REPORTABLE

CASE NO: SA 19/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ALWYN PETRUS VAN STRATEN N.O.	**First Appellant**
PROWEALTH ASSET MANAGERS (PTY) LTD (IN LIQUIDATION)	**Second Appellant**

and

NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY	**First Respondent**
SWART GRANT ANGULA	**Second Respondent**

Coram: SHIVUTE CJ, SMUTS JA and HOFF AJA

Heard: **15 March 2016**

Delivered: **8 June 2016**

APPEAL JUDGMENT

SMUTS JA (SHIVUTE CJ and HOFF AJA concurring):

[1] This appeal raises complex questions of delictual liability in respect of a claim brought by the appellants as plaintiffs against the Namibia Financial Institutions Supervisory Authority (Namfisa) as first defendant and against a firm of auditors, Swart Grant Angula (SGA), as second defendant. They are first and

second respondents in this appeal. The delicts contended for relate to breaches of statutory and common law duties by the two defendants. A third defendant was cited. But no relief is sought against her. That defendant did not defend the claims or participate in the proceedings in the High Court or in this court. Reference in this judgment to the defendants is thus to the first and second defendants.

[2] The first plaintiff, A P van Straten, sues in his capacity as the liquidator of the second plaintiff, Prowealth Asset Managers (Pty) Ltd in liquidation (PAM). They are joined by 87 natural persons (as 3rd to 89th plaintiffs) who had invested funds in PAM. They are referred to in this judgment as the investors. Their claims are in the alternative to the claim of the first and second plaintiffs. The total claim is in the sum of N$105 258 568,39.

[3] The plaintiffs assert two claims. One is against Namfisa, asserting that its oversight of PAM was lacking. The second is against SGA as PAM's auditors, contending that SGA should have become aware of a fraudulent scheme perpetrated by the controlling mind behind PAM and should have blown the whistle on the scheme. Both Namfisa and SGA excepted to the particulars of claim on the basis that the particulars did not sustain a cause of action and that they were vague and embarrassing, each raising multiple grounds in support of their respective exceptions. The High Court upheld all the exceptions and found that the particulars cannot sustain a cause of action. This appeal is directed against that judgment.

Claim against Namfisa

[4] The facts pleaded in the particulars of claim are these. On 1 August 2003, the Chief Executive Officer (CEO) of Namfisa, in his capacity as Registrar under the provisions of the Stock Exchange Control Act 1 of 1985 (SEC Act) had licenced PAM in terms of s 4(1)*(f)* of that Act. The CEO of Namfisa in that capacity also approved a certain Riaan Potgieter (the deceased) as PAM's sole portfolio manager. The deceased was sole director and shareholder of PAM and was its controlling mind. PAM was part of a group of interrelated companies in the Prowealth group, owned and controlled by the deceased.

[5] PAM and the other companies in the group were audited by SGA until PAM's liquidation.

[6] After registration, PAM proceeded to do business as an asset manager, soliciting funds from the public for the stated purpose of investing and managing them so as to optimise returns for investors.

[7] The particulars of the claim further plead that PAM had a continuing obligation under the SEC Act to submit quarterly returns and quarterly levy returns as well as audited financial statements within three months from the year end to the Registrar and/or Namfisa.

[8] It is further alleged that Namfisa had a statutory duty of care pursuant to the SEC Act and the Inspection of Financial Institutions Act 38 of 1984 (IFI Act) as well as under common law to ensure that PAM properly complied with its statutory obligations to Namfisa with a view to safeguarding the interests of members of the public who had invested in PAM.

[9] The particulars allege that, in breach of its duty outlined, Namfisa is stated to have negligently 'allowed' PAM to:

- be registered without complying with the requirements for registration;
- conduct operations from inception in 2003 to its demise in 2009 despite the fact that PAM had failed to provide specimen mandates;
- fail to submit the required quarterly returns, financial statements and levy returns; and
- fail to maintain a proper trust account separate from its operational account and keep proper accounting records.

[10] It is alleged that the deceased failed to deposit funds received from the investors into PAM's trust account and instead deposited their funds into other companies in the Prowealth group or into PAM's operational account. The deceased unlawfully reflected those funds as loan accounts in the books of PAM and embezzled those funds to other entities within the Prowealth group as a form of Ponzi scheme and essentially siphoned those funds for himself to maintain an

extravagant lifestyle. These unfortunate facts would appear to have emerged at the time of or very shortly after the death of the deceased.

[11] As a result of Namfisa's alleged negligence to properly supervise PAM's conduct, it is stated that PAM, alternatively the investors, suffered damages in the amount claimed (in excess of N$105 million) representing the total funds of the investors misappropriated by the deceased. The High Court had in separate proceedings declared the deceased liable for the debts of PAM under s 424 of the erstwhile Companies Act 61 of 1973. The deceased's estate was however unable to meet the investors' claims which were admitted by the liquidator against PAM in liquidation which was in turn unable to meet those claims. Hence the action against the two defendants.

<u>Claim against SGA</u>

[12] Although not separately identified, the claim against SGA follows in the second half of the particulars of claim. It is pleaded that, as public accountants and auditors of PAM, SGA would have known that PAM was a registered asset manager and that members of the public would entrust their funds to PAM for investment.

[13] The particulars of claim allege that SGA had a duty to act with the necessary skill and experience and conduct their functions in accordance with the Public Accountants and Auditors Act 51 of 1951 (PAA Act) and the Companies Act and generally accepted accounting practice and accepted auditing standards. It is

further pleaded that SGA would render its services with due professional care required of auditors and accountants and not act negligently.

[14] The claim alleges that SGA breached their duties by negligently –

- failing to report PAM to the Registrar pursuant to the IFI Act;
- assisting the deceased to disguise misappropriated funds from PAM by reflecting them as loans in the financial statements;
- not subjecting the accounting records of PAM to closer scrutiny, despite realising that there was ‘something awry’;
- failing to take steps to bring irregularities to the attention of the relevant authorities;
- knowingly ‘allowing’ the deceased to misappropriate investors’ funds;
- failing to verify and check information supplied to them by the deceased in their audits;
- by not conducting basic audit functions and testing which would have disclosed the deceased’s web of fraud and theft;
- by failing to ensure that PAM’s financial statements were complete and accurate and valid and not verifying the deceased’s assertions in those statements; and
- by failing to discover and disclose the preceding conduct of PAM or the deceased.

[15] The claim against SGA concluded with an assertion that the result of its negligence was that the deceased was able to misappropriate funds belonging to PAM in the sum of N$105 698 057,27 which the company (PAM) owes the investors.

[16] Both defendants sought and were provided with further particulars and, in the case of SGA, further and better particulars as well. The particulars of claim underwent amendment after further particulars were provided. Both Namfisa and SGA excepted to the claim.

Principles governing determination of exceptions

[17] Before discussing the exceptions taken by Namfisa and SGA, the approach to be followed in the determination of exceptions, which was common cause between the parties, is briefly first set out. SGA's exception is taken on the grounds of the claim being vague and embarrassing (although it is stated in the alternative that the particulars of claim do not disclose a cause of action). Namfisa raises both grounds as bases for its exception.

[18] Where an exception is taken on the grounds that no cause of action is disclosed or is sustainable on the particulars of claim, two aspects are to be emphasised. Firstly, for the purpose of deciding the exception, the facts as alleged in the plaintiff's pleadings are taken as correct.[1] In the second place, it is incumbent upon an excipient to persuade this court that upon every interpretation

[1]*Marney v Watson & another* 1978 (4) SA 140 (C) at 144F.

which the pleading can reasonably bear, no cause of action is disclosed.[2] Stated otherwise, only if no possible evidence led on the pleadings can disclose a cause of action, will the particulars of claim be found to be excipiable.[3]

[19] Whether an exception on the ground of being vague and embarrassing is established would depend upon whether it complies with rule 45(5) of the High Court Rules. This rule requires that every pleading must contain a clear and concise statement of the material facts on which the pleader relies for his or her claim with sufficient particularity to enable the opposite party to identify the case that the pleading requires him or her to meet.[4] Assessing whether a pleading is vague and embarrassing is now to be undertaken in the context of rule 45 and the overriding objectives of judicial case management. Those objectives include the facilitation of the resolution of the real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable by saving costs by, among others, limiting interlocutory proceedings to what is strictly necessary in order to achieve a fair and timely disposal of a cause or matter.[5]

[20] The two-fold exercise in considering whether a pleading is vague and embarrassing entails firstly determining whether the pleading lacks particularity to

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[2] *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F-G followed by the High Court in *Namibia Breweries Ltd v Henning Seelenbinder, Henning & Partners* 2002 NR 155 (HC) at 158H-J. (*Seelenbinder*).

[3] *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526D-G; see also *Seelenbinder* at 159A.

[4] *Scania Finance Southern Africa (Pty) Ltd v XXX Trucking CC* (I.2166-2014) [2015] NAHCMD 173 (30 July 2015).

[5] Rule 1(3)*(b).*

the extent that it is vague. The second is determining whether the vagueness causes prejudice.[6] The nature of the prejudice would relate to an ability to plead to and properly prepare and meet an opponent's case.[7] This consideration is also powerfully underpinned by the overriding objects of judicial case management in order to ensure that the real issues in dispute are resolved and that parties are sufficiently apprised as to the case that they are to meet.

Namfisa's exception

[21] Namfisa excepted to the claim in its amended form on the grounds that it lacks averments necessary to sustain a cause of action or was vague and embarrassing. Namfisa raised five grounds in support of its exception.

[22] The first ground concerned the failure to cite the Registrar whose duties were allegedly breached and what was termed the inconsistent reference to Namfisa and the Registrar interchangeably in the claim.

[23] The exception points out with reference to s 4(1)*(f)* of the Stock Exchange Act that the power to register and licence asset and portfolio managers vests in the Registrar who has not been cited as a defendant. Namfisa accordingly contends that the correct party has not been cited and, on the strength of authority,[8] submits that it is competent to except to the claim on this basis.

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[6]*Trope v South African Reserve Bank & another* and two other cases 1992 (3) SA 208 (T). See generally *Lockhat & others v Minister of Interior* 1960 (3) SA 765 (D) at 777A-118A.

[7]*Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA 297 (C) at 298–299.

[8]*Marney v Watson & another* at 146.

[24] The second ground related to PAM admitting the claims of the investors against it in the context of the deceased being declared liable as contemplated by s 424 of the erstwhile Companies Act 1973. It is contended that Van Straten's representative claim and PAM's claim are non-suited, given the admitted liability of the deceased and PAM because as they cannot rely on their own wrongful acts to claim damages against Namfisa.

[25] The third ground relates to the assertion in the particulars of claim that the damages were a foreseeable consequence of Namfisa's alleged breaches. Namfisa points out that wrongful acts on the part of the Registrar (and not Namfisa) are however pleaded.

[26] The fourth ground is on a similar basis to the second with reference to the allegation that Namfisa 'allowed' PAM to act in violation of several statutes. PAM thus pleads its own wrongful conduct in support of the claim.

[27] The fifth ground is similar to the first and third. It refers to para 10 which relies upon alleged wrongful acts of the Registrar yet proceeds in para 11 to contend that 'in the premises, Namfisa had a duty of care pursuant to the Acts . . . . 'and in common law to ensure that (PAM) complies with its obligations referred to above'.

[28] The exception complains that the particulars fail to lay a basis for a breach by Namfisa of its statutory duties (as opposed to those which are imposed upon the Registrar) or a breach of a duty under common law.

SGA's exception

[29] Three grounds to SGA's exception remain relevant. (A fourth contained in the exception was not pursued in argument).

[30] The first ground explains that the cause of action pleaded by PAM (in its own right and through Van Straten in his representative capacity) does not delineate the claim as is required by law. It is thus directed at the formulation of the claim. It is contended that SGA's duties to PAM would need to arise either by contract or delict and that this needs to be stated. If the claim is based upon contract, the source, nature and ambit of the duties and their inception date have not been pleaded. If the duties pleaded are founded in delict, then the exception contends that the claim is not competent because it is a claim for pure economic loss asserted in a contractual setting which is not one of categories recognised as an extension to the Aquilian action.

[31] The second ground of the exception is directed at the claim asserted by the investors against SGA, raised in the alternative. The basis for this claim is that if SGA had not negligently performed its audit function and had blown the whistle on the deceased, then the latter would not have been able to misappropriate money belonging to PAM, reflecting their investments. The exception complains that the

facts pleaded by the plaintiffs are insufficient to give rise to a cause of action against SGA and that they neither establish wrongfulness on the part of SGA nor meet the statutory requisites for such a claim set by the PAA Act.

[32] The third ground also concerns the formulation of the secondary claim by the investors against SGA. It is contended that the facts pleaded do not establish a legal duty on the part of SGA to the investors or a causal link with between any act or omission by SGA and the loss the investors have suffered.

Approach of the High Court

[33] The exceptions were argued in the High Court on 8 October 2013 and judgment was delivered on 31 January 2014. The court would appear to have found that there were anomalies in the plaintiff's averments with reference to the failure to cite the Registrar and not properly specify whether the claim against SGA was grounded in contract, delict or statutory obligations.

[34] The High Court concluded that the averments in the particulars of claim cannot sustain a cause of action. But it did so without explaining in which respect(s) or stating which of the several grounds raised by the two exceptions were well founded. The court below proceeded to uphold 'first and second defendant's exceptions' without specifying which grounds succeeded and afforded the plaintiffs 15 days to amend their particulars of claim. Each defendant also secured a cost order in its favour. The plaintiffs appealed against that judgment and order.

[35] Counsel for the appellants, Mr Frank, SC, assisted by Mr Schickerling, complain with some justification that the High Court did not deal separately with the different exceptions and appeared to have conflated some of them. But more importantly the complaint is made that it is impossible for the appellants to amend their particulars pursuant to the court order as the judgment does not delineate in which respects the pleading was lacking and which of the several grounds were upheld.

[36] Counsel for both respondents each argued that the High Court was correct in upholding their client's respective exceptions but neither relied upon the reasoning contained in the judgment.

[37] By not separately dealing with the grounds of the exceptions and not specifying which grounds succeeded, the approach of the High Court is not helpful. Parties are after all entitled to know in which respects their pleadings are found wanting so that those aspects can, if possible, be addressed in the subsequent exercise of amending the offending pleading in the wake of the judgment. This court is accordingly obliged to approach the exceptions afresh.

Proceedings on appeal: condonation

[38] At the commencement of the proceedings on appeal, the appellants moved a condonation application for the late filing of the record because of a mistake on the part of their legal practitioners as to the shorter time limit applicable in respect

of the filing of records involving exceptions (6 weeks as opposed to three months in other cases). Security was also provided late and condonation was sought for that as well. Only Namfisa had noted opposition to the condonation application. During argument, its counsel informed the court that it no longer opposed the appellants' condonation application. As a detailed explanation had been provided for the non-compliances which were by no means flagrant, an order was accordingly granted condoning these non-compliances as well as those of the respondents, in filing powers of attorney.

Submissions on appeal in respect of Namfisa's exception

[39] Appellants' counsel referred to s 2 of the Namibia Financial Institutions Act 3 of 2001 (Namfisa Act) which established Namfisa as a juristic person.

[40] Counsel also referred to Namfisa's power[9] to appoint employees to assist it in performing its functions which include the supervision of the business of financial institutions and financial services.[10] Counsel pointed out that Namfisa's board appoints its CEO who is 'responsible for the day to day management and administration' of Namfisa. It was also pointed out that the CEO also acts as Registrar under the SEC Act and the IFI Act.

[41] Counsel argued that Namfisa is liable for the delicts of its CEO pursuant to principles of vicarious liability. This was the way in which the plaintiffs' case was

[9] In s 4(2)*(g)*.

[10] In s 3*(a)*.

pleaded.[11] It was argued that it was as a consequence not necessary to cite the Registrar as a party and the proceedings were unlike that of a judicial review when challenging the Registrar's decision making[12] (where the Registrar would need to be cited).[13]

[42] Appellants' counsel referred to the particulars[14] where it is pleaded that Namfisa's CEO's responsibility for the day-to-day management of Namfisa includes his capacity as Registrar under the two laws in question.

[43] The other main ground of Namfisa's exception, encompassing both its second and fourth grounds, is based upon a contention that Van Straten in his representative capacity and PAM were co-perpetrators with the deceased of the wrongs alleged against Namfisa. Appellant's counsel first pointed out that this complaint would not affect the investors' claims. Counsel also argued that this ground of the exception was flawed because it could not apply against Van Straaten acting on behalf of the *concursus creditorum* and also not against the company in liquidation. It was argued that even if PAM were to be vicariously liable for the actions of the deceased, this would not mean that it was a co-perpetrator of the deceased's wrongs. Counsel also contended that criminal activities and intent

[11]Para 4 of the particulars of claim.

[12]*Young v Coega Development Corporation (Pty) Ltd* 2009 (6) SA 118 (ECP); *Cabidiya v Lobi* 1985 (2) SA 361 (C) 364E-H.

[13]Rule 76(1) of the High Court Rules.

[14]Para 10.

on the part of a company official is not automatically attributable to the company. Counsel relied upon *S v Van den Berg & others*[15] in support of this proposition.

[44] Namfisa's third ground objected to the particulars because they failed to plead sections of the Acts relied upon which made provision for the damages claimed. Appellant's counsel submitted that the requisites for an action based on a breach of statutory duties[16] under those Acts were met in the particulars of claim. It was conceded that the Namfisa Act made no express provision for a remedy in the form of a damages action for a breach of statutory provisions. But it was argued that its supervisory powers were for the benefit of those procuring financial services, such as investors, and to protect them from unscrupulous service providers. Counsel also submitted that the specific sections in the Acts relied upon for a breach were referred to.

[45] The fifth ground of Namfisa's exception disputes that there was a duty under common law on the part of Namfisa to ensure compliance with the dictates of legislation governing the financial services sector. Appellants' counsel contended that the requisites for an Aquilian action were met in respect of the claim against Namfisa based on common law. It was argued that the requirement of wrongfulness concerned the legal convictions of the community and referred to factors to be considered in that context. These included whether an action would impose an undue burden on Namfisa, the nature of the relationships between the

[15] 1979 (1) SA 208 (D) at 212.

[16] *Da Silva and another v Coutinho* 1971 (3) 123 (A).

parties, their proximity and the dependence upon a defendant for advice and information and what the public would expect from Namfisa.

[46] Appellants' counsel argued that apart from the breach of statutory duties for liability, a common law basis was also established on the pleadings.

[47] Mr Maleka, SC, who together with Mr Hinda, SC, and Mr Namandje appeared for Namfisa, stressed that the Registrar is a statutory functionary with duties set out in the SEC Act and the IFI Act. Counsel contended that the particulars inconsistently and interchangeably referred to Namfisa and the Registrar. The latter was vested with the statutory duties contended for. This meant, according to counsel, that the wrong party had been cited. Counsel also pointed out that the Registrar exercises independent powers under those Acts which are not subject to control of the board of Namfisa whereas the powers of its CEO under the Namfisa Act are subject to the directions of Namfisa's board. Counsel argued that the present formulation of the particulars, without citing the Registrar and with the inconsistent and interchangeable reference to the Registrar and Namfisa rendered them excipiable.

[48] In turning to the second ground, Namfisa's counsel referred to the investors' claim which had been admitted by Van Straten against PAM and also to the deceased being declared liable as contemplated by s 424 of the erstwhile Companies Act applicable at the time.[17] It was argued that Van Straten and PAM

[17] Act 61 of 1973. References in this judgment to the Companies' Act are to the then applicable Act 61 of 1973.

are thus non-suited to be co-claimants with the investors against Namfisa. It was argued that the related fourth ground also rendered the particulars similarly excipiable – by pleading that Namfisa allowed PAM to commit wrongful acts and that PAM would also be non-suited on that score.

[49] Namfisa's counsel further argued that the first principle of the law of delict is that everyone is liable for loss caused to them. Only when an act or omission is wrongful, negligent and causes loss to a plaintiff will there be liability. Counsel also argued with reference to authority[18] that accountability of organs of State has not evolved into a general liability for imperfect administrative actions. As the claim against Namfisa was for pure economic loss, the criterion of wrongfulness would assume special importance. As opposed to physical harm, conduct causing pure economic loss is not *prima facie* wrongful. The factors which may be relevant to determine the existence of a legal duty are, according to Namfisa's counsel, those set out in *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd.*[19] Applying the test recently restated in *Jaffit*,[20] counsel argued that the existence of a common law legal duty had not been established on the pleadings.

SGA's exception

[50] Counsel for the appellant contended that there was no need to have dealt with the claim against SGA as a contractual claim as the claim was in delict and

[18] *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA).

[19] 1982 (4) SA 371 (D) at 384 as followed by *Jaffit v Garlicke & Bousfield Inc* 2012 (2) SA 562 (KZP) at 568.

[20] At 569 – 571.

based upon the breach of statutory duties by SGA – and is in any event not based upon a breach of a contractual term. It was argued that the approach in *Lillicrap, Wassenaar & Partners v Pilkington Brothers*[21] *(Lillicrap)* did not preclude the appellants' claims against SGA which were not based upon a negligent breach of contract but rather on a breach of duties which arise from the PAA Act, international standards of auditing generally accepted accounting practice (GAAP) and the Companies Act. Counsel contended that the appellants were not arguing for concurrent delictual and contractual liability because statutory duties had been breached.

[51] Counsel referred to s 282 of the erstwhile Companies Act which required a company's auditor 'to report to its members in such manner and on such matters as are prescribed by this Act and carry out all other duties imposed on him by this Act or any other law'. Counsel argued with reference to authority[22] that it is the auditor's duty to ascertain and state the true financial position of the company at the time of the audit and ascertain that position by examining the books of that company. This task would include a duty to take care that errors are not made, including errors of commission or downright untruths.[23] This overall task and statutory duty, it was argued, requires an auditor to act with the skill, care and caution which a reasonable competent auditor would use. Counsel also relied upon certain of the specific duties of an auditor set out in s 300 of the then Companies Act.

[21] 1985 (1) SA 475 (A).

[22] Meskin*, Henochsberg's on the Companies Act* Vol 1, p 537.

[23] Meskin p 537–538.

[52] Counsel also contended that whatever the contractual terms of SGA's engagement were to PAM, they could not have excluded an auditor's statutory duties. This was, he argued, by virtue of s 247 of the Companies Act. This section precludes parties from agreeing upon contractual terms which would purport to exempt any auditor from liability which would otherwise attach in respect of any negligence or breach of duty or indemnifying the auditor against any such liability. Counsel also relied upon s 26(5)*(a)* of the PAA Act which makes an auditor liable for the negligent performance of duties.

[53] In respect of the second ground of SGA's exception, asserting that the particulars did not establish any duty of care on the part of SGA to the investors, counsel for the appellants said that the case against SGA was not based upon expression of 'any opinion or certificate given or report made or statement, account or document certified' in the ordinary course of SGA's duties. Their case instead rested on the alleged failure on the part of SGA to speak up when they would have been expected to do so. It was argued that the existence of such a duty would in any event best be determined at trial as had been held in *Axiam Holdings Ltd v Deloitte & Touche.*[24]

[54] The third ground of exception objected to the claim by the investors on the basis that the particulars do not reveal a legal duty on the part of SGA to the investors and do not establish a causal link between an act or omission on the part

[24] 2006 (1) SA 237 (SCA).

of SGA and any loss suffered by the investors. Appellants' counsel argued that the complaints directed at the formulation of the investors' claim are based upon a misinterpretation of the claim. It was pointed out that the claim is not based upon a mis-statement by SGA but rather that SGA had failed to blow the whistle on the deceased's fraudulent conduct when SGA had knowledge of those irregularities. The whistle blowing would have entailed reporting deceased's irregularities to Namfisa and to take steps required by the PAA Act.

[55] SGA's counsel, in a well-researched argument, countered that the appellants' claim against SGA had not been clearly framed as a contractual or delictual claim or was an impermissible and confusing conflation of both a contractual and delictual claim. In essence, I understood counsel to contend that appellants' characterisation of their claim as delictual was unsound in law and that the contractual relationship between PAM and SGA (by virtue of the latter's appointment as auditor) would preclude a claim in delict upon an application of the approach set out in *Lillicrap* which has been consistently followed by the South African Supreme Court of Appeal[25] (SCA) and approved by that country's Constitutional Court.[26]

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[25] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 10. *(Two Oceans); Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) para 12*; Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA); *Fourway Haulage; Chartaprops 16 (Pty) Ltd & another v Silberman* 2009 (1) SA 265 (SCA); *AB Ventures Ltd v Siemans Ltd* 2011 (4) SA 614 (SCA); *Steyn NO v Ronald Bobroff & Partners* 2013 (2) SA 311 (SCA); *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2014 (2) SA 214 (SCA); *South African Hang and Paragliding Association & another v Bewick* 2015 (3) SA 449 (SCA) (Bewick)*; Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA).

[26] *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC); *Country Cloud.*

[56] Although the particulars of claim made no direct reference to a contractual relationship between SGA and PAM, SGA's counsel argued that the reference to SGA 'acting' as PAM's auditors and PAM 'engaging' auditors made it clear that the appointment and engagement of SGA was contractual and that the statutory duties contended for would, if proven, arise as terms of that contractual relationship implied by law. It was argued that the basis of the claim lay in a contractual relationship with SGA having a duty to act as auditor with the necessary skills and experience and render services with due professional care.

[57] Counsel for SGA relied upon a recent judgment of the SCA in *PriceWaterhouseCoopers Inc & others v National Potato Co-operative Ltd & another*[27] (PWC) where Wallis JA found that the nature of the relationship in a similar setting is contractual.

[58] SGA's counsel argued that it would not be sustainable for the appellants to assert a delictual claim against SGA in this contractual setting and that this would render PAM's claim excipiable for this reason upon an application of *Lillicrap.* The claim was after all for economic loss and did not flow from an injury to the person or damage to property. On the strength of *Lillicrap*, counsel pointed out that contractual and delictual claims would only lie against the same defendant where the breach of contract simultaneously constitutes a delict against the wronged contractual party in two circumstances. They are where the impugned conduct, apart from constituting a breach of contract, also infringes a legally recognised

[27] [2015] 2 All SA 403 (SCA).

interest which exists independently of the contract (such as bodily integrity – where a surgeon operates negligently on a patient).[28] The second instance is where an independent delict – not consisting of a breach of a term of the contract – causes pure economic loss. SGA's counsel argued that neither of these circumstances applies in respect of the claim against SGA and that PAM's claim was in reality one for a breach of an audit contract by alleging that SGA failed to conduct their functions in accordance with the PAA Act and in compliance with international auditing standards, GAAP and the Companies Act. SGA's counsel argued against an extension to the Aquilian action to claims for pure economic loss in a contractual context for the reasons set out in *Lillicrap*.

[59] Counsel for SGA also argued that no case was made out for a legal duty owed by SGA to the investors. It was contended that third parties unknown to the auditors could not be on the same footing as a claim by an audit client, given the proximity of the relationship of the latter. Yet the investors' claim is pleaded as co-extensive on the same allegations as PAM's. SGA's counsel submitted that the pleadings did not disclose a sufficiently proximate special relationship between SGA and the investors to give rise to liability by SGA to them.

<u>Namfisa's exception</u>

[60] The grounds raised in Namfisa's exception may conveniently be grouped into three categories, as was done by Namfisa's counsel in argument.

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[28] *Lillicrap* at 499 See also *Van Wyk v Lewis* 1924 AD 438.

[61] In the first instance, the objection relates to the non-citation of the Registrar and the interchangeable reference in the particulars of claim to the Registrar and Namfisa. Secondly, the objection is that PAM's and Van Straaten's representative claims are non-suited, given the admitted liability of the deceased and PAM as well as PAM's involvement in the alleged delict. Finally, an objection is made to the pleading of wrongfulness which is with reference to the Registrar, yet Namfisa is alleged to have had a duty to care in the pleadings. These categories are dealt with in turn.

Non-citation of the Registrar

[62] The particulars of claim cite Namfisa as a juristic person established under its empowering legislation (the Namfisa Act) and also state the following:

> '4.1 The Chief Executive Officer also acts as the appointed Registrar pursuant to the Stock Exchange Control Act, Act 1 of 1985 and the Inspection of Financial Institutions Act, Act 38 of 1984. These functions thus also fall within the course and scope of his employment with Namfisa. The said Chief Executive Officer is hereinafter referred to as the "Registrar".
>
> 4.2 Namfisa, in terms of its establishing Act and through the position of its Chief Executive Officer as Registrar under various statutes referred to below, is by virtue of section 3 of its establishing Act the body in overall superintendence of financial institutions in Namibia.'

[63] The pleadings further allege[29] that the CEO, in his capacity as Registrar pursuant to the SEC Act, registered and licenced PAM in terms of s 4(1)*(f)* of that Act and the deceased as portfolio manager.

[64] It is further alleged that this registration and licencing afforded PAM to do business as an asset manager (until its liquidation).

[65] PAM's statutory obligations upon registration and in operating as an asset manager are then set out. Included in these are submitting quarterly returns, levy returns and copies of financial statements to 'the Registrar and/or Namfisa'.[30]

[66] Knowledge is imputed to the Registrar as to the consequences of registration.[31] It is then pleaded:

> 'In the premises, Namfisa had a duty of care pursuant to the Acts referred to above as well as such a duty in common law to ensure (PAM) complies with its obligations referred to above . . . .' (Emphasis supplied.)[32]

[67] The following paragraph[33] pleads the breach as follows:

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[29] Para 7.

[30] Para 9.2.

[31] Para 10.

[32] Para 11.

[33] Para 12.

> 'In breach of the aforesaid duty, Namfisa allowed (PAM) to "act in conflict with certain statutory provisions and enabled the deceased to defraud the investors and embezzle their funds."' (Emphasis supported).

[68] The paragraph which follows alleges that as a result of Namfisa's negligence damages were suffered.

[69] The complaint is that the exercise of the Registrar's powers and functions are independently exercised under those Acts and are not subject to the supervision and control of the board of Namfisa and that the pleadings also confuse the conduct of the Registrar with that of Namfisa. The latter's negligence is asserted and not the former.

[70] Namfisa's first function referred to in its empowering legislation[34] is to exercise supervision over the business of financial institutions and over financial services in terms of its own Act 'or any other law'. Financial institutions are defined in the Namfisa Act to include a person contemplated in s 4(1) of the SEC Act (and thus an asset manager). Other financial institutions are included such as chartered accountants, registered pension funds, friendly societies, money lenders under the Usury Act,[35] unit trusts schemes, registered medical aid funds and short- and long-term insurers and insurance agents and brokers.[36]

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[34]In s 3.

[35]Act 73 of 1968.

[36]Section 1.

[71] Financial services are also widely defined in the Namfisa Act.[37] Almost all of the financial institutions which Namfisa supervises have their own separate legislation governing registration and the conduct of those services. Many of those laws provide for the appointment and powers and functions of a registrar. In the schedule to the Namfisa Act, those laws were all amended when the Namfisa Act was passed to provide that the person appointed as registrar under each of those laws is the CEO of Namfisa. By virtue of his or her employment with Namfisa, the CEO exercises those functions in the legislation governing each of those financial institutions. The CEO does so on behalf of Namfisa.[38]

[72] The overall supervisory power of Namfisa and the plethora of legislation in turn which governs and regulates financial institutions and financial services are thus interconnected by Namfisa's CEO performing the function of registrar under each law by virtue of his or her employment as CEO. Those supervisory powers are backed up by the provisions of the IFI Act to enforce those powers.[39]

[73] The CEO of Namfisa is appointed by Namfisa's board in consultation with the Minister of Finance. The CEO is under s 5 of that Act responsible for the day-to-day management and administration of Namfisa and undertakes as part of his or her employment with Namfisa the functions of registrar or regulator under the several of the laws governing financial institutions.

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[37]In s 1.

[38]See *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 20.

[39]See *Platinum Asset Management (Pty) Ltd v Financial Services Board* 2006 (4) SA 73 (W) para 124.

[74] Whilst I agree with Mr Maleka that certain of the functions such as registration referred to in the particulars are to be exercised independently and not under the direct control and supervision of the board, it does not necessarily follow that Namfisa would not be vicariously liable for the actionable negligent execution of those functions, given the principles of vicarious liability because the CEO exercises those functions by virtue of his or her employment with Namfisa. Plainly the registrar would need to be separately cited if his or her decisions were to be taken on review by virtue of rule 76(1) of the High Court Rules. But it does not follow that the registrar would need to be separately cited in a damages action of the kind in this matter.

[75] I agree with Namfisa's counsel that the particulars of claim could have been better formulated in the references to the registrar and Namfisa. Sub-paragraphs 4.1 and 4.2 however serve to clarify that Namfisa is sought to be held vicariously liable by reason of the conduct of its CEO <u>acting as registrar</u> under the SEC and IFI Acts and by virtue of Namfisa's overall oversight function of financial services industry through its CEO exercising those functions in the course of his employment. The interchangeable reference to Namfisa and the registrar, although inelegant pleading, does not in my view render the particulars as impermissibly vague and embarrassing because Namfisa is not prejudiced by the vagueness created by it. Namfisa is in my view not prejudiced in its ability to plead to the claim as a consequence and is sufficiently apprised as to the case it is to meet.

PAM being a co-perpetrator?

[76] The averments in particulars of claim do not in my view render PAM a co-perpetrator of the fraudulent conduct of the deceased.

[77] The principles gathered from earlier Appellate Division cases and usefully summarised in *S v Van den Berg*[40] find application:

> '(a) that on account of a company's corporate status it is quite possible in law for a director, or even the board of directors, to defraud his or their own company and,
>
> (b) that a company may be thus defrauded notwithstanding the fact that all the members of its board, which is usually regarded as its controlling mind, are aware of the falsity of a representation made to it.'

[78] This is further explained in *S v Van den Berg*[41] with reference to a speech by Viscount Dunedin in *J C Houghton & Co v Northard, Lowe and Wills*[42] quoted with approval by the Appellate Division in *R v Kritzinger*[43]:

> 'The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company . . . . But what if the knowledge of the director is the knowledge of director who is himself *particeps criminis*, that is, if the knowledge of an infringement of the right of the company is only brought home to the man

[40] At 212E-F.

[41] At 212G-H.

[42] 1928 AC 14.

[43] 1971 (2) SA 57 (A).

> who himself was the artificer of such infringement? Common sense suggests the answer, but authority is not wanting. In *In re Hampshire Land Co* (1896) 2 Ch 743 at 749, Vaughan Willams LJ expressed himself thus: "If Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is guilty of irregularity - a breach of duty in respect of these transactions - the same inference is to be drawn as if he had been guilty of fraud.'

[79] The principle to be extracted from cases according to *Van den Berg* is that the knowledge of the director or of the board of directors, which is usually imputed to the company, is not so imputed if the director himself or herself or the board itself is a *particeps criminalis*.[44]

[80] This objection to the pleading must accordingly fail.

Wrongfulness in respect of Namfisa

[81] This ground of exception took issue with the assertion of a delictual claim against Namfisa, particularly in respect of the element of wrongfulness although causation was also raised in the exception.

[82] SGA's exception also asserts that the delictual element of wrongfulness has not been established on the pleadings in the claim against it. This brief discussion of wrongfulness also applies to that exception.

[44] At 213 A.

[83] It has been emphasised that the starting point in the law of delict is that negligent conduct giving rise to loss is not actionable unless it is also wrongful.[45] Aquilian liability provides an exception to this rule[46]. Liability for the loss arises if the act or omission of the defendant had been wrongful and negligent and caused the loss in question. Where the negligent conduct manifests itself in a positive act which causes physical harm to the person or damage to property of another, the culpable conduct is *prima facie* wrongful.[47]

[84] With negligent omissions causing pure economic loss, the position is different. Wrongfulness is not presumed and would depend upon the existence of a duty not to act negligently.[48] Whether such a duty exists is a matter of judicial determination according to criteria of public and legal policy consistent with the norms articulated in the Namibian Constitution.[49] Stated differently, whether the legal convictions of the community in the light of constitutional norms require that the omission to act be regarded as wrongful.

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[45]*Telemax*; *Local Transitional Council of Delmas v Boshoff* 2005 (5) 514 (SCA) para 19 *(Delmas)*; *Two Oceans.*

[46]*Telematrix* para 19.

[47]*Delmas* para 19. *Gouda Boerdery BK v Transnet* 2005 (5) 490 (SCA) para 12.

[48]*Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2005 (1) SA 1 (CC) para 22. *(Country Cloud)*

[49]*Bewick* para 5; *Moolman and another v Jeandre Development CC* Case No SA 50/2013, unreported, 3/12/2015 para 65.

[85] Where negligent conduct which causes pure economic loss is however not wrongful, public and legal policy considerations would determine that there should be no liability for a potential defendant, despite the presence of negligence. That defendant would enjoy immunity for that conduct, whether negligent or not.[50]

[86] As was stressed in *Country Cloud,*[51] the common law is generally reluctant to recognise extensions to the Aquilian action in recognising pure economic loss claims and that wrongfulness would need to be positively established. At an exception stage, this requires that plaintiffs allege wrongfulness and plead the facts relied upon to support that essential allegation.[52]

[87] The rationale behind the reluctance on the part of the courts to extend the Aquilian action to cases involving pure economic loss and the role of wrongfulness were further explained and emphasised in *Country Cloud* in the following way:

> '[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". 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

[50] *Telematrix* para 14; *Delmas* para 19; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* para 10; *Jaffit v Garlicke & Bousfield Inc* para 40.

[51] *Country Cloud* paras 22 – 23.

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

> shut-downs, expenses and loss of profits to businesses that depend on electricity".
>
> [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 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.'[53] (Footnotes excluded.)

[88] The claims against both Namfisa and SGA are for pure economic loss. The question arises as to whether it would be reasonable to impose liability upon Namfisa to accord with the legal convictions of the community for the alleged breaches. This question has been regarded as an open-ended and flexible one.[54]

[89] Mr Maleka argued that as far as organs of State are concerned, the law has not evolved into general liability for damages for imperfect administrative actions, relying on *Olitzki*. That contention is sound. But the breach of statutory duties complained of in this matter is distinguishable from the position in *Olitzki* where the act complained of concerned the exercise of a discretion in the taking of administrative action (in a procurement context).

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[53]Paras 24 and 25.

[54]*Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) paras 11 – 14.

[90] In considering whether unreasonable, arbitrary and irregular conduct in allocating a tender would constitute a civil wrong actionable at a plaintiff's instance for loss of profits by an unsuccessful tenderer, the SCA in *Olitzki* framed the nature of the enquiry as follows:

> '[10] In other words, did the section impose a legal duty on the defendants to refrain from causing the plaintiff the kind of loss it claims it suffered?
>
> [11] It is well established that in general terms the question whether there is a legal duty to prevent loss depends on a value judgment by the court as to whether the plaintiff's invaded interest is worthy of protection against interference by culpable conduct of the kind perpetrated by the defendant. The imposition of delictual liability (as Prof Honoré has pointed out) thus requires the court to assess not broad or even abstract questions of responsibility, but the defendant's liability for conduct "described in categories fixed by the law". This process involves the court applying a general criterion of reasonableness, based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community and now also taking into account the norms, values and principles contained in the Constitution. Overall, the existence of the legal duty to prevent loss "is a conclusion of law depending on a consideration of all the circumstances of the case".
>
> [12] Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation, since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent. But where a common-law duty is at issue, the answer now depends less on the

> application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is "just and reasonable" that a civil claim for damages should be accorded. "The conduct is wrongful, not because of the breach of the statutory duty *per se*, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right." The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.'[55] (Footnotes excluded.)

[91] The SCA concluded that it could find no basis when interpreting the relevant statutory and constitutional provisions and no applicable principle of public policy entitling that plaintiff to claim its lost bargain in that procurement context. It did so after considering the statutory provisions and compelling public policy issues such as the resultant substantial burden on the public purse which would involve a double imposition to the State if the action were to be accorded.

[92] This approach was subsequently followed by the Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape*[56] where that court rejected a claim for out of pocket expenses of a successful tenderer. Moseneke DCJ, writing for the majority, summarised the considerations to be taken into account in an enquiry into wrongfulness in the following way:

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[55] 2001 (3) SA 1247 (SCA).

[56] 2007 (3) SA 121 (CC).

> 'Our Courts - *Faircape, Knop, Du Plessis and Duivenboden* - and courts in other common-law jurisdictions readily recognise that factors that go to wrongfulness would include whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party; whether there are alternative remedies such as an interdict, review or appeal; whether the object of the statutory scheme is mainly to protect individuals or advance public good; whether the statutory power conferred grants the public functionary a discretion in decision-making; whether an imposition of liability for damages is likely to have a 'chilling effect' on performance of administrative or statutory function; whether the party bearing the loss is the author of its misfortune; whether the harm that ensued was foreseeable. It should be kept in mind that in the determination of wrongfulness foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant. The ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.'[57]

[93] The question arises as to whether an interpretation of the statutes in question contemplate affording persons in the position of PAM or the investors the right to claim delictual damages against Namfisa.

[94] The statutes relied upon for Namfisa's alleged breaches do not themselves grant a right of action. Nor do they expressly prohibit recourse to an action for damages. Nor do they provide an alternative remedy.

[95] Mr Maleka argued on behalf of Namfisa that s 31 of the Namfisa Act would indicate a statutory intention that it should not be held liable in damages. Section 31 provides under the heading 'limitation of liability':

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[57] *Steenkamp* para 42.

> 'The Minister, a member or an alternate member of the board, a member of a committee, the chief executive officer or any other employee of the Authority or a member of the board of appeal is not liable in respect of anything done or omitted to be done in good faith in the exercise of any power or the performance of any duty under this Act or any other law.'

[96] Mr Frank for the appellants countered in reply that this section would have the opposite affect and would be restrictively construed to preclude personal liability of the officials listed.

[97] It would seem to me that s 31 seeks to introduce a type of immunity as a defence in the form of a ground of justification for conduct which is *prima facie* wrongful and would otherwise give rise to delictual liability. This form of statutory immunity as a defence is directed at the wrongfulness element of delictual liability. It would be a defence to be raised and pleaded which would attract an onus upon Namfisa to plead and prove.[58] This would be a matter to be determined at the trial. But Mr Maleka, in his oral argument (and not in his written submissions) has referred to s 31 as an indication of a statutory intention against inferring that a breach of statutory provisions would give rise to a claim.

[98] Quite apart from the aforegoing, the wording of s 31, restrictively construed, may be found to relate to holding the officials listed personally liable. Unlike other provisions of this nature, it crucially does not refer to Namfisa's liability, which as a juristic person is capable of being sued. (The indemnity provision in the *Simon's*

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[58] *Minister of Justice and Constitutional Development* 2015 (1) SA 25 (SCA) para 41. See also *Simon's Town Municipality v Dews & another* 1993 (1) SA 191 (A) at 195H-196E.

Town case excluded liability on the part of the State and officials). Nor does it refer to the registrar but to the CEO, despite the reference to any other law which would appear to extend its reach to the range of legislation governing financial institutions including the SEC and IFI Act. It would in my view be inappropriate to determine this question of statutory construction of s 31 at exception stage. But what is clear is that s 31 would indicate that a breach of statutory provisions may be wrongful and secondly it does not include the liability of Namfisa within its reach. It is thus not necessary for present purposes to decide this issue of statutory construction which is left open.

[99] Namfisa's fundamental function under its empowering legislation read with the range of statutes governing specific financial services, which are administered by Namfisa with its CEO occupying the position of registrar in those laws, is to exercise supervision over financial institutions and financial services. The SEC Act (and other statutes administered under Namfisa's auspices) regulating financial institutions and services are directed at providing safeguards for members of the public whose savings are invested in those institutions. The mischief which the SEC Act (and other legislation governing financial institutions and services) seek to prevent is the abuse and misuse of funds held by those institutions for and on behalf of the public.

[100] To this end, the SEC Act restricts the buying and selling of securities or holding investments on behalf of others to categories of persons licenced or registered to do so. The SEC Act also requires that asset managers registered

under that Act be regularly monitored by furnishing returns and annual financial statements to the registrar.

[101] In addition to these supervisory powers, Namfisa enjoys wide powers of inspection of persons (like PAM) registered under s 4 of the Act by making the IFI Act applicable to them.[59] Those powers of inspection are far reaching and provide a powerful mechanism to the registrar and Namfisa to enforce regulatory control over asset managers as well as other financial institutions. These powers enable the registrar to enforce compliance with statutory requirements and to take precautionary steps to ensure that financial institutions do not get into difficulties which would place invested funds of the public in jeopardy.[60]

[102] These powers in the context of the supervisory powers over the regulated financial industry of asset management have as their primary goal the protection of investors for whose benefit they exist and are to be enforced. But they also serve capital market efficiency and to ensure public confidence in the overall financial system[61] and ultimately the Namibian economy. The protection of public investors and maintenance of the integrity of financial institutions are at the core of Namfisa's functions under the SEC Act read with its own empowering Namfisa Act and the regulatory framework governing other financial institutions. It would thus be foreseeable to Namfisa and its CEO as registrar that, if the regulatory

[59]Section 45 of the SEC Act.

[60]*Platinum Asset Management (Pty) Ltd v Financial Services Board* 2006 (4) SA 73 (W) paras 89 and 131.

[61]Para 131.

provisions governing financial institutions, including those registered under the SEC Act, were not to be enforced and properly supervised, then members of the public entrusting their investments to those institutions would be at risk of losing their investments and sustaining loss of the kind in question.

[103] Thus the legislative scheme, entailing the SEC Act read with the Namfisa Act and the IFI Act, is the regulation and supervision of registered financial institutions for the protection of the public investing in the institutions governed by the SEC Act.

[104] Whilst these laws do not expressly provide for or exclude a delictual action against Namfisa, the questions arises as to investors' remedies where an asset manager fails to adhere to the regulatory framework they operate under. Whether quarterly returns or annual financial statements are provided or not to Namfisa by an asset manager would not ordinarily be known to investors. They would in all likelihood have received regular investment statements from the deceased which were false and would not have had a basis to know or suspect that there was wholesale non-compliance with statutory duties.

[105] Given the highly regulated nature of the financial services industry, and the wide range of powers vested in the regulator, it would seem to me that members of the public investing in asset management concerns are entitled to assume that the registrar and Namfisa would require and monitor stringent compliance with the peremptory statutory duties enacted to protect investors. There are penal

sanctions for the failure to comply with several sections in the SEC Act, as is also the case in respect of legislation regulating other financial institutions, emphasising the importance of adherence to them in the public interest. Whilst an investor may conceivably bring a mandamus to compel the registrar to perform functions under the SEC Act, this would not constitute a realistic or adequate remedy at all, given the fact that an investor would not ordinarily have knowledge of that failure and if he or she were to eventually suspect it, losses may already then have occurred. The registrar is furthermore not vested with a discretion to enforce the provisions or not. The duties are cast in peremptory terms – in some instances at the pain of penal sanction - to be enforced by the machinery available to that office including the powers under the IFI Act and also pressing criminal charges.

[106] The failure on the part of the registrar and Namfisa to enforce mandatory duties in the supervision of financial institutions, enacted to protect the public, is more akin to omissions on the part of police officers or prosecutors to avoid harm to others than the negligent exercise of a discretion in procurement legislation. The former omissions have in fact been found in certain circumstances to constitute actionable wrongs, applying the test laid down in *Minister van Polisie v Ewels*.[62]

[107] *Minister of Safety and Security v Van Duivenboden*[63] concerned an omission on the part of police to take certain action under arms control legislation. The SCA referred to the reluctance to holding individuals liable for an omission,

[62] 1975 (3) SA 590 (A).

[63] 2002 (6) SA 431 (SCA).

even when they might reasonably be expected to avert harm, and pointed out that different considerations apply to public functionaries:

> '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 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.'[64]

[108] The nature of the duties upon the registrar and Namfisa would not be inhibited by the chilling effect of the threat of litigation. On the contrary, that consequence would accord with the foundational constitutional values of the rule of law and justice to all embodied in Art 1 of the Constitution. By requiring compliance with statutory obligations which are to be performed at the pain of penal sanction, the registrar would be merely acting in accordance with the rule of law. The failure to enforce those peremptory statutory duties by the registrar on the other hand undermines the rule of law and the value of accountability, which although not expressly referred to in the Constitution is a necessary consequence of the principles of democracy, the rule of law and justice for all embodied in Art 1. There can thus be no question of such a chilling effect. This court in *Dresselhaus*

[64] *Van Duivenboden* para 19.

Transport v Government of Namibia[65] approved of *Van Duivenboden* and quoted the following from it:

> '(ii) There is no effective way to hold the State to account in the present case other than by way of an action for damages and, in the absence of any norm or consideration of public policy that outweighs it, the constitutional norm of accountability requires that a legal duty be recognised. The negligent conduct of the police officers in those circumstances is thus actionable and the State is vicariously liable for the consequences of any such negligence.'

[109] As was spelt out by the SCA in *Van Duivenboden,* the requirements for establishing negligence and a causal link between the omission and the loss would mitigate against the spectre of limitless liability and provide practical scope to harness liability within acceptable bounds.[66] The test in respect of remoteness and causation itself involves policy considerations and is not doctrinaire. It concerns whether a sufficiently close connection exists between act and consequence. That question is to be determined on the basis of policy considerations and the limits of reasonableness, fairness and justice.[67]

[110] The harm which has befallen the investors is precisely the type of harm which is to be averted by the diligent non-negligent performance of the supervisory function under the SEC Act, backed up by the wide inspection powers under the IFI Act. This consideration is re-inforced by the absence of another effective

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[65] 2005 NR 214 (SC) at 248D-F.

[66] See also *Minister of Justice and Constitutional Development v X*.

[67] *Smit v Abrahams* 1994 (4) SA (1) (A) at 3D–F as summarised in the headnote. See also *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700–701.

remedy after the embezzlement and loss of savings entrusted to asset managers have been found out by defrauded investors other than an action in damages. The failure of supervision in this instance offers no effective remedy (except for a separate action against the auditors for a breach of a duty on their part). Nor can it be readily said on the basis of the facts before the court at exception stage that the investors were the authors of their own misfortune.

[111] The balancing of the competing interests which arise and evaluating whether public policy and the legal convictions of the community would result in a finding that the conduct complained of was wrongful and susceptible to an Aquilian remedy in damages are exercises best undertaken at the conclusion of a trial after the full factual matrix has emerged.[68] It was premature for the court below to do so at exception stage.

[112] It follows that Namfisa's exception should have been dismissed.

SGA's exception

Claim in contract or delict?

[113] Although the pleadings refer to SGA being appointed as auditors of PAM and engaged to perform annual audits, no contract is referred to and no contractual terms are pleaded in support of the claim.

[114] Mr Frank contended that the claim is for a breach of statutory duties and not founded in contract.

[68] See *Axiam* paras 23–25 where Navsa JA approved of a similar approach adopted in England.

[115] Mr van der Nest argued that that approach renders it impermissibly vague and is ultimately fatal to the claim. The appointment and terms under which audits are performed are, he argued, contractual and, once this is accepted, it would mean that a delictual claim is not competent on the basis of the approach in *Lillicrap.*

[116] In reply, Mr Frank argued in the alternative that if the appellants' claim is found to have arisen from a contractual relationship, then the Aquilian action should be extended to afford a remedy to PAM in delict (and that *Lillicrap* should not be followed).

[117] The first question which arises is whether the nature of the relationship between PAM and SGA was contractual. If so, it would follow that if *Lillicrap* were to be applied, the claim on behalf of PAM would not be competent, as was correctly contended by Mr van der Nest. That is because the majority of the court in *Lillicrap* declined to recognise a delictual claim where there was a contractual relationship between the parties and the delictual claim amounted to a breach of those contractual terms, as is further explained and discussed below.

[118] In the *PWC* matter, it had been argued that the appointment of auditors to a co-operative, being a statutory requirement under the legislation governing co-operatives, occurs at the annual general meeting (AGM) of the co-operative, as is also the case with companies. It was contended that the AGM triggered the

statutory source of the appointment which was not dependent upon a contractual relationship and that the Act governing co-operatives provides a comprehensive code covering the appointment and duties of the auditor. It was thus argued in *PWC* that the source of the appointment was statutory and not contractual.[69]

[119] Wallis JA in *PWC* found that this novel approach was not sound.[70] He reasoned that an appointment at an AGM would follow an approach to see if an auditor was willing to accept that appointment. Auditors, who work for reward, are not obliged to accept appointments and an agreement to do so would follow upon accepting an offer setting terms which are sufficiently attractive to them. He concluded that the resultant relationship is contractual[71], a view which also accorded with the auditing profession in its auditing standards and also expressed by writers on the subject.[72] The approach of the court in *PWC* is in my respectful view sound and finds application in this matter.

[120] It follows that the relationship between PAM and SGA was contractual. It further follows that the statutory duties for auditors set out in the Companies Act, PAA Act and also in the SEC Act would be implied by law into that agreement.

[121] It further follows that the breaches of the statutory provisions contended for would thus be breaches of the contractual relationship between PAM and SGA.

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[69] *PWC* para 57.

[70] *PWC* para 59.

[71] *PWC* para 60.

[72] *PWC* paras 59 – 61.

The appellants' claim is however pleaded on the basis that the breaches of those duties gave rise to an action in delict.

Does PAM have a claim in delict?

[122] Mr Van der Nest correctly contended that if the relationship were to be based in contract, then a claim in delict would be precluded if the approach in *Lillicrap* were to be followed.

[123] The question arises as to whether the Aquilian action should be extended to cover a case of professional negligence of the kind pleaded against SGA. In order to address this question, the approach in *Lillicrap* is briefly examined because such an extension would run counter to *Lillicrap*.

[124] The appellant, Lillicrap, was a firm of structural engineers engaged by the respondent *(Pilkington)* to design and supervise the construction of a glass manufacturing plant. Pilkington assigned its contract with Lillicrap to the main contractor of the plant, so that there was no longer a direct contractual relationship between Pilkington and Lillicrap. When the plant was put into operation, it became apparent that it was totally unsuitable for glass manufacturing because of soil instability causing minute movements between plant components. Pilkington sued

Lillicrap for professional negligence in the design and supervision of the construction of the plant, claiming a breach of a duty of care by failing to carry out its contractual obligations with the necessary professional skill and care.

[125] Lillicrap's exception to the claim was on the grounds that it failed to disclose a cause of action. This exception was dismissed by the court of first instance but upheld by a majority in the then Appellate Division. In dealing with the question of wrongfulness, the majority found that the claim was for pure economic loss with no infringements of any rights to person or property. The infringement complained of was an infringement of Lillicrap's 'duty to perform specific professional work with diligence'.[73] Although Aquilian liability was no longer only restricted to instances of physical harm,[74] public policy considerations did not, according to the majority, justify its extension to cases of negligent performance of contractual obligations. The underlying reasoning of Grosskopf AJA, writing for the majority, was that there was a contractual relationship between the parties (prior to assignment) and that the parties had adequate satisfactory remedies in contract. These considerations remained after assignment as the relationship had 'its origin in contract' and a 'reasonable expectation that their reciprocal rights and obligations would be regulated by their contractual arrangements and would not be circumvented by the law of delict'.[75]

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[73]*Lillicrap* at 499D-E.

[74]And was expanded to cover for instance negligent mis-statements which cause pure economic harm as found in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).

[75]*Lillicrap supra* 502–503.

[126] What weighed heavily with the majority was that the Aquilian action did not 'fit comfortably' in a contractual setting, expressing the view that the court should 'be loath to extend the law of delict into this area and thereby eliminate provisions which the parties considered necessary for their own protection'.[76] The majority also referred to the different computation of damages for breaches in contract and delict'.[77]

[127] The minority judgment in *Lillicrap* found that policy considerations did not require that liability in delict on the part of a person rendering professional services should not be recognised.[78] The reason why Pilkington's claim was framed in delict, as pointed out in the minority judgment, was because a contractual claim had become prescribed but not one in delict. Section 12(3) of the Prescription Act 68 of 1969 at the time provided that claims arising from contract arose when the debtor fails to perform contractual obligations, with knowledge of the breach being irrelevant. On the other hand, in respect of debts which do not arise under contract, prescription only would begin to run when the creditor has knowledge of both the identity of the debtor and the facts from which the debt arises, provided that the creditor is deemed to have that knowledge by exercising reasonable care.[79] It may be no coincidence that this distinction was abolished by the legislature in South Africa in 1984 by amending s 12(3) of that Act.[80] (The *Lillicrap*

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[76] *Lillicrap* 501F.

[77] *Lillicrap* 505–506.

[78] *Lillicrap* 508.

[79] Section 12(3) of Act 68 of 1969.

[80] Act 11 of 1984.

judgment on appeal was delivered in November 1984). Knowledge thus became a requisite for the commencement of prescription in contractual claims in South Africa after that amendment to s 12(3) in 1984. But the prior distinction in s 12(3) of the Prescription Act remains applicable in its unamended form in Namibia despite its removal more than 30 years ago in South Africa.

[128] Breaches of contract on the part of a person rendering professional services may only become apparent to a potential claimant more than 3 years after a breach and damage, even with the exercise of reasonable care. That may also be the case in this matter. The alleged breach on the part of SGA and resultant loss may only have become apparent more than three years after their respective occurrences when those facts emerged after the deceased took his life. A claim based upon contract would by then have become prescribed whereas prescription on a claim based on delict may only then commence to run.[81] This result would, in my view, offend against the legal convictions of the community and public policy and constitutional norms of fairness and equality before the law, the rule of law and justice for all, in the determination of wrongfulness, as discussed above.

[129] At the heart of the denial of an extension to the Aquilian action in *Lillicrap* were certain policy considerations helpfully analysed in an informative article by

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[81]*Lillicrap* 508 (minority judgment).

Hutchinson & Van Heerden, *The tort/contract divide seen from the South African perspective*.[82]

[130] Four policy considerations are listed by those learned authors. They are the spectre of indeterminate liability (the 'floodgates' argument), the anticircumvention argument, thirdly the relationship being governed by treaty or legislation and finally whether there are other adequate remedies. All but the third featured in the reasoning underpinning the approach of the majority in *Lillicrap.*

[131] The first concern (indeterminate liability) has troubled many common law jurisdictions, as articulated in *Country Cloud*, referred to above.[83] But its effect may be tempered in the determination of the existence of wrongfulness - as to whether there is a legal duty on the part of a defendant to a plaintiff not to act negligently. In grappling with this issue in a matter involving professional negligence, Marais J (as he then was) in *Arthur Abrahams and Gross v Cohen & others,*[84] referred to the approach of the High Court in Australia and the position in England in the following way:

> 'Fear of introducing what Cardozo J in Ultramares Corporation v Touche (1931) 255 NY 170 at 179 (74 ALR 1139 at 1145) called "liability in an indeterminate amount for an indeterminate time to an indeterminate class" has deterred courts from upholding too readily claims for damages for pure economic loss unassociated with physical damage. Thus, the mere fact that the loss which has

[82] 1997 Acta Juridica 97 at 109–112.

[83] See para [87] above.

[84] 1991 (2) SA 301 (C).

occurred was reasonably foreseeable by the defendant is not necessarily per se sufficient to have given rise to a legal duty to act or to abstain from acting in order to avoid the loss. Support for these propositions will be found in cases such as *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 498C; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 832H; *Yuen Kun-yeu and Others v Attorney General of Hong Kong* [1987] 2 All ER 705 (PC) at 710g-h, *Hawkins v Clayton* 1988 ALJ 240.

There is less consensus as to what the other determinants of liability and their relative importance in different categories of case may be. Thus, some have said that reliance or dependence by the plaintiff upon the defendant is critical. Others have said it is not so in all cases. Some say that an assumption of responsibility by the defendant will give rise to a legal duty to act or refrain from acting. Some idea of the ways in which the English Courts have wrestled with the problem of identifying in a given case features which would justify the imposition of liability will be gained by reading the judgment of Robert Goff LJ in *Muirhead v Industrial Tank Specialities Ltd and Others* [1985] 3 All ER 705 (CA). In *Hawkins'* case, Brennan J had this to say at 246D - 247B:

> "When the existence of a duty in a new category of case is under consideration, the question for the court is whether there is some factor in addition to reasonable foreseeability of loss which is essential to the existence of the duty: see *Jaensch v Coffey* [1984] 155 CLR 549 at 575-577. In many of the new categories of case in which a duty has been held to exist, reasonable foreseeability of loss has not been sufficient in itself to give rise to a duty to act or to abstain from acting in order to avoid the loss. In a case where a novel category of duty is proposed and the factors which determine its existence must be identified, the court may have regard to a variety of considerations: the nature of the activity which causes the loss, the relationship between the parties and contemporary community standards (especially where liability for breach of the proposed duty would be disproportionate to the risk which a person might reasonably be expected to bear as an incident of engaging in the particular activity if no limiting factor were identified). In *Sutherland Shire Council v Heyman* (at 481) I suggested that it is preferable for the law to develop new categories

> of negligence incrementally and by analogy with established categories, for the established categories provided firm evidence of the kinds of factors which condition the existence of the various categories of duties. It is one thing to speak in general terms about the considerations which affect the development of the law; it is another to define the law as developed. In a novel category of case, when it appears that the proposed duty depends on some factor additional to reasonable foreseeability of loss, the additional factor must be identified. In my opinion the identification must be sufficiently precise to permit the tribunal of fact (whether Judge or jury) to ascertain the existence of the relevant factor or factors: see *San Sebastian Pty Ltd v The Minister* (at 367-368). Indeed, it is only by reference to factors so precisely identified that it is possible to define the nature and content of the proposed duty. And it is only by reference to the nature and content of a duty that it is possible to define the elements of the cause of action in tort for its breach."

The wide range of factors which Brennan J mentions as being relevant to the enquiry is not inconsistent with the following passage in *Fleming Law of Torts*, which was quoted with approval by Rumpff CJ in *Administrateur, Natal v Trust Bank van Afrika Bpk* (At 833H-834A):

> "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."' [85]

[132] A powerful factor in the reasoning of the majority in *Lillicrap* is the policy consideration that a claimant ought not to be allowed to circumvent a contractual

[85] At 308A-C.

bargain between the parties (the anticircumvention argument). But as the minority in *Lillicrap* pointed out it would be open to contracting parties to agree upon a clause excluding liability for negligence.[86] I can see no reason why this could not be done as long as that exclusion is not against public policy or precluded by statutory provisions governing the conduct of professional duties. In the same way, the parties may agree upon an arbitration clause or other limitation clauses and, as long as they are not against public policy, I do not see why they should not be raised and take precedence over a more general delictual action.[87]Hutchinson and Van Heerden refer to an emerging consensus in England that the mere presence of contractual remedies should not in itself bar a delictual remedy, even in cases of pure economic loss.[88] The courts in Australia and Canada also recognize the existence of concurrent duties in contract and delict and have held that the fact that they do so does not mean that the existence of a contractual relationship is irrelevant to either the existence of a relationship of proximity or the content of a duty of care under the ordinary law of negligence. The existence of a contract may have the effect of favouring recognition of a relationship of proximity or may in certain instances exclude a duty to care or confine a remedy.[89]

[133] In a case such as the present where terms are imported into and implied by statute in the contractual relationship between an auditor and client, the anti-

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[86]*Lillicrap* 508.

[87]Hutchinson & Van Heerden at 111. *Henderson v Merret Syndicates Ltd* [1995] 2 AC 145 (HL) per Lord Goff at 193B-C, 194B.

[88]Hutchinson & Van Heerden at 112–113.

[89]*Bryan v Moloney* [1995] HCA 17. See also *Control Trust Co v Rafuse* [1986] 2 SCR at 204–205.

circumvention policy consideration underpinning the approach of the majority in *Lillicrap* would in my view hold far less sway. In many instances, those statutory duties may not even be referred to in an agreement appointing a companies' auditor. It is not as if those specific terms have been negotiated and agreed upon and fashioned for that particular contractual relationship. They are terms implied by the statute into the contractual relationship, being prescribed by the legislature, reflecting public policy. Those standards are thus imposed by law and understandably so. In terms of the Companies Act, an auditor cannot contract out of important statutory duties.

[134] The anticircumvention policy consideration should thus have diminished application where the legislature has set prescribed duties which are claimed to have been breached and where statutory provisions have thus dealt with the allocation of risks.[90] Similar considerations may apply where terms are imputed by trade usage or by international treaties, such as in the sphere of carriage of goods by sea.[91]

[135] The further policy consideration raised by Hutchinson & Van Heerden as relevant, with reference to authority in both South Africa and England,[92] is whether protection from the risk of loss was reasonably available to a plaintiff elsewhere. This, together with the anticircumvention consideration, held sway with the

[90]Van Heerden at 111 referring to J Stapleton '*Duty of care and economic loss: a wider agenda*' (1991) 107 LQR 249 at 287.

[91]Hutchinson & Van Heerden p 111.

[92] Hutchinson & Van Heerden p 111–112.

majority in *Lillicrap*, in finding that there was no real need to extend the Aquilian action in that matter by reason of its contractual setting. Given the provisions of s 12(3) of the Prescription Act, and taking into account the limited application of the anticircumvention consideration in a case like the present where the duties are prescribed by statute, a trial court may, contrary to the majority in *Lillicrap,* find on the basis of policy considerations that there may be a real need to extend the Aquilian action to avoid claimants being remediless in cases of professional negligence if limited to a claim under contract.

[136] As was aptly said by the High Court in *Seelinbinder*[93] when also considering an exception similarly raised in the context of a delictual claim against a firm of structural engineers for professional negligence:

> ‘But the remedies afforded by the *actio* (Aquilian) are not cast in stone. Its scope and sweep are intimately connected to the demands of fairness, reasonableness and justice of the community within which it is applied.’[94]

and

> ‘Given the dynamics in society, its ever-changing values and the fresh demands made by development and technology in business, industry and the manner in which its members interact with one another the Aquilian action is likely to be extended further in future. *Lillicrap's* case is and was never intended to be the last word on a professional person's liability for pure economic loss resulting from the

[93] *Seelenbinder.*

[94] *Seelenbinder* at 163B-C.

breach of a contractual duty to render professional services with due care and diligence.

Moreover, however persuasive the majority view in that case may be, this Court is not bound by it. The majority judgment in that case may not even be the last word on whether, independently from a contractual duty, a professional person does not also owe a duty of care to the owner and subsequent owners of a building (or sections thereof) to render services in connection with the construction or maintenance thereof with due diligence (contra: *Kohler Flexible Packaging (Pinetown) (Pty) Ltd v Marianhill Mission Institute and Others* 2000 (1) SA 141 (D)).

It is within the context of these remarks that the exception falls to be considered. The Court should be careful not to stifle the further development of the extended Aquilian action by applying a narrow and formalistic approach when exceptions are taken against a more extended application thereof. If an exception is allowed in every instance where relief is sought outside the scope of recognised remedies, the action will lose its flexibility and capacity to evolve and remain relevant to the demands of a changing society.'[95]

[137] A trial court may thus, upon, an analysis of policy considerations after all the evidence is received, find the approach of the majority in *Lillicrap* to be unpersuasive in the circumstances of this case, based as it was largely upon its anticircumvention argument which would have limited application in instances like the present where breaches of statutory duties (imported into a contract) are relied upon. A further compelling factor which South African courts have not since *Lillicrap* had to wrestle with after 1984 (because of the amendment to the Prescription Act), is the fundamental unfairness which the distinction between contractual and other claims in s 12(3) can give rise to in the present context. Recognising a delictual claim by PAM against SGA furthermore may also not be

[95] *Seelenbinder* 164G–165B.

found to bring with it the spectre of indeterminate liability. It would seem to be finite in its ambit.

[138] It would thus seem to me that it cannot thus be found on exception not to extend Aquilian liability for the alleged breaches on the part of SGA on the ground that the wrongful and negligent acts or omissions in breach of its statutory duties listed in the particulars of claim also constitute breaches of implied contractual obligations owed to PAM.

[139] The allegations contained in the particulars may thus bring PAM's case against SGA within the principles of the development of Aquilian liability and may, if proved at the trial, give rise to liability for any patrimonial loss proven at the trial as a result of the alleged negligence. It was thus premature for the court below to decide, by upholding SGA's exception without qualification, that SGA's breach of its statutory duties could not be within the principles of Aquilian liability.

Investors' claim against SGA

[140] The further question arises as to the investors' claim against SGA.

[141] Mr van der Nest is correct in pointing out that a claim by a non-audit client (a third party such as a potential investor) against an auditing firm is not readily recognised, including in the leading English case concerning the liability of auditors, *Caparo Industries Plc v Dickman & others*.[96] But the cases cited concerned the expression of an opinion or giving a certificate or report made or

[96] [1990] 1 All ER 568 (HL). See also *Axiam.*

statement in the ordinary course of an auditor's duties and thus concerned a misstatement relied upon by third parties.

[142] In *Axiam,* the alternative claim was in respect of an alleged negligent audit by an auditing firm. It was alleged that the firm would have been aware that financial statements and an audit opinion in respect of a company would have been relied upon by two potential investors in that company. But the audit had not been properly prepared and the two investing concerns were not warned that the audit was not correct. The alternative claim against the auditing firm was met by an exception on the grounds that the claim did not establish that the auditing firm owed the two investing concerns a duty of care and that the failure to warn that a proper audit had not been conducted and that the opinion could not be relied upon was insufficient to constitute a representation within the meaning of the South African PAA Act.[97]

[143] The alternative claim thus involved not only a misstatement made in the financial statements but also an alleged negligent misstatement by omission. The court pointed out that silence or inaction cannot constitute a misrepresentation unless there is a duty to speak or act.[98] Navsa, JA for the SCA elaborated:

> [18] It is true that decisions by courts on whether to grant or withhold a remedy for negligent misstatement causing economic loss are made conscious of the importance of keeping liability within reasonable bounds. It is universally accepted

[97] Act No 80 of 1991.

[98] *Axiam* para 15.

in common-law countries that auditors ought not to bear liability simply because it might be foreseen in general terms that audit reports and financial statements are frequently used in commercial transactions involving the party for whom the audit was conducted (and audit reports completed) and third parties. In general, auditors have no duty to third parties with whom there is no relationship or where the factors set out in the *Standard Chartered Bank* case are absent.

[19] In considering whether a defendant representor such as Deloitte acted unlawfully in relation to a third party, ie in breach of a legal duty, the nature, context, purpose of the statement and knowledge thereof are considered and so is the relationship between the parties. In the *Standard Chartered* case these factors were considered at the end of a trial after all the circumstances of the case were revealed by the evidence.'[99]

[144] In considering whether a duty to speak existed, the SCA in *Axiam* said:

'It must be remembered that we are dealing with a situation where the legal convictions of the community could well consider it unacceptable that an auditing firm which issued a seriously negligent report should escape the legal duty to speak with care concerning that report simply because it was, possibly even negligently, ignorant of the negligence of its report. And what is more, in circumstances in which the latter negligence was something it ought to have known of.'[100]

and

'It could well be the conclusion on trial that the representation compounds the negligence of the earlier audit and report.'[101]

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[99] *Axiam* paras 18 and 19.

[100] *Axiam* para 22.

[101] *Axiam* para 22.

[145] The court concluded that it could not be found on exception that the defendant's alleged omission to speak was not wrongful and that it was premature for the court below to decide on exception whether a legal duty could be said to exist.[102] In my view, a similar conclusion follows in this matter.

[146] The investors' claim is somewhat different to the misstatement cases. It raises an alleged failure on the part of SGA as auditors to blow the whistle on the deceased (and PAM) when it is alleged they would have been expected to do so. The duty to speak claimed by the investors was thus not that SGA should have spoken to them but rather should have spoken to Namfisa. Whether there was a duty to speak in the circumstances would be ascertained with reference to the legal convictions of the community and is related to the statutory breaches alleged on the part of SGA as set out in PAM's claim. I understood the thrust of the argument advanced in support of the exception taken to the investors' claim to concern whether the pleadings established a relationship of sufficient 'proximity' between the investors and SGA, as was articulated in *Caparo Industries.*[103] The test adopted by the House of Lords in that matter was referred to by Hannah, J in the High Court[104] in the following way:

> 'Having referred to several recent cases in which the House of Lords and the Privy Council emphasised the inability of any single general principle to provide a

[102]*Axiam* paras 23 and 24.

[103]At 617.

[104]*Namibia Machine Tools (Pty) Ltd v Minister of Works, Transport and Communication* 1997 NR 18 (HC).

practical test which could be applied to every situation to determine whether a duty of care was owed, the learned Law Lord continued –

> “What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the Court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in 'effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope."

And later -

> "One of the most important distinctions always to be observed lies in the law's essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss."

As may be seen from this brief review of recent English case law the approach of the Courts in England, when determining whether an omission should be regarded as unlawful and whether a duty of care is owed, is very close to the approach propounded in *Ewels* case *supra*. There is very little difference between determining the question by invoking the legal convictions of the community and determining it by reference to socially accepted standards of behaviour or by what the Court considers to be fair, just and reasonable.’[105]

[105] *Supra* at 25F–26C.

[147] This flexible approach accords with that of the SCA in *Cape Town Municipality v Bakkerud*:[106]

> ‘[16] The present position regarding omissions in the law of delict is accurately described by Corbett JA in the public lecture entitled 'Aspects of the Role of Policy in the Evolution of our Common Law' and published in (1987) 104 *SALJ* 52. The learned Judge of Appeal said (at 56):
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>> “Even in 1975 there were probably still two choices open to the court in the *Ewels* case. The one was to confine liability for an omission to certain stereotypes, possibly adding to them from time to time; the other was to adopt a wider, more open-ended general principle, which, while comprehending existing grounds of liability, would lay the foundation for a more flexible and all-embracing approach to the question whether a person's omission to act should be held unlawful or not. The Court made the latter choice; and, of course, in doing so cast the Courts for a general policymaking role in this area of the law.”
>
> [17] In playing that general policymaking role a court should be mindful of its limitations in diagnosing accurately and prescribing effectively for the ills of society. Some have thought that the Legislature is the more appropriate sounding board for proposed extensions of liability in cases when public and private law intersect, as they do in the municipality cases. Be that as it may, when a court is required to consider whether a legal duty should be imposed in a given situation the “balance ultimately struck must be harmonious with the public's notion of what justice demands’”.

[148] The legal convictions of the community may well consider it unacceptable for an auditor not to speak up and blow the whistle on a scheme of the nature perpetrated by the deceased, particularly in the context of the statutory duties of

[106] 2000 (3) SA 1049 (SCA) para 16–17.

an auditor under the PAA Act and Companies Act. The factors listed in the *Standard Chartered* case,[107] referred to in *Axiam,* although in the context of negligent misstatements would need to be considered, especially the relationship between the parties. There was no direct contact or dealing between the investors and SGA. This would not arise. But SGA would be aware that investors had placed their savings with PAM, given the latter's registration and business as an asset manager. The relationship is thus not close. But SGA would have realised and foreseen that the investors would sustain loss if the deceased embezzled the funds they had entrusted to him in PAM. Whether this is sufficiently proximate would best be determined at the conclusion of a trial – as had occurred in *Standard Chartered*.

[149] Like the court below in *Axiam,* it would be premature to decide on exception whether the alleged omission on the part of SGA to report the deceased to Namfisa was wrongful *vis a vis* the investors. Whether or not causation between the alleged omission and the loss sustained by each investor can be established would likewise be a question to be determined after all the circumstances were revealed in evidence at the trial, upon an application of the test for causation referred to in para [109] above which, as I have said, also involves policy considerations and the limits of fairness, reasonableness and justice.

[107] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A).

[150] As was said in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd,*[108] '. . . at the stage of deciding an exception a final evaluation and balancing of the relevant policy considerations . . . should not be undertaken'.

[151] It follows that the exception by SGA against the claim of the appellants should not have been upheld.

Costs

[152] The appellants have succeeded with this appeal and are entitled to their costs. Given the complexity of the matter, the costs of two instructed counsel are justified. The costs order should however not include the costs of preparing or perusing the record. This is because it was appallingly put together without regard to the rules and the several admonitions of this court concerning the preparation of appeal records.

[153] The record in this appeal included the transcript of oral argument in the High Court as well as written heads of argument filed in the High Court. There was also duplication of documentation on a large scale. Several repetitious documents were also included, relating to the individual investors' personal particulars which were not relevant to the appeal and should have been excluded from the record on appeal.

[108]1992 (1) 783 (A) at 801B-D. See also *Seelenbinder* at 165C-D.

[154] The several warnings made by this court concerning the state of appeal records require implementation. In the exercise of this courts' discretion, the appellants should be deprived of the costs of the record including perusing it and their instructing legal practitioners should be precluded from charging fees for those attendances.

Order

[155] The following order is made:

(a) The appeal succeeds with costs.

(b) The costs of appeal are to include the costs of two instructed and one instructing counsel, but are to exclude the costs of the record, including its perusal.

(c) The order of the High Court is set aside and replaced with the following:

> 'The first and second defendants' exceptions are dismissed with costs which include the costs of two instructed counsel, where engaged.'

(d) The matter is remitted to the High Court for further case management.

SMUTS JA

SHIVUTE CJ

HOFF AJA

APPEARANCES

APPELLANTS:	T J Frank, SC (with him J Schickerling) Instructed by Van der Merwe-Greeff-Andimba Inc.
FIRST RESPONDENT:	V Maleka, SC (with him G Hinda, SC and S Namandje) Instructed by Sisa Namandje & Co. Inc
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