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TRIBUTE TO AKHO NTANJANA

Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU
Production editor

Well done, Akho!

You have run your race; now, it is for us to take the baton and continue on your well-defined route.

Thank you for being our guiding light.

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Enhancing Judicial Excellence

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THE CONCURRENCE OF ACTIONS TUG OF WAR CONTINUES: *TRIO ENGINEERING PRODUCTS INC v PILOT CRUSHTEC INTERNATIONAL (PTY) LTD* [2019] JOL 41120 (GJ)

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I INTRODUCTION

The court in *Trio Engineered Products Inc. v Pilot Crushtec International (Pty) Ltd* [2019] JOL 41120 (GJ) ('*Trio Engineering*') has reignited a long-standing debate in the private law sphere. This debate concerns the question of whether parties who have decided to delineate their relationship through a contractual agreement can, in the alternative, raise a delictual claim. Commonly, this is referred to as the concurrence of actions in contract and delict. Two sharply contrasting views have primarily dominated this debate. On the one hand, there are those who argue that every breach of contract is an actionable delict, whereas, on the other hand, there are those who posit that a breach of contract excludes an actionable delict. Both these positions are not immune from shortfalls which renders one approach over the other undesirable.

Recognising the undesirability of each approach, Unterhaulter J in *Trio Engineering* remarked that a middle-ground approach is preferred and exists in our law. This approach recognises that a breach of contract, without more, cannot constitute and sustain a delictual claim; however, a delictual claim may arise in instances where there is an independent relationship or duty that is outside the contract, provided that the pleaded facts can sustain such a claim. Thus, the crux of this position is that the breach of contract does not exclude the existence and possible claim in delict.

Lamentably, Unterhaulter J's approach has been unduly criticised with some commentators stating that 'our law, barring a very limited exception described below, does not permit a plaintiff to pursue an alternative claim in delict for a contractual breach because that would violate the sanctity of the contract between the parties.' (Heyman 'Suing in contract and delict: Is it really possible?' available at http://www.mphela.co.za/suing-in-contract.php)

Considering the paramount importance of the law of contract and delict in everyday commercial transactions, which underpin the economic activity of the Republic, robust conversations regarding the interaction of both these areas of law evince how one can continuously shape the contours of such interactions. In my view, the criticisms outlined above are unwarranted and misplaced. Not only is *Trio Engineering* in accordance with our law (that is, rightly decided and supported by South African authorities), but comparable jurisdictions follow this middle-ground approach. This is not surprising if one considers the harsh consequences that would arise in cases where a contractual agreement simply does not provide satisfactory relief to an aggrieved party. This case note intends to bolster the middle-ground approach proffered in *Trio Engineering* and considers the relevant case law supporting this approach. I will further demonstrate that the middle-ground approach is followed in comparable jurisdictions such as England and Germany. First, I briefly turn to the facts of *Trio Engineering*.

II BACKGROUND FACTS

Trio Engineering Products Inc., the plaintiff, approached the High Court to claim payment of $636,626.17 from Pilot Crushtec International (Pty) Limited, the defendant, who in turn brought a counterclaim comprising three claims. The defendant alleges that it and the plaintiff had concluded an exclusive dealership agreement in which the defendant enjoyed the sole and exclusive right to sell and distribute the products of the plaintiff in selected, exclusive jurisdictions (*Trio Engineering* paras 1–3).

In relation to the first counterclaim, the defendant claimed that it entered into negotiations with a client in Zambia, one of the exclusive jurisdictions, to provide a crushing and screening plant. The defendant averred that the plaintiff breached the exclusive dealership agreement by replacing Pilot with Weir Minerals (Pty) Ltd ('Weir'), a third party associated with Trio, and usurped the Zambian commercial prospect and entered into an agreement with the Pilot's client to supply the plant. The defendant claimed contractual damages arising from this alleged breach of contract (*Trio Engineering* para 3).

Regarding the second counterclaim, the defendant asserted that the plaintiff partook in an unlawful strategy to undermine the agreement and the defendant's position by replacing it with a third party, Weir, to usurp its goodwill and to use its confidential information, which resulted in the defendant incurring economic loss. In amplification of this counterclaim, the defendant alleged that, as a denouement of the exclusive dealership agreement, it and the plaintiff established a mutually beneficial and continuing business relationship, in which the defendant had and benefited from the sole and exclusive right to sell and distribute the products of the plaintiff continuously

and indefinitely. The plaintiff, however, demanded that the defendant enter into a new distribution agreement, which bore terms that were less favourable than the existing agreement. The defendant resisted this demand. The plaintiff replaced the defendant with Weir, and thus, the plaintiff, it is argued, competed with the defendant through Weir. Further, the plaintiff obtained confidential information about the defendant through the business relationship, giving the former access to the latter's customer connections and exclusive jurisdictions where the defendant established markets. For this counterclaim, the plaintiff claimed delictual damages (*Trio Engineering* para 4).

Alternative to the second counterclaim, it was claimed that, based on the conduct described above, the plaintiff interfered with the defendant's goodwill and business opportunities, sought to offer employment to employees of the defendant, and permitted Weir to transact with the defendant's clients and potential clients (*Trio Engineering* para 5).

In response to these counterclaims, the plaintiff raised several exceptions to the second counterclaim and its alternative. I will not canvass all of the points raised on exception, save for the one that is relevant. The relevant point that the plaintiff took exception to regarding the defendant's counter-claim was on the basis that the second claim was grounded in delict and, therefore, no cause of action could be sustained because the breach of duty is contractual in nature. Unterhaulter J disagreed. And so, do I.

III A SYNOPSIS OF THE LAW

Before canvassing the relevant findings of the court, it is prudent that I set out the crux of the debate that has plagued the minds of private lawyers for decades. Briefly, the law governing delict and law governing breach of contract is intended to cover and regulate situations in which a person incurs a loss or suffers harm due to the conduct of the transgressor. This conduct is essentially a legally reprehensive infraction of a subjective right (Neethling & Potgieter *Law of Delict* 7ed (2015) at 3). While these fields of law may appear similar, they are fundamentally different and distinct from each other. Generally, delictual duties are imposed by law, whereas contractual duties arise based on the parties' consent. Also, contractual duties are undertaken towards a specific person or persons (*in personam*), whereas tortious duties are owed to persons generally (*in rem*). Moreover, they differ regarding remedy, philosophical underpinnings and policy reasons.

In short, delict is concerned with circumstances where a person suffers harm or incurs a loss of a legally recognised interest caused by the blameworthy conduct or omission of a person. Such an interest is traditionally related to the person, personality and patrimony. In the event of such a transgression, the wrongdoer ought to rectify it.

On the other hand, the contract law is plainly premised on parties fulfilling promises made to each other pursuant to a legal agreement between them. Thus, breach of contract concerns the non-fulfilment of these legal promises contained in legal agreements. The fundamental notion of contract law is that when two or more parties voluntarily and knowingly enter into an agreement, the terms and conditions arising from that agreement should be upheld by the parties (Van Huysteen, Lubbe & Reineke *Contract: General principles* 5ed (2016) at 321–326 and *Wells v South African Alumenite Company* 1927 AD 69 at 73; and Emanuel *The Law of Contract* 2ed (1906) at 1–2). This is underpinned by the common law-derived and constitutionally recognised principle *pacta sunt servanda*, which demands that agreements be honoured. It is trite that the *pacta sunt servanda* principle is the bedrock of contract law (*Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) para 89; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 70; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 87). While it is the bedrock of contract law, it does not axiomatically mean that it is sacrosanct and trumps all other considerations (*Barkhuizen* paragraph 15 and *Beadica* paras 87–88). Other cornerstones of contract law are freedom of contract, good faith and privity of contract (Hutchison & Pretorius *The Law of Contract in South Africa* 2ed (2012) at 21–22).

In light of the above discussion, it cannot be gainsaid that the law governing contract and delict, respectively, are geared towards achieving the same vision of corrective justice but are conceptually dissimilar and are like 'chalk and cheese'. However, the factual matrix of disputes may blur the line between a breach of contract and a delict. This was exacerbated by the recognition of pure economic loss in delict. Pure economic loss can briefly be defined as a situation where a person negligently causes another person to suffer some form of patrimonial loss in the absence of physical harm to his person or property. (Fagan 'Aquilian liability for negligently caused pure economic loss – its history and doctrinal accommodation' (2014) 131 *SALJ* 288 at 289. The central case is *Administrateur, Natal Trust Bank van Afrika* 1979 (3) SA 824 (A), where the Appellate Division expressly acknowledged a claim for pure economic loss).

Traditionally, this action was perceived to be within the exclusive terrain of contract. (*Herschel v Mrupe* 1954 (3) SA 464 (A) 478). Hutchison and Visser have argued that the acceptance of pure economic loss in delict has increased the overlap between contract and delict (Hutchison & Visser '*Lillicrap* revisited: further thoughts on pure economic loss and concurrence of actions' (1985) 102 *South African Law Journal* 587 at 592). To make matters 'worse', the reliance-based liability theory, traditionally a theory of delict, shouldered its way into the law of contract (The provenance of the reliance-based theory is Fuller & Perdue 'The reliance interest in contract damages' 1936 *Yale*

Law Journal 52). Consequently, the principle of autonomy, which underpins contract law, fades into the reliance principle, and at the centre of the contract then becomes the reasonableness of the act of reliance. Accordingly, there is a repositioning and an emphasis on the imposition of community standards of delictual reasonableness in a contractual environment.

The apparent ever-expanding overlap between breach of contract and delict sharply raised the question of concurrent actions. Simply put, the question is whether an individual's conduct can concurrently constitute an infringement of another's rights *ex contractu* and *ex delictu*. As described in the introductory paragraphs, on one end of the spectrum, it has been argued that a breach of contract precludes a claim grounded in delict. Here, the case of *Winterbottom v Wright* (1842) 10 M&W 109 is relevant ('*Winterbottom*').

In that case, the Court held that a contract can never give rise to a delictual claim concurrently in respect to the parties privy to the contract and those who are not parties to the contract (that is, third parties) (*Winterbottom* paras 112–113). The Court relied on the 'privy fallacy', which stipulated that a breach of contract committed by D against C cannot give rise to claim by a third party, including in delict, because to permit this would result in the principle of privity of contract being undermined and infringed. The Court in *Winterbottom* believed that allowing concurrent liability beyond the four corners of the contract would open the proverbial floodgates of liability (*Winterbottom* paras 112–114). Such an extension was seen to be undesirable.

An often forgotten, although paramount, judgment in this debate is *Van Wyk v Lewis,* 1924 AD 428 ('*Van Wyk*'). Briefly, the defendant, a surgeon, performed an abdominal operation on the plaintiff at night in a hospital. At the end of the operation, one of the swabs used by the defendant was overlooked and remained in the plaintiff's body, from which it passed after a lapse of twelve months (*Van Wyk* paras 441–443).

Van Wyk essentially recognised that there may be a concurrence of delictual and contractual liability grounded in the same facts. However, the reach of the judgment was limited to instances of physical loss/harm to one's bodily integrity or property, and it did not extend to and address the question of concurrence liability where there is pure economic loss. The Appellate Division implicitly held that the cornerstones of contract law, freedom of contract and *pacta sunt servanda*, are not, without more, determinative factors that completely and inescapably exclude a delictual ground (*Van Wyk* paras 443–444). The Court recognised that where there is an infraction of bodily integrity) or property of a person (a claimant), there may exist an independent delictual duty outside of the contractual arrangement (*Van Wyk* paras 443–444).

A significant development on the question of concurrence emerged from *Lillicrap, Wassenaar & Partners v Pilkington (SA) (Pty) Ltd* 1985 (1) SA 475 (A)

('*Lillicrap*'), where the Appellate Division recognised that the same factual matrix could give rise to concurrent delictual and contractual remedies in situations where the claim is based on pure economic loss. The essential facts are that Pilkington, the respondent, is a glass manufacturer and Lillicrap Wassenaar, the appellant, a consulting firm of structural engineers, was contracted to perform professional services in connection with the planning and construction of a glass plant for Pilkington. However, Pilkington was not satisfied with how Lillicrap Wassenaar performed its duties and approached a court to claim compensation for damages which it had allegedly suffered as a result of the appellant's professional negligence (*Lillicrap* paras 493–495). In other words, Pilkington claimed that Lillicrap Wassenaar's breach of contract, in the form of positive malperformance, caused Pilkington pure economic loss. The majority judgment, penned by Grosskopf AJA, acknowledged that there may be a concurrence of actions in our law. However, the majority emphasised that conduct causing pure economic loss cannot necessarily and automatically give rise to a legal duty to repair or compensate such a loss through the law of delict. This is because the relevant conduct (positive malperformance in this case) is perceived as *prima facie* lawful (*Lillicrap* paras 499–500).

Inevitably, a claimant would have to establish that the defendant was burdened with a legal duty not to commit an act or omission that would cause pure economic loss. The rationale behind this approach is that the Appellate Division feared that allowing a delictual claim based on a breach of contract without more would open the proverbial floodgates of liability (in relation to the number of litigants) or, to an extent, the quantum of liability. The point here is that to avert a floodgates conundrum, a doctrinal application of the wrongfulness is necessary, and not merely an allegation of breach of contract (*Lillicrap* paras 498–500). The converse of this is that a breach of a contract alone cannot constitute a breach of legal duty to ground a delict. A legal duty for delict purposes must be established independently from the contract (*Lillicrap* paras 496 and 500). Grosskopf AJA recognised the existence of concurrent claims in delict and contract and held that the same conduct may constitute both a breach of contract and a delict. (*Lillicrap* para 499)

Accordingly, *Lillicrap* provides the middle ground approach in relation to the concurrence of actions – a breach of contract per se does not ground a claim for delictual claims, but it also does not exclude it. A claimant would have to prove that an independent legal duty exists outside of the four corners of the contract.

I interpose at this juncture to make this following point. *Lillicrap* has been interpreted as holding that a delictual claim is not available where there is breach of contract. *Pinshaw v Nexus Securities (Pty) Ltd* 2002 2 SA 510 (C) at 535F-I is one such decision that preferred this interpretation.

With respect, such an interpretation is incorrect. The Supreme Court of Appeal in *Holtzhausen v ABSA Bank Ltd* 2005 2 All SA 560 (SCA) when interpreting *Lillicrap* and faced with the abovementioned passage from *Pinshaw* said this:

> *The court in Pinshaw erred in two respects. First, the premise underlying the reasoning is that Lillicrap decided that where delictual liability coexists with liability for breach of contract, the aggrieved party is limited to a claim in contract. That premise is wrong, as I have already shown. Second, the remarks of Grosskopf AJA in the passage just referred to reflect the facts of the case before the court which concerned a contract of professional employment and must not be interpreted as limiting the principle laid down in that case to such contracts. (paras 9–10)*

I need not say more in this regard, save for one point. The majority in *Lillicrap* was indeed concerned with the possibility of undermining contractual arrangements by imposing delictual liability (*Lillicrap* at 503). The Court recognised that while contract set out the rights and obligations of the contracting parties, it also regulates other parts of the contractual relationship between the contracting parties. This may include the limitation of liability (*Lillicrap* at 501). Thus the Court was wary of the potential danger of the existence of concurrent actions, and hence it emphasised the importance of having to establish an independent legal duty that exists outside of the contract. The finding of *Lillicrap* in the passage cited above was specific to the set of facts before the court and should not be read as a blanket prohibition of a concurrence of actions.

Let me return to the decision of the High Court in *Trio Engineering* in this respect.

IV THE DECISION OF *TRIO ENGINEERING*

Unterhaulter J recognised the odious position of automatically excluding an actionable delict where there is a breach of contract as this would 'unwarrantably leave uncompensated all persons who may be harmed by a breach of contract but are not in privity of contract with the party in breach'. He was also wary of finding that every breach of contract is an actionable delict as this would collapse the distinction between the duties found in contract and delict, which, as I have explained above, are underpinned by different considerations (*Trio Engineering* para 20).

He then cited *Lillicrap* and *Holtzhausen* as cases that support the proposition that breaches of contract may concurrently give rise to an actionable delict. In particular, he noted that *Lillicrap* is not authority for denying a claimant a claim in delict where there is a claim in contract; what is relevant is whether there are sufficient pleaded facts to sustain a cause of action in delict (para 21).

He further notes that in many other fields, our law recognises duties that co-exist with contractual duties, for instance, the no-profit principle that applies to directors of a company (para 28). Acknowledging the concurrence of actions between delict and contract would not be an anomaly. The law was succinctly summarised as follows: (a) a breach of contract is not, without more, a delict; (b) where parties have entered into a contract, the contractual rights and obligations arising from that contract will not generally permit reliance on a delictual duty, which is inconsistent with the contract; (c) parties to a contract may have a legal duty that exists independently in a delict; (d) in determining wrongfulness, one must proceed with caution when assessing whether a third party, harmed by a breach of contract, can sue a party to the contract for such harm, outside well-defined causes of action (para 29).

He dealt with the Constitutional Court decision in *Country Cloud* 2015 (1) SA 1 (CC), which I turn my attention to next ('*Country Cloud*').

V THE PROBLEM OF *TRUST, TWO OCEANS V KANTEY & TEMPLER* AND *COUNTRY CLOUD TRADING V MEC, DEPARTMENT OF THE INTRASTRUCTURE DEVELOPMENT*

Detractors of the decision in *Trio Engineering* have argued that the decision is incorrect in light of *Trust, Two Oceans Aquarium v Kantey & Templer* 2006 (3) SA 138 (SCA) ('*Two Oceans Aquarium*'). In essence, the appellants in that case were trustees of a trust that operated an aquarium in Cape Town. They sued the respondent, a firm of structural engineers, for damages arising from certain failures which had developed in the exhibit tanks at the aquarium. In that decision, the Supreme Court of Appeal held that it 'can see no reason why the Aquilian remedy should be extended to rescue a plaintiff who was in a position to avoid the risk of harm by contractual means, but who failed to do so' (*Two Oceans Aquarium* paragraph 24). The nub of this statement is that the Supreme Court of Appeal per Brand JA was of the opinion that where parties had an opportunity to regulate their relationship and the possible risks through a contractual arrangement, but elected not to, then contractual liability ought to counteract delictual liability.

Another oft-quoted case is *Country Cloud*, a Constitutional Court judgment penned by Khampepe J. The Department, the defendant, had entered into a contract with Ilima, a third party, requiring Ilima to finish the construction of a hospital. The applicant, Country Cloud, had undertaken to lend Ilima money to enable Ilima to furnish the requisite performance bond to the Department as a guarantee against default in the construction of the hospital. A third agreement entered into between Country Cloud and the Department provided for repayment of the loan by the Department.

The first agreement was however, cancelled by the Department on the grounds that Ilima fraudulently misrepresented that the tax certificate presented by Ilima was valid. That gave rise to Country Cloud's claim against the Department.

The Constitutional Court appears to have confirmed *Two Oceans Aquarium* and stated that the concerns regarding floodgate liability are a significant policy consideration where a claimant has suffered pure economic loss when there is a contract in place (*Country Cloud* paras 22–24 and 60–65). Khampepe J remarked that:

> *Where parties take care to delineate their relationship by contractual boundaries, the law should hesitate before scrubbing out the lines that they have laid down by superimposing delictual liability. (para 6)*

The Constitutional Court seemingly excludes the possibility of a concurrence of actions in contract and delict, especially because the parties have elected to enter into a contractual arrangement (privity of contract) and agreed to certain contractual rights and obligations. Thus, the law should not disturb this contractual arrangement by foisting delictual liability.

Starting with *Two Oceans Aquarium*, I respectfully disagree with the Supreme Court of Appeal to the extent that it finds that a claimant has no recourse to a delictual claim where there is a breach of contract. That judgment appears to elevate the contractual arrangements to the detriment of the important development of pure economic loss in the field of law of delict. Allowing a concurrence of contractual and delictual liability may perhaps lead to an increase in claims; however, the doctrinal application of wrongfulness will certainly limit the effect of this extension. This is not to say that a breach of contract, without more, constitutes a delictual action. The claimant would still be required to establish a legal duty owed to her under the delictual requirement of wrongfulness.

Turning to *Country Cloud*, the Constitutional Court does not appear to overturn the following principle: concurrent liability may occur when a legal duty in delict, which arises independently of the contract and the factual matrix of the case must be able to sustain the claims in delict, as well as contract. The wording used by Khampepe J indicates that the Constitutional Court did not quibble with *Lillicrap*, but merely that the law should be slow to, or 'hesitate', to overlook the express provisions of the contract through the imposition of a delictual claim. There is nothing in that judgment that can reasonably be construed as authority of the exclusion of a delictual claim, where there is a contract in place. Nevertheless, a concerning issue rears its face: there is an inconsistency within *Country Cloud* because earlier in that judgment, Khampepe J notes that concurrent claims in contract and delict exist in our law (para 19). However, later in the judgment (paras 62–66)

it appears that the Constitutional Court holds that the existence of a contractual claim precludes an action in delict. Despite Unterhaulter J's generous reading of *Country Cloud* (para 27), this inconsistency is regrettable.

VI THE POSITION IN OTHER JURISDICTIONS

A middle-ground approach would not be unique to South Africa. In English law, the seminal case is *Henderson v Merrett* [1995] 2 AC 145 ('*Henderson*'). In that case, two classes of underwriting members sued their underwriting agents for negligent advice. One class had a direct contractual relationship with the underwriting agents, and the other class only had a contract with an intermediate agent, who in turn had a contractual relationship with the underwriting agents (*Henderson* paras 510–512). The House of Lords held, *inter alia*, that the duty to give proper advice arose concurrently in delict and contract.

In delivering the leading judgment, Lord Goff furnished three key reasons in support of the concurrence of delictual and contractual liability. First, irrespective of the problems with the question of concurrent actions historically, the common law began taking steps towards concurrence of such actions (*Henderson* para 542). The House of Lords cited *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 as being the most relevant example of this. That case established a basis for delictual liability independently of a contractual relationship. Furthermore, it abrogated the law of contract's exclusive terrain of allowing claims for pure economic loss, in the absence of physical harm to a person (bodily integrity) or damage to property (*Henderson* at 518). As a result, it appears illogical to exclude delictual liability merely because there was a contract. Secondly, the Court appreciated that there were practical reasons in favour of concurrence of actions: the most significant of which was to disabuse defendants from relying on limitation/prescription defences, especially where the claimant may have been unaware of the existence of the cause of action (*Henderson* paras 518 and 524) Thirdly, Lord Goff considered the experience of other jurisdictions that have permitted concurrence of actions have not been adverse (*Henderson* at 523). To quote Lord Goff:

> *My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. (Henderson paras 27–28)*

Plainly put, English law allows for concurrent claims and so do other various common law jurisdictions.

In January 1900, the German Civil Code, Bürgerliches Gesetzbuch (BGB), came into effect, as a result of the unification of the German state in 1871. It largely adopted and followed Roman law. Since then, the BGB has undergone several amendments. The general provision of German contract law is contained in article 311 of the BGB. In contrast, articles 823–853 are the provisions relating to delict. It appears that, as a general rule, German law permits a concurrence of actions in delict and contract. Therefore, if a defendant acts in a manner that constitutes a breach of contract, the claimant may claim a delict independently, if the defendant's conduct satisfies a claim in a delict. German case law in this regard is cumbrous and inconsistent; however, it largely favours and supports a concurrence of liability (Van Rossum 'Concurrency of contractual and delictual liability in a European perspective' (1995) 3 *European Review of Private Law* 539).

In my view, there appears to be no cogent reason for excluding delictual claims merely because a contract exists. There are various reasons why it would be advantageous to allow a concurrent claim. One advantage is that a claimant may be entitled to a higher quantum of recovery because the primary object of the remedies differs for each cause of action. In respect of delict, its remedies are fundamentally concerned with protecting the claimant's status quo or reliance interest by placing her in as good of a position as she would have been in had there been no wrongdoing. In relation to breach of contract, the remedies are aimed at protecting the claimant's expectation interest by placing the claimant in as good a position as if the contract had been duly performed. Based on the differences of remedies, it is perspicuous that the quantum may be vastly different. The second advantage is a claimant may be entitled to a higher quantum of recovery due to the rules governing the limitation of damages are different for contractual and delictual claims. Consider the principles of remoteness in contract and delict for example. The last advantage is that the claimant may be subject to different limitation periods for the commencement of one cause of action in contrast to the other. Admittedly, some of these advantages are controversial and may be subject to some criticism; however, they cannot be ignored.

A claimant should enjoy a right to choose to sue between contract and delict, regardless of the existence of a contract. The proviso to this proposition is that the delict must arise independent of the breach of contract and the contract does not exclude delictual liability.

VII CONCLUSION

In conclusion, our law recognises that there can be a concurrence of delictual and contractual claims, subject to the claimant establishing and satisfying the requirements of delict to ground the cause of action, independent of the

contract. In the case of pure economic loss, the plaintiff must establish an infringement of delictual legal duty. Accordingly, *Trio Engineering* is in line with our law and is not out of step with other comparative jurisdictions, such as England and Germany. The inconsistency in our case law has been explained above and should not be seen as a hurdle to the concurrence of actions.