IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 2010/41913

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
DATE OF JUDGMENT : 17 April 2013

17/04/2013

In the matter between:

THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED — Plaintiff/Respondent

and

METTLE MANAGEMENT SERVICES (PTY) LIMITED — Defendant/Excipient

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JUDGMENT

BERRIDGE, AJ

1. For ease of reference, I will refer to the parties as the plaintiff and the defendant respectively. By way of a delictual claim, the plaintiff seeks to recover certain pure economic losses it contends it has suffered in

consequence of what are, in essence, negligent omissions on the part of the defendant which, so the plaintiff contends in its particulars of claim, amounted to a breach of a legal duty which the defendant owed to it.

2. The defendant has delivered an exception to the plaintiff's particulars of claim, asserting that they lack averments necessary to sustain an action, alternatively are vague and embarrassing. Insofar as was necessary, prior to delivery of its exception, the defendant delivered the requisite notice in terms of Rule 23(1) affording the plaintiff the opportunity of removing the relevant causes of complaint insofar as such complaints may have rendered the particulars of claim vague and embarrassing. Having already effected various amendments to its particulars of claim, the plaintiff now resists the exception. The main thrust of the exception is that the facts and circumstances upon which the plaintiff relies in its particulars of claim to establish the pleaded legal duty on the part of the defendant do not support such a conclusion. I am called upon to decide the merit of that exception.

THE PLAINTIFF'S CLAIM

3. As with all exceptions, this matter is to be approached on the basis and assumption that all the allegations contained in the plaintiff's particulars of claim are true and correct.[1] In order to succeed, the defendant must

[1] **Marney v Watson and Another 1978 (4) SA 140 (C) at 144F to G; Makgae v Sentraboer (Koöperatief) Beperk 1981 (4) SA 239 (T) at 244H to 245A.**

persuade me that upon every interpretation which the particulars of claim can reasonably bear, no cause of action is disclosed.[2]

4. The plaintiff's claim arises against the backdrop of a series of complex and convoluted commercial transactions which combined to form a debt securitisation scheme. As a natural consequence hereof, the plaintiff's particulars of claim are, inevitably, similarly complex. I summarise and, to an extent, paraphrase the essential allegations contained in the particulars of claim which are relevant and necessary for the determination of this exception.

5. The defendant, a financial services company which held itself out as a specialist in that field with extensive debt origination and structuring skills, approached both the plaintiff and Sanlam Capital Markets (Pty) Limited ("**SCM**") with a proposal to participate in the debt securitisation scheme as the senior funders thereof. The defendant's proposal entailed providing explanatory documentation to the plaintiff, including an information document, and engaging the plaintiff in providing responses and explanations to queries raised and explanations sought by the plaintiff concerning the securitisation scheme. In so doing, the defendant indicated that it would play a pivotal role in the implementation of the scheme and, once implemented, the defendant would perform an effective monitoring function in respect of it.

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[2] **Theunissen en Andere v Transvaalse Lewendehawe Koöp Beperk 1988 (2) SA 493 (A) at 500E to F; First National Bank of Southern Africa Limited v Perry N.O and Others 2001 (3) SA 960 (SCA) at 965C to D – para [6]; Vermeulen v Goose Valley Investments (Pty) Limited 2001 (3) SA 986 (SCA) at 997A to C – para [7]**

6. The debt securitisation scheme entailed certain trading entities, described as "*the originators*", selling their book debts which satisfied certain prescribed criteria to an entity known as MfP Finance (Pty) Limited ("**MfP Finance**"), a special purpose vehicle which had been established for this purpose. As part of its proposal, the defendant disclosed that it had also previously held a minority stake in what can but only have been a related entity, Music For Pleasure (Pty) Limited ("**MfP**") and the defendant had been involved in the monthly administration of an existing securitisation funding structure of MfP.

7. In essence, the defendant was the "*arranger*" of the scheme which was the result of considerable resources which had been expended by the defendant in the course of which it had undertaken an investigation of and into the businesses of the originators of the scheme, being the entities whose book debts would be acquired in terms of the debt securitisation scheme, *inter alia*, to verify the eligibility of such book debts.

8. MfP Finance, which would itself be financed by funding provided by the plaintiff and SCM by the subscription for debentures in MfP Finance, was to purchase the aforementioned book debts from the originators at below the face value of such debts. This would provide the originators with working capital, while MfP Finance would in turn recover the full book debts from the debtors and derive the benefits of the differential.

9. Unsurprisingly, the debt securitisation scheme comprised a suite of complex and interrelated agreements, styled in the particulars of claim as "*the transaction documents*". It was the defendant's function to procure that these agreements were drafted and that the requisite legal entities were created in order to establish the structure for the scheme to function and operate. MfP Finance was one such entity.

10. The complex suite of agreements comprised a multi-faceted matrix of documents and contracts, of which there were no less than six comprehensive and detailed written agreements and two versions of a Deed of Trust. The written agreements themselves, which were to be concluded between multiple parties, comprised sale of book debts agreements, a management agreement, various subscription agreements as well as an option agreement. There are, to my mind, two significant features which are immediately apparent in relation to that spider web. Firstly, the plaintiff itself was to have been a party to one of the agreements, being a subscription agreement between the plaintiff and MfP Finance. Secondly, nowhere as part of (or even in consequence of) the complex arrangements did any form of contractual nexus ever arise between the plaintiff and the defendant. In fact, aside from being the entity which devised the scheme and was to co-ordinate its structure and implementation, the defendant did not feature at all as a party to any of the agreements.

11. Furthermore, the transaction documents themselves contained certain safeguards of their own. The subscription agreement to which the plaintiff was a party had, as a condition precedent, the execution of all the transaction documents by all parties and all the transaction documents becoming unconditional. The plaintiff, moreover, obtained warranties, received representations and obtained undertakings from MfP and MfP Finance, and received yet further protection in terms of the Trust Deed, to which the plaintiff itself was bound. The Trustees of the Debenture Trust were, in addition, tasked with the responsibility of protecting the plaintiff's interests. Moreover, MfP Finance was to manage the securitisation scheme and gave contractual warranties, made its own representations and gave its own undertakings to the plaintiff.

12. The essence of the securitisation scheme, as recorded and detailed in the transaction documents, entailed each originator selling its right, title and interest in its respective book debts to MfP Finance. The purchase price which was payable in respect of the existing book debts was R220 million. The plaintiff and SCM granted MfP Finance a facility of R187 million on which MfP Finance could draw funds from time to time for the purpose of discharging the purchase price payable by MfP Finance to the originators for the purchase of the book debts. That facility would be available to MfP Finance for five years, during which time MfP Finance could require the plaintiff or SCM to subscribe for debentures issued by it. From the subscription proceeds arising from the issue of such debentures MfP Finance would then pay the originators for the book debts.

13. The business of MfP Finance was, in turn, to be administered and managed by MfP and, in so doing, MfP was required to prepare monthly reports and provide various information and reporting documents and accounts to the relevant role players.

14. Based upon the information and explanations offered by the defendant, the plaintiff elected to participate in the debt securitisation scheme.

15. The plaintiff then alleges that, by virtue of the structure of the securitisation scheme, the terms of the transaction documents, and the defendant being the arranger of the debt securitisation scheme, the defendant was aware, alternatively should have been aware, of a range of facts and considerations which impacted upon the sustainability of the securitisation scheme and its vulnerability to abuse and/or failure. In the circumstances, the plaintiff contends that the defendant owed it a legal duty in various respects, particularly:

    15.1. To verify and ensure that the book debts (both existing and future) acquired by MfP Finance were eligible book debts, in the sense that they satisfied the relevant criteria in terms of the debt securitisation scheme;

    15.2. To perform its aforesaid monitoring function;

    15.3. To verify the credit approval policy which was provided for in the sale of book debts agreement;

15.4. To determine, initially at the commencement of the securitisation scheme in regard to existing book debts, and thereafter in regard to all future book debts sold to MfP Finance, that the amount owing by each debtor in respect of the relevant book debt had been correctly calculated;

15.5. To verify the accuracy and completeness of the monthly financial reports;

15.6. To verify the viability and suitability of the debt securitisation scheme, both in terms of the funding requirements and of the originators in terms of the recoverability of MfP Finance of the book debts; and

15.7. To verify that all book debts purchased by MfP Finance in terms of the securitisation scheme met the relevant criteria.

16. In obvious recognition of the fact that legal and policy considerations play the determinative role in deciding whether or not such a legal duty was indeed owed, the plaintiff then pleads the factors which it contends ought to be taken into account and alleges the circumstances under which the legal duty upon which it relies arose. These include the structure and features of the debt securitisation scheme; the role which the defendant had played in providing explanations and responses to the plaintiff as well as its role as arranger and administrator of the scheme; its knowledge of the matters referred to in the preceding paragraph; the risk of the plaintiff

suffering irrecoverable loss in the event of the book debts sold by any originator to MfP Finance not being recoverable in full from the debtor; that the defendant knew that the plaintiff would rely upon it to perform the verification and other functions ascribed to the defendant and that the defendant knew that the plaintiff would be reliant upon the monthly reports furnished to it by MfP Finance in terms of the management agreement being accurate, complete and reliable so that the plaintiff could properly assess the financial position of MfP Finance; the transactions concluded by it in terms of the debt securitisation scheme as well as compliance by the parties in respect of the matrix of transaction documents.

17. Various breaches of that duty of care are then alleged by the plaintiff. It contends that the defendant failed to verify and ensure that the existing book debts acquired by MfP Finance complied with the relevant criteria; failed to perform its monitoring function consistently and effectively; failed to verify that the credit approval policy was being implemented; failed to verify the viability and suitability of the securitisation scheme and failed to take reasonable steps to determine or verify whether the book debts acquired by MfP Finance complied with all relevant requirements, were valid and enforceable at face value and that the monthly financial reports had been adequately prepared and correctly revealed the value of such book debts.

18. The debt securitisation scheme self-destructed. The reasons therefor, as alleged in the particulars of claim, included intercompany debtors being

included by originators as part of the eligible debts sold to MfP Finance, false invoices being raised in respect of fictitious or unconfirmed sales, invoices being raised by originators in respect of returns by originators to the suppliers being incorrectly included in the debtors book and reflected as trade receivables and the failure to timeously credit returns, rebates and other amounts due by the originators to debtors. MfP Finance thus made payments to MfP in respect of book debts which had either been artificially created and/or in respect of intercompany debtors which had been misrepresented as eligible book debts. Furthermore, MfP Finance effected payment in respect of book debts to originators which were not owed and/or which were not due and payable. Notably, no conduct on the part of the defendant is blamed for or raised as a cause for the failure of the scheme.

19. Ultimately, MfP was wound up in July 2009 and MfP Finance is unable to recover some R115 million which was paid to MfP in respect of artificially created and/or unenforceable book debts. MfP Finance, in turn, is unable to pay the plaintiff and SCM that R115 million, of which some R38,4 million represents the plaintiff's loss. It is that amount which it seeks to recover from the defendant which was, of course, at least one (if not more) step removed from the failure itself.

THE DEFENDANT'S EXCEPTION

20. The defendant raised various grounds of exception to the particulars of claim. Most of these were not, wisely in my view, vigorously pursued during argument. The main thrust of the defendant's argument became centred on what I believe is indeed the core and crucial issue to this dispute – namely whether the facts and circumstances which the plaintiff has pleaded and upon which it seeks to rely to establish the alleged duty of care on the part of the defendant support such a conclusion. In light of the view which I take on this aspect, that is the only ground of the exception which it is necessary to canvass. This entails a consideration of whether or not the plaintiff's particulars of claim contain sufficient averments to sustain a finding of wrongfulness and, therefore, unlawfulness.

THE RELEVANT LEGAL CONSIDERATIONS

21. The starting proposition, when applying the law of delict, is that everyone has to bear the loss he or she suffers – "*skade rus waar dit val.*"[3] Before a person can become delictually liable for the loss of another, the former's act or omission must be found to have been, firstly, unlawful, secondly, culpable and thirdly, the legal cause of the loss. These are discrete

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[3] **Telematrix (Pty) Limited v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 468A – para [12]**

elements of liability.[4] It is only the first of these requirements, namely unlawfulness, which arises for consideration in the present matter.

22. A positive act (coupled with negligence) that causes physical harm to person or property is *prima facie* unlawful.[5] However, where the conduct complained of is an omission, such conduct is *prima facie* lawful[6] and special circumstances have to be established before liability for an omission is imparted by law.[7] Where the harm in question is not physical harm to person or property but is pure economic loss, the causing of harm is also *prima facie* lawful.[8]

23. The most difficult case to establish unlawfulness is the case based on both an omission and the causing of pure economic loss. South African law is cautious to extend liability to new situations of pure economic loss and it "*does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations which favour such an extension.*"[9] The assessment of such policy considerations must be "*not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms*".[10] These policy considerations have nothing to do with the element of negligence – they

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[4] **Sea Harvest Corporation (Pty) Limited v Duncan Dock Cold Storage (Pty) Limited 2000 (1) SA 827 (SCA) at 837G – para [19]**

[5] **Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at 441E to F – para [12]; Gouda Boerdery Beperk v Transnet 2005 (5) SA 490 (SCA) at 498G to I; Trustees of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Limited 2006 (3) SA 138 (SCA) at para [10].**

[6] **BOE Bank Limited v Ries 2002 (2) SA 39 (SCA) at 46G to H – para [12]**

[7] **Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA).**

[8] **BOE Bank Limited v Ries (*supra*) at 46G – para [12]**

[9] **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Limited 1985 (1) SA 475 (AD) at 504 (G). See also Trustees for the Time Being of Two Oceans Aquarium Trust (*supra*) at para [20]**

[10] **Two Oceans Aquarium Trust (*supra*) *ibid***

bear on the question of the unlawfulness of the alleged acts or omissions, namely whether the defendant owed the plaintiff a duty in the circumstances alleged, and whether such duty was breached. These policy considerations include the caution of South African law to extend cases of pure economic loss, and *a fortiori* cases of pure economic loss caused by omission,[11] the reasonableness of imposing liability in such circumstances on the defendant[12] and the availability of other remedies for the claimant.[13] "*Reasonableness*" in the context of wrongfulness is something different from the reasonableness of the conduct itself, which is an element of negligence. It concerns the reasonableness of imposing liability on the defendant.[14]

24. There is no debate before me whether this would be an appropriate matter to decide by way of exception proceedings. In such proceedings "*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 duty represent the high-water mark of the factual basis on which the Court will be required to decide the question. Therefore, if those facts do not prima facie support the legal duty*

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[11] **Lillicrap, Wassenar and Partners (*supra*) at 500D; Steenkamp v Provincial Tender Board, Eastern Cape 2006 (3) SA 151 (SCA) at 162F – para [27]**
[12] **Trustees, Two Oceans Aquarium Trust (*supra*) at para [11]**
[13] **Knop v Johannesburg City Council 1995 (2) SA 1 (A) at 33A to E**
[14] **Trustees, Two Oceans Aquarium Trust (*supra*) at para [11]; Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae (2011) (3) SA 274 (CC) at para [122]**

contended for, there is no reason why the exception should not succeed."[15]

25. In summary, "*these principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical damage to the property or person of another is prima facie wrongful. By contrast, negligent causation of pure economic loss is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. In the result, conduct causing pure economic loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such conduct, if negligent, should attract legal liability for the resulting damages*" and "*liability cannot depend on the idiosyncratic views of an individual judge*",[16] since some form of certainty must, as far as is possible, be created.

26. In applying and developing these principles it is indeed so, as the plaintiff's counsel reminded me, that the law has come to recognise certain fixed categories in which defendants who cause pure economic loss (even by negligent omissions) will be held liable. The seminal example hereof is ***Indac Electronics (Pty) Limited v Volkskas Bank***

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[15] **Minister of Law and Order v Kadir 1995 (1) SA 303 (A) at 318I to J; see also Telematrix (*supra*) at 464 – paras [2] and [3] and AB Ventures Limited v Siemens 2011 (4) SA 614 (SCA) at 616 – para [5]**

[16] **Fourway Haulage SA (Pty) Limited v SA National Roads Agency Limited 2009 (2) SA 150 (SCA) at para [12] and [16]**

Limited[17] in which it was held that a collecting bank owes a legal duty to the true owner of a cheque. Other examples, all of which relate to the imposition of liability for pure economic loss in banking and financial advisory services, include ***Holtzhausen v ABSA Bank Limited***,[18] in which the Court recognised a legal duty on a bank manager not to negligently state that a cheque had been cleared; ***Standard Chartered Bank of Canada v Nedperm Bank Limited***,[19] in which a legal duty not to negligently furnish a false bank report was recognised, with resultant liability; and ***Durr v ABSA Bank Limited***[20] in which a claim founded in delict (and thus a breach of a legal duty) for the loss occasioned by poor investment advice was upheld. Whilst such cases may be useful and instructive, and do give an indication of the type of situation in which the courts have been prepared to find the existence of a legal duty and, thereby, extend Aquilian liability, each case must, of course, depend upon and be judged on its own merits and in relation to the peculiar facts and circumstances which pertain in each individual instance. Furthermore, I am of the view that the mere fact that the defendant in this matter is a banking institution is not particularly relevant and is certainly not decisive. In performing the functions which it did in this matter, the defendant can hardly be said to have been carrying out the classic functions of a commercial bank.

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[17] **1992 (1) SA 783 (A)**
[18] **2008 (5) SA 630 (SCA)**
[19] **1994 (4) SA 747 (A)**
[20] **1997 (3) SA 448 (SCA)**

27. To my mind, the most relevant principles which are apposite in the present matter are those which found the origin of their formulation in ***Lillicrap***. The principle which emerged therefrom was that there is no call for the law to be extended when the existing law provides adequate means for the plaintiff to protect itself against loss.[21] As explained and expanded upon in ***Trustees, Two Oceans Aquarium Trust***,[22] and in relation to the concept of "*vulnerability to risk*"[23], "*the criterion of 'vulnerability' will ordinarily only be satisfied where the plaintiff could not reasonably have avoided the risk by other means – for example, by obtaining a contractual warranty or a cession of rights.*" Applying these principles, the Court in ***Trustees, Two Oceans Aquarium Trust***[24] found that, generally speaking, there is no reason why the Aquilian remedy should be extended to rescue a plaintiff who is in the position to avoid the risk of harm by contractual means, but failed to do so.

28. The same approach, with the same result, was adopted in ***AB Ventures***. In that matter, where there was a similarly complex matrix of agreements which had been concluded by various role players, but not the plaintiff, in deciding the question of wrongfulness the Court stated that "*there would be major implications for a multi-party project of this kind if each of the participants was to be bound not only to adhere strictly to the terms of its specific contractual relationship, but, in addition, it was to be held bound*

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[21] See, for example, **AB Ventures (*supra*) at 623A – para [21]**
[22] **At 148F to J – para [23]**
[23] Which appears to be a concept which, if not originating in, has certainly been developed in Australian jurisprudence
[24] At **149A – para [24]**

to all the other participants by a general regime of reasonableness."[25] Analogous to the present case, the Court went further and stated "*That it had no contractual nexus with Siemens means only that it was not capable of shifting the loss that it had brought upon itself to Siemens contractually, but that is beside the point. We are concerned with whether* [the plaintiff] *was capable of avoiding the loss, and not whether it was capable of shifting it elsewhere, and clearly it was capable of doing so.*"[26]

29. Precisely the same approach has more recently been followed by the Supreme Court of Appeal in the as of yet unreported judgment in ***Cape Empowerment Trust Limited v Fisher Hoffman Sithole***[27]**.** In paragraph [28] thereof it was stated that "*what is now well established in our law is that a finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant*" and, with approving reference to ***Perre v Apand (Pty) Limited***[28] "*cases where a plaintiff will fail to establish a duty of care* [or, wrongfulness in the parlance of our law] *in cases of pure economic loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interfere with a legitimate act of trade. In many instances there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is*

[25] At 620G to H – para [16]
[26] At 623D – para [21]
[27] (200/11) [2013] ZASCA 16 (20 March 2013)
[28] (1999) 198 CLR 180 (H C of A)

therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss."

WHETHER THE PLAINTIFF'S PARTICULARS OF CLAIM ARE SUFFICIENT TO SUSTAIN A FINDING OF WRONGFULNESS

30. It follows almost axiomatically from that which I have detailed above that I do not believe that, in this instance, Aquilian liability should be extended to render the defendant liable for the plaintiff's loss. In pleading the legal duty which it does in paragraph 13 of its particulars of claim, the plaintiff seeks to impose a host of obligations upon the defendant, as I have detailed in paragraph 15 above. Each of those obligations, if they existed or even should they have existed, could quite easily have been incorporated within a contractual setting. It would have been a matter of utmost simplicity, if not advisability, for the plaintiff to have entered into a contractual arrangement with the defendant which covenanted, provided and stipulated all of those obligations. There was certainly nothing which could have prevented the plaintiff from doing so. After all, in the transaction documents to which the plaintiff itself was a party, certain protective mechanisms were indeed created and provided. The real cause of the plaintiff's predicament is that, firstly, the plaintiff received those protections from parties other than the defendant and, secondly, the

plaintiff finds itself in the somewhat invidious position of being unable to recover from the parties with which it did contract, and so it now seeks to cast the net wider to include the defendant. In my view, public policy considerations militate against such an extension. I also do not believe that it would be reasonable to impose the legal duty upon which the plaintiff relies on the defendant in these circumstances.

31. Furthermore, an additional consideration arises which was alluded to in the ***Two Oceans Aquarium Trust*** judgment[29] – it is quite conceivable that, in a contractual setting, the defendant may well have refused to have given any of the undertakings or assumed at least certain of the obligations which the plaintiff now seeks to foist upon it by way of its delictual claim. If the defendant would legitimately have been able to object to the inclusion of any such obligation in a contract, I am most reluctant to find that, in a delictual setting, the defendant ought to be shackled with such obligations. Indeed, it would be anomalous if the plaintiff had different and more extensive rights against the defendant than it secured as against the other parties to the transaction documents, or than it would have been able to secure against the defendant itself in a contractual relationship.

32. The real cause and reason for the failure of the debt securitisation scheme was not the defendant's conduct. There is no accusation that the defendant was complicit in or even responsible for any of the events

[29] At 149G

which precipitated the collapse of the scheme and the inability of the plaintiff to recover its losses. There is no allegation that the defendant was guilty of any form of misrepresentation, be it negligent, fraudulent or otherwise. There is also no suggestion that any of the answers which the defendant furnished to the plaintiff at the time when the plaintiff was deciding whether to participate in the scheme were false, wrong or inaccurate in any way. In this regard, I am constrained to agree with the submission made on behalf of the defendant that the true effect of the plaintiff's cause of action would be to elevate the defendant to the unjustified position as guarantor (or even insurer) of the success of the scheme. Such an elevation is not warranted in the circumstances of this matter.

33. There is one further aspect of the plaintiff's particulars of claim which bears mentioning. In paragraph 15A thereof, the plaintiff also alleges that the defendant's failure to take the steps and perform the functions it contends ought to be visited upon the defendant was intentional. In the normal course of events, different considerations would apply to intentional wrongdoing. However, the criteria of wrongfulness will always remain. Accordingly, if the plaintiff fails to establish the existence of the legal duty upon which it relies, even an intentional omission would still not attract liability. In this regard, I find myself in respectful agreement with the sentiments expressed by Boberg[30] that "*economic loss caused intentionally does not present the problem of indeterminate liability, for the*

[30] The Law of Delict – Volume 1 (1984) at page 105

ambit of the defendant's intention is itself the limiting factor. That is not to say that such loss is always recoverable, for it may be lawful to cause it. The requirement of wrongfulness must yet be satisfied, though it assumes a different shape. In general, the plaintiff must bring his claim within an established category of liability such as fraudulent misrepresentation, or inducement of breach of contract, in order to succeed." In the present matter there is no suggestion of any type of fraudulent or even positive intentional wrongdoing. All that the plaintiff says is that the defendant intentionally breached the alleged legal duty. If that legal duty was non-existent, as I have found, then the simple allegation of intent does not render the defendant's conduct actionable. In any event, *in casu*, the intent relied upon is in the form of various alleged omissions. That removes this matter from the realm of, for example, fraudulent misrepresentations.

34. In all the circumstances, I am persuaded that the allegations set out in the plaintiff's particulars of claim are insufficient and do not support the conclusion that the defendant owed the plaintiff the legal duty for which the plaintiff contends. The exception must therefore succeed.

35. Both parties engaged the services of two counsel. There is no doubt in my mind that this was a reasonable precaution given the complexities of this matter, both from a factual as well as a legal perspective. There was no suggestion before me that the successful party ought not to be awarded the costs of two counsel.

36. In the result, I make the following order:

1. The exception is upheld with costs, including the costs of two counsel.

2. The plaintiff's particulars of claim are set aside.

3. The plaintiff is granted leave, should it be so advised, to deliver a notice of intention to amend its particulars of claim within thirty days from the date of delivery of this order.

4. In the event of the plaintiff failing to deliver a notice of intention to amend within thirty days as aforesaid, the plaintiff's action is dismissed with costs.

J. B. BERRIDGE

ACTING JUDGE OF THE HIGH COURT

HEARD ON:	25 October 2011
DATE OF JUDGMENT:	17 April 2013
FOR THE EXCIPIENT/	
RESPONDENT:	LN HARRIS SC
	K SERAFINO-DOOLEY
INSTRUCTED BY:	Webber Wentzel Attorneys
FOR THE RESPONDENT/	
PLAINTIFF:	JG WASSERMAN SC
	PT ROOD SC
INSTRUCTED BY:	Cliffe Dekker Hofmeyr Inc