**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**REPORTABLE**

Case No.: 618/2008

In the matter between:

**BETKO PRODUCTS CC** Plaintiff/Respondent

and

**GRASSO (PROPRIETARY) LIMITED** Defendant/Excipient

**KOEN AJ.**

**JUDGMENT DELIVERED THIS 26th DAY OF MARCH 2010**

1.The defendant in this matter has noted an exception to the plaintiff's particulars of claim on the grounds that it discloses no cause of action against the defendant in either contract or delict, alternatively on the ground that it is vague and embarrassing. For the sake of convenience I propose, for the purposes of this judgment, to refer to the excipient as the defendant and to the respondent as the plaintiff.

2. At the commencement of the argument it was accepted that the action wasone in delict .At

the commencement of the argument it was accepted that the action was one in delict and the exception based on the ground that no cause of action in contract had been pleaded was not pursued. This turn of events has a bearing on the vague and embarrassing ground of exception, but I shall advert to this later.

3.In order to decide whether or not the particulars of claim make out a cause of action it is necessary, firstly, to distil from them the facts upon which the claim is based. I do not intend to quote from the particulars at length, only to summarise the essential facts upon which I understand the claim to be based.

4.The particulars of claim allege that in or about 2002 a cold storage room had been *"designed, installed and maintained"* by Grenco (SA) Pty Limited, a company which is not a party to the action. The defendant had manufactured a component of the cold storage room in question, namely the evaporator unit. The defendant, it was alleged, publically held itself out as an expert manufacturer and seller of cold storage systems which include evaporators.

5.During 2007 the plaintiff's apples, which were stored in the cold storage room, were damaged by ammonia gas. The ammonia gas had escaped as a result of weld defects in the evaporator manifold which had arisen during the manufacture of the evaporator unit. In consequence the plaintiff claimed that it had suffered a loss in the amount of R 1 710 622 being the dimunition in the value of its apples as a result of the damage caused to them by exposure to ammonia gas.

6.In the particulars of claim the plaintiff alleged, further, that the defendant's employees were negligent in the manufacture of the evaporator unit in one or a number of respects. These were that they had

failed to ensure that there were no weld defects in the evaporator manifold; that they had failed to ensure that the welding equipment would not produce weld defects; that they had failed to ensure that the materials which had been used in the welding and manufacturing process would not produce weld defects; and/or, in that they had failed to test the evaporator unit to make sure that weld defects did not exist.

7.It was alleged, further, that the conduct of the employees of the defendant, acting in the course and scope of their employment, was wrongful and that the defendant could and should have foreseen that as a result of defects in the manufacture of the evaporator unit damage could be caused to the property of end-users of the evaporator unit and its components.

8.Those facts, as I read the particulars of claim, form the basis of the claim brought against the defendant. Because the plaintiff's claim is in delict it is necessary to examine, briefly, what the requirements for delictual liability in our law are.

9.That delictual liability flows from a wrongful and negligent act or omission on the part of the defendant which causes loss to the plaintiff requires no authority. Each one of the ingredients which appear from this formula must be present in every claim based in delict. In this case the first question to be answered is whether the plaintiff has alleged in its particulars of claim sufficient facts to constitute a cause of action for damages in delict, with the focus being on the element of wrongfulness.

10. I n general, our law requires that every fact necessary to sustain a cause of action must be pleaded.[1] If facts necessary to underpin a cause of action are not pleaded the pleading discloses no

1 See H Daniels, Beck's Theory and Principles of Pleading in Civil Actions, 6th Ed at 49

cause of action. But this is a general proposition only, because our law has evolved in such a way that in most delictual cases it is not required that facts which underpin the requirement of wrongfulness be pleaded. Wrongfulness is assumed - and facts which underpin it need not therefore be pleaded - in cases where the loss arises from physical damage to the person or property of the plaintiff.[2]

11. But where a plaintiff seeks to recover by way of an action in delict loss of a purely economic kind, or loss resulting from an omission, wrongfulness is not implied or assumed. This is because a negligent act or omission causing pure economic loss, or a failure to act which causes loss, is not regarded in our law as being necessarily wrongful. In such cases facts to underpin an allegation of wrongfulness must be pleaded and proved.[3]

12. The parties were agreed that this was not a case where loss of the "purely" economic kind was being claimed. "Pure" economic loss is loss caused *"without the interposition of a physical lesion or injury to a person or corporeal property".* The loss claimed followed upon actual damage to apples owned by the plaintiff, caused - it was alleged - by their exposure to ammonia gas. This is what the pleading states and the pleaded facts must be accepted, this being an exception.[4]

2 See Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander 2002 (2) SA 447 (SCA) at 471 B - 471C; Lillicrap, Wassenaar and Partners v Pilkington Brothers 1985 (1) 475 (AD) at 497 B - C; LTC Harms Amler's Precedents of Pleadings 6th Ed at 222 See Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd en 'n Ander 2002 (2) SA 447 (SCA) at 471 B - 471C; Lillicrap, Wassenaar and Partners v Pilkington Brothers 1985 (1) 475 (AD) at 497 B - C; LTC Harms Amler's Precedents of Pleadings 6th Ed at 222.

3 See LTC Harms, Amler's Precedents of Pleadings, 6th Ed. at 222 where it is stated that "If on the other hand wrongfulness cannot be inferred from the nature of the loss suffered, which will be the case if the plaintiff claims for a loss resulting from an omission or for pure economic loss, the defendant's legal duty towards the plaintiff must be defined and the breach alleged." See LTC Harms, Amler's Precedents of Pleadings, 6th Ed. at 222 where it is stated that "If on the other hand wrongfulness cannot be inferred from the nature of the loss suffered, which will be the case if the plaintiff claims for a loss resulting from an omission or for pure economic loss, the defendant's legal duty towards the plaintiff must be defined and the breach alleged.".

4 See Natal Fresh Produce Growers Association and Others v Agroserve(Pty) Ltd and Others 1990 (4) SA 749 (N) at 754J - 755B.

13. Counsel for the defendant contended, however, that this was a case where the loss resulted from an omission. Referring to the language used to describe the negligent conduct alleged it was argued that the plaintiff's case was founded upon a failure to act in a particular manner, namely to weld properly. The failure properly to weld constituted an omission, so the argument went, and therefore facts to support a conclusion that the defendant's conduct was wrongful should have been pleaded for a complete cause of action to have been disclosed.

14. In the context of the law of delict an omission is a *"failure to take any positive steps whatsoeverto prevent damage to otherpeople"*.—Omissions have a particular significance in delict because of the time-honoured reluctance in our law to impose liability for damages upon persons who have done nothing. As Marais JA put it in *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA), *"Society is hesitant to impose liability in law for, as it is sometimes put, minding one's own business"*[5]

15. At the outset it should be said that it does not escape attention that the defendant in this case was not, according to the pleading under scrutiny, minding its own business. On the contrary, it was in fact going about its business, namely the manufacture of evaporator units. In a sense this observation addresses the submission as it seems obvious that a positive act - the manufacture of the evaporator unit - is the conduct under consideration in this action. But this may be too glib and as it was earnestly contended that the negligent conduct alleged by the plaintiff amounted to an omission a more detailed consideration of the argument is desirable. The question which is to be answered is whether the defendant's negligent failure to take certain steps during the manufacturing process amounts to an omission, at least in the way the word is understood in the context of the wrongfulness element of an action in delict in our law.

5 At 1054E At 1054E.

16. Although it is true that many negligent positive acts can be described in language which connotes a failure to act it does not follow that such acts are treated in our law of delict as constituting omissions.[6] An obvious example, as I see it, is the case of the negligent driving of a motor vehicle in failing to keep a proper lookout, or in failing to apply the vehicle's brakes when this becomes necessary. Although the failure to keep a lookout, or to apply brakes, when driving a motor vehicle are - in a loose sense - omissions they are not omissions in the context of a consideration of the wrongfulness element of a delictual claim in our law. What is in issue is the positive act of driving and a failure to take certain steps whilst doing this. To come back to this case, as I see it, the conduct under consideration is the positive act of manufacturing an evaporator unit.

17.The manner in which conduct in a delictual action is described or, to put it another way, the language used by the framer of a pleading, are not the determining factors when it comes to deciding whether or not the conduct under consideration amounts to an act or to an omission. The failure to take certain steps in the carrying out of a positive act - in this case the welding process in the fabrication of a part of the evaporator unit - does not make such conduct an omission in the sense that this word is used in the context of the consideration of the element of wrongfulness in delict. Such conduct is, as I see it, nothing more than a negligently performed commission.

18. I n my judgment therefore this is not one of those cases where the conduct which is alleged to have caused the loss is comprised of an omission, in the sense meant when one considers the wrongfulness component of delictual liability.

19. Counsel for the defendant, however, sought to persuade me that it was nonetheless the kind of case where the facts alleged did not speak of themselves to wrongfulness, and that I ought to uphold the exception because no facts to underpin the wrongfulness element had been alleged.

6 See Van Der Walt and Midgley Principles of Delict 3rd Edition at pages 65 to 66.

20. To counter this argument counsel for the plaintiff submitted that the claim could and should be characterised as a manufacturer, or product, liability case.[7] Professor Boberg in his work, *The Law of Delict Vol. 1,* described product liability cases in the following way: *"The plaintiff's action is Aquilian, and its ordinary requirements must be satisfied. A wrongful act is constituted by the production of a defective article that causes physical or purely economic damage to any person. The fault requirement is satisfied by showing that the plaintiff's damage was reasonably foreseeable, that a reasonable man would have guarded against it, and that the defendant failed to do so."*[8] In concluding his note under the rubric of "Products Liability" Professor Boberg stated that *"It is submitted that products liability in our law has perhaps been puffed up a little beyond its true importance. The reason for regarding it as a special form of Aquilian liability requiring its own dogmatic framework is not readily apparent. Wrongfulness is hardly a problem. As we have seen ... , wrongfulness is not a function of an act alone: it is a function of an act plus its consequences. To harm others physically or financially by producing or distributing a defective article is so socially undesirable (or objectively unreasonable, if you will) that the law should have no difficulty in branding it wrongful."*[9]

21. Although there was, at the time, little in the way of judicial authority to support the opinion expressed by the learned author it seems well established now that he was correct. In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd and Another* 2002 (2) SA 447 (SCA) Brand JA said *"...aanspreeklikheid wat uit die vervaardiging en verskaffing van n produk voortspruit wat vanwee die een of ander tekortkoming fisiese skade berokken, strek via die ander kontraksparty na enige derde uit wat dit op die voorgeskrewe wyse aanwend en as gevolg daarvan skade ly* (vgl *Cooper and Nephews v Visser* 1920 AD 111 *te* 114; *Tsimatakopoulos v Hemingway, Isaacs and Coetzee CC and Another* 1993 (4) SA 428 (K) te 433A-E; 435H-I; Neethling, Potgieter en Visser *The Law of Delict* 3de uitg te 321 en volgende). *Dat so n vervaardiger volgens die regsoortuiging van die gemeenskap verkeerd en dus onregmatig optree indien hy n produk kommersieel beskikbaar stel wat in die loop*

7 Nothing turns on the terminology used.
8 At page 194.
9 At page 196

*van sy bestemde gebruik en as gevolg van n gebrek vir n verbruiker daarvan skade veroorsaak, volg eintlik vanself (vgl* De Jager *Vervaardigingsaanspreeklikheid te 629 - 32).*[10]

22. That the breach of a legal duty *"to avoid reasonably foreseeable harm resulting from defectively manufactured"* products is wrongful was confirmed a year later in the decision in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA). Although that case was concerned with the imposition of strict liability in product liability cases it seems clear that the Court accepted that the causation of loss flowing from the negligent manufacture of a product is wrongful

23. I must, therefore, conclude that our law assumes that the negligent manufacture of a defective product which causes physical damage and loss to another is wrongful. It follows that it is not necessary to plead facts in support of the conclusion that such conduct is wrongful. Theexception on the ground that the particulars of claim are wanting because facts to underpin the element of wrongfulness are absent must therefore fail.

24. Having characterised the claim as a so-called manufacturer or product liability claim - which, it must be emphasised, is nothing more than an action in delict to which the normal principles of delictual liability apply -the exception on the grounds of vague and embarrassing became of lesser moment. This is because many of the grounds upon which it was contended that the pleading was vague and embarrassing had their origin in an apprehension that the claim was based in contract. Although the particulars contain allegations not strictly necessary to support a claim in delict they nonetheless expressly characterise the claim as being one in delict. As indicated above, after counsel for the plaintiff indicated that the claim was not one in contract, not much attention was devoted in argument by counsel for the defendant on the exception based upon the vague and embarrassing ground.

10 At 470 E - H

25. Be that as it may it is nonetheless desirable, in my view, briefly to deal with the exception on the grounds that the particulars of claim are vague and embarrassing. The attack on the pleading on this basis was directed, firstly, at those allegations in the particulars of claim whichascribe the manufacture of the cold storage room and the evaporator unit to the defendant, without the pleading elaborating upon the standard to which the defendant had contracted that it be built. As I see it this objection misses the point. Whilst it is so that the breach of a contractual obligation may impose liability in delict towards someone who is not a party to the contract[11] this is not the plaintiff's case. The case which is made is a not a case of a product not being up to a contractually determined specification, but a case about a product which was defectively manufactured, and which eventually caused loss to the plaintiff when its apples were damaged as a result of ammonia gas escaping because of the defect. That delictual liability can flow in these circumstances, provided that every element for such liability as our law prescribes is present, has been authoritatively established in *Ciba-Geigy.*

26. It was argued, further, by counsel for the defendant that the particulars of claim were vague and embarrassing because the basis upon which the cold storage facility was operated by the plaintiff had not been disclosed. Again, as I see it, this objection is off target. Whether or not the cold storage room was operated by the plaintiff is in my view irrelevant to the pleaded claim. As I see it the pleading makes it reasonably clear what the case of the plaintiff is, namely an action in delict of the product liability variety. The allegation in question - that the cold storage facility was operated by the plaintiff - is not anecessary ingredient of the plaintiff's cause of action and should cause no embarrassment to the defendant[12].

11 See P Q R Boberg, *"Liability for Omissions - The case of the Defective Motor Car"* 1972 SALJ at 214.

12 See *Joubert v Impala Platinum Holdings Ltd* 1998 (1) SA 463 (BHC) at 471 E - F where it was stated that: *"It has long been established that the general principles of pleading endorsed by the Courts is to move away from formality towards simplicity and that if it is reasonably clear what the defendant is sued for, then, in the absence of prejudice, technical objections will not be upheld."*

27. A third basis upon which it was contended by the defendant that the particulars of claim were vague and embarrassing related to the allegations concerning negligent and wrongful conduct on the part of employees of the defendant. In my view it is reasonably clear that these allegations are intended to do nothing more than inform the defendant that the case against it is that its employees, in the course and scope of their employment, were negligent in failing to manufacture the evaporator unit properly. I do not see that the allegation is vague or embarrassing, or that any prejudice to the defendant can flow from the manner in which this portion of the particulars have been formulated.

28. Counsel for the plaintiff sought a special costs order, in the event that the exception was dismissed, it being contended that the defendants were pursuing a baseless objection to the claim, with the intention of delaying the matter. I do not think that such a step is warranted. There was nothing about the conduct of the case to suggest that the defendant was not *bona fide,* or that it was *"buying time"*—as was suggested in argument. Moreover, as I have indicated above, the pleaded case included allegations not directly relevant to a claim in delict and although the pleading may not have been vague and embarrassing it can with some justification be said that it was not a model of clarity.

29. Both parties submitted that any costs order should authorise the recovery of the costs of two counsel. In view of the nature of the matter
I agree.

30. For the above reasons I do not think that there is merit in the exception. In the circumstances I make the following order: The exception is dismissed with costs, such costs to include the costs of two counsel.

**S J KOEN AJ**