REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

…… ……

DATE SIGNATURE

Case no.**: 21/43014**

In the matter between:

THE HOLLARD INSURANCE COMPANY LIMITED	1ST PLAINTIFF
SANTAM LIMITED	2ND PLAINTIFF
BRYTE INSURANCE COMPANY LIMITED	3RD PLAINTIFF
CONSTANTIA INSURANCE COMPANY LIMITED	4TH PLAINTIFF
GUARDRISK INSURANCE COMPANY LIMITED	5TH PLAINTIFF
OLD MUTUAL INSURE LIMITED	6TH PLAINTIFF
NEW NATIONAL ASSURANCE COMPANY LIMITED	7TH PLAINTIFF

And

INSURE GROUP MANAGERS LIMITED (in liquidation)	1ST DEFENDANT
	2ND DEFENDANT
HOWARTH LEVETON BONER	
	3RD DEFENDANT
COMPLIANCE MONITORING SYSTEMS CC	

Coram: Dlamini J

date of hearing: 10 & 11 October 2022

Date of delivery of judgment: 25 April 2023

Neutral Citation: *The Hollard Insurance Company Ltd and Others vs Insure Group Management Ltd (in liquidation) and Others* (case No: 2021/43014) [2023] ZAGPJHC 371 (25 April 2023)

JUDGMENT

DLAMINI J

[1] This is an exception application brought by the second and third defendants against the plaintiff's Particulars of Claim.

[2] The matter concerns the collection of premiums due to short-term insurers in terms of short-term insurance policies. The plaintiffs (the Insures) have issued summons against the first defendant (the Intermediary) second defendant (the Auditor) and the third defendant as (the Compliance Officer).

TEST FOR EXCEPTION

[3] In dealing with the exception it is trite that the pleadings must be looked at as a whole. An excipient must show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it.

[4] The test on exception is whether on all reasonable readings of the facts pleaded, no cause of action maybe be made out.

[5] The well-established principle of our law is that the *onus* rest upon the excipient who alleges that a summons discloses no cause of action or is vague and embarrassing. The duty rest upon the excipient to persuade the court that the pleading is excipiable on every interpretation that can reasonably be attached to it.

[6] In *H v Fetal Assessment Center,*[1] the Court said *"The test on an exception is whether, on all possible readings of the facts, no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law from which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts."*

[7] The trite principle of our law is that an excipient is obliged to confine his complaint to the stated grounds of his exception,

[8] In *Luke M Tembani and Others v President of the Republic of South Africa and Another*[2] the Supreme Court of Appeal set out the general principle relating to and the approach to be adopted regarding the adjudication of exceptions as follows; *"Whilst exceptions provide a useful mechanism to weed out cases without legal merit, it is nonetheless necessary that they be dealt with sensibly* (*Telematrix (Pty) Ltd v Advertising Standards Authority* SA [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 3). It is where pleadings

[1] 2015 (2) SA 193 (CC)
[2] [2022] ZASCA 70 (20 May 2022)

are so vague that it is impossible to determine the nature of the claim, or where pleadings are bad in law that their contents do not support a discernible and legally recognised cause of action, that exception is competent (*Cilliers et al Hebstein and Van Winsen the Practice of the High Courts of South Africa* 5ed Vol 1 at 631*; Jowel v Bramwell-Jones and Others* 1998 (1) SA 386 (W) at 899E-F). the burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable *(Ocean Echo Properties 327 CC and Another v Old Mutual Life Insurance Company (South Africa) Ltd* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 9). The test is whether on all possible readings of the fact no cause of action may be made out; it being for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts *(Trustees for the Time Being of the Children's Resources Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) para 36 (*Children's Resource Centre Trust)."*

[9] The test applicable in deciding exceptions based on vagueness and embarrassment are now well established and have been consistently applied by our Courts. In *Trope v South African Reserve Bank,*[3] it was held at (201-211) that an exception to a pleading of it being vague and embarrassing involves two primary considerations namely;

9.1 whether it is vague, and;

9.2 whether it causes embarrassment of such a nature that the excipient is prejudiced

[10] The *Trope* decision was approved in *Jowell v Bramwell –Jones,*[4] at 899-903. In the Jowell – judgment it was also held that it was incumbent upon a plaintiff to plead a complete cause of action that identifies the issues upon

[3] 1992 (3) SA 208 (T)
[4] 1988 (1) SA 836 (W)

which it seeks to rely and on which evidence will be led in an intelligible, lucid form that allows the defendant to plead to it.

BACKGROUND FACTS

[11] The facts underlying this dispute are largely common cause.

[12] The plaintiffs are insurance companies who provide short-term insurance to cover a number of policyholders, instituted action against the defendants for damages the plaintiffs alleged they suffered as a result of the collapse of the first defendant.

[13] The first defendant (IGM) presently in liquidation, rendered Intermediary Services to the plaintiffs, the short-term insurers.

[14] The Intermediary Services included the collection and accounting for premiums paid by policyholders under short-term insurance policies on behalf of the plaintiffs. After paying the necessary third parties, the first defendant was obliged to pay the balance of the remaining premiums to the plaintiffs.

[15] In rendering the Intermediary Services, the first defendant was required to provide security in respect of its obligation to short–term insurers, including the plaintiffs in accordance with the relevant regulations under the Short-Term Insurance Act.

[16] During the same period, the second defendant (Howarth) was the statutorily appointed auditor of the first defendant and was also its appointed auditor under section 19 (1) of the Financial Advisory and Intermediary Act,[5] (FAIS).

[5] Act 32 of 2002

[17] The third defendant was the compliant officer of the first defendant, appointed in terms of section 17 of FAIS.

[18] The plaintiffs allege that during the relevant period, IGM unlawfully appropriated the value of approximately two months' worth of Premiums and that IGM invested those Premiums in illiquid assets.

[19] The plaintiffs further allege that the alleged misappropriation resulted in the first defendant failing to maintain an adequate balance sheet for purposes of maintaining the IGF Guarantee, the IGF refusing to issue an IGF Guarantee for the period after August 2918 and IGM failing to pay the amounts then due to the plaintiffs in terms of the Mandates on 15 September 2018.

[20] Accordingly, the plaintiffs are thus creditors of the first defendant, who plead that they have suffered loss caused by the first defendant’s conduct.

[21] The plaintiffs have sued the first defendant in contract and have sued the second and third defendants in delict.

[22] The second and third defendants delivered a notice in terms of Uniform Rule 23 (1) to the plaintiff's particulars of claim, on the basis that the particulars of claim do not disclose a cause of action and or are vague and embarrassing.

[23] Subsequent to the delivery of the second and third defendant's notice in terms of Rule 23(1) of the Uniform Rules, the plaintiffs delivered a notice of intention to amend their particulars of claim. The third defendant delivered a notice of objection to the amendment in terms of rule 28(3).

SECOND DEFENDANT EXCEPTION

[24] The plaintiff's claim against the second defendant is premised on two distinct auditing functions.

[25] The two distinct auditing functions are common cause between the parties and are not in dispute.

[26] The first function is what is termed statutory audits.

26.1 Companies are required in terms of the Companies Act[6] to appoint an auditor to express an opinion on the financial statements of the company that were drawn by the board of directors.

26.2 The second function relates to auditors having assumed to perform various non-audit functions which, as result had statutory duties imposed on them. This amongst others has imposed a duty to report to regulators about aspects of regulatory compliance and the probity of the affairs of the companies under report.

[27] The second defendant raises this exception in relation to the plaintiff's reliance on the first function. Howarth's main complaint is on the claim based on the audit function which, in addition to the statutory claim, relies upon a further separate cause of action, being a delictual claim for pure economic loss caused by the alleged negligent performance by Howarth of its duties as auditor. The second defendant avers that the plaintiff has not pleaded the Delictual Claim as a self-standing separate claim.

[28] The second defendant's main exception to the Delictual Claim is that a statutory auditor of a company owes its legal duties to the company itself and the company's shareholders in general meetings and that a statutory auditor owes no legal duty to creditors and clients of the company that it audits, either to protect their interest or for the benefit of their commercial decisions.

[6] Act 71 0f 2008

[29] It is further submitted by the second defendant that it seeks to eliminate an impermissible reliance on a delictual cause of action, even though it is not separately identified as a claim.

[30] In sum, the second defendant submits that the are two grounds on which it should be found that its alleged negligent conduct was not wrongful;-

30.1 in respect of the IGM's annual financial statements, the second defendant owes a legal duty to IGM and not to the plaintiffs.

30.2 If a legal duty is recognised, it will raise the spectre of unlimited liability and place an undue burden on Howarth.

[31] In their reply, the plaintiffs submit that their claim is not a pure statutory claim. The plaintiffs admit that sections 45 and 46(7) of the Auditing Profession Act,[7] (APA) do not provide them with a complete cause of action which may be pursued independently of a delictual action based upon a breach of those provisions. That the cause of action remains delictual, but the element of wrongfulness is *prima facie* established by the breach of the statutory duty. Therefore, the plaintiffs submit that their claim is not based on a breach of contract but on the breach of a statutory duty.

[32] As a result, the plaintiffs insist that the allegations contained in their particulars of claim concerning wrongfulness and the existence of a legal duty, are necessary and relevant and do not render the case of the plaintiffs against the auditor excipiable.

[33] The question to be answered in the second defendant’s exception is whether the plaintiffs have not pleaded the Delictual Claim as a separate self-standing claim.

[7] Act 26 of 2005 as Amended

[34] The common cause factor is that the plaintiffs claim against the second and third defendants are based on delict.

[35] The principle of delict is now well settled and eloquently set out by the court in

Country Cloud Trading CC v MEC Department of Infrastructure Development,[8] at [22] the Constitutional said "*…In contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful. Our law of delict protects rights and, in case of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss.*

So our law is generally reluctant to recognize pure economic loss claims, especially where it would constitute an extension of the law of risk of liability in an indeterminate amount for an in determinate time to an indeterminate class".

AUDITORS

[36] The principles relating to the liability of auditors are now well established and have been enunciated in numerous judgments.

[37] Negligent misstatements by auditors have been held by our courts not to be wrongful for the purposes of the claims for pure economic loss. In *Hlumisa Investments Holdings(RF) Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) this principle was eloquently explained thus "*It is universally accepted in common-law countries that auditors ought not to bear liability simply because it might be foreseen in general that audit reports and financial statements are frequently used in commercial transaction involving the party for whom the audit was conducted (and audit reports completed) and third parties. In general, auditors have no duty to third parties with whom there is no relationship or where the factors set out in the Standard*

[8] (CC) 2015 (1) SA 1(CC)

Chartered Bank case … are absent. See also, *Magudwa v KPMG Services (Pty) Limited* 2021 (1) SA 442 (GJ). *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole SA* 2021 JDR 0920.

[38] The law is clear in this regard, auditors owe their legal duties to the companies they audit and not to the company's shareholders. To do so will in my view, as was held in *Hlumisa* supra, “expose the auditors to liability in an undeterminable amount for an undeterminable time to an undeterminable class”. The Court went on and held “that if an action were to be granted to claim compensation from wrongdoers, the Bank's creditors would demand the same facility and particularly” as in our present case if it [the company] is insolvent.

[39] In my view, the second defendant's exception has merit. This is so because the refusal of the exception will expose the second defendant to be liable to countless other creditors of the first defendant to whom Howarth has no relationship whatsoever. Therefore the spectre of the second defendant being liable to an undeterminable amount and undeterminable class will become real.

[40] Consequently, the second defendant exception is upheld.

VAGUE AND EMBARRASSING

[41] In this regard, the second defendant submits that should it be found that the listed paragraphs do not constitute a separate delictual cause of action in negligence as discussed supra then paragraphs 31,32,33,35,36,37,38,39 and 40 must be found to be vague and embarrassing, in that they rely upon negligent breaches of audit duties, while it is not clear what the relevance is of those allegations to a cause of action based upon a breach by the second

defendant of section 45, read with section 46(7) of the APA and amounts to impermissible allegations.

[42] In reply, the plaintiffs argue that the alternative vague and embarrassing exception has no merit. That these paragraphs are relevant in respect of the second pathway and in respect of the element of causation. Further that breaches by the auditor of the relevant legislation provide prima facie proof of wrongfulness for purposes of a delictual claim.

[43] For reasons set out above, this Court has made a finding that the plaintiffs have not pleaded the Delictual Claim as a self-standing separate claim. As a result, the above-mentioned allegations contained in the plaintiff's aforesaid paragraphs listed in their particulars of claim are thus found to be vague and embarrassing.

THE PLAINTIFFS CLAIM AGAINST THE THIRD DEFENDANT

[44] The plaintiff's claim against the third defendant is alleged to have arisen from the submission by the third defendant of certain compliance reports to the FAIS Regulator, in which the third defendant is alleged to have made the following;

44.1 to have made certain certifications concerning the first defendant's compliance with its statutory obligations, which were false, and

44.2 to have failed to advise the FAIS Regulator of the first defendant’s failure to comply with its statutory obligations.

[45] The third defendant argues that the plaintiff’s claim against the third defendant is for pure economic loss which is not *prima face* wrongful. The plaintiffs must, therefore, insist the third defendant, allege sufficient facts which give rise to a legal duty owed by the third defendant to the plaintiffs. Further, the plaintiffs must also plead a legally cognizable causal link

between the breach of such duty and the damages allegedly suffered by the plaintiffs.

[46] It was further submitted on behalf of the third defendant that there is no reason to apply a contrary principle to the position of the third defendant in the present matter. That there is a notable similarity of its position vis-a-vis the plaintiffs to that of an auditor. Therefore, insist the third defendant that there is no contractual or any other relationship between the third defendant and the plaintiffs.

[47] In their reply, the plaintiffs argue that the compliance officer has the power and obligation to scrutinise the affairs of the intermediary. That the third defendant must insure that the first defendant acts within the parameters set by law to protect the interest of the plaintiffs.

[48] Further, the plaintiffs submit, that the third defendant was aware of the first defendant's misdemeanors, that the compliance officer knew who the victims of the first defendant were and the compliance officer failed to comply with its statutory obligation and report this non-compliance to FAIS. That a dangerous situation was occurring in the form of the first defendant misappropriating the premiums which it collected on behalf of the plaintiffs.

[49] In sum, the plaintiffs submit that the second defendant owed a legal duty to act positively and protect the victims of the first defendant’s client.

[50] As is the case with the second defendant, the plaintiff's claim against the compliance officer is founded on delict. In my view, the third defendant is in a similar position as that of an auditor. The third defendant's obligation is to report any misdemeanors only to the Regulator. There is no legal duty owed by the third defendant to the plaintiffs. The only duty that is placed on the shoulders of the third is to report any misdemeanors to the Regulator.

[51] Significantly, the plaintiffs have not pleaded any facts which establish firstly that the third defendant

has a statutory obligation owed to the plaintiffs. Second, the plaintiffs have not pleaded a clear recognizable causal link between the breach of such duty and the damages, the plaintiffs allegedly incurred.

[52] Therefore, to place any obligation on the third defendant will result as was held in *Du Bruyn* that ‘First, cases of this kind give rise to the twin dangers of numerous plaintiffs and indeterminable liability.

[53] In the result, the plaintiff’s particulars of claim lack the averments necessary to sustain a cause of action for the relief the plaintiff's claim against the third defendant. The third defendant exception is allowed.

SECOND COMPLAINT

[54] At the hearing of the application, the third defendant did not persist with its third complaint. The third defendant's second complaint relates to paragraph 50 of the plaintiff's particulars of claim. "*Had the third defendant not breached its duty as aforesaid, the FAIS Regulator would have taken the appropriate steps against the first defendant, including advising the plaintiff of the first defendant's failure to comply with its duties*."

[55] The third defendant challenges this allegation and insists that the plaintiffs do not set out what would have come of being notified as alleged and how being so notified would have prevented the loss suffered by the plaintiff.

[56] The third defendant's complaint has merit. The plaintiffs have not pleaded succinctly and showed a clear causal link between the failure of the complainant officer to report the first defendant's misdemeanors to the Regulator and what precise steps would the Regulator taken to prevent the plaintiff's losses. This exception is allowed.

APPLICATION FOR LEAVE TO AMEND

[57] The third defendant has served a notice to remove the cause of complaint in terms of Rule 23(1) Uniform Rules. The plaintiffs gave notice of amendment which it proposed to effect to their particulars of claim and it sought to remove the third defendant's cause of complaint. The third defendant in addition to filing an exception also delivered a notice of objection to the plaintiff's proposed amendments. At the hearing of the application, the third defendant submitted that it was no longer proceeding with the first and third objections and advised that its fourth objection mirrors its first complaint.

SECOND OBJECTION

[58] In sum, the third defendant argues that the plaintiff's particulars of claim do not disclose the source of the alleged obligations of the third defendant but that these obligations mirror those that are contained in the provisions of section 2 of the FI Act. Therefore the plaintiffs have not pleaded;-

58.1 the basis upon which it is alleged that the FI Act finds application.

58.2 the basis upon which it is alleged that to render the intermediary services, the first defendant had to comply with the FI Act.

58.3 that the third defendant is defined as an entity as contemplated in section 2 of the FI Act.

[59] It is contended by the plaintiffs that it is unclear if the amendment is granted the relevant paragraphs would render the particulars of claim vague and embarrassing or that they would disclose no cause of action. That the third defendant does not allege and show that it would suffer prejudice if the amendment were granted.

[60] In my view, the proposed amendment does not amount to a separate claim. The third defendant is allowed to plead and deny that the FI Act is applicable to it and further that it was a financial institution or entity as defined in the FI

Act. Therefore, there is no prejudice that will be suffered by the third defendant if the amendment is allowed. Consequently, the third defendant's objection is dismissed.

[61] Taking into account all the circumstances of this case, the plaintiff's particulars of claim lack averments which are necessary to sustain an action against the second and third defendants. The third defendan's objection is rejected.

[62] I make the following order.

ORDER

1. The second defendant’s exception is upheld

2. The third defendant’s exception is upheld;

3. The plaintiffs are entitled to amend their particulars of claim within 20 (twenty) after the date of granting this order;

4. The third defendant's objection is dismissed;

5. The plaintiffs are ordered to pay the costs of the second and third defendants, including the costs of two counsels.

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DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 10 &11 October 2022

Delivered:	25 April 2023

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