Extension of delictual liability for pure economic loss: Are courts adopting the correct approach?

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Pure economic loss arises where a third party suffers a loss without there being injury or damage. Generally, pure economic loss is aptly referred to as financial loss. A claim for pure economic loss is based on the negligence of the insured and often happens when the insured denied a third party access to something that the third party utilised to generate an income, or breach of an undertaking that caused financial loss. Therefore the approach taken by our courts in interpreting delictual liability for pure economic loss to an insured has implications to the formulation and extent of the cover both for the insured and the insurer.

Whether to extend delictual liability for pure economic loss has been a thorny issue for our courts since the landmark judgement of *Administrator, Natal v Trust Bank van Afrika*. It appears from the two recent cases that our courts have adopted a somewhat cautious approach bordering on restriction to delictual liability for pure economic loss, and these cases seem to have joined the long line of South African judgments grappling with this notion in our law. This proposition will be explored by examining two recent Supreme Court of Appeal judgements in the cases of *Country Cloud Trading CC v MEC, Department of Infrastructure Development and Minister for Safety and Security v Scott & Another* delivered in March and May this year.

As a starting point, it is imperative to give a genesis of this phenomenon in our law. Prior to *Administrator, Natal v Trust Bank van Afrika* delictual liability was limited as a general rule, to loss resulting from physical injury to a person or property. In *Trust Bank* the court accepted that compensation for pure economic loss could be awarded in certain cases and delictual action was extended beyond the Roman law boundary of damage to property or person.

Following in the footsteps of *Trust Bank* was *Lillicrap Wassenaar & Partners v Pilkington Bros SA*. In *Lillicrap* the court concluded that delictual action does not fit comfortably in a setting where professional services are rendered pursuant to a contract. To quote the essence of Judge Grosskopf's judgement: "I do not consider that policy considerations require that delictual liability be imposed for the negligent breach of a contract of professional employment of the sort with which we are here concerned. South African law approaches the matter in a more cautious way, as I have indicated and does not extend the scope of Aquilian action to new situations unless there are positive policy considerations which favour such an extension."
The next case to grapple with this notion was *Trustees of Two Oceans Aquarium Trust v Kantley & Templer*. The court was asked to determine liability in delict for so called pure economic loss resulting from a negligent design by structural engineers. The court stated that there was no reason to extend the Aquilian remedy to rescue a plaintiff who was in a position to avoid the risk by contractual means, but failed to do so. This principle was confirmed in *AB Ventures Limited v Siemens Limited*, which followed the decision of *Lillicrap*. The court was reluctant to extend the scope of Aquilian action to new situations, especially from a contractual context unless there are positive considerations that favour such an extension.

Obviously for a plaintiff to successfully prove a delictual action, the elements of delict should be proven. Most importantly, the element of wrongfulness needs to be established in these type of cases. In doing so, the court will ordinarily establish whether a legal duty exists and it will be guided by examining several policy factors.

In *Country Cloud* the court was called upon to decide whether such factors existed for the extension of delictual action for pure economic loss. Briefly, the facts were as follows: The department (defendant) had contracted with a third party (Ilima) for the latter to complete a hospital. In order to comply with its obligations under the construction contract Ilima had borrowed R12 million from Country Cloud (plaintiff). The department, however, cancelled the Ilima contract because of the eventual liquidation of Ilima. Thereafter Country Cloud instituted damages action against the department. According to Country Cloud, the department had incurred liability because it had unjustifiably cancelled the Ilima contract with the intent to repudiate it in circumstances in which it had foreseen the damages Country Cloud would suffer in consequence. The department contended in turn that Country Cloud had failed to establish the element of wrongfulness required for delictual liability.

The court was called upon to consider the imposition of delictual liability in circumstances that had never been imposed before, namely, where a stranger to a contract has suffered economic loss as a result of the intentional repudiation of the contract by one of the contracting parties. In deciding the issue, the court delved in detail into the historical jurisprudence for extension of delictual liability by examining decided cases. In the final analysis, the court took into account two policy considerations that weighed against the imposition of delictual liability. Before dealing with policy considerations, Brand JA dealt with the significance of wrongfulness as one of the elements of delict that has to be proven for the extension of delictual liability for pure economic loss. He stated that “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”.

Then Judge Brand went on to deal with the policy considerations militating against the imposition of an extension to delictual liability in the matter. The first was the indeterminacy
issue that, "holding contracting parties delictually liable for harm suffered by strangers, flowing from the repudiation of their contracts, would raise the spectre of indeterminate liability to a multiplicity of potential claimants". The second factor was non-vulnerability, "that Country Cloud could have taken alternative steps to recover its loss, for example, by claiming repayment from Ilima in terms of the loan contract or taking cession of Ilima's claim against the department".

Hot on the heels of *Country Cloud* and another case dealing with imposition of delictual action for pure economic loss was *Minister for Safety & Security v Scott & Another*. In this case, Scott and his company instituted action against the Minister for payment of damages arising from the alleged unlawful arrest and detention of Scott. This included a claim by Scott's company for loss of contractual profits as a result for being arrested and then a certain contract being cancelled. In dismissing the claim for pure economic loss, JA Theron shared the sentiments expressed by JA Brand in *Country Cloud* in that imposition of liability on the Minister will have unmanageable consequences as it will open the door for indeterminable liability and it "would indeed be untenable to right minded people to hold the Minister liable to Scottco in the circumstances of this matter".

In cementing his findings, JA Theron held that "to have damages imposed on the police for loss of contractual profits in relation to a contract they were unaware of and in circumstances where the arrest of Scott was effected on the basis of him having been the aggressor in a drunken brawl, and where the justification for the arrest can rightly be said to have been merely technical in error, is to cast the net too wide and to land the police with liability for loss that it too remote".

It is evident from the cases discussed above that in order for there to be liability for pure financial loss in delict, there has to be a special relationship between the defendant and plaintiff. It is apparent that our courts have consistently adopted a cautious approach and rightly so having regard to the facts of each particular case weighed against policy considerations. Then the question arises, what does the future hold for delictual liability for pure economic loss? To quote from JA Brand in *Country Cloud* case, "when we abolished the absolute exclusion of liability for pure economic loss, we abandoned the bright line of limitation". In *Country Cloud* and *Scott* one can argue that even though the approach was cautious, it is apparent that our courts will readily abandon the bright line of limitation if the circumstances so dictate.

It would be interesting to note under which circumstances our courts will abandon the bright line of limitation and whether the policy of the insured will respond to such instances or fall under the exclusion as provided in the cover.

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