REPUBLIC OF SOUTH AFRICA

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

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

8/02/2017 .....
DATE SIGNATURE

CASE NO: 2011/4672

In the matter between

NEDBANK LIMITED First Excipient/First Defendant

SYFRETS SECURITIES LIMITED Second Excipient/Second Defendant

and

ABSA BANK LIMITED Respondent/Plaintiff

JUDGMENT

EPSTEIN AJ:

1. The defendants, Nedbank Limited and its wholly owned subsidiary Syfrets Securities Limited ("**Nedbank**"), face a claim in delict by Absa Bank Limited ("**Absa**") for damages in an amount in excess of R773 million. In a nutshell, Absa's claim is based on an allegation that Nedbank caused it to suffer a loss in this amount by reckless or negligent trading in Single Stock Futures ("**SSF**") on the Johannesburg Stock Exchange ("**JSE**").

2. The subject of this judgment is an exception to Absa's claim filed by Nedbank in which it contends that ABSA has failed in its particulars of claim to disclose a cause of action. Nedbank argues that on the facts pleaded, its conduct was not wrongful and liability in delict is not established.

3. This case once again focuses the spotlight on the present, but perpetually changing moral attitudes of the community which have to be assessed when arriving at a value judgment concerning liability in delict for wrongful conduct.

4. There is frequently tension calibrating conduct which gives rise to a legal duty based on the legal convictions of the community on the one hand, and conduct, on the other, which may incite moral indignation, but which does not equate to or give rise to a legal duty. Moral indignation alone does not establish wrongfulness in law. The legal convictions of the community must demand that the loss suffered

by the plaintiff should be made good by the defendant.[1]

5. In exercising a value judgment to determine whether the circumstances of a particular case give rise to a legal duty, what is called for is a balancing against each other of established standards. See **Minister of Safety & Security v Van Duivenboden**[2] where Nugent JA said:

> "When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms."

6. An analysis of the wealth of case law provides neither a formula nor a mechanical method of reaching a conclusion in the exercise of a value judgment in a world where attitudes, beliefs, directions and sensibilities are not constant, but are shifting and developing. Added to this are interactions in the business community involving innovative and sometimes complex trading activities which give rise to issues and risks not always fully contemplated or comprehended by the parties themselves at the time of the negotiation or conclusion of a contract.[3]

7. The facts of this case are complex and esoteric. Trading in derivative instruments is what has given rise to Absa's claim. As pleaded in the particulars of claim, a

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1 **Minister van Polisie v Ewels** 1975 (3) SA 590 (A), at 597A-B.
2 2002 (6) SA 431 (SCA) at 446, para [21].
3 Whilst there are some general rules determining wrongfulness, it cannot always be said that it depends on the facts of a particular case. See **Telematrix (Pty) Ltd v Advertising Standards Authority SA** 2006 (1) SA 461 (SCA) at 469, para [15].

company known as Ukwanda Leisure Holdings (Pty) Ltd ("**Ukwanda**") became liable to pay amounts to a broker, Cortex Derivative Brokers ("**Cortex**") which had appointed Absa as a clearing bank (or *clearing member*). Cortex, in turn, became liable for payment of the purchase price of SSFs. However, it was unable to make payment of the price to the JSE's clearing house. Once Cortex defaulted, Absa, as the clearing member became liable under the Derivative Rules to make payment to the seller. As the clearing member, Absa was in effect the guarantor for payment of the SSFs traded on the Stock Exchange.

8. It is Absa's case that at all material times during the period 8 November 2006 to 9 December 2008, Nedbank supported and implemented a scheme marketed to shareholders of Pinnacle Point Group Ltd ("**PNG**")[4] in terms of which these shareholders were encouraged by Nedbank to sell to Nedbank shares which they held in PNG, and to simultaneously purchase SSFs in PNG. In terms of the scheme they would be entitled to future delivery of the same number of shares as they sold.

9. Absa alleges that the effect of the scheme was that the shareholders were able to monetise their shares because the shareholders received payment for the sale of their shares to Nedbank forthwith, but only became liable to pay the purchase price for the forward sold shares represented by the SSF at a date in the future, and at a price which incorporated an interest charge.

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[4] PNG was a small company listed on AltX, the Alternative Exchange operated by the JSE.

10. Thus, it is alleged, that the sale of the PNG shares together with the purchase of the SSFs by the same shareholders had the effect of Nedbank advancing money to the shareholder at interest from the date on which the proceeds of the sale of the shareholder's PNG shares were paid to him until he became liable to pay for the PNG shares forward sold to him by Nedbank by way of the SSFs against the security only of the shares sold by the shareholder to Nedbank and the margin required to be paid in respect of the purchase of the SSF.

Trading of SSFs on the JSE

11. To understand the factual matrix of the particulars of claim, it is necessary to have an appreciation of trading of SSFs on the JSE which is subject to its Derivative Rules. A detailed exposition is found in the judgment of CJ Claassen J in **Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd**, and apposite to repeat here:[5]

> "[9] The JSE is operated by the Johannesburg Securities Exchange Limited, which is a self-regulatory organisation, being an exchange as defined in the Securities Act 36 of 2004 ("the Act"). Although the Act has been recently repealed, it was the Act in force at all relevant times in this action.
>
> [10] The JSE has made exchange rules in accordance with section 18 of the Act which rules relate to transactions in "*listed securities*" which include "*derivative instruments*" as defined in section 1 of the Act. By virtue of section 18(4) of the

[5] 2014 (1) SA 550 (GSJ) at 555, paragraphs [9-21]. This was an action instituted by Absa against Ukwanda to recover losses Absa incurred as the clearing bank of Cortex when Ukwanda defaulted in respect of SSFs.

Act, such exchange rules are "*binding on an exchange, an authorised user, an issuer and their officers and employees, and on clients.*" A "*client*" is defined in section 1 of the Act to mean "*any person who uses the services of an authorised user or a participant, as the case may be.*"

[11] On 1 August 2005, the JSE made rules, in accordance with the Act, relating specifically to derivative instruments. A copy of these rules name "*Derivative Rules and Directives*" ("DRD"), as amended and applicable at the time relevant to the present action, is annexure "B" to the plaintiff's particulars of claim. These rules provide, *inter alia,* for "*Single Stock Futures*" ("SSF") contracts.

[12] An SSF is a contract in terms of which the purchaser is entitled to demand delivery of the underlying share on the "*close out*" date of the SSF. In essence, it is a contract in terms of which the purchaser purchases and the seller sells the underlying shares for delivery at a future specified date, usually three, six or nine months in the future. Each SSF covers a hundred of the underlying shares. So, the purchaser of one SSF contract purchases and is entitled to demand delivery of 100 of the underlying shares on the close out date. Each SSF has a particular close out date on which all obligations in terms of that SSF must be settled.

[13] The price, at which an SSF trades, comprises the spot price at which the share is trading in the market on the JSE, multiplied by a hundred to take account of the fact that the SSF covers 100 shares, plus an interest component. This interest is to take account of the fact that the purchaser of an SSF is not required to put up the entire price of the position on the day he/she purchases the SSF, but is required to pay only a percentage of the value of the position. This is referred to in the Rules

as the "*initial margin*" which was held, in this case, as a deposit with the JSE. (In addition, a purchaser may be required to put up "*additional margin.*") The initial margin acts as a guarantee that the party undertaking to pay or deliver something in future will comply with such undertaking. Hence, it is to be paid at the inception of the transaction. In this regard it was held by Stegmann, Blieden and Cachalia JJ in **Nedcor Bank Ltd v First Financial Futures (Pty) Ltd** 2003 JDR 0260 (W) at page 2 as follows:

> "Because the futures contract is a guarantee to deliver something in the future, some form of financial guarantee is required from the investor that the parties will perform their obligations in the future. This is done in the form of what is called a "margin". This is an amount of money that is put up by the investor as a guarantee of performance. The initial amount so put up is the "initial Margin" and this is determined by the risk management committee of SAFEX."

[14] Because the purchaser of an SSF only has to put the initial margin, SSF's provide a capital efficient way to participate in the market movements of a particular share. For example, if a purchaser wished to purchase a hundred shares in any particular listed public company and the price was R1 per share, the purchaser would be required to pay R100 for the 100 shares. As already indicated, the standard size of 1 SSF contract on SAFEX is 100 shares. Therefore, if the purchaser purchased one SSF contract on SAFEX in respect of that public company, he/she would only initially be required to put up the required initial margin (leaving aside, for the moment, any additional margin which might be required). Assuming the initial margin requirement was R10 per contract, then the

purchaser would be required to put up a margin of R10 per SSF. Thus, the purchaser who has R100 to buy shares could obtain exposure to ten times more of such underlying shares by purchasing SSF's, than he could purchase if he purchased the underlying shares for immediate delivery. With R100, he could purchase ten SSF contracts, i.e. exposure to 1000 of the company shares. Of course, assuming there has been no price change from the date on which he purchased the shares to the future date on which he is entitled to take delivery of the shares, he will have to come up with 100% of the purchase price on the future close out date (less the initial margin he has already posted). In the example, this would mean that he would have to come up with R900 on the close out (i.e. the remaining R90 per SSF times the ten SSF's).

[15] Assuming the share price increased to R1.10 by the close out date, then by having purchased a hundred of the underlying shares, the purchaser would have made a profit of R10. By purchasing ten SSF's, he would make a profit of R100. This is so because he obtained exposure to the price increase on one thousand underlying shares. On the close out, if he takes delivery of the underlying shares, he would have a thousand shares, worth R1100 against which he would owe the purchase price of R1000. From a cash-flow point of view, he would at that stage have to come up with R900, being the purchase price of R1000 less the initial margin of R100.

[16] For most clients, SSF's provide a cheaper way, and sometimes the only way, to obtain what is called in the industry, "*leverage*". By leverage is meant the ability to purchase shares with a greater value than the amount required to be paid immediately.

[17] There is another way in which SSF's can be used, and that is as a means of obtaining a loan against an existing holding of shares. For example, if a party holds a hundred shares in a listed company which are trading at R1 and he wishes to obtain a cash advance against this holding, but wishes to retain exposure to movement in the share price, he can sell the shares to a market maker (in this case Nedbank) and simultaneously purchase the equivalent number of SSF's in the company, entitling him to claim delivery from the market maker of 100 shares on the close out. If he does so, he will immediately obtain payment of R100, but will only be obliged to put up R10. He therefore has the use of R90 until the close out, when he would be liable to pay for and take delivery of a hundred underlying shares. At that stage, he would have to pay R100 (initial margin of R10 would be applied to the purchase price). So, he would have to come up with an additional amount of R90. As already stated, the futures price has a built-in interest component and this would represent the interest cost to the purchaser of the SSF's. If the purchaser has retained the R90 he received when he sold the hundred PNG shares, then on the close out of the SSF, he would be in exactly the same position as if he had simply held onto his shares, save that he will have had use of the R90 and will have paid a wholesale interest cost (built into the futures price which will be marginally higher than the spot price of the share). Of course, if the purchaser has used the R90 for another purpose, he will have exposed himself to the risk of not being able to fulfil his obligations on the close out to pay the balance of the purchase price and to take delivery of the shares.

[18] The potential risk was that if the share price kept declining, the client would have to keep funding the variation margin. It is also important not to lose sight of the

client's obligation to pay the entire settlement value plus interest on the expiry date of the SSF. If the client wishes to own the shares on the expiry date, he will be required to fund the full purchase price of the shares covered by the SSF (less any initial margin he has paid). If he does not wish to own the shares covered by the SSF on the expiry date, he may sell the shares on the JSE and utilise the proceeds to settle the balance of the purchase price of the shares covered by the SSF (after taking account of any initial margin). If the proceeds are insufficient, the client must pay the shortfall. The client's obligation is to pay the entire settlement value plus interest on the expiry date. Furthermore, if the market for shares is illiquid, the client may not be able to realize all the shares at an acceptable price and, if it cannot do so, it would still have to come up with the cash to settle the full purchase price of the shares covered by the SSF.

[19] "*Variation margins*" are payable by the client to the trading member (in this case Cortex) who then pays the clearing member (in this case, Absa). The variation margin paid by the clearing member is cleared through the clearing house, Safcom, and paid to the clearing member of the counterparty who pays the trading member of the counterparty who pays the client by crediting the accounts held by the trading member at a bank in respect of trades by that client. Exhibit "I" gives a visual presentation of how this works.

[20] The payment of the variation margin is dealt with in Rule 8.50.1 and 8.60.2:

1. Rule 8.50.1 provides that at 17:00 on each business day, the position in each exchange contract of all members and their clients shall be marked-to-market on such basis as the JSE may determine.

2. Rule 8.60.2 provides that variation margins shall be paid to or by a member or a client in whose name a position in the exchange contract is registered as the result of the marking-to-market of a position in terms of Rule 8.50.

[21] Rule 8.90 deals with the settlement procedures in relation to payments, so as to ensure the integrity of the market. The Rule deals with the settlement procedures which are necessary to be effected so as to ensure that when a trade occurs on SAFEX, the relevant securities are delivered by the seller to the trading member and in turn by the trading member to the clearing member and in turn by the clearing member to the clearing house and down the chain on the other side, by the clearing house to the clearing member and by the clearing member to the trading member and from the trading member to his client. Correspondingly, the payment due by the purchaser is settled by the purchaser paying the trading member who traded on his behalf, that trading member paying the clearing member, who pays the clearing house, who pays the seller's clearing member, who pays the seller's trading member, who ensures that the settlement is completed by crediting the account of the seller, maintained by the trading member at a bank in relation to that seller. In so far as variation margin is concerned, the settlement procedures are designed to ensure that the relevant cash flows are settled through the settlement system so that the losers pay and winners get paid and the integrity of the market is thereby maintained. Rule 8.90 does not deal at all with the contractual arrangement between a trading member and his client as to when the money standing to the credit of the client in the trust account maintained by the trading member at a bank in relation to that client becomes due and payable to that client. It merely ensures that trades are settled as between

counterparties so that the securities purchased are cleared through the system and delivered to a trading member who allocates them to a particular client account and that payments due for securities purchased are made and credited by the trading member to the trust account maintained by the trading member in relation to the client who is the seller of the securities. When this occurs, the trade has been fully settled as far as the market is concerned. Variation margin payments are dealt with in similar fashion."

Absa's grounds giving rise to a legal duty

12. Absa pleads that Nedbank had special knowledge which gave rise to a legal duty which in turn was breached. The breach is to be found in certain acts and omissions which Absa alleges were reckless or negligent in various respects giving rise to the loss suffered.

13. Knowledge attributed to Nedbank, or facts which Absa alleges Nedbank should have known, include the following:

13.1. In the purchase of each SSF in PNG by a client as defined in the Derivative Rules, and where Nedbank was the counterparty seller, the trade had to be effected on the JSE through a trading member;

13.2. The trading member through which the trades in SSFs in PNG were effected was Cortex which had appointed Absa as the clearing member;

13.3. Absa as the clearing member had no control over whether a trade could be concluded between Nedbank and Cortex, or in respect of the volume of the SSFs traded between Nedbank and counterparty clients of Cortex;

13.4. In the event that any client failed to pay the initial variation or additional margin due in relation to any position as provided for in the Rules:

13.4.1. The trading member would be obliged, after giving the requisite notice of default, to close out the positions of such client;

13.4.2. The trading member would become liable in place of the client to pay Absa, as clearing member, all and any amounts which became due on such close-out;

13.4.3. Absa, as clearing member, would then be obliged to pay to the clearing house any and all amounts due on such close-out; and

13.4.4. The clearing house would pay to Nedbank, the amounts due to Nedbank as counterparty (through the clearing member appointed by Nedbank which had cleared the trades effected by the Nedbank through a trading member appointed by Nedbank);

13.5. In the event of the counterparty purchaser of an SSF defaulting and the trading member not being able to pay, the clearing member would be

obliged to pay and would in terms of the Rules transfer the positions to itself;

13.6. The ability of the clearing member to recover the amount paid by it would depend on:

13.6.1. the liquidity of the market and the existence of purchasers for the shares which the clearing member had been forced to acquire on the default, and consequently

13.6.2. the price which could be achieved for such shares upon a sale in the market.

13.7. If Nedbank did not, *inter alia*, disclose their purchases of PNG shares as they were required to do in terms of the Rules of the Securities Regulation Panel ("**SRP**"), and if Nedbank acquired further shares above the prescribed limits rendering them obliged to make a mandatory offer to minority shareholders of PNG, and if Nedbank during the process of acquisition of PNG shares crossed the controlled threshold of 50% of the issued shares of PNG, as determined under section 12(1)(a) of the Competition Act resulting in an "intermediate merger" alternatively a "large merger" for purposes of the Competition Act, and if Nedbank required a majority of the voting rights in PNG, thereby acquiring a "subsidiary" for purposes of the Banks Act and/or by virtue of the facts and circumstances

referred to in the aforementioned sub-paragraphs, then, it is pleaded that:

> "15.8.1 The defendants (Nedbank) would secretly create a false market in PNG shares and would manipulate the market by not disclosing that the rise in the price of PNG shares was due to their own market making efforts and bore no relationship to a true market in the shares or the underlying value of PNG;
>
> 15.8.2 Neither the SSF purchasers nor Cortex would be able to meet the call under the SSF contracts; and
>
> 15.8.3 The plaintiff (Absa) as clearing member would be unaware of the position set out in paragraphs 15.8 and 15.8.2 above or of the probability that it would be obliged to pay the amounts due and not paid by neither the SSF purchasers nor Cortex and would suffer a substantial loss."

14. Importantly, in paragraph 16 of the particulars of claim, Absa pleads as follows:

> "The defendants were accordingly at all material times aware that where they acted as a counterparty seller in respect of SSFs in PNG, payment to them of all amounts due to them from the counterparty purchaser in respect of such purchase was, by virtue of the operation of the Rules, effectively guaranteed to them by the plaintiff as clearing member."

15. Absa alleges that Nedbank owed legal duties which include the following:

15.1. to exercise the due care and skill reasonably expected of a banker in the position of the defendants and not to engage in reckless or negligent lending practices;

15.2. to adequately asses the creditworthiness of the purchasers with whom they entered into purchases of PNG shares and forward sales in the form of SSFS, in order reasonably to satisfy themselves that such purchasers would be able to pay amounts due in respect of such forward sales in the form of SSFs as and when they became payable;

15.3. not to engage in purchases of PNG shares against forward sales in the form of SSFs to the same parties in circumstances where a reasonable, prudent banker would not ordinarily have entered into loan agreements with the sellers of PNG shares in respect of the amount of the purchase price of the SSFs against the security only of the shares and the margin;

15.4. not to roll over the forward sales in the form of SSFs without adequately assessing the creditworthiness of the purchaser of the SSFs in order reasonably to satisfy themselves that the purchaser would be able to pay amounts due in respect of the purchase price due under such forward sales as and when they became payable;

15.5. to disclose their purchases of PNG shares as they were required to do.

15.6. not to secretly create a false market in PNG shares;

15.7. not to manipulate the market by not disclosing that the rise in the price of PNG shares was due to their own market making efforts and bore no relationship to a true market in the shares or the underlying value of PNG; and

15.8. alternatively, Nedbank owed Absa a legal duty to disclose to Absa their purchases and/or to disclose to Absa that the rise and the price of PNG shares was due to their own market making efforts and bore no relationship to the true market in the shares or the underlying value of PNG.

16. It is alleged that each legal duty pleaded was breached by Nedbank acting recklessly and/or negligently.

17. In essence, and this is the core of Absa's case, it is alleged that Nedbank secretly created a false market in PNG shares and manipulated the market by not disclosing that the rise in the price of PNG shares was due to their own market making efforts and bore not relationship to a true market in the shares or the underlying value of PNG.

18. The loss arising from the alleged reckless or negligent acts and/or omissions of Nedbank is alleged to arise from the fact that Ukwanda (into which entity certain

purchasers' positions had by 9 December 2008 been consolidated), alternatively the purchasers, failed to pay amounts to Cortex, the trading member, in respect of SSFs which had been sold by Nedbank to the purchasers, when they purchased the corresponding PNG shares as part of the scheme. It is alleged that on 9 December 2008 Ukwanda, as a client of Cortex, was in default, alternatively the purchasers were in default. The JSE in its sole discretion considered that Ukwanda was in default, alternatively the purchasers were in default. In terms of Rule 12.20, on 9 December 2008 Cortex closed out the positions of Ukwanda, alternatively the purchasers. The result of the close out of those positions was that Ukwanda, alternatively the purchasers, became liable to pay to Cortex the sum of R732,191,068.

19. Cortex became liable to pay this sum to Absa as clearing member which Cortex was unable to pay. Absa remained liable to the clearing house in the sum of R732,191,068 which it duly paid on 9 December 2008.

20. It is further alleged that the Quattro Trust failed to pay amounts to Cortex in respect of SSFs which had been sold by Nedbank to the Quattro Trust when it purchased the corresponding PNG shares as part of the scheme. Cortex closed out the positions of the Quattro Trust and the result of the close out was that the Quattro Trust became liable to pay to Cortex the sum of R40,941,442. Cortex was unable to pay this sum to Absa which remained liable to pay this amount to the clearing house. Absa paid this amount on 9 December 2008 which it is unable to

recover.

21. In the premises Absa claims that it has suffered a loss in the sum of R773,132,510 for which Nedbank is liable.

Apposite principles of exception

22. In considering an exception the court's main concern is always to ensure that no injustice is done between the parties.[6]

23. Unless Nedbank can establish that there is a point of law which will dispose of the case, the exception must be dismissed.[7]

24. It should be borne in mind that certain allegations expressly made may carry with them implied allegations, and the pleadings should be read as such.[8]

25. In deciding this exception, the following principles are apposite:

25.1. In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.[9]

25.2. An over-technical approach should be avoided because it destroys the

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6 **Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd** 1976 (1) SA 100 (W).
7 **South African Parks v Ras** 2002 (2) SA 537 (C) at 541J-542A, quoting from Jobert (ED) Law of South Africa, Vol 3, Part 1 first re-issue at paragraph [186]
8 **Jowell v Bramwell-Jones & Others** 1998 (1) SA 863 (W) at 903C-E.
9 **Living Hands (Pty) Ltd & Another V Ditz & Others** 2013 (2) SA 368 (GSJ) at 374, paragraph [15(a)].

usefulness of the exception procedure, which is to weed out cases without legal merit.[10]

25.3. Pleadings must be read as a whole and exception cannot be taken to a paragraph or part of a pleading that is not self-contained.[11]

25.4. The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties.[12]

25.5. The particulars of claim should be read by a mind willing to understand.[13]

Nedbank's grounds of exception

26. Nedbank's exception is directed at the element of unlawfulness. Nedbank states that the exception is founded on the basis that the particulars of claim lack averments necessary to sustain the element of unlawfulness. It is for Nedbank as the excipient, which alleges that the summons does not disclose a cause of action, to establish that upon any construction of the particulars of claim, no cause of action is disclosed.[14]

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[10] **Telematrix (Pty) Ltd T/A Matrix Vehicle Tracking v Advertising Standards Authority SA** 2006 (1) SA 461 (SCA) at paragraph [3]
[11] **Jowell** (supra) at 902J.
[12] **Van Der Westhuizen v Le Roux** 1947 (3) SA 385 (C) at 390.
[13] **Peterson NNO v Absa Bank** 2011 (5) SA 484 (GNP) at 495, paragraph [51].
[14] **Fairoaks Investments Holdings (Pty) Ltd v Oliver & Others** 2008 (4) SA 302 (SCA), page 302, paragraph [12]

27. Absa's claim is for pure economic loss[15] based on the amount which Absa became liable to pay to the clearing house whose services the JSE acquired for the purpose of clearing contracts on the exchange in accordance with the Derivative Rules.

28. The complexities of trading in SSFs are illustrated by the use in Nedbank's heads of argument of six organograms reflecting the participants and their interactions as alleged in the particulars of claim.

29. To be liable for the loss of someone else in delict, it is necessary to establish that the act or omission of the defendant was wrongful and negligent and caused the loss.[16] The premise of the exception is that the conduct of Nedbank as alleged does not amount to wrongful conduct. The essence of Nedbank's exception is that the conduct pleaded is not wrongful because public policy considerations do not demand that in the circumstances Absa should be compensated for the loss it suffered. Thus the central issue is whether the particulars of claim satisfy the requirements for delictual liability with reference specifically to the question of wrongfulness.

30. Exception has been taken on the basis that the particulars of claim do not establish that Nedbank owed Absa a legal duty. Nedbank advances the following

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[15] "Pure economic loss" notes loss that does not arise directly from damage to the plaintiff's person or property, but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses, or the diminution of the value of property. See **Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd** 2009 (2) SA 150 (SCA) at paragraph [10]; **Peterson** (supra) at 486, paragraph [3].

[16] **Telematrix** (supra), page 468, paragraph [12].

grounds in its exception:

30.1. the statutory provisions pleaded are themselves insufficient to support the creation of a legal duty;

30.2. on the allegations made in the particulars of claim, the damages suffered by Absa arose from its liability to comply with the obligations of a clearing member upon default of a trading member as set out in the Rules (including in particular Rule 12.30), which obligations arose from Absa being appointed and accepting the appointment ("**the clearing agreement**") as clearing member of Cortex.

30.3. Absa could have avoided and protected itself against suffering damages as aforesaid by not entering into the clearing agreement with Cortex, or by providing for terms therein to protect itself against suffering such damages.

30.4. The particulars of claim lack allegations to support a conclusion that Nedbank had a legal duty to protect Absa from suffering damages as aforesaid when such damages result from an agreement voluntarily entered into by Absa, and when Absa could have avoided or protected itself against suffering such damages.

30.5. the particulars of claim do not allege –

30.5.1. that Nedbank assumed responsibility for any loss which Absa may suffer as a result of any act or omission;

30.5.2. that Absa relied upon any assumption of responsibility; nor do they contain any allegations to find any conclusion that Absa was involuntarily reliant on Nedbank to acquire the information which it alleges that Nedbank was under duty to disclose to Absa;

30.5.3. any facts to find any direct link between Absa and Nedbank. On the contrary, Nedbank avers that the particulars of claim allege that Absa, subject to the Derivative Rules, dealt with Cortex;

30.5.4. facts or circumstances to show that it would be equitable, fair, just or reasonable that the law should impose a duty or duties, as contended for by Absa on Nedbank;

30.5.5. any considerations of public or legal policy which require that a legal duty and legal liability for economic loss be extended in the present case to an area where it has not before been held to exist, and which is not closely incremental to an existing and recognised legal duty; and

30.5.6. any facts or circumstances which would avoid the recognition of a legal duty or duties contended for by Absa, opening the floodgates to claims by an indeterminate class over an indeterminate time in indeterminate amounts against Nedbank and others.

31. Whilst this is not a narration of each and every ground of exception, it provides the substance of the exception.

Wrongfulness

32. Absa accepts that it is competent for a court to determine wrongfulness on exception but points out that in certain circumstances it is inappropriate to do so. In **Carmichele v Minister of Safety & Security** the Constitutional Court held that where the factual situation is complex and the legal position uncertain, the court should not determine claims for the development of the common law without the benefit of the evidence of both parties.[17]

> "There may be cases where there is clearly no merit in the submission that the common-law should be developed to provide relief to the plaintiff. In such circumstances absolution should be granted. But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial judge has to refuse absolution. If this is

[17] 2001 (4) SA 938 (CC) paragraph [80].

> done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in light of all the circumstances of the case, with due regard to the relevant factors."

33. Absa disagrees that as a general rule the issue of wrongfulness is "quintessentially an issue to be decided on exception", as submitted on behalf of Nedbank. The particulars of claim are extensive and detailed, and have a number of annexures attached to them. Whilst the issue of wrongfulness in this matter is fact bound, particularly relating to the allegation that Nedbank secretly created a false market, it is competent, in my view, to decide this matter on exception. For purposes of deciding the exception, I must accept the correctness of the allegations made in the particulars of claim.[18] In determining wrongfulness, I am required to exercise a value judgment embracing all relevant facts and involving considerations of policy. I need to determine whether the facts alleged, on the assumption that they can be proved at the trial, give rise to a legal duty without which there could be no unlawfulness.

34. Extensive reference was made in Nedbank's argument to English law, Mr Cilliers submitting that it is useful to have regard thereto, and in particular to the scope and limits of recognition of claims for pure economic loss.

35. In response, Absa argues that our courts have explicitly disavowed the English tests for the determination of wrongfulness. The importation of English law when

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[18] See footnote 14, (supra).

dealing with wrongfulness can be confusing and lead one astray. This has been emphasised by the SCA.[19]

36. In my view, it is not necessary to have regard to English law for purposes of this case. South African law is sufficiently developed to allow the court to assess whether public policy considerations impose a legal duty based on the facts and circumstances alleged in the particulars of claim.

37. The nub of Nedbank's argument is as follows:

37.1. That before a legal duty can arise, there must be a special relationship between the parties. Mr Cilliers submitted that this criterion has not been satisfied because there is no allegation that there was any proximity of special relationship between Absa and Nedbank.

37.2. Further in this regard, Mr Cilliers submitted that the plaintiff must be vulnerable. In other words, the plaintiff must be involuntarily dependent on the defendant. This too has not been alleged in the particulars of claim.

37.3. Nedbank argues that Absa did not need to enter into the transaction and could have protected itself; there was no duty on Nedbank to warn Absa not to get involved in the transaction.

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[19] See **McIntosh v Premier, Kwazulu Natal** 2008 (6) SA 1 (SCA), paragraph [9]; **Hawekwa Youth Camp v Byrne** 2010 (6) SA 83 (SCA), paragraph [21]; **Fourway Haulage** (supra), paragraphs [18-20].

37.4. Absa was in for the profit, and risks go with profit.

37.5. Absa does not rely on statutory breaches in themselves.

37.6. There are no factual allegations to support a contention that it would be reasonable, fair, just and equitable to impose on Nedbank a legal duty towards Absa as a legal conclusion. Nedbank argues that the foreseeability of harm to another is a necessary, but not a sufficient, condition for unlawfulness.[20]

38. A bank's relationship with its customers is contractual. However, banks are more than depositories of their clients' money. They play a pivotal role in society and in any economy. They interact with business and many have become venture capitalists. They loan funds, become participants in business ventures, invest in property, provide sponsorships and engage in social projects. Banks are expected to create a fair and honest competitive environment amongst themselves. Where there are no regulations governing their relations and interactions with each other and organisations, they are expected to conduct themselves in accordance with ethical principles.

39. By virtue of the role which banks play in society, it is necessary that the banking profession should retain its professional dignity and reputation of reliability in which the public as a whole generally repose confidence. The public would expect

[20] **Country Cloud Trading CC v MEC Department of Infrastructure Development** 2015 (1) SA 1 (SCA), paragraphs [42-43].

banks to adhere to the principle of integrity in all their dealings and always to provide clear, understandable and accurate information.

40. Having regard to this, Nedbank's conduct, as alleged, no doubt incites moral indignation. However, do public policy considerations based on the legal convictions of the community demand that Nedbank be held liable to Absa for its loss?

41. The answer to the exception must lie in the allegation that by virtue of the conduct detailed in the particulars of claim, Nedbank secretly created a false market in PNG shares and manipulated the market by not disclosing that the rise in the price of PNG shares was due to their own market making efforts and bore no relationship to a true market in the shares or the underlying value of PNG.[21] That this is the central basis of Absa's claim was recognised in argument by Mr Cilliers who submitted that Absa's case starts and ends with the epithet "false market".

42. The commercial effect of the scheme allowed Nedbank to advance money to the shareholders without incurring any risk. The manner in which this took place is alleged in paragraph 15 of the particulars of claim but crisply summarised by Absa in its heads of argument as follows:

- Nedbank paid the shareholders cash for their shares at their current market price.

[21] Paragraph 19.7 of the particulars of claim.

- On expiry the SSFs sold to the shareholders, Nedbank recovered the price of the SSFs comprising the original market price of the underlying shares plus interest.

- Nedbank thus in effect lent the current market price of the underlying shares to the shareholders and recovered it from them with interest on expiry of the SSFs.

- Nedbank however did not run any risk of default by the shareholders because its claim for payment of the SSFs sold to the shareholders lay against the JSE's clearing house.

- Under the Derivative Rules, the risk of default by the shareholders was borne by the broker, Cortex, and ultimately by Absa as its clearing bank.

- Despite the fact that Absa bore the ultimate risk of the SSF trades between Nedbank and the shareholders, it had no control over those trades. Nedbank selected the shareholders to whom it sold SSFs and determined the volumes of the sales and the prices at which they were done.

- Nedbank accordingly profited from the SSF sales made under its control but entirely at the risk of Cortex and Absa.

43. Opinions submitted in argument as to motive are irrelevant for determination of the exception. I am bound by the four-corners of the pleading. Thus Absa's opinion that Nedbank implemented the scheme "with exuberance born of the miracle of profit without risk" must be ignored, as well as Nedbank's submission that Absa has chosen to sue Nedbank because it is the one party with "deep pockets."

44. The core allegation made in the particulars of claim is that Nedbank knew that if it conducted the scheme as it did, it would secretly create a false market. Absa goes further and alleges that Nedbank indeed did secretly create a false market in PNG shares.[22]

45. This allegation carries with it the implied, if not express allegation that Nedbank skilfully managed the market by acting deceptively and not making disclosures which they were under a duty to make. Thus the rise in the price of PNG shares was brought about in a misleading way.

46. It is Absa's case that by virtue of Nedbank's knowledge, it deliberately or negligently exposed Absa to losses in circumstances where Absa was unaware of Nedbank's conduct. It is argued that this was an abnormal risk that Absa could not foresee and against which it could not protect itself.

47. Nedbank's argument that before a legal duty can arise there must be a special relationship between the parties is countered by the judgment of Harms JA in **Carmichele** (supra) at paragraph [41] where the learned judge said:

> "Proximity is a requirement for establishing a duty of care in English law in order to ground liability under the tort of negligence and was adopted by Scotts law. But proximity, in our law, is not a self-standing requirement for wrongfulness. Likewise,

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[22] Particulars of claim, paragraph 19.7.

> the requirement of a special relationship (which is in my view just another label for proximity) is not essential wrongfulness."

48. Whilst there was no privity of contract between Absa and Nedbank, there was an indirect relationship in terms of which Absa was the ultimate guarantor for the purchase price of the SSFs sold to the Pinnacle shareholders. In this way, Absa's liability was the direct result of Nedbank's conduct.

49. Absa has not relied for its cause of action on statutory provisions. However, it is alleged that Nedbank did indeed act in breach of a number of statutory provisions.[23] The alleged breach of statutory rules is a factor to be taken into account in determining whether Nedbank was under a duty not to act negligently.

50. I agree with the submission on behalf of Absa that it could not contractually or otherwise have protected itself against the risk to which it was exposed by Nedbank's conduct. As I have stated, there was no privity of contract between the parties and Absa was ignorant of Nedbank's conduct. When the loss occurred, it was too late to take any preventative steps.

51. This is an exception and of course it remains for Absa to prove its allegations and particularly the creation of a false market and the manipulation alleged. My findings are based purely on the contested allegations.

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[23] SRP Rules 8.1, 7.1 (a) and 21.3(a); section 13A of the Competition Act; section 52(1)(a) of the Banks Act; paragraphs 23, 57 to 60 and 69 to 71 of Schedule 4 to the Companies Act; various provisions of Rule 7.200 of the JSE's Derivative Rules; and several provisions of section 75 of the Securities Act.

52. I am satisfied that on the facts as pleaded in the particulars of claim, Nedbank was under a legal duty not to conduct itself as alleged. Such conduct, if proven, was wrongful and public policy considerations would demand in these circumstances that Absa be recompensed for the loss. There may of course be a number of defences which Nedbank will raise in its plea but for purposes of the exception, this judgment is confined to the question of wrongfulness only and the creation of a legal duty.

53. In the premises the exception fails.

Order

54. I make the following Order:

(i) The exception is dismissed

(ii) Nedbank is to pay the costs including the costs consequent upon the employment of two counsel.

EPSTEIN AJ
8 February 2017

DATE OF HEARING:	Monday, 5 December 2016
DATE OF JUDGMENT:	Wednesday, 8 February 2017
FOR THE DEFENDANTS/EXCIPIENTS:	SA Cilliers SC with JB Berridge SC, instructed by CDH Attorneys.
FOR THE PLAINTIFF/RESPONDENT:	WH Trengove SC with LN Harris SC and F Ismail, instructed by Webber Wentzel Attorneys.