REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 21660/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

SOUTHERN SUN HOTEL INTERESTS (PTY) LTD Excipient

And

ARCELORMITTAL SOUTH AFRICA LTD Respondent

In re the matter between:

ARCELORMITTAL SOUTH AFRICA LTD Plaintiff

And

MOBILE TELEPHONE NETWORKS (PTY) LTD First Defendant

TRICOM TELECOM (PTY) LTD Second Defendant

BUWA THETHA COMMUNICATIONS (PTY) LTD Third Defendant

SOUTHERN SUN HOTEL INTERESTS (PTY) LTD Fourth Defendant

SUMMARY

Summary: Exception application – requirements for excipiability – non-excipiable

Arcelomittal South Africa Ltd ("AMSA") instituted action against the defendants for damages. The fourth defendant ("SUN") excepted to the particulars of claim asserting that they do not make out a cause of action. AMSA's case was that it suffered damages as a result of a breach caused to its gas pipeline which is situated on SUN's property to which it held a pipeline servitude. Mobile Telephone Networks (Pty) Ltd ("MTN") had its telecommunications network tower situated on SUN's property directly on AMSA's servitude. The tower required upgrading and while caring out the upgrading AMSA's pipeline was drilled into causing a breach of the pipeline. AMSA argued that it suffered losses relating to the repair of the pipeline and an interruption of the gas supply.

It is AMSA's case that SUN as the owner of the land was aware of the existence of both the pipeline and of the servitude. SUN had a legal duty as the owner of the property to ensure that the approval of the local authority is obtained for the upgrading work in terms of the National Building Regulations and Building Standards Act 103 of 1997 and with regard to the excavation entailed by the drilling in terms of the Regulation G1 (3). AMSA alleges that SUN owed it a legal duty to notify it of the intended upgrading work so as to afford it an opportunity to safeguard its interests. SUN's failure to notify AMSA constituted negligence. AMSA further alleges that had SUN obtained the local authority approval and/or notified them of the drilling work the subsequent damage would not have occurred.

SUN's exception is based on the allegations that the facts pleaded by AMSA in its particulars of claim does not indicate the existence of a legal duty and

that there are no facts pleaded suggesting that SUN breached the legal duty, SUN alleged AMSA relied upon an omission and pure economic loss. The court considered the principles applicable to exceptions as held in a number of Supreme Court of Appeal decisions.

Held: AMSA's particulars of claim established a *prima facie* breach of legal duty by the fourth defendant (SUN) and such breach is the cause of AMSA's physical and economic damage and was therefore *prima facie* unlawful.
Held: AMSA's particulars of claim are not excipiable and do disclose a cause of action.
Held: The fourth defendant's exception was dismissed with costs.

J U D G M E N T

WEINER, J:

[1] The plaintiff ("AMSA") instituted an action against the defendants for damages. The fourth defendant ("Sun") has excepted to the particulars of claim asserting that they do not make out a cause of action.

BACKGROUND

[2] AMSA alleges that it suffered damages as a result of damage done to its gas pipeline ("the pipeline") which was situated on Sun's property. AMSA held a pipeline servitude over such property.

[3] A telecommunications network tower ("the tower") of the first defendant (MTN) was situated on Sun's property, directly on AMSA's servitude.

[4] The tower required upgrading. According to AMSA, whilst performing the upgrading work, those doing same drilled into the earth under the MTN tower and into AMSA's pipeline causing a breach of the pipeline. This caused damage to the pipeline as a result of which AMSA suffered losses relating to the repair of the pipeline and to the interruption of the gas supply.

[5] AMSA contends that:

(a). Sun, as owner of the land, was aware of the existence of the pipeline and of the servitude.

(b). MTN apparently liaised with Sun as owner of the property in regard to the upgrading work.

(c). Sun, as owner of the property, accordingly bore the primary legal responsibility to ensure that local authority approval was obtained for the upgrading work in terms of the Regulations promulgated under the National Building Regulations and Building Standards Act[1] ("the Act") and for the excavation entailed by the drilling in terms of Regulation G1(3).

(d). Sun owed AMSA a legal duty to notify it of the intended upgrading work to afford it an opportunity to safeguard its interests.

(e). Sun failed to notify AMSA and was accordingly negligent.

[1] 103 of 1977

(f). Had Sun obtained local authority approval and/or notified AMSA, the drilling work and the subsequent damage would not have occurred.

(g). Accordingly, Sun is jointly and severally liable with the other defendants for AMSA's damages.

EXCEPTION

[6] The fourth defendant excepted to the particulars of claim on the basis that firstly, the facts pleaded do not give rise to the legal duty contended for; secondly, the facts do not demonstrate that the Regulations referred to in paragraph 25 of the particulars of claim (referred to in paragraph 5(c) above) find application to the drilling application referred to in the particulars of claim; thirdly, no allegation is made of wrongfulness; and fourthly, no facts are pleaded that Sun breached the legal duty contended for. Sun further avers that no facts are pleaded to support the conclusion of negligence and the grounds of negligence relied upon are not set out.

LEGAL PRINCIPLES APPLICABLE TO EXCEPTIONS

[7] It is for the excipient to persuade the court that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed. See *First National Bank of Southern Africa v Perry NO*[2] where it was held:- *"The excipients have to show that the pleading is excipiable on every interpretation that can reasonably be attached to it."*

[2] 2001 (3) SA 960 (SCA) at page 965 D-G

[8] The object of an exception is to dispose of a case or a particular issue to avoid a trial and the leading of unnecessary evidence. In *Telematrix (Pty) Ltd v Advertising Standards Authority*[3] Harms JA held as follows:-

> *"Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility.*"

[9] The court must consider whether it is satisfied that the particulars of claim, as a whole, are incapable of disclosing a cause of action and that no evidence that could be led could make them disclose a cause of action. Also in *Sanan v Eskom Holdings Limited*[4] the court held that:-

> "*It is trite law that an exception which can be cured by evidence at the trial will not succeed.*"

[10] In short, AMSA contends that Sun has to satisfy the court that the plaintiff's particulars of claim are bad in law on any reasonable interpretation and that no amount of evidence which can be led at trial would cure the pleading.[5]

[11] Reference is made in this regard to *Stols v Garlicke & Bousfield*[6] where Gorven J cited the following from *Minister of Law and Order v Kadir* [7] in considering an exception:-

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[3] 2006 (1) SA 461 (SCA) paragraph 3
[4] 2010 (6) SA 638 (GSJ) at page 645 D
[5] *S A Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C).
[6] 2012 (4) SA 415 (KZP)
[7] 1995 (1) SA 303 (A) at page 318

"*It must be assumed – since the plaintiff will be debarred from presenting a stronger case to the trial Court than the one pleaded – that the facts alleged in support of the alleged legal duty represent the high-water mark 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*".

AMSA submits that, as held in *Axiam Holdings Ltd v Deloitte & Touche,*[8] courts have increasingly declined to decide the question of wrongfulness on exception, save in the clearest cases that there cannot be any wrongfulness on the pleaded facts no matter what evidence is led.

[12] Gorven J went on in *Stols v Garlicke & Bousfield* to address four categories of cases in such exceptions:-

"*The first aspect of the complaint must therefore be answered as follows. Depending on the facts of a case, there are four potential findings concerning an exception to a pleading which claims that a party was subject to a legal duty. First, it may be possible to find that the pleaded facts do not even prima facie support such a legal duty. Secondly, it may be possible to find that the pleaded facts clearly support the existence of the legal duty contended for. Thirdly, it may be possible to find that the pleaded facts at least prima facie support the existence of a legal duty even though it cannot be said that they clearly*

[8] 2006 (!) SA 237 (SCA)

establish this. Fourthly, it may not be possible to decide one way or the other on exception. In the first case the exception must be upheld. In the second, third and fourth cases, it must be dismissed."[9]

AMSA contends that it cannot be said that the pleaded facts do not even *prima facie* support such a legal duty.

WRONGFULNESS/ OMMISSION/ PURE ECONOMIC LOSS

[13] Sun contends that where there is a dispute as to whether or not the facts pleaded give rise to the legal duty and the conclusion of wrongfulness contended for, same can be challenged on exception. Reference is made to *Telematrix*[10] where Harms JA held:-

"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

[9] Supra fn 6 at paragraph 12
[10] Supra fn 1 at paragraph 2

without a detailed factual matrix, which by contrast is essential for deciding negligence and causation."

[14] Where the courts have considered exceptions taken on wrongfulness they usually entail cases dealing with omissions that cause pure economic loss in circumstances not recognised by the law as founding a duty. This is because positive conduct leading to physical damage is *prima facie* unlawful and no exception could therefore be taken where this is alleged. See *Dodo Boerdery Bpk v Transnet.*[11]

[15] Sun contends that loss caused by an omission can be actionable but only where there is a legal duty to act positively. See *Boe Bank Ltd v Ries.*[12]

[16] AMSA submits that it relies upon Sun having both a statutory duty and a positive duty to act.

[17] Sun however, contends that AMSA seeks to hold it liable on the basis of an omission. Reference was made to *Cape Town Municipality v Bakkerud*[13] where Marais JA stated:-

"*Society is hesitant to impose liability in law for, as it is sometimes put, "minding one's own business".*

The reticence is reflected in legal and judicial writing by propositions such as no liability in delict for pure (or mere) omissions."

[11] 2005 (5) SA 490 (SCA) at paragraph 12
[12] 2002 (2) SA 39 (SCA) at paragraph 12
[13] 2000 (3) SA 1049 (SCA) at paragraph 8

[18] AMSA contends that this is not a case based either on an omission or on pure economic loss because there was positive conduct on Sun's part in liaising with MTN in relation to the upgrading work thus, taking it out of the category of "*pure omissions*". Further, Sun had a statutory duty to act. AMSA further does not rely on pure economic loss but instead alleges actual loss arising out of physical damage to the pipeline, for which it claims the cost of repair.

[19] In *Knop v Johannesburg City Council*[14] it was held:-

> "*Nor can the mere allegation in the particulars of claim that the Council was under a duty to take steps to prevent loss being caused to the plaintiff carry the day for him. The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case*."

It was held further:-

> "*The issue raised by paragraph (b) of the grounds of exception is accordingly whether, having regard to the considerations mentioned above, the allegations of fact in the particulars of claim, if assumed to be proved, are susceptible in law of sustaining a finding that the Council was under a legal duty to the plaintiff, by exercising care, to avoid loss being caused to the plaintiff. If they are not, the plaintiff will*

[14] 1995 (2) SA 1 (AD) at 27F-G

be unable at the trial to discharge the onus of proving that the Council's conduct was wrongful…, and the exception would be well-founded."[15]

AMSA'S PARTICULARS OF CLAIM

[20] To determine whether the requisite legal duty exists, it is necessary to analyse AMSA's particulars of claim.

[21] AMSA relies upon the facts pleaded in paragraphs 25 to 34, and paragraph 10 which read as follows:

"25. The fourth defendant as owner of the property bore a primary legal responsibility to ensure that local authority approval was obtained for the upgrading work in terms of the Regulations promulgated under the National Building Regulations and Building Standards Act 103 of 1977, and for the excavation entailed by the drilling in terms of Regulation G1(1)(3)(sic) *of such Regulations.*

26. The fourth defendant, acting through employees, acting in the course and scope of their employment with the fourth defendant, was aware, or ought as owner reasonably to have been aware of the existence and location of the pipelines as these were designated by the poles on the property.

27. The fourth defendant, acting through employees acting in the course and scope of their employment with the fourth defendant, was

[15] Supra at paragraph 27J-28A

aware, or ought as owner reasonably to have been aware, of the fact that the plaintiff was holder of the servitude.

28. The identity of the plaintiff as owner of the pipeline and as the entity whose works were served by the pipeline was readily ascertainable and ought reasonably to have been ascertained by the fourth defendant as the owner on whose property the upgrading work was to be carried out, and with whom the licensee, intending to carry out such upgrading work, liaised in relation to such work.

29. The factors pleaded in paragraph 10.1 operated with respect to the legal duty owed by the fourth defendant to the plaintiff.

30. In the circumstances the fourth defendant owed the plaintiff a legal duty to notify it of the intended upgrading work and to afford it an opportunity to safeguard the interests of its pipeline and of its business served by the pipeline with respect to the intended upgrading work.

31. Had the fourth defendant acted to obtain approval from the local authority as owner in terms of the Regulations pleaded above, the plaintiff's interest in having the drilling not occur would have been ascertained and the drilling would not occurred.

32. Had the fourth defendant notified the plaintiff of the upgrading work, the plaintiff would have made it clear to the first defendant and/or the fourth defendant that only hand excavations, and no drilling, should be performed upon the servitude.

33. Had the fourth defendant notified the plaintiff of the upgrading work, the drilling would not have occurred and the plaintiff would not have suffered the plaintiff's damages.

34. The failure by the fourth defendant to ensure that the plaintiff was notified of the intended upgrading work was negligent".

Paragraph 10 of the particulars of claim reads:

"10.The conduct of the employees who drilled into the pipeline was in breach of a legal duty owed by them to the plaintiff, in that-

10.1.1. the interests of the owner of the pipeline, the existence, location and nature of which were indicated by the poles, and of the entity whose works would be serviced by such pipeline, would obviously be peculiarly affected by any activity that could damage the pipeline;

10.1.2. any activity carried out directly upon the area where the poles indicated a gas pipeline to run, such as could damage such pipeline, would lead to loss being suffered by the owner of the pipeline and by the party whose business the pipeline served with gas, such party being in the nature of things limited to single entity or a select group of potential entities with a peculiar interest in being served by the pipeline;

10.1.3. the likely nature of the loss that would be suffered by such entity would be, for the owner of the pipeline, the reasonable costs of repair of the pipeline, and for the entity whose business was served by the pipeline, the losses suffered in that entity's business through the

absence of a supply of gas caused by any damage to the pipeline for as long as the pipeline was unable to serve such business due to the damage and the need for it to be repaired".

[22] As set out above AMSA's claim is based on Sun's knowledge as owner of the property of the existence and location of the pipeline and of knowledge of AMSA's identity as owner thereof. It is also alleged in paragraph 28 that the licensee, intending to carry out the work, liaised with Sun. In paragraph 10 reference is made to the conduct of the employees who drilled into the pipeline and the breach of the legal duty owed by them to AMSA. This is the claim against the first, second and third defendants (which is incorporated by reference to apply to Sun as well).

THE REGULATIONS

[23] AMSA relies, in paragraph 25 of the particulars of claim, generally on the Regulations promulgated under the Act. In addition, it relies specifically on Regulation G1(3). Regulation G1 refers to an "excavation" related to a building. There is no definition of excavation in the Regulations. Giving it its ordinary meaning, Sun contends that it relates to and is concerned with an excavation to a building which is of the usual kind; that is, it precedes the erection of a building and which is done for purposes of the placing of foundations. Sun argues that the drilling activity referred to in the plaintiff's particulars of claim does not constitute an excavation such as that contemplated under Regulation G1(3). Sun further contends that the plaintiff has failed to allege any facts which could demonstrate that the drilling activity referred to in the particulars of claim qualified as an

excavation for purposes of the Regulation. AMSA however submits that the allegation in paragraph 25 is sufficient to qualify the drilling activity as an excavation for purpose of the Regulation

[24] Sun contends that in considering whether or not the facts in their particulars of claim would give rise to the legal duty and result in the legal liability contended for, regard should be had to the following:-

(a). there was no relationship between AMSA and Sun;

(b). AMSA sought to protect its pipeline by means of clearly visible concrete poles and a large sign. Therefore, Sun and its employees would have been entitled to assume that such measures would be effective and that any intended drilling activity would have been cleared with the plaintiff and such activity would be undertaken so as to avoid any damage to the pipeline;

(c). Sun is a company conducting the business of a hotel. The legal duty of any kind contended for by AMSA would impose an unwarranted burden on Sun and its employees;

(d). it is not alleged and cannot be alleged that Sun or any of its employees were aware that the intended drilling operation would as a fact breach the pipeline; and

(e). further, no facts are pleaded to indicate that Sun or its employees knew that the plaintiff was unaware of the drilling activity and that it had not been cleared with the plaintiff beforehand.

[25] Sun contends that the plaintiff's claim relies solely upon Sun's breach of the legal duty to assure that the plaintiff was notified of the drilling. In paragraph 30 of the particulars of claim, it is alleged that, Sun owed AMSA a legal duty "*to notify it of the intended upgrading work and to afford it an opportunity to safeguard the interests of its pipeline and of its business served by the pipeline with respect to the intended upgrading work*".

[26] The allegation of negligence in paragraph 34 is that "*the failure by the fourth defendant to ensure that the plaintiff was notified of the intended upgrading work was negligent*". Sun contends that the particulars of claim lack an allegation that the legal duty contended for had been breached, as the facts pleaded do not relate to the negligence relied upon in paragraph 34.

[27] Sun on the other hand contends that these legal duties are not the legal duties relied upon by AMSA in is particulars of claim. Reference is made in particular to paragraph 34 wherein the plaintiff relies to the failure by Sun to ensure that AMSA was notified of the intended upgrading work and that this failure amounts to negligence [Emphasis added].

[28] AMSA in this regard relies upon the statutory obligations imposed on Sun, as owner, by the Regulations referred to. The primary legal responsibility, as owner, was to ensure local authority approval was obtained for the upgrading work.

[29] AMSA also refers to Regulation A22(1)(a) in its Heads of Argument which was not specifically referred to in the particulars of claim. Such Regulation provides:-

> "*No work in connection with the erection or demolition of any building shall be commenced unless notice in the form required by the local authority has been given to such local authority by the owner of such building stating that the date on which such erection or demolition will commence.*"

[30] Although this Regulation is not specifically pleaded, reference is made generally to the Regulations as a whole. The facts pleaded in paragraph 31 refer to the obligation on Sun to notify the local authority of the work to be done.

[31] Sun contends that AMSA has not sufficiently identified the Regulation(s) upon which it relies. AMSA, on the other hand, submits that it clearly identified Regulation G, referred in general to the relevant Regulations and pleaded sufficient facts to substantiate reliance on Regulation 22. See *Yannakou v Appollo Club*[16] where Trollip JA held:-

> "*Hence, if he relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it (cf. Ketteringham v City of Cape Town, 1934 AD 80 at p. 90).*"[17]

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[16] 1974(1)SCA 614 A at paragraph 623

[17] See also *Vosal Investments (Pty) Ltd v City of Johannesburg & others [2009] JOL 23873 (GSJ)* and *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer 1997 (1) SA 710 (SCA)*

[32] AMSA contends that for the purposes of any excavation related to the tower Sun was obliged in terms of Regulation G 1(1)-(5) to:

(a). take adequate precautionary measures to ensure that the safety and stability of the gas line was maintained; and

(b). to obtain the prior written authorisation of the local authority for the upgrading work due to the fact that such work was likely to impair the safety and stability of the gas pipeline and the service it entailed. This is covered in paragraph 30, 31, 32 and 10 of the particulars of claim. Sun argued that there is no allegation that it is the owner of building (to place its obligation within Regulation A 22(1)(a)). However, it concedes that it conducts the business of a hotel.

[33] However, if one has regard to all of the allegations in paragraph 10 and paragraphs 25 - 34 taken together, a reasonable interpretation is that the legal duties contend for together with the statutory duties referred to were wrongfully breached. This conduct (the breach of both the positive and statutory duties referred to) is the negligent conduct relied upon. AMSA pleads the existence of a legal duty to notify it. It pleads a failure to so notify. It also pleads other duties relating to various cautionary measures and the requirement of obtaining written authorisation.

[34] AMSA alleges that this is a clear case where the legal duty is established by referring to the facts in paragraph 25 to 34 and incorporating paragraph 10. In addition to the legal duty pleaded, AMSA contends that a statutory duty was imposed upon Sun in terms of the Regulations and that that

statutory duty was breached. It is submitted that the statutory duty arising from the Regulations, and the peculiar facts pleaded in relation to the pipeline, demonstrates AMSA's clear and particular interests as an identifiable plaintiff, thus establishing Sun's legal duty. Together with the fact that there was physical damage to AMSA's property, this places the case beyond the realm of one which is reliant on an omission causing pure economic loss. AMSA submits that Sun cannot contend that there is not even a *prima facie* case of a legal duty established.

[35] Accordingly, it pleads a breach of the various legal duties contended for. AMSA contends that it need plead only the *facta probanda* and not the *facta probantia* – the test being whether there is sufficient particularity to enable the defendants to plead thereto. See *Nel and Others NNO v McArthur and Others.*[18] AMSA contends that the allegations of negligence in the particulars of claim are extensive and are incorporated in paragraphs 10 and 25 to 34, which set out in considerable detail the degree to which the loss was occasioned by AMSA's breach of its legal duties.

[36] In *International Shipping Co (Pty) Ltd v Bentley*[19] the Supreme Court of Appeal dealt with the legal duty and the breach thereof in order for liability to ensue, Corbett CJ held:

> "*In order for respondent to be held liable to International for his reporting as auditor… it is necessary for International to show not only that he acted negligently in so reporting, but also that he acted*

[18] *Nel and Others NNO v McArthur and Others* 2003 (4) SA 142 (T) at paragraph 157H-158B
[19] 1990 (1) SA 680 (A)

unlawfully, i.e. in breach of a legal duty owed to International not to report incorrectly on the financial statements. [In the court a quo] *Goldstone J came to the conclusion that the following facts and considerations established such a legal duty:*

(a)The statutory duty upon the defendant to furnish his report on the financial statements: (s 300 of the Act)…;

(b) the nature and context of the relationship between the parties created a direct link between the plaintiff and the defendant;

(c) the defendant was aware that in monitoring and reviewing the facilities of the Deals Group, the plaintiff would rely upon the financial statements in a serious and business context;

(d) there are no considerations of public policy which should induce the Court to deny liability in a case such as the present."

I agree that these circumstances do create such a duty and I did not understand respondent's counsel to dispute this". [20]

Although this cause is not on all fours with the present case it re-enforces the principle that the defendants acted unlawfully i.e. in breach of a legal duty owed to the plaintiff.

CAUSATION

[37] In regard to causation, AMSA relies upon the allegations in 10.1.1 and 25 – 33. The averments are that Sun had primary legal responsibility and a

[20] Supra at p694 at paragraph D-F

statutory legal duty to, *inter alia,* inform AMSA of the work to be done. Had it done so, the local authority would have been approached. Such approach would have enabled AMSA to protect its property rights. Sun's failure to do so was negligent and AMSA suffered the physical and financial loss which it did. In *International Shipping*, the Court held:

> *"As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently*

closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation". (See generally Minister of Police v Skosana 1977 (1) SA 31 (A), at 34E – 35A, 43E – 44B; Standard Bank of South Africa Ltd v Coetsee 1981 (1) SA 1131 (A), at 1138 H - 1139C; S v Daniëls en 'n Ander 1983 (3) SA 275 (A), at 331B – 332 A; Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) at 914 F – 915 H."

CONCLUSION

[38] At the exception stage the court must decide whether, on any reasonable interpretation and with the evidence which might be led at trial, Sun can satisfy the court that AMSA's particulars of claim do not disclose a cause of action.

[39] Whether or not AMSA will be able to prove the elements required to establish its delictual claim at the trial, is not for this court to determine.

[40] Having regard to the analysis set out above, I am of the view that the plaintiff has at least *prima facie* established a wrongful breach of a positive legal duty to act on Sun's behalf. Such breach resulted in physical and economic damage and was therefore *prima facie* unlawful.

[41] Accordingly, the following order is made:-

(a). The fourth defendant's exceptions are dismissed.

(b). The fourth defendant is to pay the plaintiff's costs.

S E WEINER

JUDGE OF THE HIGH COURT OF SOUTH AFRICA (GLD)

Appearances

For the Plaintiff:	Advocate F A Snyckers SC
	Advocate N K Tsatsawane
Instructed by:	Cliffe Dekker Hofmeyer Inc.
For the Defendant:	Advocate MC Maritz SC
	Advocate GF Heyns
Instructed by:	Gildenhuys Malatji Inc.
Date of hearing:	22 February 2016
Date of Argument:	22 February 2016
Date of Judgment:	6 May 2016