IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 698/98

In the matter between:

OLITZKI PROPERTY HOLDINGS Appellant

and

STATE TENDER BOARD First Respondent

PREMIER OF THE PROVINCE OF GAUTENG Second Respondent

BEFORE: **HEFER ACJ, OLIVIER, MARAIS, ZULMAN and CAMERON JJA**
HEARD: **MONDAY, 26 FEBRUARY 2001**
DELIVERED: **WEDNESDAY, 28 MARCH 2001**

The procurement provision of the interim Constitution does not give rise to a civil claim for damages for lost profit; similarly, the administrative justice provisions in the Fundamental Rights chapter of the interim Constitution do not confer such a claim where the claimant had an alternative remedy in interdict and review

J U D G M E N T

CAMERON JA:

[1] This appeal raises two questions. The first is whether the provision regarding procurement administration in the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) creates a right to claim damages for lost profit at the instance of a party claiming injury because of its infringement. The second is a similar question regarding breach of the administrative justice provisions in that Constitution's Chapter on Fundamental Rights. The first question raises the not unfamiliar issue of the circumstances in which the breach of a statutory provision (one in this case embodied in the interim Constitution) gives rise to a civil claim for damages. The second is whether in the circumstances of this case damages for lost profit are an appropriate remedy for the infringement of a fundamental constitutional right ("constitutional damages").

JURISDICTION

[2] The proceedings were commenced before the 1996 Constitution came into effect on 4 February 1997. Both issues raise questions concerning the interpretation of the interim Constitution. Under that Constitution, this Court had no jurisdiction to decide such issues (sections 98(2) and 101(5)). Chapter 8 of the 1996 Constitution however grants such jurisdiction, which in terms of item 17 of Schedule 6 this Court may exercise in regard to matters that arose when the interim Constitution was in force, provided that the interests of justice require it to do so. The Constitutional Court has signalled its general view that "compelling interests of justice" suggest that this Court should now exercise this jurisdiction,[1] while this Court has indicated that it will do so

[1] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council*

on an ad hoc appraisal of what the interests of justice in a particular case require.[2]

[3] In the present matter, the judge in the court below granted leave to appeal to this Court; and the parties were agreed (the respondents having abandoned their opposition) that this Court should exercise its constitutional jurisdiction. Taking into account the course of the proceedings, the delay and the wasted costs that would be occasioned if this Court declined to exercise its appellate jurisdiction in regard to the order of the Court below, and the consideration that in such circumstances it is undesirable that other courts should "be denied the benefit of the experience and expertise" of this Court in matters involving the interim Constitution,[3] I am satisfied that the interests of justice require us to determine the matter.

FACTUAL AVERMENTS, EVIDENCE AND PROCEDURE

[4] In 1995, the provincial government of Gauteng began to make arrangements to relocate from Pretoria to Johannesburg. It invited tenders for office accommodation to house various departments in an inner-city precinct. The appellant ("the plaintiff") obtained an option to purchase a building in the precinct, and tendered to provide office space in it to the provincial government. Its tender was not accepted. Thereafter it instituted a claim for damages against the first and second respondents ("the defendants"), respectively the State Tender Board ("the Tender Board"), which awarded the tender, and the Province of Gauteng ("the provincial government") which the plaintiff alleged had

and Others 1999 (1) SA 374 (CC) para 109

2 *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* 1999 (3) SA 771 (SCA) paras 4 - 6

3 *Fedsure* (above) para 106

misconducted itself during the tender process in specified ways with which the Tender Board had associated itself. The damages the plaintiff claimed allegedly arose from the defendants' unlawful conduct in managing the tender process and in awarding the tender. They consisted in the profit the plaintiff asserted it would have made from rentals if it had been awarded the tender.

4

[5] The plaintiff pleaded its claim on two alternative bases. Claim A alleged that its entitlement to damages arose from the defendants' breach of the plaintiff's right to a fair, public and competitive system of tendering embodied in section 187(2) of the interim Constitution. Claim B alleged in the alternative that the defendants' conduct constituted an infringement, entitling the plaintiff to damages, of the fundamental right to administrative justice enshrined in section 24 (a), (b) and (d) of the interim Constitution.

[6] In the court below, the parties agreed to test the legal foundation for the plaintiff's claims before possibly protracted evidence supporting them would have to be led. They requested the court to decide on the basis that the factual allegations in Claim A were correct whether the plaintiff was in law entitled to the damages it claimed. In regard to Claim B, the court was requested to assume the correctness of the same factual allegations, but, in addition, after hearing "such evidence as the parties may tender ... and which the court regards as relevant" to a specified issue, to decide whether the plaintiff was similarly entitled. That issue was the plaintiff's averment that an award of damages constituted "appropriate relief" in terms of s 7(4)(a) of the interim Constitution, since it had no other satisfactory remedy for the alleged breach of its fundamental right to administrative justice. In the event of a finding favourable to the plaintiff in regard to either Claim A or B, the court was requested to postpone the matter for further hearing. Eloff JP, who heard the matter, expressed his support for this arrangement.

[7] The allegations that the Court below in upholding the defendants' challenge to the legal basis of the plaintiff's claim assumed to be correct were in essence that the defendants in awarding the tender acted irregularly, unreasonably and arbitrarily. More particularly, the plaintiff alleged (and the Court assumed) that —

* The provincial government, an interested party which could not impartially appraise the tenders and formulate recommendations, had acted as an advisory body to the Tender Board;
* The Tender Board took the provincial government's recommendations into account in awarding the tender;
* The Tender Board failed to appraise the plaintiff's tender independently and impartially, and acted partially in making a pre-selection of premises;
* The Tender Board thus acted in breach of the plaintiff's right to a fair, public and competitive tender process as required by s 187 of the interim Constitution, in that it permitted the provincial government to act in this way, and had in addition made itself party to those acts;
* As a result the plaintiff was not awarded the tender, which would have been awarded to it had a fair, public and competitive tender process been followed.

[8] Eloff JP, after hearing evidence from the plaintiff regarding the appropriateness of constitutional damages [Claim B], upheld the defendants' contention that both claims were unsustainable in law. He considered that the availability to the plaintiff of the remedy of review precluded it from claiming damages for its lost profit under either s 187 or the administrative justice provisions of the interim Constitution. He accordingly granted with costs an order setting aside the two claims, together with leave to file amended particulars. Against this order the plaintiff with the leave of Eloff JP now appeals.

CLAIM A: DOES BREACH OF THE PROCUREMENT PROVISIONS OF THE INTERIM CONSTITUTION GIVE RISE TO A CIVIL CLAIM IN DAMAGES FOR LOST PROFIT?

[9] Claim A was premised on the contention that section 187 of the

interim Constitution conferred a right to claim damages for lost profit on those injured by its breach.[4] Section 187 reads:

> **187 Procurement Administration**
>
> (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 sub-section (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.[5]

[10] The question is whether the defendants' (assumed) unreasonable, irregular and arbitrary conduct in relation to the tender breached these provisions so as to constitute a civil wrong actionable at the plaintiff's instance. In other words, did the section impose a legal duty on the defendants to refrain from causing the plaintiff the kind of loss it claims it suffered?

[11] It is well-established that in general terms the question whether there is a legal duty to prevent loss depends on a value judgment by the court as to whether the plaintiff's invaded interest is worthy of protection against interference by culpable conduct of the kind perpetrated by the defendant. The imposition of delictual liability (as Prof Honoré has pointed out) thus requires the court to assess not broad or even abstract questions of responsibility, but the defendant's liability for conduct

[4] The effect on a claimant's cause of action of the provisions of s 187 was alluded to, but did not arise for decision, in *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 32.

[5] The comparable provision in the 1996 Constitution, which is not before us, is section 217. This reads:

> "**217 Procurement**
>
> (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 sub-section from implementing a procurement policy providing for - (a) categories of preference in the allegation 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 sub-section (2) may be implemented."

"described in categories fixed by the law".[6] This process involves the court applying a general criterion of reasonableness, based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community[7] and now also taking into account the norms, values and principles contained in the Constitution. Overall, the existence of the legal duty to prevent loss "is a conclusion of law depending on a consideration of all the circumstances of the case".[8]

[12] Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a supple test. The focal question remains one of statutory interpretation,[9] since the statute may on a proper construction by implication itself confer a right of action, or alternatively provide the basis for inferring that a legal duty exists at common law. The process in either case requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent.[10] But where a common law duty is at issue, the answer now depends less on the application of formulaic approaches to statutory construction than on a broad assessment by the court whether it is "just and reasonable" that a civil claim for damages should be accorded.[11] "The conduct is wrongful, not because of the breach of the statutory duty per se, but because it is reasonable in the circumstances

6 Tony Honoré *Responsibility and Fault* (1999) page 101

7 *Government of the Republic of South Africa v Basdeo and Another* 1996 (1) SA 355 (A) 367E-G

8 *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27F-G

9 *Knop* at 28C-D; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 60

10 *The Law of South Africa* (*Lawsa*) first reissue vol 8 part 1 paras 35, 61 by JC van der Walt, revision by JR Midgley; compare *Callinicos v Burman* 1963 (1) SA 489 (A) 497-8; *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) 134-141

11 *Knop* 21F-G, 32C-D; *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) paras 8-17; compare *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C) 66B-D

to compensate the plaintiff for the infringement of his legal right".[12] 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.[13] 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.

[13] Though this Court's broad-based approach to determining whether in such circumstances a legal duty exists has attracted criticism,[14] it seems generally to accord with trends in other jurisdictions grappling with related issues.[15] More importantly, it seems to me to be especially apposite to constitutional interpretation, which involves the application of just such standards of public principle and policy. Section 187 does not appear in an ordinary statute. It is part of a Constitution, and within the limits of linguistic meaning[16] constitutional principles must infuse our understanding of its effect. The enactment of the interim Constitution marked the transition from the old order to a new society — one avowedly open and democratic and based on freedom and equality, in which courts were not only enjoined in interpreting fundamental rights provisions to promote the values underlying such a society (section 35(1)), but in interpreting "any law" to have due regard to the spirit, purport and objects of the fundamental rights chapter (section 35(3)).

[12] *Lawsa* (above) para 61

[13] *Knop* at 35F

[14] see for instance Neethling and Potgieter "Deliktuele Onregmatigheid by die Nie-nakoming van 'n Statutêre Voorskrif" (1995) 58 *THRHR* 528 at 531-532

[15] compare for instance *Stovin v Wise (Norfolk County Council, third party)* [1996] 3 All ER 801 (HL) at 827*g-h* and 833*b*, per Lord Hoffmann; *Pyrenees Shire Council v Day and Another* (1998) 192 CLR 330 (High Court of Australia) at 418ff, per Kirby J

[16] *S v Zuma and Others* 1995 (2) SA 642 (CC) paras 17-18

Though the provisions of the interim Constitution do indeed deal with many mundane questions of governmental structure and organisation not requiring the application of lofty principle,[17] "any law" in section 35(3) in my view includes where appropriate the other provisions of the interim Constitution itself.[18] Specifically, therefore, in interpreting such provisions section 35(3) applies, and —

> "... when a court is confronted with a problem of unenumerated rights it should seek to answer the question as to whether the development [scil: recognition] of a right which is unenumerated in the Constitution would foster or promote those values which underlie an open and democratic society based on freedom and equality."[19]

[14] To these considerations may be added that in determining whether a delictual claim arises from breach of a statute the fact that the provision is embodied in the Constitution may (depending on the nature of the provision) attract a duty more readily than if it had been in an ordinary statute.[20]

[15] With this in mind I return to section 187. Mr Ginsburg SC for the plaintiff contended that on a proper construction the provision entitled the plaintiff to claim damages for its lost profit from the defendants. Though the plaintiff's claim pleaded reliance on section 187 in general terms, counsel focussed his argument on sub-sections (2) and (3). He accepted that nothing in the interim Constitution expressly afforded the plaintiff the right it claims. In ordinary legislation, the absence of an expressly conferred damages remedy does not however preclude such an entitlement,[21] since (as pointed out earlier)[22] the entitlement may be

[17] *Kalla and Another v The Master and Others* 1995 (1) SA 261 (T) 269B-C

[18] Kentridge and Spitz (above) § 11.5.

[19] Davis, Chaskalson and de Waal, Chapter 1 in van Wyk and others, *Rights and Constitutionalism — The New South African Legal Order* (1994) page 127

[20] Compare *Lawsa* (above) para 61

[21] *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) 134F-G

[22] Para 13 above

impliedly conferred by the statute itself or, even if it is not, may arise from the application of common law principles having regard to the existence of the statutory duty. Whether s 187 entails the duty sought to be relied upon therefore depends on its overall construction in the context of the interim Constitution.

[16] It can immediately be seen that section 187 contains a variety of distinct provisions, which perform a diversity of functions. But its sub-sections cannot in my view be sundered: the provision must be read and understood as a whole. Thus sub-section (2) must be read in the light of the content of sub-section (1), while sub-sections (3) and (4) clearly flow from the preceding two sub-sections, and must (as will be seen below) be understood in the context that they create.

[17] So seen, the primary and overriding import of s 187 is to impose legislative duties on the national and provincial legislatures. It requires in the first instance that procurement "shall be regulated" by legislation (subsection (1)).[23] In the second instance, it prescribes a minimum content for that legislation — it must contain "provision for the appointment of independent and impartial tender boards" to deal with procurement (subsection (1)). Subsection (2) falls syntactically into two parts. The first describes the tendering system that subsection (1) requires the legislatures to create: it must be "fair, public and competitive". The second requires that "tender boards shall on request give reasons for their decisions to interested parties". The boards envisaged are plainly those to be created by the legislation subsection (1) envisages.

[18] The cross-allusion in the first part of subsection (2) to subsection (1) leaves no doubt that the former's injunction that the tendering system be "fair, public and competitive" also constitutes a directive aimed at the

[23] See, for instance, the Free State Tender Board Act 2 of 1994, at issue in *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA).

legislatures, in the sense that it imposes upon them an obligation to create by the exercise of their legislative powers the system envisaged.

[19] The second part of subsection (2) defines further the content of this system. It does so by imposing upon tender boards a duty on request to give reasons for their decisions to interested parties. Subsection (3) must in my view be read and understood against this background. It embodies a prohibition on improper interference with the decisions and operations of "the tender boards" (the definite article signalling a clear reference back to subsections (1) and (2)). The prohibition is imposed on three classes of actors: (a) organs of State; (b) members of organs of State; and (c) any other person. Finally, sub-section (4) imposes an obligation that all decisions of any tender board be recorded.

[20] Counsel for the plaintiff submitted that, since at the time material to the plaintiff's claim there was no relevant post-Constitutional legislation, the State Tender Board Act 86 of 1968 ("the 1968 Act") must be interpreted in the light of and as subject to section 187. Although it seems evident, as counsel for the defendants indeed argued, that s 187 requires the adoption of new, post-constitutional legislation, and to this extent constitutes a "framework provision", the plaintiff's approach to the 1968 Act for so long as it remains in operation is in my view is correct. Courts must so far as possible read all legislation to conform with the Constitution and to give effect to its fundamental values.[24] It follows in my view that in so far as it is possible the 1968 Act should be read, in conformity with s 187, to require that (i) the State and regional tender boards it empowers the Minister of Finance to appoint should be independent and impartial; (ii) the tendering system they operate must be fair, public and competitive; (iii) the boards the 1968 Act creates are required on request to give reasons for their decisions to interested parties; (iv) no improper interference with their decisions and operations

[24] See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) paras 21-26; *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC) para 37(a)

is permitted; (v) all decisions they take must be recorded.

[21] It is not necessary to decide whether in fact the 1968 Act is susceptible of an interpretation that would give effect to each one of these requisites. I shall assume that it is. But this conclusion offers scant comfort to the plaintiff in establishing its cause of action. This is because the twelve provisions of the 1968 Act extant at the time of the events in issue dealt only with the establishment, constitution, powers, committees, expenditure and administration of the State and regional tender boards. Scrutiny of these provisions, interpreted in the light of s 187, reveals none that assists the plaintiff in justifying the conclusion that a tenderer's lost business opportunity can be recovered for breach of its provisions. We are therefore driven back to s 187 itself to see if its provisions can found the entitlement the plaintiff relies upon.

[22] I am of the view that they do not. Critical to the determination of the plaintiff's case is the nature of the duties that subsections (1) and (2) impose. The constitutional injunctions they contain are directed to the national and provincial legislatures. It is not necessary to decide at whose instance the legislative duties they create are exigible, if at all, since the plaintiff is a member neither of a legislature seeking their fulfilment, nor of the public complaining of legislative omission in that regard. The content subsection (1) specifies for the national and provincial laws it envisages ("provision for the appointment of independent and impartial tender boards") does not assist in establishing a legal foundation for the plaintiff's claim since, in its setting (the imposition of legislative duties), it is at best for the plaintiff neutral on the critical question of securing an independent entitlement for a lost bargain.

[23] Subsection (2) is of even less assistance. By contrast with subsection (1), it contains no direct prescription regarding legislative content. It merely imposes minimum desiderata for the system to be created. The content of that system is bounded only by the stipulation that it be "fair, public and competitive". The rest is left undefined. Both the legislative framework and its detail are left to the national and provincial legislatures. As Ackermann J has recently pointed out *S v*

Dzukuda and Others,[25] in the context of the Bill of Rights in the 1996 Constitution, it is a mistake to assume that a constitutional entitlement can be achieved by only one specific system or legislative structure. There may be more than one way of securing the various elements necessary for the fulfilment of a constitutional duty and, provided that the legislature devises a system that effectively secures the right in question, it cannot be faulted merely because it selects one system rather than another. The question to be determined in each case is whether the scheme the legislature devises, whatever its form, conforms in substance to the constitutional norm.

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[24] This has critical implications for the plaintiff's claim. Since section 187's injunctions are directed to the legislatures, and leave them free to devise any of a variety of schemes, provided only that the one selected ensures a "fair, public and competitive" system of tendering, it follows in my view that the interim Constitution also empowers them to legislate regarding the entitlement or otherwise of members of the public to claim damages for lost profit arising from conduct in breach of the desiderata in question. Their legislative capacity must as a matter of logic include this power. It is after all the defining premise of this litigation that the interim Constitution itself contains no express injunction or entitlement in this regard. Subject to fundamental rights issues (which the plaintiff has not advanced) it must follow that it would be a legitimate exercise of legislative power to limit a claimant aggrieved by a breach of the system to a particular remedy, such as interdict or review or — more acutely for the plaintiff's case — to out-of-pocket losses caused by or actual expenses arising from the breach complained of.

[25] From this it necessarily follows that the plaintiff's contention that either subsection (1) or subsection (2) without more grounds a delictual claim for damages is unsustainable. The provision the plaintiff invokes entrusts the premise critical to its claim to legislative action, and to infer, before such action, that the interim Constitution grounds the claim the plaintiff invokes would beg the question in issue.

[26] Subsection (3), as pointed out earlier, imposes a general prohibition

[25] 2000 (4) SA 1078 (CC) para 10

on improper interference with the decisions and operations of the tender boards. At first glance it offers a more promising foundation from which to infer a direct claim sounding in damages for its breach. Certainly it would in my view not be difficult to infer, even before legislative action, that a member of the public aggrieved by its breach can premise an application for review or interdict directly upon it.[26] The interim Constitution requires that legislation in fulfilment of the provision's requirements embody such a right; and that right, whether reflected in the legislation or located residually in the constitutional provision, requires for even minimal enforcement the remedies of review and interdict.[27]

[27] But the plaintiff's claim goes very much further; and in assessing it the prohibition subsection (3) contains cannot in my view be seen in isolation. It must be read in the light of and subject to the legislative directives contained in the subsections that precede it. Contextually and grammatically it 2is clear that it, too, is encompassed in the legislative duty and power to create the tendering system subsection (1) envisages; and it, too, is subject to the legislative power to define the recourse occasioned by its breach. To conclude that the purpose of its inclusion was to ground a direct action in damages for an aggrieved party's lost profit would in my view be wholly precipitate.

[28] This conclusion is underscored by the most notable feature of the plaintiff's claim. That contains no prayer for or averments regarding out-of-pocket expenses occasioned by the breaches the plaintiff relies on, but claims solely its lost profit from the tender it avers it would have been awarded if those breaches had not occurred. This casts in sharp relief the legislative choices that would have to be made in implementing the

[26] Compare *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 21 (distinguishing constitutional damages, which the judgment held could not be claimed, from non-pecuniary relief by way of prohibitory or mandatory interdict or otherwise, which the judgment expressly did not foreclose).

[27] On the pairing of rights and remedies see the judgment of Kriegler J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 94.

system that section 187 envisages. In the well-known words of van den Heever JA in *Trotman and Another v Edwick*[28] — 15

> "A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him."

[29] The plaintiff, which seeks to evoke a delictual remedy from the interstices of the interim Constitution, aspires to recover through it a loss measured not in delictual but in contractual terms.[29] That is a far-reaching assertion. While it is not impossible that a statutory provision, constitutional or otherwise, could be held to accord such recompense for its breach, it seems to me quite inappropriate for this to occur by judicial interpretation of a provision whose primary injunction is for legislative action to occur in that very area.

[30] 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[30] as to impel the conclusion that the scheme of the interim

[28] 1951 (1) SA 443 (A) 449B-C

[29] This is not even to address the distinction, fundamental to the approach to inferring wrongfulness from a breach of statutory duty in *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 26E-I, between pure economic loss and physical damage to property or injury to person.

[30] Compare the remarks of Ackermann J concerning the award of punitive damages in *Fose v*

Constitution envisaged that it should be a matter for decision by the bodies upon whom the legislative duties in subsections (1) and (2) 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.

[31] I agree with the observations of Davis J in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape*[31] that in deciding whether a statutory provision grounds a claim in damages the determination of the legal convictions of the community must take account of the spirit, purport and objects of the Constitution, and that the constitutional principle of justification embraces the concept of accountability.[32] This in turn must of course weigh in the balance when determining legal responsibility for the consequences of public malfeasance. The proceedings in *Faircape*, however, involved an ordinary statute, not a constitutional provision creating legislative duties, and the damages at issue were for out-of-pocket expenses, not for lost profit. The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realising our constitutional vision of open, uncorrupt and responsive government.[33] What precise remedy or remedies within the range available, including interdict (mandatory or prohibitory), review and the award of damages (whether for out-of-pocket losses or more), will be appropriate to secure that vision, depends however on the context of the statutory provision in question; and in section 187 I can find no basis of interpretation and no

Minister of Safety and Security 1997 (3) SA 786 (CC) para 72, referred to below para 41.

31 2000 (2) SA 54 (C)

32 At 64E-I

33 It is instructive to compare in this regard the principles enunciated in section 195 of the 1996 Constitution ("Basic values and principles governing public administration").

applicable principle of public policy entitling the plaintiff to claim its lost bargain. It must follow that Claim A was rightly set aside. 17

CLAIM B: IS AN AWARD OF DAMAGES FOR LOST PROFIT AN "APPROPRIATE REMEDY" FOR BREACH OF THE ADMINISTRATIVE JUSTICE PROVISIONS OF THE INTERIM CONSTITUTION?

[32] In terms of section 24 of the Fundamental Rights Chapter of the interim Constitution —

> **Administrative justice**
> **24.** 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.[34]

[33] Sections 4(2) and 7(1) and (2) of that Constitution entail that these provisions were binding on the defendants as organs of state. Section 7(3) provides that juristic persons are entitled to the rights contained in the Fundamental Rights Chapter "where, and to the extent that, the nature of the rights permits". I shall assume that the plaintiff is under s 7(3) entitled to the benefit of the rights in s 24. On this assumption and the facts presumed true under the parties' agreement, the defendants' irregular, unreasonable and arbitrary conduct in the tender process certainly breached the plaintiff's rights in s 24. Section 7(4)(a) provides that —

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

[34] In terms of section 33 read with Item 23(2)(b) of schedule 6 of the 1996 Constitution, this provision remained in force until the Administrative Justice Act 3 of 2000 was brought into operation on 30 November 2000.

[34] In *Fose v Minister of Safety and Security*,[35] the question was whether a plaintiff claiming damages for assault at the hands of the police could, over and above his entitlement to damages at common law, obtain "constitutional damages", including an element of punitive damages, to vindicate the constitutional rights violated by his assault. The Constitutional Court held that he could not. Before reaching that conclusion, however, Ackermann J on behalf of the majority emphasised the following regarding the entitlement to "appropriate relief" in s 7(4)(a): 18

> "In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[36]

[35] In the present case, the plaintiff in addition to the facts assumed true led evidence on Claim B seeking to establish that the award to it of its lost profit would constitute "appropriate relief" under s 7(4)(a). That evidence, together with the correspondence the plaintiff attached to its particulars of claim, established that in order to tender the plaintiff obtained an option to purchase a building, but that when its tender was not accepted the owner was unwilling to extend the option beyond 22 September 1995 for the possibly protracted period that review proceedings to set aside the tender might require. Though the building remained unsold, the owner took in other tenants, and at the time evidence was led it was at best for the defendants not clear whether and under what circumstances the plaintiff would, if it had instituted review proceedings, have been able to re-acquire an option on it.

[36] It was on this particular feature of the plaintiff's circumstances that

[35] 1997 (3) SA 786 (CC)

[36] Para 69 (footnote omitted)

counsel relied in contending that an award of the profit lost constituted an appropriate remedy. Urging that the plaintiff's entitlement was narrowly cast, and that a claim for lost profit would not be "appropriate" at the instance of every failed tenderer, counsel for the plaintiff conceded that, had the plaintiff owned the building, Eloff JP's finding that the failure to institute review proceedings precluded such a claim could not have been assailed. Counsel's concession flowed from an appreciation that in such circumstances the plaintiff would have been entitled through legal action to take steps to secure the tender to itself, thus rendering a damages award for the profit it had lost inappropriate. The plaintiff in this way sought to bolster its own claim by invoking the special facts pertaining to its position as an option-holder with only a temporary stake in the building it sought to let.

[37] To counsel's concession must be added the following. It emerges from a letter by the State Attorney to the plaintiff's attorney attached to the particulars of claim that nine days before the tender was awarded on 31 August 1995 the plaintiff was aware of the facts on which it later based its allegations of impropriety, and that the provincial government's written recommendations to the Tender Board, on which the award was based, and which formed the centrepiece of the subsequent complaint, were supplied to it at that stage. Counsel correctly conceded that in these circumstances and on the assumptions made the plaintiff would have been entitled to an interdict prohibiting the defendants from continuing the tender process and indeed from allocating the award elsewhere at all.

[38] This in my view has acute consequences for the plaintiff's task in seeking to convince the Court that an award of the profit lost through the non-award of the tender could constitute "appropriate relief". An interdict would not only have anticipated the later dispute; it would have eliminated the source of loss the plaintiff invokes. This no doubt reflects the wisdom of hindsight, and offers stony comfort to a plaintiff who, as Mr Ginsburg was at pains to emphasise, has never manifested an intention to abandon its rights. Yet, as Ngcobo J emphasised on behalf of the Constitutional Court in *Hoffmann v South African Airways*,[37] what constitutes "appropriate relief" depends on the facts of each case. The

[37] 2001 (1) SA 1 (CC) para 55

plaintiff relies on its special circumstances to found a constitutional entitlement. Fair scrutiny must encompass all aspects of its position, and the alternative remedies available to it, at all stages of the dispute, must be a critical factor in that assessment.

[39] The award, we were urged, would vindicate the purposes of the Constitution, and inhibit maladministration in public bodies. Those claims must on their own premises be assessed with an eye on their public purposes, and the fact that interdictory relief was available to the claimant, at an early stage in the dispute, must be relevant to assessing its position in asserting them.

[40] This is particularly so in relation to a remedy that would grant the plaintiff the profit it would have gained had it been awarded the tender. As with its case under s 187, the amplitude of what it claims must obtrude heavily onto the assessment. The plaintiff claims that the bargain it lost must be accorded to it so that the Constitution can be asserted. Here the judgment in *Fose*'s case[38] casts an oblique but significant shadow across the plaintiff's path. The issue there, as pointed out earlier, was the utility to the public purposes of the Constitution of awarding an individual damages over and above his common law entitlement. The plaintiff's common law entitlement here, as Eloff JP pointed out, did not encompass a right to be awarded the tender; if it was aggrieved by the award, the common law offered it the remedy of review. What the interim Constitution secured additionally to the plaintiff was a right to lawful and procedurally fair administrative action in regard to its interests as affected by the tender process.

[41] An appreciation of these factors is embedded in the formulation of its claim, which does not seek the revocation of the tender awarded and

[38] 1997 (3) SA 786 (CC)

its re-allocation to itself, but asserts instead that fair process, if followed, would have resulted in its obtaining the award and hence claims damages for profit lost by a denial of fair process. The claim thus derives from a breach of fair process but it seeks to recover the equivalent of a successful outcome. Its failure to challenge the outcome in review proceedings the plaintiff explains on the basis that its option over the building did not last long enough. Leaving aside the conceptual and practical difficulties this omission raises,[39] the nub of the matter is that the plaintiff in effect claims a windfall, and does so on the premise that its gain has also the public dimension of constitutional vindication. Yet, as Ackermann J pointed out in relation to the punitive damages sought in *Fose*, for awards to individuals to have a salutary effect on the conduct of public officials they would have to be very substantial, and "the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such magnitude".[40] Not only is there an anomaly, but the grave impact on the exchequer raises a critical policy consideration, which Ackermann J described thus:

> "In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial

[39]Compare De Smith, Woolf and Jowell *Judicial Review of Administrative Action* Fifth Edition (1995) para 19-033:

"The causation of damage also creates particular problems in respect of the imposition of tortious liability on public authorities for unlawful administrative action. It is trite law that judicial review is not concerned with the merits of administrative decisions and the court should ordinarily avoid substituting its own opinion for that of the public body as to how precisely a discretion should be exercised. How, then, is a court to approach a case where, for example, a plaintiff alleges that a breach of natural justice activated by malice has caused him loss (such as the refusal of a license to trade) or the decision maker negligently failed to take into account a relevant consideration? The court may avoid second-guessing what decision the public authority would have reached had the decision not been tainted by illegality by saying that the plaintiff has at most lost *an opportunity* to obtain a benefit. Probability will be defined by, among other facts, the degree of discretion possessed by the decision maker. As Harlow points out, whilst in most cases a court may attempt to place a value on a lost chance, special difficulties arise in relation to damages claims associated with judicial review because this exercise would necessarily involve the court substituting its own discretion for that of the decision maker. A solution is to defer the action for damages until after the outcome of the application for judicial review is known and the public body has complied with the decision. However, even if the court considering the damages claim waits for the decision maker to reconsider the decision in accordance with law, conceptual problems may still arise if a decision is characterised as void (rather than voidable); in these circumstances what will have caused the plaintiff's loss?"

[40] Para 71

> 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 it would be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already compensated ..."[41]

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[42] These constitute powerful reasons of policy pointing away from a constitutional entitlement to damages in the terms the plaintiff asserts. It is, however, not necessary to decide that a lost profit can never be claimed as constitutional damages. Certainly the question of out-of-pocket expenses is not before us. But in all the circumstances of this particular case, including the availability to the plaintiff of alternative remedies — by way of interdict before the award of the impugned tender, and, thereafter, for at least a time, by way of review — I conclude that the lost profit the plaintiff claims would not be an appropriate constitutional remedy. It must follow that Claim B, also, was correctly set aside.

[43] The appeal is dismissed with costs, including the costs of two counsel.

E CAMERON

JUDGE OF APPEAL

HEFER ACJ)
MARAIS JA) CONCUR
OLIVIER JA)
ZULMAN JA)

[41] *Fose* para 72