IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 34882/2005

DATE: 05/11/2007
UNREPORTABLE

In the matter between:

THE JSE SECURITIES EXCHANGE SOUTH AFRICA	**EXCIPIENT**
And	
JOINT MUNICIPAL PENSION FUND	**RESPONDENT**

In re the matter between:

JOINT MUNICIPAL PENSION FUND	Plaintiff
And	
DELOITE & TOUCHE	1st Defendant
PRICEWATERHOSUE COOPERSINC	2nd Defendant
THE JSE SECURITIES EXCHANGE SOUTH AFRICA	3rd Defendant
INDEPENDENT STRATEGIC INVESTMENT SERVICES (PTY) LTD	4th Defendant
MR A D NIEMANDT	5th Defendant
MR P J VAN DEN HEEVER	6th Defendant
MR S J BENADIE	7th Defendant
MR P BENNETT	8th Defendant

DR J H DE JAGER	9th Defendant
MR J C JONCK	10th Defendant
MR J A C MARITZ	11th Defendant
MR C MULLER	12th Defendant
REVEREND A S NEL	13th Defendant
MR G J PARSONS	14th Defendant
MS M SMITH	15th Defendant
MR W F STEINBERG	16th Defendant
MR G L VAN NIEKERK	17th Defendant
MR A J DU PLESSIS	18th Defendant
MR J F W POTGIETER	19th Defendant
MR D J VAN HEERDEN	20th Defendant
MR P F J ZIETSMAN	21st Defendant
MS H M JOUBERT	22nd Defendant
MR D P CROUS	23rd Defendant
REGISTRAR OF PENSION FUNDS	24th Defendant
PENSUE RETIREMENT FUND ADMINISTRATORS (PTY) LTD	25th Defendant

JUDGMENT

HARTZENBERG, J

[1] When one suffers damages it is natural to look for someone to blame. After all it is not easy to admit that one is the author of one's own disaster. When a fund loses R1,9 billion on the Johannesburg Stock Exchange (the JSE) there are many considerations why possible entities from which the loss can be recovered are urgently to be found especially if the fund is a pension fund whose function it is to provide for the elderly and the infirm and the loss has a direct effect on the means available to them. If one is on the receiving end of a claim for damages in the amount of R1,9 billion it is not unnatural to deny liability.

[2] As everybody knows speculation is rife on the JSE. Some people think that it is nothing else but gambling. Then there are people who have a very good knowledge of the stock market and its intricacies to whom it isn't such a big gamble. By and large big amounts of money are daily won and lost on the JSE. Those gains and losses become spectacular when the investors venture into the futures and options market on the SAFEX division of the JSE. Unlike in the case of ordinary stocks and shares where the script has to be delivered and the price has to be paid, only 10% of the price needs to be paid, initially. It follows that an upward movement on the market which would have yielded a modest profit, if the whole price had been paid, yields quite a handsome return on the 10% investment. The opposite is also true. A slump in the market can easily extinguish one's 10% deposit and require even further payments with disastrous results for the investor.

[3] Between October 2002 and January 2003 the plaintiff, the Joint Municipal Pension Fund (the Fund), dabbled with maize on the SAFEX to such an extent that it lost just over R1,9 billion. W J Morgan & Associates (Pty) Ltd ("Morgan"), a member of JSE and more in particular of the SAFEX, was at all relevant times and in terms of a written mandate appointed as the broker of the Fund and authorized to trade on behalf of the Fund on the SAFEX on a discretionary basis. The Fund alleges that unbeknown to it, but to the knowledge of the JSE, Morgan acted dishonestly towards it in that Morgan transferred personal losses to the account of the Fund. That is alleged to have happened on 13 November 2001, 16 November 2001 and 4 December 2001. In substantiation of that allegation an indictment against Morgan is annexed to the particulars of claim. The Fund further states that in terms of the Rules promulgated in terms of the Pension Fund Act, No. 24 of 1956, and more in particular Rule 28, a pension fund is prohibited from investing more than 2.5% of its assets on the SAFEX. The Fund alleges that it was unaware of Morgan's trading on its behalf and that, if it had been alerted to his fraudulent behaviour during November and December 2001, it would have terminated its mandate and would have been saved from the dire consequences of Morgan's trading on its behalf. It is alleged that the JSE was aware of the extent to which Morgan exposed the Fund and of the nature of the Fund and that the JSE had a duty to inform the Fund of Morgan's previous behaviour and of the extent of the investments in the SAFEX.

[4] The Fund wants to recover some of its losses. It has instituted an action against Morgan and the main characters in that company. In this matter which is a separate action from that one it has instituted action against both its external and internal auditors, against the JSE,

against its investment risk adviser, against a number of its trustees, against a number of its employees including its Chief Executive Officer until June 2002, against the Registrar of Pension Funds and against Pensure Retirement Fund Administrators (Pty.) Ltd. There is a likelihood of a consolidation of the two actions. With twenty-seven defendants and many transactions which gave rise to the R1,9 billion loss it is expected that the trial in this matter will take a very long time and will be an expensive exercise.

[5] The Fund's claim against the external auditors is broadly speaking that they failed to qualify their report for the year ending 31 December 2001 and that as a result thereof people who could have caused the investments, during the period October 2002 until January 2003, not to have been made, had not been warned of the dangers inherent in the those investments. Its case against the internal auditor for the year January 2002 until December 2002 is that despite an audit it failed to warn it against the speculation on the SAFEX which was palpably irregular. The case against the investment risk adviser is based on a breach of its contractual obligation to disclose the irregularity and dangers involved in the investment on the SAFEX to itself and to the Registrar of Pension Funds. The case against the trustees is that they failed to fulfil their obligations towards the Fund and failed to appreciate the risk to which the Fund was exposed during the latter part of 2001 and the beginning of 2002. The case against the 22nd defendant, the Chief Executive Officer of the Fund after June 2002 was that he was aware of the fact that the investments, by Morgan, in SAFEX exceeded the permissible quantities which the Fund could acquire and failed to inform the Registrar of Pensions thereof. The case against the trustees is based on a breach of their duties as trustees and the case against Pensure and the erstwhile Chief Executive Officer is based on a breach of a contractual duty.

[6] The JSE gave notice of an exception to the Fund upon receipt of the particulars of claim. Thereafter the JSE amended the particulars of claim. It inserted approximately 100 extra pages. The Fund has again noted an exception against the amended particulars of claim. The Fund seeks to hold the JSE delictually liable for an alleged negligent omission which caused it to suffer pure economic loss. The claim is pleaded in the alternative on the basis that the JSE had knowledge of certain facts which gave rise to a duty on its part to warn the Fund against the broker. In the alternative the Fund maintains that the JSE ought to have had knowledge of those facts. The exception has two legs. In the first place the JSE maintains that assuming that it had knowledge of the facts the *Aquilian* action does not underlie a claim like the present one. The second exception is against the alternative claim based on the contention that the JSE ought to have had knowledge of the facts. The argument is the same except that the JSE contends that *a priori* its exception on this basis is a good one.

[7] The parties are agreed that the only question that is relevant for the decision in this matter is whether the conduct of the JSE attributed to it by the Fund is wrongful. They are further agreed that the conduct will only be held to be wrongful if policy considerations dictate that the JSE be held liable. It is common cause that the existence of negligence and causation will be established.

[8] The Fund alleges that its case against the JSE is soundly based on the principles enunciated in the well-known judgment in *Administrateur, Natal v Trust Bank van Afrika Beperk,* 1979 (3) SA 824 (A) and the law as it developed since then. The JSE scoffs at the very idea. It all goes to show that Rumpff CJ was correct when he foresaw that the child brought into the world would in all probability be a problem child. Counsel dealt with many judgments both of our courts and of the English courts and are more or less agreed as to the stage to which the law has developed, except that Mr. Cilliers places great emphasis on the development of this aspect in English law and urges the court to adopt the approach of the House of Lords in *Yuen Kun-yeu and others v Attorney General of Hong Kong,* to which judgment reference is made in paragraph [13] hereunder, and Mr Symon finds the English law singularly unhelpful for the decision of this matter. I must again thank counsel for a very lucid and entertaining exposition of the law on this aspect.

[9] It is so that before a person can become delictually liable for the loss of another, the former's act or omission must be found to have been unlawful, culpable and the legal cause of the loss[1]. A positive act, coupled with negligence, that causes physical harm, to person or property, is *prima facie* wrongful[2]. Where the conduct complained of is an omission, such conduct is *prima facie* lawful[3]. Special circumstances have to be established before liability for an omission will, in law, be attributed to the alleged wrongdoer[4]. Where the harm is not physical harm to person or property, but pure economic loss, the causing of the harm is also *prima facie* lawful[5] Again special circumstances have to exist before legal liability will be found to exist. It follows that it becomes even more difficult to impute legal liability where not only the conduct complained of is an omission but the harm, which has befallen the plaintiff, is pure economic loss. Grosskopf AJA in *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 (1) SA 475 (A) at 504 G explained about such a situation that South African law is cautious not to extend the scope of the Aquilian action unless there are positive policy considerations which favour such an extension.

[10] It is unnecessary, for the purposes of this judgment, to dissect the authorities on this topic with the thoroughness and precision that counsel on both sides have done. Suffice it to say that an important consideration for a decision whether the conduct was unlawful or not is whether there existed some or other link or close relationship between the plaintiff and the "wrongdoer"[6]. The expression "proximate relationship" is used in English law. A further requirement before a defendant can be held liable for economic loss caused to a plaintiff is that it has to be found positively that there is a duty on the defendant to avoid the loss. Such a finding is to be based on public or legal policy considerations that make it fair, just and

---

1 *Sea Harvest Corporation (Pty) Ltd.v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) at 837 par. 19

2 *Trustees of Two Oceans Aquarium v Kantey & Templar(Pty) Ltd* 2006 (3) SA 138 (SCA) par 10.

3 *Boe Bank Ltd v Ries* 2002(3)39 (SCA) par.12

4 *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) paras. 8 -17.

5 *BOE Bank Ltd v Ries supra* par 12

6 In *International Shipping Co (Pty) Ltd v Bentley,* 1991 (1) SA 680 (A) E – G it was held that the nature and context of the relationship between the parties created a direct link between the plaintiff and the defendant and that no considerations of public policy exist that can induce the court to deny liability.

reasonable to impose the duty. The assessment of the considerations does not call for "an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms."[7] Of the considerations that are relevant are the caution in South African law against the extension of liability for pure economic loss and even more so in the case of pure economic loss caused by an omission; the reasonableness of imposing liability in the circumstances on the defendant; the availability of other remedies to the plaintiff and the risk of opening the floodgates by creating a limitless liability.

[11] Mr. Cilliers argues that what the court has to decide is a purely legal issue that can be disposed of on exception. He stresses the enormity of the pleadings, the countless relevant transactions and the many defendants who all played different roles in the chain of events that led to the loss suffered by the plaintiff. He maintains that it is settled law that if a matter can be disposed of on exception the court must do so[8]. Mr. Symon argues that this particular matter cannot be finalized at exception stage. Both counsel rely on the judgment in *Minister of Law and Order v Kadir,* 1995 (1) SA 303 (A) at 318. Mr. Symon finds the reasoning of Hefer JA that the court not only has to decide the rights of the parties *inter se* but must also take into account the conflicting interests of the community and carefully weigh all the interests up and strike a balance in accordance with the court's perception of society's notions of what justice demands, very attractive and emphasizes that such decisions can only seldom be reached on a handful of allegations in pleadings and in particular the learned judge's observation that "(i)t is impossible to arrive at a conclusion except upon a consideration of **all** the circumstances of the case". Mr Cilliers fancies the learned judge's observation that if the facts alleged in support of the legal duty, contended for, represent the high-water mark of the factual basis upon which the court has to decide whether there is indeed such a duty, the matter must be dealt with on exception.

[12] If the exception does not succeed, the JSE cannot, at this stage, appeal against it, whereas the Fund will have a right of appeal, if the exception succeeds. It means that if this court wrongly decides against the JSE it will be compelled to be a party to a lengthy trial. If on the other hand the court wrongly finds in favour of the JSE the position can be put right on appeal. The consequence is that if there is doubt, it would be to the advantage of the parties if the court errs, in favour of the JSE, rather than against it.

[13] It is the JSE's case that there does not exist a close enough relationship between it and the Fund and maintains that there is no direct link between it and the Fund as the trading was done through an intermediary with the result that the Fund was in no different position than anyone of Morgan's other clients, i.e. a member of the public who trades through a broker on the JSE. Secondly the JSE maintains that the fact that it operates under statutory powers or obligations cannot give rise to a common law duty of care owed by it to the Fund. Even assuming that the allegation by the Fund that the JSE becomes the counterparty of every transaction of Morgan's, as the clearing house represents it, is correct the Fund argues that

---

7 *Per* Nugent JA in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431(SCA) par. 21
8 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 464 and the cases cited therein.

there can be no duty on it to inform the Fund of the conduct of its own agent, Morgan, and that likewise there is no scope for a duty of care owed to the Fund. The JSE denies that even if it was able to establish facts in respect of Morgan's mode of trading or even assuming that it had knowledge of earlier dishonest trading by Morgan it did not give rise to a close relationship between itself and the Fund and accordingly to a common law duty of care owed to the Fund. The JSE denies that there are any policy considerations that make it fair and equitable to impose a duty of care on it. It is argued that there are thousands of transactions daily on the stock exchange and that it would be impossible for the JSE to monitor all those transactions. The high-water mark of the JSE's argument is that it equates its position to that of the Commissioner of Deposit-taking Companies in Hong Kong in *Yuen Kun-yeu and others v Attorney General of Hong Kong,* 1987 (2) All ER 705. The argument is that, in that case, there were cogent reasons for the Commissioner to investigate the affairs of the business, that caused the plaintiffs harm, and he failed to do so. The argument proceeds that at best for the Fund the facts of this case are similar to that situation and that as the plaintiffs were non-suited in the equivalent of an exception, in that case, the exception must succeed.

[14] Mr. Symon argues that the JSE's argument that it is a regulatory body in the same position as, for arguments sake, the Commissioner of Deposit-taking Companies is misplaced. He says that there is a difference between defendants that represent the government, be it the central government or local governments, and the JSE. He says that the JSE is not an organ of State and that it conducts a business. It levies a fee on each transaction and gets an income. It is not clear from the pleadings how the JSE operates. Mr Symon argues that if the JSE operates a business from which it derives an income its argument that there is no link between it and the Fund is not correct. He equates the position of the JSE to that of an owner of a fenced-off playground, where children can play and ride on a carousel or other contraptions, after having paid an entrance fee and paying also for individual rides. He says that it is possible that a court properly aware of all relevant circumstances my find that there was an assumption of risk by the playground owner, which may form the foundation of a legal duty on the JSE. It is contended that without evidence and a proper investigation into the mode of trade of the JSE a court is not in a position to take a decision whether legal policy imposes a duty to act on the JSE or not.

[15] A further argument on behalf of the Fund is that it must for the purposes of the exception be accepted that Morgan defrauded the Fund and that the JSE was aware of it well before October 2002. The argument is further that the extent of the trading by the Fund was unnatural, easily discernible and highly risky and that the JSE was aware of it, or ought to have been aware of it. The conclusion is that if one renders a service and one knows that one of one's customers has cheated his own client and that he is exposing that very client to extraordinary risks, way beyond what, to one's knowledge, the client is by law entitled to

take, a court, fully appraised of all the circumstances, may interpret society's legal notion as to impose a duty of care. In this connection it must be borne in mind that the Fund has set out quite a number of relevant duties, imposed upon the JSE in terms of the rules, in respect of individual investors who deal through brokers.

[16] As far as the JSE's knowledge of Morgan's fraud towards the Fund is concerned there is an allegation in the particulars of claim that the Fund has requested the JSE to provide it with a copy of the record of the disciplinary proceedings against Morgan and that the JSE has thus far constantly refused to comply with the request. The argument is that the record will be available, through discovery, at the trial and that it may shed light on the question of when and who on behalf of the JSE became aware of Morgan's misconduct and to what extent the JSE was informed. The JSE does not deny its refusal to supply the record.

[17] Another aspect which has been debated is the Fund's reliance in the particulars of claim on section 37A of the Financial Markets Control Act, No. 55 of 1989[9]. Under the heading "Limitation of liability" it reads as follows:

> "No financial exchange, clearing house, executive officer, employee or representative of a financial exchange or of a clearing house, or any member of a committee or subcommittee of the executive committee, or of a clearing house, shall be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by the financial exchange, clearing house, officer, employee, representative or member in the ***bona fide*** *or negligent, but not grossly negligent, exercise of any power or carrying out of any duty or performance of any function under or in terms of this Act or the rules"*
>
> *(Own underlining)*

[18] Mr. Cilliers argues that this section has to do with damage caused to members for, for instance, unwarranted suspension of the right to trade or an ill-conceived refusal to

9 The JSE has obtained its licence to trade by virtue of the provisions of section 8 of this very Act.

renew a licence. According to him it can never found a cause of action for an investor. As there is no discernible distinction between members and investors Mr Symon does not go along with that submission. He argues that the section provides for a cause of action and only limits it to cases of gross negligence. Whether the section comes into play can certainly not be decided before evidence has been led. In any event the interpretation of the section may be relevant for the answer to the question whether a common law duty of care was envisaged by the Legislature.

[19] I am not convinced that the allegations in the particulars of claim are extensive enough for the court to be able to decide on behalf of society whether a legal duty to warn the Fund existed or not. Evidence about the working of the JSE and the knowledge of the JSE about Morgan and the dealings on the market, at the time, may be helpful for the court to make a decision one way or the other. That conclusion does not only cover the Fund's main claim based upon actual knowledge of fraud and over-exposure on the market, but also the alternative claim based on an actionable failure to have apprised itself of relevant facts and to take appropriate action. In the light of that conclusion I must not deal too thoroughly with the different arguments as assumptions may turn out to have been wrongly made and my views may tend to confuse rather than to be helpful.

The exception is dismissed with costs, which costs include the costs occasioned by the employment of two counsel.

W J HARTZENBERG
JUDGE OF THE HIGH COURT

HEARD ON: 2-3 OCTOBER 2007

ON BEHALF OF EXCIPIENT:

Attorneys:	Webber Wentzel Bouwens
Counsel:	S A Cilliers, SC
	B Berridge

ON BEHALF OF RESPONDENT:

Attorneys:	Edelstein-Bosman Inc
Counsel:	S Symon, SC
	A E Bham, SC