TOBACCO PROCESSORS (PRIVATE) LIMITED
versus
BAK STORAGE (PRIVATE) LIMITED
and
SECURITAS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 4 October 2011 and 21 February 2012

R. Matsika, for the excipient (1st defendant)
T. Mpofu, for the respondent (plaintiff)

PATEL J: The 1st defendant leased its premises to the plaintiff in June 2009 for the warehousing, storage and related handling of tobacco bales. The 2nd defendant contracted to provide security services for the premises and its contents. Following the loss of 1446 bales of tobacco, the plaintiff sued both defendants for their value in the sum of US$438,355. The plaintiff's claim is grounded in contract or, in the alternative, in negligence.

The 1st defendant excepts to the claim on the following grounds. To the extent that it is based on contract, the 1st defendant relies on its standard conditions of storage and handling. Clause 1 thereof excludes liability on grounds other than gross negligence or wilful default, neither of which has been pleaded, as well as liability occasioned by theft or vandalism. As regards the claim in delict, it is averred that this is incompetent because it is for mere economic loss arising from negligent breach of contract.

In the event, the principal issue for determination in this matter is whether or not the plaintiff's claim discloses a valid cause of action.

The Declaration

Paragraphs 9 and 11 of the Declaration set out the claim against the 1st defendant. They state as follows:

> "9. In breach of the agreement between the Plaintiff and it, the 1st Defendant:
>
> 9.1 Failed to exercise due care and to safely keep the tobacco bales delivered at the premises by and from the Plaintiff's clients, resulting in loss of some bales.
>
> 9.2 Failed to account to the Plaintiff for some of the bales of tobacco which were delivered at the premises by and from the Plaintiff's clients."
>
> "11. Alternatively, the 1st Defendant was at fault or negligent in one or more of the following respects:
>
> 11.1 The 1st Defendant failed to take reasonable steps to ensure that the tobacco bales were kept safely.
>
> 11.2 The 1st Defendant failed to take reasonable steps to prevent the theft or loss of the tobacco bales.
>
> 11.3 The 1st Defendant's employees participated in or abetted the theft of the bales of tobacco which were in their custody."

Validity of Claims

Mrs. *Matsika* contends that under the contract between the parties the 1st defendant is only liable for gross negligence or wilful default and that neither has been pleaded in the Declaration. The contract also excludes liability for theft which is specifically pleaded. Adv. *Mpofu* counters that the Declaration does implicitly allege wilful default. In addition, he submits that a party cannot contractually exclude liability for wilful misconduct or criminal or dishonest activity, *i.e.* theft.

I fully agree. As was authoritatively enunciated in *Tubbs (Pvt) Ltd* v *Mwamuka* 1996 (2) ZLR 27 (S) at 32 & 34, a party cannot exempt himself for loss or damage to the property of another that is caused by his own *dolus* or that of his employees. To allow him to do so would be *contra bonos mores*. I further agree that the allegations enumerated in the Declaration necessarily imply gross negligence or wilful default on the part of the 1st defendant. It follows that the contractual exemption from liability for theft *in casu* is unenforceable and cannot sustain the exception to the plaintiff's

claim. Whether there was any theft, wilful default or gross negligence are matters for determination by evidence at the trial.

Turning to the claim in delict, Mrs. *Matsika* submits that this claim is incompetent because it is for pure economic loss arising from the negligent breach of a contract. In essence, the negligence alleged by the plaintiff is nothing more than the alleged malperformance by the 1st defendant of its contractual obligations. The plaintiff is therefore confined to its contractual claim. She relies in this regard on the decisions in *Lillicrap, Wassenaar and Partners* v *Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 448 (AD) at 499A-501H, and *Holtzhausen* v *ABSA Bank Ltd* 2008 (5) SA 630 (SCA) at para. 6.

As Mrs. *Matsika* quite correctly submits, these cases provide authority for the following propositions. No claim is maintainable in delict where the negligence relied upon consists in the breach of a contractual term. Where it is alleged that the defendant has negligently performed its contractual duties resulting in pure economic loss, no cause of action lies in delict as that would constitute an extension of the Aquilian action to a contract. The proper remedy arises from the contract itself and lies in the realm of contractual rather than delictual remedies.

However, as was pointed out in the *Lillicrap* case, at 496D-I, and in *Holtzhausen's* case, at paras. 6 & 7, they do not constitute authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. The law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages both in delict and in contract. Put differently, the same conduct of the defendant may constitute both a breach of contract and a delict, *viz.* an infringement of the plaintiff's rights *ex contractu* and a right which he had independently of the contract. In such a case, the plaintiff is allowed to choose which remedy he wishes to pursue.

In this regard, Adv. *Mpofu* submits that the plaintiff has specifically pleaded a duty of care. If the allegations relating to contract are excised from the Declaration, it would remain good on the basis of the remaining allegations founded upon Aquilian liability, which are independent from

the contract between the parties. In any event, he goes further to contend that the South African authorities were emphatically rejected in *J. Paar & Company (Pvt) Ltd* v *Fawcett Security Organisation (Bulawayo) (Pvt) Ltd* 1986 (2) ZLR 255 (S) at 265-266. He is clearly incorrect in that contention. Although the Supreme Court did consider and decline to follow the *Lillicrap* case, it did so because the facts before it were distinguishable from those in *Lillicrap*. It certainly did not overrule or reject the principles elaborated in that case. On the contrary, the Court's approval of the views expressed by Professor Boberg, in the *South African Law Journal* (1985) 214, at pp. 217-218, is perfectly concordant with the position taken in the *Lillicrap* and *Holtzhausen's* cases vis-à-vis the possible concurrence of actions both in contract and in delict. Indeed, the examples cited by Professor Boberg graphically illustrate the point that the claim in delict must found an independent cause of action from that grounded in contract. I fully subscribe to his broad statement of the proposition that "the law of delict does not prescribe what must be done; it prescribes how something must be done if the actor decides to do it."

Turning to the instant case, the claim in paragraph 11.1 of the Declaration is essentially the same as the claim in paragraph 9.1 and is therefore defective in that regard. However, what is pleaded in the remainder of paragraph 11, pertaining to the theft of the tobacco bales, is materially different and arises independently from the contractual *causa* pleaded in paragraph 9. In my view, the negligence alleged by the plaintiff goes beyond the mere malperformance of the 1st defendant's contractual obligations. It follows that the 1st defendant's exception must also fail with respect to the plaintiff's claim in delict.

The Exception Procedure

Given the foregoing conclusions, it is not necessary for me to determine the additional arguments put forward by counsel as to the procedure by way of exception. However, for the sake of completeness, it may be pertinent to remark on one of the larger issues raised herein.

It is trite that the procedure for excepting is to be employed for "those objections which go to the root of the declaration and allege that the declaration does not disclose a cause of action at all." See *Edwards* v *Woodnutt N.O.* 1968 (4) SA 184 (R) at 186. What is arguable is whether it is permissible to allow an amendment to the declaration to cure this defect. The decision in *Boyd* v *Minister of Justice Legal and Parliamentary Affairs* 1990 (2) ZLR 364 (H) at 368, is to the effect that such amendment is not desirable because it defeats the very purpose of exception proceedings. As against this is the more flexible approach adopted in *Levenstein* v *Levenstein* 1955 (3) SA 615 (SR) at 619, and in *Adler* v *Elliot* 1988 (2) ZLR 283 (S) at 292. In the latter case, the Supreme Court observed that a claim "should not be dismissed on an exception where it is possible that the party affected may be able to allege further facts that would disclose a cause of action". In such instances, the party should be given leave to amend and the claim should be determined on the basis of evidence lead at the trial.

Mrs. *Matsika* submits that these cases are distinguishable because they deal with exceptions to vague and embarrassing pleadings. They must, therefore, be confined to such exceptions and not be extended to pleadings which do not disclose any cause of action. While I agree that leave to amend pleadings should not be granted willy-nilly, I do not think that the authorities cited can be construed to exclude the possibility of amendment in appropriate circumstances, even where no cause of action is disclosed. It seems to me that each case must be considered on the facts peculiar to it and having regard to the conduct of the parties in relation to the proceedings generally.

As regards costs, I take the view that the exception *in casu* was not entirely unarguable and raised certain points of appreciable procedural importance. The disposition of costs should therefore be determined *in fine*. The exception is accordingly dismissed, with costs being in the cause.

Atherstone & Cook, plaintiff's legal practitioners
Wintertons, 1st defendant's legal practitioners
Coghlan Welsh & Guest, 2nd defendant's legal practitioners