REPUBLIC OF SOUTH AFRICA

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

CASE NO: 12989/2014

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

....
DATE SIGNATURE

In the matter between:

DAVMARK CALENDARS (PTY) LTD First Plaintiff

DAVMARK DIARIES & SERVICES (PTY) LTD Second Plaintiff

And

IPEX HOLDINGS (PTY) LTD Defendant

J U D G M E N T

HARTFORD, AJ:

[1] The defendant has excepted to the claims of both the first plaintiff and the second plaintiff. I deal with each in turn.

EXCEPTION AGAINST THE CLAIM OF THE FIRST PLAINTIFF

[2] The defendant has excepted to the first plaintiff's claim on the ground that the first plaintiff is not permitted in law to place reliance on a breach of the first agreement it entered into with the defendant on 2 March 2012 on the basis that a second agreement, entered into on 30 August 2012, constitutes a final settlement of all claims which the first plaintiff has consequent upon a breach of the first agreement. The defendant argues that the first plaintiff is limited to claiming a loss arising only from a breach of the second agreement. For convenience, I will hereinafter refer to the second agreement as "D".

[3] In essence, the defendant contends that "D" is an agreement of compromise which excludes any action based on the original cause of action in the first agreement.

[4] The question thus arises whether "D" in its terms constitutes such a compromise. Counsel for the defendant pointed to the terms of "D", and in particular, the first, second and third paragraphs of "D" in support of his submissions.

[5] It is trite law that in order to succeed, an excipient has, *inter alia,* to persuade a court that "*upon every interpretation which the pleading in question, and in particular the document upon which it is based, can reasonably bear, no cause of action or defence is disclosed: failing this the exception ought not to be upheld*" (*Gallagher Group Limited and Another v IO*

Tech Manufacturing (Pty) Limited and Others 2014 (2) SA 157 (GNP) at page 161D-F). Gallagher confirmed this principle previously espoused in the cases referred to therein.

[6] In addition, the defendant bears the *onus* of establishing that a compromise has been agreed. See *Hubbard v Mostert* 2010 (2) SA 391 (WCC) at para [11] where it was held:

> "*An offer of compromise will be strictly interpreted. An offer must be clear and unambiguous.*"

[7] Counsel for the first plaintiff referred to the third, sixth and last paragraphs of "D" in support of his contention that "D" is not a compromise and that the purpose of "D" was rather to secure the release of the balance of the purchase price by the bank. Counsel also argued that, as in "D" the first plaintiff's rights were expressly reserved, these could only refer to its rights arising under the first agreement.

[8] Whilst one argument pertaining to the interpretation of "D" might appear to be stronger than the other, I am unable to find that upon every interpretation which "D" can reasonably bear, that it constitutes a compromise and that therefore no cause of action is disclosed. For this reason, the exception relating to the first plaintiff must fail.

EXCEPTION AGAINST THE CLAIM OF THE SECOND PLAINTIFF

[9] The exception against the second plaintiff's claim is that there is no claim in law by the second plaintiff as:

9.1 There is no proximity or special relationship between the second plaintiff and the defendant;

9.2 It is not reasonable to impose a duty on the defendant, and there are no cogent policy reasons to do so;

9.3 The second plaintiff had other means available to it, such as contractually securing its position, to protect itself against loss;

9.4 The circumstances pleaded by the second plaintiff do not justify the extension of a duty to avoid pure economic loss and the considerations advanced do not make it fair, just and reasonable to impose such a duty.

[10] In a nutshell, it is contended that the facts pleaded by the second plaintiff do not justify the extension of a duty to avoid pure economic loss on the defendant. There is extensive case law on this topic and counsel for both the second plaintiff and the defendant submitted valuable and helpful argument on the issues, for which I am most grateful.

[11] The second plaintiff, in order to establish a delictual claim against the defendant, has to prove that the act was wrongful. In determining wrongfulness, a court must take into consideration all the factors and circumstances relevant to the matter. This includes an investigation into whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable (see *Loureiro and Others v Imvula Quality Protection (Pty) Limited* 2014 ZACC 4; 2014 (3) 394 (CC); 2014 (5) BCLR 511 (CC) at para [53]).

[12] It is further well established that our law is generally reluctant to recognise delictual claims for pure economic loss and that wrongfulness must be positively established (see *Country Cloud Trading CC v Member of the Executive Council, Department of Infrastructure Development, Gauteng (*2015 (1) SA 1 (CC) at para [23] where Khampepe J reiterated these principles with reference to previous cases). The fear is always that there will be liability in an indeterminate amount for an indeterminate time to an indeterminate class, as expressed in *Ultramares Corp v Touche* (1931) 258 NY 170 at 444.

[13] Khampepe J further stated at para [26]:

> "*Although there is no 'checklist' of relevant considerations, the enquiry does not call for an 'intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms*'."

In addition, fault, like all the other delictual elements, must be separately established.

[14] The enquiry here must commence with whether it would be reasonable to impose a legal duty on the defendant in these circumstances, and in this context, reasonableness in the context of wrongfulness is something different from the reasonableness of the conduct itself which is an element of negligence. It concerns the reasonableness of imposing liability on the defendant (as stated by Brand JA in *Trustees, Two Oceans Aquarium v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at para [11]).

[15] Brand J stated further at para [12]:

> "*When we say that a particular omission or conduct causing pure economic loss is 'wrongful', we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability.*"

[16] Defendant's counsel submitted that where a third party seeks to assert a delictual claim against a party who has undertaken certain contractual obligations in respect of other parties (excluding the third party) the following policy considerations are of importance:

16.1 The terms of the contact binding the one party (the defendant) to reciprocal rights and obligations;

16.2 Whether the third party ought to be allowed to circumvent or undermine the provisions of the contract by the law affording the third party a claim where the other contracting parties are denied one;

16.3 The terms of the contract are considered in assessing the convictions of the community in relation to affording a claim for compensation to a non-contractual party.

[17] The defendant submitted that the allegations in the plaintiff's Particulars of Claim do not in law give rise to the duty tendered for in para [22] of the plaintiff's Particulars of Claim under the *actio legis Aquiliae* as:

17.1 There was no proximity or special relationship between the second plaintiff and the defendant;

17.2 It was not reasonable to impose a duty on the defendant and there are no cogent policy reasons to do so;

17.3 The second plaintiff had other means available to it, e.g. to contractually secure its position by protecting itself against loss;

17.4 The circumstances pleaded by the second plaintiff do not justify the extension of a duty to avoid pure economic loss and the

considerations advanced to justify the conclusion that it will be fair, just and reasonable to impose such a duty.

[18] In determining the legal convictions of the community, it is necessary to look at all relevant factors and surrounding circumstances. In *AB Ventures v Siemens Ltd* 2011 (4) SA 614 (SCA) it was stated at page 618 para [10] that:

> "*Thus by the very nature of the enquiry it will generally not be helpful in a particular case to look to what has been decided in other cases of an altogether different kind. Where the case is not one that fits within the social and legal policy that has led to liability being recognised in other cases, then what is called for instead is reflection upon what considerations there might be that necessitated the law also being advanced to meet the new case. That calls not for a mere intuitive reaction to the facts of the particular case, but for the balancing of identifiable norms.*"

[19] Although, as occurred in *AB Ventures (supra)*, it is possible to determine wrongfulness on exception, the question arises as to whether all the facts and surrounding circumstances enable me to determine that there is no wrongfulness at this stage.

[20] In *AB Ventures* there was a major construction project involving a multiplicity of contractors and subcontractors, whose co-operation was defined through a web of interrelated contractual rights and obligations. Nugent JA held that:

> "*There would be major implications for a* multi-partied *project of this kind if each of the participants was to be bound not only to adhere strictly to the terms of its specific contractual relationship, but, in*

> *addition, it was to be held bound to all the other participants by a general regime of reasonableness*" (at para [15]).

[21] He went on:

> "*In this case in which Siemens bound itself to the joint venture to conform to the standards specified in its contract, it would be most anomalous if it were to be bound to a stranger to conform to a different standard*." (at para [16] thereof).

[22] The case before me relates to a group of companies of which both the first and second plaintiff are members. The second plaintiff may well not have been a "*stranger*" to the defendant, there being no facts or evidence before me on this score, as well as no facts before me as to whether the second plaintiff's loss could have been excluded by contractual means. The loss claimed herein is confined to being suffered by a single plaintiff (not a multiplicity of parties) and is presumably limited in its extent. Thus the facts herein differ substantially from those in *AB Ventures*.

[23] Although I am *prima facie* of the view that it is unlikely that this is a case where it is reasonable to impose a legal duty on the defendant in relation to the second plaintiff in these circumstances, there may be cogent evidence placed before a trial court of the surrounding circumstances and facts that might persuade a court otherwise. It is too early to close the door to this possibility, albeit a small one, by upholding an exception on these pleaded

facts now, at a time when a court has not been placed in a position to assess all relevant facts and circumstances by way of evidence.

[24] The defendant also argued that the second plaintiff has failed to plead facts sufficient to establish that the defendant was negligent. Many of the terms pleaded as grounds of negligence in the delictual claim overlap with the alleged breach of contractual terms in the first and second agreements. I am of the view that this overlap *per se* does not preclude a court from considering those grounds pleaded as constituting negligence in their own right and on a stand alone basis. The mere fact that they regurgitate some of the same grounds as those for breach of contract does not automatically exclude the possibility that there was negligent conduct in the manner described. In any event, paragraph 21 of the Particulars of Claim did not fall into this category. This issue too should be determined by a trial court.

[25] I accordingly make the following order:

25.1 The defendant's exceptions as against the first plaintiff and the second plaintiff are dismissed with costs, such costs to include the costs of two counsel where employed, including the costs of the supplementary submissions filed after the conclusion of oral argument.

_____

C HARTFORD
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Plaintiff Counsel: **Adv J Wasserman SC**
Adv H Smith

Defendant Counsel: Adv C Badenhorst SC

Date of Hearing: 09 February 2015

Date of Judgment: 28 February 2015