

WORSE THAN LOSING A GOVERNMENT TENDER: WINNING IT

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1 Introduction

In the case of *Steenkamp NO v Provincial Tender Board, Eastern Cape*¹ a majority of Constitutional Court judges held that an organ of state was not liable in delict for a successful tenderer's out-of-pocket losses following the setting aside of the tender because of a *bona fide* error on the part of the organ of state in the tender process.² In reaching this conclusion the Court ruled that the organ of state's negligent but *bona fide* conduct in the public tender process was not wrongful since it owed no legal duty to tenderers, whether successful or unsuccessful, to avoid such losses and that there were no public policy considerations that justified the recognition of such a duty.³ From a public procurement perspective, this judgment is unfortunate. As I will indicate below, Moseneke DCJ's majority judgment is based on a number of assumptions which are highly contestable, as the joint minority judgment of Langa CJ and O'Regan J points out. Furthermore, the majority judgment holds implications for public procurement that may largely undermine some of the very public policy considerations upon which it is based.

In this contribution I analyse the policy considerations that motivated the majority judgment from a public procurement perspective. I argue that the dissenting minority judgment of Langa CJ and O'Regan J (Mokgoro J concurring) is to be preferred over the majority judgment, because the dissenting judgment is not only much more sensitive to the general realities of public procurement, but specifically the realities of *South African* public procurement. In the final analysis I argue that despite my misgivings about the ruling in the *Steenkamp* matter, the problem does not lie there, but rather in the hitherto fairly unsophisticated approach to remedies following the judicial review of public tender decisions. In order to overcome the problems illustrated by the *Steenkamp* case, we should focus our attention on the development of appropriate and focused judicial review remedies within the public procurement context. The recent judgment of the Supreme Court of Appeal in *Millennium*

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I take full responsibility for the arguments advanced here

¹ 2007 3 SA 121 (CC)

² Para 56

³ Paras 54, 56

*Waste Management v Chairperson Tender Board*⁴ provides a solid foundation for such a development.

2 The Steenkamp case⁵

2 1 The facts

In 1995 the Tender Board⁶ invited tenders for the supply of a payment system for welfare grants in the Eastern Cape.⁷ Eight tenders were received including one by Balraz Technologies (Pty) Ltd (“Balraz”), an ostensibly “wholly owned black company especially incorporated”⁸ for the purpose of tendering for this particular government contract.⁹ Despite the reservations of two technical committees about Balraz’s technical ability to effectively render the services under tender, the Tender Board decided to award one part of the contract¹⁰ to Balraz in March 1996.¹¹ Balraz forthwith accepted the award and about two months later the Department of Health and Welfare placed an order for the tendered services with Balraz under the resultant contract.¹² However, before Balraz could render the services, but after it commenced preparations for its performance, an unsuccessful tenderer approached the High Court for the review of the tender award.¹³ The review succeeded and in June 1997 the contract was set aside by the reviewing court on the grounds that the decision to award the contract was tainted by an “unwarranted adherence to a fixed principle”; “a misconception of the nature of the discretion conferred”; the consideration of irrelevant factors; a failure to consider relevant facts and gross unreasonableness.¹⁴ In *Steenkamp* the parties agreed that while the award of the tender was administratively unfair it was done in a *bona fide*

⁴ 2007 JOL 21170 (SCA)

⁵ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2004 JOL 13193 (Ck); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC)

⁶ Initially the call for tenders was done by the National Tender Board, but that body was replaced during the course of the tender process by the Provincial Tender Board, which was constituted late in 1995 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 5

⁷ Para 4

⁸ Para 59, but *cf Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (CkH) 341D-F where doubt was raised about the exact stakeholding in Balraz

⁹ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 6 A second line of argument as to whether the tender board’s actions were wrongful in a delictual sense was whether Balraz in fact submitted a valid tender in light of the fact that Balraz was incorporated and obtained a certificate to commence business only after it submitted, in its own name, its tender While the case was primarily decided on the basis of this second argument in the High Court, that argument progressively declined in prominence to the extent that the majority in the Constitutional Court decided the matter wholly on the wrongfulness argument and held that “no purpose will be served in arriving at a firm conclusion on the validity of the tender,” para 61

¹⁰ The Tender Board decided to split the contract into three parts in order to allow it “to spread the work as much as possible” (*Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (CkH) 334B)

¹¹ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 7

¹² Para 7

¹³ Para 8

¹⁴ *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (CkH) 348

manner.¹⁵ The reviewing court did not remit the matter to the Tender Board for reconsideration, but ordered it to call for fresh tenders should the province still require the relevant services.¹⁶ However, when the Tender Board did call for fresh tenders Balraz was unable to tender again since it had by this time been placed under final liquidation.¹⁷

Balraz's liquidator subsequently claimed damages in contract from the Department of Health and Welfare, in its capacity as the contracting authority, and in delict from the Tender Board.¹⁸ Exceptions by the respective defendants succeeded against the contractual claim,¹⁹ but failed against the claim in delict.²⁰ The parties agreed to separate the issues underlying the delictual claim and asked the court to adjudicate only on "whether the defendant's conduct was wrongful and, if so, whether it was also negligent."²¹

2.2 The High Court judgment²²

The High Court held that in order to determine whether the Tender Board's conduct was wrongful in a delictual sense it had to establish whether there was a legal duty on the Tender Board towards successful tenderers like Balraz to avoid causing pure economic loss in the form of out-of-pocket expenses.²³ The Court found that despite a number of considerations that favoured the recognition of a legal duty on the Tender Board to exercise its statutory powers properly and with due care, no such duty arose in the present matter.²⁴ The single reason for this finding was that Balraz did not exist at the time it submitted the tender and therefore did not submit a valid tender.²⁵ As a result there was no legal relationship between Balraz and the Tender Board. Since the Tender Board's conduct could consequently not be said to be wrongful it was not necessary for the Court to rule on negligence.

¹⁵ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 36. The reviewing court was less sympathetic in its characterisation of the Tender Board's conduct. Especially Pickard JP voiced stringent criticism of the Tender Board's conduct, which at times seems to question its motives, *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (CkH) 348D-E: "On a reading of the record of the proceedings of 22 March 1996 one cannot avoid concluding that the decision to approve the successful tenders was taken to promote what was perceived as RDP, if not for other unexpressed reasons ..."; 348I: "Although it is not possible to make a definitive finding in this regard, I am left with the uneasy feeling that outside influences may have played some role in their decision;" 352I: "The technical committee's report was simply ridden roughshod over" However, despite its very critical view of the Tender Board's conduct, the High Court did not find that the Board acted in a *mala fide* manner. The court *a quo* in *Steenkamp* was also of the view that the reviewable irregularities could not "be described as mere innocent errors" *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2004 JOL 13193 (Ck) para 57.

¹⁶ *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (CkH) 355E-H.

¹⁷ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 9.

¹⁸ Para 10.

¹⁹ In upholding the exception against the contractual claim, the High Court ruled that the contract became void *ab initio* following the successful review and setting aside of the tender award and as a result there could be no contractual damages claim. *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2004 JOL 13193 (Ck) para 12.

²⁰ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 10.

²¹ *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2004 JOL 13193 (Ck) para 16.

²² *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2004 JOL 13193 (Ck).

²³ Paras 17-23.

²⁴ Para 86.

²⁵ Para 86.

In assessing whether the legal convictions of South African society favoured the recognition of a legal duty in instances such as the present, the High Court noted a number of public policy considerations that supported such recognition in principle. These included a finding that the statutory regime underlying the functions of the Tender Board was not aimed solely at protecting the interests of Government, but was also “in the interest of those who tender for the delivery of goods and services.”²⁶ No other remedies were provided for in the relevant statute, it did not preclude a damages claim and it expressly conferred the power to claim damages on the Tender Board, which in the Court’s view indicated that the Act did not intend to displace private law remedies.²⁷ The Court was not convinced that the possibility of submitting a new tender when the Tender Board called for fresh tenders following the review amounted to an effective alternative remedy for Balraz.²⁸ Furthermore, the Court described it as “unrealistic and unreasonable” to expect the successful tenderer to establish whether the Tender Board acted lawfully before incurring expenses under the awarded tender.²⁹ A successful tenderer was entitled in the Court’s view “to assume that the Tender Board complied with its statutory functions.”³⁰ Finally, the Court found that because of the limited nature of a successful tenderer’s claim for out-of-pocket expenses, as well as the narrow class of potential claimants represented by successful tenderers such as Balraz, claims such as the present did not hold significant cost implications for the public purse.³¹

2 3 The Supreme Court of Appeal judgment³²

The Supreme Court of Appeal upheld the High Court’s ruling, but for slightly different reasons. Unlike the High Court, the Supreme Court of Appeal did not look favourably upon delictual liability in the current context, either generally or specifically on the facts of this case. Having examined a range of public policy considerations, the Court held that “an action by tenderers, successful or unsuccessful, for delictual damages that are purely economic in nature and suffered because of a *bona fide* and negligent failure to comply with the requirements of administrative justice” could not be inferred from either the statute in question or the common law generally.³³

The Court set out a number of public policy considerations that motivated its decision. Unlike the High Court, it interpreted the relevant statute as aimed at the interests of the province and not tenderers.³⁴ The Act could accordingly not support the recognition of a delictual claim in favour of tenderers. With reference to earlier decisions that denied claims for lost profits flowing from

²⁶ Paras 48, 69

²⁷ Para 60

²⁸ Para 61

²⁹ Para 58

³⁰ Para 58

³¹ Para 64

³² *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA)

³³ Para 46

³⁴ Para 30

administrative errors, the Court noted that there was no principled difference between a claim for lost profits and out-of-pocket expenses and that claims for the latter are subject to the same considerations as the former.³⁵ The Court was furthermore of the view that delictual liability may have an adverse impact on the functioning of tender boards and cause them to be overly cautious.³⁶ In a key passage the Court stated:

“The chilling effect of the imposition of delictual liability on tender boards in a young democracy with limited resources, human and financial, on balance, is real because if liability were to be imposed, the potentiality of a claim by every successful tenderer would cast a shadow over the deliberations of a tender board on each tender and that may slow the process down or even grind it to a virtual halt.”³⁷

The Court reasoned that there could be no distinction between successful and unsuccessful tenderers in relation to the imposition of a legal duty on tender boards and since damages claims were refused to unsuccessful tenderers, there could be no legal duty to ground such claims in the hands of successful tenderers.³⁸ Likewise, the Court argued that it could find no reason why tenderers for public contracts should be allowed a damages claim when tenderers for private contracts did not have such claims.³⁹ In general, the Court noted that remedies for the breach of administrative law duties should be aimed at upholding “the rule of law and [ensuring] effective decision-making processes” rather than compensating the aggrieved tenderer.⁴⁰

2 4 The Constitutional Court judgments⁴¹

2 4 1 *The majority judgment*

The majority of the Constitutional Court per Moseneke DCJ agreed with both the finding and reasoning of the Supreme Court of Appeal. They expressly endorsed in general the policy considerations that motivated the Supreme Court of Appeal’s rejection of delictual liability for negligent, but *bona fide* administrative errors in the award of public tenders causing damages in the form of out-of-pocket expenses.⁴² The Court in particular noted its agreement that the statutory scheme did not contemplate a claim for damages in the present context;⁴³ that a tender board could not owe different legal duties to successful and unsuccessful tenderers respectively;⁴⁴ that allowing a delictual claim may unduly hamper the functioning of tender boards and consequently undermine the entire public procurement system and that such liability will place too high a burden on the public purse.⁴⁵ The Court also noted a number of further policy considerations in support of its position.

³⁵ Para 36

³⁶ Para 37

³⁷ Para 40

³⁸ Para 44

³⁹ Para 45

⁴⁰ Para 28

⁴¹ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC)

⁴² Para 55

⁴³ Paras 47, 55

⁴⁴ Para 54

⁴⁵ Para 55

The majority found that an initially successful tenderer does have alternative remedies open to it. It could firstly submit a new tender when fresh tenders are called.⁴⁶ The Court seems to suggest that the initially successful tenderer has nothing to complain about following such participation in a new round of tenders irrespective of the outcome of that second round.⁴⁷ The Court argued in the second place that the “prudent successful tenderer” has another alternative remedy available in the form of negotiated risk allocation in relation to potential reviews of the tender award.⁴⁸ The Court suggested that successful tenderers, following the award of the tender, should negotiate contractual arrangements with the state to govern any subsequent upset of the contract.⁴⁹

Finally, in probably the most astounding part of the majority judgment, it criticised Balraz for acting too quickly following the award of the tender.⁵⁰ The Court argued that Balraz should have waited before it acted on the tender award to see if the award was not challenged on review.⁵¹ It is worth quoting this paragraph in full:

“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 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.”⁵²

2 4 2 *The dissenting judgment*

In their dissenting judgment, Langa CJ and O’Regan J, with the concurrence of Mokgoro J, differed with the majority on only one point, namely that “normative considerations” did support the recognition of delictual liability in the present context.⁵³ While holding that the considerations motivating the majority judgment did not persuade them against the recognition of a legal duty and were given undue weight by the majority, the minority continued to identify a number of “important considerations which serve as counterweights” to the factors informing the majority’s position.⁵⁴

The minority acknowledged that damages claims in the public procurement context may place severe burdens on the public purse. As a result they noted that denying an unsuccessful tenderer a claim for lost profits is justifiable on those grounds.⁵⁵ However, they argued that a claim by an initially successful

⁴⁶ Paras 48-49

⁴⁷ Para 49: “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 ”

⁴⁸ Para 50

⁴⁹ Para 50

⁵⁰ Paras 51, 52

⁵¹ Para 52

⁵² Para 52

⁵³ Paras 64, 78, 94-95

⁵⁴ Paras 88-95

⁵⁵ Para 81

tenderer for out-of-pocket expenses incurred on the basis of its contractual obligations towards the state does not pose a similar threat to public funds.⁵⁶ Such claims are much more modest, do not represent a windfall for the tenderer and are for expenses actually incurred in good faith.⁵⁷ In the minority's view these factors were sufficient to justify a departure from earlier judgments in which damages claims were refused for administrative errors in public tender processes.

In the second place the minority found that one of the purposes of the applicable statutory regime was to give effect to the administrative justice rights found in the Constitution⁵⁸ since the statute governed specific administrative action.⁵⁹ As a result the statute was aimed at the protection of individual tenderers, contrary to the majority's and Supreme Court of Appeal's views, and could cast a legal duty on the tender board towards tenderers.

Thirdly, the minority noted the adverse impact on public procurement if damages claims were not allowed.⁶⁰ They argued that effective and efficient government contracting would be undermined if successful tenderers faced the prospect of their contracts being set aside without being able to recoup expenses already incurred under the contract.⁶¹ The minority expressly rejected Moseneke DCJ's criticism of Balraz for being too quick in performing under the contract. They noted:

"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."⁶²

Fourthly, the minority argued that denying a damages claim in the present context may have significant adverse effects on the use of public procurement to further social transformation in South Africa and in particular that of black economic empowerment.⁶³ They noted that new black businesses, which can be assisted in gaining entry to the market by means of government contracts, are often "smaller and less financially viable tenderers at risk of liquidation," "new, small and not financially robust" and "new and small companies unable to absorb the costs incurred in performing a contract subsequently declared void."⁶⁴ Given the importance of these public policies, the minority was of the view that society's sense of justice demanded protection of such new businesses against financial ruin because of void government contracts.

Finally, the minority was not convinced that a tenderer in Balraz's position has effective alternative remedies available to it. They argued that even though the initially successful tenderer may again submit a tender it would

⁵⁶ Paras 82, 83, 84

⁵⁷ Paras 82, 83, 84, 92

⁵⁸ Constitution of the Republic of South Africa, 1996

⁵⁹ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) paras 91, 94

⁶⁰ Paras 83, 86, 94

⁶¹ Para 83

⁶² Para 83

⁶³ Paras 82, 94

⁶⁴ Paras 82, 94

not recover its out-of-pocket expenses under the initial contract irrespective of the outcome of the second round of tenders.⁶⁵ The minority furthermore questioned the viability of Moseneke DCJ's suggestion that a successful tenderer should negotiate contractual protection against any losses resulting from the contract being set aside.⁶⁶ They expressed doubt whether government contracts are concluded in such a way, noting that such contracts are probably standard form contracts.⁶⁷

3 Administratively unjust⁶⁸ contracts

The *Steenkamp* matter illustrates how South African law responds to the dilemma of administratively unjust or reviewable government contracts. The Constitutional Court judgments and in particular the policy considerations that motivated those judgments should be evaluated within the framework of administratively unjust contracts.

3 1 Contractual solutions

Judged from this perspective the majority's argument that the successful tenderer should protect itself by means of contractual arrangements against losses resulting from the contract being set aside is unconvincing. It is difficult to see how a contractual provision could protect the private counterparty against administrative justice problems such as those under discussion here. If the contract is set aside on review, why would one provision, contemplating just such an event, survive to provide the private counterparty with a cause of action?⁶⁹ Such a provision would be tainted by the reviewable irregularity to the same extent as the rest of the contract. If Moseneke DCJ is contemplating a separate, and somehow independent, contractual arrangement from the main tender contract the concerns regarding administratively unjust conduct are simply duplicated.

From a policy point of view it is highly problematic to allow the parties to circumvent any potential effect of administratively unjust conduct by means of a subsequent and ostensibly separate contractual arrangement. If such an arrangement is in principle acceptable, what is to prevent the parties from agreeing that the successful tenderer is to receive its full benefit under the contract regardless of whether the contract is subsequently reviewed and set aside? Sue Arrowsmith notes in the context of restitution claims for performance under *ultra vires* con-

⁶⁵ Para 88

⁶⁶ Para 89

⁶⁷ Para 89

⁶⁸ I use the phrase "administratively unjust" to describe any action that falls foul of administrative law requirements in general, ie action that contains reviewable irregularities, what may be termed *ultra vires* in most common law jurisdictions. I specifically avoid the term *ultra vires* given the shift in South African law away from the *ultra vires* doctrine as a foundation of administrative law to the new constitutionalised administrative law centered on the notion of administrative justice

⁶⁹ In the *Steenkamp* matter the successful tenderer did in fact attempt to rely on a contractual cause of action in addition to the delictual claim. The High Court upheld the exception against the contractual claim, because the contract became void *ab initio* following the successful review and setting aside of the tender award and as a result there could be no contractual damages claim. *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2004 JOL 13193 (Ck) para 12. The majority's suggested contractual remedy would arguably suffer the same fate

tracts that the policy considerations, which motivated the *ultra vires* finding in the first instance, may also override ordinary market mechanisms such as efficient breach.⁷⁰ The same reasoning applies here. Irrespective of whether the contractual protection, which the majority in *Steenkamp* suggested, forms part of the main contract or is a separate, free-standing agreement, the policy considerations that underlie the review and setting aside of the tender award will in most instances also hit such attendant agreement.

The minority quite rightly expressed doubts about whether the majority's portrayal of the public contracting process is realistic in their suggestion that a contractual arrangement may be an effective alternative remedy. The majority's view is not in line with the law or practice governing public procurement in South Africa. Public contracting in South Africa is conducted for the most part on standard form contracts.⁷¹ State contracts are generally drawn up by the government and offered on a take-it-or-leave-it basis in the tender process.⁷² On national and provincial levels the Treasury Regulations⁷³ under the Public Finance Management Act⁷⁴ provide in relation to public procurement that "the accounting officer or accounting authority [of an organ of state] must ensure that ... bid documentation and the general conditions of a contract are in accordance with ... the instructions of the National Treasury..."⁷⁵ National Treasury has accordingly issued General Conditions of Contract applicable to most public procurement contracts.⁷⁶ Even where these conditions are not

⁷⁰ Arrowsmith "Ineffective Transactions, Unjust Enrichment and Problems of Policy" 1989 *Legal Studies* 307-311. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*; *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890-929 Hobhouse J said of restitution claims in this context: "The application of the principle is subject to the requirement that the courts should not grant a remedy which amounts to the direct or indirect enforcement of a contract which the law requires to be treated as ineffective." One finds similar reasoning against allowing the doctrine of estoppel to operate against organs of state where such organs exceeded their powers. One of the main reasons why estoppel cannot lie in such a case is that it would amount to the validation of what the law in the first instance invalidated, ie it would undermine the underlying reasons for limiting the organ of state's powers. See Hoexter *Administrative Law in South Africa* (2007) 38-40. In *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 4 SA 142 (SCA) para 13 Marais JA thus declared: "[L]eases were concluded which were *ultra vires* the powers of the department and they cannot be allowed to stand as if they were *intra vires*" and recently in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd* 2007 JOL 19532 (SCA) para 23 Ponnann JA said: "Estoppel cannot ... be used in such a way as to give effect to what is not permitted or recognised by law. Invalidity must therefore follow uniformly as the consequence. That consequence cannot vary from case to case."

⁷¹ Bolton *The Law of Government Procurement in South Africa* (2007) 111 *et seq.*, 368-369.

⁷² Bolton *Government Procurement* 368.

⁷³ GN R225 in GG 27388 of 2005-03-15.

⁷⁴ 1 of 1999.

⁷⁵ Reg 16A6 3.

⁷⁶ See Bolton *Government Procurement* 111; National Treasury *General Conditions of Contract* <http://www.treasury.gov.za/divisions/sf/sc/default.aspx> (accessed 13 December 2007). Similar arrangements exist in relation to procurement on local government level. National Treasury has issued a set of standard terms similar to the General Conditions of Contract ("GCC") applicable at national and provincial levels for local government procurement under the Municipal Supply Chain Management Regulations (GN R868 GG 27636 of 2005-05-30) promulgated in terms of the Local Government: Municipal Finance Management Act 56 of 2003 <http://www.treasury.gov.za/legislation/mfma/circulars/circular%2025.aspx> (accessed 13 December 2007). See Bolton *Government Procurement* 126.

applicable⁷⁷ or where scope is left for negotiated terms,⁷⁸ organs of state have very little freedom in such negotiations following a tender process.

If the type of contractual protection that the majority envisaged takes the form of “a guarantee, indemnity or security”, sections 66 and 70 of the Public Finance Management Act⁷⁹ place severe restrictions on the conclusion of such arrangements. In most instances the joint concurrence of the responsible member of Cabinet and the Minister of Finance⁸⁰ is required before such agreement can be concluded.⁸¹

Furthermore, administrative justice requirements generally, and section 217 of the Constitution in particular, preclude organs of state and successful tenderers from departing from the terms upon which tenders were submitted and negotiate individual terms in the subsequent contract.⁸² The problem with the type of post-award contractual arrangement that the majority in *Steenkamp* suggested is that it allocates risk under the contract, which inevitably has an impact on price. Since price is the most important factor in the award of a tender⁸³ it would be unfair to other (unsuccessful) tenderers if such an arrangement was only made after the tender was awarded with subsequent price implications.⁸⁴ In order for the tender process to be fair, competitive and transparent⁸⁵ tenderers will have to be able to estimate the risk involved in the proposed contract on the tender documents and on an equal basis. This implies that post-award risk reallocation is either not possible at all or should be put forward in the tender documents from the outset. If the latter route is followed, one can ask how such a position differs from a general delictual legal duty on

⁷⁷ The GCC eg do not apply to contracts for immovable property. See clause 2.1 of the GCC.

⁷⁸ The GCC allow for Special Conditions of Contract (“SCC”) to supplement the GCC in respect of any aspect that is not covered by the GCC. See GCC clause 2.2 and National Treasury *Practice Note Number SCM 1 of 2003* para 1.3. However, even the SCC are not necessarily open to negotiation between the parties. Both the GCC and the relevant Treasury Practice Note suggest that the SCC will be determined by the organ of state. At local government level, the Local Government: Municipal Systems Act 32 of 2000 s 84(1) allows municipalities to negotiate the terms of a municipal service delivery agreement with the successful tenderer following the conclusion of the tender process. This power to negotiate individual terms is, however, quite narrow and must proceed on the basis of the tender documents and may not “materially affect the bid in a manner which compromises the integrity of the bidding process.” See Bolton “Scope for Negotiating and/or Varying the Terms of Government Contracts Awarded by way of a Tender Process” 2006 *Stell LR* 266 279-280.

⁷⁹ 1 of 1999.

⁸⁰ On provincial level the concurrence of the MEC for finance is required.

⁸¹ Public Finance Management Act 1 of 1999 s 66 read with s 70. Note, however, that while the National Treasury in a *Circular on Contracts Containing Provisions Relating to Indemnities, Limitations of Liability and Warranties* of 2005-09-20 acknowledged that the Public Finance Management Act probably requires the written concurrence of the Minister of Finance for all such agreements, Treasury adopted the practice that such concurrence is not necessary in relation to contracts where “the indemnity, limitation of liability or warranty is integral or incidental to expenditure that has already been approved by the relevant legislature or executive authority in the annual budget of the department/constitutional institution or public entity respectively; and such indemnity, limitation of liability or warranty is necessitated by the day-to-day operational requirements of the department, constitutional institution or public entity, which include the acquisition of equipment such as photocopiers, PABX boards and computer hardware, the procurement of professional services and the hosting of events.”

⁸² Bolton 2006 *Stell LR* 277.

⁸³ Price is directly related to the principle of “cost-effectiveness” that is listed in s 217(1) of the Constitution as one of the basic requirements of all public procurement. Consequently the framework for the implementation of preferential procurement policies in terms of s 2 of the Preferential Procurement Policy Framework Act 5 of 2000 allocates primary importance to price in the preference point system used to adjudicate tenders.

⁸⁴ See Bolton 2006 *Stell LR* 277-279.

⁸⁵ See s 217(1) of the Constitution.

the tender board, at least *vis-à-vis* the successful tenderer. Questions of public trust also emerge from this latter option. If an organ of state offers some form of indemnity for its potential administrative errors right at the start of the tender process, ie in the tender documents, it may create significant adverse perceptions about its own reliability, fuelling uncertainty and undermining trust between the organ of state and private contracting parties.⁸⁶

3.2 Allocating the administrative injustice risk

The effect of the majority judgment in *Steenkamp* is to place the risk that the government contract is administratively unjust and is subsequently set aside on review, which one may call an administrative injustice risk in South Africa,⁸⁷ on the successful tenderer, ie the private party to the contract. This allocation of risk is unfortunate and may have far-reaching adverse consequences for government contracting in South Africa. The most significant implication is one of costs, which directly contradicts the cost-saving aims of the majority in *Steenkamp*. The refusal to apply private law regulation (delictual liability) in favour of public law regulation (judicial review) results in the highly inefficient outcome of forcing all private parties to internalise the risk of government contracts being set aside (or even just significantly delayed) in judicial review proceedings. In other words, the mere possibility of judicial review linked to the potential absence of a damages remedy for costs legitimately incurred under the contract and prior to it being set aside, increases the risk of the private party and will force parties to hedge against that risk,⁸⁸ with the resultant cost passed on to the state. Tenderers will typically offer lower prices when the state is selling and ask higher prices when the state is buying in order to off-set the higher transaction costs brought about by the higher risk.

This outcome is highly inefficient for a number of reasons. Firstly, the state is undoubtedly better placed to minimise administrative injustice risks than the private party.⁸⁹ An efficient approach will thus place that risk on the state, which

⁸⁶ See Davies “English Law’s Treatment of Government Contracts: The Problem of Wider Public Interests” in Freedland & Auby (eds) *The Public/Private Law Divide* (2006) 125 where she makes a similar argument in relation to negotiated solutions to regulatory changes affecting government contracts

⁸⁷ This seems to be a suitable phrase since the risk is grounded on the eventuality of a court ruling that the administrative justice rights in s 33 of the Constitution have been breached in the tender process

⁸⁸ The fact that, following *Steenkamp*, a damages remedy will be absent where administrators made an honest mistake means that private parties do not have to take an overly pessimistic view of state conduct for them to perceive and hence protect against this risk. There is thus no room for an argument that such risk averse conduct is somehow unwarranted, against public policy or even immoral, as may be arguable where private parties expect the state to act in bad faith and accordingly hedge against such contingency

⁸⁹ In rejecting the argument that the absence of restitution claims under *ultra vires* contracts creates an incentive for private contractors to “check that a contract is authorised”, Sue Arrowsmith notes that “the scope of public authorities’ statutory powers is notoriously uncertain, and a contractor cannot reasonably be expected to know whether or not a contract is *ultra vires*.” Arrowsmith 1989 *Legal Studies* 307 311-312. The same reasoning applies in the present context. The private contracting party’s disadvantage in this context is increased where the reviewable irregularity relates to more “subjective” factors, such as improper motive (cf the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) s 6(2)(e)(ii)) or reliance on irrelevant considerations (cf PAJA s 6(2)(e)(iii)), rather than more easily verifiable objective factors relating to the state’s formal capacity to enter into transactions. Eg in the *Steenkamp* matter the contract was set aside on grounds which would be extremely difficult for a private contracting party to verify before concluding the contract, see *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (CKH) 348

in the present context means placing delictual liability on the state. Secondly, allowing delictual liability in the limited number of instances where a state contract is set aside upon review may amount to higher costs for the state in those instances, but has the wider effect of removing a similar risk on private parties in all other state contracts, with the result that private parties have no need to protect against such risk. Accordingly, the costs of all state contracts are reduced.⁹⁰ Thirdly, as Anne Davies notes in relation to *ultra vires* contracts in English law, placing such risk on private contractors may result in “some potential contractors [being] deterred from bidding for government business at all, thus reducing the range of choices open to the government during the tendering process.”⁹¹ The last two considerations are particularly important in the South African context. As the dissenting minority in *Steenkamp* noted, public procurement plays a crucial role in transforming South African society, specifically in relation to economic empowerment. It is accordingly important to remove potential obstacles facing new black entrants to the market in government business. Given the “less financially viable”⁹² nature of many of these previously disadvantaged enterprises, an administrative injustice risk will undoubtedly pose a significant obstacle. *Steenkamp*’s allocation of risk will consequently not only undermine the South African government’s choice in relation to the competitive dimension (ie price or cost) of public procurement, but also its choice in relation to empowerment partners. It is suggested that this will be immensely detrimental to the broad based nature of black economic empowerment in South Africa⁹³ by limiting access to government business to a relatively small number of established and financially robust black repeat players.

There is a further implication of the majority’s allocation of risk in *Steenkamp* that merits particular attention in the South African context. In terms of the majority judgment the cost of *bona fide* administrative errors in public tender adjudication is placed on one individual or firm, namely the successful tenderer. This seems highly unfair since the benefit of administrative justice underlying the review of such errors is a benefit to society as a whole.⁹⁴ Consequently, the cost of upholding administrative justice should be “shared throughout the community.”⁹⁵ When one adds the transformation dimension of public procurement to this picture, the

⁹⁰ Davies “Ultra Vires Problems in Government Contracts” 2006 *LQR* 98 114-115: “It might be cheaper to compensate contractors on the rare occasions when a contract is held to be void, than to pay an inflated price in every contract”

⁹¹ Davies 2006 *LQR* 115

⁹² *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 82 (per Langa CJ and O’Regan J)

⁹³ See the preamble to the Broad-Based Black Economic Empowerment Act 53 of 2003, which states as one of its objectives to “promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy”

⁹⁴ This benefit is in its most basic form that of upholding the rule of law and the related principle of legality. See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 29: “Ultimately the purpose of a public remedy is ... at a broader level, to entrench the rule of law”; Hoexter *Administrative Law in South Africa* 110 *et seq*; Baxter *Administrative Law* (1984) 639.

⁹⁵ Davies 2006 *LQR* 99. Also see Baxter *Administrative Law* 641

argument for distributing the cost of administrative irregularities throughout society becomes even stronger. It seems anomalous to place the cost of implementing key transformation initiatives on the very people that the initiatives aim to empower. The cost of realising transformation objectives in South Africa should be carried by society at large.⁹⁶

3.3 Efficient performance under government contracts

Apart from the adverse cost implications of the majority judgment in *Steenkamp*, it also impacts negatively on efficient performance under public contracts. The majority judgment effectively created a “standstill period” for all government contracts awarded by means of public tender in South Africa.⁹⁷ During this period following the award of the tender, no further action should be taken in terms of the contract until such time as the administrative injustice risk has passed. In *Steenkamp* that standstill period amounted to more than a year.⁹⁸ Despite the majority’s offhand statement that “in the ordinary course tenderers who dispute the correctness of an award would challenge its correctness relatively quickly”, this standstill period can severely undermine prompt performance under government contracts. In terms of section 7(1) of the Promotion of Administrative Justice Act (PAJA),⁹⁹ future judicial review proceedings must be instituted “without unreasonable delay and not later than 180 days” after any internal remedies have been exhausted or, in the absence of any such remedies, after the person concerned was informed of the decision and its reasons. However, section 9(1)(b) of PAJA provides for the extension of the 180 day period by agreement between the parties or by the court. While a 180 day minimum period is a much shorter period of time than the year that lapsed in *Steenkamp*, it is still a significant delay in the execution of a commercial transaction. It should also be kept in mind that the 180 day limit is only the period in which the review proceedings should be instituted and that the conclusion of such proceedings, including potential appeals, may drag the matter out

⁹⁶ This is implicit in the preamble to the Constitution where “[w]e, the people of South Africa” collectively commits to the transformation of South African society

⁹⁷ This bit of judicial law-making is quite ironic given the majority’s expressed view that “[in] these circumstances to infer a remedy judicially would be to venture far beyond the field of statutory construction or constitutional interpretation,” quoting with approval Cameron JA’s remarks in *Olitzi Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 47

⁹⁸ The tender was awarded to Balraz in March 1996 and the contract was set aside upon review in June 2007 *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) paras 7-8

⁹⁹ Future applications for review similar to that in *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (CKH) will be governed by PAJA. See para 4 below for a more comprehensive discussion of the impact of PAJA on cases such as *Steenkamp*.

much longer.¹⁰⁰ Such delays inevitably have a negative impact on government effectiveness and efficiency.¹⁰¹

4 The Promotion of Administrative Justice Act

Although PAJA did not apply to the facts in *Steenkamp*,¹⁰² all the judgments made express reference to it.¹⁰³ In his brief concurring minority judgment, Sachs J placed particular emphasis on the remedy provisions in PAJA.¹⁰⁴ This is not surprising seeing that PAJA will clearly apply to similar cases in future.¹⁰⁵ Two related questions emerge in this regard. Firstly, does PAJA provide an effective remedy to a claimant in Balraz's position in the *Steenkamp* matter? And secondly, can the Court's refusal to recognise delictual liability in this instance be understood in the light of the future role of PAJA in a similar context? In his concurring minority judgment, Sachs J noted:

"Just compensation today can be achieved where necessary by means of PAJA ... Such an equitable, constitutionally-based public law remedy was not pleaded or debated in this case. Had it been, the

¹⁰⁰ The presence of internal remedies will further increase the delay since the 180 day period will only commence following the finalisation of internal remedies. For a discussion of various internal remedies available in government procurement processes, see Bolton *Government Procurement* 310-312. Even in the absence of internal remedies, the 180 day period may in practice be considerably extended when the right to reasons is kept in mind. PAJA s 7(1)(b) states that the 180 day period is calculated from the date upon which the person concerned is informed of the decision and the reasons for the decision. However, there is no general duty on administrators to supply reasons with all decisions under PAJA. An affected person has the right to request reasons under s 5(1) of PAJA and only then will there be a duty on the administrator to provide reasons. PAJA s 5(1) allows the affected person 90 days following the date upon which she became aware of the decision to request reasons and s 5(2) subsequently allows the administrator another 90 days to provide such reasons. It follows that there is an initial maximum 180 day period following the date upon which the affected person became aware of the decision during which reasons is to be requested and provided and only following that initial maximum 180 day period will the 180 day period in terms of s 7(1) for launching judicial review proceedings start to run. It is thus possible that the time limit on bringing judicial review proceedings will only expire 360 days after the decision was taken.

¹⁰¹ Cf Arrowsmith's criticism of the "mandatory standstill period" under the European Community Directive 89/665 on remedies for the enforcement of European Community procurement rules as interpreted by the European Court of Justice in Case C-81/90, *Alcatel Austria AG v Bundesministerium für Wissenschaft und Verkehr*, 1999 ECR I-7671. In this case the European Court of Justice held that the Directive's requirement that states provide an effective set-aside remedy against public procurement award decisions necessitates a national remedy system that allows for the challenge of award decisions prior to the conclusion of the relevant public contract. The European Commission interpreted this ruling to require a mandatory standstill period between award decision and conclusion of the contract during which challenges to the award decision can be brought. The United Kingdom initially implemented the European Court of Justice's ruling by allowing for a limited period following the conclusion of the public contract to challenge the award of the contract. However, under pressure from the European Commission, the United Kingdom eventually also introduced a mandatory standstill period. Arrowsmith "The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?" 2006 *Public Contract Law Journal* 337-378. The mandatory standstill period has subsequently been taken up in a proposed EC directive amending the current remedies directives with regard to improving the effectiveness of review procedures concerning the award of public contracts. This directive, proposed by the European Commission, was approved by the European Parliament and is currently awaiting approval by the Council.

¹⁰² The tender award was set aside in June 1997, while PAJA only came into operation in November 2000.

¹⁰³ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) paras 21, 30 (per Moseneke DCJ), 96-98 (per Langa CJ and O'Regan J), 99-101 (per Sachs J).

¹⁰⁴ Paras 99-101.

¹⁰⁵ It is now beyond doubt that the adjudication and award of public tenders in South Africa constitute administrative action and are accordingly subject to PAJA. See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 21.

problems acknowledged in the minority and majority judgments could have been resolved in a fair, balanced and practical way.”¹⁰⁶

The dissenting judgment similarly noted a potential compensation claim in terms of PAJA in future instances.¹⁰⁷ The realisation of this potential is, however, doubtful for a number of reasons. Section 8(1)(c)(ii) of PAJA provides for the payment of compensation by “the administrator or any other party to the proceedings” only “in exceptional cases.” The majority’s emphasis on this narrowly restricted nature of a compensation claim under PAJA suggests that the Court did not view the present instance as sufficiently exceptional to merit compensation.¹⁰⁸ It is submitted that the expressed policy considerations, which ostensibly moved the majority to reject delictual liability in *Steenkamp*, will have a similar negative impact on the success of a compensation claim under PAJA in comparable future cases. Most, if not all, of those considerations are unrelated to the specific delictual nature of the claim in *Steenkamp*.¹⁰⁹ Despite the judicial analysis in that case being couched in terms of the delictual element of wrongfulness, the expressed policy considerations would accordingly undermine any compensation claim for expenses incurred following the award of a public tender, but prior to it being set aside upon review, regardless of the legal pedigree of the claim. Basing the claim on PAJA, rather than in delict, would make no difference to arguments such as the availability of alternative remedies in the form of contractual protection or proceeding with caution; the impact on the public purse and the functioning of tender boards.

Even if one can surmount the adverse policy considerations listed by the majority in *Steenkamp* to convince a court that compensation in terms of PAJA is justifiable in a similar future case, it is not clear that a *successful* tenderer will ever be able to rely on PAJA’s compensation remedy. Such a claimant faces significant procedural obstacles in the way of a compensation claim. The remedies listed in section 8 of PAJA are only available “in proceedings for judicial review in terms of section 6(1)” of the Act.¹¹⁰ Consequently, a section 8(1)(c)(ii) compensation claim will only be possible in the original review application and not as an independent claim subsequent to the review and setting aside of the tender award. In other words, a compensation claim in terms of PAJA would not have been available in *Steenkamp* even if the Act

¹⁰⁶ Paras 101-102

¹⁰⁷ Para 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”

¹⁰⁸ See para 30. There is no more than a hint or suggestion to this effect in the majority judgment, since they expressly noted that “[i]t is unnecessary to speculate on when cases are exceptional. That question will have to be left to the specific context of each case.”

¹⁰⁹ See *Darson Construction (Pty) Ltd v City of Cape Town* 2007 4 SA 488 (C) 509D-F where the judge with reference to *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) said: “Mindful of the fact that the award of constitutional damages is not to be confused with delictual liability, I am nevertheless of the view that the practical considerations behind the policy which has led courts to decline to recognise the delictual claims of unsuccessful tenderers (and successful tenderers who are subsequently ousted) for loss of profits carry considerable weight when deciding, on the facts of this case, whether an award of applicant’s loss of profit is ‘just and equitable’ and an appropriate remedy”

¹¹⁰ PAJA s 8(1)

was operative at the relevant time. This places the successful tenderer in an extremely difficult position. In the review application the successful tenderer will inevitably be cited as a respondent along with the relevant organ of state and/or tender board that awarded the contract. The successful tenderer's interests will also generally be aligned with that of the organ of state in keeping the contract alive. It is thus to be expected that the successful tenderer would want to make out a case that the tender process was conducted in a lawful, reasonable and procedurally fair manner. However, as soon as the reviewing court sets the contract aside, the successful tenderer's interests undergo a 180 degree turn and come to stand diametrically opposite that of the organ of state. In order to recover its losses it is now in the initially successful tenderer's interests to point out the errors in the award procedure and pin the blame on the organ of state. It is not clear that prevailing rules of procedure provide adequate scope for such a course of action by the initially successful tenderer. Theoretically a reviewing court may order compensation in terms of PAJA to the initially successful tenderer when it sets the contract aside.¹¹¹ However, such a compensation order is unlikely to accompany a successful review application in practice. The issue of compensation would mostly not have been aired because of the initially successful tenderer's alignment with the organ of state during the review application.¹¹² This places the reviewing court in a difficult position regarding compensation orders since it will mostly not have the necessary evidentiary material in front of it to grant such an order and the organ of state would not have had an opportunity to address the court on the issue of compensation to one of its co-respondents. The restriction of compensation orders to "exceptional cases" also continues to raise particular difficulty in this respect. Whereas one would expect an applicant in a review, in the present context an unsuccessful tenderer, to put arguments before the court enabling it to decide on the exceptional remedy of substitution in section 8(1)(c)(ii)(aa) of PAJA, the same is not true for the exceptional compensation remedy in subsection (bb). It is the successful tenderer, normally a respondent in a review of the tender award, that would typically need to put arguments before the court enabling it to decide whether the case is sufficiently exceptional to merit a compensation remedy. The conflicting alignment experienced by the successful tenderer respondent accordingly remains. While these pro-

¹¹¹ The inclusion of the word "and" preceding s 8(1)(c)(ii) of PAJA seems to suggest that a compensation order is only available in conjunction with an order setting the relevant administrative action aside rather than as a free-standing order. See *SLC Property Group (Pty) Ltd v The Minister of Environmental Affairs and Economic Development (Western Cape)* CPD 26-10-2007 case no 5542/2007 para 55; *Darson Construction (Pty) Ltd v City of Cape Town* 2007 4 SA 488 (C) 501F-G

¹¹² The fact that reviews are mostly brought on motion proceedings adds to this problem since the reviewing court would not have heard evidence on damages, which will mostly be fatal to any potential compensation order. See *Darson Construction (Pty) Ltd v City of Cape Town* 2007 4 SA 488 (C) 509G: "Damages are by their very nature unliquidated. It is the Courts' task after hearing evidence to quantify damages." Since the initially successful tenderer is also not the one instituting the review proceedings, it has no control over what procedure is adopted at the outset. Also see Hoexter *Administrative Law in South Africa* 503: "The motion procedure associated with administrative review (and currently embodied in Rule 53) is in any event not designed for the resolution of disputes of fact, which tend to crop up in claims for damages," quoted with approval in *SLC Property Group (Pty) Ltd v The Minister of Environmental Affairs and Economic Development (Western Cape)* CPD 26-10-2007 case no 5542/2007 para 56

cedural problems are not insurmountable, they do raise questions regarding the adequacy of current judicial review mechanisms, especially in relation to remedies, in the context of public procurement.

The unconvincing nature of the expressed policy considerations that informed the majority judgment in *Steenkamp* linked to the *obiter* references to future compensation in terms of PAJA leads one to wonder whether there are other, largely unexpressed considerations really at work in *Steenkamp*. Perhaps Sachs J's overt reliance on PAJA provides a way of understanding the outcome in *Steenkamp*. In a key passage Sachs J stated: "[I]t 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."¹¹³ As a result he was "unconvinced that it is appropriate to develop private law remedies"¹¹⁴ in aid of initially successful tenderers such as Balraz. This approach of Sachs J goes back and is true to the foundational ruling of the Constitutional Court in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*¹¹⁵ where Chaskalson P held that

"[t]here are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law ..."¹¹⁶

These motivations provide a much more compelling reason for rejecting delictual liability in the context of administrative errors in the adjudication of public tenders than the policy considerations listed by the majority in *Steenkamp*. Given the applicability of PAJA to the adjudication of public tenders and its express provision for the award of compensation, it seems appropriate in principle, based on the single system approach in *Pharmaceutical Manufacturers*, to reject a parallel remedy in terms of the law of delict. However, it still seems highly unfair to deny the deserving claimant in *Steenkamp* relief in the name of coherent and principled legal development. In my view Sachs J also effectively provided a way out of this dilemma by rightly pointing out that the compensation remedy now found in PAJA could have been grounded directly on the Constitution in the absence of PAJA.¹¹⁷

5 Remedies in public procurement reviews

The real issue raised by the *Steenkamp* matter is not whether delictual liability should attach to *bona fide* errors of organs of state in the public procurement context, but rather the unsophisticated approach of courts to the judicial review of public contract decisions. The difficulties illustrated by *Steenkamp* arise not necessarily because of administrative errors by public procurement officials, but because of the legal treatment of those errors. The

¹¹³ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 99

¹¹⁴ Para 101

¹¹⁵ 2000 2 SA 674 (CC)

¹¹⁶ Para 44

¹¹⁷ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) paras 99-100

traditional approach in judicial review proceedings has been to simply set the state action aside when a reviewable irregularity is found to exist.¹¹⁸ This approach is simplistic and does not adequately take account of the complex nature of public procurement disputes. There is no reason, however, why this should be the case. The remedies regime in South Africa in relation to judicial review of state conduct has always been a fairly flexible one.¹¹⁹ The setting aside of administrative action upon review was at common law and continues to be in terms of the Constitution and PAJA¹²⁰ a discretionary remedy.¹²¹ The remedy provisions of the Constitution and PAJA clearly allow significant scope for courts to develop and apply remedies suitable to specific circumstances. The recent judgment of the Supreme Court of Appeal in *Millennium Waste Management v Chairperson Tender Board*¹²² illustrates the possibility of crafting suitable orders from this broad and flexible remedies framework. This judgment signifies a decisive step away from a simplistic legal response to reviewable irregularities in public tender cases. In order to foster this development there is a need to engage in further analysis of appropriate legal remedies in the public procurement context. It is not the purpose of this contribution to embark on that analysis. However, a few remarks regarding the outline of such an analysis flowing from the *Steenkamp* and *Millennium Waste Management* decisions are necessary.

There is a danger, evident in the majority judgment in *Steenkamp*,¹²³ that judicial scrutiny of public procurement decisions could result in the polarisation of the issues as either public or private in nature. This results in the available and relevant remedies being perceived as *either* of a public law *or* of a private law nature. The problem with this adherence to the public/private law distinction is that public procurement falls squarely within both public and private law. Disputes relating to public procurement cannot adequately be conceptualised in terms of the public/private law distinction. Prior to 1994 there was a tendency in South African law to conceptualise public contract-

¹¹⁸ Hoexter *Administrative Law in South Africa* 464-465; Baxter *Administrative Law* 678. See eg Selikowitz J's recent statement in relation to tender decisions in *Darson Construction (Pty) Ltd v City of Cape Town* 2007 4 SA 488 (C) 500G: "Where an unauthorised 'administrator' acts, its actions are clearly reviewable and cannot be upheld."

¹¹⁹ See Baxter *Administrative Law* 674-676; Hoexter *Administrative Law in South Africa* 462-465

¹²⁰ S 8(1) of PAJA states: "The court ... in proceedings for judicial review ... may grant any order that is just and equitable" echoing s 38 of the Constitution, which empowers a court to "grant appropriate relief" where a right in the Bill of Rights (including the s 33 right to administrative justice) has been infringed and s 172(1)(b), which states that a court "deciding a constitutional matter" may "make any order that is just and equitable."

¹²¹ Baxter *Administrative Law* 678; Hoexter *Administrative Law in South Africa* 465-466

¹²² 2007 JOL 21170 (SCA)

¹²³ See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 29 where it is stated: "It is ... 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" and para 30 where the majority declared in relation to the remedies regime in PAJA: "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."

ing as simply a matter of private contract¹²⁴ with the result that many of the peculiarities of public contracts were overlooked.¹²⁵ The private law remedies that were exclusively granted in terms of that approach furthermore failed to provide adequate protection to the individuals affected.¹²⁶ Under the new constitutional regime a different trend has emerged to view public contracting as a matter of administrative action and hence subject to administrative law regulation.¹²⁷ It is submitted that if this trend results in the exclusion of private law remedies in favour of exclusive reliance on public law remedies, as *Steenkamp* seems to suggest, the development of an effective remedy regime for public procurement disputes will be undermined. Given the hybrid legal nature of public procurement it is imperative to develop remedies that draw on both public and private law rules. Such remedies should “uphold the rule of law and ensure effective decision-making processes”,¹²⁸ but at the same time refrain from unduly hampering state commercial dealings by imposing a too high regulatory burden. They should protect the particular interests of the parties involved in the transaction and aim to realise the commercial rationale behind the transaction while also protecting public interest against abuse of public power. In essence, the ideal combined approach should generate a synergy between the control functions of public law rules and the facilitating functions of private law rules.¹²⁹

An effective remedies regime must also take particular notice of the multilateral nature of public procurement disputes and move away from the traditional bipolar perspective familiar to the litigation process. The trilateral nature of the interests involved in the original judicial review that resulted in the *Steenkamp* case underscores this point. As argued above, PAJA’s remedy provisions and in particular the compensation remedy in section 8(1)(c)(ii), provide particular difficulties in this regard. Sue Arrowsmith’s argument that “the court should take account of the interests of the party awarded the contract, particularly if he has begun preparation or performance in ignorance of any dispute over the award decision”¹³⁰ is accordingly also of specific relevance in the South African context. In this regard Jafta JA’s judgment in *Millennium Waste Management v Chairperson Tender Board*¹³¹ is of particu-

¹²⁴ See the detailed analysis of this jurisprudence by Cora Hoexter in Hoexter “Contracts in Administrative Law: Life after Formalism?” 2004 *SALJ* 595 and Hoexter *Administrative Law in South Africa* 147 *et seq.* Also see Pretorius “The Defence of the Realm: Contract and Natural Justice” 2002 *SALJ* 374; Cockrell “Can You Paradigm?” – Another Perspective on the Public Law/Private Law Divide” 1993 *Acta Juridica* 227

¹²⁵ Also see Baxter *Administrative Law* 59 who refers *inter alia* in the context of public contracts to “examples where judges seem to have ignored the ‘third dimension’ of disputes, treating them instead as if they merely involved private parties, each free to exercise their powers and vindicate their rights as they wish”

Hoexter 2004 *SALJ* 602-604

¹²⁷ See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 21 and the cases quoted there in note 14

¹²⁸ See *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) para 28

¹²⁹ As Anne Davies notes: “The challenge is therefore to find a set of remedies which would vindicate the Rule of Law, whilst at the same time protecting contractors’ expectations and (where relevant) preventing undue disruption to public services where a concluded contract is at issue” Davies 2006 *LQR* 98 115

¹³⁰ Arrowsmith “Enforcing the EC Public Procurement Rules: The Remedies System in England and Wales” 1992 *Public Procurement LR* 92 101

¹³¹ 2007 JOL 21170 (SCA)

lar interest. In approaching the formulation of an appropriate remedy in the public tender dispute before the Court, the judge stated:

“The difficulty that is presented by invalid administrative acts ... is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.”¹³²

Based on this acute understanding of the complexity involved in public tender disputes, the Court managed to formulate a creative and highly suitable remedy. It conditioned the setting aside of the tender award upon an evaluation by the tender board of the appellant’s incorrectly excluded tender against that of the successful tenderer.¹³³ The initial award decision would be set aside only if the tender board resolved that the tender ought to have been awarded to the appellant. Furthermore, the initially successful tenderer remained entitled to all moneys due to it under the contract up to the setting aside of the tender award, ie the original contract did not become void *ab initio* following a setting aside of the adjudication decision. As Jafta JA correctly noted: “The order envisaged here maintains a balance between the parties’ conflicting interests while taking into account the public interest.”¹³⁴

6 Conclusion

The *Steenkamp* matter illustrates the complexity involved in the judicial scrutiny of public procurement. The recognition of the public law dimension of state contracting is certainly a welcome development in South African law, but only if it constitutes the first step in the development of a coherent and integrated legal approach to such state activity. The majority judgment of the Constitutional Court in *Steenkamp* did not advance this development. If the unsophisticated approach to the judicial treatment of government contracts and tender awards is kept up, winning a state tender may just result in a fate worse than losing that tender. However, the judgment in *Millennium Waste Management v Chairperson Tender Board* suggests that South African courts are moving towards a more sophisticated approach to judicial remedies in public contract disputes. This is an important development and should be supported by further analysis in this area.

¹³² Para 23

¹³³ Para 35

¹³⁴ Para 32

SUMMARY

In *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) the Constitutional Court held that an organ of state was not liable in delict for a successful tenderer's out-of-pocket losses following the setting aside of the tender because of a *bona fide* error on the part of that organ of state in the tender process. The Court ruled that the organ of state's negligent but *bona fide* conduct in the public tender process was not wrongful since it owed no legal duty to tenderers, whether successful or unsuccessful, to avoid such losses and that there were no public policy considerations that justified the recognition of such a duty. From a public procurement perspective, this judgment is unfortunate. Moseneke DCJ's majority judgment is based on a number of highly contestable assumptions and holds implications for public procurement that may largely undermine the very public policy considerations upon which it is based. The dissenting minority judgment of Langa CJ and O'Regan J is to be preferred, because it is not only much more sensitive to the general realities of public procurement, but specifically the realities of South African public procurement. However, the problem raised by the *Steenkamp* matter, judged from a public procurement perspective, is not one of delictual liability but rather the hitherto fairly unsophisticated approach to remedies following the judicial review of public tender decisions in South Africa. In order to overcome the problems illustrated by the *Steenkamp* case, we should focus our attention on the development of appropriate judicial review remedies within the public procurement context. The recent judgment of the Supreme Court of Appeal in *Millennium Waste Management v Chairperson Tender Board* 2007 JOL 21170 (SCA) provides a solid point of departure for such a development.