IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 18477/2020

Date of hearing: 14 November 2022

Date delivered: 9 December 2022

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

9/12/22 .....
DATE SIGNATURE

In the matter between:

MAHOMED MAHIER TAYOB **Excipient/Third Defendant**

and

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD **Respondent/Plaintiff**

In re:

INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTHERN AFRICA LTD **Plaintiff**

and

RIA IVY LEDWABA	**First Defendant**
DAN ORBACH	**Second Defendant**
MAHOMED MAHIER TAYOB	**Third Defendant**
MAHOMED MAHIER TAYOB N.O.	**Fourth Defendant**

JUDGMENT

SWANEPOEL J:

[1] Respondent has issued summons against the excipient (third defendant), the erstwhile business rescue practitioner of Ifihlile Aircon Corporation (Pty) Ltd ("the company"), claiming damages of R 50 135 120.22. Respondent bases its claim on the following allegations (I paraphrase):

> [1.1] The company is indebted to respondent in the sum of R 50 135 120.22, for which sum respondent has obtained a judgment under Gauteng High Court Pretoria case number 62832/17;
>
> [1.2] The company was placed in voluntary business rescue on 12 November 2012 and third defendant was appointed as business rescue practitioner;

[1.3] Respondent lodged a claim with the excipient, who recognized the claim and included it in the business rescue plan, which was approved by affected persons on 17 April 2013;

[1.4] The excipient had a statutory duty arising from section 140 (d) (ii) of the Companies Act, 2008 ("the Act") to implement the plan and to pay the debt owed to the respondent;

[1.5] The excipient had the statutory duty to perform his functions as business rescue practitioner in terms of sections 140 (3) (d) and 76 (3) (a) and (b) of the Act in good faith, for a proper purpose and with the degree of care and skill that may reasonably be expected of a person carrying out the functions of a business rescue practitioner with the general skill, knowledge and experience of the excipient;

[1.6] The excipient wrongfully, negligently and in breach of his statutory duties failed to make payment to the respondent, alternatively, the excipient intentionally contrived not to pay the plaintiff;

[1.7] The excipient settled the claims of other creditors contrary to the approved business rescue plan;

[1.8] As a result respondent has suffered damages;

[1.9] By virtue of the provisions of section 218 (2) of the Act, the excipient is personally liable to respondent for the damages suffered.

[2] The excipient raises two exceptions against the particulars of claim:

[2.1] Firstly, that the excipient's statutory and fiduciary duties were solely owed to the company, that the latter is a separate entity from the directors (and by extension the business rescue practitioner), and that as a shareholder or a creditor would not have a claim against a director, similarly a creditor cannot have a claim against the business rescue practitioner. The excipient says that, consequently, the respondent does not have *locus standi* against the excipient.

[2.2] Secondly, that the excipient did not owe any legal duty towards the respondent, and that its omission to pay respondent cannot, therefore, found a claim in delict. On that basis, the excipient says, there is no cause of action.

[3] Two issues have to be determined. The first is whether the excipient had a statutory duty towards the company creditors, such that if he were to implement the business plan in a manner other than that approved, he would incur personal liability. The second is whether the excipient had a legal duty towards creditors which would found a claim in

delict; in other words, was the conduct attributed to the excipient in breach of a legal duty to act, and thus wrongful.

[4] The excipient raised an argument that it would be convenient to dispose of at the outset. The excipient argued that respondent does not have *locus standi*. It is argued that the claim is a reflective claim which properly is that of the company, and that the respondent as creditor may not bring the claim. A reflective claim is one where the company has a cause of action against, for instance a director, for breach of a fiduciary duty, but the claim is brought, for example, by a shareholder for the diminution in the value of his shares. The authorities[1] are all to the effect that such a claim is improper, and the so-called rule against reflective claims is now part of South African Law. In this case the company has no claim against the practitioner, and the claim is not a reflective one.

DID THE EXCIPIENT OWE A STATUTORY DUTY TO THE RESPONDENT?

[5] Section 140 (1) (a) and (d) read as follows:

> **"140 General powers and duties of practitioners**
>
> (1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter-

[1] Foss v Harbottle(1843) 2 Hare 461 (67 ER 189); Prudential Assurance Ltd v Newman Industries Ltd and Others (No 2) [1982] 1 ALL ER 354; Hlumisa Investment Holdings RF and Another v Kirkinis and Others 2020 (5) SA 419 (SCA);Itzikowitz v ABSA Bank Ltd 2016 (4) SA 432 (SCA)

(a) has full management control of the company in substitution for its board and pre-existing management;

(b) ....

(c) ....

(d) Is responsible to-

(i) develop a business rescue plan to be considered by affected persons in accordance with Part D of this Chapter; and

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter."

[6] Section 140 (3) (b) provides that during business rescue proceedings the practitioner has the responsibilities, duties and liabilities of a director of the company. He steps into the shoes of the board of directors. Section 140 (3) (c) (ii) creates liability for a practitioner for any act or omission which arises from gross negligence in the performance of his duties. Section 140 does not provide for a practitioner to be held liable, *qua* practitioner, in cases other than those envisaged in section 140 (3) (c) (ii).

[7] Respondent alleges that the above subsections should be read in conjunction with subsections 76 (3) (a) and (c), which read:

"(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose;

(b) in the best interests of the company;

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director."

[8] Section 76 sets the standards required of a director. It does not create liability where a director does not fulfil those obligations. Section 77 provides for liability of a director in cases where there is a breach of a fiduciary duty, but only for loss or damage sustained by the company. Section 77 does not create liability for a director, (and by extension to this case, for a practitioner), towards third parties.

[9] Respondent also relies on the provisions of section 218 (2) of the Act which reads:

"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."

[10] In *Hlumisa (supra)*[2] the Supreme Court of Appeal quoted a passage from the judgment of the Court a quo with approval:

"Section 218 (2) is worded widely in respect of individuals who fall within its ambit; however, it is restricted in its application and only applies to 'damage suffered by that

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[2] At para 12

person as a result of that contravention'. This restriction requires a particular person to have suffered damage as a result of a particular contravention. What this means is that the particular person who has suffered damage must be a person who is able to invoke a claim for damages as a result of a particular contravention of the Companies Act."

[11] Section 218 (2) thus does not in itself create a further cause of action. It is dependent on the existence of a contravention of one or more of the provisions of the Act. I have already found that the alleged contraventions may be the basis of a claim against a director for loss or damage to the company, but not to creditors.

DID THE EXCIPIENT OWE A COMMON LAW DUTY TO THE RESPONDENT?

[12] The respondent has also argued that it has a claim in delict against the excipient, for pure economic loss. The allegation is that the excipient had a duty of care towards the respondent, which he wrongfully and negligently breached, causing the respondent to suffer economic loss.

[13] In *Carmichele v The Minister of Safety and Security and Another*[3] the Court quoted the Supreme Court of Appeal with approval where it said:

"The appropriate test for determining the wrongfulness of omissions in delictual actions for damages in our law has been settled in a number of decisions of the Court such as Minister van Polisie v Ewels 1975 (3) SA 590 (A) at 597 A – C; Minister of Law and Order v Kadir 1995 (1) SA 303 (A) at 317 C – 318 I; Knop v Johannesburg City Council 1995

[3] 2001 ZACC 22 (CC); 2001 (4) SA 938 (CC)

(2) SA 1 (A) at 276 G – I and Government of the Republic of South Africa v Basdeo and Another 1996 (1) SA 355 (A) at 367 E – H. The existence of the legal duty to avoid or prevent loss is a conclusion of law depending upon a consideration of all the circumstances of each particular case and on the interplay of many factors which have to be considered, The issue, in essence, is one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court."

[14] In *Kadir (supra)* the Court said[4] that what must be weighed is the interests of the parties, but also the conflicting interests of the community, so that a balance is struck in accordance as to what the Court believes justice demands. The Court quoted a lecture by MM Corbett where he said:[5]

"As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which 'shape and, at times refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people."

[15] In *Country Cloud Trading CC v MEC, Department of Infrastructure Development*[6] the Court explained:

"Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. However, in cases of pure economic loss – that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property – the criterion of wrongfulness assumes special importance. In

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[4] At 318 E
[5] Aspects of the Role of Policy in the Evolution of the Common Law (1987) SALJ 52 at 67
[6] 2015 (1) SA 1 (CC) at para 22

contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful. Our law of delict protects rights and, in cases of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss."

[16] In *DE Bruyn v Steinhoff International Holdings NV and Others*[7] Unterhalter J wrote that the enquiry into wrongfulness in cases of pure economic loss is "one of policy and the legal convictions of the community". The learned Judge explained that a director (and by analogy in this case the practitioner) has a fiduciary duty to the company. He may also have a fiduciary duty to a shareholder, but that would require a special factual relationship between the director and the shareholder.

[17] In this case the only allegation upon which the respondent bases its case, is the bald statement that the excipient had a legal duty of care to the respondent, simply by virtue of his appointment as business rescue practitioner and by virtue of the business rescue plan having been approved. In my view, given the absence of any special relationship between the parties, the excipient is not liable to the respondent for pure economic loss. I find no policy reason for imposing such a duty of care upon the excipient.

[18] The principles to be applied on exception have been restated on numerous occasions. The averments made by the plaintiff must be taken

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[7] 2022 (1) SA 442 (GJ)

as correct.[8] I must be convinced that on any reasonable interpretation of the pleadings no cause of action is disclosed.[9] Only where the excipient makes out a clear and strong case should the exception be upheld.[10]

[19] In my view the respondent has not disclosed a cause of action to hold the excipient liable for its loss. Consequently, the exception must succeed.

[20] I make the following order:

[20.1] The second ground of exception is upheld;

[20.2] Paragraphs 26 to 35 of the particulars of claim are struck out;

[20.3] Respondent may amend its particulars of claim within 20 (twenty) days hereof.

[20.4] Respondent shall pay the costs of the exception.

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[8] Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd 2014 (2) SA 157 at 161
[9] Francis v Sharp 2004 (3) SA 230 (C) at 237 D;
[10] Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627 at 630

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 9 December 2022.

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ATTORNEY FOR EXCIPIENT:	**A Mothilal Attorneys Inc.**
COUNSEL FOR RESPONDENT:	**Adv. Y. Alli**
ATTORNEYS FOR RESPONDENT:	**Shaheem Samsodien Attorneys**
DATE HEARD:	**14 November 2022**
DATE OF JUDGMENT:	**9 December 2022**