



Extending Delictual Liability to Repudiating Contracting Parties: *Country Cloud Trading CC v MEC, Department of Infrastructure Development* (715/12) [2013]
ZASCA 161

At the outset, to pique your curiosity and keep you reading it must be noted that the litigant bravely attempted to re-shape our legal landscape by arguing that a third party should be able to sue a contracting party for delictual damages caused to that third party as a result of the contracting party's intentional repudiation of the contract. Successfully? Read on and find out.

Facts

The Department of Infrastructure Development ("Department"), the Respondent, contracted with Ilima Projects (Pty) Ltd ("Ilima"), a construction company, for the completion of the Zola Clinic in Soweto for R480 Million. Ilima borrowed R12 Million from Country Cloud Trading CC ("Country Cloud"). In terms of the loan agreement Country Cloud was to make a profit of R8.5 Million (total repayment: R20.5 Million). After Ilima received the loan from Country Cloud, the Department cancelled the contract which ultimately resulted in the liquidation of Ilima. Country Cloud sued the Department for delictual damages in the amount of R20.5 Million.

In the Supreme Court of Appeal

The High Court erroneously held that the construction contract was invalid on the grounds that the Departments' agent lacked the requisite authority to contract and as a result the Department could not be held liable on the contract. On the contrary, the Supreme Court of Appeal ("Court") held that on a correct interpretation of the law, the agent did have the

requisite authority. The Department then unsuccessfully argued that the contract was validly cancelled as result of Ilima materially misrepresenting its tax status. The Court held that Ilima's tax affairs were in order and a tax clearance certificate was validly issued and presented to the Department.

The Department's final defence which caught the attention of the Court went along the following lines: Country Cloud had failed to establish the element of wrongfulness which is necessary to find delictual liability.

Law

The elements of delictual liability are as follows:

- i. Act/Omission;
- ii. Causation (factual and legal);
- iii. Harm/loss (physical/patrimonial/pure economic);
- iv. To the Plaintiff;
- v. By the Defendant;
- vi. Fault (intention/negligence); and
- vii. Wrongfulness.

This case turned on the element of wrongfulness and as such the Court embarked on a historical overview of this element's place in delictual liability. As a general rule, liability was limited to loss resulting from physical injury to person or property. However, in the *locus classicus* case of *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) liability was extended to include pure economic loss ("*Trust Bank*"). This raised the problem of limitless liability. Realising as such, the Appellate Division in *Trust Bank* enlisted the wrongfulness element to limit when pure economic loss could be claimed.

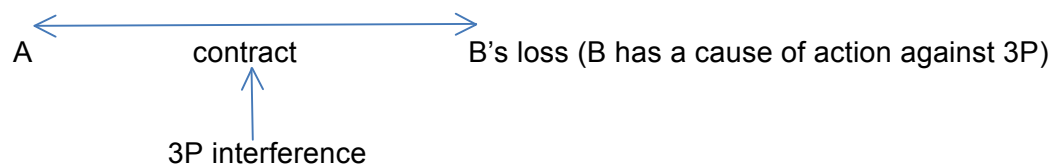
The wrongfulness enquiry is determined by having regard to considerations of legal and public policy. There was a fear that this opened up delictual liability to judicial discretion unfettered by principle. To re-frame this enquiry within principled grounds certain yardsticks were introduced such as "legal duty", "legal convictions of the community" and a "general criterion of reasonableness". In the Country Cloud matter, the Court found that these yardsticks have caused confusion as the distinct elements of wrongfulness and negligence have been conflated and negated in previous cases.

The Court expounded the law on wrongfulness for the purpose of clarity as it appears from the Constitutional Court judgement in *Le Roux v Dey* 2011 (3) SA 274 (CC):

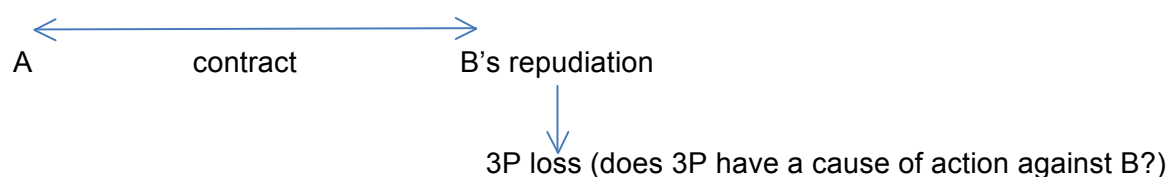
- i. The wrongfulness enquiry is a judicial determination of whether, after establishing all the other elements of delict, it would be reasonable to impose liability on the defendant; and
- ii. This reasonableness enquiry turns on considerations of public and legal policy in accordance with constitutional norms.

As a point of clarity, it must be noted that this reasonableness enquiry has nothing to do with the Defendant's conduct but concerns the reasonableness of imposing liability on the Defendant.

Wrongfulness has been established in cases where a third party has deprived a contracting party from the benefits of a contract that would have fallen to the contracting party but for the third party's conduct [*Dantex Investments Holdings (Pty) Ltd v Brenner and Others* NNO 1989 (1) SA 390 (A)]



However, it is unprecedented in our law that a 3P may hold a contracting party delictually liable for damages resulting from the contracting party's repudiation of a contract.



The Court held that the extension of delictual liability is approached with caution and will not be made in the absence of positive policy consideration in favour of such an extension as per *Lillicrap, Wassenar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A).

Application

The Court found that the only positive policy consideration in favour of extending liability was the established fact that the Defendant intentionally repudiated the contract knowing that it would cause loss to Country Cloud. However, the Court stated that the fact that the Department foresaw the loss to Country was not to be considered as a positive consideration as this is a prerequisite for delictual liability in all cases (foreseeability is examined in the negligence enquiry and is a factor in determining legal causation).

Policy considerations against extension of liability were as follows:

- i. Fear of floodgates (indeterminate liability);
- ii. “vulnerability to risk” i.e. the Plaintiff was unable to avoid the harm in the circumstances. Where the Plaintiff was able to take steps to avoid the harm and failed to do so Courts are less inclined to impose liability;
- iii. Alternative remedies available to recover the loss.

Court’s Conclusion: no extension

Ultimately, the Court held that as Country Cloud could recover the loss by means of contractual claims (against Ilima on the loan agreement or against the Department by taking cession of Ilima’s claim) there were insufficient positive policy considerations to warrant an extension of delictual liability to a repudiating contracting party causing loss to a third party. Furthermore, the Court held that once Ilima is awarded contractual damages i.e. placed in the position it would have been had the Department complied with its obligations, then Country Cloud’s claim would lie with Ilima and not with the Department. Accordingly, the Appeal was dismissed with costs.

Analysis

Strong factors for imposing liability

The Court held that the nature of the fault and the degree of blameworthiness were factors which could be considered in determining wrongfulness. In this regard, the Department had full knowledge of the loan agreement with Country Cloud, intentionally repudiated the contract and advanced specious grounds as a defence. This cumulatively is indicative of a severe degree of blameworthiness on their part and as the fault was of intentional in nature this would appear to be a case for the imposition of liability.

The factors the Court considered against the imposition of liability are open to debate within the factual matrix of this case. The Court was concerned that extending liability would result

in indeterminate liability as it was conceded that there would be no difference between the claim of Country Cloud as to that of, for example, the employees of Ilima, any other creditors or any subcontractors.

However, in my humble opinion, there is a fundamental difference. The Department had intimate details of Country Cloud's loan agreement with Ilima: the parties, the price and terms of repayment where all known to the Department. The Department even went so far as to undertake to repay the loan directly to Country Cloud when Ilima was entitled to its "mobilisation fee". This fee amounted to R20,5 Million (5% out of the contractual fee of R480 Million) that the Department was going to pay to Ilima to re-ignite the construction operation that had stalled. This fee was due 30 days after the conclusion of the contract. The contract concluded on 4 August 2008 and was subsequently cancelled 4 September 2008, 31 days later. This may lead one to infer that the Department was aware of the undertaking and attempted but failed to cancel before the due date.

Given these circumstances, could the Court not have extended liability to contracting parties who have knowledge of the *specific* damage to a *specific* third party that would result from their intentional repudiation of a contract?

Furthermore, the Court appears to have misapplied the "vulnerability to risk" enquiry which examines the steps a Plaintiff *could have taken* to protect itself. The Court expounds this concept, strangely from Australian law jurisprudence but then even more unusually fails to apply that test but rather goes on to discuss the alternative remedies open to Country Cloud. The "vulnerability to risk" enquiry examines what the Plaintiff *could have done at the time* to protect itself from harm not what the Plaintiff *can do now* to claim damages to re-right the wrong. These appear to be separate enquiries that have been conflated by the Court.

Conclusion

In the circumstances, this may have been a case of right intent wrong facts. The attorneys for Country Cloud took a brave position which may yet come to pass given the right intent and the right facts. Our law should not allow for parties to flippantly disregard their contractual obligations, especially in instances where the repudiating party does so with full knowledge of the illegality of his actions and the exact quantum of harm that will result.

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