THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 405/12

In the matter between:

PICBEL GROEP VOORSORGFONDS (In liquidation) **Appellant**

and

WILLIAM VASS GRAHAM SOMERVILLE & THREE

RELATED MATTERS and CROSS APPEAL **Respondent**

And in the matter between:

SABLE INDUSTRIES PENSION FUND (Under curatorship) **Appellant**

and

SIMON JOHN NASH	**First Respondent**
MIDMACOR INDUSTRIES LIMITED	**Second Respondent**
AUBREY WYNNE-JONES	**Third Respondent**
WYNNE-JONES & COMPANY EMPLOYEE BENEFITS CONSULTANTS (PTY) LTD	**Fourth Respondent**
NEDBANK LIMITED	**Fifth Respondent**
WILLIAM VASS GRAHAM SOMERVILLE	**Sixth Respondent**

And in the matter between:

MITCHELL COTTS PENSION FUND (In liquidation)	**First Appellant**
LUCAS SOUTH AFRICA PENSION FUND (In liquidation)	**Second Appellant**

and

NEDBANK LIMITED	**First Respondent**
WILLIAM VASS GRAHAM SOMERVILLE	**Second Respondent**

And in the matter between:

DATAKOR PENSION FUND (Under curatorship)	**First Appellant**
DATAKOR RETIREMENT FUND (Under curatorship)	**Second Appellant**
CORTECH PENSION FUND (Under curatorship)	**Third Appellant**

and

WYNNE-JONES & COMPANY EMPLOYEE BENEFITS CONSULTANTS (PTY) LTD	**First Respondent**
AUBREY WYNNE-JONES	**Second Respondent**
JOHANNES ROETS	**Third Respondent**
MICHAEL MCEVOY	**Fourth Respondent**
DERRICK JOHN PETTITT	**Fifth Respondent**
WILLIAM VASS GRAHAM SOMERVILLE	**Sixth Respondent**

Neutral citation: *Picbel Groep Voorsorgfonds v Somerville* (405/12) [2013] ZASCA 24 (22 March 2013)

Bench: **PONNAN, CACHALIA and PETSE JJA, PLASKET and MBHA AJJA**

Heard: **18 FEBRUARY 2013**

Delivered: **22 MARCH 2013**

Summary: **Apportionment of Damages Act 34 of 1956 – s 2(2)*(b)* read with s 2(12) – proceedings on exception – whether upon every interpretation which the particulars of claim and annexures can reasonably bear no cause of action disclosed.**

ORDER

On appeal from: South Gauteng High Court (Pretoria) (Sutherland J sitting as court of first instance):

(a) The appeal is dismissed with costs, including the costs of two counsel.
(b) In SGHC case number 16215/2011(*Mitchell Cotts Pension Fund (in liquidation) & another v Nedbank Limited & another*), Nedbank Limited is ordered to pay the costs, including the costs of two counsel, of Mitchell Cotts Pension Fund (in liquidation) and of Lucas South Africa Pension Fund (in liquidation) in respect of Nedbank's withdrawn cross-appeal.

JUDGMENT

PONNAN JA (PETSE JA concurring):

[1] The appellants are all pension funds[1] (the Funds), who suffered losses totalling some R946 million resulting from the wrongful removal of surplus assets from each fund through a scheme known as the Ghavalas Option, details of which are not material to the present appeal. It resulted in the Funds being placed under curatorship or winding-up. Part of those losses formed the subject matter of delictual (Aquilian) damages claims by the Funds (duly represented by their curators or liquidators as the case may be) instituted against Alexander Forbes Financial Services (Pty) Ltd (Alexander Forbes), as one of several wrongdoers in respect of the harm suffered.

[1] Picbel Groep Voorsorgfonds (in liquidation), Sable Industries Pension Fund (under curatorship), Mitchell Cotts Pension Fund (in liquidation), Lucas South Africa Pension Fund (in liquidation), Datakor Pension Fund (under curatorship), Datakor Retirement Fund (under curatorship) and Cortech Pension Fund (under curatorship).

[2] Alexander Forbes gave notice of the action to the various respondents[2] in terms of s 2(2)*(b)* of the Apportionment of Damages Act 34 of 1956 (the Act). Section 2(2)*(b)* provides:

'Notice of any action may at any time before the close of pleadings in that action be given by any joint wrongdoer who is sued in that action, to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action.'

None of the respondents intervened in the action.

[3] The damages claims were settled by Alexander Forbes. The settlement agreement to the extent here relevant read:

'4. The company [Alexander Forbes] shall:

4.1 without admission of liability pay to AL Mostert & Company, the attorneys for the Funds, the sum of R325 million, plus interest at prime rate from 21 January 2010 ("the payment"); **and**

4.2 cede to Mostert on behalf of the Funds the claims against all third parties to whom the company has given notice in terms of section 2(2)*(b)* of the Apportionment of Damages Act, arising in terms of the Act as a result of this settlement or howsoever arising.

. . .

6. The Funds record that the payment does not reflect the full loss sustained by the Funds resulting from the Ghavalas option. Consequently one or more of the Funds are pursuing other remedies, including the return of assets or their proceeds. The payment serves to discharge only that portion of the loss for which the Funds regard the company liable.

7. The payment, determination and allocation as aforesaid shall operate in full and final settlement of the company's share of the amounts claimed in the action and the Funds shall thereupon have no further claims against the company and related entities, and shall discharge the company and related entities from all present and future liability to each of the Funds inclusive of all legal costs and costs orders.

[2] William Vass Graham Somerville, Simon John Nash, Midmacor Industries Limited, Aubrey Wynne-Jones,Wynne-Jones & Company Employee Benefits Consultants (Pty) Ltd, Nedbank Limited, William Vass Graham Somerville, Johannes Roets, Michael McEvoy and Derrick John Pettitt.

8. Mostert shall make such determinations as may be required on behalf of each of the Funds as to the allocation of the payment at any time but by no later than 30 days of final judgment or settlement of all claims of any of the Funds arising from the Ghavalas option.

9. Upon conclusion of this agreement,

9.1 Mostert shall sign and formally serve on the company's legal representatives a notice of withdrawal of the action instituted by the Funds . . . Mostert shall simultaneously deliver the served notice to the company;

9.2 Upon signature hereof the company shall sign and formally serve on Mostert notices of withdrawal of its:

9.2.1 opposition to the urgent application and its counter-application in Case No 08/20841;

9.2.2 opposition to the review applications launched under Case Nos 09/35014, 09/35015, 09/35016, 09/35017, 09/35018, 09/35019 and 09/35020;

9.2.3 application for leave to appeal against the dismissal of the application for leave to join third parties; and

9.2.4 The claim lodged against Picardi Holdings Limited (in liquidation).

9.3 The company shall simultaneously deliver the served notices to Mostert.

9.4 Upon payment by the company, Mostert and the company shall become entitled and be obliged to formally file the notices referred to above with the office the Registrar of the South Gauteng High Court.

ASSISTANCE

10. The company undertakes to provide all reasonable assistance to the Funds for the purpose of enforcing the claims ceded by the company to the Funds and the claims referred to in clause 6 above.'

[4] The Funds thereafter instituted action in the South Gauteng High Court against the respondents. The particulars of claim alleged:

'4. The plaintiff seek enforcement of the ceded rights of contribution in terms of section 2(2)*(b)* read with 2(12) of the Apportionment of Damages Act 34 of 1956 ("the

Apportionment Act") against the defendant jointly or severally, the one paying the other to be absolved, for payment of the entire amount of damages paid to the plaintiffs, *alternatively* such lesser amount to be determined by the court.

. . .

6. In March 2008 under case number 08/7872 of this Court an action ("the action") was instituted by the plaintiffs and five others ("the plaintiff funds") against [Alexander Forbes] . . . .

7. A copy of the particulars of claim in the action is attached marked **"POC 1"** and the contents thereof incorporated herein by reference.

8. In the action the plaintiff claimed an amount in damages from Alexander Forbes of . . . .

9. Pursuant to the action being instituted, Alexander Forbes gave notice to the defendant in accordance with the provisions of section 2(2)*(b)* of the Apportionment Act 34 of 1956 as joint wrongdoers not having been sued in the action.

10. A copy of the notice is attached hereto marked **"POC 2"** and its contents are incorporated herein by reference.

11. On 22 April 2010 the plaintiffs and Alexander Forbes entered into a written agreement of settlement pursuant to which the claims of each of the plaintiffs in the action were settled.

12. A copy of the settlement agreement is attached hereto marked **"POC 3"** ("the settlement").

13. In accordance with clause 4.1 of the settlement, Alexander Forbes ceded to the plaintiffs, its rights to contribution against all third parties to whom it gave notice in terms of section 2(2)*(b)* of the Apportionment Act arising in terms of the Apportionment Act as a result of the settlement.

14. In settlement of the plaintiff's claim Alexander Forbes paid to the plaintiff an amount of ….

Accordingly, pursuant to section 2(12) read with section 2(6)*(a)* of the Apportionment [Act] the plaintiff *qua* cessionary of Alexander Forbes' rights to contribution as aforesaid, is entitled to claim and recover from the defendant such a contribution in

respect of his responsibility for the amounts referred to in paragraph 14 as the court may deem just and equitable.'

[5] The summons was met with various exceptions, one of which – the only one relevant for present purposes - was expressed thus:

'(a) the right in terms of section 2(12) of the Act to recover a contribution in terms of section 2(6) from any other joint wrongdoer, is only afforded to a joint wrongdoer who "*agrees to pay the plaintiff a sum of money in full settlement of the plaintiff's claim*";

(b) *ex facie* clause 6 of the settlement agreement the payment by Alexander Forbes effected in terms thereof was not in full settlement of the claims of the plaintiffs in the Alexander Forbes action, and accordingly neither section 2(12) nor section 2(6)*(a)* of the Act finds application, the effect whereof is that Alexander Forbes did not become entitled to recover a contribution from [any of the other alleged joint wrongdoers], and no such right therefor was capable of being ceded by Alexander Forbes to [the Funds].'

[6] That exception was upheld by Sutherland J, who thereafter granted leave to the Funds to appeal to this court against that order. The learned Judge, moreover, granted conditional leave to one of the respondents, Nedbank Limited (Nedbank), to cross-appeal the dismissal of two further exceptions presented and argued by it. By notice dated 22 January 2013 Nedbank withdrew its cross-appeal on the basis that the dismissal of those exceptions was not appealable. In that it was undoubtedly correct (*Maize Board v Tiger Oats Ltd & others* 2002 (5) SA 365 (SCA)). The notice of withdrawal made no provision for costs. Before us counsel for Nedbank conceded that it is indeed liable to pay such costs (including those of two counsel) as may be found to have been incurred by the appellant in respect of the cross-appeal.

[7] At the outset it may be as well to remind ourselves that we are concerned with proceedings on exception. That being so, the respondents have the duty as excipients to persuade the court that upon every interpretation which the particulars of claim (including the annexures) can reasonably bear, no cause of action is disclosed (*Lewis v Oneanate (Pty) Ltd* & another 1992 (4) SA 811 (A) at 817F-G).

[8] The Act, when it came into force, was described as 'the most important piece of law reform that has been carried out in the field of Private Law since Union'.[3] For, 'with one clean surgical cut, [it] excised the rule of the last opportunity (in the strict sense) from the law'.[4] But, while it may have set at rest some of the uncertainties that vexed the common law and 'while the passing into Law of the principles contained in it must be applauded there is no doubt that many a problem lies hidden in the folds of its tortuous syntax'.[5]

[9] Chapter 2 of the Act has been described as 'complex and textually involved'.[6] Sections 2(12) and 2(13), which lie at the heart of the present appeal, read:

'(12) If any joint wrongdoer agrees to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, the provisions of subsection (6) shall apply *mutatis mutandis* as if judgment had been given by a competent court against such joint wrongdoer for that sum of money, or, if the court is satisfied that the full amount of the damage actually suffered by the plaintiff is less than that sum of money, for such sum of money as the court determines to be equal to the full amount of the damage actually suffered by the plaintiff, and in the application of the provisions of paragraph *(b)* of the said subsection (6), any reference therein to the date of the judgment shall be construed as a reference to the date of the agreement.

(13) Whenever judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, or whenever any joint wrongdoer has agreed to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, and the judgment debt or the said sum of money has been paid in full, every other joint wrongdoer shall thereby also be discharged from any further liability towards the plaintiff.'

And subsection 6 reads:

'*(a)* If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph *(b)* of subsection (4), recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage of such

[3] Professor R G McKerron *The Apportionment of Damages Act* (1956) at 1.
[4] M A Millner 'Notes and comments: the Apportionment of Damages Act' (1956) 73 *SALJ* 319 at 320.
[5] M A Millner 'Law of Delict: A. Legislation' (1956) *Annual Survey of South African Law* 188 at 195.
[6] M A Millner 'Law of Delict: A. Legislation' 195.

an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded: Provided further that if the court, in determining the full amount of the damage suffered by the plaintiff referred to in subsection (1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof.

(b) The period of extinctive prescription in respect of a claim for a contribution shall be twelve months, calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal: Provided that if, in the case of any joint wrongdoer, the period of extinctive prescription in relation to any action which may be instituted against him by the plaintiff, is governed by a law which prescribes a period of less than twelve months as the period within which legal proceedings shall be instituted against him or within which notice shall be given that proceedings will be instituted against him, the provisions of such law shall apply *mutatis mutandis* in relation to any action for a contribution by a joint wrongdoer, the period or periods concerned being calculated from the date of the judgment as aforesaid instead of from the date of the original cause of action.

(c) Any joint wrongdoer from whom a contribution is claimed may raise against the joint wrongdoer who claims the contribution any defence which the latter could have raised against the plaintiff.'

[10] The high court concluded:

‘the settlement to the victims by Alexander Forbes was not such that it extinguished the liability of the joint wrongdoers and effected only a settlement of the liability of Alexander Forbes itself.'

In arriving at that conclusion, it reasoned:

'[19] The cessionary's particulars squarely allege a cause of action that can exist only as between joint wrongdoers as defined by the ADA [the Act]. This cause of action does not exist at common law; it is a creature exclusively of the ADA. The recovery of such contributions can occur if the conditions set out in s 2(13) are met, *ie* the discharge of any liability of the joint wrongdoers to the victims. Section 2(13) requires two conditions to

discharge the joint wrongdoers from any liability to pay damages to the victims. Insofar as this case is concerned, first there must be *"an agreement to pay a sum of money in full settlement of the [victims'] claim"*; secondly, that *"sum of money has been paid in full"* to the victim.

[20] Both of these conditions are necessary elements of the cause of action that has to be pleaded by the cessionary. However, no such averments appear expressly in the particulars. Instead, the cessionary asserts simply that it sues under the provisions of s 2(12) and annexes the settlement agreement. The particulars allege that the cessionary is entitled to a contribution from each of the defendants because it, the cessionary, has, in an agreement, settled with the victims and is entitled to a contribution towards that settlement from each of the defendants.'

The high court then asked:

'[21] If the allegations need to be made because they are absent from the particulars, they must appear from the annexed agreement. Do they?'

In endeavouring to answer that question it then scoured the annexures to the Funds' particulars of claim. It held that s 2(13) applies; that it stipulates the allegations that have to be set out; and, that the Funds' claims had to fail because they did not do so. In so doing the high court lost from sight that reliance on s 2(12) of the Act was expressly pleaded and not simply asserted. And that was therefore sufficient to invoke the *ex lege* effect of its provisions.

[11] Prior to the coming into operation of the Act, the law made no provision for joint liability of wrongdoers. The Act, as a whole, must be interpreted in that light, namely, to facilitate the recovery by victims of wrongful acts of compensation from any or some or all of their wrongdoers, as also, to facilitate the adjustment of liability *inter se* the wrongdoers. It needs to be emphasised that the wrongdoer's claim is not that of the victim – it is not Aquilian, nor derived by extension from the Lex Aquilia, but a new statutory claim created by the Act inhering in the wrongdoer who pays the plaintiff's claim (whether by judgment or settlement). Thus nothing prevents the victim taking cession of that wrongdoer's right of recourse. Indeed, such a course entirely advances the purposes of the Act. Here the Funds' claims, acquired by cession, are based on Alexander Forbes' right to recover a contribution in terms of s 2(12) read with s 2(6)*(a)* of the Act. They are not based on any cause of action

arising in their own right against the respondents. Although the Funds could at the outset have sued Alexander Forbes and all of the respondents in delict in the same action (s 2(1)), they chose to proceed against only one wrongdoer. Having made that choice it was nonetheless still open to them, at any time prior to the close of pleadings, to give notice to the respondents of that action (s 2(a)). Once again they chose not to. It was Alexander Forbes - their adversary in that litigation - who, as it was entitled to (s 2(2)(b)), gave notice of that action to the other wrongdoers (the present respondents). And, what is more, thereafter agreed to pay to the Funds a sum of money in settlement of their claim.

[12] Section 2(12) deals with the right of one joint wrongdoer, X, to recover a contribution from another joint wrongdoer, Y, where X agrees to pay the plaintiff a sum of money in full settlement of the plaintiff's claim. Section 2(12) provides that where this occurs, section 2(6) then applies *mutatis mutandis* as if judgment had been given by a competent court against X for that sum of money. In terms of s 2(6)(a), X can recover a contribution from Y where: (a) judgment has been granted against X for the full amount of the damage suffered by the plaintiff; (b) X has paid the judgment debt in full; and, notice has been given to Y by the plaintiff in terms of section 2(2)(a) or by X in terms of section 2(2)(b). It seems to me that what is envisaged by the legislature is finality, whether pursuant to judgment or a settlement of the ‘action’. And action self-evidently refers to the action in respect of which notice has been given to the wrongdoer in terms of s 2(2). Thus notwithstanding the use of the words ‘judgment for the full amount of the damage suffered by the plaintiff’ in s 2(6)(a), a judgment for a lesser amount than that claimed in the summons by the plaintiff, would obviously suffice to trigger the right to recover. So too with a settlement – a settlement for a lesser amount than that claimed, provided it brings finality to that action should also suffice to trigger the right to recover. And so it seems to me that the question to be posed in an enquiry such as this should be: ‘Has the judgment or settlement, as the case may be, brought finality to that action?’ If the answer that that question yields is an affirmative one, then, in my view, that triggers the right of recovery.

[13] Of s 2(12), Professor McKerron writes:

'This is a most useful provision. It enables a joint wrongdoer who does not dispute his liability to settle the plaintiff's claim, and then claim contribution from the other or other joint wrongdoers. It is to be noted that the effect of the reference to subsection (6) is that contribution cannot be claimed until the settlement has been implemented; in other words, until the sum agreed upon has been paid in full to the plaintiff.'[7]

Implicitly 'the sum agreed upon' contemplates less than payment of the full claim. That, as I have endeavoured to show, is exactly what happened here.

[14] What Alexander Forbes and the Funds did was to effect a final settlement of the latter's claims against the former. It did not have the effect of settling in full the losses they had suffered pursuant to the Ghavalas fraud. It certainly was not for the full amount claimed – R325 million was the Alexander Forbes total settlement figure, this in relation to claims of some R960 million. In the absence of an enforceable ceded right of recovery in terms of s 2(12) it is doubtful that a settlement could possibly exist as between Alexander Forbes and the Funds. The settlement between them provided for Alexander Forbes to pay R325 million and cede its right of recovery to the Funds. The settlement agreement (clause 4.2) specifically embodies in terms the right which the Act recognises. In argument, much was made of clauses 6 and 7 of the settlement agreement. It goes without saying that the agreement must be read as a whole. It is so that the agreement is rather clumsy and confusing. But, on a reading of the agreement in its entirety it is plain that it sought not just to put to bed the Aquilian action that had been instituted by the Funds against Alexander Forbes, but also to regulate the position of the Funds in respect of other remedies that may have been available to them and to preserve such rights as they may have had to be enforced against the other wrongdoers not party to that agreement. Thus clause 10 for example clearly distinguishes between the claims ceded by Alexander Forbes to the Funds and those referred to in clause 6. The ceded claims, as clause 4.2 makes plain, are those in respect of which the respondents were given notice in terms of s 2(2)(b) of the Act – in other words those deriving from the Aquilian action – whilst the claims referred to in clause 6 include the return of assets, such as shares and the like. In respect of the Aquilian action: if the question postulated

[7] R G McKerron *Law of Delict* 7 ed (1971) at 317.

earlier, namely whether finality has been reached, is posed, the answer in my view has to be an unequivocal 'yes'. That that is so emerges from clause 9.1 of the agreement which records that that action (namely the Aquilian action) has been withdrawn. Were the Funds, notwithstanding that settlement, to proceed under the lex Aqulia against the respondents they would require leave of the court in terms of s 2(4) of the Act. Whether leave is granted will depend upon good cause being shown (*Wapnick & another v Durban City Garage & others* 1984 (2) SA 414 (D); *Lincoln v Ramsaran & others* 1962 (3) SA 374 (N)).

[15] Here judgment was not granted by a court against Alexander Forbes for the full amount of the damages suffered by the Funds. One wrongdoer, Alexander Forbes paid a sum of money in full settlement of the Funds' claims in the Aquilian action instituted by the Funds against it. The payment of that sum has been received. In other words the settlement was thus final against Alexander Forbes but not for the full extent of the loss suffered by the Funds pursuant to the Ghavalas fraud. The effect of s 2(13) is thus to extinguish any further liability towards the Funds by Alexander Forbes in respect of their delictual claim. Professor McKerron observed:

'The subsection would appear to be merely a restatement of the common-law rule that payment in full by one co-debtor, or the receipt of a discharge which is intended to operate as a complete discharge of the whole obligation, releases the other or others.'[8]

The settlement agreement here, read with s 2(13), does not dis-entitle the Funds from taking cession of Alexander Forbes' right of recourse and suing on that or for that matter suing the other wrongdoers *ex contractu*, *ex condictione* or by way *vindicatio* or *quasi vindicatio*. The Act does not seek to give the other wrongdoers impunity either in respect of a ceded right of recourse or any other claim not subject to the first proceedings or settlement or judgment.

[16] In that way a victim can settle with a prudent wrongdoer and then proceed against the other joint wrongdoers. Thus if Alexander Forbes, in due course (in the proceedings against the other wrongdoers), is held to be only 20 per cent liable for the harm inflicted by the Ghavalas scheme, the Funds ought to be able to retain the Alexander Forbes payment and recover 80 per cent (in whatever percentages,

[8] R G McKerron *Law of Delict* 7 ed (1971) at 318.

depending on the relative co-liability of each of the other joint wrongdoers) from the others. If the high court's approach is to be endorsed it would mean that a victim may not settle with a decent or prudent wrongdoer in an amount that may represent all that the latter can pay, and then proceed against the other wrongdoers (by means of cession of the prudent wrongdoer's right of recourse) on the basis of their liability to the prudent wrongdoer for the amount capped by the settlement agreement, with a view to recovering from each according to its proportionate liability (perhaps tempered by ability to pay). It needs to be added that in terms of s 2(6)(c) any joint wrongdoer from whom a contribution is claimed may raise against the joint wrongdoer who claims the contribution any defence which the latter could have raised against the plaintiff. The former need obviously not actually be a joint wrongdoer – indeed he is entitled to plead and show that neither he nor the other were in fact wrongdoers despite whatever conclusion may have been reached in the earlier action (*South African Railways and Harbours v South African Stevedores Services Co Ltd* 1983 (1) SA 1066 (A) at 1089H-1090A).

[17] It must follow that the claims were, as pleaded, in law properly ones within the purview of s 2(12) read with s 2(6). This is so because in my view the settlement agreement is at least capable of an interpretation which sustains a claim based on s 2(12) (read with 2(6)). For, as De Villiers JA put it in *Shill v Milner* 1937 AD 101 at 105:

'The importance of pleadings should not be unduly magnified. "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings." '

It may well be that the agreement upon which the Funds' case is based, is, in the words of Schreiner JA, 'a wretched example of the draftsman's art' (*Cairn (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A) at 110). But, it is by no means clear to me that on the documents standing alone the interpretation of them should favour the excipients. Indeed, on the view that I take of the matter, the high court would have been justified in declining to decide the matter on exception. Although I have endeavoured to give the documents a sensible meaning it is neither necessary nor desirable that I come to a final conclusion on the matter. It suffices for present

purposes to say that I am driven provisionally to accept that the Funds have surpassed the threshold set on exception. It may be that at the trial stage the court may, from such evidence as to context (*KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39) as is permissible to be adduced, be in a better position than I am to finally determine the matter. Moreover, as this court held in *Louw v WP Koöperatief Bpk & andere* 1994 (3) SA 434 (AA) at 445:

'Uit die stukke blyk dit dat die Koöperasie en die Landbank dit eens is oor watter vertolking aan die sessieakte geheg moet word. In die verband is dit gepas om te let op wat Stratford AR in *Breed v Van den Berg and Others* 1932 AD 283 op 292 gesê het, naamlik:

"If one of two parties to a contract asserts that it has a certain meaning and the other agrees that that is the meaning to be given to it, a court of law will give effect to that meaning. If this mutually accepted meaning is in conflict with the clear construction of the contract, we have all the requisites for rectification of the document."

Dat 'n hof uitvoering sal gee aan die betekenis wat partye tot 'n ooreenkoms gesamentlik aan hulle ooreenkoms heg (al weerspreek dit die letterlike betekenis van die woorde wat gebruik is), blyk ook uit die beslissing in *Shill v Milner* 1937 AD 101 op 110-11. (Kyk ook Christie *The Law of Contract* 2de uitg 250-L.)'

[18] In the result I would allow the appeal with costs and alter the judgment appealed from to one dismissing the exception with costs, such costs, in each instance, to include those consequent upon the employment of two counsel.

_____

V PONNAN

JUDGE OF APPEAL

PLASKET AJA (CACHALIA JA AND MBHA AJA concurring):

[19] I have read the judgment of my brother Ponnan JA and am unable to agree with the conclusion reached by him. I am consequently of the view that the appeal should fail. These are my reasons for that outcome. I have found it necessary, for the flow of my judgment, to repeat certain matter that is to be found in Ponnan JA's judgment but I have endeavoured to keep the repetition to a minimum.

[20] The essential facts are that seven pension funds – the appellants in this appeal – sued Alexander Forbes Financial Services (Pty) Ltd (AF), in a cause of action founded in delict, for damages arising from an unlawful scheme – the Ghavalas option, as it was termed by the parties[9] – in terms of which over R900 million in assets had been stripped from the funds, resulting in them being placed under curatorship or being wound-up. (The total amount claimed by the funds was R936 781 216.)

[21] After service of summons on it, AF gave notice to the various respondents in this matter in terms of s 2(2)(*b*) of the Apportionment of Damages Act 34 of 1956 (the ADA). This section provides that a joint wrongdoer who is sued may, at any time before the close of pleadings, give notice of the action to 'any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action'. None of the parties to whom notice was given by AF intervened as defendants as they were entitled to do.

[22] In due course, the funds settled the matter with AF. I shall return to the terms of the settlement agreement below. Suffice it to say that AF paid the funds R325

[9] The name given to the scheme was explained as follows by Sutherland J in the court below (para 1): 'Peter Ghavalas wrote his name in the history books as the financial wizard who devised a scheme, with others, to redeploy the actuarial surplus from several pension and provident funds to the benefit of persons other than the beneficiaries of those funds. In this case, that scheme has been called the "Ghavalas option" which involved a series of ruses to simulate certain ostensibly innocent transactions to conceal the misappropriation. In due course, when these schemes were unmasked, a process to recover the diverted funds began.'

million and ceded to the funds a right to proceed against its co-joint wrongdoers in terms of the ADA.

[23] On the strength of the cession, the funds instituted actions against the respondents as joint wrongdoers for the recovery of those joint wrongdoers' individual contributions towards the loss suffered by the funds. The cause of action was said to be s 2(12) of the ADA. This section provides as follows:

'If any joint wrongdoer agrees to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, the provisions of subsection (6) shall apply *mutatis mutandis* as if judgment had been given by a competent court against such joint wrongdoer for that sum of money, or, if the court is satisfied that the full amount of the damage actually suffered by the plaintiff is less than that sum of money, for such sum of money as the court determines to be equal to the full amount of the damage actually suffered by the plaintiff, and in the application of the provisions of paragraph (*b*) of the said subsection (6), any reference therein to the date of the judgment shall be construed as a reference to the date of the agreement.'

[24] Section 2(6) deals with the determination of a claim against a joint wrongdoer by a court, as opposed to settlement by the parties. Only s 2(6)(*a*) is relevant for present purposes. Shorn of its proviso, which is not relevant, it states:

'If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (*b*) of subsection
(4), recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded . . . .'

[25] The exception in this appeal concerns the settlement agreement, its interpretation and its implications for the right of one joint wrongdoer to claim a contribution from other joint wrongdoers in terms of s 2(12) of the ADA. It boils down to this: because, in terms of the settlement agreement, the funds settled only AF's share of the total liability arising from the Ghavalas option, AF did not acquire, on the basis of s 2(12) of the ADA, a statutory right of recourse against the other joint wrongdoers and it consequently had no rights to cede to the funds. That being so,

the funds' particulars of claim, predicated as they are on the cession of a right of recourse arising from s 2(12) of the ADA, discloses no cause of action.

[26] It is necessary first to say something about the proper approach to issues such as these on exception. In *Lewis v Oneanate (Pty) Ltd & another*[10] Nicholas AJA stated that an excipient bears the burden of persuading the court that 'upon every interpretation which the particulars of claim' and any agreement on which they rely 'can reasonably bear, no cause of action is disclosed'. And, in *Sun Packaging (Pty) Ltd v Vreulink*,[11] Nestadt JA confirmed that there is no hard and fast rule that the interpretation of agreements is to be avoided on exception. He said:

'As a rule, Courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain . . . *In casu*, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous . . . Contracts are not rendered uncertain because parties disagree as to their meaning.'

[27] What these authorities mean in this case is that if the relevant clauses of the settlement agreement (for it is its terms that make or break the funds' cause of action for purposes of the exceptions) can reasonably bear any meaning that supports a cause of action in terms of s 2(12) of the ADA, the exceptions must fail – and the appeal must succeed. If, on the other hand, the relevant clauses of the settlement agreement can only reasonably bear the meaning attributed to them by the respondents, and they are incapable of sustaining a cause of action based on s 2(12) of the ADA, the exceptions must be upheld – and the appeal must fail.

[28] The crisp issue for determination is therefore simply whether, on any reasonable interpretation of the relevant clauses of the settlement agreement, the jurisdictional requirements of s 2(12) of the ADA have been activated.

[29] I turn now to a consideration of the particulars of claim and the settlement agreement. In so doing, I shall quote from the pleadings in SGHC case number

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[10] *Lewis v Oneanate (Pty) Ltd & another* 1992 (4) SA 811 (A) at 817F-G. See too *First National Bank of Southern Africa Ltd v Perry NO & others* 2001 (3) SA 960 (SCA) para 6; *Theunissen & andere v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E-F.

[11] *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 186J-187B.

16213/2011, *Picbel-Groep Voorsorgfonds (in liquidation) v William Vass Graham Somerville*. (The pleadings in all of the cases are essentially similar.)

[30] Paragraph 4 of the particulars of claim summarise the nature of the claim as follows:

'The plaintiff seek[s] enforcement of the ceded rights of contribution in terms of section 2(2)(*b*) read with 2(12) of the Apportionment of Damages Act 34 of 1956 ("the Apportionment Act") against the defendant jointly or severally, the one paying the other to be absolved, for payment of the entire amount of damages paid to the plaintiff, *alternatively* such lesser amount to be determined by the court.'

[31] Having set out the details of the claim against AF, the fact that AF gave notice to the defendant in terms of s 2(2)(*b*) of the ADA, the settlement of the claim, payment by AF to the plaintiff of the amount agreed and the cession of AF's right to contributions from those to whom it had given notice, the particulars of claim then state:

'Accordingly, pursuant to section 2(12) read with s 2(6)(*a*) of the Apportionment [Act] the plaintiff *qua* cessionary of Alexander Forbes' rights to contribution as aforesaid, is entitled to claim and recover from the defendant such a contribution in respect of his responsibility for the amounts referred to in paragraph 14 [being the settlement amount] as the court may deem just and equitable.'

[32] The particulars of claim then proceed to detail what is headed the '**THE CEDED CLAIM FOR CONTRIBUTION**'. It is not necessary to consider those provisions in this judgment because they are irrelevant to the anterior question of whether, on the pleadings, AF acquired a cause of action through s 2(12) of the ADA which it was able to cede to the funds. That requires, in the first instance, a consideration of the settlement agreement.

[33] The parties to the settlement agreement were AF, which is referred to as 'the company', and the funds. Clause 4 of the settlement agreement records that AF would:

'4.1 without admission of liability pay to AL Mostert & Company, the attorneys for the Funds, the sum of R325 million, plus interest at prime rate from 21 January 2010 ("the payment"); and

4.2 cede to Mostert on behalf of the Funds the claims against all third parties to whom the company has given notice in terms of section 2(2)(b) of the Apportionment of Damages Act, arising in terms of the Act as a result of this settlement or howsoever arising.'

[34] Clause 5 required payment of the R325 million to be made within 28 days of the date of the signing of the agreement. Clauses 6 and 7 then record:

'6. The Funds record that the payment does not reflect the full loss sustained by the Funds resulting from the Ghavalas option. Consequently one or more of the Funds are pursuing other remedies, including the return of assets or their proceeds. The payment serves to discharge only that portion of the loss for which the Funds regard the company liable.

7. The payment, determination and allocation as aforesaid shall operate in full and final settlement of the company's share of the amounts claimed in the action and the Funds shall thereupon have no further claims against the company and related entities, and shall discharge the company and related entities from all present and future liability to each of the Funds inclusive of all legal costs and costs orders.'

(The agreement defines 'related entities' to mean 'the company, its holding company and all subsidiaries of the holding company, all current and former employees, directors and non-executive directors'.)

[35] Finally, for what it is worth, clause 10 provides that AF undertakes 'to provide all reasonable assistance to the Funds for the purpose of enforcing the claims ceded by the company to the Funds and the claims referred to in clause 6 above'.

[36] As is pointed out by Ponnan JA, the cause of action that the funds rely on is unknown to the common law and is a creature of the ADA. The jurisdictional requirements of the cause of action must, therefore, be determined from the terms of s 2(12) of the ADA and s 2(6) to the extent that it is incorporated by reference into s 2(12).

[37] Section 2(12) read with s 2(6) requires the following in order for a cause of action to arise in respect of a claim for a contribution by one joint wrongdoer against another: (a) an agreement between a plaintiff and a joint wrongdoer; (b) in terms of which the joint wrongdoer agrees to pay a sum of money to the plaintiff; (c) the payment agreed to is in full settlement of the plaintiff's claim; and (d) payment of the money is made in full. In other words, when notice has been given in terms of s

2(2)(*b*), a right of recourse against a joint wrongdoer in terms of s 2(12) will only arise if and when these four jurisdictional requirements have been satisfied.

[38] The particulars of claim allege that an agreement was reached between the funds and AF to the effect that AF would pay an amount of money to the funds to settle the funds' claims and that the money was duly paid to the funds. Then followed the conclusion that the plaintiff, as cessionary, was entitled to 'claim and recover from the defendant such a contribution in respect of his responsibility for the amounts referred to in paragraph 14 as the court may deem just and equitable' and that this entitlement arose from s 2(12), read with s 2(6)(*a*) of the ADA.

[39] The only outstanding issue is whether the settlement agreement contemplated a full settlement, as required by s 2(12), as this is not expressly pleaded. In order to determine this, it is necessary (and permissible) to interpret the settlement agreement that is relied on in the particulars of claim, and which is 'a link in the chain of [the funds'] cause of action'.[12] In *Dettmann v Goldfain & another*,[13] this court stated that courts are, in some instances, reluctant to 'decide upon exception questions concerning the interpretation of a contract'. Those circumstances are, first, where the entire contract is not before the court; and secondly, where it appears from the contract or the pleadings that 'there may be admissible evidence which, if placed before the Court, could influence the Court's decision as to the meaning of the contract', provided that this possibility is 'something more than a notional or remote one'.

[40] In this case, the entire settlement agreement is before the court and there has been no suggestion, either in the pleadings or in argument, of the meaning of the settlement agreement being influenced by admissible evidence being led in the trial. Indeed, the parties are *ad idem* as to what the relevant clauses of the agreement mean[14] and I am of the view that that meaning is the only reasonable meaning that

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[12] *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C) at 193H; *South African Railways and Harbours v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W) at 953A; *Moosa & others NNO v Hassam & others NNO* 2010 (2) SA 410 (KZP) para 17.

[13] *Dettmann v Goldfain & another* 1975 (3) SA 385 (A) at 400A-B. See too *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) at 715G-716E.

[14] In paragraph 28 of the appellants' heads of argument, the following is stated:

those clauses can have. The parties differ only in respect of what the legal consequences may be as far as a cause of action based on s 2(12) of the ADA is concerned. As it was put in the appellants' heads of argument, the issue is 'given the terms of section 2(12), what *ex lege* is the effect of this settlement agreement?'

[41] Neither in the particulars of claim nor in the agreement is the settlement described as a full settlement – the term used in s 2(12) – of the funds' losses resulting from the Ghavalas option. The particulars of claim simply speak of a settlement. Clause 6 of the settlement agreement states that AF's payment to the funds 'does not reflect the full loss sustained by the Funds resulting from the Ghavalas option' and that the settlement discharges 'only that portion of the loss for which the Funds regard the company liable'. Clause 7 describes the payment, determination and allocation of the amount of R325 million as only being 'in full and final settlement of the company's share of the amounts claimed in the action'.

[42] It was argued by some of the respondents that a full settlement meant a settlement of the full amount claimed and that any compromise of the amount claimed meant that s 2(12) could not apply. As the funds and AF settled for far less than was claimed, so the argument proceeds, there was in this case no full settlement on this account alone. I am of the view that this argument is unsound because I cannot conceive of a reason why the legislature would wish to discourage the settlement of claims in this way, particularly when the settlement works to the advantage of the joint wrongdoers whose contributions are sought. In the same way that s 2(6) contemplates a judgment for less than the amount claimed as one of the requirements to activate a right to claim a contribution from joint wrongdoers, so s 2(12), in my view, postulates the possibility of a settlement of less than the amount claimed. From a practical point of view, this must be so: very few settlements in delictual claims involve a complete and unconditional surrender on the part of a defendant.

'The funds and AF palpably did not settle on a basis which resulted in full payment of the funds' claims for the losses they had suffered through the application to them of the Ghavalas fraud. What AF and the funds did was to effect a final settlement of the funds' claims <u>against AF</u>. This was not for the full amount claimed . . ."Final settlement" of the "*plaintiff's claim*" is expressly evident from clause 7 of the settlement agreement. In summary, and stated most simply, the settlement was, quite permissibly under the Act, final against one wrongdoer, and patently not for the full amount.'

[43] When s 2(12) speaks of a full settlement, it means a complete settlement of the claim – one that extinguishes it completely.[15] Even allowing for a claim to be compromised and still be a full settlement, the settlement contemplated by the settlement agreement is not a full settlement. It does not, on its own express terms, settle the claims of the funds completely. Instead it only settles a portion of those claims, namely the portion of the loss for which the funds regarded AF to be liable: it operates, says clause 7, 'in full and final settlement' only of AF's 'share of the amounts claimed in the action'.

[44] The purpose of the ADA is to allow for the recovery of delictual damages by a plaintiff from any, some, or all of those responsible for the harm suffered by him or her and to allow for the adjustment of liability as between the joint wrongdoers after a claim has been finalised by one or more of them, either by judgment or agreement, and the resultant debt has been paid in full. That adjustment is done on the basis of each joint wrongdoer's 'responsibility for such damage' with regard to 'the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded'.[16] Self-evidently, this system for the adjustment of liability can only function if the total claim is settled. What is not contemplated by it is the settlement by a joint wrongdoer of only his or her portion of the total liability. In such an event, the right of recourse created by s 2(12) is not activated and s 2(13) will not come into effect to discharge every joint wrongdoer from liability towards the plaintiff.[17]

[45] It is my conclusion therefore that because only a portion of the funds' claims was settled – being only AF's portion of the total liability – no full settlement of the funds' claims was reached with AF. This being so, the jurisdictional requirement of the right of action against joint wrongdoers that the claim must have been settled in full was absent. As a result, AF did not acquire a right of recourse, arising from s

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[15] *Karsen v Minister of Public Works* 1996 (1) SA 887 (E) at 895G.
[16] ADA, s 2(6)(*a*).
[17] Section 2(13) provides:
'Whenever judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, or whenever any joint wrongdoer has agreed to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, and the judgment debt or the said sum of money has been paid in full, every other joint wrongdoer shall thereby also be discharged from any further liability towards the plaintiff.'

2(12), to proceed against the other joint wrongdoers, and consequently had no rights to cede to the funds. That means that the exception was correctly upheld by Sutherland J in the court below and that the appeal must fail.

[46] It will be recalled that Nedbank's cross-appeal in SGHC case number 16215/2011 was withdrawn without a tender of costs. It is therefore necessary also to make a costs order in that respect.

[47] The following order is made:

(a) The appeal is dismissed with costs, including the costs of two counsel.

(b) In SGHC case number 16215/2011(*Mitchell Cotts Pension Fund (in liquidation) & another v Nedbank Limited & another*), Nedbank Limited is ordered to pay the costs, including the costs of two counsel, of Mitchell Cotts Pension Fund (in liquidation) and of Lucas South Africa Pension Fund (in liquidation) in respect of Nedbank's withdrawn cross-appeal.

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C PLASKET

ACTING JUDGE OF APPEAL

APPEARANCES:

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For Fifth Respondent: (Roets)	No Appearance