THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 19/08

SOUTH AFRICAN POST OFFICE — Appellant

and

BRIAN PATRICK DE LACY — First Respondent
BARRY JACK BEADON — Second Respondent

Neutral citation: *S A Post Office v De Lacy* (19/08) [2009] ZASCA 45 (13 May 2009)

Coram: FARLAM, NAVSA, NUGENT, VAN HEERDEN and MLAMBO JJA

Heard: 23 FEBRUARY 2009

Delivered: 13 MAY 2009

Summary: Tender – claim for damages by unsuccessful tenderer – whether facts establish dishonesty.

ORDER

On appeal from: High Court Pretoria (Hartzenberg J sitting as court of first instance)

The following orders are made:

1. The appeal is upheld and the cross appeal is dismissed, in each case with costs, which are to include the costs occasioned by the employment of two counsel.
2. In taxing those costs
   (a) the costs associated with the preparation and submission of the original heads of argument that were filed by the appellants in this court, and any costs associated with the receipt and perusal of the heads of argument that were submitted by the respondents in reply, are to be disallowed, and
   (b) to the extent that costs recoverable by the appellant are related to the record in this appeal those costs are to be assessed as if the record comprised 70 volumes.
3. The orders of the court below are set aside and the following order is substituted:

   'The claims are dismissed with costs, which are to include the costs occasioned by the employment of two counsel.'

JUDGMENT

NUGENT JA (FARLAM, NAVSA, VAN HEERDEN and MLAMBO JJA concurring)

[1] Cases concerning tenders in the public sphere are coming before the courts with disturbing frequency. This is another such case. It concerns a claim by an unsuccessful tenderer for damages arising from the award of the contract to a rival tenderer.

[2] A claim of that kind came before this court in *Olitzki Property Holdings v State Tender Board.*[1] In that case an unsuccessful tenderer sought to rely upon the provisions on procurement administration in s 187 of the interim Constitution to recover profits that it lost by not being awarded a contract because of irregularities on the part of the State Tender Board. Expressing the question before him as 'whether [that provision] creates a right to claim damages for lost profit at the instance of a party claiming injury because of its infringement', Cameron JA concluded that

'in s 187 I can find no basis of interpretation and no applicable principle of public policy entitling the plaintiff to claim its lost bargain.'[2]

[3] The principles underlying that decision were affirmed by this court, and subsequently the Constitutional Court, when an even narrower claim was dismissed in *Steenkamp NO v Provincial Tender Board, Eastern Cape*.[3]

[1] 2001 (3) SA 1247 (SCA).
[2] Para 31.
[3] 2006 (3) SA 151 (SCA); 2007 (3) SA 121 (CC).

In that case the claim was by a successful tenderer (in liquidation at the time the claim was brought) for the loss of the expense it had incurred in preparing and submitting its tender, when its contract was subsequently set aside on review. Dismissing the claim, Harms JA said in this court:[4]

'[T]he existence of 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 cannot be inferred from the statute in question.[5] Likewise, the same considerations stand in the way of the recognition of a common-law legal duty [not to act negligently] in these circumstances.'

Endorsing that conclusion, Moseneke J said in the Constitutional Court:[6]

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

[4] But generally, the position will be different where the loss of a contract has been brought about by dishonesty or fraud on the part of the public officials concerned. That was the conclusion reached by this court in *Minister of Finance v Gore NO.*[7] That was another claim for damages (the nature of the damages does not appear from the report) by an unsuccessful tenderer. The conduct that caused the contract to be awarded to the rival tenderer at the expense of the plaintiff was described as follows:[8]

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[4] Para 46.
[5] The statute that was there referred to was the Provincial Tender Board Act (Eastern Cape) 2 of 1994.
[6] Para 56.
[7] 2007 (1) SA 111 (SCA).
[8] Para 10.

'An OSEO examination of Terblanche's secretary's computer hard drive eventually revealed that, ten days before the closing date [for tenders], Louw and Scholtz[9] – fraudulently conspiring with Huisamen[10] and Mr André Scholtz, Scholtz's brother (a provincial employee in Port Elizabeth) – had put together Nisec's[11] tender on Friday 1 April 1994 at the CPA offices; that Louw and Scholtz had corruptly negotiated contracts of employment for themselves with Nisec, plus substantial bribes (which Huisamen paid into their wives' banking accounts); that Louw, left to steer the evaluation committee and to draft submissions to the new provincial executive and to the State Tender Board, had, with lies and distortions, manipulated the entire process to secure the award to Nisec.'

[5] That conduct on the part of the officials concerned was held to found a claim against them for damages, for which their employer was vicariously liable. Cameron and Brand JJA said the following:[12]

'[T]he question is: is there any conceivable consideration of public or legal policy that dictates that Louw and Scholtz (and vicariously, their employer) should enjoy immunity against liability for their fraudulent conduct? We can think of none. The fact that the fraud was committed in the course of a public-tender process cannot, in our view, serve to immunize the wrongdoers (or those vicariously liable for their conduct) from its consequences. And we find no suggestion in *Olitzki* and *Steenkamp* that the tender process itself must provide government institutions with a shield that protects them against vicarious liability for the fraudulent conduct of their servants.'

[6] Although the present claim was launched after *Olitzki* had been decided (but before the decisions in *Steenkamp* and *Gore*), the particulars of claim paid little regard to what was said in that case. What was fired in support of the claim was a barrage of allegations that would have been the pride of a battery of artillery. It was alleged, amongst other things, that the

[9] Senior employees of the Cape Provincial Administration, which had invited the tenders.
[10] The sole member of the successful tenderer.
[11] The successful tenderer.
[12] Para 90.

persons who evaluated the tenders were 'unqualified to do so and [were] guilty of misconduct and/or corruption', that there were 'anomalies' in the process, that the process was not 'objective, equitable and transparent', that other bidders were given an 'unfair or improper advantage', that 'back-handers and bribes entered into the process', and that the tender process was 'biased, inadequate and generally unsatisfactory'. An equally impressive salvo of defences was returned in the plea but most of those defences are not relevant to this appeal and I need not recite them. It was unfortunate that the matter was pleaded in that way because it set the scene for an unfocused battle that was waged on every front, exhausting everything there was to say about this tender, and a record of some 12 000 pages, much of which is immaterial or repetitive. Some 8 000 of those pages comprise scattered documentation that is arranged in no particular order.

[7] SCA rule 10 requires the parties to an appeal to file 'main heads of argument' and that rule serves an important purpose. Judges cannot be expected to find their way through a morass of evidence without a compass. The heads of argument are intended to be that compass and they can serve that purpose effectively only if they are concise. Practitioners might, no doubt, choose to file more elaborate argument in addition if they consider that to be advisable, but that does not detract from their obligation to comply with the rule. What the rule requires was explained by this court in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd*[13] as follows:

'There also appears to be a misconception about the function and form of heads of argument. The Rules of this Court require the filing of main heads of argument. The operative words are "main", "heads" and "argument". "Main" refers to the most

[13] 1998 (3) SA 938 (SCA) para 37.

important part of the argument. "Heads" means "points", not a dissertation. Lastly, "argument" involves a process of reasoning which must be set out in the heads.'

[8] What was presented by both sides in this case were tomes that made *War and Peace* light reading in comparison. In response to our insistence that they comply with the rule, the parties filed further heads of argument that had the advantage at least of being relatively short. Practitioners should not be surprised to find appeals being summarily removed from the roll if there is no compliance with the rule, nor should they take it amiss if their failure to comply with the rule is reflected in orders for costs, as I have it in mind to do in this case.

THE BACKGROUND TO THE CLAIMS

[9] The various provincial governments in this country have the task of seeing to the payment of state pensions and other social benefits. Fraud and other considerations make that task particularly challenging. The South African Post Office (SAPO), with offices and infrastructure that reach remote parts of the country, has a tradition of paying government pensions and other benefits. In the circumstances SAPO decided that it would offer to provide a secure electronic payment service to the government of the North West Province in return for a fee for each transaction. SAPO would, in turn, contract with a private concern to design, operate and maintain the system, at the cost of the contractor, in return for which the contractor would receive a fee for each transaction processed. The system that SAPO had in mind was called a 'biometric payment system'. It is not necessary to delve into the technical aspects of the system. It is sufficient to say that it would link payment points to data bases holding information concerning the

beneficiary. The system is called 'biometric' because it identifies the beneficiary and his or her entitlements by way of fingerprints.

[10] One of the tenderers was a company within the Cornastone group of companies. Precisely which company that was is not altogether clear (more on that presently) and for convenience I will refer to the company concerned merely as Cornastone. Cornastone's principal role in the project was to contribute 'black economic empowerment' (BEE) credibility to the tender and its role was otherwise minimal. Instead, the driving force behind the project was Mr De Lacy and Mr Beadon, the respondents in this appeal. When the contract was awarded to a rival tenderer – a consortium that I will call Kumo – Cornastone had no interest in pursuing the matter further and it ceded any rights that it might have had to the respondents.

THE CLAIMS

[11] Three claims were brought by the respondents as cessionaries. The first claim (claim A) was for the recovery of the profits that they alleged would have been made by Cornastone had it been awarded the contract, which were said to amount to a little under R108 million. The second claim (claim B) was presented as a separate claim but, in truth, it is an extension of claim A. The respondents claimed that, had Cornastone been awarded the contract for the North West Province, it would have gone on to secure similar contracts for the other provinces. It thus claims for the recovery of the profits that it would have made on those contracts amounting to about R406 million. The third claim (claim C) was an alternative claim (although it was not framed as such) that would arise only if the preceding claims failed. The respondents alleged that SAPO later used Cornastone's

'technology' to establish its own payment system and was thereby 'unjustly enriched at Cornastone's expense'. For that the respondents claimed an order directing SAPO to 'render an account…of the biometric payment system operated by [SAPO]', to debate that account, and to pay to the respondents 'whatever amount appears to be due to [them] upon debate of the account'.

[12] The court below upheld claim A in part. An adjustment was made to the claim in the course of argument, bringing it to R120 million. After allowing for what the court below called a 'contingency factor' of 50 per cent it awarded the respondents R60 million. Claims B and C were dismissed. Although SAPO was successful in defending claims B and C it was ordered to pay all the respondents' costs. With the leave of the court below SAPO appeals against the whole of the order made in respect of claim A and the order for costs. The respondents cross-appeal against the amount that was awarded on claim A and against the dismissal of claim B, and they persist in claim C in the event that those claims fail.

CLAIM A

THE BASIS OF THE CLAIM

[13] In argument before us it was correctly conceded by counsel for the respondents that claim A can succeed only if it is brought within the ambit of the decision in *Gore.* That makes it unnecessary to consider the welter of evidence relating to other defences raised by SAPO, which took up a considerable part of the trial.

[14] *Gore* makes it clear, when read together with *Steenkamp*, that irregularities falling short of dishonesty, incompetence on the part of those

who evaluated the tenders, and even conduct that amounts to negligence, will not found a claim for damages at the hands of an unsuccessful tenderer. A claim will lie only if it is established that the award of the contract to the rival was brought about by dishonest or fraudulent conduct on the part of one or more of the officials for whose conduct SAPO is vicariously liable, but for which the contract would have been awarded to the complainant. Needless to say, the onus rested upon the respondents to establish, as a matter of probability, that the award of the contract was brought about by conduct of that kind, and if that onus was not discharged the claim had to fail.

ISSUES RELATING TO MR TOPPER

[15] The court below found that the contract was indeed awarded to the Kumo Consortium through 'dishonest manipulation and corruption' and the focus in that regard fell upon a certain Mr Topper, at the time a SAPO employee, who was said to have been 'touting for a bribe' and to have 'fraudulently supported the bid [of Kumo]'. The court went on to find that Topper could not have achieved his purpose alone and that he must have been acting with the connivance of one or other unidentified persons 'higher up in the hierarchy'. It is as well to put to rest at the outset those findings relating to Topper, and to do so I need to sketch some of the background.

[16] De Lacy and Beadon have a background in the information technology industry. In about 2000 De Lacy was a consultant to a company known as Smarthold. Smarthold supplied technology, apparently to ABSA Bank, for a biometric payment system known as 'ABSA AllPay', which was then being used to disburse social grants for the government. SAPO was

interested in acquiring the use of that technology but Smarthold was unable to do business with SAPO because of restrictions in its contractual arrangement with ABSA. De Lacy saw the approach by SAPO as an opportunity to enter business on his own account (in association with Beadon and a certain Mr Pieterse who had technical expertise in the field) providing 'outsourced biometric payment services'. So he terminated his relationship with Smarthold (that seems to have been at about the end of 2000) and he started fostering a business relationship with SAPO, government's then preferred channel for the payment of social benefits. The income projections from this source reflected a most lucrative business opportunity.

[17] During the following months De Lacy came to be associated with SAPO and other parties who made unsuccessful attempts to secure contracts for the provision of payment systems for the Eastern Cape Province and the Northern Province. During that time he had regular dealings with Topper and Ms Moagi who were both employed by SAPO in its pensions division.

[18] In meetings with Topper and Moagi during November 2001 De Lacy and Beadon suggested that SAPO should turn its attention to securing a contract for the payment of social benefits in the North West Province and then 'appoint a company as its partner' to provide the service. No doubt the partner that De Lacy had in mind was himself and his associates. Topper and Moagi were receptive to the idea because they soon told De Lacy that a contract with the North West Province was 'in the pipeline' and that SAPO would soon be inviting tenders for the provision of the service. That

commenced the process that culminated in the award of the contract that is now in issue and I will return to that process presently.

[19] Meanwhile, on four or five occasions during their association, before there was talk of the tender, Topper had asked De Lacy whether he was able to offer him employment, and had also asked him to give a position to a certain Mr Inman, who was a friend. De Lacy paid no attention to these approaches because, as he put it, 'these were said in passing and you get that all the time when you deal with companies'. De Lacy said that at times 'it might have been said in jest, "have you guys got a job for me", you know, "can you get me out of this place"', and that it went 'in one ear and out the other ear'.

[20] On another occasion, in October or November 2001, Topper asked De Lacy to advance to him the sum of R150 000. De Lacy asked Topper why he needed the money but Topper would not disclose the reason. De Lacy asked Topper why he did not approach a bank if he needed money. Topper's response was that the banks would not advance money for the purpose he had in mind. De Lacy brushed the matter aside, but Topper raised the topic again a short time later. De Lacy testified that he responded once more by asking why Topper did not approach a bank and said that 'basically we never pursued it again, he just went away'.

[21] These approaches all occurred before tenders were invited for the project that is now in issue. There was no suggestion by De Lacy that he understood Topper to be soliciting a 'bribe' or to be offering anything in return for the favours he was asking. On the contrary, on two occasions

under cross-examination, he denied that that was the case. Topper's approaches were considered by De Lacy to be of no consequence and he said nothing more about them.

[22] But matters took a different turn after the contract was awarded to Kumo in September 2002. De Lacy became enraged and his rage was directed particularly at Topper. De Lacy approached the CEO of SAPO, who referred him to Mr Rulashe, the independent ombudsman for SAPO. After an initial interview De Lacy deposed to an affidavit that purported to provide the ombudsman with 'a statement of events that have taken place' in consequence of which Cornastone 'has been substantially compromised in the adjudication and subsequent awarding' of the contract.

[23] In his affidavit De Lacy recorded what he alleged took place during the '20 month tenure (March 2001 to September 2002)' of his dealings with Topper. He recorded that during that period Topper had on two occasions asked him to provide employment to Inman in which event De Lacy would be 'assured of having a "winning team"; that Topper had on two occasions asked De Lacy to provide him with R150 000; and that on at least six occasions Topper had asked to be provided with employment and that he would 'ensure we…get the business.'

[24] De Lacy's statement that this took place in the period up to September 2002 (when in fact the last of these events had occurred not later than November 2001), and the remarks that he attributed to Topper, in the context within which the affidavit was furnished, were clearly calculated by De Lacy to lead the ombudsman to believe that Topper had attempted to solicit bribes

in relation to the tender, and that the rebuff to these approaches could have influenced the award of the contract.

[25] That the ombudsman indeed understood it in that way is apparent from a letter that he wrote to De Lacy on 19 November 2002 reporting on a preliminary investigation he had made, in which he said, amongst other things, the following:

'On the 18th September 2002, I was approached by Messrs De Lacy and Beadon hereafter referred to as the complainants who had been mandated by an IT company Cornastone to report alleged irregularities committed by Post Office Employee Andrew Topper which irregularities resulted in the Kumo Consortium being awarded preferred bidder status as a result of acts by Mr Topper. In support of their allegations Messrs Beadon and De Lacy subsequently furnished me with sworn statements to the effect that Mr Topper had on at least 2 occasions tried to extort an amount of R150 000 from Mr De Lacy at a time when De Lacy and his company Cornastone were interested in securing a contract with the Post Office in respect of Biometric based pension payouts. It was stated further in their affidavit that Mr Topper wanted them to employ one Tim Inman at Cornastone and by doing so Cornastone would be assured of having a winning team. This team ostensibly would be bidding for the Biometric tender. The complainants refused to comply with Topper's demands or extortions.'

He added that the affidavits also revealed that

'on at least 6 occasions Mr Topper made a request that they get him out of the Post Office by making him an offer and in return he would ensure that the complainants "win the business".'

He concluded that

'in the light of the extortions made by Mr Topper to the complainants and his request that they fix Mr Inman with a job, Mr Topper would be in no position to adjudicate Cornastone's tender fairly or impartially by any stretch of imagination.'

[26] De Lacy replied to that letter, principally to express disquiet at the way in which the matter was being dealt with by the ombudsman. He must have known from the letter that the ombudsman was under the impression that Topper had attempted to extort money from De Lacy in connection with the tender, and had sought favours in return for lending his weight to the tender, but De Lacy said nothing to dispel the ombudsman's view.

[27] Acting on that distortion of what had occurred, and certain other 'irregularities' that the ombudsman said he had identified in the course of his preliminary investigation, the ombudsman recommended that an enquiry be conducted by independent auditors. In the course of that enquiry allegations were also made against Moagi and against a certain Ms Richter (more of her later in this judgment). Topper was later dismissed (the precise grounds for his dismissal do not appear from the record).

[28] There can be little doubt that the alleged attempt at 'extortion' by Topper, and the favours that were said to have been asked in return for his support on the tender, set in train the enquiries and concerns that followed, and has imparted colour to this matter ever since. I think that care must be taken not to permit the poison that De Lacy planted with the ombudsman, and then left to spread, to infect this case, as it seems to have done in the court below.

[29] There is no basis in the evidence for the finding by the court below that Topper was 'touting for bribes'. There is also no basis in the evidence, whether directly or by inference, for the finding by the court below that Topper 'fraudulently supported the bid [of Kumo]'. It hardly needs saying

that the allegations of 'extortion' by the ombudsman were also baseless, as De Lacy well knew. There is no suggestion in the evidence of De Lacy that Topper expected anything in return when he made his approaches, or that they were at all related to the tender, and all indications are to the contrary. I might add that De Lacy said in his evidence that throughout the process he was given no reason to think that Topper was in some way dishonestly going about his task.

[30] For completeness I should add that we were invited by counsel for the respondents to take account of the findings that were made by the auditors who were appointed on the recommendation of the ombudsman but it is an invitation that I must decline. Apart from the fact that the evidence of their findings constitutes inadmissible hearsay, their report makes it clear that their conclusions were tentative, based on an incomplete examination of all the evidence, and were expressly stated to be subject to various disclaimers. I do not think that in those circumstances they can be accorded any weight. It is for a court, not auditors, to decide this case, and to do so upon evidence that is properly before it.

THE ALLEGATIONS OF DISHONESTY

[31] A singular feature of this case has been the abandon with which accusations of dishonesty have been levelled by the respondents. In a request for particulars for trial the appellants asked: 'Who on behalf of [SAPO] was allegedly a party to fraudulent and dishonest conduct in awarding the tender to Kumo'; which elicited the expansive reply: '[SAPO] in all its components, namely the Accounting Authorities, Review Panel, the Tender Evaluation Committee, the Tender Board Executive Committee and the Post

Office Board'. Accusations that were at times as sweeping, and at times more limited, were reiterated by De Lacy when he gave evidence. Apart from attributing it to Topper, the court below also attributed dishonesty to persons 'higher up in the hierarchy' without identifying who they might have been.

[32] That there was a conspiracy amongst all the officials who were involved in this tender can be rejected summarily. That would have entailed such a massive and intricate conspiracy, coupled with consistent play-acting throughout the process deserving of a string of Oscars, that it simply could not have occurred. As for the prospect of a more limited conspiracy, as the court below found there to have been, it needs to be borne in mind that we are not dealing in this case with a diffuse group of unidentifiable individuals. All those who recommended to the SAPO board the acceptance of Kumo's tender were identified in the evidence. A Tender Board recommended to the SAPO board that the contract should be awarded to Kumo, after considering recommendations that were made to it by an Evaluation Committee. No basis at all was laid for suggesting that the members of the SAPO board did anything other than to consider and accept in good faith the recommendations of the Tender Board. If there was indeed dishonesty it must have been on the part of one or more members of the Evaluation Committee and/or the Tender Board, all of whom are identified in the evidence. I do not see how it is possible for the evidence to disclose that there was dishonesty on the part of one or more of them without simultaneously identifying the person or persons concerned.

[33] Argument before us by the respondents' counsel was marked by vacillation on the question of who had been dishonest. It was first said to have been these persons, and then it was said to have been those persons, and then accusations were retracted, and then they were revived, and so it went on. Yet notwithstanding the accusations, not once in the cross-examination of the three witnesses called by the appellant who were amongst those who were accused in the particulars for trial was it suggested that he or she had been dishonest. It seems to me that counsel's vacillation on the identity of the culprit or culprits merely demonstrates that the evidence does not reveal that there was a culprit at all.

THE RESPONDENTS' APPROACH TO THE EVIDENCE

[34] The respondents' case as it was advanced before us was necessarily founded upon inference, because there was no direct evidence of fraud or dishonesty. The approach that was taken by the respondents, both in the 'presentation' (more of that presently) that De Lacy made to the trial court, and in argument before us, was simplistic and flawed. That approach was to point to features of the tender process that were said to have been 'irregular', and then to submit that the existence of those irregularities justified the inference that the contract must have been awarded dishonestly. What was left out of account altogether in making those submissions was the context within which the 'irregularities' occurred and the probabilities as revealed by the remaining evidence.

[35] The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts: If it is not, then the

inference cannot be drawn'[14] and it must be the 'more natural, or plausible, conclusion from amongst several conceivable ones'[15] when measured against the probabilities.

THE PRESENTATION BY DE LACY

[36] A further matter that calls for mention before turning to the evidence is the manner in which the respondent presented its case. It is usual in our practice for argument to be separated from the evidence. Counsel for a plaintiff might open the case, sketching the issues and the evidence that will be presented, and then call witnesses to establish the material facts. In this case De Lacy was the first witness called on behalf of the respondents. He proceeded along a most unconventional line. Instead of confining himself to evidence he delivered what is called a 'PowerPoint' presentation, that was no less than a full presentation of the respondents' case, with reference to key points noted on electronic slides, that combined evidence with hearsay, commentary, supposition, opinion, argument and inference. It seems to me that many of the fallacies in the argument presented on behalf of the respondents have their origins in the presentation that was put together by De Lacy with little understanding of how evidence is evaluated in a court of law.

[37] I think it is most undesirable that a presentation of that kind should be placed before a trial court by a witness under the guise of presenting evidence because it tends to introduce confusion. It is illustrated in this case by written submissions that were sent to us by the respondent's counsel after

[14] *R v Blom* 1939 AD 158 at 202-3.
[15] *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D, citing *Wigmore on Evidence* 3ed para 32.

the conclusion of the hearing of the appeal. Amongst them were submissions that 'evidence' given by De Lacy had not been rebutted and must be taken to have been proved. What was referred to in each case was not evidence at all but mere assertions – principally accusations of dishonesty – that were made by De Lacy in the course of his presentation. Assertions, whether made in the pleadings, in opening argument, or under the guise of evidence, do not call for 'rebuttal'.

[38] On a related matter, counsel for the respondents presented to us in the course of argument a list of people whom the appellant might have called as witnesses and we were urged 'to draw an inference' against the appellant for not having done so. Precisely what inference we were asked to draw in each case was not elaborated upon. But it seems that what counsel had in mind is that we should find that, because the appellants failed to call witnesses who were in a position to disprove the accusations of dishonesty, we should find the accusations to have been proved. I think it bears repeating that the respondents bore the onus of proving their case and it was not incumbent upon the appellant to present witnesses for cross-examination merely because they happened to be on hand. When there is evidence properly before a court that on the face of it establishes a particular fact, it might well be inferred from the failure to call a witness in rebuttal that the evidence is not capable of being challenged, but that is another matter.

THE CENTRAL COMPLAINT

[39] SAPO's general policy, which was incorporated in the invitation to tender (called the Request for Proposal or RFP), is to evaluate tenders by allocating points to each tender in three weighted categories. In this case

Cornastone received more points overall but Kumo was nonetheless awarded the contract. When the matter is viewed as a whole that seems to me to lie at the heart of the respondents' case. It seems to me that they reason from the premise that Cornastone was entitled to the contract because it scored the most points. The inference to be drawn from the fact that Cornastone was not awarded the contract to which it was entitled, so the respondents' reason, is that there must have been a conspiracy dishonestly to deprive it of the contract. The clearest articulation of that reasoning appears from the following extract from the evidence of De Lacy: 'If we have a look at everything we see that Cornastone was by far the top scorer' and 'that is my case'.

[40] Needless to say, that reasoning would be sound only if, as I have already indicated, a dishonest conspiracy is the 'more natural, or plausible, conclusion from amongst several conceivable ones' for not awarding the contract to Cornastone notwithstanding that it scored the most points. But in this case there is no need for conjecture as to why that occurred. It is revealed explicitly in the evidence. The explanation that emerges from the evidence is that the Evaluation Committee and the Tender Board were of the view that it was not appropriate in this case slavishly to adhere to the general policy. Whether they were right or wrong in the view that they took of the matter is neither here nor there. What is at issue is only whether they were honestly of that view. And on that score there is no reason to think that they were not. On the contrary, it is perfectly understandable why they took that view.

[41] The three criteria against which tenders are to be evaluated according to the general policy, and the relative weighting that is to be accorded to each, are described in the standard procedure as 'technical (ability, quality, proposed solution)' (40 per cent), 'commercial' (30 per cent), and 'BEE' (30 per cent). A slavish adherence to the general policy has the potential that a tenderer who offers a sub-standard product but has full marks for BEE is capable of beating a tenderer whose product is perfect but who has no or minimal BEE credentials. A person evaluating tenders for the supply of major technological infrastructure, as the officials were doing in this case, where performance is critical, might understandably be hard-pressed to award the contract slavishly according to the formula, and that is what occurred in this case.

[42] A report placed before the Tender Board reflects the scores of the two tenderers as follows (out of a maximum of 100 points):

	Cornastone	Kumo	Difference
Technical (Ability)	26.33	34.58	8.25
Commercial (Price)	20.75	13.88	6.87
BEE	26.25	16.25	10.00
TOTAL	**73.33**	**64.71**	**8.62**

[43] It will be seen that Kumo's score for technical ability was significantly higher than that of Cornastone but that difference was outstripped by Cornastone's BEE points. The combined scores for technical and commercial, leaving aside BEE, placed Kumo slightly ahead of Cornastone.

[44] The question why Kumo should be awarded the contract notwithstanding that it came second on points was the very question that the Tender Board asked the Evaluation Committee. And the answer that was given by the Evaluation Committee reflects the observation that I made earlier, which was that the committee believed that the standard weighting was not appropriate to this contract, a view with which the Tender Board must have agreed. This is what the committee said in answer to the question by the Tender Board:

'The evaluation committee drew up the scores prior to presentation of bidders. After presentation the evaluation committee [were] unanimous in their decision that the technology offered by Kumo was superior and was thus in line with the RFP requirements. It was also felt that the overriding criterion for selection had to be a technology solution and thus this weighed larger than Price and BEE. The scoring that was done prior to presentation [was] used to select the bidders for presentation and after the presentation the decision would be made.'

[45] When one starts from the premise that there was a conspiracy, as the respondents do in this case, it is usually quite simple to select facts that can be fitted to that premise. But courts go about things the other way round – they evaluate the evidence to determine whether it reveals a conspiracy. The mere fact that the contract was awarded to Kumo when it did not have the highest score does not by itself justify the inference that that was done dishonestly. It is clear from the reasons given by the committee for its recommendation to the Tender Board that it considered that SAPO's interests were best served by the Kumo system, notwithstanding that Cornastone was materially better than Kumo on BEE points. When the evidence is viewed as a whole, and weighed against the probabilities, I find no proper grounds for inferring that its view was not honestly held in good

faith. On the contrary, there is ample evidence that it was a justifiable and rationally based view.

SAPO'S STANDARD TENDER EVALUATION PROCEDURE

[46] SAPO's standard procedures for the evaluation of tenders are recorded in a document under that name. It provides that SAPO will 'select the bidder which it perceives to present the best combination of ability to perform, affordable contract arrangements and BEE compliance'. It provides for the establishment of an Evaluation Committee that must make recommendations in the three weighted categories that I referred to earlier. (That weighting for the three categories was also incorporated in the RFP).

[47] The three categories are to be evaluated by separate Review Panels whose functions are to 'assess compliance with procedural requirements of the RFP,' to 'evaluate the proposals/bids against the substantive requirements of the RFP, completing the Score Sheets provided', and to 'consolidate the Score Sheets of all the Review Panels into the Calculation Sheets'. Points are to be awarded in various sub-categories in a range from 1 ('poor, below minimum RFP requirements') to 4 ('far exceed minimum RFP requirements'). Those scores are then converted to a weighted score according to the weighting of the particular sub-category.

[48] A 'three-phased' scoring process is provided for. First, members of the Review Panels must read the proposals independently and formulate their initial scores. The second phase takes place 'after the Review Panels convene for consolidation of the scores and (as a full Evaluation Committee) discuss and motivate their findings.' The final phase of the scoring takes

place, if applicable, after presentations have been made by short-listed bidders. The process is designed to 'ensure that [evaluation committee] members have an opportunity to interrogate the correctness of their scores on more than one occasion.'

[49] After the Review Panels have completed their task, the Evaluation Committee, which comprises the members of all the Review Panels, is required to 'discuss the proposals/bids received with respect to content and scores; compile a motivation/recommendation for the Tender Board; and report their findings and recommendations to the Tender Board.' After the scoring the 'overriding considerations' to be applied by the Evaluation Committee in reviewing proposals are: 'conformity with … mandatory requirements – critical criteria: ability; affordability; and empowerment thresholds (commercial and employment equity)'. The procedure provides that 'should any bidder not conform to the requirements of [any one of those criteria] the [evaluation committee] may, at its discretion, disqualify that bidder' and must then report the reasons for the disqualification to the Tender Board.

THE INVITATION TO TENDER (REQUEST FOR PROPOSAL)

[50] I have pointed out that De Lacy and Beadon were instrumental in the project being initiated, by suggesting to Topper and Moagi that SAPO secure a contract with the government of the North West Province and then appoint a partner to supply it with the necessary service. The province duly expressed an interest in the project and SAPO set about inviting tenders. Moagi told the respondents that if they were going to be serious contenders for the contract, they needed to make sure that they had a strong 'black

economic empowerment partner', because that would be an important component of the tender.

[51] At first the contract was to be awarded by 'closed tender' and four tenderers were invited to make proposals,[16] but later SAPO decided to invite tenders publicly, which they did in February 2002, by issuing the RFP. The specifications for the service that was to be provided, some of which were provided by the respondents, were set out in considerable detail but I need not deal with them. Reduced to its basics, the service envisaged an electronic system for the registration of social benefit beneficiaries that would interface with data banks of the relevant government departments that allocated social benefits. The system would capture the personal details of the beneficiary concerned, including his or her fingerprints, on a microchip embedded in a plastic card. The card, containing a photograph of the beneficiary, would be issued to the beneficiary concerned, who would present the card at designated payment points, be identified by his or her fingerprints, and be able to draw part or all of the moneys that were due.

[52] On 1 March 2002 an 'information meeting' was held for the evaluation committee, which had by that time been selected. The chairman of the evaluation committee was Mr Ngqobe. According to the minute of that meeting, which was attended by only some of those who evaluated the tenders,[17] its purpose was to 'inform the evaluation team of the process to be followed for the evaluation of tenders' and to 'determine the sub-criteria for

[16] African Legend Payment, Mchunu Mashinini & Associates, Transpay Technologies and Aplitec. African Legend was the then BEE partner of De Lacy and Beadon.
[17] The minute records the attendees as being Zakhe Ngqobe, Sheila Moagi, Andrew Topper, Connie Richter and Hensa van Niekerk.

evaluation purposes'. It recorded that it was 'critical that the system is compatible with the Hanis [Home Affairs National Identification] System of the Department of Home Affairs'; that 'it was decided that the "Technical" people on the evaluation team would look through the tenders received to identify the ones that comply with the Hanis system'; and that only those would be evaluated.

[53] Sealed tenders were required to be submitted to SAPO by no later than 18 March 2002.[18] Five tenders were received, marked for identification, and placed under lock and key, under the supervision of independent auditors, where they remained until the evaluation process commenced.

EVALUATION OF THE TENDERS

BLACK ECONOMIC EMPOWERMENT

[54] I pointed out earlier that Cornastone's major advantage over Kumo lay in its BEE points and it is not surprising that matters relating to BEE played a significant role in this case. The context in which it arose was twofold. First, the respondents sought to persuade us that Kumo's BEE points were in truth so low as to disqualify its tender and were dishonestly adjusted upwards to keep it in the race. Secondly, the respondents sought to suggest that SAPO dishonestly permitted Kumo to improve its BEE credentials midway through the process and evaluated the Kumo tender accordingly. I will deal with the first issue now. The second issue will be dealt with later in this judgment.

[18] The initial date of 4 March was extended.

[55] The introduction to the RFP stated, under the heading 'objective', that this was, amongst other things, to: 'Provide respective bidders with sufficient information on the proposed Post Office Biometric Payment System. Ensure prospective bidders shall comply with the Post Office BEE (Black Economic Empowerment) requirements. Should bidders not comply and/or meet these requirements they will not be considered for evaluation.'

[56] The 'Post Office BEE requirements' were not stated in the RFP. They are also not stated in the 'Procedure for the Evaluation of Tenders', contrary to what De Lacy said in his presentation (highlighting once more the dangers of placing a case before a court in that way). There is a document amongst the exhibits that proclaims itself to be 'Notes for info meeting', but the evidence does not disclose the status of that document or how it was used, if it was used at all. That document records the following:

'A shortlist of bidders will be drawn up based on the following

– BEE rating (the lowest acceptable rate is 50%)
– Overall rating (including Price, Ability & BEE)
– Total price (with reference to the "Mean Price")
– Positive aspects of the proposals received, and
– Negative aspects of proposals received.'

According to De Lacy, tenderers were told at a briefing that was held on 22 February 2002, in answer to a question, that

'[T]he Post Office policy requires that BEE compliancy must be at least 50%. Companies that are unable to meet this minimum are therefore encouraged to form joint ventures or consortiums to ensure a minimum of 50% is achieved. Please do not waste your or our time if you do not have 50% BEE compliancy.'

[57] Following the recommendations of Moagi, De Lacy and Beadon had approached the Cornastone group of companies to be its 'BEE partner'. There are a number of companies in the Cornastone group. As I mentioned earlier, precisely which company was the tenderer is not altogether clear. The covering letter under which the tender was submitted was in the name of Cornastone e-Commerce Services (Pty) Ltd. In response to the requirement of the RFP that the bidder had to submit its latest audited financial statements, accompanying the tender were the financial statements of Cornastone Technology Holdings (Pty) Ltd. Under the section of the document requiring information concerning the bidder it was referred to as Cornastone (Pty) Ltd. But whichever company was intended to be the tenderer is not material for the moment. I have thus far referred to the tenderer – whoever it might truly have been – merely as Cornastone and for convenience I will continue to do so.

[58] Cornastone was referred to in the evidence as a 'black empowerment company'. It was said to be a '100% black owned company' by which was meant that it was owned by two black men, Mr Nevhutalu and Mr Ratshefola, and was said to be the 'leading black empowerment IT (information technology) company.' What made Cornastone additionally attractive to De Lacy and Beadon was that it had already associated with SAPO on other projects.

[59] The Kumo tender was submitted by a consortium of four members, of which Kumo Technology was the 'BEE partner'. One of the members of the consortium – Retail Logic Ltd – was a company based in the United Kingdom.

[60] Being a UK company, Retail Logic had no BEE credentials. When the BEE component of the Kumo tender was evaluated, the credentials (or lack of them) of only three of the consortium members (Kumo Technology, Trans-Xact Systems and Square One) were brought to account.

[61] The evidence does not disclose whether the evaluation method used by SAPO required a foreign company to be brought to account in determining the BEE score of the consortium, nor why it was left out of account if that was required, but I have assumed for present purposes, as submitted by the respondents, that it ought indeed to have been brought to account.

[62] The weighting that was to be given to BEE (30 of the total 100 points) was broken down into four categories, each of which carried 7.5 points: 'ownership/shareholding', 'management control', 'black supplier procurement', and 'skills transfer and social responsibility'.

[63] De Lacy presented a calculation of what the Kumo scores would have been had Retail Logic been included and, once more, I have accepted that calculation for present purposes. For convenience I list the relevant scores in three columns: the first and second being the weighted scores actually recorded for Cornastone and Kumo respectively, and the third column reflecting the Kumo score as adjusted by De Lacy, in each of the four categories:

	Cornastone	Kumo	Kumo Adjusted
Ownership	7.50	5.00	3.75

Management	7.50	5.00	4.08
Procurement	5.00	2.50	2.50
Skills Transfer	6.25	3.75	2.20
TOTAL	**26.25**	**16.25**	**12.53**

[64] The significance of the adjusted score is this: It will be recalled that the RFP said, under the heading 'objectives', amongst other things, that prospective bidders must comply with the Post Office BEE requirements, failing which they would not be considered for evaluation. It will also be recalled that, although neither the RFP nor the standard procedures stated what that 'requirement' was, there is some evidence suggesting that it was to be 50 per cent of the weighting that had been allocated to BEE (15 of the 30 points allocated to BEE), and for present purposes I accept that that was indeed the threshold. Thus Kumo passed the threshold on the score that it was allocated (16.25 points), but fell short of the threshold on the score as adjusted by De Lacy to account for Retail Logic (12.53).

[65] On that basis it was submitted by the respondents that Moagi and Moahlo (the BEE Review Panel), conscious of that threshold, deliberately and dishonestly left Retail Logic out of account in their scoring, so as to ensure that Kumo remained in the race.

[66] I find the submission – founded on nothing more than the effect that their actions had – to be startling. Other possible explanations for their conduct immediately come to mind – not least of which is that they simply erred. Indeed, there is a clear indication from their score-sheets that, at least initially, they did not even have a proper understanding of how to go about

the evaluation. The categories had to be scored on points in the range 1 to 4, but at times both evaluators entered scores of '0' on their score-sheets, which then had to be altered in each case.

[67] But what is more important is that the submission simply ignores the probabilities, as if they are of no account. The failure to bring Retail Logic to account would have been quite apparent to the internal auditor who supervised the evaluation and to the person who later tabulated the scores. If Moagi and Moahlo had been dishonest in their evaluation they must have been well aware that their dishonesty would come to light by the glaring omission of Retail Logic. (Unless, of course, it is also to be suggested that the four of them were acting in conspiracy, for which there is no basis at all.) Moreover, had they wished to ensure that Kumo passed the threshold, they would surely have simply increased the score of one of the other three members of the consortium, bearing in mind that no more than 1 point (2.47 weighted points) was required in order to do so. Furthermore, they could not have acted in the way that the respondents allege unless they were in conspiracy with others who would later ensure that Kumo won the bid. There is no evidence to support such a conspiracy. There is also no apparent motive for Moagi and Moahlo to have acted dishonestly. Moagi had worked with De Lacy and Beadon for a considerable time before the tenders were invited and gave no indication to De Lacy that she was hostile. On the contrary, she had been the person that advised him to find a strong BEE partner. The evidence reveals nothing of Moahlo but there is also no apparent reason why she should have acted dishonestly in conspiracy with Moagi. The inference that Retail Logic was deliberately left out of the

picture is simply not supported by the probabilities. If Retail Logic was incorrectly overlooked it is far more likely that the omission was innocent.

[68] The respondents approached each so-called irregularity along the same lines. In each case they sought to draw an inference of dishonesty from the fact alone that there was an 'irregularity', viewed in isolation from the remaining evidence, and with no regard for the probabilities. I do not intend to overly burden this judgment by dealing with each and every 'irregularity' that they sought to rely upon in that way, but will deal with only those that were emphasised in the argument before us. It is sufficient to say that none of the so-called irregularities, viewed alone or in combination, justifies the inference that there was dishonesty in the process.

PRICE EVALUATION

[69] The Review Panel that evaluated price and other financial considerations had four members. Although they were amongst those who were encompassed by the respondents' initial sweeping accusation of dishonesty, they were released from the net by De Lacy in the course of his presentation and I need say no more about them.

TECHNICAL EVALUATION

[70] Topper seems to have had some technical knowledge of the system, but the same cannot be said of Prins and Richter. Prins was a reluctant participant in the process. He was employed as a 'technical consultant' but his functions related to equipment that had no relationship with the tender. He had no experience of evaluating tenders and no more than a layman's knowledge of information technology. He told his supervisor, Ngqobe, that

he was not qualified to evaluate the tender, but Ngqobe instructed him to be on the team, in accordance with a 'cross functional' management policy of SAPO. When asked in cross examination why he did not refuse, Prins said, disarmingly, that he could not disobey an instruction if he wanted to keep his job.

[71] It was also Richter's first experience of evaluating tenders. She began working for SAPO in the internal audit department and was later transferred to the information technology department, but had neither formal training in the field nor technical expertise.

[72] The technical evaluation took place in the presence of a representative of the auditing firm KPMG. This was the first occasion upon which Prins met Topper. At the outset they identified three absolute requirements of the tenders – 'EMV level 2 compliancy' (I will return to what that meant), various International Standard Organisation (ISO) standards, and compatibility with the Hanis system – each of which was to result in summary disqualification if it was not met.

[73] Of the five tenders, one was summarily discarded for want of compliance with various requirements of the RFP. The remaining four tenders – those of Cornastone, Kumo, Transpay and Aplitec – were then evaluated and ultimately the Aplitec tender was also discarded.

[74] Each member of the team was given a score-sheet upon which to score the tenders with reference to a number of specified criteria. Once more the weighting that was to be given to this aspect of the tenders (40 points out

of 100) was sub-weighted with reference to various criteria. The extent to which the system met SAPO's requirements attracted more than half the weighting (23 points out of 40), with the remaining 17 points being shared amongst seven criteria that were more peripheral.

[75] According to Prins, supported by Richter, each member initially completed his or her score-sheet independently, without reference to the others, and when that had been done they came together to compare scores and debate some of the issues upon which they differed.

[76] By the nature of things, neither Prins nor Richter (perhaps not even Topper) had the knowledge to make an informed assessment of the various components of the proposed systems. They performed what might best be described as an audit of the tenders – comparing the relevant portions of each tender against the RFP requirements to determine the extent to which those requirements were said in the tender to have been met – and allocated points accordingly.

[77] I need deal only with the scores for Cornastone and Kumo. The tables that follow reflect the points allocated by the evaluator in each case to 'user requirement compliance', and the aggregate points awarded for the remaining seven criteria. The actual points awarded on a scale from 1 to 4 appear first, and alongside that is the weighted score.

	Weight	Cornastone		Kumo	
PRINS					
user requirement compliance	23	2	11.50	4	23.00
other	17	15	8.75	22	13.25
TOTAL	**40**	**17**	**20.25**	**26**	**36.25**
TOPPER					
user requirement compliance	23	3	17.25	4	23.00
other	17	19	11.25	23	13.75
TOTAL	**40**	**22**	**28.50**	**27**	**36.75**
RICHTER					
user requirement compliance	23	3	17.25	3	17.25
other	17	22	13	22	13.5
TOTAL	**40**	**25**	**30.25**	**25**	**30.75**

Those scores were then averaged to produce the following weighted scores:

		Cornastone	Kumo
user requirement compliance	23	15.33	21.08
others	17	11.00	13.50
TOTAL	**40**	**26.33**	**34.58**

[78] What will be seen is that both Prins and Topper scored Kumo above Cornastone on user requirement compliance. The reason for that is not difficult to see. Central to the Kumo tender was the company I referred to earlier – Retail Logic – whose role in the project was comparable to the role of De Lacy and Beadon. Retail Logic was described in the Kumo tender as being ‘at the heart of the proposed system for SAPO’ and its expertise was described, amongst other things, as follows:

'Retail Logic is now the dominant player in the UK [electronic funds transfer] market and has a growing international presence. Over 165 000 points of sale rely on our products to process their payment transactions; equating to 60% of the UK integrated [electronic funds transfer] market. In the retail sector, customer base includes four of the top five supermarkets and a wide range of top high street names including Woolworths plc, Bhs Ltd, Harrods plc, House of Fraser plc and Littlewoods Retail Ltd. The retail and banking sectors have demanding requirements for reliable and resilient systems capable of processing a high volume of transactions. Retail Logic's products have proven capability in these markets.

Retail Logic's products have also been deployed in other sectors within the payment industry, and these include travel and entertainment, financial services, mail/telephone order, e-commerce, mobile telephony and others.'

[79] Against that was to be measured the system proposed by De Lacy and his associates, which had yet to be fully developed and tested, and they had no direct experience upon which to rely. It might be that their system would indeed have been up to the task, but it is clear that both Prins and Topper had good and rational grounds upon which to have had greater confidence in the Kumo system, as reflected in the differentials in their scores. And while Richer at first scored the two systems equally, later, after she had attended a presentation by the various tenderers, she became more impressed with the Kumo system. There were thus justifiable and rational grounds for recommending to the Tender Committee that Kumo be awarded the tender notwithstanding that Cornastone had the advantage on BEE points.

[80] The court below found that 'the evidence…leads to the conclusion that Topper dishonestly manipulated the scoring by the members [of the technical Review Panel]' but did not elaborate upon what that evidence might have been. That finding flies in the face of the evidence.

[81] I have pointed out that the undisputed evidence is that each evaluator scored the tenders independently of one another and it is difficult to see on what basis it could be said that they were manipulated by Topper. Neither Prins nor Richter felt that Topper had attempted to unduly influence them. Certainly Topper explained features of the tenders to the others, but that is to be expected, bearing in mind that he had greater technical knowledge than they did. Had he been intent on manipulating the scores so as to favour Kumo, one would expect that his scores would be at least as high as the highest score of the others. Yet his scores are more favourable to Cornastone than the scores of Prins (described by the court below as a 'decent and solid citizen'). And Richter scored the two tenders almost equally, which is hardly consistent with manipulation by Topper so as to favour Kumo.

[82] There is no basis in the evidence for inferring that Topper 'manipulated' either Prins or Richter in the evaluation of the tenders. The probabilities all point the other way.

[83] There is one further matter I need to refer to before leaving the technical evaluation. One of the RFP stipulations was that the system that was offered had to be 'EMV level 2' compliant. 'EMV' is an acronym for three major credit card organisations – Europay, Mastercard and Visacard – which have established an institute to evaluate electronic payment systems for compliancy with security standards.

[84] Prins had not been at the information meeting held on 1 March 2002 (it was attended by Topper and Richter). Prins said that on the day that the

tenders were evaluated he asked Topper for a brief 'overview' of what the tender was about. He was told to look out in particular for the three absolute requirements I have referred to. He did not understand what was meant by 'EMV level 2' compliant and was given an explanation by Topper. (Whether he correctly understood the explanation is neither here nor there.)

[85] The Kumo tender was accompanied by certification that its system was 'EMV level 2 compliant'. The Transpay system was not compliant. The Cornastone system, which had yet to be implemented, naturally had no such certification, and in response to that requirement in the RFP the Cornastone tender recorded the following:

'EMV level 2 compliancy is applicable at the application level, (eg banking applications) and the EMV Level 1 compliancy is at the hardware level. We confirm that our hardware devices are EMV Level 1 certified (compliant) and can host EMV level 2 certified applications. It will be necessary to have applications that will be hosted on the devices EMV level 2 certified at the EMV laboratories. This cannot be achieved in the timeframes of this tender response. We have included the cost of the EMV 2 certification for our application only and will agree the certification timetable in the [service level agreement] following discussions with the EMV laboratories. Indications from the EMV laboratories suggest that we allocate 3 months for the certification process. This will in no way affect the rollout of the project.'

[86] A considerable part of the trial was taken up with whether the Cornastone system was indeed 'EMV level 2' compliant, with SAPO contending that it was not and thus ought to have been disqualified. The court below said that 'EMV level 2 compliance could not be achieved before installation of a system and before it had been tested for some time after installation'. The court below went on to say that a 'statement made that

[because] Cornastone was not level 2 compliant at the time of the submission of the tender it should have been disqualified' was 'absolute nonsense as it was an impossible requirement for any bidder to comply with'. It might indeed have been an impossible requirement but for purposes of this appeal that is not material. What is material is only how the evaluators saw the matter (correctly or incorrectly).

[87] The points given by the three evaluators on 'user requirement compliance' (in the range from 1 to 4) were as follows::

	Cornastone	Kumo	Transpay
Prins	2	4	1
Topper	3	4	2
Richter	3	3	2

Prins noted on his score-sheet in relation to Cornastone: 'EMV L2 not compliant yet', but nonetheless gave a score of 2. Richter noted: 'bidder gives what is required and will conform to all standards'. Topper also gave a score of 3.

[88] When the matter was discussed, according to Prins, it was agreed that notwithstanding the apparent failure on this issue of Cornastone and Transpay, their tenders would nonetheless be evaluated because, if there was only one tenderer, SAPO would need to invite fresh tenders. (We need not decide whether that was indeed correct.) While that might have been why the evaluators themselves did not disqualify the two tenders, the fact is that all three tenders were duly included by the Evaluation Committee in the recommendations that were made to the Tender Board.

[89] That Cornastone was kept in the race, notwithstanding that at least Prins thought it had not met one of the 'absolute requirements', is on the face of it inconsistent with a dishonest intent to withhold the contract from Cornastone and award it to Kumo instead. But it was suggested in the course of argument that, although they believed that Cornastone could be disqualified, they kept it in the race as a ploy so as to enable them to avoid inviting fresh tenders, which would have precluded them from dishonestly awarding the contract to Kumo. No suggestion of that was made either to Prins or to Richter in the course of cross-examination. In my view the submission only demonstrates the lengths to which the respondents were forced to go in order to sustain their submission that the evaluation panel acted dishonestly. It has no merit and I need say no more about it.

THE 'LABAT' ISSUE

[90] Once the panels had completed their task the Evaluation Committee met to discuss the various tenders and prepare recommendations to the Tender Board. What occurred at various Tender Board meetings is recorded in the minutes of those meetings.

[91] At a Tender Board meeting on 8 April 2002 the evaluation committee reported on the progress of the evaluation. By then a shortlist of three bidders had been prepared (Aplitec had been excluded). The minute of that meeting records that various instructions were given to the Evaluation Committee and that 'a presentation by the short listed bidders must be done, and a list of standard questions must be compiled'.

[92] That presentation took place on 18 April 2002 and much was sought to be made of what occurred at the presentation. A certain Mr van Rooyen, who was the Group Chief Executive Officer of a group of companies that I will call 'Labat', turned up at the meeting and participated in the presentation of the Kumo tender. The essential points that he made in the course of his presentation were recorded in a series of slides. According to De Lacy, Labat was recognised in the industry to be a BEE company.

[93] Some explanation is required before turning to the significance of Labat's presence. I have pointed out that the weighting that was to be given to BEE (30 of the total 100 points) was broken down into four categories, each of which carried 7.5 points, two of which were 'ownership/shareholding' and 'management control'.

[94] It will be readily apparent that when a number of participants come together to tender, the points to be earned in the first two categories will depend largely upon how the various participants are structured in the tender, and the scores in those two categories are thus susceptible to arbitrary variation. In this case Cornastone presented itself as the sole tenderer and not surprisingly it earned full marks (a total of 15 weighted points) in those two categories (and an overall score across the four categories of 26.25). In the case of Kumo, however, the participants were arranged as a consortium, which necessarily meant that the credentials of the 'BEE partner' (Kumo Technologies) were diluted by its co-members, and it earned only 10 weighted points in those two categories (and an overall score of 16.25).

[95] In truth Cornastone's advantage in those two categories was more apparent than real. While Cornastone presented itself as the tenderer, thus earning full marks in those categories, in truth there was no intention that Cornastone itself would be responsible for executing the contract. In 'heads of agreement' signed on 19 June 2002 by Cornastone, De Lacy, Beadon and a certain Mr Hope, they agreed that if the contract was awarded to Cornastone, it would be executed by a company that was still to be incorporated. Sixty per cent of that company would be owned by Cornastone and 40 per cent would be owned by De Lacy, Beadon and Hope in equal shares. In effect, the tenderer was not Cornastone, but a consortium comprising Cornastone and De Lacy and his associates, much in the same way as the Kumo tenderer had been constructed. Had Cornastone's true intention been reflected in the tender, then Cornastone's '100% BEE points' in the two categories mentioned would have been diluted materially by the presence of its 'white' associates and would have been far closer to those of Kumo.

[96] But Kumo's points were compromised by the tenderer having been constructed as a consortium. Van Rooyen now presented the tender as if Labat Africa Limited was the tenderer in place of the consortium, with the associated 'white' parties relegated to the background as sub-contractors to Labat, much as Cornastone had presented itself as the tenderer with its 'white' associates relegated to the background. According to Van Rooyen's evidence (he was called by the respondents), Labat had concluded an agreement of some sort with Kumo at some time before the presentation was made (but apparently after the tender had been submitted). The terms of that contract were not explored in the evidence.

[97] The prospect that Kumo might reconstruct its tender so as to present Labat as the tenderer, thereby placing itself structurally on a par with Cornastone, naturally caused considerable consternation to De Lacy, and he wrote to the CEO of SAPO expressing his disquiet. That De Lacy was anxious is not surprising, bearing in mind the advantage that Cornastone had on BEE points, which was capable of being neutralized if Kumo were to re-arrange its tender in the way that Cornastone had done, and thereby attract more BEE points.

[98] In argument before us much was sought to be made of the fact that Van Rooyen was permitted to present the Kumo tender in that way, which was said to have been a major irregularity because Labat did not feature in Kumo's original tender. It was submitted that SAPO thereafter dishonestly evaluated the Kumo tender taking account of Labat's BEE credentials and that the tender was in fact not awarded to Kumo but was awarded to Labat.

[99] But the evidence shows clearly – contrary to what was submitted by counsel for the respondents – that the appearance of Labat had no effect on the evaluation of the tender. Although for a while the appearance of Labat caused some confusion amongst the members of the Evaluation Committee and of the Tender Board, the matter was eventually cleared up. The Kumo tender was evaluated precisely as it had been presented, with no consideration being given to Labat, whether in the allocation of BEE points or otherwise, and the contract was awarded to Kumo, not to Labat.

[100] A comprehensive written report of the Evaluation Committee dated 22 April 2002, containing a detailed analysis of the three tenders and the disadvantages and advantages of each, was submitted to a Tender Board meeting held on 29 April 2002. I will return to that report later in this judgment. For the moment I need only say that the report referred to Kumo as the 'Labat bidder' and brought the appearance of Labat to the attention of the Board as follows:

'Labat now indicated as the prime contractor and company which tender will be signed. The evaluation committee was not clear as to whether this was legal **and did not take it into consideration on the evaluation of the BEE of KUMO. Legal opinion is required as to whether this change of status is acceptable or legal.'** (Emphasis in the original).

[101] The response to this from the Tender Board was recorded in the minutes as follows:

'Advice must be sought in writing from the Legal and Audit departments regarding the position of Kumo and Labat. (Note that this advice is seen as separate from the advice received from within this meeting).'

[102] On 8 May 2002 Ngqobe sent a memorandum to the internal auditor (Mr Stoltz) and a SAPO legal adviser (Mr Naudé) informing them of what had occurred and requesting them to 'assist the evaluation team by stating the position the team should be taking in this regard.'

[103] On the same day Richer sent an e-mail letter to Stoltz and Naudé, which was copied to other members of the team, asking for a 'formal response' on the issue, because 'we would like to present to the [Tender

Board] on Monday'. Further e-mails were exchanged, including one in which Richter told Naudé and Stoltz that 'we would like to recommend Kumo and forget about Labat (would this be advisable as we now know of the position of Labat)?'

[104] Naudé responded to Richter (once more with copies to the other members of the team) as follows:

'Changing the structure or composition of any consortium almost at the end of the process (or at any time after submission of the proposals) would have serious legal ramifications for the PO and it will be unfair to the other bidders as well, which might be challenged by them.'

[105] From the minutes of the Tender Board meetings that followed on 6 May 2002 and 13 May 2002 it appears that the written advice that they had requested at their earlier meeting was not forthcoming because the instruction that was contained in the minutes of 29 April 2002 (as above) was repeated in the minutes of both those meetings.

[106] The minutes of 27 May 2002 record that a 'new Tender Board has been nominated and accepted at EXCO', which included a number of those who had previously been on the board. Ms Motsepe was to be the chairperson, though the previous chairperson, Mr Mabote, remained as a member. At that meeting it was decided to refer various matters back to the Evaluation Committee for consideration. No mention was made of the Labat issue. (It seems that the Tender Board never received the written advice that it had requested.)

[107] A further report was prepared by the evaluation committee for consideration by the Tender Board at its meeting on 18 June 2002. By then, of course, the Evaluation Committee had received the advice of Naudé mentioned earlier. There can be no question that it accepted that advice and prepared its report accordingly. There is simply no basis in the evidence for suggesting, as the respondents did, that the appearance of Labat indicates dishonesty on the part of the officials concerned, in some way that was never fully explained. It is perfectly clear from the evidence that the 'Labat issue' was a red herring and that the appearance of Labat had no effect on the evaluation and award of the tenders.

THE DECISION TO AWARD THE CONTRACT

[108] In its earlier report to the Tender Board dated 22 April 2002 the Evaluation Committee had expressed the view that 'no one provider could be singled out to supply a total solution' and it had recommended that 'Labat bidder 3 [in fact Kumo] and Cornastone bidder 2 be appointed to provide a total solution'. It listed various parts of the system that should be provided by each. It then offered two alternatives, the first being the 'utilisation of bidder 3 [Kumo] and negotiate the price of bidder 2 [Cornastone] to the price of bidder 3 [Kumo]' The second alternative was to 'use…bidder 2 [Cornastone] as is and look at developing the additional technology gaps at a later stage'.

[109] The report submitted to the 18 June meeting of the Tender Board repeated those recommendations. It noted that at the earlier meeting on 27 May, the Tender Board had asked it to report on various issues, amongst which were the following: 'If a joint bid is accepted what is the impact as

well as the risks involved for this option as well as the other two options', and 'why has the highest bidder to points scored been changed and what were the reasons for such'. (There had been no 'change of bidders', and I think that what was meant was rather why had the two bidders been inter-changed, which was how the Evaluation Committee understood the question). In response to the first point the report set out the advantages and disadvantages of the various options. The response on the second question was as I expressed it earlier but I will repeat it for convenience:

'The evaluation committee drew up the scores prior to presentation of bidders. After presentation the evaluation committee [were] unanimous in their decision that the technology offered by Kumo was superior and was thus in line with the RFP requirements. It was also felt that the overriding citeria for selection had to be a technology solution and thus this weighed larger than Price and BEE. The scoring that was done prior to presentation [was] used to select the bidders for presentation and after the presentation the decision would be made.'

[110] The Tender Board declined to appoint joint contractors – the first option offered by the Evaluation Committee – and decided unanimously to award the contract to Kumo subject to a number of conditions, including that 'BEE be increased to 40%' and that 'the price must be re-negotiated'. It was submitted for the respondents that the award of the contract subject to those conditions was not permitted and constituted a further irregularity. Whether or not that is so is not now material.

[111] At first the Evaluation Committee objected to the Tender Board rejecting its recommendation (to appoint joint contractors) without giving it the opportunity to review the position. It voiced its objection to the Chief Executive Officer, who took the matter up with the Tender Board. The

matter was eventually resolved at a special meeting of the Tender Board on 12 August 2002 (attended by Ngqobe and seven other members of the evaluation committee, including Topper, Richter and Prins), during which the Tender Board confirmed its earlier decision to award the contract to Kumo. According to the minutes, Mabote (who chaired the meeting in the absence of Motsepe) said, in effect, that the Tender Board could not simply rubber-stamp the recommendation of the Evaluation Committee and had made a 'business decision'. It was also noted that 'conflicting information regarding Cornastone was always present, ie the issue of EMV level 2 compliancy', and that, due to its lack of compliance, Cornastone should not have been evaluated at all.

[112] According to the minute of the Tender Board meeting on 2 September 2002, the award of the contract to Kumo was approved by EXCO and by the SAPO board. On 28 August 2002 SAPO sent a letter by telefax addressed to the Kumo Consortium informing it that its tender had been accepted on the various conditions stipulated by the Tender Board, and that was accepted on behalf of Kumo on 30 August 2002.

THE AFTERMATH

[113] Within days De Lacy began meeting with various people to complain about the award of the tender, alleging, amongst others things, fraud and corruption. This culminated in his meeting with the ombudsman on 18 September that I have referred to; the submission of the affidavits; the preliminary enquiry by the ombudsman; his recommendation that an investigation be held; and the investigation and submission by Ernst & Young of their preliminary findings on 19 November 2002.

[114] No doubt that flurry got the wind up SAPO. On 30 October 2002 Mabote sent an e-mail to the secretariat of the tender board, Mr Mngqibisa, recording that the award of the tender had been 'suspended due to the investigations [being] conducted against one of the retail officials'. He said that he had had a meeting with the ombudsman on 29 October 'regarding progress with his investigations' and had been advised that SAPO needed to 'cancel the award of the tender to Kumo due to irregularities during the tender process', and requested Mngqibisa to 'cancel the award with immediate effect'. Precisely what occurred after that is not clear but on 27 November 2002 Mngqibisa wrote to Kumo advising it that 'the advertised tender…has been cancelled for operational reasons'.

[115] Meanwhile Ms Lancaster, who had considerable knowledge of the information electronics at SAPO and was head of 'New Ventures', encountered the CEO of SAPO, Mr Manyatshe, at a meeting in November. After the meeting he told her that he was 'having difficulty with pensions in terms of getting the biometric system off the ground' and asked her advice. She told him that there was no need to seek outside suppliers because SAPO already had most of the necessary systems and it was just a question of bringing them together to come up with a solution. He asked her to take over the project and come up with a proposal on how the existing systems could be used without the need to again invite tenders. Whether this was before or after the Kumo award had been 'cancelled due to operational reasons' is not clear. In January 2003 Lancaster set about the project and I will continue with that later in this judgment.

CONCLUSIONS RELATING TO CLAIM A

[116] I can find no evidence of manipulation or dishonesty on the part of any of the members of the Review Panels. The evidence also does not disclose dishonest manipulation in the course of the deliberations of and reporting by the Evaluation Committee, nor on the part of the Tender Board.

[117] What is perhaps most significant in that regard is that the Evaluation Committee recommended to the Tender Board, as its first choice, the joint appointment of Cornastone and Kumo to carry out the project. That is altogether at odds with an intention on its part to dishonestly prefer Kumo above Cornastone. In his presentation De Lacy sought to explain that inconvenient fact away by suggesting a Machiavellian ploy on the part of the Evaluation Committee that was so elaborate as to be bizarre and I do not need to deal with it. It is not surprising that the respondents' counsel declined to repeat it in argument before us. That contradiction alone seems to me to be destructive of the inference that the respondents sought to draw.

[118] Perhaps there were irregularities, perhaps there was incompetence, perhaps officials might have been negligent, perhaps, even, Cornastone was more worthy of being awarded the contract, but none of that is enough. The respondents bore the onus of establishing that the contract was awarded to Kumo in consequence of dishonesty on the part of one or more of the officials concerned. In my view they failed to discharge that onus and Claim A should have been dismissed.

CLAIM B

[119] Claim B was dependant upon the success of Claim A and must similarly fail. I might add that the claim was in any event so remote as to be no more than speculative and the court below was correct to dismiss it on those grounds.

CLAIM C

[120] After SAPO purported to 'cancel' the tender it set about constructing its own payment system under the supervision of Ms Lancaster, who employed outside contractors in the course of doing so, one of whom gave evidence at the trial. The respondents allege that in the course of constructing its own system SAPO appropriated Cornastone's technology and was thereby 'unjustly enriched at Cornastone's expernse'. The court below, although not strictly called upon to do so, considered this claim and found that it had no merit. I agree.

[121] The identity of the technology to which the respondents laid claim remained nebulous throughout the trial. But that apart, it is clear from the evidence of Ms Lancaster, and of the contractor who was employed in the course of the process, that no use was made of technology (whatever that technology might have been) that had been disclosed by Cornastone, and on that ground alone the claim had to fail.

[122] The following orders are made:

1. The appeal is upheld and the cross appeal is dismissed, in each case with costs, which are to include the costs occasioned by the employment of two counsel.

2. In taxing those costs

(a) the costs associated with the preparation and submission of the original heads of argument that were filed by the appellants in this court, and any costs associated with the receipt and perusal of the heads of argument that were submitted by the respondents in reply, are to be disallowed, and

(b) to the extent that costs recoverable by the appellant are related to the record in this appeal those costs are to be assessed as if the record comprised 70 volumes.

3. The orders of the court below are set aside and the following order is substituted:

'The claims are dismissed with costs, which are to include the costs occasioned by the employment of two counsel.'

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R W NUGENT
JUDGE OF APPEAL

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