CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 185/13

In the matter between:

COUNTRY CLOUD TRADING CC Appellant

and

MEMBER OF THE EXECUTIVE COUNCIL, DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT, GAUTENG Respondent

Neutral citation:	*Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J
Heard on:	20 May 2014
Decided on:	3 October 2014
Summary:	Delict — wrongfulness — pure economic loss — intentional interference with contractual relations — relevance of intention in wrongfulness enquiry — norm of state accountability — vulnerability to risk — existing contractual relations

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the South Gauteng High Court, Johannesburg):

1. The appeal is dismissed.

2. There is no order as to costs.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This matter concerns a delictual claim for pure economic loss, and involves complex issues of legal responsibility and public policy. It comes before us by way of an application for leave to appeal against a judgment of the Supreme Court of Appeal which, in turn, dismissed an appeal against a decision of the South Gauteng High Court, Johannesburg (High Court). The appellant is Country Cloud Trading CC (Country Cloud) and the respondent is the Member of the Executive Council (MEC) for the Gauteng Department of Infrastructure Development (Department). The MEC represents the Department in these proceedings. The appeal originates from a building contract between the Department and a construction company, iLima Projects

(Pty) Ltd (iLima). In virtue of the allegedly unlawful termination of this agreement, Country Cloud, which had lent money to iLima, suffered a loss of R12 million.

Facts

[2] The history that preceded this dispute commenced in May 2006 when the Department awarded a tender to build the Zola Clinic in Soweto (original contract). This 300-bed district hospital was to be constructed by a joint venture of four companies, including iLima, at a contract price of around R335 million.[1] The deadline for completion was May 2008.

[3] But the joint venture foundered. In March 2008 – when only 20 per cent of the hospital had been completed – iLima's three partners abandoned it. The rescue operation fell to Mr Buthelezi, the then Head of Department, who was tasked with finding a contractor to complete the project.

[4] Mr Buthelezi was presented with two options. On the one hand, the Departmental Acquisition Council (DAC), responsible for the procurement of goods and services for the Department, recommended a competitive tender process to select a contractor. In contrast, senior officials in the Department suggested that the contract be awarded immediately to iLima, the last surviving entity in the joint venture. Mr Buthelezi took the latter course on the basis that to delay the project further would have negative consequences for the community and service delivery.

[1] The other three companies were Motheo (Pty) Ltd, Yikusasa (Pty) Ltd and TTR Construction (Pty) Ltd.

[5] iLima, however, was in no position to complete the project, absent immediate financial assistance. The Department thus agreed to make an initial "remobilisation" payment of R21.5 million to iLima, being five per cent of the contract price, within 30 days of the conclusion of the construction contract. But iLima needed financing before this time. To this end, Mr Lupepe, the founder and chief executive officer of iLima, approached Mr Dement, the managing director of one of iLima's principal suppliers under the original contract. Mr Lupepe informed him that iLima did not have the capacity to repay its debts to his company, because of the breakdown of the original contract. It also could not return the supplier's equipment, which was under the Department's control. However, he advised that iLima anticipated being awarded the contract to complete the hospital, if it could get the necessary bridging finance. If this materialised, it would be in a position to repay its debt as soon as it received the remobilisation fee. In the light of this, Mr Dement decided to find a way to help iLima. The conduit was Country Cloud, a close corporation in which his wife was the sole member.

[6] Discussions commenced between Country Cloud and iLima about the loan agreement's terms. The agreement, which was finally concluded on 18 July 2008, required Country Cloud to advance R12 million to iLima. The amount was to be repaid by 31 August 2008, six weeks later. In addition, a "service fee" of R8.5 million was to be paid to Country Cloud in monthly instalments, so that it would be fully repaid by 1 May 2009.

[7] Given iLima's precarious financial circumstances, Country Cloud also insisted on certain protections. First, Mr Lupepe was listed as one of the parties to the loan agreement, and stood as surety and co-principal debtor for the loan. Second, the whole agreement was made conditional upon iLima being awarded the completion contract. Finally, and importantly, the loan agreement was subject to the condition that the Tau Pride/Moteko Consortium (Tau Pride), the Department's official managing agent for the contract, "agree in writing to the payment of the sum of R12 million to Country Cloud from the initial remobilisation fee payable [by the Department] to iLima". Aware of the need for safeguards, the Department had appointed Tau Pride to manage and supervise the building project. Tau Pride's mandate included the management, by means of a joint bank account, of iLima's financial transactions relating to the project.

[8] The agreement between Country Cloud and Tau Pride was concluded on 21 July 2008. Tau Pride undertook to ensure that the R12 million would be paid to Country Cloud from the initial remobilisation fee received by iLima under the contract and to authorise irrevocably the release of both that payment and the service fee from the joint bank account. Thereafter the contract for the completion of the hospital (completion contract) was concluded between the Department and iLima on 4 August 2008.

[9] In execution of the loan agreement, Country Cloud paid R12 million to iLima in two tranches: one directly before, and one shortly after, the conclusion of the completion contract. The Department's principal agent for the completion contract, Tsiya Developments (Pty) Ltd, sent the Department a payment certificate, tax invoice and recommendation for the payment to iLima of the initial R21.5 million. And iLima submitted to Tau Pride an invoice for the same amount. So all seemed well as far as Country Cloud was concerned.

[10] But the semblance of stability was short-lived. Mr Buthelezi came under pressure from the media, through a query from the *City Press* newspaper on 15 August 2008, and the Department itself, for failing to follow the DAC's recommendation to go to tender. He eventually cancelled the completion contract on 4 September 2008, before any payment had been made under it. Mr Buthelezi relied on two alleged misrepresentations in doing so: iLima's tax clearance certificate, submitted as a precondition for the conclusion of the contract, allegedly could not be trusted, as information from the South African Revenue Service (SARS) showed it had considerable outstanding tax; and the authenticity of iLima's building accreditation was apparently "questionable".

[11] The cancellation of the completion contract was the beginning of iLima's end. In a last-ditch attempt to salvage its financial position, it launched a contractual claim for R1.4 billion against the Department. The claim was referred to mediation, which

broke down. Unable to meet its financial obligations to its creditors, iLima was placed in liquidation in March 2010.

High Court

[12] Before the High Court, Country Cloud claimed R20.5 million from the Department in delictual damages. According to Country Cloud, the Department owed it a duty not to repudiate the completion contract prior to the payment of the initial remobilisation fee to iLima. The Department had repudiated the contract notwithstanding this duty, but for which iLima would have been able to pay Country Cloud the loaned amount (R12 million) and the service fee (R8.5 million).

[13] But the High Court did not get to the issue of wrongfulness in delict.[2] It disposed of Country Cloud's claim by holding that the completion contract was void from its inception because Mr Buthelezi had no authority to depart from the DAC's recommendation to retender. There was no valid contract for the Department to repudiate at all and therefore no question of its breach being delictually wrongful.

Supreme Court of Appeal

[14] Country Cloud appealed to the Supreme Court of Appeal, where the question of delictual wrongfulness became a focal issue. That Court, in a judgment written by Brand JA, swiftly dispensed with the issue that had preoccupied the High Court.[3] It

[2] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2012] ZAGPJHC 166; [2012] 4 All SA 555 (GSJ).

[3] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2013] ZASCA 161; 2014 (2) SA 214 (SCA) (Supreme Court of Appeal judgment).

held that Mr Buthelezi, as the Department's accounting officer, had the authority to deviate from the prescribed tendering procedure, despite the DAC's advice. The Court also accepted Mr Buthelezi's assertion that the urgency of completing the hospital justified deviation in this case.

[15] The Department's defence that the completion contract was validly cancelled – on the basis that iLima had presented a false tax clearance certificate (the Department had conceded that iLima had the necessary accreditation) – was also dismissed. While the evidence suggested that iLima was indeed heavily indebted to SARS, the Department's own expert, a SARS employee, conceded that iLima could have made a repayment arrangement with SARS and that, as a consequence, the certificate could be valid.

[16] The only issue left was the Department's defence that its cancellation of the completion contract was not delictually wrongful. The Court accepted, on the facts, that the Department breached its contract with iLima, and caused loss to Country Cloud, acting with intent, at least in the form of *dolus eventualis*. But, it said, the case did not fall under the established delict of intentional interference with a contract. Nor were there sufficient positive policy considerations justifying a novel finding of wrongfulness. Country Cloud's claim was indistinguishable from the claims of countless other creditors, subcontractors and employees who could potentially suffer loss because of the Department's breach, thus raising the risk of limitless or indeterminate liability. In addition, Country Cloud had alternative remedies available

to it: it could have claimed repayment from iLima's estate under the loan agreement or taken cession of iLima's claim for breach of contract against the Department.

[17] The Supreme Court of Appeal therefore dismissed Country Cloud's appeal.

Leave to appeal

[18] In terms of an order dated 12 March 2014 Country Cloud was granted leave to appeal to this Court.

Issues

[19] The sole issue is whether the Department should be held delictually liable for Country Cloud's loss.[4] The answer to this question rests on an important question: Was the Department's conduct in cancelling the completion contract wrongful? The issue is not whether the Department's conduct was wrongful in some general sense, or wrongful towards iLima. It is whether its conduct was wrongful vis-à-vis Country Cloud.

Wrongfulness

[20] Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether "the social, economic and others costs are just too high to justify

[4] In its written submissions in this Court, Country Cloud abandoned its claim for the R8.5 million in lost profits and focused solely on the R12 million loan amount. The Department also did not persist with the defences it raised in the High Court and Supreme Court of Appeal based on the lawfulness of the award of the completion contract and the lawfulness of its cancellation.

the use of the law of delict for the resolution of the particular issue".[5] Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.

[21] Previously, it was contentious what the wrongfulness enquiry entailed,[6] but this is no longer the case. The growing coherence in this area of our law is due in large part to decisions of the Supreme Court of Appeal over the last decade. Endorsing these developments, this Court in *Loureiro* recently articulated that the wrongfulness enquiry focuses on—

> "the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability."[7]

The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: "that public or legal policy considerations determine that there should be no liability;

[5] Visser "Delict" in *Wille's Principles of South African Law* 9 ed (Juta & Co Ltd, Cape Town 2007) at 1098. See also Du Bois "Getting Wrongfulness Right: A Ciceronian Attempt" in Scott and Visser (eds) *Developing Delict: Essays in Honour of Robert Feenstra* (Juta & Co Ltd, Cape Town 2000) at 28.

[6] See, for example, Fagan "Rethinking Wrongfulness in the Law of Delict" (2005) 122 *SALJ* 90.

[7] *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) (*Loureiro*) at para 53.

that the potential defendant should not be subjected to a claim for damages", notwithstanding his or her fault.[8]

[22] Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is prima facie wrongful.[9] However, in cases of pure economic loss – that is to say, where financial loss is sustained by a plaintiff with no accompanying physical harm to her person or property[10] – the criterion of wrongfulness assumes special importance. In contrast to cases of physical harm, conduct causing pure economic loss is not prima facie wrongful.[11] Our law of delict protects rights, and, in cases of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss.[12]

[8] *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2005] ZASCA 109; 2006 (3) SA 138 (SCA) (*Two Oceans Aquarium*) at para 12. See also *Gouda Boerdery BK v Transnet Ltd* [2004] ZASCA 85; 2005 (5) SA 490 (SCA) (*Gouda Boerdery*) at para 12 and *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) (*Van Duivenboden*) at para 12.

[9] To say that conduct is "prima facie wrongful" means that to prove the fact of conduct alone is sufficient, absent indications to the contrary, to establish wrongfulness. In other words, wrongfulness need not be positively established by the plaintiff; wrongfulness is presumed, but may be rebutted by the defendant.

[10] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) (*Fourway Haulage*) at para 10; *Two Oceans Aquarium* above n 8 at para 14; *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA) (*Telematrix*) at para 1; and Midgley and Van der Walt "Delict" in *LAWSA* second reissue (2005) vol 8(1) at para 68. In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* [1984] ZASCA 132; 1985 (1) SA 475 (A) (*Lillicrap*) at 498, Grosskopf AJA defined pure economic loss as "loss which was caused without the interposition of a physical lesion or injury to a person or corporeal property".

[11] *Fourway Haulage* id at para 12 and *Two Oceans Aquarium* id at para 10.

[12] *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) (*Trust Bank*) at 833A-B. See also Fagan "Aquilian Liability for Negligently Caused Pure Economic Loss – Its History and Doctrinal Accommodation" (2014) 131 *SALJ* 288 at 291 and 295 in relation to negligently caused pure economic loss.

[23] So our law is generally reluctant to recognise pure economic loss claims, especially where it would constitute an extension of the law of delict.[13] Wrongfulness must be positively established.[14] It has thus far been established in limited categories of cases, like intentional interferences in contractual relations[15] or negligent misstatements,[16] where the plaintiff can show a right or legally recognised interest that the defendant infringed.

[24] In addition, if claims for pure economic loss are too-freely recognised, there is the risk of "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[17] Pure economic losses, unlike losses resulting from physical harm to person or property—

> "are not subject to the law of physics and can spread widely and unpredictably, for example, where people react to incorrect information in a news report, or where the malfunction of an electricity network causes shut-downs, expenses and loss of profits to businesses that depend on electricity."[18]

[25] So the element of wrongfulness provides the necessary check on liability in these circumstances. It functions in this context to curb liability and, in doing so, to ensure that unmanageably wide or indeterminate liability does not eventuate and that

[13] *Two Oceans Aquarium* above n 8 at para 20, citing *Lillicrap* above n 10 at 504D-H.

[14] See, for example, *Telematrix* above n 10 at para 13; *BoE Bank Ltd v Ries* [2001] ZASCA 132; 2002 (2) SA 39 (SCA) at paras 12-3; and *Lillicrap* above n 10 at 501G-H.

[15] See [27] to [31].

[16] See *Mukheiber v Raath and Others* [1999] ZASCA 39; 1999 (3) SA 1065 (SCA) and *Trust Bank* above n 12.

[17] This was memorably put by Cardozo CJ in *Ultramares Corporation v Touche* 174 NE 441 (1931) at 444. See also *Fourway Haulage* above n 10 at paras 23-4 and *Trust Bank* above n 12 at 833A.

[18] Loubser and Midgley (eds) *The Law of Delict in South Africa* 2 ed (OUP, New York 2012) at 228.

liability is not inappropriately allocated. But it should be noted – and this was unfortunately given little attention in argument – that the element of causation (particularly legal causation, which is itself based on policy considerations) is also a mechanism of control in pure economic loss cases that can work in tandem with wrongfulness.[19]

[26] This case is manifestly one of pure economic loss. Would it be reasonable to impose liability on the Department in the circumstances? Although there is no "checklist" of relevant considerations, the enquiry does not call for an "intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms."[20]

Intentional interference with contractual relations

[27] Country Cloud sought to bring itself within one of the subcategories of pure economic loss cases where wrongfulness has already been established, saying its claim amounts to an intentional interference with contractual relations.[21] The Supreme Court of Appeal rejected this argument. It said that the delict of intentional interference with contractual relations may be brought by a party to a contract who asserts that a third party – a stranger to the contract – has intentionally deprived it of benefits it would otherwise have gained from performance in terms of the contract.

[19] See *Fourway Haulage* above n 10 at paras 30-1; *International Shipping Co (Pty) Ltd v Bentley* [1989] ZASCA 138; 1990 (1) SA 680 (A) at 701F-G; and *Trust Bank* above n 12 at 833B.

[20] *Van Duivenboden* above n 8 at para 21.

[21] See generally Loubser and Midgley above n 18 at 234-7 and Neethling and Potgieter *Law of Delict* 6 ed (LexisNexis, Durban 2010) at 306-9.

But, according to the Supreme Court of Appeal, Country Cloud was the stranger to the interfered-with contract between iLima and the defendant Department. Accordingly, the Court held that the success of Country Cloud's claim would depend on the extension of delictual liability to claims for damages suffered by a stranger to the contract interfered with. This, according to the Court, had never been done before.[22]

[28] Country Cloud disputes this characterisation of its claim. It contends that the Supreme Court of Appeal focused on the wrong contract. The relevant contract, it argues, was not the contract between iLima and the Department, to which it was indeed a stranger. The relevant contract was the loan agreement it concluded with iLima, the benefits of which it was deprived when the Department repudiated the completion contract and made iLima incapable of repaying its debts. Country Cloud alleges Mr Buthelezi knew that it would suffer loss if the completion contract was cancelled and had an improper motive for cancelling that contract (saving face under public and inter-departmental pressure), and hence cancelled it with the requisite intention. Thus, Country Cloud contends, the Department intentionally interfered with its contract with iLima. The implicit force of this, Country Cloud seems to suggest, is that the conduct fell within a category of pure economic loss that our law recognises as prima facie wrongful.

[29] I cannot quibble with Country Cloud's contention that, loosely speaking, the Department intentionally "interfered" with Country Cloud's contractual relations with

[22] Supreme Court of Appeal judgment above n 3 at para 26.

iLima by causing it to lose contractual benefits to which it was entitled. But that fact does not in itself render conduct prima facie wrongful.

[30] The legal category is narrower. The cases where conduct may arguably be prima facie wrongful are limited. They involve a situation where a third party, A, the defendant, intentionally *induces* a contracting party, B, to breach his contract with the claimant, C, without lawful justification for doing so.[23] But the Department did not induce iLima's breach in the relevant sense. In these circumstances this would require an act of persuasion directed at iLima with the intent that it dishonour its agreement with Country Cloud. The defendant wrongdoer thereby becomes an accessory to the primary wrong: the breach of contract. The act of persuasion, paired with intent, establishes this accessory liability.[24] In *Pikkewyn Ghwano*, for example, the defendant wrongdoer induced an employee of the plaintiff to breach his employment contract by assisting him to sell a competitor's product and by writing the orders for the product for the employee.[25] By contrast, iLima's breach of the loan agreement with Country

[23] The classic statement recognising such a claim in our law was articulated thus by Van Dijkhorst J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) (*Pikkewyn Ghwano*) at 202G. See also *Woodlands Dairy (Pty) Ltd v Parmalat SA (Pty) Ltd* 2002 (2) SA 268 (E) at 279F; *Aetiology Today CC t/a Somerset Schools v Van Aswegen and Another* 1992 (1) SA 807 (W) (*Aetiology Today*) at 820D-E and 824I-J; and *Genwest Batteries (Pty) Ltd v Van der Heyden and Others* 1991 (1) SA 727 (T) at 729A.

[24] In English law, from which the category derives (see its importation in, for example, *New Kleinfontein Company Ltd v Superintendent of Labourers* 1906 TS 241 at 253-4), these circumstances constitute a standalone delict. See *OBG Limited and Others v Allan and Others; Douglas and Another and Others v Hello! Limited and Others; Mainstream Properties Limited v Young and Others and Another* [2007] UKHL 21 (*OBG v Allan*). This is because the wrongdoer's liability is regarded as flowing from the fact that she incurs accessory liability to the primary liability of the contract-breaker for the breach. See id at paras 3 and 44.

[25] *Pikkewyn Ghwano* above n 23.

Cloud was simply a consequence of the Department's conduct in cancelling the completion contract. There was no act of persuasion.[26]

[31] Liability has also been established in cases where A refuses to vacate premises owned by B, which interferes with the lease agreement between B and her tenant, C, causing the latter loss. Both *Dantex*[27] and *Lanco*[28] involved these circumstances. While the plaintiff's claim in *Dantex* failed, because fault was not alleged,[29] the plaintiff in *Lanco* succeeded.[30] But that case is different from Country Cloud's. The act of interference in *Lanco* involved the holding-over of leased premises.[31] The defendant there did not simply cause the plaintiff to lose its right to occupy the premises. The defendant usurped that right, appropriating it for itself. It also did so in

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[26] Moreover, I believe a certain level of intent greater than subjective foresight that the breach would result – as Country Cloud contends the Department possesses in this case – would be necessary to place it in this category. Little work has been done on this in South African law, but English law has given consideration to what counts as intention for these purposes. According to the House of Lords in *OBG v Allan* above n 24 at para 42, it is necessary to "distinguish between ends, means and consequences". Where the breach of the contract is the end itself or a means to that end, this is sufficient to establish intention for this purpose. But the fact that the breach is merely a foreseeable consequence, on the other hand, is not sufficient. In this regard, Lord Hoffmann held as follows at paras 42-3:

> "If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. . . . [P]eople seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves. . . . On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended."

See also paras 62-4 (Lord Hoffmann) and paras 164-7 (Lord Nicholls). This distinction appears to accord with our precedent. In *Pikkewyn Ghwano* above n 23, the defendant's aim was to procure business for itself and its means was persuading the plaintiff's employee to breach his contract on its behalf. See 202E-F. And in *Aetiology Today* above n 23 the defendant's aim was to solicit pupils for its new school from another school, which aim it achieved through the teachers of the latter school, which was a breach of their employment contracts. See 820D-E.

[27] *Dantex Investment Holdings (Pty) Ltd v Brenner and Others* NNO [1988] ZASCA 122; 1989 (1) SA 390 (A) (*Dantex*).

[28] *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D) (*Lanco*).

[29] Above n 27 at 395C-397B.

[30] Above n 28 at 389E-F.

[31] Id at 379E-G.

a manifestly "dishonest and mischievous" way.[32] The factual matrix in this case – where the defendant's supposed act of interference is the cancellation of an entirely different contract – is thus distinguishable from that which confronted the Court in *Lanco*. The Department's responsibility for Country Cloud's loss is very different.

[32] So Country Cloud's claim is not on a par with the cases considered above. Nor were we referred to any other similar case in which a delictual remedy was provided. But I did not take Country Cloud to dispute this. In its submissions, it acknowledged that recognition of liability in this case would be novel and an extension of the law of delict. In the light of this, the wrongfulness of the Department's conduct must be established positively. It is to this enquiry – and to the competing considerations that must be weighed under it – that I now turn.

The role of fault and foreseeability in determining wrongfulness

[33] It is not disputed that the Department's fault is established. Country Cloud submits, however, that the nature of the Department's fault – in particular, that it was in the form of intention – is a relevant policy consideration favouring the imposition of liability. It argues that the Department, through Mr Buthelezi, unlawfully cancelled the completion contract and thereby intentionally caused it harm. Furthermore, Country Cloud contends that Mr Buthelezi's subjective foresight of the precise nature and extent of the harm it would suffer if the completion contract was cancelled is a relevant consideration in the wrongfulness enquiry. In response, the Department

[32] Id at 388E.

disputes that Mr Buthelezi acted with intent to cause harm, but does not appear to take issue with the contention that the nature of the fault, foreseeability and the degree of blameworthiness are relevant to the wrongfulness enquiry.

[34] The Supreme Court of Appeal agreed with Country Cloud on the facts, holding that the Department had intent, at least in the form of *dolus eventualis*[33] – and that this was a relevant factor in assessing whether its conduct was wrongful.[34] It disagreed, however, that foreseeability of harm in and of itself is a relevant consideration in that enquiry. Although it had been adopted in previous judgments, the Supreme Court of Appeal stated that this approach was "bound to add to the confusion between negligence and wrongfulness".[35] Furthermore, the Court held that this factor could not single out Country Cloud's claim for "special treatment" because foreseeability is already a "prerequisite for delictual liability in all cases". This is because foreseeability of harm is already required to establish other delictual elements, namely negligence and causation.[36]

[35] On the facts, Mr Buthelezi was aware of the loan Country Cloud had provided to iLima. Indeed, the Department agreed to pay the remobilisation fee precisely in order to assist iLima to obtain the loan. And three days after the loan agreement was concluded, Tau Pride formally acknowledged that agreement and guaranteed Country Cloud that it would be repaid from project funds once they were released to iLima.

[33] Supreme Court of Appeal judgment above n 3 at paras 21-3.

[34] Id at paras 24-5.

[35] Id at para 27.

[36] Id at paras 27-8.

[36] Mr Buthelezi also knew of iLima's parlous financial affairs and that it would be able to repay Country Cloud only if it received the remobilisation fee. Tau Pride had been brought into the fold for precisely these reasons. The above considered, the ineluctable inference is that, at the very least, Mr Buthelezi subjectively foresaw the possibility that the repudiation of the completion contract would cause loss to Country Cloud. He reconciled himself with this possibility and repudiated the contract regardless.

[37] So Country Cloud is right that the Department had intention in the form of *dolus eventualis*, which is satisfied where a wrongdoer foresees the possibility of a consequence eventuating as a result of her conduct, but reconciles herself with the fact and proceeds anyway.[37] In fact, it is arguable that Mr Buthelezi's intent rose to the level of *dolus indirectus* – where the defendant aims at one result (in this case, the cancellation of the contract) but has knowledge that the consequence in question (iLima's breach of the loan agreement) will unavoidably or inevitably occur[38] – and I am prepared to assume so, for the sake of argument.

[38] The evidence also suggests, as the Supreme Court of Appeal correctly held, that Mr Buthelezi foresaw the risk that his purported cancellation would breach the completion contract. Mr Buthelezi came under severe pressure from within the

[37] Visser above n 5 at 1129; Neethling and Potgieter above n 21 at 127; and Loubser and Midgley above n 18 at 110-1. See also Burchell and Milton *Principles of Criminal Law* 3 ed (Juta and Co Ltd, Cape Town 2007) at 461-3.

[38] Id.

Department and from the media for not following the DAC's recommendation to put the completion contract out to tender. He was no doubt desperately looking for reasons to cancel, and the reasons he advanced proved to be utterly unfounded. Finally, despite the allegation in Country Cloud's founding papers that Mr Buthelezi had intentionally cancelled the completion contract without any basis for doing so, the Department failed to call Mr Buthelezi to give evidence at the trial. So the probable inference that he foresaw that his conduct was contractually unlawful was not rebutted.

[39] But are these features of the Department's conduct relevant to the wrongfulness enquiry as Country Cloud contends? They are indeed. The relevance of the nature of fault and fault-related considerations in the wrongfulness enquiry has been recognised on a number of occasions by the Supreme Court of Appeal.[39] Summing up this trend, the Supreme Court of Appeal in *Roux* held:

> "Amongst the considerations that may influence the policy decision whether or not to impose liability, is the nature of the fault that is proved, as well as other fault-related factors. Accordingly, while intentional conduct may sometimes attract legal liability, the same conduct may not be regarded as wrongful if the degree of fault established was no more than negligence. In other factual situations conduct may not even be regarded as wrongful when it was intentional, but only when it was accompanied by a

[39] See *Roux v Hattingh* [2012] ZASCA 132; 2012 (6) SA 428 (SCA) at para 38; *Le Roux and Others v Dey* [2010] ZASCA 41; 2010 (4) SA 210 (SCA) at paras 34-5; *South African Post Office v De Lacy and Another* [2009] ZASCA 45; 2009 (5) SA 255 (SCA) at para 5; *mCubed International (Pty) Ltd and Another v Singer and Others NNO* [2009] ZASCA 6; 2009 (4) SA 471 (SCA) at para 34; *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* [2007] ZASCA 12; 2008 (6) SA 595 (SCA) at para 14; and *Minister of Finance and Others v Gore NO* [2006] ZASCA 98; 2007 (1) SA 111 (SCA) (*Gore*) at para 86. See also Boberg *The Law of Delict* (Juta & Co Ltd, Cape Town 1989) at 33.

> motive to cause harm or by a particular awareness of the risk of serious harm that may follow."[40]

[40] And this approach makes sense. As is noted by the Supreme Court of Appeal in the present case, the element of fault is satisfied by either intention or negligence. The form of fault is generally irrelevant in the fault enquiry; proof of either form suffices.[41] It can, however, be given weight under the wrongfulness enquiry. This is not to conflate the elements of fault and wrongfulness, or to suggest that the establishment of fault is necessarily a prerequisite for the establishment of wrongfulness. Fault, like all other delictual elements, must still be separately established. It is merely recognition of the fact that where fault rises to the level of intention, and where other fault-related elements (such as motive to cause harm) are present, this may be relevant to establishing wrongfulness.

[41] However, Country Cloud also contends that foreseeability of loss, and the fact that Mr Buthelezi foresaw the precise loss it would suffer, is relevant in the wrongfulness enquiry. Of course foreseeability is relevant, as has been noted above, to the extent that it plays a role in establishing the nature of the defendant's fault. It is not necessary, however, to consider whether foreseeability might have some broader relevance in the wrongfulness enquiry. I am prepared to assume that the purpose it might serve here – to limit potential plaintiffs and diminish the risk of limitless liability – is already served by the nature of the Department's fault.

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[40] *Roux* id.

[41] Supreme Court of Appeal judgment above n 3 at para 25, citing Loubser and Midgley above n 18 at 141 and 157.

[42] Does all of this impel a finding of wrongfulness in this case? No. As the Supreme Court of Appeal correctly noted, the defendant's blameworthiness, and the risk of indeterminate liability, are relevant but not dispositive considerations. They should be weighed with all others in determining whether conduct is wrongful.[42] In addition, there are cases where knowingly causing loss, even absent any risk of indeterminate liability, could not plausibly be wrongful, for the plaintiff would not have harmed a right or legal interest of the defendant. To take one obvious example: if the Department's cancellation of the completion contract had been valid, Country Cloud would have had no hope of establishing wrongfulness. Yet the extent of its loss, and the Department's foresight of it, would have been the same as they are here; and the risk of indeterminate liability would be equally absent.

[43] Country Cloud must persuade us that the Department is responsible for the loss suffered. If the Department acted permissibly in causing Country Cloud that loss, it does not matter that it did so intentionally. Nor does it matter that there is no risk here of indeterminate liability. Until we are satisfied the Department *wronged* Country Cloud, its claim does not get off the ground. Country Cloud did not allege here, as in a negligent-misstatement case, that the Department made a representation to it that the Department would honour the completion contract. And the terms of the contract

[42] Supreme Court of Appeal judgment above n 3 at para 25. See also Loubser and Midgley above n 18 at 157. In *Two Oceans Aquarium* above n 8 the Supreme Court of Appeal considered whether a claim for delictual damages was warranted for pure economic loss caused by the allegedly negligent structural design and waterproofing of an aquarium that necessitated remedial work by the plaintiff. The Court refused a claim, despite the fact that the danger of limitless liability was not present, because of other considerations that militated against the imposition of liability. See especially para 20. See also *Fourway Haulage* above n 10 at para 25.

between the Department and iLima cannot and do not determine, without more, that the Department owes a duty to Country Cloud.

State accountability

[44] A central prong of Country Cloud's argument is the constitutional value of accountability. Country Cloud pointed to section 195(1)[43] (which sets out the basic values and principles governing public administration) and section 217(1)[44] (which concerns public procurement) of the Constitution.[45] According to Country Cloud, for the Department to evade liability would be to condone Mr Buthelezi's "capricious conduct" and would be inconsistent with the principle of accountability. By contrast, it argues, permitting the claim would deter similar capricious conduct.

[43] Section 195(1) provides, in relevant part:

> "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> . . .
>
> (f) Public administration must be accountable."

[44] Section 217(1) provides:

> "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

[45] To these I might add section 1 of the Constitution, which reads in relevant part:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure *accountability*, responsiveness and openness." (Emphasis added.)

In addition, section 41, which is entitled "Principles of co-operative government and intergovernmental relations", reiterates the value of state accountability. Section 41(1)(c) provides:

> "All spheres of government and all organs of state within each sphere must provide effective, transparent, accountable and coherent government for the Republic as a whole".

[45] It is true that the value of state accountability can be a reason to impose delictual liability on a state defendant.[46] Equally, however, it should be stressed that this value will not always give rise to a private-law duty.[47] 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.

[46] Moreover, this case does not raise the acute public-policy concerns that prompted the imposition of liability in *Gore*, which was relied on extensively by counsel for Country Cloud. In *Gore* damages were awarded against state entities which were vicariously responsible for the conduct of their employees who, through fraudulent conduct, prevented the award to a tenderer of a contract it would otherwise have been awarded. The contract was ultimately awarded to a company in which the wrongdoers held an undisclosed interest. So there was dishonesty going to the root of the defendants' conduct.

[47] By contrast, Mr Buthelezi's dishonesty lay, at worst, in the reasons he gave for his purported cancellation. This is not to suggest that his conduct was unobjectionable or innocuous. It was not. But it did not rise to the level of dishonesty and corruption

[46] *Lee v Minister for Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC) at para 70; Froneman J's concurring judgment in *F v Minister of Safety and Security and Others* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC) at para 123; and *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Metrorail*) at para 73; *Gore* above n 39 at para 88; and *Van Duivenboden* above n 8 at paras 21-2.

[47] *Metrorail* id at para 78 and *F* id at paras 123-4. In *Telematrix* above n 10 at para 24, the Supreme Court of Appeal reiterated that the value of accountability "has not evolved into a general liability for damages for imperfect administrative actions."

that was present in *Gore*.[48] Mr Buthelezi was a bungling public functionary, not one bent on illicit gain. Counsel for Country Cloud conceded at the hearing that its case was different from *Gore*. He suggested that it fell between that case and *Steenkamp*, where this Court refused to impose delictual liability for loss caused through the cancellation of a tender award because of a negligent breach of procurement regulations.[49] The same powerful policy considerations that motivated the imposition of liability in *Gore* are thus not present here.

[48] Furthermore, Country Cloud's argument once again assumes, rather than proves, that the Department has wronged it. One can be held "accountable" only for doing something wrong. And one can be held accountable only to the particular person whom one has wronged. Accountability is not fostered by holding the Department liable to any randomly selected third party.

[49] In *Gore* the defendants breached a public-law duty they owed squarely to the aggrieved tenderer, to whom it should have awarded the contract. The only question was whether paying delictual damages was the appropriate remedy. In these circumstances, the value of state accountability was vital. It compelled a finding that the defendants were delictually liable to the plaintiff for the undisputed wrong they had committed against it. But there is no equivalent link between the Department and Country Cloud in this case. Certainly, the Department breached the contractual duty it

[48] *Gore* above n 39 at para 85. This level of dishonesty and corruption was definitive for the Supreme Court of Appeal in deciding that the conduct in question was wrongful. See paras 87-90.

[49] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

owed to iLima. But that does not tell us what duty it owed to Country Cloud. Pointing vaguely at state accountability does not help.

[50] And the Department is of course liable to iLima, the party whose contractual right it unquestionably breached. So there are much more direct and effective ways of calling the state to account in this case, most obviously the enforcement of this contract.[50] It seems odd and circuitous to recognise an indirect claim by a corporate entity not directly involved in the contract between the Department and its contractor, iLima, as a means of ensuring the former's accountability. In short, this is a case where imposing delictual liability on the Department for a third party's loss is not justified on the grounds of accountability because—

> "the wrongdoer is already vulnerable to a claim by [its contracting partner], and the extent of that liability [is] extensive. Imposing further liability on the wrongdoer for the relational economic consequences of [its] act, therefore, cannot usually be justified on the ground of deterrence."[51]

To impose on the Department delictual liability to a third party, over and above its normal contractual liability, is unnecessary. Indeed it "might undermine [its] functioning".[52] In many cases, if not most, the insufficiency of the state's reasons for cancelling will be adequately addressed by its consequent contractual liability.

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[50] Compare *Van Duivenboden* above n 8 at para 21.

[51] Hutchinson "Relational Economic Loss (or Interference with Contractual Relations): The Last Hurdle" in Scott and Visser (eds) *Developing Delict: Essays in Honour of Robert Feenstra* (Juta & Co Ltd, Cape Town 2000) at 143, relying on the dissenting judgment of La Forest J in *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021; 91 DLR (4th) 289, especially at para 164.

[52] Froneman J's concurring judgment in *F* above n 46 at para 124. See also *Metrorail* above n 46 at paras 78 and 80 and *Van Duivenboden* above n 8 at para 22.

Vulnerability to risk

[51] It is settled that where a plaintiff has taken, or could have reasonably taken, steps to protect itself from or to avoid loss suffered, this is an important factor counting against a finding of wrongfulness in pure economic loss cases.[53] In these circumstances, the plaintiff is not "vulnerable to risk" and, so it is reasoned, there is no pressing need for the law of delict to step in to protect the plaintiff against loss.[54]

[52] The Supreme Court of Appeal held that Country Cloud was not vulnerable to risk. It said Country Cloud could have either claimed repayment from iLima in terms of the loan agreement or taken cession of iLima's claim against the Department.[55] This, it concluded, was a reason for refusing to impose liability on the Department.[56]

[53] Country Cloud contends it was vulnerable to risk. It suffered the loss even though it had, so it argued, taken all reasonable precautions to protect itself before advancing the loan amount to iLima. This, so it says, is evident from the undertakings

[53] *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* [2013] ZASCA 16; 2013 (5) SA 183 (SCA) (*Cape Empowerment Trust*) at para 28; *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar and Others* [2010] ZASCA 85; 2010 (5) SA 499 (SCA) at para 25; *Fourway Haulage* above n 10 at para 25; and *Two Oceans Aquarium* above n 8 at paras 23-4.

[54] *AB Ventures Ltd v Siemens Ltd* [2011] ZASCA 58; 2011 (4) SA 614 (SCA) (*AB Ventures*) at para 21. The term "vulnerability to risk" was initially imported into South African law from Australian law. See, for example, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; 216 CLR 515 at para 23 and *Perre and Others v Apand Pty Ltd* [1999] HCA 36; 198 CLR 180 at para 118. Vulnerability to risk should be distinguished from the duty on a plaintiff to mitigate the loss she suffers (see *Jayber (Pty) Ltd v Miller and Others* 1980 (4) SA 280 (W) at 282F-G) and the relevance of the plaintiff's contributory negligence in the Aquilian action (see section 1(1) of the Apportionment of Damages Act 34 of 1956). Both are relevant to the assessment of the amount of damages a plaintiff may claim. By contrast, vulnerability to risk falls squarely under the wrongfulness enquiry and is thus relevant to whether the plaintiff should be afforded a claim at all.

[55] Supreme Court of Appeal judgment above n 3 at paras 30-1.

[56] Id at para 32.

it secured from Tau Pride. Country Cloud also disputes the viability of the avenues of recovery proposed by the Supreme Court of Appeal. It says that it had no contractual claim of any worth against iLima because, once the completion contract was cancelled, its contract with iLima was an "empty shell". And it was speculative of the Supreme Court of Appeal to suggest that taking cession of iLima's claim would have been a successful means of recouping its losses. Indeed, Country Cloud points out that iLima's contractual claim against the Department went into mediation and ultimately foundered.

[54] I agree with Country Cloud that the measures proposed by the Supreme Court of Appeal may not have been without difficulty. It may have been very expensive for Country Cloud to buy iLima's claim against the Department, which iLima may have been unwilling to cede it at all; and it could have exposed Country Cloud to a slew of counterclaims by the Department. Country Cloud's contractual claim against iLima was also likely worthless, especially once the latter was liquidated.

[55] However, a perusal of the loan agreement reveals a further step Country Cloud took to protect itself from loss. Mr Lupepe, iLima's chief executive officer, had bound himself as surety for the loan amount.[57] Indeed, he is reflected as one of the contracting parties on the front page of the agreement.

[57] Clause 5 of the loan agreement reads:

> "Lupepe hereby binds himself as surety and co-principal debtor for the obligation of iLima Projects to repay the sum of R12 000 000 (TWELVE MILLION RAND) plus interest at the Interest Rate as iLima Projects is obliged to do in terms of clause 4 above. Lupepe hereby renounces the benefits of excussion, no value received, errors in calculation and cession of action."

[56] Country Cloud failed to call up this suretyship obligation, or provide a justifiable excuse why it had not. Its counsel's response at the hearing when asked why the close corporation did not pursue its claim against Mr Lupepe was woefully inadequate. He submitted that Country Cloud had relied upon Mr Lupepe's own representations that he was impecunious. But what did iLima – controlled by Mr Lupepe – do with the money Country Cloud paid it? And where did the money go?

[57] These questions require answers if Country Cloud is to persuade a court of the cogency of its delictual claim. Its counsel also speculated that those in control of Country Cloud did not want to go against Mr Lupepe, who was their friend. This does little to strengthen Country Cloud's demand for an extension of the law of delict to afford it a remedy. Plainly, Country Cloud had other avenues of recovery available to it.

[58] But there is a further consideration weighing against Country Cloud's claim. It has already been noted that Mr Buthelezi subjectively foresaw the risk of loss that the cancellation of the completion contract would cause to Country Cloud. But foreseeability cuts both ways. The risk of loss was also highly foreseeable by Country Cloud. It knew of iLima's financial state and that iLima would not be able to commence construction under the completion contract without the money. That is why Country Cloud became involved in the first place. And iLima's precarious

financial state was why Country Cloud insisted on Tau Pride's management of iLima's repayments. It was presumably also for this reason that Country Cloud's attorney was closely involved in devising the terms for the transaction. That Country Cloud was fully aware of the substantial risk it was taking is also signalled by the huge profit it stood to earn: R8.5 million on a (roughly) 30-day loan.

[59] So the risk that ultimately materialised was highly foreseeable to all parties. And the risk was the direct corollary of Country Cloud's potential gain. It was the very reason for the loan's existence, and the reason for the tremendous benefits Country Cloud would have obtained if all had gone well.

[60] Country Cloud took steps to minimise that risk. But, even for the risk that remained, it was no sitting duck. Far from being the Department's helpless victim, it willingly exposed itself to the vagaries of Mr Buthelezi's conduct, and to the risk of iLima's downfall, for the promise of a large financial reward. In *Cape Empowerment Trust* the Supreme Court of Appeal relied on the plaintiff's failure to extract itself from a high-risk transaction in the course of finding against it.[58] Its choice not to extract itself from, but instead to affirm, the transaction made it "the author of its own misfortune."[59] In conclusion, Brand JA held that the plaintiff—

> "rendered itself vulnerable to risk . . . by reinstating the agreement in order to procure a tax benefit. . . . The point is that as a matter of policy it would, in my view, be unreasonable to impose liability on [the defendant] for a loss to which [the plaintiff]

[58] *Cape Empowerment Trust* above n 53 at paras 28-33.

[59] Id at para 30.

> had exposed itself, and hence rendered itself vulnerable, while attempting to gain a tax benefit."[60]

[61] This is not to suggest that a delictual claim is precluded whenever a party puts herself in a position where there is a risk of harm. Far from it. We expose ourselves to risk, for example, every time we elect to travel on public roads and that would not excuse from liability those who culpably crash into us. But where a transaction involves a substantial and highly foreseeable risk of loss, which a commercially sophisticated and well advised plaintiff nevertheless accepts because of the promise of significant financial gain inextricably linked to it, there is often no pressing need for the law of delict to intervene.

Existing contractual relations

[62] It is true that in this case Country Cloud had no direct dealings, nor any direct contractual relationship, with the Department. But it did contract with Tau Pride, the Department's management agent under the completion contract. Through it, Country Cloud exacted specific undertakings from the Department to protect itself.[61] Although this was not raised before this Court or either of the Courts below, it may present an additional obstacle to the recognition of Country Cloud's claim.

[63] In *Lillicrap*, Grosskopf AJA for the then Appellate Division held as follows in the course of declining to recognise the plaintiff's delictual claim:

[60] Id at para 33.

[61] See [7] and [8].

> "[I]n general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly, the nature and quality of the performance required from each party."[62]

Contracts may, apart from defining the parties' respective duties, regulate other aspects of their relationship. They may limit or extend liability, impose penalties or grant indemnities, or provide special methods of settling disputes.[63] For this reason, courts should be wary of extending the law of delict where there are existing contractual relationships. This may subvert provisions the parties considered necessary or desirable for their own protection and introduce an unwanted liability that "could provide a trap for the unwary".[64]

[64] On this basis, the Supreme Court of Appeal held in *Two Oceans Aquarium* that delictual claims do not usually "fit comfortably in a contractual setting".[65] Pertinently, the Court asked:

> "[W]hat if the respondent had been asked, but refused to give a contractual warranty in respect of the work that it had done . . . ? Would it still be held liable in delict if that work was negligently done?"[66]

[62] Above n 10 at 500H-I.

[63] Id at 501E-F.

[64] Id at 501F-G.

[65] *Two Oceans Aquarium* above n 8 at para 25.

[66] Id.

The Court's implicit answer was "no", and it refused to recognise the plaintiff's claim.[67]

[65] Where parties take care to delineate their relationship by contractual boundaries, the law should hesitate before scrubbing out the lines they have laid down by superimposing delictual liability.[68] That could subvert their autonomous dealings. This underscores the broader point made by this Court in *Barkhuizen* that, within bounds, contractual autonomy claims some measure of respect.[69]

[66] While Country Cloud had no direct contractual relations with the Department, it obtained certain undertakings from it – including that the loan be repaid from the remobilisation fee – through Tau Pride. But the agreed protections did not extend to imposing liability on Tau Pride (which was acting as the Department's agent for the project) for any loss caused to Country Cloud if the Department breached its contract with iLima. This seems to me to reinforce the notion that Country Cloud should have no claim in delict.

Conclusion

[67] All told, I am unpersuaded that considerations of legal and public policy require liability in this case. Country Cloud has not established that the Department bears any

[67] Id. See also *AB Ventures* above n 54 at paras 16 and 19 where the Supreme Court of Appeal relied on similar reasoning in arriving at the conclusion that the defendant's conduct was not wrongful.

[68] This is the strong motif in *Lillicrap* above n 10, as applied in *Two Oceans Aquarium* above n 8.

[69] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 57, and compare para 70.

real responsibility for the loss it caused Country Cloud. I agree with the Supreme Court of Appeal, though for different reasons, that the category of intentional interference with contract does not help Country Cloud's claim. Unlike the Supreme Court of Appeal, in this case I am prepared to accept that Mr Buthelezi's state of mind does help distinguish Country Cloud's claim from others. But this is not dispositive of the wrongfulness enquiry, and reliance on state accountability and *Gore* offers Country Cloud little assistance. And, although my conclusion is based on different considerations, I agree with the Supreme Court of Appeal that Country Cloud's non-vulnerability is highly significant and militates against recognising its claim. This conclusion is bolstered by the threat that a delictual award may upset existing contractual relations.

Costs

[68] Though unsuccessful, Country Cloud's conduct in litigating this matter was not inappropriate. In accordance with the general rule in constitutional litigation against the state, I therefore make no order as to costs.[70]

Order

[69] In the result the following order is made:

1. The appeal is dismissed.
2. There is no order as to costs.

[70] *Biowatch Trust v Registrar Genetic, Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21-3.

For the Applicant:	L Morison SC, X Stylianou and O Ben-zeev instructed by Ramsay Webber Inc.
For the Respondent:	V Notshe SC and B Shabalala instructed by the State Attorney.