OPINION

for

THE CENTRE FOR ENVIRONMENTAL RIGHTS

concerning

THE POTENTIAL FOR CLIMATE LOSS AND DAMAGE CLAIMS IN SOUTH AFRICA

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INTRODUCTION

1 This opinion assesses the potential for a climate change "loss and damage" claim in a South African court, against one or more foreign fossil fuel companies, known as "Carbon Majors".

2 We are specifically asked to advise on the viability of a claim in the law of delict,[1] brought by South African residents, arising from losses suffered in the 2022 KwaZulu-Natal (KZN) floods.

3 "Loss and damage" is broadly defined as the harms of climate change that cannot be avoided through mitigation or adaptation measures.[2]

4 It is beyond question that such loss and damage is occurring and that South Africa is at particular risk.[3] The country is already warming at twice the global average,[4] and has experienced a series of climate shocks – including heat waves, droughts,

[1] A common law claim, broadly similar to a claim in Anglo-American tort law, albeit with material differences.
[2] There is no single definition of loss and damage. The United Nations Framework Convention on Climate Change (UNFCCC) broadly defines the concept as "*the actual and/or potential manifestation of climate impacts that negatively affect human and natural systems*". See Patrick Touissant "Loss and damage and climate litigation: The case for greater Interlinkage" (2020) 30 Review of European, Comparative and International Environmental Law 16 at 19; Maria Antonia Tigre and Margaretha Wewerinke-Singh "Beyond the North-South divide: Litigation's role in resolving climate loss and damage claims" (2023) 32 *RECIEL* 439 at 440.
[3] As detailed in the United Nations Intergovernmental Panel on Climate Change (IPCC) reports over the decades. The IPCC has produced a series of six assessment reports (ARs) since 1988, together with special and technical reports, which provide a comprehensive review of the leading science on climate change and its impacts. The final component of the Sixth Assessment Report (AR6) was published in March 2023. See the UN IPCC, 'AR6 Climate Change 2023: Synthesis Report – Summary for Policy Makers' (2023) available at https://www.ipcc.ch/report/ar6/syr/ (Synthesis Report).
[4] See South Africa's Updated First Nationally Determined Contribution (2021) p 3.

floods, and other extreme weather events – that will only increase in the coming decades.[5]

5 In April 2022, KZN experienced catastrophic floods which led to the deaths of at least 443 people. This resulted in the destruction of homes, businesses, and infrastructure, with an estimated cost of over US$2 billion. A total of 19,113 households and 128,743 people were directly and indirectly affected. Vulnerable communities living in informal settlements, often built on unstable land and near flood plains, suffered the brunt of these losses.

6 Initial studies and reports suggest that these floods were intensified by climate change. While KZN has experienced frequent heavy rains and flooding, a Presidential Climate Commission (PCC) report found that additional moisture and heat linked to climate change led to more intense rainfall.[6] A study by the World Weather Attribution Service has further detailed the effects of climate change on this heavy rainfall event, estimating that climate change increased its intensity by approximately four to eight per cent.[7]

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[5] These impacts are documented in a series of expert reports in the ongoing litigation in *African Climate Alliance & others v Minister of Mineral Resources and Energy & others* Case No: 56907/2021 in the Pretoria High Court. See Robert Scholes and Francois Engelbrecht 'Climate Impacts in southern Africa in the 21st Century' (2021) available at https://cer.org.za/wp-content/uploads/2021/09/Climate-impacts-in-South-Africa_Final_September_2021.FINAL_.pdf; Nicholas King 'Climate Change Impacts for SA's Youth' (2021) available at https://cer.org.za/wp-content/uploads/2021/09/Nick-King-Report-Final.pdf.

[6] Presidential Climate Commission "A Critical Analysis of the Impacts of and Responses to the April-May 2022 Floods in KwaZulu Natal" (2023) available at: https://www.climatecommission.org.za/publications/kzn-2022-floods-brief. The report notes, however, that due to the range of contributing factors, it is difficult to attribute flood events "exclusively" to climate change (p 2).

[7] Izidine Pinto et al "Climate Change Exacerbated Rainfall Causing Devastating Flooding in Eastern South Africa" (2022) World Weather Attribution Service available at https://www.worldweatherattribution.org/climate-change-exacerbated-rainfall-causing-devastating-flooding-in-eastern-south-africa/.

7 Over the last decade, there has been extensive work on the question of "source attribution", to identify the individual polluters that bear the greatest responsibility for anthropogenic climate change.[8]

8 The term "Carbon Majors" was popularised by Richard Heede in his groundbreaking 2013 study. Heede identified the global fossil fuel companies that have contributed the greatest proportion of greenhouse gas emissions (GHGs).[9] He found that 90 companies produced more than 64 per cent of global emissions from 1751 to 2010, with approximately half of these emissions generated after 1986. This research led to the Carbon Majors Report, published in 2014 and updated in 2017, which identified 100 companies responsible for 71 per cent of global GHG emissions since 1988.[10]

9 Holding these Carbon Majors liable for climate-related loss and damage has been described as the "holy grail" of climate litigation.[11] This litigation not only offers the promise of redress for victims of climate disasters but also has potent symbolic value. This has the potential to reframe the international debate over climate loss and damage as one of justice rather than charity. In doing so, it presents the victims of climate disasters not as passive recipients of international aid, but as empowered

[8] See Marco Grasso and Richard Heede, "Time to Pay the Piper: Fossil Fuel Companies' Reparations for Climate Damages" (2023) 6 *One Earth* 459 at 462.
[9] Richard Heede *Carbon Majors: Accounting For Carbon And Methane Emissions 1854–2010: Methods & Results Report* (2014).
[10] Paul Griffin et al *The Carbon Majors Database: CDP Carbon Majors Report* (2017); Paul Griffin et al *The Carbon Majors Database: Methodology Report* (2017).
[11] Kim Bouwer "Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation" (2020) 9 *Transnational Environmental Law* 347–378.

agents, who have been wronged, by identifiable wrongdoers, who must pay for their wrongdoing.

10 That promise must also be balanced with pragmatism. This has the potential to be among the most complex litigation ever to be attempted in a South African court. Our law of delict developed incrementally, over more than two thousand years, to address relatively small-scale, localised, interpersonal wrongdoing. It has never addressed losses on this scale and complexity, unfolding over decades, and potentially affecting millions.[12] As a result, these claims will test existing legal doctrines and may require the development of the common law, where necessary.

11 Against this background, this opinion assesses the factors that will determine the viability of a loss and damage claim in South Africa. We understand a viable claim to be one that is procedurally sound, such that it would not be dismissed on technical grounds; legally tenable, such that it would survive an exception; and factually triable, such that it raises a *prima facie* case on the facts, at minimum.

12 Our analysis is divided into three broad themes:

12.1 *Procedural and technical issues*, including:

12.1.1 Jurisdiction over multinational Carbon Majors;

[12] For further discussion of the challenges posed by climate change to tort law doctrines, see Michael Burger, Jessica Wentz and Radley Horton "The law and science of climate change attribution" (2021) 45 Columbia Journal of Environmental Law 57; Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert "If at First You Don't Succeed: Suing Corporations for Climate Change" (2018) 38 *Oxford Journal of Legal Studies* 841; Michael Byers, Kelsey Franks and Andrew Gage "The Internationalization of Climate Damages Litigation" (2017) 7 *Washington Journal of Environmental Law & Policy* 264; Douglas Kysar "What Can Climate Change Do About Tort Law" (2011) 41 *Environmental Law* 1.

12.1.2 The potential application of foreign act of state doctrine and sovereign immunity;

12.1.3 Standing and available procedures for bringing claims;

12.1.4 The "choice of law" question and the available causes of action.

12.2 *The merits,* providing an assessment of the elements for establishing delictual liability, including:

12.2.1 Parent company liability in respect of the actions of subsidiaries;

12.2.2 Wrongfulness;

12.2.3 Fault;

12.2.4 Causation.

12.3 *Remedies*, including the question of apportionment of damages in cases involving joint or separate wrongdoers.

13 Our advice is intended as a preliminary mapping exercise, outlining the relevant law and the procedural and evidentiary issues that will determine the viability of a claim. The purpose is to assist in ongoing efforts to explore potential claims and to identify potential plaintiffs and defendants.

14 At this early stage, we do not express conclusive views on the prospects of success of a claim. The prospects could only be fully assessed once potential plaintiffs and Carbon Major defendants have been identified and available evidence and expert

reports have been gathered. The views expressed here are, by necessity, preliminary and open to development as the work unfolds.

15 Before addressing the topics outlined above, we begin with a brief overview of the state of global loss and damage litigation.

GLOBAL LOSS AND DAMAGE LITIGATION

16 There has been a surge in global climate litigation[13] over the last decade.[14] By the end of 2023, the Sabin Centre's global climate litigation database recorded more than 2,300 cases worldwide,[15] up from 884 cases in 2017.[16]

17 Loss and damage litigation against Carbon Majors is a small but growing portion of this body of cases.[17] The Grantham Institute's 2023 snapshot of global climate litigation identified around 60 ongoing or completed cases against Carbon Majors.[18] The vast majority of these cases have been litigated in the United States, with most

[13] Broadly defined as litigation in which climate change features as a material question of fact or law.
[14] For helpful snapshots of the state of global climate litigation, see Joanna Setzer and Catherine Higham 'Global trends in climate change litigation: 2022 snapshot' (2022) available at https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/ (Grantham Institute (2022)); Michael Burger and Maria Antonia Tigre 'UNEP Global Climate Litigation Report: 2023 Status Review' available at https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1203&context=sabin_climate_change. (UNEP Report)
[15] Sabin Centre for Climate Change Law 'Global Climate Change Litigation Database' (2023), available at https://climatecasechart.com/non-us-climate-change-litigation/.
[16] UNEP Global Climate Litigation Report (2020).
[17] Defined broadly as claims seeking monetary compensation and other remedies for losses suffered or likely to be suffered as a result of climate change.
[18] Joanna Setzer and Catherine Higham "Global trends in climate change litigation: 2023 snapshot" (2023) at 5 available at https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2023-snapshot/. (Grantham Institute (2023)).

brought by cities and states seeking compensation for climate-linked damage to public infrastructure.[19]

18 Approximately 17 cases have been launched outside of the US between 2015 and 2023, seeking remedies against private corporations.[20] This includes two prominent examples of litigants from the Global South pursuing major polluters in courts in the Global North,[21] in the ongoing cases of *Lliuya v RWE*[22] and *Asmania et al v Holcim*.[23]

19 No litigant has yet succeeded in obtaining monetary compensation, although most cases are still progressing through the courts.[24] To our knowledge, there have not yet been any loss and damages claims launched by African litigants against Carbon Majors, either in African or foreign courts.[25]

20 The existing loss and damage cases can be loosely grouped into five overlapping categories, borrowing from the Grantham Institute's analysis[26] and the latest UNEP report:[27]

20.1 Retrospective, polluter-pays cases, seeking damages and other remedies for past losses;

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[19] Ibid.
[20] Ibid at 3.
[21] See further Tigre and Wewerinke-Singh (note 2 above).
[22] *Landgericht [LG] [Regional Court] Essen* (15 December 2016) 2 O 285/15 available at https://openjur.de/u/943890.html. Summary and papers available at https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/.
[23] English summary and papers available at https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/.
[24] Tigre and Wewerinke-Singh (note 2 above) at 440.
[25] Olivia Rumble and Andrew Gilder *An African Perspective on Loss and Damage* (2022).
[26] Grantham Institute (2023) (note 18 above).
[27] UNEP Report (note 14 above).

20.2 Prospective cases to limit future emissions;

20.3 A combination approach, seeking retrospective and prospective remedies;

20.4 Climate disinformation and misrepresentation cases, seeking to hold polluters liable for misrepresentations and even fraud over their disclosure of emissions and the dangers of climate change;

20.5 Directors' liability cases, seeking to hold individual company directors personally liable for their actions or omissions in response to climate change.

21 This opinion is primarily concerned with a case in the first and third categories, seeking monetary compensation for retrospective losses suffered in the 2022 KZN floods, potentially combined with further remedies.

JURISDICTION

22 Jurisdiction refers to the authority or competence of a court to hear and determine an issue between parties.[28]

23 A plaintiff will only be entitled to bring a claim against a foreign Carbon Major in a South African court if jurisdiction can be established. In this section, we first assess the general principles of jurisdiction and then consider their specific application to foreign Carbon Majors, including the procedure to attach assets to found or confirm jurisdiction for monetary claims for damages.

General Principles

24 Jurisdiction involves a two-fold inquiry:

24.1 First, whether there is a recognised ground of jurisdiction; and[29]

24.2 Second, if there is a recognised ground of jurisdiction, whether the court has the power to give effect to the order sought.[30]

25 The High Court's jurisdiction is regulated by statute[31] and the common law.[32] When determining the first question, courts will have regard to the common law *rationes*

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[28] *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC) at para 74. DE Van Loggerenberg *Pollak: The South African Law of Jurisdiction* 3ed (Juta, 2019) (Pollak).
[29] Pollak ibid at p 24.
[30] *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* 2010 (6) SA 329 (SCA). See also Pollak ibid at p 23.
[31] Superior Courts Act 10 of 2013, section 21.
[32] *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 (6) SA 329 (SCA) at para 10.

*jurisdictioni*s (connecting factors) necessary for a court to exercise jurisdiction. For present purposes, the relevant *rationes jurisdictioni*s are:

25.1 the defendant's residence or domicile *(ratio domicilii);*

25.2 the location of the cause of action *(ratio rei gestae)*.[33]

26 The time for determining jurisdiction is the time of the commencement of the action i.e. when summons has been issued.[34] Jurisdiction is also determined on the pleadings, not the evidence.[35] Once jurisdiction has been established it continues to exist until the end of the action even if the grounds upon which jurisdiction was established cease to exist.[36]

27 Importantly, South African law does not recognize the doctrine of *forum non conveniens* (translated as "an inconvenient forum"), which applies in other common law jurisdictions.[37] This means that once a South African court is satisfied that it has jurisdiction, it cannot decline to exercise jurisdiction merely because a foreign court may also have jurisdiction over the claim.[38] Whether or not it would be more convenient for the matter to be heard elsewhere is irrelevant.

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[33] In cases involving rights over immoveable or movable property, the location of that property is a third basis for jurisdiction. However, that ground of jurisdiction would not apply to a delictual claim.
[34] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 301D – E and 310D.
[35] *Gcaba* (note 28 above) para 75.
[36] *Communication Workers Union and Another v Telkom SA Ltd and Another* 1999 (2) SA 586 (T) at 593 H – J.
[37] *Standard Bank of South Africa Ltd and Others v Mpongo and Others* [2021] ZASCA 92; 2021 (6) SA 403 (SCA) at para 31, citing *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission and Others* 2013 (5) SA 484 (SCA) para 19. The only exception is in admiralty cases.
[38] *TMT Services & Supplies (Pty) Ltd t/a Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu-Natal and Others* [2022] ZASCA 27 (15 March 2022) at para 34.

Domicile or residence of Carbon Majors

28 The High Court's jurisdiction over all persons residing within its area of jurisdiction is based on the common law principle of *actor sequitur forum rei*, which means that the plaintiff should ordinarily follow the defendant to his forum and institute proceedings there.[39]

29 In respect of companies, a company resides at its registered office, which is required to be the same as its principal place of business, in terms of section 23(3) of the Companies Act.[40]

30 Where Carbon Majors are resident in South Africa (referred to as *incolae*), the relevant division of the High Court in their area of residence would have full jurisdiction to hear and decide all claims for damages, interdictory relief, and related remedies. There could be no debate over the effectiveness of the court's orders.

31 However, most Carbon Majors are unlikely to be South African residents (*incolae*) but would instead be classified as foreign *peregrine*.

32 While some of these Carbon Majors may have locally registered South African subsidiaries, parent and subsidiary companies are distinct entities, with separate corporate personality, and separate, limited liability.[41] Subsidiary residence would therefore not automatically give a court jurisdiction over the parent company, or *vice versa*.

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[39] Pollak (note 28 above) at p 23.
[40] 71 of 2008.
[41] *AAA & Others v Unilever & Another* [2018] EWCA Civ 1532 at paras 36 - 37.

33 In such circumstances, before a South African resident can pursue a claim against a foreign Carbon Major parent company, some independent jurisdictional basis must be found.

Jurisdiction over monetary claims against foreign peregrine Carbon Majors

34 A court will have jurisdiction over a monetary claim[42] for damages brought by a South African resident plaintiff against a foreign *peregrinus* Carbon Major in one of two instances:

34.1 The Carbon Major has consented to the jurisdiction of the court;[43] or

34.2 In the absence of consent, the plaintiff has obtained an order for the attachment of assets belonging to the Carbon Major that are located in South Africa.

35 An attachment order may serve two purposes: [44]

35.1 To found jurisdiction, where there are no other recognised grounds of jurisdiction; or

35.2 To confirm jurisdiction, where there is some recognised ground of jurisdiction.

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[42] Attachment orders are not available in claims for interdictory relief. See *Federation Internationale de Football Association v Kgopotso Leslie Sedibe and Another* [2021] ZASCA (8 September 2021).
[43] *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) at para 6; *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA) at paras 16 - 24; *American Flag plc v Great African T-Shirt Corporation CC; American Flag plc v Great African T-Shirt Corporation CC: In re Ex parte Great African T-Shirt Corporation CC* 2000 (1) SA 356 (W).
[44] Pollak (note 28 above) p 27 - 28.

36 This means that if the cause of action did not take place in South Africa, attachment serves to found jurisdiction in a claim against the foreign Carbon Major. But even where the cause of action arose in South Africa, providing a ground for jurisdiction, attachment is still necessary to confirm jurisdiction.

37 Attachment to found or confirm jurisdiction is justified by the principle of effectiveness, as it ensures that any order to pay damages is not rendered hollow.

38 The property to be attached must therefore have some saleable value,[45] although it need not be commensurate to the value of the claim.[46] There are few limits on the type of assets that could be attached. These assets could, for example, include movable or immovable property in the country, shares owned by a foreign Carbon Major in South African companies, cash held in South African bank accounts, company jets or yachts that are present in South Africa, insurance policies, and the like.

39 In identifying potential defendants, it would be advisable to conduct preliminary investigations to determine which of the largest and most heavily polluting Carbon Majors own assets in South Africa. Public share records and deeds registries would be a useful start. Reputable tracing agents could also be contracted to assist in tracking down these assets and confirming ownership.

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[45] Pollak (note 28 above) at p 28.
[46] *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A) at 309A – 310B.

40 An application for an attachment order must be brought before summons are issued.[47] That application is usually brought on an *ex parte* basis (in the absence of the prospective defendant) and must show that:

40.1 the applicant has a *prima facie* cause of action against the defendant – it is only where it is quite clear that the applicant has no action, or cannot succeed, that an attachment should be refused;

40.2 the defendant is a foreign peregrinus; and

40.3 the property sought to be attached is within South Africa and, on a balance of probabilities belongs to the defendant.[48]

41 Barring the above-mentioned requirements, the court is not entitled to go into the merits of the case. Once an applicant has satisfied all the requirements for attachment, a court has no discretion to refuse it.[49]

42 Attachment is unnecessary (and impermissible) if a foreign *peregrinus* has already consented to the jurisdiction of the court. This consent can be given at any time before the attachment order is granted.[50]

43 An order of attachment made *ex parte* is only provisional and may be set aside by the court which made it if good cause is shown by any party directly affected by the order.[51]

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[47] Pollak (note 28 above) at p 30 - 31.
[48] Pollak (note 28 above) at p 31.
[49] *Naylor and Another v Jansen* 2006 (3) SA 546 (SCA) at para 27.
[50] *Tsung* (note 43 above) at para 7.
[51] Pollak (note 28 above) at p 32.

44 Given the need to show a *prima facie* case, any application to attach assets would only be advisable once the case is ready to launch and all available evidence has been gathered. While a court would not be required to go into the merits in any detail, it would still be necessary to show that there is a credible, *prima facie* case requiring an answer at trial.

Interdictory relief against foreign peregrine Carbon Majors

45 A court does not have jurisdiction to grant a mandatory or prohibitory interdict against a foreign *peregrinus* that requires action beyond South Africa's borders.[52]

46 However, a court may exercise jurisdiction where the actions sought to be restrained or compelled are within South Africa's borders.[53]

47 This would mean, for example, that a South African court could not order a foreign Carbon Major to implement emission controls on its operations outside of South Africa. By contrast, a South African court could potentially interdict a foreign Carbon Major from conducting polluting operations within the country.

[52] *Ex Parte Goldstein* 1916 CPD 483; *Towers v Paisley* 1963 (1) SA 92 (E).
[53] *Minister of Agriculture v Grobler* 1918 TPD 483.

FOREIGN ACT OF STATE DOCTRINE AND PRINCIPLES OF STATE IMMUNITY

48 There are further issues to consider where the Carbon Major is owned by a foreign state, as many major oil and power companies are, and where the claim would require a court to pronounce on the lawfulness of foreign states' actions.

49 The foreign act of state doctrine and principles of state immunity entail that a domestic court may decline to exercise jurisdiction where the matter concerns the alleged unlawful conduct of a foreign state. This is a notoriously slippery area of law and its application to Carbon Majors is, as yet, untested in our law.

50 The principle of state immunity and foreign act of state doctrine overlap to a large extent, however, they are two distinct grounds of defence:

50.1 First, a claim to state immunity, if successful, has the effect that a domestic court does not have jurisdiction to adjudicate the matter before it. The foreign act of state doctrine, on the other hand, concerns the justiciability of the suit or a limit on issues a court can adjudicate despite having jurisdiction to adjudicate the matter.[54]

50.2 Second, the principle of state immunity is a customary international law rule which has been statutorily incorporated in South African domestic law through the Foreign State Immunities Act.[55] By contrast, the foreign act of state doctrine is a common law principle for judicial restraint.[56]

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[54] *Saharawi Arab Democratic Republic and Another v Owner and Charterers of the MV "NM Cherry Blossom" and Others* 2017 (5) SA 105 (ECP) (The Cherry Blossom) at para 56.
[55] 87 of 1981.
[56] Ibid at para 54.

51 Both the principle of state immunity and foreign act of state doctrine cannot be avoided by not joining the relevant state. They are potential, competent defences for a state-owned Carbon Major despite the foreign state not being party to the proceedings.[57]

Foreign act of state doctrine

52 This doctrine, in essence, prohibits a domestic court of one sovereign state from questioning the validity or legality of another sovereign state's conduct.[58] In *Swissborough*,[59] it was accepted – albeit not definitively – that the doctrine is part of our law:

> *"The basis of the application of the act of State doctrine or that of judicial restraint is just as applicable to South Africa as it is to the USA and England. The comity of nations is just as applicable to South Africa as it is to other sovereign States. The judicial branch of government ought to be astute in not venturing into areas where it would be in a judicial no man's land. It would appear that in an appropriate case, as an exercise of the Court's inherent jurisdiction to regulate its own procedure, the Court could determine to exercise judicial restraint and refuse to entertain a matter, notwithstanding it is having jurisdiction to do so, in view of the involvement of foreign States therein."*[60]

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[57] *East Asian Consortium, B. V. v MTN Group Limited and Others* 2023 (3) SA 77 (GJ) (*EAC v MTN*) at paras 53, 86, 89 and 92, See *Minister of Justice & Constitutional Development v Southern African Litigation Centre (Helen Suzman Foundation & others as amici curiae)* 2016 3 SA 317 (SCA) par 66 Wallis JA stated: "*This immunity is available when it is sought to implead a foreign state, whether directly or indirectly, before domestic courts, and also when action is taken against state officials acting in their capacity as such. They enjoy the same immunity as the state they represent*."

[58] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of The Republic of South Africa and Others* 1999 (2) SA 279 (T) at 330F – G.

[59] Ibid.

[60] Ibid at 334D – F.

53 The doctrine has subsequently been accepted as part of our law in three High Court decisions – two full court decisions, *The Cherry Blossom*,[61] and *Obiang v Janse van Rensburg*,[62] and recently in the Gauteng Division in *EAC v MTN Group Limited*.[63]

54 In both *The Cherry Blossom* and *Obiang*, the courts declined to apply the doctrine to non-suit the applicants in interlocutory proceedings to attach assets, holding that the application of the doctrine was best determined at the stage of final relief.[64]

55 The most extensive discussion of the doctrine is in *EAC v MTN Group Limited*, where the court found that the defence was fully pleaded and that it was bound to determine the application of the doctrine to the issues before it.[65]

55.1 There, the plaintiff, EAC, instituted action in South Africa against MTN in delict for unlawful interference and competition with the plaintiff's contract concluded with the Iranian government. The gravamen of the plaintiff's claim was that the Iranian government allowed and received another bid from MTN, allegedly induced by bribery and corruption by MTN, as a result of which, and in breach of its agreement, the Iranian government concluded an addendum to the agreement, displacing EAC and substituting it with MTN.

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[61] *Saharawi Arab Democratic Republic and another v Owner and Charterers of the MV "NM Cherry Blossom" and others* 2017 (5) SA 105 (ECP).
[62] *Obiang v Janse van Rensburg and another* [2019] 4 All SA 287 (WCC).
[63] *EAC v MTN* (note 57 above).
[64] *The Cherry Blossom* ibid at para 98; *Obiang* ibid at para 70.
[65] *EAC v MTN* (note 57 above) at para 55.

55.2 Wepener J, having found the conduct of the Iranian government to be integral to the plaintiff's cause of action,[66] declined to exercise jurisdiction over a claim that would entail ruling on the lawfulness of the Iranian state's award of a tender to MTN.[67] The court set out the following main guiding principles:

55.2.1 First, the doctrine is applicable regardless of whether there are proceedings against a foreign state, and regardless of whether there is any claim against a foreign state's assets. The court extended the doctrine to any matter where a foreign state's conduct falls to be examined and determined.[68]

55.2.2 Second, whether the doctrine applies will depend, largely, on whether the acts complained of were acts of a private or public/governmental nature.[69] If private in nature – involving commercial dealings that a private individual may engage in – the doctrine and immunity would not necessarily apply.[70]

55.2.3 Third, where it is clear that the acts relied on were carried out outside the foreign state's own territory, the foreign act of state doctrine would not apply. The doctrine is premised on a simple principle that "*every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit*

[66] Ibid at paras 31 and 84.
[67] Ibid at para 85.
[68] Ibid at para 74.
[69] Ibid at paras 75 and 81.
[70] Ibid at para 75.

in judgment on the acts of the government of another done within its own territory."[71]

55.3 There is, therefore, no reason for judicial restraint when the acts were carried out beyond the foreign state's territory.

55.4 At paragraph 74 of the judgment, Wepener J referred to United States and English authorities that touched on the conduct of state-owned oil companies and the exploitation of oil reserves. In those cases, governmental decisions relating to the exploitation of a particular State's natural resources were considered to be public acts – not private acts – that attracted immunity in a foreign court. Wepener J quoted, *inter alia*, the following passage:

> "*In IAMAW v OPEC 477 F Supp 553 (CD Cal, 1979) it was said (at 5678) that:*
>
> > *'The control over a nation's natural resources stems from the nature of sovereignty. The defendants' control over their . . . primary, if not sole, revenue producing resource, is crucial to the welfare of their nations' peoples.'*
>
> *Similarly, in In re Sedco, Incorporated 543 F Supp 561 (SD Tex., 1982), it was said:*
>
> > *in the context of conduct of Pemex, a Mexican State-owned oil company, (at 566) that 'A very basic attribute of sovereignty is the control over its mineral resources and short of actually selling these resources on the world market, decisions and conduct concerning them are uniquely governmental in nature.' In Jones v Petty Ray Geophysical Geosource 722 F Supp 343 (SD Tex, 1989) the In re Sedco, Incorporated approach was followed, and it was held that a petroleum production sharing agreement between Sudan and an energy company was not a 'commercial activity'. More recently, in RSM Production Corporation v Fridman, 643 F Supp 2d 382*

[71] Ibid at paras 83 – 84.

> *(SDNY, 2009), it was found that the Deputy Prime Minister of Granada, in denying the plaintiff's application for a licence to conduct oil and gas exploration off the coast of Granada, had 'exercised a right that is "peculiar to sovereigns"', because '"licensing the exploration of natural resources is a sovereign activity"'.*"

56 All of this indicates that the foreign act of state doctrine could not be used as a blanket defence by a foreign, state-owned Carbon Major. Much will depend on where it conducted its polluting activities and whether those activities are best characterised as public or private in nature.

57 Nevertheless, in the process of identifying prospective defendants, it would be advisable to concentrate on Carbon Majors that are not state-owned, where their activities are indisputably private and commercial in nature. A detailed corporate history would need to be compiled for each prospective defendant, detailing the company's ownership structure over the years of its polluting activities. It is likely that significant Carbon Majors may have started out as state-owned entities before transitioning to privately held or publicly listed companies.

Principle of state immunity

58 As indicated above, the Foreign State Immunities Act provides immunity to all foreign states from the South African courts. Section 2(1) of the Immunities Act provides that: "*[a] foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or in any proclamation issued thereunder.*"

59 The Supreme Court of Appeal has explained that this immunity applies in the following circumstances:[72]:

> "*This immunity is available when it is sought to implead a foreign state, whether directly or indirectly, before domestic courts, and also when action is taken against state officials acting in their capacity as such. They enjoy the same immunity as the state they represent. This is known as immunity ratione materiae (immunity attaching to official acts). In addition, heads of state and certain other high officials of state enjoy immunity ratione personae (immunity by virtue of status or an office held at any particular time). This form of immunity terminates when the individual demits or is removed from office. The country concerned may waive either form of immunity.*"

60 Section 2 of the Immunities Act is currently undergoing some revision and it is not yet clear how the amendment would affect the application of the immunity to state-owned Carbon Majors.

61 As matters stand, Wepener J in *EAC v MTN Group Limited*, held that the Immunities Act applies even where the foreign state is not joined and even when it is not raised by a party before court.[73]

62 Therefore, in a claim against a foreign state-owned Carbon Major, there is an appreciable risk that they would attempt to invoke this immunity to defeat a claim.[74] In *EAC v MTN*, the Iranian government was not party to the proceedings, nor did the claim involve any of its assets, however the court still found that it had no jurisdiction to hear the matter as it was required to make adverse findings regarding

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[72] *Minister of Justice & Constitutional Development v Southern African Litigation Centre (Helen Suzman Foundation & others as amici curiae)* 2016 3 SA 317 (SCA) at para 66.
[73] *EAC v MTN Group Limited* (note 57 above) at para 89.
[74] *The Cherry Blossom* at paras 82 – 85; confirmed in *EAC v MTN* (note 57 above) at paras 89 – 92.

the unlawful acts of Iran – a finding which will affect the interests or activities of Iran.[75]

[75] *EAC v MTN* ibid at para 93.

CAUSES OF ACTION AND CHOICE OF LAW

63 The legal basis of a claim will depend on two questions:

63.1 *The choice of law question*: does South African law or foreign law apply to the substantive merits of the claim?

63.2 *The cause of action question*: depending on the applicable law, which of the available legal bases for the claim is most appropriate?

Choice of law

64 In suing a foreign Carbon Major, which did most of its polluting beyond South Africa's borders, a South African court will have to determine whether the substantive issues fall to be decided in terms of South African law or relevant foreign law.

65 In our law, procedural matters, such as standing and jurisdiction, are always determined by our law (as the *lex fori*) while the substantive merits are determined by the law applicable to the cause of action (the *lex causae*).[76]

66 For example, in the ongoing *Kabwe* lead-poisoning litigation, the applicants sought certification of a class action in the South African High Court to sue Anglo American, on behalf of victims of lead poisoning living in Kabwe, Zambia.[77] The parties accepted, and the court agreed, that the applicable substantive law is Zambian law

[76] *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) at para 10. CF Forsyth *Private International Law* 4 ed (2003).
[77] *Various parties obo minors v Anglo-American South Africa Limited and Others* [2023] ZAGPJHC 1474.

(incorporating English law), as the lead mining and resulting injuries occurred in Zambia. Nevertheless, all procedural matters, including the test for certification of a class action, were to be decided in terms of South African law.[78]

67 In claims for damages arising from harm to person or property, our law does not yet have settled choice of law rules determining the applicable substantive law.[79]

68 In three High Court judgments, the courts have held that the appropriate starting point is to apply the law of the place where the delict / tort was committed (the *lex loci delicti commissi*).[80] That law should be applied as the default, unless there are circumstances that justify a departure. There is not yet clarity on when a departure in justified. Relevant considerations that have been considered by the courts include:

68.1 Which jurisdiction has the "*most significant relationship*" to the delict / tort;[81]

68.2 The existence of a jurisdictional "*common link*" between the parties;[82]

68.3 Whether there are grounds of public policy that warrant applying South African law in preference to the relevant foreign law.[83]

69 Climate loss and damage claims raise particular challenges in identifying a single place where the wrong was committed. Carbon Majors generally conduct their

[78] Ibid para 12.
[79] Forsyth (note 76 above) at 325.
[80] Burchell v Anglin 2010 (3) SA 48 (ECG); *Apleni v African Process Solutions (Pty) Ltd and Another* [2018] ZAWCHC 160; *EAC v MTN* (note 57 above).
[81] Burchell v Anglin at paras 124 and 125.
[82] Apleni v APS at para 57.
[83] *Burchell v Anglin* at para 127.

polluting activities across many jurisdictions, with vastly distributed production and supply chains. The climate change consequences of their emissions are also globally distributed.

70 The leading author on South African private international law, Christopher Forsyth, suggests that in cases of uncertainty, the *lex loci delicti commissi* ought to be determined by the "*place of damage*", where the harms and losses giving rise to the claim were suffered.[84] Forsyth argues that in cases involving multinational production chains and harms it is "*unfair to burden plaintiffs who have suffered damage to their person or property with the uncertainty of not being able readily to localise the delict in respect of which they wish to sue*."[85]

71 There is therefore a strong argument that victims of the 2022 KZN floods ought to be allowed to rely on South African law to determine the merits of any prospective claims against multinational Carbon Majors.

72 The strength of that argument would, however, depend on the identity of the defendant Carbon Majors and the evidence of their activities and links to South Africa. Detailed historical evidence on the extent and globally distributed nature of the defendant Carbon Major's polluting activities would be necessary. A history of conducting business in or with South Africa would also be helpful in cementing the link. Expert attribution evidence (discussed in further detail below) would also assist,

[84] Forsyth (note 76 above) at 330 – 331.
[85] Ibid at 330.

showing how the Carbon Major's emissions contributed to climate change and the specific disaster in KZN.

73 If foreign law does indeed apply to the merits, a South African court would nevertheless presume that the relevant foreign law is identical to the relevant South African law, unless proven otherwise.[86] The content of relevant foreign law is treated as a question of fact, which must be proved by expert evidence, usually by expert lawyers or academics from that jurisdiction.[87]

Causes of action

74 Assuming, for the purposes of this opinion, that South African law applies, a damages claim could potentially flow from three legal sources: statutory remedies, where available; the common law; and the Constitution.

75 There are currently no dedicated statutory remedies in our law for climate-related loss and damage. As a result, the common law is the most viable legal basis for a claim. For the purposes of this opinion, we are asked to focus specifically on the law of delict.

76 While it is notionally possible to seek constitutional damages, the Constitutional Court's recent case law suggests that this is generally a remedy of last resort, which is only available where it is the "*most appropriate* *remedy available to vindicate*

[86] *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) at para 8, Schapiro v Schapiro 1904 TS 673 at 677.
[87] *Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396-397; *The Asphalt Venture : Windrush Intercontinental SA and another v UACC Bergshav Tankers AS* 2017 (3) SA 1 (SCA) at paras 30 – 33.

constitutional rights".[88] To the extent that delictual claims and other remedies are available, constitutional damages are potentially precluded.

77 In any delictual claim, it would nevertheless be advisable to plead constitutional damages in the alternative, should a court conclude that a delictual claim is unavailable or inappropriate for any reason.

78 It is, however, uncertain whether constitutional damages would be available in a claim against a foreign-based Carbon Major that has no presence in South Africa. Our Constitution recognises the horizontal application of constitutional obligations to private actors.[89] However, constitutional rights and obligations are generally territorially confined to persons within our borders, with some, limited scope for extraterritorial application.[90] The potential for extraterritorial application of the Constitution to private actors, with a resulting right to seek constitutional damages against them, remains untested.

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[88] See *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* 2023 (3) SA 329 (CC) at paras 97, 113. See further *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* [2021] ZACC 45 (where the Court was deeply divided 4-3-2 over the future of constitutional damages, albeit with no judgment gaining sufficient support to overturn *Industry House*).

[89] Section 8(2) of the Constitution. See *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) at paras 118 – 131; *Daniels v Scribante* 2017 (4) SA 341 (CC) at para 49.

[90] See *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC).

STANDING AND AVAILABLE PROCEDURES

79 South African law adopts a relatively uncomplicated approach to standing, particularly when compared with the onerous standing requirements that have hobbled climate litigation in the United States.

80 Under our common law, a party has standing to sue where they have a direct interest in the relief sought, the interest is not too remote, and the interest is real and current (not hypothetical or abstract).[91] In practical terms, that means that where a party seeks damages flowing from alleged harm they have personally suffered due to a defendants' alleged wrongdoing, standing will be established.

81 Standing is determined on the pleadings, without requiring a determination of the merits. In assessing standing, a court will assume that the allegations set out in the plaintiffs' pleadings are correct and that their claim is legally valid.[92]

82 The Constitution has further expanded the grounds of standing in constitutional matters, to encompass public interest, class action, and representative standing.[93]

83 There are three primary procedural routes available for bringing a common law claim for damages and associated relief.

84 First, and potentially most straightforward, would be an individual claim brought by a victim or victims of climate harms, against one or more defendants. This is often

[91] *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) at paras 7 – 8.
[92] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* 2013 (3) BCLR 251 (CC) at paras 32 – 33.
[93] Section 38 of the Constitution.

referred to as “test case” litigation. The narrow focus on an individual plaintiff or a small number of similarly situated plaintiffs allows for relevant legal principles to be tested without the obscuring complexity and logistical difficulty of a large group of litigants, with different factual circumstances.

85 Second, there is a group action, brought on behalf of a larger group of victims, against a defendant or defendants, where the resolution of their claims depends on substantially the same questions of law and fact.[94] As in individual litigation, each of the plaintiffs would have to establish their own standing to bring the claim and would be formally joined in the proceedings.

86 Third, there is the potential for class action litigation. This is a form of representative action in which class representatives pursue a claim on behalf of a wider class. The class members are not joined as parties in the proceedings, but are bound by the judgment and order unless they choose to opt-out or elect not to opt-in, as the case may be.

87 Given the scale of climate-linked disasters, and the size of the potential classes of victims, the class action mechanism has certain advantages. This includes the potential to secure access to justice for a large class of individuals with limited means, whose claims may not be sufficiently large to warrant independent litigation.[95]

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[94] Uniform Rule 10(1).
[95] See Emma Schuster “Class actions in a changing climate” (2021) 37 *South African Journal on Human Rights* 102.

88 Class actions are, however, logistically complex and enormously resource intensive.

89 Prospective class representatives must first apply for certification – judicial permission to launch a class action – before initiating any claim. Applicants are required to demonstrate that it is in the interests of justice to proceed by way of class action, having regard to a range of considerations, including the existence of a viable class definition, a triable issue, sufficient commonality, and appropriate legal representation and funding arrangements, among a range of other factors.[96]

90 As recent class action certification proceedings have shown, the certification process can span several years, at vast expense.[97] When combined with an application to attach assets to found or confirm jurisdiction, these interlocutory procedures could span half a decade or more, before any trial could begin.

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[96] *Children's Resource Centre Trust v Pioneer Foods* 2013 (2) SA 213 (SCA) at para 26 (CRC Trust), approved with qualification in *Mukaddam v Pioneer Foods* 2013 (5) SA 89 (CC) at paras 34 – 37.

[97] For example, the certification application in *Nkala and Others v Harmony Gold Mining Company Limited and Others* 2016 (5) SA 240 (GJ) spanned more than four years before certification was granted in the High Court, not counting the further appeals. In the ongoing *Kabwe* class action proceedings, more than three years elapsed between the launch of certification proceedings and the High Court's judgment refusing certification. The appeal process is likely to take at least two years to reach finality.

THE LEGAL VIABILITY OF A CLAIM IN DELICT

91 Having addressed the various procedural issues, we now turn to assess the substantive issues that would arise in a delictual claim.

92 For the purposes of this discussion, we will assume that South African law applies to the substantive merits, although that choice of law question will have to be determined on a case-by-case basis.

93 The law of delict is a composite of actions with Roman-Dutch origins. A claim for climate loss and damage would involve two primary forms of action: the Aquilian action, for patrimonial losses; and the Germanic remedy for pain, suffering and loss of amenities of life arising from physical injuries.

94 The general elements for delictual liability are: harm sustained by the plaintiff; wrongful conduct (in the form of acts or omissions) by the defendant; fault (in the form of intention or negligence); and a causal link between the wrongful conduct and the harm.

95 In what follows, we will consider these key elements in turn. Before doing so, we first address the question of parent company liability for the actions of subsidiaries, which would be a critical question in any delictual claim.

PARENT COMPANY LIABILITY

96 Multinational Carbon Majors are likely to have a complex and frequently changing corporate structure, with a mix of holding companies and subsidiaries registered across the world.

97 We anticipate that, in many cases, a Carbon Major's polluting activities and liabilities will be distributed across this ever-changing group structure, like an elaborate shell game. As Carbon Majors face increasing loss and damage litigation and growing climate liabilities, this shell game will likely increase in proportionate intensity.

98 The default position is that a parent company and its subsidiaries are distinct entities, with separate corporate personality, and separate liabilities. This means that a parent company Carbon Major would not necessarily be liable for delicts committed by its subsidiaries, and *vice versa*.

99 The question of whether and when a parent company could be held liable for actions of its subsidiaries has not yet been considered in detail by the South African courts.

100 Our courts have, thus far, recognised a limited category of relationships which could give rise to vicarious liability: employment relationships and analogous relationships where a similar degree of control is present.[98] Where vicarious liability is established, one party is held liable for the delicts committed by another, even

[98] See *K v Minister of Safety and Securit*y 2005 (9) BCLR 835 (CC) at para 21; F v Minister of Safety and Security and Another 2012 (1) SA 536 (CC) at para 40.

though they were not necessarily at fault. The negligent wrongdoing of one party is attributed to the other, involving a form of strict liability.

101 While we do not rule out the possibility of establishing a basis for vicarious liability, our courts would generally be reluctant to find that the parent / subsidiarity relationship gives rise to strict liability, unless there are exceptional circumstances. This would require evidence that a particular parent / subsidiary relationship approximates the relationship of an employer and employee, setting a very high evidential threshold.

102 The relationship between a parent and a subsidiary may be more analogous to the relationship between a principal and an independent contractor. The principal is not held vicariously liable for the actions of the independent contractor, but the principal may be liable where their own negligence contributes to the harm. That negligence may be found, for example, in the principal's choice of contractor or by failing to put in place proper precautionary measures, supervision and controls.[99]

103 English law offers further guidance on the subject. There the courts have held that a parent company may, in certain circumstances, assume a duty of care over the actions of its subsidiaries. Where that duty of care is established, the parent's liability is not vicarious, as the subsidiary's wrongdoing is not attributed to the parent. Instead, the parent is held liable to the extent that its own conduct is proven to be

[99] See further *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A); *Chartaprops 16 (Pty) Ltd v Silberman* 2009 (1) SA 265 (SCA); *Avonmore Supermarket CC v Venter* 2014 (5) SA 399 (SCA).

negligent, either through its direct involvement in the subsidiary's activities or by failing to take steps to prevent or address the subsidiary's wrongdoing.

104 The relevant principles were outlined in detail in the UK Supreme Court's judgments in *Vedanta*[100] and *Okpabi v Shell.*[101]

104.1 *Vedanta* concerned a claim launched in the UK by residents of Zambia who alleged that their health and land had been damaged by pollution emanating from a copper mine in Zambia. The claim was brought against the local Zambian company that owned the mine and its London-domiciled parent company, Vedanta Resources PLC.

104.2 *Okpabi* involved a claim against the London-based Royal Dutch Shell plc, on behalf of the residents of Nigerian oil fields whose water and environment had been contaminated by oil spills, allegedly caused by the negligence of Shell's Nigerian subsidiary.

105 The UK Supreme Court held that the central consideration is the degree of control over, intervention in, supervision, or advice provided by the parent company in respect of the relevant operations of the subsidiary.[102] In assessing that degree of control, several considerations are relevant:

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[100] *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.

[101] *Okpabi v Royal Dutch Shell PLC* [2021] UKSC 3.

[102] *Vedanta* at para 49; *Okpabi* at paras 25, 146 – 147.

105.1 The parent company's majority shareholding may assist in demonstrating control, but it is not a necessary requirement.

105.2 Control could be established even in the absence of ownership. As Lord Biggs explained in *Vedanta: "[e]verything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations"* of the subsidiary*. "All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity."*[103]

105.3 It follows that the terms "parent" and "subsidiary" are used in a loose sense in these cases. Liability is not determined by the percentage shareholding, but by the degree of *de facto* control and management of the relevant activities.

106 While control is an open-ended inquiry, the UK Supreme Court identified several non-exhaustive "routes" by which a parent company may assume the necessary control over subsidiary operations, with a resulting duty of care:[104]

106.1 Route 1: taking over the management or joint management of the relevant activity of the subsidiary;

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[103] Ibid at para 49.

[104] *Okpabi* ibid at paras 26 – 27; 145 – 148; drawing on *Vedanta* ibid at paras 51 – 53.

106.2 Route 2: providing defective advice and/or promulgating defective group-wide safety/environmental policies which were implemented as of course by the subsidiary;

106.3 Route 3: promulgating group-wide safety/environmental policies and taking active steps to ensure their implementation by the subsidiary;

106.4 Route 4: holding out that it exercises a particular degree of supervision and control over the subsidiary.

107 Our law of delict does not have the same concept of a "duty of care" as applies in Anglo-American tort law.[105] As a result, some caution is needed in transposing these principles into our more flexible test for delictual liability. Nevertheless, the relevant factors in assessing parent company control over subsidiary activities would be highly relevant to assessing wrongfulness and negligence in our law.

108 In identifying prospective defendant Carbon Majors and building a case, it would be essential to map their group structure in detail to understand how this structure, its operations, and resulting emissions have changed over time. To the extent possible, it will also be necessary to identify which subsidiaries within the group structure bear the greatest responsibility for GHG emissions and to map the lines of control between the parent and those subsidiaries.

[105] See *Country Cloud Trading cc v MEC: Department of Infrastructure Development* 2014 (2) SA 214 (SCA) at para 19.

WRONGFULNESS

109 An act or omission that causes loss is not sufficient to give rise to delictual liability. It must also be wrongful.[106] A Carbon Major's liability for loss and damage will therefore depend on the wrongfulness of its relevant acts and omissions.

110 Wrongfulness involves a legal determination of whether it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct, assuming that all the other elements of delictual liability (e.g. fault, causation, harm etc) are present and proven.[107] Reasonableness, in this context, is assessed based on considerations of public and legal policy informed by constitutional values.[108]

111 The approach to determining wrongfulness will depend on the nature of the Carbon Major's alleged conduct (i.e. positive acts, omissions, statements) and the consequences (i.e. damage to property or person, pure economic loss, nervous shock, grief).

The nature of the conduct and the consequences

112 Wrongfulness will be presumed where there is positive conduct causing damage to persons or property.[109] This is because people have a common law right not to have

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[106] Neethling *et al* Law of Delict, 6th Edition, Lexis Nexis, 2010 at p 33 (Neethling).
[107] *Le Roux v Dey* 2011 (3) SA 274 (CC) at para 122. *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) at para 34. *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC).
[108] Ibid.
[109] *Country Cloud* at para 22; *AK v Minister of Police* 2023 (2) SA 321 (CC) at para 155.

their person or property damaged.[110] Where claimants have suffered personal injuries or damage to property due to alleged positive conduct by Carbon Majors, wrongfulness would be presumed.

113 That is, however, a rebuttable presumption.[111] A Carbon Major could seek to argue that that it would not be reasonable or justifiable on public policy grounds to impose liability. Likely arguments would involve the dangers of limitless liability (the "floodgates" argument), or arguments over the social benefits of fossil fuel use and consumption. We touch on some of these arguments below. The Carbon Major would, however, bear the evidential and argumentative burden to establish these defences.

114 Where the Carbon Major's alleged conduct consists of an omission (a failure to act) or statements (such as misinformation or disinformation),[112] wrongfulness will not be presumed, even where there is harm to person or property.[113] A claimant would therefore be required to prove those facts from which wrongfulness can be inferred.

115 Equally, where the alleged loss involves so-called "pure economic loss" (i.e. financial losses without underlying damage to person or property)[114] or grief and emotional shock, not linked to detectable physical or psychiatric injury,[115]

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[110] *Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd and Others* 1982 (4) SA 890 (A) at p 900 H.
[111] See also fn 9 in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) at para 22.
[112] *AK v Minister of Police* 2023 (2) SA 321 (CC) at para 155.
[113] *Mashongwa v PRASA* 2016 (3) SA 528 (CC) para 19.
[114] *Country Cloud* (note 111 above).
[115] See *Komape and Others v Minister of Basic Education and Others* 2020 (2) SA 347 (SCA) at paras 56 and 73.

wrongfulness is also not presumed and must be established. Whenever the nature of the loss is such that the wrongfulness of the relevant Carbon Major's acts or omissions cannot be inferred, wrongfulness must again be alleged and proved.[116]

116 In existing climate litigation, either in common law or public law, litigants have relied on a diverse range of alleged wrongful acts and omissions. For example:

116.1 Litigants have alleged that the wrongful act consists in releasing substantial and material GHG emissions. In *Lliuya v RWE*,[117] for example, the claimant, Mr Lliuya, seeks to hold RWE liable in proportion to its share of GHG emissions to cover the expenses necessary for Mr Lliuya to make precautionary adaptations to his property in response to potential climate change harms.

116.2 Other cases have sought to prove that Carbon Majors engaged in intentional misrepresentations both of their own GHG emissions and the relevant climate science. For example, in *State of Minnesota v American Petroleum Institute and others*,[118] the State of Minnesota brought an action against members of the fossil fuel industry for allegedly causing climate change harms by misleading the public and downplaying the threat of climate change and the role of their products in causing climate change. Here the State seeks compensation from these fossil fuel companies for a range of climate change

[116] Harms at p 162**.** See also Neethling at p 36.
[117] Available at https://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/ (accessed 14 February 2024). See also *Held v. the State of Montana and others* available at https://climatecasechart.com/case/11091/ (accessed 12 February 2024), where the plaintiffs seek regulatory change on the basis of excessive GHG emissions.
[118] See https://climatecasechart.com/case/state-v-american-petroleum-institute/ (accessed 12 Feb 2024).

related loss and damage, including adaptation costs to fortify public infrastructure against climate related harms in the future.

116.3 Other cases have alleged that Carbon Majors violated a duty of care and human rights obligations by failing to take adequate action to curb contributions to climate change.[119]

Relevant considerations for determining wrongfulness

117 The next question is what specific considerations will the court take into account in assessing wrongfulness?

118 As outlined above, wrongfulness is determined by an *ex post facto* (after-the-fact) assessment, again assuming that all elements of the delict have been established.[120] Whether or not it will be reasonable to impose liability will be assessed based on considerations of public and legal policy, informed by constitutional values.[121]

119 Those considerations may include:[122]

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[119] See, for example, *Smith v Fonterra and Others* [2024] NZSC 5, discussed in detail below. See also *Milieudefensie et al. v. Royal Dutch Shell PLC* available at https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ (accessed 13 February 2024). In this case the claimants sought and were granted an order directing Shell to, *inter alia,* reduce carbon emissions. This was, however, not a common law claim for loss and damage.

[120] Neethling and Potgieter "Foreseeability: Wrongfulness and Negligence of Omissions in Delict – the Debate Goes on MTO Forestry (Pty) Ltd v Swart N.O. 2017 5 SA 76 (SCA)" (2018) 43 Journal for Juridical Science 145 at 155.

[121] Ibid.

[122] *Country Cloud* (note 111 above) at para 26.

119.1 Constitutional rights and principles, including the section 24 environmental rights;

119.2 The nature and extent of the harm;

119.3 The social utility of the conduct;

119.4 Actual knowledge that the act or omission might result in harm;[123]

119.5 Reasonable foreseeability of harm;[124]

119.6 A pre-existing duty;[125]

119.7 The presence of any statutory regulation of GHG emissions such that a legal duty rests on a Carbon Major to act positively to prevent harm.[126]

120 Many of these considerations have a recurring role in the analysis and reappear in the assessment of fault and causation. We will touch on some of these considerations in greater detail in the sections that follow.

121 Our section 24 environmental rights, particularly the section 24(a) right to an environment that is not harmful to health and well-being, will have important role in guiding the assessment of wrongfulness.

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[123] *AK* (note 112 above) at para 157.
[124] Although, foreseeability is not normally a factor relevant to wrongfulness (see *Country Cloud* note 111 above at paras 34 – 43), subjective foreseeability could be relevant in determining wrongfulness *ex post facto* in a particular case (*AK* ibid at para 157).
[125] *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) at para 19.
[126] *AK* (note 112 above) at para 155.

122 The Constitutional Court[127] and the Gauteng Division of the High Court[128] have confirmed that the section 24(a) right is an unqualified and immediately realisable right. The Gauteng Division of the High Court has further acknowledged that climate change poses a serious threat to these rights.[129] This arguably forms the basis for an entitlement to a "safe climate", which does not pose direct threats to people's lives, health and well-being due to anthropogenic climate change.[130]

123 In this way, constitutional rights and values may be used to undergird the argument that it is reasonable to impose liability on Carbon Major's for substantial and material GHG emissions, among other potentially wrongful acts. Note that this indirect application of section 24, as a guide to the development and application of the existing common law, is different to the direct application of section 24 obligations, where a litigant seeks relief based on an alleged infringement of this right.

124 Carbon Majors are likely to rely on a range of policy-based arguments to dispute wrongfulness and liability. The New Zealand Court of Appeal's judgment in *Smith v Fonterra*[131] provides a useful preview of some of these potential arguments.

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[127] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44; 2023 (5) BCLR 527 (CC) at para 295.
[128] *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* [2022] ZAGPPHC 208 (18 March 2022).
[129] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP) at paras 82 – 83.
[130] See further Report of the Special Rapporteur on Human Rights and the Environment 'Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' UN Doc A/74/161 (15 July 2019) (Safe Climate Report); De Vilchez P and Savaresi A, 'The Right to a Healthy Environment and Climate Litigation: A Game Changer?' 2023 *Yearbook of International Environmental Law* 1; Setzer J and Winter De Carvalho D, 'Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate' 2021 (30) *Review of European, Comparative & International Environmental Law* 197
[131] *Smith v Fonterra and Others* [2021] NZCA 552.

124.1 There the Court of Appeal initially struck out all the plaintiff's claims in tort against seven of New Zealand's largest GHG emitters. The plaintiff had brought three claims, relying on the torts of public nuisance and negligence, and a new tort, alleging a special climate duty to "*cease contributing to damage to the climate system, dangerous anthropogenic interference with the climate system, and the adverse effects of climate change through their emission of Greenhouse Gases into the atmosphere*".

124.2 That judgment was recently reversed on appeal in the New Zealand Supreme Court, allowing all three claims to proceed to trial.[132] The Supreme Court held that the strict test for strike out (that the claims "*disclose no reasonably arguable cause of action*") had not been satisfied. It did not rule on the merits of the claims. Those claims will now be fully ventilated in the trial court.

124.3 The Court of Appeal's initial reasoning and the plaintiff's arguments on appeal are nevertheless instructive.

125 The Court of Appeal raised four general policy considerations, relying heavily on similar arguments raised in US cases,[133] which it regarded as precluding the plaintiff's claims. There are potentially strong answers to each of these concerns,

[132] *Smith v Fonterra and Others* [2024] NZSC 5.
[133] Referencing *American Electric Power Co Inc v Connecticut* 564 US 410 (2011); *City of New York v Chevron Corp* 993 F 3d 81 (2nd Cir 2021); *Native Village of Kivalina v ExxonMobil Corp* 696 F 3d 849 (9th Cir 2012); and *City of Oakland v BP PLC* 325 F Supp 3d 1017 (ND Cal 2018).

many of which were raised in the plaintiff's written submissions in the New Zealand Supreme Court.[134]

125.1 First, *the alleged inadequacy of the common law*: the court suggested that "*the magnitude of the crisis which is climate change simply cannot be appropriately or adequately addressed by common law tort claims pursued through the courts*" as this is "*quintessentially a matter that calls for a sophisticated regulatory response at a national level supported by international co-ordination.*"[135] In response, there are a range of potential arguments:

125.1.1 Common law liability and regulation are not mutually exclusive and are, in many cases, directly compatible, as common law claims may serve as a catalyst for regulatory action (as seen in the tobacco litigation in the United States in the 1980s through to the 2000s).

125.1.2 Furthermore, there is no basis to non-suit a party merely because the authorities have failed to take proper regulatory action.

125.2 Second, *the spectre of limitless liability:* the court suggested that the mere emission of GHGs cannot be wrongful as that would mean that everyone is potentially liable, as all human activities contribute to climate change.[136] There are again several compelling counters:

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[134] Appellant's submissions in the New Zealand Supreme Court (2022) available at courtsofnz.govt.nz/assets/cases/Submissions/2022/Hearing-date-Monday-15-Wednesday-17-August-2022-Appellant-submissions.pdf.
[135] Fonterra (Court of Appeal) (note 131 above) at para 16.
[136] Ibid at para 18.

125.2.1 Wrongfulness, in our law, is a matter of degree.

125.2.2 Relatively small emissions of GHGs by ordinary people, as a natural part of human activity, would not attract liability.

125.2.3 By contrast, material emissions from Carbon Majors and other significant polluters, in the millions of tons of GHGs each year, should arguably attract liability, to ensure that the social costs of these emissions are borne by those who profit from them.

125.3 Third, *the social utility of GHG emissions*: the court held that it would be "*be nothing short of absurd for a court to find that the common law proscribes most economic activity, and many of the activities that form an integral part of every individual's daily life*."[137] In response:

125.3.1 Many destructive and wrongful acts, which now attract liability in common law, were once thought to be natural, normal, and economically beneficial. Economic benefits alone do not preclude liability.

125.3.2 Holding major GHG emitters liable for the consequences of their actions merely ensures that these emitters bear some portion of the true societal costs of their activities. At present, these emitters reap the full profits of their activities, while passing on the costs to vulnerable victims. Liability is therefore a question of loss allocation

[137] Ibid para 22.

for harm-causing activities, ensuring that the polluter pays. It does not amount to an outright prohibition of the activities.

125.4 Fourth, *the inappropriateness of judicial intervention*: the Court suggested that liability in tort law for climate losses would lead to a "*court-designed and court-supervised regulatory regime."*[138] This also has several potential responses:

125.4.1 The explicit, policy-based nature of the wrongfulness inquiry in our law means that courts are consistently required to engage in a type of judicial regulation.

125.4.2 In any event, individual claims for damages or interdictory relief against specific defendants do not involve impermissible intrusion into the broader legislative or regulatory domain.

126 In addition to these responses, there is an important difference between litigating these cases in a South African court, as opposed to pursuing Carbon Majors in their home jurisdictions. A South African court, faced with a foreign Carbon Major, will be far less inclined to entertain bald appeals to the social utility of polluting activities, particularly in circumstances where vulnerable South African residents bear the costs while those Carbon Majors reap the profits. This perpetuation of colonial patterns of extraction and harm would, no doubt, loom large in any South African court's assessment of public policy.

[138] Ibid at para 27 and 33.

FAULT

127 A Carbon Major will only be liable if it is shown that it was at fault, which is established by proving either negligence or intention.[139] In most cases of climate-linked disasters, intention would likely be impossible to prove. The lower bar of negligence will be the appropriate test.

128 Negligence involves an assessment of whether:[140]

> "*(a) a [reasonable person] in the position of the defendant –*
>
> > *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
> >
> > *(ii) would take reasonable steps to guard against such occurrence; and*
>
> *(b) the defendant failed to take such steps*."[141]

129 This would require a plaintiff to prove that: (a) the harms of climate change were foreseen by a Carbon Major or were reasonably foreseeable; (b) a reasonable person in the position of that Carbon Major would have taken steps to prevent the harm from occurring; and (c) the Carbon Major failed to take those reasonable steps.

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[139] Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and another 2000 (1) SA 827 (SCA) at p 839F – G.
[140] Kruger v Coetzee 1966 (2) SA 428 (A).
[141] Ibid at 430.

Reasonable foreseeability

130 Courts limit liability to harm that was foreseen or was reasonably foreseeable at the time of the wrongful conduct. Conversely, harm that is so remote as not to be reasonably foreseeable is not actionable.

131 What is reasonably foreseeable depends on a variety of factors and the particular circumstances of each case.[142] These may include:

131.1 How real is the risk of harm eventuating?

131.2 If the harm does eventuate, what is the extent of the damage likely to be? and

131.3 What are the costs or difficulties involved in guarding against the risk?[143]

132 If the risk of harm occurring is very high, then the harm is usually foreseeable even if the extent of the potential damage is very small. Conversely, a small risk coupled with the potential for significant harm may be reasonably foreseeable.[144]

133 The precise nature and extent of the harm and the exact way the harm actually occurred need not be reasonably foreseeable.[145] What is required is that the

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[142] *Lomagundi Sheetmetal and Engineering (Pty) Ltd v Basson* 1973 (4) SA 523 (RA) at 524H.
[143] Ibid at 524 – 525.
[144] For example, in *Lomagundi Sheetmetal* ibid, the defendant was wielding a roof which ignited a stover. The court found that the possibility of fire occurring was real but not too great, however, if harm did eventuate the harm on the facts would be extensive, and preventing it was so easy. The court held that any prudent person would have taken precaution in the circumstances before commencing works (at 525H).
[145] See Lord Hoffmann's judgment in *Jolley v Sutton* LBC [2000] 1 WLR 1082 at 1091D.

general nature of the harm that occurred and the general manner in which it occurred (the *genus*) was reasonably foreseeable.[146]

134 On current scientific knowledge, it is certainly reasonably foreseeable that the industrial-scale production and burning of fossil fuels, resulting in substantial GHG emissions, contributes directly to climate change and resulting natural disasters.

135 However, Carbon Majors will no doubt argue that this knowledge and awareness is relatively recent and that they cannot be held to have acted negligently in the past when these dangers were still contested and not widely known.

136 There is therefore likely to be significant debate about when such harms were reasonably foreseeable, which would serve as a potential cut-off date for liability. For example, if a Carbon Major could show that these harms were only reasonably foreseeable from the early 2000s (as a hypothetical example), this would potentially immunise them from liability for acts and omissions before that date.

137 The question of the cut-off date for reasonable foreseeability has arisen in many of the ongoing climate loss and damage cases. For example:

[146] See, for example, *The Premier of the Western Cape Province v Loots* NO [2011] ZASCA 32 (25 March 2011) at para 13 (and the cases cited at fn 4). In that case a doctor failed to sterilise a patient who later fell pregnant and developed a rare complication which led to an irreversible brain damage. While this complication was rare, general complications arising from pregnancy were foreseeable. As a result, the doctor was held to be negligent.

137.1 In the ongoing litigation in *Municipalities of Puerto Rico v Exxon Mobil Corp*,[147] sixteen Puerto Rican municipalities are suing a group of Carbon Majors, seeking damages for the 2017 hurricane and resulting losses. The municipalities allege that the defendants are responsible for 40.01% of all global GHG emissions from 1965 to 2017. The plaintiffs specifically allege that the defendants had detailed knowledge, from as early as the 1950s, of the dangers of climate change and that their actions were contributing to this danger.[148]

137.2 In 2022, the Philippines Commission on Human Rights released its final report in an investigation of human rights violations resulting from Carbon Majors' contributions to climate change.[149] In that report, the Commission found, *inter alia*, that a group of 47 investor-owned Carbon Majors "*have known since 1965 that their products, when used as intended, result in various harms to the climate system*".[150]

137.3 In *Native Village of Kivalina v ExxonMobil*,[151] a coastal village hit by a storm sued several Carbon Majors for their contribution to climate change. The plaintiff alleged that knowledge of climate change and its dangers are "*not*

[147] See https://climatecasechart.com/case/municipalities-of-puerto-rico-v-exxon-mobil-corp/.
[148] See the Plaintiffs' Complaint at paras 304 – 327, available at climatecasechart.com/wp-content/uploads/case-documents/2022/20221122_docket-322-cv-01550_complaint.pdf.
[149] *In re Greenpeace Southeast Asia and Others* Case No CHR-NI-2016-0001, available at https://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/.
[150] Final Report p 104 available at https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220506_Case-No.-CHR-NI-2016-0001_judgment-1.pdf.
[151] Native Village of Kivalina v ExxonMobil Corp 696 F 3d 849 (9th Cir 2012).

new", with observations, calculations, and predictions as to its effect dating back as far as the late 1800s.[152]

138 Litigation and investigations have produced a steady accumulation of documents revealing what Carbon Majors knew about climate change and when. The evidence suggests that there was ample scientific evidence on the issues of global warning, and moreover that Carbon Majors knew, from at least the 1960s, that: (a) the burning of fossil fuels releases carbon dioxide which contributes to climate change; (b) this carries an array of harmful consequences for the planet; and that (c) significant temperature changes were almost certain to occur.[153]

139 It would be possible to rely on this evidence in litigation in South Africa. It would be advisable to secure experts to sift through the relevant evidence and to provide a coherent summary for the court, outlining the general scientific knowledge of climate change over the decades, the defendant Carbon Major's specific knowledge of these dangers, and what was reasonably foreseeable, in light of this information.

140 In any trial, the plaintiff will also have the benefit of discovery, requiring the defendant Carbon Major to disclose all documents relevant to the issues in dispute,

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[152] *Native Village of Kivalina v ExxonMobil* at p 11675.

[153] See further https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/; https://theconversation.com/what-big-oil-knew-about-climate-change-in-its-own-words-170642; https://www.theguardian.com/business/2016/apr/13/climate-change-oil-industry-environment-warning-1968.

including all internal records and reports on its state of knowledge of climate harms over time.

141 It bears repeating that "*foreseeability is not as to the particulars but the genus*" of the harm.[154] A wrongdoer can therefore "*only escape liability if the damage can be regarded as differing in kind from what was foreseeable*".[155] Moreover, it is arguable that the "*precise concatenation of events need not be anticipated if the harm is within the general range of what is reasonably foreseeable*".[156]

142 As a result, it would arguably be sufficient to prove that a Carbon Major foresaw or ought reasonably to have foreseen that their actions contributed to the general risk of extreme weather and flooding of low-lying coastal areas in Southern Africa, induced by climate change. It may not be necessary to prove that the precise "*concatenation of events*" in KZN in 2022 was foreseen or reasonably foreseeable.

Preventability

143 Once it is established that a reasonable person would have foreseen the possibility of harm, the question is whether he or she would have taken measures to prevent the occurrence of the foreseeable harm.[157] This again involves a normative value judgment, based on multiple competing considerations.[158]

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[154] Lord Hoffmann in *Jolley v Sutton* LBC [2000] 1 WLR 1082 at 1091D.
[155] *Hughes v Lord Advocate* [1963] AC 837 at 845.
[156] *Stewart v West African Terminals Ltd* [1964] 2 Lloyd's Rep. 371 at 375.
[157] Kruger v Coetzee (note 140 above) 430F – G.
[158] *Gouda Boerdery BK v Transnet Ltd* [2004] 4 All SA 500 (SCA) at para 14.

144 In *Ngubane v SA Transport Services*,[159] the Appellate Division identified four basic considerations which determine whether a reasonable person would have taken steps to prevent the reasonably foreseeable harm:[160]

144.1 the degree or extent of the risk created by the actor's conduct;

144.2 the gravity of the possible consequences if the risk of harm materialises;

144.3 the utility of the actor's conduct; and

144.4 the burden of eliminating the risk of harm.

145 As illustration, if it is alleged that a Carbon Major was negligent from the 1960s to the present, this would require a careful analysis of what a reasonable company in its position could and should have done to address the danger, given the state of knowledge at the relevant time and the available technology and resources.

146 The negligent conduct may also go beyond the mere production of GHG emissions. For example, in *Municipalities of Puerto Rico v Exxon Mobil Corp,* one of the alleged grounds of negligence is that the Carbon Majors failed to collaborate with the international community to forestall, or at least decrease, their GHG emissions.[161] It is alleged that all the defendants were required to contribute to the global effort to mitigate the impacts of climate change by, among things:

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[159] *Ngubane v South African Transport Services* 1991 (1) SA 756 (A).
[160] Ibid at 776H – I.
[161] See Plaintiffs' Complaint (above note 148) at para 597.

146.1 delineating practical policy goals and regulatory structures that would have allowed them to continue their business ventures while reducing GHG emissions and supporting a transition to a lower carbon future;[162] and

146.2 issuing reasonable warnings to consumers, the public, and regulators of the dangers known to them of the unabated consumption of fossil fuel products.[163]

147 To make out a case like this, expert evidence will be required to demonstrate the reasonable precautionary measures available and how the Carbon Major's actions fell short of those requirements.

148 Carbon Majors are likely to argue that they were operating in accordance with all laws, licences, and prevailing industry standards applicable to their operations and that there was no binding legal requirement for them to reduce or offset their GHG emissions.

149 In our law, compliance with a statute or regulation does not *per se* exclude negligence.[164] The test for negligence remains the standard of the reasonable person regardless of the statutory and regulatory requirements involved in a particular case.

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[162] Ibid at para 609.
[163] Ibid at para 666.
[164] See *Geldenhuys v South African Railway and Harbours* 1964 (2) SA 230 (C). There a train collided with a vehicle that was crossing the railway. The train driver did not use his bright lights to warn vehicles that a train was approaching. In terms of the regulations that were applicable at the time, he was required to dim his headlight in passing through the railway station – which is where the collision occurred. The court (at 233B) nevertheless held that he was negligent in the circumstances for having failed to warn of the train approaching.

150 Moreover, there is persuasive English authority for the proposition that reliance on prevailing industry standards cannot succeed in defeating a claim of negligence where *"common sense or newer knowledge*" shows that the prevailing standard "*is clearly bad*".[165] Moreover, where a party "*has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions*."[166] This reasoning would certainly apply to the Carbon Majors, given the emerging evidence of their detailed, specific and long-standing knowledge of the harms.

[165] *Thompson v Smith Shiprepairers (North Shields) Ltd* [1984] 1 All ER 881 at 889, citing Swanwick J in *Stokes v GKN (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 at 1783.
[166] Ibid.

CAUSATION

The test

151 A plaintiff would have to prove, on a balance of probabilities, that the defendant Carbon Major's negligent GHG emissions (and other wrongful acts) are causally linked to the KZN floods and the resulting losses.

152 Causation, in law, turns on two separate inquiries.[167]

152.1 *Factual causation*: whether the Carbon Major's intentional or negligent conduct was the factual cause of the loss.

152.2 *Legal causation*: if factual causation is established, whether the Carbon Major ought to be held liable for the losses, which primarily turns on whether the negligent conduct was linked sufficiently closely to the loss to warrant liability.

153 We begin with a brief background to the rapidly developing attribution science before assessing how our courts would apply the tests for causation to this emerging evidence.

Attribution science and causation

154 There have been significant recent developments in attribution science – "*the branch of science which seeks to isolate the effect of human influence on the climate*

[167] *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) at para 38.

and related earth systems".[168] In their survey of this science and its application in climate litigation, Burger, Wentz and Horton identify four important strands:[169]

154.1 *Climate change attribution*: which seeks to identify the causes of climate change at a global or regional level, primarily by understanding how human activity is driving climate change.

154.2 *Impact attribution*: which looks at whether the changes in a particular area can be attributed to climate change. These changes do not only refer to atmospheric or weather changes, but also relate to the human experience. An example of this may be the negative health impacts that may ensue as a result of a heatwave.

154.3 *Extreme event attribution*: which looks at whether certain extreme events, such as heatwaves or floods, can be attributed to climate change. This substantially overlaps with impact attribution, as it looks at the effects of climate change.

154.4 *Source attribution*: which is concerned with the extent to which anthropogenic activities or entities such as companies contributed to climate change broadly and specific impacts in particular. This branch of attribution science seeks to

[168] Michael Burger, Jessica Wentz & Radley Horton "The law and science of climate change attribution" (2021) 45 Columbia Journal of Environmental Law 57 at 63.
[169] Ibid at 67 – 73, building on the IPCC's categorisation. See, for example, Intergovernmental Panel on Climate Change (IPCC) 2007 *Climate Change 2007: The Physical Science Basis*. Contribution of Working Group 1 to the Fourth Assessment Report of the IPCC, Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

identify and quantify the sources of emissions, as a proportion of global emissions.

155 A claim for damages arising from the KZN floods would involve all four strands of attribution science, with a particular emphasis on the third and fourth. This again would require extensive expert evidence.

156 As already noted, initial studies have already established some link between the KZN floods and climate change. There has not yet been any published research, of which we are aware, that seeks to determine the contribution made by the Carbon Majors to these specific losses.

157 There are also significant causal complicating factors, as acknowledged in the initial reports, including the insufficiency of the state's preparations for and response to this disaster, which potentially contributed to the losses.

158 Extensive work would be necessary to attempt to arrive at a rough quantification of the extent to which one or more Carbon Majors' GHG emissions and other wrongful conduct contributed to KZN floods and resulting losses. This would require experts to:

158.1 Quantify, as far as possible, the targeted Carbon Majors' historical and ongoing GHG emissions;

158.2 Estimate the relative contribution of those GHG emissions to climate change;

158.3 Determine the relative contribution of those GHG emissions to the KZN floods, to the extent that is possible; and

158.4 Attempt to determine the relative contribution that the Carbon Majors' conduct made to the specific harms suffered by individuals, factoring in the other complicating causal factors.

159 Assuming that this detailed, granular scientific work is possible, it will ultimately have to satisfy the legal test for causation, on a balance of probabilities.

160 It is important to note that this is a lower standard of proof than conventional scientific standards. Proof on a balance of probabilities merely requires a court to determine that it is more probable than not that the Carbon Major's actions caused or materially contributed to the resulting harm. Certainty is not required.

Factual causation

161 Climate loss and damage cases are an example of "cumulative causation", in which multiple causative factors contribute to the resulting harm.

162 The traditional "but-for" test for factual causation has always struggled with such cumulative cases.[170] That test asks: had the negligent conduct not occurred, would the plaintiff have suffered the loss? In the case of a negligent omissions, this test asks: would the loss would have occurred had the defendant taken positive, reasonable action?

[170] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700H-I; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F – G.

163 On a strict application of this “but-for” test, it would be all but impossible to show that “but-for” the negligent actions or omissions of one or more Carbon Majors the KZN floods and resulting losses would not have occurred.

164 However, there are at least three alternative routes available in our law to establish factual causation.

165 First, there is the “*flexible*” approach to factual causation, endorsed by the Constitutional Court in *Lee*.[171]

165.1 Mr Lee developed tuberculosis (TB) while in prison and he subsequently sued the Minister of Correctional Services. The authorities were negligent in failing to put in place proper TB controls.

165.2 However, the prevalence of TB in South Africa made it practically impossible to eliminate all risk of contagion, even if reasonable controls were in place.

165.3 As a result, Mr Lee could not show that he would not have contracted the disease "but-for" the negligent conduct of the prison authorities.

166 The Supreme Court of Appeal would have dismissed his claim on that basis. But Mr Lee succeeded in the Constitutional Court. Nkabinde J, writing for the majority, favoured a more flexible approach to the “but-for” test, holding that:

166.1 The test for factual causation does not require the “substitution” of lawful, non-negligent conduct for unlawful, negligent conduct. And even if substitution

[171] *Lee* (note 167 above).

was necessary, "*our law does not require evidentiary proof of the alternative, but merely substitution of a notional and hypothetical lawful, non-negligent alternative*."[172]

166.2 Common sense had to prevail over "*strict logic"* as the test for causation "*does not require the equivalent to a control sample in a scientific investigation*".[173]

166.3 The test postulated by the Court was simply to ask "*whether the factual conditions of Mr Lee's incarceration were a more probable cause of his tuberculosis, than that which would have been the case had he not been incarcerated in those conditions*".[174]

166.4 It was enough, the majority held, "*to satisfy probable factual causation where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures*."[175]

167 The precise meaning and scope of this flexible test remains a matter of some controversy. Nevertheless, the Constitutional Court has explicitly endorsed an approach where the "probable reduction in risk" of loss may suffice to establish factual causation.[176]

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[172] Ibid at para 43.
[173] Ibid at para 49.
[174] Ibid.
[175] Ibid at para 60.
[176] As explained in Cameron J's minority judgment at para 105.

168 On this approach, a plaintiff could potentially succeed by showing that if a Carbon Major had taken reasonable, non-negligent steps to reduce its GHG emissions (or refrained from other wrongful conduct), there would have been a probable reduction in the risk of the KZN floods and resulting losses occurring, or occurring with the same intensity.

169 On the *Lee* approach, this would be assessed according to "*common sense*", rather than strict scientific logic. But those common sense judgments cannot be made in a vacuum. Given the complexity of the causal chain from GHG emissions to losses, detailed expert evidence and scientific modelling would be highly relevant and necessary to establish this probable reduction in risk.

170 Third, there is the "*material contribution*" test, which has been endorsed by the Constitutional Court as an off-shoot of the flexible, *Lee* approach to factual causation.

171 The "*material contribution*" test has long been recognised as part of our law, although it has often been eclipsed by rigid application of the "but-for" test. For instance, in the Appellate Division's 1977 judgment in *Skosana*,[177] the Court acknowledged that factual causation can be established where the "*negligent act or omission caused or materially contributed to … the harm giving rise to the claim*".

172 In *AK v Minister of Police,*[178] decided in April 2022, the Constitutional Court applied this material contribution test, building on *Lee*.

[177] *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F-G:
[178] AK (note 112 above).

172.1 The appellant, Ms AK, was attacked, robbed, repeatedly raped, and held captive for many hours in a secluded area of bushes and dunes near King's Beach in Gqeberha. The police conducted a search of the area but, through multiple errors and missteps, failed to locate her.

172.2 Ms AK sued for damages, based on the police's negligent failure to conduct a proper search of the area and their further negligence in failing to investigate the crime adequately. She argued that these failures prolonged her ordeal and contributed to her trauma, which led to severe psychiatric injuries. The evidence established that had the police conducted a proper search, this would likely have reduced the duration of the attack by approximately four and a half hours.

172.3 The Minister argued that factual causation was not established because the horrific crime itself was the proximate cause of her trauma and, even if the police had taken all reasonable measures to locate her, the harm would not have been "*altogether eliminated*". Their negligence did not cause the attack and the trauma, the Minister argued, but, at best, contributed to its duration.

172.4 The Constitutional Court rejected this argument, relying on the more flexible approach endorsed by *Lee*. Factual causation, the majority held, did not require proof that the harm would have been "altogether eliminated".[179]

[179] Ibid at para 100.

172.5 Unlike *Lee*, Ms AK could not show that the police's negligent conduct made a probable contribution to the risk of the original harm-causing event. The initial attack and kidnapping would have occurred independently of the police's negligent response.

172.6 Nevertheless, it was sufficient, the Court held, to show that the police's negligence made a "*material contribution"* to Ms AK's trauma and the resulting psychiatric injuries. That was established on the expert evidence.[180]

172.7 It was further unnecessary, the Court held, to "*scientifically quantify the measure of damage suffered as a result of the negligent search and investigation*".[181]

172.8 On that basis, the Constitutional Court upheld the High Court's order, which held the Minister liable for 40% of Ms AK's proven damages.[182] The High Court and the Constitutional Court did not, however, explain how they arrived at this apportionment.

173 On this approach, it would arguably be sufficient to show that a Carbon Major's negligent conduct made a material contribution to the intensity and duration of the KZN floods and the resulting losses to individual plaintiffs. This would be so even if a plaintiff was unable to prove that the Carbon Major's conduct was the "*but-for*" cause of the floods or the probable risk of flooding occurring.

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[180] Ibid at paras 104 – 112.
[181] Ibid at para 112.
[182] Ibid.

174 What is meant by a "*material contribution*" and how is this contribution to be quantified? There is no clear answer in our law, but these questions have received considerable attention in English law, where the material contribution test is far more developed.[183]

175 English courts have consistently applied the "*material contribution*" test to cases of cumulative causation. Examples have included industrial deafness,[184] caused by cumulative exposure to noise in multiple workplaces, and silicosis, resulting from repeated inhalation of dust from both negligent and non-negligent causes, over time.[185]

176 The English courts have held that a material contribution is established, so long as the negligent acts or omissions contributed to the harm to an extent that is more than *de minimis* – trivial or of no significance. In *Bonnington Castings*,[186] Lord Reid observed that "*this is a question of degree"* and that *"any contribution which does not fall within [the de minimis principle] must be material."* There could not be something *"too large to come within the de minimis principle, but yet too small to be material.*"[187] That sets a low bar to materiality.

177 As to the quantification of the contribution and resulting liability, the English courts have held that this does not require any precise scientific measurement, but is instead a "*rough and ready*" exercise, shaped by broad considerations of fairness

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[183] *Sienkiewicz v Grief* [2011] 2 AC 229 at paras 16 – 17.
[184] *Thompson v Smiths Shiprepairers* [1984] 1 QB 405.
[185] *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.
[186] Ibid at p 618 – 619.
[187] Ibid.

and justice.[188] That appears to be consistent with the robust approach adopted by the Constitutional Court in *AK*.

178 Establishing a material contribution would again require expert evidence, providing a rough-and-ready assessment of the extent of the Carbon Major's contribution to the risk and intensity of the KZN floods and resulting losses. The Carbon Major's overall contribution to global GHG emissions may be a useful starting point, but this may need to be discounted to factor in other causative factors.

179 The ongoing litigation in *Lliuya*, involving the Carbon Major RWE, provides an example of this attempt to determine liability based on relative contributions to GHG emissions. There the plaintiff has relied on the Carbon Majors report in seeking to hold RWE liable for 0.47% of his damages, which is calculated as the proportion of the company's estimated contribution to global GHG emissions.[189]

180 Fourth, there is the possibility of developing the common law to recognise further tests for factual causation. Two potential developments, which have been adopted in other jurisdictions, are:

180.1 The "*negligent exposure to risk*" test, developed by the House of Lords in *Fairchild.*[190] On that approach, which has thus far been confined to cases of mesothelioma,[191] causation is established by showing that negligent conduct

[188] *Sienkiewicz* (note 183 above) at para 17. See further *Holtby v Brigham Cowan (Hull) Ltd* [2000] ICR 1086 and *Thompson* (note 184 above).
[189] See further Tigre and Wawrinke-Singh (note 1 above).
[190] *Fairchild v Glenhaven Funeral Services Ltd and Others; Fox v Spousal (Midlands) Ltd; Matthews v Associated Portland Cement Manufacturers (1978) Ltd and Others* [2002] UKHL 22.
[191] An aggressive cancer of the lungs that can be caused by a single fibre of asbestos.

exposed a person to risk, even if it cannot be determined what caused the resulting losses. The defendant is then held liable in proportion to their negligent contribution to the risk. For instance, if the defendant's conduct increased the risk of the harm arising by 20%, they are held 20% liable for the resulting damages.

180.2 The "*market share*" approach, first developed in California to address harms caused by defective products. This test is applied where it cannot be determined which of a range of manufacturers were responsible for the specific product that caused the loss.[192] On that approach, defendants may be held liable based on their respective market share. For instance, a producer responsible for 10% of the products on the market would be held 10% liable.

181 These two possibilities would require a plaintiff to present evidence and argument justifying a development of the common law.[193] Any development would no doubt be fiercely resisted by any defendant Carbon Major, which would likely require final resolution in the Constitutional Court.

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[192] See *Sindell v Abbott Laboratories* 26 Cal 3d 588 (Cal 1980).
[193] On the requirements for developing the common law, see *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 16.

Legal causation

182 The test for legal causation serves as a normative brake on potentially limitless liability. As the Constitutional Court recognised in *Lee*, without this second leg to the test "*the consequences of an act or omission might stretch into infinity*".[194]

183 In *De Klerk v Minister of Police*,[195] Theron J summarised the Court's preferred flexible test, which is overlaid with constitutional norms:

> "*Legal causation involves a flexible test that may consider a myriad of factors. … Traditionally, courts oscillated between different tests for ascertaining legal causation. The traditional criteria are, among others, reasonable foreseeability, adequate causation, whether a novus actus interveniens intrudes, and directness. But each of these tests was not without its problems and could lead to results contrary to public policy, reasonableness, fairness and justice. Hence, in Mokgethi, the then Appellate Division adopted an 'elastic' approach to legal causation. This approach is sensitive to public-policy considerations and aims to keep liability within the bounds of reasonableness, fairness and justice. … Any attempt to detract from the flexibility of the test for legal causation should accordingly be resisted.*
>
> *The traditional tests for legal causation remain relevant as subsidiary determinants. These traditional criteria should be applied in a 'flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable'. It follows that the traditional criteria must be treated as being subsidiary to the considerations of public policy, reasonableness, fairness and justice. It is trite that these considerations of public policy are grounded in the Constitution and its values."*
> (Emphasis added)

184 As a result, there is a considerable overlap between the policy-laden wrongfulness inquiry and the test for legal causation.

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[194] *Lee* (note 167 above) at para 68.
[195] *De Klerk* 2021 (4) SA 585 (CC) at para 29 – 30. Citing *Mashongwa v Passenger Rail Agency South Africa* 2016 (3) SA 528 (CC) para 68.

185 The question of “remoteness” remains a highly relevant factor, which is concerned with the reasonable foreseeability of the harm.[196]

186 The more distant the harm from the conduct, geographically or temporally, the more difficult it will be to establish legal causation, unless the harm was foreseen or reasonably foreseeable. This question of foreseeability is therefore a recurring theme, which we have addressed above.

187 Legal causation may be broken by a new intervening event – a *novus actus interveniens* – which is said to break the chain of causation, making it unfair to hold the defendant liable for the resulting losses.

188 In any loss and damage claim, Carbon Majors are likely to invoke a range of alleged intervening events, including the alleged negligence of the national, provincial and municipal governments in failing to take adequate steps to respond to the KZN floods. They may also argue that unconstrained development of housing and informal settlements on floodplains and unstable slopes was a further intervening events, which ought to absolve them of liability.

189 Whether or not these defences will succeed will depend on the evidence of reasonable foreseeability. It is arguably foreseeable that those worst affected by climate-linked disasters are the most vulnerable, who live in areas where governments are least equipped to address these disasters. In those contexts, state dysfunction, incapacity, and the unconstrained development of informal housing

[196] See also *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound)* [1961] AC 388 (*Wagon Mound No. 1*); *The Wagon Mound (No. 2)* [1967] 1 AC 617, at 643.

would arguably not qualify as new intervening events. Once again, expert evidence on this issue would be helpful, including an assessment of how climate change-linked disasters systematically erode state capacity and the ability to respond to such disasters. Evidence of a Carbon Major's own internal reports and assessments on developing countries' capacity to conduct climate change adaptation and response measures would also be highly revealing.

190 It is also well-established that intervening omissions are generally less likely to constitute a *novus actus interveniens*. This is so even where the intervening act consists of a negligent failure to prevent damage caused by the defendant's wrongdoing.[197] Thus, state failure and dysfunction, alone, would not necessarily be sufficient to break the chain of causation.

191 The vulnerable position of the victims of the floods and their desperate circumstances would also not, by themselves, be sufficient to break the chain of causation. Our law has long recognised that a negligent party takes their victim as they find them, as reflected in the so-called "*thin-skull*" rule.[198] Pre-existing physical and psychological vulnerabilities do not amount to causation-breaking events. By extension, a victims' poverty, their lack of suitable housing, and inability to make proper preparations for flooding should, arguably, be regarded as irrelevant.

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[197] See, for example, *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507 at 533.

[198] See *Clinton-Parker v Administrator, Transvaal Dawkins V Administrator, Transvaal* 1996 (2) SA 37 (W) at 64 – 65; *Wilson v Birt (Pty) Ltd* 1963 (2) SA 508 (D) at 516-517, citing *Smith v Leech Brain & Co. Ltd* (1961) 3 All ER 1159 (QBD) at 1161: *"It has always been the law in this country that a tortfeasor takes his victim as he finds him. … 'If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.'"*

192 Ultimately, considerations of public policy, fairness and justice will play the most decisive role. In our view, it would be very difficult for a Carbon Major to convince a South African court that it is fair, just and reasonable to absolve it of all liability due to the poverty of its victims, who have contributed the least to climate change.

REMEDIES AND APPORTIONMENT

193 A plaintiff could seek a range of remedies in delict, including:

193.1 A declaration of liability;

193.2 Damages; and

193.3 Interdictory relief (subject to the jurisdictional issues addressed above, where the Carbon Major is a foreign *peregrinus*).

194 In bringing a damages claim, plaintiffs will be bound by the "once-and-for-all" rule. This means that a plaintiff must claim in one action all damages, including damages already sustained and all future anticipated losses, flowing the same cause of action.[199] For example, a plaintiff could not claim, in one action, the losses suffered due to the destruction of their property and personal injuries suffered and, in a separate action, claim the future loss of income as a result of those injuries.

195 We are specifically asked to advise on how damages may be apportioned between defendants and other potential wrongdoers.

196 In a delictual claim involving alleged joint wrongdoers, a plaintiff is entitled to pick their targets from a group of joint wrongdoers and is not required to join all wrongdoers in a single action.[200]

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[199] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835C – D.
[200] *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd T/A Nedbank* 1998 (2) SA 667 (W) at 673; Harms *Civil Procedure in the Superior Courts*, Last Updated: February 2019 - SI 64 at B10.2 Direct and Substantial Interest.

197 In terms of the Apportionment of Damages Act (Apportionment Act),[201] joint wrongdoers are jointly and severally liable for the losses, meaning that a plaintiff can claim the full amount of its damages from any one or more of the potential joint wrongdoers.[202]

198 A joint wrongdoer that is held liable for the full amount of the damages, and has paid those damages in full, may then elect to pursue claims against other joint wrongdoers for their contribution to these damages, provided they have complied with the procedural requirements.[203]

199 This means that a plaintiff seeking damages arising from the KZN floods could notionally select a single Carbon Major or a targeted group of Carbon Majors as defendants.

200 The plaintiff would not be required to join all Carbon Majors, other major GHG emitters, or other entities that may have contributed to the losses. Provided that these actors are indeed "joint wrongdoers", a plaintiff could, in principle, seek to hold a single Carbon Major or group of Carbon Majors liable for the full extent of the losses.

201 In terms of section 2(1) of the Apportionment Act, a "joint wrongdoer" refers to "*two or more persons [who] are jointly and severally liable in delict to a third person [the*

[201] 34 of 1956.
[202] Apportionment Act, section 2(6)(a).
[203] Ibid.

plaintiff] <u>for the same damage</u>". This encompasses two separate categories of wrongdoers under the common law:

201.1 Joint wrongdoers (in the strict sense), who jointly commit a delict by acting in pursuance of a concerted purpose or in furtherance of a common design; and

201.2 Concurrent wrongdoers, whose independent wrongful acts have combined to produce the same damage or harm.[204]

202 This definition excludes "separate" wrongdoers, whose wrongful acts have caused separate harmful consequences and damages.[205] For example, a person suffers physical injuries in an assault and the next day is attacked by a separate assailant in an unrelated altercation, resulting in further injuries. In such cases, each separate wrongdoer is separately liable for the damage caused by their independent, wrongful conduct.[206]

203 Much will therefore depend on the characterisation of the losses suffered by individual plaintiffs and the causal sequence of how those losses arose. If it can be shown that those losses arose as the "same damage", rather than a series of separate damage-causing events, the plaintiff would be entitled to rely on joint and several liability.

204 As a hypothetical example, where a family's house was swept away in a mudslide triggered by the flood, destroying their property, and leaving the family members

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[204] *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd T/A Nedbank* 1998 (2) SA 667 (W) at 671; *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA) at para 10.
[205] *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) at 622B-D.
[206] Ibid.

with injuries, that loss is the “same damage”, albeit caused by a combination of cumulative factors. By contrast, where a family member is later killed in a random act of violence, while queuing for food parcels, it would be difficult to characterise that loss as part of the “same damage", even if connected to the floods.

205 A Carbon Major, faced with the prospect of paying the full extent of a plaintiff’s losses as a joint wrongdoer, has three potential options:

205.1 First, the Carbon Major may issue a notice, in terms of section 2(2) of the Apportionment Act, to one or more other joint wrongdoers, which amounts to a notification that if it is held liable it will bring further proceedings against those other wrongdoers seeking a contribution towards the damages. Any party receiving that notice may then intervene as a co-defendant, if they so choose.

205.2 Second, the Carbon Major may issue third-party notices to other joint wrongdoers, in terms of Uniform Rule 13, which has the effect of joining them in the proceedings.

205.3 Third, the Carbon Major may do nothing and contest the claim alone, believing that it can defeat the claim on its own merits.

206 It is therefore possible that a Carbon Major may seek to involve organs of state and other Carbon Majors, either as co-defendants or third parties. Whether a Carbon Major would resort to that strategy would depend on a range of strategic factors. On the one hand, this may delay the proceedings and drive up the costs of the litigation,

discouraging the plaintiffs from pursuing the claim. On the other, it could backfire, resulting in the Carbon Major fighting on multiple fronts, both defending itself against the plaintiffs and third parties.

207 It is not possible, in the abstract, to predict which of these scenarios is more probable or how the Carbon Major would respond to a summons. All that we can advise is that there is a risk that other parties would be brought into the dispute.

208 Where two or more joint wrongdoers are joined, a court may order them to be jointly and severally liable.[207] In the unlikely event that a court is satisfied that all the joint wrongdoers have been joined, it may apportion damages between those joint wrongdoers.[208]

209 In cases of contributory negligence, where the plaintiff is also at fault – such as building a home on unstable land, knowing of the risk of landslides – section 1 of the Apportionment Act is clear that this contributory fault is not sufficient to defeat a claim. However, a court may reduce the defendant's liability, to the extent that it deems just and equitable, having regard to the plaintiff's degree of fault.

[207] Apportionment Act, section 2(8)(a)(i).
[208] Apportionment Act, section 2(8)(a)(ii).

CONCLUSION

210 In this opinion, we have mapped significant legal, procedural, and evidential issues that would determine the viability of a delictual claim, against a foreign Carbon Major, in a South African court, arising from the 2022 KZN floods.

211 In what follows, we briefly summarise the views and advice set out above.

212 *On the procedural and technical issues*:

212.1 *Jurisdiction:* In the case of a foreign Carbon Major, that has no registered office in South Africa, it would be necessary to attach assets located in South Africa to found or confirm jurisdiction. This would require an initial *ex parte* application for attachment before issuing summons. The mere presence of a Carbon Major's subsidiary in South Africa would likely not be sufficient to establish jurisdiction over the parent company.

212.2 *Foreign act of state doctrine and sovereign immunity:* Claims against foreign state-owned Carbon Majors are likely to be met with a defence based on the foreign act of state doctrine and / or sovereign immunity. As a result, it is advisable to concentrate on publicly listed or privately held Carbon Majors in identifying potential defendants.

212.3 *Standing and procedures:* South Africa's relatively relaxed standing requirements would entitle any person who alleges that they have personally suffered harm as a result of a Carbon Major's conduct to sue for damages in delict. Those claims could be brought as individual actions, group actions, or

class actions. The relative costs and benefits of these different procedures would need to be carefully assessed in preparing any litigation.

212.4 *Choice of law:* In claims against foreign Carbon Majors, the "choice of law" question will depend heavily on the facts and circumstances. There is potentially a strong argument for applying South African law, as the *lex loci deliciti commissi*, based on the "*place of damage*" principle.

212.5 *Cause of action:* Any claim in delict could be paired with an alternative claim for constitutional damages, in the event that the delictual claim fails or is unavailable. Constitutional damages are available where this is the "*most appropriate*" remedy. There is also uncertainty as to whether constitutional damages are available in claims against foreign entities, with no presence in South Africa.

213 *On the merits of a delictual claim*:

213.1 *Parent company liability and subsidiary conduct*: It is unlikely that a Carbon Major parent company could be held vicariously liable for the actions of its subsidiaries, except in exceptional circumstances. A parent company's liability would instead be established by showing its independent negligence, including in its control over its subsidiaries and wider group operations.

213.2 *Wrongfulness*: Where the Carbon Major's positive conduct has resulted in damage to persons and property, wrongfulness will be presumed. In all other cases, including omissions and statements, wrongfulness must be proved, by

showing that it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct, having regard to public and legal policy informed by constitutional values.

213.3 *Fault*: Proving fault, in the form of negligence, will require extensive evidence showing that : (a) the risk of harm was foreseen by a Carbon Major or was reasonably foreseeable; (b) a reasonable person in the position of that Carbon Major would have taken steps to prevent the harm from occurring; and (c) the Carbon Major failed to take those reasonable steps.

213.4 *Causation*: On the "flexible" approach favoured by the Constitutional Court, it may be possible to establish factual causation with expert evidence and more granular attribution science. This would require extensive evidence showing either that the Carbon Major's negligent conduct made a "material contribution" to the losses suffered in the KZN floods, or that non-negligent conduct would have resulted in a "probable reduction" in the risk of those losses. The question of legal causation will depend heavily on evidence of the foreseeability of the harms.

214 *On remedies:*

214.1 *Available remedies:* A plaintiff could seek a range of remedies in delict, including a declaration of liability, damages, and interdictory relief.

214.2 *Apportionment and joint wrongdoers*: It is, in theory, possible to target a single Carbon Major or a select group of Carbon Majors, as joint wrongdoers,

which are jointly and severally liable for all losses. Whether they are properly characterised as joint wrongdoers will depend on the nature of the losses in issue and how those losses arose. A Carbon Major defendant could potentially seek to join other joint wrongdoers, including organs of state, in the proceedings, either as co-defendants or as third parties.

215 In our view, there is potential for a viable loss and damage claim in the law of delict, against a foreign Carbon Major, in a South African court.

216 Constructing such a claim will require extensive work to overcome the legal, procedural, evidential, and logistical issues that have been outlined in this opinion.

217 While it is not possible to form a clear assessment of the prospects of success at this early stage, the potential viability of such a claim more than warrants the ongoing work and investigation to build prospective cases.

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