IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 134505/2023

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

03 NOVEMBER 2025

....
SIGNATURE **DATE**

In the matter between:

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE Plaintiff/Respondent

and

SASFIN BANK LIMITED Defendant/Excipient

JUDGMENT

LABUSCHAGNE J

[1] This is an exception raised by Sasfin Bank Limited against particulars of claim of the Commissioner for the South African Revenue Service ("SARS").

[2] SARS instituted an action against Sasfin Bank ("the Bank") pertaining to 18 clients of the Bank, who are also taxpayers. SARS contends that the 18 taxpayers failed to declare tax for income and supplies for a period from 2013 to 2023 as part of their respective Income Tax and VAT returns.

[3] SARS instituted the claim for damages against the Bank arising out of alleged conduct of the Bank in assisting the taxpayers in unlawfully expatriating undeclared taxable funds abroad in breach of the Bank's duties and obligations under an array of Acts of Parliament, generically referred to as financial sector laws. The amounts involved are significant, totalling R5 333 048 207.58.

THE PARTICULARS OF CLAIM

[4] SARS has formulated two common law claims, with Claim 2 focussing on a particular taxpayer, Gold Leaf Tobacco Corporation (Pty) Ltd ("GLTC"), who alone is alleged to have unlawfully expatriated, aided and abetted by the Bank, an amount of R2 900 935 513.01.

[5] An alternative claim to Claim 1 for a lesser amount is based on statute and is dealt with later.

[6] The Bank is alleged to have directly or indirectly assisted the taxpayers and GLTC to unlawfully export the undeclared funds. The Bank is alleged to have

processed the foreign payment transactions without valid supporting documents or based on incomplete supporting documents. In certain instances, the Bank is alleged to have concealed the transactions from SARS and the South African Reserve Bank by deleting the transactions in question, not only from the taxpayer and GLTC's bank statements, but also from the Bank's Balance of Payment to Customer reports (BOPCUS reports). The BOPCUS reports are mandatory reports generated daily and need to be submitted to the South African Reserve Bank.

[7] As far as GLTC is concerned, the Bank confirmed in writing to SARS on 31 March 2022 that GLTC's bank accounts were manipulated and that transactions had been deleted from GLTC's bank account. Despite the Bank's High Risk Committee flagging GLTC as a potential risk client during September 2016, the Bank only conducted an internal investigation a year later during September 2017, into 10 suspicious transactions of 10 of GLTC's alleged suppliers, after GLTC had requested a credit line from the Bank.

[8] Internal investigation confirmed on or about 15 September 2017 that one, more or all of the 10 transactions were fictitious, fraudulent, alternatively were based on incorrect documentation and information. The internal investigation recommended that the Bank should exit its relationship with GLTC with immediate effect, but the Bank delayed by two months, until 21 November 2017 before doing so.

[9] SARS contends for a legal duty by a bank, as an authorised dealer in foreign exchange, not recognised in law before, namely: *"A legal duty not to cause it*

to suffer patrimonial loss by directly or indirectly assisting taxpayers and GLTC to unlawfully transfer the funds abroad". In support of the legal duty, SARS relies on an array of statutory provisions governing the business of the Bank.

[10] These statutory provisions include section 60A of the Banks Act, which requires a bank to establish an independent compliance function, headed by a compliance officer. The compliance officer had to comply with the Banks Act and the regulations published in terms of section 90. The obligations of the compliance officer included the reporting of noncompliance, establishing a culture of compliance within the bank and ensuring that employees are trained on a continuous basis to ensure technical knowledge of the regulatory framework applicable.

[11] In terms of Regulation 50(1) of the Bank Regulations, the Bank had a legal duty to make policies and procedures to guard against the Bank being used for purposes of financial crime, such as fraud and money laundering, to ensure that policies and procedures are adequate to ensure compliance with legislation, to facilitate cooperation with law enforcement agencies, to identify customers and to recognise suspicious customers and transactions. The Regulations require the Bank to ensure that its policies and procedures enable the Bank to maintain high and equal standards, and to maintain records of transactions.

[12] In terms of the Financial Intelligence Centre Act, 38 of 2001 ("the FICA Act"), the Bank had to put in place measures to combat money laundering, to keep records of all transactions and to comply with reporting obligations in terms of

sections 28, 29 and 31 of the FICA Act. It is also alleged that the Bank had an obligation to comply with the current Exchange Manual for Authorised Dealers ("the Authorised Dealer Manual") also ("the AD Manual"), as required by the Exchange Control Regulations.

[13] It is pleaded that the Bank had the obligation in terms of the AD Manual to ensure correct reporting of cross border foreign exchange transactions and to comply with the provisions of the AD Manual.

[14] SARS identified four Sasfin employees who are alleged to have been instrumental in Sasfin's breach of its legal duty to SARS. They are Mr Brendon Marshall (Head of Trading Desk); Mr Saint Gennaro (Bank Office Manager); Mr Lulama Kene (a T24 Treasury/Application Specialist and T24 Developer); and Ms Cheryl Simons (a FinSurv Financial Surveillance Compliance Officer).

[15] SARS contends that the Bank, through the identified Sasfin employees, failed to comply with the requirements of governing legislation, facilitated the illegal transfer of the funds abroad by processing foreign payment transactions without the required supporting documents, some of which documents were either inadequate or false. It is also alleged that they were involved in deleting transactions facilitated on the taxpayers and GLTC's bank accounts in order to conceal them from the relevant authorities, including SARS.

[16] Claim 1 of the particulars of claim is for an amount of damages based on undeclared funds of R1 971 392 136.26. A table of the 18 bank customers and the dates of the transactions of amounts involved are pleaded. SARS

contends that it for the first time became aware or could reasonably have become aware of the facts giving rise to the claim in November 2023.

[17] SARS contends that, due to the lapse of time, most of the taxpayers being in deregistration or being without funds, SARS will not be able to recover the full amount of tax that is due to be assessed in respect of the undeclared funds. It is alleged that, due to the Bank's breach of its legal duty, SARS has suffered damages in the aforesaid amount of approximately R1 971 392 136.26, being the total estimated capital tax on the undeclared funds which were unlawfully exported from South Africa.

[18] In Claim 2 SARS pleaded that on 18 May 2023 SARS raised additional Income Tax and VAT assessments for GLTC and in terms of the assessments, GLTC was indebted to SARS in the amount of R4 469 794 323.77, made up of unpaid Income Tax in the amount of R3 144 433 706.42 and unpaid VAT in an amount of R1 323 360 617.35.

[19] The aforesaid amounts include the capital amounts of Income Tax and VAT, and the statement penalties, penalties and interest on underpayment of Provisional Tax and VAT up to the date of the assessments.

[20] GLTC's Tax debt remains due and payable to SARS. GLTC's undeclared funds are however no longer available in South Africa.

[21] SARS contends that an analysis of the available assets and resources available in South Africa indicate that GLTC does not have sufficient resources to settle the Tax debt in full and that a shortfall is expected to be at least to the

extent of GLTC's undeclared funds. SARS then pleads that, as a result of the Bank's breach of its legal duty, *"SARS has suffered damages in the amount of R2 900 935 513.01, being the total amount unlawfully exported."*

[22] Following an amendment to its particulars of claim, SARS introduced an alternative claim to Claim 1. The alternative claim is only pursued if SARS does not succeed in respect of Claim 1 (in respect of 8 specific taxpayers who are referred to as the alternative taxpayers).

[23] The Financial Sector Regulation Act, 9 of 2017 ("the FSR Act") came into effect on 01 April 2018. In terms of section 1 of the Schedule of the FSR Act the Banks Act and the Banking Regulations constitute financial sector laws.

[24] It is contended that the Bank breached section 278 of the FSR Act and that SARS has, as a result, suffered a loss in the amount of R478 889 847.16 in the tax value of undeclared funds of the alternative taxpayers. SARS also contends that it for the first time became aware or could reasonably have become aware of the facts which give rise to the alternative claim in November 2023.

[25] It is alleged that, due to the lapse of time, and most of the alternative taxpayers being in deregistration, or otherwise being left without funds, SARS will not be able to recover the full amount of the Tax that is due to be assessed in respect of the alternative undeclared funds.

THE EXCEPTION TO CLAIMS 1 AND 2

[26] The legal question is whether Sasfin had a duty to protect SARS as one of the creditors of some of its clients. The essence of the exception is the following:

26.1 Section 60A of the Banks Act and Regulations 49 and 50 of the Banks Act do not impose any duty on Sasfin to protect its customers' creditors generally or SARS in particular.

26.2 By contrast, the consequences or breaches of the aforesaid provisions are regulated exhaustively by the Banks Act and the Financial Sector Regulation Act, 9 of 2017 ("FSRA").

26.3 The Prudential Authority is the regulator responsible for banks and may impose administrative penalties for contraventions of the Banks Act or the Bank Regulations.

26.4 The Bank contends that, in terms of section 60 of the Banks Act, read with sections 77 and 78 of the Companies Act, 71 of 2008, the Prudential Authority may hold any director or executive officer of a bank liable for dereliction of duty. Any net amount recovered by the Prudential Authority, after deduction of costs, is used for the repayment of the losses suffered by depositors.

26.5 The Prudential Authority may impose non-financial sanctions, or issue directives to a bank in terms of section 6 of the Banks Act.

26.6 The Prudential Authority may cancel or suspend a bank's registration in terms of sections 23 to 25 or restrict its activities in terms of section 26 of the Banks Act.

[27] It is contended that the web of statutory remedies leaves no room for a further common law duty on the Bank to protect the creditors of its customers in general or SARS in particular.

[28] The Bank contends that SARS's claim is inconsistent with the broader scheme and the objects of the Banks Act at the FSRA.

[29] The regime of supervision of banks is by means of the Prudential Authority and is aimed at promoting the safety and soundness of banks and the banking system.

[30] To recognise a common law duty to protect the interests of SARS would result in indeterminate third party damages claims which threaten the viability of banks and the interconnected banking and financial systems of the Banks Act and the FSRA are concerned. The Bank also pleads that it would undermine the legislature's specific vesting of authority to determine the appropriate sanction for a breach of a financial sector law in the Prudential Authority, as the expert regulator responsible for maintaining a stable and robust banking system.

FICA

[31] The Bank pleads that SARS's invocation of sections 22, 28, 29 and 31 of the Financial Intelligence Centre Act, 38 of 2001 ("FICA") is misplaced, as the provisions did not impose any duty on Sasfin to protect its customers' creditors generally or SARS in particular.

[32] By contrast:

32.1 Breaches of the specific provisions of FICA are regulated by the FICA Act.

32.2 Breaches of section 22 are subjected to administrative sanctions in terms of section 47 (read with sections 45C to 45F) and criminal sanctions in terms of section 48 (read with section 68).

32.3 Breaches of section 28 are subject to administrative sanctions in terms of section 51(2) (read with sections 45C to 45F) and criminal sanctions in terms of section 51(1) (read with section 68).

32.4 Breaches of section 29 are subject to administrative sanctions in terms of sections 52(3) and (4) (read with sections 45C to 45F) and criminal sanctions in terms of sections 52(1) and (2) (read with section 68).

32.5 Breaches of section 31 are subject to administrative sanctions in terms of section 56(2) (read with sections 45C to 45F) and criminal sanctions in terms of section 56(1) (read with section 68).

32.6 It is contended by the Bank that the sanctions that may be imposed in terms of FICA for breaches of its provisions are exhaustive.

32.7 FICA provides for internal appeals under section 45D and applications by the FIC or supervisory body to the High Court under section 45F.

[33] The Bank contends, with reference to the memorandum on the objects of the Financial Intelligence Centre Bill (P1/2001) that FICA, and the duties and sanctions it imposes on accountable institutions, are intended to promote the public interest by ensuring compliance with South Africa's international commitments, by combatting money laundering and the financing of terrorists and related activities. The Bank contends that the purpose of FICA is not to protect individual persons or entities by affording them claims for damages for loss caused by breaches of its provisions.

[34] FICA[1] is composed of customer due diligence, record-keeping, and reporting duties designed to detect and disrupt money laundering and related crimes. SARS's particulars invoke the record-keeping duty in section 22, the suspicious-transaction reporting duty in section 29, and the duty to report international funds transfer transactions above a prescribed threshold in section 31.

[35] They allege that Sasfin's employees not only failed to report but also concealed transactions, for instance, by deleting records, so as to keep the authorities unaware.

[36] Those failures expose accountable institutions and individuals to regulatory and criminal consequences. But, as a matter of structure, FICA's obligations

[1] Act 38 of 2001.

are owed to the state through FIC and enforced through the FIC's administrative penalty and prosecution machinery. FICA does not confer on third parties, including SARS, an express civil cause of action for damages arising from a breach of reporting or record-keeping requirements.

[37] Accordingly, while SARS argues FICA contraventions are highly material in a regulatory sense, they do not, by themselves, create a statutory duty of care owed to SARS. In *Ross and Another v Nedbank Limited*,[2] the court held:

> *"[48] …. The critical question, therefore, is whether the statutory duties under FICA also give rise to private law duties on the part of a bank to parties that are not its customers.*
>
> *[49] The breach of a statutory duty, without more, does not give rise to a legal duty.*
>
> *[50] Our courts have, however, recognised that a breach of a statutory duty could give rise to a legal duty if:*
>
> *a. on a proper construction of the statutory provision, its breach imposes an obligation to pay damages for the loss caused by the breach; or*
>
> *b. when the statutory provision provides a basis for inferring, considered together with all the relevant facts and salient constitutional norms, that a common law duty, actionable in delict, exists."*

[38] Interpreting the purpose and architecture, the court found that FICA is for the public good, creating obligations in favour of the State and enforced by FIC supervisory/administrative sanctions, rather than a private delictual right to damages for third parties.

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[2] (10029/2020) [2024] ZAGPJHC 1146 (8 November 2024).

EXCHANGE CONTROL REGULATIONS AND THE AUTHORISED DEALER MANUAL

[39] The Bank contends that the provisions of the Authorised Dealer Manual (the AD Manual) relied upon by SARS did not impose any duty on Sasfin to protect its customers' creditors generally or SARS in particular.

[40] The purpose of the exchange control regulations is to control South Africa's foreign exchange reserves and to prevent uncontrolled capital flight. They *"are accordingly, for the public interest and not to protect any private interests"*. This statement is made with reference to **Oilwell (Pty) Ltd v Protec Internation Ltd and Others** 2011 (4) SA 394 (SCA) at paragraph [24].

[41] The exchange control regulations vest control over their implementation in the Minister of Finance. The Minister appointed the South African Reserve Bank to perform most of the functions of the Treasury under the regulations. The AD Manual is a guide to banks, in their capacity as authorised dealers acting under the exchange control regulations. It is in that capacity and for that purpose that the banks are required to report to the SA Reserve Bank's Surveillance Department (FinSurv).

[42] The exchange control regulations include sanctions for breaches thereof:

42.1 Criminal penalties under regulation 22 may be imposed.

42.2 Attachment and forfeiture and recovery of money by order of Treasury under regulations 22A to 22C for payment into the National Revenue Fund, is provided for.

42.3 Under regulation 24, administrative relief and regularisation of contraventions are provided for. This empowers the treasury or an authorised person (for example FinSurv) to allow a person who has contravened the regulations, to disclose the contravention and to apply for administrative relief. If the applicant complies with the requirements for regularisation in relation to a contravention of the regulations, Treasury must regularise any contravention in respect of these regulations – see Regulation 24(6). Regularisation entails treasury not pursuing criminal sanctions but imposing a levy or other conditions in respect of the contraventions.

[43] The Bank contends that these penalties are meant to be exhaustive, and it would be incongruous to superimpose a common law claim for damages in delict as a further consequence of a breach of the regulations.

[44] The Bank pleads in the broader context considerations militating against the recognition of SARS's claim. This is based on SARS having vast powers for the implementation and enforcement of Tax Laws under the Tax Administration Act, 28 of 2011. They include the powers in terms of section 186 to compel taxpayers to repatriate their foreign assets.

[45] The Bank contends that, if SARS's claim were to be recognised, it would extend to all the creditors of the Bank's customers and would expose banks

to indeterminate liability. This militates against recognising SARS's common law claim for damages.

[46] On the issue of factual causation, the Bank contends that SARS has failed to plead facts that establish factual causation. SARS's unspoken assumption is that, if Sasfin had not helped the taxpayers and Gold Leaf to export their undeclared funds, those funds would still have been available to SARS for execution today. However, SARS does not plead any facts in support of this assumption.

[47] The Bank contends that SARS does not explain why it may not still recover its tax claims against the taxpayers and Gold Leaf by the exercise of its powers under sections 180, 181, 184 and 186 of the Tax Administration Act.

[48] The Bank further disputes legal causation and contends that SARS's loss is a consequence too remote from Sasfin's alleged wrongdoing.

THE EXCEPTION TO THE ALTERNATIVE CLAIM TO CLAIM 1

[49] The Bank contends that SARS misinterprets section 278 of the FSRA and contends that the alternative claim does not satisfy the requirements of wrongfulness or causation (factual or legal).

[50] Section 278, which came into effect on 01 April 2018 reads:

"278. Compensation for contraventions of financial sector laws

A person, including a financial sector regulator, who suffers loss because of a contravention of a financial sector law by another person, may recover the amount of the loss by action in a court of competent jurisdiction against –

(a) the other person; and

(b) any person who was knowingly involved in the contravention."

[51] The Bank contends that section 278 does not create liability for losses caused by contraventions of the Banks Act or the Banking Regulations, as it merely confers a right of action.

[52] The Banks Act and regulations are financial sector laws. The Bank however invokes the same exception against the alternative claim based on the absence of wrongfulness and causation (factual or legal).

[53] The Bank pleads that the invocation of sections 22, 28, 29 and 31 of FICA as the basis for a common law duty to protect SARS, is misplaced. It is pleaded that the provisions did not impose any duty on Sasfin to protect its customers' creditors generally or SARS in particular.

THE TEST ON EXCEPTION

[54] For an exception to succeed, the pleading must be excipiable on every reasonable interpretation of the facts pleaded (see **Venator Africa (Pty) Ltd v Watts and Another** 2024 (4) SA 539 (SCA) at para [20]). Only the facts

pleaded and not the conclusions of law are to be accepted as proven (see **Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others** 2020 (5) SA 419 (SCA) at para [22]).

WRONGFULNESS

[55] The plaintiff's claim is a claim for pure economic loss. Such a claim is not based on a loss that arises directly from damage to the plaintiff's personal property, but rather in consequence of a negligent or intentional act, such as loss of profit, being put to extra expense, or the diminution of the value of property (see **Telematrix (Pty) Ltd v Advertising Standards Authority SA** 2006 (1) SA 461 (SCA) at para [1], page 465B).

[56] In the event of a claim for pure economic loss, wrongfulness is not assumed. Negligent conduct giving rise to damages is not actional *per se*. It is only actionable if the law recognises it as wrongful. Such wrongfulness is seldom contentious where a positive act causes physical damage to property or a person. Such conduct is *prima facie* wrongful.

[57] The enquiry is more complex in cases of pure economic loss. Brand JA states the following in **Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd** 2006 (3) SA 138 (SCA) at para [10], page 144A:

"[10] … Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss (see e.g. Minister of Safety and Security

v Van Duivenboden 2002 (6) SA 431 (SCA) para 12; Gouda Boerdery BK v Transnet 2005 (5) SA 490 (SCA) para 12). In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms (see e.g. Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 833A; Van Duivenboden (supra) in para [22] AND Gouda Boerdery BK (supra) in para [12]).

[11] It is sometimes said that the criterion for the determination of wrongfulness is 'a general criterion of reasonableness', i.e. whether it would be reasonable to impose a legal duty on the defendant (see e.g. Government of the Republic of South Africa v Basdeo and Another 1996 (1) SA 355 (A) at 367 E – G; Gouda Boerdery BK (supra) at para [12]). Where the terminology is employed, however, it is to be borne in mind that what is meant by reasonableness in the context of wrongfulness is something different from the reasonableness of the conduct itself which is an element of negligence. It concerns the reasonableness of imposing liability on the defendant (see e.g. Anton Fagan 'Rethinking wrongfulness in the law of delict' 2005 SALJ 90 at 109). Likewise, the 'legal duty' referred to in this context must not be confused with the 'duty of care' in English Law which straddles both elements of wrongfulness and negligence (see e.g. Knop v Johannesburg City Council 1995 (2) SA 1 (A) at 27B – G; Local Transitional Council of Delmas v Boshoff 2005 (5) SA 514 (SCA) at

para [20]). In fact, with hindsight, even the reference to 'a legal duty' in the context of wrongfulness was somewhat unfortunate. As was pointed out by Harms JA in Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) in para [14], reference to a 'legal duty' as criterion for wrongfulness can lead the unwary astray. To illustrate, he gives the following example:

'[T]here is obviously a duty – even a legal duty – on a judicial officer to adjudicate cases correctly and not negligently. That does not mean that the judicial officer who fails in the duty because of negligence, acted wrongfully.'

[12] When we way that a particular omission or conduct causing pure economic loss is 'wrongful' we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not (see e.g. Telematrix (Pty) Ltd supra at para [14]; Local Transitional Council of Delmas supra at para [19]; Anton Fagan op cit at 107-109).

Perhaps it would have been better in the context of wrongfulness to have referred to a 'legal duty not to be negligent', thereby clarifying that the question being asked is whether in the particular circumstances negligent conduct is actionable, instead of just to a 'legal duty'. I say this in passing and without any intention to change the settled terminology. …

[12] … When a court is requested, in the present context, to accept the existence of a 'legal duty', in the absence of any precedent, it is in reality asked to extend delictual liability to a situation where none existed before. The crucial question in that event is whether there are any considerations of public or legal policy which require that extension. And as pointed out in Van Duivenboden (para 21) and endorsed in Telematrix (para 6) in answering that question '… what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms'."

[58] In this matter SARS argues that the legislative framework referred to above warrants the inference of a legal duty by a bank to SARS not to cause it harm by assisting its customers to expatriate undeclared taxable income.

[59] In determining the existence of such a legal duty, the Acts in question need to be interpreted. The first question would be whether the Act itself creates a legal duty as a matter of proper interpretation and if not, the question is whether the Act permits a common law legal duty to coexist with the Act.

[60] Harms JA stated in the SCA judgment of **Steenkamp NO v Provincial Tender Board of the Eastern Cape** 2006 (3) SA 151 (SCA) at paras [21] to [22]:

"[21] Whether the existence of an action for damages can be inferred from the controlling legislation depends on its interpretation and it is especially necessary to have regard to the object or purpose of the legislation. This involves a consideration of policy factors which, in the ordinary course, will not differ from those that apply when one determines whether or not a common law duty existed because, as Lord Hoffman said: 'If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common-law duty of care'.

[22] … It appears to me that if the breach of a statutory duty, on the conspectus of the statute, can give rise to a damages claim, a common-law legal duty cannot arise. If the statute points in the other direction, namely that there is no liability, the common-law cannot provide relief to the plaintiff because that would be contrary to the statutory scheme. If no conclusion can be drawn from the statute, it seems unlikely that policy considerations could weight in favour of granting a common-law remedy."

[61] A similar sentiment was expressed by Wallis JA in **MEC, Western Cape Department of Social Development v BE obo JE** 2021 (1) SA 75 (SCA) at para [12].

[62] Counsel for SARS, Adv NGD Maritz SC, contends in respect of the primary claims that the statutes relied upon warrant the inference of a common law duty to SARS. In respect of the alternative claim, SARS contends that the statute expressly creates a remedy in section 278 of the FSR Act for breach of a financial sector law.

[63] In respect of the public policy consideration relevant to the enquiry into wrongfulness, SARS contends that these are matters for evidence, and the enquiry is better suited for trial.

[64] In a wrongfulness enquiry, some public policy considerations can be decided without a detailed factual matrix. This is in contrast to deciding negligence or causation (see **Telematrix** supra para [2], page 465G).

[65] To decide whether the determination of a legal duty is a matter for trial or for exception, there must be more than a notional or remote possibility that evidence of surrounding circumstances may influence the issue of wrongfulness. Conjectural and speculative hypotheses that lack any real foundation in the pleadings for the obvious facts will be insufficient (**Telematrix**, para [3]).

[66] The case for SARS in respect of wrongfulness is based on an interpretation of the Banks Act, FICA and the Authorised Dealer Manual in the context of expatriation of capital. There are four considerations advanced by Sasfin as to why the duty pleaded cannot be established. The duty referred to is the one pleaded in paragraph 26 of the particulars of claim, which reads:

"H SASFIN'S LEGAL DUTY

26. At all times relevant hereto, Sasfin owed SARS a legal duty not to cause it to suffer patrimonial loss by directly or indirectly assisting the taxpayers and GLTC to unlawfully transfer the funds abroad. The legal duty arose by virtue of the facts and circumstances set out below."

[67] Sasfin contends that the duty contended for cannot be established as:

67.1 The statutes serve the public interest and not of a particular creditor like SARS.

67.2 Each of the statutes or financial sector laws relied upon provides statutory remedies for wrongdoing or breaches of statute.

67.3 SARS is not a vulnerable creditor but has powerful remedies at its disposal, including the right to claim repatriation in terms of section 186 of the Tax Administration Act.

67.4 The imposition of a legal duty creates the risk of indeterminate liability for Banks.

[68] The countervailing contentions of SARS are:

68.1 That SARS also acts in the public interest in seeking the imposition of the legal duty.

68.2 The statutory remedies are not adequate remedies in the hands of SARS to recoup the losses that are suffered. While it is correct that SARS has statutory remedies, it is contended that the reliance on the repatriation of funds remedy in section 186 of the Tax Administration Act is misplaced as it is not a remedy as far as companies are concerned and is therefore no remedy at all.

68.3 Lastly, it is contended that there is not a risk of indeterminate liability, but liability as against SARS as a specified *sui generis* creditor who acts for the State and in the public interest in collecting taxes.

DISCUSSION

[69] SARS and National Treasury are respectively the collector and distributor of revenue in the fiscus. National Treasury controls the Reserve Bank as the central bank and the Prudential Authority in the Banks Act oversees the banking sector and enforces financial sector laws.

[70] The oversight provisions in the Banks Act indicate that the imposition of prudential duties on Banks is to ensure their compliance with prescribed solvency and liquidity requirements. In this way, the Banks Act is designed to protect the interests of depositors in the public interest.

70.1 The statutory remedies imposed in terms of the Banks Act include the imposition of administrative sanctions and even personal liability of directors.

70.2 The administrative sanctions that the prudential authority may impose on Banks for breaches of the Banks Act are a powerful tool if the conduct pleaded by SARS were to be established in proceedings under the Banks Act.

70.3 The ambit of the loss of undeclared tax arising from the conduct pleaded against Sasfin Bank would be a relevant consideration in the imposition of administrative sanctions on the Bank.

[71] SARS contends that Sasfin caused losses to SARS by, *inter alia*, intentionally (via the four identified individuals who are accused of wrongdoing) aiding and abetting the delinquent taxpayers to unlawfully expatriate capital, placing it beyond the reach of SARS.

[72] If an administrative sanction under the Banks Act in the form of a fine can be imposed on a delinquent bank, and if the ambit of the fine is affected by the loss SARS has suffered, then this indicates a legislative intention to deal exhaustively with breaches of the Banks Act in terms of its provisions. A bank that faces administrative sanctions in terms of the Banks Act and a common law liability to SARS for the same conduct is exposed to double jeopardy.

[73] The statutory remedies under the Banks Act are not available to SARS, but it can be a complainant in proceedings before the prudential authority under the Banks Act aimed at the imposition of administrative penalties.

[74] SARS contends that, different than other creditors, it cannot pursue a tax debt overseas due to the revenue rule. This is so, but it does not render SARS vulnerable.

[75] The statutory power to direct a taxpayer to repatriate funds in terms of section 186 of the Tax Administration Act is a remedy aimed at averting the consequences of the revenue rule, ie the rule that SARS cannot pursue assets abroad for a tax debt owed to it.

[76] Section 186 of the Tax Administration Act permits a senior SARS official to apply to the High Court for an order compelling a taxpayer to repatriate assets located outside of the Republic in order to satisfy a tax debt. This remedy applies against a taxpayer whether it is a company or a natural person. The court has additional powers under section 186(3) pertaining to limiting of a taxpayer's right to travel, withdrawing the taxpayer's authorisation to conduct business, requiring the taxpayer to cease trading or to issue any other order it deems fit.

[77] Non-compliance with an order of this nature may be followed up with contempt proceedings.

[78] It is contended on behalf of SARS that the companies in question are dormant, or in various stages of deregistration, rendering the repatriation of capital remedy inappropriate. This is a fact specific issue which will fall away if the companies can be compelled to repatriate funds held abroad. Whether this can be done in a specific instance or not cannot anchor the legal duty contended for.

78.1 A company in deregistration can be reregistered in terms of sec 83(4) of the Companies Act, 2008 to compel it to repatriate capital – even if by means of contempt proceedings against the company and its directors.

[79] The provisions of section 83(4) of the Companies Act, 2008 provide for a company in deregistration to be reregistered, even if only for purposes of seeking the liquidation of the company with a view to exercising remedies in terms of the Insolvency Act or the Companies Act against directors

[80] Since company directors who are involved in fraudulent conduct may be held liable personally in instances such as those contended for by SARS, it cannot be accepted that there are no other adequate remedies available.

[81] The utilisation of contempt proceedings against that individual to avoid the pitfalls of the revenue rule have been recognised in our law (see **Hawker Air (Pty) Limited v Metlika Trading Ltd and Other** …). SARS is not a vulnerable creditor.

[82] The imposition of the duty to SARS will have a chilling effect on banking in general. It creates a risk of liability when non-existed before. The risk in question is one in which the Bank has limited control over as it pertains to the conduct of its customers. Whilst the case pleaded includes complicity on the part of certain officials on behalf of the bank, the duty pleaded includes negligent conduct. The consequences of the imposition of a risk of liability in such circumstances can destabilise the banking industry and imposes the risk of an increased cost burden that arising from increased reinsurance cover.

Such costs are ultimately passed on to the customer, making banking more expensive.

[83] This is an instance where moral indignation in respect of unlawful and even heinous conduct by a bank would be insufficient to establish a common law legal duty to SARS.

[84] The legislative intention appearing from the Banks Act points to the remedies being utilised to exercise oversight over banks. The Banks Act does not grant an express remedy to SARS, and properly interpreted the legislative regime seeks to protect the public good in a manner inconsistent with the imposition of a common law duty on banks to SARS in the terms as pleaded.

[85] The provisions of FICA have the purpose of monitoring and regulating market conduct. The objects of FICA are to monitor and regulate market conduct with the specific object of avoiding money laundering and funding of terrorist activities. The Act has a very specific and limited scope, which is no doubt in the public interest. FICA provides for its own remedies. SARS does not have a remedy in terms of FICA. FICA on its own is an insufficient basis to impose the duty contended for to SARS.

[86] Sasfin's role in expatriating capital, with reference to the authorised dealer manual, needs to be scrutinised.

[87] In **Oilwell (Pty) Ltd v Protec International Ltd and Others** 2011 (4) SA 394 (SCA) Harms JA stated the following:

"[24] In search of the elusive intention or meaning expressed in the Regulations, it is necessary to reiterate that the object of the Regulations in general is to regulate and control foreign currency and the object of reg 10(1)(c) in particular is 'to control foreign exchange in the public interest and to prevent the loss of foreign currency resources through the transfer abroad of capital assets held in South Africa. The Regulations are, accordingly, for the public interest and not to protect any private interests. They were adopted for the sake of the Treasury and not for the sake of disgruntled or disaffected parties to a contract. This is apparent from the penalty provision. But more importantly, it appears from regs 22A, 22B and 22C. They provide that any money or goods in respect of which a contravention has been committed may be attached by the Treasury; these may be forfeited to the State; and any shortfall may be recovered by the Treasury from not only persons involved in the commission of the offence, but also from anyone enriched or who has benefited as a result thereof."

[88] Harms JA argued that, by virtue of the aforesaid considerations, it would not be correct to visit an agreement that breaches the exchange control regulations with nullity as that may amount to overkill (see Ibid).

[89] Consent required by Treasury can be obtained *ex post facto* and, until permission is obtained, the agreement may suffer with the defects of an inchoate or unenforceable contract, which is not *per se* invalid (see **Oilwell (Pty) Ltd v Protec International Ltd and Others** supra at para [25]).

[90] The Constitutional Court remarked on the nature of capital exports and its impact on the economy in **South African Reserve Bank and Another v Shuttleworth and Another** 2015 (5) SA 146 (CC) where the following is stated at para [69]:

"[69] Capital exports have the capacity to drain an economy of its lifeblood, and so to impact catastrophically on the country's economic welfare. The debate about how best to regulate capital movement, whether by exchange controls, or their absence, is not before us. For present purposes, capital exports are of such singular concern to the country's wellbeing that the Constitution vests special powers in the Reserve Bank. It stipulates that the 'Reserve Bank is the central bank of the Republic', whose primary object is to 'protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic'. The Constitution requires the Reserve Bank, in pursuit of this primary object, to perform its functions independently and without fear, favour and prejudice, though there must be regular consultation between the bank and the Executive.

[70] That the Constitution affords an express mandate for protecting the value of the currency demonstrates the exceptional significance of the issue. Currency moves with lightning speed. Money has long ceased to be a hand-held commodity of physical article of trade for exchange purposes. The internet and electronic communications enable it to be moved from and between locations and jurisdictions almost instantly. Hence the need for special regulation. Hence also the need for

special amplitude of regulatory power. The nature of the power the Act confers on the President to make regulations in regard to currency is unusually wide, but its unusual width meets the unusual circumstance of the subject matter."

[91] From the aforesaid quotation it is apparent that the protection of the currency is the constitutional mandate of the Reserve Bank. It is within the powers of the President to make regulations, and the powers of the prudential authority in terms of the Banks Act echo the sentiments expressed by the Constitutional Court regarding the ambit and the need for such wide ranging powers.

[92] All of these wide ranging powers militate against the recognition of a legal duty as contended for by SARS.

[93] Our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must therefore positively be established. In determining whether wrongfulness has been established, it is necessary to take into account the risk of liability of an indeterminate amount for an indeterminate time to an indeterminate class (see **Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng** 2015 (1) SA 1 (CC) at para [24].

[94] The element of wrongfulness provides a check on liability in such circumstances. The risk of indeterminate liability introduces into the wrongfulness enquiry the consideration of whether the harm would be reasonably foreseeable or not in the hands of the particular plaintiff. In this

sense, the foreseeability of harm (which also features in the question of legal causation) serves as a check on indeterminate liability.

[95] A defendant's blameworthiness, and the risk of indeterminate liability do not *per se* decide the issue of wrongfulness. They should be weighed with all other considerations in determining whether conduct is wrongful (see **Country Cloud Trading** supra at para [42]).

[96] SARS contends that the legal duty it seeks to infer is particular to SARS and not to creditors as a class.

[97] Having regard to the case as pleaded, I accept for purposes of this judgment that SARS is correct in this regard. However, when the competing interests of all role players are considered, I am of the view that it would not be reasonable to impose a duty on a Bank which is an authorised dealer for foreign exchange purposes, to SARS in respect of tax matters of the Bank's customers. This would impose a duty on a Bank to vet the veracity of disclosures by its customers to SARS and to it of tax matters at pain of being held liable if the information provided to the Bank were untrue.

[98] The reason why it is unreasonable to impose a duty on SARS as contended for can be summarised as follows:

98.1 It is not possible to infer a legislative policy from the Banks Act, the FICA Act and the Authorised Dealer Manual that the duties of a Bank in respect of those three sets of legislation impose a duty on it to act in the best interests of SARS.

98.2 By contrast, the legislation concerned creates statutory remedies for breaches of the particular statutes and those remedies protect the interests which the specific Acts intend to serve.

98.3 The legislation relied upon by SARS for purposes of inferring the duty as pleaded does not create remedies in favour of SARS. The interests sought to be protected are not specific to SARS. The inference is that the legislative regime does not contemplate a common law liability on the part of the Bank in addition to the remedies against a delinquent Bank imposed by the legislation concerned.

98.4 SARS has significant powers in terms of the legislation governing its activities and the power to direct a taxpayer to repatriate its capital is an indicator that this was the solution to the revenue rule that the legislature intended. The adequacy of this remedy for this specific matter is too fact dependant a consideration to come into play in considering the generality of the duty pleaded. The necessity to impose the duty as pleaded must hold good for any client of the bank in order for it to be reasonable in a delictual sense. The implications of the contention of SARS are that, where SARS is able to repatriate funds because the taxpayer is an individual, then no common law duty as pleaded exists as it is not required. Conversely, where it is a company in deregistration, such a duty should be inferred because of the facts of the matter. Such reasoning militates against the generality of the *boni mores* considerations that enter into the consideration of the wrongfulness enquiry required in this matter. Objective

reasonableness implies equal application in all circumstances. That is clearly not the case.

98.5 A compelling reason not to permit a common law duty to SARS is section 278 of the FSR Act. It extends the right to sue for loss for breach of a financial sector law to anyone who has suffered a loss, including a regulator like SARS. Although it only came into effect on 1 April 2018, it evidences a legislative intention that holds good at the time of these proceedings. SARS has a statutory remedy for its loss.

98.6 There is no compelling reason to extend common law delictual liability given the legislative framework. The FSRA was not included in the SARS bundle of statutes alleged to give rise to the common law legal duty. That does not remove it from consideration. It answers the call for a remedy.

[99] In the premises I find that:

99.1 The conduct imputed to Sasfin would not pass muster in the sense of it being wrongful in a delictual context. It would be unreasonable to impose a legal duty on banks to SARS to avoid the unlawful expatriation of undeclared taxable income of its customers.

99.2 However, I am not persuaded that the risk of indeterminate liability has been established. SARS is a sui generis creditor acting in the public interest. The recognition of the legal duty by a bank to SARS would nevertheless open the door for a further extension to other creditors.

It is objectively reasonable not to open the door in these circumstances.

99.3 I am not persuaded that evidence adduced at trial pertaining to the wrongfulness enquiry will affect the conclusion to which I have come. In the result, the exception succeeds in respect of the wrongfulness enquiry in terms of Claims 1 and 2.

EXCEPTION ON CAUSATION

[100] The exception also includes the pleading as far as causation is concerned. During argument it was conceded by Mr Trengrove (rightly so) that Sasfin Bank cannot go behind the allegation of factual causation that was pleaded. He however contends that legal causation had to be pleaded and, as the remoteness of damages is informed by policy considerations, arguments similar to the wrongfulness enquiry could be raised in respect of causation.

[101] All that remains then of the exception is the issue of whether it is expressly required of a plaintiff to set out a basis for legal causation in pleading that component of a delict.

[102] Causation is dependent on the facts. For purposes of pleading, the factual causation that has been pleaded would pass muster at exception stage. It is at trial that a Court could entertain a special defence pertaining to legal causation. It is in my opinion a matter for trial. This is consistent with the

sentiments expressed by Harms JA in **Telematrix** at para [2]. He there indicated that wrongfulness of claims for pure economic loss can be decided at exception stage without a detailed factual matrix. This is however in contrast to deciding negligence or causation, which are factual enquiries, better left for trial.

[103] In the premises the exception fails on causation on the main claims and on the alternative claim as pleaded.

THE ALTERNATIVE CLAIM: SECTION 278 OF THE FINANCIAL SERVICES REGULATION ACT

[104] Having already disposed of the exception on causation pertaining to the alternative claim in terms of section 278 of the Financial Services Regulation Act (FSRA), all that remains is whether an exception as pleaded should be upheld. The exception is raised on the same grounds as pertains to the wrongfulness enquiry in Claims 1 and 2.

[105] Section 278 of the FSRA reads as follows:

"278. ***Compensation for contraventions of financial sector laws***

A person, including a financial sector regulator, who suffers loss because of a contravention of a financial sector law by another person, may recover the amount of the loss by action in a court of competent jurisdiction against –

(a) the other person; and

(b) any person who was knowingly involved in the contravention."

[106] The statutory claim gives effect to a legislative intention to permit a claim for damages in terms of sec 278 of the FSR Act for breach of a financial sector law as from 1 April 2018. Section 278 furnishes SARS with a statutory damages remedy independent of the common-law delictual claim. Importantly, it treats regulators (and any person) as potential plaintiffs if they can demonstrate a link between their loss and a breach of a financial sector law. This reflects a legislative choice to broaden accountability for regulatory breaches.

[107] The FSR Act,[3] introduced a "Twin Peaks" regulatory model providing for market conduct oversight of financial services providers on the one hand, and for prudential oversight of banks on the other. It includes section 278 as a novel statutory cause of action.

[108] SARS has pleaded its alternative claim to claim 1 based on this provision, contending that Sasfin's conduct violated "a financial sector law" and that SARS thereby suffered loss in the amount of the tax not recoverable. As the section came into operation on 1 April 2018, the claim only covers claims that arose thereafter.

[109] As an empowering provision it merely creates a right of action that may result in liability for damages. The section does not create liability. Liability needs to

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be established. Liability however requires the pleading and establishment of a breach of a financial sector law causing loss.

[110] Akin to section 218(2) of the Companies Act, which requires a specific breach of a provision of the Companies Act to be pleaded, an essential component is to plead the breach of a specific financial sector law.

[111] The pleading of the alternative claim does include allegations of a breach of specific provisions of the Banks Act. In paras [38-40] SARS pleads with sufficient clarity the breach of obligations under the Banks Act. This suffices for purposes of the exception. The pleadings read as a whole lead to the conclusion that SARS has properly pleaded the alternative claim. The exception to the alternative claim therefore fails.

ORDER

[112] In the premises the following order is made:

1. The exception based on the lack of wrongfulness in respect of claim 1 and claim 2 is upheld.

2. The exception in respect of causation in respect of claims 1 and 2 is dismissed.

3. The exception to the alternative claim is dismissed on all grounds.

4. Claims 1 and 2 are set aside.

5. The plaintiff is granted leave to amend claims 1 and 2 within one month from date of this order, failing which claims 1 and 2 are dismissed.

6. SARS is to pay the costs, including the costs of two counsel on Scale C, where so employed.

BY THE COURT

REGISTRAR

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LABUSCHAGNE J
JUDGE OF THE HIGH COURT

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