

SOUTH AFRICA / JUDGMENT

Maguwada and Others v KPMG Services (Pty) Limited SA (22014/2019) [2021] ZAGPPHC 267 (6 May 2021)

[2021] ZAGPPHC 267

COURT

North Gauteng High Court, Pretoria

BEFORE

J Yende

CASE / FILE NUMBER

22014/2019

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG LOCAL

DIVISION, PRETORIA)

CASE NO: 22014/2019

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

REVISED.

YES

Date: 2021-05 -06

In the matter between:

NDITSHENI NELLY

MAGUWADA

First to Sixtieth Plaintiff/Respondents
& 59 Others

And

KPMG SERVICES (PTY)

LIMITED) SA

Defendant/Excipient

Delivered:

The

judgment is delivered electronically via email and thus deemed to be
delivered on 6 May 2021.

Summary: Claim arising out of pure economic loss, the question of wrongfulness is quintessentially a matter that is capable of being decided on exception, claim by employees and /or shareholders of a company against the auditors based on alleged negligence in the manner in which they conducted an audit of a company is bad in law, imposing a legal duty on auditors in claims of this nature raises the spectre of indeterminate liability. The general principles governing exception(s) restate.

JUDGMENT

YENDE, A.J

Nature of the proceedings

- [1] Before court is an exception by the excipient /defendant in relation to the plaintiff's amended particulars of claim effected by the plaintiffs/respondents. The excipient/defendant has delivered an exception to the plaintiff's amended particulars of claim in terms of Rule 23(1) taking exception to the plaintiff's amended particulars of claim. The excipient/defendant contends that the plaintiffs/respondents amended particulars of claim do not contain sufficient averments to sustain a cause of action and/or are vague and embarrassing premised on seven complaints and that the plaintiffs claim falls to be determinable at the exception stage.
- [2] The plaintiffs are former employees of Venda Building Society "VBS" Mutual Bank. In October 2018, the plaintiffs were retrenched by Venda Building Society's curator. Following their retrenchment, the plaintiffs brought an action against the defendant/excipient KPMG Services (Pty) Ltd "KPMG" claiming damages amounting to approximately R230 million arising out of an alleged negligent audit by the KPMG for the financial statements of "VBS" Bank for the year ending 2017.
- [3] It is the plaintiffs case that KPMG were VBS's appointed auditors for the financial year ending March 2017. The plaintiff's claim arises from an alleged misstatement by KPMG of the 2017 "VBS" financial statements, but for which, they allege, they would not have been retrenched.
- [4] In the particulars of claim the plaintiffs allege inter alia that; a certain Mr Malapa, a Director and/or an employee of KPMG conducted an audit, prepared the "VBS" financial statements and issued an auditor's report. Acting within the scope of his employment, Mr Malapa misstated "VBS"'s

financial position and failed to comply with Generally Acceptable Accounting Practice ("GAAP"). Had KPMG and/or its

Directors complied, the 2017 financial statements would have accurately represented “VBS” financial position, alternatively would have contained a qualified audit. Thus he acted negligently with the knowledge of the misstatement. The plaintiffs further contend that KPMG or its Director Mr Malapa acting in the course and scope of his employment gave a regulatory audit opinion which KPMG and/or its Directors knew was false.

[5] The plaintiffs further alleges that had the 2017 “VBS” financial statements accurately represented “VBS”s

financial position , the Reserve Bank and the Minister of Finance would have appointed an investigator and entered into a “resolution

plan” to ensure that “VBS” was not liquidated and that the plaintiff’s employment could have been secured.

[6] The plaintiff’s accordingly claim damages against KPMG in the sum total of R 230 014 925.20, which comprises :

[6.1] R 60 million for emotional shock (R 1 million each)

[6.2] R 450 000 for psychological treatment (5 consultations each, at R 1 500)

[6.3] R 169 564 925.20 for loss of earning capacity caused by the loss of their employment, and the phobia they have developed towards the banking sector.

[7] The defendant/excipient, KPGM seek to attack the plaintiff’s particulars of claim on seven separate grounds the most relevant parts of which are reproduced herein below and do not follow the same order as in the exception itself;

The excipient/defendant argues that the central respects in which the plaintiff’s amended particulars of claim fail to disclose a cause of action are two-fold:

[7.1] Firstly, the defendant contends that, even if it is assumed that the defendant culpably caused the plaintiff’s loss, such conduct is not wrongful, in that auditors do not owe a legal duty to the employees of the companies that they audit; and

[7.2] Secondly, that on the facts pleaded by the plaintiffs, the defendant is not the factual or legal cause of their loss, which is accordingly too remote from the defendant’s conduct for liability to accrue. Accordingly on the facts pleaded by the plaintiffs, the factual cause of the harm they allegedly suffered was VBS, alternatively VBS’s curator and not VBS’s auditors and that the legal cause of harm they allegedly suffered was VBS, alternately VBS’s curator.

[7.3] Thirdly, with regards to the alleged misstatement the defendant contends that same lack averments necessary to sustain a cause of action and/or are vague and embarrassing. This lack of clarity is compounded by the fact that, elsewhere in the plaintiffs amended particulars of claim , the plaintiffs allege that the defendant’s impugned conduct is that it failed to present fairly the financial position of VBS “and misrepresentation of VBS net worth reflecting R 413 965 855.59 and R 4 302 941.99”. The defendant further contends that In respect of the alleged “misstatement by

Mr Malapa”, the plaintiffs do not plead what the misstatement is, they have also not pleaded what is it that the defendant is alleged to have known or/ought to have known and how it is that the defendant acted deliberately.

[7.4] The fourth ground of defendant exception is on fault whether in the form of negligence or intention. According to the defendant, the plaintiffs in their particulars of claim contend that the defendant acted negligently, with knowledge of misstatements. However it is not clear whether the alleged failure to comply with Generally Acceptable Accounting Practice (“GAAP”) is what the plaintiff contends amounted to negligent conduct or whether negligence is pleaded in addition to the alleged failure to comply with (“GAAP”). The defendant is accordingly unable to ascertain the nature of its alleged negligence and is unable to plead thereto.

[7.5] The defendant’s fifth ground of exception is on harm. According to the particulars of claim, the plaintiffs alleges that as a result of the defendant’s conduct, they have suffered “depression, mood swings disorder, post – traumatic stress disorder and phobic response towards VBS issues”. Defendant contends that it is unable to ascertain which of the plaintiffs is alleged to have suffered which conditions and is unable to plead thereto. Accordingly no material facts have been pleaded by the plaintiffs upon which they based their allegation that these conditions resulted from their retrenchment, which, in turn, resulted from the defendant’s conduct or omission.

[7.6] The defendant’s sixth ground of exception is on damages. The defendant contends that these damages pleaded by plaintiffs as mentioned supra are not sufficiently particularized to comply with Rule 18(10) and are not competent in law. Accordingly plaintiffs have stated such damages as a globular amount resulting in the defendant being unable to reasonably assess their quantum. Defendant further contends that these damages for emotional shock are not competent as the plaintiffs have not alleged that they have suffered a detectable psychiatric injury or lesion, and have not pleaded the material facts upon which they allege that such injury or lesion occurred or that it was reasonably foreseeable in the circumstances. According to the defendant the damages for loss of earning capacity are not competent, as there is no basis in law for a claim of loss of future earning capacity arising from a retrenchment.

[7.7] The seventh ground of defendant’s exception is on the breach of Constitutional Rights. In their amended particulars of claim, the plaintiffs plead that the defendant has infringed their constitutional rights and that the action raised Constitutional

issues. Plaintiffs pleaded inter alia, that section 34 of the Constitution guarantees the plaintiffs the right to have disputes that can be resolved by application of law decided in a fair, public hearing before the Court, that the matter infringes on their socio-economic rights such as the right to housing, food and healthcare. Further on, that the matter also infringes on plaintiffs “protection against arbitrary loss of employment (property) afforded under section 25 of the Constitution”. The plaintiffs also plead that the Court must determine whether the defendant has breached the Constitution and that they seek a declaratory order that it has done so as per prayer 1. The defendant contends that plaintiffs are unable to rely on the constitutional

provisions they say are implicated in that Section 25 of the Constitution does not protect against arbitrary loss of employment.

Accordingly an infringement of Section 34 of the Constitution is not borne out by the pleadings. Defendant further contends that there is no basis for the plaintiffs to seek a declaratory order to this effect, or to rely on Section 172(1)(a) of the Constitution or to rely on section 38 thereof.

General principles

[8] Rule 23(1) provides that:

“Where any pleadings is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filling any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule 6: Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within 10 days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception”.

[9] As described in *Trope and Others v South Africa Reserve Bank* (614/91) [1993] ZASCA 54; 1993(3) SA 264 (AD), explained in *Telematrix (Pty) t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006(1) SA 461 (SCA) para[3] and confirmed by the constitutional Court in *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) “the excipient has to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts”. Moreover, an excipient is required to establish serious prejudice unless the alleged vague and embarrassing material is expunged (see *Barloworld Logistics Africa (Pty) Ltd v Ford* 2019 (5) SA 133 (GJ)). Both the Counsel for excipient/defendant and plaintiffs/respondents have presented very good heads of argument in support of their cases and the court has borrowed to a larger extent from both the excipient’s /defendant’s and the plaintiff’s/respondent’s heads of argument in setting out the court analysis as it will appear later in this judgment.

[10] The Plaintiffs claim is for Delictual liability against “KPMG” who was erstwhile “VBS” auditors in relation to an alleged misstatement of financial statements by a certain Mr Malapa one of its director(s). The Plaintiffs claim is by employees of “VBS” claiming Delictual claim against the auditors of “VBS”.

[11] The counsel for the excipient/defendant contends that since the Plaintiffs/respondents claim is for pure economic loss, the exceptions to the plaintiffs amended particulars of claim falls to be upheld on the question of wrongfulness in that same does not show wrongfulness or causation. On the other hand the plaintiffs’ counsel contends that contend the plaintiffs’ claims is of public interest and submit that in applying the principles set out in *Standard Chartered Bank* matter in the present case, the court should be loath at an exception stage “to hold that it is inconceivable that Mr Malapa who knew of the misstatement in 2017

financial statement and audit opinion and who

also knew that his has a duty to report the matter to the regulator, would not have a duty to speak”.

[12] Against this background, the court will not deal with all the seven exceptions raised by the excipient, Defendant but will focus on the main which is wrongfulness.

Exception 1: wrongfulness.

[13] I have borrowed extensively from the excipient heads of argument in setting out the courts analysis in this regard.

[14] In its amended particulars of claim, the plaintiffs plead that KPMG acted wrongfully, in that it breached its duty to “VBS”

and its employees , interalia to present fairly the financial position of ‘VBS’. Wrongfulness is an element of Delictual liability and our Courts have been at pains to caution that it should not be confused with the requirement of fault (whether in the form of negligence or intention) (see *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 CC para 53; *MTO Forestry (Pty) Ltd v Swart* NO 2017 (5) SA 76 (SCA) para 17. As the Constitutional Court has confirmed, “(n) egligent conduct giving rise to damages is not ...actionable per ser. (see *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) 138 (SCA) para 10).

[15] The test for wrongfulness therefore assumes that the defendant acted culpably (negligently or willfully) and asks whether, given that assumption, the law ought to impose liability. This question turns on considerations of public and legal policy-the so called legal convictions of the community .In so far as the inquiry is concerned with reasonableness, it is concerned not with the reasonableness of conduct, but instead with the reasonableness of imposing liability (see *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) para 122. Put differently, the wrongfulness inquiry asks whether the law imposes liability by recognizing a legal duty on the part of the

defendant to prevent the specific harm that the specific plaintiff suffered (see *Van der Bijl v Featherbrooke Estate Home Owners Association (NPC)* 2019 (1) SA 1 (CC) para 7-11).

[16] Wrongfulness thus “typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability” (see *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 20). That is, it determines whether the infliction of culpably caused harm demands the imposition of liability or conversely, “whether the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue” (see *Country Cloud Trading CC* above).

- [17] As mentioned above, the plaintiffs' claim is for pure economic loss. Accordingly, the law of delict does not allow for the recovery of pure economic loss as a general rule. It is not prima facie wrongful (see *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA) para1; *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) para 8). It is wrongful only if the court determines, on the grounds of public policy, that the perpetrator should be rendered liable in delict to compensate the victim for its pure economic loss. Indeed, in cases of pure economic, "the law proceeds from the precautionary premise of excluding liability...unless there are good reasons to recognise liability" (see *Van der Bijl v Featherbrooke Estate Home Owners Association (NPC)* 2019 (1) SA 642(GJ) para 17).
- [18] The Constitutional Court explained in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015
- (1) SA 1 (CC) para 22-23 that "Wrongfulness is generally uncontentionous in case of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful. However, in cases of pure economic loss-that is to say where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property – the criterion of wrongfulness assumes special importance. In contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful. Our law of delict protects rights and, in cases of non- physical invasion, the infringement of rights may not be as clearly as in direct physical infringement. There is no general right not to be caused pure economic loss. So our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of risk of 'liability in an indeterminate amount of an indeterminate time to an indeterminate class'".
- [19] Particularly in cases of pure economic loss, the question of wrongfulness is regularly determined on exception (see *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking and Advertising Standards Authority* SA 2006 (1) SA 641 (SCA)). Indeed the SCA has repeatedly tested claims for novel categories of pure economic loss on exception, explaining that ,given the novelty of the claim and the clear legal principles involved ,it is quintessentially a matter that is capable of being decided on exception (see *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA)).
- [20] Recently the SCA in *Hlumisa Investments Holdings (RF) Ltd and Another v Kirkinis and Others* (Case no 1423/2018) [2020] ZASCA 83 (03 July 2020) where it dealt with an appeal from this Division arising from claims for novel categories of pure economic loss upheld on exception,

stated the following in paragraph 22, "In deciding an exception a court must take the facts alleged in the pleadings as being correct. It is for the excipient to satisfy the court that the conclusion of law set out in the particulars of claim is unsustainable. The court may uphold the exception only if it is satisfied that the cause of action or conclusion of law cannot be sustained on every interpretation that can be put on those facts. As Harms JA noted in *Telematrix*, exceptions are a

useful tool to ‘weed out’ bad claims at an early stage and unnecessarily technical approach is to be avoided. The facts are what must be accepted as correct; not the conclusions of law”.

- [21] The SCA in the Hlumisa matter mentioned above at paragraph 63-65, further stated that “The test for wrongfulness should not be confused with the factual requirement .The test assumes that the defendant acted negligently or willfully and asks whether, in the light thereof, liability should follow.
- [22] The appellants submitted that it would not be appropriate to decide wrongfulness on exception. In this case, as in all cases in which a plaintiff claims damages for pure economic loss, it is incumbent that the facts upon which such a plaintiff relies for its contention that the loss was wrongfully caused to be pleaded. The pleadings are thus the high-water mark of its case on wrongfulness. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Trading v Advertising Standards AUTHORITY* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) para 2 this court noted that it has often determined wrongfulness on exception.
- [23] In *Telematrix*, para3, Harms JA said that ‘[s]ome public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding negligence and causation ’. In *AB Ventures Ltd v Siemens Ltd* [2011] ZASCA 58; 2011 (4) SA 614 (SCA) para 5, Nugent JA noted that in a case such as this, the issue of wrongfulness is ‘quintessentially a matter that is capable of being decided on exception’. In the present case all the policy factors upon which a decision would rest are known.
- [24] In 4(3) *Lawsa* 2 ed para 4 the following appears:
- ‘If the auditors perform their work negligently, it is the company, and not its members, that is the proper plaintiff to sue for any loss caused to it by that negligence’.
- [25] Auditors are accountable to shareholders collectively, as a body, i.e. as the company. Put differently, when auditors make negligent misstatements concerning the company’s financial statements ,individual shareholders do not have claims against the auditors , because financial statements are not prepared for the benefit of shareholder’s individual investment decision . Instead, primary purpose of auditing accounts is to report on the stewardship of the directors to the shareholders as a body, in order ‘to provide shareholders with reliable intelligence for purpose of enabling them to scrutinize the conduct of the company’s affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided’ (*Caparo Industries plc v Dickman* [1990] UKHL 2; [1990] 2 AC 605 at 630). The purpose of audit reports is neither to protect the interests of investors nor individual shareholders”
- [26] The SAC continues to state that “Imposing a legal duty on auditors in a case such as this raises the spectre of indeterminate liability. Policy considerations require that liability in delict be confined to reasonably predicable limits (15 *Lawsa* 3 ed par 87). Limitation of liability is therefore a key policy consideration in deciding whether pure economic loss should be actionable. This court, citing Gaudron J in *Perre v Apand (Pty) Ltd* [1999] HCA 36;

(1999) 198 CLR 180 (HC of A) para 32, in *Fourway Haulage*, said that [t]he first policy consideration is the law's concern to avoid the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class'; and that liability would be more readily imposed for 'a single loss of a single identifiable plaintiff occurring but once and which is unlikely to bring in its train a multiplicity of actions'."

Discussion

- [27] It follows from the above that the plaintiffs claim is for pure economic loss and as such the question of wrongfulness can be determined on exception. The conduct of the defendant which is alleged to have caused the pure economic loss to the plaintiffs should be classified as wrongful. For the conduct of the Auditors of "VBS" to be so classified as wrongful same would require a judicial determination based on considerations of public and legal policy. In light of the general principles mentioned above and coupled with the recent SCA court decision in the *Hlumisa* matter mentioned herein the court is inclined to uphold the exception.
- [28] The critical question is whether considerations of public and legal policy dictates that the auditors of "VBS" the KPMG should be held liable to the employees of "VBS" for the losses they have suffered. In answering this question one will have enquire as to whether KPMG breached a legal duty to the employees of "VBS". It is trite that auditors are accountable only to the companies they audit and not to the shareholders or even to the employees of such a company. The SCA explained this in *Axiam Holding v Deloitte and Touché* 2006 (1) SA 237 (SCA) para 18 and confirmed it in *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) para 21 as follows "It is universally acceptable in common-law countries that auditors ought not to bear liability simply because it might be foreseen in general terms that audit reports and financial statements are frequently used in commercial transactions involving the party for whom the audit was conducted (and audit reports completed) and third parties. In general, auditors have no duty to third parties with whom there is no relationship or where the factors set out in the *Standard Chartered Bank* case... are absent".
- [29] The Plaintiffs contends that they suffered pure economic loss because a certain Mr Malapa, Director of KPMG knew of the misstatement in the 2017 financial statement and audit opinion as such he had a duty to report the matter to the regulator . I submit that this allegation does not show wrongfulness and the SCA in the *Hlumisa* matter mentioned above held at para[67] that "...where auditors make negligent misstatements concerning the company's financial statements, individual shareholders do not have claims against the auditors , because financial statements are not prepared for the benefit of shareholders 'individual investment decision". I submit that in the present case the corollary applies to the employees of "VBS". The financial statements are not prepared for the individual benefit of the employees, they are prepared for the benefit of the company, thus no legal duty is owed by the auditors to the employees and no claim is competent on the part of the employees for any misstatement.

[30] The court is of the firm view that to recognise the claim of the employees would go against the caution raised by the SCA in Fourway Haulage mentioned above where the SCA held that “[t]he first policy consideration is the law’s concern to avoid the imposition of liability in an indeterminate amount for an

indeterminate time to an indeterminate class’; and that liability would be more readily imposed for ‘a single loss of a single identifiable plaintiff occurring but once and which is unlikely to bring in its train a multiplicity of actions’”.

[31] When applying the above principles and case law, I am of the view that just on the exception on wrongfulness the facts pleaded, as I have outlined above, for the reasons stated, the excipient /defendant owes the plaintiffs no legal duty in law and the Plaintiffs claim is convoluted and prejudicial to the excipient and untenable at the level of law.

[31] In the result the following order is made;

[31.1] The excipient/defendant’s exception is upheld;

[31.2] The plaintiffs/respondents are hereby granted leave to amend their particulars of claim within one month of the date of this order;

[31.3] If the plaintiffs/respondents do not so amend their particulars of claim, their claims against the excipient/defendant are struck out with costs; and

[31.4] The plaintiffs /respondents are to pay the excipient’s/defendant’s costs of exception.

J YENDE

Acting Judge of the High Court

Gauteng Division

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above, and is handed down electronically by circulation to the parties legal representatives by email and uploading same to the electronic file of this matter on Caselines

The date for hand-down is deemed to be: 6 May 2021.

FOR EXCIPIENT/DEFENDANT: ADVOCATE S Budlender SC

ADVOCATE M Mbikiwa

(CHAMBERS, Sandton)

EXCIPIENT’S/DEFENDANT’S ATTORNEYS: BOWMAN GILFILLAN

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