IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. D10128/2022

In the matter between:

NAT INDUSTRIES (PTY) LTD (IN LIQUIDATION)	First Plaintiff
NEIL MCHARDY N.O.	Second Plaintiff
GAIRONESSA DAVIDS N.O.	Third Plaintiff
FINANCE FACTORS (PTY) LTD	Fourth Plaintiff

and

GRINDROD BANK LTD	Defendant

Coram: Thobela-Mkhulisi AJ

Heard: 25 August 2023

Delivered: 25 October 2023

ORDER

The following order is granted:

1. The exceptions raised to all the claims pleaded in the particulars of claim are upheld.

2. The plaintiffs are granted leave to amend the particulars of claim within 10 days of the date of this judgment.

JUDGMENT

Thobela-Mkhulisi AJ

Introduction

[1] When a company defrauds another and the defrauded company discovers the fraud, confronts the fraudster and secures repayment of the money fraudulently obtained from it, with interest and charges, and it does not report the fraud to law enforcement agencies, do the joint liquidators have a claim against the defrauded company for payment of the money repaid to the defrauded company prior to liquidation.

[2] Further, does the failure by the defrauded company to report the fraud give rise to a cause of action against the defrauded company for payment of the amount by which the liabilities of the fraudster continued to exceed its assets *after* the defrauded company discovered the fraud?

[3] Finally, do third parties that continued to fall victim to the fraudster *after* the defrauded company discovered the fraud but did not report it, have a claim in delict against the defrauded company for the losses sustained by them.

[4] These are the fundamental questions raised in the exceptions that the defendant takes against the plaintiffs in the action instituted against it.

The parties

[5] The first plaintiff is Nat Industries (Pty) Ltd (in liquidation) (Nat Industries), a company in liquidation that carried on the business of placing temporary employees with entities that required such employees. The second and third plaintiffs are the joint liquidators of Nat Industries. The fourth plaintiff is Finance Factors (Pty) Ltd (Finance Factors), a private company that was initially incorporated as a close corporation.

[6] The defendant is Grindrod Bank Ltd (Grindrod), a public company that conducts the business of a commercial bank from its offices in Durban.

The relevant pleaded facts

[7] Since these proceedings are brought by way of exception this court is compelled to accept the facts alleged in the plaintiffs' particulars of claim as being correct.[1] Those facts are that during September 2017 Nat Industries and Grindrod concluded a factoring contract in terms of which Nat Industries sold its book debts to Grindrod, the factor, for an agreed consideration. The factoring contract defines 'debts' to mean claims held by Nat Industries against a third party, Southey Holdings (Pty) Ltd (Southey), for services rendered to Southey in terms of a temporary employment services contract. Pursuant to the factoring contract, Grindrod paid Nat Industries a total amount of R8.2 million in two instalments: the first instalment was R4 million paid on 5 October 2017, and the balance was paid on 12 October 2017.

[8] Shortly after making payment of the second instalment Grindrod made contact with Southey. It discovered that the temporary employment services contract on the strength of which it had concluded the factoring contract with Nat Industries, was terminated by Southey more than one year prior to the date of the conclusion of its factoring contract with Nat Industries. In fact, at the time that Nat Industries concluded the factoring contract with Grindrod no business dealings between Nat Industries and Southey existed, the last of the temporary employees that Nat Industries had placed with Southey had left that site

[1] *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA) para 22.

by March/April 2017, no invoices remained unpaid by Southey in favour of Nat Industries and no debts would become owing in the future. Nat Industries had perpetrated a fraud on Grindrod.

[9] This discovery by Grindrod led to a meeting, held on 25 October 2017, between Grindrod's representatives and Nat Industries' representatives, *Ms Jenelle Govender* and *Ms Janine Govender*. After the meeting, Nat Industries repaid Grindrod the amount of R8 581 334.31 (eight million five hundred and eighty one thousand three hundred and thirty four rand and thirty one cent) over a period of 11 months, made up of the R8.2 million Grindrod paid to Nat Industries, together with interest and finance charges. The repayments occurred as follows: on 15 November 2017 Nat Industries paid R4 million, on 8 December 2017 it paid R1 million, on 18 May 2018 a further payment of R1 million was made and on 12 October 2018 the final amount of R2 581 334.31 (two million five hundred and eighty one thousand three hundred and thirty four rand and thirty one cent) was paid. Grindrod did not report the fraud to any law enforcement authorities.

[10] Whilst the factoring contract between Nat Industries and Grindrod was concluded in September 2017, by February 2017 Nat Industries was already factually and commercially insolvent, meaning its total liabilities exceeded its total assets and its current liabilities exceeded its current assets.[2] *Concursus creditorum* commenced on 5 February 2020 in terms of section 348 of the Companies Act, No. 61 of 1973 which continues to apply pursuant to the transitional arrangements in Schedule 5(9) of the Companies Act, No. 71 of 2008. On 12 February 2020 Nat Industries was provisionally wound up and the final liquidation order was granted a few months later.

[11] The final piece of the relevant facts relates to Finance Factors. The fraudulent factoring contract that Nat Industries concluded with Grindrod was not its first. During April 2013 Nat Industries concluded a similar factoring contract with Natal Factors (Pty) Ltd. One year later the parties signed an addendum to that contract which extended the

[2] *Tyre Corporation Cape Town (Pty) Ltd and Others v GT Logistics (Pty) Ltd (Esterhuizen and Another Intervening)* 2017 (3) SA 74 (WCC) para 12.

duration of the factoring contract with Natal Factors to 31 March 2020. It is unclear why this addendum was signed because paragraph 33(1) of the initial contract stipulates that the contract shall be renewed automatically for consecutive periods of 12 months, subject to the factor's right to terminate the contract on one month's notice to Nat Industries. Be that as it may, at the beginning of 2017 Natal Factors ceded its rights and assigned its obligations to Finance Factors. A few months later Nat Industries concluded a further factoring contract with Finance Factors. As it had done with Grindrod, Nat Industries used the terminated temporary employment services contract with Southey as the underlying contract to its factoring contract with Finance Factors. By October 2017, two months after the conclusion of the further factoring contract between Nat Industries and Finance Factors and the month in which Grindrod held its 'pay back the money' meeting with Nat Industries, Nat Industries had defrauded Finance Factors of the amount of R26 988 146 (twenty six million nine hundred and eighty eight thousand one hundred and forty six rand), and as at the date that *concursus creditorum* commenced, namely 5 February 2020, this figure had ballooned to R130 721 211 (one hundred and thirty million seven hundred and twenty one thousand two hundred and eleven rand).

[12] The joint liquidators and Finance Factors instituted an action against Grindrod in which four claims are pleaded. It is to these claims that I turn to next.

The claims pleaded against Grindrod

[13] The plaintiffs' action against Grindrod is made up of four claims. Three claims are by the joint liquidators and one claim is by Finance Factors.

The claims by the joint liquidators

[14] The plaintiffs' first claim against Grindrod (Claim 1) is premised on sections 30 and 31 of the Insolvency Act, No. 24 of 1936 ("the Insolvency Act"). The relevant provisions of sections 30 and 31 read as follows:

> '**30 Undue preference to creditors**
>
> (1) If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition.

31 Collusive dealings before sequestration

(1) After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.

(2) Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate."

[15] The joint liquidators plead that since at the time that Nat Industries repaid Grindrod it was already insolvent, the amount repaid constituted an undue preference in terms of section 30 and a collusive deal in terms of section 31. The joint liquidators seek the setting aside of the repayments made.

[16] The liquidators' second claim (Claim 2) is pleaded in the alternative to Claim 1. This claim rests on the legal principle that a party is not entitled to benefit from its own fraud. The allegation made is that after the meeting of 25 October 2017 Grindrod knew that a fraud had been committed by Nat Industries on it. Therefore, when it secured payment of the amount of R8 581 334.31 to it, it benefited from and compounded such fraud, a fraud that it was complicit in and is precluded from benefiting from. In the result, Grindrod is liable to repay the liquidated estate.

[17] The final claim by the joint liquidators is pleaded as Claim 4 in the particulars of claim (Claim 4). As at 19 October 2017 the liabilities of Nat Industries exceeded its assets by the amount of R44 240 670 (forty four million two hundred and forty thousand six hundred and seventy rand). As a consequence of Grindrod's failure to report the fraud perpetrated by Nat Industries on it, on the date that *concursus creditorum* commenced the liabilities of Nat Industries had increased to R144 561 489 (one hundred and forty four

million five hundred and sixty one thousand four hundred and eighty nine rand). Accordingly, Grindrod is liable to the liquidated estate for the difference in the amount of liabilities on 5 February 2020 and such liabilities when Grindrod discovered the fraud. In other words, if Grindrod had reported the fraud committed on it when it discovered it, further liabilities in the amount of R100 320 819 (one hundred million three hundred and twenty thousand eight hundred and nineteen rand) would not have been sustained by Nat Industries. Grindrod's failure in this regard breached a duty of care that it owed to Nat Industries to ensure that the latter did not suffer continued losses after the fraud was discovered. By accepting the sums of money repaid to it and not reporting the matter in terms of the Financial Intelligence Centre Act, No. 38 of 2001 ("FICA") and the Prevention of Organised Crime Act, No. 121 of 1998 ("POCA"), Grindrod breached its duty of care. The surge in the liabilities of Nat Industries was foreseeable in the light of the information that Grindrod obtained from Southey. It follows, Grindrod is liable in delict to the liquidated estate in the amount of R100 320 819 for the increase in liabilities from October 2017 to February 2020.

The claim by Finance Factors

The claim by Finance Factors is pleaded as Claim 3 in the particulars of claim (Claim 3). Finance Factors alleges that from January 2017 to the date on which *concursus creditorum* commenced, it had paid Nat Industries the amount of R5 302 583 884.87 (five billion three hundred and two million five hundred and eighty three thousand eight hundred and eight four rand and eighty seven cent). By October 2017 Nat Industries had defrauded Finance Factors the amount of R26 988 146 (twenty six million nine hundred and eighty eight thousand one hundred and forty six rand) and on the date on which *concursus creditorum* commenced the amount paid fraudulently to Nat Industries by Finance Factors stood at R130 721 211 (one hundred and thirty million seven hundred and twenty one thousand two hundred and eleven rand). If Grindrod had reported the fraud when it discovered it in October 2017 and criminally charged *Ms Jenelle Govender*, or if it had invoked other civil remedies including bringing about the liquidation of Nat Industries sooner, then Finance Factors would not have suffered the additional losses that it did from October 2017 to February 2020, which stand at R103 733 065 (one

hundred and three million seven hundred and thirty three thousand and sixty five rand), representing the difference between R130 721 211 and R26 988 146. When Grindrod did not report the fraud, it breached a duty of care that it owed to Finance Factors to ensure that the latter did not suffer losses in consequence of the fraud. The losses suffered by Finance Factors were foreseeable due to the knowledge that Grindrod had about the fraud, it was aware that the monies Nat Industries used to repay it would be procured from alternative sources for which there was no *causa*. In consequence, Grindrod is indebted to Finance Factors in the amount of R103 733 065 (one hundred and three million seven hundred and thirty three thousand and sixty five rand).

The exceptions raised by Grindrod

[18] Grindrod excepts to each of the pleaded claims on the ground the particulars of claim lack the averments necessary to sustain a cause of action, and also that the particulars of claim are vague and embarrassing.

[19] In relation to Claim 1, the exception raised is that both sections 30 and 31 of the Insolvency Act require the disposition made to have been of property belonging to the insolvent. Since the payment by Nat Industries to Grindrod was, in fact, a repayment of money stolen by it from Grindrod, and Nat Industries could not become the owner of stolen property, Nat Industries had no other legal entitlement to the money it received from Grindrod and the repayment was not a disposition of property belonging to Nat Industries in the manner contemplated in sections 30 and 31. Instead, the repayment amounted to restitution of that which had been stolen from Grindrod. Ownership of the money Grindrod paid to Nat Industries could not pass to Nat Industries because the factoring contract with Grindrod was unlawful. Moreover, the plaintiffs have not pleaded any facts upon which a finding of collusion between Grindrod and Nat Industries may be made.

[20] The exception to Claim 2 attacks the alternative claim on the ground that the plaintiffs did not plead that Grindrod committed a fraud. To this extent, the particulars of claim lack the averments necessary to sustain a cause of action based on fraud on the

part of Grindrod. Moreover, compounding, which consists of "*unlawfully and intentionally agreeing for reward not to prosecute a crime which is punishable otherwise than by fine only*"[34] is a separate offence to fraud and the factual allegations necessary to sustain a conclusion of compounding have also not been pleaded.

[21] Claims 3 and 4 are claims for pure economic loss. The exception to each of these claims is that the plaintiffs have failed to plead the facts upon which a duty of care can arise. Further, the obligation impugned to Grindrod to lay criminal charges against *Ms Jenelle Govender* inter alia, for fraud and forgery, lack a legal basis. In the result, the particulars of claim lack the allegations upon which wrongfulness, an essential element under the *Lex Aquilia*, can be established. Moreover, the plaintiffs have failed to plead any facts which establish that the *Lex Aquilia* provides a basis upon which Grindrod may be liable. Finally, the plaintiffs have not pleaded the factual basis to support a conclusion that if Grindrod had reported the fraud, Nat Industries would have been prevented from trading and it, Finance Factors and the world at large, would have incurred no further liabilities. In the result, the averments made in the particulars of claim do not plead causation.

[22] Grindrod also excepts to the particulars of claim on the basis that the claims pleaded are vague and embarrassing. Given the conclusions to which I have come I do not detail each averment raised in this second exception by Grindrod. In summary and with reference to the allegations summarised above, Grindrod asserts that the pleaded paragraphs are vague and embarrassing.

Discussion

[23] A defendant may except to a combined summons because it lacks the averments necessary to sustain a cause of action, or because the pleading is vague and embarrassing and despite notice in terms of Uniform rule 23(1) to remove the cause of the complaint the plaintiff fails to do so, or both.

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[3] Burchell, J et al "Principles of Criminal Law" (2ed), Juta, 1997 at p710.
[4] Gardiner and Lansdown *South African Criminal Law and Procedure* Vol 1 6 ed (1957) at 157.

[24] Where the ground for the exception is that the pleading does not disclose a cause of action the following principles apply. A 'cause of action' is "*used to describe the factual basis, the set of material facts that begets the plaintiff's legal right of action*".[5] Therefore, the question whether a cause of action exists is dependent on the pleaded facts and not on questions or conclusions of law[6]. Those facts must be accepted as being correct, however this is not true for the conclusions of law for which the party for whom the pleading is drafted contends.[7] An excipient must satisfy the court that the conclusions of law, the legal right of action for which the plaintiffs contend, cannot be supported on every interpretation that can be put upon the pleaded facts.[8] Whilst exceptions provide a useful mechanism to weed out cases without legal merit they should be dealt with sensibly and an over-technical approach is not to be preferred.[9] An exception can only succeed if it is shown by the excipient, *ex facie* the allegations made by a plaintiff and any document upon which the plaintiff's cause of action may be based, that "the claim *is* (not may be) bad in law".[10] No facts may be adduced to show that the pleading is excipiable and a court must take the facts alleged in the pleading as being correct.[11] Finally, the pleading must be read as a whole inclusive of the annexures attached to it.[12]

[25] It seems to me that to determine whether a cause of action is disclosed in a pleading within the parameters of the principles applicable in exceptions, one must identify the legal right claimed and the factual allegations that must be pleaded, the jurisdictional facts required, to beget the legal right claimed, and then determine whether

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[5] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F-G.
[6] *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) para 36.
[7] *Hlumisa* above fn 1 para 22.
[8] *Children's Resources Centre Trust* above fn 4 para 36.
[9] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 3.
[10] *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.
[11] *Sarmcol Quality Tyres (Pty) Ltd and Others v Farrel Incorporated and Another* (8147/2022P) [2023] ZAKZPHC 48 (5 May 2023) para 18; *Van Staden v Van Staden NO and others* [2023] 3 All SA 307 (WCC) para 20; *Barnard v Barnard* 2000 (3) SA 741 (C) para 10.
[12] *Telematrix* above fn 9 para 10.

the required factual basis has been pleaded by the plaintiff. If not all the required facts are pleaded it must follow that the cause of action is incomplete and excipiable.

[26] Sections 30 and 31 of the Insolvency Act create a remedy, given to liquidators, to recover assets that have been removed from an estate before insolvency.[13] In "*prescribed circumstances*",[14] liquidators have the right to have a person declared to be a debtor of the insolvent estate and to have a *disposition* set aside. This is the legal right that is claimed. The summary of the legal right and what is required to be proven and implied alleged in order to beget the right, set out in *Venter v Volkas*[15], is apposite:

> 'Sec. 30(1)…provides for the recovery of the disposed property but only in those cases where the disposition was made with the intention of so preferring a creditor above other creditors or stated differently with the intention of disturbing what would be the proper distribution of the assets in the event of the sequestration of the debtor's estate. Such an intention would generally speaking not be present in the mind of the debtor who does not contemplate the sequestration of his estate as a likely event when he makes the disposition…. Being a question of intention, it involves a subjective assessment of the debtor's action in having made the disposition. In the absence of direct evidence of an intention to prefer one creditor above another, it must generally speaking be proved that the debtor contemplated sequestration before an inference can be drawn that he made the disposition with the intention to prefer the creditor, to whom the disposition was made, above another…a debtor may also have had other objects in mind when he made the disposition but in that event it is incumbent upon the person upon whom the *onus* lies to establish that to prefer the creditor in question was the paramount, dominant or substantial object. A preference involves a free selection. Where therefore a debtor pays a creditor "out of his turn" under great pressure or to avoid a prosecution or for some other reason that negatives the inference that main object was to prefer the creditor, intention to prefer will not be proved.' [16] (My underlining)

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[13] *Duet and Magnum Financial Services CC (In Liquidation) v Koster* 2010 (4) SA 499 (SCA) para 12.
[14] Ibid para 27.
[15] *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) at 179-180.
[16] Ibid at 179-181.

[27] Four facts must be alleged and proven in order to beget the setting aside of a disposition in terms of section 30(1). *First*, the insolvent must make a disposition of *its* property, not property it has stolen. *Second*, the disposition must be made at the time when the liabilities of the insolvent exceeded its assets, but prior to the insolvent's liquidation. *Third*, the disposition must be made with the intention of preferring one creditor above another. *Finally*, liquidation must post date the disposition made. The second and fourth jurisdictional facts are uncontentious in this matter because the liquidators plead that at the time that Nat Industries repaid Grindrod the amount it had stolen from it, it was factually and commercially insolvent and that *concursus creditorum* commenced almost three years after the disposition was made. It is the first and third jurisdictional facts that are in issue.

[28] A 'disposition' is defined to mean "*any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, but does not include a disposition in compliance with an order of the court*".[17] I consider first whether the amounts paid by Nat Industries to Grindrod constitute a disposition as defined.

[29] Two amounts must be distinguished from each other. The first, R8.2 million that Nat Industries obtained from Grindrod fraudulently and the second, R8 581 334.31 that Nat Industries repaid to Grindrod inclusive of interest and charges. Grindrod paid the amount first mentioned into the bank account of Nat Industries, this being in accordance with clause 4.2 of the factoring contract that stipulates that Grindrod shall make payment by means of an electronic funds transfer into a bank account nominated by Nat Industries. In argument *Mr Smallberger SC* submitted that because the funds were transferred electronically into the bank account of Nat Industries, by virtue of *commixtio* the money that was paid back to Nat Industries is no longer the money that Grindrod had received, and when Grindrod paid this amount back it transferred its personal right of payment to Grindrod. These submissions cannot be accepted. Where money is deposited into

[17] Section 2 of the Insolvency Act.

a bank account of an account holder it mixes with other money and, by virtue of *commixtio*, it becomes the property of the bank.[18] It is correct that the account holder acquires a personal right to payment of that amount from the bank arising from their bank–customer relationship. The right is exercisable against the bank and reciprocally, the bank bears an obligation to honour the customer's payment instructions.[19] However, *Nissan South Africa*[20] is authority for the proposition that when stolen money is paid into a bank account to the credit of a thief, the thief has as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account.[21] Further, in *Bank of Lisbon*[22] the court held that where money is obtained by fraud from the Commissioner, the fraudster became indebted to the Commissioner in the amount so obtained and became obligated to the Commissioner to repay him a like amount.[23] In the same way, since the payment by Grindrod to Nat Industries was obtained unlawfully, Nat Industries had no entitlement to the credit representing the money in its account, it became indebted to Grindrod in the like amount and whatever personal right to payment Nat Industries might have had against the bank pursuant to *commixtio*, whether Nat Industries had a right to the funds in relation to Grindrod is the pertinent issue. Since the funds were obtained fraudulently there is no gainsaying that Nat Industries could not, in law, have any entitlement to the R8.2 million, nor to any credit representing this amount in its bank account. Because Nat Industries had no entitlement to the this amount, when it was paid back to Grindrod this could not have been a disposition in the manner defined in the Insolvency Act because Nat Industries held no rights capable of being transferred or abandoned to this amount. As pleaded by Grindrod and emphasised in argument, the property, which in my view must be limited to the amount of R8.2 million only, was never

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[18] *South African Reserve Bank v Leathern NO and Others* 2021 (5) SA 543 (SCA) para 17.
[19] Ibid.
[20] *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd intervening)* 2005 (1) SA 441 (SCA.
[21] *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd intervening)* 2005 (1) SA 441 (SCA) para 23; *FirstRand Bank Ltd v Spar Group Ltd* 2021 (5) SA 511 (SCA) para 48.
[22] *Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another* 1994 (1) SA 205 (N).
[23] At 213H.

the property of Nat Industries. It follows, when Nat Industries repaid Grindrod the amount of R8.2 million it did not make a disposition as defined.

[30] The second amount of R381 334.31, being the difference between what Nat Industries received from Grindrod and what it repaid to it, is a different matter. This amount, comprising interest and charges, is money that I have no reason to find that it was stolen from Grindrod. It seems that at the meeting held on 12 October 2017 it was agreed that charges and interest would be levied. Nothing is pleaded as to the reasons why. Without deciding whether this amount is property that Nat Industries has rights in, I have assumed in favour of the joint liquidators that payment of this further amount constituted a disposition.

[31] However, a disposition is not enough. To be caught by the section the disposition must be made with the intention of preferring one creditor over others and "*a colourless disposition, one not made with the required intent, is not caught by the provisions of s 30(1)*".[24] Whether a disposition was made with the intention of preferring one creditor above another within the meaning of s 30(1) is a question of fact, to be established with direct evidence or by inference from the circumstances in which the disposition was made. Being a question of intention, the enquiry involves a subjective assessment of the debtor's action in having made the disposition.[25] To succeed on this front, the liquidators must allege an intention to prefer one creditor above another, and if there is no direct evidence that proves intention then the liquidators must allege and prove that Nat Industries at least contemplated liquidation before an inference can be drawn that it made the disposition with the intention to prefer Grindrod. None of these allegations appear in the particulars of claim. Instead, the liquidators plead a conclusion that the payments to Grindrod constituted an undue preference and preferent payment. In the absence of either an allegation of intention or of the factual basis upon which an inference of intention can be drawn, the necessary averments relating to the third jurisdictional fact identified above are lacking.

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[24] *Fourie NO and Others v Edeling NO and Others* 2004 JDR 0254 (SCA) para 9.
[25] *Venter v Volkskas Ltd* 1973 (3) SA 175 (T) at 180E-F.

[32] In the result, in relation to the amount of R381 334.31 I can find no facts pleaded in the particulars of claim on the basis of which it can be said that the third jurisdictional fact is pleaded. The legal right claimed under section 30 has not been pleaded sufficiently to beget that right.

[33] The jurisdictional facts under section 31 are collusion between the debtor and the creditor and disposition of property belonging to the creditor in a manner that has the effect of prejudicing one creditor over another. I have dealt with the question of the disposition of property and I focus on the requirement of collusion. The joint liquidators allege that Grindrod colluded with *Ms Jenelle Govender*, however, the factual basis upon which the collusion is premised is also required to be pleaded. This is not to say that the joint liquidators are required to plead the evidence that proves the collusion, but in my view, they are required to plead the facts upon which the allegation of collusion rests. By way of example, if the collusion pleaded took the form of a *quid pro quo*, then the facts relevant to such form of collusion are required to be pleaded, not the evidence that proves the form of collusion. There may be other forms of collusion, about which the defendant must have clarity and certainty in order to know what case it has to meet. Pleading a conclusion of collusion is insufficient and to this extent the material facts required to beget the right are not pleaded, making the claim to setting aside in terms of section 31 excipiable. The final fact required to be pleaded is that the collusion must have the effect of prejudicing one creditor over another. Given that I have found that the jurisdictional fact of collusion is not pleaded it is unnecessary to proceed to analyse the third jurisdictional fact.

[34] The exception to Claim 2 must also be upheld. It is trite that fraud unravels all, but for this to be so the fraud must be established and properly pleaded.[26] I have considered this claim in the context of the allegations in paragraphs 24 to 28 of the particulars of claim in which the discovery of the fraud on Grindrod, the meeting of 25 October 2017 and Grindrod's awareness and payments received are pleaded. In particular, in

[26] *Loomcraft Fabrics CC v Nedbank and Another* 1996 (1) SA 812 (A) at 817F-G.

paragraph 26 the liquidators plead awareness of the fraud on the part of Grindrod which fraud was perpetuated on Grindrod, not of it having perpetuated, or being party to, a fraud. What is pleaded is an awareness about fraudulent invoices that Nat Industries presented to Grindrod for payment, that Grindrod was aware of other parties that were defrauded by Nat Industries, that Grindrod owed a duty of care to the world at large to prevent Nat Industries from perpetuating any fraud and that Grindrod was repaid the money stolen from it plus charges and interest. I do not accept the contention by the joint liquidators that the awareness that other invoices were being fraudulently discounted gives rise to unlawful conduct on the part of Grindrod. The allegation against Grindrod contained in paragraph 36 of the particulars of claim is that it engaged in fraudulent conduct and the legal right claimed in this claim is that Grindrod cannot benefit from its own fraud. Having claimed this as the legal right in the claim, the factual allegations relied on cannot be some other unlawful conduct. The pleaded facts must establish a fraud, the basis of the legal right, carried out by Grindrod. An awareness of fraud carried out by Nat Industries against other parties does not establish fraud by Grindrod. The foundational facts upon which this claim can be sustained are not pleaded and therefore the legal right claimed by the liquidators cannot stand. In addition, a party is not guilty if, when a thief returns his property he unilaterally determines to keep silent[27]. There is no allegation that Grindrod agreed for reward not to prosecute, nor are there any allegations on the remaining elements of compounding.

[35] I consider the exceptions to Claims 3 and 4 together because both these claims are claims for pure economic loss. The principles applicable to claims for pure economic loss are usefully restated in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd.*[28] The elements required to be alleged and proven in order to succeed in a claim founded in delict are trite: the conduct or the omission, wrongfulness, negligence, causation and damages. In exception proceedings where the claim is founded on an omission or pure economic loss, negligence is presumed, however the negligent conduct is not *per se* wrongful and wrongfulness will depend on a legal duty not to act negligently.

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[27] Burchell above fn3, p711 citing *R v Klugman 1959 (1) PH H37 (C)*.
[28] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 9-13.

The imposition of a legal duty is judicially determined and involves public or legal policy considerations that are consistent with constitutional norms. An omission that causes pure economic loss is wrongful only if the public and legal considerations require that such conduct is actionable. A plaintiff must allege and prove the legal duty without having recourse to the terms of the contract if the action is founded in delict. At the outset of the oral argument both Ms *Annandale* and Mr *Smallberger* took no issue with this summary of the law on delict with reference to claims for pure economic loss.

[36] The conduct that the liquidators and Finance Factors rely on in their claims for pure economic loss is Grindrod's failure, after it discovered the fraud by Nat Industries, to report the fraud in terms of FICA and POCA, the provisions of which are not specified in the particulars of claim, as well as its failure to institute proceedings to liquidate Nat Industries earlier and to lay criminal charges against *Ms Jenelle Govender* and others. The pleading is silent on the considerations that the plaintiffs say give rise to a legal duty on the part of Grindrod, owed by it to the world at large, to ensure that third parties do not suffer losses in consequence of acts of fraud committed on it. It is perhaps in recognition of this lacuna in the pleadings that in their heads of argument the plaintiffs invite this court not to stifle the development of the common law and that to the extent that Claims 3 and 4 require the development of the common law, an exception must not be used to restrict such development but the matter must be allowed to proceed to trial where, after all the evidence has been heard, the trial court can decide whether the common law should be developed.

[37] There is no general rule that issues relating to the development of the common law cannot be decided on exception, but it is better not to do so where the facts are complex and the law is uncertain.[29] In *Tembani*[30] it was common cause between the parties that the Supreme Court of Appeal was presented with "*an unprecedented and novel delictual claim*". In *Tembani* the Supreme Court of Appeal referred to[31] a dissenting

[29] *Tembani and Others v President of the Republic of South Africa and Another* 2023 (1) SA 432 (SCA) para 15.
[30] Ibid para 20.
[31] Ibid para 15.

judgment of Kirby J in the Australian decision of *Harriton v Stephens*[32] where the judge opined as follows:

> 'Especially in novel claims asserting new legal obligations, the applicable common law tends to grow out of a full understanding of the facts. To decide the present appeal on abbreviated agreed facts risks inflicting an injustice on the appellant because the colour and content of the obligations relied on may not be proved with sufficient force because of the brevity of the factual premises upon which the claim must be built. Where the law is grappling with a new problem, or is in a state of transition, the facts will often "*help to throw light on the existence of a legal cause of action - specifically a duty of care owed by the defendant to the plaintiff*". Facts may present wrongs. Wrongs often cry out for a remedy. To their cry the common law may not be indifferent.' (Footnotes omitted.)" With reference to this quotation and to *H v Fetal Assessment Centre*,[33] *Pretorius and Another v Transport Pension Fund and Others*[34] and *Children's Resource Centre Trust*[35]*,* the Supreme Court of Appeal stated that the approach adopted in the Australian dissenting judgment is consistent with section 39(2) of the Constitution, which compels every court that is developing the common law to promote the spirit, purport and objects of the Bill of Rights, and that "*a court must be satisfied that a novel claim is necessarily inconceivable under our law as potentially developed under section 39(2) of the Constitution, before it can uphold an exception premised on the alleged non-disclosure of a cause of action*".[36] Further, in *Country Cloud Trading*[37] the Constitutional Court found that "*our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must be positively established*".

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[32] *Harriton v Stephens* [2006] HCA 15 para 35.
[33] *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).
[34] *Pretorius and Another v Transport Pension Fund and Others* 2019 (2) SA 37 (CC).
[35] *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA).
[36] *Tembani* above fn 27 para 20.
[37] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 23. (Footnotes omitted.)

[38] In this matter neither the facts nor the law are complex. The common law rules governing the imposition of liability in claims for pure economic loss are well established. The facts giving rise to the claim by the liquidators and Finance Factors are neither unique nor complex. To seek to impose liability on the victim of a fraud because that victim did not report the fraud and other persons fell victim to the fraud, without any allegation that had the fraud been reported the fraudster would have stopped its criminal activities and no further frauds would have occurred, goes a step too far. In any event, in *MEC for Health and Social Development, Gauteng v DZ obo WZ*[38] the Constitutional Court accepted O'Regan J's pronouncement in *K v Minister of Safety and Security*[39] that:

> '…the common law develops incrementally through the rules of precedent, which ensure that like cases are treated alike. Development occurs not only when a common-law rule is changed altogether or a new rule is introduced, but also when a court needs to determine whether a new set of facts falls within or beyond the scope of an existing rule…development of the common law cannot take place in a factual vacuum.' (Footnotes omitted.)

[39] More importantly, whilst section 39(2) of the Constitution requires the courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law, a court may only consider a case for the development of the common law by following the five steps identified in *DZ.*[40] These are determining what the existing common-law position is, considering its underlying rationale, enquiring whether the rule offends section 39(2) of the Constitution and if it does considering how development in accordance with section 39(2) ought to take place, finally considering the wider consequences of the proposed change on the relevant area of the law. A court can only follow this five-step process if a case for the development of the common law is properly pleaded. This has not been done in the claim against Grindrod and the development of the common law is raised for the first time in the heads of argument filed for the plaintiffs. The plaintiffs have pleaded nothing in the particulars of claim that would enable a trial court to make a determination for the development of the common law. In the result, these two claims also

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[38] *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) para 28.
[39] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 16.
[40] *DZ* above fn 36 para 31.

lack the averments necessary to sustain a claim for pure economic loss under *Lex Aquilia* and the case for the advancement of the common law advanced in argument has not been pleaded.

[40] Given the conclusions I have come to on the exceptions that the claims do not disclose a cause of action it is unnecessary to deal with the exception that the particulars of claim are vague and embarrassing.

[41] The only question that remains is the appropriate order to be granted. *Ms Annandale* submitted that it would be appropriate to dismiss the claims founded in sections 30 and 31 in relation to the amount of R8.2 million and that the plaintiffs be granted leave to amend the particulars of claim to obtain the interest and charges received from Nat Industries. I do not agree. In *Trope*[41] the court cited Corbett CJ in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)*,[42] and affirmed that the invariable practice of our courts is that where an exception has been successfully taken against a plaintiff's initial pleading on the ground that it discloses no cause of action, the appropriate order to be granted is one setting the pleading aside and giving leave to the plaintiff, if so advised, to file an amended pleading within a certain period of time.[43] I am inclined to follow this approach. Whilst it is so that the plaintiffs are constrained by the facts as presently pleaded to found any right in terms of sections 30 and 31, leave to amend gives the joint liquidators an opportunity to consider the claims they wish to persist with and to properly plead such claims.

Order

[42] In the result I grant the following order:

1. The exceptions raised to the all the claims pleaded in the particulars of claim are upheld.

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[41] *Trope and Others v South African Reserve Bank and Another and Two Other Cases* 1993 (3) SA 264 (A).
[42] *Group Five Building v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602D.
[43] *Trope* above fn 39 at 269G-H.

2. The plaintiffs are granted leave to amend the particulars of claim within 10 days of the date of this judgment.

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Thobela-Mkhulisi AJ

Heard:	25 August 2023
Delivered:	25 October 2023

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