

SOUTH AFRICA / JUDGMENT

Caulwell Marine (Pty) Ltd v Wallace and Another (2819/2012) [2012]

ZAWCHC 195 (7 November 2012)

[2012] ZAWCHC 195

COURT

Western Cape High Court, Cape Town

BEFORE

Mansingh, AJ

CASE / FILE NUMBER

2819/2012

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REPORTABLE

JUDGMENT

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 2819/2012

In the matter between:

CAUDWELL MARINE (PTY) LTDPlaintiff

and

GARY DONOVAN WALLACEFirst Defendant

WALLACE TRUSTEES & ADMINISTRATORSSecond Defendant

Counsel for the Plaintiff: Adv. Lance Burger (SC)

Instructing Attorneys

Counsel for Defendant : Adv. Fiona Gordon-Turner

Date of Hearing : 7 November 2012

Date of Judgement: 7 November 2012

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No:2819/2012

In the matter between: CAUDWELL MARINE (PTY)

LTDRespondent/Plaintiff and GARY DONAVAN

WALLACEFirst Excipient/Defendant WALLACE TRUSTEES

AND ADMINISTRATORS (PTY) LTDSecond Excipient/Defendant

In the matter between:

CAUDWELL MARINE (PTY) LTDRespondent/Plaintiff

GARY DONAVAN WALLACEFirst Excipient/Defendant

WALLACE TRUSTEES AND

ADMINISTRATORS (PTY) LTDSecond Excipient/Defendant

JUDGMENT

DELIVERED ON 20 NOVEMBER 2012 MANSINGH, AJ [1] The plaintiff claims delictual damages in the amount of R410 500,00 arising from the destruction and/or disposal of plaintiffs property, one fibreglass deck plug, alleging that the first defendant, acting within the course and scope of his employment with the second defendant, was instrumental thereto. The defendants take exception to the particulars of the plaintiffs claim on the ground that it lacks averments to sustain a cause of action. [2] The defendant's have to satisfy the court that the plaintiffs claim is unsustainable on any reasonable interpretation of the particulars of the plaintiffs claim (First National Bank of Southern Africa Ltd v Perry NO and Other 2001 SA 960 (SCA) para [6]). For this purpose the facts set out in the particulars of claim are accepted as correct (Stewart and Another v Botha and Another [2008] ZASCA 84; 2008 (6) SA 310 (SCA) para [4]). The essential elements of the plaintiffs cause of action maybe expressly stated or may appear by implication from all the allegations in the particulars of claim as a whole (Glaston House (Pty) Ltd 1977 SA 846 (A) 870-in fin); Moak v Reckitt and Coman (Africa) Ltd and Another 1968 (3) SA 98 104F-105A). [3] On a fair reading of the particulars of claim, the plaintiff claims damages on account of the actio legis Aquiliae, the essentials of which in the present context are: First: conduct in the form of an act or omission by first defendant, for which the second defendant is vicariously liable. Second: wrongfulness. Third: fault in the form of intent, alternatively negligence. Fourth: causation. Fifth: damages. (Mukheiber v Raath and Another 1999 (3) SA 1065 (SCA) para [6]) [4] The exception raises these discernible issues: One: A non-joinder point that the plaintiff failed to join, in addition to the first defendant, the other liquidators of Boating Dynamics CC (in liquidation). Two: The particulars of the plaintiff's claim fails to sustain a cause of action, because an allegation to the effect that the second defendant was in possession of the property of the plaintiff when the first defendant caused its destruction and/or disposal is lacking.

JUDGMENT

DELIVERED ON 20 NOVEMBER 2012

MANSINGH, AJ

- [1] The plaintiff claims delictual damages in the amount of R410 500,00 arising from the destruction and/or disposal of plaintiffs property, one fibreglass deck plug, alleging that the first defendant, acting within the course and scope of his employment with the second defendant, was instrumental thereto. The defendants take exception to the particulars of the plaintiffs claim on the ground that it lacks averments to sustain a cause of action.
- [2] The defendant's have to satisfy the court that the plaintiffs claim is unsustainable on any reasonable interpretation of the particulars of the plaintiffs claim (First National Bank of Southern Africa Ltd v Perry NO and Other 2001

SA 960 (SCA) para [6]). For this purpose the facts set out in the particulars of claim are accepted as correct (Stewart and Another v Botha and Another [2008] ZASCA 84; 2008 (6) SA 310 (SCA) para [4]). The essential elements of the plaintiffs cause of action maybe expressly stated or may appear by implication from all the allegations in the particulars of claim as a whole (Glaston House (Pty) Ltd 1977 SA 846 (A) 870-in fin); Moak v Reckitt and Coman (Africa) Ltd and Another 1968 (3) SA 98 104F-105A).

- [3] On a fair reading of the particulars of claim, the plaintiff claims damages on account of the actio legis Aquiliae, the essentials of which in the present context are:

First: conduct in the form of an act or omission by first defendant, for which the second defendant is vicariously liable.

Second: wrongfulness.

Third: fault in the form of intent, alternatively negligence.

Fourth: causation.

Fifth: damages.

(Mukheiber v Raath and Another 1999 (3) SA 1065 (SCA) para [6])

- [4] The exception raises these discernible issues:

One: A non-joinder point that the plaintiff failed to join, in addition to the first defendant, the other liquidators of Boating Dynamics CC (in liquidation).

Two: The particulars of the plaintiff's claim fails to sustain a cause of action, because an allegation to the effect that the second defendant was in possession of the property of the plaintiff when the first defendant caused its destruction and/or disposal is lacking.

Three: The particulars of the plaintiff's claim fails to sustain a cause of action, because it is based on pure economic loss and the allegation of a legal duty is lacking. Non-joinder [5] The particulars of claim is plainly open for an interpretation that the plaintiff claims damages from the first defendant personally (as opposed to his capacity as liquidator of the close corporation in

liquidation), and vicariously from the second defendant on account of the delictual conduct of the second defendant. Thus, it is not necessary to join the first defendant's co-liquidators.

Possession [6] As appears from what I have already said, it is not an essential of a claim based on the *actio legis Aquiliae* that the plaintiff's property must have been in possession of the second defendant when the first defendant caused its destruction and/or disposal. [7] Counsel for the defendants referred me to a number of cases. It is not necessary to discuss them. Suffice to say that none of them supports the submission that possession as mentioned above is an essential element of a claim founded on the *actio legis Aquiliae*. Legal Duty [8] Damage suffered by the plaintiff did not amount to pure economic loss and the question regarding the existence of a legal duty did not arise. (Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006

- (1) SA 461 (SCA) para 1, explained, "Pure economic loss in this context connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses or the diminution in the value of property." Plaintiffs claim falls squarely within the ambit of physical damage to property. IT IS ORDERED THAT: The exception is dismissed with costs. MANSINGH, AJ

Three: The particulars of the plaintiff's claim fails to sustain a cause of action, because it is based on pure economic loss and the allegation of a legal duty is lacking.

Non-joinder

- [5] The particulars of claim is plainly open for an interpretation that the plaintiff claims damages from the first defendant personally (as opposed to his capacity as liquidator of the close corporation in liquidation), and vicariously from the second defendant on account of the delictual conduct of the second defendant. Thus, it is not necessary to join the first defendant's co-liquidators.

Possession

- [6] As appears from what I have already said, it is not an essential of a claim based on the *actio legis Aquiliae* that the plaintiff's property must have been in possession of the second defendant when the first defendant caused its destruction and/or disposal.
- [7] Counsel for the defendants referred me to a number of cases. It is not necessary to discuss them. Suffice to say that none of them supports the submission that possession as mentioned above is an essential element of a claim founded on the *actio legis Aquiliae*.

Legal Duty

- [8] Damage suffered by the plaintiff did not amount to pure economic loss and the question regarding the existence of a legal duty did not arise. (Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006

- (1) SA 461 (SCA) para 1, explained, “Pure economic loss in this context connotes loss that does not arise directly from damage to the plaintiff’s person or property but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses or the diminution in the value of property.” Plaintiffs claim falls squarely within the ambit of physical damage to property.

IT IS ORDERED THAT:

The exception is dismissed with costs.

MANSINGH, AJ

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