CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 71/05

JURGENS JOHANNES STEENKAMP N.O. Applicant

versus

THE PROVINCIAL TENDER BOARD OF THE EASTERN CAPE Respondent

Heard on : 11 May 2006

Decided on : 28 September 2006

JUDGMENT

MOSENEKE DCJ:

Introduction

[1] This case raises the complex debate on the proper interface between private law and public law remedies in our constitutional dispensation. The narrow issue is whether financial loss caused by improper performance of a statutory or administrative function should attract liability for damages in delict. On the facts, the issue may be rendered as whether a successful tenderer whose award is later set aside by a court on review may claim delictual damages from the tender board for out-of-pocket expenses incurred subsequent to and in reliance on the award. A secondary enquiry relates to whether the tender was valid at inception and if not, whether the tender board nonetheless owed the initially successful tenderer a legal duty of care.

[2] These issues arise in an application to this Court for leave to appeal against the judgment and order of the Supreme Court of Appeal. It dismissed the applicant's appeal and upheld, albeit for somewhat different reasons, the decision of the Bisho High Court (High Court) that the successful tenderer whose award was later nullified was not entitled to claim delictual damages from the tender board concerned.

Parties

[3] The applicant, Jurgens Johannes Steenkamp, sues in a representative capacity as liquidator of Balraz Technologies (Pty) Ltd (Balraz). The original respondent was the Member of the Executive Council for Finance of the Eastern Cape province (MEC). The Provincial Tender Board of the Eastern Cape (tender board) has replaced the MEC as respondent. The tender board was established in September 1994 under the provisions of the Provincial Tender Board Act (Eastern Cape) of 1994.[1]

Facts

[4] The facts are neither contested nor complex. On 21 July 1995 the national State Tender Board[2] invited tenders from the public for the supply of three separate government services related to the introduction and implementation of an automatic cash payment system for social pensions and other welfare grants in the Eastern Cape province. The tender specifications originated from the Eastern Cape Department of Health and Welfare (Department of Health). Later, in August 1995, the national State

[1] No 2 of 1994, which was repealed by the Provincial Tender Board Repeal Act (Eastern Cape) 6 of 2004.

[2] Established in terms of the State Tender Board Act 86 of 1968.

Tender Board revised the specifications of the invitation to tender and extended the closing date for submission of tenders to 8 September 1995.

[5] I digress to record that although the new provincial legislation[3] establishing the tender board came into force in September 1995, its members were appointed only on 25 October 1995 with retrospective effect. Nothing turns on this belated induction of the members of the provincial tender board. Suffice it to observe that the national legislation[4] under which the national State Tender Board issued the invitation to tender was in force in the Eastern Cape province at the time the invitation to tender was issued and immediately prior to the commencement of the provincial legislation.[5]

[6] On 31 August 1995 members of Balraz signed its memorandum and articles of association but the company was incorporated and issued with a certificate to commence business[6] only some six weeks later, on 17 October 1995. By then Balraz had submitted its tender to meet the deadline of 8 September 1995. Eight tenders including the one in the name of Balraz were submitted in response to the invitation to tender.

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[3] See above n 1.

[4] See above n 2.

[5] See section 11 of the Provincial Tender Board Act (Eastern Cape) 2 of 1994.

[6] Section 172 of the Companies Act 61 of 1973 prohibits a company from commencing business unless and until it has been issued a certificate entitling it to commence business.

[7] The next significant milestone was 22 March 1996 when the tender board awarded Balraz the contract to supply the equipment and services for fingerprint and photo enrolment of social welfare beneficiaries. The tender was awarded in the face of material reservations of two successive technical committees convened by the Department of Health to evaluate the tenders and report to the tender board. The principal reservation was that Balraz lacked the technical expertise to meet its obligations under the tender. Be that as it may, Balraz warmly embraced the notice that it had won the tender and within three days wrote to accept the award. The balance of the services on tender was awarded to another company, Pensecure (Pty) Ltd (Pensecure). Nearly two months later, the Department of Health placed a written order with Balraz for the supply of services in terms of the tender awarded to it. However, this was not to happen.

[8] No less than a year later, in March 1997 a dissatisfied tenderer, Cash Paymaster Services (Pty) Ltd, approached the High Court for an order to review and set aside the tenders awarded to both Balraz and Pensecure on the ground that the decision-making process of the tender board was vitiated by reviewable irregularities. On 6 June 1997 the High Court found that the decision-making of the tender board had been irregular and administratively unfair. It set aside the tender awards.[7]

[9] As a sequel, the tender board invited fresh tenders. However, Balraz could not take advantage of the second opportunity to tender. By then, it had been placed under

[7] The judgment of Pickard JP and Ebrahim AJ on the review is reported as *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324 (Ck HC).

final liquidation. Contracts for the supply of the relevant services on tender were awarded to two other companies.

[10] The applicant approached the High Court with a contractual claim for damages against the Department of Health on the basis that the contract it had concluded with Balraz following the award of the tender had been wrongfully breached. In an alternative claim, Balraz sought delictual damages from the tender board. Each defendant excepted to the claim it was facing as not disclosing a cause of action. The High Court upheld the exception against the contractual claim and dismissed the action. In that way the Department of Health fell off the litigation picture. In contrast, the Court refused to uphold the exception directed at the delictual claim, reasoning that "it is unthinkable that the Board will have *carte blanche* to act as it pleases, irrespective of the loss which such actions may cause to others."[8]

[11] The premise of the delictual claim is that Balraz had incurred out-of-pocket expenses of R4,35 million as a result of relying on its success in obtaining the tender award. The expenses, says the applicant, were incurred after Balraz had been awarded the tender and in order to place itself in a position to fulfil its obligations under the tender contract. However, the expenses were wasted when the tender was set aside on review as a result of the negligent failure of the tender board to perform properly its statutory functions in evaluating and awarding the impugned tenders. In this manner,

[8] Per White J in the unreported judgment of the Bisho High Court, *The Eastern Cape Provincial Administration and the Provincial Tender Board Eastern Cape v Jurgens Johannes Steenkamp N.O*. Case No 148/2000, 16 August 2001, as yet unreported.

the argument goes, the tender board acted wrongfully in as much as it breached a duty owed to Balraz.

[12] The claim for delictual damages proceeded to trial before the High Court. In a pre-trial minute, the parties agreed to separate the issues. They invited the trial court to decide issues of liability – wrongfulness and negligence – only and to reserve causation and quantum of damages for later determination. In another pre-trial accord, the parties agreed that the issues of wrongfulness and negligence were to be decided on the facts that emerged from the documentation jointly placed by the parties before court and did not present oral evidence.

[13] The High Court dismissed the action for damages. It held that the tender board did owe Balraz a duty of care and that in evaluating and awarding tenders it was obliged to act properly and with due care and that in appropriate circumstances delictual liability may lie. However it found that when Balraz submitted its tender it was not registered as a company and for that reason had no capacity to act. Its tender was invalid. Therefore, the High Court reasoned, the tender board could not reasonably foresee harm to an entity that lodged a void tender. There was no relationship between Balraz and the tender board that could found a legal duty to prevent harm to the tenderer.

[14] The Supreme Court of Appeal dismissed the appeal on two distinct bases. First, it held that policy considerations precluded a disappointed tenderer in the position of

the applicant from recovering delictual damages that were purely economic in nature. Neither the statute under which the tender was issued nor the common law imposed a legal duty on the tender board to compensate for damages where it had *bona fides* but negligently failed to comply with the requirements of administrative justice. Second, the Supreme Court of Appeal took the view that given its conclusion on the substantive wrongfulness enquiry, it was unnecessary to reach the question relating to the validity of the tender. However, for the sake of completeness, it found, as did the High Court, that the tender was a nullity at its very inception because on the closing date for submission of tenders Balraz had not been incorporated, it had no legal capacity to accept the invitation to tender and as a result had no standing to attack the tender process as a disappointed tenderer. The Supreme Court of Appeal further held that the tender board, although unknown to it then, had no duty to consider an inchoate tender. Lastly, as it was unnecessary, the Supreme Court of Appeal, like the High Court, did not decide whether the tender board had acted negligently.

[15] In this Court the applicant seeks leave to appeal the decision of the Supreme Court of Appeal and to have it replaced by a declarator that the tender board acted wrongfully and negligently in its decision to award the tender to Balraz and that it is liable to Balraz for private law damages represented by out-of-pocket expenses incurred in the preparation to implement the tender. In another submission, the applicant challenges the correctness of the decision of the Supreme Court of Appeal that the tender was invalid at its very inception and argues that in any event the right

moment to assess the validity of a tender is not when it is submitted but when it is decided upon.

Issues

[16] The first issue that confronts us is whether the application for leave to appeal implicates a constitutional matter and, if it does, whether it is in the interests of justice to hear the appeal. The second relates to the existence of wrongfulness in delict. The third poses the question whether the tender of Balraz is valid in law. The fourth question concerns negligence. The third and fourth questions arise only if the preceding two issues are resolved in favour of the applicant. I now look closely at each issue.

Does the application raise constitutional issues?

[17] The respondent urged us to dismiss the application for leave to appeal on the threshold ground that it does not raise a constitutional issue. The nub of the contention is that the finding of the Supreme Court of Appeal and the High Court that Balraz is not owed a duty of care because its tender is a nullity does not engage a constitutional matter. The finding merely restates the self-evident rule that a valid contract comes into being only if a contracting party has the requisite capacity to act. And what is more, the finding is independently decisive of the appeal. Relying on section 168(3)[9] of the Constitution, the respondent submits that the decision of the

[9] The section reads:

> "The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only—

Supreme Court of Appeal, on appeal to it, is final and binding upon the applicant and is not open to a further appeal.

[18] The respondent contends that once the High Court and the Supreme Court of Appeal had found that the tender was invalid and no legal duty of care existed, the substantive test for wrongfulness should never have arisen in either court. The respondent submits that important as the broader issues of wrongfulness in delict may be, they are not decisive of the final outcome of the action and consequently need not be decided by us on appeal.

[19] This contention must fail. First, the Supreme Court of Appeal disposed of the appeal to it on the substantive ground that the loss arising from the administrative breach of the tender board is not actionable in delict. It expressly makes the point that its finding on the validity of the tender is for the sake of completeness. The Supreme Court of Appeal is clearly correct. Once it had found that the loss incurred by the successful tenderer is not recoverable in damages it matters not whether the tender was valid or not on the closing day for submission of tenders. A decision on the validity of the tender would not alter the finding that Balraz is not owed a duty of care. Second, it is an important consideration that the applicant, as the party aggrieved by the decision of the Supreme Court of Appeal, seeks an appeal to lie against the

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(a) appeals;
(b) issues connected with appeals; and
(c) any other matter that may be referred to it in circumstances defined by an Act of Parliament."

substantive decision on wrongfulness. This Court is seized with the matter and there is no good reason why it should decline to resolve the substantive issue on appeal.

[20] There are indeed other cogent reasons why the application involves constitutional issues. First, when a tender board procures goods and services on behalf of government it wields power derived first from the Constitution itself[10] and next from legislation in pursuit of constitutional goals. It bears repetition that the exercise and control of public power is always a constitutional matter.[11] Section 195[12]

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[10] The tender of Balraz was submitted and awarded in 1995 under the interim Constitution [Act 200 of 1993]. However, it was set aside by the Court on review in June 1997 and after the inception of the Constitution in 1996 and the claim for damages was initiated under the present constitutional regime. Given the substantial similarity between the provisions of section 217(1) of the Constitution and section 187 of the interim Constitution in this context it is not necessary to decide which of the two constitutions applies. I cite both. Section 217(1) 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."

Section 187 of the interim Constitution provided:

> "(1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.
> (2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
> (3) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.
> (4) All decisions of any tender board shall be recorded."

[11] See for example, *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) at para 313; *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) at para 49; *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) at para 78; *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC) at para 20.

[12] Section 195(1) of the Constitution sets out the basic values and principles governing public administration:

> "Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
> *(a)* A high standard of professional ethics must be promoted and maintained.
> *(b)* Efficient, economic and effective use of resources must be promoted.
> *(c)* Public administration must be development-oriented.
> *(d)* Services must be provided impartially, fairly, equitably and without bias.

of the Constitution further qualifies the exercise of public power by requiring that public administration be accountable, transparent and fair.

[21] Second, the question of the private law liability of a tender board involves significant policy considerations relating to fairness and justice, which must now be settled in the light of section 39(2)[13] of the Constitution. Third, although an invitation to tender and its acceptance may be susceptible to common law rules of contract, when a tender board evaluates and awards a tender, it acts within the domain of administrative law. Its decision in awarding or refusing a tender constitutes an administrative action.[14] That is so because the decision is taken by an organ of state which wields public power or performs a public function in terms of the Constitution or legislation and the decision materially and directly affects the legal interests or

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> *(e)* People's needs must be responded to, and the public must be encouraged to participate in policy-making.
> *(f)* Public administration must be accountable.
> *(g)* Transparency must be fostered by providing the public with timely, accessible and accurate information.
> *(h)* Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
> *(i)* Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

[13] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Section 35(3) of the interim Constitution provided:

> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

[14] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA); *Greys Marine Houtbay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA); *Logbro Properties CC v Bedderson N.O. and Others* 2003 (2) SA 460 (SCA); *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA); *Olitzki Property Holdings v State Tender Board and Another* 2001 (8) BCLR 779 (SCA); 2001 (3) SA 1247 (SCA).

rights of tenderers concerned.[15] In this way, the right to just administrative action is now a constitutional imperative.[16]

[22] Lastly, ordinarily a breach of the right to administrative justice entitles an aggrieved party to "appropriate relief" within the meaning of section 38[17] of the Constitution. Therefore, the enquiry into what is the just and equitable remedy available to an aggrieved tenderer in itself triggers constitutional concern.

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[15] See the definition of administrative action in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Also compare the recent decision of the SCA in *Grey's Marine* id at para 21-24.

[16] Section 24 of the interim Constitution provided:

> "Every person shall have the right to—
>
> *(a)* lawful administrative action where any of his or her rights or interests is affected or threatened;
>
> *(b)* procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
>
> *(c)* be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
>
> *(d)* administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

Section 33(1) of the Constitution provides: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." See also *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* 2005 (4) BCLR 347 (CC); 2005 (3) SA 589 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC); 2004 (4) SA 490 (CC) at para 22 and *Pharmaceutical Manufacturers* above n 11 at paras 33-45.

[17] Section 38 of the Constitution provides:

> "the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

Subsection 7(4)(a) of the interim Constitution provided:

> "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) at para 65; *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC); 1997 (3) SA 786 (CC) at para 56; *S v Bhulwana; S v Gwadiso* 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC) at para 12.

[23] There can be no doubt that the issues that arise for determination in this appeal concern constitutional matters.

Is it in the interests of justice to grant the application?

[24] The respondent argues that it is not in the interests of justice to hear the appeal because there is no reasonable prospect that this Court may alter the decision appealed against. I take a different view. The submissions of the applicant are far from frivolous. As I see it, there is a prospect that this Court may decide differently the issue whether an initially successful tenderer which incurs out-of-pocket expenses is owed a duty of care. As the substantive judgments of the High Court, the Supreme Court of Appeal and the judgment of Langa CJ and O'Regan J in this case show, the applicant has put up important common law issues that implicate the Constitution and bear some prospect that the decision against which the appeal lies may be varied.

[25] In any event, prospects of success on appeal though important, are certainly not the only or decisive considerations in assessing where the interests of justice lie.[18] Other factors are also relevant in deciding what best advances justice.[19] A decision by

[18] See for example, *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) at para 25; *Ingledew v Financial Services Board: In Re Financial Services Board v Van Der Merwe and Another* 2003 (8) BCLR 825 (CC); 2003 (4) SA 584 (CC) at para 31; *S v Boesak* 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) at para 12.

[19] See *Radio Pretoria v Chairperson of the Independent Communications Authority of South Africa and Another* 2005 (3) BCLR 231 (CC); 2005 (4) SA 319 (CC) at para 19; *Fraser v Naude and Others* 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC) at para 7; *De Freitas and Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) at paras 20-21; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (7) BCLR 855 (CC); 1998 (4)

this Court is likely to clarify the new matter of the scope of delictual liability of tender boards in relation to initially successful tenderers. The decision would be in the public interest because it is likely to be of practical value to tenderers, on the one hand, and to state tender boards, on the other, in their function to procure goods and services for the state. Happily there are no significant disputes of fact; the evidence is sufficient and we enjoy the benefit of two prior and very helpful judgments.

[26] It is clearly in the interests of justice that the application for leave to appeal be granted.

Wrongfulness

[27] The applicant's claim is couched in the private law of delict. The particulars of claim aver that when the tender board considered the tenders it owed Balraz a duty in law to: (a) exercise its powers and functions fairly, impartially and independently; (b) take reasonable care in the evaluation and investigation of tenders and (c) properly evaluate tenders within the parameters imposed by the tender requirements so as to ensure that the award of the tender was reasonable in the circumstances. The particulars do not specify whether the duty in law has a constitutional or statutory premise. However, in this Court, unlike in the Supreme Court of Appeal, the applicant advanced its case on the basis that, first, the invitation and consideration of

SA 1157 (CC) at para 32; *S v Pennington and Another* 1997 (10) BCLR 1413 (CC); 1997 (4) SA 1076 (CC) at paras 25-26.

tenders is an administrative function[20] and, second, that the legal duties pleaded do not derive from the common law principles of administrative law but from the Constitution and the controlling legislation.[21] That is indeed the correct approach to this matter.

[28] I intimated earlier[22] that since the advent of our constitutional dispensation administrative justice has become a constitutional imperative. It is an incident of the separation of powers through which courts review and regulate the exercise of public power.[23] The Bill of Rights achieves this by conferring on "everyone" a right to lawful administrative action that must also be reasonable and procedurally fair.[24] In this regard in *Bato Star Fishing*,[25] O'Regan J writing for a unanimous court reminded us that:

> "The grundnorm[26] of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution." [Footnotes omitted]

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[20] See for examples *Transnet* above n 14 at 870D-F and *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (A) at 552j-553a. See also cases in n 14 above.

[21] *Zondi* above n 16; *Bato Star* above n 16; *Pharmaceutical* above n 11; and *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC).

[22] Above at para 21.

[23] *Pharmaceutical* above n 11 at paras 45, 51, 79 and 85.

[24] Section 24 of the interim Constitution and section 33 of the Constitution. There is no material difference in the scope of the right envisaged in both provisions.

[25] Above n 16.

[26] The South African Law Reports in 2004 (4) SA 490 (CC) erroneously report this term as "groundnorm". The correct form is "grundnorm".

[29] It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief.[27] In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. The purpose of a public law remedy is to pre-empt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.

[30] Examples of public remedies suited to vindicate breaches of administrative justice are to be found in section 8 of the PAJA. It is indeed so that section 8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are "just and equitable".[28] Yet it is clear that the power of a court to order a

[27] *New Clicks* above n 11 at para 95; *Pharmaceutical* above n 11 at para 51; *Zondi* above n 16 at paras 99 and 102; *Bato Star* above n 16 at para 25.

[28] I am not unmindful of the fact that when the tender was awarded and subsequently when the claim for damages was instituted in June 2000 PAJA had not come into force. It only took effect on 30 November 2000. Its remedial provisions are cited merely to make the point that they provide in the main for public law remedies. PAJA is the legislation that is meant to give effect to the constitutional protection. Section 8 of PAJA provides:

decision-maker to pay compensation is allowed only in "exceptional cases". It is unnecessary to speculate on when cases are exceptional. That question will have to be left to the specific context of each case. Suffice it for this purpose to observe that the remedies envisaged by section 8 are in the main of a public law and not private law character. Whether a breach of an administrative duty in the course of an honest exercise of a statutory power by an organ of state ought to be visited with a private law right of action for damages attracts different considerations to which I now turn.

[31] In this case the pivotal question remains whether a successful tenderer whose tender award is subsequently set aside by a court on review, may claim damages from the relevant tender board for out-of-pocket expenses incurred in reliance on and subsequent to the award.

"(1) 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) substituted 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.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders—

(a) directing the taking of the decisions;
(b) declaring the rights of the parties in relation to the taking of the decision;
(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
(d) as to costs."

[32] The starting point must be the Constitution. It is however necessary to establish whether the interim or the final Constitution applies. To that end I have to explain that the tender was awarded in March 1996 when the interim Constitution was in force but was set aside on review in June 1997 after the new Constitution had taken effect. The claim for damages was initiated only thereafter. It follows that the proceedings were not pending when the new Constitution took effect.[29] They were instituted after its inception. Even if it were otherwise, in my view it is in the interests of justice that this matter be disposed of under the new Constitution.[30]

[33] Section 217[31] of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of state in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1).

[29] The Constitution came into force on 4 February 1997. Section 17 of schedule 6 of the Constitution regulates transitional arrangements relating to cases pending before courts. It provides that:

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

[30] The interests of the applicant are just as well protected, if not better, under the new Constitution. None of the parties sought to argue its case under the interim Constitution. And the administrative justice protections in the two constitutions are, for purposes of this case, similar in substance.

[31] For the full text see above n 10.

[34] It will be remembered that the provincial tender board is the successor in title to the State Tender Board within its province.[32] It owes its establishment to provincial legislation.[33] It exercises exclusive power to procure supplies and services for the province, to enter into or terminate procurement agreements on its behalf and could claim damages presumably for breach of a supply contract to which it is a party. It is duty bound to exercise its powers fairly, impartially and independently although in the main it acts as a procuring agent of the provincial government. There is an express prohibition against any organ of state, its member or any person from improperly interfering with its decisions and operations. On request it must furnish reasons for its decisions. The tendering system it devises must promote efficiency and effectiveness. It must advance fair dealing and equitable relationships among parties to provincial contracts.

[35] There can be no doubt that in procuring goods and services for the state, a tender board must act consistently with its statutory mandate. It must act fairly, impartially and independently. Equally, it may not act with negligent or reckless disregard for the protectable interests of tenderers. It must act within the legislative power conferred on it and properly and honestly exercise the discretion it may have. A tender board must in doing its work act transparently and be held accountable, when appropriate.[34] In other words it must in its work observe and advance the basic values

[32] See above para 3.

[33] See above n 1, which sets out both the 1994 and 2004 Acts, the latter repealed the former.

[34] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (4) BCLR 301 (CC); 2005 (2) SA 359 (CC) at paras 74-76 and 78; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); [2002] 3 All SA 741 (SCA) at para 21.

and principles governing public administration as envisaged by section 195 of the Constitution.

[36] None of the parties in this case characterised the duties of a tender board differently. If anything, both parties agree that when we assess whether Balraz is owed a duty of care we must do so on the footing that the decision of the tender board in awarding the tender was administratively unfair. In the same vein, both parties accept that the tender board acted in good faith.

[37] However, a concession that the tender board acted inconsistently with the tenets of administrative justice is neither decisive of the existence of a duty of care nor is it of any avail to the applicant's case. In our constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty. But the breach is not an equivalent of unlawfulness in a delictual liability sense. Therefore, an administrative act which constitutes a breach of a statutory duty is not for that reason alone wrongful. Unlike in other jurisdictions,[35] this does not mean that the government enjoys delictual immunity when performing its functions, but a negligent statutory breach and resultant loss are not always enough to impute delictual liability. Policy considerations of fairness and reasonableness have to be taken into account

[35] In India, the Supreme Court has carved out a sphere of governmental activity within which the state will be immune from civil suit. The Court has described the actions performed in that protected sphere as being "inalienable" functions of the state, which are derived from its sovereignty. See for example, *N. Nagendra Rao & Co. v State of A.P* (1994) 6 SCC 205 at paras 24-27; AIR 1994 SC 2663 at paras 23-26.

In the United States, the government generally enjoys sovereign immunity in tort unless the immunity is waived by a particular state constitution or other statutory provision. Tort liability is therefore completely regulated by statute and allows no room for liability derived from the common law. See Keeton WP (ed) *Prosser and Keeton on the Law of Torts* 5ed (West Publishing Co, Minnesota 1984) at 1034-1036 and 1038-1039. See also S2671-S2680 of the Federal Tort Claims Act of 1946, which created a form of liability under which the government is liable for certain torts committed by government employees.

when imposing a duty of care and ultimately liability to make good harm suffered by a claimant.

[38] Confronted with a similar enquiry in the context of the exercise of a statutory power by a local authority, Botha JA in *Knop v Johannesburg City Council*[36] sharpens the analysis as follows:

> "In my view this argument does not advance the case for the plaintiff, because it loses sight altogether of the purpose of the enquiry upon which we are engaged. The enquiry into the intention of the legislature has as its object to determine whether a local authority owes a legal duty to an applicant to exercise care in exercising the powers conferred upon it by s 92 so as to avoid causing loss to the applicant. The existence of such a duty will entail a right in the applicant to sue for damages upon its breach. The fundamental question, therefore, is this: did the legislature intend that an applicant should have a claim for damages in respect of loss caused by the negligence of the local authority?"[37]

[39] Before probing the "fundamental question", a useful point of departure may be to state briefly the common law test for determining the existence of whether a particular conduct is wrongful. It is now well settled that delictual liability arises only if the conduct that causes harm or loss is both wrongful and negligent. Similarly an unlawful act may not be accompanied by the two elements of negligence enunciated in *Kruger v Coetzee*.[38] We need say no more about negligence and the difficulty of

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[36] 1995 (2) SA 1 (A).

[37] Id at 31C-D. Of course, it should be added, that now one is obliged to have regard also to the values of the Constitution.

[38] 1966 (2) SA 428 (A) at 430E-F. In this decision, Holmes JA held:
"For the purposes of liability *culpa* arises if—
(a) a *diligens paterfamilias* in the position of the defendant—

keeping its elements distinct from those of wrongfulness.[39] What is important is that wrongfulness lies in the failure to fulfil a duty to prevent harm to another. In turn, whether or not a legal duty to prevent loss occurring exists calls for a value judgment embracing all the relevant facts and involving what is reasonable and, in the view of the court, consistent with the common convictions of society.

[40] In the case of *Olitzki*[40] the court was concerned with an unsuccessful tenderer who sought to claim loss of profits from a state tender board. The case before us relates to an initially successful tenderer for state business who claims out-of-pocket expenses because the award was subsequently set aside on review. These factual differences matter not in formulating a proper test for wrongfulness in the context of state tenders. Cameron JA, in *Olitzki*, correctly observes that the focal point in determining whether a tender board may be liable to a tenderer in the course of exercising its function is a question of the interpretation of the empowering constitutional and statutory provisions. However where a common law duty is at issue the court has to engage in a broad assessment of whether it is "just and reasonable" that a civil claim for damages should be accorded. He elaborates that:

> "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

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> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
> (ii) would take reasonable steps to guard against such occurrence; and
> (b) the defendant failed to take such steps."

[39] *Local Transitional Council of Delmas and Another v Boshoff* [2005] 4 All SA 175 (SCA) at paras 18-21; *Gouda Boerdery BK v Transnet Ltd* [2004] 4 All SA 500 (SCA) at para 12; *Van Duivenboden* above n 34 at para 12.

[40] See above n 14.

> 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 also determined in the light of the Constitution".[41]

[41] Therefore shortly stated, the enquiry into wrongfulness, is an after the fact, objective assessment of whether conduct which may not be *prima facie* wrongful should be regarded as attracting legal sanction. In *Knop v Johannesburg City Council*[42] the test for wrongfulness was said to involve objective reasonableness and whether the *boni mores* required that "the conduct be regarded as wrongful". The *boni mores* is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy. Both of which now derive from the values of the Constitution.

[42] Our courts - *Faircape, Knop, Du Plessis* and *Duivenboden*[43]- and courts in other common law jurisdictions[44] readily recognise that factors that go to

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[41] Id at para 12. This statement has been approved in the subsequent cases of *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) at para 33; *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) at para 18; *Premier Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) at para 33.

[42] *Knop* above n 36 at 27E-I. Also see *Van Duivenboden* above n 34, and cases cited in n 39 above.

[43] *Du Plessis* above n 41; *Faircape* above n 41 at paras 37-40; *Van Duivenboden* above n 34 at para 13; *Knop* above n 36.

[44] The case law in the United Kingdom suggests that the question of whether a statutory duty can give rise to a private cause of action is a question of construction of the statute. It requires an examination of the policy of the statute in order to decide whether it was intended to confer a right to compensation for breach. In this regard, see for example, *Gorringe v Calderdale* [2004] 2 All ER 326 (HL) at paras 23 and 71; *Stovin v Wise* [1996] AC 923 (HL) at 952; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 739; *Reg v Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58 (HL) at 159, 168-171.

In Australia it has been held that in determining whether a public authority has breached a common law duty by failing to exercise a statutory power, it is essential to examine the words and policy of the legislation. See for

wrongfulness would include whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party;[45] whether there are alternative remedies such as an interdict, review or appeal;[46] whether the object of the statutory scheme is mainly to protect individuals or advance public good;[47] whether the statutory power conferred grants the public functionary a discretion in decision-making;[48] 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. It should be kept in mind that in the determination of wrongfulness foreseability of harm, although ordinarily a standard for negligence, is not irrelevant.[49] The ultimate question is whether on a conspectus of all relevant facts and

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example, *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 377 [126] per Gummow J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 19 [27] per Gaudron J, 59 [160] per Gummow J, 72 [203] per Kirby J; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 540 [56] per Gaudron, McHugh and Gummow JJ. In some cases, the High Court has found that the statutory provisions at issue indicate that the legislature intended to cover the field and exclude all common law duties of care. In this respect, see *Crimmins* at 18-19 [26-27] per Gaudron J. For a similar result in New Zealand, see *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 297-298 per Cooke P.

The Supreme Court of Canada has held that in order to determine whether a duty of care will be owed by a statutory authority the words of the empowering statute must be examined to determine, *inter alia*, whether the statutory powers at issue have produced a decision that was in the "policy" or "operational" spheres. Decisions on whether or not to exercise a statutory power reside in the policy realm (and are thus immune from liability in tort), whereas, once the decision to exercise a statutory power is made, the manner in which it is exercised may give rise to liability in negligence. See for example, *Kamloops v Nielsen* [1984] 2 SCR 2 at 11-13; *Just v British Columbia* [1989] 2 SCR 1228 at 1239-1245; *Brown v British Columbia (Minister of Transportation and Highways)* [1994] 1 SCR 420.

[45] *Knop* above n 36; *Faircape* above n 41; *Lascon Properties (Pty) Ltd v Wadeville Investment (Pty) Ltd and Another* [1997] 3 All SA 433 (W).

[46] See above n 43.

[47] See above n 42 and n 43.

[48] *Van Duivenboden* above n 34 at para 20.

[49] See above n 42 and n 43.

considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.[50]

[43] The applicant contends that to deprive an initially successful tenderer where the award is subsequently set aside an appropriate remedy is not consonant with the legal convictions of the community, and it is inconsistent with the constitutional values of governmental transparency and accountability. The common law should be developed because there is no effective alternative remedy, whether legislative or contractual, other than delictual damages.

[44] The applicant says the Supreme Court of Appeal failed to distinguish between successful and unsuccessful tenderers. Balraz was not an unsuccessful tenderer claiming damages, but rather, a successful tenderer prejudiced by the negligence of the tender board. The Supreme Court of Appeal focused on a claim for damages in the form of loss of profits, rather than pointedly on a claim for damages in the form of actual out-of-pocket expenses. The applicant submits that there are good reasons why the legal convictions of the community might demand a remedy for a successful tenderer but not for an unsuccessful tenderer. The successful tenderer is obliged to spend money in preparation of performing in the tender. If it fails to perform, the resultant contract may be cancelled.

[50] *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA); [2000] 1 All SA 188 (A); *Kruger* above n 38; *Van Duivenboden* above n 34 at para 12; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 307D-308A; *VE v Minister of Safety and Security* [2001] 3 All SA 469 (T) at 475.

[45] The applicant submits that the consequence of state liability in delict would not be unduly onerous or expensive. It would relate only to actual loss incurred and not to loss of profits or consequential loss. Liability would only be imposed if the state acted negligently and if harm was causally connected with the negligent conduct. Lastly, the applicant also contends that liability in delict is likely to enhance decision-making of tender boards in a manner consistent with constitutional values.[51]

[46] Before dealing with the applicant's contentions it is convenient to dispose of one hurdle in advance. The Supreme Court of Appeal preferred to decide this matter on the footing that the claim of the applicant is for pure economic loss and that policy considerations precluded a tender board from delictual liability for pure economic damages, sustained merely because of a negligent but *bona fide* award of a tender. Relying on *Telematrix*[52] and *Faircape*,[53] the Supreme Court of Appeal observed that:

> "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."[54]

[51] Section 33(1) above n 16. Section 195 sets out the basic values and principles governing public administration. Section 217(1) above n 10.

[52] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA).

[53] Above n 41.

[54] See also *Sea Harvest Corporation (Pty) Ltd & Another v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA) at 837G-I where it was observed that in relation to claims for pure economic loss the requirement of wrongfulness gains a particular importance.

However, given the conclusion I reach, it is unnecessary to decide this matter on the limited basis that the claim of the applicant amounts to pure economic loss and I refrain from expressing an opinion in that regard.

[47] I must at the outset say that the submissions of the applicants are attractive but not sustainable. The mainstay of the applicant's case is that the controlling legislation does not expressly prohibit recourse by the successful tenderer to action for damages. That may be so. But that alone cannot be decisive. One must keep in mind that the statute does not grant a right of action for damages. I agree with the Supreme Court of Appeal that the empowering constitutional provisions read with the governing statute do not contemplate affording a disappointed tenderer the right to delictual damages. As we have seen earlier, the Constitution envisages that decisions on procurement should reside in a body the operative statute creates. In turn the statute confers on the tender board the exclusive power to procure goods and services for the provincial government and a wide discretion in the exercise of its powers to solicit, evaluate and award tenders. The statute requires that the power must be exercised within the framework of principles set out in the guidelines. The guidelines are a set of principles determined by national government within which the procurement process should function. What is more, the statute confers independence on the tender board and immunises its decisions and operations from external interference. Nothing in the overall constitutional and legislative scheme explicitly or by implication contemplates that an improper but honest exercise of the discretion of the tender board must attract a delictual right of action in favour of a disappointed tenderer. In the words of

Cameron JA, "[in] these circumstances to infer a remedy judicially would be to venture far beyond the field of statutory construction or constitutional interpretation."

[48] In a related complaint the applicant makes the point that a successful tenderer whose award is later nullified, is without alternative remedies like an interdict or review or appeal ordinarily available to a disappointed tenderer.[55] But is the applicant right that a successful tenderer is without a remedy? I am not persuaded that it is so.

[49] First, when a tender is nullified by a court on review an initially successful tenderer alongside the disappointed tenderer at whose instance the tender was set aside and other interested parties have a renewed and equal opportunity to tender. In this case too there was a renewed invitation to tender and fresh awards were made. The only event that kept Balraz out of contention was its intervening liquidation. It had a clear remedy to tender again. If Balraz had won the renewed tender would it still be open to it to claim out-of-pocket expenses? Again, if it had lost the second tender complex issues of what caused the loss of the initial out-of-pocket expenses would arise.

[50] Second, in my view a prudent successful tenderer may, after winning the tender and if required by the tender board to incur expenses in reliance on the award, negotiate the right to restitution of out-of-pocket expenses should the tender award be set aside. Once the tender is awarded the state and the tenderer are no more than equal

[55] *Knop* above n 36, *Faircape* above n 41, *Van Duivenboden* above n 34, *Olitzki* above n 14. See also the English cases relied upon by Harms J in *Telematrix* above n 52 and *Faircape* above n 41.

contracting parties in an imminent sale.[56] In daily commerce purveyors of goods and services strike bargains, which seek to mitigate their respective risks and to regulate restitution should the bargain falter. A negotiated or contractual remedy of this order is likely to be effective because it would be tailored to the peculiar facts connected to the actual delivery of supplies and services to the state. This avenue is bound to be better suited than a blunt remedy of recognising a generic duty of care in relation to out-of-pocket expenses incurred on the back of a tender award.

[51] In the present matter the review proceedings to set aside the tender were initiated very late. It took the dissatisfied tenderer a year to approach court. The question must arise whether a review mounted so late should be looked at favourably by our courts. Be that as it may, in the ordinary course tenderers who dispute the correctness of an award would challenge its correctness relatively quickly so that the question of out-of-pocket expenses would be unlikely to arise. Even where there is a delay and a court nonetheless set aside a tender award, I do not accept that ordinarily a prudent and diligent successful tenderer whose award is reversed later is without remedy. He or she too may not leap without looking.

[52] On the facts, Balraz wasted no moment to accept the tender award. But once the order to supply goods and services was made by the Department, Balraz should have curbed its commercial enthusiasm as it was well within its right to require that its initial expenses not lead to its financial ruin should the award be nullified. Balraz

[56] *Steenkamp* above n 14 at para 12; *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (10) BCLR 1026 (SCA); 2001 (3) SA 1013 (SCA) at para 18.

unnecessarily chose the more hazardous course which is to incur mainly salary expenses of its directors without fashioning an appropriate safeguard. Its loss could have been easily curbed by prudent conduct and precaution.

[53] The applicant made much of the distinction between the position of an unsuccessful tenderer and of an initially successful tenderer whose award is later invalidated. He was also at pains to distinguish his claim of out-of-pocket expenses from one for lost profits as was considered and disallowed in *Olitzki*.[57] It is clear that his claim is not for loss of profit and not for out-of-pocket expenses in preparing the tender. In any event the latter class of expenses is always irrecoverable whatever the fate of the tender is. On any outcome, expenses for preparing a tender have to be incurred.

[54] The residual question is whether there is justification to develop the common law to embrace this narrow claim for damages based on out-of-pocket expenses in favour of an initially successful tenderer where the award is subsequently set aside by the court and the tenderer retains the right to participate in the subsequent tender process. I think not. First, there is no magic in characterising financial loss as out-of-pocket. If public policy is slow to recompense financial loss of disappointed tenderers it should not change simply because of the name the financial loss bears. Second, even if there may not be a public law remedy such as an interdict, review or appeal this is no reason for resorting to damages as a remedy for out-of-pocket loss. This is

[57] See above n 14.

so because first, as I found earlier, the loss may be avoided and second it is not justified to discriminate between tenderers only on the basis that they are either disappointed tenderers or initially successful tenderers. To do so is to allot different legal rights to parties to the same tender process. There is no justification for this distinction particularly because ordinarily both classes of tenderers are free to tender again should the initial tender be set aside.

[55] It is unnecessary to traverse every ground canvassed by the Supreme Court of Appeal in its judgment. I agree with several significant findings and the conclusion of that Court on why a duty of care is not owed to Balraz and in particular that:

(a) Compelling 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. However, 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.[58]

(b) Legislation governing the tender board in this case is primarily directed at ensuring a fair tendering process in the public interest. Where legislation has a manifest purpose to extend protection to individual members of the public or groups, different considerations

[58] *Telematrix* above n 52 at paras 13-14, 26 and *Van Duivenboden* above n 34 at para 12.

may very well apply. Again whether or not delictual liability ought to attach even in that case will be dependent on the factual context and relevant policy considerations.

(c) Imposing delictual liability on the negligent performance of functions of tender boards would open the prospect of potential claims of tenderers who had won initially. This will be to the detriment of the invaluable public role of tender boards. A potential delictual claim by every successful tenderer whose award is upset by a court order would cast a long shadow over the decisions of tender boards. Tender boards would have to face review proceedings brought by aggrieved unsuccessful tenders. And should the tender be set aside it would then have to contend with the prospect of another bout of claims for damages by the initially successful tenderer. In my view this spiral of litigation is likely to delay, if not to weaken the effectiveness of or grind to a stop the tender process. That would be to the considerable detriment of the public at large. The resources of our state treasury, seen against the backdrop of vast public needs, are indeed meagre. The fiscus will ill-afford to recompense by way of damages disappointed or initially successful tenderers and still remain with the need to procure the same goods or service.

[56] In all the circumstances I am satisfied that in considering the tenders submitted by Balraz and others, the tender board did not owe Balraz a duty of care and therefore its conduct in avoiding the tender was not wrongful. I cannot find public policy considerations and values of our Constitution which justify adapting or extending the common law of delict to recognise a private law right of action to an initially successful tenderer who has incurred a financial loss on the strength of the award which is subsequently upset on review by a court order.

Was the tender valid?

[57] I have noted earlier that the High Court and the Supreme Court of Appeal declared invalid the tender submitted by Balraz. Before us the applicant argued that the Balraz tender was not a nullity and that in any event the Supreme Court of Appeal erred in finding that that nullity would necessarily preclude the existence of a legal duty to prevent harm owed by the tender board to Balraz. Neither the Act, nor the regulations,[59] nor the tender documents precluded a tender by a company in the process of being incorporated. On this argument, the formal validity of a tender is to be assessed when the tender is considered, and not when it is lodged. Relying on licensing cases such as *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman National Transport Commission, and Others*[60] the applicant says that an application for a licence does not exist before the date on which it is considered. The applicant argues that in any event, a legal duty can be owed to an entity that did not

[59] The State Tender Board Regulations, Government Gazette 11382 GN R1237, 1 July 1998 and the Tender Board Regulations, 1995 (Eastern Cape) published under PN 13 of 1995 (PG 73 of 26 June 1995). On the papers there is a dispute over which set of regulations applies. Given the decision I arrive at, it is unnecessary to resolve that dispute.

[60] 1999 (4) SA 1 (SCA).

exist at the time the tender was submitted because the legal validity of a tender is an aspect of the law of contract rather than delict.

[58] On another ground, the Supreme Court of Appeal found that the Balraz tender breached the terms of section 172[61] of the Companies Act because it commenced business by entering into initial tender agreements with the tender board prior to being issued with a certificate to do so. During the hearing the applicant properly abandoned the argument that the Supreme Court of Appeal overlooked section 172(5)(a)[62] of the Companies Act, which allows a company to conclude a provisional contract that becomes final and binding only upon the issue of a certificate to commence business. It may be said that the provision does not rescue the cause of Balraz because when it tendered it was neither a company nor a holder of a certificate to commence business.

[59] Balraz was only registered and incorporated some six weeks after the closing date for the tenders. In its tender, Balraz created the impression that it was a "wholly owned black company especially incorporated for the express purpose of handling payments of social security grants and pensions." The tender board in turn accepted the correctness of the statements.

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[61] Section 172(1) provides:

> "No company having a share capital shall commence business or exercise any borrowing powers unless and until the Registrar has under the provisions of this section issued under his hand and seal a certificate entitling the company to commence business."

[62] Section 172(5)(a) provides: "Any contract made by a company before the date on which it is entitled to commence business shall be provisional only and shall become binding on that date and not earlier."

[60] It is trite that a company, prior to its incorporation, has no corporate personality. Even so, the applicant did not rely on any pre-incorporation agreement under section 35[63] of the Companies Act. The cases the applicant cites[64] are plainly distinguishable. They relate to licensing procedures, which are markedly different from the tender process which compels strict and equal compliance by all competing tenderers on the closing day for submission of tenders.

[61] However, having disposed of the appeal on the substantive issue of wrongfulness no purpose will be served in arriving at a firm conclusion on the validity of the tender. For the same reason, I need not reach the issue of negligence.

Costs

[62] The applicant sought to vindicate a constitutional right to administrative justice and to have the common law developed to expand the reach of delictual liability related to government tenders. There is no valid reason to mulct him, in his representative capacity as liquidator of Balraz, in costs. I keep in mind that the decision-making process of the tender board, although honest, was markedly flawed.

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[63] Section 35 provides:

> "Any contract made in writing by a person professing to act as agent or trustee for a company not yet incorporated shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and such contract had been made without its authority: Provided that the memorandum on its registration contains as an object of such company the ratification or adoption of or the acquisition of rights and obligations in respect of such contract, and that two copies of such contract, one of which shall be certified by a notary public, have been lodged with the Registrar together with the lodgement for registration of the memorandum and articles of the company."

[64] *MG Holmes v National Transport Commission and Another* 1951 (4) SA 659 (T) at 666H-667F; *Rajah & Rajah (Pty) Ltd and Others v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A) at 407B-G; *Yoonuce Pillay N.O. and Another* 1964 (2) SA 286 (D) at 294H.

Further, the applicant in this Court raised matters of considerable public importance. It would be just and equitable that each party carry its own costs. Therefore, I propose to make no order as to costs.

Order

[63] The following order is made:

(a) The application for leave to appeal is granted.

(b) The appeal is dismissed.

(c) No order as to costs.

Sachs J, Yacoob J, Nkabinde J, Madala J, Skweyiya J and Van der Westhuizen J concur in the judgment of Moseneke DCJ.

LANGA CJ and O'REGAN J:

[64] We have had the privilege of reading the judgment prepared in this matter by Moseneke DCJ. We agree with his account of the facts, the history of the litigation and the issues that are raised before this Court. Indeed, we differ in only one material respect from him. That difference, however, means that we cannot concur in his judgment, and respectfully dissent for the reasons explained here.

[65] In his opening paragraph, Moseneke DCJ identifies the key issue in this case as "whether a successful tenderer whose award is later set aside by a court on review may claim delictual damages from the tender board for out-of-pocket expenses incurred subsequent to and in reliance on the award."[1] We agree that this is the key issue in the case. We also agree that, on the claim as pleaded by the applicant, the question is whether a tender board which acts negligently in allocating a tender in breach of an applicant's rights to administrative justice, thus causing a successful tenderer to incur out-of-pocket expenses, acts wrongfully or unlawfully so as to give rise to aquilian liability.

[66] The question whether the Eastern Cape Tender Board (Tender Board) acted negligently is not a matter for consideration by this Court. Both parties agreed that if the Court were to find the conduct of the Tender Board to have been unlawful or wrongful in the sense that it could give rise to aquilian liability, the case should be referred back to the High Court to determine the question of negligence. The key question for this Court is thus whether the conduct of the Tender Board is wrongful or unlawful in the sense that it could give rise to aquilian liability.

[67] We do consider that it is clear that in this case the applicant is seeking damages arising from pure economic loss. Unlike Moseneke DCJ, therefore, we do not avoid

[1] Judgment of Moseneke DCJ at para 1.

[68] deciding that question.[1] There is no suggestion on the papers that the losses incurred by the applicant were anything other than financial. The determination of the quantum, of course, together with the issue of causation have by agreement been separated from the determination of wrongfulness and will be determined by the High Court only if this Court determines that in the circumstances of this case the conduct of the Tender Board was wrongful. In our view, it is important to note that the damages claimed in the present case arise from pure economic loss as our courts have been far more cautious to find that a defendant owes a legal duty to a plaintiff in circumstances where only economic loss has been occasioned.

[69] The ordinary principle of our law is that economic loss lies where it falls, even where negligently caused, unless it can be established that the conduct giving rise to the economic loss was unlawful.[2] At times this question is formulated slightly differently to ask whether the defendant owed the plaintiff a legal duty[3] in the circumstances where it acted negligently and thus caused the plaintiff economic loss.[4] Answering this question in the positive will mean that aquilian liability may arise if the other requirements of liability are established.

[1] Id at para 46.

[2] See Harms JA in his judgment in the SCA in this matter, *Steenkamp NO v Provincial Tender Board Eastern Cape* 2006 (3) SA 151 (SCA) at para 1. See also *Minister of Finance and Others v Gore NO* [2006] SCA 97 (RSA), 8 September 2006, as yet unreported at para 82.

[3] This term has been used by our courts in preference to the English phrase a "duty of care" which arises from the tort of negligence, although the term "duty of care" is also sometimes used by our courts. The phrase "duty of care" can be misleading, in particular, because in English law it includes a consideration of the foreseeability of harm. In our law the foreseeability of harm is central to a consideration of fault, and if relevant at all in the wrongfulness enquiry, not determinatively so. See the discussion of the confusing nature of this term in Boberg *The Law of Delict Vol 1 Aquilian Liability* (Juta, Cape Town 1984) at 30 –33. See also the judgment of Harms JA in the instant matter at para 17.

[4] See, for example *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).

[70] Determining whether conduct is wrongful or unlawful for the purposes of aquilian liability, as has been stated on many occasions, essentially involves a question of legal policy which must be answered in the light of the norms and values of our society and, since 1994, in the light of the norms of our Constitution.[1] Even though the question is a normative one, it is not to be answered on the basis of "an intuitive reaction to a collection of arbitrary factors",[2] but instead requires an identification of the relevant norms followed by an analysis and, if necessary, balancing of those norms to determine the outcome.

[71] In determining whether that conduct was wrongful, the starting point in this case is the statute in terms of which the Tender Board acted and the constitutional provisions relevant to it. The Tender Board was established in terms of section 2 of the Provincial Tender Board Act (Eastern Cape), 2 of 1994 (the Act), which has since been repealed. The primary function of the Board is to procure supplies and services for the Eastern Cape province.[3] It also has the duty to advise the responsible Minister on a range of matters relevant to procurement, including the promotion of competition in procurement, promoting economy, efficiency and effectiveness in procurement and

[1] See, for example *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54 and *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at paras 16 – 17.

[2] See *Van Duivenboden* cited above n 6 at para 21.

[3] Section 4(1) of the Act.

promoting fair dealing and equitable relationships among parties to provincial contracts.[4]

[72] The principles according to which the tender process had to operate were identified in the Act. Section 2(5) of the Act provided that –

> "The Board shall exercise its powers and perform its functions fairly, impartially and independently."

Section 4(2) also provided that –

> "A tendering system devised by the Board shall be fair, public and competitive."

These provisions echoed the relevant constitutional provision, section 187 of the interim Constitution, which provided that –

> "(1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.
> (2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties."

[73] There is no provision in the Act which provides for appeals or reviews by dissatisfied tenderers subsequent to a tender process. This is an important consideration as courts have often considered the availability of internal appeal

[4] Section 10 of the Act.

processes to indicate that an aquilian action will not lie.[5] Accordingly, the ordinary rules of administrative law applied to reviews of the tender process. Indeed, the tender award to the applicant was set aside by the Eastern Cape High Court on 6 June 1997. It should be emphasised that at the time the tender in issue in this case was awarded, and at all material times thereafter, the Promotion of Administrative Justice Act, 3 of 2000, had not yet come into force.

[74] The purpose of the legislation is to ensure a fair, public and competitive process for the award of tenders by an impartial and independent agency. This purpose needs of course to be construed in the light of our Constitution which imposes the same obligations on procurement processes.[6] It also needs to be understood in the light of the right to administrative justice. Under the interim Constitution, section 24 provides as follows –

> "Every person shall have the right to –

[5] See *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 33B - E. That case concerned a local authority's decision to approve the subdivision of a suburban property which approval was subsequently withdrawn by the local authority on the grounds that it had been granted in error and contrary to the provisions of the governing legislation. The appellant unsuccessfully sought to recover the damages it had suffered as a result. The court held that the existence of an appeal procedure in the Act in terms of which the applicant could have sought relief was important to its conclusion that no aquilian action lay.

[6] See section 187 of the interim Constitution cited above para [72] and section 217 of the 1996 Constitution which provides that –

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

> (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
> (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
> (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
> (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

[75] This provision differs from the equivalent provision in section 33 of the 1996 Constitution,[7] but in our view those differences are not material for present purposes. Section 24 of the interim Constitution and section 33 both clearly establish a right to administrative justice. The purpose of such a right is to ensure that those who interact with the State are entitled to be treated fairly and lawfully. In construing the purpose of the Act, therefore, this right enshrined in our Constitution must not be ignored. It is clear that an important purpose of the Act is to establish a fair procurement process in the public interest. In our view, one of the purposes of the Act is to fulfil the right recognised in section 24 of the interim Constitution (and now section 33 of the 1996 Constitution) and so protect the right to administrative justice of those engaged in tender processes.

[7] Section 33 of the 1996 Constitution provides as follows –

> "(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."

[76] We agree with Moseneke DCJ that there is no provision in the Act which stipulates that a damages claim would lie against the Tender Board for the out-of-pocket expenses incurred by a successful tenderer pursuant to a tender award where the tender is subsequently set aside on review. The absence of such a provision does not of itself defeat the claim of the applicant. Although we agree with Harms JA that our case law is not yet clear when it comes to drawing a boundary between liability due to the breach of a statutory duty and that of a common law one, we do not agree that if no conclusion as to whether liability should arise can be drawn from the statute, it is "unlikely that policy considerations could weigh in favour of granting a common-law remedy".[8]

[77] If the statute is not clear on the matter, it is our view that what needs then to be considered is whether upon a consideration of the relevant normative principles such a claim lies. We would endorse the approach formulated by Cameron JA in *Olitzki Property Holdings* –

> "[T]he answer . . . 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 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."[9]

[8] *Steenkamp NO v Provincial Tender Board* cited above n 2 at para 22.

[9] *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) at para 12.

[78] What are the normative considerations in our legal system relevant to the question before us?

[79] Both Moseneke DCJ in his judgment and Harms JA in the Supreme Court of Appeal rely on the judgment of Cameron JA in *Olitzki Property Holdings* where he reasoned as follows –

> "Certainly the contention that it is just and reasonable, or in accord with the community's sense of justice, or assertive of the interim Constitution's fundamental values, to award an unsuccessful tenderer who can prove misfeasance in the actual award its lost profit does not strike me in this context as persuasive. As the plaintiff's claim, which amounts to more than R10 million, illustrates, the resultant imposition on the public purse could be very substantial, involving a double imposition on the State, which would have to pay the successful tenderer the tender amount in contract while paying the same sum in delict to the aggrieved plaintiff. As a matter of public policy the award of such an entitlement seems to me to be so subject to legitimate contention and debate as to impel the conclusion that the scheme of the interim Constitution envisaged that it should be a matter for decision by the bodies upon whom the legislative duties . . . were imposed. In these circumstances to infer such a remedy judicially would be to venture far beyond the field of statutory construction or constitutional interpretation."[10] [Footnotes omitted]

[80] There is much of merit in the reasoning of Cameron JA in relation to a claim by an unsuccessful tenderer for loss of profits. In our view, however, there are two significant differences between the facts in issue in *Olitzki* and the facts in the current case. The first is that we are faced here with a successful tenderer whose award was subsequently (and belatedly, as we shall discuss further later) set aside after it had already instituted processes to comply with the contractual obligations which arose

[10] Id at para 30.

subsequent to and consequent upon the award of the tender. An unsuccessful tenderer who considers the tender award to have been unlawful or improper always has a remedy of judicial review to set aside the tender and thereafter to reapply if the tender is re-advertised. A successful tenderer, however, does not have this remedy and indeed is a bearer of obligations to comply with the contractual obligations it undertakes once the tender has been awarded.

[81] Secondly, the claim in *Olitzki* was for loss of profits, not for out-of-pocket expenses. Like Cameron JA, we are of the view that an unsuccessful tenderer who may have a tender award set aside and then re-tender should not in addition be afforded an entitlement to claim loss of profits in respect of the original tender where the claim is based on negligence.[11] Whatever the situation may be in societies wealthier than ours, to afford an unsuccessful tenderer such a claim in our society would unduly burden the public purse that is already beset with more legitimate claims than it can possibly meet.

[82] A claim for out-of-pocket expenses, however, is a far more modest claim. Moreover, the inability to recover out-of-pocket expenses may well render smaller and less financially viable tenderers at risk of liquidation. Indeed, such was the case here. In our country, government procurement is one of the key mechanisms for ensuring that those previously locked out of economic opportunity by the policies of apartheid,

[11] In *Minister of Finance and Others v Gore NO* cited above n 2 at para 81 - 90, the SCA concluded that where the tender process was vitiated by corruption, an unsuccessful tenderer could claim loss of profits on the basis of vicarious liability if causation could be established.

are given an opportunity to participate. By definition such companies and individuals are often new, small and not financially robust. In our view, this is an additional and important factor which supports our conclusion that both Moseneke DCJ and the Supreme Court of Appeal are incorrect to conclude that aquilian liability cannot arise on the circumstances of this case.

[83] In our view, these two considerations — that the tenderer has been successful and has incurred expenses pursuant to a contractual obligation to do so, and that the tenderer seeks only to be reimbursed for actual expenses, not for loss of profits — are sufficiently material to render a conclusion different from that reached in *Olitzki* appropriate. Underlying the first of these considerations is the principle that it would be an undesirable consequence for the performance of government contracts, were successful tenderers to be anxiously looking over their shoulders in case their contract should subsequently be declared void. Moseneke DCJ impliedly criticises the applicant (it "should have curbed its commercial enthusiasm")[12] for being quick off the starting blocks in seeking to perform its contractual obligations. We cannot agree. In our view, it would be highly undesirable to suggest that a successful tender applicant should hesitate before performing in terms of the contract, in case a challenge to the tender award is successfully brought. Such a principle, in our view, would undermine the constitutional commitments to efficiency and the need for delivery which are of immense importance to both government and citizens alike.

[12] At para 52.

[84] The second difference to *Olitzki* relates to the difference between damages for loss of profits and damages for out-of-pocket expenses. In his judgment, Harms JA expressed the view that there was no material difference between the two. Again we cannot agree. In our view, the notion that a successful tenderer should be entitled to recover for actual money spent in good faith by it in pursuance of contractual obligations is quite different to an unsuccessful tenderer being able to recover fully those profits it cannot realise as a result of an improper tender award. The former entitles an applicant to reimbursement for expenses it undertook for the benefit of the government. The latter does in a real sense constitute a "windfall" claim,[13] as the disappointed tenderer will not need to do anything other than litigate to put itself in the position it would have been in if it had performed the contract.

[85] In relation to this latter sort of claim, the considerations mentioned by Ackermann J in *Fose* seem apt –

> "In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated . . . ".[14] [Footnotes omitted]

[13] As Cameron JA termed it in *Olitzki* cited above n 9 at para 41.

[14] *Fose v Minister of Justice* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 72.

The considerations are less apt however in respect of a successful tenderer who incurs out-of-pocket expenses for which it will receive no compensation save through a delictual claim.

[86] Holding the Tender Board liable in these circumstances will, of course, also enhance its accountability. This principle will not always require a government agency to be held liable in delict, as Nugent JA held in *Van Duivenboden* –

> "Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, 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."[15]

In this case, too, accountability does not seem to us to be the determinative criterion. A tender board can adequately be held accountable through the public law remedies of judicial review. In our view, what tips the balance in the applicant's favour is the need to ensure that it is compensated for its bona fide expenses, and that it would be unwise not to do so because of the harmful effect that may have on the performance of tender obligations.

[15] *Van Duivenboden* cited above n 1 at para 21. See also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 78 – 81.

[87] Arrayed against these considerations, must be set the considerations given weight by Moseneke DCJ in addition to those raised in *Olitzki* which we have already considered. They are the following –

- The fact that a successful tender has alternative remedies to mitigate any losses that may be occasioned by the tender award being subsequently set aside.[16]
- The important public considerations which require tender board adjudicators to be immune from damages claims in respect of their negligent but honest decisions.[17]
- The purpose of tender legislation is to ensure a fair tendering process in the public interest, rather than to protect participants in the tender process.[18]
- The chilling effect on the tender process if numerous claims by successful tenderers whose tenders are set aside.[19]

[88] These considerations do not merit as much weight in the wrongfulness analysis, in our view, as Moseneke DCJ attributes to them. In the first place, we are not persuaded that a successful tenderer has alternative and effective remedies at its disposal. As mentioned above, there are no alternative remedies for the successful tenderer in the Act. Moreover, unlike the unsuccessful tenderer, it cannot challenge the tender award by way of judicial review nor may it seek to have its validity confirmed. It is true that if the award is set aside, it may enter the race for the tender

[16] At paras 49 – 50. See also the discussion in the judgment of Harms JA at paras 41 – 44.

[17] At para 55(a) citing *Telematrix (Pty) Ltd v Advertising Standards Authority South Africa* 2006 (1) SA 461 (A) at paras 13–14.

[18] At para 55(b).

[19] At para 55(c). See also the judgment of Harms JA at paras 37 – 40.

again. However even if the tender is repeated, and the successful tenderer is again successful, it still may not receive reimbursement for out-of-pocket expenses incurred the first time around. If it is unsuccessful in the next round, it certainly will not have those expenses reimbursed.

[89] Moseneke DCJ also suggests that a successful tenderer could negotiate for contract terms to make clear that it does not bear the risk in respect of out-of-pocket expenses if the award is subsequently set aside. There is no evidence on the record on this issue. In our view, it is unlikely that government contracts are negotiated in this manner. It seems probable that government contracts of this sort are standard form contracts whose terms are stipulated in advance by government. In the absence of evidence to the contrary, we are sceptical as to whether a successful tenderer is indeed able to demand terms in its contract with government which protect its interests in the event of the tender award being set aside. Even if it is possible for a successful tenderer to do so, we are of the view that the existence of such a possibility is not sufficient to outweigh the considerations which support the conclusion that the Tender Board owes a successful tenderer, in the circumstances of this case, a legal duty not to act negligently in the adjudication of the tender process.

[90] Moseneke DCJ also relies on the consideration that members of adjudicative agencies are not ordinarily held liable for their decisions taken bona fide but negligently.[20] There is long-standing and, in our view, persuasive authority for this

[20] See judgment at para 52(a). See also *Telematrix (Pty) Ltd v Advertising Standards Authority SA* cited above n 17 at paras 17 – 26.

proposition. The functions of the Tender Board are to procure goods and services for the State. This function is primarily an executive function, not an adjudicative one. The award of a tender has been repeatedly held to constitute administrative action within the terms of the Constitution.[21] It would be unhelpful to characterise it further in a manner that would herald a return to the flawed exercise of determining whether administrative action is judicial, quasi-judicial or purely administrative.[22] The question we need to answer is whether given the nature of the functions of the Tender Board, the Tender Board cannot be liable in delict to those aggrieved by the tender process. In our view, although it will often be so that no delictual claim will lie against the Tender Board for reasons such as those identified by Cameron JA in *Olitzki*, there will be times when an action for damages may lie.

[91] Moseneke DCJ concludes that the purpose of the Act, construed in the light of the Constitution, is to promote fair tender procedures in the interests of the public. While we agree that this is one of the purposes of the Act, it is our view, as stated above,[23] that another purpose of the Act is to seek to fulfil the right to administrative justice enshrined in section 24 of the interim Constitution (and section 33 of the 1996 Constitution). As such it does seek to protect the rights of those participating in the tender process. This consideration supports a finding of aquilian liability rather than the reverse.

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[21] See, for example *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at 465F – G; and *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA) at 870D – 871C.

[22] See *Traube v Administrator, Transvaal* 1989 (1) SA 397 (A); and *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 10 – 11.

[23] See para [74] above.

[92] The question of the chilling effect that a delictual claim may have on the tender process is, in our view, a consideration of greater weight than the possibility of alternative remedies. However, as we have said before, a claim for out-of-pocket expenses seems to us to be far less inhibitive than a claim for loss of profits. Out-of-pocket expenses will be limited to those expenses proved to have been incurred as a direct result of the contract arising from the tender award. Ordinary running expenses of businesses will not be included. If unable to claim for such expenses, the successful tenderer will have to absorb those expenses itself or be liquidated. An ability to recover such expenses, therefore, is not a windfall for the successful tenderer but constitutes compensation for loss it has incurred in order to comply with its contractual obligations. As such, claims for out-of-pocket expenses, in these cases, fall squarely within the compensatory purpose of modern aquilian liability.

[93] In sum, we are of the view that the weightiest of the considerations identified by Moseneke DCJ supporting a conclusion that no liability should lie are: firstly, the nature of the functions of the Tender Board; and secondly, the risk of impairing the efficiency of the Tender Board by rendering it liable in delict and simultaneously the risk of overburdening the fiscus with such claims.

[94] In our view, we have identified important considerations which serve as counter-weights to these factors. The first is the nature of the damages claimed in this case, and the desirability of reimbursing successful tenderers for such expenses. The

second is that the Act properly construed in the light of section 24 of the interim Constitution (and section 33 of the final Constitution) does seek to vindicate the right to administrative justice of those who engage in the tender process. The third is that the efficient and speedy performance of government contracts might be undermined were successful tenderers to be left without remedy for out-of-pocket expenses. And the fourth is that given the role of government procurement in promoting participation in the economy of those precluded from doing so under apartheid, many successful tenderers will be new and small companies unable to absorb the costs incurred in performing a contract subsequently declared void which might result in their liquidation. In our view, in these circumstances, there is a need to ensure that successful tenderers, such as the applicant, will not be destroyed by having no recourse for out-of-pocket expenses incurred in good faith performance of contractual obligations.

[95] We conclude therefore that the normative factors we have considered support conclusion that the Tender Board did owe a legal duty to the applicant in the circumstances of this case. Those countervailing factors identified by both Moseneke DCJ and the Supreme Court of Appeal, in our view, are not of sufficient weight to produce the contrary conclusion.

[96] We should conclude this aspect of the judgment by repeating that PAJA does not govern this case. It is inappropriate therefore to speculate what the situation may have been, had it been applicable. As mentioned by both Moseneke DCJ and Harms

JA, the remedies for judicial review in PAJA are far broader than the common-law remedies which existed before. Section 8 of PAJA provides –

> "(1) 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."

[97] It may well be that the power to direct the payment of compensation conferred by section 8(1)(c)(ii)(bb) will result in the development of administrative law principles governing the payment of compensation to vindicate the constitutional right to administrative justice. This is not a matter for further consideration in this case, save to point out that in many other jurisdictions the rights and obligations of parties to government procurement processes are regulated by statute. In the European Union for example, two directives regulate the procurement of public works, supply and

services contracts, and utilities works and supply contracts.[24] These directives impose an obligation upon member states of the European Union to provide contractors with remedies for the review of the award of public contracts. The directives also specify the remedies that reviewing bodies should have at their disposal.

[98] One further aspect of PAJA that merits mention is the rule that administrative review proceedings must be launched timeously. Section 7(1) provides that the proceedings must be instituted "without unreasonable delay and not later than 180 days after the date" on which the grievant became aware of the administrative action and the reasons for it.[25] One of the salutary effects of this rule is that substantial delays in judicial review proceedings, such as occurred in the present case, will be avoided. The further effect of this is that a determination of the lawfulness or otherwise of the award will hopefully be made before successful tenderers have incurred significant out-of-pocket expenses.

[24] See Directive 89/665/EEC and Directive 92/13/EEC and the useful discussion of those directives in Tyrell and Bedford *Public Procurement in Europe: Enforcement and Remedies* (Butterworths, 1997) at 1 - 9. See also the United Nations Commission on International Trade Law (UNCITRAL) Model Law on the Procurement of Goods, Construction and Services adopted at the 27th Session of UNCITRAL, Official Records of the General Assembly, 49th Session, Supplement No 17 (A/49/17) (1994). See also the discussion in Arrowsmith and others *Regulating Public Procurement: National and International Perspectives* (Kluwer, 2000) Chapter 2.

[25] Or from the date upon which the grievant might reasonably have been expected to have become aware of the administrative action. Section 7(1) reads as follows:

> "(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

[99] The last issue concerns the question of the date of incorporation of the applicant. Both the Supreme Court of Appeal and the High Court conclude that at the time that it lodged its tender, the applicant did not have legal personality and its tender was therefore void. There is much to recommend this conclusion. However, given that this is a dissenting judgment, it is not necessary for us to reach a conclusion in this regard. Like Moseneke DCJ, therefore, we say nothing more about it.

Mokgoro J concurs in the judgment of Langa CJ and O'Regan J.

SACHS J:

[99] I concur in the judgment of Moseneke DCJ, subject to the following qualification. I do not feel that PAJA[1] is irrelevant to the present matter. Even though its terms are not applicable because it was adopted after the events in question had taken place, it does serve to articulate public policy as it was emerging at the relevant time. 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

[1] Promotion of Administrative Justice Act 3 of 2000, discussed in the majority judgment at para 30 and in the minority judgment at para 95.

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.

[100] 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.[1] In my view, it could have been achieved before PAJA was adopted by means of an innovative constitutional remedy of the kind referred to in *Fose*,[2] based in public law, as befits the relationship between the parties and the interests involved.

[101] Such an equitable, constitutionally-based public law remedy was not pleaded or debated in this case. Had it been, the problems acknowledged in the minority and majority judgments could have been resolved in a fair, balanced and practical way.

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[1] Section 8(1) provides that the court or tribunal, in proceedings for judicial review . . . may grant any order that is just and equitable, including orders– . . .

> (c) setting aside the administrative action and– . . .
>
> > (ii) in exceptional cases– . . .
> >
> > > (bb) directing the administrator or any other party to the proceedings to pay compensation.

[2] *Fose v Minister of Justice* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 21 of the minority judgment.

The logical difficulties of distinguishing between different kinds of damages would have fallen away. Similarly the difficulties facing a successful tenderer who wished to guard him/herself against potential loss in the event of the tender being invalidated, could have been responded to on an equitable basis. Though I am not persuaded that a prudent tenderer could be expected to enter into precautionary contracts or take out insurance in the way the majority judgment suggests I am equally unconvinced that it is appropriate to develop private law remedies to fill the gap. For these reasons, I agree with Moseneke DCJ that the application should be dismissed.

For the applicant: PBJ Farlam instructed by Webber Wentzel Bowens.

For the respondent: RG Buchanan SC and SV Notshe SC instructed by the State Attorney, King William's Town.