THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 532/2024

In the matter between:

NELSON ATTORNEYS	**APPELLANT**
and	
AMORE SMIT N O	**FIRST RESPONDENT**
ANTONIUS GERHARDUS VAN DEN BERG	**SECOND RESPONDENT**
MARGIE VAN DEN BERG	**THIRD RESPONDENT**

Neutral citation: *Nelson Attorneys v Smit N O & Others* (532/2024) ZASCA 162 (24 October 2025)

Coram: MBATHA ADP and MOTHLE, KGOELE and KEIGHTLEY JJA and HENNEY AJA

Heard: 28 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 24 October 2025.

Summary: Law of Delict – pure economic loss – attorney and conveyancer – wrongfulness – distinction between elements of wrongfulness and fault – whether wrongfulness admitted – wrongfulness not established – plaintiffs could have taken steps to avoid risk of loss – negligence not established – causation not established.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda (Mjali J, Norman J and Govindjee J, sitting as court of appeal):

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the full court is set aside and substituted with the following order:

'The appeal is dismissed with costs, including the costs of two counsel where so employed.'

JUDGMENT

Keightley JA (Mbatha ADP and Mothle and Kgoele JJA and Henney AJA concurring):

Introduction

[1] The dispute that is the subject matter of this appeal had its origins in a proposed residential property development located in Westering, Port Elizabeth (now Gqeberha) in the mid-2000's. Mrs Kelbrick (since deceased, and her estate represented by the first respondent) and Mr and Mrs Van den Berg (second and third respondents) owned adjoining immovable properties in the area. Together with the owner of a third adjoining property, Mr Jonker (who is not a party to the appeal), they entered into agreements (the deeds of sale) in terms of which they sold their

properties to the developer, Headline Trading 124 CC, trading as Status Homes Developers (Status). The sole member and director of Status was Mr Lamour. As the facts set out more fully below demonstrate, the transactions had unusual characteristics.

[2] After the development failed, Status was liquidated, and Mr Lamour was sequestrated. In a bid to recover their losses, Mrs Kelbrick and the Van den Bergs (the respondents) instituted an action against the appellant, Nelson Attorneys, seeking to hold it delictually liable for their financial loss. The respondents' claim was for pure economic loss, that is a financial loss sustained by a plaintiff with no accompanying physical harm to their person or property.[1] It is a loss that flows directly from the negligent conduct itself.[2] The respondents' case was that had it not been for Nelson Attorneys' negligence, they would have succeeded in recovering from Status or Mr Lamour the purchase price contractually due to them under the deeds of sale. In effect, they sued Nelson Attorneys (which was not a party to the contract) in delict for the value of the loss of their contractual bargain with Status.

[3] The action proceeded to trial before Rugunanan J (the trial court) in the Eastern Cape Division of the High Court, Gqeberha (the high court). No evidence was adduced in support of Mrs Kelbrick's claim, as she had passed away in the interim. Mr van den Berg testified personally and Mr Burman, a conveyancer, gave expert evidence for the plaintiffs in the trial court. Mr Nelson had previously testified for the appellant in the trial court on a separated issue. A transcript of that evidence was accepted into evidence when the trial proceeded on the merits.

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[1] *Country Cloud Trading CC v MWC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC) (*Country Cloud*) para 22.
[2] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) (*Telematrix*) para 1.

[4] The action was dismissed by the trial court but, on appeal, a full court of the high court set aside that decision. It directed Nelson Attorneys to pay delictual damages to the respondents in the amounts claimed. The present appeal against the full court's judgment is with special leave of this Court.

Facts

[5] The seeds of the plan for the development were planted some time in 2005, when Mr and Mrs van den Berg took a walk through their area and saw a small development under construction. This sparked the idea that it might be possible for them to do a development on half of their property. Status was the developer of the site they had observed and, on approaching one of the builders on site, Mr van den Berg was provided with Mr Lamour's contact details. He contacted Mr Lamour, who reacted positively to Mr van den Berg's idea of constructing about eight or nine units on their property. However, Mr Lamour had a better plan: he suggested that it would be more viable to build a larger development, of about 20 units, over not only the Van den Berg property, but also over the two adjoining properties of Mrs Kelbrick and Mr Jonker and his wife.

[6] By way of background, it is worth noting that at this stage, the property market in Gqeberha was buoyant. Many developments were under construction, with opportunities to make substantial profits from buying and selling property. Mr Lamour, trading through Status, was one of the developers involved in the market.

[7] Mr Lamour approached the other owners individually with the development idea. They all bought into the idea. Mr Nelson was not part of the picture at this stage. All preliminary discussions were between Mr van den Berg and Mr Lamour,

on behalf of Status, and between Mr Lamour and the other owners. Through these discussions, broad agreement was reached on important aspects of the agreements.

[8] The Van den Berg property at that time was worth approximately R500 000, with an outstanding mortgage bond of a little over R200 000. Mr Lamour and Mr van den Berg agreed on a computation of the purchase price divorced from the value of the property. Instead, the purchase price was based on an estimated value of R700 000 in respect of each of the units to be built in the development. In terms of the broad agreement reached with Mr Lamour, the Van den Bergs were to take transfer of two new units, in lieu of a cash payment. Consequently, the agreed purchase price was R1,4 million. In addition, Status, would pay off the amounts due on the Van den Bergs' mortgage bond on transfer of the property.

[9] From his early interactions with Mr Lamour, Mr van den Berg was optimistic about the development and confident in Mr Lamour's ability to perform. Mr Lamour gave them the plans for the development, which, according to Mr van den Berg, looked good. No doubt the Van den Bergs were looking forward to securing a foothold in the buoyant property market and exchanging their existing modest property holding for a substantially more valuable asset. However, as events unfolded, this early optimism was soon dented by the Van den Bergs' frustration at the delay in getting the plan off the ground.

[10] It is not known precisely when Mr Nelson came into the picture. It must have been by September 2005, as the Jonkers signed the first deed of sale with Status on 15 September 2005. Mr Nelson, who was acting for Mr Lamour at that time, was involved in the finalisation of the terms of the first deed of sale and signed as a witness to the agreement.

[11] Mrs Kelbrick and the Van den Bergs did not sign their deeds of sale until a year later, in September 2006. It is not clear what the reason was for this anomaly, but it is apparent from the evidence that the Van den Bergs were not happy with what they perceived to be the lack of progress in the development. On 8 December 2005, Mr van den Berg wrote to Mr Nelson voicing his concern. He noted that he had met twice with Mr Lamour, who had assured him that 'everything was on track, and the development was going ahead'. However, Mr van den Berg pointed out that no signage had yet been erected, and they had not received any feedback about the objections lodged by neighbours. Mr van den Berg wanted a timetable to indicate when building would start.

[12] Mr van den Berg also informed Mr Nelson that they had been approached by another developer who had 'seemed to know the answers' to their problems. That developer had even gone so far as to send a proposal to the Van den Bergs. The letter ended with a request for information from Mr Nelson.

[13] The Van den Bergs wrote a follow-up letter to Mr Nelson a few months later, on 10 February 2006. They again complained that Mr Lamour had not been very forthcoming with information, and they expressed their concern that there might be 'problems with the deal as a whole'. They again referred to the approach by the other developer who, the letter stated, had told them that he would have no problems with rezoning and would 'guarantee a finalisation date'. If there were any problems, they wanted them brought to their attention. The letter ended with a request that Mr Nelson contact Mr Lamour urgently and get some answers for them because '… we either get some form of commitment from him or we seek advice'.

[14] No response to these letters was contained in the evidence. Nor is there any indication of what discussions might have been held between Mr Lamour and the

Van den Bergs. However, what is apparent is that the Van den Bergs never pursued the proposal submitted by the other developer, nor, it seems, did they seek the advice they had alluded to. On 4 September 2006, the Van den Bergs and Mrs Kelbrick signed the deeds of sale.

[15] The two deeds of sale were identical in all material respects. For simplicity, I refer to the Van den Berg agreement. It recorded that Status wished to erect a sectional townhouse development on the Van den Berg property, and that the scheme required that the three affected erven (the Jonkers', the Van den Bergs' and Mrs Kelbrick's) be consolidated to provide sufficient land and to make the scheme a viable financial proposition. Aligned with this, it was a condition precedent that the agreement was subject to a similar agreement being concluded with the other owners. A further condition precedent was the approval of a site development plan by the Nelson Mandela Metropolitan Municipality (the Municipality).

[16] The purchase consideration for the transfer of the Van den Berg's property to Status was R1,4 million. It was expressly provided that: 'In lieu of payment, Status Homes undertakes to erect two dwellings for VAN DEN BERG, being unit number 10 and unit number 8, as reflected on the site layout preliminary sketch plan… .' The value of each unit would be a sale value of between R700 000 and R1,1 million. It was further recorded that as the two units chosen by the Van den Bergs exceeded the purchase price, they agreed to contribute a sum of R300 000, by way of the difference in value. Status would attempt to erect the two units chosen as soon as possible.

[17] Transfer of the property was to be effected by Nelson Attorneys 'as soon as possible'. Status was to be responsible for the cancellation of any bond over the property, and the registration of a new bond to the same value over the new property.

The Van den Bergs were liable for the costs of registration of transfer of the new units.

[18] The plans and working drawings were to be acceptable to the Van den Bergs and to be approved by the Municipality. Specific provision was made for alternative accommodation for the Van den Bergs. The deed of sale recorded that during the construction period of their first unit, the Van den Bergs would be required to arrange alternative accommodation for themselves. However, '[i]n the event of the period of construction exceeding four months, Status Homes will be responsible for the cost of alternative accommodation in the Linton Grange area or an equivalent area until completion and handing over of the unit for the further period.'

[19] As security for Status' obligations under the agreement, Mr Lamour bound himself as surety and co-principal debtor 'for the repayment on demand of any sums of money owing and the due fulfilment of all obligations of Status Homes to VAN DEN BERG'. Finally, of relevance is the breach clause. It provided that if a party breached any provision capable of being remedied and failed to remedy such breach within seven days of written notice, the other party would be entitled, at its discretion, to cancel the agreement by giving written notice of such cancellation.

Subsequent events

[20] The background to the agreements, culminating in the deeds of sale, as well as their terms demonstrate that these were unusual property transactions. The original individual owners agreed to transfer their erven to Status for consolidation into one larger property. In exchange, instead of payment of the purchase price, they acquired a personal right to demand transfer to them of the units that would be constructed in the future, as part of the development. As no purchase price was payable, there was no obligation on Status to pay a deposit. Nor was there any

obligation on the conveyancer, Nelson attorneys, to ensure that it was placed in funds sufficient to cover the purchase price before effecting transfer of the properties.

[21] This was the scheme that the Van den Bergs had agreed upon with Mr Lamour before Mr Nelson came onto the scene. It was a scheme involving no small risk for them, as they would give up their home, and would have to find alternative accommodation for a period, pending the construction of the new units. Significantly, however, the risk came with the promise of a substantial return for the respondents. The purchase price agreed on was more than double the market value of their property and they would acquire two sectional title units in exchange for their single dwelling. Moreover, in the event of the construction requiring the Van den Bergs to reside in alternative accommodation for more than four months, Status would carry that cost.

[22] A further feature of the scheme is that for the development to become a reality, several approvals had to be obtained from relevant public bodies. A site development plan had to be approved by the Municipality. From the available evidence, it seems this was in place by January 2008, as it is referred to in an affidavit supporting an application to the high court for the removal of restrictive title conditions, dated 15 January 2008. Correspondence introduced into evidence indicates that the municipality granted approval for 16, rather than the 20 units originally envisaged, requiring an amended plan to be produced. The removal of restrictive title conditions was necessitated because the individual erven that were subsequently consolidated had title conditions that were incompatible with a multi-dwelling, sectional title scheme. The removal was authorised in approximately August 2008. Prior to this, approval had to be obtained for the consolidation of the three separate erven into one erf.

[23] In addition, Status required capital to fund the development. This was provided by Standard Bank through a development loan secured by the registration of a mortgage bond over the consolidated erf together with a personal suretyship from Mr Lamour. It was a condition of the development loan that it could only be accessed once a certain number of units had been pre-sold. In his evidence, Mr van den Berg confirmed that he was aware that Mr Lamour would need to obtain working capital for the development, and that for the scheme to be financially viable, units would have to be pre-sold.

[24] The timeline of further events demonstrates that the development took a considerable period to get off the ground. Despite the Kelbrick and Van den Berg deeds of sale having been signed in September 2006, the transfer of their properties to Status was only registered on 27 July 2007. At the same time, a certificate of consolidated title was issued, consolidating the properties into erf 2757 Westering. Also on the same date, a continuing covering mortgage bond was registered over the consolidated property in favour of Standard Bank in the amounts of about R8,7 million and R2,2 million. Status' debt to the bank was further secured by a personal suretyship from Mr Lamour.

[25] For reasons that are not clear from the evidence, the project did not proceed with any urgency after consolidation and transfer. It appears that the Van den Bergs vacated their house in approximately July 2007 and moved into alternative accommodation, after which demolition work began. Mr Lamour's health seems to have been a factor, as indicated in emails from the Van den Bergs. On 26 October 2007 the Van den Bergs addressed an email to Mr Nelson complaining about the lack of progress and response. They accused Mr Lamour of deliberately stalling the process and playing games. They stated that they were fed up with the

whole process, were going to seek legal advice and would not hesitate to act on it. However, nothing came of this at the time.

[26] The application for the removal of restrictive conditions of title was launched in January 2008. Without this approval, no construction work on the development could properly begin. The approval was granted in approximately August 2008. Some preliminary clearance and foundation work were undertaken on the site from June 2008.

[27] Dissatisfied with the slow progress, the Van den Bergs and Mrs Kelbrick eventually sought legal advice. On 1 September 2008 Mr Kitching, of Pierre Kitching Attorneys, addressed a letter on their instructions to Burman Katz Attorneys who, at that stage, acted for Status and Mr Lamour, Mr Nelson having withdrawn as Status' attorney. The letter demanded a written undertaking within ten days that the units earmarked by Mr Kitching's clients would be ready for transfer and occupation within four months. The letter also demanded the amounts owing for the alternative accommodation costs of the Van den Bergs and Mrs Kelbrick.

[28] On 31 October 2008, Mrs Kelbrick and the Van den Bergs issued summons against Status and Mr Lamour based on Status' breach of the deeds of sale. They averred that more than a reasonable time had elapsed for the fulfilment of Status' obligation to construct and transfer the new units. They claimed payment of the amount of R1,4 million, being the purchase consideration under the deeds of sale, as well as the amounts due in respect of rentals for alternative accommodation.

[29] Subsequently, on 21 November 2008, the respondents filed an application for summary judgment. It is noteworthy that summary judgment was sought only in respect of the claim for outstanding rentals, and not for the purchase price. Summary judgment was granted for the rental claims on 7 July 2009.

[30] In the interim, in approximately October 2008, building work began on the development site. However, in February 2009 construction ceased and the builders left the site after Standard Bank refused to allow further drawdowns from the development bond. According to Mr Nelson, what ultimately led to this state of affairs was a combination of construction being delayed until the restrictive title deed conditions had been removed, together with a slump in the property market. Consequently, prospective purchasers of the new units cancelled, leaving Status in the position of having insufficient sold units to permit further drawdowns and, hence, no capital to continue with the development. This led to the collapse of the scheme.

[31] In separate proceedings, Mr Jonker instituted an action against Status, Mr Lamour and Nelson Attorneys on 16 September 2009. The claim against the latter was settled on terms that are not known. An application for the liquidation of Status was made on 23 December 2009. A provisional liquidation order was granted on 23 February 2010 and confirmation thereof on 15 June 2010. Mr Lamour was also sequestrated on an unknown date. It was only after the settlement of the Jonker claim that the respondents instituted their action against the appellant on 29 August 2011.

Pleadings

[32] The claim against Nelson Attorneys is premised on Mr Nelson having drafted the deeds of sale as the representative, and on instructions of Status and/or Mr Lamour. It is averred that at that time the respondents were, to the knowledge of Mr Nelson, not represented by attorneys. It is further averred that Mr Nelson caused transfer of the properties to be registered in the name of Status. The particulars of claim state that Status failed to comply with the deeds of sale. Although action was instituted against Status and Mr Lamour, and judgment granted in the respondents' favour, the liquidation of the former and sequestration of the latter resulted in the

respondents being unable to recover the monies due and payable to them. None of these averments is materially disputed in Nelson Attorneys' plea.

[33] Of significance is paragraph 23 of the amended particulars of claim. It reads: 'By virtue of [Nelson Attorneys] drafting the agreements … and acting as conveyancer with instructions to attend to the transfer of the properties of [Mrs Kelbrick and the Van den Bergs] to [Status] in terms of [the deeds of sale] …, the cancellation of the bonds… over [Mrs Kelbrick's and the Van den Bergs'] propert[ies] and subsequent appointment to register a development bond over the property as consolidated with other immovable properties and [Nelson Attorneys'] appointment as conveyancer to attend to the transfer of the completed units in the development to [Mrs Kelbrick and the Van den Bergs], [Nelson Attorneys] owed [Mrs Kelbrick and the Van den Bergs] a *duty of care*.' (My emphasis.)
In its plea, Nelson Attorneys' response to paragraph 23 is a simple '[a]dmitted'.

[34] Paragraph 25 of the amended particulars of claim deals with the alleged negligent breach by Nelson Attorneys of its duty of care towards the respondents in several listed respects. These include, among others:

a. failing to inform the respondents that in the event of Status breaching its obligations under the deeds of sale after registration of transfer and consolidation, the respondents would have no bank guarantee or other guarantee that they would be paid the monies due to them;

b. failing to advise the respondents that they would also be unable to claim restoration of their properties, as they would have been consolidated with the other erven;

c. failing to protect the interests of the respondents adequately or at all by, among others, delaying transfer of the properties until after the restrictive conditions had been removed and other authorisations or approvals

obtained; delaying transfer 'until such time as it was certain that the removal of the restrictive conditions and rezoning would be achieved, and the development would proceed'; not advising the respondents that they could require a covering mortgage bond in their favour over the consolidated property; preparing the deeds of sale that had the effect that 'transfer of the properties would be passed to the corporation with no guarantee whatsoever that the proposed development would ever come to fruition'; and failing to inform the respondents of the risk of entering into the deeds of sale with no guarantees in place;

d. failing to ascertain or reasonably foresee that Status and Lamour would not be in a financial position to meet their obligations;

e. failing to inform the respondents of events, of which Mr Nelson allegedly had knowledge, which placed the respondents at risk, including the fact that legal proceedings were instituted against Status and Mr Lamour and various judgments obtained; and the fact that Mr Lamour had divorced his first wife and had transferred substantial assets to her; and

f. making certain misrepresentations to the respondents, but for which they would not have allowed the transfers to proceed or would have acted to mitigate their risks.

[35] In paragraphs 26 to 28 of the particulars of claim it is alleged that the respondents suffered damages as a result of Nelson Attorneys's breach of its duty of care. The damages include the amount of R1,4 million, being the joint purchase price that was not paid to them by either Status or Mr Lamour and which was irrecoverable from their estates. Outstanding rentals for the alternative accommodation occupied by the respondents are also claimed.

[36] In its plea, Nelson Attorneys denies the averments that it acted negligently and breached its duty of care. It also denies the averred damages suffered by the respondent.

[37] The admission of the averments in paragraph 23 raises a pertinent issue: does it constitute an unequivocal admission by Nelson Attorneys of the delictual element of wrongfulness? Consequently, was it necessary for the trial court to consider and determine the requirement of wrongfulness at all? The respondents contended, which contention they maintain in this appeal, that it was unnecessary to do so. Their view is that on the pleadings as they stand, the trial court was bound to proceed on the basis that wrongfulness was not placed in dispute and, thus, that it had been established by the respondents.

[38] The trial court disagreed with the respondents' interpretation of the pleadings, finding that it conflated the elements of wrongfulness and that of negligence. It proceeded on the basis that, notwithstanding the admission, the court was required to inquire into and determine whether the element of wrongfulness was established. The trial court concluded that the respondents had not satisfied their onus in this regard.

[39] The full court, on the other hand, adopted the view that 'given the admission of [a] legal duty [in para 23] by [Nelson Attorneys], the issue of wrongfulness was not before the [trial] court for determination.' The full court reasoned that it is 'an established rule of evidence that admitted facts need not be proved'. It upheld the appeal, finding that, wrongfulness having been established on the pleadings, the only remaining issue was that of negligence. The full court was satisfied that that element, on the facts, and particularly on the expert evidence of Mr Burman, was also

established. It did not consider the remaining element of Aquilian liability, being that of causation.

Issues on appeal

[40] It follows from this discussion of the pleadings that the issues arising for determination in this appeal are:

a. Whether, on the pleadings, wrongfulness was admitted and hence established.

b. If so, it is only necessary to determine whether the remaining elements of Aquilian liability, being negligence, causation and damages have been established. If any of these elements are found not to have been established, the appeal must succeed.

c. If, on the other hand, wrongfulness is found not to have been admitted on the pleadings, it follows that all the elements of Aquilian liability, including wrongfulness, fall for consideration. If the respondents' claim in respect of any of these elements is found wanting, the appeal must succeed.

Wrongfulness

[41] In approaching the element of wrongfulness in this case, it must be emphasised that the respondents seek to hold Nelson Attorneys liable for their pure economic loss. There was no contractual nexus between them and Nelson Attorneys. Nor do they allege that Mr Nelson bore any responsibility for the development failing. In effect, based on his role as the drafter of the deeds of sale and the conveyancer responsible for the transfers of property involved, they seek to hold him

liable for their loss of the purchase price under their contract with a third party, Status.

[42] In cases like this, it is helpful to restate certain trite principles of Aquilian liability. The Aquilian action is an exception to the first principle of delict, which states that everyone must bear the loss they suffer. Put simply, loss lies where it falls. Under the exception to this basic principle, a negligent act or omission that causes the loss may result in Aquilian liability on the part of the wrongdoer, but only if that negligent act or omission is, in addition, wrongful. [3]

[43] It is accepted in our law that in some instances, wrongfulness is presumed: a positive negligent act causing physical harm to one's person or property is prima facie wrongful. In those cases, the element of wrongfulness is seldom contentious. However, wrongfulness becomes less straightforward in the case of negligent omissions or negligently caused pure economic loss.[4] Here, the negligent omission, or act causing pure economic loss is not prima facie wrongful. More is needed to establish liability. Wrongfulness in those circumstances will only be established if policy considerations dictate that the plaintiff should be compensated for her loss.[5] As the Constitutional Court succinctly put it in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* (*Country Cloud*), '[t]here is no general right not to be caused pure economic loss.'[6]

[44] What is more, our law is generally reluctant to recognise pure economic loss claims, especially where this would constitute an extension of the law of delict beyond the limited categories of cases in respect of which it has been recognised.

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[3] *Telematrix* para 12.
[4] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) (*Two Oceans Aquarium*) para 10.
[5] *Telematrix* para 13.
[6] *Country Cloud* para 22.

The categories include intentional interference in contractual relations or negligent misstatements, where the plaintiff can show a legally recognised interest that has been infringed.[7] Wrongfulness acts as a necessary check on liability because, due to its nature, pure economic loss can lead to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[8]

[45] It follows that conduct causing pure economic loss is only wrongful if public or legal policy considerations require that such conduct, if negligent, is actionable, and that legal liability for the resulting damages should follow. However:

'Conversely, when we say that negligent conduct causing pure economic loss or consisting of an omission is not wrongful, we intend to convey that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages, his or her negligence notwithstanding. In such event, the question of fault does not even arise. The defendant enjoys immunity against liability for such conduct, whether negligent or not.'[9]

[46] This distinction between wrongfulness and fault is crucial in cases involving pure economic loss. Too often these distinct delictual elements are confused. The confusion sometimes arises from a further confusion between the concept of a 'legal duty', which is associated with the element of wrongfulness, and that of a 'duty of care', which is commonly used to frame the element of fault in the form of negligence.[10] This Court has repeatedly warned against this confusion, noting that it may lead the unwary astray.[11]

[47] So too, the criterion of 'reasonableness' is sometimes used in the context of both wrongfulness and negligence. When reference is made to 'a general criterion

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[7] *Country Cloud* para 23.
[8] *Country Cloud* para 24, quoting from Cardozo CJ in *Ultramares Corporation v Touche* 174 NE 441 (1931) at 444.
[9] *Two Oceans Aquarium* para 12.
[10] *Hawekwa Youth Camp v Byrne* [2009] ZASCA 156; 2010 (6) SA 83 (SCA) (*Hawekwa*):
[11] *Telematrix* para 14; *Two Oceans Aquarium* para 11 and *Hawekwa* para 21.

of reasonableness', as determined by public and legal policy, in the context of wrongfulness, it means something different from the reasonableness criterion applied in respect of negligence. In respect of the former, the inquiry is into the reasonableness of *imposing liability* on a defendant. On the other hand, with negligence, the inquiry is into the reasonableness of the *conduct* in question.[12]

[48] The avoidance of these common confusions is not only necessary as a matter of principle. It is also important as a matter of practice and procedure, and, of course, in the adjudication by courts of claims for pure economic loss. Care must be taken to avoid an approach that conflates the two. Practitioners and courts should guard against the temptation to treat the wrongfulness inquiry as involving a consideration of factors that correctly belong to the fault inquiry. Similarly, it is important to avoid an approach in these cases that assumes conduct must be wrongful because it is negligent. This is why a plaintiff claiming pure economic loss must allege wrongfulness and plead the facts relied on to support the allegation.[13]

[49] With these principles in mind, I turn to the first issue arising in this appeal, namely, whether wrongfulness was admitted on the pleadings. The crucial paragraphs of the particulars of claim in this respect are 23 and 25. The respondents contend that wrongfulness is pleaded in paragraph 23, and negligence in paragraph 25. Their further contention, which the full court accepted, is that Nelson Attorneys' response in admitting paragraph 23 was an unequivocal admission of the element of wrongfulness. Consequently, they argue that the element of wrongfulness was 'off the table', so to speak, and that the trial court ought not to have considered or made any determination on this element of liability.

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[12] *Two Oceans Aquarium* para 11.
[13] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) (*Fourway Haulage*) para 14.

[50] In accepting this proposition, the full court reasoned that:

'The respondent admitted having a legal duty towards the appellants as stipulated in paragraph 23 of the … particulars of claim. … [T]hat paragraph on its own contains allegations which give rise to a legal duty on the part of the respondent. … It is an established rule of evidence that admitted facts need not be proved. The court … erred in holding that the issue of wrongfulness still had to be determined.'

[51] Unfortunately, in its reasoning and conclusion the full court was led astray by the respondents' argument that paragraph 23 constitutes their pleading on the element of wrongfulness. Inherent in this argument is the very confusion between the elements of wrongfulness and negligence against which this Court has warned. Paragraph 23 does not, in its express terms, refer to the element of wrongfulness, or unlawfulness (as it may sometimes be framed) at all. On the contrary, what is pleaded expressly is a 'duty of care'. That 'duty of care' is pleaded as arising from the fact that Mr Nelson drafted the deeds of sale and acted as conveyancer in the various property transactions associated with the development.

[52] One cannot quibble with the averment that an attorney and a conveyancer must act reasonably and diligently in his or her dealings with the parties to property transactions. In other words, that he or she owes them a 'duty of care'. In this respect, there is nothing wrong with the case pleaded in paragraph 23. The difficulty for the respondents is that in both its language and formulation, what is pleaded in paragraph 23 is not directed at the element of wrongfulness at all: it is directed at the element of fault. This becomes even clearer when paragraph 23 is read in conjunction with paragraph 25: that paragraph contains the averments in support of the respondents' case that the 'duty of care' owed by Nelson Attorneys, as described in paragraph 23, was negligently breached.

[53] Consequently, both paragraphs 23 and 25 address the element of fault, in the form of negligence. The full court erred in reading paragraph 23 as dealing with the element of wrongfulness. It compounded this error by finding that Nelson Attorneys had admitted a 'legal duty' and hence that the element of wrongfulness was not in dispute. As the trial court correctly found, the respondents' argument conflated the two elements of wrongfulness and negligence. The admission of paragraph 23 was not an admission of the wrongfulness element. Wrongfulness remained an element that the trial court was required to determine and which the respondents bore the onus to satisfy.

[54] The next question, then, is whether wrongfulness is established in this case, bearing in mind that negligent conduct causing pure economic loss is not prima facie wrongful. For purposes of the wrongfulness inquiry, negligence is presumed: the question is whether there was a legal duty not to act negligently. In other words, should legal liability be imposed for the financial loss arising from the (presumed) negligent conduct.[14]

[55] The wrongfulness inquiry is a matter for judicial determination, involving legal and public policy considerations consistent with constitutional norms.[15] By its very nature, this form of inquiry opens the door to potential uncertainty. This much was recognised in *Fourway Haulage*. There this Court accepted that absolute certainty is unattainable, and that there are no clear, bright lines between negligent conduct causing pure economic loss that will be regarded, in terms of legal policy, as actionable, and such conduct that will not.[16]

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[14] *Two Oceans Aquarium* para 12.
[15] *Two Oceans Aquarium* para 10.
[16] *Fourway Haulage* paras 16 – 22.

[56] What is clear, however, is that liability for pure economic loss does not depend on the personal views of individual judges as to what is reasonable and fair.[17] In other words, judges cannot pick out deserving cases when they see them.[18] The determination of liability does not involve 'an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms'.[19] The question in every case is whether there are persuasive legal policy reasons to impose liability for the loss concerned. An example of an accepted policy consideration is that liability may more readily be imposed (in other words, wrongfulness established) in cases of a single loss for an identifiable plaintiff that occurs only once.[20] This is thus one, albeit not a determinative, factor that is taken into consideration in the wrongfulness inquiry.

[57] Another recognised policy consideration is whether the plaintiff was 'vulnerable to risk'. If the plaintiff could reasonably have taken steps to protect itself from the loss by other means, for example, contractual means,[21] then the plaintiff is not 'vulnerable to risk'. As a matter of legal policy, in these circumstances there is no need for the law of delict to step in to protect him or her from the loss. Vulnerability to risk is an important factor mitigating against a finding of wrongfulness in pure economic loss cases.[22]

[58] In sum, claims for pure economic loss involve a different approach to the element of wrongfulness.[23] The onus on a plaintiff is considerable. As this Court explained in *Two Oceans Aquarium*:

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[17] *Fourway Haulage* para 21.
[18] *Fourway Haulage* para 17.
[19] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) (*Van Duivenboden*) para 21.
[20] *Fourway Haulage* para 23.
[21] *Two Oceans Aquarium* para 23.
[22] *Country Cloud* para 51.
[23] *Fourway Haulage* para 12.

'When a court is requested in the present context to accept the existence of a "legal duty", in the absence of any precedent, it is in reality asked to extend delictual liability to a situation where none existed before. The crucial question in that event is whether there are any considerations of public or legal policy which require that extension.'[24]

[59] In the present matter, what the respondents seek is to hold Nelson Attorneys liable for the financial loss suffered: first, as a result of Status breaching its obligation under the deeds of sale and failing to deliver the units; and second, as a result of their inability to recover the equivalent purchase price from either Status or Mr Lamour. The main complaint against Mr Nelson is that he did not warn the respondents of the risks associated with entering into the agreements without better security. Their further complaint is that as the conveyancer, Mr Nelson ought to have delayed the transfer and consolidation of the properties until the application for the removal of restrictive conditions had been approved. Had he done so, as I understand the argument, it is likely that the proposed development would have collapsed before the transfer of title from the respondents to Status.

[60] In essence, what the respondents contend for is that Nelson Attorneys should be held liable for the risk the respondents took that the development would fail, and that Status and Mr Lamour would breach their contractual obligations. Are there any pressing legal policy considerations for extending such liability in these circumstances?

[61] By its very nature the transaction was high-risk, with the prospect of concomitant high value gains for the Van den Bergs and Mrs Kelbrick. It was an arrangement that made sense in the context of the buoyant market for similar developments prevailing at the time. Instead of receiving money in exchange for

[24] *Two Oceans Aquarium* para 12.

their properties, they accepted a purchase consideration in kind. What is more, the units to which they were entitled did not exist yet. In his evidence, Mr Nelson stated that the parties understood the risks involved. Although Mr van den Berg denied this, that denial cannot hold water when viewed in context.

[62] The terms of the deeds of sale were simple and clear: in exchange for their properties and the demolition of their present homes, they would, in the future be able to claim transfer of new units that still had to be constructed. It did not take a legal mind to understand the basic scheme. Mr van den Berg understood the nature of the agreement and he must have appreciated the inherent risk it involved.

[63] After all, it was Mr van den Berg who showed the initial interest and approached Mr Lamour. He had seen the other developments Status had undertaken, and he was impressed with Mr Lamour as a developer. Mr van den Berg agreed in his evidence that he had confidence in Mr Lamour's ability to perform under the contract. He must have been satisfied, from the independent view he had formed of Mr Lamour, that the risk was worth taking.

[64] Mr van den Berg was equally alive to the profit that he stood to gain from the arrangement with Status. This, too, warranted the risk he agreed to assume. In his evidence he acknowledged that he could have been driven by the profit margin when entering into the agreement.

[65] It is important to note, too, that broad agreement was reached between the Van den Bergs and Mr Lamour before Mr Nelson became involved. Although he reduced the agreement to writing, it encapsulated the terms to which the parties had already agreed. Nelson Attorneys had no direct client-attorney relationship with the respondents. It represented Mr Lamour and Status, albeit that, as Mr Nelson acknowledged, in finalising the terms of the deeds of sale, he had to act fairly

towards both the respondents and his client. There is nothing inherently unfair in the terms of the deeds of sale. Nor is it the respondents' case that Mr Nelson pressed them to accept terms they were reluctant to accept.

[66] In these circumstances, it does not seem to me that there are persuasive legal policy reasons to extend liability to Nelson Attorneys. There are two key overwhelming reasons why this must be so. First, the real reason for the respondents' loss was that the development failed. Mr Nelson bore no responsibility for this. Multiple factors caused the collapse: the downturn in the property market, the resultant inability to sell sufficient units and, ultimately, the consequential decision by Standard Bank to close the taps of the development loan. None of these causative factors was under Mr Nelson's control.

[67] Legal policy considerations did not expect of Mr Nelson that he ought to have predicted these future events. This is particularly so because it is clear from the facts recorded earlier that the Van den Bergs were highly motivated and committed to the deal going ahead. They maintained this stance consistently, even when they voiced concern about whether the development was proceeding as planned. To hold Nelson Attorneys liable in these circumstances would mean finding that he had a legal duty to dissuade the respondents from their committed course of action. This cannot be reasonable.

[68] The second reason to refuse the extension of liability in this case is that the respondents were clearly not vulnerable to risk. They made several conscious decisions to proceed with the arrangement with Status and Mr Lamour even when, both objectively and subjectively, there were reasons for them to reconsider their position. As early as December 2005, the Van den Bergs were offered an alternative proposal by another developer when they were already concerned about the slow

progress of affairs. They declined to follow up. In February 2006, again worried about a lack of commitment from Mr Lamour, they threatened to obtain advice. Nonetheless, seven months later, and with no evidence that they had taken any legal advice, they signed the deeds of sale.

[69] Mr van den Berg was unable to explain why he had not proceeded to seek advice before entering into the agreement, save to say that he was optimistic and confident that Mr Lamour would be able to perform his obligations. The respondents had ample opportunity to withdraw from the arrangement with Status prior to signing the deeds of sale when they questioned Mr Lamour's commitment. They elected not to do so. Once again, in October 2007, the Van den Bergs threatened to get legal advice but seemingly failed to do so. Instead, they resolutely remained committed to their objective of seeing the contract through.

[70] Moreover, even after they had taken legal advice and instituted action against Status and Mr Lamour for breach, the respondents made a conscious, deliberate choice not to proceed with their claim for payment of the purchase price. Instead, they chose to hold out for the transfer of the units. As Mr van den Berg put it, he remained hopeful that the deal could be salvaged. Consequently, the respondents could have taken reasonable steps to avoid their loss by enforcing their contractual rights. They opted to ignore the clear signs of risk presented to them in the hope that the substantial return on their investment would eventuate. Accordingly, they were not vulnerable to risk and cannot expect the law of delict to come to their aid by holding Mr Nelson, a third party to the contractual relationship, liable for the financial loss they suffered consequent on their eventual inability to recover damages in contract.

[71] For these reasons, I find that the trial court correctly found that the respondents did not establish wrongfulness. This finding, on its own, is sufficient to uphold the appeal. As a precautionary measure, and to remove any lingering concerns that may arise, I proceed nonetheless to consider the remaining elements.

Negligence

[72] Nelson Attorneys admitted that it owed the respondents a duty of care insofar as Mr Nelson had drafted the deeds of sale and acted as the conveyancer appointed by Status to attend to the transfers and related conveyancing transactions arising from the development. Mr Nelson also admitted that the duty extended beyond the first transfers from the respondents to Status.

[73] As this Court noted in *Margalit v Standard Bank Ltd and Another* (*Margalit*),[25] conveyancers are expected to be fastidious in their work and to take great care in the preparation of their documents. This obligation is expressed in s 15(A) of the Deeds Registries Act 47 of 1937, which requires conveyancers to accept responsibility for the correctness of the facts stated in the deeds or documents prepared by them.[26] However, this obligation is not directly applicable in the present case as the claim against Nelson Attorneys is not founded on inaccuracies in the conveyancing documents prepared by Mr Nelson. This case stands on a different footing to that in *Margalit*.

[74] As appears under the heading 'Pleadings' above, the respondents' pleaded breaches of Nelson Attorneys' duty of care are wide-ranging. For purposes of the appeal, the respondents focused on two categories of the alleged breaches: first, and prior to the signing of the deeds of sale, the alleged failure of Mr Nelson to warn the

[25] *Margalit v Standard Bank Ltd and Another* [2012] ZASCA 208; 2013 (2) SA 466 (SCA) (*Margalit*).
[26] *Margalit* para 26.

respondents of the risks attendant on entering into transaction without adequate security; and second, post-signature of the deeds of sale, Mr Nelson's failure to delay transfer of the properties until the removal of restrictive conditions and rezoning was achieved and it was certain that 'the development would proceed'.

[75] The foundation for the respondents' case for negligence rested on the expert evidence of Mr Burman. The thrust of his opinion was that the personal suretyship provided by Mr Lamour was inadequate. Further, that Mr Nelson should have done full due diligence on Mr Lamour's financial position before including this as a form of security in the deeds of sale. Mr Burman buttressed his opinion by presenting a 2019 print-out of Mr Lamour's immovable property holdings in 2006. They indicated that Mr Lamour's immovable properties were bonded and that, according to Mr Burman, his property-holdings were insufficient to cover the amount of the debt secured by his suretyship. In addition, Mr Burman pointed to the other personal suretyships provided to Standard Bank by Mr Lamour as indicating the extent of his indebtedness. Mr Burman's view was that Mr Nelson ought to have advised the respondents to obtain additional security in the form of a second bond over the property.

[76] As to the second arm of the respondents' case for negligence, Mr Burman opined that it was not necessary to transfer and consolidate the properties before applying for rezoning and removal of restrictive conditions. This aspect of his evidence is easily dealt with, as Mr Burman conceded that it was acceptable conveyancing practice to proceed as Mr Nelson had done. In any event, the deeds of sale recorded that transfer would take place as soon as possible. In the circumstances, it can hardly be said that Mr Nelson acted negligently in proceeding with the transfers and consolidation before securing the necessary additional approvals. On the contrary, he acted in accordance with the deeds of sale.

[77] Regarding the alleged failure of Mr Nelson to advise the respondents on adequate security, as the trial court correctly observed, Mr Burman's opinion was not informed by the correct facts and appraisal of the circumstances. An expert witness must base his or her opinion on stated facts. He or she should not omit to consider material facts which could detract from his or her conclusion.[27] Mr Burman based his opinion solely on the deeds of sale, the pleadings and the transcript of Mr Nelson's earlier evidence. He did not consult with any of the respondents. Consequently, his opinion was formed without reference to several material facts.

[78] For example, Mr Burman did not know that it was Mr van den Berg who had conceived the idea for a development and had approached Mr Lamour. He did not appreciate that Mr van den Berg had formed his own independent assessment of Mr Lamour as a capable developer who could be trusted to perform. This was before Mr van den Berg met Mr Nelson. Mr Burman did not know that prior to signing the deed of sale Mr van den Berg had considered taking advice or approaching another developer but had decided not to do so. Nor did Mr Burman know that prior to Mr Nelson's involvement the parties had already reached agreement in broad strokes and that Mr Nelson's brief was to reduce that agreement to writing. This was confirmed by Mr van den Berg in his evidence. Mr van den Berg further confirmed that he was happy with accepting Mr Lamour's suretyship as security, and that when he signed the deed of sale, he knew there was no bank guarantee included in the agreement. As Mr Burman gave evidence before Mr van den Berg, he did not take any of this into account.

[79] As to the alleged over-indebtedness of Mr Lamour, and Mr Burman's opinion that Mr Nelson failed to do due diligence, this view was formed in hindsight, long

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[27] *PriceWaterhouseCoopers Inc and Others v National Potato Co-Operative Ltd and Another* [2015] ZASCA 2; 2015 JDR 0371 (SCA); [2015] 2 All SA 403 para 98.

after the development collapsed. It was based on limited access to information regarding Mr Lamour and Status' financial position, being restricted to their immovable assets. Mr Burman did not consider the value of Status as a going concern, or the value of Mr Lamour's membership in Status at the time. Mr Burman's opinion ignores the fact that both Mr Nelson and Mr van den Berg relied on Status' public reputation as a successful developer in Gqeberha at the time. Importantly, his opinion also fails to explain why, had the development been risky, and Mr Lamour's suretyship valueless at the time, Standard Bank would have agreed to extend a development loan and accept his suretyship as a form of additional security.

[80] In light of these shortcomings, the trial court can't be faulted for finding Mr Burman's opinion unpersuasive on the question of negligence. On the facts, when the deeds of sale were entered into it was not reasonably foreseeable that four years later the development would collapse due to a chain reaction triggered by a downturn in the property market, and that both Status and Mr Lamour would be insolvent.

[81] It is also not apparent from the facts what steps Mr Nelson could reasonably have taken to prevent the respondents' eventual inability to recover contractual damages from Status or Mr Lamour. Even if a second bond in favour of the respondents had been registered against the consolidated property, it is unlikely that this would have yielded any return, given that Standard Bank would have been the first secured creditor. In any event, Mr van den Berg was happy with Mr Lamour's suretyship and decided not to take advice before signing the contract. He admitted that his commitment to the deal was driven by the handsome returns he stood to gain. This being the case, it is unlikely that he would have walked away from signing the agreement because of contrary advice from Mr Nelson.

[82] For these reasons, I find that the full court erred in concluding that the respondents had established negligence on the part of Nelson Attorneys. Even if one discounts the finding that wrongfulness was not established, the appeal should succeed on this score. Nonetheless, and again as a precautionary measure, I consider the element of causation.

Causation

[83] Neither the trial court nor the full court considered the element of causation. The trial court did not do so as it was satisfied that wrongfulness was not established. The full court's failure to consider causation is inexplicable. It ought to have applied its mind to the question of whether the respondents had satisfied this element of delictual liability. It should have concluded that they had failed to do so.

[84] It is trite that causation has both a factual and legal component. Factually, the question is whether the omission in question caused the harm. This is often expressed as the 'but-for' test: if, but for the impugned conduct the harm would probably not have been suffered, it can be concluded that factual causation is established. If not, that is the end of the causation inquiry. If, however, on an application of the but-for test a factual causal nexus between the conduct and the harm is established, liability will only follow if, in addition, legal causation is established.

[85] Legal causation, or remoteness of damage, as it is sometimes called, acts as a brake against indeterminate liability. In similar fashion to wrongfulness, it is determined by policy considerations.[28] Factors that play a role in the determination of legal causation include the foreseeability of the harm, its proximity to the

[28] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 68.

impugned conduct, and the directness of the link between the conduct and the harm.[29]

[86] In my view, neither factual nor legal causation is established in this case. It cannot be concluded that but for Mr Nelson's failure to advise the respondents of the risk of proceeding with only a suretyship as security their loss would not have occurred. As I indicated earlier, it is likely that Mr van den Berg would have remained committed to the deal and would not have extricated himself from it. In any event, there is no evidence that a more tangible form of security was a realistic possibility or, even if it had been, that it would have led to a different outcome. The key reasons for the ultimate collapse of the development, and the insolvency of Status and Mr Lamour, were beyond Mr Nelson's control. No form of security that he might have advised the respondents to insist upon, would have protected them from the market collapse and the consequent failure of Mr Lamour's development enterprise.

Conclusion

[87] I conclude, for all the reasons set out above that the appeal must succeed. The full court erred in upholding the appeal against the judgment and order of the trial court. This is because, in the first place, and contrary to the findings of the full court, wrongfulness was not established. In addition, and in any event, the respondents failed to establish negligence on the part of Mr Nelson. Finally, neither legal nor factual causation was established and for this reason, too, their appeal ought to have been dismissed by the full court.

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[29] *Fourway Haulage* para 34.

[88] I make the following order:

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the full court is set aside and substituted with the following order:

'The appeal is dismissed with costs, including the costs of two counsel where so employed.'

R M KEIGHTLEY
JUDGE OF APPEAL

Appearances

For the appellant:	J J Nepgen SC and T Rossi
Instructed by:	Munshi & Associates, Gqeberha
	Honey Attorneys, Bloemfontein
For respondent:	O H Ronaasen SC and B Westerdale
Instructed by:	Meyer Incorporated, Gqeberha
	Muller Gonsior Attorneys, Bloemfontein.