THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 303/04

In the matter between:

AXIAM HOLDINGS LIMITED Appellant

and

DELOITTE & TOUCHE Respondent

Coram: *Howie P, Navsa, Cloete, Heher et Jafta JJA*

Date of hearing: **16 May 2005**

Date of delivery: **1 June 2005**

Summary: **Auditor — duty to third parties — s 20(9) of Act 80 of 1991 — exception to claim based on negligent misstatement by omission — held to be sustainable on the pleadings — premature to decide question of wrongfulness.**

JUDGMENT

(Dissenting pp 19-27)

NAVSA JA:

[1] The appellant company appeals against the upholding, in part, of a two-fold exception taken to its particulars of claim in an action it instituted in the Johannesburg High Court. In this action, it claimed damages amounting to R241 069 222-43, arising out of the alleged negligent audit by the respondent of the financial statements of the Business Bank Limited (TBB) for the financial year ending 31 March 1999. I shall, for the sake of convenience, refer to the appellant as Axiam and the respondent as Deloitte.

[2] A company in the PSG group, to which I shall refer as the PSG bank, ceded the right to recover the damages in question to Axiam. The essence of Axiam's main claim, to which exception was taken, is set out in the five paragraphs that follow.

[3] For the financial year ending on 31 March 1999 TBB appointed Deloitte, a partnership which conducts business as public accountants and auditors, to act as its auditor within the meaning of ss 274 and 282 of the Companies Act 61 of 1973. Deloitte conducted an audit and prepared and completed TBB's annual financial

statements for that financial year (the 1999 statements) and on 1 July 1999 issued an auditor's report that included the following certificate:

'We conducted our audit in accordance with the statements of South African Auditing Standards. Those standards require that we plan and perform the audit to obtain reasonable assurance that the annual financial statements are free of material misstatements. . .

In our opinion, these annual financial statements fairly present, in all material respects, the financial position of the company at 31 March 1999 and the results of its operations and cash flow for the period then ended in accordance with generally accepted accounting practice and in the manner required by the Companies Act.'

[4] The 1999 statements failed to present fairly the financial position of TBB. They misrepresented TBB's nett worth — reflecting a nett profit before tax of R29 266 176-00 whereas, in fact, TBB suffered a nett loss of R77 899 201-00. This inaccurate information resulted from what is set out hereafter. Deloitte failed to include a bad debt of R68 888 000-00 in the income statement. This amount was reflected as goodwill. In addition, non-existent income in an amount of R10,3 million was included in the financial statements as profit. Furthermore, an irrecoverable or non-existent bad debt of R27 977 377-00 was wrongly reflected as a loan to a shareholder.

[5] Deloitte, in conducting the audit and completing the financial statements, did not, inter alia, do so with the requisite professional and reasonable skill and care and failed to comply with Generally Accepted Accounting Practice (GAAP). Had Deloitte done so the 1999 statements would have accurately represented TBB's financial position, alternatively, would have contained a qualified audit opinion. Thus, Deloitte, in conducting the audit and certifying the 1999 statements, was negligent.

[6] During February 2000 two companies within the PSG group, one of which was the PSG bank, concluded linked agreements with TBB in terms of which shares in TBB were purchased and its business financed. At that time Deloitte was aware of the negotiations and that the 1999 statements and audit opinion would be relied on by the two companies in that process. Prior to 22 February 2000 (the date on which the agreements were concluded) *Deloitte knew, alternatively, could in the circumstances reasonably have been expected to know, that the two companies, in deciding to conclude the agreements, would rely on the 1999 statements and Deloitte's audit opinion and knew, alternatively, could in the circumstances reasonably have been expected to know, that the 1999 statements*

contained the misstatements and misrepresentations referred to above.

[7] In the premises Deloitte owed the two companies a duty, prior to 22 February 2000, to warn them that the 1999 statements and the audit opinion were incorrect, alternatively to warn them that it had not conducted the audit properly and that they should not rely on the 1999 statements and the audit opinion. Deloitte failed to issue the warnings. Such failure was negligent and constituted a representation within the meaning of s 20(9)(*b*)(ii) of the Public Accountants' and Auditors' Act 80 of 1991 (the PAA Act), that the financial statements were accurate and fairly presented the financial position of TBB at the end of March 1999. In consequence of Deloitte's breach of the aforesaid duty PSG bank paid TBB an amount of R241 069 222-34, in terms of the agreements referred to earlier, none of which it has been able to recover. As stated earlier the right to recover this amount was ceded to Axiam.

[8] Deloitte's exception was based on the following:

(i) the conclusion that Deloitte owed the two companies a duty in law does not follow on either of the premises set out in the italicised part of para [6] above;

(ii) its failure to warn PSG is insufficient in law to constitute a representation within the meaning of s 20(9)(*b*)(ii) of the PAA Act.

[9] Schwartzman J, in the court below, considered the bases of the exception and concluded that in the main they were sound. He issued an order in the following terms:

'18.1 The exception to the extent only that it is based on the Defendant's knowledge of the facts set out in paragraphs 12.1 and 12.2 of the Particulars of Claim is dismissed.

18.2 The exceptions are in all other respects upheld.

18.3 The Plaintiff is given twenty days within which to amend its Particulars of Claim.

18.4 The Plaintiff is to pay the costs of this application.'

The material parts of paras 12.1 and 12.2 are italicised in para [6] above.

[10] In justifying the order set out in para 18.1 of his judgment, the learned judge stated that a deliberate concealment of material facts known to the defendant, in circumstances where it could be expected

to speak, could conceivably impose a duty to ensure that PSG bank did not suffer foreseeable harm. In rejecting the alternative basis of the claim set out in para [6] above, the learned judge stated as follows:

'. . . PSG bank cannot found a cause of action based on the proposition that what is in essence being alleged is the Defendant's continuing misconduct that commenced in July 1999 with its negligent audit and which continued through to February 2000. The flaw in this submission is that in July 1999, the Defendant did not owe PSG Bank a duty of care, and that in February 2000, the Defendant did not owe PSG Bank a duty to speak.'

[11] Much time was spent by the learned judge in the court below and by counsel before us in discussing English law and applying dicta in English judgments dealing with liability for negligent misstatement inducing a contract and causing economic loss, rather than following the course of applying our law on the issue.[1] This is not to say that there is no useful purpose in having regard to English law and to the law in other common law countries for reassurance that we are not out of step with global norms as applied in the commercial world.

[1] See *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) where Corbett CJ (following on *Administrateur v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A), *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A), *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) and *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A)) set out, with customary clarity, the factors to be taken into account in considering whether a party acted in breach of a legal duty.

However, we should not lose sight of what was stated by this Court in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para [16]:

'…what is ultimately required is an assessment, in accordance with the prevailing norms of this country, of the circumstances in which it should be unlawful to culpably cause loss.'

[12] In applying the principles set out in the *Standard Chartered Bank* case, supra, one would be loath, at exception stage, to hold that it is inconceivable that an auditor who *knew* of the misstatement in the 1999 statements and audit opinion and who also knew that the two companies in the PSG group, in concluding the agreements, would rely on the correctness thereof would not have a duty to speak. These are circumstances which approximate fraud. In this regard the judgment of Schwartzman J cannot be faulted.

[13] The essential allegations in the alternative claim are as follows:

1. Deloitte could in the circumstances reasonably have been expected to know that the 1999 statements and the audit opinion were inaccurate and did not fairly present TBB's financial position;

2. Deloitte could reasonably have been expected to know that the two companies would, in concluding the agreements, rely on the correctness of the 1999 statements and the audit opinion;

3. In the premises Deloitte owed the two companies a duty to warn them of the inaccuracies and of its failure to properly conduct the audit of the 1999 statements;

4. Deloite had breached this duty by not so warning the two companies;

5. The failure to warn the two companies constituted a representation within the meaning of s 20(9)(*b*)(ii) of the PAA Act to the effect that the 1999 statements were correct as certified by the audit report and opinion;

6. In consequence of the representation aforesaid, the agreements were concluded and the amount of R241 069 222-43 was paid over for which Deloitte is now liable.

[14] Section 20(9) provides:

‘(9) Any person registered as an accountant and auditor in terms of this Act shall, in respect of any opinion expressed or certificate given or report or statement made or statement, account or document certified by him in the ordinary course of his duties —

(*a*) incur no liability to his client or any third party, unless it is proved that such opinion was expressed or such certificate was given or such report or statement was made or such statement, account or document was certified maliciously or pursuant to a negligent performance of his duties; and

(*b)* where it is proved that such opinion was expressed or such certificate was given or such report or statement was made or such statement, account or document was certified pursuant to a negligent performance of his duties, be liable to any third party who has relied on such opinion, certificate, report, statement, account or document, for financial loss suffered as a result of having relied thereon, *only* if it is proved that the auditor or person so registered —

. . .

(ii) in *any way represented*, at any time after such opinion was expressed or such certificate was given or such report or statement was made or such statement, account or document was certified, *to the third party that such opinion, certificate, report, statement, account or document was correct*, while at such time he knew *or could in the particular circumstances reasonably have been expected to know that the third party would rely on such representation for the purpose of acting or refraining from acting in some way or of entering into the specific transaction into which the third party entered, or any other transaction of a similar nature, with the client or*

any other person.'

(Emphasis added).

It is important to note that s 20(1) of the PAA Act sets out the standard of diligence required of an auditor before reporting or providing an opinion that financial statements fairly reflect the affairs of any undertaking.[2] Section 20(9)(*a*) refers to a negligent performance of duties by an auditor '*in respect of an opinion expressed…or report or statement…*'

[15] Our law now firmly recognises that a negligent misrepresentation will give rise to delictual liability provided all the necessary elements of such liability are satisfied. It was submitted on

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[2] In terms of s 20(1) no auditor shall certify or report or express an opinion that any financial statement presents fairly or gives a true and fair view of the affairs of an undertaking unless —

'(*a*) he has carried out such audit free of any restrictions whatsoever;

(*b*) proper accounting records . . . have been kept in connection with the undertaking in question, so as to reflect and explain all its transactions and record all its assets and liabilities correctly and adequately;

(c) he has obtained all information, vouchers and other documents which in his opinion were necessary for the proper performance of his duties;

(*d*) he has, in the case of an undertaking regulated by any law, complied with all the requirements of that law relating to the audit of that undertaking;

(*e*) he has by means of such methods as are reasonably appropriate having regard to the nature of the undertaking in question, satisfied himself of the existence of all assets and liabilities shown on such financial statement . . .;

(*f*) he is satisfied, as far as is reasonably practicable having regard to the nature of the undertaking . . . and of the audit carried out by him, as to the fairness or the truth or the correctness, as the case may be, of such financial statement . . .;

(*g*) any matter referred to in subsection (5) had, at the date on which he so certified or reported or expressed such opinion been adjusted to his satisfaction.'

Subsection (5) deals with the position where an auditor has reason to believe that in the conduct of the undertaking a material irregularity has taken place or is taking place. For present purposes it is not necessary to consider those provisions any further.

behalf of Axiam that there can in law be a misrepresentation by silence. That is undoubtedly so. See *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at 722F-726D. Silence or inaction as such cannot constitute a misrepresentation unless there is a duty to speak or act.

[16] It was submitted for Deloitte that, on the alternative basis set out in para [6] above, what was sought to be established was liability for an audit opinion, the inaccuracy of which Deloitte was, on the facts premised for this exception, unaware of and therefore under no duty to warn about. It was submitted further, that Schwartzman J was correct in upholding the exception on the basis set out in para [10] above.

[17] It is clear from the essentials of Axiam's alternative claim that it relies on a negligent misstatement by omission (during the period 1 July 1999 to 22 February 2000) to the effect that Deloitte's prior (negligent) certification was correct. This cannot be faulted either notionally or conceptually. Deloitte's prior audit report and opinion would thus not have been completed in accordance with s 20(1) of the PAA Act. Section 20(9)(*b*)(ii) enables a third party to sue an

auditor if, after such a negligent certification, it represents in any way that it was correct. The claim presently under discussion is in accordance with these provisions and is not against fundamental principles.

[18] It is true that decisions by courts on whether to grant or withhold a remedy for negligent misstatement causing economic loss, are made conscious of the importance of keeping liability within reasonable bounds. It is universally accepted in common law countries that auditors ought not to bear liability simply because it might be foreseen in general terms that audit reports and financial statements are frequently used in commercial transactions involving the party for whom the audit was conducted (and audit reports completed) and third parties. In general, auditors have no duty to third parties with whom there is no relationship or where the factors set out in the *Standard Chartered Bank* case are absent.

[19] In considering whether a defendant representor such as Deloitte acted unlawfully in relation to a third party, ie in breach of a legal duty, the nature, context, purpose of the statement and knowledge thereof are considered and so is the relationship between

the parties.[3] In the *Standard Chartered* case these factors were considered at the end of a trial after all the circumstances of the case were revealed by the evidence.

[20] The important factual implication in para 12.2 of the particulars of claim is that a reasonable person in the defendant's position would, at the second, or later, stage of the alleged events, have known of the defects in the report. On that basis one is justified in saying that the conclusion could well be drawn at the trial that, possessed of such knowledge, the reasonable person would not have kept silent but have expressed at least a reservation as to the reliability of the report. Although the application of the criterion of a reasonable person concerns the negligence aspect of liability, from which the legal duty element is quite separate, the provisions of s 20(9)(*b*)(ii) of the Act provide a clear pointer that a negligent representation falling within its terms is indeed wrongful.

[21] Whether the representation by silence alleged in this case does fall within the section's terms depends on whether there was a duty to speak. In other words the duty relied on for there having been a

[3] See the *Standard Chartered Bank* case, supra, at 770.

representation will be the same duty relied on for the allegation of wrongfulness.

[22] As to the existence of that duty, a court apprised of all the factors and circumstances referred to in *Minister of Law and Order v Kadir* [4] at 318H-I could find, on the framework of the allegations made in the particulars of claim, and on final evaluation, that the defendant's ignorance of its negligent report is no bar to concluding that it bore the alleged duty. It must be remembered that we are dealing with a situation where the legal convictions of the community could well consider it unacceptable that an auditing firm which issued a seriously negligent report should escape the legal duty to speak with care concerning that report simply because it was, possibly even negligently, ignorant of the negligence of its report. And what is more, in circumstances in which the latter negligence was something it ought to have known of. Reliance on the case of *Universal Stores Limited v OK Bazaars (1929) Limited* [5] is misplaced. Two factors distinguish that case. One is that the wrongful conduct in ignorance of which the alleged representation occurred was that of the representor

[4] 1995 (1) SA 303 (A)
[5] 1973 (4) SA 747 (A)

itself. It could well be the conclusion on trial that the representation compounds the negligence of the earlier audit and report. The second factor consists of the statutory provisions of s 20(9)(*b*)(ii).

[23] It cannot therefore be found on exception that the defendant's alleged omission to speak was not wrongful (cf *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* at 801D [6]).

[24] The court below was faced with an exception to a claim which on the face of it was sustainable. It was premature to decide whether a legal duty could be said to exist.

[25] In the English case of *Andrews & Others v Kounnis Freeman (a firm)* 2000 Lloyd's Rep PN 263 (p654) Jonathan Parker LJ stated:

'In my judgment, however, only rarely will the court be in a position to determine the question of the existence or otherwise of a duty of care owed by professional advisors on a strike out application. As Chadwick LJ said in *Coulthard v Neville Russell* [1998] 1 BCLC 143 at 155 ". . . The liability of professional advisors including auditors for failure to provide accurate information or correct advice can, truly, be said to be in a state of transition or development. As the House of Lords has pointed out repeatedly this is an area in which the law is developing pragmatically and incrementally. It is pre-eminently an area in which the legal

[6] 1992 (1) SA 783 (A)

result is sensitive to the facts. . . .” In my judgment these observations apply with equal force in the instant case. Although the judge in the instant case could see no realistic prospect of any further facts emerging at a trial, *I am far from persuaded that once subjected to the scrutiny of a full trial the factual background will remain quite as stark as the Judge found it to be*.’

(Emphasis added).

The attitude of our courts in relation to deciding matters of this kind on exception is not dissimilar. See *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd*, supra, at 801A-B. Counsel could not refer us to, nor could we find, any judicial pronouncement on an auditor’s liability for negligence subsequent to a negligent report or opinion in circumstances such as those of the present case. In my view this makes it all the more necessary to establish the full factual matrix before a final pronouncement is made.

[26] For the reasons set out above I make the following order:

The appeal is upheld with costs including the costs of two counsel.

The order of the court below is substituted as follows:

‘1. The exceptions are dismissed with costs.’

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

HOWIE P
JAFTA JA

CLOETE JA:

[27] I have had the advantage of reading the judgment of my colleague Navsa JA. I respectfully disagree with the conclusion reached, essentially because Axiam has not in my view alleged facts which *prima facie* establish a breach of a legal duty.

[28] Section 20 of the Public Accountants' and Auditors' Act, 80 of 1991 specifies the powers and duties of auditors. Subsection (1) deals with the position pursuant to an audit. The subsection begins:

'No person acting in the capacity of auditor to any undertaking shall, without such qualification as may be appropriate in the circumstances, pursuant to any audit carried out by him in that capacity, certify or report or express an opinion to the effect that any financial statement, including any annexure thereto, which relates to such undertaking, presents fairly, or gives a true and fair view of, or reflects correctly, the affairs of such undertaking and the results of its operations, or the manner dealt with in such financial statement or annexure, as the circumstances may require, unless —'

and there follow seven paragraphs setting out what the auditor must do.

[29] A negligent failure by an auditor to perform the statutory obligations spelled out in s 20(1) gives rise to the spectre of potential

limitless liability for pure economic loss to persons who rely to their detriment on the certificate, report or opinion given by the auditor. It was obviously to meet this problem that subsection (9) was included in s 20. The provisions of that subsection are quoted in para [14] of the judgment of Navsa JA. The essential question on appeal is whether Axiam made allegations, in that part of its particulars of claim under attack in this appeal, which bring it within the ambit of s 20(9) and more particularly, s 20(9)(b)(ii). The facts alleged by Axiam are set out in paras [2] to [7] of the judgment of Navsa JA; Deloitte's exeption, in para [8]; and the allegations relevant to the claim which is the subject matter of the appeal (the alternative claim), in para [13]. The correctness of the decision of the court *a quo* to dismiss the other part of the exception (to the main claim) was not debated before this court and I prefer to say nothing in that regard.

[30] Axiam's case is that the representation required by s 20(9)(b)(ii) was constituted by Deloitte's silence at a time when it was ignorant of its own negligence but constructively aware thereof (ie it could by the exercise of reasonable care have acquired the knowledge). Silence does not constitute a representation in the absence of a duty to

speak. As is said in Spencer Bower's *The Law of Actionable Misrepresentation* 3rd ed by AK Turner para 90 at 103:

'It is not silence, or reticence, which in itself can amount to a misrepresentation. It must be *concealment*, or *suppressio veri*. And these terms import the existence of a duty. A man cannot be said to conceal what he is not bound to reveal, suppress what he is under no duty to express, or keep back what he is not required to put forward.'

Axiam has alleged that 'prior to 22 February 2000' Deloitte could reasonably have been expected to know of the mistakes and unfair presentation in the 1999 financial statements. If this allegation means that Deloitte would at the time of the audit have become aware of the mistakes and unfair presentation had the audit been performed properly, the allegation is irrelevant because the section requires a representation to have been made thereafter. If the allegation means that Deloitte could have been expected to have become aware of the mistakes and unfair presentation subsequently, that allegation, by itself, is in my view insufficient to establish a duty to speak. It is illogical to impose without more a duty to speak on an auditor where he (she) had no reason to believe what he had done, may have been negligent. You cannot disclose what you do not know; and to hold a person liable for what that person ought to have known, is to equate

constructive knowledge with actual knowledge. In *Universal Stores Limited v OK Bazaars (1929) Limited* 1973 (4) SA 747 (A), this court refused to impose a legal duty where the knowledge of the party on whom the legal duty was sought to be imposed did not have actual knowledge. The facts in that matter were as follows:

Bosch, an employee of the plaintiff (OK Bazaars), had fraudulently altered cheques and 'negotiated' the cheques to the defendant bank. The plaintiff paid its creditors the amount of the debts in respect of which cheques had been drawn. It then, as the true owner of the cheques, sued the defendant for such amount under s 81(1) of act 34 of 1964 as a person who had been in possession of the cheques after the theft or loss. The defendant pleaded that the plaintiff was estopped by reason of its own negligence from pursuing its claim. The defendant's case was based on a misrepresentation by the plaintiff, accompanying each cheque, that Bosch had a good title to each cheque. For this representation by the plaintiff the defendant sought to rely on the conduct of the plaintiff, including carelessness inter alia in the running of its affairs, particularly in not timeously detecting Bosch's dishonesty and allerting the defendant to the situation.

Rumpff JA said at 761G-H:

'The first question that arises is whether the plaintiff's failure to alert the defendant would constitute a breach of a legal duty to speak in the circumstances. Generally speaking, and depending on the relationship between

the parties, there would be a duty to speak if it is considered reasonable in the circumstances that the party who may act to his detriment should be warned by the other party.'

After dealing with what the position might be if the plaintiff's employees had actual knowledge which could be imputed to the plaintiff, the learned judge of appeal continued at 762E-G:

'According to the plea, and the particulars for trial, defendant does not allege that plaintiff had actual or imputed knowledge of Bosch's frauds. It relies on constructive knowledge, i.e. the knowledge which plaintiff would have had, were it not for its own negligence. If the plaintiff was ignorant of Bosch's fraudulent *modus operandi*, it would have been under no legal duty to defendant to scrutinize its returned cheques and bank statements; in that case it would not even be obliged to do so *vis-à-vis* its own bank — see *Spencer Bower and Turner, op. cit.*, pp. 53-55, 199. If ignorant, the plaintiff could not, in my view, reasonably be expected to foresee that its silence might mislead the defendant into believing that Bosch had a good title to any cheques she offered to transfer (see *Connock's* case, *supra* at pp. 51-53 and 57-58). In the result, in my view, the defendant can only rely on actual, i.e. imputed knowledge of the plaintiff.'

The distinctions between that case and the present suggested by Navsa JA in para [24] of his judgment appear to me, with respect, to be distinctions without a difference. As to the first, in both cases the question is whether a duty can or should arise from constructive

knowledge; and as to the second, the duty to speak in the present matter is not to be found in the statute but must, as in the reported case, be sought in the common law ─ as is clear (in particular) from paras [20] and [21] of my learned colleague's judgment.

[31] Nor in my view does public policy require the imposition of a duty to speak in the circumstances. In *Standard Chartered Bank of Canada v Nedperm Bank Limited* 1994 (4) SA 747 (A) Corbett JA said at 770J-771A:

'There are, in my view, no considerations of public policy or fairness or equity to deny Stanchart [the plaintiff] relief in this case. This is not the kind of case where a finding in favour of the plaintiff raises the spectre of limitless liability or places an undue or unfair burden upon the bank [the defendant].'

In the present case, as I have said, the spectre of limitless liability does arise; and an undue and unfair burden would be placed on an auditor. The burden would be undue because the third party is not obliged to rely upon what the auditor has done (there is no suggestion of involuntary reliance in Axiam's particulars of claim): the third party can appoint its own auditor, or ask the auditor whether it can rely on the accuracy of the audit already done. The burden would be unfair because should the third party make such an enquiry, the

auditor would be entitled to refuse to answer[7]; but if the enquiry is not made, the auditor would be obliged nevertheless to issue a disclaimer (which would reflect on its professional competence, and would be completely unnecessary if it had not been negligent) or would be obliged at its own expense to revisit the audit, on pain of being held liable (perhaps, as in this case, for many millions of rand) to any number of third parties whom the auditor knows or ─ even worse ─ ought reasonably to know, will rely on its accuracy. At common law, mere knowledge that the third party did indeed intend to rely on the correctness of the audit or a foreseeable risk that he might, is not sufficient to create a legal duty.[8] The same is true of the statute: para (ii) requires a representation in addition to knowledge (actual or constructive).

[32] What para (ii) envisages is that the auditor must, subsequent to the audit, take responsibility to the third party for its accuracy. If silence *per se* constituted a representation for the purposes of para (ii) then that paragraph would be largely ineffective in curbing the mischief ─ indeterminate liability ─ at which s 20(9) is aimed. A third

[7] *Standard Chartered Bank of Canada v Nedperm Bank Ltd*, above (para 31) 763A-B and 771A-B.
[8] *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) para 13.

party in the position of Axiam would be entitled to sue an auditor in the position of Deloitte simply because Deloitte had been negligent in an audit performed for its client and, not having detected such negligence, had not warned the third party, when it had actual or constructive knowledge that the third party would rely on the correctness of the audit. It is to limit such potential liability that para (ii) requires a representation as well as knowledge. It may be that silence can constitute a representation for the purposes of the paragraph (although I confess to some difficulty in appreciating how this can be so); but because an omission is not *prima facie* wrongful[9], facts which at least *prima facie* establish a duty to speak must be alleged.[10] As Hefer JA pointed out in *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) 318H-J:

'Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies.

…

It is impossible to arrive at a conclusion except upon a consideration of *all* the circumstances of the case and of every other relevant factor. This would seem to indicate that the present matter should rather go to trial and not be disposed of

[9] *BOE Bank Ltd v Ries* n 2 above, para 12 at p 46G-H and authorities there quoted; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12 and authorities referred to in the footnotes.
[10] *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 (1) SA 475 (A) 496 *in fine* — 497A.

on exception. On the other hand, it must be assumed — since the plaintiff will be debarred from presenting a stronger case to the trial Court than the one pleaded — that the facts alleged in support of the alleged legal duty represent the high-water mark of the factual basis on which the Court will be required to decide the question. Therefore, if those facts do not *prima facie* support the legal duty contended for, there is no reason why the exception should not succeed.'[11]

Such allegations as have been made by Axiam, do not in my view even *prima facie* establish a duty to speak and it is for that reason I conclude that the exception to the alternative claim was properly upheld.

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T D CLOETE
JUDGE OF APPEAL

Concur: Heher JA

[11] See also *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) 801C.