**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

**JUDGMENT**

**Reportable**

**Appeal case number: A57/25**
**Court *a quo* case no: 13456/2012**

In the matter between:

**BRIAN WILLIAM LOUIS** Appellant

and

**THE ARTS FOUNDATION** Respondent

**Appeal case number: A56/25**
**Court *a quo* case no: 13457/2012**

**LOUIS JACOBUS CLOETE** Appellant

and

**THE ARTS FOUNDATION** Respondent

**Coram:** **GOLIATH DJP, MANTAME J *et* JONKER AJ**

**Heard:** **28 February 2026 and 14 May 2026**

**Delivered:** **29 June 2026**

**Summary:** Appeal - delict - pure economic loss - personal liability of company directors for the unauthorised diversion of investor funds - whether admission of a duty of care obviates the wrongfulness inquiry - held that the existence of a legal duty is a conclusion of law for the court that is not displaced by a pleader's admission - a director who was personally engaged with the investor and who signed the resolution and share certificate giving effect to a share transfer, held personally liable - the financial director whose role was limited to the operational release of payments, held not personally liable in the absence of the special relationship - one appeal dismissed; other appeal upheld.

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**ORDER**

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1. The appeal of Mr Brian William Louis under case number A57/25 is dismissed with costs, including the costs of two counsel where so employed, on scale C.

2. The appeal of Mr Louis Jacobus Cloete under case number A56/25 is upheld with costs on scale C.

3. The order of the court *a quo* in case number 13456/2012 is set aside and replaced with the following order:

   ‘(1) Judgment is granted as follows, for plaintiff, against Mr Brian William Louis and Dr Alan Louis, jointly and severally, the one paying the other to be absolved:

      (i) in the sum of USD 380 228.99;

(ii) compound interest, in US Dollars, on the aforesaid sum at the maximum prescribed interest rate at the time when such interest began to run, per annum, calculated from 13 July 2010, which interest is not subject to the *in duplum* rule;

(iii) costs of suit on scale C.

(2) The action against Mr Louis Jacobus Cloete, is dismissed, with the plaintiff to pay the costs on scale C.'

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**JUDGMENT**

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**Jonker AJ (Goliath DJP and Mantame J concurring):**

**Introduction**

[1] These are two appeals against the judgment and order of Le Roux AJ delivered on 8 November 2023 in two consolidated trial actions. The court *a quo* held the appellants, Mr Brian Louis and Mr Louis Jacobus Cloete, together with one Dr Alan Louis (who did not appeal and who has since been sequestrated), jointly and severally liable to the respondent, The Arts Foundation ('TAF'), in delict, for pure economic loss in the sum of USD 380 228.99 together with compound interest at the prescribed rate from 13 July 2010, and costs.

[2] The Court *a quo* refused leave to appeal, whereafter the Supreme Court of Appeal granted special leave to appeal on 17 October 2024 to a Full Bench of this Court.

[3] For the sake of convenience I shall deal with both appeals in one judgment.

**The essential facts**

[4] TAF is a foundation incorporated under the laws of the Republic of Panama and managed by a foundation's Council in the Isle of Man. In 2004 TAF made an investment of USD 230 000 with the Louis Group in the Isle of Man ('LGIOM'). The investment was placed in a property syndication conducted by Louis Group (SA) Ltd ('LGSA'). The syndication was known as the Century Falls development, an office park in Century City, Cape Town.

[5] The Century Falls investment was the subject of a written shareholders' agreement. The terms of TAF's relationship with the Louis Group are also reflected in a limited authorisation document signed by TAF's Mr Stuart Crane. It recorded that the investment manager of the Louis Group did not have discretionary powers to enter into transactions on behalf of TAF, and that the manager was required to obtain written instructions from TAF before entering into any transaction.

[6] In June 2008 the Louis Group advised TAF of a further investment opportunity, a shopping centre called 'the Paddocks', Cape Town. The Paddocks investment differed structurally from Century Falls. Instead of holding shares directly in the property owner, investors would acquire shares in an investment company, Violet Ivy Property Investment Ltd ('Violet Ivy'), which would be a beneficiary of the Platinum Trust which was the owner of the property.

[7] The private placement memorandum for the Paddocks was unambiguous on three protections for investors. Shares in Violet Ivy would only be transferred

once: (i) funds had been received; (ii) 'know-your-client' documentation had been received and verified; and (iii) signed share and loan agreements had been returned to the Louis Group. It was common cause at the trial that, in respect of TAF, none of these three steps was ever taken.

[8] The Century Falls investment matured in 2009. The pay-out from Century Falls took the form of a share buy-back. On 22 July 2009 the proceeds of TAF's buy-back, R2 931 565.52, being the rand equivalent at the time of USD 380 228.99, were paid not to TAF but into the bank account of Violet Ivy.

[9] It is this transfer, and the subsequent failure of LGSA to return the funds to TAF, that gave rise to the action. Mr Brian Louis was, at the relevant times, a director of LGSA, of Violet Ivy, and of Century Falls Development (Pty) Ltd. Mr Cloete was the financial director of LGSA, Violet Ivy and an accountant at the time. Dr Alan Louis (Mr Brian Louis's brother) was a director of LGSA and a senior figure in the Louis Group.

[10] TAF's pleaded case at the trial was that the directors of LGSA, including the appellants, owed it a duty of care to safeguard its investment and to prevent loss to it, more particularly upon the termination of the Century Falls investment. It alleged that, in breach of that duty and/or wrongfully, the directors intentionally, alternatively negligently, transferred or appropriated or caused the Century Falls proceeds to be paid to or withheld by Violet Ivy.

[11] In their plea, the appellants admitted the duty of care as alleged in paragraph 27 of the particulars of claim. They denied the breach of that duty. They contended that the rollover from Century Falls to the Paddocks had been authorised by TAF through its protector, Mr Frederic Goldstein, on or about 5 and 6 March 2009.

### *The events of 2009 and 2010*

[12] On 5 March 2009, with the Century Falls maturation approaching, a telephone conference call took place in the Isle of Man. The participants were Mr Goldstein for TAF; Mr Miller, as the client relationship manager (CRM) responsible within LGSA for TAF; and Mr Brian Louis. The content of that call in relation to the possibility of re-investing the TAF's proceeds is in dispute. Mr Louis's evidence was that he understood, by the end of the call, that TAF wished to roll the Century Falls proceeds into the Paddocks. His own words to the court *a quo* were that 'in my mind's eye I saw a mandate. I saw a concluded transaction.'

[13] On the following day, 6 March 2009, Mr Goldstein sent an e-mail to Ms Jennifer Cannan and Ms Shirley Dunn of TAF, copied to Mr Miller and Mr Nigel Dempsey-Moore of LGIOM. The body of the e-mail dealt with Mr Goldstein's approval, as protector, of TAF's execution of the buy-back agreement (which he could not himself sign). In a postscript Mr Goldstein added: 'In addition, I confirm my intent to roll over the funds to the Paddocks Investment which is offered with a waiver of any access loan fee.'

[14] On 21 July 2009, TAF needed funds desperately and Mr Goldstein made an inquiry from Dempsey-Moore of LGIOM. On 22 July 2009 the proceeds of the Century Falls buy-back, R2 931 565.52, were paid into the bank account of Violet Ivy. TAF was not informed. TAF had given no written instruction or mandate authorising the transfer. No shareholders' agreement had been signed in respect of Violet Ivy. No loan agreement had been signed in respect of Violet Ivy. No 'know-your-client' documentation had been processed. The mandatory protections recorded in the private placement memorandum had each been bypassed.

[15] The release of the payment to Violet Ivy was effected by Mr Cloete in his capacity as financial director, acting on a payment instruction on the strength of information supplied by Mr Miller as CRM. Mr Cloete's evidence was that he

released between 500 and 600 such payments per week across the 40 entities of the Louis Group.

[16] In September 2009, LGSA sent a Paddocks shareholder agreement to LGIOM to obtain signatures. On 12 October 2009 Mr Goldstein wrote to Mr Miller confirming that no authorisation had been given for the use of the Century Falls proceeds to purchase shares in the Paddocks and that, no paperwork had been received or signed, the funds remained outstanding.

[17] On 11 December 2009 TAF's attorneys, Edward Nathan Sonnenbergs, wrote to LGSA's managing director. The letter advised LGSA in clear terms that the re-investment of TAF's funds into Violet Ivy was not authorised, and demanded their return.

[18] On 30 March 2010 LGSA's attorneys, Cliffe Dekker, addressed a letter to the Financial Services Board. That letter recorded, in terms, that TAF was not a client of LGSA either as defined in the Financial Advisory and Intermediary Services Act or as that word is used colloquially, that LGSA did not have a signed mandate from TAF as contemplated in section 5(1)(a) of the Code of Conduct for Discretionary FSPs; and that the licensee does not have any mandate from or contractual connection with the client.

[19] On 12 July 2010 TAF's attorneys wrote to LGSA's attorneys, recording that TAF had inspected the share register of Violet Ivy and confirmed that TAF was not registered as a shareholder. The letter demanded the immediate return of the funds together with interest and costs.

[20] On 1 September 2010 TAF's attorneys wrote a further letter and demanded payment within three weeks, with interest. LGSA did not pay.

[21] Two days later, on 16 September 2010, the first annual general meeting in the existence of Violet Ivy was convened. The minutes record that the transfer of shares to TAF was discussed and that Violet Ivy shall not delay the issue any

longer. At that meeting the directors of Violet Ivy resolved that the LGSA transfer of 293 shares in Violet Ivy to TAF is approved. Mr Cloete was present at the meeting. The resolution was signed by Dr Alan Louis and Mr Brian Louis. On the same day a share certificate, also signed by Dr Alan Louis and Mr Brian Louis, was issued certifying that TAF held 293 shares in Violet Ivy.

[22] The investment ultimately failed. The Paddocks property was sold, Investec was paid out, and the investors received nothing.

**The issues on appeal**

[23] The issues that this court must determine are: (i) whether the court *a quo* materially misdirected itself, in law, by accepting the admission of a duty of care as obviating the inquiry into the element of wrongfulness; (ii) If the court did not misdirect, whether the court *a quo* was correct on the substance of its findings on wrongfulness, fault and causation; (iii) whether the court *a quo's* treatment of director liability under the Companies Act was wrong where a director's duties are to the company itself, that liability to third parties is regulated by s 424 of the Companies Act or by a common-law claim founded on *dolus* or fraud.

[24] Relating to Mr Louis specifically, this Court is asked to determine whether the court *a quo* failed to give effect to Mr Goldstein's conduct after the unauthorised transfer; that it impermissibly disregarded the corporate personality of LGSA; that judgment ought to have been granted in rands and not in United States dollars; that the claim is premature; and that the claim is barred by the reflective loss doctrine.

[25] Mr Cloete raises appeal grounds specific to his role and the court a quo conclusions in that he was not a director of Violet Ivy or of LGSA when the cause of action was complete; that his function was confined to the operational release

of payments on instructions; and that there is no evidence of intentional, dishonest, fraudulent or even negligent conduct on his part, his evidence on these matters were untested in cross-examination.

## The findings of the court *a quo*

[26] The court *a quo* found that LGSA had breached its mandate with TAF by reinvesting its funds in the Paddocks without authority. The judgment proceeded to find that the appellants, in their personal capacities, were liable to TAF in delict for the resulting loss.

[27] In its analysis of the element of wrongfulness, the court *a quo* said as follows:

> '[27] Wrongfulness is normally determined by asking whether, according to the *boni mores* criterion, the defendant had a legal duty to prevent harm i.e. had a duty of care.
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> [28] As stated above, I do not have to enter into this question because the defendants have all admitted the duty of care in their plea to the plaintiff's particulars of claim.'

[28] The court *a quo* then identified the principal question for determination:

> *'[29]* Having admitted this duty of care, the principal question to be determined is whether they breached this admitted duty of care by intentionally, alternatively negligently, transferring or appropriating or causing the plaintiff's Century Falls investment of R2 931 565.52 to be paid to, and/or withheld by, Violet Ivy.'

[29] The court *a quo* found, on the evidence, that the rollover had not been authorised; that the appellants and Dr Louis had been very clear on the situation and actively involved in the appropriation of funds; and that they were accordingly liable jointly and severally with one another for the loss claimed.

[30] On the elements of fault and causation, the court *a quo* found that the appellants and Dr Louis had acted at the very least negligently and that their conduct caused TAF's loss of its investment. Adverse credibility findings were made against Mr Louis, who was described as arrogant, evasive, and unimpressive as a witness; similar findings were made against Dr Louis.

[31] The company-law defences raised on behalf of the appellants were rejected. The court *a quo* held that the directors' personal involvement in the unauthorised conduct gave rise to delictual liability that was not displaced by the statutory scheme of director liability under the Companies Act. The defence based on s 133 of the Companies Act, raised on behalf of Mr Louis with reference to LGSA's business rescue, was held not to authorise the conduct complained of.

[32] As regards Mr Cloete, the court *a quo* held him jointly and severally liable on the same footing as Mr Louis and Dr Louis. The conclusion rested on his admission of the duty of care and his role as financial director of LGSA, in particular his authorisation of the impugned payment of 22 July 2009. Mr Cloete's evidence was not tested in cross-examination.

**Analysis**

**Wrongfulness in claims of pure economic loss**

[33] In our law, the element of wrongfulness in a claim for pure economic loss is not presumed. Liability attaches only where considerations of public and legal policy, viewed in accordance with constitutional norms, require that the conduct, if negligent, ought to attract liability. The conventional formulation, derived from various jurisprudence[1], is that wrongfulness in pure economic loss cases is

[1] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) paras 21-25; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA); *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA); and *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA).

established only where the defendant owed the plaintiff a legal duty not to cause it loss in the manner complained of. Whether such a duty exists is a conclusion of law, drawn on a consideration of all the facts and the policy factors that bear on the case.

[34] The recent Supreme Court of Appeal decision in *Nelson Attorneys*[2], as relied upon by Mr Louis's counsel, reaffirmed these principles. The Supreme Court of Appeal delivered an important warning:

> '[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 … This Court has repeatedly warned against this confusion, noting that it may lead the unwary astray.'

[35] In *Nelson Attorneys* the court went on to consider the effect of an admission of a 'duty of care' in the pleadings of the defendant. In that case the conveyancer-defendant had admitted such a duty, and the full court had held that the admission established wrongfulness, leaving only negligence and causation to be determined. The SCA held that approach to be wrong. An admission of a 'duty of care' in pleadings goes to fault, not to wrongfulness; the plaintiff cannot be relieved of the obligation to plead and prove wrongfulness by the device of an admitted 'duty of care.'

[36] The proposition that the existence of a legal duty is a conclusion of law for the court, not a question of fact capable of binding admission, was settled long before *Nelson Attorneys*. In *Knop*[3], the Appellate Division held:

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[2] *Nelson Attorneys v Smit* 2026 (2) SA 75 (SCA). See also *Hawekwa Youth Camp and Another v Byrne* 2010 (6) SA 83 (SCA) para 21; *Le Roux and Others v Dey* 2011 (3) SA 274 (CC) para 122.
[3] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27F-G.

'The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case.'

[37] The point that a court is not bound by a party's admission of a legal conclusion was reaffirmed in *Potters Mill*[4] where Koen AJ stated as follows:

> 'Where a party alleged in a pleading that a particular law governs the case, whereas that law may not, an admission by a defendant that the law referred to governs the case does not make it so. What the law is has always been a matter for the court to determine.'

[38] On the strength of *Nelson Attorneys* the appellants contend that paragraphs 27 to 29 of the judgment *a quo* disclose the same misdirection condemned by the SCA. They say the court *a quo* treated the admission of a duty of care as relieving the respondent of the obligation to establish wrongfulness, and proceeded directly to the elements of fault and breach. The contention is forcefully advanced. With respect, however, it does not survive a careful reading of what the court *a quo* actually did.

[39] The misdirection identified in *Nelson Attorneys* was a specific one. The full court in that case had treated the admission of a 'duty of care' as disposing of wrongfulness altogether, on the footing that the duty established wrongfulness and the only remaining questions were negligence and causation. The SCA rejected that approach because it permitted the plaintiff to avoid the policy-based wrongfulness inquiry altogether by capturing the defendant's admission to a label.

[40] The court *a quo* did not do that. Considering and reading the relevant paragraphs together, it takes the following structure. Paragraph 27 of the

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[4] *Potters Mill Investments 14 (Pty) Ltd v Abe Swersky & Associates and Others* 2016 (5) SA 202 (WCC) at para 11.

judgment frames the wrongfulness question. Paragraph 28 accepts the admission by the Defendants of the duty, that is, the admission that, in the relationship between the parties, the appellants owed TAF a duty to safeguard its investment and to prevent loss upon termination of the Century Falls investment. Paragraph 29 then identifies the principal question for determination as whether the appellants 'breached this admitted duty of care'. The breach inquiry that follows is in substance an inquiry into whether the appellants' conduct fell within or outside the bounds of what the legal relationship between the parties permitted. That is wrongfulness reasoning, conducted on the evidence. The court *a quo* did not skip the wrongfulness inquiry; it conducted that inquiry in two stages, dealing with the existence of the duty by reference to the admission, and dealing with the breach of the duty on the evidence.

[41] This reading of paragraphs 27 to 29 is reinforced by what the court *a quo* says at paragraph 84 of the judgment when it turns to the question of the duty of care. The court *a quo* there records the admission of the duty of care which then leaves the question of wrongfulness. The court *a quo* therefore expressly identified the wrongfulness inquiry as a question that survived the admission and that she was still obliged to determine. That is not the approach of the full court in *Nelson Attorneys*, which treated the admission as obviating wrongfulness altogether. It is, on the contrary, an express recognition of the very distinction that *Nelson Attorneys* has now affirmed must be drawn.

[42] The fact that additional words 'intentionally, alternatively negligently' in paragraph 28 of the particulars of claim were used, and the Court *a quo's* adoption of that language in paragraph 29 of the judgment, does not convert the breach inquiry into a fault inquiry. The substantive question, was the conduct authorised by the legal relationship between the parties, is a wrongfulness question, and was so treated by the court.

[43] The court *a quo* did not in terms canvass each of the policy factors identified in *Fourway Haulage*. The court *a quo* conducted the wrongfulness

analysis through the lens of breach by asking whether the appellants' conduct fell within or outside the bounds of the legal relationship between the parties, that relationship being defined principally by the limited authorisation regime upon which TAF had insisted in its dealings with the Louis Group. That is a permissible approach to the wrongfulness inquiry in a case of pure economic loss. Any criticism of the trial court's reasoning is at most form rather than substance. The question is whether, had the court *a quo* conducted the analysis in the more conventional way, it would have reached a different conclusion on the existence of the duty. For the reasons developed below, the answer is plainly that the court would not. The duty existed as a matter of policy at least as against Mr Louis, and that is what the trial court correctly determined.

[44] I do not, therefore, accept that the judgment *a quo* is vitiated by the misdirection condemned in *Nelson Attorneys*. The two cases are properly distinguished. In *Nelson Attorneys* the trial court treated the admission as obviating wrongfulness altogether; here the trial court treated the admission as disposing of the existence-of-duty question, and itself conducted a wrongfulness inquiry into breach on the evidence. The substance of the trial court's analysis is consistent with the orthodox structure of the Aquilian inquiry.

[45] It is nonetheless appropriate, given the force of the appellants' contentions, that the court conduct the policy-based wrongfulness inquiry afresh on the existing record and confirm or correct the result. I do so in respect of each appellant separately.

[46] In a supplementary note, Mr Louis's counsel referred the court to *Cape Empowerment Trust*[5] for the proposition that the degree of negligence is not a factor that bears on the wrongfulness inquiry in a claim for pure economic loss. The proposition is correct. Nothing in the analysis that follows treats the degree of negligence of the appellants as a factor relevant to wrongfulness. The factors

[5] *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* (200/11) [2013] ZASCA 16; [2013] 2 All SA 629 (SCA); 2013 (5) SA 183 (SCA).

on which the wrongfulness inquiry turns in this case are the limited authorisation document, Mr Louis's personal involvement in the impugned conduct, his consciousness of the position by 16 September 2010, his own evidence under oath, and the credibility findings of the court *a quo* against him. None of these factors is concerned with the degree of negligence.

**The wrongfulness enquiry**

***Mr Brian Louis***

[47] A preliminary point requires disposal. Mr Louis contended that the particulars of claim never pleaded the factual substratum required by *Hlumisa* to sustain personal wrongfulness against him namely that no personal mandate was traced to him, no discrete act or omission by him was particularised, and the case was pleaded in collective conclusory terms against the directors as a group. The submission must be rejected. The pleading rule on which Mr Louis relied is one developed in the context of quintessential reflective loss claims, where the failure to plead a wrong done to the plaintiff distinct from the wrong done to the company is fatal to the claim. TAF's case is not of that character, for reasons developed below. In any event, no exception was taken; the trial was conducted on the basis that the existence and breach of the duty were live issues notwithstanding the admission; evidence was led on each; and the court *a quo* made findings on each, including credibility findings against Mr Louis personally. A pleading objection that could have been raised by exception but was not, and that was not raised at any stage of the trial, cannot be raised for the first time on appeal to defeat the substantive findings made.

[48] The factors that bear on the wrongfulness inquiry against Mr Louis must be assessed on the totality of the evidence. I identify five that are of particular importance.

[49] First, the limited authorisation document. TAF was not a sophisticated risk-taker in the *Nelson Attorneys* sense. It was a foundation. It had imposed, in writing, a specific protection on its relationship with the Louis Group. The document signed by Mr Crane recorded that the investment manager did not have discretionary authority and that written instructions were required before any transaction. That document defines TAF's vulnerability for the purposes of the wrongfulness inquiry. TAF was vulnerable not in the abstract, but because it had specifically contracted to protect itself against the very risk that materialised. The Louis Group's own internal systems recorded that Mr Goldstein was an advisor and not authorised to commit TAF to any contractual obligation.

[50] Secondly, Mr Louis was personally involved at the critical moment. He was a participant in the teleconference of 5 March 2009. His own evidence was that, by the end of that call, he believed that TAF wished to roll the Century Falls proceeds into the Paddocks. Mr Louis was not a remote functionary. He was a senior director in direct conversation with the investor about the very transaction in issue. That is not the limited and discrete role that the SCA in *Nelson Attorneys* found insufficient to attract liability against the conveyancer in that case. It is the kind of direct dealing that *Pinshaw*[6] recognised as capable of grounding a special relationship between a director and an investor of a company.

[51] Thirdly, the post-July 2009 conduct of Mr Louis is materially probative of his consciousness of wrongfulness, of the lack of any genuine mandate, and of the reasonableness of imposing personal liability on him. By 16 September 2010, when Mr Louis personally signed the resolution and share certificate to which I have referred, the position was this. TAF had made four written demands for the return of its funds (in October 2009, December 2009, July 2010 and September 2010) including Mr Goldstein's inquiry of 21 July 2009 to Mr Dempsey-Moore. LGSA's own attorneys had, in March 2010, written to the Financial Services

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[6] *Pinshaw v Nexus Securities (Pty) Ltd and Another* 2002 (2) SA 510 (C).

Board stating that the licensee did not have any mandate from or contractual connection with TAF. Two days before the AGM, LGSA's attorneys had been forced to apply urgently to the Registrar of Companies for permission to hold annual general meetings that thirteen entities of the Louis Group had failed to hold. Violet Ivy's share value had fallen by more than half since the unauthorised transfer. Its auditors had cast doubt on its ability to continue as a going concern.

[52] Against that background, the resolution and share certificate of 16 September 2010 are not capable of innocent explanation. The directors of one company (Violet Ivy) purported to approve that another company (LGSA) transfer its shares in Violet Ivy to a third party (TAF). Dr Louis conceded under cross-examination that the absence of a corresponding resolution by LGSA was 'highly irregular'. The conduct can only be understood as a deliberate attempt by the directors, of whom Mr Louis was one of the two signatories, to dispose of TAF's claim for repayment by foisting on it shares it had never agreed to take, at a time when those shares were worth a fraction of the funds owed. In addition, the transfer was made against LGSA's own requirements that for an investment to be made into Paddocks, the shareholders agreement must be signed and that was not done.

[53] Mr Louis's counsel sought to defuse the characterisation of the 16 September 2010 resolution as irregular by submitting that the resolution was no more than a routine act of the directors of Violet Ivy taken in accordance with s 133 of the Companies Act, by which the directors took note of and approved a transfer of shares from LGSA to TAF held in Violet Ivy. The submission misconceives both the section and what actually occurred at the meeting.

[54] Section 133 is headed 'Registration of transfer of shares or interests'. Subsection (1) provides that any transfer of shares of or interest in a company shall be registered by the company by entering in its register of members the name and address of the transferee, the description of the shares or interest transferred and the date of the registration of such transfer. Subsection (2)

provides that, notwithstanding anything in the articles of a company, it shall not be lawful for the company to register a transfer of shares of or interest in the company unless a proper instrument of transfer has been delivered to the company. Subsection (3) permits the entry to be made on the application of the transferor in the same manner as if the application were made by the transferee. The section thus regulates the administrative act of recording a transfer that has already been agreed between transferor and transferee, and conditions the lawfulness of that recording on the delivery of a proper instrument of transfer. It does not, on any reading, authorise the directors of a company to call a transfer into being.

[55] Section 133 has no application to the 16 September 2010 proceedings, for at least four reasons. First, there was no transfer between LGSA and TAF capable of being registered. No agreement of transfer had been concluded between the supposed transferor and the supposed transferee. On the contrary, the supposed transferee had on four written occasions demanded the return of its money in lieu of any shares. Secondly, no proper instrument of transfer had been delivered to Violet Ivy as s 133(2) requires as a precondition of lawful registration. Thirdly, LGSA, the supposed transferor, had not applied for the registration of any transfer under s 133(3), and there was no corresponding resolution by its board. Fourthly, the language of the minute records more than a routine recording of a transfer already concluded. The directors of Violet Ivy resolved that LGSA transfer the shares and that Violet Ivy shall not delay the issue any longer. That is the language of directing and effecting a transfer, not of recording one that has already been concluded by the parties to it.

[56] In any event, even on the strained construction urged upon this Court, the invocation of s 133 cannot displace the substantive criticism of what was done. Whether the directors of Violet Ivy took the resolution thinking that they were acting under s 133 or under some broader authority, the fact remains that they took a step the effect of which was to foist on TAF a shareholding it had repeatedly refused, at a time when those shares were known to be impaired, in

purported satisfaction of an obligation that LGSA had refused to discharge. Reliance on one provision of the Companies Act, even on a generous reading, does not cure the wrong identified in this case.

[57] Fourthly, Mr Louis's own evidence under oath disposes of any contention that he was an innocent overseer who had no reason to know that LGSA lacked a mandate. In an affidavit deposed to on 20 October 2011, in connection with the FSB's decision to debar LGSA, Mr Louis stated under oath that TAF was in fact a client of the Louis Group (Isle of Man) and not of the LGSA in South Africa. In his evidence at the trial, Mr Louis conceded that this statement under oath was incorrect. He further accepted that his further statement, that LGIOM had a wide ranging mandate to manage investments on behalf of TAF, was wrong given that TAF's mandate to LGIOM was non-discretionary and required written instructions at all times. A director who has on oath taken inconsistent positions about whether the foundation was a client of his company, and about whether the company had a mandate to manage its funds, cannot then plead innocent reliance on others within the group.

[58] Fifthly, the credibility findings of the court *a quo* against Mr Louis are not affected by any criticism that may be made against the judgment of the court *a quo*. The court *a quo* found Mr Louis to be arrogant, evasive and unimpressive as a witness. They are findings of credibility to which this court must, in accordance with the rule in *Dhlumayo*[7], defer.

[59] Drawing these threads together, and weighing the factors traditionally taken into account in the wrongfulness inquiry, I am satisfied that the imposition of personal delictual liability on Mr Louis is supported by considerations of public and legal policy. He had subjective awareness of TAF's vulnerability, foreseeability of the harm that would flow from a breach of the limited authorisation regime, the practical ability to prevent the harm, by refusing to participate in the unauthorised transfer or by procuring the return of the funds

[7] *R v Dhlumayo & Another* 1948 (2) SA 677 (A).

once demand was made, and a direct personal involvement that distinguishes his case from the kind of downstream professional service relationship at issue in *Nelson Attorneys*. The floodgates-concern that has informed the cautious approach to pure economic loss claims does not arise here, the class of persons potentially affected is, and was, defined by the limited authorisation document. The legal duty admitted in the plea was, on a properly conducted wrongfulness inquiry, a legal duty in fact and in law.

[60] It remains to address the submission, on which Mr Louis placed considerable weight, that the court *a quo* erred in relying on *Pinshaw*, and that the special relationship which grounded liability in that case, was absent here. The submission misreads the judgment. The court *a quo* discussed *Pinshaw*, at paragraphs 24 to 27 of its judgment, only in order to identify what an inquiry into the existence of a legal duty would entail. It then held, in terms, at paragraph 28, that it did 'not have to enter into this question because the defendants have all admitted the duty of care in their plea'. The court *a quo* did not, therefore, rest its conclusion on a special relationship of the kind considered in *Pinshaw*; it founded it on the admission. The complaint that the court erred in relying on *Pinshaw* is, with respect, directed at a finding the court did not make. However, on the wrongfulness inquiry conducted afresh, I am satisfied that a special relationship of the kind considered in *Pinshaw* was indeed present in this case. Mr Louis's personal participation in the teleconference of 5 March 2009, in direct dealing with the investor about the very transaction in issue, is precisely the kind of engagement that *Pinshaw* recognises as capable of grounding such a relationship between a director and an investor of a company. The special relationship that Mr Louis contends was absent is therefore established on the facts. His attempt to distance himself from *Pinshaw* therefore fails.

[61] I have also had regard to the structured eight-factor framework on which Mr Louis's counsel relied, drawn from Neethling & Potgieter[8], and which the

[8] Neethling and Potgieter, *Law of Delict,* 309–313 as quoted in "An unsuccessful longshot aimed at effecting liability for pure economic loss", THRHR, August 2017, Johan Scott.

appellants placed at the centre of their wrongfulness submissions. Considering each factor in turn produces the same result. The factors of subjective awareness of harm, reasonable foreseeability, practical ability to prevent the harm, the degree of risk to TAF, the indeterminacy concern and the vulnerability of TAF each weigh in favour of imposing personal liability on Mr Louis on the facts established. The remaining factors of professional expertise and the existence of statutory protective frameworks do not weigh against that conclusion: the statutory scheme of director liability under the Companies Act does not, as I explain below, oust the common-law Aquilian remedy where the special circumstances identified in *Pinshaw* are present, as they are here.

*Mr Goldstein's subsequent conduct*

[62] Mr Louis also placed reliance on evidence of Mr Goldstein's conduct after the unauthorised transfer, that he is said to have asked to borrow against the Paddocks investment, to have corresponded with Dr Louis on a footing consistent with TAF having become an investor in the Paddocks, and not to have queried the position. The submission cannot avail him. Mr Goldstein had no authority to bind TAF, as the limited authorisation document expressly recorded and as the Louis Group's own internal systems acknowledged. An unauthorised act of an agent who himself lacks authority cannot be cured by his own subsequent conduct. In any event, TAF, through its proper channels, made four written demands disavowing the rollover between October 2009 and September 2010, and those demands displace any inference of acquiescence that might otherwise be drawn from Mr Goldstein's personal correspondence.

*The Companies Act framework*

[63] The case against Mr Louis cannot be defeated by the company-law arguments raised on his behalf. The cases[9] relied upon leave open the possibility

[9] *De Bruyn v Steinhoff International Holdings NV and Others* 2022 (1) SA 442 (GJ); *Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others* 2020 (5) SA 419 (SCA).

of a delictual claim by a third party against a director where a special relationship exists. The recent decision in *Venator Africa*[10] was concerned with a statutory cause of action under s 218(2) read with s 22(1) of the Companies Act, and does not on its terms exclude the kind of Aquilian claim that TAF has brought here. The legislative scheme reflected in s 76 and 77 of the Companies Act regulates the duties owed by directors to the company; it does not, in our view, oust the common-law remedies that may exist between a director and a third party where the special relationship has been established.

*Ex Parte Gore and the corporate personality of LGSA*

[64] Mr Louis further contended that the court *a quo* had impermissibly disregarded the corporate personality of LGSA, in reliance on *Gore*[11], and had done so on a basis that had not been pleaded. The contention misconceives the basis of TAF's case. TAF does not seek to disregard LGSA's corporate personality under s 20(9) of the Companies Act 71 of 2008 or on any other basis. The claim is a direct Aquilian claim against Mr Louis in his personal capacity, founded on a duty owed by him to TAF in the special circumstances established on the evidence. The corporate personality of LGSA is respected; Mr Louis's liability arises from his own conduct, not from any attribution to him of the obligations of the company. The point therefore does not arise.

*Reflective loss*

[65] Mr Louis contends that that the claim is barred by the reflective loss doctrine with reference to *Itzikowitz*[12]. The reflective loss principle holds that where a wrong is done to a company that causes it to suffer loss, the proper plaintiff to recover that loss is the company itself, and a shareholder cannot sue

[10] *Venator Africa (Pty) Ltd v Watts and Another* 2024 (4) SA 539 (SCA).
[11] *Ex Parte Application of Gore NO* 2013 (3) SA 382 (WCC).
[12] *Itzikowitz v ABSA Bank Ltd* 2016 (4) SA 432 (SCA).

to recover a sum equal to the diminution in share value. That principle has no application to the facts of this case. TAF's loss is not the diminution in value of its shares held in Violet Ivy. TAF demanded its money on 12 October 2009, 11 December 2009, 12 July 2010 and 1 September 2010. Each of those demands predated the irregular share transfer of 16 September 2010. TAF's loss is a direct loss, the failure of LGSA, and of the director who controlled it, to pay over to TAF the sum of R2 931 565.52 that LGSA had wrongfully appropriated.

[66] That the loss is direct rather than reflective does not alter its essential character: it remains pure economic loss. It is that character that gives the wrongfulness inquiry in this case its specific content. Our law imposes liability for pure economic loss only where considerations of legal and public policy require it, and the duty that rested on Mr Louis was, in consequence, a duty not to cause TAF that patrimonial loss by participating in the unauthorised diversion of its funds and in their continued withholding. The policy factors already discussed, TAF's vulnerability, the special relationship recognised in *Pinshaw*, and the absence of any indeterminate-liability concern, bear directly on the reasonableness of imposing liability for that loss. It was the breach of that duty, and not the bare movement of the funds on 22 July 2009, that translated TAF's exposure into the pecuniary loss at 16 September 2010.

[67] The element of wrongfulness is therefore established against Mr Louis on the proper analysis. To the limited extent that the court *a quo* did not engage expressly with the policy factors, the omission was not material. The conclusion the court *a quo* reached, that Mr Louis was personally liable, is, on the proper inquiry, correct.

***Mr Cloete***

[68] Mr Cloete's position is materially different. The factors that bear on the wrongfulness inquiry against him produce, in my view, a different result.

[69] Mr Cloete had no contact with TAF. He never spoke to Mr Goldstein. He was not a participant in the teleconference of 5 March 2009. He made no representations to TAF. He gave no affidavit to the Financial Services Board. He was not a signatory to the resolution or share certificate of 16 September 2010. The *Pinshaw* factors - personal dealing, the holding-out of skill, the *de facto* assumption of responsibility for the portfolio, and reliance by the client on the director personally - are absent in his case.

[70] Mr Cloete's role within the Louis Group was that of financial director. He was responsible for the cashflow and the release of payments across some forty entities. His evidence, which was not contested on any material issue and which was corroborated by Mr Brian Louis, was that he released between five and six hundred payments per week, on information provided by the CRMs.

[71] A further documentary feature of the case bears on Mr Cloete's position. The four written demands by TAF and its attorneys for the return of its funds, sent in October 2009, December 2009, July 2010 and September 2010, were addressed to LGSA's managing director, Mr Emile Louis, and were copied to Dr Alan Louis and Mr Brian Louis. Mr Cloete was not on the distribution list of any of them. The formal correspondence by which TAF brought home to the directors of LGSA that the licensee was in breach was conducted in writing with three of his fellow directors, not with him. The record contains no equivalent direct notification of the dispute to Mr Cloete in his personal capacity. That documentary position is consistent with his evidence as to his operational role within the group, and it tells against the inference that he had the kind of personal awareness of the dispute on which the imposition of Aquilian liability against him might rest.

[72] The court *a quo* found at paragraph 77 of its judgment that Mr Cloete was 'very clear on the situation and actively involved in the appropriation of funds of plaintiff and in the unauthorised and unlawful rolling over'. At paragraph 91 the court found that Mr Cloete 'knew what was happening and failed to take steps to

prevent it from happening and his omission caused the plaintiff loss'. These two findings are not consistent with one another. The first attributes active participation; the second attributes mere knowledge and omission. More fundamentally, neither finding finds support in the evidence led at the trial. There is no documentary or testimonial evidence in the record that Mr Cloete was actively involved in the decision to effect the unauthorised transfer in the sense contemplated by paragraph 77; nor is there evidence that he knew, in the sense contemplated by paragraph 91, that the transfer was unauthorised and that the formalities required by the Paddocks Private Placement Memorandum ("PPM") had not been complied with. The findings appear to have rested on inferences drawn from Mr Cloete's position as financial director, and from Mr Miller's generic evidence about what the directors as a collective were told. Neither basis can carry the weight of personal findings of the character made.

[73] There is also a procedural objection. Neither finding was put to Mr Cloete in cross-examination. Mr Cloete's evidence at the trial occupied approximately eight pages of the transcript. He was not cross-examined at all. The court *a quo* directed no questions to him.

[74] Counsel for the respondent submitted that the evidence of Mr Miller, to the effect that the directors of LGSA were told that there was no paperwork in place for TAF, and that they nevertheless proceeded to transact stood unchallenged because Mr Miller was cross-examined by Mr Cloete's own counsel and Mr Cloete did not contradict that evidence in chief. That submission cannot bear the weight that the court *a quo* placed on it. Mr Miller's evidence was generic, directed at the directors collectively (which at the time were a lot of individuals). It did not implicate Mr Cloete in any specific instance of being told and proceeding. If the respondent wished the court to make personal findings against Mr Cloete of the kind made in paragraphs 77 and 91, the substance of those findings had to

be put to him so that he might respond. That is the rule in *Browne v Dunn*[13], as confirmed in our law in *SARFU*[14].

[75] It was also submitted that Mr Cloete was present at the irregular AGM of 16 September 2010 and registered no protest, and that his silence at that meeting constituted complicity. I have considered this submission. Whilst the minute of the meeting records Mr Cloete's presence, it does not record him as a signatory to either the resolution or the share certificate. The two signatories were Dr Alan Louis and Mr Brian Louis. Mere presence at a board meeting at which an irregular resolution is taken, in the absence of any evidence that the director in question voted in favour of the resolution or had a role in framing it, does not without more constitute personal participation in the wrong. The point was not, in any event, put to Mr Cloete in cross-examination.

[76] In addition three further submissions made by respondent require brief consideration. The first relies on the evidence of Mr Louis where he mentioned that they had to decide as directors whether to roll over the funds, and contends that Mr Cloete was one of those directors and is to be fixed with whatever decision was collectively taken. The second is that Mr Cloete had the practical means, by way of correspondence to or a meeting with his fellow directors, to insist that the funds be repaid, and that his failure to do so is itself a breach. The third is that as a director of LGSA present at Violet Ivy's annual general meeting of 16 September 2010 he was under a positive duty to stand up and inform the meeting that the resolution being put was unlawful because no mandate existed and the shareholders' and loan agreements had not been signed.

[77] Each of these submissions proceeds on a common premise that Mr Cloete had personal knowledge, at the relevant times, of the absence of a mandate and of the absence of the signed shareholders' and loan agreements required by the Private Placement Memorandum. That premise is not borne out

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[13](1893) 6 R 67 (HL).
[14]*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paras 61-63

by the record. The record shows Mr Louis's own understanding and his discussion of the matter with Dr Louis; it does not, on a fair reading, descend to Mr Cloete as an individual or place him within the group said collectively to have had to decide. The four written demands were, as already noted, only addressed to Mr Emile Louis and copied to Dr Alan Louis and Mr Brian Louis; Mr Cloete was not on the distribution list. Mr Miller's evidence concerning what the directors as a class had been told does not identify Mr Cloete as the recipient of any specific communication on the matters which the impugned conduct concerned. The failure to intervene and failure to protest at the annual general meeting presupposes the knowledge that the record does not establish in his case. To convert the generalised features of Mr Cloete's directorship into personal awareness sufficient to fix him with the duties contended for would require the kind of personal confrontation in cross-examination that, as already noted, did not occur.

[78] On the wrongfulness inquiry conducted afresh, I am not satisfied that the imposition of personal delictual liability on Mr Cloete is supported by considerations of public and legal policy. He had no special relationship with TAF. He had no personal dealings with TAF. He made no representations on which TAF could be said to have relied. His role within the Louis Group was that of an executive functionary whose function was the operational release of payments on the information provided to him. To impose personal liability in those circumstances would, in the language of *Country Cloud*, create a risk of 'liability in an indeterminate amount for an indeterminate time to an indeterminate class', and would extend the law of delict into the daily operational decisions of corporate employees in a way that is neither justified by the facts of this case nor by considerations of legal policy.

[79] The admission of a duty of care in the plea cannot save the position. As discussed above, an admission of a legal conclusion does not bind a court. On the proper inquiry, the legal duty owed by Mr Cloete to TAF cannot be established on the facts. The court *a quo*, in resting its conclusion on the bare

admission and on findings against Mr Cloete that were not properly tested in cross-examination, was on this aspect of the case in error.

[80] Mr Cloete advanced, in the alternative, the same series of arguments based on the statutory scheme of director liability as those raised on behalf of Mr Louis. For the reasons given above, that scheme does not oust the common-law Aquilian remedy where the special circumstances identified in the case law are established. The point does not, however, need to be decided, because the appeal succeeds against Mr Cloete on the wrongfulness inquiry conducted afresh on the evidence.

[81] The element of wrongfulness is therefore not established against Mr Cloete.

## Fault and Causation

[82] Given my conclusions on wrongfulness, I deal with the further elements only as they relate to Mr Louis.

[83] On fault, Mr Louis's case was that he had a bona fide belief in the existence of a mandate and that this belief, even if mistaken, negates negligence. I am unable to accept that submission. By 12 October 2009, less than three months after the unauthorised transfer, TAF had stated in writing, in terms, that no authorisation had ever been given for the use of the Century Falls proceeds. By 11 December 2009 TAF's attorneys had said the same. By 30 March 2010 LGSA's own attorneys had said the same to the FSB. By 12 July 2010 TAF's attorneys had said it for a fourth time. Whatever Mr Louis might bona fide have believed on 22 July 2009, he could not bona fide have believed by 16 September 2010, by which date he personally took part in the share-transfer resolution. The fault question must be assessed at every stage of the conduct complained of. From at the latest October 2009 onwards Mr Louis was on notice

that there was no mandate. He took no steps to procure the return of TAF's funds. The court *a quo* was correct to find fault against him.

[84] Mr Louis also sought to rely, both at trial and on appeal, on advice said to have been given by Mr Derek Wille, LGSA's attorney (as he then was), to the effect that a mandate existed. He maintained that acting on that legal advice in good faith, he accordingly cannot be held to have acted negligently. I am not persuaded that Mr Wille's advice can carry the weight that the submission places on it. The evidence of the Wille advice is limited. On the record before us it amounts to no more than that the attorney, at some unspecified juncture, expressed a view on the existence of a mandate. There is no evidence that Mr Wille advised, or could properly have advised, that LGSA was entitled to transfer the Century Falls proceeds without the mandatory shareholders' and loan agreements required by the private placement memorandum; or that the directors of Violet Ivy could lawfully resolve that LGSA transfer its shares. These were the acts that gave rise to the wrong, and there is no evidence that Mr Wille's advice extended to them.

[85] Even if Mr Wille gave the advice contended for, it cannot stand against the four written demands that came after the unauthorised transfer. From 12 October 2009 onwards Mr Louis was on direct written notice that TAF disputed the existence of any mandate. By 30 March 2010 LGSA's own attorneys had said the same to the Financial Services Board in terms. By 12 July 2010 and again on 1 September 2010 TAF's attorneys repeated the demand for return of the funds. Mr Louis could not, in the face of that documentary record, continue to rely on the earlier and contrary view of his attorney as a foundation for bona fide belief.

[86] Mr Louis also invoked the statutory reliance defence under s 76(4) and 76(5) of the Companies Act 71 of 2008, contending that as a director he was entitled to rely on the CRM, the financial director and the attorney to perform their delegated functions, and that this statutory entitlement negates fault. The provisions on which he relied entitle a director to rely on the performance of

fellow employees, of professionals retained by the company, and of board committees, in respect of any particular matter arising in the exercise of his powers or the performance of his functions. The defence cannot avail Mr Louis on the facts established. The conduct that founds the case against him is not a failure of supervision; it is his own personal participation in the resolution and share certificate of 16 September 2010, in the face of four written demands. A director who himself takes the impugned step cannot invoke the statutory reliance defence to absolve himself of the consequences of that step. Sections 76(4) and 76(5) regulate the position of a director who has delegated; they do not, on any reading, immunise a director against the consequences of his own active conduct.

[87] On causation, Mr Louis's submission was that he did not execute the transfer on 22 July 2009 and that Mr Cloete did, with the result that no factual causation can be made out against him. I do not accept that the legal inquiry is so narrowly confined. The conduct complained of by TAF was both the unauthorised appropriation of its funds and the wrongful causing of those funds to be withheld. Mr Louis's active participation in the resolution of 16 September 2010, in the context of the four prior demands, was a cause of the continued withholding of the funds and the consequent loss to TAF.

[88] The submission also rests on the implicit assumption that the loss to TAF arose at the moment of the transfer on 22 July 2009. It did not. The mere movement of the funds within the Louis Group's network of entities did not, by itself, occasion any loss to TAF. The funds could have been recovered. Indeed, Dr Louis conceded in cross-examination that even in October 2009 the position was still capable of being reversed.

[89] The loss to TAF crystallised at a later moment, and through two events that combined to fix it. The first was the persistent refusal of LGSA, in the face of the four written demands to procure the return of the funds when lawfully required to do so. The second was the resolution of 16 September 2010, by

which 293 shares in Violet Ivy were issued and transferred to TAF in purported satisfaction of an obligation TAF did not accept it had incurred, at a time when those shares were worth less than half of what was owed and when the auditors had raised going-concern doubts about Violet Ivy. It is at this latter moment that the loss must be located.

[90] It follows that the causal conduct against which the loss must be measured is the conduct of the directors who refused to repay and who effected the irregular share transfer. Mr Louis was one of the two signatories to the resolution and to the share certificate. He signed in the face of the four prior demands, on a date when the Violet Ivy shares were known to be impaired. He was a legal and factual cause of the loss to TAF.

[91] The same analysis cuts the other way for Mr Cloete. His only causal contribution to the conduct complained of was the release of the payment on 22 July 2009, which by itself caused no loss. He was not a signatory to the resolution or the share certificate of 16 September 2010. He played no part in the persistent refusals to repay. The conduct that caused the loss to TAF was the conduct of those who refused to repay and who effected the share transfer, which was not conduct by Mr Cloete. That conclusion is not altered by the formulation, on which the respondent's additional note relies, that factual causation requires only that the defendant's conduct have contributed in any way to the loss. The release of the 22 July 2009 payment, made without personal knowledge of the absence of a mandate or of the want of signed paperwork, did not contribute to the loss in the sense required. The loss flowed from the subsequent refusals by LGSA to procure the return of the funds, and from the irregular share-transfer resolution of 16 September 2010, in neither of which Mr Cloete had a hand.

**Ancillary contentions**

[92] Two further contentions raised on Mr Louis's behalf may be dealt with briefly. First, he submitted that judgment ought to have been granted in rands rather than United States dollars. The submission must fail. Judgment in foreign currency is competent where the plaintiff's loss is genuinely felt in that currency. The original investment was made in dollars; the loss is pleaded in dollars; and the court *a quo* correctly granted judgment in dollars. Secondly, Mr Louis relied on the prospect that some recovery may yet flow from LGSA's business rescue or subsequent liquidation. That contingency does not displace a loss that has already crystallised. It may, in due course, found an entitlement to a credit against the judgment debt, but it does not bar the claim.

**Conclusion**

[93] For the reasons given, I am not persuaded that the judgment *a quo* is vitiated by the misdirection as condemned in *Nelson Attorneys* case. The court *a quo* accepted the admission of the duty and then conducted, on the evidence, the kind of analysis that the law requires when asking whether the appellants' conduct fell within or outside the bounds of the legal relationship between the parties. Although the terminology used was not free of the conflation against which the Supreme Court of Appeal has repeatedly warned, but the substance of the reasoning is consistent with the orthodox structure of the Aquilian inquiry.

[94] Out of an abundance of caution, I have considered the policy-based wrongfulness inquiry afresh against each of the appellants on the existing record. In respect of Mr Louis, the result is the same as that reached by the court *a quo* for the reasons set out above. The element of wrongfulness is established against him; so are the elements of fault and causation. His appeal must fail.

[95] Mr Cloete's position is different. He had no contact with TAF, no *Pinshaw*-type special relationship with the foundation, and no role in the unauthorised conduct on which the case turns. The factual findings of active participation made by the court *a quo* against him were not put to him in cross-examination and

cannot, on the record before us, sustain personal Aquilian liability on a financial officer whose function was the operational release of payments. The admission of a duty of care in the plea cannot, as a matter of law, bridge that evidentiary gap. The element of wrongfulness is not established against him, and his appeal must succeed.

**Costs**

[96] Both appellants sought costs on scale C in the event of success. The respondent, in the event of its success, similarly sought costs on scale C. The matter has been substantial, involving difficult legal issues of broad importance and rather lengthy record. The employment of senior counsel was warranted in the case of Mr Louis. I agree that costs should be ordered on scale C, where applicable.

[97] Costs follow the result in the ordinary way. Mr Louis must pay the respondent's costs of his appeal. The respondent must pay Mr Cloete's costs of his appeal.

## Order

[98] In the result, I propose the following order:

1. The appeal of Mr Brian William Louis under case number A57/25 is dismissed with costs, including the costs of two counsel where so employed, on scale C.

2. The appeal of Mr Louis Jacobus Cloete under case number A56/25 is upheld with costs on scale C.

3. The order of the court *a quo* is set aside and replaced with the following order:

‘(1) Judgment is granted as follows, for plaintiff, against Mr Brian William Louis and Dr Alan Louis, jointly and severally, the one paying the other to be absolved:

(iv) in the sum of USD 380 228.99;

(v) compound interest, in US Dollars, on the aforesaid sum at the maximum prescribed interest rate at the time when such interest began to run, per annum, calculated from 13 July 2010, which interest is not subject to the *in duplum* rule.

(vi) Costs of suit on scale C.

(d) The action against Mr Louis Jacobus Cloete, is dismissed, with the plaintiff to pay the costs on scale C.’

**E JONKER**

**ACTING JUDGE OF THE HIGH COURT**

I agree, and it is so ordered.

**DJP GOLIATH**

**JUDGE OF THE HIGH COURT**

I agree.

**BP MANTAME**

**JUDGE OF THE HIGH COURT**

## Appearances:

| | |
|---|---|
| For the Appellant (Mr Brian Louis): | W R E Duminy SC, with him J Bester |
| Instructed by: | Brand Attorneys |
| For the Appellant (Mr Cloete): | H Loots SC |
| Instructed by: | Neuhoff Attorneys |
| For the Respondent | D W Baguley |
| Instructed by: | Assheton-Smith Ginsberg Inc. |