CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 222/21

In the matter between:

ESORFRANKI PIPELINES (PTY) LIMITED Applicant

and

MOPANI DISTRICT MUNICIPALITY Respondent

Neutral citation:	*Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41
Coram:	Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ
Judgment:	Theron J (unanimous)
Heard on:	5 May 2022
Decided on:	30 November 2022
Summary:	Delictual liability for harm arising from state's intentional misconduct — section 8 of PAJA — compensation under PAJA Section 217 of the Constitution — section 33 of the Constitution

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The respondent must pay the applicant's costs, including the costs of two counsel.
4. This judgment is referred to the Special Investigating Unit.

JUDGMENT

THERON J (Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Tshiqi J and Unterhalter AJ concurring):

Introduction

[1] The central question for determination in this application is whether a tenderer, who is deprived of success in a tender by the state's intentional misconduct, can claim damages in delict from the state for loss of profit. If that question is answered in the affirmative, further questions arise as to whether the Mopani District Municipality's (respondent) alleged misconduct was intentional and whether it was the factual and legal cause of Esorfranki Pipelines (Pty) Ltd's (applicant) alleged loss.

[2] These issues arise in an application for leave to appeal to this Court against an order and judgment of the Supreme Court of Appeal. By a narrow majority, the Supreme Court of Appeal dismissed an appeal against a decision of the High Court of South Africa, Gauteng Division, Pretoria (High Court), and held that the applicant was not entitled to recover its lost profits in delict from the respondent.

Factual background

[3] In 2009, a drought caused water levels of the Nsami Dam in Giyani to drop to levels which meant that there was insufficient water for the residents of Giyani. A local state of disaster was declared in terms of the provisions of the Disaster Management Act[1] due to the severity of the drought and emergency measures were implemented. National government subsequently decided that, to alleviate the effects of the drought, water would be sourced from the Nandoni Dam in Thohoyandou for the residents of Giyani. Approximately R284 million was made available for, amongst others, the construction of a welded steel bulk water pipeline between the Nandoni Dam in Thohoyandou and the Nsami water treatment works facility.

[4] During August 2010, the respondent invited tenders for the construction of the water pipeline. In October 2010, a joint venture comprising Tlong Re Yeng Trading and Projects CC and Base Major Construction (Pty) Ltd (joint venture) was awarded the tender.

[5] The applicant, an unsuccessful tenderer, instituted an urgent application in the High Court on 30 November 2010 to interdict the implementation of the tender pending a review of the award. Cycad Pipelines (Pty) Ltd (Cycad), another unsuccessful tenderer, had instituted a similar application on 19 November 2010. The applicant contended that the joint venture did not comply with the mandatory minimum criteria specified in the bid document and should therefore have been disqualified.

[6] Cycad and the applicant alleged, specifically, that the joint venture did not meet the required Construction Industry Development Board (CIDB) grading specified in the tender.[2] They also alleged that the respondent's decision to award the tender to the joint venture was vitiated by bad faith and corruption.

[1] 57 of 2002.

[2] According to the CIDB, designations are assigned on the basis of the financial and works capability of the contractor. A designation of 1 reflects the lowest capability and a designation of 9 the highest. Contractors are also designated according to the class of work they perform with a "CE" designation indicating a civil engineering

[7] On 27 January 2011, Preller J granted an order, by consent between the parties, setting aside the award and directing that the tender be re-adjudicated and awarded in terms of the Preferential Procurement Policy Framework Act.[3] In February 2011, the tender bids were re-adjudicated and the joint venture was again awarded the tender.

[8] On 28 February 2011, the applicant again brought an urgent application to interdict the implementation of the tender pending a review of the award. Because of the dubious points allocations and the fact that the joint venture's CIDB score had seemingly miraculously been elevated, amongst other apparent irregularities, the applicant alleged that the award was unlawful. It also alleged that, as with the initial tender process, the joint venture had made various fraudulent misrepresentations in order to secure the award.

[9] On 22 March 2011, Fabricius J granted interim relief restraining implementation of the award. The respondent applied for leave to appeal the interim order, which had the effect of suspending its operation. The respondent and the joint venture refused to give an undertaking that all operations by the joint venture would be suspended pending a determination of the application for leave to appeal. As a result, the applicant applied for an order in terms of the erstwhile rule 49(11) of the Uniform Rules of Court that, pending the determination of the application for leave to appeal, the interim order would continue to operate.[4] That relief was granted and extended on various occasions until 11 May 2011, when leave to appeal against the interim order was refused. It was

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entity while "PE" is allocated to a potentially emerging entity. A "PE" designation will be allocated if an entity's principals are previously disadvantaged persons who own at least 50% of the enterprise, exercise authority and manage the assets and daily operations of the enterprise, and exercise appropriate managerial and financial authority in directing the operations of the enterprise. An entity designated as "PE" may, if various further conditions are met, be treated as having a contractor grading designation one grade higher than that for which it is registered.

[3] 5 of 2000.

[4] Rule 49(11) provided that—

> "[w]here an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."

pertinently noted in the judgment refusing leave that the order was interim in effect and not appealable and that, on the merits, there was no reasonable prospect of another court coming to a different conclusion.

[10] On 19 May 2011, the respondent applied for leave to appeal to the Supreme Court of Appeal. The applicant brought a number of applications in terms of the erstwhile rule 49(11) for the interim relief to remain operative. All the while, the joint venture proceeded to implement the contract.

[11] On 2 August 2011, the Supreme Court of Appeal dismissed the respondent's application for leave to appeal against the interim order. The respondent then applied to this Court for leave to appeal. This Court refused leave on 12 September 2011.

[12] In the review application, which commenced in February 2011, the applicant sought an order reviewing and setting aside the award of the tender and substituting it as the successful tenderer. On 29 August 2012, the High Court held that the joint venture had failed to meet the required CIDB grading, had failed to submit the necessary documentation, and had made material misrepresentations in respect of its shareholders' citizenship, its experience in construction, its equity participation rates, and its date of registration and registered address. The High Court further held 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".[5] The award of the tender was set aside and the respondent, at the joint venture's cost, was ordered to verify that all work had been completed according to specification and ensure that the joint venture performs all necessary work in terms of the agreement. This was held to constitute just and equitable relief because, amongst others, the work was partially completed, and it was unclear whether substitution of the

[5] *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* 2012 JDR 1560 (GNP) at para 75.

applicant as the successful tenderer would "serve the purpose of ensuring that water is brought to the destitute communities".[6]

[13] The applicant successfully appealed to the Supreme Court of Appeal against the relief granted by the High Court. The Supreme Court of Appeal held that the High Court had erred in exercising its discretion to permit the implementation of the contract entered into between the respondent and the joint venture. It further held that the High Court's order was inappropriate because "the parties to the contract had acted dishonestly and unscrupulously and the joint venture was not qualified to execute the contract".[7] It declared the contract void and ordered the respondent to approach the Department of Water Affairs for the latter to take steps to determine the remedial work needed to complete the pipeline and to issue, evaluate and award a tender for the completion of the work.

[14] On 12 October 2015, the Department of Water Affairs called for tenders to complete work on the pipeline. The applicant submitted a bid but was unsuccessful. It subsequently launched proceedings in which it sought to review the award but later abandoned these efforts. Whereas the initial tender may have cost approximately R200 million if it was awarded to the applicant, the new tender was awarded for an approximate amount of R600 million.

In the High Court

[15] In the proceedings which are the subject of the present appeal, the applicant claimed damages in delict from both the respondent and the joint venture for loss of profit as a result of the award of the tender to the joint venture. It alleged that the respondent and joint venture had intentionally acted unlawfully to subvert the tender process to ensure that the tender was awarded to the joint venture, rather than to the highest scoring eligible tenderer, which was the applicant.

[6] Id at para 83.

[7] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21 2014 JDR 0613 (SCA) at para 22.

[16] Makgoka J dismissed the action. The High Court held that the applicant could only succeed if, but for the Municipality's conduct, it would have been the successful bidder. The High Court held that this issue had already been decided against Esorfranki in the review application where both the High Court and Supreme Court of Appeal had refused to substitute Esorfranki as the successful tenderer. The High Court concluded that this issue was *res judicata* (a matter already decided) and, for this reason alone, Esorfranki's claim had to fail.

[17] The High Court further held that the finding of bad faith, dishonesty and ulterior purpose on the part of the respondent in the review proceedings did not, without more, give rise to delictual liability. The High Court had regard to the fact that the tender was re-advertised, the applicant was afforded another opportunity to participate in the tender and was unsuccessful. The High Court held that the re-advertised tender process constituted a *novus actus interveniens* (new intervening act), with the result that the applicant had failed to establish legal causation – that the unlawfully awarded tender to the joint venture was the cause of its loss.

In the Supreme Court of Appeal

[18] Nicholls JA, with whom Poyo-Dlwati AJA concurred, dismissed the applicant's appeal. Mbatha JA concurred in Nicholls JA's order for different reasons. Nicholls JA accepted that the respondent had "displayed mala fides, an element of dishonesty and ulterior purpose in awarding the tender to the joint venture", but held that the applicant had failed to establish wrongfulness and causation.[8] In respect of the former, Nicholls JA held that once the tender was set aside "there was no extant tender in which Esorfranki lost the opportunity to bid and thus make a profit".[9] As a result, "there was no legal duty owing to the applicant by the respondent to permit it to profit from a fair

[8] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2021] ZASCA 89; 2022 (2) SA 355 (SCA) (SCA judgment) at paras 93, 98 and 100.

[9] Id at para 98.

and competitive process because it was expunged as an incident of the order made to set aside the tender".[10]

[19] Nicholls JA held further that, subsequent to the review proceedings, the applicant was able to participate in the re-advertised tender process.[11] This militated against a finding of wrongfulness because "[p]ublic policy should not tolerate a situation where a company retains a claim in an unlawful tender process that is set aside, in circumstances where the same company fails in the lawful tender process that follows".[12] To do so would entail "a double charge upon the state, and a double entitlement on the part of Esorfranki to profit".[13]

[20] In respect of factual causation, Nicholls JA held that merely having the highest points allocation after the joint venture did not mean that the tender would have been awarded to the applicant.[14] Nicholls JA noted further that the tender itself provided that "Mopani District Municipality does not bind itself to accepting the lowest or any other bid". Nicholls JA held that there was no evidence as to what would have occurred had the tender not been awarded to the joint venture. Put differently, the applicant had failed to lead evidence that it would have been successful if the tender was not awarded to the joint venture.[15] In addition, neither reviewing Court saw fit to substitute the applicant as the successful bidder.[16] Nicholls JA reasoned that the applicant had failed to establish that, absent the fraudulent conduct on the part of the respondent, it would have been awarded the tender.[17] Like the High Court, Nicholls JA found that the re-advertised tender constituted a *novus actus interveniens* which "militates against a finding of

[10] Id.

[11] Id at para 99.

[12] Id.

[13] Id.

[14] Id at para 106.

[15] Id.

[16] Id at para 108.

[17] Id at para 110.

imputability" for purposes of legal causation.[18] Nicholls JA held that neither factual nor legal causation had been established.

[21] Mbatha JA held that the appeal was to be dismissed on the basis of the doctrine of *res judicata* and the applicant's failure to establish legal causation.[19] In respect of *res judicata,* Mbatha JA held that in both the review proceedings and the trial, Esorfranki relied on the allegation that the Municipality had acted fraudulently. Accordingly, "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".[20] To hold otherwise, Mbatha JA reasoned, would mean that although the applicant could have asked for compensatory relief in the review proceedings, it is entitled to pursue a separate delictual claim. This would "essentially mean that the respondent was called to defend the same assertions that arose from the same facts that had been made and conclusively determined in the previous court proceedings".[21]

[22] In respect of legal causation, Mbatha JA held that the applicant had failed to establish legal causation because the re-advertised tender process constituted a *novus actus interveniens* and provided Esorfranki with a suitable remedy.[22] Mbatha JA concluded that public policy considerations militate against the extension of delictual liability in this matter.[23]

[18] Id at para 119.

[19] Id at para 122.

[20] Id at para 127.

[21] Id at para 128.

[22] Id at para 136.

[23] Id at para 142.

[23] Goosen AJA, with whom Petse AP concurred, dissented and would have upheld the appeal. He held, on the strength of *Steenkamp*,[24] *Olitzki*,[25] *Telematrix*,[26] and *Gore*,[27] that there was no reason of public or legal policy justifying why deliberate dishonest conduct on the part of an organ of state, such as that evidenced by the respondent, should not attract delictual liability.[28] He further held that the fact that the tender was set aside did not mean that wrongfulness could not be established. This is because an order setting aside the award does not expunge the unlawful conduct, but corrects it prospectively.[29]

[24] Goosen AJA held further that the uncontested evidence established that the respondent had intentionally and unlawfully acted to deprive the applicant of success. This was because: (a) after the tender award was first set aside, the Municipality was aware that the joint venture was not compliant with the required contractor's rating; (b) it was also aware that the joint venture had been awarded the tender, even though its bid price was higher than eleven of the other bids; and (c) the Municipality's officials manipulated the points awarded to the joint venture so that it scored higher than the applicant.[30]

[25] In respect of factual causation, Goosen AJA found that on the evidence, the applicant had scored second highest to the joint venture in the second tender process. Accordingly, but for the manipulation of the joint venture's score, the applicant would have been successful in the tender.[31] Legal causation was likewise established because it was foreseeable that the respondent's conduct would cause the applicant financial

[24] *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

[25] *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA).

[26] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73; 2006 (1) SA 461 (SCA).

[27] *Minister of Finance v Gore N.O.* [2006] ZASCA 98; 2007 (1) SA 111 (SCA).

[28] SCA judgment above n 8 at para 74.

[29] Id at para 77.

[30] Id at paras 62-3.

[31] Id at para 78.

loss; the fresh tender process could not break the chain of causation because, to do so, an intervening cause has to be unusual or unexpected and that was not so in respect of the fresh tender process. And finally, the fresh tender was not a tender for the same work. The evidence revealed, amongst others, that the tender was for work which included remediation of the joint venture's faulty work and to redo work already done. The fresh tender process therefore could not constitute an appropriate remedy for the applicant's loss and did not break the chain of causation between the respondent's unlawful conduct and the applicant's loss.[32]

In this Court

Jurisdiction and leave to appeal

[26] This Court is called upon to consider whether delictual liability attaches to an intentional breach of sections 33 and 217 of the Constitution.[33] Plainly, therefore, the

[32] Id at paras 49-50.

[33] Section 33, which provides for the right to just administrative action, reads:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted to give effect to these rights, and must—
>
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration."

Section 217, which deals with procurement, reads:

> "(1) 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.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

application raises a constitutional issue.[34] It also raises an arguable question of law of considerable public import which has not yet been considered by this Court. In *Steenkamp*, this Court considered whether a successful tenderer, whose award was subsequently set aside, could recover in delict the out-of-pocket expenses it incurred in reliance on the award.[35] This Court held that it could not and, further, that "[c]ompelling 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*".[36] Crucially, however, *Steenkamp* left open the question whether an administrative decision tainted by intentional misconduct might attract delictual liability. It held that "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",[37] and this misconduct might therefore attract delictual liability. It is this question which we are now required to resolve.

[27] The question that arises in this application is of general public importance. The outcome of this matter extends beyond the interests of the litigants before this Court. Given the import of this question and the fact that the application has reasonable prospects of success – as is borne out by the narrow split in the Supreme Court of Appeal – it is in the interests of justice that leave to appeal be granted.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[34] *Steenkamp* above n 24 at paras 20-2.

[35] Id at para 1.

[36] Id at para 55 (emphasis added).

[37] Id.

Merits

Wrongfulness

[28] To attract delictual liability, harm-causing conduct must be both culpable[38] and wrongful.[39] Whether conduct is wrongful—

> "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."[40]

[29] Culpable conduct which causes harm to persons or property is prima facie wrongful.[41] By contrast, where the conduct causes pure economic loss – that is, where financial loss is caused with no accompanying harm to persons or property –[42] there is no presumption of wrongfulness.[43] In such a case, wrongfulness must be positively established.[44]

[30] Likewise, the breach of a constitutional or statutory provision does not, without more, give rise to a delictual claim.[45] It may however do so in either of two

[38] Save for the circumstances in which strict liability is permissible. See *Eskom Holdings Ltd v Halstead-Cleak* [2016] ZASCA 150; 2017 (1) SA 333 (SCA); *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* [2003] ZASCA 30; 2003 (4) SA 285 (SCA); and *National Media Ltd v Bogoshi* [1998] ZASCA 94; 1998 (4) SA 1196 (SCA).

[39] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) at para 20.

[40] *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amicus Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 122.

[41] *Country Cloud* above n 39 at para 22.

[42] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) at para 10 and *Telematrix* above n 26 at para 1.

[43] *Fourway Haulage* id at para 12.

[44] *Country Cloud* above n 39 at para 23.

[45] *Steenkamp* above n 24 at para 37.

circumstances.[46] The first is when, on a proper construction, the breach of the impugned provision imposes an obligation to pay damages for loss caused by the breach.[47] The second is when 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.[48]

[31] 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.[49] 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."[50]

[32] Where the breach of a constitutional provision is in issue – and, in particular, where the breach is in conflict with the state's duty to protect the rights in the Bill of Rights – the norm of accountability must be added to this list of considerations. This norm – that the state must be held accountable for conduct that is in conflict with its obligations to protect the rights in the Bill of Rights – provides a necessary and

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[46] *MEC, Western Cape Department of Social Development v BE obo JE* [2020] ZASCA 103; 2021 (1) SA 75 (SCA) at para 11.

[47] Id.

[48] Id.

[49] *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2005] ZASCA 120 (*Steenkamp SCA*) at para 22.

[50] *Steenkamp* above n 24 at para 42 (footnotes omitted).

powerful, but not sufficient, reason in favour of recognising that the conduct is wrongful in delict.[51] Importantly, however, the norm of accountability "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".[52]

[33] The norm of accountability may also, in appropriate cases, fail to give rise to a private law duty where there are countervailing constitutional principles, and/or considerations of policy, which mitigate against the imposition of such a duty.[53] Additionally, where, as here, the breach of a constitutional provision is in conflict with the state's obligation to protect the rights in the Bill of Rights, these considerations must be assessed in the context of whether the remedy constitutes "appropriate relief" in terms of section 38 of the Constitution.

[34] This case concerns pure economic loss. Although not pleaded with a great deal of clarity, the applicant's case is that the respondent's alleged intentional breach of section 217(1) of the Constitution, which it says caused it to suffer loss of profit, gives rise to a common law duty of recompense. The relevant enquiry is therefore whether the language of section 217(1) militates against a finding that the respondent's alleged intentional misconduct is actionable in delict.

[35] Section 217(1) of the Constitution 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."

[51] *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) at para 21.

[52] Id.

[53] Id at para 22.

[36] The respondent contends that the language of this provision, and that of the Preferential Procurement Policy Framework Act, indicate that aggrieved tenderers have no delictual claim against the state for loss of profit. It is indeed so that the text of section 217(1) does not expressly or by implication grant an aggrieved tenderer a delictual claim, even where the impugned breach is intentional. And, equally plainly, section 217(1) is designed, in the first place, to advance the public interest rather than the interests of individual tenderers. Neither consideration, however, is decisive. Section 217(1) is the source of the state's obligations when it conducts a tender process and the invitation and consideration of tenders is an administrative function.[54] For this reason, section 217 "must be understood together with the constitutional precepts of administrative justice in section 33".[55] Section 33, of course, is also designed to advance the public interest and it guarantees the right to lawful, reasonable and procedurally fair administrative action. Section 38, in turn, provides that a court may grant "appropriate relief" where a right in the Bill of Rights has been infringed or threatened.

[37] Construed in its proper constitutional context, while section 217 protects the public interest, it is also designed to protect private interests. The public benefits from a procurement system that is fair, equitable, transparent, competitive and cost-effective, but section 217 also serves the private interest by delineating the state's obligations to individuals in terms of section 33 of the Constitution. This Court held in *Steenkamp* that, although an infringement of the right to just administrative action attracts public law remedies rather than private law remedies, "[t]he purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function".[56] This pre-emption, correction or reversal protects private parties' section 33 rights and promotes lawful public administration.

[54] *Steenkamp* above n 24 at paras 27 and 33.

[55] Id at para 33.

[56] Id at para 29.

[38] In *Steenkamp*, this Court held that legislation designed to give effect to section 187 of the interim Constitution (the predecessor to section 217), was intended primarily to advance the public interest.[57] In that case, this militated against the claim for delictual damages. I accept that section 217 is designed primarily to protect the public interest. Depending on the nature of the breach, and other relevant policy considerations, the fact that this is the section's primary purpose might well militate against the imposition of delictual liability. That is the import of *Steenkamp*. What *Steenkamp* did not hold, however, was that this, in itself, non-suits a litigant in a claim for delictual damages. Nor does *Steenkamp* render it irrelevant, for present purposes, that section 217 advances private interests by delineating the state's obligations to the individual under section 33.

[39] Properly construed, section 217 is silent on whether economic loss caused by an intentional breach of this section is recoverable in delict. The relevant question is whether the imposition of liability for private harm is an incident of the constitutional provisions.

[40] As mentioned, *Steenkamp* answered a related but different question. It held that the negligent but honest bungling of a tender which causes economic loss is not actionable in delict, but left open the question which is now before this Court: whether the state's intentional breach of its duties in a tender process might attract delictual liability or, put differently, whether a delictual claim is available to a party who suffers harm as a result of such a breach. That was a finding consistent with the Supreme Court of Appeal's earlier holding in *Olitzki*. In *Gore*, a case heard subsequent to *Steenkamp*, the state was held vicariously liable for the fraudulent misconduct of its officials in a tender process which had caused economic loss. That Court explained that—

> "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

[57] Id at paras 55 and 75.

> 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."[58]

[41] *Gore* held further, albeit *obiter*, that 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".[59]

[42] The intensity of the respondent's fault is also relevant to the wrongfulness enquiry.[60] In this case, the respondent's conduct was reprehensible and deserving of sanction. The applicant's evidence that the respondent manipulated the scoring of the tender and overlooked the joint venture's inadequate CIDB score was uncontested. In the face of these patent irregularities, the respondent was plainly required to take steps to properly assess the applicant's allegations and assure itself that the tender had been lawfully awarded. Instead, at every turn, the respondent acted to ensure that the award was implemented and, as a result, an entity plainly unsuited to implement the award squandered vast sums of taxpayer money. A project which should have cost approximately R200 million ended up costing the fiscus approximately R800 million. And, worse still, this was a project intended to mitigate against the effects of a drought and to ensure that the residents of Giyani had water. Why the respondent acted to advance the interests of the joint venture is unclear and further investigation by the relevant authorities is undoubtedly required. 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.

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[58] *Gore* above n 27 at para 88.

[59] Id at para 89.

[60] *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* [2016] ZACC 42; 2017 (1) SA 613 (CC); 2017 (2) BCLR 152 (CC) at para 23.

[43] In this case, accountability is a neutral factor. The award has been reviewed and set aside in terms of the Promotion of Administrative Justice Act[61] (PAJA) and, in this way at least, the state has been held to account. Additionally, even if the provisions of PAJA had not been employed, the norm of accountability must be weighed against other relevant constitutional norms, including the principle of subsidiarity.

[44] PAJA was not in force at the time that the claim for damages was instituted in *Steenkamp* but it was when the judgment in that matter was delivered. In a concurring judgment, Sachs J, with reference to PAJA, reasoned:

> "Both the interim Constitution and the final Constitution envisage a right to just administrative action. The implication is that a constitutionalised form of judicial review is intended to cover the field, both in substantive and remedial terms. To my mind it would not only be jurisprudentially inelegant and functionally duplicatory to permit remedies under constitutionalised administrative law, and remedies under the common law, to function side by side. It would be constitutionally impermissible. The provision in PAJA to the effect that in special circumstances a court reviewing administrative action could award compensation, did not invent the public law remedy it articulates. On the contrary, it gave precise expression to a remedy already implicit in the interim Constitution and, later, in the final Constitution.
>
> 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."[62]

[45] PAJA is, of course, now in operation and this dictum is therefore instructive. This Court has on various occasions endorsed the principle of subsidiarity.[63] This

[61] 3 of 2000.

[62] *Steenkamp* above n 24 at paras 100-1.

[63] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC) at para 108; *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts*) at paras 160-1; *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123

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[64] or on the common law,[65] without challenging the constitutional validity of that legislation.[66] 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,[67] 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".[68]

[46] PAJA is constitutionally mandated legislation, designed to give effect to section 33 in both substantive and remedial terms. The applicant did not specifically base its case on section 33. Nonetheless, its central submission was that the respondent owed it a legal duty, actionable in delict, not to cause it to sustain economic loss through an intentional breach of section 217. According to the applicant, it is the alleged intentional breach by the state of its duty to ensure just administrative action in a tender process, which is actionable in delict. To make this finding, however, would subvert the principle of subsidiarity. It would entitle litigants to bypass the provisions of PAJA, in order to hold the state liable in terms of the common law and, in this way, give rise to "two parallel systems of law".

[47] The scheme of section 8(1) of PAJA also militates against holding that the applicant's claim for compensation is actionable in delict. That section provides:

(CC) at para 173; and *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 73.

[64] *My Vote Counts* id.

[65] *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 23 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 22.

[66] *My Vote Counts* above n 63 at para 64.

[67] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 436.

[68] *My Vote Counts* above n 63 at para 62.

"The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—

(a) directing the administrator—
  (i) to give reasons; or
  (ii) to act in the manner the court or tribunal requires;
(b) prohibiting the administrator from acting in a particular manner;
(c) setting aside the administrative action and—
  (i) remitting the matter for reconsideration by the administrator, with or without directions; or
  (ii) in exceptional cases—
    (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
    (bb) *directing the administrator or any other party to the proceedings to pay compensation;*
(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
(e) granting a temporary interdict or other temporary relief; or
(f) as to costs." (Emphasis added.)

[48] This provision empowers a court to grant "any order that is just and equitable". In determining an appropriate 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.[69] Relief under section 8 is intended to vindicate the wrong to both the public and individuals. That much is clear from the specific availability of compensatory relief under section 8(1)(c)(ii)(bb). As with any balancing exercise, the award of relief under section 8 inevitably requires a certain latitude and flexibility. There will therefore be cases where justice and equity demand that the public interest bends to the interest of the individual. For instance, where an individual is awarded compensation, that individual's interest is afforded a measure of priority over those of the public, who are

[69] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at para 56 and *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) at para 23.

forced to pay for this compensation. Conversely, in an array of cases the public interest will be afforded priority over that of the individual, such as in *Steenkamp*. Thus, where a tenderer sustains loss through the negligent but good faith bungling of a tender process, the considerations of public policy detailed in *Steenkamp* demand that no delictual liability arises, and that the public interest prevails over that of the tenderer.

[49] To hold that a residual private law right of recompense can be sustained, despite the availability of an award of just and equitable relief under section 8 of PAJA, which may in exceptional cases include compensation, would subvert the careful balancing of interests that this section envisages. 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.

[50] The principle of subsidiarity and the scheme of PAJA necessitates the conclusion that economic loss sustained as a result of a breach of section 217 – whether or not the breach is intentional – is not recoverable in delict. If the compensatory regime in PAJA is considered to be defective, or fails to ensure that failures of administrative justice are sufficiently vindicated, the appropriate course is a frontal challenge to PAJA.[70]

[51] Finally, it is necessary to address one finding of the Supreme Court of Appeal since it carries implications for the availability of compensation under section 8 of PAJA. The Supreme Court of Appeal held that—

> "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

[70] See *My Vote Counts* above n 63 at paras 64-6 for an articulation of the principle of subsidiarity in the context of the Promotion of Access to Information Act 2 of 2000.

> 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."[71]

[52] The effect of the Supreme Court of Appeal's holding is therefore that an unsuccessful tenderer can never sustain loss in the form of loss of profit through a breach of the principles of administrative justice, because the opportunity which the tenderer alleges it lost – the opportunity to accrue profits through the award of the tender – does not exist in law once it is set aside.

[53] Section 8(1)(c)(ii)(bb) of PAJA allows for the payment of compensation in exceptional cases. A person or entity can only be compensated if they have sustained loss and, were the Supreme Court of Appeal's holding correct, loss of profit could not be recovered even in terms of PAJA.

[54] This, however, is not the correct position. Loss is sustained relative to the hypothetical situation in which the defendant does not commit the delict.[72] Had the respondent lawfully evaluated and awarded the tender, the opportunity that the applicant claims it lost – the tender – would not have become a nullity. And, assuming that causation is established, it would have been able to realise that opportunity through the award of the tender and would thus have accrued profits. Relative to this hypothetical situation, therefore, the applicant did sustain loss. Put differently, the applicant is economically worse off than it would have been had the tender been lawfully

[71] SCA judgment above n 8 at para 98 (judgment of Nicholls J).

[72] *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* [2004] ZASCA 24; 2005 (1) SA 299 (SCA) at para 15, discussing the principles relevant to an assessment of damage. Though loss, for purposes of a delictual claim for loss of profit, and damage are distinct elements, both are assessed in terms of the same method.

adjudicated. The nullity of a tender process does not foreclose the possibility of a compensatory claim for loss of profit.

[55] In short, therefore, a tenderer in the position of the applicant is, in appropriate circumstances, entitled to recover its lost profits in terms of PAJA. Generally, an order setting aside a decision and remitting it to the decision-maker for a fresh determination or, in exceptional circumstances, an order of substitution will suffice to vindicate the interests of both the public and the aggrieved tenderer. But that will not always be the case. The relief available in terms of section 8 is exemplary rather than exhaustive. This is apparent from the language of section 8(1) which provides that a court may grant "*any* order that is just and equitable, *including*" the relief detailed in that section. Undue weight should therefore not be accorded to the fact that section 8(1)(c)(i), which provides for remittal, is framed disjunctively from section 8(1)(c)(ii)(bb), which provides for compensatory relief. Likewise, the fact that section 8(1)(c)(ii)(aa), which provides for substitution, is framed disjunctively from section 8(1)(c)(ii)(bb), does not mean that an order of substitution is, in all cases, a true alternative to a compensatory order.[73]

[56] This is not to say that compensatory relief will generally be available where remittal or substitution are competent alternatives. Such cases will likely be rare because remittal or substitution will often suitably vindicate all relevant interests. Additionally, though *Steenkamp* was decided in the context of a delictual claim, the considerations of public policy outlined in that case mean that negligent but honest administrative failures will not allow for a claim of compensation. But where the state's misconduct is deliberate and dishonest and where substitution or remittal are not viable forms of relief, or where this relief will not suitably remedy the loss sustained by a party, circumstances may exceptionally require compensatory relief in order to ensure a just and equitable result.

[73] *Trustees, Simcha Trust v De Jong* [2015] ZASCA 45; 2015 (4) SA 229 (SCA) at para 27.

[57] In the result, it is both constitutionally impermissible and unnecessary for us to extend the common law in order to allow for the applicant's claim. The appropriate avenue for a claim for compensation for loss sustained as a result of a breach of the precepts of administrative justice is PAJA.

Conclusion

[58] Since the applicant has failed to establish wrongfulness, the appeal must be dismissed and it is unnecessary to consider any of the remaining issues that might otherwise have arisen. It bears emphasis, however, that the respondent should take no succour in this judgment. Its conduct was reprehensible and should be further investigated by the Special Investigating Unit.

Costs

[59] Though the applicant has been unsuccessful, it has raised constitutional issues of considerable import in an effort to vindicate its rights. This would ordinarily mean that each party would bear their own costs.[74] However, in light of the Municipality's reprehensible conduct, a costs order against it is warranted. The applicant is entitled to all its costs, including the costs of two counsel.

Order

[60] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The respondent must pay the applicant's costs, including the costs of two counsel.
4. This judgment is referred to the Special Investigating Unit.

[74] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22.

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