THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Case number: 118/08

In the matter between:

mCUBED INTERNATIONAL (PTY) LTD	**FIRST APPELLANT**
mCUBED LIFE LIMITED	**SECOND APPELLANT**
and	
LEON JOHN SINGER NO	**FIRST RESPONDENT**
ANDRIES OLIVIER NO	**SECOND RESPONDENT**
FRANK WILLIAM MUGGLESTON NO	**THIRD RESPONDENT**

Neutral citation: *mCubed International v Singer* (118/08) [2009] ZASCA 6 (11 March 2009)

CORAM: **STREICHER, BRAND, MHLANTLA JJA, LEACH *et* BOSIELO AJJA**

HEARD: **17 FEBRUARY 2009**

DELIVERED: **11 MARCH 2009**

SUMMARY: Claim for damages arising from misrepresentations made in context of an offshore investment contract – held that on application of 'but-for' test factual causation not established – and that, in any event, loss too remote because occasioned by strengthening of Rand against the US Dollar rather than by misrepresentations.

ORDER

On appeal from: High Court Cape Town
(Manca AJ sitting as court of first instance)

1(a) The appeal is upheld with costs.
(b) The order of the court a quo is set aside and replaced by the following:
'The plaintiffs' claims are dismissed with costs'.
2. The cross-appeal is dismissed with costs.

JUDGMENT

BRAND JA (concur Streicher, Mhlantla JJA, Leach *et* Bosielo AJJA)

[1] This appeal arises from a claim in delict for pure economic loss resulting from alleged misrepresentations made in a contractual context. The two appellants, mCubed International (Pty) Ltd and mCubed Life Ltd, are companies in the same group. I propose to refer to them both as 'mCubed', save where differentiation becomes necessary. The three respondents are cited in their capacities as the trustees of the Leon John Singer Family Trust, ("the Trust'). The first respondent ('Singer') is the settler and driving force behind the Trust while the second respondent is his accountant and the third respondent his attorney.

[2] As will soon appear in more detail, the Trust entered into an investment contract with mCubed Life on 19 March 2002, pursuant to advice given by an employee of mCubed International. Emanating from the investment contract, the Trust instituted an action for damages against both companies in the Cape High Court. But, as I have said, its claim was not founded in contract, but in delict. As the factual basis for its delictual claim, the Trust relied on two different misrepresentations in the alternative: one before and one after the conclusion of the investment contract. Its main claim, which relied on a misrepresentation prior to – and allegedly giving

rise to – the contract, comprised of two parts, to wit, a loss of capital in an amount of R3 884 958.53 and damages resulting from interest paid by it on money borrowed to make the investment, in the sum of R3 881 017.47.

[3] The alternative claim, based on a misrepresentation subsequent to the conclusion of the contract was again comprised of the same two elements, but for lesser amounts. In this instance it claimed R2 547 122.80 for loss of capital and R3 558 435.69 for interest as damages. At the trial two witnesses, namely Singer and his financial adviser, Mr Carl Liebenberg, testified on behalf of the Trust. No witnesses were called on behalf of mCubed. The court a quo (Manca AJ) dismissed the main claim and granted the alternative claim, but in respect of the capital loss only. This gave rise to an appeal by mCubed against the judgment in favour of the Trust and a cross-appeal by the Trust against the dismissal of its main claim as well as the dismissal of its claim for interest as damages on the alternative basis. Both the appeal and the cross-appeal are with the leave of the court a quo.

[4] Singer is, what is known in banking circles, so I gather, as a 'high net-worth individual'. In August 2001 – which I find a convenient chronological starting point – his investments were mostly in immovable property. All and all his property portfolio, which he held in his own name and in the names of various entities under his control, had been conservatively valued by his bank, FirstRand, at about R76m. The advice from his accountant and his auditor was, however, that he should divert some of his assets offshore. This advice was given at a time when the Rand was in sharp decline against other currencies, including the United States Dollar. According to statistics presented to Singer at the time, the Rand had depreciated against the US Dollar over the preceding five years by 17 per cent and experts in the field predicted that the same type of devaluation could continue for at least the next five years.

[5] Singer raised the possibility of offshore investments with Liebenberg, who was employed at the time by Origin Merchant Bank, a private banking

division of FirstRand Bank, specialising in 'high net-worth clients'. At Liebenberg's suggestion, contact was made with mCubed. In the event, Singer took an initial amount of R1m offshore by means of a mCubed Life policy in the name of the Trust. This happened towards the end of August 2001. Singer thereafter discussed with Liebenberg the possibility of investing considerably greater funds. The amount he mentioned in this regard was between R35m and R50m. Liebenberg again contacted mCubed. In due course he arranged a meeting for 20 September 2001 with Mr David Cosgrove, an employee of mCubed International who specialised in offshore investments. In anticipation of the meeting, Liebenberg sent Cosgrove a letter outlining Singer's intentions with regard to offshore investments and setting out the nature of the advice that was being sought from mCubed.

[6] At the meeting of 20 September 2001 Singer was accompanied, inter alia, by Liebenberg, as well as his accountant and his auditor. Cosgrove then in essence advised those present that:

(a) mCubed Life still had 'asset swop capacity', which is the colloquial term for the foreign direct investment allowance granted by the Reserve Bank to life insurance companies.

(b) Singer (or an entity nominated by him) could make an investment through a Rand-denominated linked endowment policy issued by mCubed Life.

(c) mCubed Life would then convert the Rands received into US Dollars, utilising its asset swop capacity.

(d) The US Dollars would then be used by mCubed to purchase an offshore life policy – referred to as a SelectLife policy – issued by an overseas company in the mCubed group, which would in turn invest the money offshore.

[7] After the meeting it was pointed out to Singer by his auditor that mCubed Life was not one of the major life insurance companies and that Singer should therefore be wary of the risks inherent in mCubed Life's insolvency. At a further meeting held on 11 October 2001, with essentially

the same individuals present, Singer raised this problem with Cosgrove who immediately suggested a revised version of the structure that he previously proposed. Essential to his revised proposal was the introduction of an offshore trust as a so-called special purpose vehicle ('the SPV'). Instead of mCubed Life acquiring the SelectLife policy, as envisaged in the original version, mCubed Life would invest the US Dollars in the SPV. The SPV would then acquire the SelectLife policy, which would then be ceded to the investor, ie Singer or the entity nominated by him, *in securitatem debiti*, thus giving the investor protection against the loss of the R10m investment in the event of mCubed's insolvency.

[8] Cosgrove's revised proposal found favour with Singer and his advisors. After a somewhat lengthy delay, Singer, on 19 March 2002 invested R10m, which was then described as the first tranche of a larger investment with mCubed Life. As a quid pro quo, the Trust was issued with ten linked endowment policies of R1m each. The reason why ten policies were issued instead of one for R10m, is of no consequence in the present context. The application for the policies accompanying the investment pertinently stated that the funds were 'to be invested in the SPV and subsequent structure as per the agreed proposal'. The application then recorded 'the agreed proposal' essentially as follows:

(a) The Trust was nominated by Singer as the entity that made the R10m investment and mCubed Life would issue the ten endowment policies of R1m to the Trust.

(b) mCubed Life would convert the R10m into US Dollars and invest the Dollars in an offshore SPV, to be known as the Samson Shield Trust.

(c) The Samson Shield Trust would in turn apply for and be issued a SelectLife policy, with Singer as the life insured, for the Dollar equivalent of R10m.

(d) The Samson Shield Trust, acting through its trustees, would cede the SelectLife policy to the Trust *in securitatem debiti* to provide the Trust with security against the loss of the R10m investment, in the event of mCubed Life's insolvency.

[9] The R10m so invested was borrowed by the Trust from Singer who in turn borrowed it from a newly created trust, the Dalezbro Trust, who in its turn borrowed it from FirstRand Bank as part of a tax structure devised by Singer's financial advisors. According to Singer, he had an agreement with the other trustees that the Trust would pay him interest at the rate paid by the Dalezbro Trust to FirstRand Bank. The R10m so borrowed by the Trust was paid to mCubed Life. In return, mCubed issued the Trust with the Rand – denominated endowment policies and then converted the Rands into US Dollars. Other than that, the investment structure agreed upon was not implemented. mCubed did not invest the Dollars with the Samson Shield Trust. Instead, it applied for and was issued with a SelectLife policy in its own name for the US Dollar equivalent of R10m, which at that time was $865 800.67. Since the Samson Shield Trust did not own the life policy it could not – and in any event, never did – cede the policy *in securitatem debiti* to the Trust. In the result, the Trust enjoyed no security in the event of mCubed Life's insolvency.

[10] The correspondence handed in at the trial shows that Liebenberg thereafter kept on asking for the trust deed of the Samson Shield Trust and the cession of the offshore life policy in favour of the Trust. Cosgrove and his assistant, Ms Corinna Harvey, kept on making excuses. On 27 May 2002 Cosgrove and Harvey, in a letter signed by both of them on behalf of mCubed International, represented to the Trust that 'a cession of the SelectLife policy is in place between the Samson Shield Trust and the Leon John Singer Family Trust, to come into effect in the event of mCubed's insolvency'. This was untrue. As I have said, at that time, as at all times thereafter, mCubed Life rather than the Samson Shield Trust was the owner of the SelectLife policy and there was never a cession of the policy by the trustees of the Samson Shield Trust to the Trust.

[11] Both Cosgrove and Harvey subsequently left the service of mCubed. Yet the ongoing battle by Liebenberg and Singer to obtain documents and sensible responses from mCubed continued. It is clear that they became increasingly frustrated by the ineptitude on the part of mCubed. Eventually

the third respondent, as Singer's attorney, wrote to Liebenberg on 12 September 2003. From the contents of the letter it is clear that at that stage everybody knew that the SelectLife policy did not belong to the Samson Shield Trust but to mCubed Life and that the structure proposed by Cosgrove two years earlier – including the cession – was not yet in place. In consequence, Singer demanded a meeting with the legal department of mCubed 'as mCubed needs to understand very clearly', so the letter stated, 'that if the structure proposed by it is not fully implemented within 30 days of the date of the meeting', Singer intended to institute legal proceedings.

[12] The meeting sought by Singer was held on 7 October 2003. Among those present were Singer, Liebenberg and Mr Brett Landman who had recently been appointed by mCubed as an in-house legal advisor. Out of the blue Landman then conveyed to the meeting the rather disturbing news that, according to an opinion expressed by mCubed's attorneys, the implementation of the structure proposed by Cosgrove, and particularly the investment by mCubed Life in an offshore trust, would constitute a contravention of the Exchange Control Regulations. This, of course, meant that the structure incorporating the protective measure of a cession *in securitatem debiti* by the offshore trust, could not be implemented. mCubed therefore proposed an alternative structure, which would not expose the Trust to the risk of mCubed Life's insolvency. Singer's response was that he would only consider the alternative structure suggested if mCubed undertook liability for the professional fees he had incurred in assessment of both the old and the new structures. On that note the meeting ended.

[13] By February 2004 matters still had not been sorted out to Singer's satisfaction. On 24 February 2004 his attorney therefore sent a formal letter of demand to mCubed. The letter set out some background to the transaction before alleging that mCubed had recklessly, alternatively negligently, made incorrect representations about the legality of the protective mechanism – of a cession by an offshore trust – in the proposed investment structure which had induced the Trust to enter into the investment contract. In the light of these misrepresentations, so the letter

proceeded, the Trust had decided to cancel the investment contract. In the premises demand was made for repayment of the R10m invested, together with payment of lost interest and professional fees incurred.

[14] Despite the proclaimed cancellation of the investment contract, the Trust did not persist in its claim for repayment of the R10m invested. Instead, it sought and obtained the premature surrender of the ten endowment policies issued by mCubed and paid the penalties provided for that eventuality in terms of the policy agreement. On 5 June 2005 the Trust eventually received the proceeds of its investment. In US Dollar terms it amounted to 910 252.70, which, despite the penalties incurred, showed a slight profit when compared to the original investment of $865 800.67. But in Rand terms the proceeds of the investment amounted to only R6 115 071.74. When compared to the original R10m investment, the Trust thus suffered a capital loss in Rand terms of R3 884 958.26, notwithstanding the Dollar profit. The reason for this phenomenon is not hard to find. It was attributable to the fact that, contrary to all predictions by the experts, the Rand had strengthened against the Dollar from about R11.50 in March 2002 – when the investment was made – to about R6.74 per Dollar when repayment was received in June 2005.

[15] As I have said at the outset, the principal claim by the Trust included the capital loss of R3 884 958.26. In addition, it also included the interest for which the Trust allegedly became liable to Singer, calculated in an amount of R3 881 017.74 at the rate paid by the Dalezbro Trust to FirstRand, between 19 March 2002 – when the investment was made – and the date of summons. As the basis for its principal claim the Trust relied on the alleged negligent misrepresentation that the investment structure agreed upon, which incorporated the protective measure of a cession by an SPV, could be implemented lawfully and in accordance with the foreign exchange requirements of the Reserve Bank.

[16] For its alternative claim the Trust relied on an alleged fraudulent, alternatively negligent misrepresentation by Cosgrove and Harvey in their

letter of 27 May 2002, to the effect that the cession by the Samson Shield Trust to the Trust of the Select Life policy, had been in place. But for this misrepresentation, so the Trust contended, it would immediately have terminated the investment. As at 27 May 2002 the converted Rand value of the US $865 800.65 invested was R8 662 164.54. The difference between that amount and the R6 115 041.74 eventually received, is R2 547 122.80, which represents the capital loss claimed in the alternative. In addition the alternative claim also included a claim for interest as damages in an amount of R3 558 435.69 which was again calculated at the rate payable by the Dalezbro Trust to FirstRand Bank, but from 27 May 2002 to date of summons.

[17] Apart from issues that turned out to be of no consequence, the Trust had to establish the following elements in order to succeed in either of its claims:

- The representations of the kind alleged;
- that these representations were wrong;
- that the misrepresentations were wrongful within the somewhat special meaning that this term came to attract in the context of negligent causation of pure economic loss (see eg *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) paras 13 and 14; *Trustees Two Oceans Aquarium Trust V Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 14; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) paras 37-41; *Fourway Haulage SA (Pty) Ltd v SA National Road Agency Ltd* (653/07) [2008] ZASCA 134 (26 November 2008) para 12.)
- that the misrepresentations were made fraudulently or negligently;
- that the misrepresentations were the cause both, factually and legally, of the loss suffered by the Trust.

[18] I first turn to the main claim. With regard to this claim the court a quo found that the Trust had failed to clear the first hurdle, ie to establish that the representation relied upon had in fact been made. Even on Singer's own

version, so the court held, no one on behalf of mCubed ever made the positive statement that the structure proposed by Cosgrove was legal. I do not think that, on the evidence, the court a quo can be faulted in its finding that no express representation of legality had been established. At the same time, I agree with the Trust's submission on appeal that the court a quo had failed to consider the possibility of an implied representation by conduct. Insufficient consideration was therefore given to the question: did Cosgrove not impliedly represent through his conduct that the investment structure proposed by him was legal and in accordance with the Exchange Control Regulations? That, so the authorities say, depends on whether the representation contended for is the most likely inference to be drawn from Cosgrove's conduct (see eg *The Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) at paras 14-16).

[19] The answer to this enquiry, as I see it, is that Cosgrove's conduct indeed gave rise to the inference contended for by the Trust. Cosgrove held himself out as an expert in the field of offshore investments. He proposed a specific offshore investment structure. Why should it not be inferred that he had verified the legality of the structure he proposed? The court a quo found that the Trust simply assumed that the structure was legal, or that it never gave the legality of the structure any thought. But that, in my view, is exactly the point. The Trust assumed that the structure was legal because it never thought that Cosgrove would propose a structure without determining its legality.

[20] mCubed denied in its plea that Cosgrove's proposed scheme could not be implemented legally and that a representation to that effect would therefore be wrong. This gave rise to a rather lengthy and intricate debate about the objective legality of the scheme, turning mostly on an interpretation of the Exchange Control Regulations. I find it unnecessary to enter into this debate because mCubed's position simply strikes me as untenable. A party who had refused to give effect to its contractual obligations on the basis that performance would be illegal, cannot be

allowed to contend for the exact opposite proposition when taken at its word in subsequent litigation. Even more so when it offers no evidence that its previous attitude had been a mistake. Unlike the court a quo, I therefore find that the misrepresentation relied upon by the Trust in support of its main claim was established.

[21] Adherence to logic and doctrine dictates that I now proceed to deal with the elements that the Trust had to establish in their time honoured order, namely, first wrongfulness, then negligence and so forth. But, as Schutz JA said in *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA) para 43:

'Logic is one thing, utility sometimes another.'

As happened in *Mostert*, courts not infrequently find it convenient, in the circumstances of a particular case, to deal with the elements of delictual liability out of their logical and doctrinal sequence (see eg *First National Bank of South African Ltd v Duvenhage* 2006 (5) SA 306 (SCA) para 2). In such event the logically anterior elements are usually assumed to have been established (see eg *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) para 20).

[22] In a way similar to *Duvenhage* I find it convenient in this case to start with the element of causation. For purposes of this enquiry, I assume that Cosgrove acted both wrongfully and negligently in misrepresenting the legality of the structure he proposed. With regard to the element of causation, it has by now become well established in the law of delict, that it involves two distinct enquiries. First there is the enquiry into factual causation which is generally conducted by applying what has been described as the 'but-for' test. Lack of factual causation is the end of the matter. No legal liability can follow. But, if factual causation has been established, the second enquiry arises, namely, whether the wrongful act is linked sufficiently closely or directly to the loss concerned for legal liability to ensue. This issue is referred to by some as 'remoteness of damage' and by others as 'legal causation'.

[23] As to factual causation, Corbett CJ explained the 'but-for' test as follows in *International Shipping Co Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-G:

'[T]he so-called 'but-for' test . . . is designed to determine whether a postulated cause can be identified as the *causa causans* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued.'

(See also eg *Simon & Co v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 915B-*in fine.*)

[24] Application of the 'but-for' test to the facts of this case, raises the anterior question: what hypothetical lawful conduct should mentally replace the wrongful misrepresentation in the process of 'but-for' reasoning? Otherwise stated: what is Cosgrove supposed to have done? This question gave rise to some controversy during argument. But, having regard to the implied nature of the representation, I think the answer is that Cosgrove should have done one of two things. He should not have proposed the structure without prior determination of its legality. Or, he should have told the representatives of the Trust that the legality of the proposed structure had not yet been established. In both cases, the illegality of the structure would in all probability have come to light before the investment was made. In the event it must, in my view, be accepted that but for the misrepresentation the Trust would not have invested the R10m with mCubed. That was Singer's evidence. But for the protective measures resulting from the introduction of the SPV into the structure, so he testified, the Trust would not have been prepared to take the risk of mCubed's insolvency. Absent any evidence to the contrary, there is, in my view, no reason to hold otherwise.

[25] That raises the next question – is this the end of the 'but-for' enquiry? The Trust contended that it is. But for the investment with mCubed, so it argued, the R10m would have been retained in South African currency with the result that the loss would not have been incurred. Any further 'but-for' enquiry, so the Trust contended, would amount to mere speculation. I cannot agree. The proposition that, but for the investment with mCubed, the R10m would have been retained in South African currency, begs the question. It negates the possibility that the Trust might have made a similar offshore investment through the agency of some other institution. If, of course, this possibility had not been established on the evidence, it would be mere speculation. But that is not the position. On the contrary, as I see it, the evidence shows that this is precisely what the Trust would probably have done.

[26] Singer had been advised to diversify his investments by going offshore. In line with pessimistic predictions at the time about the further devaluation of the Rand against the Dollar, this advice appeared to have been sound. Following this advice, Singer first invested the relatively modest amount of R1m offshore through mCubed. Thereafter he created a rather complicated borrowing structure which made it possible for the Trust to take R40m overseas. The R10m under consideration was supposed to be part of it. When he became dissatisfied with mCubed during the course of 2002, it did not deter him from proceeding with his overall plan. In November that year he caused the Trust to invest a further R10m overseas through the agency of Investec Bank. And there is no apparent reason why, as a matter of probability, he would not have followed the same route if his dissatisfaction with mCubed had preceded the investment of the first R10m. In short, Singer took a position on the future Rand/Dollar exchange rate in March 2002 and there is no reason to think that that position would have been any different if he decided not to invest with mCubed. What is more, I may add, I see no difference between the capital loss and the claim for interest as damages. It stands to reason that in making a similar investment the Trust would probably have availed itself of the same borrowing structure.

[27] But even if the Trust had succeeded in establishing factual causation – which in my view it had not – I believe the main claim should in any event have failed at the legal causation stage. The issue of legal causation or remoteness is determined by considerations of policy. It is a measure of control. It serves as a 'longstop' where right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability (see eg *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd (supra)* at para 31.)

[28] Why the issue of remoteness looms large in this case is because it is undoubtedly so that in reality, the losses sustained by the Trust were attributable to the unpredicted strengthening of the Rand against the US Dollar between March 2002 and June 2005. If the Rand had continued to weaken against the US Dollar, as Liebenberg and others so confidently predicted, or even if the exchange rate remained the same, the Trust would have made a profit from the investment, despite the penalties incurred for the early withdrawal. Common sense thus dictates that, in reality, the Trust's loss was not caused by the event it says should not have occurred – ie Cosgrove's misrepresentation about the legality of the investment structure. Nor was it caused by the early withdrawal of the investment. It was instead attributable to something very different – ie the unpredicted improvement of the value of the Rand in comparison with the US Dollar.

[29] I therefore find the situation reminiscent of the following graphic illustration by Lord Hoffmann in *South Australia Asset Management Corporation v York Montague Ltd* 1997 A. C. 191 (HL) at 213D-E as to when right minded people, including judges, will regard it as untenable to impose legal liability for a particular loss:

'A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers

an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.'

At 214B-C Lord Hoffmann then concluded:

'Your Lordships might, I would suggest, think that there was something wrong with a principle which in the example which I have given, produced the result that the doctor was liable. . . . There seems to be no reason of policy which requires that the negligence of the doctor should require the transfer to him of all the foreseeable risks of the expedition.'

[30] The Trust did not deny that the real cause of its loss was the strengthening of the Rand. Its first argument as to why legal causation had nonetheless been established was that, although the improvement of the Rand against the Dollar was unpredicted, it was not an unforeseeable consequence of the investment. This argument obviously refers to the so-called foreseeability test and on a strict application of that test it seems to be valid. Furthermore, so the Trust contended, on the application of the so-called direct consequences test, the strengthening of the Rand was not some kind of *novus actus interveniens* that broke the causal chain between the investment and the loss. Again, I agree that if a *novus actus* is to be regarded as an abnormal or unexpected event in the light of human experience (see eg Jonathan Burchell *Principles of Delict* 119), the currency fluctuation which led to the loss can hardly be described in those terms. Strict application of the direct consequences test, so it seems, would therefore also lead to an answer of the remoteness issue in favour of the Trust, despite the fact that the result may be regarded as untenable.

[31] But our courts have decided against a strict approach to the remoteness issue. Instead, it adopted what has been described as a 'flexible' or 'supple' test (see eg *International Shipping Co (Pty) Ltd v Bentley (supra)* 701A-F; *Smit v Abrahams* 1994 (4) SA 1 (A) 15E-G). This was elaborated upon as follows in *Fourway Haulage (supra)* para 34:

'What Van Heerden JA said in that case [ie *S v Mokgethi* 1990 (1) SA 32 (A) at 40I-41D] is not that the 'flexible' or 'supple' test supersedes all other tests such as foreseeability, proximity or direct consequences, which were suggested and

applied in the past, but merely that none of these tests can be used exclusively and dogmatically as a measure of limitation in all types of factual situations. Stated somewhat differently: the existing criteria of foreseeability, directness, et cetera, should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable.'

[32] Strict application of both the foreseeability test and the direct consequences test for remoteness in this case would therefore, in my view, lead to a result which is so unfair and unjust that it will be regarded as untenable. This is therefore a classic example of a situation where a flexible approach is indicated. And in adopting that approach I find the loss too remote.

[33] This brings me to the Trust's alternative claim. It will be remembered that the claim under this rubric relies on the misrepresentation by Cosgrove and Harvey in their letter of 27 May 2002 that the cession by the Samson Shield Trust was in place whereas it was not. But for that misrepresentation, the Trust contended, it would have cancelled the investment there and then. As we know this claim was upheld – albeit only in part – by the court a quo, which led to the appeal by mCubed.

[34] The court a quo found the misrepresentation relied upon to have been established. That finding was undoubtedly correct. It also found that the misrepresentation was negligently made and that it was therefore not necessary to deal with the Trust's allegation of fraud. Yet, as I see it, the finding of fraud would indeed have been justified. The statement was patently incorrect. In the absence of any evidence that Cosgrove and Harvey thought it was true, it must be accepted that they knew it was not. What is more, I believe a conclusion of fraud in the circumstances of this case inevitably leads to a finding of wrongfulness (see eg *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) paras 87-88).

[35] However, as was the case in the main claim, my problem again arises with reference to the element of causation. The court a quo found this requirement to have been satisfied on the basis of the following reasoning.

'In my view, the evidence has clearly established that, as at 27 May 2002, the cession *in securitatem debiti* was not in place and, indeed the structure could never have been lawfully implemented. . . .

. . . I am satisfied that had the Singer Trust been aware of the true position, *viz.* that the cession had not been signed and the structure could not be implemented . . . it would have immediately cancelled the contract and terminated the investment.'

[36] The flaw in this reasoning, I think, is that the court a quo asked the wrong question and hence arrived at the wrong conclusion. The Trust's alternative claim relied on the proposition that, on 27 May 2002, it had been misled about the existence of the cession. The misrepresentation as to the legality of the proposed structure and the possibility of its implementation was not advanced in the context of the alternative claim. It formed the basis of the main claim. What the Trust set out to prove under the alternative claim was that, had it not been told on 27 May 2002 that the cession was already in existence, it would there and then have cancelled the investment. The question is whether it had succeeded in doing so. mCubed's contention was that it had not. I agree. The evidence shows that when it came to the knowledge of the Trust on 13 September 2002 that the cession had in fact not been signed, it nonetheless persisted in the investment. In fact, even in September 2003 it did not cancel the investment, but demanded that the structure be implemented within 30 days. It was only on 26 February 2004 that the Trust was triggered into cancelling the investment contract.

[37] As with regard to the main claim, I therefore conclude that the Trust had failed to establish the requirement of factual causation. Moreover, I find the same lack of legal causation in this instance. Again, common sense shows that, but for the fact that the Rand had strengthened against the Dollar between 27 May 2002 and 5 June 2005, the Trust would have suffered no loss even though the investment had not been terminated on

the earlier date. It follows that in my view the court a quo should have dismissed the alternative claim with costs.

[38] In the result it is ordered that:

1(a) The appeal is upheld with costs.

1(b) The order of the court a quo is set aside and replaced by the following:

'The plaintiffs' claims are dismissed with costs'

2 The cross-appeal is dismissed with costs.

……..
F D J BRAND
JUDGE OF APPEAL

Appearances:

For Appellant:	P B J Farlam Instructed by: Jan S De Villiers Cape Town Correspondence: Lovius Block Bloemfontein
For Respondent:	E Fagan Instructed By: C & A Friedlander Inc Cape Town Correspondence Honey Attorneys Inc Bloemfontein