THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 916/2018

In the matter between:

ESORFRANKI (PTY) LTD **APPELLANT**

and

MOPANI DISTRICT MUNICIPALITY **RESPONDENT**

Neutral citation: *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* (Case no 916/2018) [2021] ZASCA 89 (24 June 2021)

Coram: PETSE AP and NICHOLLS and MBATHA JJA and GOOSEN and POYO-DLWATI AJJA

Heard: 19 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 24 June 2021.

Summary: Constitutional law – procurement of goods and services by organ of state – delictual action for damages for loss of profits by an unsuccessful tenderer – claim founded on alleged breach of constitutional duty by organ of state subverting dictates of s 217 of the Constitution – organ of state deliberately manipulating selection process in order to advantage a tenderer that did not meet the tender requirements – *held* that appellant had failed to establish legal causation of loss – appeal dismissed with costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Makgoka J, sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

JUDGMENT

Goosen AJA (Petse AP concurring):

[1] This appeal concerns the liability, in delictual damages, of a municipality to an unsuccessful tenderer where the award of the tender is vitiated by fraudulent or dishonest conduct.

[2] The appellant, Esorfranki Pipelines (Pty) Limited (Esorfranki), instituted a claim for damages, based on a loss of profit, against the Mopani District Municipality (Mopani); Tlong Re Yeng CC (Tlong); and Base Major Construction (Pty) Ltd (Base Major) as first, second and third defendants respectively. It is common cause that Tlong and Base Major had formed a joint venture (the Joint Venture) for the purposes of securing and executing a contract offered by way of tender. As the successful tenderer, the Joint Venture was awarded a contract with Mopani.

[3] Esorfranki's claim for damages against Mopani and the Joint Venture was founded upon the allegation that the award of the tender was as a result of wrongful and intentional conduct, amounting to dishonesty and fraud. It was alleged that the decision of Mopani to award the contract to the Joint Venture was vitiated by bias, bad faith, ulterior purpose and dishonesty. In consequence, Esorfranki was alleged to have suffered damages based on the profit it would have earned had the contract been awarded to it as the successful tenderer as it should have been.

[4] On 29 April 2015 judgment was granted by default against the Joint Venture members for payment of damages, interest and costs. The relief claimed against Mopani was postponed sine die. The high court trial against Mopani commenced on 15 May 2017 in respect only of the issue of liability. Makgoka J dismissed the claim on 17 January 2018. The high court subsequently refused leave to appeal. The appeal therefore comes before this Court with leave having been granted on petition.

Background and litigation history

[5] In August 2010 Mopani invited tenders for the construction of a water pipeline between the Nandoni Dam, Thohoyandou and the Nsami water treatment works in Giyani (the first award). In October 2010 the contract was awarded to the Joint Venture. Esorfranki and another unsuccessful tenderer, Cycad Pipelines (Pty) Ltd (Cycad) brought an urgent application in the Gauteng Division of the High Court, Pretoria to interdict the implementation of the award pending further review relief. On 27 January 2011, Preller J granted an order by consent between the parties, setting aside the award of the tender and directing that the tender be re-adjudicated.

[6] In February 2011, the tender bids were re-adjudicated and Mopani again awarded the contract to the Joint Venture (the second award). On 1 March 2011, Esorfranki commenced an urgent application to interdict implementation of the award pending the outcome of review proceedings. On 22 March 2011, Fabricius J granted an interim order interdicting and restraining Mopani from implementing the contract.

[7] What followed the grant of the interim order was a series of applications. In response to a failure to comply with the order of Fabricius J, Esorfranki commenced contempt proceedings. Mopani brought an application for leave to appeal the interim order. When the hearing of the latter application was delayed, Esorfranki brought an interlocutory application in terms of rule 49(11) of the uniform rules. Esorfranki sought an order suspending all operations and actions by the Joint Venture pending the finalisation of the application for leave to appeal. All the while the Joint Venture proceeded with the works. Webster J granted an order in terms of rule 49(11) on 1 April 2011. That order was extended, on various occasions, to 10 May 2011, when the application for leave to appeal was heard. Leave to appeal the order of Fabricius J was refused on 11 May 2011. Mopani thereupon, on 19 May 2011, filed a petition for leave to appeal the interim order with this court. When no undertaking was provided in respect of the continuation of the contract works, Esorfranki commenced a second rule 49(11) application to stay the implementation of the contract. An interim order was granted on 24 May 2011, pending the hearing of the rule 49(11) application.

[8] On 31 May 2011, when the second rule 49(11) application came before De Vos J certain undertakings given by Mopani and the Joint Venture,

effective until 10 June 2011, were made orders of court. The hearing of the application was postponed to that date. It was then further postponed. On 24 June 2011 De Vos J discharged the order incorporating the undertakings and postponed the rule 49(11) application sine die.

[9] Since the implementation of the tender contract was proceeding, Esorfranki launched a third interim interdict application. This was heard by Kollapen J on 6 July 2011. On 8 July, Kollapen J granted the order. Despite this order the implementation of the contract proceeded. A further contempt application was heard by Jordaan J on 19 July 2011 when an order was granted by consent.

[10] On 2 August 2011, this court dismissed the application for leave to appeal against the interim order granted by Fabricius J. The respondents then filed an application for leave to appeal with the Constitutional Court on 24 August 2011. They continued, in the light thereof, to implement the contract. On 6 September 2011, Tuchten J granted a further interdict restraining implementation of the contract. The Constitutional Court thereafter dismissed the application for leave to appeal.

[11] The judgment in the review application which Esorfranki had commenced in March 2011 was delivered by Matojane J on 29 August 2012.[1] The learned Judge issued an order, inter alia, in the following terms:

'1. The tender process is declared illegal and invalid and is set aside.
2. The municipality is ordered to independently and at the Joint Ventures costs verify that all

[1] Both Esorfranki and Cycad had commenced review applications claiming substantially similar relief. The two applications were consolidated for hearing purposes.

the work has been done according to specifications and that the Joint Venture does all the necessary remedial work and work is completed as soon as possible in terms of the agreement.

3. Each party is ordered to pay its own costs.'

[12] The learned Judge also made an order that Esorfranki should pay the costs of Mopani's attorney, a Mr Mahowa, who had been joined, on a punitive scale. Esorfranki and Cycad obtained leave to appeal against the remedy (principally paragraphs 2 and 3 of the high court order set out in the preceding paragraph) to this Court. Matojane J denied Esorfranki and Cycad their costs on the basis that there was evidence of collusion between them in the manner in which they had conducted the litigation. He also found that they had sought to induce the award of the tender to Esorfranki, in an improper manner.

[13] The appeal against the order of Matojane J was heard on 4 March 2014 and judgment was delivered on 28 March 2014.[2] This court upheld the appeal against paragraphs 2 and 3 of Matojane J's order. It set those orders aside and substituted them. The relevant portion of the substituted order reads as follows:

'(a) Any contract entered into between [Mopani] and the [Joint Venture] pursuant to the award of the tender to the respondents for the construction of a pipeline between the Nandoni dam and the Nsami water treatment works (Nandoni to Giyani Pipe Project; project number LPR018), is declared void *ab initio* and is set aside.

(b) [Mopani] is ordered to formally approach the Department of Water Affairs within seven days of the granting of this order to request that Department to do the following:

(i) To take such steps as may be necessary to determine the extent of the works necessary to perform remedial work and to complete the construction of the

[2] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA).

pipeline and the other works as contemplated in the aforesaid tender, for purposes of publishing a tender for the said remedial work and the completion of the works;

(ii) To prepare and publish an invitation to tender for the performance of the remedial work and completion of the works as aforesaid;

(iii) To evaluate and adjudicate all bids received, and to make an award in respect of such invitation to bid.'

[14] It is necessary to touch briefly on Matojane J's finding regarding the conduct of Esorfranki and Cycad. This is so because my colleague Nicholls JA accords some weight to Matojane J's finding in the context of relevant public policy considerations at play in relation to the element of wrongfulness.[3] The reliance is, with respect, misplaced.

[15] This court rejected Matojane J's finding on the basis that there were no facts to support the finding. The judgment records the following:[4]

'The finding of the High Court that the parties were to pay their own costs in respect of the relevant applications was essentially made on the basis of what the court described as the "unreasonable and unconscionable manner in which Esorfranki and its attorney including Cycad conducted this litigation". It found that the appellants made themselves guilty of collusion. That finding is not supported by the facts. Esorfranki and Cycad are separate legal entities, they separately submitted tenders, instituted legal proceedings and instructed separate firms of attorneys to act on their behalf. The mere fact that they were the joint beneficiaries of a tender awarded to them in another province,[5] and that there may have been similarities in the papers filed by them in the present proceedings, does not support a finding of collusion, the import of which after all is the presence of dishonesty. There is

[3] See para 95 below.
[4] Ibid at paras 29–30.
[5] This is a reference to a tender which formed the subject matter of litigation in the Kwa-Zulu Natal Division of the High Court which is to be found in paragraph 47 of Matojane J's judgment and is cited by Nicholls JA at para 94 hereunder.

nothing untoward in one litigant aligning itself with another and co-operating in the quest to achieve a particular result in legal proceedings.'

The trial action in the high court

[16] As stated earlier, the trial commenced before Makgoka J on 15 May 2017. It proceeded only in respect of the liability of Mopani. At the commencement of the proceedings counsel for Esorfranki commenced with an opening address, as is customary. I shall return to this later in this judgment since it featured prominently in argument before this Court. For present purposes it suffices to record that counsel, with the consent of Mopani's counsel, submitted a bundle of documents which comprised the affidavits deposed to on behalf of Esorfranki in the review application heard by Matojane J. The bundle also included affidavits which had been filed in the rule 49(11) applications.

[17] It was pointed out that each of the deponents to the affidavits would be called as witnesses for the purposes of confirming their respective affidavits so that the content of the affidavits would serve as evidence in the trial. The witnesses would be available to be cross-examined should counsel for Mopani wish to do so. In consequence of this, counsel who appeared for Mopani at the trial indicated that it would not be necessary for each of the witnesses to be called. The affidavits could be received as evidence before the trial court. I shall return to this aspect since, before this court, there was some debate about the status of the affidavits as served before Makgoka J.

[18] The upshot of the agreement was that Esorfranki submitted the affidavits and thereupon closed its case. Mopani in turn closed its case without tendering any evidence before the trial court.

The findings of the high court

[19] Makgoka J dismissed Esorfranki's action against Mopani with costs. The learned Judge held that a declaration that Mopani is liable to Esorfranki in damages must, necessarily, be preceded by a finding that Esorfranki would have been the successful bidder. This issue, it was held, was *res judicata* as between the parties inasmuch as the review court and this Court on appeal were not persuaded to declare Esorfranki the successful bidder. Consequently, the learned Judge held that he was bound by this court's findings and that this was decisive of the matter.

[20] Notwithstanding his conclusion, the learned Judge still considered the question of legal causation. In this regard the court said:

'…it is instructive that neither this court nor the Supreme Court of Appeal made findings of fraud against the municipality. Those findings were made against the joint venture. The municipality was criticized, warrantably so, for its bias towards the joint venture and bad faith in adjudicating the tender. Indeed the municipality's conduct is reprehensible. But the finding of bad faith, dishonesty, or ulterior purpose does not without more, give rise to delictual liability, especially in light of the Supreme Court of Appeal declining to make an order of substitution.'

[21] The high court went on to find that the relief granted by this Court, namely the order requiring the advertisement of a tender in respect of remedial work (under the auspices of the Department of Water Affairs), effectively afforded Esorfranki another opportunity to submit a bid. Since Esorfranki did

submit a bid, albeit unsuccessful, this constituted a *novus actus interveniens*. Accordingly its claim was dismissed.

The issues on appeal

[22] In the light of the judgment of the high court, several issues in this case require consideration. The first of these concerns the nature and effect of the evidence which served before the trial court. The second relates to the findings of this Court in the review appeal. These are to be considered against the backdrop of the doctrine of *res judicata*. The third issue concerns the question of legal causation. This will require consideration of the finding in relation to *novus actus interveniens* made by the trial court. The fourth issue concerns the question of the relevant policy considerations which bear upon imposition of delictual liability in the context of tender impropriety.

The status of the affidavits before the high court

[23] There was some debate before this Court as to the effect of the admission of the affidavits filed on behalf of Esorfranki in the review application. As I understood the position of counsel for Mopani, it was that the agreement meant no more than that the affidavits could be received as being the affidavits properly deposed to by each deponent. The record of the opening address, however, does not support such a construction. To the contrary, it is clearly recorded that the affidavits were received as evidence before the trial court. It was accepted by Mopani that the deponents need not be called since there was to be no cross-examination of them. It was on this basis that Esorfranki closed its case. It was accordingly simply wrong to suggest that Esorfranki did not present evidence to support its pleaded case. The evidence it presented in the trial was, by reason of the failure to cross-

examine witnesses or to lead evidence in rebuttal, uncontested. As will be seen hereunder this is of considerable significance in the outcome of the appeal.

[24] The trial court was alive to the fact that the contents of the affidavits were properly before it as evidence. The court however took the view that the affidavits added 'nothing in terms of evidentiary value' to the determination of what it considered the crisp issue before it. The crisp issue was described as whether 'in the circumstances of the case, the municipality should be held delictually liable to Esorfranki'. That issue, as has been indicated above, concerns several interrelated questions. In the light of this approach to the affidavits the trial court determined that 'no particular regard will be had to the contents of those affidavits outside the parameters considered by the court in the review proceedings'.

[25] For reasons which will become apparent hereunder, the trial court erred in its approach to the evidence which was properly before it. The trial court took this view of the evidence given its approach to the question of *res judicata*. In consequence the trial court did not determine whether the evidence before it established the pleaded cause of action upon which Esorfranki relied. I shall return to this question later in this judgment.

[26] Before turning to the first issue, namely that of *res judicata*, it is appropriate to make one further observation about the evidence before the trial court. Both Nicholls JA and Mbatha JA express some reservation about the evidence before the trial court because of the manner in which it was presented. I am, however, respectfully, unable to discern where the difficulty arises. The fact that the same evidence, consisting of allegations of fact, was

presented by Esorfranki in the review (and related applications) as it presented at the trial is of no moment. The same facts may support different causes of action. Whether the proven facts, ie those accepted by a court, allow for the conclusion by that court that a party has discharged its onus, is a matter of adjudication according to the principles of the law of evidence.

[27] There is no procedural impediment to the reception of evidence, by a trial court, by way of affidavit. If the parties agree that facts may be placed before a court by way of affidavit and agree that the deponent will not be cross-examined, then the factual allegations contained in the affidavit stand unchallenged. Where that occurs, no dispute of fact arises.

[28] It must be emphasised that Mopani was not obliged to accept the manner in which the evidence was placed before the trial court. It was entitled to challenge the evidence by subjecting the witnesses to cross-examination. Not only did it not do so, it also elected not to present any evidence at all, despite being possessed of affidavits which had been presented in the review application and in the numerous interlocutory applications. The upshot of this was that the only evidence before the trial court was the extensive allegations of fact presented by Esorfranki's witnesses.

[29] The trial court was not required to resolve factual disputes as would a court dealing with opposing sets of affidavits. It was required to evaluate and assess the facts as presented, weigh probabilities as it ordinarily would do with evidence presented orally, and consider what inferences could be drawn from the proven facts. This, I shall demonstrate hereunder, the trial court failed to do.

Res judicata

[30] A plea of *res judicata* requires the party who relies thereupon to establish each of the three elements upon which the exception is based, namely that the same cause of action between the same parties has been litigated to finality i.e. the same relief has been sought or granted.

[31] In this instance, although the parties are undoubtedly the same, the cause of action and the relief sought in the trial action is plainly not the same as that pursued before the review court. The latter litigation concerned the exercise of a court's review jurisdiction under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and the relief which may properly be granted in relation thereto. The trial action, on the other hand, was based upon a delictual cause of action to establish liability for damages for loss of profit arising from Mopani's wrongful and culpable conduct causing loss to Esorfranki.

[32] It appears, from a reading of the high court's judgment, that it considered the doctrine to apply in relation to the determination of an issue which was before him. In *Royal Sechaba Holdings (Pty) Limited v Coote and Another* 2014 (5) SA 562 (SCA)[6] this Court held:

'The expression "issue estoppel" is a convenient description of instances where a party may succeed despite the fact that the classic requirements for *res judicata* have not been complied with because the same relief is not claimed, or the cause of action differs, in the two cases in question. The common-law requirements of same thing and same cause (*eadem res* and *eadem petendi causa*) have been relaxed by our courts in appropriate circumstances. As was pointed out by Lewis JA in *Hyprop Investments Ltd v NSC Carriers*

[6] Paragraphs 12 and 13.

and Forwarding CC and others, the relaxation and the application of issue estoppel effectively started in *Boshoff v Union Government*, where it was held that the strict requirements for a plea of *res judicata* (*eadem res* and *eadem petendi causa*) should not be understood literally in all circumstances and applied as inflexible or immutable rules. Despite some debate as to the approach of Greenberg J in Boshoff, Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* confirmed the correctness of the approach and added that in particular circumstances these requirements may be adapted and extended in order to avoid the unacceptable alternative that the courts would be obliged:

". . . om met letterknegtige formalisme vas te klou aan stellings in die ou bronne, wat onversoenbaar sou wees met die lewenskragtige ontwikkeling van die reg om te voorsien in die behoeftes van nuwe feitelike situasies."Following the decisions in *Boshoff* and *Kommissaris,* Scott JA in *Smith v Porritt* summarised the development of the law in this regard:

". . . the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of "issue estoppel". But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J–671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank* (*supra)* at 670E–F.) Relevant considerations will include questions of equity and fairness not only to the parties

themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, "unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals".' (Emphasis added.)

[33] What requires consideration therefore is whether the high court was correct in concluding that the issue, namely whether Esorfranki was the successful bidder, was an essential element of either or both of the high court and Supreme Court of Appeal judgments. In order to answer this question it is necessary to consider (a) the issues (both factual and legal) that the high court was required to decide and what its findings were; (b) the remedial jurisdiction of the high court in review proceedings; and (c) the reasons given for the remedy. Once this analysis is conducted regard must be had to the issue(s) which the high court was called upon to decide.

[34] In regard to the proceedings before Matojane J, it is common cause that this involved a judicial review of administrative action which Esorfranki alleged was unlawful. It based its case upon several factual and legal grounds. It alleged that: (a) the Joint Venture did not, as a matter of fact, meet the qualifying criteria for consideration of its bid; (b) the Joint Venture had failed to furnish proof of its capacity to conduct the works; (c) the Joint Venture had misrepresented facts upon which Mopani based its adjudication of the bid; and (d) the facts disclosed bias, bad faith and ulterior purpose on the part of Mopani in awarding the contract to the Joint Venture. As was recorded by Van Zyl AJA in the review appeal before this Court:[7]

[7] *Esorfranki* (supra) at para 10.

'The high court found that the tenders submitted by the joint venture did not comply with the bid specifications, that it was guilty of fronting and that the municipality's decision was motivated by bias and bad faith.'

[35] A court of review is, as a general rule, called upon to determine whether the impugned administrative conduct or decision is liable to be set aside on one or more cognizable grounds of review. These are enumerated in s 6 of PAJA. Once it has been determined that the decision is liable to be set aside, the review court must declare the decision unlawful and then set it aside. Thereafter, the review court will be required to consider an appropriate or just and equitable remedy in accordance with the dictates of s 172(1)*(b)* of the Constitution.[8]

[36] It stands to reason that in deciding whether a ground of review is established under section 6 of PAJA, a review court may make factual findings or draw conclusions of law which could be susceptible to a plea of issue estoppel. In this instance it was contended that since neither the high court nor this Court had found that the tender was fraudulently awarded to the Joint Venture, it was not open to Esorfranki to rely upon fraud on the part of Mopani. That being so, no liability on the part of Mopani could arise in delict for reasons of public policy.

[37] The argument was contorted. The absence of a positive finding of fraud on the part of Mopani does not constitute a finding that its conduct was not fraudulent. I shall address this aspect in greater detail later in the judgment when evaluating the evidence before the trial court and its effect.

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[8] Constitution of the Republic of South Africa Act 108 of 1996.

[38] In dealing with the central issue which was before it on appeal, namely whether the remedy granted by Matojane J on review was appropriate or just and equitable, this Court said the following:[9]

'On the findings made by the court the tender process was clearly flawed in material respects rendering it reviewable and liable to be set aside. Consistent with s 172 (1) of the Constitution s 8 of PAJA empowers a court in judicial review to grant "any order that is just and equitable". Section 8 confers on the court undertaking judicial review a "generous discretion". The discretion in s 8 must be exercised judiciously. The remedies in s 8 are not intended to be exhaustive: they are examples of public remedies suitable to vindicate breaches of administrative justice. The ultimate purpose of the public law remedy is said to "… afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law." Ultimately the remedy must be fair and just in the circumstances of the particular case.'

[39] This Court then considered the basis upon which Matojane J had formulated the remedy granted. It found as follows:

'No doubt it was the consideration of pragmatism and practicality that weighed heavily with the high court in ordering the continued execution of an invalid contract. It apparently made that decision in response to a claim by Esorfranki that an appropriate order would be one in terms of which it was to be declared the only successful bidder, and the municipality be ordered to award it a contract to complete the work. The court found that the order proposed by Esorfranki raised a number of "issues and practical difficulties" and that the granting of the order sought by Esorfranki would not serve to protect those who were to benefit from the construction of the pipeline. These issues, which it found not to have been properly addressed included inter alia "the logistical, legal and financial viability of such a relief and the extent to which the contract had been completed, the ownership of materials, whether if the balance of the contract is legally and factually separable, it should be put out to tender etc".'

[9] *Esorfranki* (supra) paragraph 18.

[40] Matojane J did not make a finding that Esorfranki was not or would not have been the successful bidder. Nor, as the above passage bears out, was the relief premised on such a finding of fact. The same is true of this Court's finding in relation to the relief granted on appeal. This Court found that the high court's decision to give effect to an unlawful contract was flawed for several reasons. Chief among these was that the *parties to the contract*[10] had acted dishonestly and unscrupulously. It also found that the invalidity of the tender process was not the result of negligence or incompetence. Rather, that the tender process and the consequent contract was tainted by dishonesty and fraud.

[41] Having come to this conclusion, the court held that the only appropriate remedy would be one declaring the contract void and granting equitable relief. In framing the relief, two considerations were decisive; namely the fact that the work was partially complete and that it would be necessary to determine what remedial work would be required and what further steps would be required to complete the project. The second issue was its acceptance that Mopani, by virtue of the bias displayed by it in the adjudication of the tender and its conduct in the litigation, was disqualified from participating in any further tender process that may arise in relation to the project.

[42] The court was therefore equally motivated by considerations of pragmatism and practicality in determining the appropriate relief. In formulating that relief, it made no finding in relation to whether or not Esorfranki was 'the successful bidder'.

[10] My emphasis.

[43] What the trial court was required to determine was whether the conduct of Mopani (found to be in breach of s 217 of the Constitution and in violation of the right to just administrative action by the review court) was wrongful and culpable in the context of a delictual claim. It was also required to consider whether as a fact, but for that conduct, Esorfranki would have been awarded the contract and what consequences flowed from Mopani's failure to do so. This issue was not one that was an essential basis for the judgment in the review proceedings. The trial court was accordingly not precluded from consideration of this issue by reason of *res judicata*.

[44] My colleague Mbatha JA comes to the conclusion that the court *a quo* was correct to find that the matter was *res judicata*, on the basis of a broad interpretation of the meaning of the cause of action. I respectfully disagree for the reasons already outlined. In addition, it must be emphasized that the review relief was premised upon several grounds of review and not solely upon a finding that there was fraud on the part of Mopani. In any event, the fact that a finding of fraud or what is tantamount to fraud in review proceedings is made, cannot preclude Esorfranki from pursuing other relief based on that finding. A plea of *res judicata* is not available to Mopani in such circumstances. It would, however, be available to Esorfranki if Mopani sought to challenge such a finding.

Novus actus interveniens

[45] The trial court accepted that the evidence established factual causation. In dealing with legal causation, that is whether the harm suffered was sufficiently closely connected to the act or omission causing harm, the high court approached the issue from the perspective that this Court, by ordering the tender process to be re-advertised, had afforded Esorfranki another

opportunity to submit a bid for the self-same tender. The court held that this constituted an alternative remedy and was a case of *novus actus interveniens*.

[46] The trial court rejected an argument that the tender which flowed from the appeal court order was not the same as the original tender. I am unable to discern on what basis the court came to this conclusion. This Court made it plain that by the time an appropriate remedy was to be formulated, although the project as a whole was incomplete, some work had been completed. This is also apparent from the high court judgment, delivered at a much earlier stage in the litigation process. Indeed in the latter judgment it was recognized that ownership of delivered materials and remedial work would need to be considered.

[47] It is necessary to say something about the 'new' tender which followed the order made by this Court. It was common cause, as indicated in Mbatha JA's judgment, that Esorfranki submitted a bid in an amount considerably higher than its bid in the tender at issue and that it was unsuccessful. It was also common cause that the successful bidder had submitted a bid which was in excess of Esorfranki's bid. The successful bidder was Vharanani Properties (Pty) Ltd and a contract in an amount of almost R600 million was awarded to it.

[48] The evidence before the review court included affidavits, which were filed by Esorfranki in the various interlocutory applications by which it sought to stop the implementation of the contract. These included affidavits filed in opposing the attempts by Mopani to obtain leave to appeal against the interim orders. Esorfranki sought to demonstrate that Mopani and the Joint Venture

were proceeding with the contract as rapidly as possible, ostensibly to render any review process academic. What is relevant for present purposes, is the evidence regarding the state of the contract works.

[49] Gibbons, Esorfranki's managing director, alleged that the Joint Venture had dumped sections of the pipes in large stockpiles, that these were unprotected and damaged. Sections of the pipeline trenches had been filled; but not in accordance with specifications; and that there was evidence of poor workmanship. The significance of this evidence, which was before this Court in the review appeal, is that it established a need for remedial work, not only to correct defective work on the project but to redo work already done. It is against this background that the order requiring the Department of Water Affairs to assess the extent of the work required and to prepare a tender for such remedial work and for the completion of the project, must be seen.

[50] The further tender advertised might have been a sequel to the original tender but it was manifestly not the original tender. The fact that Esorfranki was able to bid for that contract does not constitute 'an alternative remedy'. Nor does the availability of a further and different contract opportunity constitute a *novus actus* for purposes of breaking the causal chain.

[51] Esorfranki's claim was one for loss of profit. Its cause of action, as pleaded, was premised upon the failure of Mopani to award it a specific contract for which it had bid. And in relation to which it was the only party that had actually met the bid requirements. The availability to it of another contract requiring the delivery of a set of services different from those required in the original contract and at a different price does not interrupt causation of loss in relation to the first or original contract. At best, assuming

it was awarded the second contract, whatever profit it earned from the second contract would have to be brought to account in determining its loss on the first contract. That is so for the simple reason that the second contract only arises on account of the setting aside of the first contract which was unlawfully not awarded to Esorfranki. Nor does Esorfranki's failure to secure the second contract alter the fact that it may, as asserted, have suffered a loss of profit on the first contract.

[52] It follows from this that the trial court's reasoning in relation to the existence of a *novus actus interveniens* cannot be sustained. The inquiry, however, does not end there. It is still necessary to consider, having regard to the evidence before the trial court, whether Esorfranki succeeded in establishing each of the elements of its delictual cause of action. It is also necessary to consider whether, as the trial court found, the circumstances of the case are such as to preclude delictual liability on the basis of public policy. This latter aspect requires consideration of the nature of the wrongful and unlawful conduct of the part of Mopani.

Wrongfulness and fault

[53] These two elements will be dealt with together in what follows. It is appropriate at this juncture to return to the debate concerning the ambit of the case as presented at trial. Counsel for Mopani, submitted that the 'parameters' of what was before the trial court was set out in the opening address. He argued that counsel for Esorfranki had disavowed any reliance upon fraud as vitiating the award of the tender. Such disavowal accorded with the fact that the reviewing court and this court had made no finding of fraud on the part of Mopani. This finding was, he submitted both to the trial court and this Court,

binding upon the parties by reason of *res judicata*. It could accordingly not be revisited.

[54] However, a careful reading of counsel for Esorfranki's opening address does not reveal any statement disavowing Esorfranki's reliance on fraud on the part of Mopani. In an exchange with Makgoka J, Mr. Luderitz submitted that in so far as the element of wrongfulness was concerned the findings by the high court and this court were sufficient. Nevertheless, counsel accepted, quite correctly, that no finding of fraud was made against the municipality in either of the two judgments. That is a far cry from disavowing reliance upon the pleaded case on behalf of Esorfranki.

[55] The particulars of claim make it abundantly clear that Esorfranki relied upon deliberate and intentional dishonesty on the part of Mopani and its employees or officials. It was also specifically averred that its claim was founded upon fraudulent conduct. In the light of the pleadings there can be no question that fraud, by way of deliberately dishonest conduct, to favour the Joint Venture at the expense of Esorfranki, remained an integral part of the case to be adjudicated at trial.

[56] This brings me to the contention that the trial court could not go beyond the findings of the review court in relation to the wrongfulness of Mopani's conduct. The contention was one advanced in the context of the application of the *exceptio rei judicata*.

[57] I have already dealt with the principles applicable to *res judicata* above. As indicated, the trial court's finding that *res judicata* precluded consideration of the nature of the wrongful conduct and its impact upon the pleaded cause of action cannot be sustained. What remains to consider is the evidence tendered in relation to that pleaded case.

[58] Esorfranki's particulars of claim contained several allegations relating to the wrongful and culpable conduct of Mopani and its employees in awarding the tender to the Joint Venture. It was alleged, inter alia, that Mopani or its employees: *with knowledge of the irregularities alleged in respect of the first award* to the Joint Venture:

'…intentionally and deliberately dishonestly, and by virtue of its alternatively, their dishonest conduct, awarded the tender to the Joint Venture in terms of the second award.'

[59] In substantiation of the allegation of bias in favour of the Joint Venture, it was alleged that:

'… employees, officials and/or representatives of [Mopani], manipulated the scoring of the [Joint Venture] and increased certain of [the Joint Venture's] scores in respect of the second award to [the Joint Venture] to ensure that the [Joint Venture] was awarded the second award.' (My emphasis.)

[60] In regard to fraudulent misrepresentations made by the Joint Venture, regarding amongst others its qualifications and experience and its contractor's rating, (averments which were common cause between the parties), the particulars of claim alleged that:

'Despite knowledge on the part of [Mopani] and/or on the part of the employees, officials and/or representatives of [Mopani], of the aforesaid frauds committed by the [Joint Venture] on [Mopani] and despite knowledge of the true facts [Mopani]… intentionally

and deliberately dishonestly, and by virtue of its alternatively, their dishonest conduct, nonetheless awarded the tender to the [Joint Venture] in terms of the second award.'

[61] In regard to the evidence before the court it should be emphasized that it was uncontested. The facts alleged in the affidavits of, inter alia, Mr Arne Rheeder (Rheeder), the contracts director of Esorfranki and Mr David Gibbons (Gibbons) the managing director of Esorfranki, who deposed to the main founding affidavits in the review application and several affidavits in the rule 49(11) applications, must be accepted.

[62] Rheeder explained that in the first application which came before Preller J it was alleged by Esorfranki that, inter alia, the Joint Venture was not compliant with the required contractor's rating (its CIDB rating) which had been stipulated as a tender qualification. The Joint Venture ought on this basis to have been disqualified. It was further alleged that the contract had been awarded to the Joint Venture despite its bid price being higher than in eleven other bids. The significance of this evidence lies in the fact that the award was set aside by Preller J, by agreement between the parties, and the tenders were required to be re-adjudicated. The reason for Mopani's agreement to the order matters not. What matters is that the re-adjudication of the tenders which followed occurred in circumstances where Mopani was aware of a significant deficiency in the Joint Venture's bid, namely its CIDB rating. It is in the light of this knowledge that the conduct of Mopani and its officials is to be evaluated in making the second award to the Joint Venture.

[63] The evidence of Rheeder, Gibbons and Thompson, in particular, shows that the adjudication of the bids for the second award occurred not only on the

basis of a failure to disqualify the Joint Venture by reason of non-compliance, but upon a deliberate manipulation of the points allocated in the scoring system which applied. (My emphasis). This manipulation, by allocating points to which the Joint Venture was not entitled, had the effect that the Joint Venture notionally scored a higher total of points than Esorfranki. It was upon this basis that the award was made to the Joint Venture.

[64] The high court found that the second award of the contract to the Joint Venture was unlawful by reason of, inter alia, bias in favour of the Joint Venture, bad faith and ulterior purpose. This finding was based on the fact that the bid documents submitted by the Joint Venture established that: (a) it did not meet the required CIDB grading and that Mopani had relied on its subsequent justification of the award in the litigation, upon a document which was dated a year later after the award of the contract; (b) the Joint Venture had not submitted documents required to establish its qualifications and experience in the conduct of such works; and (c) upon proper investigation in the light of what was submitted it would have been established that the Joint Venture was using the device of 'fronting'.

[65] This Court, on appeal, considered the basis of those findings, as was necessary to determine the appeal in respect of the remedy. None of the findings were challenged. It then concluded that:

'…the parties to that contract had acted dishonestly and unscrupulously and the Joint Venture was not qualified to execute the contract.'

[66] The trial court had before it a pleaded cause of action which encompassed an allegation of fraud and deliberate dishonesty. It had before it

uncontested evidence which unequivocally established deliberate and intentional conduct to subvert the prescripts of s 217 of the Constitution. It was open to the high court to consider the evidence and to find that the unlawful conduct attributable to Mopani was indeed *in fraudem legis*, i.e. fraudulent. Had it properly evaluated the evidence it would have found that Mopani had acted dishonestly, intentionally and wrongfully in awarding the tender to the Joint Venture. On the facts, it would and should have found that the conduct of Mopani was vitiated by bad faith, ulterior purpose and fraud.

[67] There remains the question of whether Mopani's deliberate dishonesty in the tender adjudication and in its award of the contract to the Joint Venture was wrongful in the context of a delictual claim brought by Esorfranki. Consideration of this involves questions of legal or public policy. The trial court found that in the circumstances of this case legal policy does not favour delictual liability to arise against Mopani. The trial court advanced no reasons for coming to this conclusion.

[68] Before this Court it was argued that in the absence of fraudulent conduct on the part of Mopani, delictual liability in relation to public procurement ought not to be imposed. Reliance for this proposition was placed on *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) and *Olitzky Property Holdings v State Tender Board and Another* 2001 (3) SA 1241 (SCA).[11]

[69] Neither of these judgments, however, is authority for an absolute bar to delictual liability for wrongful and unlawful conduct in the context of public

[11] At 1261.

procurement. In *Steenkamp* the wrongful conduct resulting in the administrative conduct being impugned involved a negligent breach of a statutory duty. The Constitutional Court, dealing with policy considerations which are relevant to the imposition of delictual liability in the context of public procurement, said the following:

'(a) Compelling public considerations require that adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of their incorrect or negligent but honest decisions. However, if an administrative or statutory decision is made in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision, different public policy considerations may well apply.

(b) Legislation governing the tender board in this case is primarily directed at ensuring a fair tendering process in the public interest. Where legislation has a manifest purpose to extend protection to individual members of the public or groups, different considerations may very well apply. Again whether or not delictual liability ought to attach even in that case will be dependent on the factual context and relevant policy considerations.

(c) Imposing delictual liability on the negligent performance of functions of tender boards would open the prospect of potential claims of tenderers who had won initially. This will be to the detriment of the invaluable public role of tender boards. A potential delictual claim by every successful tenderer whose award is upset by a court order would cast a long shadow over the decisions of tender boards. Tender boards would have to face review proceedings brought by aggrieved unsuccessful tenders. And should the tender be set aside it would then have to contend with the prospect of another bout of claims for damages by the initially successful tenderer. In my view this spiral of litigation is likely to delay, if not to weaken the effectiveness of or grind to a stop the tender process. That would be to the considerable detriment of the public at large. The resources of our state treasury, seen against the backdrop of vast public needs, are indeed meagre. The fiscus will ill-afford to recompense by way of damages, disappointed or initially successful tenderers and still remain with the need to procure the same goods or service.' [12]

[12] Paragraph 55.

[70] *Steenkamp* accordingly recognizes that different policy considerations apply where it is found that a decision-maker has acted dishonestly, mala fide or fraudulently. In *Odifin (Pty) Ltd v Reynecke* 2018 (1) SA 153 (SCA)[13] this court held that there is no difficulty in imposing liability where the decision-maker acts dishonestly or corruptly.[14] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* [2005] ZASCA 73 (SCA), [2006] 1 All SA 6 (SCA) it was stated:

'In different situations courts have found that public policy considerations require that adjudicators of disputes are immune to damages claims in respect of their incorrect and negligent decisions. The overriding consideration has always been that, by the very nature of the adjudication process, rights will be affected and that the process will bog down unless decisions can be made without fear of damages claims, something that must impact on the independence of the adjudicator. Decisions made in bad faith are, however, unlawful and can give rise to damages claims.'[15]

[71] It bears emphasis that in this instance the decision-maker acted deliberately and dishonesty, with bias in favour of the Joint Venture. It acted in bad faith, with an ulterior purpose and, fraudulently. And what aggravates matters is that Mopani acted in the manner it did not once but twice in the face of serious allegations of wrongdoing levelled against it by Esorfranki. One would have thought that Mopani would instead pause for reflection and correct its unseemly conduct. On the contrary, Mopani became even more resolute to frustrate Esorfranki at every turn. The series of interlocutory applications brought by Esorfranki against Mopani all confirm one thing, i.e. that Mopani had clearly evinced a determination not only to award the tender

[13] Paragraph 23.
[14] See also *The Trustees of the Simcha Trust v De Jong and others* [2015] ZASCA 45; 2015 (4) SA 229 (SCA) at para 30; *South African Post Office v De Lacy and another* 2009 (5) SA 255 (SCA) para 14.
[15] Paragraph 26.

to the Joint Venture come what may, but also to ensure that its implementation proceeded notwithstanding court orders restraining it from executing the contract. Quite clearly therefore, its conduct was the antithesis of what is to be expected from an organ of the state.

[72] In *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) (*Gore*), this Court considered an argument similar to that advanced before us in relation to public policy limitations. It said the following:

'In the language of the more recent formulations of the criterion for wrongfulness: in cases of pure economic loss the question will always be whether considerations of public or legal policy dictate that delictual liability should be extended to loss resulting from the conduct at issue. Thus understood, it is hard to think of any reason why the fact that the loss was caused by dishonest (as opposed to bona fide negligent) conduct, should be ignored in deciding the question. We do not say that dishonest conduct will always be wrongful for the purposes of imposing liability, but it is difficult to think of an example where it will not be so.

In our view, speaking generally, the fact that a defendant's conduct was deliberate and dishonest strongly suggests that liability for it should follow in damages, even where a public tender is being awarded. In Olitzki and Steenkamp, the cost to the public purse of imposing liability for lost profit and for out-of-pocket expenses when officials innocently bungled the process was among the considerations that limited liability. We think the opposite applies where deliberately dishonest conduct is at issue: the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high.'[16]

[73] In *Gore* the claim against the organ of state concerned was premised upon vicarious liability arising from the conduct of its employees. The court nevertheless went on to state that:

[16] Paragraphs 87-88.

'These considerations would indicate that liability should follow even if the plaintiff's case were based on dishonesty on the part of the State Tender Board itself.' [17]

[74] In this instance the claim against Mopani asserts direct liability of the organ of state by reason of deliberate dishonest conduct on its part in the award of the tender to the Joint Venture. Based on the findings of deliberate dishonesty made by the high court in the review proceedings and this Court on appeal to it, there is, in my view, no reason of public or legal policy to exclude liability of Mopani for such economic loss as Esorfranki may have suffered.

[75] As I understand Nicholls JA's judgment she does not hold that considerations of public policy preclude a claim in damages even in circumstances where a tenderer was unsuccessful as a result of dishonest or fraudulent conduct by an organ of state. She considers instead, that since no direct finding of fraud was made against Mopani and since Esorfranki's integrity was also questioned[18], on a conspectus of all the facts, liability should not be imposed.

[76] Nicholls JA finds that the effect of this Court's order in the review appeal was to 'set aside the original tender'. This public law remedy resulted in there not being an extant tender in which Esorfranki lost the opportunity to bid and thus make a profit. Nicholls JA accordingly finds that wrongfulness is not established by reason of the non-existence of a duty owed to Esorfranki which could be breached.

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[17] Paragraph 89.
[18] I have set out in par 15 above why this finding is misplaced.

[77] I am respectfully unable to agree with this reasoning. This Court set aside the contract concluded between the Joint Venture and Mopani. It did so having found that the adjudication of the tender i.e. the process which resulted in the administrative decision to award the contract to the Joint Venture, was tainted by bias and deliberate dishonesty. The effect of the remedy is not to expunge the unlawful conduct, it is to correct it prospectively. This is achieved by determining appropriate relief by which to vindicate the right to administrative conduct that is lawful and fair. The fact of the unlawful conduct remains and there is no reason why that established breach of a duty owed to Esorfranki cannot found a claim in damages.

Causation

[78] I turn now to the element of causation. Esorfranki pleaded that but-for the unlawful conduct on the part of Mopani, it would have been awarded the contract. In support of this assertion, the evidence presented by it established that it presented an eligible or valid bid, i.e. one that complied with all of the qualifying criteria. Its price was the lowest presented. The differential between the price of the Joint Venture and that of Esorfranki was approximately R10 million. The bid adjudication report made available by Mopani after the second award indicated that Esorfranki scored the second highest number of points after the Joint Venture. The difference was a mere half a point. As already indicated, the points allocated to the Joint Venture were manipulated in order to ensure that it scored the highest number of points. Accordingly, had the points allocation not been manipulated Esorfranki would, without doubt, have secured the highest points tally. The evidence asserting this proposition was unchallenged, and no evidence to

suggest that Esorfranki would not, for some or other objective reason, have been awarded the contract, was presented.

[79] The further question is whether the harm suffered by Esorfranki is sufficiently closely linked to the wrongful and unlawful conduct to establish liability. Esorfranki's claim is one for loss of profit being the economic loss it suffered in consequence of it not being awarded the contract and therefore not being able to conduct the works in accordance with the contract.

[80] In *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A), [1990] 1 All SA 498 (A)[19] it was held:

'On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second inquiry then arises. That is whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part.'

[81] The test for legal causation is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play a part.[20]

[82] In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)[21] it was held that:

'A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible

[19] At 517.
[20] *Standard Charted Bank of Canada v Nedperm Bank Limited* 1994 (4) SA at 765A-B, *OK Bazaars (1929) Proprietary Limited v Standard Bank of SA Limited* 2002 (3) SA 688 (SCA) para 23.
[21] Paragraph 25.

retrospective analysis of what would probably have occurred, based upon all the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.'

[83] In this instance it must be accepted that it was reasonably foreseeable that Esorfranki would have generated a profit in the ordinary course of carrying out the works in terms of the contract had it secured that contract. Such loss of profit was proximate to and not too remote from the unlawful conduct of Mopani. Upon a sensible retrospective analysis of the probabilities therefore, legal causation is clearly established.

[84] That brings me to the question of the existence or otherwise of a *novus actus interveniens*. I have dealt above with the factual considerations earlier in this judgment. What remains to be said is that the order directing that a tender be re-advertised or that a further process be initiated to correct the unlawful administrative conduct is not an unusual nor generally unexpected result in the context of public law remedies. On the contrary such remedies are specifically provided for in s 8 of PAJA. As was held in *OK Bazaars*[22] the test for legal causation,

'When directed specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not as a matter of fact) the forseeability of the new act occurring will clearly play a prominent role (*Joffe & Co Ltd v Hoskins and another* 1941 AD 431 at 455–6; *Fischbach v Pretoria City Council* 1969 (2) SA 693 (T); *Ebrahim v Minister of Law and Order and others* 1993 (2) SA 559 (T) at 566B–C; Neethling *et al, supra,* 2015; Boberg *The Law of Delict* 441). If the new intervening cause is neither unusual nor unexpected, and it was reasonably foreseeable that

[22] *OK Bazaars* (supra) at para 33.

it might occur, the original actor can have no reason to complain if it does not relieve him of liability.'

[85] That is precisely the case in the present matter. By the time the high court heard the review application the contract had already been implemented to a considerable extent. That was all the more so by the time the appeal was heard. The factual circumstances that prevailed at that stage were quite different to those that prevailed when the award was originally made. Indeed, Mopani had advanced the contention in the intervening litigation that no practical effect or purpose could be served by an appeal precisely because the contract had largely run its course. It could therefore hardly not be foreseeable that a court on review might order that such outstanding work as was still required to be done, be subject to another tender process. Accordingly, the order of this court to fashion a just and equitable order to address the prevailing circumstances cannot, by any stretch of the imagination, be construed as having interrupted the chain of causation in relation to the loss suffered by Esorfranki by reason of being unlawfully deprived of the original contract.

[86] It follows in my view, that the appeal must succeed. I would accordingly make the following order:

1. The appeal is upheld with costs, such costs to include the costs consequent upon the employment of two counsel.
2. The order of the high court is set aside and replaced with the following:

    2.1 It is declared that the first defendant, Mopani District Municipality, is liable to the plaintiff, Esorfranki (Pty) Ltd, for

such loss of profits as may be agreed between the parties or as the plaintiff may prove in relation to tender bid number MDN2011-005 for the construction of a raw bulk water line from Nandoni Dam to Nsami Water Treatment Works plus interest thereon.

2.2 The first defendant is ordered to pay the plaintiff's costs, such costs to include the costs of two counsel.'

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G GOOSEN

ACTING JUDGE OF APPEAL

Nicholls JA (Poyo-Dlwati AJA concurring):

[87] I have read the judgment of my colleague Goosen AJA and agree with his rendition of the facts and litigation history. I am also in agreement with his findings on *res judicata*. Regrettably, I cannot agree with his conclusion that the Mopani Municipality should be held liable for Esorfranki's loss of profits.

[88] The requirements for a delictual claim are trite - a wrongful act or omission, fault in the form of negligence or intention, causation, and finally damages in the form of patrimonial or non-patrimonial loss. Delictual claims for pure economic loss have had a more gradual recognition in the

development of our common law.[23] It is now acknowledged that early Roman Dutch law did not only recognise claims for loss caused by physical harm to one's person or property but extended claims for all patrimonial loss, including financial. Aquilian liability for pure economic loss was conclusively recognised in *Administrateur, Natal v Trust Bank*[24] in 1979.

[89] The issue today is not so much whether such liability is recognised in principle but the circumstances in which such liability should be imposed. The general principle, frequently stated, is that every person has to bear the loss he or she suffers.[25] It is universally accepted that there must be some limitation on wrongdoer's liability. The brake on limitless legal liability takes the form of wrongfulness and causation, both of which are 'measures of control'.[26]

[90] Although these are independent and distinct enquiries, both are impacted upon by policy considerations taking into account constitutional norms and values. Conduct causing pure economic loss is not prima facie wrongful and whether a defendant is to be liable for compensation must be viewed through the prism of public policy and the legal convictions of society

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[23] In *The Cape of Good Hope Bank v Fischer* (1885-1886) 4 SC 368 it was found that Roman Dutch Law had extended Aquilian liability to 'every kind of loss' sustained as a result of a person's wrongful actions even if the loss had not been caused by damage done to corporeal property. In *Dickson and Co. v Levy* (1894) 11 SC 33 it was held that a false representation causing damage was only actionable if it was fraudulent. *Perlman v Zoutendyk* 1934 CPD 151 endorsed the *Dickenson* approach that liability for pure economic loss would only result if the wrongful conduct was intentional rather than negligent.

[24] *Administrateur, Natal v Trust Bank van Afrika BPK* 1979 (3) SA 824 (A); [1979] 2 All SA 270 (A) where it was accepted that a person who negligently causes pure economic loss to another could incur delictual liability if a duty of care is owed to the wronged person. This requires an assessment of whether public policy required that the offender ought to be placed under a legal duty to compensate that person.

[25] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of* SA [2006] 1 All SA 6 (SCA); 2006 (1) SA 461 (SCA) para 12; *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* [2017] ZASCA 77; [2017] 3 All SA 382 (SCA); 2018 (1) SA 391 (SCA) para 1.

[26] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA); [2009] 1 All SA 525 (SCA) para 31.

at large.[27] The fact that an act constitutes an administrative illegality does not mean that delictual damages should be awarded against a public authority if other administrative remedies were available.[28] There are various decisions from both this Court and the Constitutional Court where liability for financial loss suffered by unsuccessful bidders in public tenders has not resulted in an award of damages against government institutions.[29] It is settled law that negligence and incompetence is insufficient to ground liability in the context of public procurement. Only where there is 'something more' can a plaintiff recover her lost bargain.[30] In the same vein s 8(1)(*c*)(*ii*)(*bb*) of PAJA provides that only in exceptional circumstances could payment of compensation be a just and equitable remedy. It appears that 'something more' or an 'exceptional circumstance' occurs where the tender is vitiated by fraud or where there was bad faith and malice on the part of the tender board. There are two cases of this Court of significance in this regard.

[91] The legal position that loss of profit suffered by an unsuccessful tenderer as a result of dishonesty and fraud is claimable in delict, should all the other requirements of delict be met, was confirmed by this Court in *Transnet v Sechaba Photoscan.*[31] Prior to this, courts had inclined towards the

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[27] *Telematrix* para 13; *Trustees Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 12; *MV MSC Spain; Mediterranean Shipping Company v Tebe Trading (Pty) Ltd* [2007] ZASCA 12; [2007] SCA 12 (RSA); 2008(6) SA 595 (SCA); [2007] 2 All SA 489 (SCA) para 14.

[28] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); *Steenkamp v Provincial Tender Board of the Eastern Cape* [2006] All SA 478 (SCA) held that delictual damages would be inappropriate against a public authority if there were public law remedies available; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 46.

[29] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA); *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC); *South African Post Office v De Lacy and Another* [2009] ZASCA 45; 2009 (5) SA 255 (SCA); [2009] 3 All SA 437 (SCA).

[30] *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 27; see also C Okpaluba 'Bureaucratic bungling, deliberate misconduct and claims for pure economic loss in the tender process' (2014) 26 SA Merc LJ 387.

[31] *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA).

principle set out in *Trotman and Another v Edwick*,[32] namely that a litigant who sues on a contract sues to have his or her bargain or its equivalent in money. Whereas a litigant who sues in delict sues to recover the loss which was sustained because of the wrongful conduct, that is to recover the extent by which his or her patrimony was reduced by the conduct. Damages in delict seek to restore the plaintiff to the position she would have occupied had the delict not been committed. In *Transnet* an argument that the tenderer sought to have the benefit of its bargain (as in a contractual claim) and that accordingly loss of prospective profits was not recoverable in delict, was rejected. It was held that the principles set out in *Trotman* were wide enough to include a delictual claim for loss of profits in certain circumstances, as the court was careful to guard against a formula applicable to all fraud which induced a contract. However, in general, contractual damages concern the recovery of profits, whereas the measure of damages in delictual claims is different, namely to place the plaintiff in the position it would have been had the harm not occurred.[33]

[92] The next crucial decision of this Court is *Minister of Finance and Others v Gore*.[34] It dealt with a tender for the automated fingerprint identification for the payments of social grants which was designed to address the massive fraud taking place in the payments of grants. The two public officials concerned corruptly negotiated contracts of employment with the successful bidder and caused the company to pay substantial amounts of money as bribes into the bank accounts of their wives. This Court held that

[32] *Trotman and Another v Edwick* 1951 (1) SA 443 (A) at 449B-C.
[33] In German law the 'loss of a chance' to conclude a favourable contract is primarily a policy issue: 68 *RGZ* 163; 2 *BGHZ* 310.
[34] *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA); [2007] 1 All SA 309 (SCA).

where there is deliberate dishonesty on the part of government officials, this is strongly suggestive that delictual liability should follow. This Court did not say that dishonest conduct would always be wrongful for the purposes of imposing delictual liability, but that it was difficult to think of a situation where it would not be.[35] Further, it found that public officials should not be shielded with immunity and the government institution was therefore held vicariously liable for the corrupt conduct of its employees. Whilst acknowledging the impact this may have on scarce resources urgently needed for economic and social reform, the cost of the fraud was found to outweigh the effect such a finding may have on the public purse.

[93] In the present matter there is no direct finding of fraud against Mopani in either the high court or this Court's review judgments. Nor do the facts approximate the fraud and corruption that was described in *Gore*. Nonetheless, bound as we are by the factual findings in the judgments in the review proceedings, I cannot fault Goosen AJA's finding that the municipality displayed *mala fides*, an element of dishonesty and an ulterior purpose in awarding the tender to the Joint Venture.

[94] It should not be overlooked that the honesty of Esorfranki was also impugned in Matojane J's judgment. At paragraph 47 he stated:

'This case cannot be properly decided without first having regard to the manner in which Esorfranki, a civil engineering group with a turnover of 1.9 billion conducts this litigation. Esorfranki and Cycad, despite their protestations to the contrary are not independent. The Esorfranki-Cycad joint venture was awarded a tender by the Ethekwini Municipality for the construction of the Western Aqueduct Phase Two. The Kwazulu Natal High Court in

[35] Ibid para 87.

the matter of ***Sanyathi Civil Engineering and Consultants v Ethekwini Municipality*** reviewed and set aside the award of the tender to the Esorfranki-Cycad joint venture as the court found that corruption could not be ruled out in the tender process.'

[95] Notwithstanding the bias alluded to, I have some difficulty attributing wrongfulness to the municipality under these circumstances. Public law acts for the public good rather than the furtherance of private interests. Delictual claims in the context of public procurement bring into sharp focus the intersection and uneasy relationship between public and private law. The ultimate question in every case is whether on a conspectus of all the facts and considerations, public policy, infused by the values of the Constitution, requires that the conduct be compensable. The first point to be made is that the Constitution does not create a right to claim damages for loss of profits in the arena of procurement administrative law. This much was stated by this Court in *Olitzki Property Holdings v State Tender Board*[36] and *SA Post Office v De Lacy*[37] and confirmed by the Constitutional Court in *Steenkamp NO v Provincial Tender Board*.[38] Thus, the constitutional guarantee of a fair tender does not provide the basis for imposing a legal duty to compensate for loss arising from the breach of the guarantee.[39]

[96] In this particular case, public policy considerations undoubtedly require that the relevant public officials face the full might of the law, including possible criminal charges. But the question is whether public policy considerations require that a municipality (and hence ultimately the rate

[36] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 31.
[37] *South African Post Office v De Lacy and Another* [2009] ZASCA 45; 2009 (5) SA 255 (SCA); [2009] 3 All SA 437 (SCA) paras 2 and 3.
[38] *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 56.
[39] See also *Gore* above note 12 para 83.

payers), more than ten years later, should be held liable to pay a private company such as Esorfranki for loss of profits for work that it did not do. On the one hand the law cannot countenance corrupt local government officials who do not act for the public good. After all, it is the municipalities that are the direct interface between the community and government. They are the organs of state constitutionally mandated to deliver basic services to our communities. A municipality, cash-strapped as a result of the dishonest conduct of its officials, cannot deliver the necessary municipal services. Inevitably, it is the poorest who will suffer most. On the other hand do the legal convictions of the community permit a private company, with a turnover of billions, to claim for its loss of profits? It is to this issue that I now turn.

[97] Esorfranki challenged the tender awarded to the Joint Venture by way of review before the courts. It was successful. The tender awarded to the Joint Venture was set side, and a new tender process was ordered by this Court. Esorfranki used a public law remedy to right the wrong that it had suffered. Esorfranki was entitled to bid again in the new tender process that followed the order of this Court. It did tender and was unsuccessful. Esorfranki does not complain of that failure. The question is whether it can still claim in delict for the wrongful conduct that vitiated the tender awarded to the Joint Venture, even though it secured the opportunity to bid afresh in a fair and competitive new tender process? I think not for following reasons.

[98] Esorfranki obtained a public law remedy that set aside the original tender, which became void *ab initio*. That public law remedy has private law consequences. If, as a matter of public law, the tender was set aside by an order of court, there was no extant tender in which Esorfranki lost the

opportunity to bid and thus make a profit. As a result the wrongful conduct perpetrated by the municipality does not attach to any existing tender. This means that there was no legal duty owing to Esorfranki by the municipality to permit it to profit from a fair and competitive tender process because it was expunged as an incident of the order made to set aside the tender. In other words, if there was no tender, there was no legal duty that was owing. Once that is so, there is no wrongfulness that Esorfranki can rely upon to establish its cause of action.

[99] I am fortified in this view by the following consideration. The point of the review was to restore the position so that a fair, equitable, transparent, competitive and cost effective tender process could be followed as required by s 217 of the Constitution. Esorfranki's opportunity to make a private profit from public procurement was anchored in the new tender process that followed this Court's order. Esorfranki could never claim that it stood to make two profits for the same work that was the subject of the tender. It was unsuccessful in the only lawful opportunity it had to profit. It cannot use the law of delict to resurrect another opportunity to make a profit that had been expunged by operation of law. Nor can the state be saddled with the liability to compensate private companies for profits lost in a tender process that has been set aside, while also burdening the state with the cost of paying the company that wins the tender in a fair process. The Constitution requires procurement that is cost-effective. Public policy should not tolerate a situation where a company retains a claim in an unlawful tender process that is set aside, in circumstances where that same company fails in the lawful process that follows. That entails a double charge upon the state, and a double

entitlement on the part of Esorfranki to profit. Neither is justifiable. In my view no wrongfulness arises in these circumstances.

[100] There is a further basis upon which I hold that Esorfranki cannot succeed in its appeal. That is causation.

[101] A fundamental difficulty with the present matter is the manner in which the evidence was placed before court. No witnesses were called. The parties saw fit to accept the affidavits in the various applications and the factual findings in judgments of the high court and this Court, in the review proceedings, as constituting evidence in the trial court. A claim for damages inevitably involves a dispute of fact and requires evidence to be led. What is required to bring a successful review of a tender on motion proceedings is not the same as that for a delictual action. This immediately puts this matter on a different footing to *Gore* where extensive oral evidence was led in the trial and, on the evidence before it, the court found that causation had been proven.

[102] Esorfranki must show causation, both factual and legal. Factual causation, as its name suggests, is a factual enquiry as to whether the impugned conduct or omission is factually linked to the harm caused. In other words, does the one fact follow from the other? The 'but-for' test has received universal acceptance in common-law jurisdictions as being the appropriate test for determining factual causation.[40] If the harm would not have occurred

[40] See UK cases: *McGhee v National Coal Board* [1972] 3 All ER 1008 (HL); *Barker v Corus (UK) Plc* [2006] UKHL 20; *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10. Canadian cases which re-affirmed the but-for test for factual causation are *Resurfice Corp v Hanke* (2007) SCC 7, [2007] 1 SCR 333 para 21; *Clements (Litigation Guardian Of) v Clement*s (2010) BCCA 581 para 40-41. The Australian case *March v E and MH Stramere Pty Ltd* (1991) 171 CLR 506 concluded that the but-for test is not conclusive, rather causation should be determined by common sense.

'but for' the happening of a certain event, then that event is the cause. If the harm would have occurred in any event, it is not the cause. The test is set out in *International Shipping Co (Pty) Ltd v Bentley*[41] as follows:

'The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as the *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant.'

[103] The question is whether the conduct in fact amounted to a *causa sine qua non*, rather than whether it ought to have been the cause. This is a factual test. Where there has been positive conduct one eliminates the conduct to establish whether the same result would ensue. In the case of an omission, the inquiry involves 'the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such hypothesis plaintiff's loss would have ensued or not'.[42] This requires a retrospective analysis of what would have occurred and is to a large measure dependant on common sense and experience as well as reliable evidence on the probable outcome.

[104] The Constitutional Court decision of *Lee v Correctional Services* led to a debate whether policy considerations play any part in this leg of the enquiry.[43] In that matter the Constitutional Court said that what was required was 'postulating hypothetical non-negligent conduct, not actual proof of that

[41] *International Shipping Company (Pty) Ltd* v *Bentley* [1990] 1 All SA 498 (A) at 516.
[42] Ibid at 516.
[43] *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) BCLR 129 (CC); 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC) para 39.

conduct'. The debate whether *Lee* changed the test for factual causation has been resolved by the Constitutional Court in *Mashongwa v PRASA*[44] which categorically stated that *Lee* had not replaced the traditional approach to factual causation but rather emphasised the long-standing flexibility of the test where the harm is closely connected to an omission of a defendant who has the duty to prevent harm.

[105] The judgment of Goosen AJA accepted Esorfranki's evidence that it submitted a tender which was valid, and more cost effective than that of the Joint Venture. Esorfranki vigorously disputed that it should have been placed 12th in the tender process and pointed out that its tender was R10 million lower than that of the Joint Venture. In regard to the second award, the bid adjudication report indicated that there was only half a point dividing the Joint Venture and the appellant, and therefore, argued Esorfranki, there is no doubt that it would have had the highest point allocation had Mopani not acted dishonestly, intentionally and wrongfully. Because these went unchallenged and there was no 'other objective reason' to suggest that Esorfranki would not have been awarded the tender, the judgment finds that the threshold for factual causation has been met.

[106] My respectful view is that this starts from the wrong premise. Instead of finding there was no evidence led to suggest that Esorfranki would not have been awarded the tender, it was incumbent on Esorfranki to show on a balance of probabilities that it would have been awarded the tender. Much was made, in the affidavits of Esorfranki, of how it deserved to have been awarded the

[44] *Mashongwa v Passenger Rail Agency South Africa* [2015] ZACC 36; 2016 (2) BCLR 204 (CC); 2016 (3) SA 528 (CC) para 65.

tender on the basis of the point system and because the Joint Venture did not comply with the standards of the Construction Industry Development Board (the CIDB). However, understandably, because the application was for a review and setting aside of the irregular tender, evidence on what would have occurred had the tender not been awarded to the Joint Venture is absent. Merely because Esorfranki had the highest point allocation after the Joint Venture, or that its bid was for a lessor amount, does not axiomatically mean that the tender would have been awarded to it. In fact the tender itself, in the invitation to bid makes this manifestly clear. It provides: 'Mopani District Municipality does not bind itself to accepting the lowest or any other bid'.

[107] There is nothing in the papers before the court to suggest that Esorfranki would have been awarded the tender had it not been awarded to the Joint Venture. As indicated in the judgment of Matojane J, Esorfranki itself was under a cloud and suspected of fraudulent conduct with Cycad, another unsuccessful bidder. Cycad had brought a parallel application to review and set aside the award to the Joint Venture and sought an order that the tender be awarded to it. It later changed its prayer to one that the tender be awarded to Esorfranki. Whether these allegations played a role in the evaluation of the tender we cannot know in the absence of evidence, but they have an impact on causation.

[108] Neither reviewing court saw fit to substitute Esorfranki as the successful bidder despite a prayer to this effect. Mindful that there was a discretion to be exercised by the public body, the court required that the matter be remitted for the exercise of that discretion. There was nothing in the judgments to indicate how that discretion should be exercised.

[109] One cannot discount the possibility that no tender would have been awarded at all. The invitation to bid pertinently stated that there was no obligation to award the tender. No evidence was led that there was any compunction for the tender to be awarded. This situation differs from that of *Gore* where evidence was led on this aspect, and rejected. *Gore* dealt with racialised social pensions. The State Tender Board and the Cape Provincial Administration were both under great political pressure to award the tender and were very eager to do so. As the Court held: 'Ultimately it is clear that both the CPA and the State Tender Board were desperately keen to award the tender. Enormous pressures were brought to bear upon them to find a solution for the fraud that was rampant with welfare payments, not least because the extent of the fraud had received considerable coverage in the press. Apart from the enormous financial consequences, it therefore also became a political embarrassment. . . '[45]

[110] This matter dealt with an entirely different scenario. Relying on the affidavits in the review applications as amounting to the totality of evidence in the trial court was ill-conceived. The considerations in an application to set aside a decision to award a tender are different to those that are required to prove all the elements of delict. For this reason, I agree that the high court was incorrect in finding that the matter was *res judicata*. However, absent any cogent evidence to show otherwise, I am of the view that Esorfranki has not shown that it would have been awarded the contract absent fraudulent conduct on the part of the municipality. For the reasons stated above Esorfranki has not shown factual causation on a balance of probabilities.

[45] *Gore* above note 12 para 79.

[111] Once a plaintiff fails to establish factual causation that should be the end of the matter and it is not necessary to deal with legal causation. In this matter Esorfranki fails on both legs of the enquiry.

[112] The purpose of legal causation, which has been described as the remoteness of damage, is to fix the outer limit of liability by determining whether or not a factual link between the conduct and the consequence should be recognised in law. Various tests for legal causation have been used over the years. They include reasonable foreseeability,[46] adequate cause,[47] direct consequence[48] as well as notions of reasonableness, fairness, legal policy and justice. No test for legal causation should be applied dogmatically and all the theories are but factors making up the elastic criteria of legal causation.[49]

[113] Legal causation has been differentiated from factual causation in the following manner in LAWSA:

'Although a factual link exists between the conduct and the harmful consequences, courts must strike a proper and equitable balance between the interests of the wrongdoer and of the innocent victim, even if it does on occasion result in anomalies. In essence, therefore, the question of legal causation is not a logical concept concerned with causation but a policy-based reaction, involving a value judgment and applying common sense, aimed at assessing whether the result can fairly be said to be imputable to the defendant. In reaching that conclusion, constitutional imperatives also play a part.'[50]

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[46] According to the reasonable foreseeability test a defendant is held liable only for those factual consequences of his or her conduct which were reasonably foreseeable.
[47] According to this test if the harm is the likely result of a normal course of events, then the cause is said to be 'adequate' for the purposes of liability.
[48] According to the theory of direct causation, the defendant is liable for the direct factual consequences of his or her wrongful conduct.
[49] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA); [2009] 1 All SA 525 (SCA) paras 33-35; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (AD); [1994] (2) ALL SA 524 (A); *S v Mokgethi* 1990 (1) SA 32 (A).
[50] 15 *Lawsa* 3 ed para 181.

[114] The high court accepted that factual causation had been shown. In this respect it erred. The difficulty it had was with legal causation, firstly because Esorfranki had not been substituted as the successful bidder in either the high court or this Court in the review proceedings. Secondly because it had an opportunity to bid for the re-advertised tender by the National Department of Water Affairs (the Department). The high court held that because this Court in the review appeal found that the works commenced by the Joint Venture were far from completion, the re-advertised tender was merely a sequel to the original tender. As it had failed again to win the tender, this was a 'classic case' of *novus actus interveniens.*

[115] A *novus actus interveniens* is an independent event which, after the wrongdoer's act has been concluded, either caused or contributed to the relevant consequences. It usually refers to the intervening act of a third party which breaks the chain of causality or, in some instances, the actions of the wronged party itself. A *novus actus interveniens* is one of the myriad of factors to be considered when determining causation. It can go to legal causation or factual causation. Where it extinguishes the causal connection between the act of wrongdoer and harmful result of the act, it is a determining factor in factual causation.

[116] Legal causation is implicated where the *novus actus interveniens* influences the result to such an extent that the result can no longer be solely imputed to the actor, although its conduct remains the factual cause of the result. This occurs when the impugned conduct is the initial cause of the harm but there is an intervening act which materially reduces the extent of the harm suffered. It goes to limitation of liability and thus whether policy

considerations of reasonableness, justice and equity dictate the consequence of the conduct be imputed to the wrongdoer. Foreseeability and direct consequence are not discarded as determinants of legal causation but rather play a subsidiary role in this flexible approach.[51]

[117] Cycad's and Esorfranki's review appeal was partially upheld by this Court. It declared that the contract between the Joint Venture and Mopani was void *ab initio* and set aside. Instead of substitution, it was ordered that the Department determine the extent of the required remedial works and the total work required to complete the works. Once this was completed the tender was to be re-advertised. The bids would be evaluated, adjudicated upon and an award made. This was carried out by the Department and, in accordance with the order of this Court, Mopani played no role.

[118] Esorfranki again put in a bid in the sum of approximately R421 million. It should be noted that Esorfranki's original tender was for approximately R207 million, some R10 million less than the Joint Venture's bid, and a substantially lesser amount than the bid submitted for the Department's tender. Again Esorfranki was unsuccessful. The tender was awarded to Vharanani Properties (Pty) Ltd who put in a substantially higher bid, for almost R594 million. This was more than R170 million higher than Esorfranki's bid, as compared to the R10 million difference between Esorfranki and the Joint Venture's initial tender bids. Again Esorfranki sought to urgently interdict the award of the tender, this time to Vharanani. The

[51] *S v Mokgethi* 1990 (1) SA 32 (A) 40-41; *Fourway Haulage (Pty) Ltd v National Roads Agency* [2008] ZASCA 134; 2009 (2) 150 (SCA); [2009] 1 All SA 525 (SCA) para 34; *Premier of Western Cape and Another v Loots NO* [2011] ZASCA 32; See also J Neethling and J M Potgieter *Law of Delict* 7th ed (2014) at 200-203.

matter was struck from the roll due to lack of urgency and, it seems, has not been taken further.

[119] The judgment of Goosen AJA accepted Esorfranki's argument that this tender was for remedial works and the completion of the works and therefore was not the same contractual opportunity. While it may have been 'a sequel' to the original tender, the judgment finds that it is a manifestly different tender. It thus does not constitute a *novus actus interveniens* for purposes of breaking the causal link. I cannot agree. While the re-advertised tender might not directly impact on factual causation, if one applies the flexible criteria of legal causation, it certainly mitigates against a finding of imputability. The view favoured by academics is that theories of legal causation are at the service of imputability and not *vice versa*. In other words, courts should do the best they can to be fair to both parties and be not strait jacketed by any particular theory of legal causation. A court is not bound by a single theory but should strive for an outcome that serves the reasonableness and justice as embodied by the legal convictions of the community.[52] This may be an imperfect solution but is nonetheless the best that can be expected of a court.

[120] In light of the above considerations, neither the threshold for factual causation nor legal causation in the context of public procurement has been met. I am also of the view that wrongfulness has not been shown.

[52] J C Van der Walt and J R Midgley *Principles of Delict* 4th ed (2016) at 295; J Neethling and J M Potgieter *Law of Delict* 7th ed (2014) at 202; *Minister of Safety and Security and Another v Rudman and Another* 2005 (2) SA 16; [2004] 3 All SA 667 (SCA) para 81.

[121] In the result I would make the following order:

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

C NICHOLLS

JUDGE OF APPEAL

Mbatha JA

[122] I have had the benefit of reading the judgment of my colleague Goosen AJA. He found in favour of the appellant in respect of all the issues on appeal. I respectfully hold a different view. I endorse the conclusion of the court a quo in terms of which the appellant was non-suited on the bases that the issue of fraud on the part of the respondent was *res judicata*; and the failure of the appellant to prove legal causation. The basis upon which my view diverges from the judgment of Goosen AJA are elucidated below.

[123] The elements of the defence of *res judicata* are set out in para 30 of Goosen AJA's judgment. The most contentious of these elements is whether it can be said that the appellant relied on the same cause of action as before. The concept of 'cause of action', which is well-established in our law, entails 'an inquiry into whether an issue of fact or law was an essential element of the judgment on which reliance is placed' (*Royal Sechaba Holdings (Pty) Limited v Coote and Another* [2014] ZASCA 85; 2014 (5) SA 562 (SCA); [2014] 3 All SA 431 (SCA) paras 12-13).

[124] In the context the meaning of cause of action, it is important to bear in mind that the defence of *res judicata* is based first, on public policy, in that there should be an end to litigation; and second, on the hardship to the litigant, in that they should not be sued twice for the same cause. (See *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others* [1966] 2 All ER 536 at 549).

[125] The genesis of the defence of *res judicata* in this matter arises from the judicial review of administrative action proceedings that were initially instituted in the high court (before Matojane J) and subsequently appealed to this Court. The findings of both courts are final and binding on all the parties. The appellant's present claim for delictual damages against the respondent is based on the same affidavits that served before the courts in the review application. The appellant further relies on the findings of the courts insofar as they found that there was dishonest conduct on the part of the respondent, which the respondent disputed.

[126] My view is that the matter is *res judicata* on the basis that certain issues of fact and law, which are presently before this Court in the delictual proceedings, were disposed of in the review proceedings. In the review proceedings the appellant not only sought that the award be set aside, but it also sought an order substituting it as the successful bidder. Both the high court and this Court dismissed this prayer. Nonetheless, in order to conclude that the award of the tender was unlawful, the high court and this Court made factual findings that there had been acts of fraud on the part of the respondent.

[127] In the circumstances, the review proceedings relied on the factual assertion that there was fraud on the part of the respondent to establish the

relief claimed. In the present proceedings, although the appellant sues in delict, it relies on the factual finding that there was fraud on the part of the respondent. In the circumstances, on the broad interpretation of the meaning of cause of action, it can be said that the cause of action in the present proceedings was the same as that of the review proceedings.

[128] As will be demonstrated below, the appellant could have invoked, even in the alternative, the claim to monetary compensation in its prayers for an administrative law remedy in the review proceedings. The question then arises as to why the appellant should be allowed to make submissions necessary for a finding of fraud but refrain from pursuing a claim for monetary compensation in the review proceedings and opt instead to subsequently pursue a claim for delictual damages for loss of profit. This would essentially mean that the respondent would be called to defend the same assertions that arose from the same facts that had been made and conclusively determined in previous court proceedings, which is the precise basis for the existence of the defence of *res judicata*.

[129] In sum, the review proceedings that culminated in the tender process being set aside and the subsequent tender process that followed made findings with respect to the fraudulent acts of the respondent. Thus, it extinguished any claim, if any, against the respondent. I find that the judgment of Matojane J and that of this Court, on appeal to it, are binding and final and all the elements of *res judicata* are, as a result, satisfied.

[130] In spite of my finding that the defence of *res judicata* was established, I shall nonetheless proceed to consider the merits of the appellant's claim,

specifically whether it established legal causation. This is in the light of the review proceedings that set aside the award and ordered a fresh tender process for the evaluation of bids for the performance of the remaining work under the contract.

[131] The court a quo held that the appellant failed to prove legal causation. It reasoned that had the appellant been successful in obtaining an order for substitution, the delictual claim against the respondent would not have arisen. The tender was re-advertised, the appellant responded to it, but lost. It found that this was a classic case of the presence of the *novus actus interveniens*. This broke the link to establish legal causation. I agree with the conclusion that legal causation was not established.

[132] The test for legal causation is trite. The enquiry is whether the wrongful act was sufficiently closely or directly related to the loss for legal liability to arise or whether the loss is too remote. In determining whether legal causation was established considerations of public policy apply. Case law is replete with dicta regarding the extent to which public policy militates against delictual liability being extended to cases that involve administrative law breaches.

[133] In *Steeenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) BCLR 300 (CC); 2007 (3) SA 121 paras 28 and 29 the Constitutional Court acknowledged that everyone is entitled to lawful administrative action that must be reasonable and procedurally fair and that every improper performance of an administrative function entitles the aggrieved party to appropriate relief. It further held that ordinarily a breach of administrative justice attracts public law remedies.

[134] The appellant sought administrative law remedies including those available in s 8 of the PAJA, where a court could grant a just and equitable remedy that includes monetary compensation where appropriate (see *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (8) BCLR 786 (CC); 2005 (5) SA (CC) para 57). It is common cause that the appellant never sought monetary compensation. Instead, the appellant sought substitution which may be granted by a court only in exceptional circumstances where the outcome is inevitable or a foregone conclusion (see *Gauteng Gambling Board v Silverstar Development Ltd and Other* 2005 (4) SA 67 SCA; *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another* [2015] ZACC 22 (CC); 2015 (5) SA 245 (CC) para 47). Of all the available remedies in the review proceedings, exceptional or otherwise, of its own volition the appellant elected to seek a review and setting aside of the award and, flowing therefrom, substitution and not monetary compensation even in the alternative.

[135] In its order, this Court set aside the award and ordered a fresh evaluation of the remaining work of the same contract in a new tender process. In spite of the assertion by the appellant that, on the strength of its bid, it should have been the successful bidder in the initial tender it did not appeal this decision of the SCA nor did it thereafter institute proceedings for delictual damages arising out of its loss of profit. The tender was then re-advertised by the Department of Water Affairs in compliance with the order of this Court. The appellant submitted a new bid. The tender was awarded to Vharanani Properties (Pty) Ltd (Vharanani). The appellant did not succeed although its tender was considerably lower than Vharanani and although the process was conducted in a fair and transparent manner, by an independent body.

[136] In participating in the new tender process, the appellant thereby exercised an administrative law remedy granted to it by this Court. The appellant can therefore not rely on the old cause of action, which was interrupted by the review proceedings and its submission of a new bid to the new tender process. Accordingly, the court a quo was correct in holding that the tender process by the Department of Water Affairs, specifically the submission of a bid by the appellant, constituted a *novus actus interveniens*. It interrupted the chain of events that had arisen from the initial unlawful tender process which had been conducted by the respondent. Had the appellant strongly felt entitled to the tender, on any basis, it could have approached the court to review the decision of the Department of Water Affairs. It has not taken this Court into its confidence as to why it abandoned such process and opted to pursue a claim for delictual damages against the respondent.

[137] This Court in *Olitzki Property Holdings v State Tender Board and Another* 2001 (8) BCLR 779 (SCA); 2001 (3) SA 1247 (SCA) para 42 held that the loss of profit claimed by the plaintiff would not be an appropriate constitutional remedy in those circumstances but at the same time this Court was of the view that '[i]t is, however, not necessary to decide that a lost profit can never be claimed as constitutional damages'. It nonetheless held that considerations of public policy did not allow for such a claim.

[138] *Odifin (Pty) Ltd v Reyneke* [2017] ZASCA 115; 2018 (1) SA 153 (SCA) paras 16-17 clarified the position pertaining to the delictual liability for pure economic loss arising from a breach of administrative law. There, it was stated that where there was a breach of a statute pursuant to which the administrative action was taken, and if such statute on a proper interpretation confers a

delictual remedy, then delictual liability is possible. The court held that in instances where the tender was negligently awarded contrary to the principles of administrative justice, policy considerations precluded the unsuccessful tenderer from recovering delictual damages that were purely economic in nature.

[139] In *Trustees, Simcha Trust v De Jong and Others* [2015] ZASCA 45; 2015 (4) SA 229 (SCA); [2015] 3 All SA 161 (SCA) (para 27) this Court held that compensation is not available where the unlawful administrative decision is remitted back to the administrator. *Simcha Trust* further stated (para 28) that the determination of whether the case is 'exceptional' to make an order requiring payment of compensation, turns not so much on whether the administrative decision was 'conspicuously bad', but rather on whether there are unusual circumstances which make it appropriate to order compensation and not the usual remedy of setting aside and remittal. Nothing exceptional has been shown by the appellant. *Simcha Trust* (paras 18 and 28) also held that there is nothing exceptional when a litigant has an alternative remedy such as the setting aside and remittal or even substitution which will effectively rectify that violation of the right to just administrative action. It went on to state that whether a potential damages claim in delict or contract would constitute an effective alternative remedy, which could prevent a case from being 'exceptional' is an open question.

[140] I am mindful that there are judgments that recognise that delictual liability should follow where there is dishonest or wrongful conduct by the

employees of a municipality.[53] However, judgments like *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); [2002] 3 All SA 741 (SCA) recognise that redress can be sought in different ways. There, this Court said the following (para 21):

'When determining whether the law should recognize the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms. Where the conduct of the state, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights in my view the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the state to account. Where the conduct in issue relates to questions of state policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process, or through one of the variety of other remedies that the courts are capable of granting. No doubt it is for considerations of this nature that the Canadian jurisprudence in this field differentiates between matters of policy and matters that fall within what is called the "operational" sphere of government though the distinction is not always clear. There are also cases in which non-judicial remedies, or remedies by way of review and *mandamus* or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However where the state's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm. For as pointed out by Ackermann J in *Fose v Minister of Safety*

[53] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* [2005] ZASCA 73; [2006] 1 All SA 6 (SCA) paras 13-14; *Black v Joffe* 2007 (3) SA 171 (C); [2007] 2 All SA 161 (C) at 23-25.

and Security in relation to the Interim Constitution (but it applies equally to the 1996 Constitution):

". . . without effective remedies for breach [of rights entrenched in the Constitution], the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve that goal."'

[141] I reiterate that in this case the appellant received redress in the form of an administrative law remedy. Even then, the criminal justice system should play its part where dishonest conduct is proved against state organs, functionaries or officials, rather than imposing a financial burden on the public purse and the tax payer for the type of infractions perpetrated by respondent's officials in this case.

[142] In the circumstances, the appellant has failed to establish legal causation, because of the presence of the *novus actus interveniens* and particularly in light of the interests of public policy which militate against the extension of delictual liability in these circumstances. Accordingly, I would dismiss the appeal with costs including the costs of two counsel.

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Y T MBATHA

JUDGE OF APPEAL

Appearances

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