THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 764/2010

(NGHC Case Nos:57294/07: 33921/07)

CHAIRMAN OF THE STATE TENDER BOARD **Appellant**

and

DIGITAL VOICE PROCESSING (PTY) LTD **Respondent**

AND

THE CHAIRMAN OF THE STATE TENDER BOARD **Appellant**

and

SNELLER DIGITAL (PTY) LTD **First Respondent**

LINDA BEATRICE VAN DEN HEEVER **Second Respondent**

HAROON ISMAIL ANGLIA **Third Respondent**

YONANDE JOUBERT **Fourth Respondent**

BUSI MURIEL NYEMBEZI **Fifth Respondent**

VERONIQUE ANN SEPTEMBER **Sixth Respondent**

Neutral citation: *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd* (764/2010) [2011] ZASCA 202 (24 November 2011)

Coram: Navsa, Lewis, Bosielo and Seriti JJA and Plasket AJA

Heard: 10 November 2011

Delivered: 24 November 2011

Summary: Administrative law – Promotion of Administrative Justice Act 3 of 2000 – ripeness of application to review and set aside administrative action – grounds of review – error of fact and irrationality.

ORDER

On appeal from North Gauteng High Court, Pretoria (Prinsloo J sitting as court of first instance):
Both appeals are dismissed with costs.

JUDGMENT

PLASKET AJA (NAVSA, LEWIS, BOSIELO AND SERITI JJA concurring)

[1] As will be seen from the facts set out below, the two appeals dealt with in this judgment are related. They were heard together, both in the court below and before us. Both are appeals against decisions of the North Gauteng High Court, Pretoria (Prinsloo J) that reviewed and set aside the blacklisting of the respondents – the applicants in the court below – from doing business with the government in all of its guises for a period of ten years. In both matters, leave to appeal to this court was granted by Prinsloo J. I shall refer to these cases as DVP and Sneller Digital respectively.

The facts

[2] In late January 2000 the first respondent in Sneller Digital submitted a tender to the State Tender Board (the STB) for a government contract for the recording, transcribing and archiving of digitally recorded proceedings in the high courts seated at Bloemfontein, Pietermaritzburg, Port Elizabeth, Grahamstown, Kimberley, Bhisho, Mthatha, Johannesburg, Pretoria, Mmabatho and Thohoyandou. The contract was awarded to it in June 2000.

[3] The contract ran its course but was then extended beyond its final date of 31 March 2005 until a date in 2006. There were no complaints concerning the performance of Sneller Digital's contractual obligations. On 22 September 2005, however, the STB took a decision to blacklist Sneller Digital, its directors (who are the second to sixth respondents in this matter), shareholders, associated companies and their members from doing business with the government for ten years. As the decision was taken without any of those affected by it having been given a hearing of any sort, the STB

capitulated meekly in the face of review proceedings brought as a matter of urgency.

[4] Undeterred by this setback, the STB continued with its efforts to blacklist Sneller Digital and all those associated with it. As a result of complaints lodged by an unsuccessful tenderer, investigations were conducted into the affairs of Sneller Digital, at the instance of the STB, by the South African Revenue Service, the Scorpions and the Auditor-General. None of these investigations found evidence of any wrongdoing on the part of Sneller Digital. The Auditor-General, for instance, made a finding concerning the very issues involved in this case to the effect that 'Sneller Digital made no material misrepresentations that could affect the outcome of the tender award'.

[5] The renewed process that led to the second blacklisting can be said to have commenced on 27 February 2006 when Mr Ndleleni Mathebula, a chief director: contract management in the national treasury, wrote a letter to Sneller Digital through the second respondent. In it he said:

'We have observed that in your tender (tender No. RT279B/2000GE) and a resultant contract which ended on 31 July 2005, it was indicated that the directors of the company Sneller Digital (Pty) Ltd were H. Anglia, Y. Hurter, B.M. Nyembezi, V.A. September and L.B. Van den Heever. It has come to our attention that some or all of the above mentioned directors were not directors as at the closing date of the tender, namely, on 31 January 2000 under tender No. RT279B/2000GE.

It appears that on the 10th of December 1999 Earthsong Trading (Pty) Limited which was a shelf company was registered, the director of which was one Sheryl Boswell. It appears that this company was later changed on the 11th of February 2000 to Sneller Digital (Pty) Ltd and on that date the above mentioned directors were appointed.

However, the tender document was signed on the 28th of January 2000 and such tender was submitted or had to be submitted on or before the 31st of January 2000, it being a closing date. If one has regard to the date of the registration of Sneller Digital (Pty) Ltd the said directors were appointed 11 days after the tender documents were submitted.

You are kindly requested to explain as to why the above mentioned directors were alleged to have been directors of the company which submitted the tender documents.

Further you are requested to explain as to whether this did not amount to a misrepresentation on the part of the tenderer.'

[6] The letter then dealt with other issues that have no bearing on this appeal. Mathebula requested information as to when each of the directors of Sneller Digital was appointed, whether each person was still a director and, if not, when he or she ceased being a director and the reason therefor, and whether all of the directors were 'actively involved in the affairs of the company concerned' and, if so, what role they had played.

[7] This letter was answered by the attorney acting for Sneller Digital on 10 March 2006. The response, to the extent relevant to these proceedings, was this:

'1. Messrs Anglia, Hurter (now Joubert), Nyembezi, September and van den Heever were appointed as directors of Sneller Digital (Pty) Limited on 20 January 2000. In terms of Company Law, the date of appointment of a director is the date that the shareholders resolve to appoint the directors. This occurred on 20 January 2000. In terms of section 216 of the Companies Act, a director, within 28 days after the date of his appointment, must submit a consent document to the company with details of the directors' particulars and, within 14 days after the receipt of such particulars, the company must lodge a return with the Registrar of Companies. The fact that the return was lodged with the Registrar of Companies after 20 January 2000 is consistent with the procedures which are required to be followed in terms of the Companies Act.

2. As is recorded in the tender document submitted to you, Sneller Digital (Pty) Limited was a start up company initially called Earthsong Trading (Pty) Limited. Application was made to the Registrar of Companies to change the name on 17 January 2000. The name change was approved in principle by the Registrar of Companies prior to 26 January 2000 and finally registered by the Registrar of Companies on 25 February 2000.

3. At the time that the tender was submitted, Messrs Anglia, Nyembezi, September, Hurter and van den Heever were the directors of Sneller Digital (Pty) Limited. There was accordingly no misrepresentation.'

[8] The letter continued to state that the duties of each of the directors had been set out in the covering letter to the tender and in one of its forms. Those duties had not changed until February 2005 when, as a result of the

promulgation of the Broad-Based Black Economic Empowerment Act 53 of 2003, a restructuring of the Sneller Group of companies took place. As a result of the restructuring an empowerment rating was issued by Empowerdex to the Sneller Group. The attorney attached the Empowerdex reports in respect of each company in the Sneller Group stating:

'You will see from the reports attached that Messrs Anglia, Hurter, September and van den Heever continue to be directors and shareholders of companies within the Sneller Group but now in a different role. They are also all still employed in senior management roles. B.M. Nyembezi was appointed as a non-executive director. Her background is set out on page 4 of the covering letter dated 26 January 2000. She was asked to become a member of the board following her experience in facilitating empowerment.'

[9] On 15 May 2006 Mathebula wrote back to Sneller Digital, again through the second respondent (despite having been requested to direct his correspondence to the attorney). He requested a copy of the resolution in terms of which the second to sixth respondents were appointed as directors. On 7 June 2006, the attorney representing Sneller Digital responded by saying:

'We have already confirmed to you that the shareholders resolved to appoint the directors on 20 January 2000. The resolution passed by the shareholders is private. If you need a certificate from the company's auditors confirming that the resolution was duly passed on 20 January 2000, this can be obtained.'

[10] About four months later, Mathebula wrote yet again to the second respondent to say that he still was not satisfied with the responses he had received. He continued:

'We consider the issues that we have raised with you very seriously. In the circumstances you are hereby given a further opportunity by way of written representations, either through your legal representatives or yourselves, to give us reasons within 30 days of receipt hereof, why the State Tender Board should not restrict your company and its directors, shareholders, associated companies and their members from doing business with the State for a period of 10 years.'

[11] The attorney said in a letter dated 13 October 2006 that in the light of his comprehensive responses to Mathebula's concerns in his previous letter, he required clarification as to which of these concerns had not, in Mathebula's

view, been adequately addressed. He undertook to address those within 30 days of being informed of them. Mathebula did not revert to the attorney, despite reminders.

[12] Eventually, on 15 June 2007, Mathebula responded. Far from furnishing the attorney with the information requested, Mathebula informed him instead that a decision had been taken. The letter reads as follows:

'We refer to the above matter and to our previous correspondence in regard thereto which include letters dated 27 February 2006, 15 May 2006 and 6 October 2006.

In particular we record that you were given an opportunity to address the suspected fraudulent misrepresentation and fronting that surfaced after the contract in tender no. RT279B/2000GE was concluded.

The letters referred to above were addressing the issues that caused concern to the State Tender Board. These issues included the possibility of fraud on the part of Sneller Digital (Pty) Ltd when it submitted its tender in January 2000 and the possibility of fronting with a view to claim equity ownership points so as to procure the tender.

The above process has taken more than a year due to the fact that the Board regarded the issues as serious enough to warrant proper consideration and to afford your company and its directors and associated persons ample opportunity to address the issues before any decision affecting your company and the affected persons is taken.

Taking into account all circumstances of the case and the representations on behalf of the company and its directors the Board at its sitting on 8 March 2007 decided as follows:

> Sneller Digital (Pty) Ltd and its Directors, partners and all associated members who were part of Sneller Digital (Pty) Ltd at the time of the RT279B/2000 contract be restricted to do business with all three spheres of government institutions for a period of ten years;
>
> The decision to restrict Sneller Digital (Pty) Ltd does not impact on the current contracts awarded to it prior to the above decision.

The above decision was taken on the basis that you failed to remove the suspicion of fraud at the time of submission of your tender documents. This is so in the light of the fact that as at 30th January 2000 (closing date of the tender) the directors, on whose basis the equity ownership was claimed, were not yet appointed as such as they were only appointed on 11 February 2000. At all material times you were aware that this information was incorrect and therefore fraudulent. This did not only constitute fraud but what is generally regarded as fronting.'

[13] When Sneller Digital was informed of its blacklisting, the STB made no mention of the fact that Digital Voice Processing (Pty) Ltd (DVP), the respondent in the second appeal, had also been blacklisted. This could not be inferred from Mathebula's letter of 15 June 2007. That letter did not quote the resolution that had been taken but only referred, in addition to Sneller Digital, to the 'directors, partners and all associated members who were part of Sneller Digital (Pty) Ltd at the time of the RT279B/2000 contract' as the targets of the blacklisting. DVP did not exist when Sneller Digital tendered for and was awarded the contract in 2000. It only came into existence in 2001. It was, furthermore, not linked to Sneller Digital in any way and was not part of the Sneller Group, even though two of its directors were also directors of Sneller Digital.

[14] Sneller Digital launched an application to review the decision to blacklist it. In due course its attorneys, who were also DVP's attorneys, received the record of the decision, in terms of rule 53 of the Uniform rules. It was then discovered that the STB had also blacklisted DVP, it being referred to expressly in the resolution. Ms Linda van den Heever, the second respondent in the Sneller Digital matter and who had been a director of both Sneller Digital and DVP, was informed of the decision by the attorneys acting for both companies only on 27 November 2007. On 6 December 2007, she informed Mr Steven Benson, a director of DVP and the deponent to its founding affidavit. The STB had simply not bothered to inform DVP of the decision to blacklist it for close to nine months, despite the enormous adverse consequences of the decision for DVP and the fact that the State Information Technology Agency had invited DVP to bid for a valuable tender – a tender which would not even have been considered because of its blacklisting. It was at this stage that DVP launched an urgent application to review and set aside the STB's decision to blacklist it.

The DVP appeal

[15] The court below found that the decision to blacklist DVP was invalid because, being an administrative action as defined in s 1 of the Promotion of

Administrative Justice Act 3 of 2000 (the PAJA), it had been taken without DVP having been afforded a hearing: s 6(2)(c) empowers a court to review and set aside administrative action that is procedurally unfair.

[16] It is common cause that the STB never afforded DVP a hearing prior to the decision to blacklist it being taken. The only issue that is to be decided is whether the decision is reviewable because it had not been communicated to DVP by the STB. The argument advanced by the appellant is that this fact rendered the application for the review of the decision premature. In other words, the issue is one of ripeness.[1]

[17] Writing in 1984, when the common law regulated the review of administrative action, Baxter said that 'the appropriate criterion by which the ripeness of the action in question is to be measured is whether prejudice has already resulted or is inevitable, irrespective of whether the action is complete or not'.[2] While finality is usually achieved when an administrative decision has been made known – and from a practical perspective, notification to the affected party is usually the trigger for the challenge to the decision – notification is not necessarily the proper indication that a decision is ripe for challenge. This case is a good illustration why this is so.

[18] To the extent that some of the case law tends to suggest that, as a general principle, notification is the touchstone for ripeness, I am of the view that this is too rigidly expressed. This view has its genesis in cases like *Estate Garlick v Commissioner for Inland Revenue*,[3] which held that the judgment of *a court* only has efficacy once it is handed down, and stems from an era when principles relating to judicial decision-making tended to be applied to administrative decision-making, often without due regard to the differences in the nature, purpose and rationale of these two types of public power. The effect was to inject into administrative law a formality that was sometimes out of place and at odds with the informal nature of much administrative decision-making and the fact that, unlike judicial proceedings, administrative 'proceedings' often are not conducted in public – in 'open court'.

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[1]See generally, Cora Hoexter *Administrative Law in South Africa* (2007) at 518-520.
[2]Lawrence Baxter *Administrative Law* (1984) at 720.
[3]*Estate Garlick v Commissioner for Inland Revenue* 1934 AD 499 at 502.

[19] Cases like *Lek v Estate Agents Board*,[4] relied on by the appellant, must be understood in this light. To the extent that this case suggests as a general principle that, at common law, notification per se, and nothing else, renders an administrative decision ripe for review, I am of the view that it overstates the position and is to that extent wrong. In any event, the statements in *Lek* relied on by the STB concerned territorial jurisdiction, not ripeness: Lek had in fact been notified in writing of the decision taken against him, the issue being where the notification was communicated to him, and the statute under consideration required written notification to be given of the decisions of the respondent.

[20] Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process. Many examples spring to mind but one will suffice. If, for instance, a liquor board cancelled a trader's liquor licence without informing him or her, and the police then took steps to close the premises or seize the trader's stock, I have no doubt that the decision would be ripe for challenge the moment those steps were threatened. To suggest that the trader is without a remedy and is precluded from protecting his or her rights until the liquor board has communicated the decision to him or her only has to be stated to be rejected. Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.

[21] Now that the review of administrative action is dealt with in terms of the PAJA, the position is clear. An administrative action is defined in s 1 to be, inter alia, a 'decision' which has a 'direct, external legal effect'. In commenting on this aspect of the definition of administrative action, Hoexter says:[5]

'The PAJA does not refer to ripeness as such. However, s 1 of the Act appears to underscore the requirement of ripeness by confining the ambit of administrative action – the gateway to the Act – as a "decision", and moreover one with "direct" effect. Both of these terms suggest finality.'

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[4] *Lek v Estate Agents Board* 1978 (3) SA 160 (C) at 167H-168A.
[5] Note 1 at 520.

[22] Mathebula, in the answering affidavit in the DVP matter, appears to suggest that DVP should still not know of its blacklisting. He said this of the rule 53 record filed in the Sneller Digital review:

'The record that was filed only pertains to Sneller Digital and was not meant to inform the applicant of the decision of the 8th March 2007.'

[23] He did not explain why the STB chose to keep DVP's blacklisting secret, much less attempt to justify this. He conceded, however, that the decision had an effect on DVP. There was also no suggestion on the part of the STB that the decision was not final or that it had not been implemented. The adverse impact of the decision on DVP is clear. It could tender for as many contracts with the government as it wished and it would never be successful – and it would not know why. In these circumstances it is clear to me that the decision was ripe for challenge even if it had not been communicated to DVP by the STB itself.

[24] In any event, even on the appellant's version, the decision had been communicated to DVP, albeit vicariously. When the rule 53 record was furnished by the appellant's attorneys to DVP's attorneys, the cat was let out of the bag. The decision was communicated to DVP at this point, despite the fact that the STB, for its own undisclosed reasons, wished to keep its decision to blacklist DVP a secret. It does not matter, in my view, whether the notification was given personally to DVP by the STB or not. With the filing of the rule 53 record, the decision entered the public domain and DVP became aware of the decision. There is, accordingly, no merit in the argument raised by the appellant, even on its own terms.

[25] In the result, the appeal in the DVP matter cannot succeed.

<u>The Sneller Digital appeal</u>

[26] Three issues arise in the Sneller Digital matter. The first is whether the STB exercised a private, contractual power to blacklist the respondents or whether the power was a public, statutory power the exercise of which was an

administrative action as defined in s 1 of the PAJA and was reviewable in terms of s 6(1). If the decision was indeed administrative action, the second issue is whether the decision is tainted by irregularity and thereby liable to be set aside. The third issue relates only to the second to sixth respondents. The point is taken by the appellant that their application for review is premature because, while the decision to blacklist Sneller Digital was communicated to it by the STB, it never communicated the decision to blacklist the individual directors to them.

[27] The appellant asserts the STB blacklisted the respondents in terms of clause 47 of the General Conditions and Procedures (ST36) published in the State Tender Bulletin 1421 of 17 May 1991 which, along with the State Tender Board regulations, made in terms of s 13 of the State Tender Board Act 86 of 1968, were incorporated into the contract between it and Sneller Digital that resulted from the tender submitted by Sneller Digital on 28 January 2000. This power, the argument proceeds, is a private power and is therefore not subject to the constraints imposed by the rules of public law.

[28] Interesting as that issue may be, it is not necessary to decide it. By the time the power to blacklist was exercised, the contract no longer existed, having been extinguished by the effluxion of time. The contract was entered into in June 2000. It was to subsist for a fixed period – until March 2005. By agreement between the STB and Sneller Digital, it was extended to a date in 2006. The STB purported to blacklist the respondents on 8 March 2007 but only informed Sneller Digital of its decision on 15 June 2007. By the time it took its decision, therefore, the contract upon which it relied had run its course. Furthermore, the contract could not be the basis for the blacklisting of the second to sixth respondents because they were not parties to it.

[29] The only remaining possible source of the STB's power to blacklist is reg 3(5)(a) of the regulations made in terms of s 13 of the State Tender Board Act. This regulation provides:

'If the Board is of opinion that a person -

. . .

(iv) who has concluded an agreement referred to in section 4(1)(a) of the Act, has promised, offered or given a bribe, or has acted in respect thereof in a fraudulent manner or in bad faith or in any other improper manner, the Board may, in addition to any other legal remedies it may have, resolve that no offer from the person concerned should be considered during such period as the Board may stipulate.'

Regulation 3(5)(c) provides that the same penalty may be imposed on 'any other enterprise, or to any partner, manager, director or other person, who wholly or partly exercises or exercised or may exercise control over the enterprise of the first-mentioned person, and with which enterprise or person the first-mentioned person is or was in the opinion of the Board actively associated'.

[30] It has been definitively determined by this court in *Chairman, State Tender Board & another v Supersonic Tours (Pty) Ltd*[6] that an exercise of power in terms of reg 3(5)(a) constitutes administrative action. Cloete JA said the following in this respect:[7]

'The STB is an "organ of State" as defined in s 239 of the Constitution, incorporated in the definitions section, s 1, of PAJA. The STB made a "decision relating to imposing a restriction" as contemplated in para (d) of the definition of "decision" in s 1 of PAJA. The decision was an exercise of a public power in terms of legislation, viz the regulations quoted above, and that requirement of "administrative action" as defined in s 1 of PAJA is accordingly fulfilled. The decision had immediate and direct legal consequences for Supersonic. The decision accordingly constituted an "administrative action" as defined in s 1 of PAJA and the provisions of PAJA are applicable. . . The rights of Supersonic were materially and adversely affected by the decision and Supersonic was consequently entitled to procedural fairness in terms of s 3(1) of PAJA.'

[31] The decision to blacklist the respondents was clearly an administrative action in terms of the PAJA with the result that it is, in terms of s 6(1), susceptible to review if any of the grounds of review specified in s 6(2) are found to be present.

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[6] *Chairman, State Tender Board & another v Supersonic Tours (Pty) Ltd* 2008 (6) SA 220 (SCA).
[7] Para 14.

[32] It was argued on behalf of the respondents that the decision to blacklist them was tainted by a material error of fact or law and that it was an unreasonable decision on account of its irrationality. It was also argued that it was procedurally unfair in the sense that the STB was biased. In the light of what is set out below, it is not necessary to determine this last issue.

[33] As a matter of objective fact, the second to sixth respondents were appointed as directors of Sneller Digital on 20 January 2000, before the contract was concluded. The STB was informed of this by the respondents' attorney and proof, in the form of a certificate from Sneller Digital's auditors, was offered to, but not requested by, the STB. There was, at this stage, no reason to doubt the veracity of the information provided and the attempt, in the answering papers, to suggest that the respondents were lying has no factual foundation and so does not raise a genuine dispute of fact.

[34] It is now well established in South Africa (and in some other common law jurisdictions[8]) that a material error of fact is a ground of review. This is so even though it is not one of the grounds specifically listed in s 6(2) of the PAJA. It has been held that it falls within the ground specified in s 6(2)(e)(iii) – the taking into account of irrelevant considerations and the ignoring of relevant considerations[9] – but it may just as easily be accommodated in s 6(2)(i), the catch-all provision that allows for the development of new grounds of review. This section provides that administrative action may be reviewed and set aside on the basis of it being 'otherwise unconstitutional or unlawful'.

[35] In *Pepcor Retirement Fund & another v Financial Services Board & another*[10] Cloete JA held:

'In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts

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[8]Christopher Forsyth and Emma Dring 'The Final Frontier: The Emergence of Material Error of Fact as a Ground for Judicial Review' in Christopher Forsyth, Mark Elliot, Swati Jhaveri, Michael Ramsden and Anne Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 245 at 250-257.

[9]*Chairpersons' Association v Minister of Arts and Culture & others* 2007 (5) SA 236 (SCA) para 48.

[10]*Pepcor Retirement Fund & another v Financial Services Board & another* 2003 (6) SA 38 (SCA) para 47. See too *Government Employees Pension Fund & another v Buitendag & others* 2007 (4) SA 2 (SCA).

which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, *inter alios*, the functionary who made it – even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure*, *Sarfu* and *Pharmaceutical Manufacturers* requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires*.'

[36] The STB erred factually when it concluded that the second to sixth respondents had been appointed on 11 February 2000, after the tender had been submitted. If the STB had taken its decision based on the proper facts it could not have concluded that the respondents had made fraudulent misrepresentations to it. Its factual error was material as it was the direct cause of the decision to blacklist the respondents.

[37] The decision was also irrational. The STB chose to ignore the true position in relation to when the second to sixth respondents were appointed as directors, and it did so without reverting to their attorney who had offered proof in the form of an auditor's certificate. A reasonable administrator, faced with these circumstances would not have taken the decision without first obtaining the certificate. Instead, the STB closed its mind to facts that disproved its suspicion that the respondents were guilty of fraudulently misrepresenting that the second to sixth respondents were directors at a time when they were not.

[38] Furthermore, the STB failed to apply its mind properly or at all to whether the conduct attributed by it to Sneller Digital amounted to a fraudulent misrepresentation that induced the contract. If one accepts, for the sake of argument, that the second to sixth respondents only became directors on 11 February 2000, and that between 28 January and 11 February 2000 they were not directors, I cannot see how this could have induced the contract that

was only concluded in June 2000. By the time the tenders were evaluated and a decision taken, they had been directors for some time.

[39] The STB also chose to ignore the information it had been given about each of the directors, including the fifth respondent – a non-executive director – when it decided that the respondents were guilty of 'fronting'. There is simply no evidence to support this suspicion. One wonders what would have been capable of satisfying the STB that Sneller Digital and is directors had done nothing wrong.

[40] In order to be rational, the decision must be 'based on accurate findings of fact and a correct application of the law'.[11] That being so, no rational basis existed for the STB's conclusions: the administrative action that it took was not rationally connected to the information before it, as required by s 6(2)(f)(ii)(cc) of the PAJA.

[41] The final argument raised by the appellant is that, as the STB only communicated its decision to Sneller Digital and not to the second to sixth respondents, their application to set aside the decision is premature. When the decision was communicated to the attorney acting for Sneller Digital, its directors were obviously informed – they having instructed the attorney – and they discovered that they too had been blacklisted. The decision was a composite one, blacklisting not only Sneller Digital, but also its directors and other persons and entities. It would be artificial and absurd to suggest that the decision to blacklist Sneller Digital, having been communicated directly by the STB to Sneller Digital's attorney and thence to its directors, is final but the remainder of the decision – blacklisting the directors – is not. This argument has been dealt with in relation to the DVP case and is bad for the reasons stated above.

[42] In the result, the appeal in the Sneller Digital matter cannot succeed.

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[11] *Kotzé v Minister of Health & another* 1996 (3) BCLR 417 (T) at 425F-G.

Conclusion and order

[43] It is necessary to comment on the defences raised by the appellant in both matters and the conduct of the STB throughout this dispute. The appellant took the point that the decision to blacklist DVP had not been communicated to it by the STB, despite knowing that his own attorneys had made the decision public by providing it to the company that was blacklisted at the same time, and despite knowing that DVP had actual knowledge of the decision as a result. It took the same point in relation to the directors of Sneller Digital. The decision to blacklist DVP and the directors of Sneller Digital was a decision that had very real and prejudicial consequences for them. The fact that the STB had not bothered to tell DVP that it had been blacklisted for a period of almost nine months from the taking of the decision until the filing of the rule 53 record is not explained. Then it opposed the application brought by DVP on spurious grounds and persisted in them on appeal, raising the same spurious ground against the directors of Sneller Digital. The other grounds raised in the Sneller Digital matter are not much better. All of this speaks of an organ of state that has conducted itself with contempt for the rights of DVP, Sneller Digital and its directors and with disdain for the constitutional values of accountability, responsiveness and openness.

[44] The following order is made:

Both appeals are dismissed with costs.

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C. PLASKET

ACTING JUDGE OF APPEAL

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APPEARANCES

Appellants	B.R. Tokota SC and Z.Z. Matebese Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
Respondents	E.C. Labuschagne SC Instructed by: Cox Yeats Attorneys, Durban Honey Attorneys, Bloemfontein