SACHS J ABRIDGED JUDGMENT (CONCURRING)

Steenkamp NO v Provincial Tender Board of the Eastern Cape

[99] I concur in the judgment of Moseneke DCJ, subject to the following qualification. I do not feel that PAJA 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 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. 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*, 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. 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.