



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT
OF APPEAL**

FROM: The Registrar, Supreme Court of Appeal
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STATUS: Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

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

The Supreme Court of Appeal (the SCA) today dismissed an appeal against an order of the Gauteng Division of the High Court, Pretoria (Makgoka J) (the high court) dismissing a delictual action instituted against the Mopani District Municipality (Mopani).

The action arose from circumstances in which Mopani awarded a contract for the construction of a water pipeline between Thohoyandou and Giyani in Limpopo Province. In 2010, Mopani published a call for tenders for the construction of the pipeline. A number of entities submitted bids, including Esorfranki Pipelines (Pty) Ltd (Esorfranki) and a Joint Venture (the Joint Venture) comprising TeLong Re Yeng CC and Base Major Construction (Pty) Ltd. Mopani awarded the contract to the Joint Venture in October 2010. Esorfranki launched urgent proceedings in the Pretoria High Court to set aside the award of the contract to the Joint Venture, alleging that the Joint Venture was disqualified since it did not meet the specified bid requirements. On 27 January 2011 Preller J granted an order, by agreement between the parties, setting aside the award of the contract and ordering that the tenders be re-adjudicated.

On 1 March 2011, Mopani again awarded the contract to the Joint Venture. Esorfranki thereupon again commenced review proceedings and, on 21 March 2011, obtained an interim interdict preventing the implementation of the contract works. Despite the existence of the interim order the implementation of the contract proceeded. Mopani sought leave to appeal against the interim order. Since the works were continuing Esorfranki brought an application in terms of rule 49 (11) of the Rules of Court, seeking to enforce compliance with the interim orders it had obtained.

The review application was finalised on 29 August 2012 when Matojane J found that the award of the contract to the Joint Venture was tainted by bias in favour of the Joint Venture. Matojane J also found that Mopani had acted with deliberate dishonesty and *mala fides* in awarding the contract to the Joint Venture. The review court did not, however, set aside the contract.

Esorfranki appealed against the failure to set aside the contract. In a judgment, reported as *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA), the SCA confirmed the findings of deliberate dishonesty, bias and *mala fides* on the part of Mopani. It set aside the contract and ordered the Department of water Affairs to assess the work needed to complete the pipeline and to proceed with another public tender for such works. This was done and upon adjudication of the bids received, which included a further bid by Esorfranki, the contract was awarded to a third party.

Esorfranki instituted a delictual claim against Mopani claiming damages for loss of profits arising from the wrongful and unlawful failure by Mopani to award the original contract to it. The trial was heard by Makgoka J on 15 May 2017. Makgoka J dismissed the action on 17 January 2018. The high court found that the issues before it were *res judicata*. It further held that the award of a further tender published by the Department of Water Affairs following the SCA order on review, constituted a *novus actus interveniens* i.e. a new event that interrupted the causal chain giving rise to the loss allegedly suffered by Esorfranki. Esorfranki had therefore failed to establish legal causation in its claim.

On appeal the SCA found, by a majority of three to two, that the high court's finding regarding the interruption of causation was correct. It therefore dismissed the appeal with costs.
