IN THE SUPREME COURT OF SOUTH AI
(APPELLATE DIVISION)

In the matter between:

DANTEX INVESTMENT HOLDINGS (PTY) LTD — Appellant

and

A BRENNER, D J RENNIE and M I SCHWARTZ in their capacity as joint provisional liquidators of NATIONAL EXPLOSIVES (PTY) LTD (IN LIQUIDATION) — Respondents

CORAM: RABIE, ACJ, HOEXTER, BOTHA, VAN HEERDEN, GROSSKOPF, JJA

HEARD: 5 September 1988

DELIVERED: 29 September 1988

J U D G M E N T

GROSSKOPF, JA

This is an appeal, with leave granted by the court a quo, against a judgment of the Witwatersrand Local Division (GOLDBLATT AJ) upholding an exception to the appellant's particulars of claim, as amplified by further particulars.

For convenience I shall refer to the parties as the plaintiff and the defendants. The plaintiff is a company having its registered office in Johannesburg. The defendants are the joint provisional liquidators of National Explosives (Proprietary) Limited ("Natex"). It is not clear what the nature of the plaintiff's business is - it refused to reply to a request for further particulars on this point - but it does appear from further particulars furnished in respect of damages allegedly suffered by the plaintiff that there is some business relationship between the plaintiff and Natex in the manufacture of explosives.

The substantive allegations in the particulars of claim read as follows:

> "3. At all material times since the 1 August 1986 the plaintiff has, by reason of a written agreement of lease entered into with certain Rand Leases Vogelstruisfontein Gold Mining Company Limited, been entitled to occupy the Farm Vogelstruisfontein No 231 I.Q., situated in the district of Roodepoort (hereinafter referred to as "the said premises").

4. At all material times since the said date the Defendant has been in wrongful occupation of the said premises and despite demand has refused to vacate same.
5. Arising out of such wrongful occupation, the Plaintiff has to date hereof suffered damages in a sum of R1 140 000 and will continue to suffer damages at the rate of R360 000 a month until the Defendant vacates the said premises."

To these rather terse statements there was added a paragraph 6, reading: "The Defendant disputes the Plaintiff's said claims." Since no "claims" in the strict sense of the word are mentioned in the preceding paragraphs of the pleading, it is difficult to understand the exact import of this paragraph. If the word "claims" was intended to mean no more than allegations or averments, paragraph 6 would seem to indicate that all the substantive averments in the pleading were in dispute between the parties.

On the strength of the above averments the plaintiff claimed damages in the amounts set out in paragraph 5, with alternative relief and costs. The defendants filed a request for further particulars, in which they asked, inter alia:

"On what grounds is it alleged that the defendant's occupation is wrongful?"

To this the plaintiff replied as follows:

"(a) (i) The Defendants have no right to occupy the said premises.

(ii) The said premises now being occupied by the Defendants in their capacities as liquidators of National Explosives (Pty) Limited (Natex) have, to the knowledge of the Defendants, been leased to the Plaintiff, and Plaintiff was in terms of the said lease to take occupation of the said premises on 1st August, 1986."

The next step in the proceedings was the filing by the defendants of a notice in terms of rule 23 of the uniform rules of court. This notice reads as follows:

"TAKE NOTICE that the defendants intend to except to the particulars of plaintiff's claim on the grounds that same are vague and embarrassing unless the following cause of complaint is removed within fourteen days:
It is not clear whether the plaintiff alleges that it occupied the said premises at any time prior to 1 August 1986. The plaintiff is requested to clarify whether it enjoyed such occupation and, if so, the dates thereof."

The plaintiff did not react to this notice. Thereafter the defendants filed the following exception:

> "The defendants hereby except to the particulars of plaintiff's claim on the ground that they lack averments which are necessary to sustain an action, alternatively the said particulars are vague and embarrassing. The grounds of exception are:
>
> 1. A non-owner and non-occupier of land has no right to claim damages from a person in occupation.
> 2. No conduct on the part of the defendants has been alleged which gives rise to any cause of action for damages by the plaintiff.
> 3. It is not clear whether the plaintiff ever had occupation of the said premises.
>
> WHEREFORE the defendants pray that the exception be upheld and that the plaintiff's claims be dismissed with costs."

As already stated, the exception was upheld with costs - hence the present appeal.

For the purposes of the present case it must be accepted that the plaintiff never was in possession or occupation of the leased premises. Paragraph 1 of the exception was clearly intended to raise the question whether a lessee, who has not

received occupation, is entitled to claim damages under the lex Aquilia for the unauthorized occupation of the leased premises by a third person, i.e., whether in such a case the third person's conduct is unlawful, in the delictual sense, against the lessee. The decision in Smit v. Saipem 1974 (4) SA 918 (A) suggests that according to Roman-Dutch law this question is to be answered in the negative, although that by itself might not necessarily preclude an appropriate extension of the Aquilian remedy. See, for instance, Minister van Polisie v. Ewels 1975 (3) SA 590 (A); Administrateur, Natal v. Trust Bank van Afrika Bpk 1979 (3) SA 824 (A); and Lillicrap, Wassenaar and Partners v. Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A). However, in argument before us Mr. Slomowitz, who appeared for the plaintiff, did not contend that a lessee who is not in occupation of the leased premises has a sufficient interest in the property to entitle him to invoke the Aquilian action in respect of damage to his limited interest in the land in the same way in which, for instance, the owner or bona

fide possessor might take action to protect their more extensive interests. Of course, even if the plaintiff had had a sufficient interest to invoke the action, it would in addition have had to allege fault, in the form of dolus or culpa, on the part of the defendants as a necessary element of its action for damages. As I shall show later the particulars of claim contain no such allegation. It suffices to say on this part of the case, therefore, that the plaintiff did not contend that the Aquilian remedy has been or should be extended in this direction, and in any event, that fault on the part of the defendants has not been alleged.

The cause of action relied upon by Mr. Slomowitz was a wider one. The plaintiff had sufficiently alleged, he said, that the defendants had deliberately interfered with its contractual rights under the lease with intent to injure it, and he contended that this interference constituted an actionable delict. It is clear that an interference with contractual rights can in certain circumstances constitute

a delict. What is less clear is what precisely the requirements for liability are. Compare, for instance, the discussions in N.J. van der Merwe and P.J.J. Olivier, Die Onregmatige Daad in die Suid-Afrikaanse Reg, 5th ed., pp. 369 to 381; Mc Kerron, The Law of Delict, 7th ed., pp. 268-9; and Lee and Honoré, The South African Law of Obligations, 2nd ed., pp. 306-7. In the present case Mr. Slomowitz accepted that this cause of action required fault in the form of dolus on the part of the defendants. Moreover both parties were ad idem that, if such dolus has been pleaded, the pleading would disclose a cause of action in delict. For the purposes of this case I assume, without deciding, that the parties' attitude is correct. I would, however, emphasize that the question whether culpa might not constitute a sufficient element of fault to ground liability for damages for an unlawful interference with contractual relations was not raised or debated in argument.

Since there was in any event no allegation of culpa in the pleadings I need say no more about this possibility.

The question then is whether the plaintiff has sufficiently alleged that the defendants acted dolo or intentionally. Had there been an express allegation to this effect, that would of course have been all that was required. It is common cause, however, that no such averment appears expressly or by implication in the particulars of claim, nor does it appear expressly in the further particulars. The plaintiff's argument is that an averment of dolus on the part of the defendants may be inferred from the further particulars quoted above. In these particulars, it is contended, all the elements of dolus, as this concept is understood in the law of delict, are alleged. Reliance is placed particularly on the following allegations, viz., that the defendants had no right to occupy the premises and that the defendants knew that the premises were leased to the plaintiff.

These averments do not, however, embrace all that is meant by dolus. In Geary & Son (Pty) Ltd v. Gove 1964 (1) SA 434 (A) at p. 441 D STEYN CJ pointed out that a plaintiff,

who bases his claim for patrimonial loss on an intentional wrongful act on the part of the defendant, must allege and prove, inter alia, that the defendant intended to cause the plaintiff loss. In the present case there is no such allegation - all that is alleged is that the defendants acted with knowledge of the plaintiff's rights, and that the plaintiff in fact suffered loss. The pleadings are therefore not inconsistent with a belief on the part of the defendants that the plaintiff would not suffer damage by being kept out of the leased property. A state of facts in which such a belief could arise can easily be imagined - the defendants might believe that the plaintiff required the premises only for future expansion, or that the plaintiff has, since entering into the lease, acquired other more suitable premises and would prefer not to take occupation under the lease.

Moreover, it is now accepted that dolus encompasses not only the intention to achieve a particular result, but also the consciousness that such a result would be wrongful

or unlawful. See Nydoo en Andere v. Vengtas 1965 (1) SA 1 (A) at p. 15 A; Suid-Afrikaanse Uitsaaikorporasie v. O'Malley 1977 (3) SA 394 (A) at pp. 403 C-D, 405 G-H; Matlou v. Makhubedu 1978 (1) SA 946 (A) at p. 962 A; Ramsay v. Minister van Polisie en Andere 1981 (4) SA 802 (A) at pp. 807 C, 818 F-G; Pakendorf en Andere v. De Flamingh 1982 (3) SA 146 (A) at p. 157 E and, in the criminal law, S v. de Blom 1977 (3) SA 513 (A). In Ramsay's case, supra, the majority of this court (per BOTHA JA) doubted whether animus injuriandi, including consciousness of wrongfulness, was a necessary element in all forms of injuria (see at pp. 818 F - 819 C). In the present case we are, of course, not concerned with an injuria but with a claim under the extended lex Aquilia in which the plaintiff relies upon fault in the form of dolus. The policy considerations which might affect the elements of various types of injuria consequently do not arise in the present case, and I do not read the judgment of BOTHA JA as casting doubt on the proposition that dolus or animus injuriandi in principle requires

consciousness of unlawfulness. And even if there may be policy considerations in certain cases falling under the extended lex Aquilia why a plaintiff, who relies on fault in the form of dolus, should not be required to prove consciousness of unlawfulness, the present is, in my view, not such a case. In the type of interference with contractual rights with which we are here concerned there would appear to be no reason why dolus should not comprise all its normal elements. It follows, therefore, that the plaintiff should have alleged consciousness of unlawfulness on the part of the defendants, and the question is whether it has done so.

In the further particulars in the present case it is alleged, as an objective reality, that the defendants have no right to occupy the leased premises. The plaintiff does not, however, allege that the defendants are aware that their conduct is unlawful. Indeed, the pleadings are entirely consistent with the existence of an honest dispute about the defendants' right to occupy the premises. Some force is lent

to this possibility by the wording of paragraph 6 of the particulars of claim, which I have quoted above, and which, it will be recalled, records that the defendants dispute the plaintiff's claims. If the defendants believe bona fide that they are entitled to occupy the premises, their conduct would not be tainted with dolus towards the plaintiff.

It appears from the foregoing that the plaintiff has neither alleged intent or dolus in express terms, nor has it sufficiently alleged the elements which go to make up this concept. Since it is common cause that an allegation of dolus is essential to the plaintiff's cause of action, it follows, in my view, that the exception was correctly upheld.

The appeal is dismissed with costs, including the costs of two counsel. The period allowed by the court a quo for the amendment of the plaintiff's particulars of claim is extended to one month from date hereof.

GROSSKOPF, JA

RABIE, ACJ

HOEXTER, JA Concur
BOTHA, JA
VAN HEERDEN, JA