REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 10146/2010

In the matter between:

MERLIN STUART STOLS Plaintiff

and

GARLICKE & BOUSFIELD INC. Defendant / Respondent

and

PKF (DURBAN) INCORPORATED 1st Third Party / Excipient
PATRICK ROBERT 2nd Third Party
NERAK FINANCIAL SERVICES (PTY) LTD 3rd Third Party

CASE NO: 10142/10

In the matter between:

DAVID JAFFIT Plaintiff

and

GARLICKE & BOUSFIELD INC. Defendant / Respondent

and

PKF (DURBAN) INCORPORATED 1st Third Party / Excipient
PATRICK ROBERT 2nd Third Party
NERAK FINANCIAL SERVICES (PTY) LTD 3rd Third Party

CASE NO: 10144/2010

In the matter between:

ERROLL JAMES WATT Plaintiff

and

GARLICKE & BOUSFIELD INC. Defendant / Respondent

and

PKF (DURBAN) INCORPORATED 1st Third Party / Excipient
PATRICK ROBERT 2nd Third Party
NERAK FINANCIAL SERVICES (PTY) LTD 3rd Third Party

CASE NO: 10145/2010

In the matter between:

NEIL DOUGLAS RODSETH Plaintiff

and

GARLICKE & BOUSFIELD INC. Defendant / Respondent

and

PKF (DURBAN) INCORPORATED 1st Third Party / Excipient
PATRICK ROBERT 2nd Third Party
NERAK FINANCIAL SERVICES (PTY) LTD 3rd Third Party

CASE NO: 10186/2010

In the matter between:

TOWER BRIDGE SOUTH AFRICA (PTY) LIMITED Plaintiff

and

GARLICKE & BOUSFIELD INC. Defendant / Respondent

and

PKF (DURBAN) INCORPORATED 1st Third Party / Excipient
PATRICK ROBERT 2nd Third Party
NERAK FINANCIAL SERVICES (PTY) LTD 3rd Third Party

CASE NO: 858/2011

In the matter between:

DYCOMBER (PTY) LTD Plaintiff

and

GARLICKE & BOUSFIELD INC. Defendant / Respondent

and

PKF (DURBAN) INCORPORATED 1st Third Party / Excipient
PATRICK ROBERT 2nd Third Party
NERAK FINANCIAL SERVICES (PTY) LTD 3rd Third Party

CASE NO: 1340/2011

In the matter between:

COTTON KING MANUFACTURING (PTY) LTD Plaintiff

and

GARLICKE & BOUSFIELD INC. Defendant / Respondent

and

PKF (DURBAN) INCORPORATED 1st Third Party / Excipient
PATRICK ROBERT 2nd Third Party
NERAK FINANCIAL SERVICES (PTY) LTD 3rd Third Party

JUDGMENT

GORVEN J

1]In these matters, the excipient is the first third party which I will refer to as the third party. The defendant is the respondent and will be referred to as the defendant. These matters were argued together and it was agreed

that they should be dealt with on the same argument without any distinctions. I shall use the pleadings in the Stols matter in order to deal with the issues. The averments in the pleadings are identical except for the amount invested by each plaintiff and whether all or only part of it was at some stage deposited into the defendant's trust banking account.

2]The background to the exception is as follows. The plaintiff sues the defendant on the basis that a contract of deposit was concluded with the defendant. In terms of this contract, the plaintiff deposited money with the defendant. This was to be repaid with interest at a specified date. It is alleged that one Cowan, who was admittedly at the time an executive consultant of the defendant, was authorised to represent the defendant and did represent the defendant in this contract. A failure to repay is alleged and repayment claimed. The defendant pleads to the particulars of claim, in that part which bears on the exception, as follows:

'2. The Defendant denies each allegation in paragraph 3 of the Particulars of Claim save that the Defendant admits that Colin Bernard Cowan was an executive consultant of the Defendant and a practising attorney and that the Plaintiff caused an amount of R2 million to be paid into the Defendant's trust account on 13 October 2010 but

2.1 The Defendant specifically denies that the said Cowan was authorised to enter into any such agreement as alleged:

2.2 Further, the Defendant denies that the said Cowan entered into any such agreement as alleged for the purposes or in the interests of the Defendant or for any purpose other than his own dishonest purpose.

2.3 The Defendant denies that the amount of R2 million was properly paid into the Defendant's trust bank account in that the said amount was not entrusted to the Defendant or received by the Defendant on account of the Plaintiff.'

The plaintiff replicated to the effect that, if it is found that Cowan was not authorised to represent the defendant, the defendant is estopped from

denying such authority. Two weeks after delivering the plea, the defendant issued the third party notice to which exception has been taken.

3]The annexure to the third party notice refers to the plea. It indicates that one of the grounds of the defence is that Cowan was not authorised to act, or to make representations that he was acting, on behalf of the defendant so as to bind the defendant in respect of the transactions sued upon. The claim against the third party is predicated on it being found that Cowan did not have authority to represent the defendant and further on the defendant nevertheless being estopped from denying the authority of Cowan. This is clear from the third party notice and, after the defendant had confirmed this in argument, the third party accepted that this was the position.

4]It will be necessary to set out in full the relevant paragraphs of the annexure to the third party notice:

'9. From the year 2002 Cowan was an executive consultant of the Defendant and conducted operations as hereinafter set forth which he frequently represented to parties thereto were conducted on behalf of and so as to bind the Defendant.

10. The defendant denies that the transactions were so authorised or conducted and further denies that the defendant is bound in respect of any of the said transactions.

11. If contrary to the said denials it be held that the defendant is so bound the defendant will suffer loss in the amount for which it is held so liable in that the defendant will not be able to recover in respect of any such amount any amount from the said Cowan or his estate.

12. While he was an executive consultant of the defendant and until his death in November 2010 Cowan conducted operations which involved the receipt of and disbursement of money received from persons on the basis that Cowan would invest or otherwise deal with the money so paid by those persons and in due course pay to or to the order of those persons the

proceeds of any such investment or dealing.

13. The said transactions formed no part of Cowan's practice with the defendant as executive consultant and were not authorised by or known to the defendant.

14. The transactions relied on by the plaintiff are among the said transactions.

15. From the year 2006 the third party enabled Cowan to cause to be received into and paid out of various bank accounts operated by or on behalf of the third party funds obtained by Cowan from his operations as hereinbefore referred to.

16. The said bank accounts were as follows:

    1. DS&T Services account from October 2006 to March 2007.
    2. PKF Agency account from July 2007 to November 2007.
    3. Royal Fern Investments 9 account from October 2007 to September 2008.
    4. DS&T Nominees account from February 2009 to October 2010.
    5. Rodlane Trading & Investment account a dedicated corporate saver account in October and November 2010.

17. If the defendant had been aware of the operation of the said accounts in the manner in which they were operated the defendant would immediately have taken steps to ensure that the defendant would not be bound by any of the transactions entered into by Cowan.

18. The said accounts were all operated on behalf of the third party by one McHardy a director of PKF Durban Incorporated.

19. Any loss suffered by the defendant as hereinbefore referred to were suffered because the defendant had no knowledge of Cowan's said dealings and operations. If the defendant had been informed of Cowan's operation with regard to the said accounts the defendant would not have suffered any loss or damage in respect of transactions after the time the defendant should reasonably have been informed of the fact that Cowan was causing the said accounts to be so operated.

20. By reason of the facts set forth in the particulars hereto the third party was under a legal duty to inform the defendant of the fact that Cowan was causing the said accounts to be so operated.

    1. The third party, and in particular the said McHardy, at all times

knew that Cowan was an executive consultant of the defendant.

2. The third party, and in particular the said McHardy, further knew that Cowan was causing the said accounts to be so operated allegedly on behalf of the defendant.

3. The said McHardy was informed by Cowan and believed that Cowan was acting on behalf of the defendant in the course of the provision by the defendant of bridging finance for clients of the defendant.

4. The third party well knew or ought to have known that the manner of conducting in the said accounts was not one consistent with there being conducted for the purpose for which Cowan had stated they were being conducted.

   (i) Amounts provided for the said purpose would normally have been paid into and out of the defendant's trust account.

   (ii) Cowan specifically stated that he did not wish the amounts to go through the defendant's trust account.

   (iii) If the amounts had been dealt with through the defendant's trust account in a proper manner the defendant would have become aware of Cowan's operations and the details of them.

   (iv) No information which should have been required by the third party as an accountable institution under the Financial Intelligence Centre Act No. 38 of 2001 was ever obtained by the third party in accordance with section 21 of that Act as it should have been.

   (v) Requests to McHardy that amounts be withdrawn from the said accounts were conveyed either orally or by E-mail or by SMS and never by written signed authority.

   (vi) All transactions were required to be performed with extreme urgency.

   (vii) On occasions the said accounts were overdrawn.

5. The third parties especially with the knowledge that they would have as accountants and financial advisers were or should have

been aware that if the accounts were conducted irregularly ostensibly on behalf of the defendant it might reasonably be the position that the defendant would become liable for any loss occasioned by the accounts being irregularly conducted.

21. In the premises the third party was under a duty to take reasonable steps to inform the defendant of the fact that Cowan was causing the said accounts to be conducted in the manner aforesaid.

22. Although there was no difficulty in the third party so informing the defendant the third party negligently failed to take any steps so to inform the defendant.

23. In the premises if the defendant is liable to the plaintiff or any claimant aforesaid the third party is liable to pay to the defendant any loss suffered by the defendant, including any amount payable, whether as damages, interest costs or otherwise whatsoever by reason of the said negligence of the third party.'

5]The exception is based on what are called four complaints concerning the annexure to the third party notice. I will deal with them in a different order to that in which they appear in the exception. The first is to the effect that the defendant avers that, notwithstanding the absence of authority on the part of Cowan, the defendant may be held liable but that the plaintiff has not replicated an estoppel. The second is that the question of Cowan's authority does not arise in the defendant's claim against the third party. The third is that it is vague and embarrassing because the third party notice is based on a lack of knowledge on the part of the defendant that Cowan was conducting himself in such a fashion whereas the defendant admits in its plea that moneys were deposited into its trust banking account. The fourth is that the facts alleged by the defendant are not sufficient to sustain the legal duty relied upon.

6]The first of these was correctly abandoned in both the heads of

argument and at the hearing because the plaintiff has filed a replication raising the estoppel issue. It is not clear whether this was done before or after the third party delivered the notice of exception but, since no-one has asked for the costs arising specifically from this complaint, it is not necessary to deal with it any further.

7]The second can likewise be disposed of fairly briefly. Counsel for the third party conceded in argument that at least certain questions relating to the authority of Cowan arise as between the plaintiff and the defendant and also as between the defendant and the third party. This places the matter squarely within the ambit of Uniform Rule 13(1)(b). It is clear that the concession was correctly made. If Cowan is held by the trial court to have been authorised by the defendant, the liability of the third party does not arise. If, however, it is found that Cowan was not authorised by the defendant but that the defendant is estopped vis-à-vis the plaintiff from denying such authorisation, liability on the part of the third party may be triggered. This means that the third party has an interest in making common cause with the plaintiff in his claim that the defendant had authorised Cowan. If authorisation is proved, this would relieve the third party of potential liability. The third party also has an interest in making common cause with the defendant that the defendant should not be estopped from denying Cowan's authority since if this is held to be the case, no liability can attach to the third party. A third party is entitled to plead to a plaintiff's claim as well as to the third party notice and may lead evidence in support of that plea.[1] The present situation is precisely that envisaged by Rule 13 because, if the defendant is not entitled to join the third party in the present proceedings and thereafter sues the third party on the basis of an estoppel, if it is found in the first action that there

1 Rule 13(7)(b).

was no actual authority and that the defendant is estopped, that judgment would not be *res judicata* against the third party in the second action. Rule 13 is designed to avoid just such a multiplicity of actions relating to the same subject matter and the concomitant disadvantages which could flow from these.[2] If Rule 13 were not to operate in the present matter, conflicting findings might be made on the same issues by different courts. It goes without saying that this is undesirable. The second complaint must therefore fail.

8]As for the third complaint, the third party avers in the exception that, 'given the defendant's actual knowledge of the plaintiff's deposit' into the defendant's trust banking account, the averment in the third party notice that the defendant was unaware of such deposit makes the notice vague and embarrassing. What is relied on by the third party is the admission in the plea that 'the Plaintiff caused an amount of R2 million to be paid into the Defendant's trust bank account'. It was submitted that the plea therefore conflicts with the third party notice. The short answer to this is that, as is clear from this part of the plea, the defendant does not admit that it was aware that such a deposit was made; it only admits that it was made. Where the exception avers that the defendant had 'actual knowledge' it is therefore not based on the defendant's pleadings. There is accordingly no conflict between the plea and the annexure to the third party notice and the third complaint is without merit.

9]The fourth complaint is to the effect that the annexure to the third party notice does not contain sufficient averments to sustain a cause of action against the third party. In essence this is a complaint that unlawfulness is not shown because the averments do not go so far as to found the legal

2 *Gross v Commercial Union Assurance & another* 1974 (1) SA 630 (A) at 634E-F; *Nel v Silicon Melters (Edms) Bpk en 'n ander* 1981 (4) SA 792 (A) at 802B-C.

duty on the part of the third party contended for by the defendant. In this regard, there are two main issues for determination. The first is whether the issue of unlawfulness can be dealt with on exception. If it can, the second issue is whether it can be said that the allegations in the annexure to the third party notice are not sufficient.

10]The approach to exceptions which claim that the impugned pleading does not sustain a cause of action is well established. The court is to take as true the allegations pleaded by the respondent and to assess whether they disclose a cause of action.[3] A cause of action, in the case of a plaintiff, comprises:

'…every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.'[4]

The same applies to a defendant who issues a third party notice. The third party is therefore required to persuade the court that, upon every interpretation which the annexure to the third party notice can reasonably bear, no cause of action is disclosed.[5]

11]In their heads of argument, counsel for the defendant submitted that this was not a matter capable of being decided on exception because the existence or otherwise of a legal duty is a conclusion of law. Such a conclusion can only be reached upon an objective consideration of all of the relevant circumstances.[6] I can find no clearer statement of the

3 *Oceana Consolidated Co Ltd v The Government* 1907 TS 786 at 788.
4 Per Maasdorp JA in *McKenzie v Farmers'Co-Operative Meat Industries Ltd* 1922 AD 16 at 23.
5 *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F-G.
6 *Carmichele v Minister of Safety and Security & Another* 2001 (1) SA 489 (SCA) para 7.

approach to take in such matters than in the dictum of Hefer JA in *Minister of Law & Order v Kadir*[7] to the following effect:

'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" (*per* M M Corbett in a lecture reported *sub nom* 'Aspects of the Role of Policy in the Evolution of the Common Law' in (1987) *SALJ* 104 at 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the Court conceives to be society's notions of what justice demands. (*Corbett (op cit* at 68); J C van der Walt 'Duty of care: Tendense in die Suid-Afrikaanse en Engelse regspraak' 1993 (56) *THRHR* at 563-4.) Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies. In the passage cited earlier *Fleming* rightly stressed the interplay of many factors which have to be considered. It is impossible to arrive at a conclusion except upon a consideration of *all* the circumstances of the case and of every other relevant factor. This would seem to indicate that the present matter should rather go to trial and not be disposed of on exception. On the other hand, it must be assumed - since the plaintiff will be debarred from presenting a stronger case to the trial Court than the one pleaded - that the facts alleged in support of the alleged legal duty represent the high-water mark of the factual basis on which the Court will be required to decide the question. Therefore, if those facts do not *prima facie* support the legal duty contended for, there is no reason why the exception should not succeed.'[8]

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7 1995 (1) SA 303 (A) at 318D-J.

8 His emphasis. See also *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 2 where Harms JA said the following in a matter involving particulars of claim and annexures which ran to 158 pages: 'The case does not, therefore, have to be decided on bare allegations only, but on allegations that were fleshed out by means of annexures that tell a story. This assists in assessing whether or not there may be other relevant evidence that can throw light on the issue of wrongfulness. I mention this because, relying on the majority decision in *Axiam Holdings Ltd v Deloitte & Touche,* the plaintiff argued that it is inappropriate to decide the issue of wrongfulness on exception because the issue is fact-bound. That is not true of all cases. This Court, for one, has on many occasions decided matters of this sort on exception. Three important judgments that spring to mind are *Lillicrap, Indac* and *Kadir*. Some public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation.' (footnotes omitted).

In argument counsel for the defendant readily conceded that there was no absolute bar to deciding on the existence or otherwise of a legal duty on exception.

12]The first aspect of the complaint must therefore be answered as follows. Depending on the facts of a case, there are four potential findings concerning an exception to a pleading which claims that a party was subject to a legal duty. First, it may be possible to find that the pleaded facts do not even prima facie support such a legal duty.[9] Secondly, it may be possible to find that the pleaded facts clearly support the existence of the legal duty contended for.[10] Thirdly, it may be possible to find that the pleaded facts at least prima facie support the existence of a legal duty even though it cannot be said that they clearly establish this.[11] Fourthly, it may not be possible to decide one way or the other on exception.[12] In the first case the exception must be upheld. In the second, third and fourth cases, it must be dismissed. It remains to assess which of these findings is appropriate in the present matter.

13]The argument for the third party on the substance of the fourth complaint can be summarised as follows. The claim is a delictual one. It is one for pure economic loss. Even positive conduct causing pure economic loss is prima facie lawful. No legal relationship between the defendant and the third party is relied on, whether by virtue of contract or

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9 This was the outcome in *Telematrix*, *Kadir* and *Lillicrap Wassenaar & Partners v Pilkington Brothers (SA) (Pty)* 1985 (1) SA 475 (A) and in the minority judgment in *Axiam Holdings Ltd v Deloitte & Touche* 2006 (1) SA 237 (SCA) para 32 where Cloete JA held that the exception was properly upheld in the court *a quo* because the allegations made by the plaintiff did not even prima facie establish a duty to speak on the part of the defendant.

10 I have not found any cases where such a finding was made, nor was I referred to any. Such a finding is, however, notionally possible.

11 This was found to be the case in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 801A – D.

12 This appears to have been the basis of the majority decision in *Axiam Holdings* – see para 25.

otherwise. The conduct complained of is that of an omission. The legal duty contended for does not fit into one of the categories hitherto recognised by our law. Due to policy considerations, the courts have been cautious in extending liability to new situations. The defendant raised no argument with these submissions. Indeed they are clearly correct. However, the third party also submitted that no prior conduct is alleged and there are no public policy considerations or special circumstances in favour of any such extension in the present matter. These are contested submissions.

14]As regards the existence or otherwise of a legal duty, I must assume that, if such a legal duty existed, the failure of the third party to speak was a culpable failure, triggering liability. This is a separate issue and should not be conflated with that of the existence of a legal duty.[13] It was not part of the exception that the culpability of the third party was not adequately pleaded. I need therefore say no more on this aspect of the matter.

15]The underlying dilemma in assessing liability for omissions was elegantly framed by Marais JA in the following way:

'Society is hesitant to impose liability in law for, as it is sometimes put, "minding one's own business". The reticence is reflected in legal and judicial writing by propositions such as no liability in delict for pure (or mere) omissions. The problem with such beguilingly simple propositions is that, however convenient they may be, they are apt, at worst, to mislead the unwary and, at best, to be unhelpful. The proposition that there is no liability in law for minding one's own business is sound only if, in the eyes of the law, the situation which has arisen is someone else's business and not one's own. But whether that is indeed so is, of course, the very question which has proved so difficult to answer in every age. It is implicit in the

13 *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12. Here it was said that it 'might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.'

second proposition, qualified as it usually is by the use of accompanying epithets such as "pure" or "mere", that there are omissions which are not of that character. But what kind of omissions those might be is left unanswered by such formulations.'[14]

16]The crisp issue is whether, in the circumstances of the pleaded case, the convictions of the community as to what the law should be prima facie support a legal duty on the part of the third party to speak.[15] More recently, in relation to wrongfulness and the existence or otherwise of a legal duty, the Supreme Court of Appeal has preferred to ask whether 'if the defendant was negligent, it would be reasonable to impose liability on him for such negligence'.[16] The courts have approached the question of liability in various ways, all of which boil down to a principled approach involving 'a balancing against one another of identifiable norms'[17] rather than 'an intuitive reaction to a collection of arbitrary factors'.[18] This was articulated by Cameron JA in the following terms:

'This process involves the court applying a general criterion of reasonableness, based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community and now also taking into account the norms, values and principles contained in the Constitution. Overall, the existence of the legal duty to prevent loss "is a conclusion of law depending on a consideration of all the circumstances of the case".'[19]

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14 *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para 8.
15 The phase 'legal convictions of the community is normally used and I will use it hereafter. It originates in the Afrikaans phrase 'regsoortuiging van die gemeenskap' in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597B. As was said of the English phrase by Marais JA in footnote 3 of *Bakkerud* at 1053, however, 'It is not a particularly happy rendering. What after all is a *legal* conviction? "Sense of what the law ought to be" would, I think, convey the meaning more accurately.' In *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA) para 30, Cameron JA spoke of 'the community's sense of justice' in this regard.
16 In *MV MSC Spain; Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA) para 14, reference was made to *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11, where the formulation of Anton Fagan `Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ 90* at 109 was approved.. See also *Hirschowitz Flionis v Bartlett and another* 2006 (3) SA 575 (SCA) para 27.
17 *Van Duivenboden* note 13, para 21
18 Ibid.
19 *Olitzky* note 13, para 11 (footnotes omitted).

The policy considerations involve weighing and striking a balance between the interests of the parties and the conflicting interests of the community.[20] As was said by Brand JA in *Two Oceans Aquarium*:[21]

'The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms…'

17]The workable general principle[22] which has evolved is to the effect that a legal duty arises only 'when the circumstances are such, not only that the omission evokes moral indignation, but also that the legal convictions of the community demand that it be regarded as wrongful and that the loss should be compensated by the person who failed to act positively'.[23] An assessment of the legal convictions of the community is an objective one.[24] Even in the light of the need to include in this assessment the norms, values and principles contained in the Constitution, 'the general approach of our law towards the extension of the boundaries of delictual liability remains conservative. This is especially the case when dealing with liability for pure economic losses.'[25] Various expressions have been used interchangeably for the approach but 'the enquiry underlying those expressions is whether contemporary social and legal policy calls for the law to be extended to the exigencies of the particular case.'[26] This was crisply formulated by

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20 *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318E-H
21 Para 10.
22 *Bakkerud* para 16.
23 Per Hefer JA in *Minister of Law & Order v Kadir* 1995 (1) SA 303 (A) at 320B-C; *Bakkerud* para 14.
24 In *S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd & another* 2000 (4) SA 1019 (SCA) para 7, Harms JA said, 'The criterion is based upon considerations of morality and policy and the court's perception of the legal convictions of the community.' See also *Bakkerud* para 15 and see generally Neethling et al: *Law of Delict* 4 ed p 38 and the cases cited there.
25 Per Harms JA in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 27.
26 *AB Ventures Ltd v Siemens Ltd* 2011 (4) SA 614 (SCA) para 8.

Brand JA in *Two Oceans Aquarium* as follows:[27]

'When we say that a particular omission or conduct causing pure economic loss is "wrongful", we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability….'

The relevant policy considerations must be identified.[28]

18]The pleaded facts in the third party notice must be analysed in the light of this principled approach. As already mentioned, it is clear that the claim is for pure economic loss arising from an omission. It is also clear that, on the averments in the third party notice, no actual legal relationship came into being between the defendant and the third party. What is alleged, however, amounts to a belief on the part of the third party that a legal relationship had come into being. The defendant pleads that McHardy, who was the natural person who represented the third party in its dealings with Cowan, 'was informed by Cowan and believed that Cowan was acting on behalf of the Defendant in the course of the provision by the Defendant of bridging finance for clients of the Defendant'. This means, therefore, that the third party believed that it was dealing with the defendant. It further believed that what Cowan was doing related to clients of the defendant and that what was being done for these clients was being done on behalf of the defendant. This must mean that the third party believed itself to be providing facilities for the defendant in the dealings of the defendant with its clients. The third party therefore believed that it was an integral part of the provision by the

27 Note 15, para 12.
28 *Van Duivenboden* para 21; *Steenkamp* note 21, para 25.

defendant of bridging finance for its clients.

19]As indicated above the third party submitted in argument that no prior conduct on its part is pleaded. This is at the very least debatable. It is averred that 'the Third Party *enabled* Cowan to cause to be received into and *paid out of* various bank accounts *operated* by or on behalf of the Third Party funds obtained by Cowan from his operations…'[29] It is not made clear what precisely was done to enable this conduct. It is conceivable that no action was required by the third party when money was deposited into its bank accounts. Someone other than the third party might have given particulars of a bank account to the person making the deposit or transferring moneys into the account. Such deposit or transfer might have also have been done in error. Neither of these activities necessarily requires action on the part of an account holder. It is, however, difficult to conceive how it is possible for the third party not to have been active in some way when money which had been deposited into any of the accounts operated by it or on its behalf was paid out. It must have authorised Cowan to do so or have done so on his behalf. Money does not simply get paid out of a bank account. Any payment requires some form of authorisation and action. It is pleaded that the various accounts were under the control of the third party. The third party must therefore have been involved in the authorisation of payments from those accounts in some or other way. The averment of prior conduct to at least this extent is therefore made. It is the third party who is alleged to have operated the various bank accounts. Since it is the manner in which the accounts in question were operated that is averred to be irregular, it is not strictly accurate to say that no prior conduct is alleged. It would certainly be open to the defendant to lead evidence of this form of prior

29 My emphases.

conduct on the pleadings as they stand.

20]It is further pleaded that the third party knew or ought to have known that the way the accounts were conducted was not consistent with Cowan's stated purpose. Facts are pleaded in support of this averment. Some examples follow. The third party was aware that amounts should be paid into the defendant's trust banking account but Cowan stated to the third party that he did not want them to go through the defendant's trust account. It is difficult to conceive how this could not have been understood by the third party to mean that Cowan did not want the transactions in the accounts used to be traced or traceable by the defendant or subject to the scrutiny of the defendant's auditors. If amounts go through an attorney's trust account, there are stringent rules as to how they must be dealt with including the following. A trust ledger account must be opened in the name of the client to whose credit the funds are deposited. The funds in the trust banking account must be regularly reconciled with the balance in the trust ledger account opened in the name of the client. The funds may only be transferred or paid out from the trust banking account if properly authorised and, when this happens, an entry must be made in the trust ledger account for that client concerning that transfer or payment. The trust account is subject to annual audit which reviews whether the correct procedures have been implemented. Amongst other things the auditor is also required to review and report on whether the balances in the trust ledger accounts add up to the total balance in the trust account, whether this reconciles with the total funds in the trust banking account, whether any of the trust ledger accounts have been in deficit during the year and whether any deficit occurred in the trust account as a whole. If the trust banking account has been overdrawn, this must also be reported on.

21]It is reasonable to hold that, at a prima facie level, the known refusal of Cowan to use the trust banking account of the defendant and his use of accounts held by others would probably have led the third party to conclude that Cowan wanted to avoid these standards and the scrutiny which accompanies the exclusive use of the defendant's trust account. Banks are under a legal duty to take steps to ensure that persons who open accounts for other persons or entities are authorised to do.[30] In *Energy Measurements (Pty) Ltd v First National Bank of SA Ltd*[31] it was held that '[t]he very least that is required of a bank is to properly consider all the documentation that is placed before it and to apply their minds thereto'. The fact that a bank would not be opening an account and scrutinising documentation for that purpose in the present matter is likely to have alerted the third party to the probable reason for the irregular manner in which Cowan operated. The averment of the defendant that the third party did not obtain from Cowan any of the information which it was required to obtain as an accountable institution under the Financial Intelligence Centre Act 38 of 2001 (FICA), points in a similar direction. This does not, of course, go so far as to make the *Indac Electronics* decision apply to the third party.

22]In the present matter, even if the third party did not draw these inferences, it is pleaded that it knew that the trust account should have been used and that Cowan deliberately avoided doing so. In a situation where the third party believed that this was a bridging finance service of the defendant to its clients, evidence may be led that the third party knew

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30 *Indac Electronics* note 11. Cameron JA held in *Columbus Joint Venture v ABSA Bank Ltd* 2002 (1) SA 90 (SCA) para 21 'that accounts operated under names other than those of the client may be used for fraud is an evident danger' and approved the observation of the trial court that 'the use of a name other than a customer's own in opening an account "lends itself to misuse and calls for some explanation"'. In *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D), persons completely unknown to the bank opened a new account.

31 2001 (3) 132 (W) para 134.4. This dictum was endorsed by the SCA on appeal.

that the defendant's procedures were being circumvented and also knew or suspected that the defendant did not know that this was the case. In addition, on occasion the accounts operated by the third party were overdrawn. Evidence may be led as to the significance this would have for accountants and financial advisers in the position of the third party. Such evidence may lead to a finding that the third party knew that no account opened with moneys of an attorney's client is allowed to be overdrawn.

23]It is also pleaded that withdrawals were authorised orally, by email or SMS. Evidence may establish that the third party knew that firms of attorneys, or even the defendant specifically, would not function in that way. It is not pleaded that the relevant paperwork was completed after the initial authorisation. No paperwork is mentioned. Finally, it is conceivable that some transactions on accounts run by attorneys would be urgent but here it is pleaded that all transactions were required to be performed with extreme urgency. Evidence may be led that this raised a flag in the mind of the third party that Cowan was on a frolic of his own and that the defendant was unaware of the way he was functioning.

24]In the light of this analysis, I turn to consider issues of public policy. This involves weighing and striking a balance between the interests of the parties and the conflicting interests of the community. One of the primary policy considerations arising in the extension of delictual liability is whether such an extension will open the door to limitless liability.[32] This is unlikely to result if liability is extended in the present matter. There are surely a limited number of people who allow bank accounts under their control or operated by them to be used by a non-account holder in an

32 This has always been a concern of the courts when considering an extension of aquilian liability. See eg.*Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833A.

irregular fashion. It is likely that there are even fewer who allow a person to do so who claims to represent someone else without obtaining from that person proof of their authority to do so. There will be still fewer people who do so by someone claiming to be performing services on behalf of a firm of attorneys.

25]A further consideration of public policy is whether an extension of liability will operate unduly onerously on the third party. Here, there is a readily identifiable party, the defendant, to whom harm was foreseeable.[33] The position is therefore distinguishable from that referred to by Cloete JA in the minority judgment in *Axiam Holdings* . In this and other matters the particular person who might be placed at risk could not be readily identified by the party it was sought to hold liable.

26]Another policy consideration is whether the recognition of a legal duty is likely to place people in a position where they are uncertain in any one situation whether they are acting wrongfully when 'minding their own business'. Once again, the third party is said to have believed itself to be in some kind of relationship with the defendant. The third party, as the operator of these accounts or the person under whose control they were operated, was in a unique position to observe the irregularities. Uncertainty as to a legal duty to speak when the account is being used irregularly, ostensibly on behalf of the party with whom it is believed there is a relationship, is therefore unlikely to arise and I can conceive of no policy reason not to impose liability on this basis.

27]A policy factor in favour of the recognition of liability arises from the case law and FICA concerning banks and the need for them to ensure that

33 *S M Goldstein* note 24, para 7.

persons who open or operate accounts with them are properly authorised to do so. If a person whose account is being used knows that the account is being used in order to avoid the rigorous provisions to which he would otherwise be subject in opening an account, it is not unreasonable to expect the third party to notify the entity that the account is being used irregularly. There is clearly a need for vigilance on the part of people like the third party who allow others to use accounts under their control. This is because those persons would ordinarily be required to prove their authorisation and would, in addition, act in the interests of the entity in whose name they purport to operate.

28]As regards the values of the Constitution, no specific submissions were made by the parties in argument. The promotion of a culture of transparency certainly underlies the Constitution. I agree with the submission of the defendant in its heads of argument that the value to society of combating white collar crime is a relevant factor which also finds support in the Constitution. I can certainly find nothing in the spirit, purport and objects of the Bill of Rights in the Constitution or in its norms, values and principles which militates against, or is inconsistent with, an extension of liability in the present matter.

29]In the light of these factors, can it then be said that public or legal policy considerations require that the failure to speak on the part of the third party should be actionable? Put another way, do the legal convictions of the community demand that a legal duty be imposed on the third party to speak? It should be borne in mind that no one factor is decisive. However, there are cumulative aspects averred which weigh on the overall outcome. Prior conduct in terms of which the danger to the defendant was caused. The belief of contractual proximity with the

defendant on the part of the third party. The knowledge that the accounts were being operated in a way which circumvented the checks and balances normative for attorneys' trust accounts. Society's recognition of the need for increased vigilance to ensure that people who purport to open and operate accounts on behalf of another are authorised to do so. In the light of these and the other factors dealt with above, both questions must be answered in the affirmative. I conceive that it would be contrary to public policy to exonerate the third party from speaking when it allowed its facilities to be used in what it believed to be an operation run by the defendant which was clearly being conducted in a manner inimical to the strictures of the legal profession of which the defendant is a part where the defendant was placed at risk. Viewed objectively, society will take account of these factors and require such a legal duty to be imposed.

30]In my view the annexure to the third party notice therefore falls into the third category mentioned in paragraph 12 of this judgment. It prima facie supports the legal duty contended for. If I am wrong in this, however, at the very least one cannot decide that such a duty does not exist on the pleadings alone and the matter therefore falls into the fourth category. The third party has therefore not succeeded in showing that no cause of action is founded after regard is had to every reasonable construction of the annexure to the third party notice. In the circumstances, the fourth complaint must fail.

31]Counsel for the various plaintiffs sought to support the exception, both by submitting heads of argument to that effect and by appearing at the hearing. The support was said to be limited to an indication of the attitude of the plaintiff and, at the hearing, no substantive argument on the exception was embarked upon. When asked why the plaintiffs had any

interest in the exception and why they should be heard, counsel was unable to cite any authority and merely submitted that the outcome of the exception would affect the further conduct of the action. The prayer for the defendant to pay the plaintiff's costs relating to the exception was withdrawn in argument and it was submitted that the appropriate costs order should be that the plaintiffs should bear their own costs and that no further order should be made. Counsel for the defendant submitted that the exception gave rise to no *lis* involving the plaintiffs and that the plaintiffs should pay the costs arising from their involvement. I agree that this is the appropriate order.

32]Both the third party and the defendant were represented at the hearing by two counsel. The matter was sufficiently complex to warrant this and is of great importance to both of these parties. It is clear that any costs order should include the costs of two counsel, where utilised. No-one argued differently.

33]In the result the following orders issue in respect of each matter under consideration:

1. The first third party's exception to the annexure to the third party notice is dismissed with costs, save for the costs dealt with in paragraph 2 hereof.
2. The plaintiff is directed to pay the costs of the defendant and the first third party arising from the participation of the plaintiff in the exception.
3. All costs shall include the costs occasioned by the employment of two counsel wherever this was done.

DATE OF HEARING:	14 November 2011
DATE OF JUDGMENT:	22 December 2011
FOR THE EXCIPIENT:	M du P VAN DER NEST SC AND I P GREEN, instructed by VON KLEMPERERS.
FOR THE RESPONDENT:	D J SHAW QC AND R J SALMON SC, instructed by GARLICKE & BOUSFIELD, locally represented by VENN, NEMETH & HART.
FOR THE PLAINTIFF:	A J DICKSON SC, instructed by SHEPSTONE & WYLIE. Also instructed by DAVID RANDLES, locally represented by AUSTEN SMITH.