

Follow-On Damages for Anti-competitive Conduct: A Need for Legislative Intervention?

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Contents

Introduction.....	2
Background to Civil Liability in South Africa	3
A Delictual Claim versus a Statutory Claim.....	5
The Nationwide and Comair cases	7
Elements of a Common Law Delict.....	8
Conduct.....	8
Fault	9
Wrongfulness	9
Causation.....	13
Harm	15
Practical Considerations.....	16
<i>Indirect Purchasers and the Passing-On Defence</i>	16
<i>Joint and several liability</i>	17
<i>Apportionment of liability</i>	19
Access to information.	19
<i>Timing of Instituting a Civil Damages Claim and Prescription</i>	21
Conclusion	24

Introduction

South Africa's law governing follow-on damages for competition law violations remains largely undeveloped and plaintiffs as well as our civil courts are likely to encounter a number of legal and practical challenges in pursuing damages claims against those defendants who have been found to have engaged in prohibited anti-competitive conduct.

On 8 August 2016 and 15 February 2017, the South Gauteng High Court awarded damages to Nationwide Airlines² and Comair Airways³ (the “**Plaintiffs**”) respectively, following the Competition Tribunal's decision that South African Airways had abused its dominant position in the market by inducing travel agents not to deal with competitors (the “**Airline cases**”).

The High Court's decisions, however, left open a number of questions as to the precise nature of the basis for liability and particularly, whether civil liability may only be imposed once a plaintiff has proved all the elements of a common law delict or whether civil liability is statutorily based.

This paper assesses whether the High Court's decisions in the Airline cases are in fact the ‘landmark’ decisions many initially thought would be the case and whether a sufficient framework now exists in terms of which civil damages claims may be brought and assessed. Furthermore, this paper explores what the impact may be (in relation to certain competition law infringements) if a plaintiff is required to satisfy all the common law elements of a delict before civil liability may be imposed, and whether an assessment in terms of the traditional common law of delict provides an appropriate balance between enabling victims of anti-competitive conduct to pursue their claims for compensation, whilst simultaneously ensuring that defendants do not face undue hardships in fending-off indeterminate liability. This is particularly relevant in relation to claims instituted by ‘indirect purchasers’⁴ and the policy considerations in respect of claims for pure economic loss.

In light of the *per se* nature of cartel conduct and the principle of ‘joint and several’ liability, there is also a risk that defendants may be held liable for damages which it did not in fact cause. The paper evaluates whether, and in what circumstances, such a scenario may arise and whether a defendant will be unduly or ‘unjustifiably’ burdened by this proposition.

² *Nationwide Airlines (Pty) Ltd (in Liquidation) v South African Airways (Pty) Ltd* 2016 (6) SA 19 (GJ).

³ *Comair Limited v South African Airways (Pty) Ltd* (2008/23443; 2011/34079) [2017] ZAGPJHC 10; [2017] 2 All SA 78 (GJ).

⁴ Based on Gehring, “The power of the purchaser: The effect of indirect purchaser damages suits on deterring antitrust violations” *New York University Journal of Law and Liberty* 208, “indirect purchasers” may briefly be described as those “purchasers further down the line who had not dealt directly with the monopolist or cartel responsible for the overcharge”. For example, where B bought goods or services from A, which he sold to C, and A is responsible for the anti-competitive conduct, C would be the indirect purchaser.

The paper also briefly discusses additional practical and legal considerations which plaintiffs should be cognisant of when considering whether, and when, to institute a civil damages claim, particularly in relation to prescription arguments and the availability of evidence.

Background to Civil Liability in South Africa

Chapter 2 of the Competition Act 89 of 1998 (“**Competition Act**”) prohibits specific types of restrictive horizontal and vertical practices and various forms of ‘abuse of dominance’ conduct.⁵

The South African Competition Commission (“**Commission**”) is responsible for investigating alleged contraventions of Chapter 2 and for referring them to the Competition Tribunal (“**Tribunal**”) for adjudication. The Commission may proceed to investigate a matter in instances where it has initiated a complaint against an alleged prohibited practice or where a complaint has been submitted to it by a member of the public.⁶

Once the Commission has investigated a complaint, it may refer the matter to the Tribunal for adjudication, either in terms of section 50(1) (if the complaint was initiated by the Commissioner) or in terms of section 50(2) (if the complaint was submitted to the Commission by a member of the public). It is only once the Commission determines not to refer a complaint to the Tribunal that a complainant may refer its complaint privately, in terms of section 51(1). Accordingly, the Commission is effectively the “*plaintiff of first choice*”⁷ in respect of all alleged contraventions of the Competition Act.

If the Tribunal determines that a prohibited practice has occurred, it has the power to make any appropriate order in relation to that practice, including imposing an administrative penalty in the circumstances prescribed by section 59(1) of the Competition Act. In doing so, it acts in the public interest to promote open and unfettered competition in the economy and to deter and punish a participant to a prohibited conduct.⁸

Referral proceedings are thus the primary mechanism for enforcing the provisions of Chapter 2 of the Competition Act, and any engagement in a prohibited practice is primarily penalised by the imposition of an administrative penalty.

⁵ Sections 4, 5 and 8 of the Competition Act.

⁶ *Id.*, Sections 49B(1) and 49B(2)(b).

⁷ *Glaxo Wellcome v National Association of Pharmaceutical Wholesalers* 15/CAC/Feb02 para 26.

⁸ *Competition Commission v Pioneer Foods (Pty) Ltd* [2010] 2 CPLR 195 (CAC) para 11.

For purposes of civil liability, section 65 of the Competition Act, titled “*Civil Actions and Jurisdiction*” provides as follows:⁹

‘A person who has suffered loss or damage as a result of a prohibited practice –

(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49D(1); or

(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form –

- (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;*
- (ii) stating the date of the Tribunal or Competition Appeal Court finding; and*
- (iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.’*

Section 65 of the Competition Act, therefore, provides for damages claims to be brought pursuant to findings by the Competition Tribunal or Competition Appeal Court (CAC) of a prohibited practice (i.e. restrictive practices and various forms of abuse of dominance as defined in Chapter 2 of the Act).

As made clear by section 65(9) of the Competition Act, the right to claim damages arising from a prohibited practice comes into existence on the date that the Competition Tribunal made a determination in respect of the matter or, if the case was on appeal, on the date the appeal process in respect of the matter is concluded. The certification also constitutes conclusive proof of its contents (that is that the relevant prohibited practice has been committed) and is binding on a civil court.¹⁰ What is less clear is whether section 65 gives rise to a *sui generis* statutory cause of action or simply provides the factual basis for pursuing a common-law action.¹¹ We discuss the implications of this distinction below.

⁹ Section 65(6) of the Competition Act.

¹⁰ *Id.*, Section 65(7); see also *Premier Foods (Pty) Ltd v Manojm NO and Others* 2016 (1) SA 445 (SCA) para 14.

¹¹ Du Plessis, Oxenham NO: *Class Action Litigation in South Africa* 1st ed (2017), (“*Class Action Litigation*”) 46 & 48.

A Delictual Claim versus a Statutory Claim

A claim for damages is available only as a follow-on remedy, once the Tribunal and/or the CAC has determined that a prohibited practice has occurred and has itself imposed an appropriate form of relief. That is so because:

- i. Section 65(9) of the Competition Act provides that a right to claim for damages only comes into existence once the Tribunal has “*made a determination in respect of a matter that affects that person*” or, in the case of an appeal, where the appeal is finally determined. It means that the civil claim arises pursuant to the findings in a referral and by operation of statute;
- ii. The Competition Act provides for a complete bifurcation of the powers of the Tribunal (and the CAC) from those of the High Court, with the Tribunal having exclusive jurisdiction to determine whether a prohibited practice has occurred. Its findings may, in certain circumstances, be exhaustive of the matter. So, for example, if the Tribunal awards damages pursuant to a consent order, that would wholly preclude that party from seeking damages through a civil, High Court, claim;¹² and
- iii. by contrast, a civil court has no jurisdiction to determine whether conduct constitutes a prohibited practice under the Competition Act.¹³ It must instead apply the determination of the Tribunal or the CAC in respect of that issue.¹⁴

On a plain reading of the Competition Act, it appears that the primary purpose of first providing for a public remedy and only secondarily for a claim for follow-on damages is to exclude a delictual claim for damages under the common law. In other words, that no claim can be brought independently of the Competition Act, under the common law delict.

In *Children’s Resource Centre*, however, the Supreme Court of Appeal (“SCA”), after a consideration of submissions from the parties as to the effect of section 65, ultimately left open the question of whether section 65 creates a statutory claim for damages arising from the certification of a prohibited practice or only provides for the specific determination of the fact of the prohibited practice - with parties seeking damages then still having to show, in terms of delict,

¹² Section 65(6)(a) of the Competition Act.

¹³ That is a matter that falls within the exclusive jurisdiction of the Tribunal and the CAC, in terms of s 62(1) read with s 27(1) of the Competition Act.

¹⁴ Section 65(2)(a) of the Competition Act.

a legal duty owed to the class not to have committed the prohibited practice.¹⁵ It would appear that the majority in the Constitutional Court in *Mukaddam* may, indirectly, have indicated that it favoured an interpretation that the effect of section 65 was to give a party who may have suffered damages the right to ‘approach a civil court for the assessment or award of damages’ - which seems to indicate an acceptance that there would be no need to prove a separate legal duty in delict (i.e. that section 65 creates a statutory claim).¹⁶ The SCA has adopted a similar approach in the recent *Premier Foods* case, holding that:

“The Tribunal and the CAC are the only bodies that can make an order declaring that a firm has engaged in a prohibited practice. Unless they do so, no such declaration can be made. This is clear from s 62(1)(a), which provides that the Tribunal and CAC have exclusive jurisdiction in respect of the interpretation and application of Chapter 2 of the Act Section 65(2) ousts the jurisdiction of a civil court to consider whether conduct prohibited by the Act has taken place and, if so, to make a declaration. A civil court is obliged to apply the determination of these specialist bodies. Once a declaration has been made by the Tribunal or CAC, it therefore renders res judicata the issue of the wrongful conduct of the firm in question.”¹⁷ (our emphasis)

In the *Nationwide* case, however, Nicholls J expressly stated in the opening line of the judgment that ‘*this is a delictual claim, the first of its kind, arising out of the anti-competitive practices of our national carrier South African Airways (SAA).*’ (Own emphasis)

Unfortunately, Nicholls J did not elaborate any further as to the precise ambit and scope of the requirements which a plaintiff must prove in order to succeed with a damages claim.

Perhaps Nicholls J considered it unnecessary to provide any further guidance as to the precise nature of a follow-on damages claim as (on the facts of the *Nationwide* case) it was common cause that the general requirements for a common law delict had been satisfied and that the only issue that was contested before the High Court was the quantification of damages.

¹⁵ *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* (050/2012) [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) paras 69-73.

¹⁶ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) para 54. However, the Constitutional Court’s position is far from clear, since the majority did not directly engage with the debate dealt with by Wallis JA in *Children’s Resource Centre*, and in para 74 of the concurrent judgment, Froneman and Skweyiya JJ refer with approval to Wallis JA’s decision not to determine the true nature of a section 65 claim. They stated: ‘It has not yet been determined in our law what the true nature of a claim under section 65(1) is and it is unwise to attempt to do so at this early certification stage of proceedings.’

¹⁷ *Premier Foods* (note 10 above) para 14 (emphasis added).

Accordingly, the facts relating to the *Nationwide* case, which was a claim by one competitor against another for abuse of dominance, may differ significantly from claims brought by direct or indirect purchasers against multiple respondents who were found to have engaged in cartel conduct for example - where satisfying the common law elements of delict may not be so apparent.

The importance in distinguishing between a delictual claim and a statutory claim is that in relation to the latter, liability is strict and all that a claimant would be required to show is that the conduct was casually linked to the damages suffered and to quantify the damages. A plaintiff would not have to show that the defendant was at fault (i.e. acted intentionally or negligently) or even 'wrongfully' (based on the SCA's decision in *Premier Foods*).

Accordingly, a 'statutory claim' would assist a plaintiff in follow-on damages as not all the elements of a common law delict must be proved. We discuss each of the elements below. Before doing so, however, it is useful to provide a brief summation of the *Nationwide* and *Comair* cases.

The Nationwide and Comair cases

Although Nationwide and Comair (the "**Plaintiffs**") brought separate civil damages claims against SAA, for purposes of this paper the claims will be discussed generally as one case against SAA, as the underlying conduct in respect of which the Competition Tribunal issued a 'Section 65 certificate' is the same - namely that SAA abused its dominance in the market by inducing travel agents not to deal with competitors¹⁸.

Both Plaintiffs based their civil case on the basis of a "loss of profit" which the Plaintiffs allegedly sustained as a result of SAA's abusive conduct.

The High Court found in favour of the Plaintiffs and awarded Nationwide damages of approximately R104 million plus interest and awarded a total amount of R554.2 million plus interest in damages to Comair. The total damages together with interest for both cases amounts to approximately R2 billion.

The majority of the *Nationwide* and *Comair* judgments deal with the quantification of damages and the evidence provided by the respective expert witnesses. In this regard, the High Court held that although there is not necessarily one method to quantifying damages, both parties agreed that the linear interpolation model was the most prudent model to utilise in this case.

¹⁸ SAA effectively offered rebates and incentives to travel agents which could not be matched by Nationwide and Comair and had an anti-competitive foreclosing effect on the Plaintiffs.

Essentially, the Court was tasked with evaluating how the Plaintiffs had performed in light of the prohibited conduct and how the Plaintiffs would have performed had it not been for the prohibited conduct (i.e. determining the counter-factual scenario).

In order to calculate the damages, evidence was led which determined the additional revenue which would have been derived by the Plaintiffs had the travel agents not been induced not to deal with the Plaintiffs, less the additional costs which the Plaintiffs would have incurred in deriving such additional revenue.¹⁹

The High Court in *Nationwide* also indicated that although the majority of airline tickets during the relevant period were sold via travel agents, there were alternative distribution channels including direct sales and internet sales. Accordingly, the High Court decided to allow for a 25% contingency deduction to address those ticket sales which were not affected by the anti-competitive conduct.

Elements of a Common Law Delict

Assuming that the basis for liability for follow-on damages is in fact purely delictual (as expressed by the High Court in *Nationwide*), rather than statutorily based, a plaintiff would need to, on a balance of probabilities, prove each of the common law elements of a delict in order to succeed with a damages claim, namely:

- i. conduct;
- ii. fault;
- iii. wrongfulness;
- iv. causation; and
- v. harm.

We discuss each of these elements briefly below in relation to a potential follow-on damages claim.

Conduct

Conduct can take place either in the form of a positive act or an omission to act (in cases where there is a duty to act positively).

For purposes of delictual liability, the decision in *Omnico* is a good example of the CAC imposing a positive duty on firms to distance themselves from cartel conduct for purposes of a section 4(1)(b)

¹⁹ By way of an example, if on a specific route the Plaintiffs would have benefitted from an additional number of passengers which would have necessitated an additional plane or flight, the costs of the additional flight would have to be taken into account.

contravention. It was the respondent's failure to take positive steps to distance themselves upon which the CAC principally based its reasoning in order to find that the respondents were part of the cartel.

The 'conduct' element is, however, largely unproblematic in most cases as a Section 65 Certificate would serve as conclusive proof that the conduct element has in fact been satisfied. The Competition Act makes this clear.

In relation to a defendant who did not in fact implement the anti-competitive conduct, the other requirements of wrongfulness and causation may provide an adequate safeguard.

Fault

Fault, as an element of delictual liability, requires that the law hold a person responsible for the harm caused by his or her wrongful conduct. It is common cause that for there to be delictual liability, it is not enough to show that harm was caused wrongfully, the defendant must also prove fault.²⁰

Similar to the 'conduct' element, from a practical perspective the 'fault' requirement is unlikely to pose significant challenges to a plaintiff nor unduly prejudice a respondent in abuse of dominance cases - in terms of which a respondent would invariably have taken active steps to implement or enforce the relevant conduct. The same is true to a large degree for respondents who engaged in conduct which contravenes the cartel provisions of the Act. A respondent in these cases would invariably either have done so intentionally, or at the very least, negligently.

If the basis for liability is statutory, liability is strict and the fault requirement would automatically be satisfied.

Based on the common law elements of a delict, a plaintiff must prove fault. It is likely, however, that a 'Section 65 certificate' would serve as prima facie evidence of fault and that the onus would rest on the defendant to prove that although he contravened the Competition Act, he should not be considered to be at fault for purposes of delictual liability.

Wrongfulness

It seems based on the SCA's decision in *Premier Foods*, that the wrongfulness element may be irrebuttably presumed following the issuing of a Section 65 certificate. Although this approach would seem consistent with the purpose of the Act in relation to hardcore cartel conduct, it is

²⁰ Loubser & Midgley (eds) *The Law of Delict in South Africa* (2010) ("*The Law of Delict in South Africa*") 99.

submitted that an irrebuttable presumption of wrongfulness would be an overly prejudicial position to adopt as a matter of course.

In principle, the issue of wrongfulness is based on a party's legal duty not to cause harm to a plaintiff. It is likely to be argued that in competition law infringements, firms have a legal duty not to contravene the Competition Act and accordingly, by engaging in such unlawful conduct, the wrongfulness element of the common law delict has been satisfied.

However, as we have noted elsewhere in this paper, the element of wrongfulness in terms of common law delict is based on broader policy implications, even if there is contravention of a law.

For instance, it is not clear that public policy demands that a respondent's conduct in respect of an excessive pricing matter or section 5 violation is as 'wrongful' as hard-core cartel conduct.²¹ This is likely why the legislature sought only to criminalise cartel conduct and not other forms of prohibited conduct.

Furthermore, competition law is not necessarily straightforward. In the *Sasol* 'excessive pricing' case for example in which the CAC upheld Sasol's appeal in respect of the Tribunal's finding that Sasol had engaged in 'excessive pricing' in contravention of the Competition Act²². Two specialised competition law agencies, therefore, interpreted and applied the excessive pricing provisions incorrectly (based on the evidence at hand). To hold a respondent, who may have erred on the wrong side of a technical infringement civilly liable, therefore, does not seem appropriate without first assessing the 'wrongfulness' of the conduct as a separate element of a delict.

In terms of common law, wrongfulness is often an issue in claims for pure economic loss. The courts have, therefore, determined that wrongfulness should be determined in light of a broader reasonableness criteria based on the legal convictions of society.

Notionally, wrongfulness is not purely an element of conduct. Wrongfulness entails an assessment of the conduct and the harm caused. As Walker commented in relation to the Scottish law of Delict:

“The act or omission by itself is not wrongful or delictual unless it brings about as an immediate consequence some harm to a legally protected interest of another person. The

²¹ In *Nationwide* (Note 2 above), a dominant firm was found by the Competition Authorities to have embarked on a strategy which deliberately and effectively harmed its competitors and that the conduct was unlawful. In other words, SAA had a legal duty not to abuse its dominance in a manner which had an exclusionary effect on its competitors.

²² *Sasol Chemical Industries Limited vs The Competition Commission* 131/CAC/Jun14.

*law of delict is concerned with harms, with wrongs to, or infringements of, the interests of others, not with the bare conduct whereby those come about.*²³ (Own emphasis)

The SCA has also confirmed that it is only if the legal convictions of society demand that the plaintiff be awarded damages for pure economic loss, that the wrongfulness element will be met.²⁴

In relation to competition law damages claims, a question which then arises is whether the wrongfulness criteria would be relevant in cases of cartel conduct in which the pro-competitive effects or other efficiency enhancing arguments may, on a net effects basis, outweigh any anti-competitive effects. In other words, does public policy demand that a respondent meet the “wrongful” element of a delict when the procompetitive effects of a respondent’s conduct outweigh any negative effects?

An example may be where competitors are found guilty of fixing a purchase price. The benefits flowing from reduced input costs may well have been passed on to consumers which would be pro-competitive and possibly outweigh any negative effects felt by the supplier. Should the supplier institute a damages claim, would public policy demand that the respondents be held liable for the damages caused?

Furthermore, absent any price regulations, a firm does not generally have a legal duty to price products at a certain price. Accordingly, it is not apparent that a firm which may have been found to have contravened the *per se* section 4(1)(b) provision (i.e. cartel conduct), but did not enforce the collusive arrangements, would irrebuttably be considered to have acted wrongfully for purposes of delictual liability on the basis of joint and several liability which is discussed further below.

In cases in which the pro-competitive and anti-competitive effects are felt or directed at the same plaintiffs, then the factual causation test would effectively ensure that a defendant is not unduly prejudiced as the ‘counter-factual’ would show a net ‘positive effect’ on the plaintiff rather than a negative effect. In other words, no damages were suffered. In cases, however, where the defendants conduct may have disproportionately harmed a specific individual or group but the net effects of the pro-competitive or efficiency enhancing arguments may be felt more broadly, the question then arises as to whether a defendant may raise the defence that its conduct was not in fact wrongful.

²³ Walker, *The Law of Delict in Scotland* 2 ed (1981) 33.

²⁴ *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA)

Perhaps it is at this juncture that a defendant should be permitted to raise the ‘characterisation argument’. As noted in the SCA’s judgment in *ANSAC*, the Tribunal and CAC’s approach to section 4(1)(b) contraventions is that:

*“once the conduct complained of is found to fall within the scope of the prohibition, that is the end of the enquiry. There is no potential for a further enquiry as to whether the conduct is justified (an enquiry of the kind that is envisaged by s 4(1)(a)), and evidence to that end is not relevant and thus inadmissible.”*²⁵

The ‘characterisation argument’, however, is a separate inquiry from the ‘rule of reason’ inquiry - although, the same evidence may potentially be considered when assessing both arguments. In terms of the characterisation argument, the primary assessment is to:

*“establish whether the character of the conduct complained of coincides with the character of the prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of: this is a factual enquiry.”*²⁶

Furthermore, the SCA stated that *“the concept of ‘price fixing’, both in lay language and in the language that the Act uses, may, for example, be limited to collusive conduct by competitors that is designed to avoid competition, as opposed to conduct that merely has that incidental effect”*²⁷. (Own emphasis)

If, however, the ‘character’ of the conduct was assessed during the Tribunal or CAC hearings, then that would effectively limit the prospects of successfully raising the characterisation argument in order to demonstrate a lack of wrongfulness. The characterisation argument has not, however, been fully recognised by the Competition Authorities and the characterisation argument as a defence to the *per se* nature of the Competition Act’s ‘cartel conduct’ prohibition, does not appear to have gained traction with the Tribunal or CAC. For purposes of civil liability, however, a defendant ought to be entitled to raise a legitimate characterisation argument to demonstrate that its conduct was not in fact ‘wrongful’ for purposes of delictual liability.

A further instance where the element of wrongfulness may be of particular relevance is in cases where a respondent did not implement a collusive arrangement, but other members to the cartel

²⁵ *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* (554/2003) [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA); [2005] 3 All SA 1 (SCA) para 37.

²⁶ *Id.*, Para 47.

²⁷ *Id.*, Para 49.

arrangement did. The fact that defendants are jointly and severally liable to the damages caused by the cartel assists plaintiffs as they do not necessarily need to show the specific damages claimed were caused from a particular member of the cartel. The fact that a respondent did not implement the cartel conduct, is not a defence available to a respondent during a Tribunal hearing. It is, however, an important factor in mitigation of an administrative penalty. Assuming that a respondent had no intention of implementing a collusive arrangement, but was still found to be part of the collusive arrangement for purposes of the *per se* section 4(1)(b) contravention, does public policy demand that such a respondent be held equally liable for the damages caused by the cartel as those respondents who did in fact implement the collusive conduct?

Accordingly, regardless of whether the basis for liability is found in terms of statute or the common law delict, a defendant should be entitled to raise a defence that its conduct, despite contravening the Competition Act, was not in fact wrongful for purposes of delictual liability. The onus should, however, be on the defendant to prove such a defence.

Causation

As mentioned above, regardless of whether a follow-on civil damages claim is based in common law delict or rather statutory liability, a plaintiff will be required to show that the prohibited conduct was casually linked to the damages suffered.

Causation, as an element of delict, must be assessed in terms of both factual causation and legal causation.

The traditional test for determining factual causation is whether the defendant's conduct was a necessary condition for the plaintiff's harm to occur.²⁸ The test commonly utilised to establish factual causation is known as the 'but-for' test.²⁹

In *Nationwide*, despite SAA raising the issue of causation as a defence, Nicholls J, did not deal with causation as a separate standalone delictual element. Rather, Nicholls J states that, in relation to SAA's defence that Nationwide's loss of profit was a result of Nationwide's management and how the company was being run rather than a result of SAA's abusive conduct, SAA's defence is one of damages rather than causation.³⁰

²⁸ *The Law of Delict in South Africa* (note 20 above) 68.

²⁹ Although the 'but-for' test is the most commonly used test for factual causation, the courts have also used other methods of determining factual causation including the 'material contribution' and 'common sense' test.

³⁰ *Nationwide* (note 2 above) para 12.

This reasoning is logical insofar as factual causation is concerned. The High Court quantified the Plaintiffs damages by determining the ‘counter-factual’. In other words, the Court had to evaluate ‘but for’ SAA’s abuse of dominance, what would the Plaintiffs respective position be and what turnover would the Plaintiffs’ likely have generated.

In relation to legal causation, however, the underlying policy is that a person should only be held liable for the consequences that are sufficiently closely linked to the conduct.³¹ Legal causation is particularly relevant when dealing with claims for ‘pure economic’ loss. In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*³² the Court drew a distinction between legal causation and wrongfulness. In this regard, the Court stated that:

*“...wrongfulness and remoteness are not the same. They involve two different enquiries in respect of two different elements of delict, each with its own characteristics and content. Even where negligent conduct resulting in pure economic loss is for reasons of policy found to be wrongful, the loss may therefore, for other reasons of policy, be found to be too remote and therefore not recoverable.”*³³

In terms of common law delict, the courts have generally used a flexible approach to establish legal causation which includes the ‘direct consequence’ test, the ‘reasonable foreseeability test’, the *novus actus interveniens* concept and the ‘adequate cause’ test. Regardless of which test is ultimately used, the courts should be governed by principles of fairness, reasonableness and justice.

In *Nationwide*, the High Court did not specifically deal with the issue of legal causation. Again, based on the facts of the case it may have been unnecessary to do so as the Court stated that it was bound by the Tribunal’s finding that SAA’s conduct was exclusionary, harmful and that the damages suffered by the Plaintiffs were directly as a result of SAA’s abusive conduct.

A damages claim brought by indirect purchasers, for example, may not be as clear. Civil claims should be limited in so far as possible to only legitimate claims which do not expose defendants to a flood wave of litigants (many of whom may be purely opportunistic hoping for a settlement before it is necessary to prove the quantum of damages). To ensure that defendants are not exposed to indeterminate liability, the courts should ensure that a proper assessment of the legal causation element is also met in addition to the factual causation test.

³¹ *The Law of Delict in South Africa* (note 20 above) 85.

³² *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA).

³³ *Id.*, para 34.

In relation to the passing-on defence, the factual causation test should afford the necessary protection to a defendant in order to mitigate against the defendant paying damages to a claimant which did not actually suffer damages.

In addition, most follow-on damages cases, the ‘damages’ suffered will be in the form of ‘pure economic’ loss. South African courts have, however, strived to protect defendants from potential indeterminate liability (which is a particular concern in relation to claims for pure economic loss) and have used either the tests for legal causation or the general ‘reasonableness’ requirement to establish wrongfulness, in order to limit liability.

Pure economic loss is closely linked to the wrongfulness criteria. In this regard, the Supreme Court Appeal (SCA) in *Telematrix*³⁴ confirmed in terms of common law, causing pure economic harm is not *prima facie* wrongful. The SCA stated that:

*When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission, is not prima facie wrongful and more is needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered.*³⁵

Harm

A plaintiff should not be saddled with having to prove harm as a separate delictual element in order to proceed with a claim for damages (assuming all the other delictual elements have been met). Harm should be presumed as is the approach adopted by the European Commission which, in terms of a Directive, introduced a rebuttable presumption of harm.³⁶ In this regard, the Directive reads that “*Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult.*”

The onus of actually quantifying the damages suffered, naturally rests with the plaintiff. The ‘wrongfulness’ and ‘causation’ tests should sufficiently protect a defendant from frivolous claims and indeterminate liability.

³⁴ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA).

³⁵ Para 13.

³⁶ Article 17(2), Chapter V of the EU Directive (note 40 above).

Practical Considerations

In addition to assessing the framework in which civil damages claim ought to be assessed, there are also certain practical considerations relating to follow-on damages claims which may require the attention of the legislature. We discuss these briefly below.

Indirect Purchasers and the Passing-On Defence

A particularly contentious issue in relation to follow-on damages, especially in relation to class actions, is whether such civil claims are available to ‘indirect purchasers’. Indirect purchasers are not entitled to institute civil actions in most common law based jurisdictions. For instance, in Canada, two decisions (*Pro-Sys Consultants Ltd v. Microsoft*, [2011] B.C.J. No. 688 and *Sun-Rype Products Ltd v. Archer Daniels Midland Co.*, [2011] B.C.J. No. 689 (heard together by a single panel of the British Columbia Court of Appeal)), “represent yet another 180 degree turn in the treatment of indirect purchaser class actions in Canada”.³⁷ In those cases, the Court of Appeal has held conclusively that indirect purchaser actions are not available in Canada as a matter of law.³⁸

Under South African law, however, there appears to be no basis which precludes ‘indirect purchasers’ from instituting a claim for damages. Practically, applying both the common law factual and legal causation tests to ‘indirect purchasers’ should mitigate against a defendant being held liable for damages which are too remote and far down the line to have been reasonably foreseen.

Linked to the suitability of claims by ‘indirect purchasers’ is the ‘passing-on defence’. If ‘indirect purchasers’ are entitled to institute civil claims, then our courts should also recognise the ‘passing-on’ defence during the ‘quantification of damages’ stage so as to preclude a defendant being held liable for treble damages. In this regard, some useful guidance as to the onus of proof may be found by considering the European Commission’s White Paper on *Damages Actions for Breach of EC*

³⁷ See Katz, “Indirect purchaser class actions: the pendulum swings back”, July 15 2011 issue, available at <http://www.lawyersweekly.ca/index.php?section=article&volume=31&number=11&article=2> (accessed on 30 July 2012).

³⁸ In *Sun-Rype Products Ltd v. Archer Daniels Midland Co.*, [2011] B.C.J. No. 689, the plaintiffs alleged that the defendants had conspired to fix the price of high fructose corn syrup (HFCS), a sweetener used in various food products. The proposed class consisted of both direct and indirect purchasers resident in British Columbia (B.C.) who purchased HFCS or products containing HFCS in the period between Jan. 1, 1988 and June 30, 1995. In *Pro-Sys Consultants Ltd v. Microsoft*, [2011] B.C.J. No. 688, the proposed class was comprised exclusively of indirect purchasers, namely persons resident in B.C. who indirectly acquired Microsoft operating systems and applications software (for example, through new computers pre-installed with Microsoft’s software) on or after Jan. 1, 1994. The plaintiffs alleged that Microsoft had engaged in various kinds of anti-competitive behaviour with original equipment manufacturers and others, which permitted it to overcharge for its products.

Antitrust Rules (2 April 2008), which, although leaving the applicability of the passing-on defence to the consideration of individual Member States, provides as follows:

"On the passing-on of overcharges:

- *The defendant in an antitrust damages case should be entitled to rely on the passing-on defence against a claim for compensation of the overcharge, brought by a claimant who is not a final consumer.*
- *The burden of proving the passing-on of overcharge would have to lie with the defendant. The standard of proof for the passing-on should not be lower than the standard to which the claimant has to prove the damage.*
- *An indirect purchaser would be able to rely on the rebuttable presumption that the illegal overcharge was passed on in its entirety down to his level.*
- *In case of joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain, national courts are encouraged to use whatever mechanism under national or Community law at their disposal in order to avoid under- or over-compensation of the harm caused by a competition law infringement."*³⁹

Joint and several liability

Joint wrongdoers are regulated by the Apportionment of Damages Act, 34 of 1956 ("**Apportionment Act**"). Section 2(1) states that "*Where it is alleged that two or more persons are jointly and severally liable in delict to a third person for the same damage, such persons may be sued in the same action.*" (Own emphasis).

It is, therefore, permissible for the courts to make a judgment against the wrongdoers jointly and severally (the one paying the other to be absolved) without apportioning the damages between the various wrongdoers.⁴⁰

Effectively, from a plaintiff's perspective, it matters not who the respondent is. Plaintiffs are ultimately left to decide whether to join wrongdoers in a single action or to institute separate actions against each of the wrongdoers. The Apportionment Act makes it clear that any such joint wrongdoer must be joined or at the very least notified of its potential liability.⁴¹ In so joining a joint wrongdoer, it has been held "*that leave of the court had to be obtained before such*

³⁹ The European Commission's White Paper on *Damages Actions for Breach of EC Antitrust Rules* (2 April 2008) 95.

⁴⁰ The European Commission's Directive on antitrust damages actions of 26 November 2014 (EU Directive), Articles 11(1) and 11(2) http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (accessed 29 June 2017).

⁴¹ Section 2(2) of the Apportionment of Damages Act 34 of 1956.

wrongdoers could be sued regardless of the fact that no allegation had been made in the original action that they were joint wrongdoers.⁴²

If plaintiffs are not entitled to hold cartel members jointly and severally liable, plaintiffs may be faced with an unsurmountable hurdle in trying to recover the portion of damages attributable to each defendant separately.⁴³

In South Africa, however, in light of the *per se* nature of cartel prohibitions, a firm will be found to have contravened the cartel provisions by simply being party to a collusive agreement regardless of whether a particular respondent ever intended to implement or give effect to the agreement or not. Accordingly, absent any other grounds for excluding liability, a respondent who did not implement any cartel conduct may be held jointly liable for the damages caused by those respondents who did in fact implement the cartel conduct (and hence caused the ‘damage’).

This is an even more likely potential outcome following the CAC’s decision in the *Omnico* case⁴⁴ case, in which the CAC placed an onerous duty on parties to actively distance themselves from anti-competitive conduct in order not to be found to have also engaged in such conduct.⁴⁵

Various policy considerations perhaps necessitate further attention from the legislator (we highlight and discuss these issues throughout this paper). Notably, in the United Kingdom, although the principle of joint and several liability also applies, a leniency applicant is liable only for the damages which it caused the plaintiff and is specifically not jointly and severally liable with the other cartellists.⁴⁶

Adopting a similar approach in South Africa would go a long way in not only ensuring that the Competition Commission’s Corporate Leniency Policy is not undermined but further incentivise

⁴² See *Absa Brokers v RMB Financial Services and others* [2009] (09/332) ZASCA 20) 83 para 16; in terms of the Apportionment Act (note 22 above), a joint wrongdoer who is held liable, and who has paid in full, may recover from another joint wrongdoer a contribution based on such wrongdoer’s responsibility for the damages suffered by the Plaintiff.

⁴³ This is particularly so in cases where the cartel consisted of an ‘umbrella cartel’ which spanned across a number of geographic areas over a sustained period of time and the members to the cartel may have fluctuated over time.

⁴⁴ *Omnico (Pty) Ltd; Cool Heat Agencies (Pty) Ltd vs The Competition Commission & Others* 143/CAC/Jun16.

⁴⁵ African Antitrust and Competition Law “South Africa: competition appeal court sends strong ‘passive participation’ message”, available at <https://africanantitrust.com/2016/12/22/south-africa-competition-appeal-court-sends-strong-message-in-relation-to-passive-participation-at-competitor-gatherings/> (accessed on 29 June 2017).

⁴⁶ In the UK, the Department for Business Innovation & Skills (BIS) was tasked with ultimately deciding whether whistle-blowers should be protected from the joint and several liability that currently exists between cartel members for damages awarded.

parties to apply for leniency, particularly when the failure to obtain immunity may result in such parties being held jointly responsible for the entire damage caused by the cartel.

Apportionment of liability

The apportionment of damages between respondents presents its own challenges. Plaintiffs should, however, not be burdened with the issue of apportionment - hence the basis of joint and several liability.

In dealing with the issue of apportionment in the EU, the Directive states that “*where several undertakings infringe the competition rules jointly, as in the case of a cartel, it is appropriate to make provision for those co-infringers to be held jointly and severally liable for the entire harm caused by the infringement.*”⁴⁷

Under South African law, damages are ordinarily apportioned based on a ‘degree of negligence’, expressed as a percentage. However, quantifying the pro rata liability between respondents in cartel cases for example, may be particularly challenging.

In this regard, the EU directives favour an approach that seeks to apportion damages based on the relevant respondent’s ‘affected’ turnover,⁴⁸ market share, or role in the cartel. There appears to be no reason why this would not be an equally suitable basis upon which the South African civil courts could apportion liability.

Access to information.

In order to prove damages, a prospective claimant will invariably require substantial evidence to demonstrate the casual effect of the conduct and the quantification of damages.⁴⁹

During the Commission’s investigation, the Commission is likely to come into possession of a substantial amount of evidence which would, if plaintiffs were afforded access to such evidence, assist a plaintiff’s case substantially. A plaintiff is, however, restricted from accessing certain information held by the Commission.

⁴⁷ Article 11 of the EU Directive (note 40 above).

⁴⁸ I.e. turnover derived from the cartel conduct.

⁴⁹ In the *Children’s Resource Centre Trust* judgment (note 13 above), the applicants had originally asserted that showing a valid cause of action (a *prima facie* case) did not require any inquiry into the merits. However, the judgment of Wallis JA makes clear that ‘evidence is required showing a *prima facie* cause of action’ para 42.

For instance, a respondent's confidential information should be afforded adequate protection and the Commission is bound by strict rules regarding the protection of confidential information.⁵⁰

Further, any information which the Commission obtains during the course of its investigation may be 'restricted information' and is accordingly confidential either in the hands of the owner of that information, or the Commission.⁵¹

The Commission may not unilaterally waive confidentiality over any information claimed as confidential. A respondent is also unlikely to ever waive confidentiality over confidential information if there is a risk that such information may be used against it in subsequent civil proceedings. Accordingly, should plaintiffs require access to confidential information, their only option available is approaching the Competition Tribunal or CAC for an order regarding access to these documents.⁵²

Furthermore, even in discovery proceedings before a civil court,⁵³ any information which is legally privileged or confidential may be excluded from discovery.⁵⁴

Accordingly, a plaintiff may find it significantly challenging to obtain access to crucial evidence and may be required to proceed with a number of interlocutory procedural challenges simply to gain access to sufficient evidence in order to assess what the potential damages are that the plaintiff may have suffered.

In the EU, civil litigants traditionally faced similar challenges regarding access to information as recognised in the *Pfleiderer* decision.⁵⁵ The Court of Justice, however, held that the most appropriate method of addressing these concerns is by way of legislation. A Directive was then issued which effectively sets out a framework in terms of which defendants who have been found to have engaged in competition law infringements may be required by courts to disclose evidence

⁵⁰ Competition Commission Rules, Rule 14 "Restricted Information".

⁵¹ *Id.*, Rule 14(1)(c)(i). The Commission may however, at its discretion, use or disclose, subject to its rights and obligations in terms of the Act and in the light of its litigation privilege, any information, documents or submissions that a person or firm provides to it by virtue of this settlement process for any legal proceeding contemplated in the Act.

⁵² *Id.*, Rule 15(2) of the Competition Commission's Rules. Importantly, it should also be noted that the Tribunal in *Arcelormittal South Africa Ltd and Another v Competition Commission and Others, Arcelormittal South Africa Ltd v Manojim NO and Others* (103/CAC/Sep10) [2012] ZACAC 1, also held that documentation submitted to the Commission as part of a cartel leniency application is subject to legal privilege.

⁵³ See rule 35 of the South African Uniform Rules of Court.

⁵⁴ See *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980(3) 1093 (W) and *Unilever plc & Another v Polagric (Pty) Ltd* 2001(2) SA 329 (CPD).

⁵⁵ In 2011, the Court of Justice held in *Pfleiderer v FCO case no. C-360/09* [2011] that, in the absence of EU law on the subject, it is for national law to determine the circumstances in which leniency documents may be disclosed to victims of antitrust infringements in private damages actions.

which lies within their control, following a reasoned justification for such disclosure by the plaintiff.⁵⁶ Notably, such disclosure orders will not apply to leniency statements or settlement submissions.⁵⁷

Timing of Instituting a Civil Damages Claim and Prescription

A key issue which all civil litigants face relates to the timing regarding when to institute a follow-on damages claim. Although there is still some uncertainty as to the precise basis for civil liability, the courts have made it clear that the right to bring a civil claim based on anti-competitive conduct, may only be instituted after the Tribunal has made a determination in terms of section 65 that the defendant has engaged in a prohibited practice in contravention of the Competition Act.⁵⁸

A ‘Section 65 certificate’ may be issued only once the Tribunal has finalised a consent order (i.e. a settlement agreement which is made an order of the Tribunal) or issued a decision following a contested hearing.

Although this process is designed to assist civil litigants (as the plaintiff does not have the onus of proving that the conduct was a contravention of the Competition Act before a civil court), civil litigants may be prejudiced in cases which involve long drawn out proceedings before the Tribunal or CAC.

In both the Airline cases as well as in respect of the bread cartel, it was close to a decade which passed from the date the Commission initiated the complaint and the finalisation of the civil damages actions.⁵⁹ Naturally, the more time which elapses, the more difficult it will be for a plaintiff to build and sustain a civil damages case. Evidence may be lost, key witnesses may no longer be available to testify or may no longer be able to accurately recollect certain pertinent facts and in cases where victims are potentially foreclosed and liquidated, the liquidators may not have the appetite to delay distributing the assets to creditors in order to pursue a follow-on damages claim.

Accordingly, in order to ensure that civil litigants are not effectively deprived of their rights to pursue follow-on damages claims, the competition authorities should be cognisant of finalising matters expeditiously, as required by section 49B(3) of the Competition Act.

⁵⁶ The EU Directive (note 40 above) cautioned, however, that courts must ensure that such disclosure orders are proportionate and that confidential information is duly protected.

⁵⁷ Chapter II of the EU Directive (note 40 above); Class Action Litigation (note 11 above) 208-209.

⁵⁸ Section 65(6)(b) Competition Act

⁵⁹ These may still not have been finalised at the date of writing this paper.

A further and somewhat novel concern which plaintiffs may face in bringing a follow-on civil damages claim relates to prescription. The Competition Act does not specify the time period in which a civil litigant must approach the Tribunal in order to obtain a ‘Section 65 certificate’. Accordingly, the general principles governing prescription would apply and a civil litigant would ordinarily be obliged to institute a civil claim within three years of the Tribunal or CAC making its determination.⁶⁰

If liability is based on statutory liability, then the cause of action likely only arises once a ‘Section 65 certificate’ has been issued. If, however, the basis is delictual, then the cause of action arguably arises on the date that the Tribunal or CAC makes a declaration that a respondent has engaged in anticompetitive conduct (i.e. by way of a consent order or a decision).

Assuming that a plaintiff is required to institute civil damages within three years of the Tribunal or CAC making a determination in terms of Section 59, a difficulty for plaintiffs arises in cases where certain respondents opted to settle their case early on in the Commission’s investigation (i.e. by way of a consent order), whilst other respondents chose to contest the Commission’s referral – which may take more than three years to finalise. In such instances, a plaintiff may be obliged to institute an action for civil damages against the first respondents who concluded consent orders within three years of the consent orders being finalised, as a failure to do so could result in the plaintiff’s case being prescribed *vis-à-vis* such respondents.

At first blush, such an outcome may appear overly prejudicial to a potential plaintiff as ordinarily a plaintiff may want to wait until the entire investigation has been concluded against all the respondents before launching a civil action. In light, however, of the fact that investigations may take a number of years to finalise, it may be strategically beneficial for a plaintiff to institute a civil damages claim against a respondent who has concluded its case by way of a consent order, given that such a respondent would be jointly and severally liable for the harm caused by the entire cartel. Provided the defendant is in a position to afford to pay the total damages suffered, it would be immaterial to the plaintiff which respondent actually pays the damages.

⁶⁰ Interestingly, section 65(10) of the Competition Act, states that “*interest on a debt in relation to a claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (6).*” The specific inclusion of subsection 10 might suggest that for purposes of legal interpretation, the omission from the legislature to deal, specifically, with prescription shows that the legislature did not intend to alter the position of prescription as found in the Prescription Act.

Although this strategy may in principle be open to a plaintiff to pursue, there are a number of practical considerations which may best be regulated by legislative intervention. We discuss these briefly below:

- *Difficulty in proving damages caused by the cartel:* Until the Tribunal makes a determination as to who the members of the cartel are, it will be challenging for a plaintiff to demonstrate the total harm caused by the cartel. It would be a typical ‘putting the cart before the horse’ scenario if a plaintiff sued a respondent for the total damages caused by the cartel, before the cartel itself has been defined. Of course, if the plaintiff’s claim against an ‘early settler’ can be sustained and the quantum of damages proved without the need to demonstrate the total damages caused by the cartel, then there would not necessarily be any benefit in waiting until the entire investigation has been finalised before instituting a claim.
- *Undue burden on ‘first’ in line:* To the extent that the first respondent(s) who have settled their case are held liable for the total damages caused by the cartel (assuming that this could be proved), it may be particularly prejudicial for such respondents to be held liable for the entire damages caused. Although such respondents would potentially be able to claim the pro rata share of damages from the other cartelists (based on the joint and several liability principle), it is not difficult to imagine a scenario in which a few smaller cartelists (in terms of their size in the market) in the market may be required to pay damages caused by the larger players. A court would, therefore, be required to exercise some measure of discretion so as not to cripple in particular a few defendants by burdening them with the entire damages caused by the cartel.
- *No incentive to settle:* From a purely commercial perspective, it is unlikely that respondents would look to settle its matter with the Commission if there is a likelihood that they may be on the hook in a follow-on damages case for the entire damages caused by the cartel. Accordingly, a policy decision needs to be made as to whether the Competition Authorities would in fact like to preclude a respondent who has expeditiously opted to settle its case, being held liable for the total damages caused by the other cartelists.
- *Nature of consent orders:* Consent orders are typically structured in a high-level manner which contains limited information (as opposed to substantiated decision issued by the Tribunal or CAC). A consent order contains hardly any factual findings which would assist a plaintiff in a follow-on damages claim. One suggestion is, therefore, to ensure that

consent orders are more robust and substantiated. Of course this would also depend on the policy arguments and what impact this would have on respondents' appetite to conclude a consent order in the first place.

It is also noteworthy that Section 65(10) specifically states that for purposes of the Prescribed Rate of Interest Act⁶¹, interest on a debt in relation to damages under the Competition Act, will commence on the date of issue of the Section 65 certificate. It is less clear, however, whether the legislature envisaged that prescription runs from the date a Section 65 certificate is issued, and not the date that the Tribunal ultimately makes a determination.

Conclusion

Despite being the first cases in which a civil litigant successfully sued a defendant for breaching the Competition Act, the *Nationwide* and *Comair* decisions did not materially pave the way for future follow-on damages. The facts of the cases did not lend themselves to such an assessment.

The *Nationwide* case did, however, confirm that the basis for liability is delictual and unless a superior court takes a different stance, a civil plaintiff will be required to satisfy each of the five elements of a common law delict - a more onerous burden than if the basis for liability was strict (i.e. statutory liability).

In applying the common law elements of a delict, however, an appropriate balance may be achieved in ensuring that only the conduct of defendants' which is so egregious that society demands such protagonists to be liable in delict for the pure economic loss caused to plaintiffs. Central to this assessment will be the burden of proof in order to assess whether each of the five elements have been met.

A 'Section 65 certificate' serves as conclusive proof of conduct, and applying rebuttable presumptions of harm, fault and wrongfulness will be in keeping with the scheme of the Competition Act while ensuring that respondents are, in certain limited instances, entitled to raise arguments, in contention that one or more of these elements has not been proved, as a defence to delictual liability. These include for example instances where a respondent did not implement the collusive conduct, the procompetitive effects of the conduct outweigh the anticompetitive effects (i.e. rule of reason defence) or the conduct was not "designed to avoid competition" (i.e. the characterisation argument).

⁶¹ Act No 55 of 1975.

A plaintiff, however, would have the burden of proving both the factual and legal elements of causation as well as of course proving the quantum of damages suffered. This would permit for claims to be instituted by ‘indirect purchasers’ as well as allow a defendant to raise the ‘passing-on’ defence without exposing a defendant to indeterminate liability and having to fend off frivolous and opportunistic claims.

Accordingly, it is submitted that the common law elements of a delict may be applied in a manner which sufficiently safeguards and balances the rights and interests of both plaintiffs and defendants and that no legislative intervention is necessarily required in this regard.

A key issue which perhaps requires legislative intervention relates to that of prescription.⁶² If prescription runs from the date the Tribunal or CAC makes a finding against a respondent, there is a risk that a plaintiff’s case against a respondent who concluded a consent order may prescribe before the entire investigation has been resolved.

A further area of uncertainty relates to the apportionment of joint and several liability in cartel cases. It may be useful to follow the position in the UK and the EU respectively in terms of which a leniency applicant is not held jointly or severally liable for the damages of the entire cartel but only for the damages it caused directly while the remaining respondents are held liable for the remaining portion of the damages based on their respective market shares, turnover and/or role in the collusive arrangement.

Finally, one of the key challenges facing potential plaintiffs is often lengthy investigations and interlocutory procedures before the Competition Authorities. Although this does not require legislative intervention, the timeous and expeditious conclusion of investigations and referrals will go a long way in assisting victims seeking compensation for the damages it has suffered as a result of prohibited anti-competitive conduct.

⁶² As has been done with other areas of legislation such as the Road Accident Fund Act 56 of 1996.

Bibliography

Textbooks

Max Loubser & Rob Midgley: *The Law of Delict in South Africa*, Oxford University Press (2010).

Max Du Plessis, John Oxenham Isabel Goodman, Luke Kelly and Sarah Pudifin-Jones: *Class Action Litigation in South Africa*, JUTA, First Published 2017.

David M Walker: *The Law of Delict in Scotland* 2 edition, Scottish Universities Law Institute (1981).

Journal articles

Gehring, “The power of the purchaser: The effect of indirect purchaser damages suits on deterring antitrust violations” *New York University Journal of Law and Liberty*

Legislation

The Apportionment of Damages Act, 34 of 1956

The Competition Act, 89 of 1998

Prescribed Rate of Interest Act, No 55 of 1975

Cases

Absa Brokers v RMB Financial Services and others [2009] (09/332) ZASCA 20) 83 August (2009)

American Natural Soda Ash Corporation and Another v Competition Commission of South Africa (554/2003) [2005] ZASCA 42; [2005] 1 CPLR 1 (SCA) ; [2005] 3 All SA 1 (SCA) (13 May 2005)

Arcelormittal South Africa Ltd and Another v Competition Commission and Others, Arcelormittal South Africa Ltd v Manojim NO and Others (103/CAC/Sep10) [2012] ZACAC 1 (2 April 2012)

Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others (050/2012) [2012] ZASCA 182; 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) (29 November 2012)

Comair Limited v South African Airways (Pty) Ltd (2008/23443; 2011/34079) [2017] ZAGPJHC 10; [2017] 2 All SA 78 (GJ) (15 February 2017)

Competition Commission v Pioneer Foods (Pty) Ltd [2010] 2 CPLR 195 (CAC)

Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others 1980(3) 1093 (W) and *Unilever plc & Another v Polagric (Pty) Ltd* 2001(2) SA 329 (CPD)

Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA)

Glaxo Wellcome v National Association of Pharmaceutical Wholesalers 15/CAC/Feb02

Mukaddam v Pioneer Foods (Pty) Ltd and Others (CCT 131/12) [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) (27 June 2013)

Nationwide Airlines (Pty) Ltd (in Liquidation) v South African Airways (Pty) Ltd 2016 (6) SA 19 (GJ)

Pfleiderer v FCO case no. C-360/09 [2011]

Premier Foods (Pty) Ltd v Manojim NO and Others 2016 (1) SA 445 (SCA)

Pro-Sys Consultants Ltd v. Microsoft, [2011] B.C.J. No. 688

Sun-Rype Products Ltd v. Archer Daniels Midland Co., [2011] B.C.J. No. 689

Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)

Internet sources

Africanantitrust “South Africa: competition appeal court sends strong ‘passive participation’ message”, available at <https://africanantitrust.com/2016/12/22/south-africa-competition-appeal-court-sends-strong-message-in-relation-to-passive-participation-at-competitor-gatherings/> (accessed on 29 June 2017)

Katz, “Indirect purchaser class actions: the pendulum swings back”, July 15 2011 issue, available at <http://www.lawyersweekly.ca/index.php?section=article&volume=31&number=11&article=2> (accessed on 30 July 2012).

Other

The Competition Commission’s Rules

The European Commission’s Directive on antitrust damages actions of 26 November 2014

The European Commission’s White Paper on *Damages Actions for Breach of EC Antitrust Rules* (2 April 2008)

The Uniform Rules of Court