



IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Exercising its Admiralty Jurisdiction

Case no: AC81/09

In the matter between:

**THE OWNERS, UNDERWRITERS AND PARTIES
WHO BEAR RISK IN AND TO THE PONTOON
“MARGARET” AND THE CARGO OF TWO
FLOATING DOCKS AND TWELVE BARGES**

Plaintiffs

And

TUG “SALVALIANT”

Defendant

Admiralty action in rem

AND

Case No: AC144/10

In the matter between:

L.J. BOER HANDEL B.V.

First Plaintiff

L.J. BOER VASTGOED B.V.

Second Plaintiff

And

SEMCO SALVAGE (VI) PTY LTD

First Defendant

POSH SEMCO PTE LTD

Second Defendant

Admiralty action in personam

Date of hearing: 14-15 October 2014

Date of judgment: 4 December 2014

JUDGMENT

SAVAGE AJ:

Introduction

[1] On 21 April 2009 the mt “Salvaliant”, a Singaporean-flagged ocean going salvage Tug took up the Tow, being the pontoon ‘Margaret’ and her cargo of two floating docks and twelve barges, and proceeded to tow the Tow around the Cape of Good Hope towards Rotterdam, Netherlands. During 22 and 23 June 2009 and after rounding the Cape of Good Hope, the Tug and the Tow encountered stormy weather with gale force winds and a heavy storm. The tow line parted on 23 June 2009 and the Tow ran aground on the Jacobs Bay reef, north of Saldanha Bay on 24 June 2009 causing the Tow to suffer irreparable damage and be wrecked.

[2] In 2009 the Owners and Parties who bear the Risk in and to the pontoon ‘Margaret’ and the Cargo of the Two Floating Docks and Twelve Barges instituted an admiralty action *in rem* against the Tug. Thereafter in 2010 the first plaintiff, L.J. Boer Handel B.V. (“Handel”) and the second plaintiff, L.J. Boer Vastgoed B.V. (“Vastgoed”), both companies incorporated according to the laws of the Netherlands with their respective principal places of business in Sliedrecht, Netherlands, instituted an admiralty action *in personam* against

Semco Salvage (VI) Pte Ltd, as the Tug-owner, and Posh Semco Pte Ltd, as salvor and towage company, both companies incorporated and carrying on business in Singapore. In both actions the plaintiff(s) seek payment of €34,236,368.26, US\$2,057,500.00 and R10,919,417.96 plus interest and costs. Attached to the particulars of claim in both actions was annexure POC1 in which the quantum of the plaintiffs' claims was detailed.

[3] The action *in rem* and action *in personam* have been consolidated for hearing at a trial which was initially set to commence in October 2014 but is currently to commence during March 2015, with the following applications now before this Court for determination:

- i. the plaintiffs' application for leave to further amend the particulars of claim in both actions;
- ii. the defendants' application in terms of Admiralty rule 20 for an order striking of the plaintiffs' application to amend the particulars of claim as an irregular proceeding; and
- iii. the defendants' application to compel a proper response by the plaintiffs to the defendants' request for trial particulars.

Application for leave to amend particulars of claim

[4] On 12 August 2014 the plaintiffs gave notice of their intention to seek an amendment to the particulars of claim in the consolidated actions. Having opposed the application to amend, the defendants abandoned their objection to the amendments in paragraphs 1.2.2, 1.2.3, 1.2.4, 1.3.2, 1.3.3 and

1.3.4 of the notice of motion. Accordingly, under admiralty rule 22(9), these amendments are deemed to have been effected and the particulars of claim amended in these respects. The remaining amendments sought in paragraphs 1.1, 1.2.1, 1.2.5, 1.2.6, 1.3.1, 1.3.5 and 1.3.6 of the notice of motion seek the substitution of the current POC1 to the particulars of claim in both actions and the amendment of the damages amount claimed from €29,011,712.61 to €28,611,712.61. The defendants persist with their opposition to these amendments.

[5] The defendants' objection centres on paragraphs 2.1 and 2.2 of the proposed annexure POC1, which relate in the main to paragraph 10.4 of the action *in rem* and to paragraph 16.4 of the action *in personam*. Paragraph 10.4 of the action *in rem* details the plaintiff's claim for damages in the amount of €13,639,104.90 being for Boer's estimated loss of income. Paragraph 16.4 of the action *in personam* details the plaintiffs' claim for damages in the amount of the €13,639,104.90 for loss of profits.

[6] Paragraph 4 of the existing POC1 reads as follows:

“4	<i>LOSS OF PROFITS</i>	
4.1	<i>Hoek en Blok accountants invoices for calculating loss of profit</i>	
4.1.1	26.10 .09	€ 18, 159.40
4.1.2	18.11 .09	€ 19, 635.00
4.1.3	21.01.10	€ 17, 790.50
		€ 55, 584.90
4.2	<i>Loss of profits claim iro loss of use of the Floating Dock:</i>	
4.2.1	<i>As per calculation by Hoek en Blok of 8 Feb 2010, extrapolated for 6 years, rather</i>	

than the 2 years used in the calculation
 = € 877, 840.00 or € 438, 920.00
per annum
 - therefore 6 x € 438, 920.00 € 2,633,520.00

4.3 *Loss of profit claim iro the use of the pontoon “Margaret”*

4.3.1 € 5000.00 per day (being the
 rate secured from Mertrade per Charter
 agreement) for 6 years 365 x
 € 5000 x 6 years € 10,950,000.00

TOTAL LOSS OF PROFITS CLAIM € 13,639,104.90”

[7] In the report which was addressed to L.J. Boer Handel B.V. by auditors Hoek and Block dated 8 February 2010 to which reference is made paragraph 4.2.1 of the existing POC1, the operating budget ‘*prepared for the dock that was lost due to the events on the coast of South Africa*’ was recorded as € 877,840.00.

[8] The plaintiffs first sought that POC1 be amended under the heading ‘(l)oss of profit claim iro loss of use of the Floating Dock’ at 2.1.2 to the amount of €2,970,000.00 for ‘(l)oss of rental suffered by L.J. Boer Vastgoed BV from September 2009 to September 2015, calculated on loss of rental of € 495,000.00 per annum for 6 years’; and a similar loss of profit claim in respect of the use of the pontoon “Margaret” under 2.2 in the amount of € 4,641,000.00 ‘*arising from loss of charter hire by L.J. Boer Vastgoed BV, calculated on a daily rate of € 4,250 for 26 weeks per year, for 6 years*’. The plaintiffs abandoned this proposed POC1, following opposition by the defendants.

[9] The plaintiffs then put up the current proposed version of POC1. It is this proposed version that is the subject of the current application for amendment. In this proposed POC1, headed '*Plaintiffs' Quantum of Claim Schedule*' paragraphs 2.1 and 2.2 are styled 'loss of profits' claims in respect of the pontoon, Margaret, and the two sections of the floating dock:

“2 *LOSS OF PROFITS arising out of the loss of the floating dock and pontoon*

2.1 *Loss of profit claim iro loss of use of the Floating Dock*

2.1.2 *Loss of rental suffered from September 2009 to September 2015, calculated on loss of rental of € 495, 000.00 per annum for 6 years* € 2, 970, 000.00.

2.2 *Loss of profit claim iro the use of the pontoon “Margaret”*

2.2.2 *Loss of profit arising from loss of charter hire, calculated on a daily rate of € 4,250.00 for 26 weeks per year, for 6 years* € 4, 641, 000.00

TOTAL LOSS OF PROFITS CLAIM € 7,611,000.00”

[10] In this proposed POC1 the reference to Vastgoed contained in the earlier version put up by the plaintiffs has been removed.

[11] The distinctions between the loss of profits claim quantified in respect of the pontoon and floating dock in the existing POC1 and the proposed POC1 are as follows:

11.1 In the existing POC1, the loss of profits claim in respect of the floating dock is detailed ‘(a)s *per calculation by Hoek en Blok of 8 Feb 2010, extrapolated for 6 years, rather than the 2 used in the calculation...*’ with a total of € 2,633,520.00 claimed,

whereas the proposed POC1 details this claim as *‘(l)oss of rental suffered from September 2009 to September 2015, calculated on loss of rental of € 495, 000.00 per annum for 6 years’* with a total amount of € 2,970, 000.00.

11.2 In the existing POC1 the loss of profits claim in respect of the pontoon is stated as *“€5000,00 per day (being the rate secured from Mertrade per Charter agreement) for 6 years 365 days x €5000 x 6 years € 10,950,000.00”*, whereas the proposed POC1 details it as a *‘(l)oss of profit arising from loss of charter hire, calculated on a daily rate of € 4,250.00 for 26 weeks per year, for 6 years’ in a total amount of € 4, 641, 000.00’*;

11.3 Total loss of profits in the amount of €13,639,104.90 are claimed in the existing POC1 whereas in the proposed POC1 the total amount is stated to be €7,611,000.00.

[12] The defendants object to the introduction of paragraphs 2.1 and 2.2 amended proposed POC1 on the basis that –

12.1 if the amendment were permitted, it would have the effect that the claim for loss of profits would be one advanced by Vastgoed when it was neither the owner nor possessor of the pontoon or floating dock at the time of the stranding and therefore, as a matter of English law, it has no claim for such a loss and to allow the amendment would render the particulars of claim excipiable; and

12.2 to the extent that South African law applies, the particulars of claim as formulated lack the requisite allegations to support a claim for loss of profits by Vastgoed and would therefore be excipiable to the extent that the amendment was made.

[13] Uniform rule 28 governs the amendment of pleadings, with the Court granted a wide discretion under rule 28(10) to grant leave to amend any pleading or document. In granting amendments the Court the greatest latitude to effect amendments¹ the general rule is that an amendment will be allowed where it permits the ventilation of the real issues between the parties in order that justice is done,² except where it is *mala fide*, causes prejudice or injustice which cannot be compensated by an order for costs or, where appropriate, a postponement. An amendment will generally not be allowed where its introduction into the pleading would render such pleading excipiable,³ save for exceptional cases where the balance of convenience or some such reason might render another course desirable.

[14] It is apparent from paragraph 10.4 of the particulars of claim in the action *in rem* and paragraph 16.4 of the action *in personam* that it is the plaintiffs, Handel and Vastgoed, who seek damages for loss of income (in the

¹ *Whittaker v Roos and Another* 1911 TPD 1092 at 1102

² *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D&CLD) at 638A-B; *Devonia Shipping Lt v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369F; *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 9; 463E, 462J-463B and 464E-H

³ *Bafokeng Tribe v Impala Platinum Ltd and others* 1999 (3) SA 517 (BH) at 539H-J; *Barnard v Barnard* 2000 (3) SA 741 (C) at 754F; *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T); *Kirschke v Road Accident Fund* 2004 (4) SA 358 (W) at 363B

in rem action) and loss of profits (in the *in personam* action) as a consequence of the stranding. These claims follow averments made in the amended particulars of claim regarding the ownership of the property. At paragraph 2 of the particulars of claim in the action *in rem* it is pleaded that Vastgoed was the owner of the twelve barges, while Handel was the owner of the pontoon “Margaret” and two floating docks. At paragraph 3 of the amended particulars of claim in the action *in personam* it is pleaded that:

‘3. *At all material times:*

3.1 *the first plaintiff, alternatively the second plaintiff, was the owner of the pontoon ‘Margaret’ and two floating docks and/or bore the risk therein;*

3.2 *the second plaintiff, alternatively the first plaintiff, was the owner of the twelve barges loaded aboard the ‘Margaret’ and/or bore the risk therein.’*

[15] It follows from the particulars of claim therefore that in the action *in rem* a claim for loss of income is pursued against the defendant by the plaintiffs in circumstances in which the ownership of the property is specifically pleaded. In the action *in personam* a loss of profits claim is pursued by the plaintiffs in circumstances in which the one plaintiff has been pleaded as the owner, with the other plaintiff pleaded in the alternative as the owner of the same property. The plaintiffs have not made out a claim for pure economic loss in their particulars of claim, nor have they alleged that the defendants’ conduct vis-à-vis Vastgoed was wrongful. The defendants contend

that there are no facts pleaded from which wrongfulness may be imputed or inferred.

[16] In particulars provided to the defendants for purposes of trial the plaintiffs stated that ownership and risk in the pontoon and the barges was transferred by Handel to Vastgoed on 23 March 2009, being the date when Mr Leo Boer signed the notarial deeds of sale giving effect thereto before the notary in Sliedrecht, Holland, and effected on that date. Ownership in the pontoon was then transferred back to Handel on 15 April 2009, being the date when Mr Boer signed the notarial deeds of sale giving effect thereto before the notary.

[17] Trial particulars under rule 21(2) may be requested as are necessary to prepare for trial and are not pleadings: they do not set up a cause of action or a defence by which a party is bound, nor can they change an existing cause of action, create a new one or limit the scope of the case being made by the party that supplies them.⁴ Their purpose in general is not to elicit evidence or information that will emerge in cross examination⁵ but ‘...to limit waste of time and costs by providing the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponement to seek evidence to meet a case’.⁶ It follows therefore that the plaintiffs’ case regarding where ownership of the property lay is that set out in the pleadings and this pleaded case is not amended by the trial particulars

⁴ *Ruslyn Mining and Plant Hire (Pty) Ltd v Alexkor Ltd* [2012] 1 All SA 317 (SCA) at para 18

⁵ *Von Gordon v Von Gordon* 1961 (4) SA 211 (T) at 213

⁶ *Ruslyn* at para 8

provided. The fact that trial particulars provided may be shown later to have caused prejudice by virtue of incorrect information being put up which contradicts the particulars of claim, is a matter for consideration by the trial court whether in respect of costs or the grant of a postponement as a result thereof. For current purposes the trial particulars provided do not amend the existing cause of action or pleaded case as detailed by the plaintiffs.

[18] In the plaintiffs' founding affidavit to the current application, their attorney, Mr Patrick Holloway, stated that the plaintiffs have advanced their case on the basis that no distinction has been made between Handel and Vastgoed in the quantification of the claim, with both being subsidiary companies controlled by Mr L J Boer, who is the sole trustee of Stichting Administrasie Kantoor LJ Boer Sliedrecht Beheer, which owns all shares in LJ Boer Sliedrecht Beheer BV which in turn owns all shares in Handel and Vastgoed, of which Mr Boer is the sole director. Mr Holloway states further that –

'...it had always been Mr Boer's intention that Handel would in due course have transferred ownership of both the two halves of the floating dock and the pontoon to Vastgoed... after they had arrived in Rotterdam and the composite dock had been completed. Mr Boer had intended that Vastgoed would thereafter rent the floating dock to the entity which would operate it...As regard the pontoon, Mr Boer had also always intended that the pontoon would in due course be transferred to Vastgoed by Handel. In fact, a notarial deed of transfer of ownership from Handel to Vastgoed was executed on 23 March 2009. However, this transfer was reversed on 15 April 2009, so, I understand, that ownership of the pontoon was transferred back to Handel....To sum up, the position therefore is that as far as the plaintiffs are concerned, Handel was the owner of the two halves of the floating dock and the pontoon at the time of the casualty while, arising out of Mr Boer's

aforesaid intention, Vastgoed would have suffered the loss of profits in consequence of their loss in the casualty.'

[19] Mr *MacWilliam* SC argued for the plaintiffs that the contents of paragraphs 2.1 and 2.2 of the proposed POC1 introduce nothing new and refer to neither Handel nor Vastgoed, only seeking to amend the quantification of the plaintiffs' loss of profit claims and not the formulation of the claims in the particulars of claim. Yet, it was argued that the defendants are not entitled to rely as 'immutable' fact on Handel being the owner of the pontoon while Vastgoed was the plaintiffs not that the intended owner who would have lost profits and the proposed POC1 does not deal with this issue. The particulars of claim in the two actions have never identified Handel or Vastgoed as the plaintiff claiming loss of profits and the plaintiffs note that the defendants have not excepted to the particulars, despite the alleged ground of exception having existed since the inception of the claims, and any exception now out of time in that two years have elapsed since the particulars of claim were amended. The plaintiffs contend that the identity of the specific plaintiff which owns the pontoon and floating dock is only capable of determination by the trial court and that a quantification of the loss of profits claim should therefore not be precluded. Importantly, Mr *MacWilliam* stated that the plaintiffs do not exclude that the claim pursued is one for pure economic loss, which they argue is competent both under either South African Roman-Dutch and English law.

[20] I accept that the amended particulars of claim read with the existing POC1 by referring to the auditors' report and the charter agreement

limited the claim to one by Handel. This is not however the case in respect of the proposed POC1. The proposed POC1 therefore alters the quantification of the claim proposing a claim by either Handel or Vastgoed without limiting such a claim to one based solely on ownership of the property in question.

[21] Admiralty rule 2(1)(a) requires that a summons ‘*contain a clear concise statement of the nature of the claim and of the relief or remedy required and of the amount claimed, if any*’, with Admiralty rule 9(3)(a) requiring every pleading to contain a clear and concise statement of the material facts upon which the party relies for his or her claim with sufficient particularity to enable a reply. These rules echo similar provisions in the Uniform Rules of Court. While the facts to which a party pleads do not need to be established in order for an amendment to be granted, the issue proposed to be introduced by the amendment must be a triable issue⁷ which if proved on the basis of evidence foreshadowed by the applicant in his or her application, will be viable or relevant, or which will as a matter of probability be established by the evidence thus foreshadowed.⁸

[22] Uniform rule 23 permits a party to deliver an exception ‘*(w)here any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be...*’. An exception

⁷ *Trans-Drakensberg Bank Ltd (under judicial management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D&CLD) at 638A-B; *Barnard* at 754F; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 565H-J

⁸ *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander* [2002] 1 All SA 517 at para 34; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* (2) 2005 (6) SA 23 (C).

raised strikes at the formulation of the whole cause of action, which must be demonstrated to be vague and embarrassing:⁹

‘The plaintiff is required to furnish an outline of his case. That does not mean that the defendant is entitled to a framework like a crossword puzzle in which every gap can be filled by logical deduction. The outline may be asymmetrical and possess rough edges not obvious until actually explored by evidence. Provided the defendant is given a clear idea of the material facts which are necessary to make the cause of action intelligible, the plaintiff will have satisfied the requirements.’

[23] In *Quinlan v MacGregor*¹⁰ it was stated that an exception to a pleading on the ground that it is vague and embarrassing involves a determination as to whether the pleading lacks particularity to the extent that it is vague and thereafter whether the vagueness causes embarrassment of such a nature that the excipient is prejudiced. By the nature of exception proceedings the correctness of the facts averred in the particulars of claim must be assumed.¹¹

[24] Both the action *in rem* and the action *in personam*, now consolidated, are matters in respect of which a Court of Admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, had jurisdiction immediately before the commencement of the Act on 1 November 1983. The defendants contend that the plaintiffs’ claims are governed by English law as at 1 November 1983, which is South African law, in accordance

⁹ *Jowell v Branwell-Jones and others* 1998 (1) SA 836 (W) at 899G, 913F-G

¹⁰ 1960 (4) SA 383 (D) at 393 E-H

¹¹ *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 3-10; *Stewart & another v Botha & another* 2008 (6) SA 310 (SCA) para 4

with s 6(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (“AJRA”), as amended. S 6 provides that:

- ‘(1) *Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall –*
- (a) *with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such matter at such commencement, insofar as the law can be applied;*
- (b) *with regard to any other matter, apply the Roman Dutch law applicable in the Republic.*
- (2) *The provisions of ss (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in para (a) or (b) of that subsection.’*

[25] Corbett JA in *Transol Bunker BV v MV Andrico Unity and others*¹² stated that in terms of s 6(1)(a) disputes such as that before this Court must:

*‘...be resolved by reference to the applied by the English High Court exercising admiralty jurisdiction as at 1 November 1983 and that this reference comprehended both domestic rules of law and the relevant principles of private international law’.*¹³

¹² 1989 (4) SA 325 (A) at 336B

¹³ See too *Red Sea Insurance Company Limited v Bouygues SA and 22 Others* [1995] 1 AC 190, Privy Council Appeal No. 32 of 1993 also referred to as *The Agulhas* 1999 SCOSA A1 (D); Hofmeyr Admiralty Jurisdiction: Law and practice in South Africa 2nd edition, chapter 111 para 11.17, p93, with reference to *Transol Bunker BV v The Andrico Unity* 1987 (3) SA 794 (C) at 822G-823D and on appeal in 1989 (4) SA 325 (A) at 335E-336B; *Macard Stein & Co v Port Marine Contractors (Pty) Ltd* 1995 (3) SA 663 (A) at 667C and *The Argun* 2001 (3) SA 1230 (SCA) at 1239 I-J

[26] The plaintiffs contend that under English private international law it is South African Roman-Dutch law that has the closest connection to the delict and as the *lex loci delicti* it applies to the claims. The defendants dispute this on the basis that South African law is English law as at 1 November 1983, alternatively if English private international law finds application then the Court will nevertheless apply English law as at 1 November 1983 on the application of the double actionability doctrine detailed in *Phillips v Eyre*¹⁴:

‘As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England...Secondly, the act must not have been justifiable by the law of the place where it is done’.

[27] *Chaplin v Boys*¹⁵ found double actionability to be a general rule to which an exception may apply. In that case, English law, being the *lex fori*, applied given that the litigants were British servicemen even when damages were not recoverable under Maltese law. Although the *ratio decidendi* in *Chaplin v Boys* has long been the subject of debate, there has been judicial approval for an exception to the principle formulated as arising on the basis of the law that had the most significant relationship with the occurrence and the parties.¹⁶ The Privy Council in *Red Sea Insurance Co Ltd v Bouygues SA and*

¹⁴ 1870 LR 6 QB 1 at 28 -29

¹⁵ [1969] 2 All ER 1085.

¹⁶ Dicey, Morris and Collins on The Conflict of Laws (15th ed) 2006 at 1895 and 1896 footnote 37. This formulation has received subsequent judicial approval.

*others*¹⁷ found the double actionability rule as not inflexible, with it possible to depart from the rule on unclear and satisfying grounds in order to avoid injustice such as the law of the country to which there existed the most significant relationship with the occurrence and with the parties. This was so even where the claim would not be actionable under the *lex fori*.

[28] In addition to arguing that the decision in *Red Sea* is not binding given that it is a decision of the Privy Council, the defendants contend that there are no significant factors connecting any particular country to the delict. Without determining the weight to be attached to the decision in *Red Sea*, it appears to me that it must have strong persuasive value. Nor am I persuaded that no particular country is connected to the delict given that the stranding occurred in the territorial waters of South Africa which provides a significant connecting factor in circumstances in which the United Kingdom has no such direct connection. It seems to me therefore that the country with the most significant relationship with the occurrence appears therefore to be South Africa.

[29] The parties are not *ad idem* as to whether a claim for pure economic loss is permissible under English law and to this extent the issue of choice of law becomes relevant. Assuming for current purposes that Mr *MacWilliam* is correct and South African law applies to the delict, a claim for pure economic loss, as per *Administrateur, Natal v Trust Bank Bpk*,¹⁸ would be

¹⁷ [1994] 3 All ER 749

¹⁸ 1979 (3) SA 824 (A)

recognised by our law with the only limiting factor being whether the defendant's conduct was wrongful vis-à-vis the plaintiff, which is a matter of public policy.¹⁹ However, as was stated in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*²⁰ by Khampepe J:

'There is no general right not to be caused pure economic loss...our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must be positively established. It has thus far been established in limited categories of cases, like intentional interferences in contractual relations or negligent misstatements, where the plaintiff can show a right or legally recognised interest that the defendant infringed...In addition, if claims for pure economic loss are too freely recognised, there is the risk of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". Pure economic losses, unlike losses resulting from physical harm to person or property—

"are not subject to the law of physics and can spread widely and unpredictably, for example, where people react to incorrect information in a news report, or where the malfunction of an electricity network causes shut-downs, expenses and loss of profits to businesses that depend on electricity."

...So the element of wrongfulness provides the necessary check on liability in these circumstances. It functions in this context to curb liability and, in doing so, to ensure that unmanageably wide or indeterminate liability does not eventuate and that liability is not inappropriately allocated'.

[30] It is trite that the plaintiff is required to plead all the facts on which it relies. If the pleadings lack sufficient clarity to make out a case, the pleadings may be vague and embarrassing.²¹ Equally trite is that five elements must be present under our law before conduct complained of may be classified

¹⁹ *Country Cloud Trading CC v MEC, Department of Infrastructure* 2014 (2) SA 214 (SCA) at para 18

²⁰ (CCT 185/13) [2014] ZACC 28 (3 October 2014); see too 2014 (2) SA 214 (SCA) at para 18 per Brand JA

²¹ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 575 (A) at 498H-499A

as the delict: an act, wrongfulness, fault, causation and harm.²² Save for certain exceptions, with one or more of these elements absent there is no delict and no liability.²³ In *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*²⁴ Brand JA stated that-

‘The proposition that a plaintiff claiming pure economic loss must allege wrongfulness, and plead the facts relied upon to support that essential allegation, is a principle well founded. In fact, the absence of such allegations may render the particulars of claim excipiable on the basis that no cause of action has been disclosed.

[31] In *Minister of Safety and Security v Scott*²⁵ it was stated that our courts have correctly held that the wrongfulness of an act causing pure economic loss almost always lies in the breach of a legal duty. This requires in each case a determination as to whether, according to the circumstances, there was a legal duty to avoid pure economic loss with the yardstick being the general criteria of reasonableness or *boni mores*.²⁶ The *boni mores* criterion implies a careful weighing up of the interests of the parties involved, taking into account the public interest.²⁷ This involves courts attaching importance to factors such as knowledge (whether the defendants knew or subjectively foresaw that their negligent conduct would cause damage to the plaintiffs);²⁸ whether the defendants should have foreseen that their negligent conduct would have harmed the plaintiffs; whether practical steps could have been

²² *Telematrix* at 468

²³ Neethling at page 4

²⁴ 2009 (2) SA 150 (SCA) at para 14 with authorities quoted there.

²⁵ 2014 (6) SA 1 (SCA) at para 32

²⁶ Neethling *et al* Law of Delict (2010) at 291 and authorities quoted there.

²⁷ *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 384

²⁸ At 386

taken by the defendant to prevent the economic loss; the extent of the defendants' professional knowledge and competence; the extent of the risk of economic loss and the extent of the loss; the existence of any statutory provision; and other miscellaneous considerations.²⁹

[32] The plaintiffs' particulars of claim do not contain sufficient allegations to support a claim for economic loss by Vastgoed. The reference to a 'breach of duty' of the amended particulars of claim is insufficient and the grounds on which negligence is alleged cannot be extrapolated to glean the basis on which wrongfulness is alleged. Without a clear and concise statement of the material facts on which a pure economic loss claim is founded and from which wrongfulness is alleged to arise, permitting the amendment sought would quantify a claim in respect of which there has not been a clear and concise statement of the material facts relied upon with sufficient particularity to found such claim pleaded and which, if granted, may well render the pleadings excipiable. In the circumstances, I am not persuaded that the application to amend the particulars of claim to the extent sought by the plaintiffs through the introduction of paragraphs 2.1 and 2.2 of the proposed POC1 stands to be granted. Such application is accordingly refused and the plaintiffs are to pay the defendants' costs jointly and severally, such costs to include those occasioned by the employer two counsel.

²⁹ Neethling *et al* (*op cit*) at 293-7

Admiralty rule 20 application

[33] The second application before this Court is one brought by the defendants under Admiralty rule 20 for an order striking out the plaintiffs' application to amend the particulars of claim as an irregular proceeding. Rule 20 permits the Court to strike out any proceedings which are vexatious, an abuse of the process of the court or make such an order as appears to be just where they have been in regular proceedings or non-compliance with the rules or any order of court.

[34] The defendants complaint is that Uniform rule 28(4) the plaintiffs were required to commence an application for leave to amend their particulars of claim within 10 days of the date upon which the notice of objection was received, being by no later than 2 July 2014. There is no dispute that such application was launched six weeks later on 12 August 2014, with no application for condonation, seeking an amendment that differed from the one foreshadowed in the notice of amendment. By doing so, the defendants contend that the plaintiffs' conduct is vexatious and unfounded.

[35] In *Federated Trust Ltd v Botha*³⁰ it was stated that -

'The Court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts...Where one or other of the parties has failed to comply with requirements of the Rules or order made in terms thereof and prejudice has thereby been caused to his opponent, it should be the court's endeavour to remedy such prejudice

³⁰ 1978 (3) SA 645 (A) at 654C-F

in a manner appropriate to the circumstances, always bearing in mind the object for which the Rules were designed.'

[36] Vexatious proceedings are those which are unfounded or impossible, pursued where there is '*plainly no prospect of success*', or which '*can really lead to no possible good*'.³¹ The plaintiffs' application to amend its particulars of claim constitutes no such proceedings.

[37] Abuse of process refers to frivolous litigation with an ulterior or improper purpose to '*exert pressure so as to achieve and improper end*'.³² Similarly, the plaintiffs' application to amend cannot be said to constitute an abuse of process. The defendants have shown no prejudice to have been caused to them as a consequence of the late filing of the amendment application given the postponement of the trial which had been agreed prior to the hearing of the matters at hand.

[38] This Court is clearly permitted under rule 28(10) to grant leave to amend any pleading or document regardless of when such application is made, with due regard to issues of prejudice. It is unclear why given the agreed postponement of the trial, the defendants persisted with the current application, as opposed to focusing on the opposition to the amendment application. I am satisfied that the plaintiffs were within their rights to seek an amendment on the

³¹ *Fitchet v Fitchet* 1987 (1) SA 450(E) at 454; *Farjas Pty Ltd and another v Regional Land Claims Commissioner, KwaZulu-Natal* 1988 (2) SA 900 (LAC) at 927; *Polverini v General Accident Insurance Co South Africa Ltd* 1988 (3)SA 546 (W) at 554.

³² *PricewaterhouseCoopers Inc and others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) at para 50.

basis they did and that their delay in doing so was neither vexatious nor did it constitute an abuse of process. In these circumstances, it must follow that the defendants' application under Admiralty rule 20 is refused. There is no reason as to why the defendants should not pay the plaintiffs' costs in opposing this application jointly and severally, including the costs of two counsel.

Application to compel response to the defendants' request for trial particulars

[39] In the final application before this Court, the defendants seek an order compelling the plaintiffs to provide a '*full and proper response*' to the defendant's request for trial particulars delivered on 25 March 2014. By the date of hearing of this application the particulars sought which had not been provided had been narrowed to paragraphs 15.1, 52, 70 and 153 of the request. The defendants contend that whatever the outcome of the application they have been substantially successful insofar as following the launch of the current application is concerned, with *inter alia* paragraph 2.1 of the notice of motion having been resolved and the particulars sought in paragraphs 1, 3, 4.1, 7, 9, 40 and 83 having been furnished by the plaintiffs. The plaintiffs dispute that the defendants are entitled to the costs of this application given that it was in an attempt to avoid litigation that such particulars were provided, and not as a result of an entitlement on the part of the defendants to obtain such particulars.

[40] Admiralty rule 13 provides that:

'(1) *At any time after the close of pleadings a party may deliver a request for further particulars with regard to the pleading of any*

other party to the action for the purpose of enabling the party delivering the request to prepare for trial.

(2) (a) *Particulars may be requested of a denial or with regard to any matter deemed to have been put in issue.*

(b) *It shall not be an objection to any such request that the purpose of the request is to obtain an admission of a matter placed in issue.*

(3) *Any answer to a request for further particulars shall bind the party giving the answer in relation to all particulars to the action and not only in relation to the party requesting the particulars.'*

[41] The ambit of Admiralty 13 is wider than the provisions of Uniform rule 21(2), which restricts particulars to those '*strictly necessary to enable him to prepare for trial*'. The defendants contend that the Court may go beyond the pleadings and look at other matters to determine whether a litigant requires the particulars in order to prepare for trial with the purpose of particulars is to prevent surprise and to narrow the issues in dispute, without tying the other party down or limiting his or her case. As was stated in *Ruslyn Plant Hire Ltd v Alexcor Ltd*³³—

'The purpose of particulars for trial is to limit waste of time and costs by providing the other party with additional insight into the case which has been pleaded, thus avoiding, where possible, delays or postponement to seek evidence to meet a case'.

Para 15.1

[42] In paragraph 15 of the request the plaintiffs are asked whether they admit that the bill of lading listed as item is 14 and 15 of the plaintiffs'

³³ At para 8

discovery affidavit dated 29 October 2012 is the bill of lading issued in respect of the Tow. The plaintiffs responded 'no'. In paragraph 15.1 of the request, the plaintiffs were asked seven questions with regards to the bill of lading. It is the sixth question which is the subject of this application, namely whether the plaintiffs or their agents, including Rabobank, participated or assisted in the drawing up of the bill of lading, and in the formulation of the description of the cargo and the clauses on the face of the bill of lading. If so, full details were sought as to precisely which provisions were proposed or formulated. In response the plaintiff's stated that the particulars requested are not required for any purpose envisaged in the rules of court and are refused.

[43] The defendants argue that they require details relating to the bill of lading which is a negotiable document evidencing a contract of carriage between one or both of the defendants, as carrier, and the shipper, Ningbo Grand Ocean International ('Ningbo'). If the bill of lading was delivered to the plaintiffs or their agents, the plaintiffs may have become parties to the contract of carriage evidenced by the bill of lading.

[44] It is not disputed that the bill of lading is recorded to be '*without prejudice to the signed Towcon agreement*'. The parties agree that the Towcon constitutes the contract and is unaffected by the signature of the bill of lading. However, the defendants submit that the effect of the clause is that the Towcon will be regarded as incorporated into the bill of lading contract, save insofar as the terms of the bill of lading are inconsistent with the Towcon and that they require the information requested for purposes of preparing for trial. I am not

satisfied that this is so, or that such information is reasonably required by the defendants for purposes of preparing for trial. Such matters are properly dealt with in evidence and the plaintiffs are not obliged to provide the particularity sought in this regard by the defendants.

Para 52

[45] The plaintiffs were asked in paragraph 51 of the request whether it was the duty of the master and/or crew of the Tug, and/or of the Owner or Posh Semco, to ensure that the towing arrangement, emergency towing arrangement, tackle and/or equipment on board the Pontoon was what would reasonably be expected to ensure the Tow was towed safely, that the tow line would not part, and that if it did part, that the Tow could nonetheless be retrieved before stranding. To this the plaintiffs replied 'yes'. In paragraph 52 of the request the plaintiffs were asked if this was so, and having regard to inter alia Box 39 of Part 1 of the Towcon (item A12 of the first part first schedule of the defendant's discovery affidavit stated to January 2013) and clauses 2.2, 2.3 and 2.6 of the Transportation Manual (item A10 in the first schedule to the defendants' discovery affidavit deposed to on 2 January 2013) to specify the factual and legal basis for that contention.

[46] The plaintiffs responded that not only are the terms of the Towcon irrelevant to the plaintiffs' cause of action but the plaintiffs were not responsible for the tow from Shanghai to Rotterdam, were not party to the Towcon and played no role in its negotiation. Furthermore, the Transportation

Manual was not prepared by plaintiffs and the plaintiffs had no knowledge of it prior to the parting of the tow wire.

[47] The defendants claim that they are entitled to know the legal basis and other basis for the plaintiff's contention that the defendants, as well as the master and crew of the Tug, had an obligation to ensure that the towing arrangement and the emergency towing arrangement were adequate. This is particularly so as the plaintiffs' contentions are contradicted by the provisions of the Towcon and the Transportation Manual. Once again, I am not satisfied that this information is reasonably required by the defendants for purposes of preparing for trial. Such matters are properly dealt with in evidence and the plaintiffs are not obliged to provide the particularity sought in this regard by the defendants.

Para 70

[48] The plaintiffs were asked in paragraph 70 what distance they regard as constituting sufficient sea room between the Tug and Tow and the West Coast with distances stated from 20 – 100 nautical miles, or more. In response the plaintiffs indicated that after passing Cape Agulhas the Tug and Tow should have put as much to sea room as possible between them and the West Coast but that it was not possible to state precisely what that distance would have been as this would have depended on a number of factors including the Tug's capabilities and limitations, the behaviour of the Tow, the convoy's speed and the sea and weather conditions actually experienced.

[49] The defendants contend that having made a positive averment in this regard, they cannot refuse to provide an indication of what they regard as ‘sufficient sea room’ to be. I am not satisfied that this is so, or that such information is reasonably required by the defendants to prepare for trial. Such matters are properly dealt with in evidence and the plaintiffs are not obliged to provide the particularity sought in this regard by the defendants.

Para 153

[50] The plaintiffs were asked to provide full particulars of and in terms of rule 35(3) to produce and discover all documents relating to the pledge of the plaintiffs' current and future claims against Posh Semco as described in the relevant finance proposal, including details of any registration thereof in the Netherlands. In response the plaintiffs stated that they are not in possession of any further documents relating to the pledge.

[51] With the deed of pledge having been discovered by the plaintiffs, the plaintiffs contend that the defendants seek documents and further particularity regarding the reference to a finance proposal referred to in the pledge in an attempt to investigate whether the plaintiffs have title to sue. What this request amounts to is a fishing expedition embarked upon by the defendants with the hope that the plaintiffs *locus standi* may be impeached. I am not satisfied that such information is reasonably required for purposes of preparing for trial and the plaintiffs are not obliged to provide the particularity sought in this regard by the defendants.

[52] The determination of the costs of this application should properly be dealt with by the trial court in its consideration of the evidentiary material before it, including the relevance of such material. The costs of this application accordingly stand over for later determination.

Order

[53] In the result, an order is made in the following terms:

1. The plaintiffs' application to amend the particulars of claim in the consolidated actions instituted under case numbers AC81/2009 and AC144/2010 is refused. The plaintiffs are jointly and severally to pay the defendants' costs in opposing such application on the scale between party and party, including the costs of two counsel.
2. The defendants' application under Admiralty rule 20 is refused. The defendants are jointly and severally to pay the plaintiffs' costs in opposing such application on the scale between party and party, including the costs of two counsel.
3. The defendants' application to compel a response by the plaintiffs to the request for further particulars to prepare for trial is refused with costs to stand over for later determination.

KM SAVAGE

Acting Judge of the High Court

Appearances:

For plaintiffs: RWF MacWilliam SC and D Melunsky

Instructed by Webber Wentzel

For defendants: M Wragge SC and JD McKenzie

Instructed by Norton Rose Fulbright SA