IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NUMBER: 08/42229

In the matter between: -

McCRAE, GORDON ANDREW Plaintiff/Respondent

and

ABSA BANK LIMITED Defendant/Excipient

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Defendant except to plaintiff's particulars of claim. Defendant avers that the shareholder plaintiff is precluded from instituting action against defendant bank for damages arising out of the diminution in the value of his shareholding when such defendant is alleged to have caused harm to the company in which the plaintiff is a shareholder. This judgment must address the rationale for the rule against the mischief of 'double recovery' or risk of 'double jeopardy' (also known as the 'Foss v Harbottle' rule) as well as the rationale for such exceptions to this rule as may be found to exist.

2. In December 2005 the defendant bank made an accounting entry which transferred millions of Rands which had been standing to the credit of three bank accounts in the names of two companies in which plaintiff is a substantial shareholder[1]. The plaintiff avers that these transfers were done unlawfully,

[1] Metallurgical Design & Management (Pty) Ltd ("MDM") and MDM Ferroman (Pty) Limited ("MDMFM").

without authorisation and in breach of specific signing instructions.

3. Defendant bank was subsequently ordered by the Supreme Court of Appeal to repay the monies transferred from one account and has since also repaid the monies transferred from another account.

4. Plaintiff avers that the defendant bank's conduct was unlawful and intentional alternatively negligent. The monies were transferred out of bank accounts ring-fenced for specific contractual purposes. It is alleged that the result of defendant's conduct was to render four companies[2], in which the plaintiff was either the sole or a substantial shareholder, commercially insolvent. All four companies were placed under final liquidation during August 2006.

5. The liquidators of the four companies have not launched any proceedings against the defendant bank for recovery of damages sustained by the companies.

6. Plaintiff claims that, by reason of the defendant's conduct and the resultant liquidation of the companies, the value of his shareholding in the companies has diminished and that he has, in that regard, suffered damages amounting to the sum of R93,214,542,94.

7. Plaintiff's action does not purport to be a derivative action. He does not claim to vindicate a right of any company nor does he attempt to recover a loss on behalf of any company. I understand his claim to be a personal action in which he is: claiming the diminution of his investment and [he] intends to pocket the proceeds[3]."

THE EXCEPTION

8. Defendant's exception is set out as follows:

> "Para 12: Plaintiff pleads a contractual relationship between companies and defendant and relies upon purported unlawful conduct by the defendant within the parameters of such contractual relationship."
>
> "Para 13: Plaintiff does not directly or indirectly allege any contractual relationship with the defendant, but appears to claim against the defendant ex delicto. As such, the plaintiff alleges a duty of care by

[2] MDM, MDMFM and also Metallurgical Projects Development (Pty) Limited ("MPD") and Friedshelf 374 (Pty) Limited ("Friedshelf")

[3] The unreported judgment of the TPD - Routhauge & Others v South African Reserve and Others [2005] JOL 13294 T at para13.

> the defendant against him qua shareholder, which the defendant had allegedly breached. No circumstances have been pleaded to justify the existence of such entity; on the contrary the plaintiff's rights in these circumstances qua shareholder in the companies are circumscribed and limited."
>
> "Para 14: The companies are separate legal entities and if harm was done to such entities by the defendant, then only such entities could be the plaintiff in any action for redress."
>
> "Para 15: As shareholder the plaintiff has no action against alleged wrongdoers for damages in respect in respect of the resulting alleged diminution in the value of his shares[4]."

9. Notwithstanding the wording (and perhaps import) of paragraphs 12 and 13 of the exception, Mr. Robinson for the defendant was very clear that the defendant has not excepted on the basis that the allegations in the summons *per se* are insufficient to sustain a cause of action. "The exception is solely and exclusively directed against the attempt by the plaintiff, in the face of the rule against double recovery, to claim *qua* shareholder[5]."

10. Accordingly, defendant's argument is that whatever claims might exist and which could have arisen by virtue of the defendant's conduct in transferring the funds without the proper authority will lie only in the hands of those legal entities involved and not their shareholders.

THE FACTUAL BASIS

11. It is well established that, for the purpose of determining whether the plaintiff's particulars of claim are excipiable, all the factual allegations relied upon by the plaintiff are true - unless manifestly false [6].

12. Accordingly, the following factual matrix is taken to be admitted:

    a. MDM, MDFM, MPD and Friedshelf were all private companies with a limited number of shareholders. Plaintiff held 40% of the issued share

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[4] Paragraphs 12 to 15 of the Exception.
[5] Paragraph 2 of Excipients supplementary heads of argument.
[6] See Trinity Asset Management (Pty) Ltd and Others v Investec Bank Limited unreported judgment of the SCA (54/07) [2008] ZASCA 158 (27 November 2008) ; Anirudh v Sasmdei and Others 1975 (2) SA 706 N ;Voget and Others v Kleynhans 2003 (2) SA 148 C ; Twk Agriculture Ltd v NCT Forestry Co-Operative Ltd and Others 2006(6) SA 20 N at 23B.

capital in MDM, 29,7% in MDFM, 28% in MPD and 100% in Friedshelf (paragraph 3).

b. At the request of the defendant bank, the companies had executed cross deeds of suretyship (paragraph 4).

c. MDFM opened and operated two bank accounts and MDM one bank account with defendant bank (paragraph 5). These accounts all had substantial credit balances as at 10 December 2005 (paragraph 5).

d. Defendant bank was aware that MDMFM was engaged in certain mining contracts and that the three bank accounts were ring fenced project accounts dedicated to these contracts (paragraph 6.2 – 6.3) and the monies standing to the credit of these accounts were absolutely essential for the performance of MDMFM of its obligations (paragraph 6.5).

e. Defendant was not authorised to pay out or transfer monies standing to the credit of these bank accounts without compliance with certain specific signing instructions and mandates (paragraph 6.4).

f. The transfer of funds by defendant bank was in breach of such compliance.

g. Defendant knew that, in the event of transfer of such monies, MDMFM would be unable to continue performing it's obligations, the contracts would probably be cancelled, MDMFM would suffer a substantial loss of profit, MDMFM would be rendered commercially insolvent and would probably be liquidated (paragraph 6.7 – 6.10).

h. Defendant bank knew that such transfer of monies would also render MDM, Friedshelf and MPD commercially insolvent and that they would probably be liquidated (paragraph 6.13).

i. Defendant bank knew that these circumstances would result in plaintiff suffering extensive damages (paragraph 6.11 and 6.14). The potential for the plaintiff to suffer extensive damages was foreseeable alternatively ought to have been foreseen and defendant ought to have taken steps to guard against it (paragraph 7). In the circumstances, the defendant owed a duty of care to the plaintiff not to transfer any monies standing to the credit of these bank accounts (paragraph 8).

j. Defendant bank transferred the total sum of R 41,303,361.35 out of these accounts on 10th December 2005 (paragraph 9). Such transfers were made without the necessary authorisation (paragraph 9) and defendant was

aware or foresaw that they were not authorised (paragraph 10) or a reasonable person would have known or foreseen such lack of authority (paragraph 11) and would not have effected such transfers.

k. Defendant bank refused to repay or retransfer during January 2006 (paragraph 12).

l. The four companies were rendered commercially insolvent and were placed under final liquidation during August 2006 (paragraph 15).

m. MDFM sustained certain losses of profits by reason of the transfer of funds and the cancellation of the contracts (paragraph 16). The liquidators of MDFM sold the MDM name, assets, intellectual property and contracts in progress (paragraphs 18 – 20). Friedshelf had certain value immediately prior to the transfer of funds which caused the liquidation of Frieshelf (paragraph 24 – 25). MPD had certain value immediately prior to the transfer of funds which caused the liquidation of MPD (paragraph 28).

n. The plaintiff has suffered damages as a result of the loss of profits by MDMFM (paragraph 17), a loss of value of his shareholding in MDMFM, MPD and Friedshelf (paragraphs 22, 26, 28).

o. The liquidators of MDM, MDMFM, Friedshelf and MPD have not launched any proceedings against the defendant for the recovery of damages (paragraph 31).

THE DUTY OF CARE AND UNLAWFULNESS IS A POLICY MATTTER

13. Plaintiff's claim is formulated in delict. He claims that the defendant owed plaintiff a duty of care not to unlawfully transfer monies in the various bank account in the particular circumstances set out in the particulars of claim[7].

14. Amongst the issues to be decided in due course will be whether or not defendant bank owed a duty of care to the plaintiff, would have foreseen the possibility of harm occurring to the plaintiff and ought to have taken steps to guard against its occurrence. These are ultimately policy questions.[8]

[7] The defendant has not taken exception to the particulars on the grounds that it lacks averments to sustain a cause of action. For purposes of this exception the court must therefore accept that the allegations as to the duty of care, the unlawful conduct and the diminution of shareholding are not in dispute.

[8] As identified in McLelland v Hulett and Others 1992 (1) SA 456 D at 464

15. It is well accepted that the court faced with an exception to a claim should be careful not to make a premature decision as to whether a legal duty could be said to exist.

16. Where exception had been taken solely on the ground that the facts alleged by the plaintiff did not give rise to a legal duty of care by a collecting banker to the true owner of a lost or stolen cheque, the Supreme Court of Appeal held in Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 A that:

> "However, at the stage of deciding an exception a final evaluation and balancing of the relevant policy considerations which have been mentioned above should not be undertaken." (801B)

17. In Axiam Holdings Ltd v Deloitte & Touche 2006(1) SA 237 SCA where the English case of Andrews and Others v Kounnis Freeman (a firm) [2000] Loyds Rep PN 263 was approved in which Jonathan Parker LJ stated "In my judgment, however, only rarely will the court be in a position to determine the question or otherwise of a duty of care owed by professional advisors on a strike out application. ….. I am far from persuaded that once subjected to scrutiny of a full trial the factual background will remain quite as stark as the Judge found it to be" (at 654). Navsa JA concluded in Axiam supra that the attitude of our courts in relation to deciding matters of this kind on exception is not dissimilar (paragraph 25) stating that where counsel could not refer the Supreme Court of Appeal to judicial pronouncements on an auditor's liability for negligence, "… in my view this makes it all the more necessary to establish the full factual matrix before a final pronouncement is made" (paragraph 25).

18. Mr. Brett, for the plaintiff, referred me to the remarks of Booysen J in McLellan supra at page 464…… where was pointed out that the foundation of policy as to the existence of a legal duty of care is the "criterion of reasonableness" to which considerations of "moral indignation" and also "the legal convictions of the community" contribute. The learned judge took the view (464) that to make "a fair examination of the policy considerations involved" one must firstly, proceed "upon the assumption that the rule in Foss v Harbottle is not necessarily an absolute bar to the present action", secondly, that the "defendant's conduct should be regarded as unlawful", thirdly, that "the true relationship between a shareholder and the commerce of the company … ought to be seen against a broader backdrop" (such as was done in the case of Stellenbosch Farmers Winery (Ltd) v Distillers Corporation (SA) Ltd and another 1962 (1) SA 458 A) and finally noting "recognition of the financial right or interest in the property or affairs of the company with respect to which the plaintiff was harmed" (464 – 467).

19. Of course, the defendant rightly points out that the facts in McLelland supra were

different to those in the present case. [9] Defendant then submits that those different facts in Mclelland demonstrate why it was held that there was no basis for the risk of double recovery. There was no unlawful conduct vis-à-vis the company but a delict committed, so the plaintiff alleged, against him by the fellow directors and shareholders. I shall deal, in due course, with the remarks by the learned judge in McLelland supra concerning the 'risk of double recovery' or 'double jeopardy'. For the present it suffices to say that the facts in McLelland supra do not and cannot detract from the policy issues which are raised in this particular case.

20. Once the claim is a personal one arising from a duty of care alleged to exist directly by the defendant bank to the plaintiff shareholder, a court would be loath to ignore the comments made by Hefer JA in Minister of Law and Order v Kadir 1995(1) SA 303:

> "….. conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which 'shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people' (*per* M M Corbett in a lecture reported *sub nom* 'Aspects of the Role of Policy in the Evolution of the Common Law' in (1987) *SALJ* 104 at 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands. (*Corbett* (*op cit* at 68); J C van der Walt 'Duty of care: Tendense in die Suid-Afrikaanse en Engelse regspraak' 1993 (56) *THRHR* at 563-4.) 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* the circumstances of the case and of every other relevant factor. This would seem to indicate that the present matter should rather go to 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

[9] That claim arose out of defendant's failure, in their capacities as directors of a company of which plaintiff was both a director and shareholder, to carry out an undertaking to acquire certain land on behalf of the company, thereby causing the value of the plaintiff's interest in the company to be diminished. Plaintiff claimed for damages alleging wrongful actions or inactions which had not been made on a consideration of the interests of the company or shareholders as a general body, had been made negligently and without regard for the plaintiff's rights and prospective loss.

> 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." (at page 318F-J).

21. The defendant argues that it does not help the plaintiff to endeavour to construe a duty of care by the defendant to him in circumstances where the law does not recognise his claim. Defendant maintains that the claims, such as they might be, must be instituted by the four corporations/companies by reason of what is known as the rule in 'Foss v Harbottle'.

THE RULE AGAINST 'DOUBLE JEOPARDY' / 'DOUBLE RECOVERY'

22. It is a general principle of law that "A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C". C is the proper plaintiff "because C is the party injured, and therefore the person in whom the cause of action is vested" [10] [11] When applied to corporations , this principle is usually referred to as the rule in Foss v Harbottle[12].

23. The rationale behind the rule is variously expressed. In LAWSA is stated "… any harm the shareholder may suffer is merely indirect harm….In other words B owes a duty to C not to cause him harm, but owes no duties to those who thereby suffer indirect harm"[13]. That, of course, is not the case of the plaintiff who has pleaded that the defendant does owe the plaintiff a duty of care and which averment has yet to be determined.

24. Most frequently the rationale behind the rule is expressed in its descriptive nomenclature – the rule against the mischief of 'double recovery' or risk of 'double jeopardy'. If both a shareholder, as well as the company, were entitled to compel a third party to make good damage done to the company then the two rights would run parallel to each other and both be directed against the same third party – "resulting in two different persons having a cause of action against the same person for the same remedy"[14]. The result would be the third party suffering double jeopardy ie being at risk of having to pay out twice on the same claim and the shareholder anticipating double recovery ie the possibility of recovering twice (once directly and personally and once through his or her shareholding in the company).

25. The so-called rule against double jeopardy has been restated and approved time and again. Amongst the various formulations are :"It is a fundamental principle

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[10] Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) 1982 CH 204 210; 1982 All ER 354 (CA) 357
[11] LAWSA Vol IV: Companies, para 192
[12] (1843) 2 Hare 461: (1843) 67 ER 189)
[13] Vol IV, para 192
[14] LAWSA Vol IV para 192

of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which it alone is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in Foss v Harbottle" [15].

26. The courts have confirmed that the mischief which the rule is intended to prevent is that of duplication of jeopardy and recovery. There is the oft quoted and approved passage from Prudential supra, "The plaintiff obviously cannot recover personally some £100 000 damages in addition to the £100 000 damages recoverable by the company." (366j-367c) [my underlining]**.** There is the approach in McLelland supra "in practice the real reason why the rule must exist is linked more fundamentally to the separate existence of the company, with the result that, if the shareholder is allowed to sue, any wrongdoer will be subject to 'double jeopardy " (467 G). A repetition of this view is found in Golf Estates (Pty) Ltd v Malherbe and Others 1997(1) SA 873 (C) "…..… to allow the shareholder a right to claim his loss, where that loss is in truth part of the loss for which the company has a right of action, could result in 'double recovery' which is clearly unacceptable and contrary to all basic principles of justice." (at 879I). And pithily expressed in Letsing Diamonds Ltd v JCI Ltd and Others; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others 2007 (5) SA 564 (W) is the phrase " the fact that there could be a duplication of actions" (para 61).

27. The rationale for the rule is clear: the risk of placing a third party in jeopardy of double litigation and double payment must be avoided; the mischief of allowing a shareholder to recover twice – personally and through the company must be prevented. It would be contrary to the interests of justice for such to be initiated and inequitable for it to take place.

28. There is also the associated concern expressed in Letsing supra as to the need to avoid "an endless multiplicity of actions brought by shareholders" (para 62) which "would result in anarchy in the affairs of the company" (para 61).

WHAT RISK?

29. Plaintiff 's particulars of claim[16] state that the liquidators of the four companies have not launched any proceedings against the defendant for recovery of damages suffered by the companies by virtue of the defendant's conduct and accordingly,

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[15] Per Lord Denning MR in Wallersteiner v Moir (No 2); Moir v Wallersteiner and Others (No 2) [1975] 1 All ER 849 (CA) at 857d

[16] Dated December 2008.

the plaintiff avers that the liability of the defendant bank is not subject to the risk of double recovery.

30. In excepting to this claim, the defendant has not adverted to any risk to which the defendant is or may be subject. Instead, the defendant has approached the exception on the basis that the plaintiff is non-suited because no claim vests or can vest in the plaintiff.

31. I will discuss the issue of the vesting of the claim (if any) in due course. However, it is necessary to consider the question of what risk there is of double recovery or double jeopardy – firstly, this is the proclaimed rationale for the rule and secondly, the defendant reverts to this rule at certain points in its argument.

32. In assessment of the risk of double recovery/double jeopardy, a number of factors have been taken into account by the courts. The following is not attempted as an exhaustive list of those factors but are some of those which have been identified and which seem to be of relevance in the present case:

    a. The corporate identity: Is the company privately incorporated? See McLelland supra. Is it a public company listed on a stock exchange? See Letsing supra.

    b. The number and identity of shareholders: Is there a limited number of shareholders whose identities are known? Is the number of potential plaintiffs determinable and foreseeable? See McLelland supra. Are there thousands of shareholders? See Letsing supra. Can the plaintiff be singled out from what might otherwise be a mass of 'unforseeable plaintiff's? McLelland supra.

    c. The status of the company: Is the company still operating or has it been wound up? See Letsing supra; Kalinko v Nisbet and Others 2002(5) SA 766W; the unreported judgment of Routhauge & Others v South African Reserve Bank and others [2005] JOL 13294 T.

    d. Status of claims: Has the company's claim prescribed? See Routhauge supra. Has the company or the liquidator thereof instituted proceedings against the allegedly wrongdoing third party? See Kalinko supra, Routhauge supra.

    e. Other remedies: Is there any other remedy available to a wronged shareholder? See Routhauge supra, Letsing supra.

33. The continuum of assessment of risk encompasses a variety of scenarios. On the one hand there might be a private company where "all shareholders are identifiable and limited in number" enabling "a more personal relationship

between them"[17] where the company is in liquidation. On the other hand there might be a public company with "thousands of shareholders owning millions of shares" where allowing individual shareholders to proceed with claims would result in "an endless multiplicity of actions" resulting in "anarchy in the affairs of the company"[18] because the company is still operating.

34. Liquidation of a company may affect assessment of the risk of double recovery. Where the company has been liquidated, this may affect whether or not there is the potential for the risk of double recovery. On the one hand, in Kalinko supra, the learned judge took the view that the mischief of double recovery need not be decided at the exception stage because "At this stage I am not aware whether or not the liquidator has elected to pursue any claim which the company may have against the defendants arising out of their alleged wrongful conduct. At the trial it may transpire that the liquidator, upon the instructions of the general body of creditors, has been precluded from pursuing any litigation on behalf of the company. In that event the potential mischief of "double recovery" alluded to in the authorities cited above will not occur. In such event it would be open to the plaintiff to pursue his remedy. On the other hand it is equally open to the defendants to plead in defence to plaintiff's claims, that the liquidator has decided to pursue its remedies against the defendants in which case plaintiff may very well be non-suited in regard to his derivative action" (at 778) and "there are a number of imponderables and permutations which at the exception stage cannot be properly assessed or contemplated" (779). On the other hand, the learned judge in Routhauge supra did not agree with the approach in Kalinko supra that the entitlement of the shareholder to sue is a matter of evidence. The learned judge stated the shareholders should be required to state why they and not the company or the liquidators are entitled to institute the action. "It must also be taken into account that even where a company is liquidated the possibility of a claim by the liquidators still exists. It does not , in my view, follow that because a company is in liquidation, a shareholder will have the right to institute an action for an indirect loss caused to him as a result of the loss or diminution of the value of his shares" (at 15). Accordingly, the mere allegation that the company had been liquidated was not enough. However, once there was "a complete loss of shareholder value" as opposed to a company which "continues to exist, crippled but battling on" it would seem that the shareholder could be allowed to proceed with the claim for diminution in the value of his shareholding (page 15).

35. In the present case, the shareholder is a major or the sole shareholder in four private companies each with a limited number of shareholders. The companies have been finally wound up. None of the liquidators have instituted proceedings for damages.

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[17] McLelland supra

[18] Letsing supra para 61

36. It is difficult to envisage, on these facts, when, where or how the mischief of double jeopardy or doubly recovery may reveal itself – certainly not at this exception stage.

VESTING OF CLAIM

37. The defendant has focused on the vesting of the claim in the companies (and then the liquidators) as a bar to this shareholder acquiring or exercising any right to sue the defendant. I understand the defendant's argument to be that the issue before the court is not that of the mischief of double recovery or the risk of double jeopardy but rather that the companies would be the injured parties and any cause of action vests in the liquidators and cannot vest in the shareholders.

38. In this regard the defendant/excipient has used the word " immutable" to describe the rule in Foss v Harbottle . With such an 'unchanging' or 'inflexible' rule no claim will or can vest in the shareholder.

39. The defendant submits that McLelland supra and Kalinko supra [19] were both wrongly decided because the question before those courts was not that of double jeopardy. In McLellan supra the risk was non existent because there was no delict against the company and the company had no claim. In Kalinko supra the correct approach would have been to look at the time of the vesting of the claim – in the company (then the liquidators) not the shareholder. Once the claim lies in the hands of the company, it is the company's claim alone.

40. I shall deal with the view that the rule against double recovery/double jeopardy is not an immutable one.

41. At this point, I note that the defendant has also submitted that the plaintiff is not the only shareholder and so there is the potential for the opening of floodgates in a plethora of claims against the defendant. It is this potentiality for double recovery which non suits the plaintiff. I have already dealt with this argument.

EXEMPTIONS [20] FROM THE RULE – IS IT IMMUTABLE?

42. The rule against double jeopardy/double recovery has never been an absolute rule. When Foss v Harbottle supra was originally pronounced the derivative action was recognized to allow relief for oppressed minority shareholders. [21]

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[19] Defendant's counsel has rightly pointed out the distinction between a personal and derivative claim. In the present case (unlike McLelland supra) the claim is a personal one (as was the claim in Routhauge supra and possibly in Kalinko supra). The plaintiff has specifically pleaded a duty of care by the defendant bank to the plaintiff shareholder. Although there is a dearth of factual allegations set out to support such claim (In Routhauge supra, the learned judge held that , at the very least, the plaintiff's should have alleged such duty of care (page 17)). This is an issue to be decided on trial and not on exception.

[20] I have not used the obvious terminology "exception" since that might be confusing in the context of exception proceedings.

43. The issue is whether other concessions are permitted or justified in certain circumstances. Plaintiff argues that the rule is not immutable whilst defendant argues that it is.

44. The reasoning behind the concession which was recognized in Foss v Harbottle supra (and subsequently) is of assistance. I recognize that much (though not all) of what is said pertains to the so-called 'derivative action' but the principles underlying this exemption are worth identifying.

45. In Foss v Harbottle supra the court conceded that the rule might have been too broadly stated and that "there are cases in which a suit might properly be so framed". Such a case was found where a society of private persons would:

> "be deprived of their civil rights", [where' " no adequate remedy remained except that of a suit by individual corporators in their private characters" [and where the] "claims of justice would be found superior to any difficulties arising out of technical rules…" (202/203).

46. In Burland v Earle [1902] AC 83 it was held that it was a " mere matter of procedure to give a remedy for a wrong which would otherwise escape redress" (at 93). See also TWK Agriculture Ltd v NCT Forestry Co-Operative Ltd and Others 2006 (6) SA 20 N at paragraph 16.

47. In McLelland supra, the learned judge acknowledged

> "the more pressing demand of justice and of the law is that wrong should be redressed and that structural or technical impediments should not lightly be permitted to stand in the way of the redress of a wrong"(465)

and that in certain contexts too narrow a view of the definition of shareholder's rights was not justified

> "a reliance on this "technical' status of a shareholder ought not to be allowed as a matter of policy" (at 487)

and held that

> "where, as in the present case, that risk is non-existent and a shareholder is left with a diminished patrimony, the continued application of the rule would amount to an unwarranted and technical obstruction to the course of justice." (467)

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[21] Which is now given statutory recognition in section 266 of the Company's Act.

48. In Letsing supra, the learned judge recognized that there could be very exceptional circumstances where "there was no remedy available to a plaintiff" where such relief might be granted (paragraph 61).

49. In short, the rationale for the exceptions to the rule against double recovery/double jeopardy arise from acknowledgment that considerations of equity and the interest of justice require recognition of a shareholder's rights and protection of same and that technical niceties should not obstruct such recognition and protection.

50. This point was not expressed in this fashion by counsel for the plaintiff but is, I believe, implicit in his reliance upon the *dicta* and the *rationes* in both McLennan and Kalinko supra and dealt with by counsel for defendant in his critique of both these judgments.

51. One aspect of the derivative action available to minority shareholders is the lack of control of the minority over the affairs of the company. The wrongdoing majority and/or directors control the legal entity, has not acted and does not intend to act in the future [22]. It seems to me that the shareholder/s in the four companies concerned in the present case are in much the same position *vis a vis* the liquidators.

52. Mr. Robinson for the defendant urged that this court should rely for guidance upon the unreported judgment of Griesel J in Jacobus Potgieter v ABSA Bank Bpk Case no 2325/02 CPD handed down 10 June 2008. The learned judge found no delictual action availed the plaintiff in the circumstances of that case and went on to find that the plaintiff, although not formally a shareholder, was for all practical purposes in the position of shareholder and that the rule in Foss v Harbottle was of application.

53. With respect, the learned judge did not refer to or apparently have the benefit of considering the reasoning in either McLelland or Kalinko or Routhouge supra. Restatement of the formulation as set out in Prudential supra does not assist in dealing with the issues now before me.

ANOTHER REMEDY

54. The statutory derivative action provided for in section 226 of the Companies Act is not available to the plaintiff. The companies no longer exist and so no general meeting can be called. In any event, he alleges a duty of care to himself irrespective of that to the companies

[22] See Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others 2003(3) SA 268 W.

55. Defendant's counsel submitted that plaintiff should exercise his rights within the insolvent estates but those rights and their availability to the plaintiff have not been elucidated.

CONCLUSION

56. The rule against double recovery/ double jeopardy is not unqualified. The rule should be applied in line with the interests of justice.

57. The plaintiff has alleged that defendant owed him a duty of care which has been breached. There has been loss to four private companies and to their shareholders. Plaintiff is one of a limited number of shareholders or (in the case of one company) the only shareholder.

58. The companies were all placed under final liquidation. The liquidators have not instituted proceedings against the defendant for recovery of damages. No risk of double jeopardy to the defendant bank nor opportunity for double recovery to the plaintiff has been shown as possible or probable. Even the potentiality of such hazard/advantage is unlikely since the liquidators' claims have not been exercised.

59. Accordingly, I conclude that the exception should be dismissed with costs.

60. Counsel were in agreement that this was a matter justifying the services of two counsel.

I therefore make the following order:

1. The exception to plaintiff's particulars of claim is dismissed.

2. The defendant shall pay the costs including those attendant upon the employment of two counsel

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K. Satchwell

Date of hearing: 1st April 2009
Date of Judgment: 7th April 2009

Counsel for Plaintiff: JJ Brett SC

E Kromhout
Attorneys for Plaintiff: Gary Janks Attorneys

Counsel for Defendant: P Robinson SC
Attorneys for Defendant: De Vries Incorporated