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DISPUTE RESOLUTION ALERT

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Unsuccessful in bidding for a public tender? Think twice before instituting a claim for delictual damages

Over the past 25 years aggrieved bidders have unsuccessfully sought to bring delictual claims – that is, claims for civil damages – against organs of state for their infringement of the various rules and procedures that apply to public procurement. This article explores why this is so.

Recovery of ill-gotten assets held abroad

Asset forfeiture is a powerful tool for clawing back unlawful proceeds located both domestically and internationally. Assistant Federal Bureau of Investigation Special Agent Douglas Leff said, *"Unfortunately, asset forfeiture often is neglected or misunderstood, thereby allowing criminals to enjoy the fruits of their crimes even after conviction."* This statement is true when it comes to the law relating to the court's power to grant an asset forfeiture order outside the territory of South Africa.

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Unsuccessful in bidding for a public tender? Think twice before instituting a claim for delictual damages

A claim would be competent where it is established that the award of the contract was brought about by dishonest or fraudulent conduct on the part of the officials whose conduct the organ of state is vicariously liable for.

Under the Constitution, an organ of state must contract for goods and services in accordance with a system that is “fair, equitable, transparent, competitive and cost effective”. When an organ of state does not do so, aggrieved bidders whose rights or interests have been infringed upon are entitled to approach the courts to have the decision set aside on review and, where appropriate, to interdict the organ of state from implementing its decision.

Despite this, over the past 25 years aggrieved bidders have sought to bring delictual claims – that is, claims for civil damages – against organs of state for their infringement of the various rules and procedures that apply to public procurement. These attempts have been unsuccessful largely because the courts have held that public policy does not require an organ of state to compensate an aggrieved bidder for loss of profits, particularly under circumstances where the organ of state has already paid the successful tenderer. The Constitutional Court went so far as to hold that even out of pocket expenses, such as wasted costs for compiling a bid, were not recoverable.

However, in 2007 the door was left ajar by the Supreme Court of Appeal (SCA) in *Minister of Finance and Others v Gore* NO [2007] (1) SA 111 (SCA), where a provincial tender was awarded through fraud, bribery and corruption. In this case, the SCA confirmed that even where the organ of state’s conduct amounted to

negligence, a claim for damages would not be competent, however, a claim would be competent where it is established that the award of the contract was brought about by the dishonest or fraudulent conduct of the officials, for which the organ of state is vicariously liable.

However, circumstances of blatant malfeasance are rare, and one would be hard pressed to find instances where aggrieved bidders have successfully prosecuted a case for damages against the relevant organ of state despite the narrow opening left by the Gore case. The recent judgment of the SCA in *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2021] ZASCA 89 is illustrative of this point, particularly because the facts in that case demonstrated, at the very least, *mala fides*, which is commonly translated as bad faith but which also means an intention to deceive.

Damages sought for loss of profit

An exposition of the facts underlying the conduct of the municipality cannot be sufficiently condensed to fit into this article, however, what is important to note is that the decision to award the tender was successfully reviewed by Esorfranki in an earlier suit and was declared unlawful. Esorfranki was also successful in interdicting the implementation of the award, but was unsuccessful in enforcing the interdict, because the municipality was intent on implementing the award despite being interdicted from doing so.

Unsuccessful in bidding for a public tender? Think twice before instituting a claim for delictual damages...*continued*

The five-person bench was split down the middle, with no clarity being given as to whether wrongfulness could be established under circumstances where the review court has set aside the award and where the reason the award was set aside in the first place was due to conduct amounting to fraud and corruption.

This brings us to the issue of delictual damages, which was sought by Esorfranki against the municipality for loss of profit. The legal requirement for a delictual claim for damages is that a litigant must prove that there was a wrongful act, fault either in the form of negligence or intention, causation, and damages in the form of a reduction in the litigant's financial position (or non-patrimonial loss such as loss for pain and suffering). The limitation to a wrongdoer's liability is found in the wrongfulness and causation elements. As a result, these elements are often crucial to the success or failure of a claim for delictual damages.

If you recall, in *Gore* the SCA held that a claim in delict would be competent where it is found that the conduct underpinning the decision to award the tender was tainted by fraud, bribery and corruption. In *Esorfranki*, the SCA grappled with whether an express finding that the conduct by the organ of state was fraudulent and corrupt was required to satisfy the wrongfulness element of a delictual claim.

Judgment

The judgment of Goosen AJA found that because the decision maker at the municipality acted with deliberate dishonesty, in bad faith, with an ulterior purpose and fraudulently (not once but twice because the decision to award the tender was reviewed by Esorfranki twice) it was clear that the conduct was wrongful.

The judgment of Nicholls JA disagreed with this finding, holding instead that because the review court made no direct findings of fraud against the municipality when it set aside the decision to award the tender, wrongfulness could not be established. In addition, she found that when the review court set aside the decision to award the tender, it resulted in there being no extant tender in which Esorfranki lost the opportunity to bid and thus make a profit. In other words, Esorfranki obtained a public law remedy that set aside the decision to award the tender, which made the decision void from the outset. The result being that the wrongful conduct perpetrated by the municipality would no longer attach to any existing tender, meaning that there was no legal duty owing to Esorfranki which Esorfranki could use as a basis for establishing a cause of action.

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So, what does it all mean? In our view, despite the lengthy debate on wrongfulness, the status quo remains the same for aggrieved bidders seeking to claim damages.

The judgment of Goosen AJA was supported by Petse AP, whereas the judgment of Nicholls JA was supported by Poyo-Dlwati AJA. The five-person bench was split down the middle, with no clarity being given as to whether wrongfulness could be established under circumstances where the review court has set aside the award and where the reason the award was set aside in the first place was due to conduct amounting to fraud and corruption.

In the end, however, Esorfranki was unsuccessful, and the appeal was dismissed because Nicholls JA (Poyo-Dlwati AJA concurring) along with Mbatha JA (who wrote a separate judgment on the issue) found that Esorfranki had failed to satisfy the causation element, more crudely known as the "*but for test*". Of course, causation is more than simply answering the question of whether the harm would have been caused but for the wrongdoer's conduct. It involves a second analysis to determine the remoteness of the conduct to the harm caused and whether there were

intervening factors. On this issue, the majority found that there were insufficient facts, given the litigious history of the matter whereby no witnesses were called at the trial, to satisfy the legal element of causation.

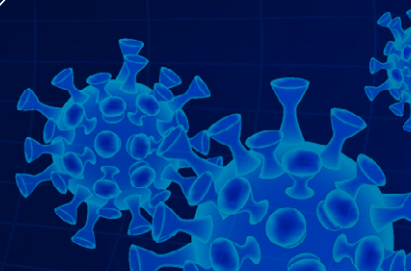
Comment

So, what does it all mean? In our view, despite the lengthy debate on wrongfulness, the status quo remains the same for aggrieved bidders seeking to claim damages. That is, that although Gore is illustrative of the fact that our courts are willing to entertain claims for damages, the circumstances giving rise to such claims require blatant malfeasance that distinguishes clearly between mere incompetence and deliberate corruption. In addition, even where such extraordinary facts are established, it is by no means clear that a court will award the delictual damages being sought. Thus, aggrieved bidders would do well to think twice before instituting an action for delictual damages.

Tiffany Jegels and Imraan Abdullah

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Recovery of ill-gotten assets held abroad

The SCA further held that although the High Court does not have inherent jurisdiction over persons in foreign countries and assets held in a foreign country, it found that jurisdiction can find its source in statute as well.

Asset forfeiture is a powerful tool for clawing back unlawful proceeds located both domestically and internationally. Assistant Federal Bureau of Investigation Special Agent Douglas Leff said, *"Unfortunately, asset forfeiture often is neglected or misunderstood, thereby allowing criminals to enjoy the fruits of their crimes even after conviction."* This statement is true when it comes to the law relating to the court's power to grant an asset forfeiture order outside the territory of South Africa.

In the case of *Bobroff and Another v The National Director of Public Prosecutions* (Case no 194/20) [2021] ZASCA 56 (3 May 2021), the Supreme Court of Appeal (SCA) was required to determine whether the High Court exceeded its powers in ordering the forfeiture of assets located outside the territory of South Africa in favour of the National Director of Public Prosecutions (NDPP).

In the High Court, the NDPP sought an order to preserve credit balances and interest accrued and held in two accounts in Israel by account holders Ronald Bobroff and Darren Bobroff who were resident in Australia. The basis for the preservation order was that the assets were proceeds of unlawful activities, as defined in the Prevention of Organised Crime Act 121 of 1998 (POCA).

The order was granted by the High Court but the Bobroffs appealed the order on the basis that the High Court lacked jurisdiction to make a forfeiture order in terms of POCA in respect of property held abroad and belonging to persons resident outside of South Africa.

Determining jurisdiction

The SCA, in considering whether or not the High Court did have the requisite jurisdiction stated that the determination of jurisdiction is a two-stage inquiry: (i) it must be established whether the court is competent to take cognizance of the particular case (that is, whether a recognised jurisdictional ground exists); and (ii) if a recognised jurisdictional ground exists, whether an effective judgment can be given.

The SCA considered section 50 of POCA as well as section 19 of the International Co-operation in Criminal Matters Act 75 of 1996 (ICCM Act). Section 50 of POCA provides that if the court finds on a balance of probabilities that the property concerned *"(a) is an instrumentality of an offence referred to in schedule 1; [or] (b) is the proceeds of unlawful activities it may order a forfeiture of the property"* and section 19 of the ICCM Act provides for South Africa to request a foreign state to assist it in the enforcing of a confiscation order.

The SCA held that section 50 of POCA read together with section 19 of the ICCM Act is *"directed at enlisting international assistance in the enforcement of a forfeiture order made under the POCA in respect of property held in another country"*.

The SCA further held that although the High Court did not have inherent jurisdiction over persons in foreign countries and assets held in a foreign country, it found that jurisdiction can find its source in statute as well. In this case, it found that the High Court is empowered

Recovery of ill-gotten assets held abroad...*continued*

The SCA was also careful to order only those amounts proportional to the proceeds of unlawful activities engaged in by the appellants – engaging in a full enquiry into the source of amounts within their various bank accounts.

by the POCA to make forfeiture orders in respect of assets held in a foreign country and the ICCM Act ensures the execution of such orders.

Amending the order

In applying the two-stage inquiry set out above, the SCA held that the court *a quo* had ordered that the authorized personnel at the respective banks in Israel be directed to deposit the credit balance into the Criminal Asset Recovery Account established in terms of POCA. The SCA recognised that in so doing the court *a quo* had indeed overstepped its jurisdiction as it cannot exercise its powers over persons not resident in its jurisdiction and over whom it has no authority. The SCA directed that the order granted by the High Court be amended to bring it in line with section 19 of the ICCM Act, by setting aside that particular order and replacing same with “*The balance of the proceeds in the accounts ... are to be paid into the Criminal Assets Recovery Account.*”

The SCA was also careful to order only those amounts proportional to the proceeds of unlawful activities engaged in by the appellants – engaging in a full enquiry into the source of amounts within their various bank accounts. It held that some amounts were sufficiently explained and accounted for, whereas other amounts were unexplained and were likely the proceeds of unlawful activities.

In conclusion, the Bobroff case upholds the principles of effectiveness to ensure that the courts produce orders that can be meaningfully executed and section 19 of the ICCM Act is specifically directed at achieving the effectiveness of a forfeiture order. Further, section 19 of the ICCM Act ensures that criminals do not enjoy the fruits of their crimes when such fruits have been moved outside the territory of South Africa – making certain that the arm of the law remains long.

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