

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

8/4/2016

CASE NO: 74727/15

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

08/4/2016
DATE

SIGNATURE

In the matter between:-

TERENCE MNCENDISI NOMBEMBE 1st Plaintiff / 1st Respondent

NOKWANDA PETRONELLA NOMBEMBE 2nd Plaintiff / 2nd Respondent

and

MATTHYS MARTINUS VAN MOLENDORFF 1st Defendant

JACOBUS CORNELIUS VAN TONDER 2nd Defendant / Excipient

JUDGMENT

MADIBA (A J)

INTRODUCTION

1.

The Plaintiffs instituted an action against 1st and 2nd Defendants.
The 2nd Respondent (excipient) excepted to the Plaintiffs' particulars of claim on the basis that they lack averments necessary to sustain a cause of action against the excipients. The Plaintiffs are challenging the exception.

2.

Background

The Plaintiffs entered into a sale agreement with the 1st Respondent involving property situated at 2142 Coinwell drive, Irene Farm, Centurion during 24 January 2007.

The property was purchased with a residential building on it which building was constructed by the 1st Respondent. The 1st Respondent engaged the services of the 2nd Respondent a civil engineer to carry out the design and /or to overseeing of the constructions of the said building.

During April 2011 the Plaintiffs noticed several cracks appearing on the interior walls, the boundary wall, the stairwell and the driveway.

The damage to the residential building, the foundations, the walls and floors of the said building was alleged to have been caused by the under design and / or defective constructions of the building.

3.

The Plaintiffs alleged that the excipient had a legal duty to the Plaintiffs as the first purchasers of the residential building to carry out the design and / or overseeing of the constructions of the building with a degree of skill and care and with due diligence required from a civil engineer.

4.

It is alleged by the Plaintiffs that the excipient omitted to carry out the design and / or overseeing of the construction of the building with due diligence and failed to exercise the required degree of care and skill which a person in his position ought to have exercised. Consequently the Plaintiffs allegedly suffered a loss in the sum of R1 203 451.76 (one million two hundred and three thousand four hundred and fifty one rand seventy six cents) as a result of the excipient's failure to oversee the constructions of the building and carrying out the design thereof.

The Plaintiff further alleged that the excipient foresaw or ought to reasonably have foreseen the likelihood of the damage to the building as a result of his breach but failed to take any steps to avoid such damage.

5.

The claim by the Plaintiffs for damage is as a result of pure economic loss based on the breach of an alleged legal duty by the excipient.

The excipient contends that the Plaintiffs failed to plead facts in support of the legal duty so alleged.

The Plaintiffs do not allege that there is a contractual relationship between them and the excipient. The only contractual relationship existing to which the excipient was party to, is the contract entered into by the excipient and the 1st Respondent.

It is the excipient's contention that the Plaintiffs failed to establish facts or basis of negligence in support of the legal conclusion of negligence.

6.

THE LAW RELATING TO EXCEPTIONS

The position of our law is that whenever an exception is taken to any pleading, the grounds upon which the exception is founded shall be clearly and concisely stated. The court must look at the pleading excepted to as it stands, no facts outside those stated in the pleading can be brought into issue except in the case of inconsistency.

It follows from the particulars of claim that there is indeed no contractual

relationship between the excipient and the Plaintiffs. The only contract existing is between the Plaintiff and the 1st Respondent.

7.

LEGAL DUTY

The question to be asked is whether the excipient had a legal duty towards the Plaintiffs.

8.

For the Plaintiff to be successful, he has to allege sufficient facts to constitute a cause of action for damages in delict.

9.

Since the Plaintiffs' claim is founded on the principles of the extended Acquilian action, the Plaintiff must allege and prove that the Respondent has been guilty of conduct which is both wrongful and culpable and which caused patrimonial damage to the Plaintiff. See **Lillicrap Pilkington Bros 1985 (1) SA 475 A at 496T and 497 (c)**

It is trite that a Plaintiff must properly and fully plead all the facts relied upon in support of the conclusion of wrongfulness. The mere allegation of a legal duty is not sufficient. See **Knop v. Johannesburg City Council 1995 (2) SA 1 AD**. Careful reading of the particulars of claim do not reveal any facts talking to the alleged legal duty on the part of the excipient.

The Plaintiff contended that the excipient omitted to carry out the design and / or overseeing of the construction with the necessary skill and diligence.

The court in **BOE Bank Limited v. Rics 2002 (2) SA 39 SCA at paragraphs 12 and 13** stated that:-

"Similarly loss caused by an omission can be actionable where there is a legal duty to act positively. But where the conduct complaining of takes the form of an omission, such conduct is prima facie lawful"

I am of the view that the Plaintiffs failed to establish a legal duty on the part of the excipient.

10.

The court must be persuaded that the legal conviction of the community demand that the conduct ought to be regarded as unlawful.

Put another way, the court has to be persuaded that the Defendant owes a legal duty and not only a moral duty to the Plaintiff.

I am therefore not persuaded that the conduct of the excipient can be regarded as unlawful as per the legal conviction of the community.

11.

The Plaintiffs had a contractual relationship with the 1st Respondent and not the excipient. The rights and obligations of the excipient are governed by the contract between the excipient and the 1st Respondent and not by the Plaintiffs. It could not have been foreseen that the Plaintiffs' would be the first occupants of the house built by the 1st Respondent with the excipient overseeing the construction thereof.

12.

CLAIM BEING FOR PURE ECONOMIC LOSS

As the loss suffered by the Plaintiffs' is not as a result of damage to their persons but due to the negligence act, their claim is for pure economic loss.

The Plaintiffs' ought to allege wrongfulness and plead sufficient facts to constitute a cause of action for a delictual claim not to be excipiable.

In **Telematrix (Pty) Ltd v. Advertising Standard Authority SA 2006 (1) SA 461 SAC at paragraph 13**, the court held as follows:-

"When dealing with negligent causation of pure economic loss, it is well to remember that the act or omission is not prima facie wrongful and more is needed".

13.

The Plaintiff relying on a claim for pure economic loss must allege and plead facts justifying the legal conclusion that it was wrongful on the part of the Defendant to cause such a loss. See **Fourway Haulage SA Pty Ltd .v. SA National Roads Agency 2009 (2) SCA 150**. It will be of no assistance to the Plaintiff to merely allege in his particulars of claim wrongfulness and that the Defendant had a legal duty not to cause such harm or loss.

20.


The court warned against imposing a delictual liability in instances where there is no contractual relationship between the parties due to the danger of indeterminate liability. See **Country Cloud Trading .v. Department of Infrastructure Development 2014 (2) SA 214 SCA.**

21.

Having considered the particulars of claim in this matter, I fail to find allegations and facts justifying the legal conclusion of wrongfulness.
The Plaintiffs' particulars of claim fail to disclose a cause of action in the circumstances.

Accordingly the following order is made:-

- i. The second Defendant / excipient's exception is upheld.
- ii. The claim against the second Defendant is struck out.
- iii. Plaintiffs to pay the costs.



S S MADIBA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Heard on the	30 NOVEMBER 2015
DATE OF JUDGMENT	08 APRIL 2016
PLAINTIFFS COUNSEL	ADV. R.A FODEN
PLAINTIFFS ATTORNEYS	EDWARD NATHAN SONNERBURGS INC.
2 ND DEFENDANT'S COUNSEL	ADV. GF HEYNS
2 ND DEFENDANT'S ATTORNEYS	GILDENHUYS MALATJI INC.