REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT
JOHANNESBURG LOCAL DIVISION

CASE NO: 12/07159

(4) REPORTABLE: YES
(5) OF INTEREST TO OTHER JUDGES: YES
(6) REVISED.

11 JUNE 2014

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SIGNATURE

In the matter between:

Sanlam Capital Markets (Pty) Ltd	**Plaintiff /Respondent**
and	
Mettle Manco (Pty) Ltd	**First Defendant/First Excipient**
May Harry Wesley	**Second Defendant/Second Excipient**
Maree, Werner	**ThirdDefendant/Third Excipient**
Hislop, Jonathan Scott	**Fourth Defendant/Fourth Excipient**

Judgment

Vally J

Introduction

1. The plaintiff/respondent in this matter has summoned the four defendants to Court to answer to a claim for negligent misstatement which has caused it a loss of some considerable amount. It has furnished detailed

particulars of its claim (the particulars) outlining the basis upon which it holds the four defendants liable for the loss it suffered. The first, second and third defendants/excipients take exception to the particulars of claim. They jointly assert that the particulars do not contain the necessary averments to sustain a cause of action and, unless this defect is cured, there is no reason why they should be required to visit Court to defend themselves against a claim that from its inception was legally unsound. Accordingly, they ask that this Court declare that the particulars fail to disclose a cause of action, and to afford the plaintiff an opportunity to remedy the particulars within a specified period of time, failing which the claim against them be dismissed with costs.

2. In order to facilitate the reading of this judgment, the respondent in this application will be referred to as plaintiff and the first, second and third excipients will be referred to as defendants.

The particulars

3. The particulars are lengthy and complex. They detail a complex commercial transaction which, in many ways, is esoteric. It concerns the buying and selling of financial instruments based on debts, and involves commercial transactions whereby debts of individuals (and perhaps even businesses) are parcelled and sold, or securitised, so that the risks inherent in them are removed altogether (should the debts be sold), or shared (should the debts be securitised). The transactions involve complex contractual arrangements. The arrangements as well as the

terms embodying some of the contracts are an innovation of very recent times, as a result of which potential participants have little historical knowledge or experience to draw on when considering whether or not to participate in them. Unsurprisingly, the workings of such commercial transactions remain mysterious to most ordinary folk and for that reason the transactions remain the domain of a tiny minority of the economically active individuals in the country.

4. The plaintiff engaged in these transactions by virtue of certain representations made to it by the defendants. The defendants, the plaintiff claims, succeeded in convincing it to partake in such transactions. This took the form of the first defendant, uninvited and at its own instance, calling on the plaintiff with a proposal, which invited the plaintiff and one other institution (the Hong Kong Shangai Bank (the HSBC)), to "*participate in a debt securitisation scheme as the senior funders of such a scheme*"[1] (the proposal).The proposal was presented in writing and orally. In presenting the proposal the defendants made certain representations (the representations), the crux of which was that "*the first, second and third defendant's had been and were historically and continuously involved with and intimately knowledgeable of the business, history, management, personnel, financial position, accounts and structuring of*" another commercial entity trading as MfP Logistics (Pty) Ltd (MfP Logistics).[2] MfP logistics was associated with a number of other commercially active entities. The document that formed part of the

[1] Para 6 of the particulars.
[2] Para 7 of the particulars.

proposal is annexed to the particulars. It is a lengthy document and is entitled "*Debtors Securitisation Transaction MfP Logistics Limited.*" The key expressed and implied representations contained in the document are specified in the particulars.[3] The oral representations are identified as being "*responses and explanations to queries raised and explanations sought by the plaintiff concerning the Securitisation Scheme.*"[4]

5. The plaintiff claims that the defendants further presented to it that the "*Debt Securitisation Structure ... had been used successfully in several successful debt securitisation schemes previously arranged by the first, second and third defendants, and was proven to be effective, lawful and enforceable* (and that) *the Securitisation Scheme devised by the First, Second and Third defendants was capable of adequately safeguarding and protecting the interests and rights of the senior funders in such a structure.*[5] The representations went further to indicate that the "*first, second and third defendants had taken all the necessary and reasonable steps to satisfy themselves as to the eligibility of the specific debtors whose debts were to form the subject matter of the Securitisation Scheme*"[6]; that it "*embodied the necessary structural safeguards and monitoring mechanisms to perform an on-going, effective monitoring function in respect thereof, which would include such accounting and control safeguards as would be reasonably required to ensure the*

[3]Para 9 of the particulars.
[4]Para 8.2 of the particulars.
[5]Paras 10.1 and 10.2 the particulars.
[6]Para 10.3 of the particulars.

integrity of the debtors and the integrityof the Securitisation Scheme."[7] The representations went on to claim that a number of other important protective measures were in place which would ensure that the interests of the funders to the Securitisation Scheme were protected.[8] The defendants also represented that they "*had undertaken a thorough and appropriate detailed investigation of the originators of the debts and their businesses so as to establish that existing book debts of each originator that formed part of the Securitisation Scheme comprised of bona fide claims*"[9], that "*sufficient and reliable accounting controls were in place to ensure that book debts sold to MfP Finance* (one of the associate companies of MfP Logistics), by an Originator *would only consist of claims* which arose as a result of the implementation of the credit approval policy of the originator of the debt[10] and, finally, "*that the originators had the necessary and reliable accounting controls, managerial safeguards and integrity to reasonably preclude the occurrence of a large scale fraud and/or misrepresentation that might potentially undermine the effectiveness of the Securitisation Scheme.*"[11] On the basis, and only because, of these representations, the plaintiff participated in the Securitisation Scheme as a Senior Funder, together with the HSBC.

6. The plaintiff avers that the defendants in communicating the proposal and making the representations knew, or ought reasonably to have known,

[7] Para 10.4 of the particulars.
[8] See paras 10.5 and 10.6 of the particulars.
[9] Para 10.7 and 10.7.1 of the particulars.
[10] Para 10.7.2 of the particulars.
[11] Para 10.7.4 of the particulars.

that they had no knowledge, or had inadequate knowledge about the correctness or accuracy of the representations and that the plaintiff would be relying on these representations when deciding to participate in the Securitisation Scheme as a Senior Funder.[12] And further, that in the event of the representations being "*incorrect*" the Securitisation Scheme "*could fail to give rise to a satisfactory secured structure in relation to the book debts being sold by any originator(s) to the plaintiff resulting in the plaintiff suffering a loss.*"[13]

7. Under these circumstances, the plaintiff claims that the defendants owed it a duty of care not to make the representations to it unless the representations "*were correct in all material respects*"[14], and "*to notify the plaintiff of the respects in which the ultimate Securitisation Scheme differed from*"[15] that presented in the representations.

8. The plaintiff alleges that it relied on the representations to participate in the Securitisation Scheme as a senior funder and that "*but for*" the representations, it had neither interest nor inclination to participate in the Securitisation Scheme as a senior funder. The other senior funder was the HSBC. The details of the plaintiff's participation in the Securitisation Scheme are then specified in the particulars.[16]

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[12]Para 11.1 of the particulars.
[13]Para 11.2 of the particulars.
[14]Para 12.1 of the particulars.
[15]Paras 12.2 of the particulars.
[16]See para 13 of the particulars.

9. Consequent upon the plaintiff's participation in the Securitisation Scheme together with the HSBC two legal entities were established, *viz* the MfP Securitisation Trust and MfP Finance. A trust deed was executed and a number of agreements were concluded, namely: the Sale of Book Debts Agreement; a Management Agreement; a SCM Subscription Agreement; an HSBC Subscription Agreement, an MfP Subscription Agreement and an Option Agreement.[17] All the documents and agreements are annexed to the particulars.

10. The essence of the documents and agreements are then pleaded.[18]

11. The plaintiff contends that the defendants breached their duty of care towards it and proceeds to furnish a detailed factual account of the form of the breach. This takes up no less than ten sub-paragraphs and five pages of the particulars.[19] The crux of plaintiff's claim is that the defendants were negligent in failing to ensure that the representations were *"at all material times"* correct.

12. The consequence of the defendants' breach was that significant losses were incurred by the various associated companies of MfP Logistics. The losses are particularised.[20]

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[17] See para 14 of the particulars.
[18] See para 16 of the particulars.
[19] Para 17 of the particulars.
[20] See para 18 of the particulars.

13. MfP Logistics was finally wound up on 7 July 2009.[21] The consequence of its insolvency was, amongst others, that one of the associated companies, MfP Finance, was unable to recover an amount of R157 067 921, 90, which it paid to Music for Pleasure (another associated company of MfP Logistics). The plaintiff's share of this loss was R104 999 905,79 and the HSBC's share of the loss was R 52 068 016,11.

14. In the alternative the plaintiff claims that the second, third and fourth defendants contravened section 76(3) of the Companies Act 71 of 2008 (the 2008 Companies Act) by acting recklessly, alternatively negligently, in their capacities as directors of MfP Finance by not, inter alia, exercising their powers and performing their functions as directors with the necessary care, skill and diligence expected from a reasonable person in their position. A lengthy list of omissions on the part of the second, third and fourth defendants is listed in the particulars.[22]

15. The plaintiff alleges that the contravention of s 76(3) of the 2008 Companies Act by the second, third and fourth defendants caused it to suffer a loss for which the second, third and fourth defendants are liable in terms of s218(2) read with item 7(7) of schedule 5 of the 2008 Companies Act, alternatively in terms of the common law. Again, the loss is particularised and amounts to R98 243 807.00.[23]

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[21] Para 19 of the particulars.
[22] See para 23 of the particulars. This should have been numbered para 24.
[23] See para 25 - 27 of the particulars.

16. In the further alternative, the plaintiff claims that the second, third and fourth defendants:

16.1. contravened s 22(1) of the 2008 Companies Act read with item 11 of schedule 5 thereto; alternatively,

16.2. contravened s 77(3)(b) of the Companies 2008 Act; alternatively,

16.3. contravened s 424 of the Companies Act 61 of 1973 (the 1973 Companies Act) read with item 9 of schedule 5 of the 2008 Companies Act,

which contravention resulted in it suffering a loss of R98 243 897.00 for which the second, third and fourth defendants are jointly and severally liable.

17. Accordingly, the plaintiff claims R104 999 905.79 from the defendants together with interests and costs, alternatively R 98 243 807.00 from the second, third and fourth defendants together with interest and costs.

18. The main claim of the plaintiff is based on the alleged misstatements of the defendants which were the cause of the plaintiff deciding to participate in the Securitisation Scheme, and as a result of which it suffered a pure economic loss.

19. The defendants have taken seven exceptions against the particulars. The first three of these relate to the defendants not being sure what meaning is intended by certain averments in the particulars. The fourth exception

relates to the issue of negligence. The defendant's contend that the particulars do not allege facts or circumstances to support the plaintiff's claim that they were negligent. However, at the hearing, the first four exceptions were abandoned. This left the fifth, sixth and seventh exceptions for determination. The fifth and sixth exceptions relate to the issue of unlawfulness, the seventh exception concerns the issue of the liability of the second, third and fourth defendants on the basis of their alleged contravention of various sections of the 2008 Companies Act.

A negligent misstatement causing only economic loss is actionable in terms of the *Lex Aquilae: Bayer v Frost*[24] and *Standard Chartered Bank of Canada v Nedperm Bank Ltd*[25]

20. The entire case is pleaded on the basis of the legal principles outlined by Corbett CJ in *Bayer* and refined in *Standard Chartered*: in fact, the case is modelled on *Bayer* read in conjunction with *Standard Chartered*.

21. In *Bayer*, the appellant (Bayer) had induced the respondent (Frost) to use a chemical herbicide (sprayed from a helicopter) on one of its vineyards. The inducement took the form of representations by Bayer's employees to the effect that it was safe to spray the chemical herbicide on the vineyards by releasing it *via* a moving helicopter. This was done. It turned out that it was not safe to release the chemical herbicide from a helicopter since it caused significant damage to the crop. Thus, the representations imputed to Bayer (that it was safe), were not correct. Frost claimed, *inter*

[24] 1991 (4) SA 559 (A)
[25] 1994 (4) SA 747 (A)

alia, that the employees of Bayer were under a legal duty to ensure that the representations were correct and by failing to do so breached this duty. As a result, the representations were unlawful and negligent thus making Bayer liable for the loss he suffered. Corbett CJ agreed. Developing the common law, he held that it was time that the law recognised an action for a negligent misstatement ("*negligence by word*"), which was made unlawfully and which caused the plaintiff financial loss, regardless of whether it was made within or outside a contractual context.[26] The foundation for this development of the common law was laid in the Appellate Division's pioneering decision in *Administrateur, Natal v Trust Bank van Afrika Bpk*,[27] where the Court found that a negligently made statement which caused someone, who reasonably relied thereupon, to suffer financial loss is a ground for holding the maker of the misstatement liable for the loss. The Court in *Administrateur, Natal*, did not deem it necessary to decide whether the same negligent misstatement provides grounds for action if it induced a contract. In the light of the same Court's earlier finding in *Hamman v Moolman*[28] that no liability should be imputed to the maker of the misstatement that induced a contract, as the person relying upon the statement should protect himself in the contract that is concluded, the reluctance of the Court in *Administratuer, Natal* to pronounce on the issue of whether *Hamman* was correct is understandable as the facts before it did not allow it to focus on this issue. However, the facts before the Court in *Bayer* clearly expanded the focus directly onto the issue of whether liability should be imputed

[26] *Id.* at 568A-F
[27] 1979 (3) SA 824 (A)
[28] 1968 (4) SA 340 (A)

upon the maker of a negligent misstatement where the misstatement induced a contract. In *Hamman*, Wessels JA held that the law of delict should not come to the rescue of a representee of a negligent misstatement who relied on the misstatement to his detriment by concluding a contract. It is incumbent upon the representee to protect his own interests in the contract so concluded. Wessels JA reasoned the conclusion in the following terms:

> "It would seem that, in the field of contract, the making of honest but carelessly mistaken statements of fact or opinion can by no means be regarded as a modern phenomenon and peculiar to present-day circumstances. The incidence of such statements must surely have been noted and considered long before now, and the call to modify "old practice and ancient formulae" could hardly be said to arise from any recently detected urgent need 'to keep pace with the requirements of changing conditions'. The existing law grants what appears to be adequate protection in the field of contract to a party to whom a misrepresentation is made. Thus a contracting party may safeguard himself against loss by simply taking the elementary precaution of requiring the representor to guarantee the truth of his representations. Adequate remedies are available where misrepresentations are tainted with *dolus*, and in appropriate circumstances an aggrieved party is granted relief in the case of an innocent misrepresentation. Although pure logic and the never-ending development and expansion of legal ideas do not appear to be opposed in principle to a conclusion that in appropriate circumstances an action might be maintained to recover pecuniary loss caused by honest but carelessly made verbal (or written) misrepresentations, there is as yet in our law no authoritative determination or generally accepted definition of the principles to be applied in deciding in what circumstances such an action will lie in the field of contract. The practical difficulties involved in any general and unqualified extension of the principles of our law of negligence, as applied to negligent conduct causing injury to persons or property, to honest but carelessly made misrepresentations causing pecuniary loss are referred to in *Herschel v Mrupe*, *supra*, I am by no means satisfied that the practical necessity of a remedy of the kind contended for has been demonstrated, nor that it's recognition might not result in more ills than the one it is intended to remedy, namely, the failure of the unwary representee to have proper regard to his own interests in the field of contract."[29]

22. Faced with the same issue Corbett CJ, in *Bayer,* concluded otherwise: the learned Chief Justice concluded that whether the negligent

[29] *Id.* at 348D-H

misstatement is made to induce a contract, or is "*made outside the contractual sphere*", is irrelevant for purposes of imputing liability upon the maker of the misstatement.[30] This conclusion places *Bayer* at odds with *Hamman*. This fact did not elude the attention of Corbett CJ, who held that it was time for the law to move on in order to meet the demands of, and be relevant to, the workings of modern day commerce. The underlying basis for this conclusion is that "*the novelties and complexities of contemporary life have widened the potential scope for misstatement and for the damage which it may inflict.*" The reasoning of Corbett CJ is cogently articulated and bears repetition:

> "It is no doubt true that the making of negligent misstatements in the course of contractual negotiations is not a peculiarly modern phenomenon, but at the same time I think that it must be recognised that the novelties and complexities of contemporary life have widened the potential scope for misstatement and for the damage which it may inflict. And this causes me to question, with respect, the further statement (in the *dictum*) that the existing law grants adequate protection to a contracting party to whom a misrepresentation is made. Take the present case by way of example. The purchase and sale of a chemical herbicide for application to a vineyard from a helicopter is essentially a modern type of transaction. If the law does not recognise a delictual claim for damages for negligent misrepresentation, then it would seem that in general the only relief accorded to the representee would be a contractual claim for the avoidance of the contract and restitution, including in an appropriate case an *actio quanti minoris* (see *Pharne (Pty) Ltd v Paizes* 1973 (3) SA 397 (A)). In the circumstances of this case a claim for restitution could have presented problems and would, in any event, have been cold comfort to the respondent.
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> It is also true that, as stated in the *dictum*, (the dictum of Wessels JA quoted above in the previous para) a contracting party can safeguard himself against loss by requiring the representor to guarantee the truth of his representation. This, with respect, seems to me to be a counsel of perfection. The realities of modern commercial life show that many laymen are not aware of such legal niceties and contract upon terms put forward by the other contracting party. In my opinion, the law should provide adequate protection for persons induced to contract by a negligent misstatement emanating from the other contracting party and not incorporated as a term of the contract; and in many instances this can only be done by granting the party concerned compensation for consequential loss suffered as a result of the misstatement.

[30] *Bayer* (*op cit*) at 568F

> Finally, as the dictum in *Hamman's* case shows, the Court was there concerned about the practical difficulties inherent in any extension of the law of negligence, as applied to conduct causing injury to persons or property, to honest but carelessly made misrepresentations causing pecuniary loss; and these concerns appear to have caused the Court to adopt a conservative approach. In my opinion, this viewpoint has been overtaken and its relevance largely ousted by the subsequent decision of this Court in the *Administrateur, Natal* case, which, as I have indicated, specifically dealt with the difficulties associated with the recognition of a delictual action for damages on account of a negligent misstatement and indicated how they could and should be overcome."[31]

23. Thus, in *Bayer*, it was found that a plaintiff could claim for financial loss (harm) suffered as a result of a misstatement (causation) by a defendant if the plaintiff can prove that in making the misstatement the defendant failed to exercise reasonable care (negligence) and acted unlawfully (wrongfulness) by breaching a legal duty owed to the plaintiff. On the issue of whether the defendant breached a legal duty of care towards the plaintiff, Corbett CJ noted that this was an issue that pre-eminently fell within the purview of the particular facts of the case, and that the trial Court considering this issue must decide whether the facts establish that the defendant owed the plaintiff a legal duty not to make the misstatement, that the defendant failed to exercise reasonable care before making the misstatement to the plaintiff and that the misstatement was the cause of the harm suffered by the plaintiff. By emphasising the fact-based and case-specific nature of the enquiry, the judgment took care of any anxieties concerning the issue of limitless liability, thus allowing it to expand the scope of the Aquilian remedy. All the members

[31] *Bayer* (*op cit*) at 569B - I

of the Court agreed that the scope of the Aquilian remedy should be expanded.[32]

24. Of particular interest to the case at hand is that Corbett CJ took particular note of the fact that the law of contract may offer "*cold comfort*" for the unwary person who was induced by a misstatement to conclude a contract and did so in circumstances where s/he cannot be faulted for having fallen for the misstatement.

25. Three years later, the issue resurfaced in the Appellate Division in *Standard Chartered.* Once again, Corbett CJ penned the judgment for the Court. In this case, the plaintiff (Standard Chartered) contended that the defendant (Nedbank) owed it a legal duty not to furnish a false bank report with regard to the financial affairs of another entity (Triomf RB), that it breached this duty and therefore acted unlawfully. To determine whether this negligent misstatement (the furnishing of a false bank report), was unlawful Corbett CJ considered various factors such as: (i) the context in which the statement was made; (ii) the nature of the statement; (iii) the purpose of the statement and Nedbank's knowledge thereof; (iv) reliance by a third party on the report: (v) relationship between the parties; and, (vi) public policy, fairness and related matters etc.[33]Having examined these factors, Corbett CJ concluded that the negligent misstatement constituted an unlawful act. Hence, the principle outlined in *Bayer* was refined, but followed nevertheless.

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[32]The support for this principle was explicit in the two separate concurring judgments of Kumleben JA (at 576A) and Hefer JA (at 585G).
[33]*Standard Chartered (op cit)* at 770

26. The reasoning of Corbett CJ in *Bayer* and *Standard Chartered* is compelling, especially when regard is had to the fact that the scope for misstatement causing pure economic loss (whether by inducing a contract or not) in the modern commercial world is very wide as decisions are made with speed unparalleled in the less technologically advanced economic periods that prevailed at the time *Hamman* was decided. The law must, if it is to genuinely offer remedies relevant to this state of affairs, adapt to this reality. This is precisely what *Bayer* does.[34]It is a ground-breaking judgment that allows for the development of the law in a way that is relevant and useful to modern commercial life. By accepting that the making of a negligent misstatement (whether inside or outside a contractual setting), may provide cause for action, the law imposes a duty on parties to conduct their commercial affairs with honesty and *"to exercise care when giving advice to another."*[35] In my judgment the legal policy underpinning the adoption of this cause is consistent with our nascent constitutional norms, especially the norm of respecting everyone's dignity. The negligent misstating of (a) fact(s) which cause(s) a person harm is potentially violative of the constitutional value of dignity. For these reasons, I am of the view that *Bayer* holds good and should be followed.

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[34] Together with *Administrateur, Natal*, it is, to borrow a phrase from the speech of Sumption SCJ, "*a milestone in the development of the law*". See: *Bank Mellat v HM Treasury (No 2)* [2013] 4 All ER 533 (UKSC) at 549c

[35] *Standard Chartered (op cit)* at 763G

The fifth and sixth exceptions: the defendants' conduct was not wrongful

27. That said, however, the defendants except to the particulars on the basis that the negligent misstatement(s) imputed to them are not, *per se*, unlawful. They contend that even though incorrect representations imputed to them were the cause of the plaintiff concluding a contract to its detriment, these representations were not wrongful. This, in one sentence, is the nub of the fifth and sixth exceptions they take against the particulars. They contend that the legal convictions of the community do not require that they be held liable for the misstatements.

28. These exceptions attack the plaintiff's main cause of action.

29. It is trite that the particulars in a delictual claim must contain an allegation of wrongfulness as well as the facts relied upon to support such allegation. Absent such allegation, the particulars are rendered excipiable for failure to disclose a cause of action.[36] Bearing this requirement in mind, the defendants contend that the particulars do not contain the necessary averments to sustain a claim that they were wrongful either in their actions or by their negligent omission to act when duty-bound to do so. They claim that in order for them to be found to have acted wrongfully, the plaintiff has not only to allege that the representations were wrong, but that it is also required to allege that it was completely unable to protect itself from relying on the incorrect representations. Absent the latter allegation the particulars lack the necessary averment(s) to sustain

[36] *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 797E; *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at [14]

a cause of action, so they claim. The defendants' contention is articulated in the following terms in the heads of argument submitted on their behalf:

> "What the plaintiff attempts to do is to make the defendants the guarantors of the securitisation scheme in circumstances where the plaintiff, if that was its intention, ought to have obtained the necessary contractual warranties. There is no sound reason for imposing a duty on the defendants 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 the harm from the defendants' conduct is ordinarily a prerequisite to imposing a duty. If the plaintiff has taken or could have taken steps to protect itself from the defendants' conduct and was not induced by the defendants' conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendants to protect the plaintiff from the risk of pure economic loss."

30. This contention, in my view, overlooks what the plaintiff is asking for. The plaintiff is not asking for the extension of the Aquilian liability in order to secure a protection that it failed to obtain contractually. The relevant extension of the Aquilian liability has occurred in the paradigm-shifting judgment of Corbett CJ in *Bayer*. The plaintiff is merely asking that the law as expressed in *Bayer* be applied to the facts of its case. This, in a society founded on the rule of law[37], it is perfectly entitled to do and the law is required to come to its assistance if the facts are in its favour. Nevertheless, the substance of the exception is that the plaintiff had an opportunity to protect itself (in contract) against the alleged conduct of the defendants and as it failed to take advantage thereof, it should be denied access to the Aquilian remedy. The defendants say that the plaintiff must show that it was unavoidably vulnerable to the harm caused by the defendants for them to be held liable in delict for the loss suffered by it. In support of this contention the defendants rely on recent pronouncements

[37] See s 1(c) of the Constitution

from the SCA. These pronouncements, according to them, indicate that that they should not be held liable in delict when the plaintiff had every opportunity to protect itself in contract. It is the defendants' case that *Bayer* has been overtaken by a recent judgment of the SCA. The judgment, according to them, revert to *Hamman* and hold that a misstatement that induces a contract has no cause for action in delict as the representee should protect himself in the contract and not (*ex post facto*) seek refuge in law of delict: policy considerations require that the plaintiff should not be rescued from its own failings. The defendants rely on *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*[38] in support of this contention.

31. In *Trustees, Two Oceans* the relevant respondent/defendant (i.e. the second defendant) was a company of consulting engineers which was employed to, *inter alia*, design an aquarium, while the appellants/plaintiffs were trustees of the trust that leased and operated the aquarium. In their particulars the plaintiff's allege that the defendant (together with the other defendant's) agreed with a joint venture, which existed prior to the formation of the plaintiffs, that it would "*assist, in (its) capacit(y) as ... consulting engineers, ... in the process of investigating the feasibility of developing and operating the aquarium and in the process of investigating appropriate design options for the aquarium with a view to its formal appointment*", should they decide to proceed with the development and operation of the aquarium. Furthermore, by agreeing to

[38] 2006 (3) SA 138 (SCA)

assist the joint venture the defendant knew that the joint venture would be dependent upon its professional expertise and advice and would rely thereupon, and for that reason it "*owed a legal duty to the joint venture (and to the trust upon its formation)*" not to perform the responsibility it assumed negligently. The particulars allege further that as a result of the negligence of the defendant, the design of the aquarium was defective. The defect came to light after the plaintiff was formed and caused the plaintiff economic loss. The plaintiff contended that, as it was not yet formed at the time the defendant had agreed to assist the joint venture and at the time that it acted negligently, it cannot be expected to have protected itself in contract against the negligence of the defendant. For that reason it should not be deprived of the opportunity to recover its loss in delict; in fact, it contended that policy considerations require that it be allowed an action in delict in these circumstances where its loss was caused by the negligence of the defendant. The SCA disagreed. It found that the pleaded facts revealed that the joint venture and the defendant were aware that the trust was to be formed and that, once formed, the trust would be replacing the joint venture, and that a relationship between the trust and defendant would be governed by contract. In these circumstances Brand JA found:

> "...I can see no reason why the trust could not have been covered against the risk of harm due to the respondent's negligent conduct by appropriate contractual stipulations covering even conduct that occurred before the trust was formed. This, so it seems, could have been done on two occasions. First, by way of a *stipulatio alteri* in favour of the trust (to be formed) in the agreement between the joint venture and the respondent (see eg McCullogh v Fernwood Estate Ltd 1920 AD 204 at 208). Or, by the insertion of apposite provisions relating to any decisions which might already have been taken by the respondent, in the contract of formal appointment. I find support for this consideration in the judgment of the High Court of Australia in Woolcock Street Investments

(Pty) Ltd v CDG Pty Ltd (formerly Cardno & Davies Australia Pty Ltd) [2004] HCA 16, in which 'vulnerability to risk' was held to be a critical issue in deciding whether delictual liability should be extended in a particular situation (see eg McHugh J in para [80] of the judgment). In this regard, it is to be noted that the concept of 'vulnerability' as developed in Australian jurisprudence is something distinct from potential exposure to risk and that 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. I find the Australian reasoning to be in accordance with the cautious approach of our law with regard to the extension of Aquilian liability that I have referred to.

Generally speaking, I can see no reason why the Aquilian remedy should be extended to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means, but who failed to do so. In argument, the only answer to this difficulty proffered by the appellants' counsel was that the insertion of appropriate contractual provisions would require a great deal of wisdom before the event by those acting on behalf of the trust, which could not be reasonably expected at the time. In support of this answer, counsel placed particular reliance on the minority judgment of Kirby J (para [173]) in the Woolcock case. Though I obviously express no opinion on the facts of Woolcock, I do not think that answer is supported by the facts of this case. First, the trust was represented, not only by presumably able trustees, but also by professional project managers. Second, it appears from the way in which the appellants' case was pleaded that it should have been plain to everybody concerned that the respondent could opt for a particular design prior to its formal appointment and that, if it were negligent in doing so, the trust would suffer damages when that wrong option was eventually implemented.

Other considerations alluded to by Grosskopf AJA as to why Aquilian liability does not fit comfortably in a contractual setting (cf Lillicrap at 500G - 501G) also find application in this case. To illustrate - what would happen if the respondent's design, which was eventually implemented, complied with its obligations undertaken in terms of its formal agreement of appointment, but not with the standards of the notional reasonable engineer? Would it then make any difference that the design was decided upon prior to the appointment? Or, what if the appointment contract is construed to relate to the design as eventually implemented, irrespective of whether it was decided upon by the respondent before or after its formal appointment. Would the respondent's conduct then be measured by two different standards - one contractual and the other delictual? Or, what if the respondent had been asked, but refused to give a contractual warranty in respect of the work that it had done on a speculative basis and without any remuneration prior to its formal appointment? Would it still be held liable in delict if that work was negligently done? In short, I believe that the following statement by Grosskopf AJA in Lillicrap (at 500H - I) is equally apposite in this case:

> '(I)n general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly,

> the nature and quality of the performance required from each party."[39]

32. The approach adopted in *Trustees, Two Oceans* bears a close resemblance to that adopted in *Hamman*. In *Hamman*, it was said that the Aquilian remedy should not avail an "*unwary representee*" who failed "*to have proper regard to his own interests in the field of contract*".[40] Similarly, in *Trustees, Two Oceans* it was said that "*the Aquilian remedy should (not) be extended to rescue a plaintiff who was in the position to avoid the risk of harm by contractual means, but who failed to do so.*" But this is precisely what Corbett CJ rejected in *Bayer*, for according to the learned Chief Justice it seems to be "*a counsel of perfection*"[41], which fails to come to terms with the reality of modern day commerce. *Bayer* specifically overruled *Hamman*. *Trustees, Two Oceans*, on the other hand, came after *Bayer* but made no reference to *Bayer*, and for that reason cannot be said to have overruled *Bayer* and return to the position expressed in *Hamman*.

33. The principle established in *Bayer* was accepted in *Absa Bank Ltd v Fouche*.[42] However, the majority judgment, penned by Conradie JA, found that on the facts of that case the defendant (Absa Bank Ltd) was not duty-bound to disclose to the plaintiff (Fouche), what the security arrangements at the Bank were so that she could make an informed decision as to whether or not she should entrust her valuables in its care,

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[39] *Id.* at [23]-[25]
[40] The full quotation is to be found in para 21 above.
[41] The full quotation is to be found in para 22 above.
[42] 2003 (1) SA 176 (SCA)

and for that reason the learned judge of appeal dismissed her claim.[43] Conradie JA was also not convinced that the plaintiff was induced by any misstatement (in the form of silence), on the part of any of the defendants' employees to conclude a contract with the defendant.[44] On the other hand, the minority judgment of Schutz JA came to exactly the opposite conclusion. Schutz JA found that the failure of the defendant to disclose the true state of the security measures it took to protect the valuables of the plaintiff was unlawful, for it was duty-bound to reveal these facts, and its failure to do so had induced the plaintiff to conclude a contract with it. According to Schutz JA:

> "Finally policy, what I perceive to be an element of the legal convictions of the community, demanded of the bank officials that they should speak. Why they did not do so is plain. It would have discouraged her from entrusting her valuables to this branch and it would have been bad for the bank's image." [45]

34. The different factual conclusions arrived at do not detract from the fact that both the majority and the minority judgments accept that it is now part of our law that a negligent misstatement causing pure economic loss may give rise to an Aquilian action. Interestingly, in that case, the contract concluded specifically contained a clause which effectively absolved the defendant from the harm that may be suffered by the plaintiff. The relevant clause, which was protective of the defendant's interest reads:

> "While the Bank will exercise every responsible care for the security of the locker area, it is a special term and condition of the acceptance thereof that no responsibility for the loss or damage of the contents of the locker whether partial or total, from whatever cause, whether by theft,

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[43] *Id.* at [22]
[44] *Id.* at [21]
[45] *Id.* at [38]

> fire, water, explosion, war, riot, or otherwise, is accepted and that the client himself shall be responsible to insure the contents of the locker."[46]

35. Neither the majority nor the minority judgment interpreted this clause as barring the plaintiff from invoking the jurisdiction of the Court by relying on the *Lex Aquilia* when her claim in contract would have had no merit. Both judgments accept that the approach adopted in *Hamman* has been overtaken.

36. In conclusion then, *Bayer*, in my judgment, has not been overturned, is good law and should be followed.

37. Furthermore, the plaintiff argued that *Trustees, Two Oceans* is to be differentiated from the facts in this case in that no contract was concluded between it and any of the defendants. Therefore, it was not able to protect itself against the misstatements of the defendants which induced it to contract with third parties. Thus, it contends that to the extent that the exception is based on *Trustees, Two Oceans*, it is misdirected. The plaintiff is correct in this regard. The facts of this case are clearly distinguishable from that of *Trustees, Two Oceans,* and for that reason the principle outlined in that case has no application to the present one.

38. This is an exception. At this stage of the proceedings all that is required of the plaintiff is for it to show that, *prima facie,* it has a cause of action based on a negligent misstatement unlawfully made by, or on behalf of,

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[46] *Id.* at [1]

the defendants which caused it financial harm.[47] This it has done. Whether it ultimately satisfies all the requirements identified in para 23 above is a matter for the trial Court.

39. For all the aforestated reasons, I hold that the fifth and sixth exceptions lack merit and should, therefore, be dismissed.

The seventh exception: The 2008 Companies Act

40. In the alternative to its main claim, the plaintiff alleges that the second, third and fourth defendants knowingly acted recklessly by their participation in the affairs of MfP Finance in circumstances in which MfP Finance was, at all material times, commercially and legally insolvent. Thus their conduct was in contravention of s 424(1) of the 1973 Companies Act, alternatively of s 77(3)(b) of the 2008 Companies Act. In the alternative the plaintiff premised its claim upon the contravention of s 76(3), read with s 218(2) and item 7(7) of schedule 5 of the 2008 Companies Act. Accordingly, it seeks compensation from the second, third and fourth defendants in the sum of R98 243 807.00.

41. The second, third and fourth defendants except to this claim on the basis that s 77(3)(b) of the 2008 Companies Act expressly restricts to the first defendant any potential liability of the second, third and fourth defendants for contravention of s 22(1) of the same Act. The second, third and fourth defendants are correct in that s 77(3)(b) of the 2008 Companies Act

[47] See, *IndacElectorinic (Pty) Ltd* (*op cit*) at 801A-D.

imposes liability on a director for any loss suffered by the company (not a third person), as a result of his/her acquiescing to the company conducting its business recklessly or with gross negligence.

42. However, what is important is that the plaintiff aims to hold the second, third and fourth defendants liable for breach of, *inter alia*, s 76 of the 2008 Companies Act. It founds its claim on the provisions of s 218(2) of the same Act. Section 76 of this Act identifies the standards that should be adhered to by directors of companies. Section 76(3) emphasises the fiduciary duties of a director to act in the best interest of the company, to act in good faith, with proper purpose and with the degree of diligence, skill and care to be expected of a reasonable director in the position of the director concerned. This sub-section reiterates what was already established by the common law. Section 218 of this Act imposes liability on any person who contravened any provision of the Act and who by so doing caused that person to suffer a loss. Item 7(7) of schedule 5 protects the right of that person to seek the remedy in respect of conduct pertaining to any pre-existing company, and which conduct took place before (1 May 2011). Accordingly, the plaintiff is entitled to found its alternative action on the provisions of s 218(2) read in conjunction with s 76 and the various other sections of the 2008 Companies Act identified in the particulars, save for s 77(3)(b). The reliance on s 77(3)(b) may be misplaced but, in my reading of the particulars, it is not the basis of the alternative claim of the plaintiff. The basis remains s 218(2) of the Act.

The second, third and fourth defendants cannot, and do not, dispute that this is a valid legal cause.

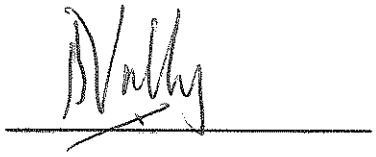
43. There is, therefore, no substance to the seventh exception, and so, it too, falls to be dismissed.

Order

44. The following order is made:

44.1. The exceptions are dismissed.

44.2. The first, second and third defendants are jointly and severally liable, the one paying the other to be absolved, for the costs incurred by the plaintiff, which costs are to include those occasioned by the employment of two counsel.



Vally J
Gauteng High Court, Johannesburg Local Division

Appearances:

For the Plaintiff/Respondent and	:	Adv A Subel SC
Heads of argument compiled by	:	Adv C Eloff SC and Adv S Stein
Instructed by	:	Baker & McKenzie
For the 1st, 2nd, and 3rdDefendants/Excipients :		Adv L Harris SC
Instructed by	:	Webber Wentzel
Date of hearing	:	18 March 2014
Date of judgment	:	11 June 2014