



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO.: D10128/2022

In the matter between:

NAT INDUSTRIES (PTY) LTD (in liquidation)	First Plaintiff
NEIL MCHARDY N.O.	Second Plaintiff
GAIRONESSA DAVIDS N.O.	Third Plaintiff
FINANCE FACTORS (PTY) LTD	Fourth Plaintiff
and	
GRINDROD BANK LTD	Defendant

JUDGMENT

Olsen J:

[1] Two applications to amend serve before me. They owe their existence to a judgment of this court (now reported as *Nat Industries (Pty) Ltd (in liquidation) & Others v Grindrod Bank Ltd* 2024 (2) SA 506 (KZD) – hereafter the “first judgment”) upholding an exception delivered by Grindrod Bank Ltd, the defendant. The court upheld the contention that the plaintiffs’ particulars of claim disclosed no cause of action, and granted the plaintiffs leave to amend their particulars of claim within 10 days of the date of the judgment. The first application to amend was delivered on time. The second one came later. The defendant objected to both amendments upon

the basis that, save in one respect, when amended as proposed, the particulars of claim will still not disclose a cause of action, and on the basis that they will remain vague and embarrassing, as also originally contended.

[2] The first plaintiff is Nat Industries (Pty) Ltd (in liquidation). It is joined in the action by its liquidators who are the second and third plaintiffs. Four claims are pleaded in the particulars of claim. Claims one, two and four belong to Nat Industries. Its claim two is an alternative to claim one. The third claim is that of the fourth plaintiff, Finance Factors (Pty) Ltd ("Finance Factors").

[3] Nat Industries conducted business as a labour broker or temporary employment service. It was wound up by order of this court granted provisionally on 12th February 2020 and finally on 15th June 2020. Whilst in business it followed the practice of factoring or selling its client invoices. One of its clients was a company known as Southey Holdings (Pty) Ltd ("Southey"). The business of Nat Industries supplying labour to Southey was substantially downscaled in September 2016, and terminated altogether in March or April 2017.

[4] It is pleaded that on 29th September 2017 Nat Industries and Grindrod concluded a written agreement in terms of which Nat Industries would sell, and Grindrod buy at a discount, debts owing to Nat Industries for the supply of employment services to Southey. At the time there were no debts owing by Southey to Nat Industries, and there were no debts which would become due by Southey to Nat Industries. On 5th October 2017 Grindrod paid R4 million to Nat Industries to discount a debt it believed was owing by Southey to Nat Industries, and similarly on 12th October 2017 paid a further sum of R4.2 million to Nat Industries in respect of a debt thought to be owing by Southey. It is pleaded that later in October 2017 Grindrod established that there were no longer any business dealings between Nat Industries and Southey, and no debts owing by the latter. Grindrod had been the victim of fraud perpetrated by Nat Industries.

[5] A meeting was held between representatives of Grindrod and Nat Industries on 25th October 2017 at which time Grindrod was aware that false and fraudulent invoices had been presented to it for discounting by Nat Industries. It is pleaded that following that meeting the defendant failed to report the frauds

perpetrated by Nat Industries to the authorities as it ought to have done; and failed to seek the winding-up of Nat Industries; but instead bargained for and ultimately received payments from Nat Industries totalling R8 581 334.31.

[6] With that overview of the background circumstances, gleaned from the particulars of claim and the proposed amendments (as are all of the alleged facts, true or false, hereafter referred to), I turn to deal with each of the claims to determine whether the proposed amendments cure the deficiencies which led to the unchallenged finding in the first judgment that no cause of action was disclosed.

Claim One

[7] The first claim is for repayment to the first plaintiff of the money paid by Nat Industries to Grindrod following the meeting of 25th October 2017. The claim rests on the proposition that in making those payments Nat Industries made dispositions of its property to Grindrod which are recoverable in terms of both sections 30 and 31 of the Insolvency Act, 1936.

[8] As to R8,2 million of the sums paid to Grindrod, the first judgment held that there was no disposition of property belonging to Nat Industries. As the proceeds of fraud, the payments to Nat industries constituted stolen money, and Nat Industries had no entitlement to the credit in its bank account representing the money which it had received from Grindrod. (See paragraph 29 of the first judgment). The plaintiffs' notices of amendment propose a number of additions to the paragraphs of the particulars of claim dealing with claim one. However, none of them address the basis upon which it was held in the first judgment that, as to R8,2 million, the payments did not constitute dispositions of property of Nat Industries. If the amendments were granted the position would remain as it was before.

[9] As to the balance of some R381 000 paid by Nat Industries to Grindrod, the exception that no cause of action was disclosed was upheld in the first judgment upon the basis that there was no allegation of an intention to prefer, or of a factual basis upon which an inference of the intention could be drawn. (See paragraphs 30 to 32 of the first judgment.) As to the issue of collusive dealings, it was held that no factual basis for a conclusion that there was collusion had been pleaded.

[10] The quite extensive amendments proposed to the paragraphs of the particulars of claim dealing with claim one concentrate on Grindrod's failure to report the frauds committed by Nat Industries to the authorities, and allege an express intention that Grindrod should be preferred above all other creditors in circumstances where it knew that Nat Industries had insufficient funds to settle its creditors. It is indeed now proposed to plead that the payments were in fact made by Nat Industries upon the footing that the defendant would not report the fraudulent transactions or cause Nat Industries to cease trading. In my view those allegations cure the faults which were identified in the first judgment with regard to the sum of R381 000.

[11] The notices objecting to the amendments to Claim One deal only with the sum of R8,2 million. They conclude that the amendments should be allowed, but conditionally upon the prayer for enforcement of Claim One being reduced to the sum of R381 334.31. In my view that is the correct approach.

Claim Two

[12] As already mentioned Claim Two is pleaded as an alternative to Claim One. I have difficulty in understanding the basis upon which Claim Two is advanced, whether in the original pleading or under the proposed amendments.

[13] The central contention appears to be that the payments made by Nat Industries to Grindrod were the proceeds of a fraud committed by Grindrod. In the first judgment it was held that no facts were pleaded upon which it could be concluded that any fraud had been perpetrated by Grindrod. (See paragraph 34 of the first judgment.)

[14] In the original particulars of claim it was alleged that by insisting that it was paid what was owed to it, Grindrod compounded the offences of fraud and forgery that had been committed by Nat Industries. Counsel for the plaintiffs accepted in argument that this allegation ought to have been deleted by the proposed amendments as it is simply wrong in law. I must disregard it. None of the proposed amendments to the paragraphs of the particulars of claim dealing with claim two take the matter any further. The argument by counsel for Grindrod that in

its dealings with Nat Industries Grindrod was the victim of fraud, and not the perpetrator, would remain valid even if the amendments to the relevant paragraphs were allowed.

Claims Three and Four

[15] Claims three and four are delictual claims. They were dealt with together in the first judgment because their viability depended in part on similar considerations. Each of them

- (a) rests on a contention that Grindrod's liability stems from a negligent omission; and

- (b) constitutes a claim for pure economic loss.

On both these counts the plaintiffs were obliged to plead facts which, if proved, would sustain a conclusion that Grindrod's conduct was wrongful in relation to Nat Industries and Finance Factors, respectively.

[16] The first judgment held that no such facts had been pleaded. (See paragraphs 35 and 36 of the first judgment.) It recorded that in argument the plaintiffs had sought to circumvent this problem by arguing that it would be open to the trial court to develop the common law in order to allow the claim. That argument was rejected in the first judgment and has not been repeated before me.

[17] Very broadly stated the causes of action sought to be pleaded go as follows.

- (a) When in October 2017 Grindrod discovered that it had discounted false invoices, it was obliged to report the crimes to the authorities and apply for the winding up of Nat Industries.

- (b) Because Grindrod did not do either, Nat Industries was able to continue in business, and persuade other financiers, or at least Finance Factors, to discount false invoices after October 2017.

- (c) As it turned out, each of Nat Industries and Finance Factors incurred financial losses after October 2017, and are entitled to be compensated for those

losses by Grindrod, which would not have occurred had Grindrod not omitted to take the steps set out above.

[18] Some of the fundamental principles applicable in assessing liability for omissions are set out succinctly in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

(a) “Negligence, as it is understood in our law, is not inherently unlawful – it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee* [1966 (2) SA 428 (A)], namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.” (See paragraph 12.)

(b) The court endorsed the correctness of the following passage from Fleming *The Law of Torts* 4th ed at 136.

“In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff’s invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of constant shifts and changes in community attitudes.” (Paragraph 13.)

(c) In applying the test, an assessment of how the convictions of a community bear upon the decision to allow or disallow a claim flowing from an omission

“must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution.” (Paragraph 17.)

[19] Similar considerations arise in connection with claims for pure financial loss. The present case falls outside the ambit of any recognised category of such claims, such as negligent misstatement. A prominent policy consideration in this case must be whether allowing the claim opens the door to limitless or indeterminate liability to any number of people similarly situated to the plaintiffs in this case. Another prominent question is whether one is dealing with a plaintiff who is in a position to avoid the loss or the risk of loss by other means. The question also arises, especially in commercial contexts, as to whether the imposition of liability would be an undue obstacle to the pursuit by the defendant of its legitimate activities and interests. (As to the foregoing, and other principles, see *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at paras 23 to 26 , and the authorities there referred to.)

[20] With these principles in mind I turn to a consideration of what the proposed amendments may contribute to the enquiry as to whether a cause of action has been disclosed.

- (a) It is said that Grindrod held itself out to be a responsible bank and corporate citizen with which the “world at large” could transact with confidence in its integrity, ethical and responsible behaviour, and the lawful conduct of its affairs. In my view that does not single out Grindrod as exceptional in any respect. All banks, and I dare say all commercial enterprises, would find themselves hard pressed to contradict the proposition that they hold themselves out in a similar manner.
- (b) Whereas the original particulars of claim had made broad references to certain legislation under which reports, according to the plaintiff, should have been made, without identifying the particular provisions, the proposed amendment now introduces a reference to an obligation to report the matter in terms of section 34 of the Prevention and Combating of Corrupt Activities Act, 2004. A consideration of that provision suggests that it is at least arguable that Grindrod was under a statutory duty to report the fact that it had been the victim of fraud in an amount exceeding R100 000. It was not argued before

me that, properly construed, the statute determines that a failure to comply with that statutory obligation would result in delictual liability for any losses sustained by others as a result of that omission. The existence of a statutory duty is merely one factor in the much wider enquiry into whether considerations of public and legal policy dictate that it is reasonable to impose delictual liability for the consequences of non-compliance with that statutory duty. (See *South African Hang and Paragliding Association and Another v Bewick* 2015 (3) SA 449 (SCA) at paragraph 23.)

- (c) Repetitive paragraphs are sought to be introduced to bolster the original claim that Grindrod knew that if it did not report what it had discovered, or apply for the winding up of Nat Industries, that company (under the directing hand of a Ms Govender) would be able to continue in business and, if it was so minded, could defraud others using false invoices. That adds nothing to the enquiry made in the first judgment.
- (d) It is sought to introduce a paragraph which goes further, and alleges that Grindrod knew, or ought reasonably to have been aware, that there were others who had been victims of similar fraudulent conduct. However, that paragraph actually refers to an earlier allegation in the particulars of claim that Grindrod was aware of the fact that another identified company had been a victim of the same fraudulent conduct; a fact of which Grindrod was aware because it shared a director with that company, and indeed financed that company's factoring enterprise. There is in fact no allegation that Grindrod was aware that anyone besides itself and its associate was a victim of frauds perpetrated by Nat Industries.
- (e) It is alleged that Grindrod was aware that the world at large would place confidence in Nat Industries as it was transacting with Grindrod Bank. Nothing is said about how the world at large would have known that Nat Industries had conducted any business with Grindrod. (The allegation is all the more remarkable because Grindrod is asked to bear responsibility for the losses sustained by "others" after Grindrod had terminated its business dealings with Nat Industries, despite the fact that its business relationship with Nat Industries lasted for less than a month.)

[21] In my view none of these allegations take the matter any further. There is no allegation that Finance Factors knew that Grindrod was discounting invoices submitted by Nat Industries. There is no allegation that Grindrod knew that Finance Factors was factoring invoices of Nat Industries. There is no allegation in particular that Grindrod knew that false invoices were being submitted to Finance Factors. Ultimately the case sought to be made by the plaintiffs is that Grindrod owed a duty to all finance houses, and indeed to all who may do business with Nat Industries, to protect them from any potential losses caused by doing business with Nat Industries. Allowing that such a duty might be recognised as wrongful in delict would fix Grindrod with an indeterminate liability with respect to an indeterminate number of persons. Such an action is not sustainable in our law.

[22] There are peculiar and crucial features of the claims applying separately to each of Nat Industries and Finance Factors which I deal with hereunder.

Claim Three

[23] This is the claim of Finance Factors. According to the pleadings it had been factoring invoices of Nat Industries from January 2017. (The factoring agreement between Nat Industries and Grindrod was only concluded at the end of September 2017.) Finance Factors claims that at the time when Grindrod discovered the fraud in October 2017 Nat Industries had discounted a “net” R26,9 million with Finance Factors using forged Southey Invoices. (The term “net” is used to signify how much was due but unpaid at the time.) At the date of commencement of the winding-up of Nat Industries (5th February 2020) that “net” figure had risen to R130,7 million. The contention is that the difference between the two amounts (R103,7 million) is owed by Grindrod as compensation for pure financial loss. According to the particulars of claim the shortfall is solely attributable to fraudulent invoices “in relation to Southey Holdings”. The claim is said to be supported by what is set out in a schedule annexed to the particulars of claim. When I asked counsel for the plaintiffs to comment on the fact that the heading to the schedule does not suggest that it is confined to Southey invoices, I was advised that the heading is an error and could easily be amended. Taking that assurance from counsel at face value, what

the schedule reveals is that between January 2017 and November 2019 Finance Factors took cession from Nat Industries of amounts apparently owing under forged Southey invoices to the value of R5,3 billion.

[24] A plaintiff's vulnerability to harm is an important factor in considering whether an omission by the defendant, which caused or was a cause of the harm, should be regarded as actionable in delict, and in the enquiry as to whether harm by way of pure financial loss should be recoverable. (See *Edward Nathan Sonnenberg Inc v Hawarden* 2004 (5) SA 9 (SCA) at paragraphs 22 – 25, and the judgments there referred to.) Finance Factors has pleaded in effect that it is sound policy, and in accordance with justice, that by reason of the omission attributed to Grindrod, the latter should in law be regarded as in effect the insurer of any losses sustained by finance houses, or at least Finance Factors, as a result of doing business with Nat Industries from October 2017 until the date of winding up. Such a finding would imply that the law regards such money lenders as a vulnerable group, not capable of taking care of their own interests, nor of ensuring that they do not become the victims of fraud; and in particular incapable of taking care to establish that all invoices submitted for discounting are genuine. That proposition is in my view untenable.

[25] In the case of Finance Factors itself the position is perfectly clear. The contract in terms of which it factored the Southey invoices is annexed to the particulars of claim. It expressly records the right of Finance Factors to contact debtors in order to ensure that invoices submitted for discounting are genuine. It was perfectly capable of avoiding the losses it allegedly incurred. Its claim remains as expiable now as it was prior to any of the proposed amendments.

Claim Four

[26] This is the first plaintiff's claim in delict. It is pleaded that when Grindrod discovered the first plaintiff's own fraud its liabilities exceeded its assets by R44,2 million. By 5th February 2020 the disparity had risen to R144,5 million. Its claim is for the difference, some R100,3 million.

[27] In my view in arguing in support of this claim Nat Industries and its liquidators have confused the issue as to whether anything is owing by Grindrod to Nat Industries, with the question as to whether any of the creditors of Nat Industries have a claim against Grindrod. The liquidators have no right to pursue any claim which may vest in any such creditor. Their power is restricted to recovery of what is owing to Nat industries. Only one creditor, Finance Factors, has asserted a claim directly against Grindrod. As to the remaining creditors their claims are against Nat Industries only. Accordingly, if those creditors are to gain an advantage from claim four against Grindrod, it will only be indirectly. The claim, if it exists, belongs to Nat Industries only. A finding that the claim presently made in delict by Nat Industries against Grindrod is actionable must rest on a finding that Grindrod had a duty to Nat Industries to seek its winding up, and/or to report its conduct to the authorities, and that Nat Industries is itself entitled to claim the pure economic loss it has claimed.

[28] The basis for the claim that a duty was owed is more than a little confusing. In a paragraph sought to be introduced by the amendments it is said that the entire indebtedness of R100,3 million “is attributable to the fact that Nat Industries was able to continue trading”. In an earlier paragraph in the original particulars of claim the allegation is the duty of care owed to Nat Industries was to ensure that it did not continue to suffer losses in consequence of its own fraudulent conduct.

[29] On the latter basis the claim amounts to this.

“You caught me passing fraudulent invoices. You owed me a duty to report me so that I would stop this fraudulent activity. As you did not report me I carried on committing fraud. Unfortunately I lost R100,3 million in the process. According to law you are liable to compensate me for those losses.”

That proposition need only be stated in order to be rejected.

[30] If the claim is that the losses making up the sum of R100,3 million were incurred in trade unconnected with any fraudulent activities, the answer would remain the same. Here the contention is that Grindrod owed Nat Industries a duty to prevent the latter from continuing in business, either by reporting the fraud or by

applying to wind up the company. As Grindrod did not take steps to prevent Nat Industries continuing in business, it is liable to make good losses that Nat Industries happened to incur as a result of its own decision to continue in business. Again, the contention is untenable. The pleading remains excipiable because it discloses no cause of action.

Conclusion and the Appropriate Order

[31] It will be apparent that the discussion above also addresses the subject of legal causation. The plaintiffs have not moved beyond pleading the 'but for' test, which can establish factual causation only. The cause of the losses allegedly sustained by Nat Industries was its own decision to continue trading (fraudulently or otherwise) notwithstanding its insolvent condition at the end of October 2017. The cause of the losses of Finance Factors was its decision (operative at all material times) to do business with Nat Industries by factoring Southey invoices without employing at any time the simple expedient of checking that the invoices were genuine. Whether these circumstances are regarded in each case as a *novus actus interveniens*, or merely as evidence of the level of remoteness between Grindrod's omission and the loss making conduct of the two plaintiffs, the answer remains the same. There are no allegations made which, if proved, would establish the required causal link between the omission and the losses allegedly incurred.

[32] The order made at the end of the first judgment simply upheld the exceptions and granted the plaintiffs leave to amend the particulars of claim within 10 days of the date of the order. (The question of costs seems to have been overlooked. One assumes that, acting sensibly, the parties could resolve that issue without troubling the court which delivered the first judgment.)

[33] During the course of oral argument I raised the question as to whether, if I found the objections to the amendments to be well founded, I should not now strike

out the particulars of claim. Counsel for the plaintiffs argued that that would not be the proper course as Grindrod had not sought an order striking out the particulars of claim. That is not entirely correct. Such a request was made when the exception was first taken, and in my view applies equally to the objections to the notices to amend delivered in an attempt to cure the shortcomings in the pleading.

[34] In my view the correct approach is the one set out by Corbett CJ in *Group Five Building Limited v Government of the Republic of South Africa (The Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602.

“As far as I am aware, in cases where an exception has successfully been taken to a plaintiffs initial pleading, whether it be a declaration or the further particulars of a combined summons, on the ground that it discloses no cause of action, the invariable practice of our courts has been to order that the pleading be set aside and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time.”

I propose to follow that invariable practice insofar as setting aside the initial pleading is concerned. However the plaintiffs have already been allowed the opportunity to put matters right with amendments, but have succeeded in only one minor respect.

[35] In paragraph 41 of the first judgment the court recorded its intention to follow *Group Five Building*, but only did so in part. It failed to set aside the errant pleading, but did grant the plaintiffs leave to amend. As I understand it there was arguably no need to deliver a notice in terms of Rule 28(1). If an amended pleading had been delivered it would have been susceptible to an exception that it also disclosed no cause of action. The issues would have been the same as those now before the court following the procedure under Rule 28 chosen by the plaintiffs without objection from the defendant.

[36] Nevertheless, this is not an ordinary application to amend. It is an extension of the right of the defendant to except on the basis that no cause of action is disclosed. In my view the order required in this case is one which recognises that the first judgment has already established that no cause of action has been disclosed, and that where the application to amend is refused, that condition continues to prevail.

[37] Where I refer to paragraph numbers in the order which follows I am referring to the proposed new paragraph numbers reflected in the rendition of the particulars of claim reflecting the original text and proposed amendments, as supplied by counsel with the plaintiffs' heads of argument. I deal with both applications for leave to amend together.

[38] I make the following order.

1. The amendments introducing or proposed to be made to the following paragraphs of the particulars of claim are allowed, conditionally upon compliance with paragraph 4(a) of this order.
 - (a) Paragraphs 13A to 13J.4 inclusive.
 - (b) Paragraphs 23; 26.3; 26.3A.
 - (c) Paragraphs 27A to 27D inclusive.
 - (d) The deletion of former paragraphs 29, 28.1, 29.1, 29.2 and 28.2 appearing immediately after paragraph 28.
 - (e) Paragraph 29C.
2. Save as aforesaid the applications for leave to amend are dismissed.
3. The paragraphs of the particulars of claim under the headings 'Claim Two', 'Claim Three' and 'Claim Four', and the associated prayers, are set aside.
4. The plaintiffs are directed to effect the following amendments to the particulars of claim within ten (10) days of the date of this order, following the process for making amendments provided by Rule 28(7).
 - (a) The substitution of the amount of R381 334.31 for the amount of R8 581 334.31 in prayers 1 and 2, and the necessary amendments to the pleading under the present heading 'Claim One' to confine the claim to payment of R381 334.31.

(b) The deletion of the paragraphs of the particulars of claim, and the prayers, which are the subjects of paragraph 3 of this order.

5. In the event of the plaintiffs failing to comply with paragraph 4(a) of this order, the leave to amend granted in paragraph 1 of this order shall lapse, and the paragraphs of the particulars of claim under the present heading 'Claim 1' shall be regarded as set aside.
6. The costs of the applications to amend, including the notices delivered in connection therewith, shall be paid by the first and fourth plaintiffs, their liability therefor being joint and several. The costs of two counsel shall be allowed. Senior counsel's fees may be taxed on Scale C, and junior counsel's fees on Scale B.

Olsen J

Case Information:

Date of Hearing:
Date of Judgment:

27 July 2026
25 August 2026

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