Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 7471 / 2021

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 21-22 February 2023

Date of judgment: 11 April 2023

In the matter between:

GR SUTHERLAND AND ASSOCIATES (PTY) LTD	Applicant
and	
V & A WATERFRONT HOLDINGS (PTY) LTD	First Respondent
MACE MANAGEMENT SERVICES (PTY) LTD	Second Respondent
VAN DER MERWE MISZEWSKI ARCHITECTS	Third Respondent
JACOBS PARKER ARCHITECTS CC	Fourth Respondent
RICK BROWN & ASSOCIATES	Fifth Respondent
WBHO (PTY) LTD	Sixth Respondent
GREENLITE CONCRETE	Seventh Respondent
THE SILO HOTEL	Eighth Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicant, GR Sutherland and Associates (Pty) Ltd ('Sutherland'), is a company that carries on business as a firm of professional consulting structural engineers. In 2014, it was appointed by the first respondent, V & A Waterfront Holdings (Pty) Ltd ('V & A'), to be the consulting structural engineer in respect of a building project to modify and adapt an old grain silo in the Victoria and Alfred Waterfront section of the Cape Town harbour area.[1] The undertaking involved the conversion of the silo into a building that would, amongst other things, accommodate a luxury boutique hotel.

[2] The construction work was done in terms of a building contract between V & A, qua employer, and WBHO (Pty) Ltd, the sixth respondent, qua principal building contractor. When the work was completed, the space earmarked for the hotel was taken over by the eighth respondent, The Silo Hotel ('the Hotel'). The Hotel is leasing the relevant part of the building from V & A in terms of a contract of lease concluded on 27 November 2014.

[3] The second respondent, Mace Management Services (Pty) Ltd ('Mace'), was appointed by V & A as the 'principal consultant' and 'project manager' in respect of the building contract. The third, fourth and fifth respondents, collaborating for the purpose in a joint venture, were engaged by V & A as executive architects to the project.[2] The fifth respondent has reportedly since been liquidated and played no role in the proceedings. I shall refer collectively to the third and fourth respondents, Van Der Merwe Miszewski Architects and Jacobs Parker Architects CC, respectively, as 'the architects'.

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[1] The deed of contract was executed only in or about June 2015. The effective date was stipulated to be 1 March 2015.

[2] The design architect was Heatherwick Studio Ltd. The fifth respondent, Rick Brown and Associates was also separately engaged as the '*hotel fitout architect*'. The members of the joint venture comprising the third, fourth and fifth respondents were nominated as '*the Architect*' in the JBCC format principal building agreement concluded between V & A and WBHO.

[4] Sutherland and the second to fifth respondents (hereinafter, where convenient, collectively referred to as 'the consultants') were engaged for the project in terms of standard form PROCSA contracts concluded by V & A severally with each of them.[3] PROCSA is an acronym for 'Professional Consultants Services Agreement Committee'. *Ex facie* the covering page of the standard form contract document, it was recommended for use by the 'PROCSA™ Constituents', viz. the Africa Association of Quantity Surveyors, the Association of Construction Project Managers, the Association of South African Quantity Surveyors, Consulting Engineers South Africa, the South African Black Technical and Allied Careers Organisation, the South African Institute of Architects and the South African Property Owners Association. A copy of the agreement between V & A and Sutherland was annexed, marked '**FA 2**', to Sutherland's founding affidavit in the current proceedings.

[5] Clause 18 of the PROCSA agreement regulates the '*resolution of disputes*' between the parties to the agreement. '*Party*' is specially defined in clause 1 to mean '[t]he **client** or the **consultant** entering into this **agreement**'. Clause 18.1 provides: '*Should any dispute whatsoever arise between the **parties**, then either **party** hereto may declare a dispute by delivering notice of the details thereof to the other **party**, which dispute shall be referred to mediation prior to arbitration*'. Clause 18.9 provides that any arbitration shall proceed before a single arbitrator to be appointed jointly by the parties, failing which by either one of the parties. Clause 18.11 records that the arbitration shall be conducted according to rules determined by the arbitrator. Clause 18 has been referred to in the current proceedings as '*the arbitration agreement*'.

[6] A dispute, particulars whereof will be described presently, has arisen between the V & A and the consultants. Notices declaring the dispute have been given by V & A to all of the consultants, but at this stage arbitration proceedings are being prosecuted by it only against Sutherland. Mr L.A. Rose-Innes SC, a senior counsel in practice at the Cape Bar, was appointed as the arbitrator. Sutherland has pleaded

[3] With tailormade 'amendments and/or additions' as provided for in clause A.20 of the standard form contract document.

to the V & A's statement of claim and the V & A has delivered a replication to the plea. Sutherland has also instituted counterclaims in the arbitration against V & A. V & A contested whether the counterclaims fell within the ambit of the reference to arbitration, but the arbitrator has given a reasoned ruling determining that they do. V & A has since pleaded to the counterclaims.

[7] In the current proceedings, Sutherland has applied for orders that –

1. the arbitration agreement ... embodied in annexure "**FA 2**" to the founding affidavit be set aside; alternatively,

2. the arbitration agreement shall cease to have effect with reference to the dispute relating to the failure of the screed flooring at the Silo Hotel referred to arbitration before Adv L Rose-Innes SC;

3. the first respondent, and such other respondent who elects to oppose this application, be directed to pay the applicant's costs of this application jointly and severally, the one paying the other to be absolved;

4. granting such further and/or alternative relief as the above honourable court deems meet.

[8] The application is brought in terms of s 3(2) of the Arbitration Act 42 of 1965, which provides:

'*The court may at any time on the application of any party to an arbitration agreement, on good cause shown –*

(a) set aside the arbitration agreement; or

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) *order that the arbitration agreement shall cease to have effect with reference to any dispute referred.*'

[9] The provision allows for a negation of the usually hallowed principle of sanctity of contract often expressed by lawyers through the maxim *pacta sunt servanda* (viz. agreements are to be respected). Ordinarily, agreements competently concluded between contracting parties will be upheld and enforced by the court according to their tenor provided only that they are lawful and not contrary to public policy. It is for that reason that showing 'good cause' within the meaning of the subsection has been held to be a difficult case to make out.[4]

[10] In *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another* [2015] ZACC 35 (24 November 2015); 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC), at para 36, the Constitutional Court expressed itself on s 3(2) as follows: '*The question remains whether* [the applicant] *has advanced good cause to escape the agreement. The Act is not particularly helpful on what would make up good cause. Nor have our courts expressly defined good cause. It is, however, clear that the onus to demonstrate good cause is not easily met. A court's discretion to set aside an existing arbitration agreement must be exercised only where a persuasive case has been made out. It is neither possible nor desirable, however, for courts to define precisely what circumstances constitute a persuasive case*'.

[11] The Court continued, in para 37, '*Absent infringement of constitutional norms, courts will hesitate to set aside an arbitration agreement untainted by misconduct or irregularity unless a truly compelling reason exists*'. It illustrated the proposition with the following examples of situations in which a court might intervene: '*where allegations of fraud are best adjudicated in open court rather than private arbitration proceedings, or where a party's counterclaims affect third parties who were not*

[4] *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E-F. In *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 375, it was remarked that a '*very strong case*' had to be made; see also *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 334A.

subject to the arbitration and in respect of which the arbitrator lacks investigative powers'.[5]

[12] The reason why a truly compelling reason must be shown for relief in terms of s 3(2) is that arbitration agreements are ordinarily entered into for the common benefit of the contracting parties, and a party should not lightly be able deprive another party of the benefit. As the majority of the Constitutional Court observed in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6 (20 March 2009); 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC), '*The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters*.'[6]

[13] Mindful of the foregoing considerations, it is evident that whether just cause in the relevant sense has been shown is ultimately dependent on the peculiar circumstances of the given case.

[14] The arbitral dispute between Sutherland and V&A arises from part of the work done to the silo building that required the floor levels in the section of the structure that houses the boutique hotel to be raised above the level of the solid floor slabs. That was done using a special type of light-weight screed. The screeding work was done by a concern called Greenlite Concrete (the seventh respondent) in terms of a subcontract with WBHO (Pty) Ltd. The screed did not function satisfactorily, with the result that the floors of the hotel became uneven. Remedial work at an alleged cost

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[5] In footnote 34. The approach that a party against whom allegations of fraud are made should, if it so desires, be permitted to have the case determined in open court rather than in private arbitration was discussed in *Metallurgical and Commercial Consultants* supra, at 393; see also *Sera v De Wet* 1974 (2) SA 645 (T) at 654*fin*-655. In *Sera*'s case, the considerations that appear to have weighed with the Court in its decision to grant an application in terms of s 3(2) were the suggestion that the architect employed by one of the parties had been party to fraudulent conduct coupled with the fact that the arbitrator called upon to determine the question was of the same profession. That gave rise to what Viljoen J considered to be a reasonable apprehension by the applicant that he would not be treated fairly. In addition, the dispute involved questions of law that the Court considered should preferably be decided by a court of law. It is difficult to see how the latter consideration could ever apply in a matter in which the arbitrator is a senior legal practitioner.

[6] In para 219.

of approximately R6 million has been carried out. The remedial work will, however, apparently provide only a temporary solution and it is therefore currently envisaged that further work, expected to cost V&A approximately R30,6 million in present value (including losses associated with the building being out of commission during the execution of the work), will be required in the future to give a long-lasting result. The Hotel had to close its business for five months while the remedial work to provide a temporary solution was carried out.

[15] The causes of the problem were investigated by an engineer and architect, one Professor Vernon Collis, who furnished three reports on the matter. Collis opined that the consultants, as well as the sixth and seventh respondents, were each, in the several respects identified in his reports, at fault in respect of the unsatisfactory work. As mentioned, V&A gave notice to each of the parties with which it had an arbitration agreement (including WBHO (Pty) Ltd) of its intention to proceed against them. It also issued an invitation to those parties to agree to proceedings in which the issues could be addressed and determined on a consolidated basis as between everyone involved. Sutherland declined the invitation. V&A has reportedly concluded a settlement with the building contractor. Thereafter, as also mentioned earlier, V&A proceeded only against Sutherland, holding in abeyance for the time being any claims it might also be able to advance against any of the other parties.

[16] V&A's claim is founded on an alleged breach by Sutherland of its contract with V&A. V&A alleges that had Sutherland properly performed its obligations under the contract the defective light-weight screeds would not have been laid. It computes its resultant damages in the sum of the rental it did not receive from the Hotel while the interim remedial solution was being implemented (R7,1 million) plus the cost of the remedial work associated with the initial interim and subsequent long-lasting solutions. The pleaded claim acknowledges, however, that Sutherland's liability is limited in terms of its contract with V&A to an amount twice its contract fee; viz. R14.5 million.

[17] In its plea to the claim, Sutherland has denied that the screeding work fell within the ambit of its contractual responsibility; and pleaded that in any event any

liability by it was excluded by virtue of clause 7 of its contract because the primary or direct responsibility for it lay with the other consultants or those involved in carrying out the work. It has also pleaded that it is excused from liability to V&A because the failure of the claimant's principal agent, Mace, to properly oversee the renovation was causal of the problem. Sutherland further pleaded that V&A has 'assigned' its claim to the Hotel and consequently lacks standing to pursue it. V&A's counsel consider that the statement of defence is further susceptible to being interpreted as including a contention by Sutherland that the claim vests in the Hotel on the basis that V&A had acted as the Hotel's agent in engaging Sutherland as the consulting engineer. Finally, Sutherland has pleaded that V&A is precluded from advancing the claim because in terms of the lease agreement between V&A and the Hotel the latter undertook at its cost to remedy any latent defects in the building after the completion of the remodelling work.

[18] Clause 7 of the contract, upon which Sutherland relies in its plea, provides (in subclause 2) for the forementioned limitation in the monetary amount of Sutherland's potential liability, and further as follows in relevant part:

> '7.0 **LIMIT OF CONSULTANT'S LIABILITY**
>
> 7.1 Notwithstanding 6.0, the **consultant** shall specifically not be liable for the following:
>
> 7.1.1 Acts or omissions of **other consultants**
>
> 7.1.2 Construction methods, techniques, sequences and procedures employed by the **contractor(s)**
>
> 7.1.3 Any material, component, system, specialist design or workmanship failing to perform according to the claims of manufacturers, suppliers, contractors or subcontractors
>
> 7.1.4 Reasonable deviations from any estimates of costs and/or budgets

7.1.5 Failure by the **contractor** or the **client** to perform in terms of the **contract**

7.1.6 Delays due to causes beyond the **consultant's** control

7.1.7 Acts or omissions of third parties.

...

7.4 The **client** hereby indemnifies the **consultant** against all claims by third parties which arise out of or in connection with **services** rendered under this agreement:

7.4.1 Which exceed the maximum amount of compensation in terms of 7.2 and

7.4.2 for the full amount of any such claims after the period stated in 7.3'.

The words in bold print are specially defined in clause 1 of the agreement. '*Contract*' is defined to mean '*an agreement entered into between the **client*** [V&A] *and a **contractor** for the execution of the works or part thereof*'. '*Contractor*' is defined as '*the entity or entities entering into **contract(s)** with the **client** for the execution of the **works** or part thereof*'. (WBHO (Pty) Ltd was the '*contractor*' in respect of the silo project.) '*Consultant*' means '*the contracting party named in the **schedule** providing the **services***'. '*Other Consultants*' means '*entities or third parties acting on behalf of the **client** to provide professional or specialist services on any aspect of the **project***'. Mace and the architects were accordingly 'other consultants' within the meaning of the agreement between V&A and Sutherland. '*Services*' means '*the duties and functions of the **consultant** set out in Annexure B*'.

[19] It will be for the arbitrator to determine the effect of clause 7.1 on the pleaded claim. It is relevant for present purposes, however, to observe that clause 7.1.1 appears to have the effect of materially limiting the possibility of concurrent liability by any of the consultants to V&A for damages occasioned by the breach by any of

them of their respective contracts. When read with clause 6 of the agreement ('Consultant's Obligations'),[7] the clause appears to have a compartmentalising effect on the extent of the respective consultants' contractual obligations and attendant potential liability. The clause is plainly intended to operate in the consultants' favour by affording each of them the protection of a type of ringfenced exposure to liability for breach of contract. The apparent effect is to restrict the possibility of any of the consultants being involved in litigation in which the predominant cause of any damage sustained by the client is the breach of its discrete contractual obligations by another consultant.

[20] It seems to me that the situation in the current matter as between V&A and the parties with which it contracted in relation to the silo building project is comparable to that which obtained in *Van Immerzeel & Pohl and Another v Samancor Ltd* [2000] ZASCA 79 (30 November 2000); 2001 (2) SA 90 (SCA); [2001] 2 All SA 235 (A), 2001 CLR 32. The consultants and the building contractor may be independently liable for the same or similar damage, but the V&A's causes of action against them are separate and independent based upon separate if interconnected contracts.[8] Subject to the possible effect of clause 7 of the respective PROCSA agreements, V&A is entitled to choose against which contractor or contractors to proceed in respect of the damage. As Farlam AJA noted in *Van Immerzeel & Pohl* at

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[7] Clause 6 provides:

'*6.1* *The **consultant** shall generally provide the **services** reasonably required set out in Annexure B in relation to the **scope of work** in the **schedule***

6.2 *The **consultant** shall exercise reasonable professional skill, care and diligence in the performance of the obligations in terms of this **agreement***

6.3 *Where the **services** assigned to the **consultant** include the obligation to certify, or to exercise discretion or quasi arbitrational functions in carrying out the **services**, the **consultant** shall be obliged to exercise such obligations, discretions and functions in an independent professional manner acting with reasonable skill, care and diligence with regard to all interests involved*

6.4 *The **consultant** shall not make any material alteration, or addition to, or omission from the approved design, budget or programme without the consent of the **client** and/or the **principal consultant** except when required to do so by any applicable law or when arising from an emergency. In such circumstances, the **consultant** will notify the **client**, **principal consultant** and other **consultants** as soon as practicable of the action taken*

6.5 *The **consultant** shall cooperate in absolute good faith, comply with and accurately and timelessly adhere to all reasonable requests by the client, **principal consultant**, **principal agent** and other **consultants**.*'

[8] *Van Immerzeel & Pohl* at para 76-81; cf. also *PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another* [2015] ZASCA 2 (4 March 2015); [2015] 2 All SA 403 (SCA) at para 62

para 79, there is '*no legal principle which compels a plaintiff in a case such as this to excuss, as it were, one contract breaker before suing or recovering compensation from the other*'. V&A is, of course, nonetheless precluded from recovering in total from any party it might choose to sue more than the amount of its loss; in other words, double recovery is not permitted.

[21] Absent a contractual basis for such liability, a person who is liable to compensate another in damages for breach of contract does not enjoy a right to claim a contribution from another contracting party whose breach might have contributed to the claimant's loss or for an abatement on account of the claimant's fault.[9] We do not in this country have legislation like the United Kingdom's Civil Liability (Contribution) Act (c47) of 1978, which, subject to the provisions of the statute, allows '*any person liable in respect of any damage suffered by another person* [to] *recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)*' irrespective of '*the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise*'.

[22] The position as between joint wrongdoers in delict under the common law and the Apportionment of Damages Act 34 of 1956 is distinguishable when the context in which the damages in issue were sustained was contractual; see *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* [2001] ZASCA 82 (1 June 2001); [2001] 4 All SA 161 (A) from para 66 and *Nedcor Bank Limited v Lloyd-Gray Lithographers (Pty) Limited* [2000] ZASCA 166 (8 September 2000); [2000] 4 All SA 393 (A) at para 10-12.

[23] In its counterclaim, Sutherland has sought an award declaring that V&A '*indemnifies* [it] *against all and any claims of the Silo Hotel arising from the Lightweight Screeds dispute directly and/or indirectly, either generally or more*

[9] It is, with respect, not clear on what basis the court in *Turn Around Investments 7 (Pty) Ltd and Others v Marcus Smit Architects CC and Another* 2023 (1) SA 300 (WCC), to which counsel referred in argument, gave judgment against two contractors who were liable to the plaintiff for the same damage arising out of the breach of two independent albeit interconnected contracts '*jointly and severally*'. A joint and several liability implies a right by the party paying more than his share to claim a contribution in respect of the excess from the other liable party. The order appears to have been made consistently with the relief sought in the summons, but the existence of a legal basis for '*joint* [as distinct from concurrent] *liability*' between the first and second defendants in that matter does not appear to have been considered.

particularly as currently formulated and/or still to be formulated in the particulars of claim of the Silo Hotel'. The particulars of claim of the Silo Hotel is the founding pleading in an action instituted in this court by the Hotel under case no. 5619/22, which will be described presently.

[24] Sutherland also makes a contingent counterclaim in delict for damages against V&A in any amount that it might be ordered to pay to the latter in respect V&A's claim in convention founded in contract. It is not for this court to determine them, but I do not think it would be unreasonable to describe the pleaded bases for the delictual claim as 'creative'. It is advanced on a twofold basis. Firstly, that were the contingency of a contractual damages award against it in favour of V&A realised, the latter would be delictually liable to it for negligently appointing an allegedly incompetent party (Mace) as its principal agent and principal consultant to administer the works contract. Secondly, it alleges that V&A, as Mace's principal, is vicariously liable for Mace's alleged breach of its contract with V&A, which Sutherland alleges gave rise to a delictual liability by Mace to any of the other consultants who were consequently rendered liable to V&A in contract.

[25] Mace, two of the three architects cited by Sutherland in the current application, WBHO (Pty) Ltd and Arup (Pty) Ltd (described as one of the project engineers on the Grain Silo project), as well as Sutherland itself, have been cited as defendants in the Hotel's action. The Hotel's pleaded claim is founded in delict, it being alleged that the defendants had been under a duty in law '*to ensure that the redesign and reconstruction of the Grain Silo resulted in the building being suitable for use by the Hotel as a luxury hotel*' and that they had negligently breached that duty by '*inter alia*: (1) *failing to comply with the National Building Regulations and* (2) *failing, as the case may be, to specify, design and/or build a compliant floor, and instead delivering a non-compliant, lightweight polystyrene floor which was not fit for purpose*'. The Hotel claims damages in respect of its estimated financial loss by reason of its inability to trade during the period that the hotel premises were closed for the implementation of the forementioned temporary solution and the period it will be closed when the work to effect a permanent solution is undertaken. Sutherland points out that inasmuch as V&A relies on the Collis reports in its claim against

Sutherland, so does the Hotel in its action proceedings against the defendants in case no. 5619/22.

[26] For whatever it might be worth (which is unclear), the Hotel's particulars of claim in the action contains the following statement:

> 'The Plaintiff has not claimed in this action for damages pertaining to the estimated cost of the permanent flooring solution itself, as V&A Holdings, the landlord of the building, has undertaken to cover the costs of implementing the permanent solution, and has also itself demanded that the professional team cover the estimated costs of the repair. The Plaintiff does however reserve the right to do so in future should this become necessary.'

[27] Notice of an intended exception has been given by some of the defendants to the Hotel's pleaded claim in delict for compensation for pure economic loss. It is not for this court to pre-empt the outcome of the exception. It is, however, relevant for this court to take a view on its prospects of success for the purpose of weighing whether good cause has been shown by Sutherland for the setting of aside of the arbitration proceedings for Sutherland relies, in part, on the incidence of the Hotel's action in support of its application. I agree with the submission by counsel for the architects that if the exception were upheld that would likely be the end of the Hotel's action because the result would strike at the very foundation of its claim in delict, and the Hotel has no contractual relationship with any of the defendants. (As it happens, proceedings in the Silo Hotel action appear - perhaps unsurprisingly - to have ground to a halt.)

[28] Where culpable conduct causes pure economic loss, there is no presumption of wrongfulness. The claimant has to persuade the court that considerations of public and legal policy in accordance with constitutional norms impel the characterisation of the conduct in issue as wrongful for the purposes of an Aquilian action.[10] It is well documented that the courts have shown notable cautiousness in

[10] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41 (30 November 202; 2023 (2) BCLR 149 (CC); 2023 (2) SA 31 (CC) at para 28-29.

extending the Aquilian action to claims for pure economic loss.[11] In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 504F-G, the appeal court observed that our courts will '*not extend the scope of the Aquilian action to new situations unless there are positive policy considerations which favour such an extension*'.

[29] Concern about creating limitless liability is a frequently cited reason for this policy of restraint, but it is not the only one. In *Country Cloud* (CC), the relevant enquiry was stated to be '*do these* [legal and public] *policy considerations require that harm causing conduct should be declared wrongful and consequently render the defendant liable for the loss, or do they require that harm should remain where it fell, ie with the plaintiff?*'.[12] There has been some reluctance to regard the foreseeability of harm as a determinant criterion in the decision whether conduct causing pure economic loss is wrongful.[13]

[30] The cases show that the ability of the claimant to have protected itself by contractual provision has been an important consideration in determining whether the defendant's negligent act or omission should be characterised as wrongful for the purposes of a delictual claim; see for example *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109 (25 November 2005); [2007] 1 All SA 240 (SCA); 2006 (3) SA 138 (SCA) and consider the repeated endorsement by our higher courts of the observations of McHugh J in *Perre v Apand (Pty) Ltd* [1999] HCA 36; (1999) 198 CLR 180 at para 118.

[31] McHugh J said '*Cases where a plaintiff will fail to establish a duty of care in cases of pure economic loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interference with its legitimate acts of trade. In many cases, there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was*

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[11] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gaute*ng [2014] ZACC 28 (3 October 2014); 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) at para 23, where Khampepe J noted '... *our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict*'.

[12] In para 18.

[13] *Country Cloud* (SCA) supra, at para 27, but see *Country Cloud* (CC) supra, at para 41.

reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.' The observation was endorsed in *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* [2013] ZASCA 16 (20 March 2013); [2013] 2 All SA 629 (SCA); 2013 (5) SA 183 (SCA) at para 28 (also in my judgment in the court of first instance under the same case name at [2005] ZAWCHC 10 (28 January 2005); [2005] 1 All SA 654 (C) at para 74), *Country Cloud* (SCA) supra, at para 30 and *Country Cloud* (CC) supra, para 51 in fn 54.

[32] The provision of accommodation for its enterprise in the silo building that was fit for purpose was primarily a matter for arrangement between the Hotel and its landlord. In its lease agreement with V&A, the Hotel waived any right of action against its landlord for any latent defects in the reconstructed silo. I am unaware of any case in which a delictual claim has been upheld in a situation closely comparable to the facts alleged in the Hotel's particulars of claim.

[33] It is incumbent upon a claimant for delictual damages for pure economic loss to plead the facts it relies upon to support the required conclusion that the defendant's causal conduct was wrongful; cf. *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134 (26 November 2008); 2009 (2) SA 150 (SCA) ; [2009] 1 All SA 525 (SCA) at para 14. That is a requirement that renders statements of claim in such matters readily amenable in appropriate circumstances[14] to determination on exception. Sutherland has in the current proceedings not clearly identified any facts, other than the interconnectedness of the separate contractual relationships between the various parties, that for public and legal policy reasons might support the required findings of wrongfulness in the

[14] An exception would obviously not be appropriate where the relevant 'duty in law' alleged to have been breached is one already established by the jurisprudence, see e.g. *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at para 15 with reference to the duty of a collecting bank to owner of a cheque established in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783(A).

delictual claims that it posits, nor for that matter has the Hotel in its particulars of claim. I consider that the exception against the Hotel's action enjoys very reasonable prospects of success.

[34] The existence of the action has consequently not weighed with me persuasively as a factor in favour of the application. It is any event by no means certain, even were the Hotel's action in delict to proceed, that it would be consolidated with an action founded in contract instituted by V&A against Sutherland in lieu of the currently pending arbitration proceedings. On the contrary, for the reasons discussed earlier, there is good cause to doubt that the Hotel's action will ever come to trial. But even were the Hotel's action to proceed, its subject matter is materially different from V&A's claim against Sutherland. The Hotel claim concerns the income it allegedly has lost and will in the future lose through its inability to use the hotel accommodation while remedial work is carried out. V&A's claim against Sutherland is concerned with other matters; namely, the cost of the remedial work required to provide the temporary and permanent solutions to the defective screeding work and the loss of rental for the accommodation while the remedial work is carried out.

[35] Furthermore, any determination by the arbitrator pursuant to Sutherland's counterclaim that V&A is bound by clause 7.4 of their contract to indemnify Sutherland against any liability to the Hotel would be binding as between V&A and Sutherland. There is no possibility in such an event that the court seized of the Hotel's action might have to determine the same question. Similarly, were the arbitrator to uphold Sutherland's allegation that V&A lacks standing to advance the claim that it has brought against the applicant, that would be the end of the matter as between those parties.

[36] A fundamental difficulty with Sutherland's application, which were it to be granted would compel V&A to proceed by action, is that upholding it would not affect the several arbitration agreements that V&A has with the other consultants and the building contractor. V&A could not join any of those parties in the contemplated action without the material risk of a special plea of arbitration being raised against it. As pointed out by the respondents' counsel, success in the application consequently

would not, of itself, achieve Sutherland's declared purpose of facilitating the containment of any litigation between the parties concerning the defective screeding work in a single action in the High Court. On the contrary, it would likely result in various other proceedings related to the several arbitration agreements in existence, the nature and outcome of which are unpredictable. These factors militate trenchantly against a finding that Sutherland has shown good cause why V&A should be deprived of the benefit of its arbitration agreement and forced instead into a readily foreseeable morass of litigious uncertainty.

[37] Counsel for Sutherland argued, however, that if the arbitration were set aside and V&A's claim against it were then to be prosecuted by way of action, Sutherland would join the other parties involved in the silo project; it was submitted in oral argument that 'in an action, everyone would be joined or would intervene'. I found it noteworthy, however, that the argument gave little attention to the basis upon which this allegedly desirable inclusivity was to be achieved.

[38] There is no direct contractual relationship between Sutherland and the other consultants or the building contractor. Any duty by any of those parties not to act negligently was a duty owed in contract to V&A as the employer. The only conceivable basis for a claim by Sutherland against the other consultants or the building contractor to ameliorate the effect of an award or judgment against it on V&A's claim against it would lie in delict, which explains the character of the continent counterclaim by Sutherland described in paragraph 24 above. The considerations pertaining to delictual claims for pure economic loss have already been discussed above. I am, to say the least, very doubtful about the viability of any such delictual claim.

[39] All the foregoing considerations suggest that the bases for the other proceedings that Sutherland contends should be taken into account to show that there is good cause to grant its application in terms of s 3(2) are tenuous. Accordingly, as a matter of probability, the postulate that if the relief is not granted Sutherland will become embroiled in multiple proceedings involving the same evidence, unnecessarily incur duplicated costs, be exposed to prejudicial 'procedural

jockeying' and possibly conflicting decisions seems to me unlikely to materialise. In the result, the case the applicant has made out is not a compelling one.

[40] The applicant and the first respondent each availed of the services of two counsel and the third and fourth respondents engaged senior counsel. The engagement of two counsel was reasonable in my view. The third and fourth respondents sought an order allowing the fees of senior counsel. I am aware that orders to that effect have sometimes been made in recent times. In my opinion, however, such orders are inappropriate. The amount in which counsel's fees fall to be taxed and allowed is properly a matter for decision by the taxing master. It will be sufficient for the court to record, as I hereby do for the taxing master's guidance, that the engagement of senior counsel in the case was reasonable.

[41] An order is made in the following terms:

1. The application is dismissed.

2. The applicant shall be liable for the costs of suit of the first, third and fourth respondents, such costs to include the fees of two counsel where such were engaged.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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