

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)  
REPUBLIC OF SOUTH AFRICA**

Case Number: 52117/2015

**In the matter between:**

**UBUNTU TECHNOLOGY (PTY) LTD**

**Plaintiff**

**And**

**MEMBER OF THE EXECUTIVE COUNCIL OF THE  
DEPARTMENT OF PUBLIC WORKS, ROADS AND  
TRANSPORT: MPUMALANGA**

**First Defendant**

**FELISITY SALZWEDEL**

**Second Defendant**

**JUDGMENT**

**JANSE VAN NIEUWENHUIZEN J**

[1] This matter emanates from a skilfully executed fraud scheme resulting in a loss for the plaintiff in the region of R 8 million.

[2] The plaintiff alleges that the loss was as a result of the negligent

conduct of employees in the employ of the Mpumalanga Provincial Department of Public Works, Roads and Transport ("the Provincial department and instituted the present action to recover the loss.

[3] At the inception of the trial the plaintiff withdrew its claim against the second defendant. It is, however, common cause between the parties that the second defendant acted, at all relevant times, within the cause and scope of her employment with the first defendant.

## Introduction

[4] The plaintiff is a supplier of computers and computer related products. In its aforesaid capacity, the plaintiff entered into a Vendors Agreement with the State Information Technology Agency (SITA) in terms of which it provided, *inter alia*, computer desktops to Government departments. Upon receipt of a purchase order for laptops from a Government department, the plaintiff would ord the plaintiff would order the laptops from Dell South Africa (Pty) Ltd.

[5] In the normal course, the laptops are shipped from Dell's manufacturers in Poland to South Africa and delivered by a freight and forwarding agent to the relevant Government department. Payment usually follows and all is well. As will become evident *infra*, the purchase of the laptops that forms the subject matter of the dispute *in casu* was, however, not business as usual.

## Particulars of claim

[6] The following facts contained in the plaintiff's particulars of claim are either common cause or not seriously disputed:

*On or about March 2014, the plaintiff, duly represented by Mr Wade Chetty and the National Department of Public Works, Roads and Transport (hereinafter referred to as “the National Department”), which was ostensibly represented by a person who purported to be Mr Mziwonke Dlabantu, the Director-General of the National Department, entered into a partly written, partly oral agreement in terms whereof the plaintiff sold 55 (four hundred and fiffi455 (four hundred and fifty five) Dell laptops and accessories (hereinafter referred to as “the laptops”), for a total purchase price of R 8 166 021.50 (Eight million one hundred and sixty six thousand and twenty one rand and fifty cents) to the National Department. A copy of the exchange of e-mails comprising the partly written portion of the agreement is annexed hereto marked “A”.*

4.

*In terms of the agreement, the plaintiff undertook to deliver the laptops to the Department of Works, Roads and Transport, Mpumalanga, Middelburg (hereinafter referred to as the Middelburg Department, which falls under the first defendant.*

5.

*The plaintiff duly delivered the laptops to the first defendant's Middelburg Department and on the following dates, the second defendant personally accepted delivery of the laptops:*

- 5.1. *1 On 28 March 2014, the second defendant accepted delivery of 100 (one hundred) laptops;*
- 5.2 *On 31 March 2014, the second defendant accepted delivery of 55 (fifty five) laptops;*
- 5.3 *On 1 April 2014, the second defendant accepted delivery of 200 (two hundred) laptops;*

5.4                                      *On 10 April 2014, the second defendant accepted delivery of 100 (one hundred) laptops.*

6A

*The second defendant subsequently released the laptops from safekeeping and storage of the Middelburg Department, but before the plaintiff had received any portion of the purchase price.*

7.

7.1                                      *on or about 16 July 2014; the plaintiff was informed that the order for the laptops and the agreement between the plaintiff and the National Department had been induced and concluded fraudulently.*

7.2                                      *In fact, no agreement had been concluded between the plaintiff and the National Department.*

[7]                                      In view of the aforesaid facts, the plaintiff's claim is formulated as follows:

“6.

*At all material times and upon receipt of the laptops by the second defendant and by the first defendant's Middelburg Department, the defendants owed a legal duty of care to the plaintiff, which arose under the following circumstances:*

6.1.     *The first defendant, alternatively the second defendant ordered the goods in bulk and stored such goods in warehouses; bulk and stored such goods in warehouses;*

6.2.     *The fir6.2 The first defendant, alternatively the second defendant had access to computer systems which could detect whether goods had been fraudulently ordered;*

- 6.3. *The first defendant, alternatively the second defendant had to ensure that the order placed for laptops was regular and not fraudulent,*
- 6.4. *The first defendant, alternatively the second defendant had to take reasonable steps to prevent the fraudulent order of laptops and the loss referred to below.*
- 6.5. *The first defendant, alternatively the second defendant had to follow the procedures and guidelines laid down for the collection and release of assets which had been ordered;*
- 6.6. *The first defendant alternatively the second defendant had to take reasonable precautions to prevent the loss referred to below when, by exercising reasonable care, it alternatively she could and should have done so;*
- 6.7. *The first defendant, alternatively the second defendant had to implement the LOGIS System at the Middelburg Department;*
- 6.8. *The first defendant, alternatively the second defendant had to make use of the LOGIS System in its entirety, alternatively to correctly make use of the LOGIS System upon receipt of the laptops;*
- 6.9. *The first defendant, alternatively the second defendant had to only allow properly authorised and/or designated persons to accept and release the laptops on its behalf;*
- 6.10. *The first defendant alternatively the second defendant had to safeguard and store the laptops and subsequently only release the laptops after confirming that an official order had indeed been placed for the aforesaid laptops;*
- 6.11. *The State, including the first defendant is accountable to its citizens, including the plaintiff;*

6.12. *The first defendant, from time to time, stored goods on behalf of other governmental institutions.*

**8.**

*At all material times hereto, the first defendant owed a duty of care to the plaintiff and wrongfully and negligently acted in breach of such duty of care in one or more of the following respects:*

8.1. *It failed to ensure that the order placed for the laptops had been regular and not fraudulent;*

8.2. *It failed to take reasonable steps to prevent the fraudulent order of laptops and the loss referred to below;*

8.3. *It failed to follow the procedures and guidelines laid down for the collection and release of assets which had been ordered;*

8.4. *It failed to take reasonable precautions to prevent the loss referred to below when, by exercising reasonable care, it could and should have done so,*

8.5. *It failed to implement the LOGIS System at the Middelburg Department,*

8.6. *It failed to make use of the LOGIS System in its entirety, alternatively failed to correctly make use of the LOGIS System, which upon receipt of the laptops, would have made the first defendant aware that the order for laptops was fraudulent and/or not authorised, and that the laptops were therefore not to be released;*

8.7. *It allowed a person not properly authorised and/or designated ("the second defendant") to accept and release the laptops and accessories on its behalf.*

8.8. *It failed to safeguard and store the laptops and released the laptops prior to confirming that a genuine official order had been placed for said laptops."*

**ISSUES IN DISPUTE:**

1. Whether the boxes delivered at the Provincial department 1.

Whether the boxes delivered at the Provincial department contained laptops and laptop accessories.

2. Whether the Provincial department's conduct was unlawful and negligent.

#### Evidence

[8] The plaintiff called four witnesses. Their evidence is referred to insofar as it is relevant to the issues in dispute. The first witness, Gary Robinson (Robinson"), testified that he had been a director of the plaintiff since 2003. Robinson confirmed the Vendors Agreement that was concluded between the plaintiff and SITA during 2005. Robinson stated that the plaintiff has had a business relationship with Dell since 1999 and confirmed the chain of events from the moment that the plaintiff received a purchase order until the computer equipment is delivered to the relevant Government department.

[9] He testified that the plaintiff utilises DB Schenker as its logistics partner and confirmed that the plaintiff never handled or viewed the goods ordered from Dell. Robinson stated that there were never any problems with the specifics of the computer equipment ordered from Dell. Nothing much turned on his cross-examination.

[10] Wade Chetty ("Chetty") the accounts manager in the employ of the plaintiff, at the time, testified that he received an e-mail from Dell pertaining to a request for a quotation for Dell laptops from the National Department of Public Works ("the National department"). The request dated 20 February 2014 was sent by Mziwonke Dlabantu ("Dlabantu") from the National department and reflected Dlabantu's contact details as tel: [...] and fax: [...].

[11] Chetty phoned Dlabantu in respect of the request and apparently obtained Dlabantu's e-mail address, to wit [..]. All communication between Chetty and Dlabantu was via

the aforesaid e-mail address. Chetty prepared a quotation and sent same to Dlabantu. On 10 March 2014 Chetty received an official purchase order from Dlabantu for 455 laptops. The delivery address on the purchase order is indicated as *"Department of Public Works Roads and Transport, cnr Beyers Naude & Lilian Ngoyi Street, Public Works Roads and Transport Building, Middelburg*

[12] Chetty proceeded to order the laptops from Dell. Chetty was referred to several Waybills, which evidenced the delivery of the laptops at the aforesaid address on various dates during the end of March 2014 and the beginning of April 2014.

[13]. In each instance Felicity Salzwedel (Salzwedel), an employee of the Provincial department, acknowledged receipt of the goods by signing the waybill. Salzwedel furthermore endorsed the waybill with an official stamp confirming that the shipment was received in good order and complete. Chetty received the signed and stamped waybills directly from Dell. Chetty was referred to a series of e-mail correspondence between Salzwedel and Dlabantu in respect of the receipt and collection of the laptops.

[14] During cross-examination Chetty testified that he did not find anything suspicious about the order. He was requested to peruse the e-mail correspondence between Salzwedel and Dlabantu as well as the collection requests and stated that nothing in the documents appeared suspicious to him.

[15] Shaun van Coller ("Van Coller") testified next. He is an IT specialist who assists the South African Police Service ("SAPS") in IT related crimes. Van Coller was contacted by SAPS in the Strand, Western Cape in connection with a suspicious top laptop. Upon his arrival in the Strand he found the laptop still sealed in its box. He opened the box and found a Dell laptop inside. Utilising the serial number of the laptop and the shipping information on the box, he ascertained from Dell that the laptop was one of a shipment that was ordered by the plaintiff.



[16]. Van Coller succeeded in recovering a further 26 laptops that formed part of the shipment that was ordered by the plaintiff and delivered to the Provincial department in Middelburg.

[17] Mziwonke Dlabantu ("Dlabantu") was the last witness to testify on behalf of the plaintiff. He was, at the time, the Director General of the National department of Public Works. Dlabantu testified that the National department does not store goods at the offices of a Provincial department. Computer equipment ordered by the National department is delivered to a centralised office in Madiba Street, Pretoria.

[18] Upon receipt of the equipment, the computers are configured and registered on the National department's asset register before the computers are sent to the National department's various regional offices. Dlabantu confirmed that he did not order the laptops in question. Dlabantu was referred to the request for collection documents that were presented to Salzwedel prior to the removal of the laptops. Upon perusal of the documents, Dlabantu indicated that his telephone number on the collection notes, namely [...] has never been used by his department. Dlabantu stated that his telephone number appeared on the department's website and was therefore easily accessible.

[19] The same applied to the e-mail address that appeared on the e-mail correspondence between Salzwedel and the fraudster. The domain, to wit "co.za" was incorrect and should have been detected by Salzwedel as all public servants use the domain "gov.za". In his opinion Salzwedel would have discovered the fraud if she had phoned the department's correct number. Salzwedel could furthermore have detected the fraud, if she had confirmed the identity of the person collecting the laptops.

[20] During cross-examination, Dlabantu stated that he never had any dealings with the plaintiff, because there are specific persons in the procurement section of the department who are mandated to order goods. When confronted with Chetty's version that

he had on numerous occasions dealt with Director Generals when goods are ordered, Dlabantu firmly denied that Chetty ever had any dealings with him and emphasised that the department had a supply chain process for ordering goods. A Director General is the head of the department and is the second most senior person after the Minister of Public Works.

[21] When confronted with Chetty's version, that computers ordered by the department were regularly delivered to the departments' regional offices, Dlabantu strenuously denied the version and confirmed that deliveries were only made at head office.

[22] When asked whether he always verified the identity of an official he is dealing with, Dlabantu testified that it depended on the weight of the issue. Dlabantu further admitted that he did not always pay attention to an e-mail address when he receives an e-mail. Dlabantu, lastly, admitted that one would only make enquiries if you are put on guard

[23] That concluded the evidence on behalf of the plaintiff.

[24] Salzwedel was called to testify on behalf of the Provincial department. Salzwedel commenced her employment in 1972 with the previous Transvaal Provincial Administration. She retired during 2016. Salzwedel testified that she was an accountant at the time of the incident and that she was tasked with the lease of buildings and other administrative tasks.

[25]. In the past the Department of Health had stored old furniture at the offices of the Provincial department. No policy document exists in respect of the storage of goods. She testified that she had merely accompanied the person of the Department of Health to the office where the furniture was to be stored. Once all the furniture was in the office she locked the door and kept the keys with her. She did not compile an inventory of the stored goods.

When the furniture was collected from storage, the person in control of the collection did not present any documents confirming his authority to collect the furniture. No problems ensued.

[26] Other departments in the province stored vehicles in need of repair on the property of the Provincial department across the street from the department's offices. Salzwedel decided on her own volition to open a register in respect of the vehicles to monitor the movement of the vehicles and the person collecting a vehicle would present a note indicating which vehicle is to be collected.

[27] Upon retirement she was on employment level 7, which is considered a low level. She confirmed that a Director General would be on an employment level of 15 or 16.

[28] Returning to the laptops in question, Salzwedel testified that her supervisor, Brain Nxumalo ("Nxumalo"), informed her that a certain person from the National department had phoned him to find out whether the Provincial department had storage space. Nxumalo told Salzwedel that the person's name is Dlabantu and that he will be phoning her in due course. Salzwedel did not know at the time that Dlabantu was a Director General. Dlabantu did phone her and told her that he had arranged with Nxumalo to store goods at their offices.

[29] A day or two later goods were delivered at the offices. Due to a knee operation Salzwedel was unable to climb the stairs to the second floor and asked a co-employee to accompany the delivery people to the second floor, to ensure that everything was placed in the office, to lock the office and return the keys to her. Prior to the goods being moved to the storage place, she together with a security officer ensured that all the goods reflected on the consignment note were in fact delivered.

[30] The delivery vehicle looked to her like a "broodwa" and she did not notice any signage on

the vehicle. Her evidence in respect of the remainder of the deliveries was in a similar vein. She was referred to the quotation, official order and invoice documents in respect of the laptops and stated that she never saw the documents. She confirmed that she had never purchased goods as procurement did not fall within her job description.

[31] In respect of the collection of the laptops Salzwedel was referred to several Fax Transmission documents addressed to Dlabantu and testified that she did send the faxes to Dlabantu to inform him of the deliveries. Salzwedel was also referred to e-mail correspondence between herself and Dlabantu in respect of the receipt of the laptops. She testified that neither the fax number nor the e-mail address appeared strange to her. When asked whether she noticed the e-mail address, she replied that she merely responded to the contents of the e-mails and that she did not pay close attention to the address.

[32] Salzwedel identified the register kept by the security personnel, which register laptops. In respect of the van that was used to collect the laptops, Salzwedel testified that the van looked the same as the one that was used to deliver the laptops. She did not notice any signage on the van.

[33] . Salzwedel was referred to the *"REQUEST FOR COLLECTION"* documents that were presented to her in each instance when the laptops were collected. Each document appears on the letter head of the Department of Public Works, South Africa and is signed on behalf of Supply Chain Management. The Request document refers in detail to the number of laptops received and to the communication with Salzwedel. The request is framed in the following terms: *"Please hand over the available consignment to our Distribution Department as per our request on this letter."*

[34] Salzwedel testified that nothing seemed out of the ordinary or suspicious to her.

[35] During cross-examination it was put to Salzwedel that she should have phoned the

National department to confirm the order. Slazwedel responded that she did not deem it necessary because her supervisor, Nxumalo, instructed her to assist Dlabantu. She added that she had stored goods on previous occasions on Nxumalo's instructions. It was put to Slazwedel that the telephone and fax number provided by "Dlabantu" were not used in State departments. Slazwedel answered that nothing seemed suspicious to her and that she merely phoned the number provided by "Dlabantu."

[36] It was pointed out to Slazwedel that "Dlabantu" utilised different e-mail addresses and that that should have made her suspicious. Slazwedel readily, if she meticulously examined the e-mails, she would have become suspicious.

[37] Slazwedel was criticised for not confirming the identity of the person collecting the goods on behalf of the National department prior to releasing the goods. Slazwedel responded that the Request for Collection note did not raise any suspicion and that she did not deem it necessary to phone the National department. She added that she had never previously phoned the departments when goods stored by her were collected.

### **Factual issue**

[38] - The evidence of Robinson and Van Coller is relevant to question of whether the boxes delivered at the Provincial department did contain laptops and laptop accessories.

[39] Robinson confirmed that in all the plaintiff's dealings with Dell over a period of 15 years, there was never an incident that the goods received did not correspond with the goods ordered.

[40] Van Coller recovered 26 laptops, some of which were still in their original packaging that formed part of the shipment of laptops delivered to the Provincial department.

[41] Their evidence was not disputed. In view of their evidence I am satisfied that the plaintiff has proved on a balance of probabilities that the boxes delivered at the Provincial department did contain laptops and accessories.

### Legal issue

[42] As alluded to *supra* the parties agreed that only unlawfulness and negligence remained in dispute.

### Unlawfulness

[43] In the present instance the loss suffered by the plaintiff, through the fraudulent conduct of the fraudsters, is a pure economic loss. The test applicable to unlawfulness in the context of a pure economic loss has been restated by Lewis JA in *Viv's Tippers (Edms) Bpk v PHA Phann Staff Services (Edms) Bpk hla PHA Phann Security* 2010 (4) SA 455 (SCA) at 458 F-H as follows:

*"...But the loss suffered is purely economical: so the law does not without more impose a legal duty on the guard to prevent loss. In Telematrix (Pty) Ltd Va Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) Harms JA said that pure economic loss 'connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit being put to extra expenses, or the diminution in the value of the property The loss, through theft, of property, would also fall into this class. "*

[44] The facts in *Viv's Tippers* bear some resemblance to the facts *In casu*. Viv's Tippers rented trucks to Lone Rock Construction, who was conducting construction work at a site in Kibler

Park Johannesburg. Lone Rock Construction obtained the services of a security firm Pha Phama to guard the site. On a Sunday evening in September 2004, two men arrived at the site to repair one of the trucks. They presented the guard on duty with a letter from a purported firm of truck repairers, which letter stated that the truck's diesel pump will be repaired on site. The vehicle's registration number appeared on the note and the note indicated that subsequent to the repairs being done, the mechanics must do a test drive away from the site and the truck was never seen again.

[45] The court held that the guard's conduct constituted a positive act and proceeded to determine the wrongfulness of the guard's conduct with reference to the contractual obligations emanating from the contract between Lone Rock and Pha Phama.

[46] In the present instance no contractual relationship existed between the plaintiff and the Provincial department. The purported order of goods, if genuine, would have created a contractual relationship between the plaintiff and the National department. No genuine order was placed. and the unlawfulness *in casu* does not arise in a contractual setting. In respect of unlawfulness in a contractual setting also see *McCarthy Ltd t/a Budget Rent a Car v Sunset Beach Trading 300 CC t/a Harvey World Travel and Another* 2012 (6) SA 551 (GNP).

[44] Although other factors play a role in respect of unlawfulness in a contractual setting, wrongfulness still presupposes a legal duty to prevent loss. The duty is also referred to as a duty of care and the following extract from LAWSA Volume 15 (3rd Edition) at para 8, is incisive:

•82                                      *The duty of care*

...

*the traditional test for ascertaining the existence of a duty of care in a particular case is the*

foresight of a reasonable person.<sup>1</sup> One owes a duty of care only to persons to whom harm may reasonably be care to whom harm may reasonably be foreseen.<sup>2</sup> The foreseeability formula for the determination of a duty comprises two separate but related inquiries, namely:

- (a) would a reasonable person in the same circumstances have foreseen the possibility of harm occurring to the plaintiff and, if the answer is in the affirmative;
- (b) would a reasonable person have taken measures to guard against the occurrence of such foreseeable harm?

If the answer to the second question is also in the affirmative, then the duty to take care is established.<sup>3</sup> If the duty is breached, this means, in current terminology, that the conduct was unlawful and the defendant was at fault.

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<sup>1</sup> 1 See, generally, *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 3 All SA 736 (A); 1991 1 SA 1 (A) 12; *Butters v Cape Town Municipality* 1993 4 All SA 437 (C); 1993 3 SA 52. 1 (C); *Joubert v Impala Platinum Ltd* 1997 3 All SA 180 (B); 19981 SA463 (B) 473 474-475. In England 3 criteria are now used for determining a duty of care: foreseeability of harm, proximity of relationship and whether or not it is fair, just and reasonable that liability should attach: *Caparo Industries plc v Dickman* 1990 1 All ER 568 (HL); *White v Jones* 1993 3 All ER 481 (CA). The classic pronouncement of the duty of care as a test for liability is that of Lord Atkin in *M Alister (or Donoghue) v Stevenson* supra 580: "Liability ... is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure our neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question"

<sup>2</sup> *Leon Bekaert Southern Africa (Pty) Ltd v Rauties Transport(Pt) Ltd* 19841 SA 814 (W) 818. See also *Bowley Steels (Pty) Ltd v Dalian Engineering (Pty) Ltd* 1996 1 All SA 383 (T) 387; 1996 2 SA 393 (T).

<sup>3</sup> *Cape Town Municipality v Paine* supra 215-217; *Joffe & Co Ltd v Hoskins*, *Joffe & Co Ltd v Bonamour* supra 451; *Stride v Reddin* 1944 AD 162 172; *Wasserman v Union Government* supra; *Herschel v Mrupe* supra 470-471 474-477 48 491-493; *Union Government v Ocean Accident & Guarantee Corporation Ltd* supra 585; *Peri-Urban Areas Health Board v Munarin* supra 373; *Franschhoekse Wynkelder(Ko-operatief) Bpk v SAR&H* supra 41; *Coronation Brick(Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 2 All SA 330 (D); 1982 4 SA 371 (D) 378; *J Paar & Co (Pvt) Ltd v Fawcett Security Organisation (Bulawayo) (Pvt) Ltd* 1987 2 SA 140 (ZS); *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W) 527-628; *Langley Fox Building Partnership (Pty) Ltd v De Valence* supra 13.



*The duty issue The duty of care is not a general duty; it is not necessarily owed to each and every person. The duty to take care is particular, relative or directional in the sense that it is owed to a particular person or persons, or to a particular class of persons. Unless the plaintiff is such a particular person or belongs to such a class of persons, he or she has no cause of action against the defendant. The plaintiff is owed a duty by the defendant only if he or she was a so-called "foreseeable plaintiff". This implies that a defendant owes a duty of care to persons to whom harm may reasonably be foreseen.<sup>4</sup> The foreseeability of harm within the field of the foreseeable risk.*

[44] Salzwedel was under the firm impression that the goods being stored are the property of the National Department of Public Works. She was blissfully unaware that the goods were ordered from the plaintiff. The instruction from her superior, the communication with "Dlabantu" from the National department and the relevant documents neither revealed the identity of the plaintiff nor the fact that the plaintiff was the supplier of the goods.

[45] Without being aware of the identity of the plaintiff and the fact that the goods were ordered from the plaintiff, it is difficult to contemplate that Salzwedel should reasonably have foreseen that harm might befall the plaintiff.

[46] In the circumstances, the plaintiff was not a "foreseeable plaintiff".

[47] Notwithstanding the aforesaid Mr Preiss SC, counsel for the plaintiff submitted that the State is, in terms of constitutional prescribes, accountable to its citizens. Such constitutional imposed accountability, according to Mr Preiss SC, creates in itself a general duty of care by State departments towards citizens. As alluded to *supra* the plaintiff framed the duty as "The

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<sup>4</sup> *Premier of the Western Cape v Faircape Property Developers (Pty) Ltd* 2003 2 All SA 465 (SCA) par 42; 2003 6 SA 13 (SCA); *Workmen's Compensation Commissioner v De Villiers* 1949 1 All SA 216 (C); 1949 1 SA 474 (C); *Union Government v Ocean Accident & Guarantee Corporation Ltd* supra 585; *Leon Bekaert Southern Africa (Pty) Ltd v Rautles Transport (Pty) Ltd* supra 818; *Daniels v General Accident Insurance Co Ltd* 1992 3 All SA 484 (C); 1992 1 SA 757 (C); *Moni v Mutual & Federal Versekeringsmpy Bpk* 1992 1 All SA 135 (T); 1992 2 SA 600 (T); *Ess Kay Electronics (Pte) v First National Bank of Southern Africa Ltd* 1998 2 All SA 353 (W); 1998 4 SA

*State, including the first defendant, is accountable to its citizens, including the plaintiff'.*

[48] Public accountability by the State towards its citizens has been the subject of various authorities.

[49] In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) the potential threat of the constitutional rights to human dignity, to life and to security of the person led to the State being held, in the circumstances surrounding the claim, accountable, which accountability gave rise to a legal duty.

[50] In *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C), the accountability of a State official in reaching a decision negligently was considered at the exception stage. Having had regard to the legal convictions of the community Davis J held as follows at 65H:

*"Thus our law has reached the point where legal convictions of the community would consider the negligent decisions by a public authority to represent wrongful conduct."*

[51] The claim in *Faircape supra* was based on a decision of the Minister of Agriculture, Planning and Tourism of the Western Cape to approve the plaintiff's application for the removal of certain title restrictions. The application was successful, but reviewed and set aside. The plaintiff once again applied and the application was successful. The plaintiff's claim was summarised as follows at 57I to 58A:

*"Plaintiff now claims the sum of R 1 054 407 which it alleges was the loss suffered by it as a consequence of the Minister's having breached the duty of care to plaintiff to apply his mind properly to the first application. In short the plaintiff submits that the Minister breached this duty of care when considering the first application in that he failed to apply his mind properly to the application and to arrive at his decision with due care and without negligence."*

[52] In *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA), a claim for loss of profit due to misfeasance in the award of a tender was unsuccessful. Cameron JA held as follows at paragraphs [30] and [31]:

*"[30] Certainly the contention that it is just and reasonable, or in accord with the community's sense of justice, or assertive of the interim Constitution's fundamental values, to award an unsuccessful tenderer who can prove misfeasance in the actual award its lost profit does not strike me in this context as persuasive. As the plaintiff's claim, which amounts to more than R10 million, illustrates, the resultant imposition on the public purse could be very substantial, involving a double imposition on the State, which would have to pay the successful tenderer the tender amount in contract while paying the same sum in delict to the aggrieved plaintiff. As a matter of public policy the award of such an entitlement seems to me to be so subject to legitimate contention and debate<sup>5</sup> as to impel the conclusion that the scheme of the interim Constitution envisaged that it should be a matter for decision by the bodies upon whom the legislative duties in subsections (1) and (2) were imposed. In these circumstances to infer such a remedy judicially would be to venture far beyond the field of statutory construction or constitutional interpretation.*

*[31] I agree with the observations of Davis J in Faircape Property Developers (Pty) Ltd v Premier, Western Cape<sup>6</sup> that in deciding whether a statutory provision grounds a claim in damages the determination of the legal convictions of the community must take account of the spirit purport and objects of the Constitution, and that the constitutional principle of justification embraces the concept of accountability<sup>7</sup>. This in turn must of course weigh in the balance when determining legal responsibility for the consequences of public malfeasance. The proceedings in Faircape, however, involved an ordinary statute, not a constitutional provision creating legislative duties, and the damages at issue were for out-of-pocket expenses, not for lost profit. The principle of public accountability is central to*

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<sup>5</sup> Compare the remarks of Ackemann J concerning the award of punitive damages in *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC) para 72.

<sup>6</sup> 2000 (2) SA 45 (CC).

*our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part In realising our constitutional vision of open, uncorrupt and responsive governments.<sup>8</sup> What precise remedy or remedies within the range available, including interdict (mandatory or prohibitory), review and the award of damages (whether for out-of-pocket losses or more), will be appropriate to secure that vision, depends however on the context of the statutory provision in question; and in section 187 can find no basis of Interpretation and no applicable principle of public policy entitling the plaintiff to claim its lost bargain. It must follow that Claim A was rightly set aside."*

[53] In the premises and in order to impose a legal duty, in this instance on the basis of accountability, regard should be had to public policy and the convictions of the community.

[54] In *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA), the Supreme Court of Appeal warned against an overbroad imposition of a legal duty in a delictual setting. At paragraph [20] of the judgment Ponnar JA stated the following

*"[20] Conduct is wrongful in the delictual sense if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant<sup>9</sup> It is then that it can be said that the legal convictions of society*

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<sup>7</sup> At 64E-I.

<sup>8</sup> It is instructive to compare in this regard the principles enunciated in section 195 of the 1996 Constitution ("Basic values and principles governing public administration").

<sup>9</sup> *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B: 'dat die gelede skade vergoed behoort te word'. In *Olitzki Property Holdings v State Tender Board & another* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA) para 12, Cameron JA observed: 'Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory Interpretation, since the statute may on a proper construction by Implication Itself confer a right of action, or alternatively provide the basis for Inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which It was enacted, and the kind of mischief It was designed to prevent. But where a common law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is "just and reasonable that a civil claim for damages should be accorded. • The conduct is wrongful, not because of the breach of the statutory duty per se, but because It is reasonable in the circumstances to compensate the plaintiff for the Infringement of his legal right. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably Include the application of broad considerations of public policy determined also in the light of the Constitution and the Impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.'

regard the conduct as wrongful.<sup>10</sup> 'Wrongfulness: the Constitutional Court held, 'typically sets as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability'. It elaborated: [wrongfulness] functions to determine whether the infliction of culpably caused harm demands the Imposition of liability or, conversely, whether "the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue",<sup>11</sup> What is called for is 'not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.'<sup>12</sup>"

[55] In my view, the present circumstances do not justify the imposition of a legal duty on the State to prevent the loss suffered by the plaintiff. In the authorities referred to *supra* where a pure economic loss was suffered, a direct relationship existed between the plaintiff and defendant.

[56] In *Van Duivenbodem supra* the legal duty was imposed where the protection of human dignity, life and security of the person was involved.

[57] In the present circumstances none of the aforesaid considerations apply.

[58] Furthermore, to impose a legal duty on the State *in casu* would potentially open a floodgate of claims. It would indeed be undesirable and overly burdensome to impose liability on the State in each instance where a citizen suffers an economic loss due to fraud or theft of goods delivered to the State. Moreover in circumstances where the identity of the supplier is unknown to the official receiving the goods.

[59] The fact that the plaintiff's own employee, who had been dealing with State departments for a considerable period of time, did not suspect any wrongdoing, is a further factor mitigating against holding the Provincial department accountable *in casu*.

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<sup>10</sup> *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B.

<sup>11</sup> *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) para 20.

[60]                   The concept of "accountability" in a delictual sense refers in my view to the performance by State officials of their official duties. The mere storage of goods by one State department on behalf of another State department does not, in the present circumstances, entail the performance of an official duty by the official in question.

[61]                   Having found that the plaintiff has failed to establish wrongfulness, the issue of negligence does not arise.

#### ORDER

[62]                   The plaintiffs claim is dismissed with costs, including the costs of two counsel.

JANSE VAN NIEUWENHUIZEN J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

DATE HEARD: 6 to 14 August 2018

JUDGMENT DELIVERED: 10 September 2018

#### APPEARANCES

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<sup>12</sup> Minister of Safety and Security Van Duivenboden [2002] ZASCA 79; 2002 (6) SA 431 (SCA); [2002] 3 All SA

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