

SOUTH AFRICA / JUDGMENT

Meechan and Another v VGA Chartered Accountants Partnership t/a PKF (VGA) Chartered Accountants (7999/2019) [2020] ZAGPJHC 53; [2020] 2 All SA 510 (GJ) (28 February 2020) [2020] ZAGPJHC 53

COURT

South Gauteng High Court, Johannesburg

BEFORE

I Opperman

CASE / FILE NUMBER

7999/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

No: 7999/2019

In

the matter between:

MALACHY

MEECHAN First

Plaintiff/Respondent

RUMI

MASIH Second

Plaintiff/Respondent

and

VGA

CHARTERED ACCOUNTANTS PARTNERSHIP

t/a

PKF (VGA) CHARTERED

ACCOUNTANTS Defendant/Excipient

Summary

– Exception

– the court in the particulars of claim was asked to extend

delictual liability to a situation where none had been recognized in our law before - the issue which fell for determination was whether an ‘outsourced’ chief financial officer, an auditing partnership, should be held liable to the chief executive officer and chief operating officer of an American company, a subsidiary of a Dutch foundation, for alleged misrepresentations made - the question was thus whether there were any considerations of public or legal policy which required that extension of our law. Held: the pleaded case did not warrant such extension, exception upheld. Held: wrongfulness in respect of an unprecedented case can be considered at exception stage.

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

- [1] By way of a claim advanced in delict the plaintiffs make claims for pure economic losses they contend they suffered as a result of a report issued by the defendant to the members of a Dutch foundation on 19 October 2016 (‘the report’). The report, so the plaintiffs aver, was issued in breach of a “duty of care” which the defendant owed to them.[1]
- [2] The defendant filed an amended exception (“the defendant’s exception”) to the plaintiffs’ amended particulars of claim on the basis that they do not contain averments necessary to sustain a cause of action, alternatively, are vague and embarrassing. The defendant’s exception contained 6 grounds.
- [3] Pursuant thereto the plaintiffs filed a notice to amend their particulars of claim which amendment was effected on the day of the hearing of the exception and the particulars so amended will herein be referred to as “the amended particulars”. This amendment addressed 3 of the 6 grounds of the defendant’s exception. The hearing was thus confined to grounds 1 to 3 of the defendant’s exception only.
- [4] The defendant’s exception focuses on three distinct elements necessary for the plaintiffs to sustain a cause of action. In summary:
 - 4.1. The first ground of exception impugns the plaintiffs’ contentions as to what the report (alleged to contain the misstatement) conveyed – i.e. the pleaded meaning of the alleged misstatement or misrepresentation in the report is challenged.

4.2. The second ground of exception is that the amended particulars do not contain sufficient averments to sustain a finding of wrongfulness, and consequently do not disclose a cause of action.

4.3. The third ground of exception places in issue the requirement of legal causation. The thrust is that the damages claimed by the plaintiffs are too remote and therefore not recoverable from the defendant.

[5] For the purposes of the exception and to place the grounds thereof in context, it is necessary to identify the relevant dramatis personae and where they fit into the corporate structure described in the pleaded case. Thus, before the individual exceptions are addressed, a short introduction in this regard follows. This is extracted from the amended particulars and the annexures thereto.

THE DRAMATIS PERSONAE AND CORPORATE STRUCTURE

[6] Reliance Inc. is a company registered and incorporated in terms of the company laws of the State of Delaware, USA, abbreviated by the plaintiffs as 'FMLR'.

[7] The first plaintiff was employed by FMLR as its Chief Operating Officer ('COO') on 10 September 2015. The second plaintiff was employed as FMLR's Chief Executive Officer ('CEO') on 9 July 2015. Despite these executive positions neither plaintiff was ever paid his salary.

[8] Stichting FML Asset Management is a foundation registered in accordance with the laws of the Netherlands abbreviated by the plaintiffs as 'FMLAM'. FMLR was wholly owned by FMLAM. Tyrone R. Elting ('Mr Elting') was a representative of FMLR who made representations to the plaintiffs.

[9] The defendant is VGA Chartered Accountants Partnership, a partnership carrying on business as accountants and auditors and performing the functions of accountants and auditors which trades under the name and style of PKF (VGA) Chartered Accountants, the partners of whom were all registered with the Independent Regulatory Board for Auditors ('IRBA').

[10] Amongst the defendant's partners was a Henico Schalekamp ('Mr Schalekamp'). Mr Schalekamp is an auditor registered with IRBA.

THE PLAINTIFFS' CLAIM IN SUMMARY

[11] The plaintiffs' claim is in summary the following: The first and second plaintiffs took up employment as COO and CEO of FMLR respectively pursuant to certain representations that Mr Elting (not the defendant nor Mr Schalekamp) had made to them. The defendant alternatively Mr Schalekamp acted as 'outsourced Chief Financial Officer' ('CFO') or assisted the outsourced CFO of FMLAM and FMLR. In such capacity the defendant, alternatively Mr Schalekamp had certain obligations to FMLAM and its related entities, and by virtue of the services rendered to FMLAM and FMLR the defendant alternatively Mr Schalekamp was

aware of the corporate structure of FMLAM and FMLR, that FMLAM funded the operations of FMLR, that the plaintiffs were FMLR's CEO and COO, knew what their terms of employment were and that neither had been paid his salary by FMLR. He also knew of the representations Mr Elting had made to them. On 19 October 2016 the defendant alternatively Mr Schalekamp, acting in the course and scope of his employment with the defendant, issued a financial report representing that FMLAM (not FMLR) had access to current assets of US\$1 trillion. In fact, neither entity had access to current assets in the sum of US\$1 trillion.

- [12] The plaintiffs allege that the defendant alternatively Mr Schalekamp breached a duty of care to the plaintiffs in issuing the report about FMLAM without conducting a proper investigation and due diligence into the correctness of the financial report and failing to verify the truth and veracity of the information contained in the report. The issue of the report by the defendant caused the plaintiffs to remain in the employment of FMLR by virtue of which they suffered loss of earnings (first plaintiff, \$US 6 900 000 and second plaintiff, \$US 12 937 500) and further damages being what they would have been able to earn as COO and CEO of a private or sovereign wealth company in the United States of America and which, by reason of the report they were unable to earn for the period August 2017 to December 2018 (first plaintiff, \$US 8 400 000 and second plaintiff \$US 16 900 000).

THE LEGAL PRINCIPLES TO EXCEPTIONS BRIEFLY STATED

- [13] Rule 23(1) provides for exceptions when a claim lacks averments necessary to sustain a cause of action, or where it is vague and embarrassing. The approach to both type of exceptions is well established.
- [14] As to the first, the court is to take as true the allegations pleaded by the plaintiff and to assess whether they disclose a cause of action.[2] The test on exception is whether on all reasonable readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every reasonable interpretation that can be put to the facts.[3]
- [15] As to the second type of exception, an exception taken on the grounds that a pleading is vague and embarrassing strikes at the formulation

of the cause of action and not at its legal validity.[4] An exception to a pleading contended to be vague and embarrassing involves considering first whether the pleading lacks particularity

to the extent that it is vague, and secondly, considering whether the vagueness causes prejudice.

[5] A pleading may be vague if it is "either meaningless or capable of more than one meaning", leaves one guessing as to what it means, or if it fails to provide the degree of detail necessary in the particular case properly to inform the other party of the case being advanced.[6] A classic example of a vague and embarrassing pleading is where there is a contradiction between a document annexed to the pleading and what is pleaded about it.[7]

THE FIRST GROUND OF EXCEPTION

[16] The thrust of the first ground of exception is that the document upon which the plaintiffs base their claim (i.e. the report) does not make the representations the plaintiffs contend for and that the particulars of claim do not disclose a cause of action.

[17] The plaintiffs plead that the defendant's report dated 19 October 2016 represented that FMLAM possessed and/or had access to current assets of US\$1000 billion (US\$1 trillion).

[18] "In making the representations" Mr Schalekamp represented that: FMLAM and FMLR were possessed of sufficient cash to conduct any business they chose to become involved in, taking into account that FMLAM was to the knowledge of Mr Schalekamp the funder of the activities of FMLR; FMLR had sufficient cash to pay the plaintiffs their annual salaries in terms of the agreements by which they were employed and that the report was correct.

[19] The report consists of two pages: The first is a covering letter addressed to "the members of the Stitching FML Asset Management"[8] headed "Practitioner's Compilation Report". It reads, in relevant part:

'To the members of the Stitching FML Asset Management

I have compiled the day one balance sheet of Stitching FML Asset Management on 19 October 2016 based on information provided by you'

[20] The second page of the report is headed "Stitching FML Asset Management"[9] and is described as being an "Opening day balance sheet" and is dated 19 October 2016. Under the section dealing with Current Assets, it is set out that FMLAM had liquid cash assets in the amount of US\$1 000 billion. Under the Owner's Equity section, the report reflects that FMLAM was funded by investment capital in the amount of US\$1 000 billion. It is clear from the report that the only entity that features in the report is FMLAM. FMLR is not mentioned in the report at all.

[21] Ex facie the report, it does not represent that FMLR was possessed of sufficient cash to conduct any business they chose to become involved in nor that FMLR had sufficient cash to pay the plaintiffs their annual salaries in terms of their employment agreements. The only

representation made is that FMLAM had cash assets of US\$1 000 billion. The fact that a foundation has a thousand billion dollars in cash (a trillion dollars) does not represent that an unnamed subsidiary is possessed of that cash, and neither does the

fact that FMLAM is the funder of FMLR convey that all of the funder's resources are available to the recipient. It does not follow that because FMLAM is the funder of FMLR that the latter has enough money to pay the plaintiffs their salaries. The day one balance sheet actually reflects no other assets other than cash, i.e. no interest in FMLR at all.

- [22] This presents a problem for the plaintiffs since the report, being the only written document relied upon, makes no mention of them nor of FMLR, nor the representations it is alleged to convey. The plaintiffs are thus compelled to seek to interpret or add to or modify or say how they understand the contents of the report so as to try and make its contents applicable to the case they wish to advance. This they cannot do.
- [23] In *KPMG Chartered Accountants (SA) v Securefin Limited and Another*,^[10] the SCA held the following: first, the integration (or parol evidence) rule remains part of our law and that if a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning.^[11] Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses. Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent. Fourth, to the extent that evidence may be admissible to contextualise the document (since context is everything) to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible.^[12]
- [24] The SCA also held that a witness may not be asked what the document means to him or her and a witness (expert or otherwise) may also not be cross-examined on the meaning of the document.^[13]
- [25] Very recently, in *Tshwane City v Blair Atholl Homeowners Association*^[14] the SCA reaffirmed that KPMG remains good law:

“[68] In KPMG this court, as we are now, was expressing judicial frustration at how hitherto recognised inadmissible evidence, which,

in any event, is invariably inconclusive, was being led in support of a party’s contentions in relation to written text. The criticism set out above, in our view, is unjustified.

- [69] Before us it was not suggested that the foundational principles set out in KPMG no longer apply or should be abandoned. Nor is such a suggestion sustainable. Those principles continue to be applicable. *Endumeni* at 603F, reaffirmed those principles and did not detract from them.”^[15]
- [26] The criticism referred to in the last sentence of para [68], is that referred to in para [66] of the judgment. The principle remains: to the extent that evidence may be admissible to contextualise a document to establish its factual matrix or purpose, one must use it as conservatively as possible. Of course, on exception there is no ‘evidence’, the Court assumes for purposes of evaluating the exception that that which is pleaded is correct, however, the Court is not obliged to accept that all that is pleaded is admissible. The very object of exception proceedings is to prevent the leading of unnecessary evidence.
- [27] The following flows from the above: the report is a complete memorial of a jural act which was the issue of the report concerning the ‘day one balance sheet’ position of FMLAM. Consequently, extrinsic evidence (such as that of the nature set out in paragraph 19 of the

amended particulars and as summarised in para [11] & [12] hereof) as to what the report meant or conveyed or represents only seeks to contradict, add to or modify its meaning. This is inadmissible. The report speaks for itself. The parties' contentions in relation to the written text are inadmissible. Interpretation of the report is a matter of law and not of fact. It is not for either of the plaintiffs to say what representations were made in the report, or what they understood the report to mean. The decision in *KPMG v Securefin* makes it clear that the plaintiffs at the trial will not be allowed to testify about the document's meaning nor be cross-examined on it. The rules of admissibility of evidence apply equally to the report, (as they do to contracts, statements, patents and other documents). In the circumstances, the sole memorial of the representations, given that the pleader avers that the representations take written form, can only ever be that which is recorded in the report.

- [28] Mr Viljoen representing the plaintiffs argued that reliance on the parol evidence rule is misplaced as it only finds application in a contractual context where a written agreement is intended by the parties thereto to integrate the terms of their agreement into a single complete recordal and because it is not the plaintiffs' case that the report constitutes a contract, the parol evidence rule does not find application. The discussion herein before of the current law on this issue disposes of this argument. The application of the parol evidence rule is not dependent on the nature of the document but rather on the intention of the author/s of the document: did she intend to provide a complete memorial of a jural act?
- [29] Mr Viljoen argued that evidence to contradict the truth of the content of the report will have to be led to show that the information contained in the report was false. That may be so and such evidence will be admissible. Such evidence will be adduced not to interpret the content of the report but to dispute the truth thereof. The falsity of the content of the report has been pleaded. This evidence does not offend the parol evidence rule and indeed has nothing to do with such rule. Parol evidence may not be lead to show that the written provisions of a document embodying the sole memorial of a jural act have a different or opposite meaning to what the document's text, interpreted in context, reveals. This does not mean that evidence that shows that the document's meaning is false is inadmissible.
- [30] If the plaintiffs wanted to rely upon a contextual interpretation which is at variance with the content of the report or, although not at variance elaborates on the meaning which appears on the face of the report, they ought to have pleaded such a factual matrix, which they have not.
- [31] Harms JA held in *Telematrix* that :-

"[E]xceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that cuts through the tissue of which the exception is compounded and exposes its vulnerability. Dealing with an interpretation issue, he added:

‘nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific

allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts”. [16] (emphasis provided)

- [32] The plaintiffs’ entire claim is predicated on the report and the alleged representations made in it. I am satisfied that there are no allegations in the amended particulars from which it may be inferred that further facts affecting interpretation may reasonably possibly exist to support the interpretation contended for by plaintiffs. Since the representations pleaded are not in the report, the pleading does not disclose a cause of action and the exception therefore should be upheld.
- [33] But assuming that I was wrong in this approach, the amended particulars are excipiable for another reason: what is pleaded about the report differs materially from what it reflects. The pleading and the report are incompatible. There is a contradiction between the document relied upon and what is pleaded about it. On every possible reading of the report, what is pleaded about it is not there. This renders the particulars of claim a vague and embarrassing pleading.[17] The contradiction in the pleading read together with the report renders the amended particulars either meaningless or capable of more than one meaning. The excipient is self-evidently prejudiced: whilst it would be able to fashion a plea in the form of a meaningless denial, it will not be able to address the material merits of the alleged negligent misrepresentation/ misstatement based upon the report.[18]

THE SECOND GROUND OF EXCEPTION

- [34] The defendant’s second ground of exception is that the allegations made in the plaintiffs’ amended particulars are insufficient to establish the element of wrongfulness or unlawfulness. In the context of the present matter, it is a question of whether the “duty of care” (as pleaded by the plaintiffs – intending to connote that element of wrongfulness in the parlance of our law[19]) was breached.

- [35] Whether the allegations in the particulars of claim are sufficient or insufficient to establish the element of wrongfulness is a legal question which is eminently suitable to be decided at exception stage, more about that later. The allegations in the particulars of claim “represent the high-watermark of the factual basis on which the court will be required to decide the question. Therefore, if those facts do not prima facie support the legal duty contended for, there is no reason why the exception should not succeed.”[20]
- [36] Wrongfulness is quintessentially a matter capable of decision on exception.[21] The notional possibility that evidence of surrounding circumstances may influence the issue should not operate to debar the court from deciding the issue of wrongfulness on exception.[22]
- [37] The starting proposition when applying the law of delict, is that everyone has to bear the loss he or she suffers – “skade rus waar dit val”. [23] A positive act (coupled with negligence) that causes physical harm to a person or property is prima facie unlawful.[24] Where the harm in question is not physical harm to person or property but is pure economic loss, the causing of harm is prima facie lawful.[25] There is no general right not to have pure economic loss[26] inflicted on one - if there were, profit making and commerce as we know it, would grind to a halt - and unlike in loss from injury to person or property, wrongfulness is not presumed. More is needed to extract a remedy from the Court where the loss is purely economic.[27]
- [38] It is now well established that considerations of public policy and the legal convictions of the community inform the issue of wrongfulness[28] and whether a defendant should be held legally liable for loss resulting from a misstatement or be afforded legal immunity.[29]
- [39] With reference to considerations of policy, some policies have crystallised where legal liability for pure economic loss will be imposed as a matter of course.[30] However, negligent misstatement by an auditor is not one of those.[31] In *Axiam Holdings Limited v Deloitte and Touche*[32] the court held:

“It is universally accepted 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 whether factors set out in the Standard Chartered Bank case (i.e. Standard Chartered Bank of Canada v Nedperm Bank Limited [1994] ZASCA 146; 1994

(4) SA 747 [A] are absent.”

- [40] Consequently, as Brand JA held in *Cape Empowerment Trust v Fisher Hoffman Sithole* [33] the policy-based determination whether legal liability should be imposed on an auditor for loss resulting from a negligent statement, must therefore be determined with reference to the facts and circumstances of the particular case.

[41] The case of Cape Empowerment Trust Limited [34] is particularly instructive because it deals specifically with the question of pure economic loss allegedly arising from negligent misstatement by an auditor. In that matter, the buyer of a business asked the seller's auditor to certify the business'

profit. The seller's auditor certified the profit when there was none. This misstatement caused the buyer to enter into a

transaction and to incur wasted expenses. The SCA found that the statement was grossly negligent and the factual cause of the loss,

but not its legal cause, nor was it wrongful.

[42] After referring to past authorities and academic writers, Brand JA held that two considerations were relevant:

"[25] ... as relevant in the context of negligent misstatements are, first, whether the representation was made in a business context and whether in response to a serious request and, secondly, whether the plaintiff was dependent upon the defendant to provide the information or advice sought"[35]

[43] Brand JA went on to address other considerations as follows:

"But the consideration which, in my view, weighs most heavily against the imposition of legal liability on FHS in the circumstances of this case is the one that has become known, in the context of wrongfulness, as the plaintiffs' "vulnerability to risk". As developed in our law, under the influence of Australian jurisprudence, vulnerability to risk signifies that the plaintiff could not reasonably have avoided the risk of harm by other means. What is now well established in our law is that a finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant. (see e.g Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Limited 2006 (3) SA 138 (SCA) at paras [23] to [24]; Fourway Haulage para [25]; Delphinsure Group Insurance Brokers Cape at para [25]). The role of this consideration is best illustrated, I think, by McHugh J in Perre v Apand (Pty) Limited [1999] HCA 36; (1999) 198 CLR 180 (HC of A) (supra) para 118:

'Cases where a plaintiff will fail to establish a duty of care [or wrongfulness in the parlance of our law] in cases of pure economic

loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interfere with legitimate acts of trade. In many cases there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a pre-requisite to imposing a duty. If the plaintiff has taken or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.'"[36]

[44] In Country Cloud[37] the Constitutional Court identified the risk of “liability in an indeterminate amount for an indeterminate time to an indeterminate class” as being a factor militating against a recognition of claims for pure economic loss[38] and held that the element of wrongfulness provides the necessary check on liability in these circumstances. It functions to curb liability, and in doing so, to ensure that unmanageably wide or indeterminate liability does not eventuate and that liability is not inappropriately allocated. [39]

[45] In Delphisure Insurance Brokers v Dippenaar[40] Leach JA set out considerations of public policy he had gleaned from other decisions including those referred to subsequently in Cape Empowerment and Country Cloud. Those not already mentioned above include the nature of the relationship between the parties, contractual or otherwise and whether the relationship between the parties was one of “proximity” or closeness and the reasonableness of the plaintiff relying on the accuracy of the statement.

[46] Against the background of the authorities the core averments containing allegations about the duty of care relied upon by the plaintiffs are: Paragraph 21 where it is pleaded:

‘In preparing the report and making the representations therein, the defendant, alternatively Mr Schalekamp knew, or could in the

particular circumstances pleaded above could have been expected to know, that:

21.1 Elting, FMLAM and FMLR would use the report to induce the plaintiffs to:

21.1.1 continue their employment with FMLR despite not having received payment of their agreed remuneration; and

21.1.2 use the report to solicit business for the benefit of FMLR and/or FMLAM; and

21.2 The plaintiffs would rely on the report for the purpose of:

21.2.1 continuing their employment with FMLR despite not having received payment of their agreed remuneration; and

21.2.2 using the report to solicit business for the benefit of FMLR and/or FMLAM,”

[47] Paragraph 22 where it is pleaded:

“22. At all material times and given the particular involvement of the defendant and Schalekamp in the affairs of FMLAM and its related

entities, specifically FMLR, as pleaded above the defendant alternatively Mr Schalekamp as auditor, owed the plaintiffs a duty of care not to make any report or representation concerning the financial affairs of FMLAM without conducting a proper investigation

and due diligence to determine the correctness of the information on which the report would be based.”

[48] Thus, dissecting the three paragraphs, three principal propositions in support of the “duty of care” (i.e. the allegations that the defendant’s conduct was wrongful) are advanced:

48.1. The defendant or Mr Schalekamp either knew or should have known what Mr Elting, FMLAM and FMLR would use the report for and that the plaintiffs would rely on it for the purposes of carrying on being employed by FMLR (albeit that they had not been paid by FMLR at all) and using the report to solicit business for FMLR and FMLAM. This allegation was essential for the plaintiffs to have made since without it their claim would be statutorily barred by virtue of the provisions of section 46(2) and 46(3) of the Auditing Profession Act.[41]

48.2. The defendant alternatively Mr Schalekamp’s particular involvement in the affairs of FMLAM and its related entities specifically FMLR.

48.3. The defendant alternatively Mr Schalekamp was an “auditor”.

[49] The question is whether these three propositions and taking into account the policy considerations identified by the case law, give rise to a conclusion that the Court should grant a remedy i.e. that the conduct was wrongful in the sense understood by our law.

Proposition One: Knowledge

[50] For purposes of the exception, it must be taken to be true that when the defendant alternatively Mr Schalekamp issued the report, the defendant alternatively Mr Schalekamp had the knowledge referred to above (i.e. what Mr Elting, FMLAM and FMLR would do with the report and that the plaintiffs would rely on it).

[51] Knowledge however of what Mr Elting would do with the report and that the plaintiffs would rely on it however is not decisive in determining whether or not the defendant’s conduct in issuing the report was wrongful - liability is determined in relation to wrongfulness with reference to all of the facts and circumstances of a particular case.[42]

[52] The Constitutional Court put it thus in *Country Cloud*[43]

“[26]. This case is manifestly one of pure economic loss. Would it be reasonable to impose liability on the department in the

circumstances? Although there is no ‘checklist’ of relevant considerations, the enquiry does not call for an ‘intuitive

reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms:”[44]

Proposition Two: Involvement in FMLAM and FMLR “as pleaded above”

[53] The plaintiffs plead details of their respective educational qualifications and work experience and that they took up employment as FMLR's COO and CEO respectively. None of the authorities to which I have been referred have ever taken into account a plaintiff's educational qualifications and work experience in assessing whether or not a duty of care exists in relation to a negligent misstatement. Such allegations do not assist the plaintiffs' cause at all. If anything, their qualifications

gave them the means to avoid being misled.

[54] Similarly, the plaintiffs' allegations as to breaches of their employment agreements and not being paid their salaries and the defendant's alternatively Mr Schalekamp's knowledge thereof do not found legal duties on the defendant not to cause the plaintiffs economic loss. Knowledge that employees of a subsidiary of a foundation had not been paid their salaries can hardly give rise to a legal duty to such employees when preparing a report to the members of the foundation. The duty is only owed to the entity to whom the report is addressed. The plaintiffs' own pleadings make this point – they plead that the report was prepared pursuant to the obligations of the defendant alternatively Mr Schalekamp towards FMLAM and its related entities.

[55] In paragraph 15 of the amended particulars, the plaintiffs referred to and rely on four material representations alleged to have been made by Mr Elting which induced and caused them to take up employment with FMLR, and which were known to Mr Schalekamp. However, both the first and second plaintiffs' employment with FMLR was governed by written agreements between FMLR and each plaintiff both agreements being attached as annexures to the amended particulars. Clause 30A of both the employment agreements provides, in relevant part, as follows:

“A. This agreement represents the entire understanding of the parties concerning the subject matter hereof and supersedes all prior

communications, agreements, and understandings whether oral or written, relating to the subject matter hereof...”

[56] The representations Mr Elting apparently made were not included in the employment agreements concluded between the plaintiffs and FMLR. Those agreements constituted the entire memorial of their written agreements with FMLR and consequently whatever Mr Elting may or may not have said is legally irrelevant. The legal position is quite simply that Mr Elting made no representations which induced the plaintiffs to conclude their employment agreements with FMLR.[45]

- [57] In paragraphs 15A to 15C of the amended particulars, the plaintiff averred that at all material times the defendant alternatively Mr Schalekamp acted as outsourced CFO of FMLAM and its related entities, including FMLR, alternatively assisted the outsourced CFO of the aforesaid entities. In this capacity, the defendant alternatively Mr Schalekamp had certain obligations to FMLAM and its related entities (presumably including FMLR) and these are set out in paragraph 15B.[46]
- [58] Paragraph 15C imputes knowledge to Mr Schalekamp of the corporate structure, funding arrangements and that the plaintiffs were the unpaid CEO and COO of FMLR.
- [59] Assuming that the legal irrelevance of the allegations in paragraph 15 does not affect Mr Schalekamp's knowledge, and that the representations contained in paragraph 15 were known to him, none of what is said in paragraph 15 nor in paragraphs 15A to 15D takes the issue of wrongfulness in this case any further. Knowledge of the corporate structure of FMLAM and FMLR, its operations and financing, Mr Schalekamp's obligations to FMLR and FMLAM, and knowledge of the plaintiffs' existence and the fact that they were unpaid does not cast any legal duty on Mr Schalekamp or the defendant when their task was to prepare a report to the members of FMLAM. Any duty owed was owed only to FMLAM. The plaintiffs contended that this is the weightiest consideration pointing towards the defendant's legal duty, its knowledge derived from its proximity to FMLAM, FMLR and the plaintiffs. For the reasons set out herein, I cannot agree.
- [60] Additionally, and in any event, and as set out above, knowledge is but one of the factors taken into account in the assessment of whether or not wrongfulness should be found.

The Third Proposition: "Auditor"

- [61] The third proposition is that the defendant alternatively Mr Schalekamp acted as "auditor". In the context of the amended particulars, the allegation that Mr Schalekamp acted "as auditor" can only describe his profession merely because he was "an auditor" imposes no duties on him to anyone whether it be FMLAM, FMLR or the plaintiffs, unless and until he was acting qua auditor.
- [62] The defendant alternatively Mr Schalekamp could only ever attract duties as an auditor if and when the defendant or him had conducted an audit. An audit is defined in section 1 of the Auditing Profession Act[47] as:

"An examination of, in accordance with prescribed or applicable auditing standards

- (a) Financial statements with the object of expressing an opinion as to their fairness or compliance with an identified financial reporting framework and any applicable statutory;
- or
- (b) Financial and other information, prepared in accordance with suitable criteria, with the objective of expressing an opinion on the financial and other information".

- [63] It is trite that the role of an auditor is to report to the members of a company in which report he expresses an opinion on whether the financial statements fairly present the position of the company in question.[48]
- [64] It is not pleaded that the defendant or Mr Schalekamp conducted a statutory audit on FMLAM nor that the defendant or Mr Schalekamp expressed an opinion on the financial statements, nor that Mr Schalekamp was the auditor of FMLAM. On the contrary, it is pleaded that the report was not prepared by Mr Schalekamp as auditor, but rather pursuant to his obligations as outsourced CFO or assistant CFO of FMLAM and FMLR. Thus, in the circumstances, the mere fact that the defendant alternatively Mr Schalekamp are auditors is, in the circumstances of the current case not sufficient.

Business Context and Serious Request

- [65] The defendant accepts that the report was issued in a business context and presumably in response to a serious request. But the business context is that of a relationship between the defendant and the members of FMLAM. The report is addressed to the members of “Stitching FML Asset Management” and was thus presumably prepared in response to a request by such members. The plaintiffs plead as much when they aver the report was prepared by virtue of the obligations that the defendant had to FMLAM and its related entities.
- [66] Consequently, the business context is the context arising from Mr Schalekamp’s role as outsourced CFO alternatively assistant to the outsourced CFO. Any duties and obligations that the defendant alternatively Mr Schalekamp had arose out of one of the roles referred to. Significantly and importantly, those roles are regulated by contract and they are contractual roles that exist between Mr Schalekamp and the defendant and FMLAM and/or FMLR. No other persons (including the plaintiffs) are implicated.
- [67] It is not pleaded that the plaintiffs requested the report, nor that they knew the report had been requested, nor that they had anything to do with the request for the report. Indeed, there would be no need for them to have done so given their roles and functions were within FMLR, not FMLAM.
- [68] What is also missing under the heading of this consideration is any allegation about how and when the plaintiffs got to see a report that had been prepared for the members of FMLAM, and how and when they came to rely upon it. They thus do not even address the concept of business context.
- [69] The business context involved other parties and the request was made by another entity which was remote from the plaintiffs. Consequently the business context and nature of the request do not assist the plaintiffs.

Dependence on Advice

- [70] The plaintiffs were not dependant on the defendant to provide the information contained in the report at all.
- [71] The plaintiffs' complaint is about FMLR and its inability to pay them. The first plaintiff was the COO and the second plaintiff was the CEO of FMLR. They are described in their employment agreements as "executives" reporting only to the Chairman of FMLR.
- [72] Thus the plaintiffs were very senior people in FMLR. They ran its business. Both of their employment agreements say that their functions included but were not limited to the management and oversight of the company business units, the direction and implementation of the business operating strategy and functions associated with such.
- [73] As a matter of common sense, in order to establish whether or not FMLR, their employer, could pay their salaries, or even establish the most other basic financial information about it, all they had to do was look at the books, records, financial information and bank statements of the business in which they were executives. The plaintiffs have not pleaded that they did so nor that the defendant or Mr Schalekamp was the only source of information in relation to the financial affairs of FMLR.
- [74] The fact that the plaintiffs failed to plead anything in relation to the books and records of FMLR leads one to the ineluctable conclusion that they did not take the simple, easy, cheap and obvious steps themselves to find out information about their employer. Had they done so, and there had been no information or the information had been false, they would have pleaded this in order to ground reliance or alleged dependence on Mr Schalekamp. They did not do so.
- [75] The plaintiffs were certainly not dependant on an auditor, and in particular an auditor that had prepared a report in relation to FMLAM, to get information concerning the financial position of FMLR. Indeed, on the pleaded facts they were full-time executives in the employ of FMLR who had worked unpaid for FMLR for a considerable period prior to the report being issued. It is plain they would be much closer to the business of FMLR than the defendant was. A contention that they were dependent on his advice cannot be sustained.
- [76] Once again, it is useful to compare what happened in Cape Empowerment Trust. In Cape Empowerment Trust, the buyer was trying to buy a business from a seller. He did not have sight of the books and records of the target business – this is why he relied upon the auditor's certificate. But here, in the present matter, the plaintiffs worked in executive positions at the company and could simply examine the books and records of the company itself. They clearly could have got the information from FMLR, and they should have done so. They were certainly not dependant on the defendant to furnish them with that information.

Vulnerability to Risk

- [77] The plaintiffs were not vulnerable to risk in the circumstances of this matter and could easily have taken steps to protect themselves.
- [78] Common sense dictates that the first step the plaintiffs could have taken to protect themselves is to look at the books, records, financial information and bank statements of FMLR. They did not take this obvious step and protect themselves.
- [79] Furthermore, the plaintiffs had written contracts of employment with FMLR which they could use to protect themselves and render themselves less vulnerable to risk. On this score, both employment contracts provided that the plaintiffs would be paid not less frequently than monthly. Clause 7 read with clause 7E of both agreements gave the plaintiffs the right to terminate the employment agreements for good reason, and after giving notice. The very first good reason defined for terminating the employment agreement is the failure by FMLR to pay the plaintiffs their salaries. By the time the report was issued, the first plaintiff had worked for FMLR without receiving any salary for at least twelve months; the second plaintiff for at least 14 months.
- [80] The plaintiffs could simply have placed FMLR on terms, and if their salaries had not been paid, they could have terminated their employment, and left FMLR. They would not have then carried on for another sixteen months without pay. In addition, the employment agreements provide for dispute resolution mechanisms in the form of mediation and arbitration, which they failed to invoke. It is clear from the pleadings that the plaintiff did not enforce their own employment contracts. Had they done so, they would have pleaded that they had, since this would have been a fact in support of their reliance on the defendant and/or Mr Schalekamp. It

is also clear from the pleadings that the plaintiffs never cancelled their employment contracts. Indeed they rely on them in the pleading as being in existence.

- [81] The plaintiffs did not enforce their own employment contracts, which could have reduced their vulnerability to risk completely. They did not do so and now seek to extend the aquilian remedy to rescue them from their own failure to enforce their own contracts.
- [82] There is something additional the plaintiffs could have done to protect themselves. The plaintiffs allege the defendant alternatively Mr Schalekamp owed them a duty of care not to make any report or representation concerning the financial affairs of FMLAM without conducting a proper investigation and due diligence to determine the correctness of the information upon which the report would be based.
- [83] These obligations, if they existed or even should they have existed, could quite easily have been incorporated into a contract between the plaintiffs and the defendant. It would have been a very easy matter for the plaintiffs to have entered into a contractual arrangement with the defendant which specifically obliged the defendant to issue a report pertaining to the financial position of FMLAM, FMLR and whether they would be paid. They could have stipulated the defendant's obligations concerning investigation and due diligence. There was

certainly nothing that could have prevented the plaintiffs from doing so.

- [84] Thus the cause of the plaintiffs' predicament was that they did not take protection in a contractual setting from the defendant. Secondly, they did not take steps to enforce their own agreements with FMLR when they could have. Thus having not taken appropriate steps and not contracting directly with the defendant in the first place, and being in a position where they did not seek to recover anything from the party with whom they did contract (FMLR), the plaintiffs now seek to cast the net wider to include the defendant. It is not reasonable to impose a legal duty upon the defendant in these circumstances.

Indeterminate Liability

- [85] The plaintiffs aver that relying on the contents of the report, they continued to solicit business from high profile businesses and private wealth funds in the United States of America and elsewhere, including the US Central Bank, Goldman Sachs, JP Morgan, Nomura Securities, BNP Paribas, Standard Bank and various other private and sovereign wealth custodians ('actual and potential clients').
- [86] This vast and indeterminate number of actual and potential clients raises the spectre of indeterminate liability. Any one of the high-profile businesses and private wealth funds in the United States and elsewhere, including the entities mentioned, might emerge from the woodwork and sue the defendant alleging reliance on the report as well claiming damages running into hundreds of millions of dollars. This is yet another reason to find that the defendant's conduct was not wrongful, and why, in the parlance of Country Cloud, it would not be reasonable to impose liability in the circumstances.

Nature of Relationship and Proximity

- [87] No contractual or other relationship existed between the plaintiffs and the defendant. None is pleaded. The high watermark of any relationship is that the defendant through Mr Schalekamp maintained regular contact with the plaintiffs concerning the affairs of FMLAM and FMLR.
- [88] Regular contact does not amount to any sort of formal business relationship, and is certainly not a contract.
- [89] The fact that the plaintiffs were employees of FMLR and the defendant acted as its outsourced CFO or as assistant to the outsourced Chief Financial Advisor of FMLAM and FMLR does not give rise to any special or proximate relationship between them. The plaintiffs and the defendant both did work for the same company in different capacities but this does not found a duty to the plaintiffs by the defendant.

Reasonableness of Reliance On Report

- [90] Plaintiffs argued that what VGA was a party to, was the management of FMLAM and FMLR; it occupied the position of CFO. Its position within the corporate structure and its professional expertise, so the argument ran, rendered it uniquely qualified to provide

authoritative information about the finances of these entities. It was accordingly eminently reasonable for the plaintiffs and other executives without further interrogation to accept and to act upon financial information relating to FMLAM and FMLR emanating from the defendant. The corollary of this, so it was contended, was a duty on the part of the defendant to ensure the accuracy of information it disseminated.

[91] There are multiple reasons why it would not have been reasonable to rely on the accuracy of the report. A cursory glance at the report should have raised the alarm:

91.1. Mr Schalekamp did not get the name of FMLAM correct. On both the covering page and the day one balance sheet, he called it “Stitching FML Asset Management” when in fact it should be “Stichting”.[49] They knew what the correct name was by virtue of the representations that had been made to them by Mr Elting. The plaintiffs were content to seek business from actual and potential clients where the document they claim to have relied upon in soliciting business got the name wrong for a trillion dollar foundation.

91.2. A Stichting is a foundation as the plaintiffs plead. A foundation differs from a corporate entity and is more akin to a trust. As such, it has no members and no owners. Yet the day one balance sheet is addressed to “The Members” of FMLAM, of which none exist. The balance sheet also reflects “owners’ equity” which it cannot have since a Stichting has no owners.

91.3. According to the plaintiffs, Mr Elting had informed them that FMLAM had at its disposal assets in excess of US\$1.5 billion to fund operational and transactional business. However, when the day one balance sheet was issued the assets of FMLAM were in the region of US\$1 trillion. From the time they spoke to Mr Elting until the time they saw the opening day balance sheet, FMLAM’s assets had swelled by some 666,667%.

91.4. FMLAM’s assets are said to be “liquid cash assets” and are in the amount of US\$1000 billion, yet the balance sheet conveyed that FMLAM had US\$1000 billion in cash. This is extremely unlikely and should have raised alarm bells.

91.5. The balance sheet is bereft of any detail other than two line items reflecting perfectly round numbers. Every other line item is blank. The business is reflected as having no other assets and no fixed assets. It is reflected as not having any liabilities. There are no notes or annotations to the balance sheet. It is unreasonable in the extreme to expect that a one trillion-dollar entity would have a balance sheet which looked like the one the plaintiffs allegedly relied upon.

91.6. The plaintiffs had been told that FMLR was wholly owned by FMLAM. The balance that they relied upon reflects no assets other than the cash asset of US\$1000 billion. The balance sheet thus directly contradicted what the plaintiffs had been told by Mr Elting about a relationship between FMLAM and FMLR. If FMLAM had owned FMLR, then it would have been reflected as one of the assets in

FMLAM. It was not, yet the plaintiffs were apparently misled.

- [92] Simply looking at the report renders its accuracy highly questionable. Any reasonable person would view it with caution and not rely upon it for the purposes of making a decision that would ultimately result in the losses claimed.
- [93] This is all the more so in the case of the plaintiffs, especially having regard to their strident pleading as to their wisdom and experience. I have already adverted to this double edged sword which cuts as much into the plaintiff's case as it cuts for them.
- [94] The first plaintiff is Mr Malachy Meechan, who was an associate at Goldman Sachs Bank in New York ('Goldman Sachs') for a period of some eleven years and was responsible for Goldman Sachs' Global Investment Research department. From 2011 onwards he was employed by or consulted for numerous start-up companies in the financial and defence industries. As a result thereof, the first plaintiff developed and marketed qualitative and quantitative research products for institutional investors and governments, established and grew the GS research business through tailored financial products for investors and established and grew new companies from inception to fruition.
- [95] The second plaintiff is Dr Rumi Masih who is possessed of even more impressive credentials. He was Vice President of Goldman Sachs from 1997 to 2007, was also Global Econometrician at Goldman Sachs Group Incorporated, Research Division, was then employed as Managing Director of JP Morgan Bank, New York, from November 2007 to March 2011, was employed as Head of Investment Strategy at BNY Mellon Asset Management from May 2011 to September 2015. He was responsible for developing thought leadership and investment policy, asset allocation research, custom solutions and risk management product solutions for institutional clients, has published more than 60 articles in the fields of macro-economics, development economics and empirical finance and was awarded a Ph.D in Econometrics from the University of Cambridge, in the United Kingdom.
- [96] By virtue of their recognition and experience in the business community in the United States of America, the plaintiffs had reputations in terms of which they were held in the highest regard by other participants in the business and financial community including actual and potential clients.
- [97] It stretches the bounds of credulity to believe that the plaintiffs relied on the report. For the purposes of the exception however, and in the light of the wrongfulness enquiry, the question is whether objectively speaking, two highly educated, highly experienced businessmen who had occupied senior positions in established and reputable financial institutions in New York, and who had enjoyed prominence and high esteem in the business and financial community could ever have reasonably relied on an obviously problematic report.
- [98] In my view they could not reasonably have relied on the report. This conclusion is even more forceful taking account that both plaintiffs apparently made the identical error at the identical moment.

Conclusion

on this ground

[99] Mr Viljoen argued that the defendant's analysis loses sight of the fact that in the context of establishing wrongfulness, 'the whole is greater than the sum of its parts', meaning that whilst the individual considerations taken in isolation might be susceptible to criticism, they serve to reinforce each other and cumulatively establish the duty of care contended for. I disagree. Careful and critical evaluation of the considerations is required. In this case, this leads to the conclusion that all these weak 'pillars' are unable to hold the building it seeks to support.

THIRD GROUND OF EXCEPTION

[100] The third ground of exception addresses the issue of causation. It is well established that in the law of delict that the element of causation involves two distinct enquiries. First there is an enquiry into factual causation which is generally conducted by applying the 'but for test'. Lack of factual causation leads to the end of a matter. No legal liability follows. However, if factual causation is established, the second enquiry arises, namely whether the wrongful act was linked sufficiently closely or directly to the loss concerned for legal liability to ensue. That issue is referred to by some as 'remoteness of damage' and by others as 'legal causation'.^[50]

[101] In the third exception, the focus is not on factual causation, but on legal causation. The issue of legal causation or remoteness is determined by considerations of policy. It is a measure of control. It serves as a long stop where right minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability.^[51]

[102] The yardsticks of foreseeability and remoteness in the context of causation are not to be applied dogmatically but in a flexible

manner. This means that if the application of any or all of the known criteria should lead to a result which is untenable, legal causation will not be found.^[52]

[103] In summary on this score, the plaintiffs' case is that they ascertained on 14 August 2017 that FMLAM and FMLR had no money and that the report was false. They immediately left the employ of FMLR and stopped pursuing business opportunities on behalf of FMLAM and FMLR with effect from the end of August 2017.

[104] The plaintiffs allege that the defendant is liable for damages sustained by them as a result of the conduct of Mr Schalekamp. Both plaintiffs allege that they have suffered two types of damages:

104.1. First – the salaries that they should have earned from FMLR for the period of 19 October 2016 to 14 August 2017, being the date on which they had learnt that the report was false – this occurred on 14 August 2017. In the case of the first plaintiff, the damages for lost salary amount to US\$6 900 000. In the case of the second plaintiff, the damages for lost salary are

US\$12 937 500.

104.2. Second – for patrimonial damages comprising employment the plaintiffs were not able to obtain for the period August 2017 to December 2018 as a result of their having solicited business from actual and potential clients on the basis of the false content of the report. They contend that they were unable to seek or obtain employment commensurate with their positions, reputations and qualifications for the period August 2017 to December

2018. In the case of the first plaintiff, he claims US\$8 400 000. In the case of the second plaintiff, the amount claimed is US\$16 900 000.

[105] The defendant argues that it is not the defendant's conduct that was the legal cause of the damages suffered by the plaintiffs. In this regard even though Mr Schalekamp knew that the plaintiffs would rely on the report for the purposes of continuing their employment with FMLR (even though unpaid) and would use the report to solicit business for the benefit of FMLR and/or FMLAM, it was not foreseeable that:

105.1. FMLR would continue not to pay the plaintiffs;

105.2. the plaintiffs would remain in the employment of FMLR for ten further months before eventually leaving FMLR, bearing in mind that the plaintiffs had been employed by FMLR from September and July 2015 and had not, even as at 16 October 2016 been paid any salary. It was thus not foreseeable to the defendant that they would allow the unhappy situation to persist;

105.3. that neither plaintiff would fail to avail themselves of the opportunity to look at the books, records, financial information and bank statements of FMLR for the period of 16 October 2016 until the day upon which they found out that the report was false;

105.4. that they would not avail themselves of their contractual rights and remedies against FMLR and in particular in circumstances where they continued to be unpaid. In Cape Empowerment Trust Brand JA found that in the circumstances of that case, it was not foreseeable that the buyer of the business would not avail itself of its own contractual remedies. Precisely the same applies here.

[106] It was the plaintiffs' decision, so the argument goes, to remain employed by FMLR and the plaintiffs' decision to continue soliciting business from actual and potential clients. It was thus that decision, not the report that caused the loss. The plaintiffs could and should have changed their course easily but did not do so. Their predicament is of their own making. In the circumstances, it is argued that the damages are too remote and consequently the requirement of legal causation is not satisfied. In the result, the particulars of claim do not disclose a cause of action.

[107] Causation, certainly factual causation, is fact bound. The current exception has targeted legal causation. In my view and having regard to the authorities referred to in the section hereinafter, causation falls to be considered after the hearing of evidence.

EXCEPTIONS – SUITABILITY OF CONSIDERING POLICY CONSIDERATIONS

[108] Mr Viljoen was at pains to persuade this court not to decide the issues of wrongfulness and legal causation on exception. He argued that both wrongfulness and legal causation were driven by policy considerations which were aimed at preventing liability on the part of the wrongdoer that extends beyond what is reasonable. He also submitted that policy conclusions are best drawn from proven

facts.

[109] In support of this proposition he relied on a number of decisions which I intend dealing with. In the Brooks[53] matter, Erasmus J held as follows:

[50] The answer to these submissions is threefold:

3. It may well be that the same legal and policy considerations that militate against imposing a legal duty on the police would apply equally in relation to the issue of legal causation, but within the context of a detailed factual matrix, other policy considerations may also become relevant. Policy conclusions are best drawn from proven facts.

[110] This comment must be viewed against the following background – an exception was taken including a ground that the plaintiff had failed to establish wrongfulness on the pleadings. This enquiry included the question whether in the circumstances of that case, the failure on the part of the police to take action gave rise to an actionable duty to a person in the position of the plaintiff. The Court was asked to extend delictual liability by allowing a claim of a dependant where the breadwinner had by his own intentional act (Brooks was convicted of murder) rendered himself unable to support his dependant. The Court was in effect asked to extend delictual liability to a situation where none existed before. The question was thus whether there were any considerations of public or legal policy which required that extension. The court decided this question against the plaintiff at exception stage. This case is thus support for the proposition that wrongfulness can be determined as at exception stage.

[111] Mr Viljoen also relied on para [26] of the Mukheiber[54] matter where, an article of Chief Justice Corbett is quoted and where emphasis is placed on the principle that determining wrongfulness or unlawfulness poses the question whether in all the circumstances of the case there was a legal duty to act reasonably. It doesn't follow from that that the considerations don't have to be pleaded out or that it can not be determined at exception stage.

[112] The facts of this case are unprecedented, argues Mr Viljoen – the question which falls for determination is whether the outsourced CFO should be held liable to the CEO and COO of a subsidiary of a foundation for misstatements made to the foundation - and the attitude of society should only be considered on proven facts. Mukheiber was decided after the hearing of evidence. I read nothing in the quoted article which is to the effect that wrongfulness in respect of an unprecedented case cannot be considered at exception stage.

[113] The issue was put to bed in Telematrix where the following was held:

‘[2] The plaintiff’s particulars of claim, with annexures, runs to 158 pages and contains a full exposition of the events surrounding

the Directorate’s decision. In addition we were provided with the ASA’s Code of Advertising Practice and Procedural Guide and the parties prudently were content that regard could be had to it even though it does not form part of the pleadings. The case does not therefore have to be decided on bare allegations only but on allegations that were fleshed out by means of annexures that tell a story. This assists in assessing whether or not there may be other relevant evidence that can throw light on the issue of wrongfulness. I mention this because, relying on the majority decision in *Axiam Holdings Ltd v Deloitte & Touche*, the plaintiff argued that it is inappropriate to decide the issue of wrongfulness on exception because the issue is fact bound. That is not true in all cases. This court for one has on many occasions decided matters of this sort on exception. Three important judgments that spring to mind are *Lillicrap*, *Indac* and *Kadir*. Some public policy considerations can be decided without a detailed factual matrix, which by contrast is essential for deciding

negligence and causation.’

[114] This principle was restated thereafter by Nugent JA who held that wrongfulness was quintessentially a matter capable of decision on exception.[55] This would seem to follow from the objective nature of the enquiry into wrongfulness.

CONCLUSION

& ORDER

[115] In the circumstances, I conclude that the amended particulars do not contain averments necessary to sustain a cause of action in respect of both grounds 1 and 2, and, alternatively to ground 1, I find that the amended particulars are vague and embarrassing and the defendant is prejudiced in pleading thereto.

[116] In the circumstances, the following order is granted:

116.1. The defendant’s exception is upheld.

116.2. The plaintiffs’ amended particulars of claim are struck out.

116.3. The plaintiffs are to pay the costs of this exception jointly and severally, the one paying the other to be absolved.

116.4. The plaintiffs are granted leave, should they be so advised, to deliver a notice of intention to amend their amended particulars of claim within twenty days of the date of the granting of this order, failing which the defendant will be entitled to approach this court for an order dismissing the plaintiffs' claim against it with costs.

I OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Counsel for the excipient: Adv T Dalrymple

Instructed by: Clyde & Co Inc

Counsel for the respondents: Adv HM Viljoen

Instructed by: Ramsay Webber Inc

Date of hearing: 25 February 2020

Date of Judgment: 28 February 2020

- [1] The expression “duty of care” arises in English law and straddles both wrongfulness and negligence and has often been confused with the concept of a “legal duty” in our law: Country Cloud Trading CC v MEC, Department of Infrastructure Development 2014
- (2) SA 214 (SCA) at [19]. In this case the expression “duty of care” as used by the plaintiffs is used to denote the concept of “wrongfulness” in our law.
- [2] Marney v Watson and Another 1978 (4) SA 140 (C) at 144 F to G; Makgae v Sentraboer (Kooperatief) Bpk 1981
- (4) SA 239 (T) at 244H to 245A
- [3] Children’s Resource Centre Trust and Others v Pioneer Food (Pty) Limited and Others 2013 (2) SA 213 (SCA) at para [36]; cited with approval in H v Foetal Assessment Centre 2015 (2) SA 193 (CC) at para [10]
- [4] Trope v South African Reserve Bank
- [1993] ZASCA 54; 1993 (3) SA 264 (A) at 269I
- [5] Trope v South African Reserve Bank 1992 (3) SA 208 (T) at 211B
- [6] Parow Lands (Pty) Limited v Schneider 1952

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- [1] SWA (at 152E to G); *Lockhat v Minister of the Interior* 1960
- [3] SA 765D (at 777D; *Trope v South African Reserve Bank* 1992 (3) SA 208 (T) at 211D; *Nasionale Aartappel Kooperasie Beperk v PriceWaterhouseCoopers* 2001 (2) SA 790 (T) at 797J to 798A; *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at 148F
- [7] *Naidu v Naidoo* 1967 (2) SA 223 (N) at 226C to D
- [8] This is an error –the correct name of FMLAM is “Stichting FML Asset Management” [9] The same error is made as to the name of the entity.
- [8] This is an error –the correct name of FMLAM is “Stichting FML Asset Management”
- [9] The same error is made as to the name of the entity.
- [10] 2009
- (4) SA 399 (SCA) at para 39
- [11] See also *Johnson v Leal* 1980 (3) SA 927 (A) at 943B
- [12] *Delmas Milling Co. Limited v Du Plessis* 1955 (3) SA 447 (A) at 455B to C
- [13] *KPMG* (supra) at para [40]
- [14] 2019
- (3) SA 398 (SCA)
- [15] *Blair Atholl* at paras [68] and [69]
- [16] *Telematrix (Pty) Limited trading as Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006
- (1) SA 461 (SCA) at para [3]
- [17] *Naidu v Naidoo* (supra) at 226 C to D; *Keely v Heller* 1904 TS 101 at 103 to 104; *Herbert v Smit* 1929 TS 306
- [18] *Barloworld Logistics v Ford* 2019 (5) SA 133 (GJ) at [41]
- [19] *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 2013
- (5) SA 183 (SCA) at para [28]
- [20] Per Hefer JA in *The Minister of Law and Order v Kadir* [1994] ZASCA 138; 1995
- (1) SA 303 (A) at 318I to J – where the exception was upheld; see also *Telematrix* (supra) at paras [2] and [3]
- [21] *AB Ventures Limited v Siemens Limited* 2011 (4) SA 614 (SCA) at para [5]
- [22] *AB Ventures Limited* (supra)

- [23] Telematrix (Pty) Limited (supra) at para [12]
- [24] Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at para [12]; Trustees of Two Oceans Aquarium Trust v Kantey and Templer (Pty) Limited 2006 (3) SA 138 (SCA) at para [10]
- [25] BOE Bank Limited v Ries 2002 (2) SA 39 (SCA) at para [12]; Fourway Haulage SA (Pty) Limited v SA National Roads Agency
- [2008] ZASCA 134; 2009 (2) SA 150 (SCA) at para [12]
- [26] Administrateur Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 833A to B; Country Cloud Trading v MEC, Department of Infrastructure Development 2015
- (1) SA 1 (CC) at [22]
- [27] Cape Empowerment Trust Limited v Fisher Hoffman Sithole 2013 (5) SA 183 (SCA) at para [21]
- [28] Loureiro and Others v Impula Quality Protection (Pty) Limited 2014 (3) SA 394 (CC) at para [53]
- [29] Local Transitional Council of Delmas and Another v Boshoff 2005 (5) SA 514 (SCA) at para [19]; Telematrix (Pty) Limited (supra) at paras [13] and [14]; Cape Empowerment Trust (supra) at para [21]; Country Cloud Trading (supra) 2015 (1) SA 1 (CC) at para [21]
- [30] Telematrix (supra) at para [15]; Fourway Haulage SA (Pty) Limited (supra) at para [21]
- [31] Cape Empowerment Trust (supra) at para [21]
- [32] 2006
- (1) SA 237 (SCA) at para [18]
- [33] Supra at para [22]
- [34] 2013
- (5) SA 183 (SCA)
- [35] Cape Empowerment Trust at para [25]
- [36] Cape Empowerment Trust (supra) at para [28]
- [37] Supra at para [24]
- [38] Country Cloud (supra) at para [24]
- [39] Country Cloud (supra) at para [25]
- [40] 2010
- (5) SA 499 at paras [24] to [26]

[41] Auditing Profession Act 26 of 2005. Section 46(2) provides that an auditor does not incur liability to a client or any third party unless it is proved that the opinion was expressed or the report made maliciously, fraudulently or pursuant to a negligent performance of the registered auditor's duties. Section 46(3) provides, in short, that a registered auditor incurs liability to third parties who have relied on an opinion or report only if it is proved that the opinion was expressed or the report or statement pursuant to a negligent performance of the auditor's duties and the auditor knew or could in the particular circumstances have been expected to know that the third party would rely on the opinion, report or statement for the purposes of acting or refraining from acting in some way

[42] Cape Empowerment Trust (supra) at para [22]

[43] Supra at para [26]

[44] Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at para [21]

[45] SA Sentraale Ko-op Graanmaatskappy Bpk v Shifren n' Andere 1964 (4) SA 760 (A); Cecil Nurse (Pty) Limited v Nkola 2008

(2) SA 441 (SCA) at para 17

[46] The defendants alternatively Mr Schalekamp's role as outsourced Chief Financial Advisor or assistant to the outsourced Chief

Financial Advisor and what his obligations in relation thereto are do not ground any legal duty towards the plaintiffs. Certainly Mr Schalekamp alternatively the defendant would have duties and obligations to FMLAM and FMLR but not to the plaintiffs.

[47] 26 of 2005

[48] Section 44 Auditing Profession Act; Powertech Industries v Mayberry and Another 1996 (2) SA 742 (W) at 746A to H

[49] The plaintiffs specifically plead awareness of the error in paragraph 17 of the amended particulars where they state that the report erroneously refers to FMLAM as "Stitching FML Asset Management"

[50] mCubed International (Pty) Limited and Another v Singer and Others NNO 2009

(4) SA 471 (SCA) at para [22]; see also Country Cloud (supra) at para [25]

[51] Fourway Haulage SA (Pty) Limited v SA National Road Agency Limited (supra) at para [31]; mCubed International (Pty) Limited v Singer NNO (supra) at para [27]

[52] Cape Empowerment Trust (supra) at para [36] and the authorities cited there

[53] Brooks v Minister of Safety and Security,

[2007] ZAWCHC 51; 2008 (2) SA 397 (C) at paras [50]

[54] Mukheiber v Raath & another,

[1999] ALL SA 490 (A) at para [26]

[55] AB Ventures Limited v Siemens Limited (supra) at para [5]

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