IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

02 March 2022

DATE

[redacted]

SIGNATURE

Case Number: 41424/20

In the matter between:

AL MAYYA INTERNATIONAL LIMITED (BVI) **PLAINTIFF**

And

DDP VALUERS (PROPRIETARY) LIMITED **DEFENDANT**

JUDGMENT IN RESPECT OF LEAVE TO APPEAL

INTRODUCTION

1. On 21 September 2021, I gave judgment in favour of DDP Valuers (Proprietary) Limited ("DDP Valuers") upholding its exception against the particulars of claim in action proceedings that Al Mayya International Limited (BVI) ("Al Mayya") brought against them.[1]

2. In the judgment, at paragraphs 43 to 49, I upheld DDP Valuers' exception against the particulars of claim in action proceedings that Al Mayya brought against them.

APPLICATION FOR LEAVE TO APPEAL

3. On 05 October 2021, Al Mayya brought an application for leave to appeal my judgment of 21 September 2021.[2]

4. The application for leave to appeal was heard on Monday, 14 February 2022. The application was initially set down for hearing on Wednesday, 09 February 2022. I could not hear the matter as scheduled due to the fact that my regular professional assistant did not properly diarise the matter. This was an unfortunate oversight on both myself and my professional assistant. During the hearing of this application I apologised to the parties.

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[1] Judgment. Caseline 017 – 1 to 017 – 23.
[2] Application for leave to appeal. Caseline 018 – 1 to 018 – 6.

THE TEST FOR LEAVE TO APPEAL

5. The test is stated at Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013. The test in terms of Section 17 of the Superior Courts Act is whether the Court hearing the application for leave to appeal is of the opinion that the appeal will have a reasonable prospect of success.

LEGAL SUBMISSIONS MADE BY COUNSEL FOR BOTH PARTIES

MR WOODLAND'S SUBMISSION

6. Mr Woodland's submission referred me to paragraph 43 of my judgment and the case of Steinhoff. He indicated that DDP was liable to Al Mayya on the basis of a special relationship created by the facts of the case. He argued that DDP Valuers was required to exercise due care and proper valuation. That Al Mayya's case is not based on a contractual relationship but a delictual claim and he referred me to paragraph 167 of the Steinhoff case.

7. He also referred me to paragraph 29 and 30 of the particulars of claim where foreseeability is dealt with.

8. He stated that it was properly pleaded that DDP Valuers knew that Al Mayya will rely on the property valuation. That Al Mayya will invest a sum of R100 million pursuant to the valuation. He emphasised that what is pleaded at paragraph 29 and 30 is sufficient to determine the exception on the basis of the Steinhoff case. He further stated that paragraphs 29 and 30 bring the claim against DDP Valuers within the ambit of Steinhoff.

9. In relation to wrongfulness, he stated that the facts as pleaded are cogently and properly stated. He also stated that the knowledge that is expected of DDP Valuers is pertinently pleaded and that there are sufficient facts necessary in the particulars of claim to prove the knowledge. He also stated that in the judgment there are no findings of embarrassment. He referred me to the judgment of Jowell v Bramwell-Jones 2000 (3) SA 274 (SCA) [2000] 2 All SA 161 (A). He stated that the challenge is on paragraph 43 of my judgment.

10. He then indicated that for the purpose of judicial clarity, it would be appropriate for this matter to be referred to the SCA as there is no law that has dealt with valuers in South Africa and that there are facts and policy issues that will have to be ventilated by the SCA.

11. He also indicated that the issue is not about diminution of shares. The issue is that Al Mayya invested R100 million which was lost. He also indicated that the R105 million has no connection to the R28 million.

12. He referred me to paragraph 24 of the particulars of claim where the valuation was dealt with. He referred me to the dates of 17 September 2012 as the date of valuation. Whereas twelve months earlier on 9 September 2011 the same property was valued at R28 million.

13. He also indicated that evidence will determine whether actualisation of that is correct. He stated that the amount R105 million is a distraction. He submitted that another court would come to a different finding. He then concluded by asking for costs to be in the costs of the appeal.

MR SUBEL'S SUBMISSION

14. Mr Subel submitted that success of one ground would be sufficient to uphold the exception. He indicated that there are no prospects of the appeal succeeding. He indicated that if Al Mayya does not overcome other grounds, they should not succeed in their appeal.

15. He also indicated that Al Mayya was given opportunities to amend their pleadings, however they have not taken that challenge.

16. He indicated that there are serious gaping holes in the case of Al Mayya. He indicated that there was no case made out for the loss which was caused by the winding up of Value of Kings in 2018. It is also not clear what the cause of the loss is or what led to the Value of Kings losing its value.

17. He also submitted that there is no link between acts of defendant and the windup. He also indicated that this is a situation where there is a hopeless cause of action. He also indicated that there was no duty of care that the defendant owed to the plaintiff. He indicated that in effect the plaintiff was merely making allegations as per conclusion.

18. He also submitted that there was no contractual nexus between plaintiff and defendant. He also indicated that it is foreseeable that someone else might suffer a loss but there is a limit that should be applied to the extent that such a loss can be recovered.

19. He also indicated that the plaintiff was impermissibly seeking to introduce a cause of action where there is no contract between the plaintiff and the defendant.

20. On pure economic loss, he indicated that this is an import through a back door where there is no contractual basis. He indicated that the starting point in a matter like this is contractual liability.

21. He indicated that the defendant should not be compelled to face liability to parties not connected to this contract. He argued that the parties connected to the contract such as Clyde & Co. may have a cause of action. Al Mayya on the other hand is far removed from the cause of action.

22. He indicated that the valuation was determined by the contract that was the basis on which a mandate was given to the valuers to conduct the valuation. He further indicated that if any entity has a claim, it would be the parties which are in close proximity to the matter such as Value of Kings and T-Mots.

23. There is no spectra of far out foreseeability liability in this instance.

24. He then indicated that we have the following:

24.1. If anyone would have a claim, first it would be Clyde & Co, secondly it will be the Value of Kings which bought the farm from T-Mots.

24.2. He then went on to indicate that the test that was stated by Judge Unterhalter should be applied. The test stated that a claim must fall within the class of persons where legal obligations are foreseeable. In this case the class will include the execution of the mandate to client. He referred to paragraph 18.1 of my judgment which paints the manner in which the transactions happened, how they changed hands, that the purchase was by T-Mots followed by T-Mots selling the property to Value of the Kings for R180 million. He indicated that there is no legal

basis laid as a fact for under valuation. He also indicated that the commercial transaction should not automatically be equivalent to the value of the property. He then indicated that there is no causal link between valuation and winding up. There is no link between the valuation and the winding up of Value of Kings.

25. He indicated that the valuation was based on contract and that there is no basis to sneak through the back door a delictual claim. He further indicated that the plaintiff suffered a loss as a result of shares in Value of Kings becoming useless. That there is no link between the loss in shares in the Value of Kings and the valuation report.

26. He indicated that the duty of care is central in this case. There are no reasonable prospects of a duty of care. There is no basis to link the loss suffered at all to the valuation.

27. He indicated that essentially, the defendant is unable to plead as different parties have been brought to the pleadings. However, the case in regard to these different parties is not clearly stated. That the plaintiff brought these different parties and therefore their role is substantial in the matter.

28. He indicated that the valuation took place on 02 May 2012. Al Mayya subscribed to the shares on 27 September 2012. The winding up of Value of the Kings happened on 31 October 2018. The winding up was more than six years after the valuation report was finalised.

29. He indicated again that the winding up was not caused by the valuation report. The loss was as a result of the investment by Al Mayya in Value of the Kings becoming worthless resulting in the company being wound up.

30. Accordingly, there is no delictual cause of action.

31. He dealt with the case Telematrix as follows:

31.1. That paragraph 22 was clear that there is a need to weed out cases without merit;

31.2. That paragraph 30 dealt with wrongfulness;

31.3. That in paragraph 23 I set out correctly the law;

31.4. That at paragraph 38 it is clear that liability is linked to a particular class of shareholders. He posed the question as to how possible is it that defendant can be flustered with responsibility in this instance. He then prayed for the application to be dismissed.

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32. Woodland in reply, indicated that Lillicrap v Wassenaar case is applicable as it does not limit the litigant to a class of people who were directly affected. He indicated that foreseeability was properly dealt with in paragraph 29 and 30 of the particulars of claim. That reliance on contractual relationship is a distraction. He indicated that the damages are not necessarily linked to the liquidation of the Value of Kings. That the loss of R100 million is based on the wrong valuation of which the plaintiff would not have paid for, had it known the real value.

33. He referred me to paragraph 35 of the particulars of claim. He again indicated that the loss happened when the investment happened on 28 November 2012. That the loss emanates from the payment of the amount of R100 million. He then again referred me to paragraph 24 of the particulars of claim where it is

alleged that the R28 million is the value of the land. He further stated, however that that evidence may turn out to be wrong but that it is the basis of Al Mayya's case. He again referred me to paragraph 32.4 and to the case of Jowell v Bramwell-Jones which states that one has to look at the pleadings in context. He again reiterated that the market value of the purchased farm was R28.9 million. He stated that by valuing the market value at R105 million, DDP Valuers caused the loss to the plaintiff.

34. Mr Subel brought to my attention paragraph 28 of the particulars of claim. This according to his argument is the real basis of the cause of action (which is disguised as a delictual claim). In reality the cause of action is that Al Mayya invested in the Valley of the Kings which was placed in business rescue on 23 August 2016 by the High Court and was wound up on 31 October 2018. It was wound up because it was both factual and commercially insolvent. The Plaintiff's shares in the Valley of the Kings are now worthless.

JOWELL v BRAMWELL-JONES[3]

35. During the argument, Mr Hoodward referred me to the case of Jowell v Bramwell-Jones and others.

36. This case dealt with fiduciary duty that Mrs Jowell who was appointed a trustee in the Will of her deceased husband, Dr Jowell owed to the capital beneficiaries. The issue was whether Mrs Jowell owed a fiduciary duty to the capital beneficiaries (her own children), the heirs of the estate of the late Dr Jowell. The case also dealt with whether the appellant can bring legal action

[3] 2000 (3) SA 274 (SCA) [2000] 2 All SA 161 (A).

against Mrs Jowell and the financial and legal advisors for a prospective loss which will be determined after the death of Mrs Jowell.

37. At paragraph 22, the Court stated the following:

> *"The element of damage or loss is fundamental to the Aquilian action and the right of action is incomplete until damage is caused to the plaintiff by reason of the defendant's wrongful conduct (see Oslo Land Co Ltd v The Union Government 1938 AD 584 at 590; Evins v Shield Insurance Co Ltd 1980 (2) SA 814 SA (A) at 838 H - 839 C). This applies no less to claims arising from pure economic loss than it does to claims arising from bodily injury or damage to property (see Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) at 911 B - D). Whether a plaintiff has suffered damage or not is a fact which, like any other element of his cause of action and subject to what is said below, must be established on a balance of probabilities. Once the damage or loss is established a court will do its best to quantify that loss even if this involves a degree of guesswork. (See Turkstra Ltd v Richards 1926 TPD 276 at 282 - 283.) However, a distinction must be drawn between accrued or past damage or loss on the one hand and prospective damage or loss on the other, the latter being damage or loss which has not yet materialised. Delictual actions which include claims for prospective loss are not uncommon, particularly in the case of actions arising out of bodily injuries where the prospective loss is inevitably accompanied by some accrued or past loss. When dealing with such claims, however, the courts have not required the plaintiff to prove on a preponderance of probability that such a loss will occur or arise; instead they have made a contingency allowance for the possibility of the loss. (See Blyth v Van den Heever 1980 (1) SA 191 (A) at 225 E - 226B where Corbett JA cites with approval a passage in the judgment of Colman J in Burger v Union National South British Insurance Company 1975 (4) SA 72 (W) at 75 D - G.) The underlying reason for such an approach is probably the "once and for all" rule which compels a plaintiff who has suffered accrued or past*

damage to institute action in order to avoid the running of prescription; in other words he is precluded from waiting to see if the prospective loss will occur. In Coetzee v S A Railways & Harbours 1933 CPD 565 it was held that a person cannot sue solely for prospective damages. Gardiner JP, with whom Watermeyer J concurred, expressed himself at 576 as follows:

"The cases, as far as I have ascertained, go only to this extent, that if a person sues for accrued damages, he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future. Prospective damages may be awarded as ancillary to accrued damages, but they have no separate, independent force as ground of action."

This approach has been the subject of some criticism. Boberg , The Law of Delict at 488, contends that there is no reason why a person cannot sue solely for prospective loss provided he can establish the future loss on a balance of probabilities, although not necessarily the quantum of his claim. (See also Corbett The Quantum of Damages Vol 1 4 ed (Gauntlett) at 9 where the same criticism is made.) The advantage of the approach adopted in the Coetzee case is of course the certainty it provides. If an action for loss which is prospective is completed only when the loss actually occurs, prescription will not commence to run until that date and a plaintiff will generally be in a position to quantify his claim. To the extent there may be additional prospective loss the court will make a contingency allowance for it. On the other hand, if the completion of an action for prospective loss entitling a person to sue is to depend not upon the loss occurring but upon whether what will happen in the future can be established on a balance of probabilities, it seems to me that the inevitable uncertainty associated with such an approach is likely to prove impractical and result in hardship to a plaintiff particularly in so far as the running of prescription is concerned. However, it is unnecessary to finally decide the point. As indicated above, the allegations

contained in the particulars of claim are incapable of supporting evidence that would discharge the burden of proving on a balance of probabilities that there will be a loss on the termination of the trust, nor could such allegations reasonably have been made. Moreover, the argument advanced by counsel on both sides proceeded on the premise that some form of past or accrued loss was an essential element of the appellant's cause of action."

38. At paragraph 23, the Court stated the following:

"Counsel for the appellant submitted that although Mrs Jowell was not prohibited from selling the Trencor shares, the particular circumstances in which she disposed of them amounted to a breach of trust which deprived the appellant of the opportunity of participating in the fortunes of those shares and in this sense caused the appellant an immediate loss. That being so, as I understood the argument, the appellant's cause of action would have been completed upon the implementation of the scheme and as far as the future uncertain events were concerned the trial Court would be entitled to apply a contingency factor when determining the quantum of the appellant's damages. In support of this argument counsel placed particular reliance on the English cases of Chaplin v Hicks [1911] 2 K B 786 (CA) and Forster v Outred & Co [1982] 2 All ER 753 (CA). I think neither is of assistance. In the former, the plaintiff as a result of a breach of contract had been deprived of the chance of winning a prize. It was held that the loss of the chance constituted an immediate loss on which, although with difficulty, a monetary value could be placed. In the Forster case the defendants alleged negligence had resulted in the execution of a mortgage bond over the plaintiff's property. It was held that the execution of the mortgage bond had resulted in a quantifiable loss which served to complete her cause of action even although the quantum of damages would depend on subsequent events. On the particular facts of each case, therefore, the court found that there had been some past or accrued

loss. The facts are distinguishable from the present case, as are the facts in Sasfin (Pty) Ltd v Jessop and Another 1997 (1) SA 675 (W) on which appellant's counsel similarly sought to rely."

39. I have quoted the case of Jowell in detail so as to demonstrate that the facts in that case do not necessarily assist the appellant in this matter. This is very important as stated at page 288 of Jowell judgment, paragraphs D and E where it is stated a case must be determined on the particular facts of each case. The Court found that there have been some past or accrued loss.

40. Accordingly, the facts in Jowell do not in any way assist the case of the appellant. If one has regard to the case of Jowell, this is a case which dealt with a trustee who was appointed in terms of the Will of her late husband. It is alleged by one of her sons who is a capital beneficiary, who brought the action proceedings that she was in breach of her fiduciary duty in selling the shares in one of the companies in which the late Dr Jowell held shares.

41. The trustee, Mrs Jowell, also had 25% in those shares. Mrs Jowell was not prohibited from selling the Trencor shares.

42. This case in fact falls within a class of persons that Unterhalter J dealt with as quoted in paragraph 38 of my judgment.

THE COURT'S ASSESSMENT OF LEGAL SUBMISSIONS RAISED BY COUNSEL IN THE MATTER

43. I agree with Mr Subel's argument and my approach in this case remains the same as was the case during the hearing on exception. This is a case where

the appellant is attempting to sneak a delictual claim in circumstances where this case relates to contractual obligations between DDP Valuers and Clyde & Co. Al Mayya does not fall within a class of persons that should expect a legal duty of care from DDP Valuers.

44. The real cause of action which is disguised as a delictual action is found in paragraph 28 of the particulars of claim. Al Mayya suffered a loss after investing in the Valley of the Kings. The value of the investment became worthless due to the Valley of the Kings being wound up as a result of being factually and commercially insolvent.

45. There is no connection between the loss incurred by Al Mayya when it invested in Valley of the Kings and the valuation by DDP Valuers. The valuation by DDP Valuers six years earlier and the winding up of the Valley of the Kings are not remotely connected. There is no causal link between the valuation by DDP Valuers and the winding up of the Valley of the Kings into which Al Mayya outlaid its investment.

CONCLUSION

46. Accordingly, the application for leave to appeal is dismissed with costs, including costs of Senior Counsel.

TD SENEKE AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

Appearances

For appellant: Adv G.W. Woodland SC & Adv C Cutler

Instructed by Gillan & Veldhuizen Inc

c/o Jacobson & Levy Inc

215 Orient Street

Arcadia, Pretoria.

For respondent: Adv A Subel SC

Instructed by Yammin Hammond Inc

c/o PDR Attorneys Inc

213 Richard Street

Hatfield, Pretoria.