REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

COURT CASE NO:

51992/2016

4/3/2019

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

....
DATE SIGNATURE

In the matter between:

BILLION PROPERTY DEVELOPMENTS (PTY) LTD **Plaintiff**

(REG NO 2007/004487/07)

and

RHINO LOG FURNITURE AND LAPAS CC **First Defendant**

(REG NO 2004/035020/23)

T/A LOG FURNITURE

MATTHEWS, PIETER JOHN **Second Defendant**

(ID NO [….])

J U D G M E N T

UNTERHALTER J

INTRODUCTION

1. The Plaintiff, Billion Property Developments (Pty) Ltd (“Billion “) instituted an action against Rhino Log Furniture and La Pas CC (“Rhino”) and Pieter John Matthews (“the Defendants “). Billion claims that Rhino breached its lease with Billion and claims the arrears. Billions also claims the arrears from Mr. Matthews who, it is

alleged, bound himself as surety and co-principal debtor with Rhino for the payment of the arrears.

2. The Defendants have pleaded to the claim. They contest their liability to Billion and bring a counterclaim alleging that Billion's agent, duly authorized, made various misrepresentations to Rhino that induced Rhino to conclude the lease with Billion, as a result of which Rhino suffered damages.

3. Billion excepts to the plea and counterclaim on various grounds. I proceed to consider these exceptions in turn.

THE FIRST EXCEPTION

4. By its first exception, Billion contends that the tacit term pleaded in paragraph 3.2 of the plea is repugnant to the express provisions of clause 14 and clause 17 of the lease, and consequently, the tacit term relied upon does not disclose a defence or is vague and embarrassing.

5. Paragraph 3.2 of the plea states that it was a tacit condition (by which from the context is meant a tacit term) that: "*the premises would be suitably fit for its intended purpose and that the First Defendant would have free and undisturbed beneficial use and occupation of the leased premises*."

6. Clause 14 of the written lease, which the Defendants admit was concluded, contains two relevant commitments. First, it reads in relevant part: "*The leased premises shall*

be used for the sole purpose of a log furniture (sic). The lessor shall trade under the name Log Furniture". Second, "The lessor does not warrant that the property or the leased property or the leased premises are suitable for the purpose of the lessee's business… ".

7. Clause 17 provides that the Lessor does not warrant that that the leased premises are fit for the purpose intended by the Lessee.

8. Billion contends that the cumulative force of these provisions precludes reliance by the Defendants on the tacit term in paragraph 3.2 of their plea.

9. In my view, this exception cannot be upheld. The tacit term refers to the premises being suitably fit for **its** intended purpose. On a generous reading, this means that the premises must be suitably fit for the intended purpose to which such premises can be put. That may be something different to the purposes of the lessee's business. In other words, the tacit term postulates that the premises must be fit for some purpose which is not repugnant to the warranty that excludes liability if the premises are not fit for the purposes of Rhino's business or for Rhino itself. The ambit of the tacit term and whether it assists the Defendant, on the facts, is an issue to be explored at trial. The tacit term, so interpreted, is not repugnant to the express provisions of the lease. And in consequence this exception must fail.

THE SECOND EXCEPTION

10. In paragraph 3.3 of the plea, the Defendants plead that it was an implied term (more accurately a tacit term) of the lease agreement that Billion or its duly appointed agent would properly market the building so as attract custom for the tenants. This term is said to derive from clause 9 of the lease that requires the lessee to contribute to a marketing fund to be utilized by the lessor for the promotion of trading in the building.

11. Billion complains that the Defendants cannot rely upon this tacit term because it contradicts the actual terms of the lease. And in any event, the pleading is vague and embarrassing.

12. Clause 9, in my view, does not only impose a duty on the tenant to contribute to the fund. The obligation to contribute is for a specific purpose. If the lessor declined to utilize the fund at all or for a purpose other than one for which the funds were required, I do not consider that the lessor would be acting in accordance with the agreement. The stipulation of purpose carries with it an obligation on the part of the lessor to utilize the fund for its given purpose. It would strain good faith, which underpins all contracts, if the lessor could require the contributions, but elect whether to utilize the funds for the stated purpose.

13. Once the lessor is required to use the funds for the purpose for which they are contributed, the question is whether the tacit term is repugnant to clause 9, properly interpreted? The tacit term is one way in which the duty resting upon Billion could be discharged. Whether it is the only way to do so and, if it is not, whether the

agreement nevertheless required such utilization appear to me to be matters better explored at trail. The tacit term pleaded cannot be impugned for repugnancy because there may be factual circumstances in which the term may be an application of the lessor's duty in terms of Clause 9.

14. Nor do I consider that the tacit term is vague and embarrassing. It is no less specific than the express language used in clause 9 as to the purpose for which the fund must be used. Further particularity may be secured for trial. But the formulation of the tacit term is neither unintelligible, nor incapable of response.

15. The second exception is also dismissed.

THE THIRD EXCEPTION

16. By its third exception Billion complains that paragraph 4 of the Defendant's plea is vague and embarrassing for its want of particularity as to how Billion failed , " *to provide the shopping centre, access to the shopping centre, access to the leased premises in a manner fit for its intended purpose* "

17. There is some merit to this complaint. It is not at all clear what is meant by Billion's failure " to provide the shopping centre" , how such failure breaches an obligation resting upon Billion, nor how this failure is distinct from the failure to give access to the shopping centre ? This gives rise to ambiguity and may be prejudicial in that, if it is unclear what obligation required Billion to provide the shopping centre, and how such obligation was breached, it will be difficult for Billion to plead.

18. In addition, since the plea, as I have observed, is predicated on the leased premises being fit for its purpose, rather than the purpose of Rhino's business, there is a need, given this demarcation, to aver what Billion has failed to do.

19. It is certainly so, as the Defendants' counsel submitted, that some particularity is given in paragraph 5 of the counterclaim as to the falsity of representations made by Billion. But these averments are made in respect of the Defendants' counterclaim for actionable misrepresentation. There is ambiguity as to whether the averments in paragraph 5 of the counterclaim also identify the breaches of contract pleaded in paragraph 4 of the plea. This ambiguity also renders the pleading prejudicial to Billion in determining the case it must meet.

20. Furthermore, where the Defendants wish to rely on the failure of the lessor to provide beneficial occupation and use, the pleading cannot simply reference the obligation, but must say something as to how the obligation was breached. This is all the more so when the agreement of lease includes quite specific exclusions of liability that favour the landlord.

21. This exception is accordingly upheld.

THE FOURTH EXCEPTION

22. By its fourth exception, Billion objects to the first portion of paragraph 5 of the plea. There the Defendants allege an agreement between Billion and Rhino that Rhino would attempt to pay a stated amount of rental whenever possible and that Rhino was otherwise excused its obligations to pay rent. Billion submits that absent averments as to whether the agreement was oral or in writing, whether Billion's representative was authorized and to what extent, if any, the Defendants complied with the agreement, the pleading sets out no defence, alternatively it is vague and embarrassing.

23. It is not correct that the pleading fails to set out a defence. The agreement alleged may appear commercially improbable, but that is irrelevant to the question as to whether the pleading founds a true exception. If the obligation to pay rent was varied so as to require Rhino to pay R10 000 – R12000 "whenever possible", then such variation would not permit Billion to claim arrears under the terms of the written agreement. The pleading does disclose a defence.

24. As to whether the pleading is nevertheless vague and embarrassing, I am inclined to think not. The want of compliance with Rule 18 does not strike at the whole of the cause of action.[1] As to failure to plead that the representative of Billion was duly authorized, that is a matter that Billion may plead, if its representative was not so authorized. The pleading is not ambiguous or unclear. And lastly, the failure to plead compliance does not render the defence lacking. The variation of the written agreement that is pleaded suffices at this stage to disclose a defence - whether or

[1] See *Jowell v Bramwell Jones* 1998 (1) SA 836 (W) 902

not Rhino complied with the varied agreement. This and other complaints of particularity may be dealt with by way of seeking further particulars.

25. Accordingly, the fourth exception is dismissed.

THE FIFTH EXCEPTION

26. The Defendants plead that the suretyship does not comply with certain of the requirements of the General Law Amendment Act 50 of 1956 ("the Act").

27. Billion excepts on the basis that the defects complained of do not give rise to invalidity under the Act. Counsel for the Defendants concedes that that is so and that the defence relied upon by the Second Defendant is ill-founded. This concession was properly made.

28. Accordingly, this exception is upheld.

THE SIXTH EXCEPTION

29. By its sixth exception, Billion points to the averment in paragraph 2 of the Defendants' counterclaim that Billion in the period January 2014 to July 2014 made a number of material and false representation that induced Rhino to enter into the lease. Billion's complaint is that the pleaded representations could not have induced

the agreement because the lease itself (see clause 22) makes it plain that Rhino made an irrevocable offer when it signed the document on 7 December 2013. The agreement was only concluded when the offer was accepted by Billion on 23 May 2014. However, since the actionable representations occurred after Rhino made the irrevocable offer, the representations did not induce the contract. And absent a pleaded case that, if proven, can make out the requirement of causation, the counterclaim fails to make out a cause of action.

30. The Defendants' response to this complaint is that the pleading can survive the challenge because the offer was not irrevocable, and hence the offer could have been withdrawn prior to acceptance. For this reason the representations remained causally relevant because absent the representations the offer might have been withdrawn.

31. The difficulty with this response is that clause 22 plainly states that Rhino's offer is irrevocable. And hence the causation problem raised by Billion is not cured by the possibility that Rhino may have withdrawn the offer. To this, counsel for the Defendants points out that the agreement reflects in two places that there was an amendment to the agreement dated 24 June 2014, that is after acceptance of the irrevocable offer on 24 May 2014.

32. It is not clear to me how this cures the problem raised by Billion. In paragraphs 2, 3 and 4 of the counterclaim, the Defendants allege that the representations induced Rhino to enter into the lease agreement. But that cannot be so because Rhino had

made an irrevocable offer to lease the premises on the terms reflected in the written lease, attached to the particulars of claim, on 7 December 2013. It is that offer that was accepted on 23 May 2014 by Billion. No representations are alleged that induced the irrevocable offer and hence the contract came into being not as a result of the alleged misrepresentations, but simply because Billion accepted the irrevocable offer.

33. The fact that the agreement that was concluded on 23 May 2014 was amended in June 2014 does not avoid the problem. The Defendants' case is not that the misrepresentations induced the amendments, but rather that the misrepresentations induced the lease which, *ex facie* the pleadings, was concluded on 23 May 2014. And so the problem of causation remains in that the contents of the written lease, relied upon by the Defendants, are at odds with the averment in the counterclaim that misrepresentations in 2014 induced an agreement to which Rhino was irrevocably committed in December 2013.

34. The exception is accordingly upheld.

THE SEVENTH EXCEPTION

35. By its seventh exception, Billion complains that the misrepresentations relied upon by the Defendants concern opinions not facts and are thus not actionable. In the alternative it is said that the pleading is vague and embarrassing because Billion

cannot ascertain whether the representations were relied upon, how the opinion could have been relied upon as a representation of fact, and how Rhino can claim reliance on the representations given the exclusionary force of clause 21 of the lease.

36. In my view, the representations pleaded are indeed actionable. The representations as pleaded are certainly capable of being understood as stating Billion's existing expectations. Such expectations may constitute actionable representations[2] and should be tested at trial.

37. As to the complaint that the pleading is vague and embarrassing, the Defendants say it induced the agreement and, subject to the causation issue canvassed above, Billion is not left in any doubt as to whether it is the Defendants' case that the misrepresentations were relied upon and induced the lease agreement. Whether the misrepresentations are actionable rather than mere opinion is a matter that must, for the reasons given, go to trial. Lastly, the Defendants appear to allege that the misrepresentations are fraudulent (see paragraph 6). If that be so, then clause 21 would not be availing to exclude liability.

38. This exception cannot be upheld.

[2] *Feinstein v Niggli* 1981 (2) SA 684 (A)

THE EIGHTH EXCEPTION

39. By its eighth exception Billion contends that the Defendants in paragraph 2.6 of the counterclaim allege that Billion's chief executive officer made a fraudulent misrepresentation, but that the pleading is a conclusion of law without supporting facts.

40. The pleading should have stated that the chief executive officer made the misrepresentation knowing it to be false. However, that is what a fraudulent misrepresentation amounts to. And I do not consider that the omission of these words means that the Defendants have failed to make out a cause of action, nor that there is any prejudice to Billion, since the allegation of a fraudulent misrepresentation entails that the chief executive officer knew the representation to be false. It is not necessary to plead the evidence as to how the Defendants intend to establish the chief executive officer's knowledge.

41. This exception also fails.

THE NINTH EXCEPTION

42. By its ninth exception, Billion references paragraph 6 of the Defendants' counterclaim, where the Defendants plead the damages they allege that Rhino suffered as a result of the fraudulent misrepresentations of Billion. Billion complains that the damages claimed are based upon the cost of setting up Rhino's business

and its loss of nett profits for the 3 year period of the lease. This Billion says, constitutes an impermissible duplication of damages because an injured party cannot claim both its cost of setting up the business and the lost profits attributable to the business.

43. The Defendants contend that there is no impediment of legal principle to the claim by Rhino of both reliance and expectation losses caused by a fraudulent misrepresentation. It is a question of evidence, and that is a matter for trial.

44. The classic statement in our law as to the difference in principle between damages that may be claimed for breach of contract and damages claimed in delict is to be found in *Trotman v Edwick*[3]. There the following was said :

> "A *litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on (sic) delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him …"*

45. This formulation states a well-known distinction between damages that serve an expectation interest and damages that serve a reliance interest. An expectation interest gives the person wronged the benefit of their bargain. In cases of breach of

[3] *Trotman v Edwick* 1951 1 SA 443 (A) at 449

contract, damages seek to place the plaintiff in the position she would have enjoyed had the contract been fully performed. A reliance interest seeks to place the plaintiff in the position she would have occupied absent the wrongdoing, by compensating her for any losses she may have suffered. In the case of a delict suffered by a plaintiff, damages seek to restore the plaintiff to the position she would have been in had the wrong not been done to her. This distinction is sometimes described as the difference between a forward looking (and positive) and a backward looking (or negative) conception of damages.

46. Each of these ways of thinking about damages uses a base-line for making the determination. The base-line used however is different. The reliance interest seeks to restore the plaintiff to the position she occupied before the wrong. The expectation interest seeks to make good the position the plaintiff expected to be in had the contract been fully performed or had the representations been true.

47. The apparent clarity of this distinction has not always permitted of easy application. In the law of contract, the award of damages for breach of contract based on expectation interest, affirmed in *Holmdene*[4]*,* was found in *Probert*[5] not to preclude an award of damages so as to place the plaintiff in the position she would have been in had the contract not been concluded. A position rejected by the majority in *Hamer*[6]*.*

48. In determining the measure of damages in the case of a fraudulent misrepresentation, relied upon by a party that induces a contract, our courts have

[4] *Holmdene Brickworks (Pty) Ltd V Roberts Construction Co.Ltd 1977 3 SA 670 (A) at 697 B-F*
[5] *Probert v Baker 1983 (3) SA 229 (D)*
[6] *Hamer v Wall* 1993 (1) SA 235 (T). See also the further consideration of this issue in *Mainline Carriers (Pty) Ltd v Jaad Investments CC and Another* 1998 (2) SA 468 (C) and *Drummond Cable Concepts v Advancenet (Pty) Ltd 08179/14 GLD (* as yet unreported)

long sought to adhere to the distinction originally made in *Trotman v Edwick,* but with no small measure of controversy as to whether our courts have in fact applied a reliance standard to the quantification of damages.

49. A fraudulent misrepresentation is a delict. The losses caused by the fraudulent misrepresentation, as a matter of principle, should seek to place the plaintiff in the position she would have occupied had the fraudulent misrepresentation not been made. In that position, the plaintiff would not have entered into the contract because it was the fraudulent misrepresentation that induced the contract. It follows, therefore, that to restore the plaintiff to the position she would have enjoyed had the fraudulent misrepresentation not been made, she is entitled to the expenditure needlessly incurred in undertaking the transaction. That is sometimes referred to as the out of pocket rule and restricts the plaintiff to her reliance interest. What this measure does not permit is to put the plaintiff in the position she would have occupied if the representations made had been true. If that would have placed the plaintiff in a position to make a profit, that loss of profits is not compensable – it is an expectation loss that finds application in a damages action for breach of contract.

50. The principle that losses caused by a fraudulent misrepresentation are not compensated by allowing for recovery as if the representation was true (the so called benefit of the bargain) was confirmed by the majority in *Ranger v Wykerd*[7]*.* Trolllip JA declined to follow the minority judgment of Jansen JA. Jansen JA held that: " *It would lead to less misunderstanding if it is frankly recognized that in our*

[7] *Ranger v Wykerd and another* 1977 (2) SA 976 (A)

law, for reasons of policy , in actions based on fraudulent misrepresentation bearing upon the conclusion of a contract, a contractual measure of damages (viz. making good the representation) may be applied in appropriate circumstances, despite the fact that the representee's action is not based upon the contract, but founded in delict" (at 989)

51. Trollip JA reasoned that the claims of the appellant were founded in delict and the appellant could only recover the appropriate delictual measure of damages which, following *Trotman v Edwick,* is not the benefit of the bargain, but the amount by which his patrimony is diminished. (At 991). As to the actual computation, Trollip JA held that while the cost of repairing the swimming pool may appear to be a contractual measure of damages because it makes good the representation that the swimming pool was sound, the computation was also consistent with the delictual measure of damages because it measured the appellant's patrimonial loss. If, as the Court found, the actual value of the property in the condition represented (i.e. with a sound swimming pool) was the price paid for the property, the cost of repairs represents the patrimonial loss sustained by the appellant, as a result of the representation, in having bought the property with a defective swimming pool (at 993)

52. Put differently, the majority in *Ranger v Wykerd* may be understood to have determined that the cost of repairing the swimming pool was an out of pocket

expense that accounts for the difference between what the appellant gave up as a result of the fraud, that is the price of the property, and what was received by the appellant – the value of the property with an unsound swimming pool. That difference is the cost of repairs. On this view of the case, the majority affirmed that damages for a fraudulent misrepresentation look backwards to restore the appellant to the patrimonial position he enjoyed before the sale. In that position, the appellant had the money that he paid over as the purchase price. The appellant received a property with an unsound swimming pool. The difference between these two values restores the appellant to the position he enjoyed before the wrong was committed.

53. The supremacy of the reliance interest as the touchstone in our law for determining delictual damages has long endured. Counsel for the Defendants relied upon the decision of the Appeal Court in *Transnet Ltd v Sechaba Photoscan (Pty) Ltd*[8] and submitted that this case recognized expectation interests in the law of delict.

54. In *Sechaba,* the respondent had lost a tender as a result of a fraudulent tender process. The respondent sued for its damages. The appellant admitted that the respondent had suffered damages and the issue that went to trial was to determine the quantum of the damages. The damages awarded were based on the nett profits, over three years, that the respondent would have earned had it been awarded the contract. On appeal, the appellant contended that the respondent was not entitled to have its bargain made good, but being a claim in delict, the respondent was confined to its out of pocket expenses.

[8] *Transnet Limited v Sechaba Photoscan (Pty) Ltd 2005 1 SA 299 (SCA)*

55. Howie P cited the *dictum* in *Trotman v Edwick* referenced above and then wrote the following:

"[10] The dictum in Trotman v Edwick reads as follows:

'A litigant who sues on contact sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.'

It does not seem to me that that statement assists the appellant. First, Trotman's case was one of fraud inducing a purchase where the land bought was, because of the fraud, not worth the price paid. In our case the fraud prevented the purchase of a business that had, on the evidence, a highly desirable profit-earning potential. Accordingly, there, it was a case of diminution of the value of the plaintiff's assets; trading profits did not come into it. Here, by contrast, it is all about the trading profits that the respondent was due to be able to make but where the opportunity to earn them was deviously denied.

[11] Second, the court approved the perennially true statement that the aim in awarding delictual damages is to put the injured party in the same position as he would have been in but for the delict.

[12] Third, the court in Trotman was careful to guard against laying down a formula applicable to all cases of fraud of the nature involved there, that is, fraud inducing a contract. It did not seek to comment at all on fraud having the results involved here. Finally, even in the quoted passage the formulation of the delictual measure of damages is wide enough to include, in a suitable case, loss of profits.

…

[14] Turning to the third base of the appellant's argument, the legal position is briefly this. The Roman id quod interest (literally, that which is between; broadly, that which makes

up the difference) could afford a damages claimant not only out-of-pocket losses but loss of profits as well. In medieval times the word interesse came into use but it simply denoted all the damages that had to be paid. Voet defined interesse as 'the deprivation of a benefit and the suffering of a loss through such fraud or negligence on the part of an opponent as he is liable to make good and as is assessed in fairness by the duty of the judge' (Gane's translation). It was nineteenth century German scholarship that drew the distinction between positive and negative interesse. Specifically with regard to delict, this court has referred to the difference between the patrimonial position of the plaintiff before and after the delict, being the unfavourable difference caused by the delict.

[15] It is now beyond question that damages in delict (and contract) are assessed according to the comparative method. Essentially, that method, in my view, determines the difference, or, literally, the interesse. The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict. That surely says enough to define the measure. There appears to be no practical value in observing the distinction between positive and negative interesse in determining delictual damages It is a distinction that tends to obscure rather than clarify. If to award the difference means necessarily awarding loss of profits then it does not assist first to ask what positive interesse and negative interesse comprise.

[16] The idea that loss of profit is not recoverable in delict is not historically founded. Indeed, the converse is the case. Moreover, it is commonly the subject of an award of damages for loss of earning capacity in personal injury cases. Why should it matter that the injury is not physical but economic, as long as the loss is one of earning capacity? Take the example of the owner of a taxi that is negligently damaged. He has a claim for the profit lost while the vehicle is out of action. Can it make any difference if, subject to quantification, the delict is committed when he has just bought the vehicle, before commencing business? I

think not. Nor can it matter if the loss were caused by fraudulent conduct, not negligence. Clearly, the loss would impair his earning capacity and that is part of his patrimony. The claimant in the present case is a company. Once again, that can make no difference. Its patrimony has been impaired by having the bargain that it was on the point of acquiring dishonestly snatched away."

56. I have set out these passages as some length because it might be thought that *Sechaba,* whilst seemingly recognizing the distinction between contractual and delictual damages, in fact overthrows this long-held distinction, holding that the respondent was entitled to the loss of profits it would have enjoyed had it been awarded the contract, that is to say, the benefit of the bargain. Such an interpretation of the case would suggest that the Appeal Court recognized the respondent's expectation interest as a proper basis to award damages for the commission of a delict. That would indeed be a striking doctrinal departure.

57. In my view, this is not the correct interpretation of *Sechaba.* Rather, the case recognizes that in order to place the respondent in the position it would have occupied had the fraudulent tender process not taken place, there are circumstances in which it is necessary to recognize that the injured party has given up opportunities that it would have enjoyed, but for the delict. These opportunities, sometimes referred to as opportunity costs, have a value and that value may sound in a loss of profits. Accordingly, a delict may give rise to damages for loss of profit if the consequence of the delict is that the plaintiff is

deprived of the opportunity to earn profits that it would otherwise have made. In *Sechaba,* the fraudulent process deprived the respondent of the opportunity to acquire a business that would have secured profits for the respondent. This is not a case where a fraudulent representation induced a contract and the respondent sought to recover as if the representation were true (an expectation loss) Rather, the respondent was deprived of an opportunity to secure a contract from which it would have profited. The damages for profits lost places the respondent back in the position it would have occupied if the fraud had not been committed. And thus the damages are entirely consistent with the reliance interest that our courts have recognized as the basis for determining damages in delict.

58. In the Defendants' counterclaim, they allege that the duly authorized agent of Billion made a number of material and false representations that induced Rhino to conclude a lease with Billion. The representations concerned the qualities of the shopping centre in which Rhino would lease premises and the marketing that Billion would undertake to attract custom to the centre. These misrepresentations, the Defendants allege, were made fraudulently, as a result of which Rhino claims damages for the costs of setting up its business and the loss of nett profits for the three year period of the lease.

59. Unlike the position in *Sechaba,* where the fraud did not induce a contract but prevented the plaintiff from securing a contract, the Defendants' counterclaim is a claim that Billion's fraudulent misrepresentations induced Rhino to conclude the

lease. This difference however does not, in my view, render the Defendants' damages claim excipiable and for the following reasons.

60. As the *Sechaba* case illustrates, damages resulting from a delict do not exclude compensation for loss of profits. Is the delict of a fraudulent misrepresentation an exception to this proposition? It is not. What the authorities discussed above show is that the damages recoverable for a delict do not permit of the recovery of expectation loss. This exclusion is of particular importance when the delict is a misrepresentation inducing a contract because the injured party cannot claim the benefit of the bargain, that is to say, there is no recovery so as to make good the plaintiff's position, as if the representations were true.

61. It does not follow from this exclusion that damages for a fraudulent misrepresentation do not permit of recovery for loss of profit. Where, absent the misrepresentation, the plaintiff would have enjoyed an opportunity that has been lost, the plaintiff is entitled to be compensated for the lost opportunity. Depending on the nature of opportunity and what is ultimately proven at trial, that loss may be a loss of profits. Compensation of this kind seeks to place the plaintiff in the position the plaintiff occupied before the wrong. Damages so justified are predicated upon a reliance interest and not an expectation interest.

62. The question that then arises is whether the Defendants' claim for loss of profits seeks compensation as if the representations made to Rhino were true or whether the loss of profits concerns some other business opportunity that Rhino lost because it concluded a lease to conduct its business from the premises in

Billion's shopping centre? For example, Rhino may have had other premises available to it to hire that would have afforded it better business prospects than those that materialized at the premises leased to it by Billion.

63. The damages are pleaded so sparsely that it is not possible to discern whether the Defendants claim for loss of profits is as an expectation or reliance interest. The pleading is suggestive of a claim to place Rhino in the position it would have enjoyed if the representations were true. But as these are exception proceedings, there must be no cause of action on every reasonable interpretation of the pleaded claim.

64. Accordingly, I do not find that the claim for loss of profits fails to make out a cause of action.

65. That conclusion however does not end Billion's challenge. Billion contends that whether or not the loss of profits claim is sound in law, it is not permissible to claim both the costs of setting up a business and the loss of profits sustained by that business. As a matter of basic commercial logic, costs are incurred to make a profit, and if the claim is for a loss of profits, costs would necessarily have been incurred to make a profit and cannot be sought from a defendant together with the loss of profits. That would be an impermissible burden that would give rise to compensation in excess of Rhino's loss.

66. This reasoning would be sound if the Defendants' claim for loss of profits was intended to compensate Rhino for the profits it would have made had the representations as to the shopping centre been true. In that event, Rhino would

have had to incur the costs of setting up the business in the shopping centre as represented and its expectation loss would have been limited to the profits the business might reasonably have expected to make had it been conducted in the shopping centre as represented by Billion.

67. But for the reasons I have already given, such a claim cannot be made in our law.

68. However, if the Defendants' loss of profits claim is for Rhino's lost opportunity, then there is no impediment to a claim for the costs of setting up the business in the premises hired from Billion and the loss of profits arising from the opportunity cost of being induced to enter a lease on the basis of false representations, when Rhino had other options to hire premises in another shopping centre that would have permitted its business to prosper.

69. As a matter of principle, the two claims may compliment one another rather than being alternatives. Reliance damages seek to put the plaintiff in the position the plaintiff would have occupied if the wrong had never been done. Had the misrepresentations never been made, Rhino would, *ex hypothesi*, not have concluded the lease with Billion. In consequence, Rhino would not have incurred any out of pocket expenses in setting up its business in the premises it hired from Billion. In addition, Rhino might also be able to show that had it not hired premises from Billion, it would have hired other premises and been able to run a profitable business. Rhino can thus claim the expenses that it needlessly incurred because it concluded the lease with Billion. Rhino may also claim the

value of the opportunity foregone because Rhino relied upon the representations made to it and entered into the lease with Billion, when it might have concluded a lease altogether more favourable to the profitability of its business. Both claims, if proven, constitute reliance damages and seek to restore Rhino to the position it would have occupied, but for the delict.

70. This conclusion is also warranted as a matter of authority. In *Sechaba*[9], the Appeal Court approved the proposition that damages may compensate a claimant not only for out of pocket losses but also for its loss of profits. It went on to warn that there is little practical value in marking out a distinction between positive and negative *interesse*[10] as a way of understanding damages in the law of delict.

71. I conclude with two final observations. First, much of the modern comparative law of damages in common law jurisdictions has been greatly influenced by the recognition of the distinctions between restitution, reliance and expectation interests. The classic exposition of this way of thinking about damages in both contract and delict is to be found in the 1936 and 1937 articles of Lon Fuller and William Perdue[11]. Our case law has not always systematically applied these distinctions. Second, the coherence of these distinctions has been under scrutiny for many decades in the academy[12], but it will be for the Appeal Court, and

[9] At paragraph [14}, quoted above
[10] A distinction, of 19 th century German pedigree, that we might now relinquish or at least render in the plain language of interest.
[11] L.L. Fuller and William R Perdue Jr. *The Reliance Interest in Contract Damages I and II,* 46 Yale LJ 52 (1936) and 46 Yale LJ 373 (1937)
[12] See for example Richard Craswell, *Against Fuller and Perdue,[2000]* Chicago Law Review 99

ultimately the Constitutional Court, to determine whether the fundamental distinction between damages in contract and delict warrants reconsideration.

72. The Ninth exception is dismissed.

CONCLUSION AND COSTS

73. It follows that the third, fifth and sixth Exceptions are upheld and the first, second, fourth, seventh, eighth and ninth Exceptions are dismissed.

74. As to the costs, Billion has prevailed in some of the exceptions and failed in others. With this in mind, Billion is entitled to 50% of its costs.

In the result:

i) The following exceptions are upheld: Exception 3, Exception 5 and Exception 6.

ii) The following exceptions are dismissed: Exception 1, Exception 2, Exception 4, Exception 7, Exception 8 and Exception 9.

iii) The Defendant's plea is set aside in so far as the exceptions are upheld.

iv) The Defendants are granted leave to amend within 20 days of this order.

v) The Defendants shall be jointly and severally liable for 50% of the Plaintiff's costs

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Unterhalter J

Judge of the High Court

Date of Hearing: 14 February 2019

Judgment Delivered: 04 March 2019

Appearances:

Advocate for the Appellant: Advocate G Dobie instructed by Reaan Swanepoel Attorneys

Advocate for the Respondent: Advocate M Louw instructed by Mark Efstratiou Incorporated