

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 29896/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	<input checked="" type="radio"/> NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO	<input checked="" type="radio"/> NO
(3) REVISED.	<input checked="" type="checkbox"/>
<div style="font-size: 1.5em; font-family: cursive;">24/3/16</div> <div style="font-size: 0.8em; margin-top: 5px;">DATE</div>	<div style="font-family: cursive; font-size: 1.2em;">[Signature]</div> <div style="font-size: 0.8em; margin-top: 5px;">SIGNATURE</div>

24/3/2016

In the matter between:

HILLARY CONSTRUCTION (PTY) LTD

PLAINTIFF

And

TELKOM SOUTH AFRICA SOC LTD

DEFENDANT

JUDGMENT

Fabricius J,

1.

At the hearing of this action the question of quantum and merits was separated in terms of the provisions of Rule 33 (4) of the Rules of Court. It was also agreed that an exception would be argued in terms of which Defendant contended that Plaintiff's Particulars of Claim do not disclose a cause of action, inasmuch as Defendant's act or omission in a delictual action, was not wrongful. Formulated more precisely, the objection was that Plaintiff's Particulars of Claim contained insufficient allegations to found such a claim in delict, based on pure economic loss.

2.

Plaintiff's Particulars of Claim:

It was alleged that during 2010 the South African National Roads Agency ("SANRAL") and Plaintiff, in terms of a revised tender, entered into a written agreement on 31 January 2011. It was pleaded that the contract comprised certain

volumes of documents which were briefly described. It was also pleaded that for purposes of the action the material terms of the contract were the following:

2.1

The commencement date in respect of the works would be 14 March 2011;

2.2

The contract period would be 27 months;

2.3

The anticipated completion date in respect of the works would be 14 June 2013;

2.4

The contract sum was agreed upon.

The particular road which had to be reconstructed by Plaintiff in terms of this agreement was a national road as defined in the *South African National Road Agency Ltd and National Roads Act 7 of 1998 ("the SANRAL Act")*. Plaintiff further pleaded that during the period 2007 to 2008, Defendant laid an optic fibre cable below the surface of the road. This optic fibre cable was a structure or thing as envisaged by the provisions of s. 48 (1) of the said *SANRAL Act*. It was alleged

that Defendant laid this optic fibre cable without the written permission of SANRAL, alternatively, contrary to written permission given by SANRAL in contravention of the provisions of s. 48 (1) of the said *Act*. It was then alleged that on 15 May 2011, Plaintiff, in his execution of the relevant works, discovered that the optic fibre cable had been laid in a certain manner by Defendant which caused an obstruction, and prevented the Plaintiff from constructing the layer works in execution of the construction required.

3.

In par. 17 of the Particulars of Claim it was stated "the Plaintiff, upon discovery of the obstruction, notified the Defendant thereof in writing, on 19 May 2011". Nothing further was pleaded about this notification, and its terms for present purposes do not form part of the Particulars of Claim.

4.

In par. 18 of the Particulars of Claim the following was stated: "On 20 May 2011, the Plaintiff, in writing, demanded from the Defendant to remove the obstruction by relocating the optic fibre cable to the standard position, alternatively to its correct position outside the road prism". No details of this of this demand were given, and its terms are for present purposes not known, and do not form part of the Particulars of Claim. For instance, one would not know on which terms Defendant was placed in this context, and whether any consequences were put to Defendant should it fail to heed the demand either within a certain period or at all.

5.

Plaintiff continued to plead that Defendant removed this obstruction on 24 June 2012. This particular date was inserted at the hearing of the exception by way of an amendment, the request for such not having been opposed by Defendant's Counsel. It will be noted that the removal of this obstruction occurred about 13 months after

the demand made, and at least some three years after the fibre optic cable had been laid.

6.

Plaintiff then continued to allege that as a result of the obstruction and the removal of the obstruction, it was unable to execute the works in the relevant area from 15 May 2012 to 24 June 2012. This period was referred to as "the delay" period. It will be noted that this "delay" occurred for this period almost one year after the demand made by Plaintiff to remove the obstruction. Plaintiff then alleged that the delay was caused by the Defendant creating the obstruction, and not removing it when it should have, or in the alternative, delaying the removal of the obstruction. It was not pleaded when Defendant ought to have removed the obstruction, or as an alternative, how long it delayed in removing this particular obstruction.

Having regard to the terms of the exception and the nature of Plaintiff's claim, I deem it convenient to quote the following conclusions or contentions pleaded by Plaintiff: "23: In causing the delay, the Defendant, through its employees acting within the course and scope of their employment with the Defendant, acted negligently in the following respects:

23.1 It failed to exercise reasonable care to ensure that the fibre optic cable was located correctly;

23.2 It failed to exercise reasonable care of failing to remove the obstruction timeously, expeditiously and diligently when it should have".

It was not pleaded when the obstruction ought to have been removed timeously, but from the previous allegations made by Plaintiff one knows that it was removed 13 months after the demand referred to by Plaintiff.

Paragraph 24 reads as follows: "Defendant, as owner of the optic fibre cable, alternatively as the custodian of the optic fibre cable, further alternatively as the person responsible for the optic fibre cable, pursuant to the notification and the

demand referred to in paragraphs 17 and 18 above (I underline) owed to the Plaintiff a duty to act carefully and not to cause damages to the Plaintiff ("the duty of care").

It will be noted that Plaintiff's allegations in this context are very specific: the so-called "duty of care" plainly and simply arose as the result of the notification and the demand that I have referred to hereinabove, and which was set out in paragraphs 17 and 18 of the Particulars of Claim.

8.

In paragraph 25 of the Particulars of Claim the following allegation is then made:

"The Defendant wrongfully breached the duty of care by acting negligently as set out in paragraph 23 above, thereby causing damages to the Plaintiff in the form of pure economic loss: ("the damages")".

For purposes of an exception one must assume that the facts pleaded and giving rise to the exception are correct. A particular pleading must also be read as a whole in this context. The annexure of Defendant's objection is plainly and simply that as a matter of law the Plaintiff is not entitled to the relief claimed by it. Negligent causation of pure economic loss is not *prima facie* wrongful in the delictual sense, and does not give rise to liability for damages, unless policy considerations require that the Plaintiff should be recompensed by the Defendant for the loss suffered. A number of decisions of the Supreme Court of Appeal deal with this particular topic, as do a number of the Constitutional Court.

See: *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2)*

SA 150 SCA, Telematrix (Pty) Ltd v Advertising Standards Authority 2006 (1) SA

461 SCA, Le Roux and Others v Dey 2011 (3) SA 274 (CC) and Country Cloud

Trading CC v MEC, Department of Infrastructure Development 2015 (1) SA 1 CC.

Defendant's Counsel submitted that the facts pleaded by the Plaintiff did not give rise to a legal duty on the Defendant to act carefully and not to cause damages to

the Plaintiff. They therefore lacked averments necessary to sustain a cause of action, and it has been generally accepted that the issue of wrongfulness could be decided on exception.

See: *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A)*.

It will be convenient to refer to the *Country Cloud* decision *supra* in the context of Defendant's argument that the facts pleaded by the Plaintiff do not give rise to a legal duty on the Defendant to act carefully, and not to cause damages to the Plaintiff: the general principle is that if conduct is not wrongful, a defendant or potential defendant should not be subjected to a claim for damages notwithstanding that it may have acted negligently. At paragraph 22, Khampepe J put it as follows:

"Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is *prima facie* wrongful. However, 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 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". It is also clear from this judgment that wrongfulness must be positively established and in addition such a claim has been recognised in our law only in a limited category of cases. If such claims are too freely recognised there could be a risk of liability in an indeterminate amount for an indeterminate time to an indeterminate class. The question at the end of the day is the following: would it be reasonable to impose liability under the circumstances, and by "circumstances" in this context I refer to those allegations set out in the Particulars of Claim.

In the *Le Roux* decision *supra* the following was said at paragraph 122: "In the more recent past our Courts have come to recognise ... that in the context of the law of delict:

- a) the criterion for wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be

present – it would be reasonable to impose liability on a defendant for the damages flowing from a specific conduct; and

- b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with reasonableness of the Defendant's conduct [which is part of the element of negligence], but it concerns the reasonableness of imposing liability upon the defendant for the harm resulting from that conduct".

This whole topic was also covered in great detail by the judgment of Brand JA in *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd 2006 (3) SA 138 (SCA)* at paragraphs 10 to 13.

Facts as pleaded:

10.1

According to the Particulars of Claim the Plaintiff entered into a contract with SANRAL on 31 January 2011.

10.2

It did so in accordance with general applicable conditions of contract;

10.3

The commencement date in respect of the works would 14 March 2011 and the anticipated completion date would be 14 June 2013;

10.4

The Defendant laid the relevant optic fibre cable during the period 2007 to 2008;

10.5

Defendant was informed of the obstruction on 19 May 2011 and requested to remove it on 20 May 2011;

14

10.6

Defendant removed the obstruction on 24 June 2012;

10.7

Plaintiff was unable to execute its works in the relevant area from 15 May 2012 to

24 June 2012 which caused the relevant delay relied upon.

11.

What was not pleaded is the following:

11.1

The terms of the demand to remove the obstruction, which demand was given on

20 May 2011;

11.2

What occurred from date of the demand namely 20 May 2011 to the date of the

removal of the obstruction on 24 June 2012;

15

11.3

When the obstruction ought to have been removed;

11.4

What the envisaged consequences would be should such obstruction not be removed by a particular date;

11.5

In which respect Defendant failed to exercise reasonable care to ensure that the fibre optic cable was located correctly some three years prior to Plaintiff entering into the relevant contract with SANRAL.

11.6

What role, if any, SANRAL played, in over-seeing the work done by Defendant, and what Defendant's liability, if any, was for any deficient or negligent acts or omissions.

12.

It is clear from the Particulars of Claim and in particular paragraph 24 thereof that the legal duty (what Plaintiff refers to as the "duty of care") only and solely arose in the present context from Plaintiff's notification of the obstruction on 19 May 2011 and its demand, in unknown terms, to remove the obstruction. The negligence relied on occurred some three years prior to the demand on the one hand and on the other by Defendant failing to remove the obstruction timeously. The details referred to in the previous paragraph were not pleaded. The notification and demand, according to the Particulars of claim, are therefore the sole origin of the alleged legal duty.

12.1

Apart from the allegations not pleaded, the following must be kept in mind: there is no relationship whatsoever between the Plaintiff and Defendant, be it on a contractual basis or otherwise;

12.2

It was not pleaded why a simple notification, and a demand with unknown terms, would entitle Plaintiff to create a basis for a legal duty, the breach of which would entitle it to damages;

12.3

Plaintiff was in a contractual relationship with SANRAL in terms of generally accepted conditions and terms, but it was not pleaded that such terms did not include any provisions based on a delay or risks in that context.

13.

The question therefore arises in the context of all of the above whether it would be reasonable to impose a liability on the Defendant for the harm resulting from the conduct relied upon? In my view the answer must be an emphatic no. In the absence of factual allegations that would underpin the opinion of the community that justice demands that liability be imposed, I cannot hold that a notification and a

demand such as in the given context, would without further ado, result in delictual liability. Society would not regard such imposition of liability as reasonable. I do not wish to repeat the relevant facts, but the relevant time periods are of importance as well as the fact that no details as to the notification and demand whatsoever were pleaded. I am also of the view that should a mere notification and demand such as in the present case be sufficient, it could open the door for litigation in so many other comparable instances that the consequences would be unimaginable. A mere unspecified demand can in my view not create a legal duty such as is contended for in the present case. The legal convictions of the community would not regard Defendant's conduct in the present context as wrongful. One also cannot gather from the Particulars of Claim in any event what the nature and extent of such alleged duty was or would have been. One does not know what Defendant's alleged negligence consisted of. One has no explanation for the time delays. I have also had regard to the provisions of s. 22 of the *Electronic Communications Act 36 of 2005* and the decision of *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC 2012 (6) SA 638 SCA* and *Tshwane City v Link Africa and Others 2015 (6) SA*

440 (CC) at par. 113, in the context of whether Defendant had required the consent of SANRAL in this particular instance to lay the fibre optic cable, although this is certainly not decisive of the issue before me.

14.

Even if I accept that Defendant was negligent in that it laid the cable without such consent, the other allegations relied upon by Plaintiff in the Particulars of Claim do not in my view establish a cause of action on the basis that Defendant owed Plaintiff a legal duty and that its breach thereof was wrongful. I must therefore uphold Defendant's contention that the Particulars of Claim read as a whole do not disclose a cause of action. As far as the question of costs is concerned Plaintiff's Counsel contended that Defendant ought to have taken the exception in the period provided for by the ***Rules of Court***, or at least in any event not at the day of the trial. In general terms this is so, and in this instance there is insufficient reason to deviate

from this general guide-line. A Court in any event has a discretion in the context of cost orders.

The following order is therefore made:

1. **Plaintiff's Particulars of Claim are set aside;**
2. **Plaintiff is given leave within 30 days from the date of this order to amend the Particulars of Claim if so advised;**
3. **Plaintiff is to pay the costs of this action up to the date when Defendant ought to have taken the exception in terms of the Rules of Court. The costs incurred thereafter are to be paid by Defendant.**



JUDGE H.J. FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 29896/14

Counsel for the Plaintiff:

Adv G. P. van Rhyn

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Counsel for the Defendant:

Adv M. Seape

Instructed by: Mahlangu Attorneys

Date of Hearing: 8 & 9 March 2016

Date of Judgment: 24 March 2016 at 10:00