REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 32870/12

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... DATE

SIGNATURE

In the matter between:

ABSA BANK LIMITED Plaintiff

and

CHAIM COHEN Defendant

JUDGMENT

WEINER J:

1. The plaintiff has delivered an exception to certain allegations in paragraphs 54 to 56 of the defendant's counterclaim.

2. Paragraph 54.2 of the defendant's counterclaim states as follows:

> "*54.2 The plaintiff, by virtue of:*
>
> *i) its exercise of de facto control over AMU; and*
>
> *ii) the relationship which arose between the plaintiff, in the exercise of such control, and New City, as a shareholder of QPG (which, in turn, was the sole shareholder of AMU);*
>
> *owed New City a duty of care, which required the plaintiff ...*" [emphasis added]

3. In paragraphs 55 and 56 of the counterclaim, the defendant alleges that New City was the holder of 26.4 million shares in QPG and QPG owned all of the shares in AMU.

First ground of exception

4. The plaintiff has taken exception to the above paragraphs in the counterclaim on two main grounds:-

4.1 Firstly, there is a material contradiction in the counterclaim which renders the counterclaim vague and embarrassing. The plaintiff concedes that it may be that this is a

typographical error and the defendant can amend to remove this cause of complaint.

4.2 Secondly, the plaintiff contends that the counterclaim discloses no cause of action.

5. The plaintiff's first ground of exception is premised upon the contention that the defendant has pleaded that the plaintiff owed New City a duty of care due to:

> "*The relationship which arose between the plaintiff, and the exercise of such control, and New City, as a shareholder of AMU.*" [emphasis added]

6. In the plaintiff's first ground of exception, it contends that the contradiction goes to the root of the cause of action and is vague which is prejudicial to the plaintiff in preparing its case.

7. It is clear from paragraph 54.2 that the claim is based on New City's shareholding in QPG and QPG's shareholding in AMU. There is no contradiction contained in paragraph 54.2.

8. Thus the claim is one which goes a step further than the cases which dealt with the right of a shareholder in a company to sue a 3rd party for a wrong done to the company. In this case, the defendant's counterclaim is that New City is a shareholder in QPG; QPG is the

shareholder in AMU; thus New City (as the ultimate shareholder in AMU) claims against the plaintiff for the wrong committed against AMU. The merits of such a claim will be dealt with below. However, the first exception must fail.

Second Ground of Exception

9. The plaintiff contends that the counterclaim does not sustain a cause of action in that the legal duty relied upon, i.e. the plaintiff's duty to Newcity, is bad in law.

10. The principles applicable to exceptions are that:-

10.1 The court will accept, as true, the allegations pleaded by the defendant to assess whether they disclose a cause of action;

10.2 A sustainable cause of action will be found only if the defendant has pleaded every fact necessary for it to prove in order to support its claim to a right to judgment.

10.3 It is for the plaintiff to show that upon every reasonable interpretation which the pleading can bear, no cause of action is disclosed. See ***Lewis v Oneanate (Pty) Ltd*** 1992 (4) SA 811 (A) at 817 F-G.

11. It is well-established that, for the purposes of determining whether the defendant's counterclaim is excipiable, all the factual allegations relied upon by the defendant are accepted as true – unless manifestly false. See ***Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd*** [2008] ZASCA 158.

12. The allegations in the counterclaim are, *inter alia,* that:-

12.1 The plaintiff exercised *de facto* management and control of AMU by, *inter alia,* dictating the terms of the agreements to be concluded by AMU;

12.2 In the exercise of its control over the management of AMU, the plaintiff caused AMU to enter into and/or breach agreements to its (AMU's) detriment;

12.3 The conclusion of the restatement agreement had negative consequences for AMU as it increased the level of debt owed by AMU to the plaintiff, and it imposed on AMU a debt of R61 million which the plaintiff knew AMU would not be able to repay;

12.4 If the plaintiff had not refused the third party's investment and also not insisted on the conclusion of agreements with Protea, AMU would not have had to make payment to

Protea. It would then have had additional monthly rental payments and would have been able to repay the plaintiff the amounts advanced to it by the plaintiff prior to the conclusion of the restatement agreement.

13. In the circumstances, the following facts must be taken to be admitted for the purposes of the hearing on exception:

13.1 That the plaintiff was in control of the management of AMU;

13.2 That AMU suffered a loss as a result of the poor management, alternatively, breaches by the plaintiff acting in that role;

13.3 That the value of the shares in AMU, being the asset of QPG, diminished as a result;

13.4 That AMU was liquidated as a result;

13.5 That the value of the shares in QPG reduced to nil as a result;

13.6 That the value of New City's shareholding in QPG thus diminished to nil.

14. The plaintiff's argument must therefore proceed on the facts pleaded, i.e. that Newcity held the shares in QPG and that QPG held the shares in AMU. As stated above, the court must accept that the wrong done to AMU by the plaintiff caused it to suffer damages.

15. The main considerations relevant to the present matter can be dealt with under two headings:-

15.1 General principles of Company Law;

15.2 The risks of indeterminate liability and multiple claimants for the same loss.

Legal duty relied upon by the plaintiff

16. The legal duty relied upon by the defendant is pleaded in pargraph 54.2. The source of the duty is alleged to be a *"relationship"* between i) the plaintiff in the exercise of *"de facto control"* over AMU; and ii) Newcity as shareholder of QPG, which held the shares in AMU.

17. Effectively, the defendant contends that:-

17.1 The manager and/or director of a company owes the shareholders of that company (or the shareholders of that

shareholder in the present case) a legal duty to manage the company's business without negligence; and

17.2 If the manager/director breaches that duty, the law allows the shareholder to sue him/her for the value of the diminution in the shares held by the shareholder.

18. The plaintiff submits that no such legal duty exists in law.

19. The plaintiff contends further that the defendant seeks to extend the delictual action and found liability in a manner which has not previously been done. In order to achieve this extension of the Aquilian action, the Court must consider policy considerations that will justify an extension of delictual liability in the circumstances. The plaintiff submits that the South African courts have clearly laid down the relevant policy considerations, and have decided that delictual liability ought not to be extended to a situation such as that relied upon by the defendant in the counterclaim.

Company Law Principles

20. At common law, only the company may take proceedings against wrongdoers that cause it to suffer harm or prejudice. See ***Foss v Harbottle*** (1843) 2 Hare 461; 67 ER 189 *(the Foss v Harbottle rule)*.

21. The company is separate and distinct from its members. Its property is not the property of its members, its debts are not the debts of its members and its shareholders are not obliged to indemnify the company for its debts. See ***Salomon v Salomon and Co Limited*** [1897] AC 22 (HL). Consequently, shareholders are not entitled to claim debts owed to the company.

22. Our courts have held that if a harm is done to the company, and the company has a claim against the wrongdoer for the loss suffered by it as a result of the harm, a member of the company has no action in his own right for loss suffered by him, by way of an alleged diminution in the value of his shares, as a result of such a wrong. See ***Golf Estate (Pty) Ltd v Malherbe*** 1997 (1) SA 873 (C) at 870-880.

23. In the circumstances, the plaintiff contends that the claim by Newcity is bad in law. The defendant, in seeking to justify its claim, relies upon the unreported judgment of Satchwell J in ***McCrae, Gordon Andrew v Absa Bank Limited*** [2009] JOL 24153 (GSJ). Satchwell J analysed the authorities dealing with the issue of the duty of care which a third party may owe to a shareholder of a company not to cause harm to the company, which may consequently cause harm to the shareholder. At [14], Satchwell J stated as follows:-

> *"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."

24. In ***McCrae*** Satchwell J, in dealing with the *Foss v Harbottle* rule, stated at [24]:-

"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".

And further at [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 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."

And then at [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" which "would result in anarchy in the affairs of the company".

25. In ***McCrae*** *(supra),* the risk of a multiplicity of claims was not an issue as the liquidators of the four companies had not launched proceedings against the defendant for the recovery of claims suffered by the companies.

26. The issues which have to ultimately be decided will be whether or not the plaintiff owed a duty of care to the defendant, would have foreseen the possibility of harm occurring to the defendant and ought to have taken steps to guard against its occurrence. As was held in ***McLelland v Hulett and Others*** 1992 (1) SA 456 (D) at 464, these are policy considerations.

Multiplicity of claims

27. The plaintiff submits that if Newcity has a cause of action (ceded to the defendant) then the same cause of action would be available to, *inter alia:-*

27.1 AMU itself, suing the plaintiff directly for its conduct in managing the business of AMU;

27.2 Each of the shareholders of AMU. The fact that there is only one shareholder in AMU in the current matter (QPG) is irrelevant to determining whether a general duty should be recognised in principle.

27.3 Each of the shareholders in QPG. In this case, there are multiple shareholders in QPG as it is a listed company. This opens the possibility of innumerable potential plaintiffs in this case.

28. The plaintiff submits that the policy considerations are overwhelmingly against the extension of a legal duty to a shareholder, in the position of Newcity, for the simple reason that the extension of liability in these circumstances would be a clear realisation of indeterminate liability. This case differs from the situation in ***McCrae*** *(supra)* in that in that case, the issue of indeterminate liability was not anticipated. It is correct that the extension of the Aquilian liability goes even further than that considered in the cases in which the exception to the *Foss v Harbottle* rule was upheld. See ***McLelland v Hullett*** *(supra)*. In those cases, the plaintiff was a shareholder of the impugned company. In the present case, the plaintiff is the cessionary of a claim being instituted by the shareholder of the shareholder of the impugned company. In addition, the risk of double jeopardy is a consideration, as QPG is a

listed company with many shareholders, all of which would potentially have a claim.

29. However, in my view, although the defendant's counterclaim may ultimately fail the test (on multiplicity of claims) on policy grounds, the principle in ***McCrae*** *(supra)* at [15] remains applicable:-

> *"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."*
>
> See also ***Kalinko v Niset and Another*** 2002 (5) SA 766 (W) at 778-779.

30. In ***Minister of Law and Order v Kadir*** 1995(1) SA 303, Hefer JA held at 318F-J:-

> *"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… 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 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."

Question of foreseeability

31. During argument, I raised the issue as to whether the defendant's counterclaim contained the requisite elements for a claim in delict. In particular, there did not seem to be an allegation of foreseeability, which is a prerequisite for delictual liability. See ***Country Cloud Trading CC v MEC, Department of Infrastructure Development*** [2014] 1 All SA 267 (SCA) at [27] and [28].

32. The plaintiff, in this regard, referred to paragraph 8 of its exception and relied on same to submit that it covers the situation referred to in [28] above. Paragraph 8 reads:-

"No facts are pleaded by the defendant to establish a legal duty owed by the plaintiff to Newcity."

33. The defendant contended that the plaintiff's exception was not premised on the basis that its counterclaim lacked allegations relating to foreseeability. It contends that the exception related only to the proposition that "a shareholder has no right to claim a debt owed to the company."

34. Rule 23(3) of the Uniform Rules of Court states that *"wherever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated."* See ***Cook and Others v Muller*** 1973 (2) SA 240 N at 244A-C. See also ***Feldman NO v EMI Music*** SA (P/L) 2010 (1) SA SCA at [7]

35. It seems to me that "foreseeability" is a separate element of the prerequisites for the delictual claim from "the duty of care". Therefore, the plaintiff's exception set out in paragraph 8 would not cover this issue. The grounds should have been clearly and concisely stated. They were not.

36. The question remains, what does the court do in circumstances where a ground of exception is not raised? The court cannot *mero motu* grant relief based upon grounds that were not "clearly and concisely stated". It is now for the parties to proceed as advised; either the defendant will have to file a further exception, or the plaintiff will amend, or both.

Costs

37. On the face of it, the plaintiff's submissions in relation to the duty of care relied upon by the defendant may well be correct. Facts may however be pleaded before the trial court which would negate the fear of a multiplicity of actions. As stated above, the issue is one based on policy considerations, which should not be dealt with at the exception stage. In my view, once the trial and full argument is head, the trial court will be in a better position to determine the costs incurred in relation to this hearing.

Accordingly, the following order is made:

1. The exception is dismissed;
2. Costs are reserved for the trial court.

WEINER J

Counsel for the Plaintiff: Adv. Leathern SC with Adv. Turner
Plaintiff's Attorneys: WEBBER WENTZEL
Counsel for the Defendant: Adv. Brett SC with Adv. Mahon
Defendant's Attorneys: TERRY MAHON ATTORNEYS
Date of Hearing: 17 April 2014
Date of Judgment: 3 JUNE 2014