, the plaintiff must prove all five elements of a delict. This includes the element of wrongfulness. The underlying basis of the RAF Act is the common law principles of the law of delict.

[7] The RAF averred that Mr Du Toit's claim for damages against the Farm Film Production is premised on a contract due to a breach of one or more of the warranties and in delict due to the Farm Film Production owing him a legal duty which was negligently

breached in that the plaintiff alleges that Farm Film Productions and or its employees were negligent.

[8] Du Toit's claim for damages against RAF is predicated on the provisions of section 17 and section 21(1) of the Road Accident Fund Act 56 of 1996 ('The Act'). RAF alleges that the accident was caused by the sole negligence of Farm Film Productions and or its employees acting within the course and scope of their duties as employees of Farm Film Productions.

THE RAF'S SUBMISSIONS

[9] Mr Jaga SC ("Mr Jaga") on behalf of the RAF in his heads of argument submitted that the Plaintiff's amended particulars of claim lack averments necessary to sustain a cause of action that would render section 17 (1) of the Road Accident Fund Act 56 of 1956 ('RAF Act') applicable. Mr Jaga further asserts that Mr Du Toit does not allege that:

9.1he was driving for purposes of the Act;

9.2 on a road contemplated by the Act; and

9.3 in a motor vehicle for purposes of the Act.

[10] Mr Jaga, further argued that, Du Toit averred that he drove a specially modified vehicle which was designed to ramp or jump at a speed and location determined by Farm Film Productions for a commercial television production. According to Mr Jaga, in addition, a permit was obtained by Farm Film Productions from the City of Cape Town, granted in terms of the City's Filming By-Law, 2005 in order to execute the stunt. In

addition, Counsel submitted on behalf of the RAF that, the By-Law recognizes that the stunt activities form part of filming operations, there will be an interruption to “traffic on public roads” and “pedestrian traffic on sidewalks” and “activities that have an impact on public parking”

[11] Thus, on Mr Du Toit’s version he was not driving for purposes of the Act because he was performing a stunt on a designated film location described as ‘on set ‘authorized by the City of Cape Town as opposed to a public road. A further contention is that Mr Du Toit was not driving the motor-vehicle ordinarily as contemplated by the Act, as the vehicle was specially modified for purposes of performing inherently dangerous activity necessary for the production of a television commercial.

[12] Expanding further on his argument, Counsel contended that apart from the jurisdictional requirements of section 17 (1) of the Act, Mr Du Toit’s amended particulars of claim is not capable of sustaining a cause of action in delict. This he bases on the argument that, to succeed with the alternative claim Du Toit must prove all five elements of delict. In particular, the element of wrongfulness which is a question of law, inherently requiring a court to pay consideration to whether it would be reasonable to impose liability on a defendant for damages flowing from a specific conduct. To this end, Mr Jaga submitted that reasonableness must be assessed with reference to the prevailing legal convictions of the community. Counsel asserted further that the legal convictions of the community disavows liability where parties to a contract freely agree to regulate the harm arising from performing inherently dangerous activities. In addition, the *boni mores* of

society reject parties escaping their contractual responsibilities by shifting liability to publicly funded institutions such as the RAF, particularly where those parties recognize that their activities involve extraordinary and unusual risk, the consequences of which are regulated through the confidentiality of the contract.

PLAINTIFF'S SUBMISSIONS

[13] Mr Newton, on behalf of Mr DuToit responding to the RAF's argument contends that the submission by Mr Jaga to the effect that the Act is only applicable when a vehicle is driven on a public road is inconsistent with the express wording of the section, which does confine the driving of the motor vehicle to the road. It is argued further that the Act applies to the driving of a motor vehicle by any person at any place within the Republic. Augmenting to this submission, Mr Newton asserted that it cannot seriously be contested that Long and Leeuwen Streets in Cape Town are roads and that they do not cease to be such just because they are closed to all but certain vehicles during the film shoot.

[14] Mr Newton also contended that the application of the Act is limited to the driving of a motor vehicle as defined, which in terms of section 1 of the Act is "any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, an agricultural or other implement designed or adapted to be drawn by such motor vehicle." It was averred that the ice cream truck is a vehicle designed for driving on a road and it being adapted to enable it to absorb hard impact does not change its character. The ice cream truck is compared to other vehicles that

have been heavily adapted to perform certain functions but do not cease to be motor vehicles, namely: cement mixers and waste removal lorries.

[15] Mr Newton asserted that Mr Du Toit claims for loss or damages suffered as a result of sustaining bodily injuries caused by or arising out of the driving of a modified or adapted motor vehicle, by himself at a place within the Republic, which injuries are due to the negligence of the owner of the vehicle and /or its employees. On the basis of the aforementioned, Mr Newton submits that all of the jurisdictional facts required for a claim in terms of section 17(1) of the Act have been included in the particulars of claim and that the first ground of exception lacks merit and falls to be dismissed.

[16] Pertaining to the second ground of exception that: the particulars of claim fail to disclose a cause of action against the RAF in delict. Mr Newton asserts that the provisions of section 21 of the Act abrogates Mr Du Toit's contractual and common law remedies. That was in short the argument that was presented before court. I wish to extend a word of gratitude to counsel for their extensive heads of argument. I turn to consider the legal principle applicable in cases of this nature.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[17] Rule 23 of the Uniform Rules of Court deals with the exceptions and provides as follows:

"(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filling any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception."

[18] The excipient bears the onus of establishing that on every reasonable interpretation that can be placed on the particulars of claim no cause of action is disclosed. In *Francis v Sharp and Others* 2004 (3) SA 230 at 237G, the Court stated as follows:

"… the Courts are reluctant to decide upon exception questions concerning the interpretation of a contract (Sun Packaging (Pty)Ltd v Vreulink 1996 (4) SA 176(A) at 186 J). In this regard it must be borne in mind that an excipient has a duty to persuade the Court that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed."

[19] The consideration of exceptions requires the adoption of an approach that will not analyse the individual paragraphs complained of, but one that encapsulates the pleadings in its entirety, meaning that a holistic view must be espoused. The general principles to exceptions were conveniently summarised by Makgoka J in *Living Hands (Pty) Ltd v Ditz* 2013 (2) SA 368 (GSJ) at 347 G as follows:

“ Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:

(a) allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one’s opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against embarrassment which is so serious as to the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, excipient should make out a very clear case before it would be allowed to succeed.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) 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.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self contained .

(g) Minor blemishes and unradical embarrassment caused by a pleading can and should be cured by further particulars.”

[20] The test on exception is whether on all possible readings of the facts no cause of action is made out. It is incumbent therefore on the excipient to persuade the court that

upon every interpretation which the amended particulars of claim can reasonably bear, no cause of action is disclosed. *Trustees for the time being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2013] 1 ALL SA 648 (SCA) at [36]. Put differently, the excipient has to satisfy this Court that the exception should be upheld.

[21] Mr Du Toit's claim against the RAF, it is contended falls under section 17 (1) (a) of the Act as the owner of the vehicle, the modified ice cream truck is Farm Film Productions.Section 17(1) (a) of the RAF Act provides:

"The Fund or an agent shall -

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established

subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of lump sum."

[22] Section 17(1) of the Act recognises claims for compensation where the owner or driver of the vehicle is capable of being identified. Notwithstanding, the provisions of section 17(1) will only find application where certain jurisdictional requirements are satisfied. One of which is that the alleged loss must have been suffered as a result of the driving of a motor vehicle. Categorically, the Court is not dealing with an ordinary road accident, in that the plaintiff was contracted specifically to perform a stunt for the purposes of filming a commercial. Distinctly, the contract contained the terms of the contract inclusive of an indemnity cover. Incidentally, the indemnity cover is a prerequisite in the permit application process to the City Manager, incorporated in the Filming By-Law of 2005 published, in the Western Cape Provincial Gazzette no. 6277 on 24 June 2005. Section 3 thereof provides that:

> "(1) No person may carry out any filming on Council land: -
>
> (a) except with the written permission of the City Manager, and
>
> (b) otherwise than in accordance with such terms and conditions as may be determined by the City Manager.
>
> (2) Subsection (1) is also applicable to any filming related activities on Council land where the actual filming takes place on land other than Council Land.
>
> (3) Filming related activities include, but are not limited to: -
>
> (a) <u>the interruption of traffic on public roads;</u>
>
> (b) <u>the interruption of pedestrian traffic on sidewalks</u>;
>
> (c) wires or cables running across or over sidewalks or public roads;

(d) the use of generators, tripods or dollys on sidewalks or public roads;

(e) activities that have an impact on public parking, public open space or beaches, and

(f) activities that will generate noise and air pollution.

(4) Permission to be obtained from the City Manager

(1) Subject to the provisions of subsection (3), a person who intends to carry out filming for which permission is required in terms of section 3, must submit a written application to the City Manager; provided that any other persons taking part in the same filming, need not also apply for permission, if such persons are under the control of the applicant.

5. Insurance

The applicant must provide: -

(a) <u>evidence, to the satisfaction of the City Manager, of appropriate indemnity cover, and</u>

(b) <u>where it is the intention that stunts, special effects, pyrotechnics or any other activity which may put the public at risk will be involved, evidence to the satisfaction of the City Manager of appropriate specialised risk insurance, blanket liability or work cover</u>".(underlining supplied)

[23] It is pleaded by Mr Du Toit that the vehicle was to be suitably modified or improved to render it fit to "jump" and "ramp" over Long Street and absorb the impact upon landing safely and without causing any injury to Mr Du Toit. The ramp would be correctly set up

and the vehicle's speed and trajectory would be correctly calculated to ensure Mr Du Toit's safety whilst performing the services.

[24] Although the RAF Act does not define driving and its meaning for the purposes of the Act, the meaning will have to be determined with reference to its ordinary meaning. The Oxford English dictionary defines driving as ''the control and operation of a motor vehicle." The word "motor vehicle", is however, defined in the Act as meaning:

> "any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle."

It follows from the definition that the motor vehicle must be driven on a road for the purposes of section 17(1) of the Act. In this instance, the amended particulars of claim indicate that the modified ice cream truck was driven on a film set.

[25] Similarly, 'road' is not defined in the Act and the issue of road clearly needs to be considered. In this regard, Mr Jaga referred to *Prinsloo v Santam Insurance Ltd* 1996 (3) All SA, wherein the Court paid particular consideration to the case of *Chauke v Santam Limited* 1995 (3) SA 71(W). In that case the court considered the meaning of the word road and held, that although road as envisaged in the definition of motor vehicle in the Act, it was not necessarily limited to a public road, the natural meaning of the word implied a prepared surface having a determined path leading from one place to another and to which a number of people and vehicles might have access at any given time. Similarly, in

Chauke v Santam Ltd 1997 (1) SA 178 (A) at 181 F-G and *Bell v Road Accident Fund* 2007 (6) SA 48 (SCA) at [7] the SCA endorsed the meaning attributed to the word road. In *Bell v Road Accident Fund,* the court went further to clarify that the road need not be a public road, but it must be capable of ordinary use.

[26] Pertinently, *in casu* Long and Leeuwen Streets were closed or interrupted, preventing access to traffic and pedestrian traffic respectively during the filming of the commercial. This is specially provided in section 3 of the City of Cape Town's Filming By-Law. Moreover, of particular significance for the purposes of the stunt performance, a ramp was set up on the road and the trajectory and the speed was calculated and determined by Farm Film Productions. This supposes that the speed limit provided by the National Road Traffic Act 93 of 1996 which applies uniformly throughout the Republic of South Africa in order to ensure road safety, was not applied in this instance. Instead, compliance with the rules relating to road safety in my view, did not apply on the film set because it would not be possible to produce commercials where dangerous stunts are performed on the road. Sensibly, it is the very intended non-compliance with the ordinary road safety and traffic rules that necessitated the invocation of the provisions of the Filming By-Law. Mr Du Toit does not in his amended particulars of claim, aver that the accident occurred on a road for purposes of the Act.

[27] Mr Du Toit also had to aver that the motor vehicle was designed for general use on a road, which is the ultimate test on whether a vehicle is a motor vehicle as contemplated in the Act. I find what the court in *Bell v Road Accident Fund* supra at page 50 para [8] observed, apposite in this matter. The court stated:

"This Court has on a number of occasions pronounced upon the correct interpretation to be given to the phrase 'designed for propulsion on the road' as envisaged in the definition of a motor vehicle. While the third party insurance legislation has been amended over time, the definition of a 'motor vehicle'has remained fairly constant. The test to determine whether a vehicle was designed for propulsion on a road is objective. In Chauke v Santam Ltd Olivier JA stated that 'designed for' connotes 'the general idea of its purpose' and added that the phrase must be given an objective common sense meaning. <u>The learned Judge explained that the word 'design' conveys the notion of the ordinary, everyday and general purpose for which the vehicle was conceived and constructed and how a reasonable person would see its ordinary and not some fanciful, use on a road.</u>" (underlining supplied)

[28] The word "Propulsion", according to the Oxford English dictionary, means "driving or pushing forward ", it is plain that its ordinary grammatical meaning excludes ramping or jumping. Undeniably, the general idea of the purpose of the modified ice cream truck was ramping and jumping for which it was specifically designed and just because the ice cream truck could be used on the road by no means implies that it was designed for propulsion on the road. See *Chauke* (*supra*) at 183 A. Mr Du Toit did not make out a case that the vehicle was designed for ordinary everyday and general use, conversely, in paragraph 8.1 of his amended particulars of claim, he alleges that:

"the vehicle would in all respects, be suitably modified or improved to render it fit to jump or ramp over Long Street and absorb the impact upon landing safely and without causing any injury to the plaintiff."

[29] In the amended particulars of claim specifically in paragraph 17.1, it is asserted that the front chassis and /or steering column and /or suspension system and /or driver's seat of a specially modified motor vehicle collapsed after being "ramped" over Long Street and the intersection of Long and Leeuwen Streets. The motor vehicle in this instance was modified to ramp and jump as a stunt vehicle which is clearly not as contemplated in the RAF Act's meaning of propulsion.

[30] Ostensibly, the ice cream truck was not adapted for functions of an ordinary ice cream truck that would drive in the ordinary sense on a road, for the normal function of an ice cream truck. To the contrary, the ice cream truck was modified to enable it to absorb a hard impact for stunt performances which clearly is not for the purpose of ordinary driving as envisaged in section 17 (1) of the Act.

[31] Irrefutable on the facts of this matter, is that the ice cream truck is clearly a stunt vehicle designed for ramping and jumping, and Mr Du Toit was a Stuntdriver, in an enclosed film set or location. It cannot, therefore, be argued that at the time Mr Du Toit was driving a motor vehicle for the purposes of the Act. Considering the motor vehicle definition as contemplated in the Act, a clear distinction of a Stunt driver is drawn from the ordinary meaning of the driver as contemplated in the Act. According to the Oxford English Dictionary the word 'stunt' means "something unusual done for publicity " and the

word 'stuntman' means a man employed to perform dangerous stunts in place of an actor". Mr Du Toit was performing a stunt which is his occupation. In my view, these definitions elucidate, the reason and the necessity for the comprehensive personal accident insurance, which was to be maintained by Farm Film Productions in the course and scope of Mr Du Toit's rendering of services. Also, the definitions delineate Mr Du Toit's purpose in the process of filming the commercial, which was certainly not driving a motor vehicle in the ordinary course. It bears emphasis that the intention and purpose was the performance of a dangerous stunt, and that the damage or injury caused as result of the negligent act or omission by Farm Film Production was foreseen. I am not satisfied that Mr Du Toit has satisfied the jurisdictional requirements of section 17(1) of the Act to sustain a cause of action. Crucially, Mr Du Toit does not allege that he drove the said vehicle for the purposes of the Act and on a road contemplated by the Act; in a motor vehicle for the purposes of the Act. Thus, in my view, there are merits in RAF's first ground of exception.

[32] Turning to the second ground of the exception: that the particulars of claim fail to disclose a cause of action against the RAF in delict. It was contended on behalf of the RAF, that liability only arises where Mr Du Toit is able to prove all five elements of a delict inclusive of wrongfulness. The basis of this proposition is succinctly phrased by the SCA in *Septoo v Septoo and Another v Road Accident Fund [2017] ZASCA 164 at [3] (29 September 2017) at [3]:*

> *"[3] Section 3 of the Act stipulates that:*

‘The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles’ The underlying basis for the Act is the common law principles of the law of delict. A claimant must prove all the elements of a delict before it can succeed with its claim in terms of the Act.”

[33] Notably, Mr Du Toit is not opposed to this submission. Mr Newton’s fulmination in this regard is premised on the contention that, these issues: wrongfulness; and the RAF’s submission, that the recognition of its liability in circumstances such as those that give rise to Mr Du Toit’s claims, will unduly burden the RAF; and in consequence will be compromising its ability to honor legitimate claims, should not be decided on exception. In advancing this argument, Mr Newton relied on the case of *Trustees, Burmilla Trust and Another v President of the Republic of South Africa and Others* 2022 (5) SA 78 (SCA) para 59 where the court quoted an extract from *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at page 318 G- J, where the court in consideration of the determination of wrongfulness observed as follows:

“*Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited earlier Fleming rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of all circumstances of the case and of every other relevant factor. This would seem to indicate that the present matter should rather go on trial and not be disposed of on*

exception. On the other hand, it must be assumed – since the plaintiff will be debarred from presenting a stronger case to the trial court than the one pleaded — that the facts alleged in support of the alleged legal duty represent the high water mark 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." (underlining supplied)

[34] The aforementioned passage, does not seem to support Mr Newtons argument. Accordingly, it is plain that as a question of law, the issue of wrongfulness warrants determination by the courts. Therefore, courts are not prohibited from the consideration and determination of the issues such as wrongfulness on exception. In essence, courts are in a position to dispose of such issues on exception where the facts pleaded provide no form of buttress to the contention that a legal duty exists.

[35] The Constitutional Court in *Le Roux v Dey* 2011 (3) SA 274 (CC) at [122] provides guidelines on the enquiry into wrongfulness:

" In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether - assuming all the other elements of delictual liability to be present - it would be reasonable to impose liability on the defendant for damages flowing from specific conduct ; and (b) that the judicial determination of that reasonableness would in turn depend on consideration of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in

mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from the conduct." *(underlining supplied)*

[36] Undeniably, wrongfulness is not averred in the pleadings in respect of the alternative claim, the facts pleaded by Mr Du Toit similarly lack an averment specifically dealing with first, the question of whether it would be reasonable to impose liability on the RAF with the facts at hand. Second, whether the legal convictions of the community are in harmony with the imposition of liability on the RAF. Mr Du Toit's claim against the RAF is an alternative claim in response to the Farm Film Production's special plea. Intelligibly, there is appreciation on Mr Du Toit's part that the contractual remedy available to him is primary to that sought against the RAF. This appreciation is however, incongruous to the proposition by Mr Newton, that section 21 of the Act abolishes the plaintiff's contractual and common law remedies against Farm Film Productions. In my view, this argument is untenable as the claim against Farm Film Productions is extant in Mr Du Toit's amended particulars of claim.

[37] Moreover, it is abundantly clear that Mr Du Toit is not vulnerable to risk, as he has another remedy as demonstrated in how the claims unfolded and were ultimately structured. See *SA Hang and Paragliding Association v Bewick* 2015 (3) SA 449 at [33]. It follows therefore that the non-vulnerability on Mr DuToit's part exempts the RAF from

delictual liability. *Cape Empowerment Trust v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) at [28].

[38] As mentioned in the preceding paragraphs of the judgment, the contract concluded by Farm Film Productions and Mr Du Toit recognises that Farm Film Productions will inevitably be liable for any damage or injury suffered by Mr Du Toit. I am in agreement with Mr Jaga,that, recognising claims akin to the present would render the RAF the public insurer for resourced private commercial entities, who knowingly engage in dangerous activities on the roads in order to produce profitable digital commercials. In my mind, that would clearly offend the role intended to be played by the RAF which is not meant to be so expansive. In addition, to the finding I made above that plaintiff's amended particulars of claim lack averments necessary to sustain a cause of action that would render section 17(1) (a) of the Road applicable, I take the view that, imposing such liability to the RAF would not only be repudiated by society, it would be affront to the South African road users who essentially through payment of fuel levy, provide funding to the RAF.

[39] Furthermore, it has to be recognized that the convictions of the community require that contracts entered into freely by the parties be honoured. *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247(CC) at [83]. It would therefore be remiss of this court not to recognise the privity of contracts which is central to constitutional values and right to freedom and dignity; and the principle of good faith which underlies our law of contracts.

[40] In conclusion, the amended particulars of claim fail to make out a cause of action against the RAF in delict as the wrongfulness element has not been averred therein .With the aforementioned hierarchy of considerations I'm disinclined to find that Mr Du Toit's alternative claim against the RAF can be sustained as a matter of law.

ORDER

[41] In the result, the following order is made:

41.1 The RAF'S exception to the plaintiff's amended particulars of claim dated 3 December 2021 is upheld.

41.2 The plaintiff is ordered to pay the costs of this application including the costs of Counsel.

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N.E RALARALA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the excipient: R. Jaga SC, instructed by the State Attorney

For the Plaintiff: A.R Newton instructed by Lombard & Kriek Inc