THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case No 528/04

In the matter between:

JURGENS JOHANNES STEENKAMP NO **Appellant**

and

THE PROVINCIAL TENDER BOARD OF THE EASTERN CAPE **Respondent**

Coram:	HARMS, CAMERON, JAFTA, PONNAN AND MLAMBO JJA
Heard:	17 NOVEMBER 2005
Delivered:	30 NOVEMBER 2005
Subject:	Delict – liability of tender board towards tenderers for negligently awarding tender contrary to principles of administrative justice – no liability in damages

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J U D G M E N T

HARMS JA:

INTRODUCTION

[1] The negligent causation of pure economic loss is prima facie not wrongful in the delictual sense and does not give rise to liability for damages unless policy considerations require that the plaintiff should be recompensed by the defendant for the loss suffered. This is another case in which these limits are being tested, this time in an administrative law setting.

[2] The appellant, the liquidator of Balraz Technologies (Pty) Ltd, sued the Provincial Tender Board of the Eastern Cape (the respondent) for such damages suffered by the company before its liquidation. These are the facts in summary. Balraz, and five other concerns, submitted tenders pursuant to an invitation issued by the State Tender Board for the supply to the Eastern Cape Province of three separate services relating to the implementation of an automated cash payment system for social pensions and other welfare grants. Balraz's tender appeared to be the lowest but concerns were raised by two technical advisory committees about the effective cost of its tender (the tender was not for a globular sum but per item and the number of items were an unknown factor) and about Balraz's ability to deliver. In spite of these reservations and in the belief that Balraz represented local (Eastern Cape) interests and that awarding the contract to it would support black empowerment, the Board decided to split the

tender (as it was entitled to do) by awarding one of the three services to Balraz and the other two to Pensecure (Pty) Ltd.

[3] Pursuant to the award the Province placed an order on Balraz. In order to perform in terms of the contract, Balraz allegedly incurred expenses amounting to R4,35m (the bulk of which in fact represented consultants' and directors' 'salaries'). Thereafter, the Ciskei High Court at the behest of an unsuccessful tenderer set both tender awards aside on review.[1] It is these expenses that the appellant wishes to recover as damages from the Board. They are admittedly purely economic and consist of out-of-pocket expenses.

[4] The appellant's case as pleaded was that the Board owed Balraz a duty in law to (i) exercise its powers and perform its functions fairly, impartially and independently; (ii) take reasonable care in the evaluation and investigation of tenders; (iii) properly evaluate the tenders within the parameters imposed by tender requirements; and (iv) ensure that the award of the tender was reasonable in the circumstances. The appellant specifically disavowed reliance on lack of good faith on the part of the Board.

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[1] *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and others* 1999 (1) SA 324 (CkH).

[5] The particulars of claim alleged further that the Board, in performing its statutory duty, acted negligently. The sting of the allegation was based on a number of factual assumptions, namely that the tender as awarded would have been R100m more expensive than otherwise and was not the cheapest; that the requirements of economic efficiency were accordingly ignored by the Board; and – ironically – that the Board did not take into account the fact that Balraz lacked the required technical competence.[2] The Board was, according to the allegations, negligent (and I summarise) because it failed to take reasonable care in the evaluation and investigation of tenders by disregarding the recommendations of two technical evaluation committees; did not properly study the tender documents; failed to determine the actual costs but had regard to the unit costs only; made a hasty decision on inadequate facts; and overemphasised the principles of the national government's reconstruction and development policy.

[6] In the particulars of claim the appellant originally claimed loss of profit because of a breach of contract. The Board filed an exception to this leg of the particulars of claim on the basis that it did not breach the contract; the contract was invalidated.[3] The exception was upheld by White J who though dismissed an exception against the delictual claim. The delictual

[2] The assumptions were based on the findings in *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and others* 1999 (1) SA 324 (CkHC), especially at 342J, 343C, 347E-H, 350C-D and 360E-F.
[3] Cf *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA).

claim went on trial before David van Zyl J, who ordered a separation of the questions of liability (i.e. whether the Board's conduct had been wrongful vis-à-vis Balraz and, if so, whether it had been negligent) and quantum, the latter standing over for later adjudication. Causation the parties thought relates to quantum only, which it does not necessarily, as the facts of the case will demonstrate, and much of what follows would have been irrelevant if causation relating to damage (in contradistinction to causation of quantum) had not been separated.

[7] Because Balraz had not been incorporated at the time when the tender was submitted in its name and when the tenders closed, the court below held that the tender was in any event void and that the Board could therefore not have had a 'duty of care' towards Balraz and the claim was dismissed because wrongfulness had not been established in this regard. The appeal is before us with its leave.

STATUTORY SETTING

[8] These events took place under the interim Constitution which provided that the procurement of goods and services at any level of government had to be regulated by statute; 'independent and impartial'

tender boards had to be appointed; and tendering systems had to be 'fair, public and competitive' (s 187).[4]

[9] In consequence the Province adopted the Provincial Tender Board Act (Eastern Cape) 2 of 1994.[5] It established a tender board of between 12 to 16 persons. Not fewer than six and not more than half of its members could be officers or employees of the Province. Men and women had to be adequately represented and the composition of the Board had to be 'widely representative of the interests of all the people resident within the Province'. The Act did not establish any criteria or minimum qualifications or levels of technical or legal expertise for board members. (The first chair and his alternate were both men of the cloth.) Echoing the interim Constitution, the Act required of the Board to 'exercise its powers and perform its functions fairly, impartially and independently' (s 2(3)). The Board also had to devise a tendering system that was 'fair, public and competitive' (s 4(2)).

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[4] See now s 217 of the Constitution, which is somewhat different:
'(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-
(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[5] Since repealed by the Provincial Tender Board Appeal Act (EC) 6 of 2004. The repeal does not affect the judgment save that the Member of the Executive Council responsible in the EC Province was substituted as respondent for the sake of form, which happened when the appeal was called.

[10] The legal position of the Board was somewhat ambiguous. The intention was to set up an organ of state, independent of the provincial government, which had to advise and protect the Province during the procurement process of goods and services. However, the Board was also an arm of the provincial government with the power to act on its behalf and to bind it contractually. The Board had the sole power to procure supplies and services for the Province, it could conclude procurement agreements on the Province's behalf and resile from them. In an appropriate case the Board could claim damages, presumably those suffered by the Province due to a breach of a contract concluded by the Board.

ADMINISTRATIVE LAW AND THE LAW OF CONTRACT

[11] There is no need to restate the administrative law principles applicable to a public tender process save to repeat that any such process is governed by the Constitution (which includes the right to administrative justice) and legislation made under it and that if the process of awarding a tender is sufficiently tainted the transaction may be visited with invalidity on review.

[12] Everything though is not administrative law. Seen in isolation, the invitation to tender is no doubt an offer made by a state organ 'not acting from a position of superiority or authority by virtue of its being a public authority',[6] and the submission of a tender in response to the invitation is likewise the acceptance of an offer to enter into an option contract by a private concern who does so on an equal footing with the public authority.[7] The evaluation of the tender is however a process governed by administrative law.[8] Once the tender is awarded the relationship of the parties is that of ordinary contracting parties although in particular circumstances the requirements of administrative justice may have an impact on the contractual relationship.[9]

FATE OF THE TENDER AWARD

[13] As mentioned, the 'contract' between Balraz and the Board was nullified by the order on review.[10] It is difficult to pinpoint the exact ground of review which was held to apply and I am left with an uneasy feeling that the difference between appeal and review was not always kept in mind but it is not necessary to reconsider the judgment. It is a given. On the other hand,

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[6] *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA) para [18].
[7] Cf *Blackpool Aero Club v Blackpool BC* [1990] 1 WLR 1195 (CA).

[8] *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 (SCA) para [19].
[9] *Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA).
[10] *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and others* 1999 (1) SA 324 (CkH).

delictual liability was not an issue in that case and the judgment and its reasons have no bearing on this appeal.

WRONGFULNESS: THE VIEWS OF THE COURTS BELOW

[14] White J, in dismissing the exception dealing with delictual liability, was satisfied that:

‘public policy does consider any act or omission by the Board, which results in anyone else suffering damages or economic loss, to be wrongful. It is unthinkable that the Board will have *carte blanche* to act as it pleases, irrespective of the loss which such actions may cause to others.’

[15] Van Zyl J, after a close analysis of the case law, was more circumspect but also concluded that a tender board owes a legal duty to the successful tenderer in awarding a tender to that party. Paraphrased he reasoned as follows. All tenderers, successful and unsuccessful, are entitled to a lawful and fair process. Statutes dealing with tenders are enacted in the interest of both the state and of tenderers. An unsuccessful tenderer has a remedy in the form of a review whereas a successful tenderer, such as Balraz, has none unless a damages claim is recognised. Balraz’s claim is limited to out-of-pocket expenses and a damages award will not place a serious burden on the public purse. The threat of a damages claim will not make a tender board unduly cautious but will rather

lead to a higher standard of care in accordance with the constitutional concept of accountability. The floodgate argument does not apply because it will only be successful tenderers (in this case two, Balraz and Pensecure) who could have claims once awards are set aside. It is foreseeable that a failure to comply with a statutory duty in the adjudication of a tender might result in the successful tenderer, who does not know of the irregularity, incurring expenses to perform in terms of the contract, and that such a tenderer might suffer loss in the form of wasted expenses if the award were to be set aside subsequently.

[16] The ‘duty of care’, van Zyl J continued, is not general, but relative or directional and the question was therefore whether such a duty was owed to Balraz where its tender offer was a nullity. He found that the absence of a valid tender meant that there could not have been any administrative relationship between Balraz and the Board. Consequently it could not have been within the reasonable contemplation of the Board that Balraz could suffer harm or loss when it directed its mind to the acts or omissions that were questioned. Lacking foreseeability of harm there could not be wrongfulness. Based on this he dismissed the claim.

DUTY OF CARE AND FORESEEABILITY

[17] The constant use of the phrase ‘duty of care’ is unfortunate. It is a term that in our legal setting is inherently misleading and its use may have led the trial court somewhat astray. This appears from especially the concluding part of the ratio mentioned where the emphasis in relation to wrongfulness was placed on foreseeability of harm as if it were a *sine qua non* for wrongfulness. The approach adopted appears to be similar to that under the English tort of negligence. There the questions to answer in order to establish a duty of care are: (i) Was the damage to the plaintiff reasonably foreseeable? (ii) Was the relationship between the plaintiff and the defendant sufficiently proximate? (iii) Is it just and reasonable to impose a duty of care?[11]

[18] The role of foreseeability in the context of wrongfulness must be seen in its correct perspective. It might, depending on the circumstances, be a factor that can be taken into account but it is not a requirement of wrongfulness and it can never be decisive of the issue. Otherwise there would not have been any reason to distinguish between wrongfulness and negligence and since foreseeability also plays a role in determining legal causation, it would lead to the temptation to make liability dependent on the foreseeability of harm without anything more, which would be undesirable.

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[11] *Caparo Industries plc v Dickman* [l990] 2 AC 605 (HL) at 617-618.

LEGAL DUTY OF TENDER BOARD

[19] A useful starting point in considering the nature of the legal duty of the Board towards tenderers in general is to remind oneself a legal duty may have its origin in either statute law or the common law and that the breach of every legal duty, especially one imposed by administrative law, does not translate by necessity into the breach of a delictual duty, i.e. a duty to compensate by means of the payment of damages. Because the term 'legal duty' is inherently ambiguous, it is therefore important to have due regard to the exact nature of the legal duty in issue.

[20] A statutory and a common-law duty may, in a given case, overlap. If the legal duty invoked is imposed by a statutory provision the focal question is one of statutory interpretation: does the statute confer a right of action or provide the basis for inferring that a legal duty exists at common law? But if a common-law duty is at issue, the answer depends on a broad assessment of whether policy considerations require that a civil claim for damages should be accorded.

[21] Whether the existence of an action for damages can be inferred from the controlling legislation depends on its interpretation[12] and it is especially necessary to have regard to the object or purpose of the legislation. This

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Olitzki Property Holdings v State Tender Board and another 2001 (3) SA 1247 (SCA) at para [12].

[12]Cf *Knop v Johannesburg City Council* 1995 (2) SA 1 (A).

involves a consideration of policy factors which, in the ordinary course, will not differ from those that apply when one determines whether or not a common-law duty existed because, as Lord Hoffmann said:[13]

'If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.'

[22] One has to concede that our case law is not clear when it comes to drawing the boundary between liability due to the breach of a statutory duty and that of a common-law one. It appears to me that if the breach of a statutory duty, on a conspectus of the statute, can give rise to a damages claim, a common-law legal duty cannot arise. If the statute points in the other direction, namely that there is no liability, the common law cannot provide relief to the plaintiff because that would be contrary to the statutory scheme. If no conclusion can be drawn from the statute, it seems unlikely that policy considerations could weigh in favour of granting a common-law remedy.

[23] Counsel for the appellant eschewed reliance on a statutory duty and although the legal duties pleaded were derived from the wording of the Act

[13] *Stovin v Wise* [l996] AC 923 (HL) at 953A. Cf Lord Slynn in *Barret v London Borough of Enfield* [1999] UKHL 25; [1999] 3 All ER 193: 'Both in deciding whether particular issues are justiciable and whether if a duty of care is owed, it has been broken, the court must have regard to the statutory context and to the nature of the tasks involved. The mere fact that something has gone wrong or that a mistake has been made, or that someone has been inefficient does not mean that there was a duty to be careful or that such duty has been broken. Much of what has to be done in this area involves the balancing of delicate and difficult factors and courts should not be too ready to find in these situations that there has been negligence by staff who largely are skilled and dedicated.'

under consideration, he submitted that those duties were in any event common-law duties that have their origin in the basic principles of administrative law, and that it was merely by chance that the two overlap. This argument, although at first blush attractive, contains some pitfalls.

[24] Since the adoption of the interim Constitution the common-law principles of administrative law have been subsumed by a constitutional dispensation and every failure of administrative justice amounts to a breach of a constitutional duty, which raises the question whether, under the Constitution, damages are an appropriate remedy. The problem becomes more complex since the adoption of the Promotion of Administrative Justice Act 3 of 2000 (which does not govern this case) which sets out the remedies available for a failure of administrative justice. It may not be without significance that an award of damages is not one of them, although an award of ‘compensation’ in exceptional circumstances is possible. This could imply that remedies for administrative justice now have to be found within the four corners of its provisions and that a reliance on common-law principles might be out of place. One aspect must nevertheless be kept in mind. A failure of administrative justice is not *per se* unlawful (in the sense of being *contra legem*): it simply makes the decision or non-decision vulnerable to legal challenge and, until set aside, it is valid. The award of

the tender in this case was not unlawful, it was merely vulnerable. I raise this to indicate that an act by an administrator, which is entirely unauthorised (whether expressly or impliedly) or which violates some or other legal prohibition will probably not be subject to the constraints as to remedy that I have mentioned. For instance, in *Cameau*,[14] the relevant minister was held liable in damages for a purported administrative decision which he was not authorised to make at all. His decision was not only wrong, it was impermissible. Proper categorisation of the administrative error is therefore also important because it is unhelpful to call every administrative error 'unlawful', thereby implying that it is wrongful in the delictual sense, unless one is clear about its nature and the motive behind it.[15]

[25] Questions of public policy and the question of whether it is fair and reasonable to impose delictual liability are decided as questions of law,[16] and it is necessary to identify the relevant policy considerations and not to react intuitively to a collection of arbitrary factors.[17] Evidence may be required in order to enable the court to identify the policy considerations that could apply in the particular factual matrix[18] because factors that are

[14]*Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)* [1995] 2 FC 467, 1995 CanLII 3576 (FCA).
[15]*Logbro Properties CC v Bedderson NO and others* 2003 (2) SA 460 (SCA) at para [18].
[16]*Barret v London Borough of Enfield* [1999] UKHL 25; [1999] 3 All ER 193 (HL) at 199g-h.
[17]*Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [21].
[18]*Telematrix (Pty) Ltd v Advertising Standards Authority SA* (SCA case 549/04, unreported) at para [16].

relevant in one context (e.g. negligent misrepresentation)[19] could hardly be relevant in another such as the present where administrative law issues arise.

[26] In the course of this judgment I intend to refer to and quote from judgments from a number of common-law jurisdictions that deal with the tort of negligence. Their courts, too, have to grapple with similar policy issues and have to weigh competing considerations.[20] This does not mean that their policy considerations are necessarily applicable locally; indeed, they may not apply at all[21] but they are at least identified and assessed.

THE GENERAL APPROACH TO DELICTUAL LIABILITY FOR PURE ECONOMIC LOSS CAUSED BY ADMINISTRATIVE BREACHES

[27] Subject to the duty of courts to develop the common law in accordance with constitutional principles, the general approach of our law towards the extension of the boundaries of delictual liability remains conservative.[22] This is especially the case when dealing with liability for pure economic losses.[23] And although organs of state and administrators

[19] E.g. *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 770.
[20] *Rowling v Takaro Properties Ltd* [1988] AC 473 (PC) at 501F.
[21] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 504G-505E.
[22] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 500D.
[23] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (SCA case 549/04, unreported)*; Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA).

have no delictual immunity, 'something more' than a mere negligent statutory breach and consequent economic loss is required to hold them delictually liable for the improper performance of an administrative function.[24] Administrative law is a system that over centuries has developed its own remedies and, in general, delictual liability will not be imposed for a breach of its rules unless convincing policy considerations point in another direction.

[28] One reason (others will appear later) is the need to preserve the coherence of other legal principles because otherwise[25]

'the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms.'

Put differently by McHugh J, the law is too complex for it to be a seamless web: courts should try and make its principles and policies coherent and, in extending delictual liability, it is necessary to consider whether an extension would be consistent with other legal doctrines, principles and policies.[26] In the present context, as Spigelman CJ[27] explained, the most significant characteristic of administrative law is that courts are concerned with the

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[24] Mason J in *Kitano v The Commonwealth of Australia* (1973) 129 CLR 151 at 174-175. Referred to with approval in *Dunlop v Woollahra Municipal Council* [1981] 1 All ER 1202 (PC) at 1208f-g. The case concerned the liability of a local authority in tort for passing an *ultra vires* resolution.

State of New South Wales v Paige [2002] NSWCA 235 at para 172: 'Compensatory damages for administrative error are available only in very limited circumstances.'

[25] *Sullivan v Moody* (2001) 75 ALJR 1570 at para 42.

[26] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 at para 102.

[27] *State of New South Wales v Paige* [2002] NSWCA 235 at para 174-176.

legality of the decision-making process only, and that the purpose of judicial review of administrative decisions is not compensatory but to uphold the rule of law and ensure effective decision-making processes.

THE DUTIES OF THE TENDER BOARD

[29] In holding that the administrative failure of the tender process did not give rise to a constitutionally based claim for damages for lost profits, Cameron JA made a number of pointed remarks in *Olitzki.*[28] He held that the constitutional injunctions contained in s 187 of the interim Constitution were directed to the national and provincial legislatures and did not create duties vis-à-vis tenderers that on breach could be translated into such damages claims. Important in this regard is his conclusion:[29]

'Certainly the contention that it is just and reasonable, or in accord with the community's sense of justice, or assertive of the interim Constitution's fundamental values, to award an unsuccessful tenderer who can prove misfeasance in the actual award its lost profit does not strike me in this context as persuasive. As the plaintiff's claim, which amounts to more than R10 million, illustrates, the resultant imposition on the public purse could be very substantial, involving a double imposition on the State, which would have to pay the successful tenderer the tender amount in contract while paying the same sum in delict to the aggrieved plaintiff. As a matter of public policy the award of such an entitlement seems to me to be so subject to legitimate contention and debate as to impel the conclusion that the scheme of the interim Constitution envisaged that it should

[28] *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA).
[29] *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA) para [30].

be a matter for decision by the bodies upon whom the legislative duties in ss (1) and (2) were imposed. In these circumstances to infer such a remedy judicially would be to venture far beyond the field of statutory construction or constitutional interpretation.'

[30] Most of these considerations apply likewise to the Act governing the Board and its functions. The injunctions therein were primarily directed at the Board in the interest of the Province and not tenderers as a group or individually. Indisputably, they were entitled to proper administrative legal proceedings and the Board had, in this respect, administrative legal duties vis-à-vis all tenderers. But that did not mean that the breach of the administrative duties as set out in the particulars of claim necessarily translated into private law duties giving rise to delictual claims.[30] An American court said in a similar context:[31]

'The object and purpose of this provision of the statute is to insure competition in the letting of contracts for public improvements. This is the uniform ruling of courts in reference to similar statutory and charter provisions governing cities. . .[T]he intention [of the statute] was to protect the taxpayer and the public – not material-men and laborers.'

COMPOSITION AND NATURE OF FUNCTIONS OF THE BOARD

[30] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (SCA case 459/04 unreported).
[31] *Surety Co v Brick Co* 73 Kan 196, 84 Pac 1034 (1906) quoted with approval in *Sutter Brothers Construction Co Inc v City of Leavenworth* (1985) 65 ALR 4th 81 at 84. See also *Swinerton & Walberg Co v City of Inglewood-L.A. County Civic Center Authority* 40 Cal App 3d 98, 114 Cal Rptr 834 (1974) and *Funderburg Builders v Abbeville City Memorial Hospital* 467 F Supp 821 (DSC 1979).

[31] A related factor was the composition of the Board. The majority of the Board members were (or might have been) lay persons.[32] They did not necessarily have the ability to understand the technical intricacies of tender requirements and documents. They had to rely on advice but they were at the same time not supposed to be bound by advice. In this case, for instance, the Board asked for a second evaluation report, not being satisfied with the first. The first indicated that Balraz's tender was more than R80m cheaper than the next tender but stated that because of the way the tender was formulated it 'may therefore not actually be the lowest tender'. The second report confirmed that Balraz's price was the lowest but was 'concerned' about the pricing mechanism. No-one suggested at the Board meeting, which was attended by departmental employees, that the acceptance of the lowest tender could in fact have the disastrous financial consequences as found by the reviewing court.

[32] The Board was not obliged, either in terms of the Act or the tender conditions, to accept the lowest or any other tender. There were no fixed parameters within which the Board had to act and the Board had to determine by itself what weight had to be accorded to each factor in a given tender without affecting the administrative fairness of the process. This

[32] The Board awarded tenders by majority vote. The reasons of the members of the majority for awarding it to a particular party may have differed. In spite of this the Board could be called on to give its reasons.

meant that the Board had to exercise a discretion or value judgment. In general, public policy considerations do not favour the recognition of damages claims for the wrong exercise of a discretion negligently made. That was the import of *Knop*[33] to which can be added these comments by Lord Slynn:[34]

'On this basis, if an authority acts wholly within its discretion – i.e. it is doing what Parliament has said it can do, even if it has to choose between several alternatives open to it, then there can be no liability in negligence. It is only if a plaintiff can show that what has been done is outside the discretion and the power, then he can go on to show the authority was negligent. But if that stage is reached, the authority is not exercising a statutory power, but purporting to do so and the statute is no defence.'

THE DISAPPOINTED TENDERER: LOSS OF PROFITS

[33] Holding that an unsuccessful tenderer is not entitled to recover damages (at least not for lost profits) in delict is not a quirk of local jurisprudence.[35] Courts in the USA appear to have held consistently that disappointed tenderers have the right to challenge the improper awarding of public contracts by means of injunctive or mandamus relief, but not by means of a mandamus directing a public authority to award a contract to a

[33]*Knop v Johannesburg City Council* 1995 (2) SA 1 (A) as explained in *Telematrix (Pty) Ltd v Advertising Standards Authority SA.* See also *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) at para [37].
[34]*Barret v London Borough of Enfield* [1999] UKHL 25;[1999] 3 All ER 193 at 210g-h.
[35]*Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA)dealt with liability arising under the interim Constitution but as said most of the reasoning is equally applicable here.

particular (low) tenderer because the public entity is not required to award a contract in light of the express or implied authority to reject all bids. A tenderer, even the lowest responsible tenderer, has no vested or contractual right to the award of the contract. The right to relief does also not extend to a right to damages suffered as a result of not being awarded the contract.[36] The public policy considerations are these:[37] (i) The unsuccessful tenderers' status to compel, by injunction or mandamus, a public authority to properly award a public works contract is not founded upon the private tenderers' rights, but on the public's interest in the integrity of the bidding process; (ii) awarding damages for lost profit to an unsuccessful tenderer may force the public to pay twice for the work; and (iii) allowing tenderers on public works to collect damages when the work is improperly let to someone else places them in an advantageous position compared to tenderers on private projects, who have no such right. The first two of these considerations were referred to in *Olitzki* and the third I intend to develop.

THE DISAPPOINTED TENDERER: OUT-OF-POCKET EXPENSES

[34] There are indications that in the USA the out-of-pocket expenses of a disappointed tenderer may be recovered on the basis of ‘promissory

[36]*Sutter Brothers Construction Co Inc v City of Leavenworth* (1985) 65 ALR 4th 81 (Kansas Supreme Court); *M A Stephen Construction Co Inc v Borough of Rumson* (1973) 308 A 2d 280 (New Jersey Supreme Court); and *Owen of Georgia Inc v Shelby County* (1981) 648 F 2d 1084 (US Court of Appeal).

[37] As summarised by Harvey J in *Whistler Service Park Ltd v Whistler (Resort Municipality of)* 1990 CanLII 573 (BC SC)

estoppel' but not in tort,[38] and Canadian law, which similarly does not recognise a tort claim, appears to recognise a damages claim for breach of some or other express or tacit terms of the contract (express or implied) that governed the tendering process:[39]

'Actions by parties [for damages in the amount of an unsuccessful tenderer's expenses for preparing the bid] . . . are based upon breach of the contract which is said to arise upon submission of a tender in accordance with the terms set out in the tender documents.'

[35] Before getting involved in the niceties of wrongfulness, it appears to me that a disappointed tenderer's claim in delict for out-of-pocket expenses in preparing the tender will inevitably fail at the causation hurdle. Those expenses were not caused by any administrative impropriety because they would in any event have been incurred and are always irrecoverable, irrespective of whether or not the tender was awarded to that party, properly or improperly.

[36] Returning then to wrongfulness: Unless one is unduly impressed by the floodgate argument, it is difficult to appreciate why the nature of the specific economic loss should make any difference to the scope of the Board's legal duty. In other words, there does not appear to me to be a

[38] *Owen of Georgia Inc v Shelby County* (1981) 648 F 2d 1084.
[39] *Whistler Service Park Ltd v Whistler (Resort Municipality of)* 1990 CanLII 573 (BC SC).

difference in principle between purely economic losses that are out-of-pocket and those of another kind.

OVERKILL AND ACCOUNTABILITY

[37] This Court has held that the threat of a damages action may hamper administrative organs unduly in the execution of their duties and that this may be an important pointer away from delictual liability.[40] In the same vein, the Privy Council (per Lord Keith) spoke of the danger of overkill:[41]

'The third is the danger of overkill. It is to be hoped that, as a general rule, imposition of liability in negligence will lead to a higher standard of care in the performance of the relevant type of act; but sometimes not only may this not be so, but the imposition of liability may even lead to harmful consequences. In other words, the cure may be worse than the disease. [After referring to *Anns v Merton London Borough Council* [1978] AC 728 (HL) it continued.] A comparable danger may exist in cases such as the present, because, once it became known that liability in negligence may be imposed on the ground that a minister has misconstrued a statute and so acted *ultra vires*, the cautious civil servant may go to extreme lengths in ensuring that legal advice, or even the opinion of the court, is obtained before decisions are taken, thereby leading to unnecessary delay in a considerable number of cases.'

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[40] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 33C-D discussed in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para [22]. *Telematrix (Pty) Ltd v Advertising Standards Authority SA* (SCA case 459/04 unreported) at para [19].

[41] *Rowling v Takaro Properties Ltd* [1988] AC 473 (PC) at 502C-F.

[38] There is another view, expressed rather forcefully by Linden JA in a minority judgment in Canada, when he said:[42]

'I would not say that our public servants are any better than those in England, but I see no reason to disparage Canadian bureaucrats, as Lord Keith has their British counterparts. I cannot believe that the Canadian bureaucracy is as timid and faint-hearted as Lord Keith apparently believes public servants in England are nowadays.'[43]

[39] The importance of accountability as a public policy factor serving a constitutional imperative has more than once been underscored by this Court but, as counsel ruefully mentioned, it has never carried the day by imposing delictual liability.[44] Van Zyl J, understandably, placed a heavy premium on this factor but the real question appears to me to be whether the imposition of delictual liability is necessarily the appropriate method of attaining this object. The Board or its guilty members would not pay the award – the provincial government would. Also, the Board was otherwise accountable, first by legal process in the form of a review and second, by means of ordinary political processes. The Board was accountable to the provincial legislature and in this case it was in fact called upon to account when the provincial legislature instructed the Standing Committee on Finance and Provincial Expenditure to investigate the award and to report

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[42]*Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)* [1995] 2 FC 467, 1995 CanLII 3576 (FCA).
[43]Ironically, the case emanated from New Zealand and did not deal with British bureaucrats.
[44]*Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA)at para 40 where the authorities are collected.

back as a matter of urgency. Board members were consequently called upon to testify publicly to justify the award of these tenders.

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

AVAILABILITY OF OTHER REMEDIES

[41] The availability of other remedies is often taken as an indication of whether or not a claim for damages should be recognised. In *Knop*,[45] for instance, this Court held that the fact that the relevant statute provided for an administrative appeal was indicative of an intention to limit the disappointed member of the public's remedies to such an appeal. A similar approach was adopted by the Privy Council in *Rowling v Takaro Properties Ltd,*[46] albeit obiter. The importance of this consideration was also

[45] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A).
[46] *Rowling v Takaro Properties Ltd* [1988] AC 473.

recognised by the Federal Court of Appeal in Canada in *Comeau*[47], quoting C Lewis with approval:[48]

'Decisions taken in the exercise of statutory power will be subject to judicial review, and sometimes a statutory right of appeal. Unlawful decisions can be nullified and the individual relieved of the consequences of such a decision. The existence of these remedies is regarded by the courts as an indicator that no additional remedy in negligence need be provided, particularly where the judicial review or appeal is adequate to rectify matters, and the only real damage suffered by the individual is the delay and possibly the expense involved in establishing that a decision is invalid. This seems in part an axiomatic decision on the part of the court, that there should be a division between public law remedies and private law remedies. Where an *ultra vires* decision can be set aside on appeal or review, there should not normally be any additional liability in damages, unless the individual can establish misfeasance. Simple negligence is insufficient. The fact that the decision may be set aside may also mean that the only damage suffered is the expense involved in challenging the decision.'

[42] Van Zyl J regarded the absence of an alternative remedy as a compelling reason for finding that a 'duty of care' was owed by the Board to Balraz. This led him to distinguish between the disappointed tenderer and the (initially) successful one. The former could attack the award by means of a review while the latter, having been awarded the tender, could not.

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[47] *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)* [1995] 2 FC 467, 1995 CanLII 3576 (FCA). Some reasons given by the Privy Council were dealt with harshly in this case in a minority judgment but since they are makeweights, it is not necessary to consider them further.

[48] C Lewis *Judicial Remedies in Public Law* (London 1992) 379.

[43] The 'alternative remedy' argument has some validity but the point must not be stretched to breaking point. Availability of review to an unsuccessful tenderer can hardly be an argument for conferring a damages claim on the successful tenderer. All that can happen on review is that the award may be set aside. The successful litigant does not acquire the benefits (or burdens) of the successful tenderer. Recently a disappointed tenderer, who was able to show that the award was seriously tainted, was vindicated on review, though only by an award of costs since setting aside the award was impractical as the contract work had already been performed.[49] In other words, the suggestion that review is an adequate alternative remedy is a misconception.

[44] Since the disappointed tenderer is not able to recover damages, is there any reason in principle why the successful tenderer should be? Drawing such a distinction would imply that during the consideration process there are legal duties of the kind set out in the particulars of claim towards the successful tenderer while the same duties are simultaneously absent vis-à-vis the other tenderers. I do not believe that policy considerations justify such discrimination. Those legal duties are duties owed towards a class of persons and not towards one or two members of

[49] *The Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* (SCA case 511/04 unreported).

the class and if their breach does not justify a damages claim in the one instance it is difficult to justify it in another.

PUBLIC VERSUS PRIVATE TENDERS

[45] Earlier in this judgment I referred to the policy consideration that allowing tenderers on public contracts to collect damages when the work is improperly awarded to someone else places them in an advantageous position compared to those on private projects, who have no such right. A similar consideration arises here. In ordinary contractual relations, one contracting party cannot without more hold the other liable in delict if the contract is void or voidable, even due to the fault of the latter. I can think of no good reason why it should be different where the contract is preceded or affected by an administrative action.

CONCLUSION

[46] Weighing up these policy considerations I am satisfied that the 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. Likewise, the same considerations stand in the way of the recognition of a common-law legal duty in these circumstances. This conclusion makes it

strictly unnecessary to consider the basis of the trial court's judgment but for the sake of completeness I shall nevertheless do so.

VALIDITY OF BALRAZ'S TENDER OFFER

[47] The court below held that that Balraz's tender offer was invalid and that therefore the Board had no 'duty of care' towards Balraz in awarding the tender to it.

[48] The contentious tender was submitted in the name of Balraz Technologies (Pty) Ltd on 8 September 1995, the closing date for tenders. Late tenders were not eligible for consideration. But the company was only incorporated on 17 October 1995. On the same day the certificate to commence business was issued. The tender was awarded on 22 March 1996. The court below relied on a few well-established propositions in reaching its conclusion: a company is prior to incorporation not yet in existence and cannot perform a juristic act like submitting a tender, and that no-one can at that stage act as its agent because one cannot act as the agent of a non-existent principal unless a pre-incorporation agreement is concluded, which is later ratified,[50] something that did not arise in this case.

[49] In response the appellant relied on some case law which, according to counsel, indicated that this principle is not as far reaching as van Zyl J

[50] Companies Act 61 of 1973 s 35.

suggested. The first is *Rajah*.[51] An application for a business licence was made to the local authority in the name of a company before incorporation. Aware that the company was not yet in existence the local authority nevertheless issued a certificate of authority permitting the Receiver of Revenue to issue the licence. The Receiver, who regarded the certificate as one in favour of a company not yet in existence, issued the licence. After incorporation of the company the local authority sought to set the licence aside because of the non-existence of the company both at the time of application and the issuing of the licence. This Court held against the local authority on the basis that in the absence of prejudice to either the public or the local authority there was no reason to set the licence aside.[52] This judgment bears no relationship to the instant case. It dealt with a review application. The Court dealt with one issue only and that was prejudice since invalid administrative acts are not set aside for the asking; the court has a discretion[53] and absent prejudice there was no reason to set the licence aside. That is also how Henning J understood *Rajah* when he dealt with a similar problem.[54]

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[51]*Rajah & Rajah (Pty) Ltd and others v Ventersdorp Municipality and others* 1961 (4) SA 403 (A).
[52] Hoexter ACJ at 405A-B, and Holmes JA at 407D-E and 408B-C.
[53]*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 36.
[54]*Yoonuce v Pillay NO and another* 1964 (2) SA 286 (D) at 294C-D and H.

[50] Reliance was next placed by counsel on *Holmes.*[55] Four persons completed an application for a licence in the name of a company before incorporation. By the time the application was received by the licensing authority the company had been incorporated. The question was whether the application was in order and Price J held that the question had to be answered with reference to the date of receipt of the application and not when the application forms were completed. I am unable to extract any principle from the judgment that can be of any assistance to this case and in any event the dictum on which the appellant relies was held to be suspect.[56]

[51] The trial judge dealt with the issue at some length and since I agree with his views it is not necessary to repeat all he said or to follow his exact reasoning. To simplify, all that has to be said is this. Only entities with contractual capacity can perform juristic acts such as making an offer (such as the tender submission). Balraz did not exist at the relevant time. Submitting a tender involves more than merely making an offer. It amounts to the conclusion of a preliminary agreement, which is also a juristic act, in which the tenderer accepts the tender conditions imposed and undertakes

[55] *MG Holmes (Pty) Ltd v National Transport Commission and another* 1951 (4) SA 659 (T).
[56] *Transnet Ltd v Chairman, National Transport Commission* 1999 (4) SA 1 (SCA) para [25]-[26].

to comply with them.[57] For instance, in this particular case the tender had to be (and was) in the form of an option open to acceptance by the Board during a given period. In addition Balraz undertook a number of obligations, including being liable for damages in the event of, for example, the withdrawal of its tender; accepting certain risks relating to calculations; and accepting the responsibility for the proper execution and fulfilment of the ultimate contract. If we accept (as we must) that by submitting a tender an option contract is concluded and that the

option is exercised by the award of the tender, it has to follow that because of Balraz's non-incorporation the award to it did not lead to the conclusion of a valid contract.

[52] There is another fundamental problem. Balraz was not entitled to 'commence business' prior to the issue of a certificate entitling it to commence business (s 172), a provision introduced by the 1973 Act. It (or persons on its behalf) nevertheless commenced business by submitting a tender. What was done was *contra legem* and the tender offer had to be null and void in the light of the wording of the section.

[53] One would have thought that once this was found the claim would have been dismissed because of the absence of any causal connection

[57] Cf *Blackpool Aero Club v Blackpool BC* [1990] 1 WLR 1195 (CA).

between the failure to assess the tenders properly and the invalidity of the contract. But, as mentioned, causation was not an issue and the appeal cannot be disposed of on that ground, and I shall later revert to the effect of the invalidity of the tender on the question of wrongfulness.

LEGAL DUTY IN RELATION TO VOID TENDERS

[54] Van Zyl J held that the legal duty cannot extend to tenderers who submit invalid tenders or are non-existent legal entities. Simply put, Balraz would not have had any standing to attack the tender process had it been a disappointed tenderer. The Board was not even entitled to consider its tender (something it did not know). It would to my mind amount to a perversion of logic and justice to extend an administrative non-duty into a delictual duty based on the breach of that non-duty. No public policy considerations point in a different direction.

ORDER

[55] These findings make it unnecessary to decide the question of negligence and the appeal stands to be dismissed.

[56] The appeal is consequently dismissed with costs, including those consequent upon the employment of two counsel.

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L T C HARMS
JUDGE OF APPEAL

AGREE:
CAMERON JA
JAFTA JA
PONNAN JA
MLAMBO JA