REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 12696/2019

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES~~/NO~~	
(2) OF INTEREST TO OTHER JUDGES: YES~~/NO~~	
(3) REVISED :	
19/04/2020	
DATE	SIGNATURE

In the following matter between:

GOBI HOLDINGS LIMITED	**PLAINTIFF**
And	
FAIRBRIDGE ARDERNE & LAWTON INCORPORATED t/a FAIRBRIDGES WERTHEIM BECKER	**DEFENDANT**
BERNADT VUKIC POTASH GETZ ATTORNEYS	**THIRD PARTY**

JUDGMENT

SIWENDU J

INTRODUCTION

[1] The Plaintiff, Gobi Holdings Limited (Gobi Holdings) is a company incorporated in Guernsey. The defendant, Fairbridge Arderne and Lawton Incorporated (Fairbridge Arderne) is a law firm based in Johannesburg. The defendant previously traded as Hogan Lovells (South Africa). The 3rd Party, Bernadt Vukic Potash & Getz Attorneys (Bernadt Vukic) is a law firm with its principal place of business at No1 Thibault Square, Cape Town. The application concerns the determination of an exception raised by Bernadt Vukic.

[2] In October 2016, Gobi Holdings engaged Fairbridge Arderne to act as its attorney in terms of a part written and partly oral agreement to represent it in a share sale transaction with Platinum Hospitality Corporation (Platinum Hospitality). Gobi Holdings and Platinum Hospitality jointly owned an equal shareholding (50% shares each) in Kruger Gate Hospitality Holdings (Kruger Gate). The instructions to Fairbridge Arderne were to negotiate, conclude and implement the sale of shares agreement between the shareholders. Mr Joffe of that office represented Gobi Holdings.

[3] On the other hand, Platinum Holdings appointed Bernadt Vukic to represent it in the share sale transaction. Mr Hessian of that office represented Platinum Holdings. It is essential to say something about the structure of the share sale agreement to give context to the application.

[4] Ultimately, Gobi Holdings and Platinum Hospitality concluded an agreement with an exit clause colloquially known as a "Texas Shoot- Out" clause. The structure of the agreement was that, Platinum Hospitality presented two offers to Gobi Holdings. In the first offer, Platinum Hospitality would be the purchaser of the shares in Kruger Gate. In the second offer, Platinum Holdings would be the seller of the shares in Kruger Gate. Platinum Hospitality offered to buy Gobi Holdings' shares for R90m. For the second offer, Platinum Hospitality offered to sell its 50% shareholding to Gobi Holdings for R 91,5m. Gobi Holdings had to accept either of the two offers in 60 days, failing which Gobi Holdings would be deemed to have accepted to sell its 50% shareholding to Platinum.

[5] Gobi Holdings claims to have accepted the offer to acquire Platinum Hospitality's shares for R 91, 5m on 11 September 2017, and, as part of its acceptance, agreed to deliver sale transaction closing documents by 24 October 2017. The transaction closing documents included written resignations of directors Gobi Holdings had appointed on the board of Kruger Gate. The letters of resignation of the directors were not furnished, because Fairbridge Arderne's attorney, Mr Joffe, believed it was not necessary to do so. I surmise without deciding that the failure to deliver the documents must have been because Gobi Holdings was believed to be the acquirer of Platinum Holdings' shares. He thought it was not necessary to resign Gobi Holdings' directors from the Kruger Gate board.

[6] It appears from the pleadings that Mr Joffe and Mr Hessian discussed the documents required. Fairbridge Arderne blames Mr Hessian for sending Mr Joffe a misleading e-mail leading him to believe that the written resignations were not required. The email complained of reads:

> *Thanks for this. We still need the following from your client which I will hold in trust:*
>
> - *the written resignation of all directors appointed by it (only applicable if your client is the seller)*
> - *resolution of the board of directors of your client to execute the sale agreement (applicable in either event) (with emphasis added by Fairbridge Arderne)*

[7] The consequence is that Gobi Holdings was deemed to have accepted to sell its shareholding in Kruger Gate for R 90m to Platinum Holdings instead. Gobi Holdings lost, not only the shareholding in an asset, but the value in respect of the price at which it was deemed to have sold the shares. The deemed offer to sell led to arbitration proceedings in a dispute Gobi Holdings declared against Platinum Holdings at the advice of Mr Joffe. Even though the arbitrator is reported to have found Mr Hessian sent an ambiguous and misleading email about the documents, Gobi Holdings was unsuccessful in the arbitration proceedings and incurred arbitration costs following an award against it.

[8] In April 2019, Gobi Holdings instituted proceedings against Fairbridge Arderne to recover damages arising out of the alleged breach of contract. It claims a sum of R

84.5m arising from the loss of the shares together with the arbitration costs incurred in the sum of GBP 66, 956.

[9] Gobi Holdings' action against Fairbridge Arderne is premised on a breach of the contract by its attorneys. It alleges that Mr Joffe was negligent, breached the mandate and did not act with reasonable skill and care. The manifestation of the breach is referred to as: "Mr Joffe's Mistake". In addition, Gobi Holdings relies on a tacit and implied term of the contract that Fairbridge Arderne would discharge its mandate with reasonable care and skill.

[10] Fairbridge Arderne resists the claim against it. In addition to the plea in defence, it issued a 3rd party notice to Bernadt Vukic, the attorneys for Platinum Holdings. It claims a question has arisen between Fairbridge and Bernadt Vukic which is substantially the same as that between it and Gobi Holdings. It seeks that the main action is determined not only between Fairbridge Arderne and Gobi Holdings but also between Bernadt Vukic and "the parties to the action". It prays for an order that any judgment in favour of Gobi Holdings is granted entirely against Bernadt Vukic. In the alternative, if Fairbridge Arderne is found liable to Gobi Holdings, then it seeks an order declaring that it and Bernadt Vukic are joint wrongdoers in respect of damages due to Gobi Holdings. It also seeks an order to contribute towards the payment of the damages in terms of the Apportionment of Damages Act No. 43 of 1956.

[11] In response, Bernadt Vukic raised this exception to the 3rd party notice and prayers.

[12] The Annexure filed with the 3rd Party Notice, claims that Bernadt Vukic had a legal duty and/or it owed a duty of care to Gobi Holdings and Platinum Hospitality resulting from clause 5 of the addendum and agreement. The relevant part of Clause 5 reads:

"CLOSING DOCUMENTS AND RELEASE

By not later than ten (10) Business Days of signature hereof by the last of the parties ("Closing documents Date") the parties shall each deliver to BVPG Attorneys to be held in trust, the items and documents contemplated in clauses 9.1, 9.2 and 9.3 of the Sale Agreement, as may be required, in the event of either the First Offer or Second Offer being applicable (closing documents)"

[13] It alleges that in terms of the addendum to the Sale Agreement, Mr. Hessian, the attorney at Berndt Vukic specifically instructed and responsible for the duty to receive and hold the transaction closing documents in trust acted as a custodian and

stakeholder. By accepting and assuming this role, he bore and owed a legal duty of care to Gobi Holdings *and* Platinum to keep the transaction documents in trust. Fairbridge Arderne frames the liability of Berndt Vukic as follows:

> *18 As a result, the third party and /or Hessian, as the stakeholder, had a duty by express or necessary implication to ensure-*
>
> *18.1 that each party delivered the closing documents that it was required to deliver*
>
> *18.2 that each party delivered such documents as may be required timeously as may be required, timeously in compliance with the Sale Agreement and the Addendum*
>
> *18.3 That each arty did everything reasonably within its power necessary or incidental to the effectiveness and performance of the Sale Agreement.*
>
> *18.4 That each party observed utmost good-faith in the implementation of the Sale Agreement*
>
> *18.5 That any of the parties which was slow in complying with the Sale Agreement is notified and called upon it to comply*

[14] It claims Mr Hessian failed to discharge the legal duty to Gobi Holdings because the email he sent to Mr Joffe failed to explicitly and unambiguously advise and/or correct Fairbridge Arderne and/or remind Gobi Holdings that despite it being the purchaser of the share, Gobi Holdings had to deliver its directors resignation letters. It also relies on additional clauses 15.8 and 15.11 of the sale agreement which read:

15.8 The parties undertake to do everything reasonable in their power necessary for or incidental to the effectiveness and performance of this agreement

15.11 In the implementation of this Agreement, the Parties undertake to observe the utmost good faith"

[15] The alternative claim is that Fairbridge Arderne and Berndt Vukic are joint wrongdoers and jointly liable to Gobi Holdings as contemplated in the Apportionment of Damages Act 34 of 1956.

THE GROUNDS FOR EXCEPTION

[16] There are three exceptions raised against the 3rd party Notice. The exceptions are underpinned by a common claim that the notice lacks the necessary averment to sustain a cause of action, alternatively, it is vague and embarrassing. The expections are:

[16.1] The alternative claim for the joinder of Berndt Vukic as "a joint wrongdoer" in terms of Section 2(2) the Apportionment of Damages Act 34 of 1956, only applies to a liability founded in delict. The Fairbridge Arderne does not assert that Bernadt Vukic committed a delict. Gobi Holding's case against Fairbridge Arderne is premised on a breach of clause 5 of the contract. The 3rd party notice also premises the liability of Bernadt Vukic on clause 5 of the contract.

[16.2] The prayer that a judgment against Fairbridge Arderne in favour of Gobi Holdings is granted entirely against Berndt Vukic is not competent. There is no legitimate issue or cause of action between Fairbridge and Berndt Vukic. There is no valid claim for a contribution or indemnification in the main claim. It does not meet the requirements of a valid 3rd party joinder under Rule 13.

[16.3] The duty allegedly owed by Berndt Vukic to Gobi Holdings and Platinum does not arise in law or by express or necessary implication under clause 5. The duty was limited to holding the documents 'in trust' once received. As an attorney appointed for Platinum, Berndt Vukic had no obligation to advise Gobi Holdings of its own obligations under the Sale Agreement or Addendum.

[17] Mr. Seleka SC who appeared for Fairbridge Arderne objected to what he considered new grounds of exception. In my view, the added grounds are in the main, ancillary to the above grounds. It is not necessary to singularly decide these for the purpose of the exception. I am also of the view that the main grounds of exception are linked with the central theme of Bernadt Vukic's liability to the plaintiff or at all – an issue that occupied the bulk of the argument.

[18] The issue is whether there is a valid cause of action disclosed against Bernadt Vukic. The thorny legal issue as I see it, is whether the law should impose a legal duty of care and a duty to act reasonably on Bernadt Vukic to prevent the loss suffered by Gobi Holdings, a counterparty who was a non-client in the commercial transaction.

APPLICABLE LEGAL PRINCIPLES AND SUBMISSIONS

[19] I commence with the trite principles and am bound to accept the factual averments made in the pleadings as correct. The courts have consistently held that a claim that a pleading is excipiable is not only in relation to a question of an absence of a factual averment or allegation but extends to the formulation of the pleading. It is also whether the claim is one that is sound in law. On this score, the courts have repeatedly held that the exception must strike at the heart of the cause of action and/or its legal validity[1]. Therefore, an assessment of whether an exception is properly taken must be viewed holistically as a question of fact and law or a combination.

[20] In this case, Bernadt Vukic has the onus and duty to persuade the court that upon every conceivable interpretation, there is no cause of action disclosed in the particulars of claim[2].

[21] The crux of the argument by Mr. Loxton SC on behalf of Bernadt Vukic is that in asserting that Mr. Hessian failed to discharge a legal duty to Gobi Holdings, Fairbridge Arderne has created an unusual situation by imposing a duty which does not exist, about a breach of a duty Gobi Holdings does not complain. He argues that the source of Fairbridge Arderne's liability and duty to Gobi Holdings is contractual, embodied in Clause 5 of the agreement. The foundation of the liability is contractual and not in delict. He contends, the obligations and duties Fairbridge Arderne looks to impose on Bernadt Vukic are not in terms of the contract. On the contrary, the express terms of the contract imposed a duty on each of the transacting parties. If correct, the argument brings the claim that Bernadt Vukic is a joint wrongdoer out of the purview of Section 2(2) the Apportionment of Damages Act 34 of 1956[3].

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[1] McKenzie v Farmer's Cooperative Meat Industries Ltd 1922 AD 16 at 23). Jowell v Bramnell Jones and Others

[2] Theunissen v Transvaalse Lewendehawe Koöp Bpk 1988 (2) SA 493 (A) AT 500D; Lewis v Oenanate (Pty) Ltd and Another (1992) ZASCA 174; 1992(4) SA 811 (A) AT 817 F

[3] Notice of any action may at any time before close of pleadings in that action be given –
a) by the plaintiff
b) by any joint wrongdoer who is sued in that action, to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as defendant in that action.

[22] Mr. Seleka SC on behalf of Fairbridge Arderne correctly conceded there is no contract between Bernadt Vukic and Gobi Holdings. However, in support of an actionable cause of action, he argues despite the reference to Clause 5 of the Agreement in the 3rd Party Notice, the liability Fairbridge Arderne seeks to impose on Bernadt Vukic is in delict. It built the liability on the role of a stakeholder assumed by Bernadt Vukic. He contends the liability of a stakeholder finds support in the court's decision in *Baker v Probert*[4] where Botha JA noted that:

> *"The concept of a stakeholder is best known in our lawinthe context of a person who holds a reslitigiosa pending the outcome of litigation between two rival claimants (see eg Voet 16.3.12- 15; Corrans V Transvaal Government & Coull's Trustee 1909 TS 605 at 621-2, 631-2, and Kelly V Lombard 1927AD 187-8). It is known also in the context of a person who holds money which is the subject of a wager, to be paid over to the party who turns out to be the winner of the bet (see eg Voet 11.5.9; Sloman v Berkovitz 1891 NLR 216; and Clarke v Bruning 1905 TS 295). In both instances it is of the essence of the stakeholding that at its inception it is not certain which of the two partie involved will ultimately become entitled to receive what the stakeholder is holding.*

[23] He asserts that the absence of a contract is not a prerequisite or a bar to the liability of Bernadt Vukic in delict. It is incorrect to state that Bernadt Vukic was responsible only to its client, Platinum Holdings. He claims negligence is the common denominator. He argues the 3rd party notice pleads the same negligence relied on by Gobi Holdings. I do not agree that a claim of a negligent mistake based on a contract equates to negligence in delict. That argument discards a vital source of liability. In any event, negligence alone is not the sole fact for determination in this case.

[24] Invited to explain how two law firms could be held liable jointly in circumstances where each law firm was instructed separately to represented their respective clients, Mr. Seleka SC argued that the court should delineate its role at exception stage from the exercise of a trial court. As I understand it, the argument is that this court's domain is to assess whether Bernadt Vukic has alleged enough facts upon which evidence at the trial will be led to prove those facts. In my view, the argument picks a part of the complaint by Bernadt Vukic. The main thrust and heart of the exception is a lack of a cause of action or actionable joinder. Vagueness is an alternative ground. Ultimately, Mr. Seleka SC, agreed that the request is to determine whether the exception is good or bad in law.

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[4] 1985(3) SA 429 A

[25] Mr. Seleka SC underscores decisions from cases involving "disappointed beneficiaries" to contend that courts have imposed liability on an attorney for damages incurred by a non-client. He relies on these decisions to support his contention that legal duty in delict may arise in the absence of a contract. Circumstances giving rise to liability are not exhaustive.

[26] In *Arthur E Abrahams & Gross v Cohen and Others*[5] the executor of the deceased estate employed by a firm of attorneys to unwind an estate failed to inform the intended beneficiaries that there was an insurance benefit in their favor. The failure was despite numerous correspondence by the insurance company to the executor calling for the signature and return of discharge forms. There was a five-year delay to the payment. In imposing the legal duty to inform, the court had regard to the peculiar characteristics of the entitlement and benefit to decide who should bear the loss of the external beneficiaries. Marais J held that:

"As is see the position it comes to this. A defendant may be held liable ex delicto for causing pure economic loss unassociated with physical injury but before he is held liable it will have to be established that the possibility of loss of that kind was reasonably foreseeable by him and that in all the circumstances of the case he was under a legal duty to prevent such loss occurring. It is not possible or desirable to attempt to define exhaustively the factors which would give rise to such a duty because new situations not previously encountered are bound to arise and societal attitudes are not immutable. However, that does not mean that capriciousness in the adjudication of claims of this kind is permissible. If liability is to be imposed, a court must satisfy itself that there are adequate grounds for doing so and be able to say what they are. It follows that the pleader of such a claim must allege the fact which give rise to the alleged duty."

[27] In *Herrie Windsor Construction (Pty) Ltd v Raubenheimers Inc*[6] Yekiso J conducted a comparative analysis of the law in other jurisdictions. He held that:

"Legal advice by a legal practitioner to a non-client has a potential to expose the legal practitioner concerned to liability should the non- client act to its detriment following that advice. However, in order to attract liability, it will have to be established in respect of the

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[5] *1991 (2) SA 301*

[6] 2016 JDR 0809 (WCC) ; See also Jowell v Bramwell above

legal practitioner concerned that it owed the non- client a legal obligation to act reasonably and, in particular, a duty not to make a negligent representation. "

[27] I decipher from these cases that over and above the duty to act reasonably and not to make a negligent representation, the material factors underpinning liability are: (1) the extent to which the transaction was intended to affect a plaintiff, (2) foreseeability of the harm to the plaintiff (3) the degree of certainty the plaintiff would suffer harm; (4) closeness of the connection between the conduct and the injury suffered (5) Moral blame attaching to a defendant's conduct; (6) The profession's interest. I pause to mention that the hallmark for liability is the loss of a benefit by the injured non-client.

[28] Given that the liability Fairbridge Arderne looks to impose is in delict, wrongfulness, a core element for liability is a hurdle Fairbridge Arderne must leap. In this regard, it is essential to restate an issue dealt with by the Constitutional Court in *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre* as *amici curiae)*[7] that reasonableness in respect of wrongfulness concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.' As Mr. Loxton SC pointed, in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* [8]the court held that the fact that an act is negligent does not make it wrongful. The question of wrongfulness is a policy consideration.

[29] Turning to the facts, the argument that Bernadt Vukic was a stakeholder and/or custodian therefore a joint wrongdoer with Fairbridge Arderne merits scrutiny. A stakeholder has two meanings. The first meaning refers to someone who has an interest in an issue. I understood the reference to the decision in *Baker v Probert* to entail a position where an independent party holds a stake on behalf of two interested parties. I accept that the structure of the sale of shares agreement between Gobi Holdings and Platinum Hospitality meant, the identity of the seller and/ or purchaser could not be known until the closing of the transaction. The meanings ascribed to a stakeholder do not admit the argument advanced. Bernadt Vukic was not an independent third party. It had its own mandate with Platinum Hospitality. In this sense, it did not have a direct interest in the matter. Secondly, its obligation was to hold the transaction documents 'in trust" on behalf of both transacting parties and

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[7] (CCT 45/10) [2011] ZACC4
[8] SA 2006(1) SA 461 (SCA)

no more. As a custodian, that obligation only arose after closing, once it received the transaction documents and not before.

[30] Despite the complaint about the ambiguous email, it was Fairbridge Arderne's sole contracted duty to assess and ensure compliance with transaction requirements. There are no overlapping or interdependent facts argued which would demonstrate that Fairbridge relied or had to rely on Bernadt Vukic to fulfill its obligations. To suggest otherwise means, an untenable dual role must be imputed to Bernadt, potentially in conflict with Platinum Hospitality, its client. On these facts and circumstances, it is not desirable to impose the legal duty on Bernadt Vukic. Accordingly, I uphold the exception.

[31] In my view, the three expectations pivot on the existence of a legal duty and a cause of action against Bernadt Vukic. My finding means there is no actionable joinder against Bernadt Vukic. Under these circumstances, a claim for a contribution is not permissible.

[32] In the result, I make the following order :

[32.1] The exception is upheld;

[32.2] The defendant is liable to pay the costs of the Third Party, including the costs of two counsel.

SIWENDU J

Appearances:

On Behalf of the defendant	:	For PG Seleka SC
With him	:	SJ Van Vuuren
Instructed by	:	Fairbridge Wertheim Becker
On behalf of the Third Party	:	Mr Loxton SC

With him	:	Mr D. Turner
Instructed by	:	Clyde & Co Inc