REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28167/2012

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

....
DATE SIGNATURE

In the matter between:

MORGAN STANLEY CAPITAL GROUP INC Plaintiff

And

STRATEGIC FUEL FUND ASSOCIATION Defendant

SUMMARY

Civil proceedings – exception based on allegations that plaintiff's alternative claim premised on delict not alleging adequate facts to establish the elements of wrongfulness and legal causation necessary to sustain the pleaded cause of action – main claim for damages based on breach of contract and alternative claim premised on negligent misstatement contained in a tank

warrant on exact quantity of crude oil issued by defendant – duty of care owed by defendant to plaintiff – purpose of exception – issues raised in exception falling pre-eminently within purview of trial – exception dismissed with costs.

J U D G M E N T

MOSHIDI, J:

[1] This is an exception taken by the defendant in regard to part of the plaintiff's particulars of claim under circumstances described immediately below.

THE PLAINTIFF'S ACTION

[2] The plaintiff has instituted action against the defendant, seeking damages under Claim A and Claim B. The relief sought under Claim B is in the alternative to that sought under Claim A. The latter claim, as will be seen below, is premised on alleged breach of contract by the defendant in regard to the contents and warrantees in a tank warrant. However, the present exception is directed at plaintiff's alternative Claim B which is founded in delict premised on allegations of a wrongful misstatement that caused the plaintiff to suffer patrimonial loss.

THE IMPORT OF THE EXCEPTION

[3] In the notice of exception, the defendant contended as follows:

> "*The alternative Claim B is one for delictual damages, purportedly based on the extended lex Aquilia of which wrongfulness and legal causation are elements. It is incumbent on the plaintiff to plead adequate facts from which it can be deduced that the defendant's alleged act or omission was wrongful and legally caused the alleged damages. The defendant contends that the plaintiff has failed to plead adequate facts to establish the elements of wrongfulness and legal causation, and accordingly that Claim B is excipiable in that it lacks averments necessary to sustain the pleaded cause of action.*" (emphasis added)

THE INSEPARABILITY OF THE CLAIMS

[4] It appears to me that, upon close scrutiny, Claims A and B of the amended particulars of claim, at this stage, although based on separate legal principles, remain intertwined. For this reason, limited reference to Claim A in deciding the fate of the exception, is inevitable. The relevant portions of Claim A are paragraphs 3 to 6, in which it is alleged as follows:

> "*3. On 27 November 2009, and at Cape Town, the Defendant, represented by the Petroleum and Gas Corporation of South Africa (Proprietary) Limited ('PetroSA') and Masefield (South Africa) ('Masefield SA') concluded a written agreement styled 'Storage Agreement' ('the storage agreement').*
>
> *4. A copy of the storage agreement is annexed hereto marked 'POC 1' and the terms thereof are to be read as if incorporated herein.*
>
> *5. The storage agreement:*

5.1 *related to and provided for the hire, by Masefield SA from the Defendant, of five storage tanks ('the storage tanks') – being tanks CT 5, CT 6, CT 13, CT 17 and CT 23 – situated at the Defendant's Milnerton, Cape Town, Storage Facility ('the storage facility'), for the purposes of storing crude oil; and*

5.2 *would in its terms expire on 31 March 2010.*

…

6.

6.1 *On 14 December 2009, Masefield SA transferred its rights under, inter alia the storage agreement as amended from time to time to Masefield AG in terms of Deeds of Assignment with the consent of PetroSA as agent for the Defendant.*

6.2 *On 8 June 2010 the Defendant and Masefield SA concluded a new crude oil storage agreement in terms of which Masefield SA hired from the Defendant the storage tank CT 5, CT 6, CT 13, CT 17 and CT 23 situated at the storage facility from 1 April 2010 to 31 March 2011. The terms of such storage agreement were recorded in a letter from the Defendant to Masefield AG dated 8 June 2010 contemplating the replacement of that letter with a formal storage agreement. A copy of such letter is annexed marked 'POC 2'.*

6.3 *The formal storage agreement contemplated in annexure 'POC 2' and referred to in paragraph 6.2 above is annexure 'POC 5' hereto.*

6.4 *On 8 June 2010, and in terms of a written assignment agreement ('the written assignment agreement') concluded between Masefield SA, Masefield AG and the Plaintiff, the Plaintiff took cession and assignment of all of Masefield AG's and Masefield SA's rights and obligations in terms, inter alia, of the various storage agreements to which reference is made in these particulars of claim.*

6.5 *A copy of the written assignment agreement is annexed hereto marked 'POC 3' and the terms thereof are to be read as if incorporated herein.*

6.6 *On 11 June 2010, the Plaintiff concluded an umbrella purchase agreement with Masefield AG in terms of which the Plaintiff purchased from Masefield AG certain crude oil and agreed, moreover, to take cession and*

assignment of Masefield AG's rights and obligations in terms , inter alia, of the various storage agreements to which reference is made in these particulars of claim. …"

[5] In the balance of the particulars of claim in regard to the contract,[1] the plaintiff alleged that the defendant has breached the contract, including the various addenda in certain respects. As a consequence, the plaintiff claims damages for breach of contract, which subject is not entirely pertinent to the present exception proceedings.

THE PLAINTIFF'S ALTERNATIVE CLAIM B

[6] What, however, are relevant are the contents of paras 17 to 32 of plaintiff's particulars of claim, dealing with a tank warrant and the alleged representation in regard to the contents of the tank warrant on the part of the defendant, these paragraphs alleged as follows:

"*17. On or about 25 May 2010 the Defendant issued a written tank warrant ('the tank warrant').*

18. A copy of the tank warrant is annexed hereto marked 'POC 7'.

19. The tank warrant:

19.1 records the following against the letter A under the heading 'PREAMBLE':

'WHEREAS a storage agreement was entered into between PetroSA, on behalf of SFF, [Strategic Fuel Fund Assocation] *as lessor and MASEFIELD SA as lessee on 1st April 2007 as amended from time to time, for the storage of a maximum of 990,000 bbls of Crude oil in Tanks CT 13, CT 17, CT 23, CT 5 and CT 6 of the*

[1] See pp 5 to 12.

Milnerton Storage Terminal, Cape Town ('Milnerton'), (hereinafter referred to as the 'Storage Agreement');'

19.2 at clause 2 thereof, confirms that, as at 25 May 2010, the Defendant held 991 646 bbls of crude oil in Milnerton solely on behalf of BNP Paribus and at its sole disposal;

19.3 at clause 3 thereof, confirms that the tank warrant was issued in Cape Town, South Africa, on 25 May 2010, by the Defendant.

20. Moreover, and in any event, the quantity of the Plaintiff's crude oil stored by the Defendant at its storage facility was confirmed by:

20.1 the stock reconciliation figure provided by the Defendant to the Plaintiff, a copy of which is annexed hereto marked 'POC 8'; and

20.2 the reconciliation performed by the Plaintiff, derived, in turn, from figures provided to it by the Defendant, and which is reflected on the spreadsheet annexed hereto marked 'POC 9'.

21. In the premises, and as at 25 May 2010, 991 646 bbls of crude oil were stored by the Defendant in the storage tanks at the storage facility.

21A The tank warrant records at clause 4(b) thereof:

'SFF is and will continue to hold the Crude Oil in Milnerton exclusively on behalf of at the disposal of and to the order of the Secured Party or of any third party to which the Secured Party may elect to endorse this Tank Warrant. Any such endorsement shall be in writing and signed by the relevant parties thereto and a duly signed copy shall be provided to SFF.'

21B On or about 7 June 2010, BNP Paribas irrevocably endorsed the tank warrant to the Plaintiff with all terms and conditions of the Tank Warrant remaining in force and effect. A copy of the endorsement bearing the signature of a duly authorised representative of BNP Paribas as annexed hereto marked 'POC9A'."

SFF refers to the defendant, whilst BNP Paribus is the secured party.

I hereafter paraphrase the contents of paras 22 to 25 of the particulars of claim. The plaintiff gave notice to the defendant on 24 August 2011 to effect the final pump-over of the crude oil remaining in storage tanks at the storage facility. The plaintiff also by letter of 11 October 2011, addressed to the defendant, confirmed, and as recorded in the tank warrant, that the defendant, as at 25 May 2010, held 991 646 bbls of oil in the storage tanks. At the same time, the plaintiff confirmed that it had since received 939 985 bbls of such oil, leaving a balance of 50 596 bbls of oil due to it by the defendant; and the plaintiff gave notice to the defendant to complete the re-delivery of the outstanding quantity of oil, i.e. 50 596 bbls, within ten days of receipt of the letter. In para 25 the plaintiff alleged that notwithstanding the above confirmation and notification, the defendant failed and/or was unable to re-deliver or permit the plaintiff to remove the outstanding quantity of 50 596 bbls of oil at the Milnerton Storage Tanks. The plaintiff further alleged,[2] that before the institution of the present proceedings, the defendant purportedly tendered only 33 559 bbls of oil to the plaintiff. The plaintiff, however, rejected the tender since it did not constitute a valid tender to restore to the plaintiff 33 559 bbls of oil of the same quality and standard as the oil stored by the plaintiff at the storage facility. The plaintiff persisted in is rejection of the defendant's tender. In regard to the alleged damages suffered by the plaintiff, paras 26 and 27,[3] the plaintiff alleged that the value of the shortfall of 50 596 bbls of oil, as at 30 September 2011, being the date on which the plaintiff would remove the total quantity of its crude oil from the storage facility, was US $5 865 240.10. The removal of the oil would be facilitated by the defendant, to the

[2] See paras 25A to 25C of POC.
[3] See pleadings bundle 16.

plaintiff, by cross-pumping such oil from the storage tanks to one of plaintiff's customers, Chevron.

[7] In support of its Claim B, (in the alternative to Claim A), the plaintiff relied on the contents of paras 17 to 21 quoted partly above, and proceeded to allege in paras 29 to 32,[4] as follows:

> "*29. The tank warrant annexure 'POC7' constituted a representation by the Defendant that 991 646 bbls of crude oil were held in storage at Milnerton as at 25 May 2010 ('the Defendant's representation').*
>
> *30. In the event and to the extent that the Defendant is not bound by the contents of the tank warrant and/or in the event that the Defendant is entitled to contest the contents thereof for the purpose of this action (which is denied), then in such event the Plaintiff avers:*
>
> *30.1 in issuing the tank warrant annexure 'POC7' the Defendant was aware alternatively ought reasonably to have been aware that it would be relied upon by third parties including, but not limited to financiers, bankers and/or successors-in-title to Masefield;*
>
> *30.2 the Defendant accordingly owed a duty of care to any person or entity relying upon such tank warrant to ensure the accuracy of its contents.*
>
> *31. The Defendant's representation was recorded in monthly reporting and invoicing undertaken by the Defendant to Masefield and was repeated by the Defendant to the Plaintiff after issue of the tank warrant through monthly reporting and invoicing undertaken by the Defendant.*
>
> *32. In the event that the contents of the tank warrant and the representations referred to in paragraph 31 above were incorrect, then in such event the Plaintiff avers:*
>
> *32.1 Masefield and the Plaintiff as its successor at all material times relied upon the correctness and accuracy of the*

[4] See pleadings bundle 16 to 22.

contents of the tank warrant and of the representations referred to in paragraph 31 above;

32.2 in placing reliance upon the correctness of such tank warrant and representations the Plaintiff made payment to Masefield calculated on the basis of the correctness of the tank warrant and representations and more particularly the quantity of 991 646 bbls of crude oil held in storage at Milnerton;

32.3 the consideration attributed to such crude oil was US $76 477 623.97;

32.4 but for the Defendant's misrepresentation/s the Plaintiff would have made payment to Masefield in an amount of US $74 562 610.06;

32.5 the Plaintiff accordingly suffered loss in consequence of its overpayment in an amount of US $1 915 013.91;

32.6 As aforesaid, the Defendant's tender of 335559 bbls of oil has been rejected by the Plaintiff ('the tendered barrels'). The basis for the Plaintiff's rejection is pleaded above.

32.7 The value of the tendered barrels as at 30 September 2011 (i.e. the date referred to in paragraph 14.2 above) was US $3 890 259.95.

32.8 The Plaintiff has accordingly suffered further damages in the sum of US $3 890 259.95."

[8] In paragraph 32.9 of the particulars of claim, the plaintiff alleged that the defendant charged it for storage of the oil, from June 2010 to September 2011, at a monthly charge of 17.5 United States cents per barrel until April 2011, and thereafter at a reduced monthly charge of 12 United States cents per barrel. The plaintiff then proceeded to set out the respective dates and quantities for the period June 2010, commencing with 991 356 barrels, to September 2011, ending with 48 558 barrels.

[9] In paras 32.10 to 32.12, the plaintiff alleged that:

"*32.10* *In fact, and calculated on the basis on the Defendant's allegations as to the number of barrels of oil stored by it, the Defendant ought to have charged the Plaintiff based on the schedule attached hereto marked 'POC13';*

32.11 *In making payment of the amount set out in paragraph 32.9 above the Plaintiff made such payments in the bona fide and reasonable but mistaken belief that the amounts invoiced were correct whereas in fact they were incorrect in the event that the quantity of oil was not as recorded in the tank warrant and represented by the Defendant in its invoices;*

32.12 *The overpayment by the Plaintiff in such circumstances aggregated US $72 713.65 calculated as set out annexure 'POC13'.*"

[10] The prayer under the impugned Claim B then proceeded to claim for loss:

"*(c)* *Payment in the amount of US $1 915 013.91 alternatively the South African Rand currency equivalent thereof as at the date of payment;*

(d) *Interest on the aforesaid amount of US $1 915 013.91 at the legal rate from 10 June 2010 until date of payment;*

(e) *Payment in the amount of US $3 890 259.95 alternatively the South African Rand currency equivalent thereof as at the date of payment;*

(f) *Interest on the aforesaid amount of US $3 890 259.95 at the legal rate, from 1 October 2011 until date of payment;*

(g) *Payment in the amount of US $72 713.65 alternatively the South African Rand currency equivalent thereof as at the date of payment;*

(h) *Interest on the aforesaid amount of US $72 713.65 a tempore morae;*

(i) *Costs of suit, including the costs occasioned by the employment of two counsel.*

(j) Further and/or alternative relief."

THE DEFENDANT'S PLEA AND COUNTER-CLAIMS

[11] In its plea, in regard to plaintiff's Claim A, the defendant admitted, *inter alia,* that the contractual rights and obligations of Masefield SA and Masefield AG, *vis-à-vis* the defendant, have been assigned to the plaintiff, and that the defendant was obliged to transfer the volume of the product that it held for the plaintiff in the Milnerton tanks on, and in accordance with, the plaintiff's instructions. The defendant further admitted that the document attached to the particulars of claim "*POC 7*" purports to be a tank warrant. However, the defendant pleaded that it did not hold the quantity of product referred to in paragraph 2 of "*POC 7*" on behalf of Masefield SA, Masefield AG or the secured party. As at 25 May 2010, the defendant pleaded, that there was no more than 971 547 barrels of oil held by it for Masefield SA, Masefield AG or the secured party reflected in "*POC 7*". The defendant tendered to the plaintiff the balance of the oil held in the storage tank in the quantity of 33 559 barrels, which tender was rejected. The tender was repeated in the plea. The defendant also filed what appeared to be two counter-claims.[5] However, the contents and consideration of these counter-claims do not warrant adjudication for present purposes.

[5] See pleadings bundle pp 79 to 83.

SOME APPLICABLE LEGAL PRINCIPLES

[12] The principles of adjudicating an exception and the approach of the courts are trite. These include that, for the purposes of the exception, the facts pleaded must be accepted as correct, as was stated in *Marney v Watson and Another.*[6] In Amler's *Precedents of Pleadings*,[7] the following is stated:

> "*The purpose of an exception alleging that a pleading lacks averments, which are necessary to sustain an action or defence, is to dispose of the leading of evidence at the trial. Such an exception must go to the root of the claim or defence. An exception cannot be taken to a declaration or particulars of claim on the ground that it does not support one of several prayers arising out of one cause of action because the unjustifiable prayer amounts to a plus petitio and its deletion cannot affect the amount of evidence to be led.*"

Later on, and on the same page, and with reference to *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd*:[8]

> "*An exception is generally not the appropriate procedure to settle questions of interpretation because, in cases of doubt, evidence may be admissible at the trial stage relating to surrounding circumstances which evidence may clear up the difficulties.*"

(*Cf* also *Du Preez v Boetstap Stores (Pty) Ltd.*[9])

[13] The legal principles also enjoin the Court '*to defer consideration of an exception to the trial*'. See in this regard *Hudson v Hudson and Another*,[10] and *Du Preez v Boetstap Stores (Pty) Ltd, supra*. This approach, in my view,

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[6] 1978 (4) SA 140 (CPD) at 144F.
[7] 6th ed at 174.
[8] 1991 (1) SA 508 (A).
[9] 1978 (2) SA 177 (NCD) at 182.
[10] 1927 AD 259 at 269.

is a particularly attractive one in the circumstances of the present matter, and in the light of the issues raised by the exception. However, in the light of the view I take in the matter, i.e. that the exception is misplaced, it is as well to determine it.

[14] As stated above, the remedy of an exception is appropriate when the objection goes to the root of the opponent's claim or defence. In *Glaser v Heller*,[11] the Court said:

> "*The true object of an exception is either, if possible, to settle the case, or at least part of it, in a cheap and easy fashion, or protect oneself against an embarrassment which is so serious as to merit the costs of an exception.*"

Some two years later, in *Kahn v Stuart*,[12] the Court said:

> "*… It is the duty of the court, when an exception is taken to the pleading, first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is any embarrassment, which is real and such cannot be met by the asking of particulars, as the result of the faults in the pleading to which exception is taken. And, unless the excipient can satisfy the court that there is such a point of law or such real embarrassment, then the exception should be dismissed.*"

[15] In addition, the Courts have accepted that in order to succeed, the excipient has to demonstrate that the pleading is excipiable on every reasonable interpretation that could reasonably be placed on it. This principle

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[11] 1940 (2) PH F119 (C).
[12] 1942 CPD 386 at 392.

was more recently articulated in *Picbel Groep Voorsorgfonds (In Liquidation) v Somerville, and Related Matters*,[13] as follows:

> "*At the outset it may be as well to remind ourselves that we are concerned with proceedings on exception. That being so, the respondents have the duty as excipients to persuade the court that upon every interpretation which the particulars of claim (including the annexures) can reasonably bear, no cause of action is disclosed (Lewis v Oneanate (Pty) Ltd and Another 1992 (4) SA 811 (A) at 817F-G).*"

See also *Maize Board v Tiger Oats Ltd and Others*,[14] where the Court said:

> "*… When it has to be decided whether a declaration or particulars of claim disclose a cause of action or whether a plea discloses a defence the issue often is whether in law that is the case. A decision on that point of law is not final. Blaauwbosch is clear authority to that effect. The point may be re-argued at the trial in the event of the exception being dismissed. …*"

APPLYING THE LEGAL PRINCIPLES

[16] In applying the above legal principles to the facts of the instant matter, it must be borne in mind, at the risk of repetition, that the crux of the defendant's gripe is that the plaintiff has failed to plead adequate facts in order to establish the elements of wrongfulness, and legal causation. As a consequence, so the complaint extended, the plaintiff's Claim B is bereft of allegations sufficient to sustain the pleaded cause of action. The assertions, when regard is had to the legal principles, are plainly without merit. There is

[13] 2013 (5) SA 496 (SCA) para [7].
[14] 2002 (5) SA 365 (SCA) para [12].

room for evidence to be led at the trial on the allegations made in Claim B. The issues raised by the exception in connection therewith are truly legal issues. For these reasons only, the exception cannot and ought not to be upheld. There are other obvious reasons which show undoubtedly that the exception is either misconceived, ill-founded or that the defendant has misconstrued the actual basis of the plaintiff's Claim B.

THE ISSUES OF WRONGFULNESS AND LEGAL CAUSATION

[17] In any event, even if I am incorrect in the above finding, the issues of wrongfulness and causation raised by the defendant, require some mention. As I understand it, the plaintiff's Claim B is premised as an alternative on the basis of a misstatement before the conclusion of the transaction between the plaintiff and Masefield. The claim under discussion is not intended to enforce the contractual obligations on the part of the defendant. In addition to the alleged misstatement contained in the tank warrant issued by the defendant, the plaintiff, at this stage, at least, relies on the ongoing misstatements in the monthly reporting and invoicing given by the defendant subsequently. A trial court is likely to find that, on the evidence to be led, the issuing of the patently misleading tank warrant, and indeed, the subsequent perpetuation thereof, as pleaded, was wrongful. In this regard, as argued by the plaintiff, the Constitutional Court, in dealing with wrongfulness, in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*,[15] said:

[15] 2015 (1) SA 1 paras [20] to [21].

> "*[20] Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.*
>
> *[21] Previously, it was contentious what the wrongfulness enquiry entailed, but this is no longer the case. The growing coherence in this area of our law is due in large part to decisions of the Supreme Court of Appeal over the last decade. Endorsing these developments, this Court in Loureiro recently articulated that the wrongfulness enquiry focuses on –*
>
> > *'the* [harm-causing] *conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.'*" (footnotes omitted)

[18] The plaintiff's pleaded contents of paras [31] and [32] have left it wide open for a trial court subsequently finding (on the pleadings as they stand, supplemented by the required evidence if led), that the defendant's alleged conduct, is actionable. The same applies to the community at large. This is so bearing in mind that we are presently dealing with exception proceedings, and plainly not argument at the end of the trial. The defendant's contentions that, the plaintiff is not capable of adducing evidence on Claim B that will disclose a cause of action; that the plaintiff cannot possibly prove that the defendant owed it a legal duty not to be negligent; that on the interpretation of the plaintiff of the tank warrant and the defendant's subsequent conduct, altogether, do not support the extension of the Aquilian liability; and that on the interpretation contended for by the plaintiff, the defendant was likely to face unlimited claims seemingly caused by the plaintiff's own conduct, etc, are

collectively, either premature or without merit, at this stage. It also appears to me that the over-reliance by the defendant on case law such as *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*,[16] and *Two Oceans Aquarium Trusts v Kantey and Templer (Pty) Ltd*,[17] was somewhat misplaced, on the pleadings under discussion. As argued by the plaintiff, the circumstances that would probably render the misstatement wrongful include knowledge on the part of the defendant that an entity in the position of the plaintiff, as successor-in-title to Masefield, would rely on the statement (which was perpetuated), and therefore owed a duty to ensure the accuracy of the statement. It was also argued that the defendant's reported expertise, and the fact that it holds itself out as issuing tank warrants upon which reliance can be placed by third parties, are some of the factors that could and should influence the assessment of wrongfulness. The pleadings of the plaintiff at this stage, suggest, rather strongly too, that there was a duty of care towards the plaintiff. See for example, in this regard, *Axiam Holdings Ltd v Deloitte & Touche,*[18] and *Standard Chartered Bank of Canada v Nedperm Bank.*[19] In *Axiam Holdings Ltd* at paras [23] and [24], it was acknowledged that:

> "*It cannot therefore be found on exception that the defendant's alleged omission to speak was not wrongful (cf Indac Electronics (Pty) Ltd v Volkskas Bank Ltd at 801D). The Court below was faced with an exception to a claim that on the face of it was sustainable. It was premature to decide whether a legal duty could be said to exist.*"

In my view, in many ways, save for what is stated above, the same applies to the instant matter. The duty of care as pleaded currently, is not such that it

[16] 1985 (4) SA 475 (A).
[17] 2006 (3) SA 138 (SCA).
[18] 2006 (1) SA 237 (SCA) at 244D.
[19] 1994 (4) SA 747 (AD).

would give rise to limitless liability owing to unforeseen plaintiffs in circumstances where such plaintiffs could and should protect their contractual rights and obligations, as contended for on behalf of the defendant in this matter. It is rather simply that this aspect cannot be properly determined at this stage without evidence. To do so, would be speculative in the extreme. The defendant has plainly conflated the plaintiff's Claims A and B. For these reasons too, and on the issue of wrongfulness, the exception cannot succeed.

[19] I deal briefly with the question of causation. The defendant in the exception alleged, *inter alia*, that it is incumbent on the plaintiff in a case such as the present to allege such facts and circumstances as would allow for a finding that the defendant legally caused the plaintiff's alleged loss of damage. The plaintiff has failed to make out any or adequate allegations in this regard.[20] In paragraph 11 of the exception, the defendant contended that, '*from the allegations made by the plaintiff, it does not appear why the defendant should be held liable for loss that was caused to the plaintiff by the plaintiff's own conduct*'. These assertions, including those in paragraph 14 of the exception, regrettably, ignored a number of pertinent considerations, and what is actually pleaded, as pointed out immediately below.

[20] For starters, in Christie's *The Law of Contract in South Africa*,[21] and in regard to the inquiry into whether damages were caused by an alleged breach, the following is stated:

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[20] See para 10 of the exception.
[21] 6th ed pp 565 to 566.

> "*It so happens that this inquiry has engaged the attention of the courts more frequently in the law of delict than in the law of contract, but in both types of case the inquiry is basically the same, and Corbett CJ's restatement of the relevant principles in International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 608 (A) 700E-701A is as authoritative in contract as in delict. These principles call for a two-stage inquiry, first into factual causation and then into legal causation. To establish factual causation it must be shown that the breach was the causa sine qua non of the loss. This quaint Latin phrase is best understood by applying the but-for test: would the plaintiff have suffered a loss but for the defendant's breach? As noted by Nugent JA in Minister of Safety and Security v Van Duivenbodem 2002 (6) SA 431 (SCA) 449 (a delict case), there were conceptual hurdles to be crossed when reasoning along these lines, but they can be crossed by remembering that a plaintiff 'is not required to establish the causal link with certainty, but only to establish that the wrongful conduct* [or breach of contract] *was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.*" (footnotes omitted)

[21] In *Holtzhausen v Absa Bank Ltd*,[22] the Court said:

> "*In the present matter, the pleadings cover a claim for damages for negligent misstatement. The plaintiff does not rely on the breach of any contractual obligation which the defendant or its servants may have owed him, as constituting the negligence for his claim. The plaintiff's case as it was presented in evidence was that a right which he had independently of any such contract, was infringed. The decision in Lillicrap is accordingly of no application.*"

See also *Minister of Safety and Security and Another v Scott and Another*,[23] in which the plaintiff also relied for the proposition of knowledge of a contract as an important policy consideration to create a duty of care, and for when loss suffered is considered to be too remote to attract liability.

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[22] 2008 (5) SA 630 (SCA) para [8].
[23] 2014 (6) SA 1 (SCA).

[22] The above principles make it plain that, in determining factual causation it must be shown that the breach was the cause *sine qua non* (a matter that is absolutely essential) of the loss; that the plaintiff is not expected to establish the causal link with any certainty; and that a plaintiff's case (as in the current Claim B), which will be premised on evidence to show that its right, which it had independently of the contract, has been infringed. These are matters which fall pre-eminently within the purview of the trial, not in exception proceedings.

THE ARGUMENT THAT THE TANK WARRANT EXCLUDES THE PLAINTIFF

[23] In closing argument, it was submitted, rather strongly too, on behalf of the defendant that, the fact that the tank warrant nowhere mentions the name of the plaintiff, is indicative of the fact that the plaintiff does not have the rights which it presently wishes to enforce. This was, of course, with reference to plaintiff's Claim B. In my view, the submission overlooked entirely the rights and obligations attained by the plaintiff through the Assignment Agreement, concluded between Masefield (South Africa), ("*MSA*"), Masefield AG ("*MAG*") and the plaintiff on 8 June 2010. Clause 3, in particular, clauses 3.1.2, 3.1.3 and 3.1.4 thereof, make it clear that MSA delegated and ceded all its obligations, rights under the Storage Agreement to the plaintiff. Clause 3.1.3 provides that:

> "*The effect of the cession and delegation of rights and obligations in terms of clauses 3.1.1 and 3.1.2 is that all rights and obligations of MAG and/or MSA under the Storage Agreements are assigned to MSCG* [the plaintiff]*. The plaintiff duly accepted the cession*." (my insertions)

The argument advanced therefor has no merit at all. Indeed, a document such as a tank warrant, by its nature, is not only a contract, but also a very important document.

[24] The arguments presented on behalf of the defendant also ignored or misunderstood the contents of what the plaintiff pleaded in paras 32.1 to 32.5 of the amended particulars of claim, as quoted earlier above. These paragraphs alleged, *inter alia*, that, if the contents of the tank warrant and representations were incorrect, the plaintiff as successor of Mansefield, relied upon the correctness and accuracy thereof, in placing reliance on the correctness of the tank warrant and representations, the plaintiff made payments to Masefield, calculated on the basis of the correctness of the tank warrant. The payments so made are mentioned by the plaintiff. As mentioned already, in paras 30 and 31, the plaintiff pleaded a duty of care owed by the defendant to any person or entity relying upon the contents of the tank warrant, including the plaintiff. All the relevant allegations had therefore been made in the amended particulars of claim.

[25] The appeal matter of *Western Alarm System (Pty) Ltd v Coini and Co*,[24] concerned the duty of care in the installation of a burglar alarm system at the plaintiff's premises. When it became apparent that the alarm system

[24] 1944 CPD 271.

would not function in the plaintiff's premises, the defendant company (appellant installer) alleged that the reason for the non-functioning was due solely to the fact that the electrical light wiring in plaintiff's premises was faulty and advised the plaintiff that such wiring had to be renewed entirely before the alarm system could function effectively. The plaintiff, accepting such statement as correct, had the electric wires of his premises renewed at his own cost, but thereafter, the burglar alarm system still failed to operate effectively and useless for the purpose for which it was installed. The plaintiff successfully instituted action in the lower court for damages based on the installer's (appellant's) duty of care. In finally dismissing the appeal, the Court said:

> "*For the negligent statement made was intended to be acted upon, was acted upon and being so acted upon occasioned pecuniary loss to plaintiff, and defendant company was under a duty to observe that degree of care which a reasonable man would have observed. I say was 'under a duty', because of the contractual relationship existing between plaintiff and defendant company, and the fact that the misstatement was made to plaintiff in relation to a matter arising out of the contract and intimately associated with its fulfilment, which was to provide and keep in good working order an alarm system in plaintiff's premises.*"[25]

In my view, the above principles apply with equal force to the facts of the present matter.

[25] At 276.

CONCLUSION

[26] Based on the above, I conclude that the amended particulars of claim, as pleaded currently, are reasonably sufficient for the defendant to plead thereto in regard to plaintiff's Claim B without allowing the exception. The trial court will be in a position to determine whether the defendant owed the plaintiff a duty of care, and breached that duty of care, in issuing the tank warrant, as it did. The defendant's arguments in regard to policy considerations, in cases of pure economic loss and the reason why the plaintiff rejected its offer, are negated by case law cited and have no merit at all and the exception is premature and must also fail for this reason.

COSTS

[27] The costs should follow the result, which is a discretionary matter. Both parties enjoined the services of two counsel, in what appears to be a complex matter.

ORDER

[28] In the result the following order is made:

1. The exception, aimed at plaintiff's Claim B, is dismissed with costs.

2. The costs shall include the costs occasioned by the employment of two counsel.

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D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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