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

Case Number: 8984 / 2021

In the matter between:

BETTER SAILS MANUFACTURING (PTY) LTD	Plaintiff
and	
GORDON DAVID TURNER	First Defendant
SAIL DESIGN COMPANY (PTY) LTD	Second Defendant
PLATINUM MILE INVESTMENTS 517 (PTY) LTD	Third Defendant
FOUR RIVERS TRADING 363 (PTY) LTD	Fourth Defendant
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Fifth Defendant

Coram: Wille, J
Heard: 17th May 2022
Delivered: 31st of May 2022

JUDGMENT

WILLE, J:

Introduction

[1] The first defendant excepts to the plaintiff's particulars of claim on several grounds. The first defendant argues that the plaintiff's particulars of claim are bad in law and do not disclose a cause of action because; (a) the plaintiff has failed to plead any material facts and circumstances that will give rise to a finding (on the grounds of public and legal policy), that the first defendant should be rendered liable, in delict, to compensate the plaintiff for its pure economic loss; (b) the plaintiff has failed to

plead wrongfulness; (c) the plaintiff has failed to plead its *quantum* of damages and, (d) the plaintiff has failed to plead that it falls within the group of applicants with the *requisite standing* as contemplated to have the excipient declared to be a delinquent director. At the hearing of the matter, I was advised that it was no longer necessary for me to deal with the issue raised in connection with the plaintiff's *quantum* of damages

[2] As a general proposition in deciding an exception, a court must accept all the allegations of fact made in the particulars of the claim as true, may not have regard to any other extraneous facts or documents, and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on *every interpretation* that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment that is so serious as to merit the costs even of an exception.[1]

The 'Context of the Claims'

[3] In summary, the plaintiff pilots two claims against the first defendant. One claim for damages and another claim for the first defendant to be declared a delinquent director. The plaintiff claims damages from the first defendant in terms of a few legislative interventions in terms of the Companies Act.[2] These interventions will be referred to as the first legislative intervention[3], the second legislative intervention[4], and the third legislative intervention[5], respectively.

[4] These claims arise from the first defendant's alleged conduct in his capacity as a director of the second defendant, third defendant, and the fourth defendant.[6] Further, these claims are underpinned by the first defendant's alleged utilization of

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[1] *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC) at [15].
[2] Act, No. 71 of 2008 (the 'Companies Act').
[3] Section 76(3) of the Companies Act.
[4] Section 77(2) of the Companies Act.
[5] Section 218(2) of the Companies Act.
[6] These defendants shall be referred to as the 'corporate defendants' for the purposes of this judgment.

the juristic personalities of the corporate defendants in and by aiding and abetting certain third parties[7] in unlawfully competing with the plaintiff's business.

[5] These are the same third parties that sold a certain sail-making business as a going concern to the plaintiff. In turn, it is alleged that the issued share capital of the corporate defendants is owned by a trust, and it is alleged that this trust is the *alter ego* of the third parties who indirectly sold the sail-making business to the plaintiff.

[6] To place this prior sale transaction in its proper perspective it is apposite to record that the plaintiff conducts a sail design and sail manufacturing business under license from a company based in the United States of America. The sail design and manufacturing business of the plaintiff was acquired as a going concern in terms of a commercial transaction concluded between the plaintiff, the corporate defendants, and the third parties. Part of this transaction involved the use and occupation of the premises previously occupied by the second defendant (from which it operated its business), together with certain premises formerly occupied by the third defendant.

[7] The latter were bespoke custom-fitted premises for the purpose of conducting the plaintiff's business for a period of ten years. The plaintiff entered into certain formal lease agreements with the second and third defendants for the use of these premises to conduct their business operations going forward. It is averred that these commercial transactions were predicated upon the material representations made by the second and third defendants (and the third parties), which induced the plaintiff to conclude the commercial transaction previously referenced.

[8] In short, the representations made were to the effect that the premises would be fit for the purpose of conducting the plaintiff's business and would not pose a risk to the further conducting of its business (as a going concern) for at least a continuous period of ten years.

[9] Further, the case for the plaintiff is that to the knowledge of the third parties, these representations were false, *inter alia*, because the third parties failed to disclose; (a) the existence of asbestos-containing materials in the roof or in the

[7] Mr and Mrs Reuvers.

buildings situated on the premises; (b) the existence of substantial leaks in the roof of the premises; (c) the scope and extent of the repair work that would be required to remedy the leaks in the roof of the premises and, (d) the scope and extent of the disruption to the operation of plaintiff's business brought about by the remedial work to remedy these defects.

[10] The core allegations that find application against the first defendant are that prior to and following the conclusion of the commercial transaction, the first defendant aided and abetted the third parties and the corporate defendants to undermine the business of the plaintiff and to circumvent certain of the provisions of the commercial transaction.

[11] It is alleged that this was achieved, *inter alia,* by the following, namely; (a) the fourth defendant concluded a loan agreement with a financial institution for a loan of R42 million repayable as a residual amount (at the end of a five year period); (b) the additional amounts due on the loan, being interest costs and other charges were also repayable over five years and, (c) prior to the conclusion of this loan, the second defendant, the third defendant and the fourth defendant were represented by both the third party and the first defendant.

[12] This loan was incurred ostensibly to purchase another immovable property and for the purpose of financing, *inter alia*, a new business set up by the third parties for the purpose of unlawfully competing with the plaintiff. Further, it is pleaded that the first to the fourth defendants aided and abetted the third parties in these unlawful attempts, alternatively, that the first defendant aided and abetted the third parties in these unlawful activities. Further, it is averred that as a direct result the plaintiff has suffered damages and is suffering damages on a continuous basis.

[13] This claim for damages against the third parties and, *inter alia,* the second defendant and the third defendant, form part of the relief claimed in a totally discrete action. In the current particulars of the claim as formulated, the plaintiff pleads that it intends to apply for consolidation of this former discrete action with the current action and for all these claims to be determined together.

[14] The claim for consolidation of these actions, is in turn, underpinned mostly by the allegation that the facts that need not be pleaded in the current action materially overlap with the facts that need not be pleaded in the prior discrete action. It is further alleged that the first defendant was at all material times the sole director of the corporate defendants and was obliged to exercise the powers and to perform the functions of a director as follows; (a) in good faith and for a proper purpose; (b) in the best interest of the company and, (c) with the degree of care, skill and, diligence that may reasonably be expected (of a person carrying out the same functions in relation to the company as those carried out by that director) and having general knowledge, skill, and experience of that director.

[15] Moreover, it is pleaded by the plaintiff that at the time of the conclusion of the loan agreement the excipient was aware (alternatively reasonably ought to have been aware) that the fourth defendant had at all times traded recklessly and with the fraudulent purpose to serve as a conduit to raise the loan finance to provide seed funding for the purpose of funding the business set up by the third parties or conducted for this purpose, through associated persons.

Consideration

[16] The first complaint piloted against the claims by the plaintiff relates to the core issue of wrongfulness. This bears further scrutiny. The plaintiff always pleads that prior to and during the conclusion of the loan agreement the corporate defendants were duly represented by the third parties and the first defendant. In addition to this, it is pleaded that the loan agreement was entered into for the purpose of financing the business set up by the third parties for the purpose of unlawfully competing with the plaintiff and specifically to undermine the business of the plaintiff. It is advanced that the first defendant and the remaining corporate defendants aided and abetted the third parties in these unlawful undertakings.

[17] Alternatively, it is pleaded that the first defendant aided and abetted the third parties in these unlawful undertakings. It is also alleged that the fourth defendant (alternatively, commanded by the first defendant as the ‘marionette’ of the third parties) traded recklessly and with the fraudulent purpose to serve as a conduit to

raise loan finance to provide seed funding for the purpose of funding the business set up by the third parties (in unlawful competition with the plaintiff) and, in circumvention of the commercial transaction.

[18] The first defendant complains that by the first legislative intervention, a standard of conduct is merely established (as expected of directors), without dealing with the liability of directors.[8] Accordingly, it is contended that for a director to be liable for damages (because of the breach of the standard so imposed), this must be brought also under the umbrella of the second legislative intervention.[9]

[19] The first defendant argues that pure economic loss is not *prima facie* wrongful and that the law of delict does not allow for its recovery generally. Further, it is averred that the plaintiff failed to plead the following, namely; (a) the material facts and circumstances (that may give rise to a finding), on the grounds of public and legal policy (that the first defendant should be held liable in delict to compensate the plaintiff for its pure economic loss) and, (b) that the first defendant, in his capacity as a director of the corporate defendants, owed a legal duty to the plaintiff to prevent the pure economic loss claimed.

[20] The first defendant contends that as a consequence of the absence of the specific allegation of the existence of a legal duty, the plaintiff's claims on this ground alone (as currently formulated), are subject to exception. The plaintiff disagrees and seeks refuge in the third legislative intervention in an attempt to ward off this complaint by the first defendant.

[21] The first defendant takes this position because he, *inter alia*, asserts; (a) that the duties owed by a director in terms of these sections are owed to the company of which he is a director and, (b) that the liability under these sections does not arise unless (the liability is established in accordance with the principles of the common law), with reference to a breach of a fiduciary duty.

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[8] Section 76(3) of the Companies Act.
[9] Section 77(2) of the Companies Act.

[22] Turning for a moment to the sole remaining exception. This exception is in my view inextricably linked to the main exception. I say this because the remaining exception is aimed at an order declaring the first defendant to be declared a delinquent director.[10]

[23] The argument on this score is that this relief is bridled. It remains open only to a closed list of claimants, namely: (a) the company; (b) a shareholder; (c) a director; (d) a company secretary or prescribed officer, and (e) a registered trade union that represents employees of the company or another representative of the employees of a company.

[24] The first defendant contends that the plaintiff's interest in his conduct and the consequences thereof is unique and private in nature. This because the plaintiff is no more than; (a) a party to commercial agreements that were concluded with the corporate defendants and, (b) a claimant in civil proceedings against the first defendant in which damages are sought from him based on his alleged conduct in his capacity as director of the corporate defendants.

[25] Accordingly, it is submitted by the first defendant that a claim for pure economic loss is distinguishable from other claims in delict because the element of wrongfulness is not established merely by the existence of negligent conduct.[11] By the evolution of this theme, it is submitted that the question of whether there exists a legal duty or not, is one for judicial determination based on public or legal policy considerations, consistent with constitutional norms.[12]

[26] That having been said, it must be accepted that there is no closed list of legal duties. This must be so because ultimately wrongfulness reflects the legal convictions of the community and constitutional norms and, wrongfulness 'enables' the law of delict to move with the times. In essence, the first defendant's case is that

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[10] In terms of section 162(2)(a), read with section 162(5)(c)(iv)(bb) of the Companies Act.
[11] *Hlumisa Investment Holdings (RF) Ltd v Kirkinis* [2020] 3 All SA 650 (SCA) at para [64].
[12] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at para [12].

the plaintiff places exclusive reliance on this legal duty with reference to the first legislative intervention.[13] On this, I disagree.

[27] Although not pleaded with absolute clarity by the plaintiff, it is abundantly clear that the plaintiff relies on the fact that the first defendant, as a director of the corporate defendants, owed the plaintiff a legal duty. In addition, the actual words used by the plaintiff are a reference to the third legislative intervention.[14] In my view, any person who could bring himself within the ambit of the third legislative intervention is permitted to advance the claims as formulated by the plaintiff in its particulars of claim. All that is required is a link between the specified contravention and the loss allegedly suffered.[15]

[28] I hold the view that the plaintiff's core claim is consonant with the type of claim addressed in *Rabinowitz*[16] as this claim was precisely in terms of the third legislative intervention at the instances of third parties and not shareholders. This must be so because this third legislative intervention imports into it common law concepts of liability.

[29] The provisions of the third legislative intervention are extremely wide and far-ranging. This scheme of potential liability is indicated as follows;[17]

'…Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention…'

[30] Accordingly, in my view, this statutory scheme of liability exists alongside and parallel to the liability recognized in the common law. We are here not dealing with a case advanced by shareholders for reflective losses.[18] A derivative shareholders claim is as a matter of logic by its very nature precluded by the rule against a claim for reflective losses.

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[13] Sections 76(3)(a) and 76(3)(c) of the Companies Act
[14] Section 218 (2) of the Companies Act.
[15] *Hlumisa* at para [51].
[16] *Rabinowitz v Van Graan and Others* 2013 (5) SA 315 (GSJ).
[17] Section 218 (2) of the Companies Act.
[18] This claim is very different to the claim referenced in *De Bruyn v Steinhoff International Holdings N.V. and Others* 2022 (1) SA 442 (GJ)

[31] The legal and policy grounds for the first defendant's potential liability are therefore well-established. It is alleged that prior to and following the conclusion of the commercial transaction, the third parties (aided and abetted by the first defendant and the corporate defendants) embarked upon a concerted effort to undermine the business of the plaintiff to thwart the provisions of the commercial transaction.

[32] Accordingly, the exercise in establishing a legal duty to act (or actionable omission) rests upon a range of factual or factual-legal considerations and accordingly an exception (in these peculiar circumstances) would be entirely unsuited for the determination of the issue of wrongfulness. The dispute pertaining to wrongfulness is clearly best left for evaluation at the trial rather than at the exception stage.

[33] So too, the issue of the plaintiff's standing is also not appropriate for determination at the exception stage. This is so because it does not only concern a legal question and it would also not as a racing certainty avoid the leading of unnecessary evidence at the trial. The plaintiff requests an order declaring that it has extended standing to claim for the first defendant to be declared a delinquent director. An objection to this is more suited to the filing of a special plea.

[34] Further, the plaintiff does not take issue with the contention that the issue of standing ought to be determined prior to the commencement of the trial. The plaintiff also makes a powerful point in that it takes the position that the first defendant himself elevates the test for public interest which requires a consideration of, at least, the following factors, namely; (a) whether there is another reasonable and effective manner in which the challenge can be brought; (b) the nature of the relief sought, and the extent to which it is of general and prospective application; (c) the range of persons or groups who may be directly or indirectly affected by any order made by the court and, (d) the opportunity that these persons or groups have had to present evidence and argument to the court.

[35] In support of its position for extended standing, the plaintiff submits that indeed a public interest is attracted in these proceedings by virtue of several

allegations, including, *inter alia*, the following, namely that; (a) the corporate defendants are currently in business rescue proceedings; (b) it is alleged that the corporate defendants (through the conduct of the first defendant) traded recklessly and with the fraudulent purpose and, (c) the fact that a company is under business rescue proceedings presupposes that the said company is financially distressed. It is argued that it is unlikely that the corporate defendants will be able to pay all their debts within the immediately ensuing six-month period, alternatively, it is very likely the corporate defendants will become insolvent within the immediately ensuing six-month period.

[36] In the first instance, this envisages that the corporate defendants may be commercially insolvent while, in the second case, this envisages factual insolvency of the corporate defendants. As a general proposition, it is advanced that liquidation or insolvency proceedings by their very nature involve public interest.[19] Accordingly, the same, it is submitted, applies to business rescue proceedings.

[37] It seems to me that this may be an issue for the court to eventually decide once the relevant evidence is placed before it to determine whether the plaintiff has the 'extended standing' that it seeks also by way of legislative intervention. It also must be so that fraudulent conduct (if established) is a matter which is ultimately inimical to the interests of the community.

[38] Fortunately, this is not an issue upon which I need to render a definitive finding in this judgment as I am not sure in what manner the first defendant will be embarrassed by pleading to the claims as currently formulated. This is precisely because he is obliged in any event to plead to the main claims as formulated by the plaintiff. To succeed with his exceptions, the first defendant must show that the pleading is indeed subject to exception on every interpretation that can reasonably be attached to it.[20] I am enjoined to consider the pleading excepted to as it stands and not to facts outside those stated in it.

Conclusion and Costs

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[19] *Absa Bank Ltd v Hammerle Group (Pty) Ltd* 2015 (5) SA 215 (SCA) at [13].
[20] *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) at 965C–D.

[39] For all these reasons, I hold the view that the claims as currently formulated by the plaintiff are not subject to exception. I do however accept that certain of the averments made by the plaintiff in its particulars of claim could have (and should have) been pleaded with more clarity and precision.

[40] This latter position will be reflected in my order as to the costs of and incidental to these exception proceedings.

[41] In the result, the following order is granted, namely:

1. That the exceptions at the instance of the first defendant, are dismissed.

2. That the costs of and incidental to the exception proceedings shall stand over for determination by the trial court.

E. D. WILLE
Judge of the High Court
Cape Town