



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO. 2923/2021

In the matter between:

GARY DAVID MEYERS N.O.

First Plaintiff

HILTON SAVEN N.O.

Second Plaintiff

JACK MEYERS N.O.

Third Plaintiff

and

NELSON MANDELA BAY

METROPOLITAN MUNICIPALITY

First Defendant

THE BUILDING CONTROL OFFICER

OF THE FIRST DEFENDANT

Second Defendant

JUDGMENT IN RESPECT OF EXCEPTION

HARTLE J

[1] In this matter the defendants¹ persisted with an exception taken to the plaintiffs' amended particulars of claim on the sole remaining basis that they lack averments necessary to sustain a cause of action.

[2] The plaintiffs' purported claim is one in delict for damages (pure economic loss) alleged to have been suffered as a direct and consequent result of the conduct referred to below.

[3] The plaintiffs have sued the defendants in their capacities as the trustees of the Meyprop Trust ("the trust"). The trust is the registered owner of immovable property situated in Swartkops, Gqeberha, ("the property") which resorts within the municipal area of jurisdiction of the first defendant. The second defendant is the "*building control officer*" of the municipality appointed by the first defendant in accordance with the provisions of the National Building Regulations and Building Standards Act, No. 103 of 1977 ("the Act"),² as read together with the Regulations promulgated in terms of the Act ("the Regulations"). It is under the ambit or in the context of this legislation ("the empowering provisions") that the harm causing conduct described in the particulars of claim is said to have occurred.

[4] The conduct essentially entails a failure on the part of the municipality's functionaries - on two occasions in the course of considering and approving plans

¹ I intend to refer to the parties as they are cited in the main action. In this instance the defendants are the excipients.

² Section 5.

submitted to it under the empowering provisions, to have ascertained and drawn the trust's attention to existing municipal services of which it ought to have been reasonably aware, which failures, in turn, led directly to the losses sustained by the trust.

[5] The following factual averments set forth in the amended particulars of claim (which I must for purposes of deciding the exception assume to be correct)³ are relevant to the trust's contention that the defendants' conduct in the peculiar circumstances of the matter attracts liability for its economic losses in delict.

[6] In August 2018 the trust, in accordance with the relevant provisions of the Act and Regulations, applied for the approval of a site development plan and building plans respectively with a view to the proposed development of its property. On 11 and 14 December 2018 respectively, these received the go ahead by the first defendant acting through its relevant functionaries, including the second defendant, who approved the building plans.

[7] The trust says that it complied with all conditions of approval, as imposed by the "*defendant*"⁴ and that it commenced with the construction and development at the property in accordance with these plans, which commenced during or about late December 2018.

[8] During February 2019 the trust's building contractors discovered, to the surprise of its trustees since its existence was not given recognition on the approved

³ *Voget v Kleinhans* 2003 (2) SA 148 (C) at 151.

⁴ The first and second defendants are collectively referred to as "the Defendant/s" in the particulars of claim, which nomenclature I will retain for purposes of referencing this pleading.

site development plan and/or building plans, a 450 mm effluent pipeline (“the pipe”) under the surface of the property, which extended underneath the newly constructed warehouse on its property. The pipe extends from the western to the eastern boundary, and approximately 4 metres from the northern boundary of the property.⁵

[9] The plaintiffs plead that the officers of the first defendant, including the second defendant, did not advise the trust (who was entirely nescient) of the pipe’s existence notwithstanding the fact that they knew or ought reasonably to have known thereof.

[10] The trust avers further, in the context of the defendant’s failure to have informed it of the pipe’s existence, additionally that: *“By approving the SDP and/or Building Plans, the defendants represented that no Municipal services, such as the 450 mm Pipe, would be adversely affected by the construction and development at the property.”*⁶

[11] The trust asserts that the defendant had a *“duty of care”* to draw the fact of the pipe’s existence and position of its current services (including the pipe) to its attention when approving the development of the trust’s property. Such duty arises

⁵ According to the trust’s official demand addressed to the municipality, included as an annexure to the particulars of claim, the title deed in respect of the property does not contain any reference to a servitude. The evidence thereby portended is that *sans* registration the trust could not been expected to have known of the servitude. Also portended by correspondence attached to the particulars of claim and alleged in the pleading itself is the fact that prior to the approval requests the municipality was in possession of original sepi service drawings that reflected the water services traversing the trust’s property. (The same applies in respect of the second set of approvals. In this regard the municipality was in possession of original service drawings recording the presence of high voltage cables in the servitude area of a neighbouring property over which the trust hoped by its second application to relocate the pipe to instead of accommodating them underneath its newly constructed warehouse.)

⁶ One gets the impression (confirmed by the demand letter) that the trust’s claim is also based on negligent misstatement in this respect. The notice heralded that it would also rely on a negligent misstatement concerning the absence of any high voltage cables in the servitude area on the neighboring property that was supposedly available for the relocation of the pipe, but this was not carried over in the particulars of claim.

from the obligation on it to record and be aware of the existing municipal services, particularly those which traverse property owned by the trust, and to have drawn attention to their existence and position prior to or at the time of approval of the plans. Concerning their alleged negligence, the defendant was said to have been in possession of drawings showing the existence of the pipe in accordance with the obligation on it to record and be aware of the existing municipal services at the time of approving the plans (particularly those which also traverse the property owned by the trust) and therefore ought reasonably to have known of the pipe's existence so as to have drawn this adverse effect by the proposed development to its attention, which it failed to do.

[12] The trust concludes that the defendant was therefore both negligent and acted wrongfully in having failed to draw the trust's attention to the existence and position of current services, including the pipe, when approving the site development and building plans.

[13] The consequence that would have been averted had the trust been so advised at the relevant time is that it "*would have made adjustments to the SDP and Building Plans so as to avoid the additional costs occasioned by accommodating such existing services.*"

[14] On 12 June 2019 (by way of a circuitous route first to compel it to take such steps and evidently upon the compunction of a court order)⁷ the first defendant

⁷ A substantive application was launched under case number 1396/2019 to compel the municipality's functionaries to consider and approve plans and drawings the trust submitted to it for the diversion of the storm water pipeline on the property, and to take a decision on certain proposals that had been made by it to resolve the conundrum that had been posed by the revelation of the existence of the pipe traversing its property. Although the municipality filed a notice to oppose the application it did not put up answering papers and the court granted an order in the trust's favour.

approved plans and drawings submitted by the trust which allowed for the diversion of the pipe on the property (“the diversion approval”) which conditions it pleads it also complied with.

[15] On 28 June 2019 the first defendant approved the trust's request for the relocation of the pipe (“the relocation approval”). Pursuant to this approval, on 16 October 2019 (“the October submission”), the trust through its consulting engineers submitted plans and drawings for approval by the defendant of the design for the relocation of the pipe, for leave to commence with construction relating to the relocation of the pipe, and for comment on all other municipal services that may or may not be affected by the proposed construction.

[16] The defendants required certain amendments to the plans and drawing forming the subject matter of the October submission which the trust’s engineers complied with and upon which they resubmitted certain amended plans and drawings to the defendants for approval (“the December submission”). In resubmitting, they repeated the same requests alluded to in paragraph 15 above which significantly called for “*comment*” on all other municipal services that may or may not be affected by the proposed construction.⁸

⁸ Possibly the request was made in terms of section A3 (1) of the Regulations, but the trust gives no further context to its request for such comments except to state that the defendant failed to respond. In the trust’s official letter of demand to the defendant it appears (as I have stated elsewhere) that it possibly also relies for the harm causing conduct on negligent misstatement causing it harm, if not on omissions. The first was its misrepresentation (implicit in the approval of the plans in the first place) that the pipe did not exist, and the second, (again implicit in both the relocation approval and the failure to comment) that the high voltage cables did not exist and that the servitude area in question was available for the purpose of relocating the pipe. I understood the thrust of the trust’s argument to be that it was the (mis)representations made in this matter (*inter alia*) that gave it the edge over the kind of situation arising in the *Steenkamp* judgment which I refer to above, where the subject of the administrative conduct in question in that matter concerned negligent but *bona fide* errors made in the course of a tender board carrying out its administrative functions.

[17] On 10 December 2019 the first defendant gave the trust its approval in respect of the design relative to the relocation of the pipe (“the design approval”). In terms of this approval the trust was required to relocate the pipe to a municipal servitude area (i.e., a servitude registered in favour of the first defendant) located to the north of the boundary wall of its property (“the servitude area”).⁹

[18] Significantly, from the trust’s perspective, the defendants did not advise the trust or its engineers, of any existing municipal services that may be affected by the design or the design approval (despite a request for comment in this regard), and it accordingly put the work out to tender to attend to the relocation of the pipe in accordance with the relocation and design approvals.

[19] After having awarded a tender to it, Mawethu Civils (Pty) Ltd (“Mawethu”) commenced construction work at the property at the behest of the trust pursuant to the design approval on 2 March 2020 when it discovered the existence of nine high voltage electrical cables within the servitude area, with the result that the pipe could not be installed in the servitude area, as per the design approval.

[20] The trust pleads that this has rendered the design approval completely unusable and inoperable, with the result that it must incur further costs in having a new design prepared and submitted for approval.

[21] The trust avers that the defendant was negligent in this respect too and acted wrongfully. Firstly, it is under obligation to record and be aware of the existence of the existing municipal services and had been specifically asked on two occasions to

⁹ It appears from annexures supplied that the servitude area is on a neighbouring property.

comment on all other municipal services that may or may not be affected by the proposed diversion or relocation of the pipe so when it approved the design therefor, it owed it a duty of care to have drawn its attention to the existence of the high voltage cables. Secondly, since it was at the time of approving the design in possession of original drawings showing the existence of the cables, it acted negligently in not ascertaining the existence and position of the cables and in not informing the trust of same before or at the time of approving the design.

[22] It pleads that had it been so informed at the relevant time two consequences would have been averted. The first is that Mawethu would not have been instructed to commence work at the property and, secondly, they would have adjusted the design so as to avoid the additional costs occasioned by accommodating the cables.

[23] In the result it claims damages in the sum of R1 312 621.00 made up of various fees incurred as a result of the defendants' negligence on the two occasions outlined above.¹⁰

¹⁰ It would have been helpful to plead more specifically how each fee arose to understand how the harm is causally connected to the negligent conduct in each instance but the gist of it is there. One of the factors that goes to wrongfulness is whether the harm that ensued was foreseeable. In *Steenkamp NO v The Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) at par [42] ("*Steenkamp CC*") we are reminded that in the determination of wrongfulness foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant. The circumstances of this matter are quite novel. From a property law point of view the pipe servitude on the trust's property (albeit not registered) could not be wished away and had to be engaged with by the trust who it seems as a means of solving the problem offered to bear the costs of a diversion subject to the reservation of its right to reclaim such costs down the line. An application to compel ensued, there was a counteroffer, a plan and a revised plan etc. The point sought to be made is that it becomes hard to see what in the fees that were invoiced are directly related to the claimed negligence of the municipality to have ascertained and advised the trust of the presence and existence of the pipe and high voltage cables, or to the misstatement(s) relied upon concerning their presence and existence respectively.

[24] The nature of the trust's claim for the losses it claims to have suffered is clearly one framed in the private law of delict.¹¹

[25] The first principle of the law of delict is that everyone has to bear the loss that he or she suffers.¹² And, in contrast to instances of physical harm, conduct causing pure economic loss¹³ is not *prima facie* wrongful. Accordingly, a plaintiff suing for the recovery of such loss is in no position to rely on an inference of wrongfulness such as would flow naturally from an allegation of physical damage to property (or injury to person) because the negligent causation of pure economic loss is *prima facie* not wrongful in the delictual sense and does not give rise to liability for damages, that is at least not unless policy considerations require that the plaintiff should be recompensed by the defendant for the loss suffered thus rendering the conduct relied upon to be wrongful in the Aquilian sense.¹⁴ (It is on the basis of such policy considerations applied to the unique factual situation that pertains in this matter that the trust hopes to recover its losses.)

[26] The plaintiff must allege facts from which the wrongfulness can be inferred. If the element can be implied from the allegation that the defendant negligently caused the plaintiff's damage, it is not customary to allege separately that the act or omission was wrongful. This is the usual case, for example, where physical damage was caused. If on the other hand wrongfulness cannot naturally be inferred from the

¹¹ The *actio legis Aquiliae* enables a plaintiff to recover patrimonial loss, including pure economic loss, suffered through a wrongful and negligent act of the defendant. Liability depends on the wrongfulness of the act or omission of the defendant.

¹² *Telematrix (Pty) Ltd T/A Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 SCA at [12]; *Steenkamp NO v Provincial Tender Board, Eastern Cape*¹² ("Steenkamp SCA") at [1]; *Min of Fin v Gore NO* 2007 (1) SA 111 (SCA) at [82]; *Steenkamp CC* at [69].

¹³ Pure economic loss in this context connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of property, being put to extra expenses, or the diminution in the value of the property. See *Telematrix* at [1].

¹⁴ *Home Talk Development (Pty) Ltd & Others v Ekurhuleni Metropolitan Municipality* [2017] 3 All SA 382 (SCA) at [1].

nature of the loss, which will certainly be the case where the plaintiff claims for a loss resulting from an omission or for pure economic loss (both of which apply in the present scenario), the defendant's legal duty towards the plaintiff must be "defined" and the "breach" alleged.¹⁵

[27] Wrongfulness can manifest itself in different ways, for example, as the breach of a common law right, particular statutory duty, or duty of care that may arise for example from the provisions of the Bill of Rights. For instance, the state has a positive duty to protect individuals from violence, and its failure to do so may give rise to liability.¹⁶ The more specific the breach of a duty of care relied upon, obviously the more information is required to be pleaded to give a context to the nature thereof and to provide a premise for why the court should determine its existence, and breach, compensable by way of a claim in delict.

[28] In restating the common law test for determining whether particular conduct is wrongful, policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered.¹⁷ In *Telematrix (Pty) Ltd T/A Matrix Vehicle Tracking v Advertising Standards Authority SA*, the court held in this respect that:¹⁸

"...conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant.¹⁹ It is then that it can be said that the legal convictions of society regard the conduct as wrongful,²⁰ something akin to and perhaps derived from the modern Dutch test

¹⁵ See the requirements postulated in *Amler's Precedents of Pleadings* for claims under the mantle of *Lex Aquilia* and the cases cited therein.

¹⁶ *Amler's*, and the cases cited therein.

¹⁷ *Telematrix* at [13]. *Steenkamp CC* at [39].

¹⁸ *Telematrix* at [13].

¹⁹ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A–B; *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA) para [12]; *Pretorius en andere v McCallum* 2002 (2) SA 423 (C) at 427E.

²⁰ *Minister van Polisie v Ewels*, *Supra*, at 597A–B.

"in strijd . . . met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt" (contrary to what is acceptable in social relations according to unwritten law).²¹

[29] In *Knop v Johannesburg City Council*,²² an appeal against a judgment upholding an exception by the respondent to the particulars of claim of the appellant in an action for damages brought by the latter, the basis of who's claim was to be found in allegations that that municipality's officials owed certain duties to him in connection with the exercise of their statutory powers in the course of a wrongful approval as it were of an application for subdivision under the Johannesburg Town Planning Scheme and that the municipality negligently failed to comply with such duties in certain respects,²³ the court referred to this as a "legal duty". It noted as follows in this respect:

"In the phraseology of our law the "policy-based or notional duty of care" is more appropriately expressed as a "legal duty", in consonance with the requirement of wrongfulness as an element of delictual liability and the underlying concept of legal reprehensibility in respect of the causing of pure economic loss. As is evident from the passage quoted from *Millner*, and from the clear distinction in our law between fault and unlawfulness referred to by CORBETT CJ in the *Simon's Town Municipality* case *supra* at 196F, the enquiry into the existence of a legal duty is discrete from the enquiry into negligence. Nor can the mere allegation in the particulars of claim that the Council was under a duty to take steps to prevent loss being caused to the plaintiff carry the day for him. The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. The general nature of the enquiry is stated in the well-known passage in Fleming, *The Law of Torts* (4th edition), quoted in the *Administrateur, Natal* case *supra* at 833 *in fine* – 834 A:

"In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiffs invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable

²¹ Asser *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht: Verbintenissenrecht* (9 ed) (1994) Part III at 36–37.

²² 1995 (2) SA 1 (A).

²³ The facts of that matter bear some similarity to those in the present matter.

to adjustment in the light of the constant shifts and changes in community attitudes.”²⁴

The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court (see, e.g. *Minister van Polisie v Ewels* 1975 (3) S A 590 (A) at 596 H – 597 F and *Lillicrap’s case supra* at 498G-H). ”

[30] It is to be noted from the excerpt above that the observation of the court that the mere allegation that a defendant is under a duty of care to take steps to prevent the loss is insufficient has less to do with a direction to a plaintiff as to how to plead his cause of action than on pointing out that the enquiry envisaged in order to get to the conclusion that a legal duty exists and that the conduct in question is pursuant to the outcome a value judgement wrongful is discrete from the enquiry into negligence and cannot be morphed into being by merely stating in one’s particulars of claim that a duty of care not to cause harm exists. Instead, the existence of a duty of care to prevent loss is a conclusion of law *dependent on all the circumstances of the case*.²⁵ It begs the question, when all is in the pan, whether the defendant owes a legal duty to the plaintiff.

[31] It is evident therefore that “*more*” is needed to justify a case that delictual liability should be imputed in any particular set of circumstance.²⁶ Wrongfulness, an element distinct from that of negligence²⁷ and which lies in a failure to fulfil a

²⁴ At page 30.

²⁵ *Knop* at page 27.

²⁶ *Telematrix* at [13]; *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at [12] – [13]. The “more” here envisaged is that the court must be persuaded that the legal convictions of the community demand that the conduct ought to be regarded as unlawful. What will go into the pan, on the back of the allegation of wrongfulness, will in my view begin with a theory of the case with a focus on all the relevant facts and background, an examination of the statutory context (if applicable) and the nature of the statutory duty and end with a normative analysis and balancing of these involving legal policy.

²⁷ *Telematrix* at [12].

different, legal duty, to prevent harm to others,²⁸ must be positively established²⁹ and, so it was submitted on behalf of the municipality, a basis to justify the conclusion sought to be drawn that its conduct in this instance should be determined to be wrongful, ought to be pleaded.

[32] The last submission is an important one in the context of the test upon exception. The issue before this court is whether the allegations of fact in the particulars of claim, if assumed to be proved, are susceptible in law of sustaining a finding that the municipality in this instance was under a legal duty to the trust, by exercising care, to avoid the loss it seeks to recover in the action which it says was caused to it under the peculiar circumstances. If they are not, the trust will be unable at the trial to discharge the *onus* of proving that the municipality's conduct (committed through its officials) was wrongful, and the exception would be well founded.

[33] As an aside the municipality initially also objected to the trust's particulars of claim on the basis that they are vague and embarrassing more particularly because they contain no averments as to which portions of the empowering provisions create a duty of care by the municipality to the trust, but this aspect of the exception was not pursued before me. Despite this, submissions were made at the hearing that the particulars of claim are "fatally defective", and that the municipality does not know what case to meet. In my view all of this relates to a misconception created by taking the observation in *Knop* that "*Nor can the mere allegation in the particulars of claim that the Council was under a duty to take steps to prevent loss being caused to the*

²⁸ *Steenkamp CC*, at [39] – [42]; *Telematrix* at [14]. See also *Knop* at pages 26-27.

²⁹ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2014 (12) BCLR 1397 (CC) at paragraph at [23]; *Esofranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) BCLR 149 (CC) at [29].

plaintiff carry the day for him” out of context or rather reading it in isolation without the next important statement that: “*The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case.*” I have already stated in paragraph [30] above that the first comment cannot be taken to mean what counsel for the municipality contended for.

[34] The enquiry into wrongfulness is evidently an *after-the-fact* objective assessment of whether conduct which *prima facie* may not be wrongful should be regarded as attracting legal sanction.³⁰

[35] However, I do espouse the view that the enquiry must at least precede from a “factual theory of the case” premise that suggests that it is fair and reasonable that a duty should arise in the circumstances. This, as I will demonstrate below, the trust has sought in its particulars of claim to do. For the rest all the essential averments for the delictual claim have been pleaded by it and it is quite clear that it wishes to prevail on the trial court to assess whether the conduct it relies on is wrongful for the purposes of Aquilian liability or not.

[36] A final word on this issue is to note the caution expressed by the court in *Telematrix* that exceptions should firstly be dealt with sensibly,³¹ and that it is not true in all cases that it is appropriate to decide issues of wrongfulness on exception where the issues are “fact bound”.³² Here the trust hopes to be allowed the benefit of leading evidence concerning the circumstances surrounding the various submissions of site development plans and building plans to the municipality. The

³⁰ *Steenkamp CC* at [41].

³¹ *Telematrix* at [3].

³² At [2].

numerous annexures filed in support of averments portend the comprehensive evidence to come. They give an indication that there may be relevant evidence that “can throw light” on the issue of wrongfulness.³³ It would therefore be counterintuitive to decide the question of wrongfulness without a detailed factual matrix that is reasonably anticipated from the averments pleaded, read together with the annexures and documentation provided in the trust’s statement of case.³⁴

[37] To return to the theme that “more’ is needed to underpin the after-the-fact objective assessment of wrongfulness, this is particularly so in the administrative law context which naturally implicates the constitutional right to fair and just administrative action under the provisions of the promotion of Administrative Justice Act, No. 3 of 2000 (“PAJA”) that provides for its own unique remedies and or consequences of any unfair or unjust administrative action.³⁵ In such a setting the element of wrongfulness similarly cannot be assumed to exist in the presence of illegality or unlawfulness. An administrator may be liable in delict for damages caused during or as a result of the performance of their statutory functions but would escape liability by showing that their actions were authorized by statute (it is obvious that an action authorized by statute cannot be wrongful even if it infringes rights or causes other harm), or on the basis that they were otherwise lawful.³⁶

³³ At [2].

³⁴ At [3].

³⁵ See *Esorfranki* at [32] and [43] in which the court noted the unique position where the breach of a statutory provision giving rise to the harm is a constitutional one that additionally requires the court (in determining the substantive issue of wrongfulness) to add to its list of considerations the norms of accountability by government agencies and the constitutional principle of subsidiarity that leads one back to the all-encompassing provisions of PAJA which is constitutionally mandated legislation designed to give effect to section 33 of the Constitution in both substantive and remedial terms.

³⁶ C Hoexter and G Penfold, *Administrative Law in South Africa*, 3rd Edition at 704-9.

[38] The breach of a constitutional or statutory provision (generally applicable to the performance of an administrative function) does not, *without more*, give rise to a delictual claim. It may however do so in either of two circumstances. The first is when, on a proper construction, the breach of the empowering provision imposes an obligation to pay damages for loss caused by the breach.³⁷ The second is when the statutory provision, taken together with all the relevant facts, and salient constitutional norms, mandates the conclusion that a common law duty, actionable in delict, exists.³⁸

[39] These two enquiries have been said to overlap.³⁹ 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 ought also not to arise. The reason suggested for this is that to allow for a damages claim would subvert the statutory or constitutional scheme applicable in a particular factual matrix, but this does not necessarily follow. In *Steenkamp CC* Langa CJ and O'Regan J penned a minority judgment in which they disagreed with the proposition that if no conclusion as to whether liability should arise can be drawn from the relevant statute that it is unlikely that policy considerations could weigh in favour of granting a common law remedy, this with reference to the approach adopted by Cameron JA in *Olitzki Property Holdings v State Tender Board & another* (in effect endorsed by both the SCA and CC in *Steenkamp*) to the effect that where a common law duty is at issue :

³⁷ See *Knop* at page 31 where the court notes that the enquiry into the intention of the legislature serves the purpose of determining whether a defendant owes a legal duty to the administrative subject to exercise care in exercising the powers conferred upon it in relation to his or her application, in that instance for subdivision approval. In other words, did the legislature intend that such an applicant should have a claim for damages in respect of loss caused by the administrator's negligence.

³⁸ *Esorfranki* at [30].

³⁹ At [31].

“...the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is “just and reasonable” that a civil claim for damages should be accorded. “The conduct is wrongful, not because of the breach of the statutory duty per se, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right”. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court’s appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.”

[40] The proper construction of the empowering provision (such as is applicable to the peculiar circumstances of each matter) is thus relevant to both enquiries and requires a consideration of:

“whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party; 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.”⁴⁰

[41] As can be seen above the trust has attempted to go into considerable detail in pleading the necessary facts that give a context and background to the matter⁴¹ to illuminate the “*something more*” that is required to hold the municipality liable for its pleaded failures/omissions (or negligent misstatement) and going to the element of wrongfulness.

⁴⁰ *Esorfranki Supra* at [31].

⁴¹ The trust has also extensively referenced official documentation attached as annexures that portend what the evidence will be. As suggested in *Telematrix* at [2] the allegations are “*fleshed out by means of annexures that tell a story.*”

[42] In *Steenkamp NO v Provincial Tender Board, Eastern Cape* (“*Steenkamp SCA*”)⁴² the court alluded to this “*something more*” that is necessary to be established in laying down the general approach to delictual liability for pure economic loss caused by administrative breaches as follows:

“Subject to the duty of courts to develop the common law in accordance with constitutional principles, the general approach of our law towards the extension of the boundaries of delictual liability remains conservative. This is especially the case when dealing with liability for pure economic losses. And although organs of State and administrators have no delictual immunity, “something more” than a mere negligent statutory breach and consequent economic loss is required to hold them delictually liable for the improper performance of an administrative function. Administrative law is a system that over centuries has developed its own remedies and, in general, delictual liability will not be imposed for a breach of its rules unless convincing policy considerations point in another direction.”⁴³

[43] In *Steenkamp (CC)* the 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. The 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”.⁴⁴

[44] The court however left open the question whether an administrative decision tainted by other conduct having its origin in the administrative domain might yet 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.*”

⁴² 2006 (3) SA 151 (SCA).

⁴³ at [27].

⁴⁴ In the present scenario we are not concerned with the exercise of a discretion.

[45] As was pointed out by Mr. Buchanan who appeared on behalf of the trust, *Steenkamp CC* does not postulate an absolute rule that there can never be such a delictual claim unless one can establish *mala fides*, corruption or the like. It simply means that one has to persuade the court that a legal duty exists to prevent loss to a plaintiff in any instance of financial loss caused by improper performance of a statutory or administrative function “*where called for by policy considerations of fairness and reasonableness.*”⁴⁵

[46] Therefore, notionally, any other “*misconduct*” (or improper performance of a statutory or administrative function, or misfeasance), that is other than merely incorrect or negligent but honest decisions,⁴⁶ might for policy reasons require the Aquilian law of delict to be extended to permit the recovery of a pure economic loss occasioned by such conduct but each case will in my view stand on its own merits and be context specific.

[47] In this instance the particulars of claim allege actual knowledge of existing services on the part of the relevant officials, including the second defendant, and

⁴⁵ See in this regard Moseneke DCJ’s amplification of his judgement in *Steenkamp* articulated in “*All Rise A judicial Memoir*” at 184 to such effect.

⁴⁶ Policy has already been formed through the sentiment expressed in *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at [17] for example that administrative subjects are “*..not entitled to a perfect process, free of innocent errors, and the administrative subject could not expect to be immunised from all prejudicial consequences flowing from such errors.*” *Telematrix* at [26] also puts the decisions of adjudicators beyond the pale and as being immune to damages claims in respect of their incorrect and negligent (but not made in bad faith) by reason of public policy considerations, the overriding consideration being that, by the very nature of the adjudication process, rights will be affected and that the process will bog down unless decisions can be made without fear of damages claims, something that must impact on the independence of the adjudicator. An example on the other side of the coin, where the court has felt compelled by policy considerations to permit a private law remedy is that of *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) in which the loss of a contract (in a tender process) had been brought about by dishonesty or fraud on the part of the public officials concerned. In *Olitzki*, where the defendant’s conduct was found to be deliberate and dishonest, the court noted that these factors “strongly” suggested a basis for liability to following damages even where a public tender is being awarded.

furthermore allege that the officials were expressly requested to consider and investigate the presence of existing services which are self-evidently under their control.⁴⁷ Notwithstanding such knowledge (which it must be accepted for present purposes the trust could not have had absent the registration of a servitude over its own property concerning the pipe, or of the high voltage cables on the neighboring erf), and notwithstanding such request on more than one occasion regarding the failure to identify the presence of not one but several high voltage cables, the officials of the municipality simply failed to advise the trust of the presence of such services, which failure, in turn, led directly to the loss sustained by it. It additionally relies on a negligent misstatement which is a class of a claim on its own.⁴⁸

[48] Against this background the municipality's complaint that the trust's amended particulars of claim lack averments to sustain a cause of action ring particularly hollow. I agree with Mr. Buchanan that this is not a case where the process was free of innocent errors or where the kind of situation is one made provision for by exemptions in the Act and regulations at least concerning the process for the approval of site development and building plans. The wrongful approval of the plans which serves to demonstrate that the municipal officials (specialists in the engineering and land survey fields) are not on top of their obligation to record and be aware of their own services, even when pressed for comment and assurance, is

⁴⁷ Section 116 of the Local Government: Municipal Systems Act, No. 32 of 2000 provides that public servitudes are under the control of the municipality which must protect and enforce the rights of the local community arising from these servitudes. Local authorities also have obligations with regard to maintaining the accuracy of details required pursuant to the Land Survey Act, No 8 of 1997. In this instance there is also the suggestion of evidence that will establish that the municipality is in possession of original service plans that reflect the existence and presence of the pipe and high voltage cables that are the subject of the trust's claims.

⁴⁸ This presupposes an already established category of claim for pure economic loss where the plaintiff can show a right or legally recognized interest the defendant has infringed without having to extend the law of delict. See *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2014 (12) BCLR 1397 (CC) at paragraph [23] in which the court refers to the classic example in *Mukheiber v Raath and others* 1999 (3) SA 1065 (SCA). I imagine though that it would have to be relooked at through the prism of public policy considerations applicable to an administrative law setting.

also particularly reprehensible⁴⁹ and provides a novel set of circumstances that deserve to be assessed and put through the wringer of the indicated value judgment required to establish if the trust's invaded interests are deemed worthy of legal protection by a private law remedy.

[49] Finally, on the issue of an appropriate public law remedy, the municipality's submissions were amplified after oral argument when on 13 November 2022 the Constitutional Court in *Esorfranki*⁵⁰ handed down its judgment in which it was confirmed that the appropriate avenue for a claim for compensation for loss sustained as a result of a breach of the precepts of administrative action is PAJA.⁵¹ (Sic) In my view the facts in *Esorfranki* are entirely distinguishable from the facts in the present matter and the court's pronouncement that it was both constitutionally impermissible and unnecessary for it to extend the common law was qualified to relate to the applicant's unique claim. Indeed, that matter related to the issue of whether delictual liability attaches to an intentional breach of sections 33 and 217 of the Constitution whereas the trust in this instance seems to eschew any direct administrative law relationship. Though the judgement may influence how policy considerations evolve in the future in the domain of administrative law, my conclusion is that it does not render the trust's claim any less susceptible to a finding that the conduct relied upon will be established to be wrongful in all the circumstances.

⁴⁹ See *Esorfranki* at [42] where the court held that the intensity of the defendant's fault is also relevant to the wrongful enquiry.

⁵⁰ *Supra*.

⁵¹ At paragraph [47].

[50] In the premises the municipality has not met the onus on it to show that the trust's amended particulars of claim are excipiable⁵² or that that upon every interpretation which the pleading can reasonably bear, no cause of action is disclosed.⁵³

[51] As for the question of costs there is no reason why these should not follow the result. Mr. Ronaasen who appeared for the municipality suggested that these courts should be determined by the trial court depending how that might go for the trust. He added that his client may be criticized at the end of the trial for not have taken the exception, but such overcaution must be for its own account.

[52] In the result I issue the following order:

1. The exception is dismissed, with costs.

B HARTLE

JUDGE OF THE HIGH COURT

⁵² *South African National Parks v Ras* 2002 (2) SA 537 (C) at 541ff.

⁵³ *Herbstein and Van Winsen, Supra*, at 639 and the authorities set out in footnote 50.

DATE OF HEARING : 10 November 2022
 DATE OF PLAINTIFF'S
 FURTHER REPRESENTATIONS : 12 January 2023
 DATE OF DEFENDANTS'
 FURTHER REPRESENTATIONS : 19 January 2023
 DATE OF JUDGMENT : 7 September 2023

Appearances:

For the Plaintiffs : Adv. R Buchanan SC instructed by STBB / Smith Tabata Buchanan Boyes c/o Pagdens, Gqeberha (ref. J Eksteen).

For the Defendants : Adv. O Ronaasen SC together with Adv N L Nsepe instructed by Maci Incorporated, Gqeberha (ref. SM/N0019/21/os).