

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**Jurgens Johannes Steenkamp N.O v The Provincial Tender Board of the Eastern Cape
CCT 71/05**

Hearing Date: 11 May 2006

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 11 May 2006, the Constitutional Court heard an application for leave to appeal against the judgment of the Supreme Court of Appeal upholding a decision of the Ciskei High Court. The issue before this Court was whether tender boards should be held liable in delict for loss suffered by a successful tenderer as a result of reliance on a tender, and steps to fulfil obligations in terms of that tender, when the tender was subsequently set aside on review due to the tender board's negligence in performing its administrative duties.

The applicant, Mr J.J. Steenkamp acts in his capacity as the liquidator of Balraz Technologies (Pty) Ltd. Balraz was incorporated as a company and issued with a certificate to commence business on 17 October 1995. On 8 September 1995 it lodged a tender for and was awarded a contract to implement an automatic cash payment system for social pensions and other welfare grants in the Eastern Cape Province. A dissatisfied tenderer successfully applied to the High Court for an order reviewing and setting aside the tender awarded to Balraz on the basis that the decision-making process of the tender board had been irregular.

Balraz sued the tender board for recovery of out of pocket expenses it says it incurred in preparing to execute the successful tender award. The High Court held that Balraz failed to submit a valid tender because it was not incorporated in terms of the Companies Act at the time when it submitted its tender. On appeal, the SCA dismissed the appeal on the basis that policy considerations precluded delictual liability for damages which were purely economic in nature. Neither statute nor common law principles imposed a legal duty on tender boards to compensate for damages where it had *bona fide* but negligently failed to comply with the requirements of administrative justice.

In this Court the applicant contended that the tender board owed Balraz a legal duty to ensure that the tender process was administratively just; that its failure to do so was not consonant with the values of transparency and accountability as guaranteed by section 195 of the Constitution or the right to just administrative action as guaranteed by section 33 of the Constitution. As a result, the applicant argued, it is entitled to appropriate relief in the form of delictual damages for the expenses that it incurred. Further, the applicant contended that it would be in the public interest for this Court to develop the common law on the delictual liability of tender boards in order to set a precedent for future successful tenderers who suffer loss as a result of a tender board's failure to ensure administrative justice. The tender board opposed the application for leave to appeal and argued that it owed no legal duty care toward Balraz.

Moseneke DCJ, writing for a majority of the Court, granted the application for leave to appeal while dismissing the appeal itself. He noted that ordinarily a breach of administrative justice attracts public law remedies and not private law remedies. In our constitutional dispensation, every failure of administrative justice amounts to a breach of a constitutional duty, but this is not an equivalent of unlawfulness in a delictual liability sense. An administrative act that constitutes a breach of a statutory duty is not for that reason alone wrongful. Whether or not a legal duty to prevent loss should be recognized calls for a value judgment embracing all the relevant facts and involving what is reasonable and consistent with the common convictions of society.

In evaluating the proposed extension of delictual liability, Moseneke DCJ noted that nothing in the overall constitutional and legislative scheme explicitly or by implication contemplates that an improper but honest exercise by a tender board of its discretion attract a delictual right of action in favour of a disappointed tenderer.

In response to the argument that a successful tenderer whose award is later nullified is without alternative remedies like an interdict, review or appeal, Moseneke DCJ observed that when a tender is nullified by a court on review, both the successful and disappointed tenderers have a renewed opportunity to tender. In addition, a prudent successful tenderer may, after winning the tender, negotiate the right to restitution of out-of-pocket expenses should the tender award be set aside. Moreover, 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. Finally, it is not justified to discriminate between tenderers only on the basis that they are either disappointed tenderers or initially successful tenderers.

Moseneke DCJ agreed with several significant findings of the SCA including: (a) compelling public considerations require that adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of honest decisions; (b) legislation governing the tender board in this case is primarily directed at ensuring a fair tendering process in the public interest; and (c) imposing delictual liability on the negligent performance of functions of tender boards would lead to a spiral of litigation that is likely to weaken the effectiveness of or cause the tender process to grind to a stop. The fiscus can ill-afford to recompense initially successful tenderers.

With regard to costs, Moseneke DCJ noted that 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. It would be just and equitable that each party carry its own costs. Therefore, no order as to costs was made.

Moseneke DCJ's judgment was concurred in by Madala J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J.

Writing separately, Sachs J concurred in Moseneke DCJ's judgment on the basis that, even before the Promotion of Administrative Justice Act was passed, the interim Constitution envisaged public law remedies for breaches as in the present case, that compensation could have been claimed under the interim Constitution, and that therefore it was neither necessary nor appropriate for the common law principles of delict to be hybridised and stretched to provide a remedy.

Langa CJ and O'Regan J filed a dissenting judgment that was concurred in by Mokgoro J. They found that where a Tender Board has awarded a tender negligently and the award is subsequently set aside, the successful tenderer should be able to claim damages from the Tender Board for those out of pocket expenses it has incurred in fulfilling contractual obligations that arose as a result of the tender award. They emphasised that a successful tenderer is under an obligation to fulfil its contractual obligations and that compensating a tenderer for the money it has spent in fulfilment of those obligations is normatively appropriate in the light of the provisions of the Constitution and other relevant considerations.

They did not agree with Moseneke DCJ that a successful tenderer has effective alternative remedies to recover expenses incurred in this way. They also note that a claim of this sort would protect the rights to administrative justice protected in the Constitution, and would not undermine the efficient and speedy performance of government contracts. Finally, they reasoned that given the role of government procurement in promoting participation in the economy of those prevented from doing so in the past, many successful tenderers would be small and new companies might not be able to absorb the wasted costs of complying with their tender obligations, if the contract arising from the tender was subsequently set aside.

