ESORFRANKI PIPELINES (PTY) LTD v MOPANI DISTRICT MUNICIPALITY [2022] ZACC 41

1 Introduction

The Constitutional Court, in the recent case of *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* ([2022] ZACC 41), had to decide whether a tenderer, whose tender failed as a result of the intentional misconduct of the State, could claim from the State damages in delict for loss of profits (par 1).

The High Court and the Supreme Court of Appeal both applied the *res iudicata* rule, holding that the matter had already been raised. In both instances, the courts also found that wrongfulness and causation had not been proved.

In addition to finding that the applicant had not proven wrongfulness, the Constitutional Court held that the delictual claim had to fail and, "[t]he appropriate avenue for a claim for compensation for loss sustained as a result of a breach of the precepts of administrative justice is [the Promotion of Administrative Justice Act (3 of 2000) (PAJA)]" (par 27). The court, per Theron J, thus invoked the principle of subsidiarity (see discussion below) as the reason that the applicant was precluded from claiming damages in terms of the law of delict.

This note addresses the correctness of the Constitutional Court judgment, with regard, *inter alia*, to the finding of lack of wrongfulness and the application of the principle of subsidiarity. The application of the *res iudicata* rule and the application of the tests for factual and legal causation, as addressed by the High Court and the Supreme Court of Appeal, are also examined.

2 Case discussion

2 1 Background

Pursuant to a debilitating drought in Giyani, a national disaster was declared in terms of the Disaster Management Act (57 of 2002). National Government then decided that water should be sourced from a dam and for this purpose, a welded-steel bulk-water pipeline would be constructed to alleviate the effects of the drought.

During August 2010, the Mopani District Municipality (the respondent) invited tenders for the construction of the water pipeline. Esorfranki Pipelines (Pty) Ltd (the applicant) submitted a tender, but its tender was unsuccessful. Instead, the tender was awarded to a joint venture, consisting of two entities. The applicant instituted an urgent application to interdict the implementation

of the tender, pending a review. The applicant's contention was that the joint venture did not comply with the mandatory minimum requirements for the tender and that its tender should therefore have been disqualified.

A similar application had also been instituted by another unsuccessful tenderer. Both it and the applicant claimed that the joint venture had not met the required requirements specified in the tender. Furthermore, they alleged that the decision to award the tender to the joint venture "was vitiated by bad faith and corruption" (par 6).

The High Court set aside the tender and directed that the tender be re-adjudicated in terms of the Preferential Procurement Policy Framework Act (5 of 2000). The tender bids were adjudicated afresh, and the joint venture was again awarded the tender.

The applicant again brought an urgent application to interdict the process, pending a review. The applicant alleged that the tender award was unlawful, and that during the tender process, the joint venture had made various fraudulent representations to secure the tender. The High Court, per Fabricius J, granted an interdict to restrain the implementation of the award. The respondent and the joint venture applied for leave to appeal. Furthermore, they refused to give an undertaking that operations would be suspended pending a determination of their application for leave to appeal. The applicant applied to the court in terms of the Uniform Rules of Court for the interim order to continue to operate, and this relief was granted. Leave to appeal against the interim order was refused.

The respondent and the joint venture applied to the Supreme Court of Appeal to have the interdict set aside. The applicant, in the meantime, brought an application in terms of the Uniform Rules of Court for the interim relief to remain operative. The Supreme Court of Appeal, and subsequently the Constitutional Court, dismissed the respondent's application for leave to appeal.

The applicant, in the review proceedings, applied for the tender to be set aside. It furthermore wanted itself substituted as the successful tenderer. Finding that the joint venture's tender application was wholly irregular (par 12) and that the respondent's "failure to detect these manifest irregularities supported the conclusion that its decision 'to appoint the joint venture was vitiated by bias, bad faith and ulterior purpose'" (par 12, quoted from *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2012 JDR 1560 (GNP) par 75), Fabricius J set aside the awarding of the tender, and the respondent was ordered to ensure that all work that had already been done, had been completed according to specification. The court, furthermore, held that it was not certain whether substituting the applicant as the successful tenderer would achieve the purpose of ensuring that destitute communities would be supplied with water.

The applicant appealed to the Supreme Court of Appeal, which held that the High Court had erred in permitting the continuation of the contract between the respondent and the joint venture (*Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21; 2014 JDR 0613 (SCA) par 22). It declared the contract void and then ordered the respondent to approach the Department of Water Affairs to take steps to ensure that the

remaining work would be completed. The Department called for tenders and the applicant was again unsuccessful. The applicant launched proceedings to have the tender set aside but abandoned these proceedings.

2 2 Litigation history: delictual claim

(i) High Court

The applicant approached the court to claim delictual damages for loss of profits from both the municipality (respondent) and the joint venture (*Esorfranki Pipelines v Mopani District Municipality* [2018] ZAGPPHC 224 par 1–2). The applicant alleged that it had suffered damage because the tender had been awarded to the joint venture, and not to it (par 2). From the pleadings, it appeared that it was common cause that the tender process had been "vitiated by bias, bad faith and ulterior purpose" (par 17).

The High Court per Makgoka J held that the applicant was not entitled to claim delictual damages (par 2). It found that the matter was *res iudicata* because it had already been decided when both the High Court and the Supreme Court of Appeal had refused to substitute the applicant as the successful tenderer (par 21 and 22).

Makgoka J held, moreover, that while the applicant had proved factual causation (par 23), it had failed to prove legal causation because the re-advertised tender constituted a *novus actus interveniens* (par 25). The applicant had, therefore, not established that the unlawfully awarded tender was the cause of its loss.

The court found that "legal policy does not favour delictual liability to arise against the municipality" and held that the applicant's claim had to fail (par 27).

(ii) Supreme Court of Appeal

The applicant appealed to the Supreme Court of Appeal (*Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2022 (2) SA 355 (SCA)). The appeal was dismissed, the court finding that the applicant had failed to prove wrongfulness and causation. Insofar as wrongfulness was concerned, Nicholls JA held that the applicant had a public remedy at its disposal; this involved setting aside the tender, which then became void *ab initio* (par 98). This meant that there was no tender in terms of which the applicant had lost the opportunity to bid and profit (par 98).The applicant had, furthermore, been invited to participate in the re-advertised tender process (par 98).

Nicholls JA explained that in terms of public policy it would not be tolerable for a company to retain a claim in a tender process that is unlawful, but at the same time then fail in the legal tender process following on the first (par 99). This would furthermore entail "'a double charge upon the State, and a double entitlement on the part of Esorfranki to profit'" (par 99). Wrongfulness had, therefore, not been established.

Regarding causation, the Supreme Court of Appeal, per Nicholls JA, found that neither factual nor legal causation had been established (par 110

and 120). Insofar as factual causation was concerned, Nicholls JA held that the applicant had failed to prove that its tender would have been accepted if the tender had not been awarded to the joint venture (par 105). The appeal court, like the High Court, found that the re-advertised tender constituted a *novus actus interveniens*, and thus legal causation had also not been established (par 114–115).

Mbatha JA, who wrote the concurring judgment, held that the appeal had to fail, specifically on the basis that the claim was *res iudicata* and also since legal causation had not been established (par 122). Insofar as the principle of *res iudicata* was concerned, Mbatha JA held that in both the review proceedings and the delictual claim, the applicant relied on the allegation that the respondent had acted fraudulently (par 127). The two claims were thus based on the same cause of action (par 127). According to Mbatha JA, this would mean that the respondent would have to defend the same claims based on the same facts that had been made previously and been "conclusively determined" in previous proceedings (par 128).

Legal causation had, furthermore, not been established because the re-advertised tender constituted a *novus actus interveniens* (par 131). Mbatha JA noted that the test for legal causation entailed whether the wrongful act was "sufficiently closely or directly related to the loss" for delictual liability to arise (par 132). In order to ascertain whether legal causation had been established, regard has to be had to public policy (par 132). There is a plethora of cases involving administrative-law breaches in which public policy excludes delictual liability being imposed (par 132).

Goosen AJA in his dissenting judgment held that the appeal should have been upheld. He held that there was no reason "in law or public policy" for the intentional and dishonest conduct on the part of the municipality not to give rise to delictual liability. He furthermore held that the setting-aside of the tender does not mean that wrongfulness could not be proved. Goosen AJA, moreover, found that both factual and legal causation had been established (par 45–52).

Insofar as *res iudicata* was concerned, he noted that while the parties were the same, the cause of action and the relief sought were not the same as that which had been sought before the review court (par 31). The first cause of action, according to Goosen, was the exercise of a court's review jurisdiction, whereas the second cause of action dealt with a claim for delictual damages for loss of profit (par 31).

2 3 Constitutional Court

Apart from referring to the lower courts' application of the *res iudicata* principle, the Constitutional Court, per Theron J, did not address the matter. The court, furthermore, did not deal with causation. Instead, after having found that wrongfulness had not been established, it ultimately decided the matter on the basis of the principle of subsidiarity, and the fact that the applicant had to use PAJA to claim redress.

(i) Jurisdiction and leave to appeal

Theron J held that the matter raised a constitutional issue because the court was called upon to decide whether delictual liability could attach to an intentional infringement of sections 33 and 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution) (dealing with just administrative action and procurement respectively) (par 26). In addition, the question of whether an administrative action affected by intentional misconduct could give rise to delictual liability had been left open by Moseneke J in *Steenkamp NO v Provincial Tender Board of the Eastern Cape* (2007 (3) SA 121 (CC) par 26; see discussion on merits under heading 2 3 (ii) below).

Given the general public importance of the matter, as well as the fact that the application had a reasonable prospect of success, Theron J granted leave to appeal (par 28).

(ii) Merits

(1) Wrongfulness

As mentioned above, Theron J did not address the issue of causation. Instead, she focused only on wrongfulness, which she found had not been established by the applicant (par 58).

Theron J reiterated the legal position that conduct must be both culpable and wrongful. She quoted the well-known *dictum* from *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amicus Curiae)* 2011 (3) SA 274 (CC)), where the question as to whether conduct is wrongful is answered as follows:

> "[It] ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and ... that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms." (par 122, quoted at par 28 of *Esorfranki*)

Theron J then noted that, while culpable conduct that causes harm to someone is *prima facie* wrongful, in the case of pure economic loss, the position is different. In this instance, conduct is not *prima facie* wrongful, and wrongfulness has to be established (par 29; see also Neethling and Potgieter *Law of Delict* 8ed (2020) 60; headings 3 2 and 3 3 below and sources cited there).

She went further by saying that in the case of a breach of a constitutional or statutory duty, delictual liability will not necessarily ensue (par 30). However, delictual liability may arise in two instances: first, when the breach of a provision imposes a duty to pay damages for loss that may be caused by that breach; secondly, where the statutory provision, "taken together with all relevant facts and salient constitutional norms, mandates the conclusion that a common law duty, actionable in delict, exists" (par 30). (In the latter instance, the court referenced *MEC, Western Cape Department of Social*

Development v BE obo JE 2021 (1) SA 75 (SCA) par 11; see also Neethling and Potgieter *Law of Delict* 90.)

Theron J then explained that these two enquiries overlap.

> "If, on a proper construction, a statutory or constitutional provision provides that a litigant is not entitled to recover damages for its breach, then a common law claim for damages will also not arise, because to allow for a damages claim would subvert the statutory or constitutional scheme." (par 31)

Referring to *Steenkamp* (par 22, quoted at par 31 of *Esorfranki*), Theron J held:

> "The proper construction of the applicable provision is thus relevant to both enquiries and requires a consideration of–
>
> 'whether there are alternative remedies such as an interdict, review or appeal; whether the object of the statutory scheme is mainly to protect individuals or advance public good; whether the statutory power conferred grants the public functionary a discretion in decision-making; whether an imposition of liability for damages is likely to have a 'chilling effect' on performance of administrative or statutory function; whether the party bearing the loss is the author of its misfortune; whether the harm that ensued was foreseeable.'"

In addition to the factors mentioned in *Steenkamp*, Theron J added accountability to the list of instances where a constitutional provision is in issue, for example where there is a duty on the State to protect the rights in the Bill of Rights and there is a breach of such rights (par 32). Accountability provides "a necessary and powerful, but not sufficient reason to recognise that conduct is wrongful in delict" (par 32). With reference to *Minister of Safety and Security v Van Duivenboden* (2002 (6) SA 431 (SCA) par 21, cited at par 31 of *Esorfranki*), she noted that the norm of accountability need not always translate constitutional duties into private-law duties that can be enforced by means of an action for damages, as, in some instances, other remedies will be available to hold the State accountable (par 21).

In certain cases, according to Theron J, the norm of accountability will not give rise to a private-law duty. This will be the case where there are "countervailing constitutional principles, and/or considerations of policy, which mitigate against the imposition of such a duty" (par 33). Furthermore, where there is a breach of a constitutional provision that is in conflict with the state's duty to protect rights in the Bill of Rights (as in the present case), these policy considerations have to be assessed in terms of whether the remedy constitutes "appropriate relief" as provided for in section 38 of the Constitution (par 33).

Theron J continued by noting that the case concerned pure economic loss. The applicant averred that the respondent caused it to suffer loss by its intentional breach of section 217(1) of the Constitution, which provides:

> "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

Theron J raised the question of whether the wording of section 217(1) militated against a finding on whether the respondent's conduct was

actionable in delict (par 34). She stated that upon a proper construction of section 217, the section is silent as to whether an intentional breach of the section is actionable in delict: "The relevant question is whether the imposition of liability for private harm is an incident of the constitutional provisions" (par 39).

Theron J then referred to *Steenkamp*, where the court answered a question that was related to the *Esorfranki* case, namely whether the "negligent but honest bungling of a tender" that results in pure economic loss was actionable (par 40). In *Steenkamp*, it was held that incorrect or negligent but honest decisions were not actionable in delict, but the court did not address the matter of whether intentional breach of the State's duties would give rise to delictual liability (par 55). The decision in *Steenkamp* was consistent with the decision in *Olitzki Property Holdings v State Tender Board* (2001 (3) SA 1247 (SCA)). After *Steenkamp*, the Supreme Court of Appeal in *Minister of Finance v Gore NO* (2007 (1) SA 111 (SCA)) found that the State was vicariously liable for fraudulent misconduct on the part of its officials in a tender process that resulted in pure economic loss.

Theron J went on to discuss the principle of subsidiarity (see below) and came to the conclusion that, because wrongfulness had not been established, the claim had to fail (par 58).

(2) Subsidiarity

At the time *Steenkamp* was heard, PAJA was not yet in force, but it came into force before the judgment was delivered. Theron J referred to a concurring judgment by Sachs J, in which the following was stated:

> "The existence of this constitutionally based public-law remedy renders it unnecessary and inappropriate to hybridise and stretch the common-law delict of injury beyond its traditional limits in this area. Just compensation today can be achieved where necessary by means of PAJA." (*Steenkamp* par 101, quoted at par 44 of *Esorfranki*)

Theron J, in finding that the applicant should have relied on PAJA, rather than on the law of delict, referred to the principle of subsidiarity:

> "This principle provides that where legislation is enacted in order to comprehensively give effect to a constitutional right, a litigant cannot bypass the relevant legislation and rely directly on the Constitution or on the common law, without challenging the constitutional validity of that legislation. The principle has two foundational justifications: to mitigate against the development of 'two parallel systems of law', one judge-made and the other crafted by Parliament, and to ensure 'comity between the arms of government' by maintaining "a cooperative partnership between the various institutions and arms tasked with fulfilling constitutional rights." (par 45)

Theron J recognised that PAJA was now in force and that the *dictum* of Sachs J was useful. To find that the respondent is liable in delict would offend the principle of subsidiarity (par 46). PAJA makes provision for, *inter alia*, the granting of a court order that is just and equitable (par 46 and 47). When called upon to decide upon a remedy,

> "a court must seek, as far as possible, to fully vindicate the breach of administrative justice by carefully balancing the interests of the public with those of the reviewing party and other affected parties." (par 48)
>
> "If private interests are vindicated in terms of the law of delict then, in assessing appropriate relief under PAJA, a court would either be required to discount these interests from the balance (despite the clear contrary injunction which emerges from section 8), or risk the situation in which an individual's interests are, in effect, double counted, since they are able to obtain redress both in terms of PAJA and in delict." (par 49)

Theron J accordingly held that both the principle of subsidiarity and the scheme of section 8 of PAJA meant that economic loss sustained as a result of an infringement of section 217 of the Constitution, irrespective of whether the breach was intentional, could not be recovered in terms of the law of delict. She referred specifically to section 8(1)(*c*)(ii)(*bb*) of PAJA, which makes provision for directing the administrator or any other party to the proceedings to pay compensation in exceptional cases.

She concluded by saying that it was not permissible from a constitutional perspective, and also not necessary, to allow the applicant's claim in delict (par 57). The appropriate remedy in this case was a claim for compensation based on loss sustained as a result of the breach of the principles of administrative justice, and thus recourse should be had to PAJA (par 57).

3 Discussion

The purpose of this section is to examine the reasons raised in all three *Esorfranki* cases to deny a claim for delictual damages and to show that the reasons were based on incorrect applications of the relevant legal principles.

3 1 Res iudicata

As mentioned above, the Constitutional Court did not address the matter of *res iudicata*, but it featured in the reasoning of both the High Court and the Supreme Court of Appeal.

The High Court held that the claim for damages was *res iudicata*, as a claim based on the same cause of action had already been heard by both the High Court and the Supreme Court of Appeal in the matter where Esorfranki claimed it should have been the successful bidder (par 22 High Court judgment).

In the Supreme Court of Appeal, Mbatha JA, in his concurring judgment, also held that the matter was *res iudicata* (par 126). The defence, according to Mbatha JA, was based on the public-policy notion that there should be an end to litigation and also that a defendant should not be sued twice based on the same cause (par 124).

In deciding that the matter was not *res iudicata*, Goosen AJA explained the principle as follows:

> "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." (par 30 SCA) (own emphasis)

The defence of *res iudicata* is closely aligned with the so-called "once and for all" rule. In order for the rule to apply, it has to be shown that the subsequent action is based on the same cause of action as the previous action (Peté, Hulme, Du Plessis, R Palmer, Sibanda, T Palmer *Civil Procedure: A Practical Guide* (2016) 3ed par 3.3.1(c)(iii)(c)). A case is *res iudicata* if a court has given final judgment in a matter based on the same cause of action and involving the same parties (Peté *et al Civil Procedure* par 2.3.1(c)(iii)(c)).

The "once and for all" rule can be defined as follows:

> "In claims for compensation or satisfaction arising out of a delict, breach of contract or other cause, the plaintiff must claim damages once for all damage already sustained or expected in the future in so far as it is based on a single cause of action." (Potgieter, Steynberg and Floyd *Law of Damages* 3ed (2013) 153; see also *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 835B–C; Loubser and Midgley *Law of Delict in South Africa* 492–495; Neethling and Potgieter *Law of Delict* 270)

For the purposes of this rule, it is important to know what is meant by a "cause of action". Applying the *facta probanda* approach, the court in *Evins v Shield Insurance* (*supra*) defined a cause of action as:

> "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." (838E–F, referring to *McKenzie v Farmers' Co-operative Meat Industries* Ltd 1922 AD 16 23)

The question that has to be answered here is whether the initial claim is based on the same *facta probanda* as the claim for pure economic loss. The cause of action in the first case related to the tender not being awarded to Esorfranki, while the second was a delictual claim for pure economic loss, the *facta probanda* of which would include the elements of delict. The two claims are definitely not based on the same *facta probanda*, and therefore constitute different causes of action. It is, therefore, clear that the findings in this regard of both Nicholls JA and Goosen AJA were correct and that the claim for delictual damages was not *res iudicata*.

3 2 Wrongfulness

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* (2015 (1) SA 1 (CC)), Khampepe J described the test for wrongfulness as functioning

> "to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. *Wrongfulness typically acts as a brake on liability, particularly in areas of the law of delict where it is undesirable or overly burdensome to impose liability.*" (par 20) (own emphasis)

Khampepe J went further, noting, with reference to *Loureiro v Imvula Quality Protection (Pty) Ltd* (2014 (3) SA 394 (CC)), that wrongfulness is based on the duty not to cause harm … *and questions the reasonableness of imposing liability*." (par 21) (own emphasis)

In the case of pure economic loss and omissions, harm-causing conduct is not *prima facie* wrongful; wrongfulness lies in the breach of a legal duty (*Country Cloud Trading v MEC, Department of Infrastructure Development, Gauteng supra* par 22; see also *Minister of Finance v Gore supra* par 82; Neethling and Potgieter *Law of Delict* 350). Khampepe J in *Country Cloud* formulated it as follows:

> "Our law of delict protects rights, and, in cases of non-physical invasion, the infringement of rights may not be as clearly apparent as in direct physical infringement. There is no general right not to be caused pure economic loss." (par 22)

She noted the problem of limitless liability, which could arise should all instances of pure economic loss be compensated (*Country Cloud Trading v MEC, Department of Infrastructure Development, Gauteng supra* par 24). Unless wrongfulness is positively established, there can be no liability (*Country Cloud Trading v MEC, Department of Infrastructure Development, Gauteng supra* par 23).

Theron J found that the respondent was not liable, *inter alia* because wrongfulness had not been proved (par 58).

She first recognised that "the intensity of the respondent's fault is ... relevant to the wrongfulness enquiry" (par 42), and continued by saying:

> "What is clear, however, is that the respondent's unconscionable conduct harmed the rights and interests of the residents it was duty bound to protect, egregiously violated the applicant's right to just administrative action, and prejudiced the country generally, by squandering taxpayer money." (par 42)

Despite finding that the applicant had not proved wrongfulness, she referred the matter to the Special Investigation Unit (par 58). In addition, she ordered the respondent to pay all costs, repeating again, the fact that the conduct was reprehensible (par 59).

Recognising the (intentional) conduct as reprehensible and unconscionable implies that it was wrongful. Neethling and Potgieter state the following with regard to wrongfulness:

> "In essence, wrongfulness lies in the infringement of a legally protected interest (or an interest worthy of protection) in a legally reprehensible way …
>
> The determination of wrongfulness in principle entails a dual investigation. In the first place, one must determine whether a legally recognised interest has been infringed, ie, whether such interest has in fact been encroached upon. In other words, the act must have caused a harmful result. In the second place, if it is clear that a legally protected interest has been prejudiced, legal norms must be used to determine whether such prejudice occurred in a legally reprehensible manner." (Neethling and Potgieter *Law of Delict* 35–36)

What is not clear from the facts of the case is whether Esorfranki proved the nature and scope of their harm. In the absence of a harmful consequence, wrongfulness cannot be established (Neethling and Potgieter *Law of Delict*

36–37). This would be a better basis for establishing absence of wrongfulness.

3 3 Causation

While both the High Court and the Supreme Court of Appeal held that causation had not been established, Theron J in the Constitutional Court did not address the issue of causation.

The High Court held that factual causation had been proved, but that legal causation had not been established. The issues of factual causation and *res iudicata* were conflated by the High Court. Under the heading of *res iudicata*, the court applied the "but for" test:

> "Such a declaration must, perforce, be preceded by a finding that, *but for the municipality's conduct*, Esorfranki would have been the successful bidder. *But Esorfranki has already failed in that respect – not once, but twice.* Both in the review application in this court and on appeal to the Supreme Court of Appeal, Esorfranki expressly and pertinently sought that order." (par 21 High Court) (own emphasis)

> "Neither of the two courts acceded to its request. Despite negative findings by both courts against the municipality, they were not sufficient to move either of the courts to declare Esorfranki the successful bidder. It was submitted on behalf of the municipality that as a result, this issue (whether Esorfranki was the successful bidder) is res judicata between the parties and cannot be revisited*. I agree, and that should be the end of the matter, as this court is bound by the conclusions arrived at ultimately by the Supreme Court of Appeal*." **(**par 22 High Court) (own emphasis)

The High Court thus seemed to find that factual causation had not been established (par 21), but then stated that "[t]here is no question that in the present case, factual causation has been established by Esorfranki" (par 23).

The Supreme Court of Appeal, per Nicholls J, found that neither factual nor legal causation had been proved. Mbatha J, in his concurring judgment, held that factual causation had been proved but agreed with Nicholls J and the High Court that the re-advertised tender constituted a *novus actus interveniens.* Goosen AJA, in his dissenting judgment, held that causation had been established (par 45–52. See heading 2 2 (ii) above).

Neethling and Potgieter (215) write, "The causing of damage through conduct, or, in other words, a causal nexus between conduct and damage, is required for a delict." Causation involves two enquiries, namely both factual and legal causation (*Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) par 38; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) 163–164; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700–702. See also Neethling and Potgieter *Law of Delict* 215).

It is trite that the test used for factual causation is the so-called *conditio sine qua non*, or "but for" test (*Lee v Minister of Correctional Services supra* par 40; *International Shipping Co (Pty) Ltd v Bentley supra*). It was described in *International Shipping Co (Pty) Ltd v Bentley* (*supra*) as involving

> "the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; [otherwise] it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise." (700F–H)

The question, therefore, is first whether the conduct of the respondent was a *causa sine qua non* for the financial loss suffered by the applicant, and secondly, whether legal causation had been established, or whether the re-advertised tender constituted a *novus actus interveniens.*

The High Court, as well as the two minority judgments of the Supreme Court of Appeal (per Mbatha JA and Goosen AJA) were correct in holding that factual causation had been established. Applying the *conditio sine qua non* test, it is clear that, but for the conduct of the respondent, the applicant would not have suffered harm.

Insofar as legal causation is concerned, Neethling and Potgieter describe the test (with reference *inter alia* to *S v Mokgethi* 1990 (1) SA 32 (A) 40–41; *International Shipping Co (Pty) Ltd v Bentley supra* 700–701) as follows:

> "The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice. However, the existing criteria for legal causation (such as direct consequences and reasonable foreseeability) may play a subsidiary role in determining legal causation within the framework of this elastic approach." (Neethling and Potgieter *Law of Delict* 234)

These existing criteria include whether or not something was a *novus actus interveniens* (new intervening cause), which has been described as follows:

> "A novus actus interveniens (new intervening cause) is an independent event which, after the wrongdoer's act has been concluded, either caused or contributed to the consequence concerned."(Neethling and Potgieter *Law of Delict* 250)

The authors provide the following example: A administers a dose of slow-working poison to her husband whereafter the husband is shot dead by B; there is no [causal] connection between A's deed and her husband's death. B's act is then a *novus actus interveniens* (Neethling and Potgieter *Law of Delict* 250 fn 236).

From the above, it is clear that the *novus actus interveniens* achieves the result initially intended with the "first act". This criterion also has to be viewed against the elastic criterion for legal causation, which takes into consideration "policy considerations based on reasonableness, fairness and justice" (Neethling and Potgieter *Law of Delict* 234). In the present case, the "second cause" did not contribute or cause the financial loss and in fact had nothing to do with it. It is, therefore, submitted that the re-advertised tender was not a *novus actus interveniens*. Furthermore, "policy considerations based on reasonableness, fairness and justice" should not regard the relationship between conduct and the damage as too remote to impute liability, particularly since the conduct in question was fraudulent.

3 4 Remedies for pure economic loss in the case of unsuccessful tender bids

(i) Delictual damages

Bleazard, Budlender and Finn note that in two Supreme Court of Appeal cases – *Transnet v Sechaba Photoscan (Pty) Ltd* (2005 (1) SA 299 (SCA)) and *Minister of Finance v Gore NO* (*supra*) – the court awarded delictual damages where the tender process was vitiated by fraud ("Remedies" in Quinot, Anthony, Bleazard, Budlender, Cachalia, Corder, Finn, Kidd, Madonsela, Maree, Murcott, Salakuzana and Webber *Administrative Justice in South Africa* 2ed (2021) 293; see also Hoexter and Penfold *Administrative Law in South Africa* 3ed (2021) 708). In those cases, the courts did not require the parties to rely only on PAJA.

In *Steenkamp NO v Provincial Tender Board of the Eastern Cape* (*supra*), the Constitutional Court, per Moseneke DCJ, held that delictual liability should not be imposed where the tender board had acted negligently:

> "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." (par 55.)

Moseneke DCJ further held that it would be detrimental to the public. He noted the constraint on the public purse and the fact that the State would not be able to compensate disappointed tenderers and still procure the same goods or service (*Steenkamp* par 55. He noted that "if an administrative or statutory decision is made in bad faith, under corrupt circumstances of outside the legitimate scope of the empowering provision, different policy considerations may well apply" (par 55.). It would appear from this *dictum* that Moseneke J recognised the possibility of damages where a tender process has been tainted by fraud.

(ii) PAJA

PAJA makes provision for a number of remedies, including, in terms of section 8(1)(*c*)(*ii*)(*bb*), compensation to be paid by the administrator. This compensation is payable only in exceptional circumstances. What is meant by "exceptional circumstances" is, according to Bleazard *et al*, not entirely clear, as the courts have hesitated to define what this entails, preferring instead to decide this on a case-by-case basis (Quinot *et al Administrative Justice in South Africa* 294).

Bleazard *et al* remark that compensation in terms of section 8 of PAJA is a public-law remedy (in Quinot *et al Administrative Justice in South Africa* 291). This has to be distinguished from private-law damages (Bleazard *et al* in Quinot *et al Administrative Justice in South Africa* 291). Referring to *Steenkamp*, the authors note:

> "the considerations that it attracts differ from those that inform whether a breach of an administrative duty can give rise to private-law delictual damages. Nevertheless, in applying section 8(1)(*c*)(ii)(*bb*), the courts have had regard to the practical and policy concerns that have informed the courts' approach to delictual damages for irregular administrative action. (Bleazard *et al* in Quinot *et al Administrative Justice in South Africa* 291)

Section 10A of PAJA provides as follows:

> "No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act or the rules made under section 7(3)."

This seems to imply that civil (or criminal) liability may ensue where an administrative act was *not* performed in good faith. This would further imply that delictual damages may be available where the administrative act (in this case the awarding of a tender) was vitiated by fraud (Hoexter and Penfold *Administrative Law* 708, 709; *LAWSA II Administrative Justice* par 74).

Hoexter and Penfold write:

> "Delictual liability, at least for pure economic loss, is unlikely to be visited on a negligent administrator. The same, however, cannot be said of an administrator who is corrupt or dishonest or acts in bad faith. As Cameron JA put it in a procurement case, *Minister of Finance v Gore NO,* 'the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high." (708)

From the above, it appears that section 10A of PAJA does not exclude delictual liability in the case of fraudulent administrative acts. The mere fact that PAJA provides for compensation does not, therefore, mean that delictual damages are not available in the case of fraudulent administrative acts.

3 5 The principle of subsidiarity

As can be seen from the discussion above, the principle of subsidiarity was not used in the lower courts' judgments to exclude delictual liability, and was raised for the first time by Theron J in the Constitutional Court. While she did refer to the fact that wrongfulness had not been proved, that was not the reason that the delictual claim ultimately failed; instead, it failed because of Theron J's application of the principle of subsidiarity.

Subsidiarity featured prominently in the recent case of *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* ([2022] ZACC 44). In that instance, Madlanga J described the principle as follows:

> "The principle of subsidiarity, repeatedly recognised by this Court, has a number of applications. One application of the principle is that a litigant cannot directly invoke a constitutional right when legislation has been enacted to give effect to that right. The litigant must either challenge the constitutionality of the legislation so enacted or rely upon the legislation to make its case." (par 149)

He also quoted (*Eskom* par 234) from Cameron J's minority judgment in the case of *My Vote Counts NPC v Speaker of the National Assembly* (2016 (1) SA 132 (CC) (*My Vote Counts I)* (the majority did not address this issue):

> "[A] litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. ... *Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement.* The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role." (*My Vote Counts I* par 46) (own emphasis)

In *SAHRC obo Jewish Board of Deputies v Masuku* ([2022] ZACC 5 par 102–108), the Constitutional Court similarly noted that the principle entails that where legislation has been enacted to give effect to a constitutional right, the Constitution cannot be invoked directly to give effect to that right. In *Thubakgale v Ekurhuleni Metropolitan Municipality* ([2021] ZACC 45), Jafta J reiterated the principle, holding that the parties, instead of claiming constitutional damages, should have claimed damages in terms of the relevant legislation (in that case, the Housing Act) (par 178).

In the case law quoted above, the principle was applied where claimants relied directly on the Constitution under circumstances where legislation had been passed to give effect to give to a constitutional right, or where there was a remedy in terms of the common law. In terms of the principle, the aggrieved party has to institute a claim in terms of the legislation or the common law. Other than Sachs J's concurring judgment in *Steenkamp*, where subsidiarity is not mentioned by name, there is no prior example of the principle being used to exclude delictual liability.

In *Jayiya v MEC for Welfare, Eastern Cape* (2004 (2) SA 611 (SCA)), the court applied the principle of subsidiarity to PAJA. In this case, the appellant had claimed constitutional damages for the infringement of her right to lawful administrative action in terms of section 33(1) of the Constitution. The court held that the PAJA remedies should be used; only where these did not provide "appropriate relief" could a claim be brought under the Constitution. While the principle of subsidiarity was not mentioned by name, the court, per Conradie, noted as follows:

> "[T]he Promotion of Administrative Justice Act was passed by Parliament to give effect to the constitutional guarantee of just administrative action. The appellant should accordingly have sought her remedy in this Act. '*Constitutional damages*' in the sense discussed in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 826 para [69] *might be awarded as appropriate relief where no statutory remedies have been given or no adequate common law remedies exist***.** Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used. The Promotion of Administrative Justice Act does not provide for the kind of relief afforded to the appellant in paras 2(c) and 3 of the order. Instead, it provides in sec 8(1)(c)(ii)(bb) that a court may in proceedings for judicial review, exceptionally, direct an administrator to pay compensation." (*Jayiya* par 9) (own emphasis)

In the *Jayiya* case, the principle was used with reference to PAJA, but to exclude a claim for constitutional damages, not to exclude a delictual claim.

The principle of subsidiarity should, therefore, not have been used in *Esorfranki* to exclude a claim for delictual damages.

4 Conclusion

It has been shown that the applicant's claim should not have failed on the basis of *res iudicata* or of lack of wrongfulness and causation.

It is submitted that Theron J erred in two respects: first, in finding that wrongfulness had not been proved; and secondly, holding that in terms of the principle of subsidiarity there was no delictual claim.

Theron J referred three times to the fact that the respondent's conduct was "reprehensible", and from this an inference of wrongfulness can be drawn.

Theron J applied the principle of subsidiarity to exclude delictual liability where a tender had failed as a result of the intentional misconduct of the State. Past cases have primarily applied the principle of subsidiarity to exclude a claim under the Constitution – for example, for constitutional damages, where a common-law (delictual) claim was available. The principle has also been invoked numerous times where legislation has been passed in terms of the Constitution; specifically, it has been used to prevent direct access to the Constitution where legislation has been passed in terms of the Constitution to protect rights entrenched in the Bill of Rights.

PAJA, furthermore, does not exclude a common-law remedy where conduct has been fraudulent – only where it has been "done in good faith". Since civil liability is not excluded where an administrative act is not performed "in good faith", this surely means that delictual claims should be available for pure economic loss where the conduct is fraudulent and where the defendant has a legal duty not to cause pure economic loss.

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