THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 751/12

In the matter between:

COUNTRY CLOUD TRADING CC **APPELLANT**

and

MEC, DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT **RESPONDENT**

Neutral citation:	*Country Cloud Trading CC v MEC, Department of Infrastructure Development* (751/12) [2013] ZASCA 161 (26 November 2013).
Coram:	Brand, Leach, Tshiqi, Theron *et* Saldulker JJA
Heard:	**8 November 2013**
Delivered:	**26 November 2013**

Summary: **Delictual claim by stranger to a contract against contracting party who intentionally repudiated the contract for loss suffered by the stranger as a result of that repudiation.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Satchwell J sitting as court of first instance):

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

JUDGMENT

BRAND JA (LEACH, TSHIQI, THERON et SALDULKER JJA concurring):

[1] The respondent is a Member of the Executive Council in the province of Gauteng with responsibility for the provincial Department of Infrastructure Development, which was formerly part of the Department of Public Transport, Roads and Works (the Department). The appellant is a close corporation, Country Cloud Trading CC (Country Cloud). The appeal originates from a building contract between the Department and a construction company, Ilima Projects (Pty) Ltd (Ilima). In terms of this contract Ilima undertook to complete the construction of the partially built Zola Clinic in Soweto at a contract price of R480 million. In order to comply with its obligations under the contract, Ilima borrowed R12 million from Country Cloud. In terms of the loan agreement between these two parties, Country Cloud stood to make a profit of R8,5 million.

[2] After Country Cloud had paid the R12 million to Ilima, the Department cancelled the construction contract, which ultimately led to the liquidation of Ilima. Following upon these events, Country Cloud instituted an action against the Department in the South Gauteng High Court, Johannesburg for delictual damages in an amount of R20,5 million together with interest at 15,5 per cent. In the event the matter came before Satchwell J who dismissed the claim with costs. The present appeal against that judgment, which has since been reported as *Country Cloud*

Trading CC v MEC, Department of Infrastructure Development [2012] 4 All SA 555 (GSJ), is with the leave of the court a quo.

[3] A proper understanding of the issues arising requires a broad outline of the background facts. What eventually proved to be a rather sad tale of woe for all parties concerned, started on 10 May 2006 when the Department awarded a tender to build the Zola Clinic in Soweto, which was designed as a 300 bed district hospital, to a joint venture of four companies at a contract price of about R335 million. Ilima was one of the four companies in the joint venture. In terms of the ensuing contract, the project had to be completed by May 2008. But the joint venture never really got off the ground. In March 2008 Ilima's three partners withdrew, which left it as the last contractor standing. At that stage only 20 per cent of the hospital had been completed.

[4] The Head of the Department at the time, Mr Sibusiso Buthelezi, was then landed with the responsibility of appointing a contractor to complete the building project. The Departmental Acquisition Council (DAC), which concerned itself with the procurement of goods and services for the Department, recommended to Buthelezi that the contract should once again go through the tender process. On the other hand, the recommendation by senior officials of the Department was that, due to the urgency of the situation, the completion contract should, without further ado, be awarded to Ilima as the only surviving member of the joint venture. This is what Buthelezi then did. Although Buthelezi himself did not testify at the trial, it appears from the documentary evidence that he was of the view that, as the accounting officer of the Department, he was entitled to override the advice of the DAC and that due to the exigency of the situation, he should do so. In motivating this decision in subsequent correspondence, Buthelezi pointed out, for instance, that the people of Soweto were in dire need of a hospital which was destined to be completed by May 2008; that by that time only 20 per cent of the work had been done; and that going out on tender was bound to give rise to further delay and additional costs.

[5] Ilima was confident that it was able to complete the construction of the hospital on its own. Yet it needed immediate financial assistance in an amount of R12 million to do so and the Department was clearly aware of this need. Hence the Department made various concessions to assist Ilima in obtaining a loan so as to facilitate the expeditious completion of the hospital. First the Department undertook, as part of the construction contract, to pay Ilima a so-called 'site re-establishment and mobilisation fee' equal to five per cent of the contract price of R480 million – that is R21,5 million – within 30 days of concluding the contract. Secondly, the Department allowed its managing agent, Tau Pride (Pty) Ltd (Tau Pride), to give a formal undertaking to Country Cloud that the loan of R12 million be paid directly to it out of the site rehabilitation and mobilisation fee of R21,5 million when Ilima became entitled to this fee.

[6] On this basis Country Cloud agreed, in terms of a loan agreement with Ilima to advance an amount of R12 million to the latter to perform its obligations under the completion contract. In turn, Ilima undertook to repay the amount of R12 million when the site rehabilitation and mobilisation fee became payable. In addition, Country Cloud would receive a handsome profit of R8,5 million which Ilima undertook to pay by 1 May 2009. The construction contract for the completion of the Zola Hospital, which ended up as the source of this litigation, was then concluded between Ilima and the Department on 4 August 2008. It soon became known as 'the completion contract'. Following upon the conclusion of the completion contract, Country Cloud advanced the R12 million to Ilima.

[7] Trouble started on 4 September 2008 when the Department cancelled the completion contract before it had made any payments thereunder, either to Ilima or, via Tau Pride, directly to Country Cloud. This despite a certificate by the principal agent in terms of the construction contract, that an amount of R21,5 million became due and payable by the Department. The comprehensive letter of cancellation on behalf of the Department was written by Buthelezi. In essence it relied on two misrepresentations by Ilima prior to the conclusion of the completion contract, which

were alleged to be both intentional and material. The first related to a representation conveyed through a tax clearance certificate from the South African Revenue Service (SARS), to the effect that Ilima had complied with all its tax obligations and was in good standing with SARS. This was alleged to be untrue in that, at the time, Ilima's tax affairs were in serious disarray. The second was that it had received a level 8 accreditation from the Construction Industry Development Board.

[8] Subsequently, as I have indicated by way of introduction, Country Cloud had been liquidated for being unable to meet its financial obligations to its creditors. This happened in March 2010. Prior to its liquidation, summons was issued on behalf of Country Cloud against the Department for contractual damages in an amount of R1.4 billion on the basis of its alleged unlawful repudiation of the completion contract. What happened to this claim is not entirely clear. Apparently it went to mediation, which proved to be unsuccessful, but whether it was then pursued further and, if not, why not, we simply do not know.

[9] Country Cloud's particulars of claim reveals clear difficulty in the formulation of a claim in delict. As it happened, the basis finally relied upon was only introduced by way of an inelegantly drafted amendment shortly before Country Cloud closed its case in the court a quo. Not revealing the scars of amendments, the formulation eventually followed the following lines:

(a) The Department owed Country Cloud a so-called 'duty of care' not to cancel the completion contract without any lawful ground prior to payment of the site rehabilitation and mobilisation fee to Ilima. (The reason for the 'so-called' is to highlight the confusion revealed by the reference to 'a duty of care' to which I propose to return.)

(b) On 4 September 2008 the Department intentionally, and in breach of its duty of care, unilaterally cancelled the completion contract without any lawful grounds.

(c) But for the conduct of the Department, Ilima would have received payment of an amount of R21,5 million and would have been able to pay the R12 million and R8,5 million which it owed to Country Cloud.

[10] In the original version of its plea the Department persisted in the defence that the completion contract had been validly cancelled on grounds of Ilima's material and intentional misrepresentation. As in the cancellation letter, the two misrepresentations relied upon again related to the content of the tax clearance certificate provided by Ilima and the representation that Ilima had been accredited by the Construction Industry Development Board with a level 8 rating. Moreover, and in any event, the Department denied that it was liable in delict to Country Cloud for the damages claimed. Shortly before the commencement of the trial the Department amended its plea so as to introduce a further defence. According to this new defence the completion contract was in any event invalid because 'the tender awarded to Ilima was contrary to the procurement regulations and policies of the . . . Department' in that 'it was not advertised and [did not invite] . . . other companies to bid for the tender; and it was not evaluated and adjudicated by the appropriate internal structures of the Department'.

[11] Prior to the commencement of the trial the Department admitted that Ilima possessed the required level 8 rating. Hence the evidence at the trial focussed on (a) the validity of the tax clearance certificate and (b) the Department's contention that the award of the tender to Ilima was invalid from the start. As to the first issue, it was common cause that Country Cloud produced a tax clearance certificate issued by SARS on 5 December 2007 which was valid for a period of one year – that is until 5 December 2008 – which obviously extended beyond the conclusion of the completion contract on 4 August 2008. In support of the contention that there was nothing wrong with this certificate, Country Cloud presented the evidence of Dr Tembalegise Lupepe, who was the founder of and driving force behind Country Cloud. For the contrary proposition, the Department relied on the testimony of a Mr Wayne Broughton, a senior employee of SARS. The only other witness of note was Mr Mohlomphegi Thulare, a departmental official, who was called by the Department to testify in support of its non-compliance defence.

[12] At the end of the trial, the court a quo was thus enjoined to decide three issues: (a) whether the award of the completion contract to Ilima was valid and lawful; (b) whether the contract was validly cancelled on the basis that the clearance certificate provided by Ilima was invalid; and (c) whether the Department could be held liable in delict for the damages allegedly sustained by Country Cloud as a result of the repudiation of the contract by Buthelezi on behalf of the Department. The court a quo decided first to consider the issue in (a). It then concluded that the award of the contract to Ilima was indeed invalid and unlawful. In consequence, the court found it unnecessary to embark upon the other two issues at all.

[13] Without any intent to be uncharitable, the defence on which the Department eventually succeeded was – perhaps in retaliation of the similar lackadaisical approach to pleadings adopted by Country Cloud – introduced at a very late stage by means of an ineptly drafted amendment to the plea and then presented in an even worse way. The factual basis advanced for the alleged unlawfulness of the award of the completion contract was that it was not advertised and that it did not go through the tender and bidding process. The legal basis pleaded was that the award of the tender was therefore 'contrary to the procurement regulations and policies' of the Department. At the trial the Department sought to establish this defence through the evidence of Thulare. It then emerged that the legal basis for the defence had nothing to do with 'Departmental policy' but instead derived from a myriad of statutory provisions, including the Public Finance Management Act 1 of 1999 (the Act); the Preferential Procurement Policy Framework Act 5 of 2000; regulations promulgated under these Acts; practice notes issued by the National Treasury; and so forth. Relying on these statutory provisions, the theme of Thulare's testimony proved to be that:

(a) as a general rule, procurement of goods and services by the Department had to follow the prescribed advertising and competitive bidding process which was not adopted in the award of the completion contract;

(b) although the prescribed process could be departed from in cases of emergency, the circumstances surrounding the award of the completion contract did not constitute a case of emergency;
(c) the DAC, of which Thulare was a member, had recommended to Buthelezi that the completion contract should once again go through the prescribed process, which advice Buthelezi had refused to follow.

[14] Undoubtedly as a result of the way in which this defence was presented, the court a quo gained the impression, which proved to be mistaken, that the authority to decide whether or not deviation from the prescribed process was justified, did not rest with Buthelezi but with the DAC. Since the DAC 'to which Buthelezi . . . was accountable, did not approve the deviation from inviting competitive bids', so the court held (in para 36), the completion contract was concluded without authority. In consequence the Department could not be held liable under the completion contract (see para 61). On appeal it was common cause, however:
(a) that sections 38 to 44 and the Practice Notes issued by National Treasury bestowed the authority to deviate from the prescribed procedure on the 'accounting officer';
(b) that in terms of s 36 of the Act, Buthelezi was indeed the accounting officer; and
(c) that Buthelezi therefore had the authority to ignore the DAC's advice that the completion contract should again go out to tender.

[15] The interpretation of the relevant statutory provisions thus accepted by counsel for both parties – which I regard as correct – essentially deprived the judgment of the court a quo of its whole substructure, ie that Buthelezi had no authority to deviate from the prescribed procedure. Nonetheless, the Department contended that the award of the contract was unlawful on the basis that the circumstances surrounding the award did not qualify as a case of emergency. In support of this contention it relied on the evidence of Thulare. As I see it, however, there are at least three reasons why this reliance cannot be sustained. First,

Thulare's opinion is inadmissible on matters of law. Secondly, insofar as his opinion pertained to matters of fact, it was equally inadmissible since he was not called as an expert witness. Thirdly, I cannot see why his opinion should be preferred to that of Buthelezi and other senior members of the Department who held the view that the completion of the Zola Clinic was indeed required as a matter of urgency. In this light I conclude that the Department's defence resting on an unlawful award of the completion contract, should not have been upheld.

[16] The Department's further defence, based on the proposition that the completion contract was validly cancelled, can be disposed of with even less ado. It will be remembered that this defence was based on the premise that the tax clearance certificate submitted by Ilima was false. At the trial the Department set out to establish this defence through the evidence of Broughton, a senior official in the employment of SARS. Since Broughton was not directly involved with the issue of the certificate, the high-water mark of his evidence was, however, that the certificate should not have been issued. The basis he advanced for this view was that, at the time the certificate was issued, Ilima's tax affairs were in serious disarray. Under cross-examination he conceded, however, that a tax clearance certificate could nonetheless be issued if Ilima had come to an arrangement with SARS. He further conceded that he could not exclude the possibility that such an arrangement had in fact been reached. These concessions in turn led to the concession by counsel for the Department – which was, in my view, rightly and fairly made – that the defence based on cancellation of the completion contract could not be sustained.

[17] This leads to a consideration of the Department's further defence that, in any event, it cannot be held liable in delict for the damages claimed because Country Cloud had failed to establish the element of wrongfulness, which is essential for Aquilian liability. The contention must of course be understood in the light of the evolution of our law with regard to delictual liability for pure economic loss that started with the decision of this court in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A). Prior to *Trust Bank*, Aquilian liability was limited, as a

general rule, to loss resulting from physical injury to the person or property of the defendant. But in *Trust Bank* it was extended to liability for pure economic loss. What Rumpff CJ immediately realised in that case (at 833A) was that this extension gave rise to the danger of 'oewerlose aanspreeklikheid' (limitless liability). Experience tells us that economic effects are not subject to the laws of physics. They can be much more widely spread. Hence the problem of the extension was one of limitation. Or, as this court said in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 17, when we abolished the absolute exclusion of liability for pure economic loss, we abandoned the bright line of limitation. That gave rise to the question: where is the next bright line to be drawn?

[18] What Rumpff CJ decided in *Trust Bank* was to cast the element of wrongfulness in the role of an instrument of control to prevent limitless liability. In this way the role of wrongfulness became far more pivotal than the one it traditionally performs with reference to conduct causing physical harm. In the latter situation wrongfulness is rarely contentious. In fact, in these cases wrongfulness is presumed with the result that the onus is on the defendant to exclude the inference of wrongfulness arising from physical harm (see eg *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A); *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 13; *Roux v Hattingh* 2012 (6) SA 428 (SCA) para 32). But in the case of pure economic loss, wrongfulness performs the function of a safety valve; a control measure; a long stop which enables the court to curb liability where despite the presence of all other elements of the Aquilian action, right-minded people will regard the imposition of liability as untenable. Decisions building upon *Trust Bank* demonstrate the clear recognition by different members of this court that wrongfulness in the context of delictual liability for pure economic loss is ultimately dependent on an evaluation based on considerations of legal and public policy. The enquiry is thus: do these policy considerations require that harm causing conduct should be declared wrongful and consequently render the defendant liable for the loss, or do they require that harm should remain where it fell, ie with the plaintiff? (See eg *Indac Electronics (Pty) Ltd v*

Volkskas Bank Ltd 1992 (1) SA 783 (A) at 797E-H; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 26J-27D.)

[19] Yet, for some or other reason there was a clear reluctance, during the early stages of the development of the delictual action for pure economic loss, to admit that we are dealing with considerations of policy. Perhaps the reluctance was motivated by fear that an express reference to vague notions of policy would fuel the criticism of those who contended that the extension of liability in *Trust Bank* would result in the substitution of judicial discretion for principle. But whatever the reason, in *Trust Bank* Rumpff CJ (at 833A) introduced the concept of a 'legal duty' as the yardstick to determine when policy considerations will require the imposition of delictual liability for pure economic loss. With the passage of time, further attempts were made to formulate some practical yardstick for this purpose. Included amongst these was the concept of the '*boni mores'* or 'legal convictions' of the community; and the 'general criterion of reasonableness', which poses the question whether or not it would be reasonable to impose liability on the defendant (see eg *S M Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd* 2000 (4) SA 1019 (SCA) para 7). Unfortunately, these yardsticks gave rise to confusion. While the concept of a 'legal duty' was often confused with the concept of a 'duty of care' in English law – which straddles both wrongfulness and negligence – the 'general criterion of reasonableness' was frequently associated with the reasonableness of the defendant's conduct, which is an element of negligence (see *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11). Our case law illustrates that this confusion had practical consequences in that it often led to a complete negation of either negligence or wrongfulness (see eg *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) paras 17-20; *Telematrix* para 14). I raise this because, despite the frequent warnings against this confusion by this court over the last ten years, it again raised its head right throughout the proceedings in this case.

[20] Fortunately, in the light of the confusion caused by the yardsticks, our courts have since found their way open to acknowledge in express terms that wrongfulness, in the context of delictual liability, is determined by considerations of legal and public policy. This appears for instance from the following statement by the majority of the Constitutional Court in *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA 274 (CC) para 122:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'

(See also Froneman J in *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) paras 117-124.)

[21] Pivotal to Country Cloud's contention as to why considerations of public policy dictate the imposition of delictual liability on the Department, was the proposition that Buthelezi cancelled the completion contract without any legal justification and that he did so with the intent – at least in the form of *dolus eventualis* – to repudiate the contract. Stated somewhat differently, in the language of *dolus eventualis*, Buthelezi subjectively foresaw the possibility that he had no legitimate grounds to cancel the contract, but reconciled himself with that possibility and nonetheless continued to do so, regardless of the consequences. That, so the argument went, distinguishes this case from the situation where the degree of blameworthiness associated with the repudiation of a contract can be placed no higher than negligence.

[22] As to the factual basis for its contention regarding Buthelezi's state of mind, Country Cloud relied on the following:

(a) The evidence by Thulare that Buthelezi came under severe pressure, not only from the Department itself, but also in the media, for not following the recommendation of the DAC to put the completion contract out to tender and that he was desperately looking for reasons to cancel.

(b) The allegation in Country Cloud's particulars of claim to the effect that the Department intentionally cancelled the contract without any legitimate grounds for doing so.

(c) The fact that it must have been patently clear to the Department that the sting in that allegation was pointed directly at Buthelezi and that the Department nonetheless failed to call him as a witness.

(d) The fact that the two grounds for cancellation of the completion contract advanced by Buthelezi both proved to be entirely unfounded.

[23] These circumstances, so Country Cloud argued, gave rise to the inference that Buthelezi at least foresaw that the cancellation was unjustified and that he reconciled himself with that possibility. Absent any explanation by Buthelezi, so the argument went, that inference became the most probable one. Despite the Department's arguments to the contrary, it seems to me that the logic of Country Cloud's reasoning cannot be faulted. In consequence, the factual basis of the policy consideration for which Country Cloud contends appears to be well-founded.

[24] For the legal basis of the policy consideration based on the blameworthiness of Buthelezi's state of mind, Country Cloud sought to find support in the following statement by this court in *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) para 86:

'We do not think that it can be stated as a general rule that, in the context of delictual liability, state of mind has nothing to do with wrongfulness. Clear instances of the contrary are those cases where intent, as opposed to mere negligence, is itself an essential element of wrongfulness. These include intentional interference with contractual rights (see eg *Dantex*

Investment Holdings (Pty) Ltd v Brenner and Others NNO [1989 (1) SA 390 (A)]) and unlawful competition (see eg *Geary & Son (Pty) Ltd v Gove* [1964 (1) SA 434 (A)]).

[25] Again I can find no fault with Country Cloud's point of departure that, generally speaking, the nature of the defendant's fault and the degree of blameworthiness of the conduct are policy considerations that can legitimately be taken into account in deciding whether or not delictual liability should be imposed. Max Loubser (Editor), Rob Midgley (Editor) André Mukheibir Liezel Niesing and Devina Perumal *The Law of Delict in South Africa* 2 ed (2012) at 141 develop this thesis somewhat further. Under the Aquilian action, so they say, the element of fault is satisfied by either negligence or intent. As a general rule, no weight is therefore given, under the rubric of fault, to the degree of blameworthiness or any reprehensible motive on the part of the defendant. This is so because the element of fault leaves no scope for considerations of policy. In determining wrongfulness, on the other hand, these very considerations of policy do indeed come into play. But it goes without saying, as is underscored by Loubser, Midgley et al op cit 157, that '[i]ntentionally causing harm to others will not always be wrongful' and that 'intent does not necessarily indicate wrongfulness'. In the end the nature of the fault and the degree of blameworthiness are therefore considerations to be weighed up with all others in determining whether delictual liability should be imposed.

[26] With reference to the quotation from *Gore NO,* it will be realised that the present is not the type of situation contemplated in cases such as *Dantex.* In those cases a delictual remedy is afforded to a party to a contract who complains that a third party – who is a stranger to the contract – has intentionally deprived him or her of the benefits he or she would otherwise have obtained from performance under the contract. Examples include, preventing a lessee from taking occupation of the leased property in terms of the lease (*Dantex*); enticing another person's employees to breach the contract (*Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 202G-H); and so forth (for a more complete list of illustrations see J Neethling, J M Potgieter and P J Visser *Law of Delict* 5 ed (2006)

translated and edited by J C Knobel) at 282; Loubser, Midgley et al supra at para 17.2). For Country Cloud to succeed, we must extend delictual liability to a contracting party for damages suffered by a stranger to the contract resulting from the intentional repudiation of the contract by that contracting party. This, as counsel for Country Cloud rightly conceded, has never been done before. And, as Grosskopf AJA said in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 504F-G:

'South African law [unlike English law] approaches the matter in a more cautious way, as I have indicated, and does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations which favour such an extension.'

[27] Aside from intent on the part of Buthelezi, the only other positive policy consideration proposed by Country Cloud in favour of imposing delictual liability on the Department is that all departmental officials involved, including Buthelezi, foresaw the damages that it would suffer if they were to repudiate the completion contract. I know that foreseeability of harm has in the past been recognised by this court as a factor in establishing wrongfulness (see eg *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12). Nonetheless, I have some reservation about this approach, mainly because it is bound to add to the confusion between negligence and wrongfulness (see eg *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) para 18). Moreover, foreseeability is a requirement of negligence and also plays a role in the determination of legal causation. A defendant will therefore not be held liable for harm which was not foreseeable (see eg *Fourway Haulage SA (Pty) Ltd supra* paras 28, 34 and 35).

[28] I find this last mentioned consideration of particular significance in the present context. The import, as I see it, is this: since foreseeability of harm is a prerequisite for delictual liability in all cases, that feature cannot render the claim by Country Cloud deserving of special treatment. Imposition of delictual liability on the Department in this case will therefore as a general principle render contracting parties liable in delict for harm suffered by strangers which flows from the

repudiation of their contracts. The realisation that this is so immediately raises a feature which is generally regarded as a strong pointer away from the imposition of delictual liability, namely that of indeterminate liability. In fact, this consideration is directly linked to the very reason for the initial doubt as to whether pure economic loss should be actionable at all. If delictual liability were to be imposed on the Department for the loss suffered by Country Cloud, what about all others who lent money to Ilima? And what about Ilima's employees? And what about its subcontractors? And so the list of potential plaintiffs goes on and on. In argument counsel for Country Cloud was constrained to concede that there would be no difference in principle between these potential claimants, on the one hand, and Country Cloud on the other. What exacerbated that difficulty was counsels' further concession, rightly made, that there appears to be no reason why the claims of all these potential claimants would not be cumulative with one another and with the contractual claim of Ilima as well.

[29] The problems of limitation thus arising are reminiscent of those referred to by Schreiner JA in *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A) at 585B-D. In that case the Government claimed for the loss it had suffered as a result of negligently inflicted injury to a Government employee (a magistrate). In explaining why this court declined to expand Aquilian liability beyond the injured person himself to those who may indirectly suffer harm as a result of the injury, Schreiner JA said (at 585F-H):

'Once one goes beyond physical proximity and considers the possibilities that may arise out of the relationships, contractual or other, between the physically injured person and other persons who may suffer indirectly, though materially, through his incapacitation, one is immediately met with the prospects of an unmanageable situation. It is easy to imagine the absurdities that would arise if all persons contractually linked to the injured person could sue the careless injurer for the loss suffered by them. The case was put to us of the injured building contractor who in consequence of his injury has to discontinue his contract, so that his employees and the building owner and the architect and his sub-contractors and their employees are all put to some loss.'

[30] A further consideration, which, in my view, weighs heavily against the imposition of delictual liability on the Department in the circumstances of this case, is the one that has become known in the context of wrongfulness as the plaintiff's 'vulnerability to risk'. As developed in our law under the influence of Australian jurisprudence, vulnerability to risk signifies that the plaintiff could not reasonably have avoided the harm suffered by other means. What has by now become well-established in our law is that the finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant (see eg *Trustees, Two Oceans Aquarium Trust* supra paras 23-24; *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) paras 28-30). The import of this consideration is best illustrated, I think, by McHugh J in *Perre v Apand (Pty) Ltd* (1999) 198 CLR 180 (HCA) para 118:

'Cases where a plaintiff will fail to establish a duty of care [or, wrongfulness in the parlance of our law] in cases of pure economic loss are not limited to cases where imposing a duty of care would expose the defendant to indeterminate liability or interference with its legitimate acts of trade. In many cases, there will be no sound reason for imposing a duty on the defendant to protect the plaintiff from economic loss where it was reasonably open to the plaintiff to take steps to protect itself. The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss.'

[31] In this case it is clear to me that there were at least two alternative remedies available to Country Cloud to recover its loss. It could either have claimed repayment from Ilima in terms of the contract of loan or it could have taken cession of Ilima's claim against the Department. The reason why it did neither is not explained. The contention on behalf of Country Cloud was that, because of Ilima's insolvency, it was not able to recover its claim in full. But as I see it, there is more than one answer to this contention. First, it still does not explain why Country Cloud did not take cession of Ilima's claim against the Department if the liquidators elected

not to pursue their claim. Secondly, there is no reason to think that if Ilima or its liquidator had successfully pursued its claim for breach of contract against the Department, it would still be unable to repay Country Cloud. Thirdly, if Ilima would remain unable to pay Country Cloud despite its success against the Government, the cause of Country Cloud's loss would no longer lie in the Department's breach but in Ilima's insolvency. Logic dictates that this must be so. Once Ilima is – by means of an award of damages in contract – placed in the position it would have been if the Department had complied with its obligations, any further damage that Country Cloud could suffer could no longer be laid at the door of the Department.

[32] It follows that in my view there is no room for the imposition of delictual liability on the Department for the loss claimed by Country Cloud. In the result I agree with the court a quo's finding – albeit for reasons that are quite different – that Country Cloud's claim could not succeed.

[33] For these reasons the appeal is dismissed with costs, including the costs of two counsel

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	L J MORISON SC X STYLIANOU
Instructed by:	RAMSAY WEBBER INC JOHANNESBURG
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For Respondent:	N DUKADA SC B SHABALALA
Instructed by:	STATE ATTORNEY JOHANNESBURG
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