

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON ABSOLUTION FROM THE INSTANCE

Case no: HC-MD-CIV-ACT-DEL-2021/02822

In the matter between:

CAPX FINANCE NAMIBIA (PTY) LTD

PLAINTIFF

and

**GERT HAMMAN PROPERTY VALUERS CC
NADIA VAN DER SMIT**

**FIRST DEFENDANT
SECOND DEFENDANT**

Neutral citation: *Capx Finance Namibia (Pty) Ltd v Gert Hamman Property Valuers CC* (HC-MD-CIV-ACT-DEL-2021/02822) [2024] NAHCMD 222 (10 May 2024)

Coram: SCHIMMING-CHASE J

Heard: 7 – 10 February 2023; 15 – 16 and 18 August 2023

Delivered: 10 May 2024

Flynote: Practice — Trial — Absolution from the instance at close of plaintiff's case — Test restated — Test is whether a prima facie case exists upon which a reasonable court might find in favour of plaintiff.

Delict — Specific forms — Pure economic loss — Negligent misstatement by valuator — Money lender relying on valuation of an immovable property by the defendant, a qualified valuator, prepared for and submitted by an applicant for loan finance to lend money to a third party — Third party not repaying loan and property sold at execution for a fraction of the valued amount. — Misstatement negligent and to a certain extent cause of loss but not wrongful.

Delict — Elements — Unlawfulness or wrongfulness — Policy considerations to be used in determining wrongfulness — Degree of negligence not such consideration — Valuers cannot be liable to each and every money lender that considers same — No other due diligence exercised by the money lender in considering the loan.

Summary: The plaintiff, Capx Finance Namibia, is a registered private company with limited liability. It offers business finance to small businesses as one of its main objects. It concluded a written loan agreement in the amount of N\$2 million with a third party. As part of the terms of the loan agreement, the third party was required to put up security, which he did, in the form of an immovable property located in Ondangwa, over which a mortgage bond was subsequently registered by the third party in favour of Capx. After the third party reneged on the loan, Capx instituted action against the third party and obtained summary judgment in the amount of N\$2 345 521,76. The immovable property was declared executable and was eventually sold at a public auction for the amount of N\$1000.

Capx later established that the valuation report contained a misstatement. The valuation report recorded, inter alia, that the immovable property's size was 29 950 square metres with an estimated market value of N\$8 680 000. The actual size of the property turned out to be 2950 square metres, with an estimated value of \$800 000. Capx then instituted action against the valuers, claiming damages in the amount of N\$6 498 336 occasioned by the defendants' apparent gross negligence in conducting the valuation on the immovable

property.

Capx called one of its directors, who testified that the defendants were aware, or should have foreseen, that the valuation report would be used by the third party for financing purposes and that an entity such as Capx would rely heavily on its contents, especially regarding the size and value of the immovable property so valued, for purposes of concluding a loan agreement with the third party.

At the close of Capx's case, the defendants moved to be absolved from the instance, on the grounds that, in law, Capx has failed on its own version to establish that the defendants owed it a duty of care, and that their actions were wrongful in the circumstances. A distinction was sought to be drawn between wrongfulness and negligence. In addition, the defendants contended that, based on a lack of a special relationship between Capx and the defendants and the absence of Capx being vulnerable to the risk in the circumstances, wrongfulness was also not proven. This is because Capx could have avoided the risk of harm by exercising its own due diligence investigation into the financial position of the third party as well as obtaining an independent valuation of the property before concluding the loan agreement with the third party.

Secondly, the defendants contend that they expressly excluded liability to third parties for the contents of the valuation report, which disallowed the plaintiff from seeking damages against the defendants; and that the plaintiff failed to establish its damages.

Held that, the test to be applied for absolution from the instance is whether there is evidence adduced upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff, and not whether the plaintiff has led evidence which established what would finally be required to be established.

Held further that, it is a general principle that a misstatement negligently made by a defendant that causes the plaintiff purely economic loss is actionable in our law in appropriate circumstances.

Held further that, in the context of the claim for economic loss, there was on the evidence no special relationship between the plaintiff and the defendant. Even if the defendants were negligent, they did not owe a duty of care to the plaintiff and the defendants actions were not wrongful vis-à-vis the plaintiff.

Held further that, it is to be considered that on the plaintiff's own version, no attempts were made by it to exercise any form of due diligence or investigation on the financial veracity of the potential money lender, given the main business of the plaintiff. This, too, caused the plaintiff's loss.

Held further that, the exclusion clause in the valuation report, which had been prepared for the third party who applied for the loan (and to whom a duty of care was owed), provided that no liability or responsibility to third parties would be accepted for the valuation or other comments contained in the report.

Held further that, the plaintiff in any event also failed to properly set out or quantify any damages.

The defendants' application for absolution from the instance is granted.

ORDER

1. The defendants' application for absolution from the instance is granted.
2. The plaintiff is ordered to pay the defendants' costs of suit, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.
3. The matter is considered finalised and removed from the roll.

JUDGMENT

SCHIMMING-CHASE J:

Introduction

[1] The plaintiff sued the defendants for pure economic loss caused by a negligent misstatement contained in a valuation report authored by the defendants (in particular the second defendant) relating to an immovable property, which purportedly resulted in damages to the plaintiff amounting to N\$6 498 336. The alleged negligent misstatement relates to the size and value of the aforesaid immovable property.

[2] At the close of the plaintiff's case, the defendants applied for absolution from the instance, which this court must now determine.

[3] The plaintiff is Capx Finance Namibia (Pty) Ltd ('Capx'), a company with limited liability duly incorporated in terms of the laws of Namibia. Capx offers business finance to small businesses through a variety of financial products, which include invoice discounting and secured loans.

[4] The first defendant is Gert Hamman Property Valuers CC, a close corporation registered in terms of the laws of Namibia. The second defendant is Nadia van der Smit, a major female employed by and acting within the scope and ambit of her employment with the first defendant.

[5] I refer to the first defendant as 'Gert Hamman' and the second defendant as 'Ms van der Smit'. Where reference is made to the defendants collectively, I will refer to them as such. Where I make reference to the plaintiff and the defendants collectively, they will be referred to as 'the parties'.

Pleadings

[6] Before analysing the evidence adduced by Capx in support of its claim, it is necessary to set out the relevant allegations in the pleadings. I interpose to mention that the particulars of claim run into an excess of 33 pages, and are not at all a model of brevity.

[7] Capx's claim is for damages against the defendants, jointly and severally, in the amount of N\$6 498 366 together with interest and costs.

[8] According to Capx's amended particulars of claim, an entity known as Dash Enterprises Number One CC ('Dash'), duly represented by one John Dalton Hashondali Ashikoto ('Mr Ashikoto'),¹ applied for a loan facility with Capx during August 2018. In support of the loan application, Mr Ashikoto provided certain documents to Capx, which included a valuation report dated 26 July 2018 ('the valuation report') authored by Ms van der Smit, relating to certain immovable property described as Erf 3183, Ondangwa ('the property'). The property is allegedly owned by Mr Ashikoto, who is also the sole member of Dash.

[9] The aforesaid valuation report reflected, inter alia, that the property's total size was 29 950 square metres with an estimated open market value of N\$8 680 000.

[10] According to Capx, and premised on the facts presented in the valuation report relating to the size and value of the property, Capx concluded a written loan agreement with Dash, duly represented by Mr Ashikoto, on 18 October 2018, and advanced N\$2 million to Dash.

[11] It was a term of the loan agreement, that Mr Ashikoto personally bind himself as surety, jointly and severally, with Dash.² The loan was also subject to

¹ Mr Ashikoto is not a party to these proceedings.

² It was pleaded that Mr Ashikoto signed as surety on 12 September 2018 at Windhoek. Additionally, Dash Enterprises Twelve CC – an entity of which Mr Ashikoto is ostensibly a

the registration of a first bond over the property in the amount of N\$3 million in favour of Capx as continuing and covering security for the loan and any future indebtedness over the property. This was done on 18 October 2018.

[12] Capx's case against the defendants is that it lent and advanced the sum of N\$2 million to Dash relying on, inter alia, the correctness and reliability of the contents of the valuation report prepared by the defendants for Mr Ashikoto. It was pleaded that in lending and advancing funds to Dash, Capx specifically relied on the fact that the loan amount of N\$2 million represented roughly 23 per cent of the value of the property (as per the valuation report), and the bond over the property would, thus, sufficiently secure the indebtedness of Dash to Capx.

[13] Dash breached the terms of the loan agreement by failing to make the due payments. Capx then instituted action against Dash and Mr Ashikoto in case HC-MD-CIV-ACT-CON-2019/04075. Summary judgment was obtained in the amount of N\$2 345 521,76 plus interest on 9 June 2020, jointly and severally, against Dash and Mr Ashikoto. The property was also declared executable.

[14] Capx firstly caused execution against the movable assets resulting in a recovery of N\$45 859,64. The immovable property was then sold in execution and Capx purchased the property on execution at amount of N\$1000. This was ostensibly the best price that could be obtained at the sale in execution. These proceeds were applied to reduce the judgment debt and as at 30 June 2021, the judgment debt was at N\$6 498 336,97, on which the damages claim against the defendants is based.

[15] Capx later discovered, when conducting its own investigation into the purchase price at which the property was likely to be sold at a public auction, that the defendants were guilty of 'gross errors and misrepresentations' when the valuation was compiled, the main complaint being that the actual size and value were misstated in the valuation report. The size of the property was found

member of – signed as surety on 12 September 2018 at Windhoek. Capx's witness testified that the property is owned by the aforesaid entity.

to be 2950 square metres and not 29 950 square metres. Therefore, the value of the property was not N\$8 680 000, but a mere N\$850 000.

[16] Capx's case is that the defendants were grossly negligent in compiling the valuation and/or causing same to be presented as a document upon which a credit grantor, such as Capx, would rely on for purposes of deciding whether or not to grant any credit or loan to Dash. The gross negligence of the defendants was described as:

- (a) the failure to access or consider the title deed to the property or other relevant documents to check the accuracy of their assumption of the size of the property; and
- (b) a failure to conduct the necessary inspections of the property to determine its true nature and extent.

[17] Further, that the property, at all times, was bordered by a railway line on the one side and a road by the other sides, as such, despite the property not being 'bounded', a reasonable valuator, exercising his/her profession with the necessary skill, expertise and duty of care and knowledge, would take notice that it would be impossible for the area of the property to be 29 950 square metres.

[18] That a valuation certificate, in the terms alleged, was authored by the defendants is not in issue. It is also admitted that the size of the property was subsequently established to be 2950 square metres.

[19] In their plea, the defendants deny negligence. They plead that the valuation report revealed clearly that no title deeds of the property had been inspected for purposes of preparation of the valuation, and also expressly provided that the valuation report was for the 'specific purpose' and use of only Mr Ashikoto to determine whether he should purchase the property. Further, the report contained a qualification that it could not be disclosed to anyone without

the first and/or second defendants' approval. It also expressly excluded liability to any third parties for the valuation. The defendants plead that they were not made aware of the purpose of the valuation and to whom it would be transmitted.

[20] I set out the clauses relied upon by the defendant below for ease of reference.

'17. RESTRICTION ON USE, DISTRIBUTION OR PUBLICATION

Confidentially

This report is confidential to the client for the specified purpose to which it refers. It may be disclosed to other professional advisers assisting you in respect of the purpose but may not be disclosed to any other person without my written consent. The report, contract documents, notes and other information obtained by the valuer may be subject to inspection by the Royal Institution of Chartered Surveyors as part of the regulation procedures.

Publication

Neither the whole nor any part of the report may be included in a published document, circular or statement or published in any way without my written approval of the form or context in which it may appear.

Liability

It must be emphasised that no liability or responsibility to third parties can be accepted for the valuation or other comments contained in the report.

Relationship with the client:

The valuer is an external valuer. The firm or valuer has no previous relationships with the vendor, potential purchaser or potential tenants of the properties. There has thus been no rotation of the valuer or change of the signatory to the report. The fees derived from this instruction are less than one percent of turnover.

18. STANDARDS

The valuation was prepared in accordance with the Valuation and Appraisal Standards

published The valuation was prepared in accordance with the Valuation and Appraisal Standards published by the Royal Institution of Chartered Surveyors and definitions in the red book. Compliance with the standards may be investigated by RICS for the purposes of the administration of the Institution's conduct and disciplinary regulations.' (Emphasis supplied.)

[21] In amplification, the defendants plead that at the time of the valuation, the property had not been subdivided, separately registered or fenced. In order to determine the size of the property, the defendants, particularly Ms van der Smit, had access to the official published municipal roll which reflected the following description of the property: 'Erf No. 3183, erf size 29,950, registered owner Ondangwa Town Council, LE Deed No.: (empty) land value 2,500,000, improvement (empty), total 2,500,000, improvements deck (vacant), zoning general residential, township Ondangwa, street name (empty) and extension No. 14'.

[22] It is not in dispute from the evidence led that valuation rolls are commonly relied upon by valuers in terms of accepted protocol for identification of the property, size and municipal value.

The evidence

[23] Given that at the stage of an application for absolution, the evidence of the plaintiff's witnesses must be accepted as true,³ I only deal with the evidence of Mr Willem Gabriel Nel, one of three directors of Capx. He is effectively the main witness for Capx. I mention, however, for the sake of completeness that the defendants subpoenaed witnesses from the Deeds Office at the Business and Intellectual Property Authority ('BIPA') and Bank Windhoek to produce certain official documents,⁴ and to, inter alia, obtain clarity (from a Bank Windhoek employee) regarding Bank Windhoek's utilisation of a panel of valuers when determining whether to grant business finance or a loan to a

³ *Bidoli v Ellistron t/a Ellistron Truck & Plant* 2002 NR 451 (HC) at 453 D-F.

⁴ To demonstrate that Capx had ample opportunity through the different entities owned by the debtor to recover the amounts owed.

client. It was clear from this evidence that Bank Windhoek has a panel of valuers that it utilises in considering whether to grant finance.

[24] Capx also called one Jan Oberholzer to give opinion evidence on the standards valuers must apply in valuing a property, but in my view, his evidence was not relevant or of any assistance, mainly because he relied on South African standards, and only had one experience in Namibia where he provided services as a valuer regarding a property in Swakopmund. In any event, the defendants expressly indicated that the valuation report was prepared in accordance with the Valuation and Appraisal Standards published by the Royal Institution of Chartered Surveyors ('RICS').

[25] The contents of Mr Nel's witness statement are in essence a regurgitation of the amended particulars of claim summarised above. This manner of presentation of the witness statement led to substantial amplification thereof at the trial, permitted only because the defendants' counsel, Mr Marais SC, did not meaningfully object to the amplification. Let it be said that this exercise resulted in an inefficient utilisation of the court's time. I will summarise only the salient parts.

[26] Mr Nel is one of three directors of Capx. He confirmed that Dash, represented by Mr Ashikoto, applied for a loan facility with Capx during August 2018, and that Mr Ashikoto transmitted documents to Capx in support of the loan, which included the valuation report on the property dated 26 July 2018 signed by Ms van der Smit.

[27] Mr Nel affirmed that the valuation report was vital to Capx to assess the credit risk, as it confirms to financiers that 'the valuator has applied their mind to the market conditions and made a specific statement to that effect in the valuation report'.

[28] According to Mr Nel, the defendants were at all times fully aware, alternatively they foresaw, that the valuation report was intended to be presented as a document in support of an application by Dash for financing, and

that an institution like Capx, would rely on the valuation report to influence its decision on whether to grant or refuse an application for a loan. Mr Nel confirmed that Capx found comfort that the valuation report explicitly reflected that it was prepared in accordance with valuation standards as set out by RICS.

[29] Instead, the defendants incorrectly recorded the size of the property as 29 950 square metres with an open market value of N\$8 680 000. Premised on the recordals made in the valuation report, specifically the size of the property, Capx concluded a loan agreement of N\$2 million, together with interest, with Dash. The loan would bear interest at a rate of three per cent per calendar month calculated weekly and payable as follows:

(a) for months 1 – 6, Dash would pay an amount of N\$15 000 to Capx per week, the first payment being due on the first Monday following the advance date and weekly thereafter on every subsequent Monday for a period of six months;

(b) for months 7 – 18, Dash would pay an amount of N\$26 743,68 per week, the first payment being due on the first Monday of the 7th month after the advance date and weekly thereafter on every subsequent Monday for a period of 12 months; and

(c) the final repayment date would be 18 months after the advance date, or such earlier date on which Dash was to repay all amounts owing to Capx, or such later date as agreed between the parties.

[30] Mr Ashikoto, in his personal capacity, concluded a deed of suretyship agreement with Capx, represented by Mr Nel on 12 September 2018, in terms of which he bound himself to Capx, jointly and severally with Dash, for the due and proper fulfilment of all the obligations of Dash to Capx. On the same date and at Windhoek, Mr Ashikoto caused a close corporation doing business under the name Dash Enterprises Twelve CC ('Dash 12), the owner of the immovable

property, to be bound to Capx (again represented by Mr Nel), jointly and severally, as further surety and co-principal debtor in solidum for the due and proper fulfilment of all the obligations of and for the punctual payment of whatever sums would become due and payable by Dash to Capx.

[31] Mr Nel confirmed that Mr Ashikoto then caused a surety mortgage bond (B6901/2018) to be registered on the immovable property belonging to Dash 12 in favour of Capx.

[32] Dash failed to meet its obligations in terms of the loan agreement and summons was issued against Dash. Capx obtained summary judgment against Dash and Mr Ashikoto in the amount of N\$2 345 521,76 together with interest. The property was subsequently declared executable. Mr Nel confirmed that Dash and Mr Ashikoto's movable assets recovered an amount of N\$45 859,64. As at 30 June 2021, Dash and Mr Ashikoto, jointly and severally, were liable to Capx in the amount of N\$6 498 336,97. The aforesaid amount consists of (regular and penalty) interest and further interest at a rate of four per cent calculated daily and compounded monthly, as per Capx's certificate of balance incorporating a statement. It was testified by Mr Nel that in executing on the property, Capx could only recover N\$1000, after it purchased same at the public auction for this amount.

[33] It was the testimony of Mr Nel that Capx subsequently conducted its own investigation into the purchase price of the property which was sold in execution at a public auction and found that the defendants were apparently 'guilty of gross and serious errors and misrepresentations when they prepared, compiled and presented their valuation' in that the defendants wrongly recorded that the property's area was 29 950 square metres where it was actually 2950 square metres with an estimated market value of N\$850 000 and not N\$8 680 000 as recorded in the valuation report.

[34] Mr Nel testified that Capx was initially under the impression that the valuation report was drafted, compiled and prepared by Ms van der Smit, but upon reading her witness statement, it became clear to him that the site

inspection on the property was done by a certain Mr Kanime (an apparent student valuator) and that the valuation report was drafted and compiled by a certain Ms Shigwedha (an apparent candidate valuator), and Ms van der Smit then signed off.

[35] He specifically made reference to an email correspondence dated 21 May 2018, between Mr Ashikoto and Ms van der Smit, where Mr Ashikoto asked for an urgent valuation of the property. In the aforementioned email correspondence, Mr Ashikoto clearly stipulated that the size of the property was 2950 square metres (and not 29 950 as set out in the valuation report). Mr Nel further referred to a second email correspondence dated 26 June 2018, where Mr Ashikoto requested for the invoice from the defendants for the valuation and therein, again, referred to the property's size as 2950 square metres.

[36] It was Mr Nel's further testimony that the defendants should have foreseen the likelihood that their valuation report contained material or serious errors and that the defendants, in a letter dated 8 September 2020, demonstrated their 'reckless intent and/or gross negligence', when they stated that they were not provided with a copy of the title deed of the property and that the Certificate of Registered Title, at the time, did not specify the size of the property. In this regard, the defendants pleaded that, given that the property had not, at the time, been registered in the name of Mr Ashikoto, they relied on the information provided by the Local Authority Valuation Roll as being correct. It was also stated in their letter that the defendants verified the valuation roll information with the town planner, who confirmed the property's size being 29 950 square metres.

[37] In contrast to what is stated in the letter, Mr Nel pointed out that the general plan (which was handed up as an exhibit) by the Surveyor General which had been available since 2011 and which described the property as being 2950 square metres in size. In a letter by the Ondangwa Town Council dated 10 September 2018 (which was handed up as an exhibit) the size of the property was identified as 2950 square metres as opposed to the 29 950 square metres. According to Mr Nel, the defendant failed to utilise these sources in their

valuation report.

[38] Mr Nel explained the importance of valuations in Capx's line of business, this being the basis for favourable consideration of a loan, and to enable Capx to make an informed decision. Mr Nel testified that he placed high importance on the contents of the valuation report, and his reliance thereon was based on the good reputation of Gert Hamman Valuers, who Mr Nel trusted implicitly. He also considered himself to be a 'professional advisor' as set out in paragraph 17 of the valuation report. In terms of this paragraph, permission was granted to disclose the valuation report to a professional advisor assisting Mr Ashikoto 'in respect of the purpose'.

[39] Mr Nel underscored that the defendants' 'grossly negligent' misstatement caused financial damage to Capx, as it concluded the loan agreement based on the terms of the valuation report, in particular as regards the size and value of the property. He testified that the defendants held themselves out as expert valuers who perform their work with the necessary degree of expertise, and that they should have foreseen that the report would be used for purposes of obtaining financing and that it would be disclosed to a money lender for that purpose.

[40] As a result of the negligence, Capx is entitled to such damages that it would have been in a position to fully recover from Dash and or Mr Ashikoto. Mr Nel testified that Capx took steps to ensure that the movable property was declared executable; and that with interest and penalties, Mr Ashikoto and Dash owe Capx N\$6 498 336.00. This is the extent of the damages occasioned to Capx, which the defendants should be held liable to pay, together with interest at the rate of four per cent per month compounded monthly, calculated from 30 June 2021 until date of payment.

[41] From the cross examination of Mr Nel, he did not dispute that Capx's business model as a money lender was high risk, as reflected in Capx's high interest rates. Mr Nel confirmed that Capx did not obtain any alternative independent valuation of the property, given its high-risk business profile and

reliance on valuations.

[42] It became apparent from the cross examination of Mr Nel that Capx also did not obtain a copy of the title deed to the property, in spite of the fact that Capx specifically requested same from Mr Ashikoto in an email dated 8 August 2018. Mr Nel remained steadfast that this was not necessary. He testified that his implicit trust in the reputation of the defendants, rendered it unnecessary for Capx to engage in any other form of due diligence to determine the veracity of the application for loan finance. Mr Nel disputed that the cause of Capx's damages was Capx's own failure to undertake due diligence or to properly verify the financial statements and founding statements of Dash. When questioned on execution proceedings, Mr Nel conceded a lack of follow up on some of the representations made by Mr Ashikoto as to his financial situation before the loan agreement was concluded.

[43] Regarding the estimated market value of the property, Mr Nel testified that the market value of N\$850 000 was calculated at N\$290 per square metres. He testified that N\$290 at 2950 square metres (which is the total area of the property) amounts to approximately N\$855 500. It must be added that Mr Nel testified that he is not an expert valuator, and no other extrinsic evidence was presented on these amounts.

[44] Regarding further execution processes that Capx could have pursued, it was Mr Nel's testimony that Capx had learned that Mr Ashikoto is the owner of a townhouse complex in Windhoek, but given the provisions of rule 108 of this court's rules, Capx had to apply to declare the property specially executable and Mr Ashikoto had 'thwarted' any attempts made to serve the application under rule 108.

[45] Having summarised the plaintiff's case and accepting the evidence against the defendants as true, at this stage of the proceedings, for purposes of the absolution application, I assume that negligence is present on the part of the defendants. The issue raised by the defendants is that at the close of its case, Capx has not adduced the necessary evidence to prove two elements

necessary to succeed in a delictual claim, namely, wrongfulness, and as regards Capx's claim for pure economic loss, the issue of quantum. In this regard, the defendants contend that Capx failed to prove its damages.

[46] The trite test to be applied in applications of this nature, is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.⁵ I also bear in mind that absolution ought only to be granted in a very clear case where no case has been made out, in fact or in law, and that a trier of fact should be on guard for a defendant who attempts to invoke the absolution procedure to avoid coming into the witness box to answer uncomfortable questions having a bearing on both credibility and the weight of probabilities in the case.

[47] The defendants' case is that Capx has not made it out of the starting blocks. Capx's claim is for pure economic loss, and no duty of care is owed to Capx by the defendants. The only duty of care that existed was towards Mr Ashikoto. This is because the report was confidential and meant for Mr Ashikoto, and because liability to third parties was expressly excluded. Then, there is the issue of causation. In this regard, Mr Marais submitted that the negligence did not cause the damage, not only because there was no duty of care, but because Capx on its own version and as a money lender, failed to exercise any form of due diligence in ascertaining the financial profile of Mr Ashikoto and his entities before lending the money to Dash. Lastly, the question of proof of damages was also raised, Mr Marais contending that the quantum of damages was not proved at all.

[48] Mr T Barnard, appearing for Capx, maintained that a prima facie case was indeed disclosed at the close of Capx's case, and that the defendants were obliged to perform and discharge their duties towards the outside world in which third parties may rely on valuation reports presented by them in a manner commensurate with the skills that they professed to have. The defendants failed to perform the work entrusted to them with the skill, care and expertise required

⁵ *Stier and Another v Henke* 2012 (1) NR 370 (SC); See also *Factcrown Ltd v Namibia Broadcasting Corporation* 2014 (2) NR 447 (SC).

from an expert valuator in their position.

[49] It was further submitted that Capx relied on a valuation report of a reputable firm of sworn appraisers that, to its knowledge, was on the panel of Bank Windhoek. Such action was the most responsible and most reliable action that a person in the position of Capx could take. Furthermore, Capx knew that the defendants were bound by the provisions of RICS, from which fact it 'took comfort'. Thus, any accusations that Capx did not undertake its own investigations or follow its own due diligence as a money lender were meritless arguments.

[50] As regards the disclaimer relating to third parties, Mr Barnard submitted that the wording of the clause must be carefully analysed, and that it does not purport or attempt to exclude liability arising from any errors, or errors caused by the negligence or gross negligence, or wilful misconduct of the defendants, or any of its employees. It simply attempted to exclude 'liability or responsibility' for its contents. It was submitted that this was a profoundly defective attempt to protect the defendants, since no mention was made in the clause of an exclusion of liability for errors or negligence, or wilful misconduct on the part of the valuer.

[51] It was further submitted that for a professional valuator to present a valuation, but to disavow any liability or responsibility for the contents thereof, would be against public policy, and would not be permitted. In any event, it was pointed out that the contents of the report permitted disclosure to other professional advisors, and that Capx was a professional advisor in the circumstances. Thus, the clause therefore contemplated that the valuation report may be disclosed to professional advisers of the client such as the plaintiff and that third parties may act upon what was contained in the valuation report.

[52] It was submitted that the defendants' general attempt to exclude liability must, furthermore, be viewed against the legal position that an exclusion clause cannot provide any indemnity against the consequences of wilful actions of the party seeking to avoid the consequences of its conduct. The conduct of the

defendants was of such a nature that the consequences thereof were most probably foreseen - through the doctrine of *dolus eventualis* - to be likely to cause damages to be suffered by Capx. The following points were raised as significant

(a) the defendants were notified on two separate occasions before they finalised their valuation report, by the owner of the property itself, that the size thereof comprised only 2950 square metres on 21 May 2018 and on 26 June 2018.

(b) Furthermore, the defendants presented a valuation report in which a site map of the property was included (that the defendants therefore at all times had in their possession) that indicated, unambiguously and clearly, the boundaries of the property, and also indicated – if a simple comparison were to be made with the surrounding properties – that the property described as erf 3183, could by no stretch of the imagination and under no circumstances have had a size of 29 950 square metres. The complaint by the defendants that they could not determine the size of the property since it was ‘unbounded’ was, therefore, plainly false.

[53] It was submitted that a clear basis was presented on behalf of the plaintiff that the defendants acted recklessly and with *dolus eventualis*; foreseeing that what they concluded in their report was incorrect when they recorded the size of the property to be 29 950 square metres, and that, despite what they had foreseen, they forged ahead to present their reckless and incorrect valuation to their client. The exclusion clause relied on made no attempt to exclude liability for conduct of such nature.

[54] As a starting point in a delictual claim of this kind it is trite that it is necessary to prove wrongfulness, *dolus* or negligence, causality and quantum.

[55] Capx's case is for pure economic loss suffered as a result of a negligent misstatement reflected in a valuation report for which Capx allegedly suffered

damages. It is indeed a general principle that a misstatement negligently made by a defendant that causes purely economic loss is actionable in our law in appropriate circumstances. However, Mr Marais submitted that to establish a claim for pure economic loss, the court must at the outset ascertain whether a relationship exists between the parties which could import a legal duty on the defendants in favour of Capx. On the evidence adduced by Capx (which evidence this court must regard as true), no relationship exists between the parties. This is because in cases for pure economic loss, wrongfulness is not presumed, and more is necessary.

[56] In this regard, it was submitted that the foundational principle of a delictual claim is that it must be proved that, because of the delict, the loss was suffered. In *Meechan & Another v VGA Chartered Accountants Partnership t/a PKF (VGA) Chartered Accountants*⁶ Opperman J held the following –

‘The starting proposition when applying the law of delict is that everyone has to bear the loss he or she suffers – “skade rus waar dit val”. A positive act (coupled with negligence) that causes physical harm to a person or property is *prima facie* unlawful. Where the harm in question is not physical harm to a person or property but is pure economic loss, the causing of harm is *prima facie* lawful. There is no general right not to have pure economic loss inflicted on one – if there were, profit making and commerce as we know it, would grind to a halt – and unlike in loss from injury to person or property, wrongfulness is not presumed. More is needed to extract a remedy from the Court where the loss is purely economic. It is now well established that considerations of public policy and the legal convictions of the community inform the issue of wrongfulness and whether a defendant should be held legally liable for loss resulting from a misstatement or be afforded legal immunity.’

[57] Therefore, in order for this court to find in favour of Capx at the end of the trial, it must be established that the defendants owed a legal duty towards Capx and in the absence thereof, there is no unlawfulness:

⁶ *Malachy Meechan & Another v VGA Chartered Accountants Partnership t/a PKF (VGA) Chartered Accountants* (7999/2019) [2020] ZAGPJHC 53; [2020] 2 All SA 510 (GJ) (28 February 2020) paras 37 and 38.

‘Thus, it must appear from all the circumstances of the case that, inter alia, the defendant owed the plaintiff a legal duty not to make the mis- statement to him, for otherwise, it would not have been unlawful for him to have made it ... and to keep this kind of action within reasonable bounds a Court should give anxious consideration to the nature of the mis-statement, its proper interpretation to ascertain its correct meaning and effect, and the problem whether or not it did cause the alleged loss.’⁷

[58] In *Van Straten N.O and Another v Namibia Financial Institutions and Another*⁸ Smuts JA, writing for the Supreme Court, held as follows regarding wrongfulness in respect of pure economic loss –

[84] With negligent omissions causing pure economic loss, the position is different. Wrongfulness is not presumed and would depend upon the existence of a duty not to act negligently. Whether such duty exists is a matter of judicial determination according to criteria of public and legal policy consistent with the norms articulated in the Namibian Constitution. Stated differently, whether the legal convictions of the community in the light of constitutional norms require that the omission to act be regarded as wrongful.’

[59] It was further held that ‘where negligent conduct which causes pure economic loss is however not wrongful, public and legal policy considerations would determine that there should be no liability for a potential defendant, despite the presence of negligence. That defendant would enjoy immunity for that conduct, whether negligent or not’.⁹ In other words, to establish pure economic loss, the conduct of the defendant must be wrongful with due regard to public and legal policy considerations; otherwise, no liability would be imputed, despite negligence.

[60] Although there can be no numerus clausus of considerations to be taken into account in the determination of the duty of care, the Cape Town Full Bench

⁷ *Siman & Co. (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 881 A (at 904); See also *Administrator, Natal v Trust Bank of Africa Beperk* 1979 (3) SA 824 (A).

⁸*Van Straten NO and Another v Namibian Financial Institutions Supervisory Authority and Another* 2016 (3) NR 747 (SC) at 768G-H.

⁹ *Ibid* para 85.

in *Aucamp and Others v University of Stellenbosch*¹⁰ helpfully suggested the following :

- (a) whether the defendant knew or foresaw that his negligent conduct could cause damage to the plaintiff;
- (b) whether the defendant could have taken reasonably practical steps to prevent the damage;
- (c) whether the defendant possessed or professed to possess any special competence;
- (d) whether special protection against economic loss was required;
- (e) whether a finding in favour of the plaintiff could open the flood gates;
- (f) whether a statutory provision required the prevention of economic loss;
- (g) whether the plaintiff could protect itself;
- (h) whether the defendant could protect itself (for example, with insurance). Additionally
- (i) whether the parties had a contractual or fiduciary relationship;
- (j) whether the defendant had exclusive information not readily

¹⁰ *Aucamp and Others v University of Stellenbosch* 2002 (4) SA 544 (C).

available or accessible to the plaintiff;

(k) whether the defendant furnished the information by reason of its professional competence;

(l) whether the defendant was aware or ought to have been aware of the existence and identity of persons who would rely upon the misrepresentations; and

(m) whether the defendant was aware or ought by the exercise of reasonable care to have been aware of the existence and identity of persons who would suffer damage.¹¹

[61] An important principle that arises from the above, as submitted by Mr Marais, is that the courts are not there to protect others against themselves. Thus, where a plaintiff has taken or could reasonably have taken steps to protect itself from or to avoid loss suffered, this is an important factor counting against a finding of wrongfulness in pure economic loss cases.¹²

[62] If Mr Barnard's argument is understood, then the defendants would owe a duty of care, as it were, to any and all financial institutions or money lending businesses, not to be negligent in their valuations, and these institutions would be entirely within their rights to rely solely on the valuation report presented, and would not be required to obtain either their own independent valuation or to exercise any form of additional due diligence to fully investigate the financial profile of a potential money lender without more. They would all develop a right to sue the defendants for a negligent misstatement which was relied on and later caused damage. For conduct to be unlawful or wrongful, there must be a breach of the legal duty owed. It is not enough that the defendant was

¹¹ Ibid paras 69-70.

¹² *Country Cloud Trading CC v MEC (Department of Infrastructure Development)* 2015 (1) SA 1 CC para 51.

negligent.¹³

[63] The authorities have called for a policy based approach to the aspect of the duty of care concept, by which the scope of judicial liability is judicially controlled. I refer to a helpful summary provided by the learned author Joubert¹⁴ as follows:

‘The basic requirement that the act causing the economic loss must have been wrongful affords the most effective guarantee against too wide liability. This requires the act to be either an infringement of a recognized right or the breach of a duty to act reasonably. The determination of the existence of a duty in the particular circumstances provides effective control over the extent of liability. The application of the foreseeability test, either in its traditional form or as an instrument of reason and policy, ensures the possibility of flexible judicial response to the policy considerations involved in an action for the recovery of pure economic loss. The test implies that the court must carefully balance and evaluate the interests of the concerned parties, the relationship of the parties, and the social consequences of the imposition of liability in a particular type of situation. The recognition or denial of a duty to act in the particular circumstances provides a judicial device for keeping liability within acceptable limits.’¹⁵

[64] In *Franschoeke Wynkelder (ko-operatief) Bpk v South African Railways and Harbours*,¹⁶ the Cape Full Bench refused to hold the South African Railway liable for contamination to the soil of adjoining farms, following the spraying of weed killer along the railway tracks, on the basis that there was no reason to find that there was such relationship between the farmers and the railways to give rise to a duty of care.

[65] In considering whether the defendants had a duty of care to Capx, and even to the ‘advisors’ to whom permission was granted by the defendants to disclose the valuation report (in terms of clause 17), I hold the view that some

¹³ *Franschoeke Wynkelder (ko-operatief) Bpk v South African Railways and Harbours* 1981 (3) SA 36.

¹⁴ Joubert *The Law of South Africa* Vol8 para 36.

¹⁵ Cited with approval in *Franschoeke Wynkelder (ko-operatief) Bpk v South African Railways and Harbours* 1981 (3) SA 36 at 4041H-41A.

¹⁶ *Ibid.*

special kind of relationship would be required.

[66] One would not expect the defendants to have a duty of care to each and every single financial institution that is considering to grant loan finance to a client against the value of that client's property. In other words, and in my respectful view, Capx was not dependent on the defendants for the necessary information. It could have obtained it through a due diligence investigation of its own, considering its main business objects.

[67] In *Cape Empowerment Trust Limited v Fisher Hoffman Sithole*,¹⁷ the buyer of a business asked the seller's auditor to certify the business's profit. The auditor, in circumstances of gross negligence, certified that there was profit when there was none. The Supreme Court of Appeal found that whilst the auditor's statement was grossly negligent and the factual cause of the loss, it was not wrongful. Nothing prevented the third party from undertaking its own investigation and therefore such a party was not entirely dependent upon the auditor for the decision that followed.

[68] On the evidence presented, there was to my mind no special relationship between Capx and the defendants. They were not on Capx's panel of valuers, and they did not even attempt to communicate with the defendants to obtain assurance on the contents of the valuation. It is clear from the evidence, that the defendants were at no time aware what the purpose was for the valuation.

[69] More importantly, and as regards the question of foreseeability, it is clear from the valuation report that although permission was granted to disclose the valuation to 'other professional advisors' assisting Mr Ashikoto 'in respect of the purposes' for which the valuation report was sought, the defendants expressly stated that, not only that the report was confidential, but they emphasised that 'no liability or responsibility to third parties can be accepted for the valuation or other comments contained in the report'.

[70] In my opinion, this was a specific indication to third parties that the

¹⁷ *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* 2013 (5) SA 183 SCA.

defendants would not accept liability for the valuation or other comments. These third parties would include Capx and other financial institutions or business finance providers. The authorities cited by Mr Barnard in this regard, relate to cases where there is a special relationship and a direct duty of care, which is not the case in this instance, in my view.

[71] This brings me to the related question of causation and what role Capx might have played in its resultant financial losses. By way of example, it is pertinently stated in the valuation report (clause 4) that the property is held under deed of transfer. In clause 16, it is also stated that 'no title deeds of the properties have been inspected'. This, as I understand Mr Barnard, should be placed squarely before the defendants, who had a duty to consider the deed of transfer (together with other sources) in making a proper and professional determination of the size of the property.

[72] I am not persuaded by this argument. Capx is an independent entity that enters into loan agreements with clients as its main business. It charges significantly high interest rates. This can be gleaned from the repayment plan contained in the agreement concluded with Mr Ashikoto. In correspondence with Mr Ashiko dated dated 8 August 2018, a copy of the same title deed of the property 'offered as security' was requested by Capx, and ex facie this email correspondence, the title deed would have been provided in the next two weeks.

[73] Mr Nel could not explain why Capx of its own accord did not have sight of or regard to the title deed of the property, given that it was being offered for security. Surely, this would be one of the most important documents for a money lender to consider, not only for the size of the property, but to be sure of ownership. References to Mr Ashikoto's correspondence to the defendants indicating the size of the property, could also have been considered by Capx. It is to my mind not impossible to assume that Mr Ashikoto had sight of the valuation report when he submitted same to Capx for the loan, and he had ample opportunity to point out the mistake to Capx or to the valuator, given that he did not advise that the purpose of the valuation report was for loan finance. Capx also did not consider or obtain another independent valuation, when

nothing prevented it from doing so, given its main business function.

[74] Mr Barnard argued that Mr Nel was not questioned on whether the defendants owed a duty of care to Capx. He argued that Mr Nel's testimony specifically bore out that the defendants, as sworn valuers with expertise in property valuation, were obliged 'to perform their duties and discharge such duties towards the outside world in which third parties may rely on valuation reports presented to them in a manner commensurate with the skills that they have professed to have' and when the defendants presented a valuation report knowing that it would be presented to a credit grantor in consideration of granting credit or not, the defendants had an enhanced duty to ensure that the valuation report would be impeccably correct in all respects. I disagree with this submission in light of what is advanced above.

[75] My considered view on the evidence is that the defendants indeed owed a duty of care to properly prepare a valuation report by complying with the necessary principles and procedures in compiling same. To my mind, that duty is not to every financial institution or money lender that may consider the valuation in a vacuum, but to Mr Ashikoto, first and foremost, as this is the person who requested the valuation. I bear in mind that Mr Ashikoto was, according to the documents presented, at all material times aware of the right size of the property. I consider also Capx's dogged reliance on the veracity of the valuation in the absence of any further due diligence. In addition, the evidence is clear that Capx never considered or inspected any title deed to the property.

[76] What is also notable is the clear indication in the valuation itself, which Capx considered in detail, that the same was confidential and that 'no liability or responsibility to third parties can be accepted for the valuation or other comments contained in the report'. Exemption clauses fall to be interpreted by striking a balance between the parties to enjoy common law rights and the principle that a party should be able to protect himself against liability.¹⁸

¹⁸ *Van Der Westhuizen v Arnold* [2002] 4 All SA 331 SCA para 21.

[77] It is clear *ex facie* the valuation report that the disclaimer is prominently incorporated in the valuation itself. Anyone reading the valuation would read the disclaimer. Everything necessary was therefore done to bring it to the attention of anyone inclined to rely upon the valuation.

[78] Mr Marais' final blow to Capx's case was that no evidence was presented by Capx regarding the value of the property being N\$800 000 and that Capx failed to exhaust the execution process available to it. In this regard, it was argued that Capx had the onus to prove: (a) the actual damages that it suffered; and (b) the facts that would be necessary to enable this court in making a finding as regards the damages. Where a plaintiff fails to lead the necessary evidence, a court will refuse to make a finding on quantum.¹⁹ In such a case, the court would grant absolution from the instance.²⁰

[79] Mr Marais submitted that where the evidence that is necessary is not lead by Capx, the court will refuse to make a finding on the quantum and this court is, thus, bound to grant absolution from the instance.

[80] My issue with Capx's claim for damages is that no evidence was presented on the actual value of the property. Not even its own expert could attach a value to the property for the assistance of the court. Not even an opening or starting balance is provided. Capx suggests that the property is worth N\$800 000, but provided no evidence of its value. It is not clear how the court is expected to determine the value of the property and accordingly damages based on Capx's own evidence. Thus, Capx must be absolved from the instance on this score too.

¹⁹ *Dykes v Gavanne Investments (Pty) Ltd* 1962 (1) SA 16 T at 18; See also *Nkwanazi v van der Merwe* 1970 (1) SA 609 A at 631 H-632 D; *Range Land Limited v Henderson* 1955 (3) SA 134 SR.

²⁰ *Aaron's Whale Rock Trust v Murray & Roberts Ltd* 1992 (1) SA 652 C (at 656 E); See also *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 C; *Hanos v Barnett* 1972 (1) SA 334 T.

Conclusion

[81] Having considered the pleadings, evidence, arguments and legal principles, I find that no prima facie evidence exists to prove wrongfulness or quantum on the part of Capx.

[82] For the foregoing reasons, the following order is made:

1. The defendants' application for absolution from the instance is granted.
2. The plaintiff is ordered to pay the defendants' costs of suit, such costs to include the costs consequent upon the employment of one instructing and one instructed counsel.
3. The matter is considered finalised and removed from the roll.

E M SCHIMMING-CHASE
Judge

APPEARANCES

PLAINTIFF:

T A Barnard

Instructed by Schickerling Attorneys,

Windhoek

DEFENDANTS:

J Marais SC

Instructed by Francois Erasmus & Partners,

Windhoek