REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title:		**Case No:**
		HC-MD-CIV-ACT-OTH-2020/02366
Olivia Ndahafa Kanyemba-Usiku	1st Plaintiff	**Division of Court:**
		Main Division
and		**Heard on:**
		19 July 2022
Etzold-Duvenhage	1st Defendant	
Ulrich Etzold	2nd Defendant	
Hannelie Duvenhage	3rd Defendant	
Kelina Mushore	4th Defendant	
Heard before:		**Delivered on:**
Honourable Lady Justice Rakow		09 August 2022
		Reason released:
		12 August 2022

Neutral citation: *Usiku v Etzold-Duvenhage (*HC-MD-CIV-ACT-OTH-2020/02366) [2022] NAHCMD 412 (09 August 2022)

Order:

1. The exception is upheld and prayers 1 – 4 of the defendants 'exception are granted.
2. The court finds that the particulars of claim lack essential averments necessary to sustain a cause of action for damages suffered by the plaintiff and she is granted 14 days from this order to amend her particulars of claim to rectify these shortcomings.
3. The applicant/defendant is awarded the costs of this application, costs to include the costs of one instructed and one instructing counsel, but capped in terms of rule 32(11)
4. The matter is postponed to 30 August 2022 at 15h30 for a status hearing.
5. Parties to file a joint case status report on or before 25 August 2022.

Reasons for order:

RAKOW, J:

Introduction

[1] The plaintiff (respondents herein) is Ms. Olivia Ndahafa Kanyemba-Usiku. Initially, the plaintiff was joined by a CC being Temptations Fashion t/a Temptations, of which the plaintiff is the sole owner of the shares. After an application from the defendants, which was successful, to determine an amount of security to be paid in terms of s 8 of the Close Corporations Act, No 26 of 1988, Temptations withdrew from the matter and tendered costs. Only Mrs. Usiku, therefore, remained as plaintiff.

[2] The defendants (applicant herein) are the law firm Etzold-Duvenhage and its partners Mr. Ulrich Etzold, Ms. Hannalie Duvenhage, and Ms. Kelina Mushore, cited as the second, third, and fourth defendants.

[3] The defendants were the legal practitioners of record for Sannamib Investments (Pty) Ltd, which obtained default judgment against the plaintiffs and subsequently a warrant of execution against the property of the plaintiffs. The defendants exercised a rent interdict and attached the property of the plaintiffs. The plaintiffs instituted action against the defendants jointly and severally for the loss sustained as a result of them being deprived of their product by the exercise of the rent interdict, which includes loss of profit, loss of future income, trauma, etc, which amount to N$ 65 000 000.00.

The particulars of claim

[4] The particulars of claim (as amended) were summarised by the defendant's legal practitioners. The particulars of claim made the following averments:

[4.1] Summons under case number 10074/2018 was served on the plaintiff by the defendants on behalf of their client, Sannamib Investments (Pty) Ltd, on or about 23 November 2018, at Shop 22, Windhoek Sanlam Centre, 145 Independence Avenue, Windhoek when the plaintiff was on sick leave, albeit the plaintiff was notified of the summons.

[4.2] The summons provided for payment in installments and consent to judgment, in terms of s 75 and s 58, respectively, of the Magistrates' Courts Act 32 of 1944("Magistrates' Courts Act").

The plaintiff emailed the defendants' office to make payment arrangements, on 27 November 2018, again on 27 November 2018, and on 29 November 2018, but the defendants did not respond to the plaintiff's emails. The defendants applied for default judgment on or about 7 December 2018, unbeknownst to the plaintiff, on account thereof that the time to enter an appearance to defend had elapsed. At some stage during 2018, the plaintiff called the defendants' office to make payment arrangements, but a meeting was not possible because the defendants were closing their offices for the December holidays, and only reopening on 15 January 2019. On 15 January 2019, the plaintiff attended to the defendants' office, admitted liability, signed acknowledgments of debts, and consented to judgment in terms of s 58 of the Magistrates' Courts Act. The plaintiff established, on 26 April 2019, that default judgment in terms of rule 12 of the Magistrates' Court rules had been granted on 16 April 2019. The consent was never filed or brought to the attention of the clerk of the Court "hence the default judgment in terms of rule 12 instead of s 58 as per Plaintiff consent".

[4.3] The plaintiff alleges:

- That legal practitioners should act as officers of the Court, should comply with their legal obligations imposed for the benefit of members of the general public who depend on their competence, and avoid advancing their clients' cause in a manner that affects their duties towards the Court;
- That by ignoring the plaintiff's correspondence to make payment arrangements, the defendants negligently failed to comply with their legal duty and are liable for losses sustained by the plaintiff.
- That by failing to sign and file the consent the defendants breached a duty wrongfully and negligently, and failed to act in good faith in the exercise of a legal duty, resulting in irreparable financial losses sustained by the plaintiff, which were foreseeable and preventable;
- That the defendants interfered with the plaintiff's right in terms of Art 21(1) (j) of the Constitution to do business, and their conduct led to unlawful interference with the plaintiff's economic activities;
- That as a result of the defendants' unfair, unreasonable and unconstitutional acts, the plaintiff suffered damages in the form of loss of business/ income, that legal practitioners have a fiduciary duty to act in the public interest, should not be in breach of that duty, and cause loss and damage
- That the defendants misled the Court by failing to disclose the existence of the acknowledge of debt with consent, and instead obtained default judgment

- That the defendants had a duty to inform the Court of all material matters within their knowledge, and that they failed in this duty in order to promote the interests of their client, failing to honour their undertaking to the plaintiff that they would proceed to apply for judgment in terms of s 58 as agreed, and that they ignored all 3 emails sent by the plaintiff
- That under the aforesaid premises the defendants disrupted the plaintiff's business, depriving the plaintiff of income, and the plaintiff suffered consequential losses or damages, and irreparable harm, as a result of the damages caused by business disruption, since 7 May 2019

[4.4] As damages the plaintiff claims:

- "Actual income loss" in the amount of N$12 000 000.00;
- "Future and consequential loss" in the amount of N$15 000 000.00;
- "Goodwill and brand damage" in the amount of N$7 000 000.00;
- "Trauma and other Financial interruptions" in the amount of N$11 000 000.00; and
- "Punitive Damage" in the amount of N$20 000 000.00; plus interest and costs of suit.

The exception

[5] The defendant filed grounds for exception against the particulars of claim of the defendant. The first exception deals with the fact that the plaintiff is the only plaintiff and the plaintiff sued for certain damages as set out above. But after studying the POC it is clear that the plaintiff is suing because of damages suffered by the CC, who is no longer a party to the proceedings. The plaintiff's claim against the defendants constitutes an *aquilian* action, for delictual damages alleged to have been suffered by the plaintiff in her personal capacity, albeit *ex facie* the particulars of claim these appear to be losses suffered by the CC of which the plaintiff is a member, barring perhaps a portion of one head of damage being "trauma" suffered by the plaintiff in person.

[6] The exceptions deal in essence with the question of damages having been suffered, a *petitio principii*, which is an element of the *aquilian* action that the plaintiff essentially takes for granted in the particulars of claim, and assumes, but the plaintiff has failed to establish that any person has actually suffered any damages, and in particular: -

- The plaintiff fails to plead a *prima facie* case that she, in her personal capacity, has suffered any damages; and
- In aggravation of the fact that the only plaintiff before Court has not suffered damages, the plaintiff, in any event, fails to plead a *prima facie* case that the CC has suffered any

damages.

[7] The defendants' first ground of exception, therefore, relates to what is known in the Common Law as the rule against "reflective loss"[1]. The rule against reflective loss was developed in England in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[2] which is an evolution of sorts of the rule developed in the English courts in *Foss v Harbottle*[3], which states that the only person who can seek relief for an injury done to a company, where the company has a cause of action, is the company itself.

[8] The second exception which was raised but perhaps not so strenuously argued as the first is that neither the plaintiff nor the CC actually suffered damages (and to that end the 5 elements of the Aquilian action are not pleaded, and cannot be proved) because not only does the plaintiff admit the liability of the CC towards the defendants' client in the context of the recovery action initially instituted, but the plaintiff also annexes a document, signed by the plaintiff (in her capacity as a member of the CC) that constitutes an acknowledgment of liability (the AOD).

Arguments by the parties

[9] On behalf of the defendants, who raised the exception, it was argued that the court should follow the common law as established in *Prudential Assurance* and find that the plaintiff did not make out a case for the recovery of damages when the party who suffered the damages and who can in law recover damages, is the CC who is a legal entity in its own with its own rights.

[10] The plaintiff on the other hand argued that the law as established in *Prudential Assurance*[4] has been criticized in numerous jurisdictions and referred the court to a recent matter in the English jurisdiction where the approach was indeed again criticized. The court was referred to *Sevilleja v Marex Financial Ltd*[5] and invited to follow the sentiments expressed in this matter by some of the minority judgements. This mainly deals with the possibility to sue for reflective loss

[1] See: Cassim FHI et. al. *CoCtemporary Company Law* 2nd Ed Juta Press 2013 at P. 517, para. 12.2.4 and at P. 822, para. 16.5.3 and *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1981] Ch 257; 1982 [1] Ch 204 (CA); *Itzikowitz v ABSA Bank Ltd* 2016 (4) SA 432 (SCA); *Hlumisa Investment Holdings Rf Limited & Another v Kirkinis & Others* 2020 (5) SA 419 SCA at [24] to [4].

[2] Supra.

[3] *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189

[4] Supra.

[5] *Sevilleja v Marex Financial Ltd* [2020] UKSC 31.

when the company has no cause of action or it is impossible for the company to recover the debt, or the company failed to pursue the recovery of such debt. She further argued that she is the only shareholder in the CC and as such, there exists a very close relationship between her and the CC.

[11] It was further pointed out on behalf of the defendant, to the court that in the matter of *Sevilleja v Marex Financial Ltd*[6] the majority of the bench still upheld the position as set out in *Prudential Assurance*.[7]

Legal considerations

[12] It is an elementary principle in the law of delict that 5 elements of the delictual action must be pleaded and proved, in order to establish and prove a cause of action under the Aquilian action. They are[8]: -

- That there was an act or omission on the part of the wrongdoer;
- That the act or omission was/ is wrongful (*iniuria*);
- That there was fault on the part of the wrongdoer (*culpa/ dolo*);
- That there is a causal nexus between the wrongful act and the harm suffered;
- That the plaintiff suffered patrimonial or non-patrimonial harm (damnum, or damages)

[13] The judgment in *Sevilleja* [9] limited the application of the rule against reflective loss to shareholders and shareholders only. Lord Reed said as follows[10]:

'79. Summarising the discussion to this point, it is necessary to distinguish between (1) cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer, and (2) cases where claims are brought, whether by a shareholder or by anyone else, in respect of loss which does not fall within that description, but where the company has a right of action in respect of substantially the same loss.

80. In cases of the first kind, the shareholder cannot bring proceedings in respect of the company's loss, since he has no legal or equitable interest in the company's assets: *Macaura and Short v Treasury*

[6] Supra.

[7] Supra.

[8] See generally van der Walt JC & Midgeley JR *Principles of Delict* 4th Ed Lexis Nexis Press Durban at pg 10 to 11, para. 8.

[9] Supra.

[10] At para 79 – 83.

Comrs. It is only the company which has a cause of action in respect of its loss: *Foss v Harbottle*. However, depending on the circumstances, it is possible that the company's loss may result (or, at least, may be claimed to result) in a fall in the value of its shares. Its shareholders may therefore claim to have suffered a loss as a consequence of the company's loss. Depending on the circumstances, the company's recovery of its loss may have the effect of restoring the value of the shares. In such circumstances, the only remedy which the law requires to provide, in order to achieve its remedial objectives of compensating both the company and its shareholders, is an award of damages to the company.

81. There may, however, be circumstances where the company's right of action is not sufficient to ensure that the value of the shares is fully replenished. One example is where the market's valuation of the shares is not a simple reflection of the company's net assets, as discussed at para 32 above. Another is where the company fails to pursue a right of action which, in the opinion of a shareholder, ought to have been pursued, or compromises its claim for an amount which, in the opinion of a shareholder, is less than its full value. But the effect of the rule in *Foss v Harbottle* is that the shareholder has entrusted the management of the company's right of action to its decision-making organs, including, ultimately, the majority of members voting in general meeting. If such a decision is taken otherwise than in the proper exercise of the relevant powers, then the law provides the shareholder with a number of remedies, including a derivative action, and equitable relief from unfairly prejudicial conduct.

82. As explained at paras 34-37 above, the company's control over its own cause of action would be compromised, and the rule in *Foss v Harbottle* could be circumvented, if the shareholder could bring a personal action for a fall in share value consequent on the company's loss, where the company had a concurrent right of action in respect of its loss. The same arguments apply to distributions which a shareholder might have received from the company if it had not sustained the loss (such as the pension contributions in Johnson).

83. The critical point is that the shareholder has not suffered a loss which is regarded by the law as being separate and distinct from the company's loss, and therefore has no claim to recover it. As a shareholder (and unlike a creditor or an employee), he does, however, have a variety of other rights which may be relevant in a context of this kind, including the right to bring a derivative claim to enforce the company's rights if the relevant conditions are met, and the right to seek relief in respect of unfairly prejudicial conduct of the company's affairs.'

[14] In the matter of *Johnson v. Gore Wood & Co*.[11] the House of Lords explained the principles applicable and how these were crystalized as follows:

[11] *Johnson v. Gore Wood & Co* [2000] UKHL 65; [2001] 1 All ER 481; [2001] 2 WLR 72 (14th December, 2000)

'On this issue we were referred to a number of authorities which included *Lee v. Sheard* [1956] 1 QB 192; *Prudential Assurance v. Newman*, above; *Heron International Ltd. and Others v. Lord Grade, Associated Communications Corp. Plc. and Others* [1983] BCLC 244; *R. P. Howard Ltd. & Richard Alan Witchell v. Woodman Matthews and Co.* (a firm) [1983] BCLC 117; *George Fischer (Great Britain) Ltd. v. Multi Construction Ltd., Dexion Ltd.* (third party) [1995] 1 BCLC 260; *Christensen v. Scott* [1996] 1 NZLR 273; *Barings plc. (in administration) and another v. Coopers & Lybrand (a firm) and others* [1997] 1 BCLC 427; *Gerber Garment Technology Inc. v. Lectra Systems Ltd. and another* [1997] RPC 443; *Stein v. Blake and Others* [1998] 1 All ER 724; and *Watson and Another v. Dutton Forshaw Motor Group Ltd. and others*, Court of Appeal, unreported, 22 July 1998.

These authorities support the following propositions:

1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss. So much is clear from *Prudential*, particularly at pages 222-3, *Heron International*, particularly at pages 261-2, *George Fischer*, particularly at pages 266 and 270-271, *Gerber and Stein v. Blake*, particularly at pages 726-729.

2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding. This is supported by *Lee v. Sheard*, at pages 195-6, *George Fischer and Gerber*.

3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other. I take this to be the effect *of Lee v. Sheard*, at pages 195-6, *Heron International*, particularly at page 262, R. P. *Howard*, particularly at page 123, *Gerber and Stein v. Blake*, particularly at page 726. I do not think the observations of *Leggatt L.J. in Barings* at p. 435B and of the Court of Appeal of New Zealand in Christensen v. *Scott* at page 280, lines 25-35, can be reconciled with this statement of principle.

These principles do not resolve the crucial decision which a court must make on a strike-out application,

whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of Prudential at page 223) the loss claimed is "merely a reflection of the loss suffered by the company." In some cases the answer will be clear, as where the shareholder claims the loss of dividend or a diminution in the value of a shareholding attributable solely to depletion of the company's assets, or a loss unrelated to the business of the company.'

[15] The above cases reflects the arguments and application of the rule against claims for reflective damages in the English jurisdictions. In the South African courts this rule was discussed in *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others*[12], a South African Supreme Court decision. Navsa JA and Schippers JA explained as follows:

'The rule against claims for reflective loss will be examined in some detail later in this judgment. For present purposes it suffices to state its essentials: Where a wrong is done to a company, only the company may sue for damage caused to it. This does not mean that the shareholders of a company do not consequently suffer any loss, for any negative impact the wrongdoing may have on the company is likely also to affect its net asset value and thus the value of its shares. The shareholders, however, do not have a direct cause of action against the wrongdoer. The company alone has a right of action. In their exceptions, the directors contended that ABIL and/or African Bank ought to have brought an action, if one was sustainable, and not the appellants as shareholders in ABIL. The exceptions accordingly encompassed the no-loss principle.'

[16] Further in the *Hlumisa Investments* judgement, the court referred in more detail to the rule and said the following:

'[30] In 2018 the Court of Appeal considered the scope of the rule against reflective loss in *Garcia v Marex Financial*[13]. Flaux LJ observed that the justification for the rule is fourfold:

"The four aspects or considerations justifying the rule which emerge from the authorities, in particular Lord Millett's speech in *Johnson v Gore Wood & Co* [2002] 2 AC 1, are: (i) the need to

[12] *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA).

[13] *Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468 ([2018] 3 WLR 1412; [2019] QB 173) at 188 – 189.

avoid double recovery by the claimant and the company from the defendant . . . ; (ii) causation, in the sense that if the company chooses not to claim against the wrongdoer, the loss to the claimant is caused by the company's decision not by the defendant's wrongdoing . . . ; (iii) the public policy of avoiding conflicts of interest particularly that if the claimant had a separate right to claim it would discourage the company from making settlements . . . ; and (iv) the need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors."

[31] Blackman, *Jooste and Everingham* provide a slightly different rationale for the rule against reflective loss in their *Commentary on the Companies Act*,[14] which is perhaps more convincing. On the 'double recovery' justification for the rule, and the view that allowing a personal action would subvert the rule in *Foss v Harbottle*,[15] the authors say the following:

" This explanation is misleading. When the value of shares is depreciated or destroyed as a consequence of harm done to the company, the shareholders suffer harm, albeit that the harm is indirect. A person who suffers "indirect" harm, suffers harm. And there is no principle of law that denies a person a claim for damages, merely because the harm he suffered was "indirect harm", although of course the question of remoteness of damage may arise. The principle is that where harm is wrongfully caused directly to A (e.g. the company) and indirectly to B (e.g. the company's shareholders), the law gives the right of action to claim compensation to A. It does so because if, instead, the right were given to B, A and A's creditors would be prejudiced. What is more, B's action would involve a determination of A's loss. In the case of a company, each shareholder would have an action, and consequently there would be a multiplicity of actions, many of which would be for very small sums. If, instead, the cause of action is given to A, the law will not only ensure that A suffers no loss: it will also ensure that B suffers no loss. This is not because B will, then, merely suffer "indirect" or "incidental" harm. It is because B suffers no harm at all. A's right of action is an asset which, itself, compensates A for his loss. If A (eg the company) is able to obtain full compensation from the wrongdoer, A's financial position is unaffected. And therefore B's financial position (e.g. the value of the company's shareholders' shares) is also unaffected."

And in a later paragraph:

"It is usually said that if both the company and the shareholder were given the right to recover, the wrongdoer would suffer "double jeopardy" and the shareholder might receive "double compensation". If the shareholder sued first, the wrongdoer would be placed in double jeopardy because, after paying the shareholder, he would still be liable to the company; and if, then, the company obtained recovery, the shareholder would receive double compensation. However, despite the frequency with which this argument has been advanced, it is mistaken. If the company has the right of action, the wrong done to it causes its shareholders no harm. Hence the

[14] 'Remedies of Members' in MS Blackman et al Commentary on the Companies Act (RS 9 2012) at 9 – 67 to 9 – 68 – 1 (citations omitted; emphasis original).

[15] Supra.

shareholder can have no action. The problem of "double jeopardy" and "double compensation" simply does not arise. Thus, it is not merely the company's existence as a separate legal person that deprives the shareholder of an action against the wrongdoer. What deprives the shareholder of a right of action is the fact that the company has a right to recover damages for the loss it has suffered."

There can, however, be no doubt that there are sound policy and jurisprudential reasons for the rule.'

Conclusion

[17] It is correct that the initial first plaintiff, the CC withdrew from these proceedings after being ordered by this court to pay security in terms of s 6 of the Closed Corporations Act, 26 of 1998. The court further finds that although the authorities discussed above refer to companies and their shareholders, it can be made applicable to closed corporations and their members in a similar manner as the relationship between the members and the closed corporation and shareholders and a company is similar in nature.

[18] The claim is in essence reflecting a reflective loss suffered by the plaintiff as all the losses and damages complained about, were caused by some injury done to the CC. In her particulars of claim, she makes out no case for damages suffered directly by herself due to the conduct of the defendants. The "no reflective loss" principle is a part of our common law and the court took note of how it developed since the early days of *Foss v Harbottle*[16]. It however applies when both the company or closed corporation and the shareholder or member have a claim against a party based on the same set of facts.

[19] The court further finds that it has not become an impossibility for the cc to recover the losses suffered and in achieving the object of the court's purpose, as so aptly described in *Johnson v. Gore Wood & Co* , in ascertaining 'whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of Prudential at page 223) the loss claimed is "merely a reflection of the loss suffered by the company'[17] and in this instance, it was indeed shown that the loss complained of, is a mere reflection of the loss suffered by the company.

[20] For the above reasons I will not deal with the second objection as I came to a final conclusion based on the first objection.

[16] Supra.

[17] Supra.

[21] In the result, I make the following order:

1. The exception is upheld and prayers 1 – 4 of the defendants 'exception is granted.
2. The court finds that the particulars of claim lack essential averments necessary to sustain a cause of action for damages suffered by the plaintiff and she is granted 14 days from this order to amend her particulars of claim to rectify these shortcomings.
3. The applicant/defendant is awarded the costs of this application, costs to include the costs of one instructed and one instructing counsel, but capped in terms of rule 32(11)
4. The matter is postponed to 30 August 2022 at 15h30 for a status hearing.
5. Parties to file a joint case status report on or before 25 August 2022.

Judge's signature	**Note to the parties:**
E RAKOW Judge	Not applicable
Counsel:	
1st & 2nd Plaintiffs:	**1st - 4th Defendants**:
O N Kanyemba-Usiku (In person) General Murtala Muhammed Avenue Eros, Windhoek	Adv Barnard (with him L Du Pisani) Instructed by Du Pisani Legal Practitioners, Windhoek