IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 12922/2014P

In the matter between:

GAVIN ANOTHONY BREETZKE N.O.	First Plaintiff
MICHAEL JOHN BREETZKE N.O.	Second Plaintiff
MARGARET ANNE BREETZKE N.O.	Third Plaintiff
and	
ROBERT EDWARD ALEXANDER	First Defendant
ZININGI PROPERTIES (PTY) LTD	Second Defendant
RODNEY JOHN TROTTER N.O.	Third Defendant
BRETT DENNIS BERRIMAN N.O.	Fourth Defendant
ANGELA CLAIRE ALEXANDER N.O.	Fifth Defendant

JUDGMENT

Vahed J:

[1] The defendants have taken exception to the plaintiffs' particulars of claim on the basis that they do not disclose a cause of action against the second defendant and/or lack the averments necessary to sustain actions against the second defendant. I will describe the nature of the exception shortly.

[2] Shortly after the action was initially commenced during September 2014 the defendants took exception to the plaintiffs' particulars of claim in the

form that those particulars of claim then existed. That exception was held to be good and was the subject of a judgment delivered by this court on 8 September 2015. That judgment was subsequently confirmed on appeal by the Full Court. Thereafter the Supreme Court of Appeal refused an application for leave to appeal. The consequence of that was that the plaintiffs were given leave to amend the particulars of claim which they then did.

[3] The defendants delivered a further exception during February 2018 and the plaintiffs further amended their particulars of claim as a consequence.

[4] This is yet a further exception.

[5] The three plaintiffs are the three trustees of the St. Francis Trust, that trust being the actual claimant in this matter. The claim mounted against the first defendant is based upon his alleged breach of his fiduciary duty to the Sleepy Hollow Trust and its beneficiaries.

[6] The Sleepy Hollow Trust is a trust in which the trustees are the first and second plaintiffs and the first and third defendants. The St. Francis Trust (i.e. the true plaintiff) and the June Alexander Family Trust were equal beneficiaries (50% each) of the Sleepy Hollow Trust and each has a vested interest in the Sleepy Hollow Trust.

[7] The claim against the first defendant is against him in his personal capacity and also in his representative capacity as a trustee of both the

Sleepy Hollow Trust and the June Alexander Family Trust. It is also alleged in the particulars of claim (in the amended form which is now the subject matter of the present exception) that the first defendant is the sole director and shareholder of the second defendant. The second defendant is alleged to be a company duly incorporated as such and which carries on business in matters relating to immovable property. As the defendants point out, the second defendant is not alleged to be anything but a duly incorporated company.

[8] The particulars of claim also allege that the second defendant was nominated as the purchaser of 50% of the shares from the Sleepy Hollow Trust and in respect of which it was alleged that the second defendant was "… a company nominated by the first defendant which was owned and/or controlled by him and/or in which he had a financial interest.".

[9] The Sleepy Hollow Trust owned several properties including the one described as "The SARS property".

[10] At the instance of the first defendant the Sleepy Hollow Trust resolved to sell certain of the immovable properties, including the SARS property. The first defendant nominated the second defendant, which as I have indicated he controlled, to purchase properties from the Sleepy Hollow Trust, including the SARS property for a price of approximately R90 million.

[11] During this period the first defendant knew that another entity, Delta, was eager to purchase the SARS property and that he could cause the second defendant to on sell the SARS property to Delta at a profit. The first defendant did not disclose the opportunity to sell to Delta to the trustees of the Sleepy Hollow Trust.

[12] The second defendant purchased the SARS property from the Sleepy Hollow Trust and then on-sold the SARS property to Delta, along with other properties. The price paid for the SARS property was R110 million. This was R19.283 million more that the second defendant paid to the Sleepy Hollow Trust for the SARS property.

[13] As against that background the plaintiffs allege that the second defendant benefitted by the said sum of R 19.283 million and that in addition the second defendant knowingly participated in the first defendant's breach of trust in respect of the fiduciary obligation he (i.e. the first defendant) owed to the Sleepy Hollow Trust.

[14] It is against that background that the exception is taken with the defendants contending in the exception that:-

a) There are no allegations of wrongdoing by or in respect of the second defendant and the allegation is of knowledge of the first defendant's breach of trust;

b) No allegations are made in order to pierce the veil of the separate legal personality of a company.

[15] In argument before me Mr *Acker* SC, who with Mr *Boulle* appeared for the plaintiffs acknowledged that the claim against the second defendant was properly founded in delict under the *Lex Aqulia* and asserted that the pleadings contained sufficient allegations of intentional conduct on the part of the second defendant and that the plaintiffs were relying on *dolus* and not on negligence because the second defendant's conduct was said to be intentional. Thereafter, he contended the plaintiffs' claim properly fell into place because of the allegation that the second defendant's knowing participation in the breach of trust by the first defendant was sufficient to found a delictual claim against the second defendant.

[16] Mr *Acker* continued by acknowledging that the plaintiffs' loss was in the form of pure economic loss and that based on the authority of *Gross and others v Pentz* 1966 (4) SA 617 (A), which in turn relied on *Yorkshire Insurance Co Ltd v Barclays Bank* 1929 WLD 200, contend that the mere allegation of a knowing participation in a breach of trust was sufficient to found a delictual claim.

[17] With due respect, I am of the view that the reliance on those authorities is misplaced and this is demonstrated by the fact that Corbett CJ, in the majority judgment in *Gross*, indicated that the merits of the plaintiff's cause of action were not relevant for the purposes of deciding the case before him.

[18] An exception is to be judged on the pleading being excepted to as it stands and no facts outside the pleading can be taken into consideration. It must be established that on any and every interpretation of the pleading no cause of action is disclosed. See in this regard *Minister of Safety and Security and another v Hamilton* 2001(3) SA 50 (SCA) at para 5 and *Lewis v Oneanate (Pty) Ltd and another* 1992 (4) SA 811 (AD) at 817 F – G.

[19] Mr Acker's concession that the case against the defendant remains one founded in delict on the *Lex Aqulia* is significant. In *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) the following is said (footnotes omitted):-

> "[20] Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.
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> [21] Previously, it was contentious what the wrongfulness enquiry entailed, but this is no longer the case. The growing coherence in this area of our law is due in large part to decisions of the Supreme Court of Appeal over the last decade. Endorsing these developments, this court in *Loureiro* recently articulated that the wrongfulness enquiry focuses on—
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> > 'the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm — indeed to respect rights — and questions the reasonableness of imposing liability.'

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: 'that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages', notwithstanding his or her fault.

[22] 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. 9 However, in cases of pure economic loss — that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property — the criterion of wrongfulness assumes special importance. In 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.

[23] So our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must be positively established. It has thus far been established in limited categories of cases, like intentional interferences in contractual relations or negligent misstatements, where the plaintiff can show a right or legally recognised interest that the defendant infringed.

[24] In addition, if claims for pure economic loss are too freely recognised, there is the risk of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'. Pure economic losses, unlike losses resulting from physical harm to person or property —

> 'are not subject to the law of physics and can spread widely and unpredictably, for example, where people react to incorrect information in a news report, or where the malfunction of an electricity network causes

shut-downs, expenses and loss of profits to businesses that depend on electricity'.

[25] So the element of wrongfulness provides the necessary check on liability in these circumstances. It functions in this context to curb liability and, in doing so, to ensure that unmanageably wide or indeterminate liability does not eventuate and that liability is not inappropriately allocated. But it should be noted — and this was unfortunately given little attention in argument — that the element of causation (particularly legal causation, which is itself based on policy considerations) is also a mechanism of control in pure economic loss cases that can work in tandem with wrongfulness."

[20] Following upon that, in *Masstores (Pty) Ltd v Pick and Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC), it was held (footnotes omitted):-

"[46] Our law has often sought guidance in English law in cases involving some kind of commercial interference in the trade of another, because 'the analysis of the problem to be found in English cases is often illuminating and can be of assistance to solving the problem of how to apply the principles of our own law to the facts of a particular case'. This must of course be done both with the general caution expressed by this court of comparable context and text, and the particular caution that here those cases must be reconciled with Aquilian principles. In English law two distinct torts have been recognised in this field, namely the 'procurement of breach of contract' and 'unlawful interference with economic interests'. The first probably inspired our own inducement form of delict, but it is the latter that is relevant in deciding whether extension for another form is called for in our law. In *OBG Ltd* the House of Lords in effect held that the means used by the third party to prevent performance must be independent of the normal means used in contractual interference cases. Transposed here, it would mean that something more than Masstores' breach of its own lease with Hyprop is required: the

unlawfulness of that breach vis-à-vis Hyprop does not automatically translate into delictual wrongfulness as against Pick n Pay.

[47] So analogous reasoning from existing authority does not yet make a compelling case for extension. That may be an indication that none should take place, or perhaps that it should rather be sought in general principles.

…

[52] Is there nevertheless room for a delictual claim to be found elsewhere? Yes, possibly. The justification for the claim would then not, however, lie in the direct infringement of Pick n Pay's contractual exclusive trade rights, or a breach of the duty to respect them, but in the possibly unreasonable manner that Masstores used or exercised its own rights. Liability in these kinds of circumstances has been variously described as being grounded in malice, or as an abuse of rights, or where the level of intention and other fault-related elements such as 'motive to cause' are highly relevant in establishing wrongfulness. But to extend Pick n Pay's pleaded case to this kind of situation would be a step too far. Despite the challenge to the alleged unlawfulness of its conduct by Masstores, Pick n Pay did not seek to widen it. It is an issue that needs to wait for another day."

[21] Drawing on those principles it is fair to restate the basic principles that the requirements of an aqulian action are a) a wrongful act or omission; b) fault; c) causation; and; d) patrimonial loss. These issues, especially the wrongfulness of an act or omission must be justified and pleaded and proved, especially in cases of pure economic loss.

[22] The second defendant's knowing participation in the sale of the SARS property does not, in and of itself, suggest that its act was wrongful.

The second defendant must be judged to be a separate, at arm's length, corporate entity and its commercial activity, *prima facie*, is not wrongful in the ordinary course.

[23] Mr *Acker* has pertinently said that this case is not about piercing the corporate veil and that the knowledge imputed to the first defendant is not to be imputed to the second defendant. The second defendant could just as well have been a remote third party sitting at a coffee shop and overhearing a conversation unfolding at a table nearby

[24] That being the case the plaintiffs must make out a separate and independent case, properly grounded in delict, in order for it to succeed against the second defendant. There are no allegations to sustain this and in my view the exception is well taken.

[25] I accordingly grant the following Order:-

a) The defendants' exception dated 5 April 2018 is upheld;

b) The claim and prayer against the second defendant is struck out;

c) The plaintiffs are given leave to amend the particulars of claim, such amendment to be effected within fifteen (15) days of the date of this order;

d) The plaintiffs, jointly and severally, are directed to pay the costs of the exception, such costs to include those reserved on previous occasions.

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Vahed J

Case Information

Date of Hearing	:	30 October 2018
Date of Judgment	:	9 November 2018
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