IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case No.: **7798/2012**

In the matter between:

ABSA BANK LIMITED	Plaintiff
and	
EAGLE CREEK INVESTMENTS 490 (PTY) LIMITED	First Defendant
HENDRIK JOHANNES GREYLING	Second Defendant
and	
SYDNEY REBE	First Third Party
N NKOPANE	Second Third Party
P J McKAY	Third Third Party
N McKAY	Fourth Third Party
M F BARDIEN	Fifth Third Party
M I HIGGENS	Sixth Third Party
ANTONY DERBY	Seventh Third Party

JUDGMENT: 28 MAY 2014

GAMBLE J

INTRODUCTION

1. In April 2012 Absa Bank Limited ("*the bank*") issued summons against Eagle Creek Investments 490 (Pty) Limited ("*Eagle Creek*") and Hendrik Johannes Greyling ("*Greyling*") for repayment of a loan in the amount of R3.2 million, together with interest and costs. The amount in question had been advanced by the bank against the security of a mortgage bond passed by Eagle Creek in favour of the bank over certain immovable property that Eagle Creek owned at the Arabella Golf Estate near Kleinmond in the Western Cape. Greyling stood surety for Eagle Creek's obligation to the bank under this loan.

2. When Eagle Creek entered an appearance to defend the claim, the bank applied for summary judgment against only the First Defendant in May 2012. The application was opposed and an affidavit (with annexures) running to some 130 pages was made by Mr Ari Fonarov, a chartered accountant, who is a director of Eagle Creek. I shall revert to the content of that affidavit shortly.

3. The opposition to the application for summary judgment raised significant points of law and was postponed on 19 June 2012 by the Motion Court Judge for hearing on the semi-urgent roll on 11 September 2012. The parties thereafter filed detailed heads of argument. On 11 September 2012 an order was taken by agreement in terms whereof Eagle Creek was granted leave to defend the action with costs to stand over for later determination.

4. Eagle Creek has not yet filed a plea in this matter, nor has a plea been demanded by the bank. Rather, the bank took the somewhat unusual step in February 2013 of issuing a series of Third Party Notices directed at seven of

the shareholders of Eagle Creek, in consequence whereof the First to Seventh Third Parties were joined as parties in these proceedings.

5. The notice given to the First Third Party is accompanied by an annexure in which the bank purports to set out its case against that Third Party. Attached to that annexure is a copy of the bank's Combined Summons and Particulars of Claim herein, together with the annexures thereto.

6. No Third Party Notice has been given to the Second Third Party whose name appears as such in the heading to the various documents filed in this matter. In the index filed on 27 August 2013 it is recorded (as item 17) that pages 297-300 of the Court papers are "*Notice to Third Party: Third and Fourth Third Parties*". No such documents are to be found in the Court file, the pagination running directly from p 296 to p 301.

7. The bank has further filed a document entitled "*Notice to Third Party: Fifth and Sixth Third-Parties* [*sic*]". The Notice contained in this document is identical to the Notice given to the First Third Party, save that there is no annexure thereto. The bank has done precisely the same in respect of the Seventh Third Party.

8. Save for the Notice to the First Third Party, the remaining Notices are irregular and do not comply with the provisions of Rule 13. The irregularity in these Notices was not attacked but on 26 March 2013 the First and Seventh Third Parties filed a Notice of Exception in which the bank's Third Party Notices were attacked on the basis that they lacked averments necessary to sustain the Plaintiff's action.

9. That exception was set down for hearing on 10 September 2013 on the semi-urgent roll. The bank was represented by Mr Amm from the Johannesburg Bar and the First and Seventh Third Parties were represented by Ms Holderness from the Cape Bar, both of whom filed detailed heads of argument prior to the hearing. During the course of the hearing, I queried, *inter alia*, the appropriateness of issuing Third Party Notices before the Defendants had filed their Pleas and of taking exception to such a potentially defective pleading. Subsequent to the hearing, counsel each filed a further note in November 2013 addressing these concerns and confirming that neither party took the point that the exception was premature. Ms Holderness said that the same legal team represented the First Defendant and the First and Seventh Third Parties, and that to insist on formalism at this stage would unnecessarily protract the matter and result in wasted costs. Mr Amm adopted a similar approach: both counsel urging the Court to determine the substance of the points raised in the annexure to the First Third Party's Notice.

THE DEFENCES RAISED IN THE AFFIDAVIT OPPOSING SUMMARY JUDGMENT

10. Mr Fonarov's affidavit contains a long narrative explaining the background to the legal relationship between the bank and Eagle Creek, and the circumstances giving rise to the bank's claim against it. I shall endeavour to summarise the salient points.

11. The immovable property involved is evidently a house on the Arabella Golf Estate which is owned by Eagle Creek. The company has 13 shareholders

and by arrangement each shareholder has the use of the property for four weeks in a year. The form of ownership and the derivative use of the property is dubbed "*fractional ownership*", a marketing device developed by a company which traded as "*Seeff Fractional Ownership*" ("*SFO*"). This company was the brainchild of the Second Defendant, Greyling, both of whom have subsequently been declared insolvent.

12. The first law point taken by Fonarov in the summary judgment affidavit is that the bank has failed to allege that Greyling, who was sued jointly and severally by the bank under a deed of suretyship executed in favour of the bank on behalf of Eagle Creek, and who signed the loan agreement with the bank on behalf of Eagle Creek, was duly authorised to represent Eagle Creek. It is suggested that "*this may render the particulars of claim excipiable*". However, nothing further is said in the First and Seventh Third Parties' Notice of Exception in this regard.

13. The affidavit proceeds to set out in the minutest of detail a defence under the Share Blocks Control Act, 59 of 1980 ("*the SBCA*"), read with the 1973 Companies Act. It is claimed that the bond and its underlying agreement fall within the definition of a "*loan obligation*" as contemplated in section 1 of the SBCA. It is said that such an agreement must comply with sections 14(1) and (6) of that Act which require a resolution passed by 75% of the shareholders of Eagle Creek. Absent such compliance, it is said that in terms of section 8(1)(d) of the SBCA, the company acted *ultra vires* in concluding the loan with the bank.

14. Fonarov says, further, that the bank's remedy lies against Greyling personally and that Eagle Creek is absolved from liability. He goes on to allege a potential counterclaim against the bank by Eagle Creek. A further complaint that is raised relates to the unauthorised transfer of funds from Eagle Creek's bond account by the bank and the potential misappropriation by Greyling of some R2.4 million which will also be considered in the formulation of Eagle Creek's counterclaim. However, nothing is said about the attitude of Eagle Creek's liquidators to these alleged counterclaims and so one does not know whether they will ever see the light of day.

15. Finally, Fonarov alludes to the substantial losses incurred in a number of share block schemes in other exclusive resorts throughout South Africa as a consequence of SFO's demise and says that "*the present matter before the Court is one of a multitude of matters, which have or will in due course become litigious as a direct result of substantial public involvement in the various share block offerings made to the public and marketed by SFO under the Seeff umbrella*".

THE BANK'S RESPONSE

16. Since Eagle Creek's plethora of allegations of both fact and law have not been formulated in a Plea and Counterclaim, we do not know which of those contentions are disputed by the bank: there is at this stage no Plea to a Counterclaim nor a Replication filed by the bank. Instead, the bank considered it prudent to respond by way of a melange of Third Party Notices, one procedurally valid and the others apparently not. Those Notices seek to

draw into this litigation some of the shareholders in Eagle Creek, although no substantial relief is sought against any of them.

17. In the Third Party Notice to the First Third Party, the following preamble appears:

> "***TAKE FURTHER NOTICE*** *that the above-named Plaintiff contends that questions of fact and law that have arisen (and are anticipated to arise) from the pleadings in the action between the Plaintiff and the Defendants are substantially the same as some of the questions of fact which will arise between the Defendants and you, and should properly be determined not only as between the Plaintiff and the Defendants, and/or also between the Defendants and yourself, the grounds hereof appear from the annexure hereto.*"

18. After reciting the facts and cause of action relating to the claim against Eagle Creek, the bank sets out in the annexure to the Third Party Notice directed at the First Third Party what it terms "*The First Defendant's (Anticipated) Defence*" and proceed to summarise its understanding of part of that defence thus:

> "*16. The first defendant has yet to plead to the particulars of claim, but in summary judgment proceedings, the first defendant contended as follows:*
>
> *16.1 that the first defendant carried on the business of a share block scheme as contemplated by the definition of 'share*

block scheme', and furthermore was a 'share block company', as contemplated by the relevant definitions under the Share Block Control Act, no. 59 of 1980 ('the Act');

16.2 *the first defendant was not duly authorised to be represented by one Hendrik Johannes Greyling ('Greyling'), its sole director, in concluding the loan agreement and mortgage bond;*

16.3 *the loan agreement and mortgage bond were concluded in breach of the provisions of sections 14(1) of the Act; and*

16.4 *as a consequence thereof, and/or under section 8(1)(d) of the Act, the mortgage bond and loan agreement are void and/or unenforceable.*"

19. Then the bank purports to set out what it terms its "*claims as against the third parties*" as follows:

"*17. The plaintiff proceeds as against the third parties in the event of the first defendant's contentions in paragraph 17* [*sic*] *above being found to be correct.*

18. At all material times hereto, the third parties owed the plaintiff a duty of care (properly a duty not to act negligently)."

It proceeds to set out the circumstances under which the duty of care allegedly arose and lists the respects in which the Third Parties are alleged to have breached that duty.

20. The consequences of such breaches are then articulated as follows:

> "*21. As a consequence of the third parties' aforesaid breach(es) of their respective duties of care, the plaintiff concluded the loan agreement with the first defendant and registered the mortgage bond.*
>
> *22. As a consequence of the aforesaid and only inasmuch as the first defendant's contentions in paragraph 17 above may be found and/or held to be correct, the plaintiff has suffered damages in an amount of R3 219 930,15 as at 6 January 2012 together with interest thereon at a rate of 7% per annum from 6 January 2012 to date of payment, calculated daily and compounded monthly both days inclusive.*"

21. Nowhere in any of its Third Party Notices does the bank formulate any claim against any of the Third Parties. It does not say either why it has only purported to give notice to seven shareholders whereas Fonarov claims that there are 13 shareholders, nor does it suggest whether the shareholders to whom it has purported to give notice should be held to be liable jointly and severally, if at all.

THE NOTICE OF EXCEPTION

22. For the sake of convenience I shall recite the Notice of Exception filed on behalf of the First and Seventh Third Parties in full:

> "***BE PLEASED TO TAKE NOTICE*** *that the First and Seventh Third Parties hereby except to the Plaintiff's third party notices, on the ground that they lack averments necessary to sustain the Plaintiff's action, as follows:*
>
> *1. The Plaintiff conditionally claims against the First and Seventh Third Parties ex delicto. As such the Plaintiff alleges a duty of care by the First and Seventh Third Parties against it qua shareholder, which it alleges the First and Seventh Third Parties have breached.*
>
> *2. The Plaintiff alleges inter alia that the First and Seventh Third Parties, as shareholders in the First Defendant, knew or ought to have known that the First Defendant was carrying on the business of a share block scheme as defined in terms of the Share Blocks Control Act 59 of 1980 ('the Act'), the provisions of sections 4, 7, 8, 9, 14 and 16 of the Act and that third party financiers, such as the Plaintiff in conducting business with the First Defendant would have due regard to the identity of its director/s, its main object and business and its name in determining the capacities or authorities of the sole director*

purporting to represent or contract on behalf of the First Defendant.

3. *The Plaintiff alleges further that the third parties knew, alternatively ought reasonably to have known that the failure of the First Defendant to comply with the provisions of the Act referred to in paragraph 2 above, could result in any agreements concluded by the First Defendant in breach thereof being found to be void and/or voidable and/or unenforceable.*

4. *The Plaintiff further alleges that the First and Seventh Third Parties negligently and wrongfully breached the aforesaid duty in inter alia the following respects:*

    4.1 *they failed to ensure that its object and business were recorded as being in respect of the operation of a share block scheme in respect of immovable property owned by it;*

    4.2 *they failed to ensure that the articles of the First Defendant provided that a member would be entitled to use a specific part of the immovable property in respect of which the company operated the share block scheme, on the terms and conditions contained in the use agreement entered into between the company and such member;*

4.3 they failed to ensure that the First Defendant included in its name the expression 'share block'; and

4.4 they failed to ensure, or to reasonably and adequately take steps to ensure that the Second Defendant did contract on behalf of the First Defendant (in respect of the loan agreement and mortgage bond) alternatively that the third party financiers such as the Plaintiff were informed that the Second Defendant was not duly authorised to represent the First Defendant.

5. The Plaintiff pleads that as a consequence of the third parties' aforesaid breaches of their alleged duties of care, the Plaintiff concluded the loan agreement with the First Defendant registered the mortgage bond, and as a consequence thereof and if the defence raised by the First Defendant in the summary judgment application is upheld, the Plaintiff has suffered damages in an amount of R3 219 930,15, as set forth in the annexure to the third party notice.

6. The Plaintiff alleges that in their capacities as shareholders the First and Seventh Third Parties owed the aforesaid duties, that is the duty not to act negligently, to the Plaintiff.

7. The Plaintiff's claim is bad in law and does not sustain a cause of action against the First and Seventh Third Parties for the following reasons:

7.1 a shareholder does not in law owe any duty of care to the company (in this case the First Defendant) in which the shares are held, or to the creditors of the company, or to future or potential creditors of the company, or to other third parties with whom the company may have had dealings, due to the fundamental principle that a company is a legal entity separate and distinct from its shareholders;

7.2 the facts upon which the Plaintiff relies in paragraphs 19.1 to 19.5 of the annexure to the third party notice in any event did not in law give rise to the alleged duties;

7.3 even if the First and Seventh Third Parties owed the alleged duties to the Plaintiff, the duties did not in law extend to a duty to protect the Plaintiff as a creditor or future/potential creditor of the First Defendant against losses of the kind suffered in the present case, which losses were caused solely by the conduct of the Second Defendant;

7.4 even if the First and Seventh Third Parties owed the alleged duties to third parties, its breach of those duties could not in law render third parties liable to the Plaintiff for its loss; and

7.5 furthermore the Plaintiff has not alleged that the First and Seventh Third Parties had a legal duty to prevent the loss aforesaid alternatively the facts pleaded are insufficient to support the existence of the legal duty contended for, as the loss alleged to have been suffered amounts to pure economic loss negligently caused, which is not prima facie wrongful.

8. Accordingly the conduct or omission by First and Seventh Third Parties and the remaining shareholders cited by the Applicant/ Plaintiff as third parties is not legally actionable and the extension of delictual liability is not warranted in the circumstances.

9. Furthermore the facts as pleaded by the Plaintiff do not demonstrate a sufficient nexus between the conduct of the First and Seventh Third Parties and the loss alleged to be suffered by the Plaintiff.

***WHEREFORE** the First and Seventh Third Parties pray that their exception be upheld and that the Plaintiff's case be dismissed with costs.*"

23. In summary then the bank's case as set out in the Third Party Notices seems to be to the following effect:

23.1. the bank lent money to a company which owned an immovable property;

23.2. that loan was secured by a mortgage bond over the property in favour of the bank;

23.3. the company to which the bank lent the money conducted a share block scheme in respect of the property and the provisions of the SBCA were applicable to the transaction;

23.4. the SBCA has onerous provisions (including section 14) which require that a loan of the sort advanced by the bank is supported by a resolution approved by 75% of the members of such a share block company;

23.5. such a resolution was not passed in terms of section 14(1) of the SBCA;

23.6. the loan is therefore void and unenforceable in terms of section 8(1) of the SBCA;

23.7. the bank did not know it was dealing with a share block company and advanced the loan oblivious of the requirement that it needed the support of 75% of the shareholders, or that there was in fact a valid resolution to that effect passed by 75% of the members;

23.8. the general description of the name of the company does not include the words "*share block*" which would ordinarily alert a party doing business with it to its corporate status as such;

23.9. further, the description of the main object of the company in its Memorandum of Association does not refer to its status as a share block company but rather "***investments in movable and immovable property***";

23.10. the mis-description of the company in its Memorandum of Association is in breach of the peremptory provisions of section 7(1) of the SBCA;

23.11. the members of the company are responsible for the aforesaid mis-description in the Memorandum of Association, in that, in attending to the registration of the company, the members were duty bound to ensure that the company's Memorandum accurately reflected its main object;

23.12. the members breached that duty (a legal duty owed to third parties dealing and contracting with the company), and as a consequence of that breach the bank suffered damages.

THE APPROACH ON EXCEPTION

24. The general principles applicable to an exception were recently usefully summarised by Makgoka J in Living Hands[1] with reference to a number of earlier decisions:

> "*[15] …*
>
> *(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.*
>
> *(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.*
>
> *(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.*

[1] Living Hands (Pty) Limited and Another v Ditz and Others 2013 (2) SA 368 (GSJ) at 374G.

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.

(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.

(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars."

THE DUTY OWED BY SHAREHOLDERS

25. In Living Hands the Court was confronted, albeit on significantly different facts, with the question as to what duties shareholders owed to a company in which they held shares. The Court answered the question before it thus[2]

"*[21] … In our jurisprudence and common-law jurisdictions such as England, Australia and New Zealand it is settled that a shareholder owes no fiduciary duty to the company in which he*

[2] Page 377D, para [21].

is a shareholder, and has no duty of care to the company in his capacity as such. See Kuwait Asia Bank EC v National Mutual Life Nominees Ltd, [1991] 1 AC 187 (PC), where the position was neatly summed up as follows:

> *'With regard to the alleged cause of action based on negligence, the law does not recognise any duty of care owed by shareholders of a company to creditors of the company, or to other third parties with whom the company may have dealings. This is a consequence of the fundamental principle that a company is a legal entity separate and distinct from its shareholders. The courts in England have refused to recognise any such duty … (T)he idea that shareholders owe any such duty has also not found favour with those directly concerned with law reform in the United Kingdom or in New Zealand.'*

26. Mr Amm accepted the correctness of this principle and acknowledged that, at first blush, there was merit in the Exception. However, he contended that the provisions of, *inter alia*, sections 5, 7, 8, 9 and 10 of the SBCA placed the members of a share block company in a different position to members of ordinary companies. The reason for this, so the argument ran, is that a share block company is a different *species* of corporate entity with a number of in-built rights and protections afforded by a piece of legislation quite distinct from the Companies Act. An important aspect of this distinction is, for example, section 14 of the SBCA which will entitle it to avoid the consequences of a loan procured without the support of 75% of its members.

27. Mr Amm argued then that because of these provisions , which are intended to protect and benefit members of a share block company, there is a greater degree of vigilance and care required on the part of the members when the company engages in commercial dealings with third parties.

UNLAWFULNESS

28. Given that it is common cause that the company was not properly described in its Memorandum or in relation to its name, the question that follows is whether any liability can attach in respect of potentially negligent conduct on the part of the parties responsible for this. Such liability will arise in circumstances where:

28.1. the conduct (or as in this case, the omission) on the part of the members complained of was unlawful; and

28.2. the conduct (or omission) on the part of the members caused damages to the bank, both factually and legally.

29. In determining whether the omission was unlawful a Court must enquire whether there was a legal duty on the part of the members to conform with the standard of a reasonable person, and then whether the omission falls short of that standard.[3]

[3] First National Bank of SA Limited v Duvenhage 2006 (5) SA 319 (SCA) at 320F.

30. In recent years there has been a plethora of cases relating to the so-called "*duty of care*" principle.[4] The point of departure is undoubtedly Ewels[5] (a claim for patrimonial damages) in which Rumpff CJ observed that our law had developed to the point where an omission was to be regarded as unlawful when the circumstances of the case at hand were such that the alleged omission not only incited moral indignation, but also the legal convictions of the community demanded that the omission was to be considered as unlawful, and that the damage suffered was to be made good by the person who neglected to perform a positive act.

31. Some four years later the Chief Justice approved the extension of such liability to cases involving pure economic loss in the milestone judgment in Administrateur, Natal v Trust Bank van Afrika Bpk[6].

32. In the constitutional era the test for pure economic loss is evaluated against the norms and values enshrined in the Constitution.[7] It is therefore a concept which is liable to change and "*continues to develop incrementally as the expectations and needs of society evolve*".[8]

33. In relation to claims for pure economic loss, as we have here, the approach was summarised thus by Harms JA in Telematrix[9]:

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4 The relevant cases are usefully collected in, for example, Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA), and Lee v Minister for Correctional Services 2013 (2) SA 144 (CC).
5 Minister van Polisie v Ewels 1975 (3) SA 590 (A).
6 1979 (3) SA 824 (A).
7 Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA).
8 AB Ventures Ltd v Siemens Ltd 2011 (4) SA 614 (SCA) at 616F.
9 Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 468C.

"*[13] When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not prima facie wrongful ('unlawful' is the synonym and is less of a euphemism) and that more is needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered (and not the converse as Goldstone J once implied unless there is a case of prima facie wrongfulness, such as where the loss was due to damage caused to the person or property of the plaintiff). In other words, conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful, something akin to and perhaps derived from the modern Dutch test ''n strijd … met hetgeen volgens ongeschreven recht in 'n maatschappelijk verkeer betaamt' (contrary to what is acceptable in social relations according to unwritten law). …*

[15] Stating that there are no general rules determining wrongfulness and that it always depends on 'the facts of the particular case' is accordingly somewhat of an overstatement because there are also some 'categories fixed by the law'. For example, since the judgment in [Indac Electronics (Pty) Limited v Volkskas Bank Limited 1992 (1) SA 783 (A)], which held that a collecting bank owes a legal duty to the owner of a cheque, it is well-nigh

impossible to argue that a collecting bank has no such duty, and all that may remain is to consider whether vis-à-vis the particular plaintiff the duty existed. However, as public policy considerations change, these categories may change, whether by expansion or contraction." [Footnotes otherwise omitted]

34. In Fourway Haulage[10] Brand JA dealt with a claim for an extension of liability for pure economic loss on the part of the SA Roads Agency which claimed lost toll fees on a toll road operated by it and which was closed after a collision caused by a truck belonging to Fourway. The learned Judge of Appeal stressed the importance of a party wishing to make such a claim to properly plead its case:

"*[13] In this light, so Fourway contended on appeal, the Agency was obliged to allege in its pleadings not only that the negligent conduct relied upon was wrongful, but that it also had to allege and prove the facts relied upon to substantiate the considerations of policy giving rise to a legal duty on the part of Fourway's employee. As a result of the Agency's failure to adhere to these rules of litigation, so the argument went, neither the policy considerations relevant to the question of wrongfulness, nor the factual basis underlying such policy considerations, was identified and investigated during the trial. In consequence, so the argument concluded, it would be prejudiced if the issue of wrongfulness were to be summarily*

[10] See paragraphs [13]-[15].

disposed of at the appeal. Fourway therefore suggested that, unless this court upholds its contention that the damages claimed are too remote – to which I shall presently return – the issue of wrongfulness should be postponed and decided with the rest of the issues concerning the quantum of the Agency's damages which are standing over in any event.

[14] The proposition that a plaintiff claiming pure economic loss must allege wrongfulness, and plead the facts relied upon to support that essential allegation, is in principle well founded. In fact, the absence of such allegations may render the particulars of claim excipiable on the basis that no cause of action has been disclosed."

35. Brand JA observed that Fourway had not filed an exception and that the matter had proceeded to trial regardless. The Court then grappled with the problem on appeal of the sufficiency of evidence:

"*[14] … The trial proceeded without any objection on [Fourway's] part. In the circumstances it would be futile to investigate whether an exception, if properly and timeously taken, would have been successful. As I see it, the question is rather whether, despite the lack of necessary allegations in the Agency's pleadings, Fourway had sufficient opportunity to produce the facts it would seek to rely on for the determination of the policy considerations pertaining to wrongfulness in its*

favour. Conversely stated, the question is whether Fourway has shown prejudice, in the sense that it would have conducted its case in a materially different way if the Agency's claim for pure economic loss had been properly pleaded."

THE CASE AS PRESENTLY PLEADED

36. The case before the Court at this juncture consists of a variety of documents – Particulars of Claim, Third Party Notices and a voluminous affidavit filed in reply to an application for Summary Judgment. The pleadings have not yet closed – the Defendants and the Third Parties have not yet articulated their defences to the various claims brought against them without anything approximating the requisite degree of accuracy.

37. No trial particulars have been sought by either party and no discovery has been called for. The matter therefore has a considerable procedural distance to run before it can be said to be trial ready.

38. Given that the bank's claims against the shareholders call for an extension of the grounds for delictual liability in respect of wrongfulness (and I have not even begun to consider the question of causation), and given that the claim flies in the face of the accepted case law which absolves shareholders from any duty towards the company or parties dealing with it, I believe that the matter is not ripe for determination at the stage of exception. Unlike the case as pleaded in Living Hands, I cannot conclude that it is appropriate to consider the exception on the factual matrix before me. To that extent then the noting of an exception is premature.

39. In Fourway Brand JA stressed the importance of legal certainty being striven for:

> "*[16] The enquiry, whether as a matter of policy Fourway should be held liable for the pure economic loss suffered by the Agency, raises a question which is logically anterior: what are the considerations of policy that should be taken into account for purposes of the enquiry? In accordance with what criteria should the relevant considerations of policy be identified? Must we accept that policy considerations are by their very nature incapable of pre-determination and that the identification of the policy considerations that should find application in a particular case are to be left to the discretion of the individual judge? Does this mean that in the context of pure economic loss the imposition of liability will depend on what every individual judge regards as fair and reasonable? I believe the answer to the last two questions must be 'no'. Liability cannot depend on the idiosyncratic views of an individual judge. That would cloud the outcome of every case in uncertainty. In matters of contract, for example, this court has turned its face against the notion that judges can refuse to enforce a contractual provision purely on the basis that it offends their personal sense of fairness and equity. Because, so it was said, that notion will give rise to legal and commercial uncertainty … I can see no reason why the same principle should not apply with equal force in matters of delict. A legal system in which the outcome of litigation cannot*

be predicted with some measure of certainty would fail in its purpose."

40. In National Chemsearch[11] Botha J enjoined judges not to be hesitant, in appropriate cases, to seize the nettle (as it were) and to move the law forward when moral convictions warranted it. But he sounded a word of caution that in the process a judge:

> "*… must guard carefully against being over-bold in substituting his own opinion for those of others, lest there be two much chopping and changing and uncertainty in the law*."

41. I am of the firm view that the matter should proceed via thorough trial preparation to a hearing of *viva voce* evidence. If at the commencement of the trial the issues have been sufficiently delineated through the pleadings and discovery process, it will be open to the Defendants and/or the Third Parties to ask the trial court to determine the point of law raised in the exception by way of a separate issue under rule 33(4), possibly even by way of a stated case if the parties are able to agree on the relevant factual matrix.

COSTS

42. In view of that which I have set out above, the Exception cannot be upheld at this stage. It therefore falls to be dismissed. However, it may be that the legal points raised by the Defendants and the Third Parties are ultimately found to be successful and that the substance of the Exception was good. For that

[11] National Chemsearch (SA) (Pty) Ltd v Borrowman and Another 1979 (3) SA 1092 (T) at 1101B-F.

reason it seems to me to be fair to reserve the question of the costs of this exception for determination by the Court hearing the trial in this matter. That Court will ultimately be in the best position to determine whether the points of law were properly raised.

ORDER OF COURT

43. In the circumstances, the Exception is dismissed. The costs of the Exception are to stand over for determination at the trial of this matter.

GAMBLE J