IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 22235/19

In the matter between:

BRENTMARK (PTY) LTD First Plaintiff

BRENT OK (PTY) LTD Second Plaintiff

and

PUMA ENERGY SOUTH AFRICA (PTY) LTD Defendant

Bench: P.A.L. Gamble, J

Heard: 2 February 2021

Delivered: 5 July 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Monday 5 July 2021.

JUDGMENT

GAMBLE, J:

INTRODUCTION

[1] Is it wrongful for a party (A) who has contracted with another party (B) to cause pure economic loss to a non-contracting party (C) through conduct that constitutes a breach of the contract between A and B? That, in general terms, is the question that must be answered in this exception taken by the defendant ("Puma") to a delictual claim brought against it by the second plaintiff ("OK") for damages for pure economic loss.

[2] The subject of the dispute is a service station and adjoining convenience store at 51 Durban Road, Mowbray, located on premises owned by Mowbray Caledonian Court (Pty) Ltd ("Caledonian"). The service station was operated by the first plaintiff ("Brentmark"), which sold petroleum products supplied to it by Puma, while the convenience store was operated by OK. As might be expected, there is a suite of written agreements in place that govern the relationships between the parties. The content of the various agreements is uncontroversial and can be dealt with briefly.

BACKGROUND

[3] As of June 2015, the premises were being leased from Caledonian by Brent Oil (Pty) ("Brent Oil"), for purposes of conducting a service station and convenience store business thereon. On 19 June 2015 Brentmark concluded a binding agreement of sub-lease with Brent Oil, with a view to Brentmark conducting a similar business on the premises. The duration of the sub-lease was to be 9 years and 11 months. For the sake of convenience, this will be referred to as "the Brentmark sub-lease".

[4] It was an express term of the Brentmark sub-lease that it was subject to a further agreement, to be concluded between Brentmark and Brent Oil, for the supply of petroleum products by the latter to Brentmark. That condition was fulfilled on 19 June 2015, when those parties also concluded a so-called "dealer agreement", to which further reference will be made later.

[5] The shareholding in both Brentmark and OK was held in equal shares by the Saman Trust and LMT Investments (Pty) Ltd. While the particulars of claim do not

reflect who the guiding minds of the two plaintiffs were, the equal shareholding in each company suggests a material degree of commercial interest between the two entities trading on the premises. Further, the Brentmark sub-lease records that it was represented in the conclusion of that agreement by Mr. Andrew Bradley, and Brent Oil by Mr. Phillip Robinson, and in the particulars of claim it is alleged that the same persons represented the parties to the dealer agreement.

[6] Pursuant to the Brentmark sub-lease and the dealer agreement, Brentmark –

6.1. commenced operating a fuel filling station at the premises;

6.2. purchased petroleum products from Brent Oil, which it sold to customers of the filling station; and

6.3. procured that the convenience store be operated by OK at the premises.

[7] On 18 September 2015 Brent Oil changed its name to that of the defendant – Puma Energy South Africa (Pty) Ltd ("Puma").

[8] The convenience store business was conducted by OK in terms of a further sub-lease concluded between it and Brentmark. For the sake convenience, this will be referred to as "the BrentOK sub-lease". Brent Oil (and subsequently Puma) was not a party to the BrentOK sub-lease, while OK was not a party to the dealer agreement or the Brentmark sub-lease.

ALLEGED ONEROUS TERMS OF DEALER AGREEMENT

[9] Brentmark contends that the pricing structure of the dealer agreement, pursuant whereto it was obliged to purchase petroleum products from Puma, was fixed and not subject to any adjustment in order to counter the adverse effects of inflation and unforeseen fluctuations in economic and market conditions.

[10] Brentmark contends further that as a consequence of that pricing structure, the prices of the petroleum products it was entitled to sell under the dealer agreement became increasingly uncompetitive and commercially unviable for it. To that end,

says Brentmark, it attempted to persuade Puma to agree to a revised pricing structure to replace a structure which, it says, had become obsolete and archaic.

[11] However, says Brentmark, notwithstanding Puma's acknowledgement that the existing pricing structure was obsolete and commercially unviable, it refused to renegotiate that part of the dealer agreement.

SALE OF BUSINESSES

[12] Brentmark alleges that in order to avert its potential financial demise, which would have been inevitable if it had remained locked in to the dealer agreement under the existing pricing structure, it took steps to investigate the sale of both the filling station business and that of the convenience store. It says that Puma was kept informed of these negotiations at the time.

[13] In the result, on 1 July 2018, and by way of an agreement for the sale of the shareholding in each of the entities -

13.1 Brentmark sold the filling station business to JR Petroleum (Pty) Ltd ("JR Pet") for the amount of R2,5m, and

13.2 OK sold the convenience store business to JR Convenience Foods (Pty) Ltd ("JR Foods") for the amount of R4m.

[14] Under the Brentmark sub-lease, the sale of the filling station business to JR Pet required the written consent of Puma and, to this end, during August 2018, Brentmark approached Puma. However, Puma refused to furnish its consent.

ALLEGED BREACH OF CONTRACT

[15] The dealer agreement contained a so-called 'good faith clause', which was binding on the parties.

'24. GOOD FAITH

In their dealings with each other and in implementation of this agreement, the parties undertake to observe the utmost good faith and to give full effect to the intent and purpose of

this agreement and neither to do anything nor to refrain from doing anything which might in any way prejudice or detract from the rights, property or interest of any of them.'

[16] For reasons which will be canvassed more fully hereunder, Brentmark alleges that Puma breached the provisions of this clause, when it refused to agree to the sale of the filling station business by Brentmark to JR Pet. After due notice had been given to Puma to remedy its breach, Brentmark gave notice of the cancellation of the dealer agreement on 5 September 2018. The effective date of the cancellation was to be 31 October 2018.

[17] Brentmark alleges that subsequent to such notice of cancellation, the parties entered into discussions during October 2018. The outcome thereof, says Brentmark, was that the termination of the Brentmark sub-lease would be postponed until 31 January 2019, to avoid the sub-lease terminating during the 2018 Festive Season when an increase in turnover was anticipated.

[18] Brentmark says that during the period between October 2018 and the end of January 2019, Puma took certain commercial steps that ultimately led to the demise of its filling-station business. As a consequence, Brentmark says it was forced to close the filling-station business, and the convenience store business of OK was similarly forced to close.

ACTION PROCEEDINGS

[19] On 11 December 2019, Brentmark (as first plaintiff) issued summons against Puma for damages for breach of contract. Its damages were quantified as R2,5m – the loss allegedly sustained as a result of the closure of the filling station business. OK joined in those proceedings as the second plaintiff, and independently sought delictual damages in the amount of R4m for the losses it says it sustained as a consequence of the forced closure of the convenience store business.

[20] On 3 June 2020 Puma gave notice to Brentmark and OK, in terms of Rule 23(1), that it intended noting an exception against both the contractual claim of Brentmark and the delictual claim brought by OK. The response of each of the plaintiffs was to seek to amend their particulars of claim. The issue of the potential exception to Brentmark's claims was resolved through the unopposed amendments

which it subsequently effected to its particulars of claim. However, Puma persisted in its objection to OK's claims, notwithstanding the attempted amendment thereof.

[21] In the result, this Court must determine both Puma's exception to, and OK's notice of intention to amend, the particulars of claim. The matter was heard virtually on 2 February 2021. Brentmark and OK were represented by Adv.P.de B. Vivier SC, and Puma by Adv. M. van Kerckhoven. The Court is indebted to counsel for their helpful heads of argument and oral submissions.

THE MATERIAL ALLEGATIONS MADE BY OK IN THE PARTICULARS OF CLAIM

[22] The factual matrix relevant to both claims was referred to as Section A in the particulars of claim, while Brentmark's claim was termed Section B. The allegations made by Brentmark which impact on OK's claim will be referred to in general hereunder. It is necessary, at this stage, only to recite OK's claim in full, in which, for the sake of convenience, I will substitute the relevant parties' names.

'C. The Second Plaintiff's claim

62. [OK] conducted the convenience store in a section of the premises which it rented from [Brentmark], in terms of a sub-lease which had been entered into between [Brentmark] and [OK] for such purpose (hereinafter referred to as "*the BrentOK sub-lease"*).

63. [Brentmark] had duly acquired Brent-Oil's prior written consent to enter into the BrentOK sub-lease, as required by clause 12.12.1 of the sub-lease between [Brentmark] and [Puma] (hereinafter referred to as "*the Brentmark sub-lease"*).

64. The continued existence of [OK's] convenience store as a successful business enterprise was contingent on the continued existence of the filling station business (and [Brentmark's] right to occupy the premises in terms of the Brentmark sub-lease).

65. The convenience store was [OK's] only business and its sole source of income.

66. [Puma] was at all times aware of the facts and circumstances set out in paragraphs 64 and 65 above. It knew, alternatively ought to have known, that the cancellation of the dealer agreement and the Brentmark sub-lease would herald the end of [OK's] convenience store business at the premises.

67. The manner in which [Brentmark] was eventually forced to cancel both the dealer agreement and the Brentmark sub-lease, as described in section A above, was not foreseeable by [OK] when it entered into the BrentOK sub-lease with [Brentmark] with a view to operating the convenience store.

68. Neither was [OK] in a position to avoid such occurrence, or to protect its interests by means of appropriate contractual stipulations with [Puma], against the adverse consequences of the forced cancellation of the said contracts, which underpinned [OK's] convenience store business.

69. In the premises, considerations of public and legal policy dictate that Puma owed a legal duty to [OK] to avoid that [OK] would suffer economic loss, as a consequence of the cancellation by Brentmark of the dealer agreement and the Brentmark sub-lease, due to Puma's breach of contract.

70. [Puma] breached such legal duty negligently by failing to take reasonable steps to prevent that [OK] suffer economic loss as described in para 71 below.

71. As a consequence of [Puma's] aforesaid breach of its legal duty, [OK] suffered pure economic loss, in that –

71.1 it was denuded of the opportunity to sell the convenience store business at a time when its value was at least R4 million;

71.2 such value was subsequently eroded, as a further consequence of [Puma's] wrongful conduct, as set out in paragraphs 41 to 48 above.

72. [OK's] patrimonial position has, as a consequence of [Puma's] aforesaid wrongful conduct, been reduced with at least R4 million.

73. In the premises, [OK] suffered damages in an amount of R4 million, which it is in law entitled to claim from [Puma].'

THE EXCEPTION TO CLAIM C

[23] As already stated, Puma filed a notice in terms of Rule 23(1) affording both plaintiffs an opportunity to amend their respective claims on the basis that Puma contended that they were both vague and embarrassing, and/or lacked averments

necessary to sustain their causes of action. The notice recited three grounds of complaint, of which only the second ground was relevant to OK's claim.

[24] In response thereto, Brentmark and OK gave notice in terms of Rule 28 that they intended amending their respective claims. The proposed amendment in respect of the first and third grounds of complaint addressed Puma's objection, but not the second, in respect whereof Puma gave notice of opposition under Rule 28(3). In the result, this judgment is required to consider-

24.1 the validity of the exception noted in the second ground of complaint raised by Puma in respect of Claim C; and

24.2 OK's intended amendment to that claim and the opposition thereto.

THE EXCEPTION TO OK'S CLAIM

[25] The exception, rather laboriously, repeats much of the content of Claim C, but a further repetition thereof is unavoidable if justice is to be done to the parties.

'**2. SECOND COMPLAINT**

2.1. In paragraph 62, the plaintiffs plead that Brent OK conducted a convenience store under a lease agreement between Brentmark (as lessor) and Brent OK (as lessee) (**the Brent OK sub-lease**).

2.2. In paragraph 66, the plaintiffs plead that the defendant was aware that:

2.2.1. the continued existence of the convenience store "*as a successful business enterprise was contingent on the continued existence of the filling station business (and [Brentmark's] right to occupy the premises in terms of the Brentmark sub-lease)"* (as pleaded in para 64); and

2.2.2 the convenience store was Brent OK's "*only business and its sole source of income"* (as pleaded in para 65),

and knew or ought to have known (i.e. foresaw) that if the dealer agreement and sub-lease were cancelled, this "*would herald the end of [Brent OK's] convenience store business at the premises."*

2.3 In paragraphs 67 and 68, the plaintiffs plead that:

2.3.1 at the time of the conclusion of the Brent OK sub-lease, Brent OK did not foresee the "*manner in which [Brentmark] was eventually forced to cancel both the dealer agreement and the Brentmark sub-lease"* set out under claim A (that is, as a result of the failure of the sale of shares agreements (para37), in turn caused by the defendant's alleged failure to provide consent (para 35-36)) (para 67);

2.3.2 Brent OK was not "*in a position to avoid [the cancellation by Brentmark], or to protect its interest by means of appropriate contractual stipulations with the Defendant, against the adverse consequences of the forced cancellation"* (para 68).

2.4 In paragraph 69, the plaintiffs plead that:

2.4.1 "*[i]n the premises"* - seemingly referencing both that the defendant foresaw that Brent OK may suffer harm, and that Brent OK was vulnerable to the risk of suffering harm by reason of cancellation of the agreements;

2.4.2 "*considerations of public and legal policy dictate that the Defendant owed a legal duty to [Brent OK]";*

2.4.3 this duty being "*to avoid that [Brent OK] would suffer economic loss":*

2.4.3.1 as a consequence of "*the cancellation by [Brentmark]"* of the agreements;

2.4.3.2 "*due to the Defendant's breach of contract"* (as pleaded in para 54, being breaches of the dealer agreement).

2.5. In paragraph 70, the plaintiffs plead that the defendant breached this duty "*negligently by failing to take reasonable steps to prevent that [Brent OK] suffer economic loss"* – this amounting to a claim that the defendant negligently breached a duty to Brent OK to not breach the dealer agreement between the defendant and Brentmark in a manner that would cause Brent OK to suffer loss.

2.6 In paragraphs 71 to 73, the plaintiffs plead that:

2.6.1 as a result of the defendant's alleged breach of its duty (to not cause Brent OK loss by breaching the dealer agreement) (**i**) Brent OK was prevented from selling the convenience store business when its value was at least R4 million, and (**ii**) that this value "*was*

subsequently eroded" by the defendant's alleged wrongful conduct pleaded in paragraphs 41 to 48 (comprising the allegations that the defendant misrepresented the reasons for the extension of the sub-lease) (para 71);

2.6.2 Brent OK's patrimonial position was reduced by R4 million, and it suffered damages of R4 million, "*as a consequence of the . . . aforesaid wrongful conduct"* (para 72 and 73).

2.7 The conduct that the plaintiffs rely on to establish a delict is inconsistent:

2.7.1 Regarding the breach of the legal duty, the defendant's conduct appears to take the form of the breaches of the dealer agreement as pleaded in paragraph 54.

2.7.2 But the conduct that caused the loss is pleaded as the defendant's alleged misrepresentation of the reasons for the extension of the sub-lease, this being one, but not all of the alleged breaches of the dealer agreement pleaded in paragraph 54.

2.8 Brent OK effectively seeks to hold the defendant liable in delict for pure economic loss that Brent OK sustained by reason of the defendant's alleged negligent breach of the dealer agreement between the defendant and Brentmark, and Brentmark's alleged resultant forced cancellation of both the dealer agreement and the sub-lease.

2.8.1 This is not an established category of delict claiming pure economic loss and, as such, the defendant's alleged conduct is not *prima facie* wrongful.

2.8.2 The plaintiffs must, therefore, positively establish wrongfulness.

2.8.3 The plaintiffs' allegation in support of wrongfulness that:

2.8.3.1 the defendant foresaw the harm, is not relevant to the determination of wrongfulness;

2.8.3.2 the defendant (sic) was vulnerable to the loss, is insufficient to render the defendant's conduct wrongful and, therefore, for liability to be imposed on the defendant for the damages flowing from the alleged conduct.

2.8.4 As such, assuming all the other elements of delictual liability to be present, Brent OK has not made out a case that the defendant's negligent breach of a contract that Brent OK is a stranger to, is wrongful such that the defendant should be liable for damages that Brent OK suffers as a result of that breach.

2.8.5 To the extent that Brent OK contends that Puma interfered with its contractual relations:

2.8.5.1 intentional interference (or inducement) is required, not mere negligence;

2.8.5.2 it is unclear which contract Brent OK contends was interfered with – the Brent OK sub-lease or the sale of business;

2.8.5.3 it is unclear what benefits of which contract Puma deprived Brent OK of and usurped as its own.

2.9. The particulars of claim, therefore, lack averments that are necessary to sustain a cause of action against the defendant alternatively are vague and embarrassing.'

THE PLAINTIFFS' NOTICE IN TERMS OF RULE 28(1)

[26] As stated, on 4 September 2020 the plaintiffs gave notice of their intention to amend their particulars of claim in various respects. Given that it is only the proposed amendment to Claim B that is opposed by Puma, I shall only recite the paragraphs of the notice relevant thereto. Once again, for the sake of consistency, I shall substitute the names of the parties.

'6. By substituting paragraphs 69 and 70 thereof, with the following paragraphs:

"69. By reason of the facts and circumstances set out in paragraph 62 to 68 above, considerations of public and legal policy dictate that [Puma] owed a legal duty to [OK], not to cause the termination of the contractual relationship between Brentmark and Puma arising from the sub-lease and the dealer agreement, by conduct which would be in breach of its duty of good faith and in terms of clause 24 of the dealer agreement, in the manner as alleged in paragraph 54 above, and thereby effectively-

69.1 cause the cancellation of the Brentmark sub-lease;

69.2 prevent [OK] from trading and operating the convenience store;

69.3 force [OK] to close down such business, alternatively to sell it at a substantial loss; and

69.4 cause [OK] to suffer economic loss.

70. [Puma] breached such legal duty negligently in that it failed –

70.1 to realise that its conduct as referred to in paragraph 54 above-

70.1.1 would result in the termination of the dealer agreement and the sub-lease, and the concomitant adverse consequences for [OK] as described in paragraphs 69.1 to 69.4 above; and

70.1.2 cause [OK] to suffer economic loss; and

70.2 to take reasonable steps to ensure that the dealer agreement and the sub-lease remain in existence, which would have (a) enabled [OK] to continue operating the convenience store, and (b) prevented [OK] from suffering economic loss as described in paragraph 71 below."'

PUMA'S NOTICE IN TERMS OF RULE 28(3)

[27] Puma's objection to the proposed amendment to OK's Claim C reads as follows:

'**TAKE NOTICE THAT** the defendant, objects to the plaintiffs' notice of intention to amend their particulars of claim dated 21 August 2020 (**the notice**), on the following grounds:

1. On 3 June 2020, the defendant delivered a notice to remove cause of complaint under rule 23(1) . . . raising three grounds on which the defendant contended the plaintiffs' particulars of claim were excipiable.

2. The intended amendments in the plaintiff's notice will not cure the second ground of complaint in the defendant's notice to remove cause of complaint and, as such, the particulars will remain excipiable on that ground.'

[28] This background detail thus sets the basis for the consideration of Puma's second ground of exception. Obviously, the exception must be considered with due regard for Claim C in its amended from. If the exception survives that intended amendment, it must be upheld. If it does not, the amendment must be granted and the exception dismissed.

THE APPROACH TO EXCEPTIONS

[29] The approach to the determination of an exception is well established and the relevant principles were conveniently summarized as follows by the Constitutional Court in *Pretorius*:[1]

'In deciding an exception a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. The purpose of an exception is to protect litigants against claims that are bad in law or against an embarrassment which is so serious as to merit the costs even of an exception. It is a useful procedural tool to weed out bad claims at an early stage, but an overly technical approach must be avoided.' (Internal references omitted.)

[30] In order to succeed with the second ground of exception, Puma must persuade the Court that upon every interpretation which OK's claims against it can reasonably bear, no cause of action is disclosed.[2] Furthermore, it must show that the claims **are** (and not may be) bad in law.[3] It is trite, too, that for the purposes of an exception, Puma must accept that the facts pleaded in the particulars of claim are correct.[4] Lastly, unless Puma can satisfy the Court that there is a real point of law or real embarrassment, the exception should be dismissed.[5]

[31] In *Ras*, van Heerden J considered the authorities upon which a plea of exception was based in some detail and offered the following summary, at 541I:

'The approach is neatly summed up by one writer in the following manner:
"The court should not look at a pleading with a magnifying glass of too high power. It is the duty of the court when an exception is taken to a pleading first to see if there is a point of law to be decided which will dispose of the case in whole or in part. If there is not, then it must see if there is an embarrassment which is real as a result of the faults in the pleadings to which exception is taken. Unless the excipient can satisfy the court that there is such a point of law or such real embarrassment the exception should be dismissed." (See Joubert (ed)

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[1] *Pretorius and another v Transport Pension Fund and others* 2019 (2) SA 37 (CC) para 15.
[2] *Ocean Echo Properties 327 CC and another v Old Mutual Life Assurance Co (SA) Ltd* 2018 (3) SA 405 (SCA) para 9.
[3] *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) para 7.
[4] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 10.
[5] *SA National Parks v Ras* 2002 (2) SA 537 (C) at 541I-542A.

Law of South Africa vol 3 part 1 (first re-issue by Harms and Van der Walt, 1997) at para 186.)'

DELICTUAL DAMAGES FOR PURE ECONOMIC LOSS

[32] Puma's second ground of exception traverses a legal issue which has been the subject of considerable litigation in the last decade or two – delictual damages for pure economic loss occasioned to a plaintiff by a defendant whose causal negligence has allegedly resulted in such loss.[6]

[33] The applicable principles were usefully summarised by Harms JA in *Telematrix*:

'[1] At stake is the liability for damages of the respondent, the Advertising Standards Authority of SA (the ASA), to an advertiser who suffered a loss because of an incorrect decision by one of its organs. The ASA filed an exception against the particulars of claim of the plaintiff (the present appellant) in which the ASA pertinently raised the question whether such a negligent decision, which prohibited the publication of two advertisements, and which gave rise to pure economic loss can be "wrongful" in the delictual sense. "Pure economic loss" in this context 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 property . . .

[12] The first principle of the law of delict . . . is . . . that everyone has to bear the loss he or she suffers . . . Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful . . . To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it.

[13] When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not *prima facie* wrongful ("unlawful" is the synonym and is less of a

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[6] See for example *Knop v Johannesburg City Council* 1995 (2) SA 1 (A), *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA), *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA), *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA), *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA) ("Country Cloud SCA"); 2015 (1) SA 1 (CC) ("Country Cloud CC").

euphemism) and that more is needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered . . . In other words, conduct is wrongful 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. It is then that it can be said that the legal convictions of society regard the conduct as wrongful . . .' (Internal references omitted.)

[34] Harms JA examined the law from the angle of the quasi-judicial decision-making function on the part of the ASA and, in particular, whether that function afforded a basis to found a claim for damages for pure economic loss. The wrong decision taken by the ASA in *Telematrix* in adjudicating a complaint regarding misleading advertising was held, in the circumstances, not to afford the complainant a cause of action in respect of damages for pure economic loss. To that extent, that matter is on a different footing to the present in which an alleged legal duty[7] is essentially sourced in a contractual setting, in which an obligation of utmost good faith is prescribed. Rather, the matter is closer to the dispute in *Country Cloud*, which will be discussed in more detail anon.

[35] Further, the fact that one is dealing with a contractual setting between private parties, removes the matter from the ambit of the many cases involving pure economic loss in the context of decisions made by public functionaries in cases such as *Knop* and *Steenkamp*. The distinction was explained thus by Nugent JA in *Van Duivenboden*:[8]

'[19] The reluctance to impose liability for omissions is often informed by a *laissez faire* concept of liberty that recognises that individuals are entitled to "mind their own business" even when they might reasonably be expected to avert harm and by the inequality of imposing liability on one person who fails to act when there are others who might equally be faulted. The protection that is afforded by the Bill of Rights to equality, and to personal freedom, and to privacy might now bolster that inhibition against imposing legal duties on private citizens. However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others and its duty to do so will differentiate it

[7] It is to be noted that OK has formulated its claim against Puma on the basis of a 'legal duty' allegedly owed by it to OK. In *Country Cloud* (SCA) para 19 *et seq* Brand JA stressed the importance of the use of that term in matters involving delictual claims for pure economic loss so as not to confuse the duty owed under the broader term used in the English law of tort of a "duty of care".
[8] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)

from others who similarly fail to act to avert harm. The imposition of legal duties on public authorities and functionaries is inhibited instead by the perceived utility of permitting them the freedom to provide public services without the chilling effect of the threat of litigation if they happen to act negligently and the spectre of limitless liability. That last consideration ought not to be unduly exaggerated, however, bearing in mind that the requirements for establishing negligence and a legally causative link provide considerable practical scope for harnessing liability within acceptable bounds.' (Internal references omitted.)

WRONGFULNESS

[36] *Two Oceans Aquarium* involved a claim in delict by a building owner against a firm of structural engineers, for pure economic loss resulting from the alleged negligent design of an aquarium. In the course of his judgment, Brand JA discussed the importance of proof of the element of wrongfulness in the context of such claims for pure economic loss. The passage in question has been regularly referred to with approval in subsequent similar decisions:

'[10] The exception raises the issue of wrongfulness which is one of the essential elements of the Aquilian action . . . Negligent conduct giving rise to damages is not, however, actionable *per se.* It is only actionable if the law recognises it as wrongful. Negligent conduct manifesting itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. In those cases, wrongfulness is therefore seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently caused pure economic loss . . . In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms . . .

[12] When we say that a particular omission or conduct causing pure economic loss is "wrongful", we mean that public or legal policy considerations require that such conduct, if negligent, is actionable; that legal liability for the resulting damages should follow. Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not . . . When a court is requested in the present context to accept the existence of a "legal duty", in the absence of any precedent, it is in reality asked to extend

delictual liability to a situation where none existed before. The crucial question in that event is whether there are any considerations of public or legal policy which require that extension. And as pointed out in *Van Duivenboden* (para [21]) and endorsed in *Telematrix* (para [6]) in answering that question "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".' (Internal references otherwise omitted.)

[37] In the present case, Puma contends in the exception that OK has failed to make out a case that Puma's breach of the dealer agreement with Brentmark, a contract to which it claims OK was 'a stranger', was wrongful to the extent that it (Puma) should be held liable to OK for damages in delict. In support of its argument, Puma relies heavily on the judgments of the Supreme Court of Appeal and the Constitutional Court in *Country Cloud*.[9]

[38] OK disputes this reading of its claim against Puma, contending that the contention is not only factually incorrect, but based on a misconception of the nature and extent of the legal duty which it contends Puma owed to it. This divergence in approach is, in my view, central to the dispute before the Court. Before considering the import of *Country Cloud* though, it is necessary to establish the facts upon which Puma's exception must be determined.

THE FACTUAL MATRIX

[39] The facts already traversed above, together with certain further allegations in the particulars of claim, constitute the factual matrix upon which Puma's exception must be determined. They are, largely, uncontroversial and may be summarised as follows hereunder. For the sake of convenience, the relevant paragraphs in the particulars of claim ("POC") will be added in parentheses where applicable:

39.1 The pricing mechanism of the dealer agreement, which determined the prices at which Brentmark had to buy petroleum prices from Puma, was fixed and not subject to adjustment. (POC 16)

[9] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA) ("Country Cloud SCA"); 2015 (1) SA 1 (CC) ("Country Cloud CC").

39.2 The dealer agreement contained no mechanism by which to adjust the prices of Puma's products, in order to counter the adverse effects of inflation and unforeseen fluctuations in economic and market conditions. (POC 16)

39.3 Consequently, over time, the prices of Puma's petroleum products became uncompetitive and commercially unviable for Brentmark, and this ultimately affected the profitability of the filling station business negatively. (POC 17)

39.4 Puma was fully aware of the effect of the rigidity of the pricing mechanism in the dealer agreement and, in particular, the detrimental effect which it had on the profitability of Brentmark's filling station business. (POC 19)

39.5 The financial demise of Brentmark was inevitable unless Puma expressed a willingness to amend the fixed pricing structures in the dealer agreement. (POC 20)

39.6 This eventuality notwithstanding, Puma steadfastly refused to accede to Brentmark's request that the pricing structures be adjusted. (POC 19)

39.7 In an attempt to ultimately avert their corporate demise, Brentmark and OK disposed of their respective businesses to JR Pet and JR Food respectively. (POC 20-23)

39.8 Brentmark required Puma's consent to dispose of the filling station business to JR Pet. (POC 20 – 23)

39.9 Puma refused to consent to the sale to JR Pet, without any reasonable or justifiable basis therefor, in circumstances where it had no reason whatsoever (from a commercial perspective or otherwise) not to consent to the transaction. (POC 29)

39.10 The explanation put up by Puma at the time for refusing to consent to the transaction, was that there were too many filling station operators in the Western Cape. This explanation was (to Puma's knowledge) false, because, at that time, Puma was negotiating with JR Pet to enable the latter to acquire control of additional filling stations in the Western Cape. (POC 30, 31 & 46)

[40] The particulars of claim further allege that Puma was aware that -

40.1 OK's business was commercially dependent upon both the dealer agreement and the BrentOK sub-lease. (POC 69)

40.2 The continued existence of the convenience store as a successful enterprise, was contingent upon both the continued existence of the filling station business, and thus Brentmark's right to occupy the premises in terms of the Brentmark sub-lease. (POC 64)

40.3 The convenience store was OK's only business and its sole source of income. (POC 65)

40.4 Cancellation of the aforesaid contracts with Brentmark would result in the collapse of OK's convenience store business at the premises. (POC 66)

40.5 The eventual forced cancellation of the contracts was not foreseeable by OK when it entered into the BrentOK sub-lease. (POC 67).

40.6 OK was not in a position to avoid such an occurrence, or to protect its own interests by means of an appropriate contractual stipulation with Puma, whereby it might avoid the adverse consequences of the forced cancellation of the contracts. (POC 68)

[41] In the circumstances, OK argues that it is entitled to draw the incontrovertible factual conclusion that Puma knew that the cancellation of the Brentmark sub-lease (for whatever reason) would inevitably result in the closure of the convenience store, which in turn would mean that OK would lose its only source of business.

[42] Finally, OK asks the Court to draw the conclusion that Puma behaved dishonestly and fraudulently in the circumstances, on the basis of the following facts:

42.1 While claiming that its refusal to agree to a revision of the dealer agreement with Brentmark was based on the fact that there were already too many filling stations in the Western Cape, it was actively negotiating with JR Pet with a view to increasing the number of filling stations being operated by JR Pet in the Western Cape.

42.2 In the course of these negotiations with JR Pet, Puma indicated a willingness to amend the pricing structures of the two existing filling station dealer agreements it had with JR Pet, having accepted that such agreements were archaic, obsolete and necessitated revision. (POC 32 – 33).

42.3 Notwithstanding these facts relevant to its dealings with JR Pet otherwise, Puma refused to agree to Brentmark's request for a revision of the pricing structure of the dealer agreement and, further, refused to provide the consent required by Brentmark under the Brentmark sub-lease which was critical to enable it to sell the filling station business to JR Pet.

42.4 Moreover, Puma used the consent so required by Brentmark in terms of its sale agreement with JR Pet, to place undue pressure on JR Pet to agree to a prospective pricing structure for the new filling station business which it was to conduct on the premises that would be more beneficial to Puma, and less beneficial to JR Pet. Puma suggested that if JR Pet accepted such proposal it would consent to the sale of the filling station business, but JR Pet regarded such proposal as unacceptable. In the result, the sale of the filling station business to JR Pet fell through.

[43] Brentmark and OK allege further dishonesty on the part of Puma in the period subsequent to the cancellation of the dealer agreement and the Brentmark sub-lease in September 2018:

43.1 At a meeting on 17 October 2018 with representatives of Puma, Brentmark was informed that Puma had entered into negotiations with a potential new sub-tenant for the premises, which was interested in buying both the filling station and convenience store businesses. Puma said it thus needed additional time to finalise these negotiations. (POC 41.1)

43.2 To this end Puma requested Brentmark to postpone the date of the termination of the sub-lease for one or two months, while it continued to conduct the filling station business and to procure that OK continued running the convenience store business. (POC 41.2)

43.3 Brentmark was amenable to such an extension on condition that the cancellation became effective on 31 January 2019, claiming that it preferred that date because it would afford it the benefit of additional trade over the Festive Season. The parties agreed accordingly and the plaintiffs continued conducting their respective businesses. (POC 43 – 46)

43.4 Brentmark and OK say that Puma's allegations that induced the extension of time were false, in that it was not involved at the time in any *bona fide* negotiations with a third party relating to the conclusion of a new sub-lease of the filling station business. (POC 48)

43.5 Rather, the plaintiffs claim that Puma's motivation at the time for requesting an extension of time was to place further undue pressure on them, by requiring Brentmark to trade at uncompetitive prices and thus ensure its demise. This would have had the knock-on effect of procuring OK's demise as well. (POC 49)

DELICTUAL LIABILITY ARISING FROM INTERFERENCE IN CONTRACTUAL RELATIONSHIPS

[44] In *Country Cloud (SCA)*, Brand JA focused on the question of delictual liability for pure economic loss occasioned to a contracting party by a non-contracting party, the so-called 'stranger to the contract' scenario. In the course of his discussion, the Learned Judge of Appeal referred to cases such as *Dantex*[10] and *Gore NO*,[11] and noted that certain categories of interference in contractual relationships had been recognised by our courts so as to afford the injured party a right of action in delict:

'[26] With reference to the quotation from *Gore NO*[12], 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

[10] *Dantex Investment Holdings (Pty) Ltd v Brenner and others NNO* 1989 (1) SA 390 (A).
[11] *Minister of Finance and others v Gore NO* 2007 (1) SA 111 (SCA).
[12] The following passage in *Gore NO*, para 86, was cited with approval by Brand JA in *Country Cloud (SCA)*, para 24*:*

'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 . . . (see eg *Dantex* . . .) and unlawful competition (see eg *Geary & Son (Pty) Ltd v Gove* [1964 (1) SA 434 (A)]).'

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 JC Knobel (ed) J Neethling, JM Potgieter & PJ Visser *Law of Delict* 5 ed (2006) at 282; Loubser et al supra[13] in 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."'

[45] Relying on this authority, counsel for Puma stressed that the contract under discussion did not fall into one of the 'recognised categories' in which our law permitted the imposition of delictual liability.[14] Hence, it was said, OK had to establish the element of wrongfulness of Puma's conduct with due regard to considerations of public policy.

[46] I understood counsel for OK to accept that the second plaintiff's claim for pure economic loss did not resort under one of these so-called 'recognised categories'. I say 'so-called' because, as various of the appellate cases show, there is no *numerus clausus* to which a party can look to assess whether its delictual claim for pure economic loss is likely to pass judicial muster or not. In each case the element of wrongfulness will be determined on its merits.

[47] In *Telematrix* Harms JA dealt with the concept of 'categories fixed by law' as follows:

> '[15] Stating that there are no general rules determining wrongfulness and that it always depends on "the facts of the particular case" is accordingly somewhat of an overstatement because there are also some "categories fixed by the law". For example, since the judgment in *Indac* [Electronics (Pty) Ltd v Volkskas Bank Ltd 1992 (1) SA 783 (A)], which

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13 Max Loubser and Rob Midgley (eds) Andre Mukheibir, Liezel Niesing & Devina Perumal *The Law of Delict in South Africa* 2 ed (2012).

14 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 21.

held that a collecting bank owes a legal duty to the owner of a cheque, it is well-nigh impossible to argue that a collecting bank has no such duty, and all that may remain is to consider whether *vis-à-vis* the particular plaintiff the duty existed. However, as public policy considerations change, these categories may change, whether by expansion or contraction.' (Internal references omitted.)

[48] It seems to me, therefore, that in a case such as the present, where there is no established legal precedent for the claim asserted by OK, the Court will be required to consider, as was said in *Fourway Haulage*, whether the claim so advanced met the relevant policy considerations. These considerations, said Brand JA, paras 23 – 25 of *Fourway Haulage*, encompassed elements such as (i) indeterminate liability, (ii) blameworthiness, and (iii) vulnerability to risk. In *Country Cloud (SCA)*, paras 24 – 31, Brand JA repeated the importance of consideration of these elements.

[49] However, in *Fourway Haulage*, Brand JA urged reticence in developing the common law of delict, and cautioned against an approach which might lead to a proliferation of such claims in circumstances where our law was rather inclined to the achievement of legal certainty:

'[22] Further insurance against uncertainty and unpredictability derives from the principle which was formulated as follows . . . in . . . *Van Duivenboden* . . . para 21:

"When determining whether the law should recognise the existence of a legal duty in any particular circumstances 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."

. . . In a case like the present where the claim for pure economic loss falls outside the ambit of any recognised category of liability, the first step is therefore to identify the considerations of policy that are of relevance. As part of the identification process assistance can of course be gained from previous decisions, both at home and abroad, as well as from the helpful analysis by academic authors such as those to which I have already referred.'

[50] In *Country Cloud (SCA)* Brand JA also gave consideration to the fact whether Country Cloud was vulnerable to risk. The Court found that the plaintiff was not at risk because it had at least two alternate remedies available to it, and included this factor in the policy considerations for not affording the injured party a claim for pure economic loss.

[51] In relation to blameworthiness as a factor for consideration in this exercise, Brand JA made the following observations in *Country Cloud (SCA)* after citing the *dictum* in *Gore NO* referred to in footnote 12 above:

'[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 be legitimately be taken into account in deciding whether or not delictual liability should be imposed . . . 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 . . . 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.'

FACTORS ADVANCED BY OK IN SUPPORT OF ITS DELICTUAL CLAIM

[52] I turn then to consider the factors which are said to be relevant to the determination whether there are policy considerations in favour of a right of action being granted to OK against Puma. In doing so, the Court is bound to accept the factual allegations made in the particulars of claim by OK (and Brentmark) as correct. This will include any inferences of fact sought to be relied upon by OK with reference to other allegations of fact.

[53] Then, the Court must bear in mind that issues of public policy are now infused with the values inherent in the Constitution, Act 108 of 1996, and it should further have regard to the fact that such considerations will also include an appreciation of the sense of justice of the community.[15] These latter considerations may, in turn, depend on evidence to be presented by OK at the trial. In my view, however, the point of departure in this exercise is that Puma was bound by the strict provisions of the good faith obligations to be sourced in clause 24 of the dealer agreement, and it is to that which I now turn.

GOOD FAITH IN CONTRACT LAW GENERALLY

[15] *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA) para 12; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) paras 24, 71 – 72; *Botha and another v Rich NO and others* 2014 (4) SA 124 (CC) para 46.

[54] The obligations imposed on Brentmark and Puma in clause 24 are consonant with the principle of contractual *bona fides* which the Constitutional Court has now adopted without more.[16]

[55] The debate regarding the application of the principle of contractual *bona fides* has raged on for decades, commencing in the pre Constitutional era[17] and continuing thereafter in the Constitutional era.[18] But, for present purposes it is not necessary to delve into any of those decisions save to say that they had, at their core, the legal issue as to whether the existence of the general principle of *bona fides* in the law of contract afforded a party a basis to avoid liability under a contract, or whether the principle was rather to be read restrictively as a foundational value which underpinned the interpretation and enforcement of an agreement.

[56] Writing for the majority in *Beadica*, Theron J conducted an extensive review of the law relating to good faith in the law of contract, over various common law and European jurisdictions. The Court was sensitive, too, to the perception that there was dissonance between the jurisprudence emanating from that Court and the Supreme Court of Appeal. But, said the learned Justice, there was really no difference.

[57] The Constitutional Court accepted that the application of the general principle of good faith and the so-called 'abstract values' inherent in the law of contract, did not entitle a Court to allow a party to avoid the consequences of a contract *per se.* Rather, said the learned Justice, these values were 'creative, informative and controlling functions' to be resorted to when a court was asked to enforce the provisions of a particular contract:

'[79] Much was made by the applicants in this case of a "divergence" between the approach of this court and that of the Supreme Court of Appeal to the judicial control of contracts. The "divergence" is said to centre on the role of abstract values in our law of contract and whether these values can be directly relied upon to invalidate, or refuse to enforce, contractual terms. This controversy has now been put to rest by the clarification of the law as expressed by this court in *Barkhuizen* and *Botha*. There is agreement between

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[16] *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC).
[17] See for example *Eerste Nasionale Bank van Suidelike Afrika BPK v Saayman NO* 1997 (4) SA 302 (SCA); *NBS Boland Bank v One Berg River Drive and others* [1999] 4 All SA 183 (SCA).
[18] *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Botha v Rich NO* fn 15 above.

this court and the Supreme Court of Appeal that abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships. As mentioned, they perform creative, informative and controlling functions.

[80] It emerges clearly from the discussion above that the divergence between the jurisprudence of this court and that of the Supreme Court of Appeal is more perceived than real. Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and the enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.' (Internal references omitted.)

[58] In the present matter, the dealer agreement expressly contains a good faith clause, and there is thus no debate as to the applicability of the principle. What falls to be determined here is the extent and ambit of clause 24, in the context of a delictual claim for pure economic loss by a non-contracting party. The answer, it seems to me, is to be found in the judgments from both of the aforementioned courts.

[59] When the Supreme Court of Appeal discussed the underlying principle of contractual *bona fides* in *Brisley*, it accepted (in para 22 of the majority judgment) the import of the following passage in a journal article by Prof Dale Hutchison:[19]

'What emerges quite clearly from recent academic writings, and from some of the leading cases, is that good faith may be regarded as an ethical value or controlling principle, based on community standards of decency and fairness, that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or

[19] Dale Hutchison *Non-variation clauses in contract: Any escape from the Shifren straightjacket?* (2001)118 SALJ 720, at 744

explanatory function. It is not, however, the only value or principle that underlies the law of contract; nor, perhaps, even the most important one.'

[60] In *Everfresh*, the Constitutional Court was divided on the merits of the matter before it. Nevertheless, there was unanimity on the importance of the principle of good faith in the contractual setting. Yacoob J (writing for the minority) explained the approach as follows:

'[22] Everfresh contends that the common law should be developed in terms of the Constitution to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith. The contention of Shoprite is that a provision of this kind should not be enforceable because the concept of good faith is too vague. Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.

[23] The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman-Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.'

[61] Writing for the majority in *Everfresh*, Moseneke DCJ opined as follows:

'[71] Had the case been properly pleaded, a number of interlinking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the

past this court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and "carries in it the ideas of humaneness, social justice and fairness" and envelopes "the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity".

[72] Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.'

[62] Lastly in *Botha*, the Constitutional Court (per Nkabinde J) commented on the import of the principle of good faith in the contractual setting, as follows:

'[46] . . . Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way. In this case good faith is given expression through the principle of reciprocity and the *exceptio non adimpleti contractus.*'

<u>OK'S ALLEGATIONS IN SUPPORT OF ITS CLAIM FOR DELICTUAL LIABILITY BY PUMA.</u>

[63] For the purposes of the exception, the Court must assume that Puma's termination of the dealer agreement with Brentmark was in breach of the good faith clause. The relevant allegations made by Brentmark in Part B of the particulars of claim, contending for such breach by Puma, are as follows (once again, the parties' names have been substituted):

'52. Clause 24 of the dealer agreement imposed a duty on the parties to observe the utmost good faith and neither to do anything, nor to refrain from doing anything, which might adversely affect the other party (in the manner as contemplated in the second part thereof) –

52.1 not only in respect of the implementation of the dealer agreement;

52.2 but also in respect of their dealings with each other, including their dealings in relation to the sub-lease.

53. As a consequence of the aforesaid reciprocal obligations of the parties arising from the dealer agreement, created by the provisions of clause 24 of the dealer agreement –

53.1 the contractual relationship between the parties arising from the dealer agreement and the sub-lease, was analogous to that of a fiduciary relationship imposed by law; and

53.2 neither party was entitled to put its own interests above those of the other, in breach of this fiduciary relationship.

54. [Puma's] conduct –

54.1 to refuse to enter into *bona fide* negotiations with [Brentmark], with a view to amending the pricing structures in terms of the dealer agreement (which refusal was based on ulterior motives);

54.2 to refuse to consent to the sale of shares agreement, also with ulterior motives; and

54.3 by negotiating the extension of the sub-lease on the premise of false representations, to the financial detriment of [Brentmark}; constituted a material breach of the provisions of clause 24 of the dealer agreement.

55. But for [Puma's] aforesaid breach of contract, Brentmark would have been able to sell the filling station business for an amount of not less than R2.5 million.

56. The profitability and viability of [Brentmark's] filling station business were further adversely affected during the extended duration of the [Brentmark] sub-lease, to such an extent that when the [Brentmark] sub-lease was eventually terminated on 31 January 2019, [Brentmark] had to close down the filling station because it could no longer be conducted profitably.'

[64] The facts upon which OK relies for its claim against Puma have already been set out: in para 22 above the claim as originally formulated is reproduced and in para 26 the intended amendment to that claim is set out. Both of these formulations of the delictual claim are based on considerations of public and legal policy.

[65] As I have already said, OK accepts that the claim against Puma does not fall into any so-called 'recognised category' of liability for pure economic loss. But, it argues, that does not mean that its claim should not be countenanced. In the course of argument, counsel for OK referred to *Bakkerud*[20] in which Marais JA made the following observation regarding the approach to be adopted by a court in assessing whether a party was said to be saddled with a legal duty in any given situation:

'[15] While that attempt to devise a workable general principle by which to determine on which side of the moral/legal divide a duty to act falls has not been universally acclaimed, it has been welcomed by most. Those who welcome it do so because of its inherent flexibility and its liberation of Courts from the conceptual strait jacket of a *numerus clausus* of specific instances in which a legal duty to act can be recognised. Those who do not are distrustful of the scope it provides for equating too easily with the convictions of the community a particular Court's personal perception of the strength of a particular moral or ethical duty's claim to be recognised as a legal duty. That is a risk which is not peculiar to this particular problem. There are many areas of the law in which Courts have to make policy choices or choices which entail identifying prevailing societal values and applying them. But Courts are expected to be able to recognise the difference between a personal and possibly idiosyncratic preference as to what the community's convictions *ought* to be and the *actually prevailing* convictions of the community. Provided that Courts conscientiously bear the distinction in mind, little, if any, harm is likely to result.'

[66] While the *dictum* of Marais JA in *Bakkerud* precedes that of Brand JA in *Fourway Haulage*, the *rationes* in both cases are entirely consistent with each other. Shortly before his concurrence in *Fourway Haulage* Scott JA delivered the unanimous judgment of the Court in *Mediterranean Shipping*[21] (in which Farlam and Lewis JJA, who had also concurred in *Fourway Haulage*, similarly concurred with Scott JA). As counsel for OK observed, the approach to be adopted in a matter such as the present was usefully summarised in *Mediterranean Shipping*:

'[14] Wrongfulness and fault are both requirements for liability under the modern Aquilian action. Negligent conduct which is not also wrongful is therefore not actionable. The inquiry into the existence of the one, save in the case of *dolus*, is discrete from the inquiry into the existence of the other. However, the issue of wrongfulness will more often than not be

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[20] *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA).
[21] *MV MSC Spain; Mediterranean Shipping Co (Pty) Ltd v Tebe Trading* (Pty) Ltd 2008 (6) SA 595 (SCA).

contentious. This is because the culpable conduct complained of will be prima facie wrongful. Typically, this is the case where the negligent conduct takes the form of a positive act which causes physical harm. But conduct which takes the form of an omission or which results in pure economic loss is not prima facie wrongful. In such cases it becomes necessary to determine whether there is a legal duty owed by the defendant to the plaintiff to act without negligence or, as the inquiry has more recently been formulated, whether, if the defendant was negligent, it would be reasonable to impose liability on him for such negligence. This, in turn, is a matter for judicial judgment involving criteria of reasonableness, the legal convictions of the community, policy and where appropriate, constitutional norms. Precedent may also play a role. Where, as in the present case, it is contended that there existed a delictual legal duty in what was essentially a contractual setting, relevant circumstances will include such factors as the extent to which the plaintiff was or could have been protected against the risk of harm by contractual provisions, whether the duty alleged could have arisen in the absence of a contract and generally, depending on the circumstances, the mere existence of the contract. In [*Two Oceans*], for example, the court was not prepared to recognise the existence of a legal duty in circumstances where the plaintiffs could have protected themselves against pure economic loss by contractual means. Similarly, in [*Lillicrap*] the court, while recognising the possibility of a *concursus actionum,* declined to accept the existence of a delictual legal duty in circumstances where the plaintiff would previously have had a claim in contract but had subsequently assigned its rights and obligations under the contract to a third party.'

[67] The *dictum* in *Mediterranean Shipping* highlights the importance of a Court considering the factual setting of the delictual claim in assessing whether a legal duty existed or not. It goes without saying that evidence which might be adduced by a plaintiff relevant to issues of public policy will greatly assist the Court in coming to its decision on the existence or not of a legal duty. Similarly, evidence relevant, for example, to a plaintiff's ability to protect itself against harm through contractual stipulations would also be of assistance. There is indeed a multitude of factors which a Court might consider in determining whether Puma was under a legal duty not to cause harm to OK when it breached the dealer agreement with Brentmark. That is the very essence of the value judgment which the Court is called upon to make in any given case of this nature.

[68] How is that value judgment to be made? In *Van Duivenboden*, para 13, Nugent JA cited with approval the following passage in Fleming[22] in establishing the general nature of the enquiry:

'In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes.'

[69] After a detailed consideration of the approach to such a duty in various common law jurisdictions, Nugent concluded that –

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

[17] . . . (T)he "convictions of the community" must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution.'

[70] More recently, in deciding whether a railways authority was to be held liable for its omission to provide adequate security on a passenger train, the learned Chief Justice said the following in *Mashongwa*:[23]

'[23] An omission will be regarded as wrongful when it also "evokes moral indignation and the legal convictions of the community require that the omission be regarded as wrongful"[24]. This leads to a legal policy question that must of necessity be answered with reference to the norms and values, embedded in our Constitution, which apply to the South African society. And every other norm or value thought to be relevant to the determination of this issue would find application only if it is consistent with the Constitution. As Moseneke DCJ put it: "the ultimate question is whether on a conspectus of all reasonable facts and

[22] Fleming *The Law of Torts* 4th ed at 136.
[23] *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC).
[24] *Van Duivenboden* para 13.

considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages"[25].' (Footnotes otherwise omitted.)

DID PUMA HAVE A LEGAL DUTY TOWARDS OK?

[71] The question as to whether Puma had a legal duty not to cause harm to OK when (as it is alleged) it intentionally and with ulterior motive breached the dealer agreement with Brentmark, requires this Court to assess whether Puma's conduct 'evokes moral indignation' and whether public policy, embracing the 'legal convictions of the community' as understood through the prism of the Constitution, requires that such conduct be regarded as wrongful.

[72] The issue of whether the common law of delict should be advanced by finding that Puma's conduct was in breach of public policy, and hence unconstitutional, is not always suited to determination by way of exception.[26] As I have said, there may be material evidence going one way or the other which would be conclusive of the enquiry. But the matter must now be adjudicated on the principles applicable to exceptions and on the basis of the evidence as contended for in the papers as they stand.[27] That is the risk a party runs when it decides to test the development of the law by way of exception.

[73] The point of departure in considering the question of a legal duty, is the fact that Puma was both contractually and legally bound under the common law to observe good faith towards its co-contractant, Brentmark. The judgment of Nkabinde J in *Botha*, para 46, is clear authority for the proposition that this obligation did not, for example, permit it to place its own interests above those of Brentmark.

[74] In *Silent Pond*[28] Morley AJ was required to interpret a good faith clause in an agreement not dissimilar to the dealer agreement: the matter also related to a convenience store/filling station set up. In considering the import of the clause in question, the learned Acting Judge remarked as follows:

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[25] *Steenkamp* para 42.
[26] *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 10 *et seq.*
[27] *Hlumisa Investment Holdings RF Ltd and another v Kirkinis and others* 2020 (5) SA 419 (SCA) paras 64 – 65.
[28] *Silent Pond Investments CC v Woolworths (Pty) Ltd and another* 2011 (6) SA 343 (D).

‘[70] I must, however, give the duty of good faith in the implementation of the tripartite agreement some meaning. It appears to me that the parties intended the scope of the good-faith provision to be no more and no less than the scope of the duty of good faith in a fiduciary relationship implied by law. The seminal case in this regard is *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 180, where Innes CJ said:

> “Whether a fiduciary relationship is established will depend upon the circumstances of each case. . . . But, so far as I am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases. There may surely be circumstances, apart from mandate, where a duty to acquire for the company may be inferred.”

[71] The consequence of the agreement between the parties in the present case is, in my view, that stated by Innes CJ in *Robinson* (supra) at 177 – 178 where the learned judge stated as follows:

> “Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship.”

[72] At 179 the judgment reads as follows:

> “For it rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interests (e.g. by making a profit) at that other's expense.”’

[75] The judgment in *Silent Pond* was referred to with approval by Francis AJ in this Division in *Puma Energy SA (Pty) Ltd v JR Petroleum Services (Pty) Ltd* Case No. 10854/2019 (12 December 2019). The latter judgment records that late in 2019 JR Pet operated filling stations in Kraaifontein and Airport Industria, selling petroleum products supplied to it by Puma under a dealer agreement similar to the present. A dispute had arisen regarding fuel which JR Pet was allegedly selling and which had been delivered by a supplier other than Puma. The dispute centred around the interpretation of the dealer agreement and whether it contained an exclusivity clause limiting Puma as the sole supplier, and Puma sought an urgent interdict to restrain JR

Pet from selling products other than its own. Incidentally, Puma was represented by, inter alia, Mr. van Kerckhoven and JR Pet by Mr. Vivier SC.

[76] I agree with counsel for OK that these decisions are authority for the fact that the contractual relationship between the parties in this matter, arising from the dealer agreement, was analogous to that of a fiduciary relationship imposed by law. I did not understand counsel for Puma to take issue with this proposition. Indeed, a remark by Francis AJ in para 16 of his judgment suggests that the parties before him were in agreement -

'. . . that the parties should act in good faith in the overall implementation of the dealer agreements, and they must act honestly in their commercial dealings and not promote a party's own interest at the expense of the other in so an unreasonable manner as to destroy the basis of the consensus between the parties.'

[77] The good faith clause is only to be found in the dealer agreement. However, the duty on the part of Puma to act honestly was not limited to the dealer agreement. Given the clear stance now of our appellate courts in regard to the application of the principle of contractual *bona fides*, I am of the view that the same parties, as co-contractants to the Brentmark sub-lease agreement, were required to conduct themselves in accordance with constitutionally normative standards of public policy and ethical business dealings in relation to that agreement too.

[78] And, I consider, the same must apply to the BrentOK lease. While that sub-lease might be regarded, in the light of the common shareholding, as effectively having been concluded between the same parties (or at least between parties with a strong commonality of interests), it is important to have regard to the fact that Puma was materially interested in the conclusion of that sub-lease agreement, as it was required to consent to the further sub-lease of 'the shop' to OK. Self-evidently, Puma's approval of the sub-lease of the convenience store to OK was the very genesis of OK's business.

[79] In the result, I conclude that neither Puma nor Brentmark was entitled to place its own interests above those of the other. Yet, this is just what Puma is alleged to have done in clear breach of the dealer agreement. It refused to consent to the sale of the business by Brentmark to JR Pet, for no discernible reason and, says

Brentmark, that refusal was designed to advance its own interests in relation to its on-going negotiations with JR Pet, and to enable it to put the squeeze on JR Pet in those negotiations.

[80] In my view, such conduct, in and of itself, attracts moral indignation. In the words of Prof. Hutchison quoted above, it lacks the 'standards of decency and fairness that underlies and informs the substantive law of contract.'

CONSIDERATION OF THE JUDGMENTS IN COUNTRY CLOUD

[81] Counsel for Puma relied heavily on the fact that OK was 'a stranger' to the dealer contract and stressed that this was what had dissuaded the appellate courts from extending liability for pure economic loss in coming to the assistance of the plaintiff in *Country Cloud.*

[82] It is apparent that in his judgment in *Country Cloud (SCA)*, Brand JA did not non-suit the plaintiff because it was a 'stranger' to the contract *per se*. Rather, the learned Judge of Appeal declined to find that the conduct of the relevant departmental official upon which the plaintiff sought to rely for its cause of action was wrongful, citing three primary considerations in support thereof – (i) foreseeability of harm; (ii) the spectre of indeterminate liability; and (iii) non-vulnerability to harm.

[83] In *Country Cloud (CC),* Khampepe J[29] did not dismiss the claim on the basis that the plaintiff was 'a stranger' to the contract either. Rather, the learned Justice observed that the case was about consideration of the extension of the common law in circumstances which were to be regarded as novel. She too looked to the issue of wrongfulness as being decisive of the matter.

[84] I consider that there are, in any event, certain significant distinguishing factors in the instant matter that render reliance on *Country Cloud* inappropriate. Firstly, the factual setting is wholly different. That matter concerned a building contract for the completion of a partially built clinic, by a company (Ilima Projects) which had borrowed money from Country Cloud to finance the remainder of the project. After Country Cloud had advanced the money to Ilima, the Department of Infrastructure

[29] Paras 27 – 32.

Development in Gauteng Province ("the Department") cancelled the contract, which cancellation ultimately led to the liquidation of Ilima. In seeking to hold the Department liable in delict for its loss, Country Cloud sought to characterise the conduct of the relevant departmental official charged with oversight of the project and the cancellation thereof, Mr. Buthelezi, as wrongful.

[85] *Country Cloud* was not decided on exception. Rather, the matter went to trial, firstly, on two contractual causes of action, with an alternate claim for pure economic loss bringing up the rear. The plaintiff succeeded in the court *a quo* on the contractual claims and the delictual claim was thus not addressed in that court. On appeal, the contractual claims failed and were set aside. The SCA was thus required to consider the pure economic loss claim afresh. It did so on the basis of the evidence on record adduced before the court *a quo.*

[86] Noting that the delictual claim had been formulated with some difficulty at a late stage of the proceedings in the court *a quo*, and that it was the subject of inept draftsmanship, Brand JA considered that what was really at issue in the matter was whether Mr. Buthelezi had a valid basis for cancelling the contract with Ilima, and whether his conduct in doing so was to be regarded as wrongful. The SCA judgment reflects that the enquiry as to whether Mr. Buthelezi's conduct was wrongful was determined by a number of factors, including compliance with myriad statutory provisions such as the Public Finance Management Act, the Preferential Procurement Policy Framework Act and various Treasury regulations.

[87] The judgments in *Country Cloud* must thus be considered against the background of the constraints on the use of public power, and the reluctance to inhibit public officials in the orderly discharge of their duties. Extension of delictual liability in those circumstances was to be discouraged, for reasons such as those advanced in *Van Duivenboden*, para 19:[30]

'. . . The imposition of legal duties on public authorities and functionaries is inhibited instead by the perceived utility of permitting them the freedom to provide public services without the chilling effect of the threat of litigation if they happen to act negligently and the spectre of limitless liability.' (Internal footnotes omitted.)

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[30] See para 34 above.

[88] In *Country Cloud (CC)*, Khampepe J highlighted the concerns relating to the granting of private law remedies against persons wielding public power:

'[45] It is true that the value of state accountability can be a reason to impose delictual liability on a state defendant. Equally, however, it should be stressed that this value will not always give rise to a private-law duty. And Country Cloud did very little to explain how or why state accountability compels us to recognise a private-law duty on the state to compensate it here.' (Internal footnotes omitted.)

The finding of the learned Justice was clearly based on the evidence before the court.

[89] Lastly, the Constitutional Court had regard to the conduct of Mr. Buthelezi, which was categorised by Khampepe J, para 47, as that of 'a bungling public functionary' and not of 'one bent on illicit gain.' The learned Justice went on to distinguish the conduct of the public functionary in *Country Cloud* from the fraudulent and dishonest conduct of the officials in *Gore NO*, in which the imposition of liability was motivated, from a public policy point of view, by such conduct.[31]

[90] In summary, it is apparent that the appellate courts were concerned about the fact that Country Cloud was a true 'stranger' to the contract between Ilima and the Department, and had regard to the fact that imposing delictual liability on the Department in those circumstances would, in general terms, be interpreted as rendering contracting parties liable in delict for harm suffered by such 'strangers' arising causally from the repudiation of their contracts. The spectre of indeterminate liability thus loomed large in granting the remedy sought by Country Cloud.

[91] The appellate courts also had regard to the fact that Country Cloud was not vulnerable to risk, having had the opportunity to address this consequence when it contracted to provide financial assistance to Ilima, whom it knew was already in financial straits. This consideration played a pivotal role in the judgment of both courts.

91.1. In *Country Cloud (SCA)*, para 30, Brand JA noted that this consideration 'weighs heavily against the imposition of delictual liability on the Department'; while

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[31] '[47] . . . The same powerful policy considerations that motivated the imposition of liability in *Gore* are thus not present here.'

91.2 In *Country Cloud (CC)*, para 67, Khampepe J stated that the consideration was 'highly significant and militates against recognising its claim.'

[92] Lastly, both courts examined the conduct of Mr. Buthelezi in detail, and were satisfied, upon analysis, that his decision to cancel the contract with Ilima was not tainted, dishonest nor fraudulent, and was not wrongful in the circumstances.

WAS OK REALLY A 'STRANGER'?

[93] I turn then to consider the factors at play in the delictual claim before the Court. While OK was manifestly not a party to the dealer agreement, it was certainly no 'stranger' to the commercial rationale which under-pinned both that agreement, the Brentmark sub-lease, and the BrentOK sub-lease. Indeed, OK's very commercial existence and viability derived from the Brentmark sub-lease, in which the premises which were the subject thereof were described as 'the filling station at 51 Durban Road, Mowbray, Cape Town, including all fixtures and fittings contained on the forecourt, underground tanks, pumps and **shop**.' (Emphasis added). Put simply, the entire premises (including the convenience store) were made available by Caledonian to Puma for it to lease out, and Puma agreed that the 'shop' component thereof be leased, firstly, to Brentmark and, subsequently, to OK.

[94] In the result, neither OK nor its business was unknown to Puma. Nor was the relationship between Brentmark and OK unknown to Puma. In addition, OK knew that if Brentmark's sub-lease with Puma was unlawfully cancelled before it had run its designated 10-year course, and that Brentmark thus stopped trading, the substratum of its (OK's) business would fall away, and it would suffer financial ruin. Brentmark also knew of that eventuality and, to be sure, so did Puma.

[95] The BrentOK sub-lease was entirely dependent on the dealer agreement – without such an agreement there was no commercial rationale for either the sub-lease with Brentmark or Brentmark's sub-lease with Puma. And, as observed at the commencement of this judgment, the conclusion of a dealer agreement between Puma and Brentmark was stipulated as a condition precedent to the conclusion of the Brentmark sub-lease.[32] The structure of the parties' commercial arrangements was

[32] 'Cl 4.1 This agreement . . . is subject to the fulfilment of the following suspensive conditions . . . by no

therefore based on a high degree of inter-dependence and it might be said that the collapse of, for example, the dealer agreement would have a domino effect on the other agreements.

[96] In the circumstances, I am not persuaded that OK was a 'stranger' to the contract in the sense contemplated in *Country Cloud*. But even if it was, I do not consider that its status as such precludes it from seeking to recover damages for pure economic loss from Puma. OK's acquaintanceship with Brentmark and Puma, and its necessary involvement with them in the running of its business, meant that it was liable to suffer financial damage (a reduction of its patrimony) if Brentmark and Puma fell out and terminated the dealer contract. The question ultimately then is whether Puma is capable of being held liable in delict for OK's losses in such circumstances.

IS THE NATURE OF PUMA'S ALLEGED CONDUCT RELEVANT?

[97] The case advanced on behalf of OK is based solely on an alleged legal duty on Puma not to breach the good faith clause. Its claim is not that there was a duty on Puma not to commit any breach of the dealer agreement, which would justify the cancellation of that agreement or the Brentmark sub-lease. OK maintains, at para 69 of its intended amendment to the particulars of claim, that by breaching clause 24 (and only that clause), Puma was in breach of its good faith obligations and effectively caused the cancellation of the BrentOK sub-lease, thereby –

97.1 preventing OK from trading and operating the convenience store;

97.2 forcing OK to close its business, alternatively to sell it at a substantial loss; and

97.3 causing OK to suffer economic loss.

[98] In *Gore NO*, the Supreme Court of Appeal considered a claim for pure economic loss in the context of the irregular and fraudulent allocation of a provincial government tender. The matter went to trial and was, once again, not decided on exception: the court of appeal thus had the benefit of the record of proceedings before

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later than the respective dates provided below:

> 4.1.1 . . .
> 4.1.2 the Dealer Agreement is concluded and becomes unconditional, save for any condition that this agreement become (sic) unconditional. . .'

the court *a quo* which had found for the plaintiff in delict.

[99] In a joint judgment, Cameron and Brand JJA had regard to the conduct of the relevant officials in the granting of the tender and, in particular, whether fraud, per se, on the part of the officials was a basis for finding that their conduct was wrongful. The province had argued that the state of the law was such that the conduct of its officials (Louw and Scholtz) was not to be regarded as wrongful, and thus did not expose it vicariously to delictual liability.

[100] The learned Judges of Appeal referred to matters such as *Olitzki* and *Steenkamp* and came to the following conclusion:

'[86] But the province's argument starts from the wrong premise. 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*) and unlawful competition (see eg *Geary & Son (Pty) Ltd v Gove*). Closer to the mark, in our view, is the following exposition by Boberg *The Law of Delict* vol 1 (Aquilian liability) at 33, who correctly highlights the significance of the perpetrator's state of mind in determining wrongfulness:

> "Examination of these crystallised categories of wrongfulness reveals the determining factors. They are: (a) the nature of the defendant's conduct (was it a positive act or an omission; did it consist of deeds or mere words?); (b) the nature of the defendant's fault (was it intention or negligence; (sometimes) did he have an improper motive?); (c) the nature of the harm suffered by the plaintiff (was it physical harm or mere pecuniary loss?). These criteria do not operate independently but in conjunction with one another. Thus harm of one kind (eg physical) may be actionable whether caused intentionally or negligently, harm of another kind (eg mere pecuniary loss) may be actionable only if caused intentionally (otherwise it is problematical). . . . At the root of each of these crystallised categories of wrongfulness lies a value judgment based on considerations of morality and policy – a balancing of interests followed by the law's decision to protect one kind of interest against one kind of invasion and not another. The decision reflects our society's prevailing ideas of what is reasonable and proper, what conduct should be condemned and what should not . . . ."

[87] In the language of the more recent formulations of the criterion for wrongfulness: in

cases of pure economic loss the question will always be whether considerations of public or legal policy dictate that delictual liability should be extended to loss resulting from the conduct at issue. **Thus understood, it is hard to think of any reason why the fact that the loss was caused by dishonest (as opposed to *bona fide* negligent) conduct, should be ignored in deciding the question. We do not say that dishonest conduct will always be wrongful for the purposes of imposing liability, but it is difficult to think of an example where it will not be so.**

[88] In our view, speaking generally, **the fact that a defendant's conduct was deliberate and dishonest strongly suggests that liability for it should follow in damages,** even where a public tender is being awarded. In *Olitzki* and *Steenkamp* the cost to the public purse of imposing liability for lost profit and for out-of-pocket expenses when officials innocently bungled the process was among the considerations that limited liability. We think the opposite applies where deliberately dishonest conduct is at issue: the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high.

[89] These considerations would indicate that liability should follow even if the plaintiff's case were based on dishonesty on the part of the State Tender Board itself. But that is not the case before us, and this constitutes a further problem for the province's argument. This case does not concern the direct liability of the tender-awarding authority itself: it concerns government's vicarious liability for its employees' conduct. The province's argument is therefore misconceived, since it starts from the wrong premise and therefore inevitably arrives at the wrong conclusion. The plaintiff's case is that defendants are vicariously liable for the wrongful conduct of Louw and Scholtz. Once we have decided the issue of vicarious liability in favour of the plaintiff, as we have, the only remaining question in the context of wrongfulness is whether Louw and Scholtz, public employees in charge of a tender process, should themselves be exempt from the consequences of their own dishonest conduct. The issue in *Olitzki* and *Steenkamp* – whether loss resulting from conduct by the tender-awarding authority itself should be visited with delictual liability – does not arise. For present purposes the question about wrongfulness is no different than if Scholtz and Louw themselves were the defendants.

[90] Thus understood the question is: is there any conceivable consideration of public or legal policy that dictates that Louw and Scholtz (and, vicariously, their employer) should enjoy immunity against liability for their fraudulent conduct? We can think of none. The fact that the fraud was committed in the course of a public-tender process cannot, in our view, serve to immunise the wrongdoers (or those vicariously liable for their conduct) from its consequences. And we find no suggestion in *Olitzki* and *Steenkamp* that the tender process

itself must provide government institutions with a shield that protects them against vicarious liability for the fraudulent conduct of their servants. The wrongfulness issue therefore cannot shield the defendants.' (Emphasis added; internal references otherwise omitted.)

[101] Counsel for OK stressed that the particulars of claim (in their form as sought to be amended) make out a case for conduct on the part of Puma which was dishonest and intentional, rather than negligent, and that this was a relevant factor to be taken into account when determining the wrongfulness thereof. Counsel adverted to the following factors:

101.1 Puma had recalcitrantly refused to enter into *bona fide* negotiations with Brentmark in relation to reviewing the pricing structure of the dealer agreement. On that score it is said that Puma accepted in its negotiations with JR Pet that the existing structure had become obsolete;

101.2 In so doing, Puma refused to assist Brentmark in its attempts to re-establish its profitability and avoid financial collapse;

101.3 It further refused to consent to the sale of the filling station business to JR Pet, a refusal which is said to have been actuated by an ulterior motive;

101.4 After the cancellation of the contracts, Puma agreed to the temporary extension of the Brentmark sub-lease, while making false representations that it was in negotiations with a third party; and

101.5 Its conduct indirectly, but effectively, deprived OK of its sole source of income.

[102] It was stressed that Puma was fully aware of these facts and the potential consequences thereof and, accordingly, it was said that the pleadings suggested the requisite degree of intention on its part. Further, it was submitted that Puma's dealings with Brentmark were alleged to be based on dishonesty and expediency, and intended to advance its own interests to the detriment of Brentmark, in circumstances where it knew that the consequences thereof would lead to OK's demise. It was said that the question of foreseeability on the part of Puma had thus been sufficiently pleaded as well.

[103] I agree with the submissions made by counsel for OK. In my considered view, the alleged conduct of Puma falls squarely within the purview of that deprecated by the learned Judges of Appeal in para [88] of *Gore NO*. While accepting that there may be an exculpatory answer put up by Puma when the matter goes to trial, I am satisfied, for the purposes of determining the exception, that the element of wrongfulness has been pleaded with sufficient clarity and adequacy by OK at this stage.

[104] There are two remaining factors which require consideration at this stage. Firstly, there is the issue of indeterminate liability – the so-called 'floodgates argument' – and then there is the question of OK's potential vulnerability.

LIMITLESS LIABILITY

[105] In the landmark decision of *Trust Bank*[33] which heralded the importation of the principle of delictual liability for pure economic loss into our common law, the erstwhile Chief Justice cautioned (at 833A) of the danger of 'oewerlose aanspreeklikheid' (limitless liability). This aspect has rightfully concerned courts in the decades since the decision in *Trust Bank*, in determining where 'the bright line of limitation'[34] might next be drawn.

[106] In *Country Cloud (SCA)* Brand JA suggested the following answer:

'[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 . . . *Telematrix* . . . para 13 . . .). 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

[33] *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).
[34] *Fourway Haulage* para 17.

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 . . . Knop . . . at 26J – 27D).' (Internal references otherwise omitted.)

[107] Despite the apprehension expressed by Brand JA in *Country Cloud (SCA)*,[35] I do not consider that granting OK a right of action in delict in this matter will lead to a flood of claims by 'strangers' to contracts. In the first place, the apparent novelty of the situation can never be a bar to the development of the law in that regard. Were that to be the case, *Trust Bank* would never have ushered in the sea change in jurisprudence which it sought to do. Moreover, s39(2) of the Constitution mandates the development of the common law as the rights protected in the Constitution are developed over time. In cases involving questions of public policy and the constitutional values inherent therein, it is invariable that there will be advances in the common law from time to time.

[108] Secondly, as I have attempted to demonstrate, we are not dealing here with a true 'stranger' to the contract as contemplated in, for instance, *Country Cloud*. The facts of this case are sufficiently unique to permit it to be distinguished from future claims by non-contracting parties. Importantly, in this matter, the alleged dishonest and self-serving conduct of the contracting party (Puma) sought to be held liable for its commercial misdemeanours, is sufficiently reprehensible to render it incomparable to that of the proverbial 'bungling bureaucrat' in *Country Cloud*. There is thus a marked degree of blameworthiness on the part of Puma: a factor which both Brand JA and Khampepe J[36] found can legitimately be taken into account in determining whether to extend delictual liability for pure economic loss.

[109] Looking at Puma's conduct here, the trouble started when it refused to engage with Brentmark in order to amend the pricing structure of the dealer agreement. For the reasons alleged in para 18 to 20 of the particulars of claim, Puma's refusal in that regard was manifestly *mala fide* and in breach of its obligations under clause 24. The

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[35] '[26] . . . 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.'

[36] *Country Cloud (SCA)* para 25; *Country Cloud (CC)* para 40.

situation was then exacerbated when it subsequently refused to consent to the sale of the filling station business to JR Pet and the convenience store to JR Foods, while its only explanation for this recalcitrant refusal was false. As I have said, this evidences a marked degree of blameworthiness which favours the imposition of delictual liability.

OK'S VULNERABILITY TO RISK

[110] In *Country Cloud (SCA)*, para 30, Brand JA discussed the steps which the plaintiff in that matter might have been in a position to take to avoid or limit its losses. That finding was of course based on all the evidence then before the court. In this matter, at para 68 of the particulars of claim, OK makes the allegation that it was not in a position 'to protect its interests by means of appropriate contractual stipulations with [Puma], against the forced cancellation of the said contracts, which underpinned [OK's] convenience store business.'

[111] Puma may be in a position to adduce evidence to the contrary at trial, but that is neither here nor there on exception, where the integrity of the factual allegations in the particulars of claim must prevail. In the circumstances, I am unable to reject those allegations at this stage of proceedings. As suggested in *Country Cloud (SCA)* the presence of such an alternate remedy to avoid loss would be a pointer away from imposing delictual liability. But there is nothing before the Court at this stage to gainsay OK's allegation to the contrary.

CONCLUSION

[112] In my view, the alleged conduct of Puma falls short of 'the standards of decency and fairness that informs the substantive law of contract' and does not measure up to the behaviour to be expected of a party in its position. Right-minded persons would, in my view, deprecate the manner in which Puma failed to uphold its contractual and common law obligations.

[113] On the basis of the aforegoing considerations, I am satisfied that OK has made sufficient allegations in its particulars of claim (as sought to be amended) to justify its contention that Puma's conduct was wrongful in the circumstances. It follows that its claim against Puma for damages for pure economic loss are sustainable in law and that the exception thereto falls to be dismissed.

[114] As regards OK's application to amend its particulars of claim, I am satisfied, in light of what I have found, that the amendment does not render the particulars of claim objectionable and it must accordingly be granted.

[115] On the issue of costs, there is no debate that costs should follow the result in relation to the exception. As far as the costs of the amendment are concerned, I agree with the submission by counsel for Puma that fairness dictates that each party should bear its own costs.

ACCORDINGLY, IT IS ORDERED THAT:

A. The exception is dismissed.

B. The plaintiffs are granted leave to amend their particulars of claim in the manner set forth in their notice of amendment dated 21 August 2020 and served on 4 September 2020.

C. The defendant shall pay the plaintiffs' costs in respect of the exception.

D. Each party shall bear its own costs in respect of the aforesaid notice of amendment.

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GAMBLE, J