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Regspraak

EMAIL HACKERS, CONVEYANCERS AND PURE ECONOMIC LOSS*

Edward Nathan Sonnenberg v Hawarden 2024 5 SA 9 (SCA)

SAMEVATTING

EPOS-KUBERKRAKERS, AKTEBESORGERS EN SUIWER EKONOMIESE VERLIES

Hierdie vonnisbespreking is ’n kritiek op *Edward Nathan Sonnenberg v Hawarden* (2024 5 SA 9 (HHA)). Die saak handel oor epos-kuberkraking in die konteks van aktebesorging wat lei tot suiwer ekonomiese verlies. Die koper van onroerende eiendom moes die koopprys aan die aktebesorger oorbetaal. Die aktebesorger het sy bankbesonderhede per epos aan die koper gekommunikeer. ’n Kuberkraker het die epos onderskep voordat die koper dit ontvang het en het sy eie bankbesonderhede aan die koper verskaf. Die misleide koper het toe R5,5 miljoen aan die boosdoener oorbetaal. Die kuberkraker het verdwyn teen die tyd wat die waarheid na vore gekom het.

Die koper eis haar verlore miljoene van die aktebesorger in ’n deliksaksie in die hooggeregshof. In *Hawarden v Edward Nathan Sonnenbergs Inc* (2023 4 SA 152 (GJ)) bevind die hof van eerste instansie dat die aktebesorger onder ’n regsplig was om “nie nalatig” teenoor die eiser te handel nie. Die hof bevind ook dat die regsplig nie nagekom is nie en dat die verweerder die eiser se skade op ’n nalatige wyse veroorsaak het. Dus slaag die eiser. Terwyl die uitspraak swak gestruktureer is en konseptuele foute daarin gemaak word, bevat dit ’n paar akkurate stellings oor die beleidsoorwegings wat in ag geneem moet word by die bepaling van die onregmatigheid van die verweerder se handeling.

Op appèl beslis die hoogste hof van appèl dat die eiser om twee redes nie onregmatigheid kon bewys nie: Eerstens sou ’n bevinding van onregmatigheid lei tot onbepaalde aanspreeklikheid en tweedens was die eiser nie kwesbaar vir die risiko nie omdat sy haarself kon beskerm het teen die skade wat sy gely het.

In hierdie vonnisbespreking word daar geargumenteer dat die hoogste hof van appèl se bevinding oor onregmatigheid foutief is. Teenstrydig met die hoogste hof van appèl se bevinding, word geargumenteer dat verskeie faktore daarop dui dat onregmatigheid wél aanwesig is: (i) die feit dat die erkenning van ’n regsplig in hierdie konteks ’n inkrementele verwikkeling van die reg sou behels wat alreeds ’n regsplig erken tussen ’n prokureur en derde partye wat betalings maak; (ii) die professionele aansien van prokureurs en statutêre verpligtinge wat op regspraktisyns geplaas word; (iii) die nabye en direkte verhouding tussen die eiser en verweerder in hierdie geval; (iv) die vertroue wat die publiek in regsfirmas behoort te hê; (v) die feit dat daar geen aantoonbare risiko van onbepaalde aanspreeklikheid is nie; (vi) die feit dat die eiser se bydraende nalatigheid nie as ’n absolute verweer teen haar gebruik mag word nie; en (vii) die feit dat die tegnologiese risiko van epos-kuberkraking objektief akuut voorsienbaar is asook die verweerder se subjektiewe kennis hieroor.

1 *Facts*

This case of *Edward Nathan Sonnenberg v Hawarden* tells the story of an email hacker, a big law firm, and an unsuspecting victim who lost R5,5 million. The victim in this case, known to be a retired senior citizen, bought a property for R6 million (par 2). Her estate agent requested a R500 000 deposit. In that request, the victim was warned about the rise of cybercrimes, “email hacking, phishing and cyber scams” and was advised to call the estate agency to confirm their banking details. She duly did so, paid the deposit, and was put in contact with the appointed conveyancers at Edward Nathan Sonnenberg, popularly known as ENS (par 3).

* The Oppenheimer Memorial Trust is acknowledged for supporting this research with generous sabbatical funding. This research was conducted at the Amsterdam Centre for Transformative Private Law and some useful feedback was received from participants at a seminar that I presented on this case (University of Amsterdam, 7 October 2024).

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Soon after this, a representative from the conveyancing department at Edward Nathan Sonnenberg, Africa's largest law firm, sent an email to the victim with the correct banking details of the firm, to which the remaining money had to be paid (par 4). Behind the cyber veil, a hacker was lurking in the victim's email inbox, unknown to both the victim and Edward Nathan Sonnenberg. The hacker intercepted the true email from Edward Nathan Sonnenberg and replaced it with a fraudulent one, containing the criminal's banking details. After further telephonic conversations, this process of interception and fraudulent replacement was repeated (par 5).

The only clue about the fraud seems to be that the hacker's mail server indicated in the email address was "@ENSafirca" instead of the correct "@ENSafrica". The victim went to her bank and, with the assistance of a banker, made the payment to the fraudster (par 7). The victim sent proof of payment to Edward Nathan Sonnenberg but that email too was intercepted and replaced with a fraudulent email, making it seem as if the payment was made into the correct account (par 8). After a series of similar fraudulent exchanges, the fraud was discovered more than a week later (par 11). Sometime between the victim's payment and Edward Nathan Sonnenberg becoming aware of the fraud, the hacker had withdrawn the money and seemingly disappeared without a trace (par 9). The victim instituted a delictual claim in the high court against Edward Nathan Sonnenberg for her lost R5.5 million.

2 *High court judgment and critique*

In *Hawarden v Edward Nathan Sonnenbergs Inc* (2023 4 SA 152 (GJ)), the high court started its legal exposition by reiterating the basics of the law of delict: the victim must prove wrongful conduct, fault, causation, and harm (par 98). That is certainly aligned with the traditional dogma on Aquilian liability (see Neethling and Potgieter *Law of Delict* (2020) 4; Loubser and Midgley (eds) *The Law of Delict in South Africa* (2017) 24 and Van der Walt and Midgley *Principles of Delict* (2016) par 3).

The high court held that the conduct in question was Edward Nathan Sonnenberg's failure to protect the victim, in other words, an omission (the *Hawarden* case par 98). This was surely an uncontroversially correct description of the conduct in question (see Neethling and Potgieter 32-33; Loubser and Midgley 99 and Van der Walt and Midgley par 71).

Regarding wrongfulness, the high court relied on the point of departure provided in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* (2015 1 SA 1 (CC) par 22), that causing pure economic loss is prima facie lawful, unless policy considerations require that lawfulness be rebutted (the *Hawarden* case par 99). This basic statement of law is widely accepted to be correct (see Fagan *Aquilian Liability in the South African Law of Delict* (2019) 174; Neethling and Potgieter 351; Loubser and Midgley 274 and Van der Walt and Midgley par 87).

The high court reiterated the classical and authoritative test for negligence from *Kruger v Coetzee* (1966 2 SA 428 (A) 430), namely that the conduct of the alleged wrongdoer must be weighed against that of the reasonable person in terms of reasonable foreseeability and reasonable preventability (the *Hawarden* case par 100; see also Neethling and Potgieter 165-166; Fagan 13; Loubser and Midgley 153 and Van der Walt and Midgley par 148).

Against this backdrop of basic legal principles, the high court proceeded to apply the law to the facts, necessarily adding more legal principles as the judgment developed. Most of the remainder of the judgment focused on the element of wrongfulness, while negligence and causation also made brief appearances. The wrongfulness discussion was based on considering pro-and-con policy arguments.

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This was not done in a particularly systematic manner, as first critiqued by Scott ("'n Ernstige waarskuwing aan prokureursfirmas wat elektroniese betalings vir hulle kliënte fasiliteer" 2023 *THRHR* 473 480).

The first policy consideration in favour of a finding of wrongfulness was that our courts have historically recognised that when third parties deposit money into an attorney's trust account, that attorney owes a duty to "exercise care" towards those third parties (the *Hawarden* case par 102-103). One might call this the "general duty on attorneys" factor. This, the high court said, is the gist of cases like *Bruwer v Pocock and Bailey* (2016 JDR 2129 (WCC) par 26) and *Du Preez v Zwiegers* (2008 4 SA 627 (SCA) par 19-23). A point that the high court did not address immediately is that both the *Bruwer* case and the *Du Preez* case dealt with the situations where a depositor had already paid money into an attorney's trust account, after which the money was carelessly mismanaged. This is of course a different factual construction to the one in the *Edward Nathan Sonnenberg* case, where the money never entered the law firm's account. I will deal with this shortcoming in the high court judgment later in this note in more detail.

The high court weighed the "general duty on attorneys" factor against a much broader policy consideration, laid down in cases like *Hawekwa Youth Camp v Byrne* (2010 6 SA 83 (SCA) par 22), namely that omissions are generally regarded as prima facie lawful (the *Hawarden* case par 104-105). One might call this the "omissions" factor. The high court explained that this case involved prima facie lawfulness, both on account of an omission and the infliction of pure economic loss (par 106). It is not entirely clear whether the supposed double dosage of prima facie lawfulness weighs particularly heavily against a finding of wrongfulness. It is also not entirely clear from the judgment why the *Hawekwa* case was invoked in this regard because that case dealt with a physical injury sustained by a child and not pure economic loss, which necessarily involves more nuanced considerations.

From here, the high court reiterated that wrongfulness in these cases ought to be determined by balancing pro-and-con policy considerations (par 106). This, the high court emphasised, must be done with reference to norms and not arbitrary intuition, as cautioned in *Minister of Safety and Security v Van Duivenboden* (2002 6 SA 431 (SCA) par 21) and the *Country Cloud* case (par 26). The swaying backwards and forwards from general principles to specific rules does not do much for the coherence of the judgment, even though the court is correct in saying that wrongfulness is necessarily imbued with policy considerations that should not be based on pure intuition (see Du Bois "Getting wrongfulness right: a Ciceronian attempt" 2000 *Acta Juridica* 1 2 ff).

The third policy consideration that the high court reflected upon was the "risk of indeterminate liability" (the *Hawarden* case par 106-107). The high court cited the cases of *Country Cloud* (par 24-25) and *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* (2009 2 SA 150 (SCA) par 23). These cases and academic commentaries agree that this factor is an important consideration in the determination of the wrongfulness of causing pure economic loss (see Neethling and Potgieter 353; Fagan 190; Loubser and Midgley 277 and Van der Walt and Midgley par 87). This factor was treated briefly as the high court regarded it obvious that, in a case like this, the loss is necessarily "quantifiable and determinate". A more rigorous explanation would have been a welcome addition to this judgment.

From here the high court oscillated back to the general principles of wrongfulness, reminding us that the apex court in *Le Roux v Dey* (2011 3 SA 274 (CC) par 122) stated that a determination of wrongfulness requires a value judgment to be made about the reasonableness of imposing liability (the *Hawarden* case par 107). The

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high court in the *Hawarden* case (par 108) also reminded readers that wrongfulness is "open-ended and flexible" (following *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) par 11) and must necessarily change as society changes (following *Du Plessis v De Klerk* 1996 3 SA 850 (CC) par 86). In light of this, the high court decided that the rise of cybercrimes is one societal change to which the doctrine of wrongfulness ought to be responsive and so the court would impose a narrowly delineated "duty of care" on a conveyancer towards a purchaser in a conveyancing transaction (the *Hawarden* case par 108). The use of the term "duty of care" is a controversial choice of expression that could have been avoided (see the debate implicit between Neethling and Potgieter 63 and Fagan "A duty without distinction" 2000 *Acta Juridica* 49).

One would imagine that this concludes the wrongfulness enquiry. But the high court then went on to discuss further arguments for and against a finding of wrongfulness. This judgment is probably not one that I would prescribe to students as an example of conceptual clarity and systematic reasoning (on the power of well-structured legal writing see Oates, Enquist and Francis *Legal Writing Handbook: Analysis, Research and Writing* (2021) ch 48).

The high court then seemed to deal with the issue of indeterminate liability alongside the determination of whether the victim was "vulnerable to risk" in the sense that she could not reasonably protect herself from the harm (the *Hawarden* case par 109-114). The high court found that the victim in this case was not a business enterprise capable of protecting itself by clever contracting (par 117). While the victim could have protected herself better by asking Edward Nathan Sonnenberg to confirm their banking details telephonically or asking the bank for assistance in verifying the banking details (par 118), the victim reasonably placed her full trust in the law firm (par 125). Thus, the high court determined that a conveyancer like Edward Nathan Sonnenberg "owed at least, a general duty of care" to the victim in this case (par 122). That duty arises from the moment that the conveyancer is appointed and the victim places trust in that conveyancer (*ibid*). That duty required a conveyancer like Edward Nathan Sonnenberg to warn the victim of the threat of email hacking and/or to employ safer communication methods (*ibid*). Vulnerability to risk is identified in the major scholarly works on delict as an important consideration in the determination of the wrongfulness of causing pure economic loss, but the high court here made novel observations about the relationship of trust of the victim and wrongdoer in this context (Neethling and Potgieter 356; Fagan 189; Loubser and Midgley 276; Van der Walt and Midgley par 87).

The high court further considered the subjective foresight of harm by Edward Nathan Sonnenberg and the fact that they were the proximate cause of the victim's loss and concluded that the firm acted "wrongfully in light of the legal convictions of the community" (the *Hawarden* case par 126). The use of subjective foresight and proximate causation are not traditionally regarded as factors to consider when determining wrongfulness and patently amounts to a conflation of elements for liability (on the undesirability of the conflation of elements see most recently Ahmed "The origins of the recent new approach to determining wrongfulness in the South African law of delict" 2019 *THRHR* 136 139).

The element of negligence was dispensed with in a single paragraph making vague allusions to technological measures that "should have and could have" been implemented by Edward Nathan Sonnenberg (the *Hawarden* case par 128). The negligence enquiry, properly informed by the *Kruger* case and the hundreds of cases that have followed upon it, surely requires a more robust engagement with the standard of the reasonable person (or, in this case, the reasonable conveyancer, as a

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professional), reasonable foreseeability, and reasonable preventability. The lack of a thorough analysis of negligence is also criticised by Scott (490) in his discussion of the *Hawarden* case. Similarly, the causation enquiry was dealt with very briefly (par 129). Factual causation did not seem to be in dispute. Legal causation was asserted, rather than reasoned, by the high court. In the end, the victim succeeded with her claim in the high court (par 134).

3 *Supreme court of appeal judgment and critique*

3.1 Overview

On appeal, the supreme court of appeal overturned the high court decision and determined that the victim's case should fail because of the element of wrongfulness (the *Edward Nathan Sonnenberg* case par 16). As such, the supreme court of appeal only dealt with this element. The supreme court of appeal started by repeating the correct general rules that omissions causing physical harm and the infliction of pure economic loss are not regarded as prima facie wrongful and will be regarded as wrongful only if policy considerations justify such a finding (par 17-19).

The supreme court of appeal reasoned through the wrongfulness enquiry by relying on two main considerations: indeterminate liability and the victim's vulnerability to risk. These two factors had to be understood against the backdrop of the following facts (par 20): the victim had no contract with Edward Nathan Sonnenberg and was not the law firm's client; the victim suffered the loss because of a third party hacker's conduct towards the victim's email account and not a problem with Edward Nathan Sonnenberg's systems; the victim was warned about email hacking by her estate agent for the purposes of making a deposit related to the property purchase and duly verified the estate agent's account details before effecting payment; and the victim failed to do the same when dealing with the law firm shortly thereafter. It is unfortunate that these factors were not robustly woven into the parts of the judgment where the law was applied to the facts of the case.

3.2 Indeterminate liability

Zooming in on the issue of indeterminate liability, the supreme court of appeal was concerned that a finding in favour of the victim would have "profound implications not just for the attorney's profession, but all creditors who send their bank details by email to their debtors" (par 21). The high court's judgment created an "untenable" situation where "all creditors in the position of Edward Nathan Sonnenberg owe a legal duty to their debtors to protect them from the possibility of their accounts being hacked", which creates a "real danger of indeterminate liability" (*ibid*). It seems as if the lack of an attorney/client relationship informed the court's stance on this issue. This is a rather dramatic description of the effect of the high court judgment – a point to which I will return in due course.

The supreme court of appeal held that indeterminate liability is the "main policy consideration" that restrains findings of wrongfulness in pure economic loss cases (par 22). In this regard, the supreme court of appeal quoted the *Country Cloud* case at length:

> "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

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> information in a news report, or where the malfunction of an electricity network causes shut-downs, expenses and losses of profits to businesses that depend on electricity'" (par 24, footnotes omitted).

It is peculiar that the supreme court of appeal did not elaborate on the utility of this quotation from the *Country Cloud* case. The indeterminacy of liability is very clear in the hypothetical scenarios of a power outage's knock-on effects and a fake-news frenzy. The class of victims and the extent of harm is indeterminate in those cases in the sense that every single person in South Africa could notionally be affected by that power outage or the fake news report. In the *Edward Nathan Sonnenberg* case, we are not dealing with a law firm's conduct that could cause harm to all, most, or many South Africans. We are dealing with a law firm's conduct and duties vis-à-vis a specific identified victim who has the potential to lose a clearly defined sum of money. A more careful treatment of analogy and distinction would have either strengthened the supreme court of appeal's reasoning or led the supreme court of appeal to a different conclusion.

The supreme court of appeal's panicked claim that a case like this would cause havoc for all creditor/debtor relationships is perhaps overstated. The court could quite easily have formulated a narrow rule that only applies to conveyancers, their clients, and third-party depositors. Furthermore, the duty could have been narrowed even more specifically to be, for example, "a duty not to act negligently" in relation to hacking risks rather than an overbroad duty to prevent hacking in totality (see Fagan 158-169). This was how the same court formulated the much narrower duty that attorneys owe to third-party depositors in the *Du Preez* case (par 19-21) that was also cited in the high court judgment. Alternatively, even if the duty was formulated quite broadly as a "duty not to cause harm" (a position favoured by Neethling and Potgieter 62-63), sight should not have been lost of the fact that the law firm would only be liable if the other elements for liability are also met (notably including negligence and causation), and so the net would not inevitably be cast far too widely (this point is also made in the context of a different case by Mukheibir "Limitless liability – Tokoloshe or real danger?" 2015 *SALJ* 22 30). In the end, the net effect is that the law would not require a law firm, or anyone in a similar position, to do more than to act non-negligently.

It is furthermore critical to understand that in the *Du Preez* case, where a duty was imposed on attorneys, the depositor whose money negligently slipped out of the attorney's trust account was not a client of the attorney. The lack of an attorney-client relationship cannot be a major factor for wrongfulness in this context. Alternatively, the supreme court of appeal should have told us that it decided the *Du Preez* case incorrectly to that extent, with convincing reasons. This does leave one wondering whether it would be stretching the law too far to require a conveyancer to act (narrowly to act non-negligently or more broadly to act to prevent harm) towards a third-party depositor (purchaser), whose identity and details are fully known to the conveyancer, in the process leading up to the payment of money. In my view, this would be an incremental and logical legal development in relation to legal duties to prevent pure economic loss, firmly rooted in existing precedent, in light of the rise of the cybercrime plague in business communications (see the recent cases of *Hartog v Daly* 2023 JDR 0189 (GSJ); *Lester Connock Commemoration Fund v Brough Capital (Pty) Ltd* 2024 2 SA 486 (GJ); *Mosselbaai Boeredienste v OKB Motors* 2024 JDR 1348 (FB); *Pinnacle Micro v Govender* 2024 JDR 2031 (KZD) and *Fortein v Iprop Trading* 2024 JDR 2153 (FB)).

If we are to believe that requiring conveyancers to act non-negligently towards depositors (with whom they stand in close relationship) would create an untenable

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situation and throw conveyancing practices into disarray, I worry about the present and future of the legal profession. In light of my critique developed against of the supreme court of appeal's indeterminate-liability reasoning, I would argue that this factor does not weigh against a finding of wrongfulness in the *Edward Nathan Sonnenberg* case.

3.3 Vulnerability to risk

The supreme court of appeal next considered the issue of vulnerability to risk (the *Edward Nathan Sonnenberg* case par 23). The court relied on the *Country Cloud* decision for the general principle in this regard:

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

The supreme court of appeal also recalled that it had earlier determined in *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* (2013 5 SA 183 (SCA) par 28) that a victim's vulnerability to risk is "ordinarily a prerequisite to imposing a duty", and in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*: "the criterion of 'vulnerability' will ordinarily be satisfied only where the plaintiff could not reasonably have avoided the risk by other means – for example, by obtaining a contractual warranty or a cession of rights" (2006 3 SA 138 (SCA) par 23).

In its application of the law to the facts, the supreme court of appeal held that the victim in this case could have easily avoided the risk by at least three other means. Firstly, the victim could have verified Edward Nathan Sonnenberg's banking details over the telephone, like she did with her estate agent a few months earlier, when paying the deposit (the *Edward Nathan Sonnenberg* case par 20). Secondly, she could have asked her banker to assist her in verifying Edward Nathan Sonnenberg's banking details (par 20). Thirdly, the victim could have asked for a bank guarantee for the cash transfer instead of making the payment (par 26). In light of these three steps that the victim could have taken, the supreme court of appeal concluded that "she must in the circumstances take responsibility for her failure to protect herself against a known risk" (par 26). In other words, the element of wrongfulness was absent and Edward Nathan Sonnenberg's appeal succeeded.

There is at least one major critique to be raised against the court's treatment of the victim's vulnerability of risk. The consideration of vulnerability to risk was imported from the Australian high court case of *Woolcock Street Investments (Pty) Ltd v CDG* (2004 HCA 16 par 80) and adopted into our law by the supreme court of appeal in the *Two Oceans* case (par 23). In the *Two Oceans* case the court was quick to assume that this criterion fits well into the scheme of Aquilian liability in South African law. A pressing problem with incorporating vulnerability to risk into our law of delict is that we have a statute that prohibits this type of reasoning – or at least, the specific reasoning on vulnerability that the court employed in the *Edward Nathan Sonnenberg* case. Section 1(1)(*a*) of the Apportionment of Damages Act 34 of 1956 says the following:

> "Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent

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> as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage."

In the *Edward Nathan Sonnenberg* case it is apparent that the victim's contributory negligence is one of the key reasons for rejecting her claim. The essence of the court's reasoning against a finding of wrongfulness was that the reasonable person in the victim's position would have reasonably foreseen the risk of a hacker intercepting the emails in question and would have taken reasonable preventative steps to avoid the harm, which the victim here failed to do. In effect, her contributory negligence defeated her claim. The problem is of course that the act prohibits this defeat.

Some might argue that the use of the term vulnerability and its use in the context of wrongfulness indicates that we are dealing with something completely different here. The constitutional court in the *Country Cloud* case suggests this in a footnote (par 51 n 54). However, we ought to be careful that terminological decadence does not obfuscate what is really at stake here – resurrecting the complete defence of contributory negligence. If vulnerability to risk really means something totally different to a victim's contributory negligence, more analytical reasoning would be required to convince us of that fact. Otherwise, the vulnerability-to-risk criterion could run the risk of simply acting as a mask to hide the fact that we are really resurrecting contributory negligence as a complete defence, flying in the face of one of the act's main purposes. In summary, I would argue that a court wanting to apply the vulnerability criterion would have to convince us that they are not implicitly and artfully overriding legislation.

Concluding this discussion on the supreme court of appeal judgment in the *Edward Nathan Sonnenberg* case, I am left unconvinced that the considerations of indeterminate liability and risk vulnerability were properly applied in this matter. While the high court decision in the *Hawarden* case leaves much to be desired in terms of systematisation and coherence, some astute observations were made about the determinacy of liability and the victim's relative vulnerability to risk, which the supreme court of appeal did not address as seriously as it ought to have done in the *Edward Nathan Sonnenberg* case. If the element of wrongfulness is absent in this case, it must surely be for some reason other than the ones proffered by the supreme court of appeal. Alternatively, we might have to accept that the conduct of Edward Nathan Sonnenberg was indeed wrongful in this case. In the next part of this case note, I will aim to resolve the systematisation problem that is observed in the high court decision and the reasoning problem observed in the supreme court of appeal judgment. I will specifically focus on the element of wrongfulness.

4 *The way forward*

In *Loureiro v iMvula Quality Protection (Pty) Ltd* an overarching definition of wrongfulness was provided as follows:

> "The wrongfulness enquiry focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability" (2014 3 SA 394 (CC) par 53).

This definition effectively summarises and unifies divergent views on and tests for wrongfulness into two neat sentences (see the authorities cited in the *Loureiro* case par 53 n 47 and the commentary by Knobel "Wrongfulness: derailed or on track?" in Kuschke and Cornelius *Ars Docendi et Scribendi: Essays in Honour of Johan*

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Scott (2019) 49 53 ff). This definition has subsequently been cited with approval by the constitutional court as the starting point for the wrongfulness enquiry in the *Country Cloud* case (par 21), *DE v RH* (2015 5 SA 83 (CC) par 18), *Oppelt v Department of Health, Western Cape* (2016 1 SA 325 (CC) par 51) and *Mashongwa v Passenger Rail Agency of South Africa* (2016 3 SA 528 (CC) par 13). It is peculiar that the high court in the *Hawarden* case and the supreme court of appeal in the *Edward Nathan Sonnenberg* case relied on older and narrower general definitions of wrongfulness. If this matter were appealed to the constitutional court, or if a similar case is decided in future, I would argue that the *Loureiro* case should really be the starting point.

The definition from the *Loureiro* case may be usefully supplemented with the following extract from the *Country Cloud* decision that explains the underlying rationale for the element as follows:

> "[Wrongfulness] functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability" (par 20, footnotes omitted).

These *dicta* make it clear that wrongfulness involves a cost-benefit analysis of all relevant policy considerations in determining whether liability ought to be imposed on a particular wrongdoer. While the legal convictions of the community, constitutional considerations, rights, duties, and reasonableness certainly play a role in wrongfulness, these open-ended concepts have been given expression in more concrete rules over time that assist us, very practically, to conduct the cost-benefit analysis mentioned in the *Country Cloud* case.

Our courts tend to distinguish three different practical points of departure for determining wrongfulness in cases of Aquilian liability (see Neethling and Potgieter 49-51 and Fagan 174). Each of the three factual constructions have their own nuanced rules for how wrongfulness ought to be determined. The first relates to the situation where positive conduct has caused physical harm to the victim's body or property. The second relates to omissions that cause physical harm to the victim's body or property. The third relates to the infliction of pure economic loss, whether by positive conduct or an omission. I will explore the first and second points of departure briefly for the sake of context, after which I will focus on the third category that is more relevant for our understanding of the *Edward Nathan Sonnenberg* case.

The first factual construction that might give rise to a wrongfulness dispute relates to positive conduct that causes physical harm to the victim's own body or property. It is an established rule that such harm-causing conduct is labelled as being prima facie wrongful without further ado (see *Minister of Safety and Security v Rudman* 2005 2 SA 16 (SCA) par 57). To tie this back to the overarching principles of wrongfulness from the *Loureiro* case and *Country Cloud* case, the rationale for this rule might be that in these cases we are dealing with the infringement of a clear right of the victim, which could certainly include a constitutional right. The inverse phrasing is that, as a general rule, we are dutybound not to cause physical harm to other people's property or body through positive conduct. Once a *prima facie* case of wrongfulness has been established by a victim, it is up to the wrongdoers to raise a defence of some kind against wrongfulness, justifying their conduct. The open list of defences includes, popularly for example, private defence, necessity, consent,

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statutory authority, and official command (see Neethling and Potgieter 106-147; Loubser and Midgley ch 10 and Van der Walt and Midgley par 110).

The second factual construction that might give rise to a wrongfulness dispute relates to omissions that cause physical harm to the victim's own body or property. It is an established rule that such harm-causing conduct is prima facie lawful, unless the victim can convince a court that policy considerations exist that justify a shift towards labelling the omission as wrongful (see *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) par 12). From the *Van Duivenboden* case, the rationale for this general rule seems to be a concern for the alleged wrongdoer's rights to dignity (autonomy) and freedom, and the fact that imposing duties on legal subjects to intervene in one another's affairs may be overly burdensome or, to use the terminology of the *Country Cloud* case, the social, economic and political costs of this kind of duty are too high. However, sight must not be lost of the fact that this is only the point of departure. From there, victims can make out a case that their rights to tangible property and bodily integrity and the specific wrongdoer's legal duties require that an exception ought to be made to this general rule.

Historically, the wrongfulness of an omission, and thus also whether an alleged wrongdoer bore a legal duty towards the victim, was determined solely based on the prior-conduct rule (see *Halliwell v Johannesburg Municipal Council* 1912 AD 659 670-671). Later, the dangerous-property rule was introduced (see *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 3 SA 69 (A) 80H-82E). By the time of the groundbreaking case of *Minister van Polisie v Ewels* (1975 3 SA 590 (A) 597A-B), the wrongfulness of omissions would no longer be determined with reference to a single rule. The appellate division held that a variety of factors, ultimately inspired by the legal convictions of the community, ought to be considered in the process of labelling an omission as wrongful. With the dawn of constitutional democracy came the rise of constitutional rights and duties and the value of state accountability in the wrongfulness enquiry – opening a much wider range of factors that courts ought to consider when determining the wrongfulness of an omission (see Fagan 180-186 and Loubser and Midgley ch 14).

The third category of wrongfulness relates to the causing of pure economic loss. It is an established rule that harm-causing conduct of this kind is prima facie lawful, regardless of whether the conduct involved took on the form of an act or an omission, unless a victim convinces a court that policy considerations exist that justify a shift to wrongfulness (see the *Country Cloud* case par 22). The rationale for this rule seems to be that our law has been historically reluctant to confer new rights that protect individuals from economic harms, especially when compared to the rights-based protection afforded to tangible property and personality (*ibid*). The corollary is that our courts have also been slow to impose new duties to prevent pure economic loss to others.

While one might be tempted to do a wholesale cut-and-paste from the second category of prima facie wrongfulness (adopting the prior-conduct rule, dangerous-property rule, and so forth), the case law points in a different direction. The reason for the different set of rules is historical. Claims for pure economic loss only properly started to take flight in the South African law of delict since *Administrateur, Natal v Trust Bank van Afrika Bpk* (1979 3 SA 824 (A)), which opened the door for pure-economic-loss lawsuits based on negligent misstatements. From here, the rules regarding wrongfulness and pure economic loss developed incrementally on a case-by-case basis.

The effect is that there are established sub-categories of pure economic loss that each contain their own nuanced rules for how wrongfulness ought to be established

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while the possibility always exists to create new categories (see *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) par 21-22).

Following Wessels ("Establishing legal certainty in novel pure economic loss cases" 2020 *THRHR* 318 340) this means that we must turn to existing precedent on the wrongful infliction of pure economic loss and determine whether a set of facts is analogous to a previous case or string of cases and, if so, apply the relevant rules to determine wrongfulness. On my reading of the cases, popular sub-categories of pure economic loss include fraud, negligent misstatements, wrongful contractual interference by a third party, and wrongful competition. Other sub-categories notionally exist. If a new case does not fit comfortably into one of the existing sub-categories, courts must consider the relevant policy considerations to determine whether an existing sub-category ought to be broadened or whether a new category ought to be created. Wessels (329-330) notes that in these novel situations, the case law shows that the policy considerations of indeterminate liability, vulnerability to risk, and the weight of the burden placed on the wrongdoer seem to be particularly important. Scott (489), Neethling and Potgieter (352 ff) and Loubser and Midgley (275 ff) read the cases and would add factors like subjective knowledge of the likelihood of harm, a heightened sense of objective foreseeability of harm, the professional standing and skill of the wrongdoer, statutory duties, and any other similar policy consideration. In agreement with Scott, I would argue that all these factors should be considered holistically in making a finding about wrongfulness.

Let us turn to consider the implications of the above summary of the law on wrongfulness for the *Edward Nathan Sonnenberg* case. The point of departure is to explain that this case deals with the infliction of pure economic loss because, in this case, the victim has not experienced any physical harm to her tangible property and/or body in the process of losing R5.5 million in her bank account. The general rule is that this type of harm-causing conduct is prima facie lawful, regardless of whether the conduct in question is an act or omission. However, it is open to the victim in this case to convince the court that policy considerations exist that justify a conclusion that Edward Nathan Sonnenberg owed her a duty not to cause her harm negligently and that Edward Nathan Sonnenberg breached that duty. The easiest way to do this is to slot her case into one of the pure economic loss sub-categories.

The *Edward Nathan Sonnenberg* case is relatively close to an existing sub-category that one might call the attorney/depositor relationship. The high court correctly identified the *Du Preez* case as one that shows some similarities with the *Edward Nathan Sonnenberg* case, even though there may be fundamental differences between them. There, an attorney received money in trust from a non-client. That attorney negligently proceeded to pay out that non-client's money to a third party who was not entitled to it. The court there clearly said that the attorney in question owed the non-client a duty not to act negligently in relation to the money placed in trust. The policy considerations underlying the decision are not clear from the judgment, but reliance was placed on the supreme court of appeal's earlier judgment in *Hirschowitz Flionis v Bartlett* (2006 3 SA 575 (SCA)) where a firm of attorneys received a deposit from an unknown person and subsequently paid it out to a fraudster unbeknown to the depositor.

In the *Hirschowitz* case the policy considerations that support an attorney's legal duty not to cause harm negligently are made clear, which I quote here at length because it was somehow missed in the high court and supreme court of appeal judgments in the *Edward Nathan Sonnenberg* case:

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> "First and foremost, the appellant, as recipient, was a firm of practising attorneys. As such, it proclaimed to the public that it possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly. Second, [the victim] relied on that and particularly on the fact that the money would be in the appellant's trust account until he instructed otherwise. [An expert forensic accountant's] exposition of an attorney's obligations in properly managing a trust account demonstrates that [the victim's] reliance on the money being safe in a trust account was reasonable, even if, as I shall point out, his failure to communicate with [the attorney] was not. Third, even where an attorney discovers an anonymous and unexplained deposit, it requires minimal management to transfer the money to a trust suspense account. It is then a task of no difficulty to trace the depositor with the aid of the firm's own bank. After that, one need merely leave the money where it is until receipt of instructions by or on behalf of the depositor or the person for whose benefit the deposit was made. Fourth, unreasonable conduct that might put the money at risk would, as a reasonable foreseeability, cause loss to the depositor or beneficiary. The legal convictions of the community would undoubtedly clamour for liability to exist in these circumstances" (par 30).

The facts of the *Edward Nathan Sonnenberg* case are of course different in material respects: the victim in the *Edward Nathan Sonnenberg* case did not make the payment into the attorney's account and so this is not a case of trust-account mismanagement as was seen in the *Hirschowitz* case. The hacking fraudster in the *Edward Nathan Sonnenberg* case dabbled with the victim's own email account and not the account of the attorneys, while in the *Hirschowitz* case the fraudster beguiled the attorneys. However, this is not the end of the matter. A court should consider more broadly whether strong enough policy reasons exist to extend the duty on a law firm beyond existing precedent. In this case, the question is about expanding an existing rule rather than creating a brand-new category of actionable pure economic loss.

I would argue that a nugget of wisdom from the *Hirschowitz* case lies in the first policy consideration that grounded the duty on the attorneys in question: one cannot ignore the fact that Edward Nathan Sonnenberg is a firm of practising attorneys, proclaiming that it possesses expertise and trustworthiness in relation to other people's money and legal affairs. In fact, their corporate image is built on the fact that they are the largest firm in Africa, which certainly creates an even stronger impression of trustworthiness and professionalism. The implications of that relationship of trust between the victim and Edward Nathan Sonnenberg should be considered more thoughtfully in this case. Neethling and Potgieter summarise the position as follows, citing more than 30 cases in the footnotes to support this proposition:

> "[the courts attach importance to] the fact that the defendant exercises a certain calling and thereby possesses or professes to possess special skill, competence and knowledge. This means that where the defendant is rendering professional services, he has a duty not to cause financial loss to others" (353 n 179).

In this regard, I would argue that mention should also be made of the rules regulating the profession, which, incidentally, also constitute the statutory duties imposed on legal professionals. Section 36(1) of the Legal Practice Act 28 of 2014 instructs the Legal Practice Council to issue a code of conduct regulating all legal practitioners. Section 36(2) of the act makes it plain that a breach of the code of conduct constitutes misconduct. The Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities has been duly published (GN 168 of 2019 in *GG* 42337 (29-03-2019)). Rule 3.14 of the Code of Conduct states that all legal practitioners owe a duty of "integrity, fairness, and respect" to the public at large – not only their clients. Legal practitioners may not bring the profession into dispute (rule 3.15) and attorneys must act "with such a degree of skill, care

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or attention, or of such a quality or standard as may reasonably be expected of an attorney". Cumulatively, these provisions from the Code of Conduct certainly do not point away from a finding of wrongfulness. That being said, the Code of Conduct is silent on the specific issue of the rise of cybercrimes and the duties of attorneys in relation thereto and this may be something that the Legal Practice Council could consider incorporating into their rules more clearly in future.

Moreover, our case law in other pure economic loss sub-categories, notably negligent misstatements, suggests that the existence of a proximal relationship in a professional setting, not limited to a professional/client relationship, creates a situation of trust that may give rise to the existence of a legal duty not to act negligently. For example, in *International Shipping Co (Pty) Ltd v Bentley* the "nature and the context of the relationship between the parties" and especially the direct link between them was an important consideration weighing in favour of wrongfulness (1990 1 SA 680 (A) 694E-F). In *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* (2010 5 SA 499 (SCA) par 25) the court noted that proximity, for purposes of determining wrongfulness is not limited to contractual relationships. To reiterate an argument that I made earlier in this note: The fact that the victim in the *Edward Nathan Sonnenberg* case was not a client of the law firm does not necessarily show an absence of proximity for purposes of determining wrongfulness.

Relatedly, as argued earlier in this note, the proximity of the relationship between Edward Nathan Sonnenberg and the victim in this case also demonstrates that there is no spectre of indeterminate liability here. The identity – maybe even the ID number – of the victim and the possible extent of her loss was perfectly determinate and known to Edward Nathan Sonnenberg. Attorneys are not required to protect the whole world from cyber-attacks. But surely we can expect them to take reasonable, proactive steps to protect their clients and proximal members of the public, like a purchaser in a conveyancing transaction.

Earlier in this note I also explained that vulnerability to risk should not come to the law firm's aid in this case because that would amount to using the victim's contributory negligence as a complete defence against her claim, which is statutorily prohibited. (That being said, if the law firm is found to be liable, it would be possible for a court to apportion the damages owed to the victim if it would be just and equitable to do so. In light of the victim's vulnerability as I explain it directly below, I would not support apportioning damages in this case on the basis of justice and equity.) If we are adamant that vulnerability ought to continue to exist as a wrongfulness consideration, we might do so through a different lens.

Perhaps we would do better to consider vulnerability with reference to victims' social positions that make them vulnerable vis-à-vis a wrongdoer (the same idea in a different context is introduced by Biggs and Jones "Legal vulnerability: What is vulnerability and who is vulnerable?" in Freeman et al *Law and Global Health* (2014) 133). Vulnerability in this sense would of course have to be determined on a case-by-case basis. The victim's status as a retired senior citizen as well as digital and financial literacy might be considered. A holistic picture of the victim's social position may help us understand why she might have placed full trust in the law firm instead of taking calculated steps to protect herself from online thugs. It may also help us understand why a law firm like Edward Nathan Sonnenberg ought to be dutybound to do marginally more to protect someone in the victim's position. Viewing vulnerability through this lens would arguably do better for the sake of promoting the spirit, purport and objects of the bill of rights (s 39(2) of the Constitution of the Republic of South Africa, 1996), which certainly places a high

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premium on equality and the protection of more vulnerable groups (on this theme in wrongfulness cases, see *Mashongwa v Passenger Rail Agency of South Africa* 2016 3 SA 528 (CC) par 18-19).

We must also remember that the legal convictions of the community necessarily develop over time (the *Hawarden* case par 106). As technology changes, so the risks associated with technology also change, and judges ought to be attentive to those changes and the law/technology interface. This general principle on wrongfulness is usefully mediated by the policy considerations of knowledge and foreseeability in this case: If it can be shown that Edward Nathan Sonnenberg subjectively knew or that there was an objective rising threat of harm related to hacking and business email compromise (*ie* the societal and technological change) in this context, an affirmative finding of the existence of a legal duty becomes increasingly likely.

Holistically viewed, I would argue that the policy considerations seem to weigh in favour of the victim in the *Edward Nathan Sonnenberg* case. If one were to use the terminology from the *Du Preez* case, the conclusion would be that Edward Nathan Sonnenberg in this case owed the victim a duty not to act negligently, the breach of which would be wrongful (this would be in line with how Fagan 158-169 conceptualises wrongfulness). If one were to cast the duty more broadly, one would say that Edward Nathan Sonnenberg owed the victim a duty not to cause harm and in this sense their omission could be labelled as wrongful (this would be in line with how Neethling and Potgieter 62-63 conceptualise wrongfulness). In both formulations of the duty, it is worth noting that the other elements for liability would still have to be established, notably negligence and causation. In the end, the outcome would ultimately be the same regardless of how we frame the duty involved.

In this discussion so far, I have said very little about the potential impact of the constitution on this case. I have left the best for last. When we consider a wide range of factors in determining wrongfulness, like I have suggested we should do in this case, the effect will be that we properly balance the interests of the victim and the wrongdoer against the background of the community at large. This type of balancing exercise is aimed at protecting the victim's property interests (expansively understood in the constitutional sense) against the wrongdoer's freedom of action and own economic interests in running an efficient business (see Zitzke "Justice Froneman and transformative delict" 2024 *PELJ* 1 10-12). When this is properly done, a balancing or proportionality exercise of this kind accords with the spirit, purport and objects of the bill of rights as required by s 39(2) of the constitution (see *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) par 43). However, when focusing on only one or two factors, and doing so in a panicked manner myopically focused on the wrongdoer's free trade, the result might not accord with constitutional objectives (a point most powerfully first made by Bhana and Visser "The concurrence of breach of contract and delict in a constitutional context" 2019 *SAJHR* 94 110 ff). Going forward, our courts ought to employ a more analytically rigorous approach where each factor's pros and cons are carefully and thoughtfully weighed.

5 *Brief comparative remarks from the Netherlands*

While conveyancers facilitate the transfer of immovable property in South Africa, *notarissen* fulfil an analogous role in Dutch law. Immovable property is formally transferred by means of a notarial deed that is registered in a public registry (a 3:89 par 1 *BW*). By the time that the notarial deed is signed, the purchase price must no

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longer be in the control of the purchaser and will be transferred to the seller once the deed has been registered (a 7:26 par 3 *BW*). In modern practice this means that the purchaser will usually pay the money to the notary by means of a bank transfer to keep in trust (in a special account created in accordance with a 25 of the *Wet op het Notarisambt*) by the time that the deed is signed (see Huijgen *Koop en Verkoop van Onroerende Zaken* (2022) par 25 and Hijma *Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere Overeenkomsten. Deel I. Koop en Ruil* (2019) par 732). South African and Dutch law appears to have a comparable practice of lawyerly involvement in the receipt of the purchase price from the purchaser for the seller. The pressing question is of course whether there are Dutch cases with facts analogous to the *Edward Nathan Sonnenberg* matter.

In the Netherlands it is observed that civil-liability cases on email hacking are (alarmingly) also on the rise. These cases often deal with the contractual implications for email hacking that leads to the non-payment of a contractual debt, as was seen in a recent decision of the *hoge raad* as supreme court of appeal (HR 28 mei 2021, NJ 2024/81, m nt Hijma (*Devante/Hascor*)). That judgment may prove fruitful ground for South African contract lawyers intending to ask the question about what should happen to a hacking victim's debt, like the purchaser in the *Edward Nathan Sonnenberg* case. However, a perfect email-hacking comparator to the *Edward Nathan Sonnenberg* case in a delictual context could not be found among the reported Dutch cases.

One reason for the lack of analogous cases on this point in Dutch law may be that it is settled law that the Dutch notary is dutybound to advise *both* the purchaser and the seller about the consequences of the legal act in question (a 5 of the *Verordering Beroeps- en Gedragregels* 2011 of the *Koninklijke Notariële Beroepsorganisatie*, passed in accordance with a 61 of the *WNA*). In other words, a Dutch notary explicitly acts as a legal professional towards *both* the purchaser and seller of immovable property. It seems that Dutch law would not view the purchaser of immovable property, like the victim in the *Edward Nathan Sonnenberg* case, as someone without any legal relationship towards the notary. At first glance we might say any further comparison between South African and Dutch law becomes moot. However, Dutch law offers some interesting insights about how we might conceptualise the legal duties owed by contracting parties towards third parties in a more abstract sense. This may be useful for an enriched understanding of the *Edward Nathan Sonnenberg* case.

Sieburgh, writing about protective norms and pure economic loss, notes that there have been no general theories developed by the *hoge raad* for delineating duties on contracting parties vis-à-vis third parties (*Asser/Sieburgh 6-IV De Verbintenis uit de Wet* (2023) § 66 5). She nonetheless contends that a contract between two parties may necessarily impact the interests of third parties and, as such, the existence of the contract may influence a finding on what *maatschappelijke zorgvuldigheid* requires of the contracting parties towards third parties (*idem*). Sieburgh's line of reasoning is insightful for the South African *Edward Nathan Sonnenberg* case in that we might argue that the existence of the contract between the seller of immovable property and the conveyancer necessarily brings the conveyancer into a proximal relationship with the purchaser that attracts a legal duty and makes a finding of wrongfulness more likely.

Moreover, some Dutch case law supports the broader argument made in this contribution that *notarissen* owe protective duties to certain non-client third parties. There is a long history of this principle in Dutch law (HR 23 dec 1994, NJ 1996/627 (*Curatoren THB, Notarissen THB I*); HR 23 dec 1994, NJ 1996/628 (*Notaris M/*

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Curatoren THB, Notarissen THB II); HR 15 sept 1995, NJ 1996/629 (*Notaris E/ Curatoren THB, Notarissen THB III, Tilburgse Hipotheekbank*); HR 26 jan 1996, NJ 1996/607, m nt Kleijn (*Dicky Trading II*) HR 3 apr 2015, NJ 2015/479, m nt Perrick (*Reijnders-Louis/Ribama, De Novitaris*); HR 19 febr 2016, NJ 2016/295, m nt Perrick (*S/E*) and HR 10 nov 2017, NJ 2018/192, m nt Perrick (*De Notaris/ De Zoon*). These cases cumulatively reveal that Dutch law imposes a duty on a *notaris* to be more than a passive spectator of imminent damage befalling others. This duty certainly ensures that a high view of the legal profession is maintained, safeguarding the status of these esteemed professionals. When dealing with non-client third parties in particular, the lawyer's subjective knowledge and/or objective foresight of a serious threat of damage would be important factors considered in the course of determining liability (see the analogous legal reasoning employed by Van Boom "The case studies" in Busani and Palmer (eds) *Pure Economic Loss in Europe* (2009) 171 412 ff).

Therefore, borrowing the above general principles from Dutch law and applying these to the South African case, if the risk of harm arising from email-hacking fraud is high for a person who stands in proximity to the conveyancer, the conveyancer arguably has a duty to warn that person about the imminent harm – and a failure to do so could be labelled wrongful (see also the general principles deduced by Verheij *Onrechtmatige Daad* (2023) par 2.22.3 and Jansen "Art 6:162" in Stolker (ed) *Groene Serie Onrechtmatige Daad* (2020) par. 6.5.5).

This brief comparative exercise has shown that the supreme court of appeal's reasoning and outcome in the *Edward Nathan Sonnenberg* case is not inevitable. A subtle shift in focus to different policy considerations can lead to a very different result. This is why I contend that the South African approach to determining the wrongfulness of causing pure economic loss, where multiple policy considerations ought to be considered cumulatively, ensures that many different angles of argument are addressed to reach a balanced and just outcome.

6 *Conclusion*

In this note, I have argued that the high court in the *Hawarden* case provided some useful policy considerations to determine wrongfulness but articulated these incoherently, while the supreme court of appeal in the *Edward Nathan Sonnenberg* case seems to have botched the policy considerations, albeit in a better structured judgment. In my view, the factors weighing in favour of a positive finding of a duty being placed on Edward Nathan Sonnenberg in this case would be (i) the fact that imposing a duty on the conveyancers in question would involve an incremental development of the law that already recognises a duty owed to proximal non-clients to act non-negligently; (ii) the professional standing and statutory duties imposed on legal practitioners; (iii) the proximate and direct relationship between the victim and wrongdoer, in spite of the absence of a contract between them; (iv) the trust that the public ought to be able to place in law firms with which they interact; (v) the fact that there is no demonstrable risk of indeterminate liability; (vi) the victim's contributory negligence may not be used to defeat her claim completely under the guise of her "vulnerability to risk"; and (vii) the technological risk of email hacking is objectively acutely foreseeable and subjectively known. If the *Edward Nathan Sonnenberg* case, or a similar one, is appealed to the constitutional court, it is hoped that a more robust, coherent and convincing engagement with these policy considerations would take place. Casting a wider net on the consideration of policy considerations necessarily ensures richer reasoning on balancing the interests of the

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parties. This increases the chances for a properly just and constitutionally spirited outcome to be reached. That is surely, in part, what transformative adjudication in a constitutional democracy ought to involve. It is worth repeating that, for the law firm to be held liable, the other elements for liability would also have to be met, notably negligence and causation – elements on which I have not provided any reflections here and which should not be imputed to the law firm in this case too hastily.

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RETURN TO THE INFAMOUS ENGLISH CASE OF *HOLLINGTON v F HEWTHORN & CO LTD* 1943 KB 587 (CA): STILL AUTHORITATIVE IN SOUTH AFRICA, ALBEIT RESTRICTED TO ITS ORIGINAL *RATIO*

Technology Corporate Management (Pty) Ltd v De Sousa 2024 5 SA 57 (SCA)

SAMEVATTING

'N TERUGKEER NA DIE BERUGTE ENGELSE SAAK *HOLLINGTON v F HEWTHORN & CO LTD* 1943 KB 587 (CA): STEEDS GESAGHEBBEND IN SUID-AFRIKA, MAAR BEPERK' TOT SY OORSPRONKLIKE *RATIO*

In *Technology Corporate Management (Pty) Ltd v De Sousa* het die vraag onder andere ter sprake gekom of die reël in die dikwels gekritiseerde Engelse saak *Hollington v F Hewthorn & Co Ltd*, bo en behalwe 'n skuldigbevinding in 'n strafsaak, ook van toepassing is op die bevindinge van ander tribunale. Die verhoorhof het, met 'n beroep op die *Hollington*-saak, beslis dat die bevinding van die Kommissie vir Versoening, Bemiddeling en Arbitrasie (meestal op Engels afgekort as die CCMA), dat die eerste respondent (De Sousa) se ontslag uit die diens van die eerste appellant (Technology Corporate Management (Pty) Ltd) (TCM) billik was, ontoelaatbaar was in die daaropvolgende siviele geding tussen De Sousa en TCM. Die verhoorhof het die eiser (De Sousa) se eis op die meriete gehandhaaf. Daarteen het TCM na die hoogste hof van appèl geappelleer.

Die hoogste hof van appèl, bestaande uit vyf waarnemende appèlregters, het by monde van waarnemende appèlregter Wallis bevind dat die verhoorregter gefouteer het wat die toepassing van die reël uit die *Hollington*-saak betref. Volgens die appèlhof moet die *Hollington*-reël streng beperk word tot skuldigbevindings in strafsake. Die verrigtinge in die KVBA was nie 'n strafverhoor nie en die bevinding van die tribunaal het dus buite bestek van die *Hollington*-reël geval. Derhalwe was die verwysing na die bevinding van die KVBA wél toelaatbaar in die daaropvolgende siviele saak tussen die genoemde partye.

Aangesien die hoogste hof van appèl bevind het dat die *Hollington*-reël nie van toepassing was op die onderhawige siviele saak nie, was die hof nie geroepe om oorweging te gee aan die afskaffing van die reël deur die uitoefening van die hof se inherente bevoegdheid om die gemenereg te ontwikkel nie. Enige uitlatings in die verband sou *obiter dicta* gewees het, wat nie bindend op laer howe sou wees nie. Alhoewel dit nie die geleentheid was om die *Hollington*-saak ter ruste te lê nie, is die hof se beslissing dat die reël in die saak streng tot skuldigbevindings in strafsake beperk moet word te verwelkom. Daar was in die verlede wel enkele sake waarin die uitbreiding van die *Hollington*-reël na ander tribunale se bevindinge goedgekeur is. Gelukkig het die hoogste hof van appèl se beslissing hierdie ontwikkeling gekelder.

Die appellant het ook geargumenteer dat die verhoorregter se optrede gedurende die verhoor die billikheid van die verhoor geskaad het. Die hoogste hof van appèl het dit nie nodig gevind om dié punt te beslis nie aangesien die hof eenparig op die meriete beslis het dat die appèl gehandhaaf moes word. Desnietemin het die hof sekere riglyne neergelê oor hoe 'n verhoorregter behoort op te tree om te

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