THE AWARD OR NON-AWARD OF GOVERNMENT TENDERS: WHAT IS MY REMEDY IN LAW?

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PREFACE

This dissertation is a comprehensive examination of the nature and scope of the different remedies that litigants may seek in matters concerning the awards of government tenders. Government procurement is a very important aspect in any democratic society, and the ambit of government procurement has expanded vastly in the last couple of years. This is evident from the substantial increase in cases concerning government procurement and the Promotion of Administrative Justice Act 3 of 2000.

Government procurement has constitutional status, as the procurement of goods and services are governed by section 217 of the Constitution, which section specifically stipulates the manner in which the state must contract for goods and services. Not only are the state bound by the manner in which they must act when procuring for goods and services, but the courts are also faced with the difficulty in granting orders that comply with the provisions of the Constitution. In terms of section 38 of the Constitution the courts must grant appropriate relief, which is not a simple task, especially in the framework of matters relating to government tenders. The qualification of the orders that the courts must grant go even further than this in that orders must also comply with the provisions of PAJA, and be just and equitable.

The court's interpretation of what would constitute appropriate relief and what would suffice as a just and equitable order in matters related to the awards of government tenders are critically analyzed and discussed, by examining various cases in this specific field.

Each chapter focuses on the various remedies that are at an aggrieved tenderer's disposal, either under the provisions of the Constitution or those listed in section 8 of PAJA.

Due to the importance of government procurement in South Africa, the development of the legal aspects thereof is equally as important.

The law is stated as at the end of June 2011.

Lia de Beer

Johannesburg, December 2011

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CHAPTER 1 - INTRODUCTION

1.1 Introduction

What is my remedy in law, and how will I go about seeking effective relief? This question may, at first glance, seem to be easy to answer for any legally qualified person. However, if one takes a closer look at the difference of opinions of academic writers on this subject, the difference of advice given by one legal representative to that given by another, the difference in arguments lead by an advocate for the one party and that of an advocate lead in favour of the other party in one case, and the fast difference that may occur in High Court, Supreme Court of Appeal and Constitutional Court judgments we realize that this question, however simple it may seem, can in some instances be extremely difficult to answer.

This very reason makes the election process - in other words, the process of selecting the basis and specific grounds that form part of the foundation on which litigants rely when launching their claims or applications - exceptionally important, as one wrong decision can be detrimental to a case and may have devastating consequences. On the other hand the courts are faced with the complex function of correcting or redress a wrong and while doing so considering all the relevant conflicting interests, the one weighed against the other.

The courts are flooded with matters concerning the award of government tenders. Answering the question posed in paragraph one (what is my remedy in law, and how will I go about seeking effective relief) is also where these awards are concerned one of the more difficult matters. Litigants should therefore bestow the necessary attention to the obstacles they might have to overcome when addressing the court and should recognize the difficulties courts have to deal with when adjudicating a matter, and particularly where the award of a government tender is the source of the litigation.

In order to justify and emphasise the statement made above I find it necessary to quote his Honourable Judge Harms in the matter of *Moseme Road Construction CC v King Civil Engineering CC*:[1]

> This appeal concerns the award of a government tender. These awards often give rise to public concern – and are a fruitful source of litigation. Courts (including this court) are swamped with unsuccessful tenderers that seek to have the award set aside and for the contracts to be awarded to them. The grounds on which these applications are based are many. Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders. Sometimes the successful tenderer is to be blamed for the problem but then there are cases where he is innocent. Many cases are bedevilled by delay, whether in launching the application (and also because the facts were not readily available or easily ascertainable) or because of delays and suspensions inherent in the appeal procedure. If the applicant succeeds the contract may have to be stopped in its tracks with the possibly devastating consequences for the government or the successful tenderer or both. Conversely, if the works are allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. There are also cases where the final judgment issues only after the completion of the contract. Tendering has become a risky business and courts are often placed in an invidious position in exercising their administrative law discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy.

Harms JA clearly indicates in this passage that seeking effective relief when dealing with cases where the awards of government tenders are concerned is a complicated matter, with a large number of technical difficulties, and that it should be pursued with the necessary care.

In this dissertation and in order to answer the question posed in the first paragraph I focus on the remedies that litigants may seek in proceedings of judicial review and other forms of litigation, where the award of government tenders is the source of the litigation. What relief may the courts grant in such cases and does this relief constitute effective relief?

[1] 2010 (4) SA 359 (SCA) para 1.

The different chapters focus specifically on the relevant judgments that were passed by our courts from the famous *Olitzki*[2] and *Steenkamp*[3] judgments up to the Moseme *Road Construction*[4] and *Viking Pony*[5] judgments. It is necessary to address and interpret the different courts' judgments in order to attend to and evaluate the different pathways and processes that may be followed when proceeding with actions and applications concerning the award of government tenders. By interpreting the case law, one will know exactly on which basis to approach our courts and what remedies are most likely to be granted.

It is vitally important to seek the correct remedy especially where an award of a government tender forms the basis of one's claim or application as the court will nullify an administrative order only if the correct remedy is sought. Quinot also referred to this view expressed by Wade *Administrative Law* 7th ed (by H W R Wade and Christopher Forsyth) at 342 - 4 that is set out as follows:

> The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the "void" order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another and that it may be void against one person but valid against another…"Void" is therefore meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation.[6]

This very stance makes the initial selection process as referred to above very important, if it is decided to approach the court for the necessary relief, as our courts are most likely not to grant "further and/or alternative relief" which is normally sought when instituting an action or application. If the courts are approached on the wrong basis, and the wrong remedy is sought one will not be successful. In order to formulate some sort of a "recipe" with successful results it is necessary to follow the correct process on the correct basis.

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[2] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA).
[3] *Steenkamp No v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).
[4] *Moseme Road Costruction CC v King Civil Engineering CC* 2010 (4) SA 359 (SCA).
[5] *Viking Pony Africa Pumps v Hidro-Tech Systems* 2010 (3) SA 365 (SCA).
[6] Quinot *Administrative Law Cases and Materials* (2008) 648.

1.2 A description of the words remedy, effective and appropriate relief

The question of which remedy may be pursued and what will constitute effective relief can only be answered if it is understood exactly what the intrinsic meaning of the word remedy and effective relief is.

Quinot provides a good starting point:

> A remedy is defined in the *New Shorter Oxford English Dictionary* as a "means of counteracting or removing something undesirable, redress, relief; legal redress". Inherent in this concept, as it is used in its legal context is the idea that a remedy, in order to qualify to be regarded as such, must be capable as a matter of law, of providing what the Constitution terms appropriate relief: it must be an effective remedy.[7]

In the matter of *Fose v Minister of Safety and Security* the Court held that:

> an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have means to enforce their rights through the courts. It is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.[8]

If we take a closer look at these two phrases it seems that both the remedy and the relief that is granted is qualified by the term effective and an effective remedy should be something that corrects or redresses a wrong or compensates for a loss.

The determination of appropriate relief was explained in the matter of *Hoffmann v South African Airways*[9] where the Court held that:

> Appropriate relief calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future

[7] *Id* at 641.
[8] 1997 (3) SA 786 (CC).
[9] 2001 (1) SA 1 (CC).

violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case.

In public procurement matters the courts are faced with tremendous difficulty in determining what would be appropriate and effective in different circumstances. There are normally various parties' interests that need protection, and balancing these conflicting interests is not an easy task. On the one hand it is expected of the court to protect and balance the various interests and on the other hand it is expected of the court to grant relief which best vindicates the right that was infringed. How the courts go about fulfilling this duty and how these obstacles are overcome where government tenders are at stake will be broadly addressed in this dissertation.

1.3 Relevant sections in the Constitution

The award of government tenders is administered by s 217 of the Constitution, which provides protection to contractors when participating in public tender processes. Section 217 determines the following:

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identifies in the national legislation, contracts for goods and 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.

In terms of this section the courts have to determine whether the system that was utilized by the organ of state in the process of awarding a tender to a specific body is not only fair, but also equitable, transparent, competitive and cost effective. How the

courts determine whether these factors were met, what constitutes a fair, equitable, transparent, competitive and cost effective system will be answered in the analysis of each case that will be discussed in the remaining chapters. The Preferential Procurement Policy Framework Act 5 of 2000 prescribes the framework for the implementation of any preferential policy as provided for in s 217(3) of the Constitution. The Supreme Court of Appeal has described the role of this act as follows:

> It provides that organs of state must determine their preferential procurement policy based on a points system. The importance of the points system is that contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer.[10]

A discussion and interpretation of the relevant sections and its regulations, with specific reference to regulation 15 of the act and the question of what constitutes objective criteria is also dealt with in this dissertation.

1.4 Judicial review and remedies available in judicial review proceedings

Organs of state have to comply with their various duties. In complying with these duties they are bound by the common law, constitutional law and their statutory duties. All public acts are administrative action, which is governed by different statutes including the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as PAJA).

> In brief PAJA, lays down rules and principles that apply to and bind all levels of government. PAJA gives powers to the courts to scrutinise the lawfulness, reasonableness, procedural fairness and the right to written reasons for administrative action. It also provides for remedies that are available if these requirements are not complied with.[11]

Judicial review of administrative action is governed by s 6 of PAJA. The specific remedies that courts or tribunals may grant in proceedings for judicial review are listed in s 8 of PAJA. This section its workings, interpretation, function and relevance and more importantly how the courts apply it to the unique sets of facts before them

[10] *Moseme Road Construction* para 2.
[11] P Bolton 'Scope for negotiating and/or varying the terms of government contracts awarded by way of a tender process' (2006) 2 STEL LR at 271.

are critically discussed in order to address and answer the question of what remedies the courts will grant to ensure effective relief, where the award of government tenders is the subject matter to be adjudicated.

1.5 Conclusion

> Both public and private bodies need goods and services in order to function. In many instances, depending on the nature and value of a particular contract, a public or private body may choose to meet its needs by means of a public call for tenders.[12]

The main focus of this dissertation is the development of constitutional as well as judicial remedies within the public procurement sector. In order to illustrate this development a critical study of the relevant case law is of paramount importance, and an in depth study and analysis of this development forms the basis of the dissertation. A very important aspect that will be dealt with is whether the right to effective relief is extended to a right to damages suffered as a result of not being awarded a government tender.

In chapter 2, I deal with delictual liability of state organs in terms of the Constitution and the common law, particularly what that liability entails, how the courts interpret the concept of damages, specifically under what circumstances a claim for damages will succeed and exactly which claims for damages will be granted.

Chapter 3 consists of an analysis of a claim for damages specifically, loss of profit in terms of s 8(1)(c)(ii)(bb) of PAJA, and how the courts interpret this section, as well as the concept of “exceptional cases”, as contemplated in this section. A very important question that will be answered is whether the common law is developed and broadened by the interpretation of this section in PAJA, and when a claim based on this section for loss of profit will be granted to an aggrieved tenderer.

In chapter 4 all the other available remedies as set out in PAJA are critically analyzed, with the necessary emphasis on the circumstances under which the courts will grant an order in terms of which the government tender will be set aside and awarded to the aggrieved party or referred back to the relevant administrative body

[12] *Id* at 266.

for review. In this chapter I also deal with the different interests that the court considers and the influence that these interests may have on the courts' decision.

In the concluding chapter, chapter 5, the concept of effective relief sought (where government tenders are the essence of the litigation) versus the actual orders granted in different circumstances is discussed and critically addressed in order to deal with and answer the questions posed in this founding chapter.

All the chapters are dealt with in the form of various case notes concerning the specific subject matter of each chapter. Due to the limitation on the length of this dissertation I refer to either the Supreme Court of Appeal or Constitutional Court judgments in most instances, except where the High Court judgments are relevant and important in the conclusion of my arguments.

CHAPTER 2 – DELICTUAL LIABILITY OF STATE ORGANS IN TERMS OF THE CONSTITUTION

2.1 Introduction

In this chapter, the focus is a critical analysis of the case law concerning the state's liability, under the provisions of the Constitution, for compensation in cases concerning government tenders. I consider and evaluate the circumstances under which an aggrieved party will be successful with a claim for constitutional damages in order to determine what the stance in our country is in cases like these. The main topics that are scrutinized are; the state's liability for lost profit (assessed in light of the *Olitzki* judgment), secondly, the state's liability for out – of – pocket expenses (evaluated in light of the *Steenkamp* judgment) and lastly the liability of state organs for fraudulent conduct as determined by the court in the *Gore* matter.

2.2 The state's liability for lost profit by an unsuccessful tenderer, evaluated in light of the *Olitzki* judgment.

The facts of *Olitzki Property Holdings v State Tender Board and Another* [1] are briefly as follows:

> In 1995, the provincial government of Gauteng began to make arrangements to relocate from Pretoria to Johannesburg. It invited tenders for office accommodation to house various departments in an inner-city precinct. The appellant (the applicant) obtained an option to purchase a building in the precinct, and tendered to provide office space in it to the provincial government. Its tender was not accepted. Thereafter it instituted a claim for damages against the first and second respondents (the defendants), respectively the State Tender Board, which awarded the tender, and the Province of Gauteng which the plaintiff alleged had misconduct itself during the tender process in specified ways with which the Tender Board has associated itself. The damages the plaintiff claimed allegedly arose from the defendants' unlawful conduct in managing the tender process and in awarding the tender. They consisted in the profit the plaintiff asserted it would have made from rentals if it had been awarded the tender.[2]

The Plaintiff's claim was pleaded in the alternative and comprises a claim A and a claim B. In claim A the plaintiff alleged that it is entitled to damages due to the

[1] 2001 (3) SA 1247 (SCA).
[2] *Id* para 4.

defendants' breach of its right to a fair, public and competitive tendering system as set out in s187(2) of the interim Constitution. In claim B the plaintiff alleged in the alternative that the defendants' conduct constituted an infringement and that it is entitled to damages for breach of their fundamental right to administrative justice as set out in s 24(a), (b) and (d) in the interim Constitution.

2.2.1 The judgment in the High Court

In the court *a quo* the parties, astutely, to my mind, agreed to first test the legality of claim A on the basis that the Court should assume that the allegations made are factually correct, and to decide whether the plaintiff was entitled to the damages it claimed.

> In regard to claim B, the court was requested to assume the correctness of the same factual allegations, but, in addition, after hearing such evidence as the parties may tender and which the court regards, as relevant to a specified issue, to decide whether the plaintiff was similarly entitled. That issue was the plaintiff's averment that an award of damages constituted 'appropriate relief' in terms of s7 (4)(a) of the interim Constitution since it had no other satisfactory remedy for the alleged breach of its fundamental right to administrative justice. In the event of a finding favourable to the plaintiff in regard to either claim A or B, the court was requested to postpone the matter for further hearing.[3]

Eloff JP dismissed both claims with costs, on the basis that the plaintiff had available the remedy of review, which prohibited it from claiming damages for its lost profit.

The judgment of Eloff JP, already at a very early stage, makes it clear that claiming for constitutional damages is easier said than done, and all other remedies should carefully be considered before this option is pursued.

The plaintiff was granted leave to appeal.

2.2.2 The Supreme Court of Appeal judgment

In the SCA the judgment of the High Court was upheld in a majority judgment penned by Cameron JA.

[3] *Id* par 6.

(a) Does the breach of s 187 of the Interim Constitution give rise to a civil claim for damages of lost profit?

In the interpretation of section 187[4] of the interim Constitution, considering the relevant facts before the Court and the specific relief sought by the plaintiff, Cameron JA was faced with the question of whether a breach of these provisions gives rise to a delictual claim of damages for loss of profit. The court held that:

> the question is whether the defendants' (assumed) unreasonable, irregular and arbitrary conduct in relation to the tender breached these provisions so as to constitute a civil wrong actionable at the plaintiff's instance.[5]

The Court in answering this question applied the criterion of reasonableness, based on specific considerations such as morality and policy and took into account the values and principles contained in the Constitution. The interest of the public - weighed against the interest of the plaintiff - played a vital role in the Court's interpretation and decision.

Council for the plaintiff relied mainly on ss (2) and (3) of s 187. However, the Court held that the section as a whole, in the context of the interim Constitution, needed to be interpreted. The Court held that ss (1) is at its best neutral to the Plaintiff as it makes provision for the appointment of an independent and impartial body to regulate public procurement, and does not favour the case of the plaintiff in any way.[6] Subsection (2) was found to be of even less use to the plaintiff as it merely refers to the minimum criteria that the tendering system has to comply with.[7] The Court noted further that ss (3)

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[4] Section 187 the interim Constitution provides that:
(1) The procurement of goods and services for any level of Government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurement.
(2) The tendering system referred to in ss (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
(3) No organ of State and no member of any organ of State or any other person shall improperly interfere with the decisions and operations of the tender boards.
(4) Al decisions of any tender board shall be recorded.

[5] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 10.

[6] *Id* para 22.

[7] *Id* para 23.

> imposes a general prohibition on improper interference with the decisions and operations of the tender boards, and at first glance it offers a more promising foundation from which to infer a direct claim sounding in damages for its breach.[8]

The Court held that an aggrieved party could easily succeed with an application for review or an interdict by relying on this provision, as the interim Constitution requires that

> legislation in fulfilment of the provision's requirements embody such a right; and that right, whether reflected in the legislation or located residually in the constitutional provision, requires for even minimal enforcement the remedies of review and interdict.[9]

However, the Court found that the plaintiff's claim for lost profit goes far beyond this point and that, in assessing its right to claim such damages the prohibition in ss (3) cannot be viewed in isolation, but has to be read in conjunction with ss (1) and (2). This means that

> contextually and grammatically it is clear that it, too, is encompassed in the legislative duty and power to create the tendering system ss (1) envisages; and it, too, is subject to the legislative power to define the recourse occasioned by its breach.[10]

In light of this argument the Court held that this section did not include a direct claim for damages.

The Court emphasised the fact that the plaintiff's claim is for lost profit and not for out-of-pocket expenses. This is a very important remark, as out-of-pocket expenses (notwithstanding the outcome of the majority judgment in the *Steenkamp* matter which will be discussed later in this chapter) should be dealt with on a completely different basis - given the Court's remarks on this subject there is a strong possibility that the plaintiff might have had a better chance of succeeding with a claim for out-of-pocket expenses than a claim for loss of profit. The Court held that the plaintiff's claim "*contains no prayer for or averments regarding out-of-pocket expenses occasioned by the breaches the plaintiff relies on, but claims solely its lost profit from*

[8] *Id* para 26.
[9] *Ibid.*
[10] *Id* para 27.

the tender it avers it would have been awarded if those breaches had not occurred."[11]

The Court in concluding its judgment on the plaintiff's first claim made a very important point that I deem necessary to quote in full:

> The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realising our constitutional vision of open, incorrupt and responsive government.[12]

In light of further judgments that will be discussed later in this and other chapters it is important to note that this was a very ambitious averment made by the Court, as one will note, later on, that it is extremely difficult, and only in very specific circumstances that one is able to succeed with a civil remedy in a public procurement matter.

The Court found that claim A was rightly set aside by the High Court.

(b) A critical analysis of the Court's finding and what would constitute an appropriate remedy in these circumstances

At first glance it might seem that the rights of the plaintiff were not suitably vindicated. However, if one properly evaluates this specific set of facts as well as the applicable law and has cognisance of the impact that a claim in this instance will have on our country's limited recourses,[13] it is understandable why the Court came to the conclusion it did. If this judgment is compared with the *Steenkamp* judgment the conclusion reached is much more reasonable, fair and in line with the principles of both the interim Constitution and the 1996 Constitution. The plaintiff in this matter, unlike in the matter of *Steenkamp*, was to a certain extent the creator of his own damages and did not seek the appropriate relief when the chance was there to do

[11] *Id* para 28.
[12] *Id* para 31.
[13] The Court in paragraph 41 of its judgment referred to the judgment of Ackermann J in the matter of *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), where it was held that "in a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are "multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform, it seems to me it would be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated."

so. The outcome was that his rights could not effectively be protected by the Court. The plaintiff should have calculated its risk more carefully and was in the position to approach the court much earlier for an interdict and thereafter, for at least a period of time with a review application. Counsel for the defendant argued that the plaintiff was aware of the circumstances on which it later based its claim approximately nine days before the tender was awarded. In these circumstances the plaintiff would have been entitled to approach the court for an interdict, to prohibit the continuation of the tender process and the award of the tender to another tenderer.[14] The Court was therefore not convinced that an award for lost profit would constitute 'appropriate relief'.

If cognisance is taken of all the factors listed above, especially the interest of the public and the effect that these types of claims in these specific circumstances would have on the financial position of the state, the outcome of this judgment is understandable.

2.3 Out-of-pocket expenses claimable in terms of the provisions of the Constitution – the *Steenkamp* judgment

In the matter of *Steenkamp NO v Provincial Tender Board, Eastern Cape*[15] the Constitutional Court was faced with the question of whether an organ of state was liable in delict for a successful tenderer's out-of-pocket losses after a government tender has been set aside due to a *bona fide* error by the organ of state during the tender process.[16] The court came to the conclusion that an organ of state is not liable in delict, and ruled:

> that the organ of state's negligent but bona fide conduct in the public tender process was not wrongful since it owed no legal duty to tenderers, whether successful or unsuccessful, to avoid such losses and that there were no public policy considerations that justified the recognition of such a duty.[17]

[14] *Olitzki* (SCA) para 37.
[15] 2007 (3) SA 121 (CC).
[16] G Quinot 'Worse than losing a government tender: winning it' (2008) 1 *STELL LR* at101.
[17] *Ibid*.

The recognition and development of the public law concerning state contracts are exceptionally important for South African jurisprudence. This case had a vast amount of potential to expand the enforceability and implementation of judicial remedies in the public procurement sector. The majority judgment of the Constitutional Court failed to secure this advancement and as Quinot rightfully notes:

> if this unsophisticated approach to the judicial treatment of government contracts and tender awards is kept up, winning a state tender may just result in a fate worse than losing that tender.[18]

In the analysis of this case I deal extensively with the difference in the majority and minority judgments in the Constitutional Court and critically discuss the reasons why the minority judgment of Langa CJ and O' Regan J (Mokgoro J concurring) should be preferred.

The facts of the case were as follows:
In 1995 the Tender Board invited tenders for the supply of a payment system for welfare grants in the Eastern Cape. Eight tenders were received including one by Balraz Technologies (Pty) Ltd, (Balraz). In spite of the reservations of two technical committees about Balraz's technical ability to efficiently render the services under the tender, the Tender Board decided to award one part of the contract to Balraz in March 1996. Another company namely Pensecure (Pty) Ltd, (Pensecure) was awarded the other part of the tender. In 1997 a displeased tenderer, Cash Paymaster Services (Pty) Ltd, approached the High Court for an order to review and set aside, the tenders to Balraz and Pensecure. They based their application on the ground that the decision making process of the tender board was reviewable due to several irregularities. The High Court found that the decision-making process was indeed irregular and administratively unfair, and the tender awards were set aside.[19] As a result hereof the tender board invited new tenders; Balraz was placed under final liquidation and could not tender. The tender was awarded to two other companies. "Balraz's liquidator subsequently claimed damages in contract from the Department of Health and welfare, in its capacity as the contracting authority, and in

[18] *Id* at121.
[19] *Steenkamp No v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 8.

delict from the Tender Board."[20] Exceptions by the respective defendants succeeded against the contractual claim, but failed against the claim in delict. The parties agreed to separate the issues underlying the delictual claim and asked the court to adjudicate only on whether the defendant's conduct was wrongful and, if so, whether it was also negligent.

2.3.1 The High Court Judgment

Even though the action for damages was dismissed by the High Court it is important to deal with the High Court's judgment first in this specific instance as this Court made important findings which should be noted and taken into account when comparing the majority judgment of the SCA with the minority judgment. The essence of the High Court's judgment was based on the finding that Balraz was not registered as a company at the time when their tender was submitted and that they had therefore submitted an invalid tender.[21]

> The Court found that in order to determine whether the Tender Board's conduct was wrongful in a delictual sense it had to establish whether there was a legal duty on the Tender Board towards successful tenderers like Balraz to avoid causing pure economic loss in the form of out-of-pocket expenses.[22]

The Court recognized this legal duty but due to Balraz's position found that this duty was not applicable on this specific set of facts. The High Court considered a number of public policy considerations and very importantly noted that the functions of the Tender Board included the protection of those who tender and was not exclusively intended to protecting the interests of the Government.

The Court recognized the fact that the "possibility of submitting a new tender when the Tender Board called for fresh tenders was not an effective alternative remedy for Balraz" and described it as unrealistic and unreasonable.[23] A successful tenderer was entitled in the Court's view to assume that the Tender Board complied with its statutory functions. The Court came to the conclusion that:

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[20] Quinot (note 16 *supra*) at103.
[21] *Steenkamp NO v Provincial Tender Board, of the Eastern Cape* 2004 JOL 13193 (CK) para 86.
[22] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 26.
[23] *Id* at 104.

> due to the limited nature of a successful tenderer's claim for out-of-pocket expenses, as well as the narrow class of potential claimants represented by successful tenderers such as Balraz, claims such as the present did not hold significant cost implications for the public purse.[24]

2.3.2 The Supreme Court of Appeal judgment versus the High Court judgment

It is important to note that although the Supreme Court of Appeal and Constitutional Court upheld the High Court's judgment, the reasoning behind their conclusions differed from that of the High Court. The Supreme Court of Appeals' interpretation of the relevant law was not favourable to the development of the remedies aggrieved parties can seek, in public procurement matters. The High Court evoked a more positive outlook on future remedies that may be sought by those in need of the necessary assistance and relief, and specifically due to its stance as quoted above. The SCA also examined various public policy considerations, but held that

> an action by tenderers, successful or unsuccessful, for delictual damages that are purely economic in nature and suffered because of bona fide and negligent failure to comply with the requirements of administrative justice could not be inferred from either the statute in question or the common law generally.[25]

An important distinction between the High Court and the SCA judgment is that the SCA, unlike the High Court interpreted the relevant statute in favour of the interests of the province, and not in favour of the interest of the tenderer. In these specific circumstances I do not agree with the SCA, especially considering and emphasising the fact that the claimant was initially a successful tenderer. This stance creates an extremely unfavourable dictum for aspiring litigants in the public procurement sector. Should the negligence of the state be overlooked, to the detriment of a tenderer? Does the *bona fide* nature of actions overshadow their negligent nature to such an extent that liability is completely waived? I find it difficult to understand the reasoning behind this judgment as it is in direct conflict with the underlying principles enshrined in our Constitution, and can never be reasoned as being fair. There is a vast difference between lost profits flowing from administrative errors and out-of-pocket

[24] *Ibid.*
[25] Quinot (note 16 *supra*) at104.

expenses. Although the SCA noted that there was no "principled difference between a claim for lost profits and out-of-pocket expenses and that claims for the latter are subject to the same considerations as the former"[26] the difference in my mind is rather simple. Out-of-pocket expenses are direct costs already incurred, direct damages, monies lost, and in this instance, due to the "*bona fide* negligence of the state". This is quite different from profit, which can be described as a future benefit, or a future monetary expectation. Monies lost due to costs incurred - and I simply cannot help but to argue that these direct expenses were indirectly incurred in favour of the state and the general public, may have devastating consequences for any aggrieved party. I find it disturbing that the negligence on the part of the tender board should simply be overlooked, at the expense of the tenderer.

The SCA went even further and reasoned that

> there could be no distinction between successful and unsuccessful tenderers in relation to the imposition of a legal duty on tender boards and damages claims were refused to unsuccessful tenderers, there could be no legal duty to ground such claims in the hands of successful tenderers.[27]

Once again I disagree with this finding. Not only does a successful tenderer have the expectation of a future profit, but there might be a vast difference between the expenses incurred by a successful tenderer in order to be initially successful than those expenses incurred by an unsuccessful tenderer. It might not always be the case, but to merely compare the entitlement of unsuccessful tenderers to those of successful tenderers is wrong. These entitlements should be evaluated on the basis that each set of facts is unique. The High Court correctly recognized the duty of the tender board to prevent economic loss in the form of out-of-pocket expenses, and one will note further that the High Court judgment (even though the same conclusion was not reached) is much more in line with the dissenting Constitutional Court judgment of Langa CJ and O'Regan J.

[26] *Ibid*.
[27] Quinot (note 16 *supra*) at105.

2.3.3 The Constitutional Court judgment

In both the majority and minority judgments the Constitutional Court identified the main issue that needed to be adjudicated as:

> whether a successful tenderer whose award is later set aside by a court on review may claim delictual damages from the tender board for out-of-pocket expenses incurred subsequent to and in reliance on the award.[28]

(a) The majority judgment of Moseneke DCJ

Moseneke DCJ rightfully decided that the application does involve constitutional issues, and noted that

> when a tender board procures goods and services on behalf of government it wields power derived first from the Constitution itself and next from legislation in pursuit of constitutional goals, and noted further that it bears repetition that the exercise and control of public power is always a constitutional matter.[29]

The Court applied various sections in the Constitution and interim Constitution, which I will briefly refer to. Due to the similarities of the provisions in s 187[30] of the interim Constitution and s 217(1)[31] of the Constitution the Court applied and cited both sections. Section 39 (2)[32] of the Constitution was applied in order to consider the

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[28] *Steenkamp No v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 65 (*Steenkamp*).

[29] *Id* para 20.

[30] Section 187 of the interim Constitution provides:
(1) 'The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.
(2) The tendering system referred to in ss (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
(3) No organ of State and no member of any organ of State or any other person shall improperly interfere with the decisions and operations of the tender boards.
(4) All decisions of any tender board shall be recorded.'

[31] Section 217(1) provides:
'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.'

[32] Section 39(2) of the Constitution provides:
'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'
The Court also referred to s 35(3) of the interim Constitution which provided:
'In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.'

tender board's private-law liability. The Court very importantly stressed the fact that a tender board in evaluating the acts of awards within the public sphere of administrative law, exercises a public power and the decision reached constitutes an administrative action which "affects the legal interest or rights of tenderers concerned."[33] This constitutes the right to just administrative action, which was governed by s 24[34] of the interim Constitution. The Court lastly applied the provisions of s 38[35] of the Constitution as well as ss 7(4)(a)[36] of the interim Constitution to the right that an aggrieved party has to "appropriate relief"[37] when his right to administrative justice has been breached. Al these sections were considered and the Court held that "there can be no doubt that the issues that arise for determination in this appeal concern constitutional matters."[38]

The Court, in deciding whether the tender board is delictually liable for out-of-pocket expenses incurred by Balraz, took several policy considerations into account. The Court found that even though

> every failure of administrative justice amounts to a breach of a constitutional duty, that breach is not an equivalent of unlawfulness in a delictual liability sense, and for that reason is not alone wrongful.[39]

The Court in particular held that the considerations of "fairness and reasonableness"[40] have to be considered when a duty of care is evaluated and a

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[33] *Steenkamp* para 21.
[34] Section 24 of the interim Constitution provided, that every person shall have the right to-
(a) 'Lawful administrative action where any of his or her rights or interest is affected or threatened;
(b) Procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
(c) Be furnished with reasons in writing for administrative action which affects any of his or her rights or interest unless the reasons for such action have been made public' and
(d) Administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'
The Court also referred to s 33(1) of the Constitution which provides that: 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'
[35] Section 38 of the Constitution provides – the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'
[36] Subsection 7(4)(a) provided that – 'When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in para (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.'
[37] *Steenkamp* para 22.
[38] *Id* para 23.
[39] *Id* para 37.

negligent statutory breach is not enough to be held delictually liable in this specific sense.[41] The Court went further and compared the position in the *Olitzki*[42] matter to the position in this specific case, notwithstanding the fact that there is a vast difference, (as noted by the minority judgment) between out-of-pocket expenses and lost profit, in order to determine the test for wrongfulness in the context of public procurement matters, and noted that the factual differences between the two cases do not matter.[43] Several considerations were taken into account in order to determine the issue of wrongfulness and the Court ultimately noted that it should be determined in light of all the relevant facts if "public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages."[44] It was found that

> allowing a delictual claim may unduly hamper the functioning of tender boards and consequently undermine the entire public procurement system and that such liability will place too high a burden on the public purse.[45]

The majority found it unnecessary to decide whether the claim of the applicant is for pure economic loss.[46] It was found that if the constitutional provisions read with the governing statute are taken into account the applicant's claim for damages is not enforceable upon the tender board.[47] The majority rejected the applicant's submission that it is without another remedy and argued that the initially successful tenderer does have alternative remedies. The Court held that when an initial tender is nullified by a court on review, there is the opportunity to tender again, failing to consider the losses already suffered by the tenderer and the further expenses it would have to incur to tender once again. The second argument was that "the prudent successful tenderer has another alternative remedy available in the form of negotiated risk allocation in relation to potential reviews of the tender award; the Court suggested that successful tenderers, following the award of the tender, should

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[40] *Ibid*.
[41] *Ibid*.
[42] *Olitzki* (SCA).
[43] *Steenkamp* para 40.
[44] *Id* para 42.
[45] Quinot (note 16 *supra*) at105.
[46] *Steenkamp* para 46.
[47] *Id* para 47.

"negotiate contractual arrangements with the state to govern any subsequent upset of the contract."[48]

I agree with Quinot that the most "astounding part of the majority judgment"[49] is the Court's criticism against Balraz for accepting the tender award immediately and acting upon it, arguing that Balraz should have waited and that its loss could then easily have been limited.

In order to conclude the majority judgment and to compare and critically discuss the vast differences between the majority and minority judgment, I deem it necessary to quote the Court's final analysis on liability of delictual damages:

> In all the circumstances I am satisfied that in considering the tenders submitted by Balraz 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 who has incurred a financial loss on the strength of the award which is subsequently upset on review by a court order.[50]

(b) The dissenting judgment of Langa CJ and O'Regan J, with the concurrence of Mokgoro J

The question that is posed in the minority judgment is, "whether the conduct of the tender board is wrongful or unlawful in the sense that it could give rise to Aquilian liability."[51] The minority acknowledged that the applicant made out a proper case for damages arising from pure economic loss, and unlike the majority judgment did not evade this question, and found no other indication on the papers that the losses incurred were "anything other than financial."[52] It was found that in order to determine whether conduct was wrongful or unlawful for the purpose of delictual liability the statute in terms of which the tender board acted as well as the relevant constitutional provisions had to be investigated and analyzed.[53] The Court noted that the tender board was established in terms of s 2 of the Provincial Tender Board Act,

[48] Quinot (note 16 *supra*) at106.
[49] *Ibid.*
[50] *Id* para 56.
[51] *Id* para 66.
[52] *Id* para 67.
[53] *Id* para 71.

Act 2 of 1994, and that the relevant sections in this act, in terms of which the tender process had to operate were s 2(5) and s 4(2)[54] "which echoes the relevant constitutional provision",[55] being s 187[56] of the interim Constitution.

The Court contended that there is no provision made in the Act for any internal appeal process, and therefore the ordinary "rules of administrative law applied to the review of the tender process."[57] The Court agreed with Moseneke DCJ that the Act does not lay down a specific claim for damages of out-of-pocket expenses, incurred by an initially successful tenderer, where the tender was later set aside on review, but made it clear that the lack of such a specific provision does not in itself eliminate the claim of the applicant.[58] They argued that

> if the statute is not clear on the matter, it is our view that what needs then to be considered is whether upon a consideration of the relevant normative principles such a claim lies.[59]

Unlike the majority judgment the minority made a clear and concise distinction between the facts in the *Olitzki* judgment and the facts in this case. They held that in this case we are dealing with an initially successful tenderer who incurred out-of-pocket expenses in order to comply with its contractual obligations subsequent to the award of the tender, unlike an unsuccessful tenderer who has a remedy for judicial review to set the tender aside and has the option (and in my opinion the luxury) to tender again. A successful tenderer does not have this remedy. As noted above this claim dealt with out-of-pocket expenses and not lost profit. These two differences, the fact that the tenderer in this matter was initially successful and incurred out-of-pocket expenses as opposed to an unsuccessful tenderer who claims loss of profit, were enough evidence for the minority to render a different conclusion from that reached in the *Olitzki* judgment.

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[54] Section 2(5) of the Act provided that:
'The Board shall exercise its powers and perform its functions fairly, impartially and independently.'
Section 4(2) provided that:
'A tendering system devised by the Board Shall be fair, public and competitive.'
[55] *Steenkamp* para 72.
[56] See note 30.
[57] *Steenkamp* para 73.
[58] *Id* para 76.
[59] *Steenkamp* para 77.

The minority accepted the fact that damages claims in the public procurement sector, especially in our society, will bestow an excessive burden upon the shoulders of the public but contended that an out-of-pocket claim is a far more modest claim.

A very important consideration by the minority, that the majority completely failed to overlook, is the fact that "government procurement is one of the key mechanisms for ensuring that those previously locked out of economic opportunity by the policies of apartheid, are given an opportunity to participate,"[60] as well as the fact that these companies might be smaller and not financially as strong as other companies might be. This factor was additionally taken into account by the minority upon their conclusion that the majority judgment is incorrect.

The minority stressed the fact that a tenderer in a similar position as Balraz does not have effective alternative remedies - no remedies are mentioned in the Act and such a tenderer cannot approach the court on a judicial review basis. The minority noted that although the tenderer might be able to enter the race again, if the tender is re-advertised it will still not be reimbursed for the expenses already incurred in the first instance. The minority was also not in agreement with majority's stance that government contracts can be negotiated, as there is no evidence on record on this issue, and in their view government contracts are standard form contracts, and the terms are stipulated in advance by the government.[61]

In conclusion the minority noted that the

> weightiest of the considerations identified by Moseneke DCJ supporting a conclusion that no liability should lie are: firstly, the nature of the functions of the tender board; and secondly, the risk of impairing the efficiency of the tender board by rendering it liable in delict and simultaneously the risk of overburdening the fiscus with such claims.[62]

The minority's stance is that they identified important considerations which outweigh these factors held by Moseneke DCJ. These considerations are in short the following:

[60] *Id* para 82.
[61] *Id* para 89.
[62] *Id* para 93.

(1) The claim is specifically for out-of-pocket expenses, and the nature of this claim makes it desirable to reimburse successful tenderers.
(2) The Act read in conjunction with the principles of s 24 of the interim Constitution does seek to "vindicate the right to administrative justice of those who engage in the tender process."[63]
(3) "Effective and efficient government contracting would be undermined if successful tenderers faced the prospect of their contracts being set aside without being able to recoup expenses already incurred under the contract."[64]
(4) Social transformation in our current post-apartheid climate is of paramount importance, and the use of public procurement has a positive influence on the advancement of this transformation - if claims for damages such as this one are not properly vindicated many smaller black empowered companies may not be able to usurp the costs incurred in performing a contract which is ultimately void, and this may have devastating consequences for the company.

The judgments in *Steenkamp* specifically referred to the provisions in PAJA. I do not find it necessary to discuss these expressions now as this Act is not applicable to this specific case and will be dealt with extensively in the analysis of further judgments.

The reference to the remedies in PAJA in this case will be dealt with in chapter 3, after the analysis of the *Darson*[65] judgment, where PAJA was applicable, in order to determine if Balraz would have been successful with a claim under PAJA.

(c) A critical study of the differences in the majority and the minority judgment and the influence that the majority judgment might have on the future of public procurement litigation

One of the most important differences between the two judgments is the distinction drawn by the minority judgment between out-of-pocket expenses incurred by initially

[63] *Id* para 94.
[64] Quinot (note 16 *supra*) at107.
[65] *Darson Construction (Pty) Ltd v City of Cape Town and Another* 2007 (4) SA 488 (CC).

successful tenderers and future loss of profit claimed by unsuccessful tenderers. The minority judgment recognizes the state's delictual liability, where pure economic loss in the form of out-of-pocket expenses forms the basis of a "successful"[66] tenderer's claim. This recognition is extremely important for so many reasons.

Firstly the successful tenderer is without any further remedy. I agree with the minority's argument that the tenderer would be in no position to enter into contractual arrangements to prevent it from losses which are a direct result of the contract being set aside. Quinot rightfully notes: "If the contract is set aside on review, why would one provision contemplating just such an event, survive to provide the private counterparty with a cause of action?"[67] Even if such a provision is dealt with in a complete separate agreement, would it still stand if the tender contract is set aside on review? I doubt it. I am further not convinced that it would be fair to expect of a successful tenderer to anticipate his losses, and be liable to protect its own interest by negotiating terms with the state should the contract be set aside on review. Who would the contracting parties be, would these terms really be negotiable and would this jeopardise the "law or practice governing public procurement in South Africa?"[68] This question was clearly answered by Quinot, and I consider it necessary to quote his expressions:

> State contracts are generally drawn up by the government and offered on a take-it-or-leave-it basis in the tender process. On national and provincial levels the Treasury Regulations under the Public Finance Management Act, 1 of 1999, provide in relation to public procurement that the accounting officer or accounting authority (of an organ of state) must ensure that… bid documentation and the general conditions of a contract are in accordance with… the instructions of the National Treasury. National Treasury has accordingly issued General Conditions of Contract applicable to most public procurement contracts. Even where these conditions are not applicable or where scope is left for negotiated terms, organs of state have very little freedom in such negotiations following a tender process.

It is clear that these types of negotiations are highly unlikely. The tenderer would not be in a position to negotiate for example with both the tender board and the National

[66] Where "successful" is referred to as an initially successful tenderer before the contract was set aside under review.
[67] Quinot (note 16 *supra*) at108.
[68] *Id* at109.

Treasury, the terms of the tender contract are governed by a separate body and if organs of state are not even in a position to freely negotiate the terms of the tender contract itself where would that leave the tenderer to enter into a completely separate negotiation.

Secondly, the majority held that the tenderer would have the option to tender again once the award is set aside. This might be so, but the expenses already incurred would not have been recovered, which may cause the tenderer irreparable financial damage, which could finally lead to liquidation.

Thirdly it was noted by the minority that it is clear that out-of-pocket expenses will be "limited to those expenses proved to have been incurred as a direct result of the contract arising from the tender award."[69] It is clear that these expenses were incurred in order to fulfil contractual obligations and cannot be compared to loss of future profit.

Fourthly and in conclusion the right to administrative justice was not properly vindicated by the majority judgment. In terms of s 24[70] of the interim Constitution as well as s 33[71] of the Constitution, every person has the right to lawful administrative action, and the purpose of such a right is to "ensure that those who interact with the State are entitled to be treated fairly and lawfully."[72] If all the relevant principles are considered, Balraz would have been treated fairly and lawfully if it was compensated for the expenses incurred in order to meet their obligations in terms of the tender contract. It is important to also note that these expenses were ultimately - given the outcome of this case - incurred in favour of the state and the public, to their own detriment.

[69] *Steenkamp* para 92.
[70] See note 34 *supra*.
[71] *Ibid*.
[72] *Steenkamp* para 75.

2.4 Delictual liability of State organs for fraudulent conduct – the *Gore* judgment

In the matter of *Minister of Finance and Others v Gore No*[73] the SCA was once again faced with the question of whether the State could be held liable for payment of damages where government tenders are concerned but the circumstances under which these damages were suffered by the tenderer differed vastly from those in the *Olitzki* and *Steenkamp* matters. The essence of the facts was briefly the following:

The respondent in his capacity as liquidator of a company namely 3D-ID Systems (Pty) Ltd sued the four appellants,[74] who represented the National Government of the Western Cape Provincial Administration for damages specifically for the company's pure economic loss arising from not having been awarded a government tender, due to fraudulent acts by certain government administration officials.[75] In the Pretoria High Court, Hartzenberg J found in favour of the plaintiff.

The appellants raised four defences to the respondent's claim:

(1) The claim had prescribed in that it had been instituted more than three years after commission of the alleged fraud;
(2) The appellants ought not to be held vicariously liable for the fraudulent conduct of its employees as the latter were acting outside of the course and scope of their employment in perpetrating the fraud;
(3) The company had suffered no loss in that, even in the absence of the alleged fraud, it would not have been awarded the tender;
(4) As a matter of legal policy, a public tender process, damages should not be recoverable as a result of fraud committed during a public tender process.[76]

This dissertation deals mainly with the availability of remedies during a public tender process and for this reason I found it necessary to deal only with the appellants' fourth defence.

[73] 2007 (1) SA 111 (SCA).
[74] The four appellants were the Minister of Finance, responsible for the State Tender Board, the National Government, the Minister of Welfare and Population Development, responsible for the payment of social pensions and welfare grants after April 1994 and the Premier of the Western Cape.
[75] *Gore* para 1.
[76] *Gore* at 112.

2.4.1 Does fraudulent conduct in the tender process constitute liability for a claim for damages?

The appellants argued, (and their argument was mainly supported by the dictum in the *Olitzki* and *Steenkamp* matters discussed above) that the respondent failed to establish the element of wrongfulness, necessary in order for them to be held delictually liable. The Court made a very important distinction between the conduct in these three cases and held that

> the decisions in *Olitzki* and *Steenkamp* has to be understood against the well-established principle of our law of delict that negligent conduct causing pure economic loss is not *prima facie* wrongful.[77]

The Court explained that the duty of care is judicially determined in light of public and legal policy and should be applied in line with constitutional principles.[78] This indicates that it cannot be interpreted in such a way that the appellants will not be held liable and "enjoy immunity"[79] against delictual liability despite the reality of their guilty conduct. They attempted to rely heavily on the policy considerations applied in *Olitzki* and *Steenkamp* and argued that the Court should give due regard to the same considerations and therefore refuse to extend Aquillian liability to loss caused by fraud in the tender process. They went further and argued that fault and wrongfulness are both elements of the Aquilian action, "with the consequence that because subjective factors such as the perpetrator's state of mind and motive pertain to fault they are irrelevant in determining wrongfulness."[80] The Court was not convinced and made it clear that the province's argument starts from the wrong premise. The Court held that it cannot be stated as a "general rule that, in the context of delictual liability, state of mind has nothing to do with wrongfulness."[81] The Court described the question of wrongfulness in cases of pure economic loss as a judgment of whether considerations of public or legal policy "dictate that delictual liability should be extended to loss resulting from the conduct at issue."[82] The Court held that it cannot think of any reason why it should be ignored that the loss was

[77] *Id* para 82.
[78] *Ibid*.
[79] *Ibid*.
[80] *Id* para 85.
[81] *Ibid*.
[82] *Id* para 87.

caused by dishonest conduct in deciding the issue of wrongfulness.[83] In deciding the effect of the burden that the claim will have on the public's purse (as referred to in *Olitzki* and *Steenkamp*) the Court importantly noted that the opposite should apply in circumstances like this and held that, "the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high."[84] The Court lastly posed a very important question, the question of whether

> there are any conceivable consideration of public or legal policy that dictates that the two employees (Louw and Scholtz who committed the fraudulent deeds) or their employer should enjoy immunity against liability for their fraudulent conduct?[85]

The Court found none and made it clear that the fact that the fraud was committed in the course of a "public-tender process cannot, in their view, serve to immunise the wrongdoers"[86] or their employers, and found that the tender process itself does not provide

> government institutions with a shield that protects them against vicarious liability for the fraudulent conduct of their servants. It is clear that the wrongfulness issue therefore cannot shield the defendants.[87]

2.4.2 The onus of proof: do the facts establish dishonesty?

The Court made it clear in the *Gore* matter that in order for an unsuccessful tenderer to succeed with a claim for delictual damages the plaintiff bears the onus and has to proof dishonesty or fraud on the part of one or more of the public officials. This was confirmed in the case of *SA Post Office v De Lacy.*[88] The facts of this case are briefly as follows:

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[83] *Ibid.*
[84] *Id* para 88.
[85] *Id* para 90.
[86] *Id* para 90.
[87] *Id*.
[88] The Court clearly stipulated in paragraph 14 that: "*Gore* makes it clear, when read together with *Steenkamp*, that irregularities falling short of dishonest, 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 dishonesty 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."

> 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… One of the tenderers was a company within the Cornerstone group… Cornastone's principal role in the project was to contribute 'black economic empowerment credibility to the tender. Instead, the driving force behind the project was a Mr. De Lacy and Mr. Beadon, the respondents in the appeal. The contract was awarded to a rival tenderer – a consortium that is referred to as Kumo.[89]

The respondents instituted 3 claims against the appellant on the basis that the contract was awarded to Kumo through dishonest manipulation and corruption. Claim A was for the recovery of lost profit that they alleged Cornarstone would have made had it been awarded the contract, in the amount of R108 million. Claim B was also for the recovery of lost profit but on the basis that had they been awarded the contract they would have secured separate similar contracts in other provinces, in the amount of R406 million, and claim C was a claim instituted on the basis of unjust enrichment, as they alleged that SAPO used Cornarstone's technology.[90] The plaintiff succeeded with claim A in part in the court *a quo* and claims B and C were dismissed.

The Respondent failed to provide sufficient evidence in order to prove fraudulent or dishonest conduct by the appellant or any of its officials, and as their case was merely founded upon inference, they were unable to present direct evidence of fraud or dishonesty.[91] The Court clearly stated that 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 and it must be the more natural or plausible, conclusion from amongst several conceivable ones when measured against the probabilities.[92]

[89] *SA Post Office v De Lacy* 2009 (5) SA 255 para 9 & 10.
[90] *Id* para 11.
[91] *Id* para 34.
[92] *Id* para 35.

This makes it very clear that the onus of proof in order to succeed with a claim for delictual damages rests very heavily upon the shoulders of an unsuccessful tenderer who decides to litigate. One cannot pursue this route if there is no concrete evidence that proves fraud or dishonesty on the side of the state. A mere assumption or vague probability will not suffice and it is important to address the court with clear and concise evidence.

The respondent's relied upon the fact that they were the highest scorer, and on that basis the tender should have been awarded to them.[93] They failed to convince the Court, who stipulated that such reasoning would stand only if all the facts were evaluated as a whole and the only reasonable and natural explanation that can be drawn is that the award of the contract to Kumo had been due to a "dishonest conspiracy."[94] It is relevant to note that Cornarstone had the highest score in general, due to its BEE scoring but Kumo's technical score was higher than Cornarstone's. On this point the Court rightfully held that it would be appropriate for the Evaluation Committee to believe that the standard weighting was not appropriate due to the technicality of the tender and in these circumstances Kumo was the more favourable tenderer.[95] This indicates that an unsuccessful tenderer should evaluate the facts carefully and should bestow the necessary attention to the reasons given by a tender committee for granting a tender to a specific party. The mere fact that the tender was granted to a tenderer who did not score the highest points, does not by itself establish dishonesty or fraud.[96]In conclusion the Court held that even if there were some or other form of irregularities, incompetence or negligence or even if Cornarstone was more worthy of being awarded the tender, it is not enough to sustain a claim for damages.

2.5 Conclusion

The outcomes of these various judgments clearly illustrate the complexity the courts are faced with when dealing with matters where conflicting interests have to be protected. Maintaining a balance between a right that has to be effectively vindicated on the one hand and the effect that this vindication will have on the public interest

[93] *Id* para 39.
[94] *Id* para 40.
[95] *Id* para 44.
[96] *Id* para 45.

and specifically the public's purse on the other hand is not a simple duty. It is evident from the facts in the *Steenkamp* matter that public law remedies should be developed in order to include specific private law remedies and to ultimately develop an effective remedial system in the public procurement sector. The majority judgment in *Steenkamp* did not uphold this essential requirement for just administrative action. The majority failed to have cognisance of the major burden that this unsophisticated and simplistic approach will have on the future development of our administrative regime and did not consider the true meaning of the underlying principles in our Constitution. The specific circumstances of the *Steenkamp* matter allowed the Court to develop and apply a remedy suitable for that specific case, (as illustrated by the minority judgment). The distinctive differences between the circumstances in *Olitzki* and *Steenkamp* should have been noted and are sufficient to justify a different ruling in each case. The majority ruling of *Steenkamp* does not uphold the rule of law, and merely protects the interest of the state and not that of the contracting party.[97] It is apparent from the *Steenkamp* and the *Gore* matter that the only circumstances in which an aggrieved party will be successful with a claim for damages under the provisions of s217 of the Constitution is where fraudulent or dishonest conduct by the state or one of its officials is proven by the tenderer. The onus of proof lies in the hands of the tenderer and adequate evidence (as illustrated in *SA Post Office*) should be brought before court in order to succeed with ones claim.

[97] Quinot (note 16 *supra*) at 119.

CHAPTER 3 – THE STATES LIABILITY TO PAY DAMAGES UNDER THE PROVISIONS OF PAJA

3.1 Introduction

In terms of s 8 of PAJA a court or tribunal that deals with proceedings for judicial review may grant any order as long as this order is just and equitable. This section makes provision for the remedies available to the relevant parties, and if the review is successful the

> Court is empowered by ss (1)(c) to set aside the administrative action and do one of three things:
>
> 1. it may remit the matter for reconsideration by the administrator, with or without directions;
> 2. it may substitute or vary the administrative action or correct a defect resulting there from; or
> 3. it may direct the administrator or any other party to the proceedings to pay compensation.[1]

The second and third options are qualified by the phrase 'in exceptional circumstances.' It is clear that the preferred option is for the matter to be referred back to the administrator for reconsideration, which is "in line with the view that the Courts ought not to usurp the power that has been delegated to the decision maker."[2]

This chapter deals mainly with the third option, the question of payment of compensation in terms of s 8(1)(c)(ii)(bb) of PAJA, and which factors the courts consider in order to determine the qualification of 'exceptional circumstances.' In the matter of *Darson Construcion (Pty) Ltd v City of Cape Town*[3] the Court had to determine whether the payment of compensation in terms of s 8 of PAJA would be a just and equitable order.

[1] Quinot (see note 7 ch 1) at 665.
[2] *Id* at 665.
[3] 2007 (4) SA 488 (C) (*Darson*).

3.2 Compensation in terms of s 8 of PAJA: the *Darson Construction* case

3.2.1 Facts

In *Darson Construction* the applicant tendered for a civil engineering contract. The contract was awarded by the first respondent to the second respondent.

Applicant had the highest scoring and achieved 81.42 points out of 100 and the second respondent scored 74.49 points. However,

> At a meeting held on the 10th of December 2004, The Goods, Services and Property Advisory Body, noted that applicant had been awarded a number of contracts during its tenure. It was of the view that the opportunities to secure contracts with the city should be spread equitably to companies and it therefore recommended that second respondent's tender be accepted The recommendation was forwarded to the first respondent's Supply Chain Management Committee which, on 17 December 2004, accepted the recommendation and resolved that the tender offer submitted by second respondent in the sum of R21 382 989.96 be accepted.[4]

The applicant was informed on the 23rd of December 2004 that its tender was unsuccessful and that it had a right to appeal. Upon appeal the acting city manager decided in favour of the applicant and the decision taken by the Supply Chain Management Committee was revoked and referred back for reconsideration. The city manager found that the Supply Chain Management Committee faulted by taking into consideration the equitable spread of opportunities to secure contracts, which measure did not exist in the tender condition.

A very important observation made by the Court relates to the fact that the applicant failed to seek an undertaking from the first respondent, before the noting of the appeal, pending the outcome of the appeal that it would not award the tender or would prevent the successful tenderer from commencing with the project.[5] It was only on the 22nd of March 2005 that "applicant's

[4] *Id* at 492.
[5] *Id* at 493.

attorneys requested first respondent to confirm urgently that it had instructed second respondent to cease building works and vacate the site."[6] On the 1st of April 2005 the Supply Chain Management Committee confirmed their decision to award the contract to the second respondent. The applicant launched an urgent application on the 18th of April 2005. The application was initially sought on the basis of an interdict in order to prevent the second respondent from proceeding with any further building and construction on the project pending the outcome of the review application, but due to the extensive work done by the second respondent, the applicant tendered not to seek any further costs against the second respondent if it withdrew its opposition.

Applicant amended its notice of motion and sought an order "declaring that it was entitled to have been awarded the contract and to claim compensation in the sum of R1 808 507.12 pursuant to the terms of s 8(1)(c)(ii)(bb) and (d) of PAJA."[7]

3.2.2 A brief overview of the arguments on behalf of the applicant and the first respondent

The first respondent relied heavily on the requirement of equality in terms of s 217(1) of the Constitution as well as on s 2(1)(f) of the Preferential Procurement Policy Framework Act[8] (PPPF Act), which permits the award of a contract to a tenderer who does not score the highest points where "objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer."[9] These arguments were mainly advanced in order to justify its decision to award the contract to the second respondent notwithstanding the fact that the applicant scored the highest points and to rationalize their actions in considering the fact that the applicant had already been awarded many tenders in the past. The respondent submitted that no 'exceptional circumstances' as required by s 8(1)(c)(ii)(bb) were set out by the applicant as to permit a claim for loss of profit.[10] Their second argument was

[6] *Ibid.*
[7] *Id* at 494.
[8] Act 5 of 2000.
[9] *Ibid.*
[10] *Id* at 496.

based on the premise that a claim for compensation under PAJA does not include a claim for loss of profit but rather a claim for out of pocket expenses; and "thirdly it was denied that the applicant had alleged sufficient facts from which the Court could determine the loss, if any, that applicant has suffered."[11] In the replying affidavit of the applicant it was stated that exceptional circumstances do indeed exist and three specific factors were listed:

1. It was noted that "on first respondent's own showing the decisions were defective;"[12]
2. "Considerations which should not have been taken into account were taken into account in respect of both decisions; and"[13]
3. "Following the successful appeal, the equitable-spread criterion which had been rejected was used again to justify the decision to award the contract to second respondent."[14]

By virtue of a further amendment the applicant made provision for its out-of-pocket expenses in the amount of R25 955.00 and substituted his claim of R1 834 462.12 with R 1 808 507.12.

The most important aspect which was addressed by the Court was whether the

> appointment by the Director: Legal Services of Mr Robson, to act in his place and be consulted by the chief financial officer when decisions were taken to act on recommendations of the Goods, Services and Property Advisory Board, was competent.[15]

The counsel for the first respondent advised that the sub-delegation was not valid. This conclusion was accepted by counsel for the applicant. Extensive arguments were advanced by counsel for the applicant discussing this very

[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Id* at 497.
[15] *Ibid.*

point and it was submitted that on the first respondent's own showing the decisions taken on 17 December 2004 and on 1 April 2005 to award and re-award the contract to second respondent are reviewable,

> on the simple basis that they were taken by the Supply Chain Management Committee whereas they should have been taken by the Chief Financial Officer acting in consultation with the two designated officials with delegated authority. Also that Mr Robson is not the Director: Legal Services, but had been nominated by the said Director to act in his stead for and on his behalf.

Detailed arguments were lead on behalf of the applicant applying and analyzing s 217[16] of the Constitution as well as s 2(1) of the PPPF Act, which provides that an organ of State must determine a preferential procurement policy and implement it within the framework of the Act.[17]

The Court found that these factors were not relevant as the decisions of an unauthorised administrator are in any event invalid and cannot be upheld, which makes the contract on 17 December 2004 reviewable pursuant to the provisions of s6(2)(a)(ii) and 6(2)(b)[18] of PAJA.

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[16] Refer to para 1.3 of Chapter 1 for a description of this section.

[17] Mr. Heunis, counsel for the applicant, referred to the salient features of the framework and described it as follows:
"A preference points system must be followed for contracts with a Rand value of more than a prescribed amount according to which ten points may be allocated for specific goals as contemplated in s2(1)(d); provided that the lowest acceptable tender scores 90 points for price. The acceptable goals may include-
contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination; and
implementing the programmes of the Reconstruction and Development Programme."
He argued that any specific goal for which a point may be awarded must be clearly specified in the invitation to tender, and has to be measurable, quantifiable and has to be monitored for compliance. He referred to ss(1)(e) of the Act, and submitted that "the achievement of an equitable spread of work is a specific goal and ought therefore to have been clearly specified in accordance with the provisions of this subsection." (See p 498 and 499 of the judgment).

[18] These sections provides that:
(2) 'A Court or tribunal has the power to judicially review an administrative action if-
(a) the administrator who took it-
(i)…..
(ii) acted under a delegation of power which was not authorised by the empowering provision; or
(iii)…..
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.'

3.2.3 The Court's finding: just and equitable?

The phrase 'in exceptional cases' was not defined or interpreted by the Court upon making the decision of whether the applicant should succeed with its claim for compensation. The Court found that it would be 'undesirable' to define this phrase and that each case should be assessed on its own facts. Although I am in agreement with the Court that each case should be judged on its own merits in order to determine what would suffice as just and equitable in different circumstances, the Court had the opportunity to at least lay down some guidelines that may be considered where a claim is launched for compensation under PAJA. In both the *Olitzki* as well as the *Steenkamp* matter the Court was very clear on the different factors that had to be considered where damages are claimed under the Constitution. I am cognisant of the fact that it is not possible to classify the exact factors that will be vital in order to succeed with a claim for compensation under PAJA, but I am of the view that the basic considerations can be defined.

The Court emphasised the fact that it is not in the position to make a decision on whom the contract should be awarded to and whether to award it at all, due to considerations of specific expertise and lack of the factual background in this specific instance.[19] The Court held that there is no question that the decision taken by the respondent should be referred back to the proper authority for reconsideration, but that it is important to note that the contract period was already completed even before the hearing.[20] This is one of the most important factors, and the Court failed to address it sufficiently. The applicant would, notwithstanding the Court's view that the matter should be referred back to the proper authority for reconsideration, never be in the position where the matter would in actual fact be reconsidered. The contract was already completed when the order was made, and therefore the applicant would never stand the chance to be awarded the tender. The mere existence of this aspect and specifically in this set of facts should have been interpreted as a ground for an exceptional case.

[19] *Ibid.*
[20] *Darson* at 502.

In addition to the above the Court also referred to the dictum in the *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[21] matter and noted that the

> setting aside of an invalid decision does not per se affect the validity of the contract which was concluded between the first and the second respondent and which was later completed.[22]

The Court went further and made it clear that the applicant is not in a position to rely on the decisions or actions of the Supply Chain Management Committee in order to advance its case as these decisions, as well as the decision that was taken upon appeal were invalid.[23]

These two statements (the *dictum* in the *Oudekraal* matter and the Court's stance that the applicant cannot rely on the decisions taken by the Supply Chain Management) are clearly contradictory. The contract between the first and second respondent was concluded due to the decision taken by the Supply Chain Management Committee, but this action (the conclusion of the contract) and the consequences thereof were not affected in any manner whatsoever by the invalid decision. The Court confirms this *dictum* and relies on the action taken by the first respondent after the invalid decision was taken, by indirectly confirming the validity of the contract between first and second respondent. The applicant on the other hand is not permitted to rely on any actions or decisions taken by the first respondent of whatsoever nature, in order to advance or in actual fact to argue its case. If the Court may rely on an action taken after an invalid decision, it would only be fair and reasonable if the same opportunity is afforded the applicant.

The Court referred to the *dicta*[24] of Ackerman J in *Fose v Minister of Safety and Security*[25] as well as the *dicta of* Cameron JA in the *Olitzky*[26] matter in

[21] 2004 (6) SA 222 (SCA).
[22] *Darson* at 502.
[23] *Id* at 504.
[24] *Ibid* "… it seems to me that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce ch 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be

order to define the term 'appropriate relief' and to decide whether an award in the amount of R18 34 462.12 which includes the sum of R25 955.00 for out of pocket expenses is 'just and equitable,'[27] and held that it is apparent that an award for compensation is not intended to be the norm.

The Court emphasised the route the applicant chose to follow and made it clear that the applicant did not approach the Court soon enough, and referred to Cameron JA in the *Olitzki* matter where it was held that "fair scrutiny must encompass all aspects of its position, and the alternative remedies available to it, at all stages of the dispute, must be a critical factor in that assessment."[28] The Court held that applicant should have approached the Court for an interdict immediately after the award of the contract to second respondent, and that the appeal procedure followed by applicant was the wrong remedy. It was held that

> in any event when applicant became aware that second respondent was on site and had begun work in terms of the contract, it could immediately have approached the Court to interdict second respondent pending the outcome of its appeal."[29]

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claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed."

[25] 1997 (3) SA 786 (CC).

[26] *Darson* at 505 "Certainly the contention that it is just and reasonable, or in accord with the community's sense of justice, or assertive of the interim Constitutions' fundamental values, to award an unsuccessful tenderer who can prove misfeasance in the actual award its lost profit does not strike me in thiscontext as persuasive. As the plaintiff's claim, which amounts to more than R10 million, illustrates, the resultant imposition of 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 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."

[27] *Darson* at 504.

[28] *Id* 506.

[29] *Darson* at 506.

The Court held further that

> an application for an interdict would, in all probability, have brought to the fore that the decision of 17 December 2004 was invalid and would have prevented the loss which applicant seeks to recover had applicant, in addition been able to show its entitlement to the contract."[30]

If applicant had launched an application for an interdict prohibiting second respondent from continuing with the work pending the outcome of the appeal (considering the outcome of the appeal and the subsequent re-award of the contract to second respondent), applicant would have been compelled, after the re-award of the contract to second respondent to once again launch an application for an interim interdict pending the outcome of the review application. The question is: Is it reasonable in the circumstances to expect of the applicant to go to this extent to limit its damages, especially in a situation where provision is made for an internal appeal procedure and where this appeal procedure was followed by the applicant? Second respondent was aware of this appeal procedure and applicant wasted no time to appeal the decision of the Supply Chain Management Committee. I am of the view that it was second respondent who must be faulted by not prohibiting first respondent from commencing with the work on the contract pending the outcome of the appeal, rather than applicant being faulted for not seeking an interdict. Applicant's attempts to resolve the matter without pursuing the litigious route were *bona fide* and in direct contrast to second respondent's *mala fide* actions; blatantly ignoring applicant's correspondence.

The Court highlighted the 'policy considerations'[31] that were taken into account in both the *Olitzki* and *Steenkamp* matters and noted that these

> practical considerations behind the policy which has led courts to decline to recognise the delictual claims of unsuccessful tenderers (and successful tenderers who are subsequently ousted) for loss of profits carry considerable weight when deciding, on

[30] *Ibid.*
[31] For an overview of these policy considerations refer to chapter 2 hereof.

> the facts of this case, whether an award of applicant's loss of profit is 'just and equitable' and an appropriate remedy."[32]

The Court expressed the view that to grant applicant its claim for loss of profits "in the sum claimed and on the evidence which it placed before the Court would not result in a 'just and equitable' order."[33] The Court went further and explained that the applicant's quantification of its damages are faulty, in that the applicant simply added its out-of-pocket expenses to the sum of R1 808 507.12 being the alleged loss of profits. This, the Court continued, illustrates a lack of understanding on the applicant's side of its true loss.[34] The Court noted that in the event of the tender being awarded to applicant the profit made would have been profit after deduction of all costs, and that out-of-pocket expenses can only be an alternative claim to loss of profit. I agree with the Court's finding on this specific aspect but am of the view that this calculation error of the applicant should not be detrimental to the validity of its claim. The Court could have ordered applicant to lead additional evidence in order to quantify its damages. Unlike the *Steenkamp* matter the Court granted an order in favour of the applicant pursuant to the terms of s 8 (1)(c)(ii)(b) of PAJA, for out-of-pocket expenses, in the amount of R25 955.00, which was one positive light that this matter shed on the development of our administrative jurisprudence. The Court noted that it is "satisfied that applicant is entitled to some compensation for the manner in which first respondent breached its right to administrative justice."[35]

The Court also ordered the setting aside of both decisions taken by the Supply Chain Management Committee on behalf of first respondent on the 17th of December 2004 and the 1st of April 2005, notwithstanding the fact that the first respondent has already fulfilled its obligations in terms of the contract, and that the award of the contract to first respondent can for this reason not be re-evaluated or re-awarded to another tenderer. As for the costs of the application the Court found it to be just and equitable that the costs be paid by

[32] *Darson* at 509.
[33] *Ibid.*
[34] *Ibid.*
[35] *Darson* at 510.

the first respondent, due to the applicant's success of having the review upheld and of being awarded compensation for its out-of-pocket expenses.[36]

3.2.4 PAJA's compensation remedy: applicable to an initially successful tenderer's claim for out-of-pocket expenses?

In light of the finding in the *Darson Construction* matter I am confident (if we, hypothetically speaking, for one second, leave the procedural obstacle that will be discussed hereunder out of the equation) that an initially successful tenderer might just be successful in claiming for compensation in the form of out-of-pocket expenses under the provisions of PAJA. I am of the opinion that PAJA has the potential to provide an effective remedy to a claimant such as Balraz in the *Steenkamp*[37] matter. I do not agree with Quinot that the "realisation of this potential is doubtful,"[38] and believe that the opposite is more likely. In the *Darson Construction* matter the Court found an order in favour of the applicant for payment of compensation in the form of out-of-pocket expenses to be just and equitable based on the following view:

> …the applicant is entitled to some compensation for the manner in which first respondent breached its right to administrative justice. Having regard to the facts of this matter it is clear that applicant responded at a cost to the invitation to tender, only to have its tender considered by an unauthorised administrator - the Supply Chain Management Committee. Applicant deserved far better from first respondent.[39]

Although the Court recognized and noted the policy considerations that were taken into account in both the *Olitzki* and *Steenkamp* matters these considerations did not influence the Court's decision to award compensation for the applicant's out-of-pocket expenses incurred in order to tender. These considerations were in fact regarded as relevant only in determining whether the applicant should succeed with its claim for loss of profit and to decide whether such a claim would be just and equitable based on the merits and specific circumstances of the particular case. In addition the Court did not define the grounds (as quoted above) on which it based its reasoning for

[36] *Ibid*.
[37] Refer to chapter 2 for a discussion and analysis of the *Steenkamp* case.
[38] Quinot (see note 16 ch 2) at115.
[39] *Darson* at 510.

compensation in the form of out-of-pocket expenses as 'exceptional' circumstances. In the contrary the Court merely based its finding for 'some compensation' on the manner in which first respondent breached the applicant's right to administrative justice.

In the *Steenkamp* matter a review application was also brought before court and the applicants succeeded with the review application, and the contract was set aside on the grounds that the

> decision to award the contract was tainted by an unwarranted adherence to a fixed principle; a misconception of the nature of the discretion conferred; the consideration of irrelevant factors; a failure to consider relevant facts and gross unreasonableness.[40]

These factors are far worse than the relevant factors in the *Darson Construction* matter. In addition Balraz (in the *Steenkamp* matter) was initially successful with its tender, also responded at a cost to tender and deserved far better from the tender board. If we consider these important different aspects as well as the grounds that lead the application for review to be successful I can think of no reason, substantively, why Balraz should not also be successful with a claim for compensation for out-of-pocket expenses under PAJA.

Procedurally there is an obstacle to overcome, and on this specific aspect Quinot noted the following:

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

[40] Quinot (see note 16 ch 2) at102.

> and setting aside of the tender award. In other words, a compensation claim in terms of PAJA would not have been available in Steenkamp even if the Act was operative at the relevant time.[41]

It is true that the issue of compensation would most likely not have been raised because of the "initially successful tenderer's alignment with the organ of state during the review application", but should this be seen as a reason why the initially successful tenderer would never succeed with a claim for compensation of its out-of-pocket expenses under the provisions of PAJA. Sachs J stated that "both the interim Constitution and the final Constitution envisage a right to just administrative action",[42] and that "just compensation today can be achieved where necessary by means of PAJA."[43] These statements should form the basis of the tenderer's claim. Just administrative action would only prevail, if we consider the merits and circumstances in the *Steenkamp* matter, if the initially successful tenderer is compensated for its loss of its out-of-pocket expenses in the event of the award being set aside. If the reviewing court did not order compensation in terms of PAJA to the initially successful tenderer when the contract is set aside would it be just and equitable to exclude the option and availability of this remedy to the initially successful tenderer? Before answering this question it is important to consider the following factors:

1. the issue of compensation would mostly not have been aired because of the initially successful tenderer's alignment with the organ of state during the review application,
2. the reviewing court would mostly not have had the necessary evidentiary material in front of it to grant such an order,
3. the organ of state would not have had an opportunity to address the court on the issue of compensation to one of its co-respondents.

[41] *Ibid*.
[42] *Steenkamp* para 100.
[43] *Id* para 100.

"Given the applicability of PAJA, to the adjudication of public tenders and its express provision for the award of compensation,"[44] as rightfully stated by Quinot, I can find no reason why an initially successful tenderer should not be able to claim compensation for its out-of-pocket expenses after the tender award had been set aside and even if this claim is instituted after the review application had been heard. If due consideration is given to

1. the preamble of PAJA which explicitly states that PAJA was enacted to "give effect to the right to administrative action that is lawful, reasonable and procedurally fair…"[45] and in order to "*create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action*"[46] and;
2. s 39(2) of the Constitution which provides that; "when interpreting any legislation….every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights"

it is clear that s 8 of PAJA cannot be interpreted restrictively and in the sense that the remedy under s 8(1)(c)(ii) will strictly only be applicable during the primary review proceedings itself and not be available to the initially successful tenderer afterwards.

3.3 Conclusion

The *Darson Construction* case (if the fact that the applicant was not successful with its claim for loss of profit, as well as the fact that the tender award notwithstanding it being set aside will not be re-evaluated or re-awarded to another tenderer are, ignored) sheds some light on the availability of remedies that are to some extent effective in the public procurement sector and contributes a much more positive development on administrative law jurisprudence than the *Steenkamp* matter. At least the applicant, who was not even an initially successful tenderer, succeeded partially with its claim for

[44] Quinot (see note 16 ch 2) at117.
[45] See preamble of Promotion of Administrative Justice Act 3 of 2000.
[46] *Ibid*.

compensation under PAJA. In chapter 4 the judgment in *Millennium Waste Management v Chairperson Tender Board*[47] will be discussed and critically analyzed in order to illustrate how South African courts can move towards an even more sophisticated and efficient approach in order to effectively vindicate infringed rights within the public procurement sector.

[47] 2008 (2) SA 481 (SCA).

CHAPTER 4 – JUDICIAL REMEDIES IN REVIEW PROCEEDINGS

4.1 Introduction

"The utility of any system of judicial review depends largely on the effectiveness of its remedies."[1] This view expressed by Hoexter is significantly important, for without effective remedies that will ensure a proper vindication of parties' rights the entire review process will be worthless and of no force or effect. The main focus of this chapter is a discussion and critical analysis of the interpretation of the courts' views and judgments on the various other remedies available to litigants under the provisions of s 8(1)[2] of PAJA, where the award of a government tender is the source of the litigation.

Are our courts willing to act robustly by interfering with the awards of government tenders in order to ensure that a just and equitable decision is made? The reason why this question is raised and needs to be answered is in order to determine under which circumstances will an invalid administrative decision where a government tender was awarded to a specific party actually be set aside.

In order to answer the question set out above I dealt with four different judgments which are discussed hereunder.

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[1] Hoexter Administrative Law in South Africa (2007) at 462.

[2] Section 8(1) of PAJA provides that:

(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders-
  (a) Directing the administrator-
    (i) to give reasons; or
    (ii) to act in the manner the court or tribunal requires;
  (b) prohibiting the administrator from acting in a particular manner;
  (c) setting aside the administrative action and-
    (i) remitting the matter for reconsideration by the administrator, with or without directions; or;
    (ii) in exceptional cases-
      (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
      (bb) directing the administrator or any other party to the proceedings to pay compensation;
  (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
  (e) granting a temporary interdict or other temporary relief; or
  (f) as to costs

4.2 What effect will time have on the outcome of a reviewable award - the *JFE Sapela Electronics* case

In the matter of *Chairperson, STC v JFE Sapela Electronics*[3] the SCA was faced with the difficult question of whether to set aside an invalid administrative act, under circumstances where a vast period of time has already lapsed since the decision was made and the award was granted.

4.2.1 A brief description of the facts

The third respondent Nolitha Electrical and Construction (Pty) Ltd (Nolitha) was the successful tenderer for three separate contracts to perform certain repair and maintenance work at three separate prisons in the Western Cape for the Department of Public Works, who was the second appellant in the matter. Two companies, who were both unsuccessful tenderers launched an application in the High Court for the review and setting aside of the award of the tenders, and were successful in their application, the High Court set aside the award of the tenders and declared the contracts entered into between the third respondent and the second appellant to be null and void. The two companies who were the unsuccessful tenderers were JFE Sapela Electronics (Pty) Ltd (Sapela) and JFE Power Distribution (Pty) Ltd. The first appellant in the matter was the chairperson of the Department of Public Works' (DPW) Standing Tender Committee which functions as the DPW's head office. The basis on which the application was brought is set out in the following summary and I deem it necessary to quote this passage:

> In the case of the first two tenders, the third respondent had quoted nominal amounts for a whole section of the work in the knowledge that it would not have to perform the work; and, in the case of the third tender, that, after tenders had been opened, the second appellant and third respondent had agreed to reallocate amounts over tendered for two items of work to items for which the third respondent had under tendered.[4]

4.2.2 Judgment of the SCA - appropriate in the circumstances?

The SCA came to the conclusion that the tenders submitted by Nolitha should have been rejected[5], but for purposes of this dissertation I considered it unnecessary to

[3] 2008 (2) SA 638 (SCA).
[4] *Id* at 639.
[5] This stance was emphasised in paragraph 15: "It follows that in my view both Nolitha's Drakenstein tender

discuss the reasoning of the court behind this finding as the main focus is whether the actual judgment of the court constituted appropriate relief under the circumstances of the case and to determine under which circumstances an invalid decision will in actual fact be set aside by the court. In order to determine these factors I find it important to quote his Honourable Justice Scott who noted that:

> Had the application in the court below been adjudicated when proceedings were launched Sapela and Reticulation (the respondents) would no doubt have been entitled to the relief they sought. But given the inevitable effluxion of time and the extent of the work performed by Nolitha between the launching of proceedings and the granting of judgment, the question that arises is whether the relief sought, and granted, was capable of practical implementation.[6]

The court's standpoint in this regard makes it clear that not only are litigants faced with the onus of proofing that an administrative action is reviewable but are also burdened with the issue of ensuring that the matter is expeditiously ventilated. This obligation may in some circumstances be impossible to accomplish.[7] In this case not even the respondents' prompt reaction after it came to their attention that the contracts were awarded to Nolitha, could guarantee the relief that they sought.[8] The court found that it would be impracticable to start the tender process over again for

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and Worcester tender were unacceptable and should have been rejected." Scott JA also noted in paragraph 19 that: "In the present case, what in effect occurred is that Nolitha's tender, with the latter's written consent, was adjusted by the reallocation of an amount overqouted for one or, rather, two items, to 'most of the remaining maintenance items for Installations A to p' for which Nolitha had underquoted. The effect was apparently to convert a tender from one regarded by the engineer as unbalanced and a financial risk to one which was acceptable. But the offer made by Nolitha, as embodied in its tender, was not the one ultimately accepted. What was accepted was in truth an offer that was made on 7 November 2003, some two months after the closing date for tenders. In my view this was enough to strip the tender process of the element of fairness which requires the equal evaluation of tenders. It follows that the acceptance of the Nolitha tender and the award of the contract were correctly held by the court a qou to be reviewable."

[6] *Id* para 20.

[7] If one only considers the obstacles that an applicant might be faced with in order to set a matter down for hearing on an urgent basis, it is easy to grasp how heavily this burden lies upon the shoulders of the applicant. In order to succeed with an urgent application, grounds for urgency needs to be proven, and to proof these grounds, the applicant has to be in possession of certain facts including at least the facts upon which the administrator based its decision. If a matter is not set down for hearing on an urgent basis and the matter is opposed, which is the case in most of these matters; it might take months before the matter is actually heard. It is clear that these are difficult obstacles to overcome.

[8] The court emphasised their position in paragraph 26 and stated: "Within a day or two of becoming aware of the award of the Helderstroom tender the respondents wrote to the Ministry expressing their concern over the tender process. As early as 26 January 2004 they wrote to the DPW requesting the documents necessary to enable them to ascertain their rights with regard to a possible review. The request was refused. A subsequent attempt to invoke the provisions of the Promotion of Access to Information Act was similarly unsuccessful. Ultimately they were obliged to institute proceedings even before they were fully apprised of the facts necessary to substantiate the review. The documents they sought were eventually furnished to them on 23 March 2004, almost two months after their initial request. It was only then that they were able to file a supplementary affidavit properly substantiating the relief they sought. In my view they were not in any way to blame for a delay in initiating proceedings or brining them to finality.

the completion of the remaining work, and emphasised that if the court a quo's order is followed it would give rise to 'a host of problems' in relation to both the tender process and the work to be performed.[9] The court noted that "in appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act"[10] and referred to the view expressed in the *Oudekraal Estates*[11] matter, which reads as follows:

> It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.[12]

Although it was found that there was no culpable delay on the part of the respondents, the court found that the circumstances of the case are of such a nature that an invalid administrative act must be permitted to stand.

It is clear that an administrative act (and for relevance of this dissertation an award of a government tender) will not automatically be set aside if it was found that the granting of the award to a specific tenderer was invalid. The circumstances, merits and the consequences if the award is set aside, have to be evaluated first in order to determine whether the setting aside of the invalid administrative act should be permitted. In these circumstances where the invalid administrative act is not set aside, and specifically where the aggrieved party was an honest tenderer and a *bona fide* party to the litigation it is difficult to argue that the judgment that was granted was appropriate and constituted effective relief as envisaged in s 38 of the Constitution. If one however considers the reasoning behind the court's finding it is clear that in some circumstances, the relief granted may seem to be appropriate but does not necessary constitute effective relief.[13] The courts are faced with the difficult task of balancing the interests of the relevant parties as well as the interest of the public on whose behalf the administrative body is suppose to act. This stance was emphasised in the matter of *Millennium Waste Management*[14] which will be discussed hereunder. It is important to note that the circumstances of each case

[9] *Id* para 27.
[10] *Id* para 28.
[11] 2004 (6) SA 222 (SCA).
[12] *Id* para 36 at 246D.
[13] For an explanation of the terms 'effective and appropriate relief refer to paragraph 1.2 of chapter one hereof.
[14] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA).

plays a pivotal role in the court's finding especially where an application is launched in order to set aside and invalid award, at this early stage it is already clear that the court will not automatically set aside an award even if it was found that the administrative act was in actual fact invalid.

4.3 A Just and Equitable Order – the *Millennium Waste Management* judgment

In this matter the court clearly illustrated that the remedies under s 8 of PAJA are flexible in nature providing the court with the necessary means to formulate just and equitable orders, orders that properly protect the interests of the relevant parties.

4.3.1 A brief overview of the facts

Tenders were invited for the removal of medical waste from public hospitals by the Limpopo Department of Health and Social Development. The tender was awarded to a consortium of companies, hereinafter referred to as the "consortium". The applicant- Millennium Waste Management (Pty) Ltd (hereinafter referred to as 'Millennium Waste') was one of a number of tenderers, its tender was however disqualified by the departmental tender committee due to non-compliance with administrative requirements. This non-compliance was not the fault of Millennium Waste, but notwithstanding this fact its tender was not considered. The applicant applied to the High Court for the review and setting aside of the tender decision but was unsuccessful in its application, upon appeal to the SCA the court found that the tender of Millennium Waste was mistakenly disqualified and that the tender decision was reviewable.

4.3.2 The judgment of the SCA

In order to express and draw the necessary attention to the court's attitude when this matter was adjudicated, and even more so due to the relevance of this approach to my dissertation, I find it essential to quote the court's interpretation of s 8 of PAJA and of what would suffice as a just and equitable order

> The question of relief remains for consideration. While acknowledging that there was no culpable delay on the part of the appellant to institute review proceedings, exercising its discretion the court below dismissed the application with costs. In so doing the court overlooked the provisions of s 8 of PAJA which require that any order granted in matters such

> as this be just and equitable. This guideline involves a process of striking a balance between the applicant's interests, on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only. Furthermore, the section lists a range of remedies from which the court may choose a suitable one upon a consideration of all relevant facts. The dismissal of the application by the court below does not constitute appropriate and effective relief contemplated in s 38 of the Constitution. In view of the court a quo's error this court is entitled to interfere with the order granted.[15]

It is apparent from this passage that the court recognized the fact that orders made in terms of s 8 of PAJA should be made in line with the qualification of being just and equitable. This important directive should always be the starting point of any judgment passed under the provisions of PAJA, and with this in mind the court will ensure that appropriate and effective relief is granted.

The court recognised the difficulty that is presented by invalid administrative acts, as described in the *Oudekraal Estates*[16] matter and noted that a contract is almost immediately acted upon by acceptance of a tender, which may cause devastating consequences for both the innocent tenderer and the public if the contract is rendered invalid from its inception.[17] Notwithstanding this remark the court found a way of protecting the interests of all the relevant parties, and ensuring that the rights of the aggrieved tenderer are properly protected by formulating a very specific judgment.

The court identified four interests that needed to be taken into account in the exercising of its discretion:

(a) The first interest was that of the appellant, and specifically the loss it had suffered for not having its tender considered.[18]

(b) Secondly the court emphasised the fact that the consortium was an innocent party, as there was no suggestion that it was complicit in some way bringing about the exclusion of the appellant's tender.[19]

[15] *Id* para 22.
[16] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).
[17] 2008 (2) SA 481 (SCA) para 23.
[18] *Id* para 25.
[19] *Id* para 26.

(c) Thirdly the court considered the nature of the work that needed to be performed under the contract and noted that the service is for the removal and safe disposal of medical waste from all public hospitals in Limpopo Province that must be carried out without interruption and that the province does not have the capacity to step in itself if the contract is terminated.[20]

(d) The final interest that the court considered was the public purse. In this regard the court emphasised the fact that the consortium's price to provide the service was vastly more than that of the appellant, and even if the decision is set aside at this late stage, 29 months of the contract still remained which will make an enormous difference to the public purse if the appellant is indeed able to render the service at the price it had offered. The court however stressed the fact that at this stage it is all a matter of speculation. I deem it necessary to quote the court's explanation in this regard:

> It is only if the appellant's tender is now evaluated and found to be acceptable, and the decision to accept the consortium's tender is not set aside, that any loss will occur. But if the appellant's tender were not to be accepted, and the decision to appoint the consortium has meanwhile been set aside, nothing will have been gained and there is the real prospect that loss and disruption might occur.[21]

In reaching its decision the court stressed the fact that an order should be made that creates certainty and that properly protects the rights of all the parties including the public.[22]

The court ordered that the tenders must be evaluated by the tender board itself and that the decision to accept the consortium's tender must only be set aside if the appellant's tender is found to be accepted.[23] The court rightfully recognised the fact that the consortium (who is an innocent tenderer) might suffer a loss, if the tender of the appellant is accepted, but this loss is inevitable if one accommodates the loss of the public purse. It is clear from this passing that the interest of the public purse is an extremely relevant and important factor that the courts consider in determining which

[20] *Id* para 28.
[21] *Id* para 30.
[22] Id para 32. The court noted that: "*An order to that effect vindicates the appellant's rights to the full while it prevents the potential for disruption to the service, and it avoids unwarranted loss to the public purse.*"
[23] *Ibid*.

remedies will properly vindicate the aggrieved parties' rights. It is a consideration that can never be overlooked, no matter what the loss is that an aggrieved or innocent tenderer might suffer.

The court formulated its order in very exact terms, ensuring that there will be no further undue delay or confusion that might be to the detriment of the appellant.

4.4 A critical analysis of the differences between the *Sapela and Millennium Waste Management* judgements – which one should be preferred?

It is clear from both judgments that the court emphasised the position of the successful tenderer at the time when the award was granted to it. The question is whether the successful tenderer is also an innocent tenderer. This aspect was significantly pointed out in both the judgments.

The fact that neither of the unsuccessful tenderers could be blamed for the time period that has lapsed since they became aware of the invalid administrative act up until the point where the matter was brought to finality was noted in both cases. Notwithstanding these similarities two completely different decisions were reached. If one however considers the nature of the different contracts it is understandable that an exact same order in both instances is simply not possible. This once again reiterates the tremendous difficulty the courts are faced with in adjudicating these types of matters. Not only should the interests of all relevant parties be protected as was stressed in the *Millennium Waste Management*[24] case but by protecting these interests an appropriate and effective decision has to be reached.[25] The court properly vindicated the rights of the unsuccessful tenderer in the *Millennium Waste Management* case, but given the circumstances and the nature of the contract it was able to do so. A perfect balance was strike between the rights of the successful and unsuccessful tenderer as well as the public. The fact that the nature of the contract allowed the court to reach this decision makes one realize that this is another factor that an applicant should consider before approaching the court for the necessary relief. If it is ascertainable from the facts that are at the disposal of the applicant, that a contract have already been acted upon by a successful tenderer or the work will commence before the matter will be finalised it is necessary to consider launching an

[24] 2008 (2) SA 481 (SCA).
[25] *Id* para 22.

application for an interim interdict. This however is also easier said than done. On this point the court in the *Millennium Waste Management* matter noted the following:

> The DPW made it quite clear in correspondence that it was not prepared to suspend the work or to withhold from Nolitha access to any of the installations. It is true that the respondents did not proceed with their threatened interdict but, as explained in the replying affidavit, access to all the installations had by then been granted to Nolitha. Any application for an interdict would in any event have been opposed by the appellants.[26]

Unfortunately an applicant will never be in a position where the outcome of legal proceedings are predictable as it is clear that there is no specific recipe that can or should be followed. The facts at hand are dealt with in a manner that is suitable at that point in time, and it is easy to judge the manner in which proceedings were instituted, in retrospect, without considering the difficulties the party was faced with when the process commenced.

In the *Sapela* matter the circumstances simply did not favour the unsuccessful tenderer at the time when the matter was finalised, and the rights of the aggrieved party could not be properly protected.

It is easy to state that the court erred in its decision in the *Sapela* matter and that the judgment in the *Millennium Waste Management* matter should be preferred but this simple attitude towards a fairly difficult issue would be nothing less than naïve. One cannot merely compare the two judgments and prefer the one to the other, the judgments should be considered in line with the unique set of facts of each matter and this is also evident from the outcome in both the *Eskom Holdings*[27] and *Moseme*[28] matters that will be discussed hereunder. It is however important to note that the judgment in the *Millennium Waste Management* case was a positive development for our public law jurisprudence.

[26] *Id* para 26.
[27] *Eskom Holdings Ltd & another v The New Reclamation Group (Pty) Ltd* 2009 4 SA 628 (SCA).
[28] *Moseme Road Construction CC v King Civil Engineering CC* 2010 (4) SA 359 (SCA) (*Moseme*).

4.5 Setting aside an invalid award – illustrated in the *Eskom Holdings* matter

Due to the simplicity of the facts in this case I found it unnecessary to discuss it in great detail and will only refer to the facts briefly. Eskom Holdings Limited (Eskom) who was the first appellant in this matter awarded a tender for the collection and disposal of scrap metals to the second appellant – Kwanda Ferro-Alloy African Resources (Pty) Ltd (Kwanda). The respondent – New Reclamation Group (Pty) Ltd (NRG) was an unsuccessful tenderer who succeeded with the relief sought in the court a quo. The award of the tender to Kwanda was set aside and the High Court ordered both Eskom and Kwanda to pay the costs of NRG. Upon appeal the appeal was dismissed with costs and the SCA found that the award was rightfully set aside by the court a quo.[29] It is also important to note that Kwanda was partially to blame for the invalid award because its tender was flawed.[30]

The SCA drew a clear distinction between the facts and circumstances in this case from those in the *Olitzki*[31], *Darson Construction*[32], *Sapela* and *Millennium Waste Management* cases, which once again clearly illustrates that it is not possible to merely base the chances of success of one matter upon the outcome of another. Each set of facts are uniquely evaluated by the courts in order to reach a decision. These distinctions were briefly illustrated by the SCA as follows:

(1) During the appeal proceedings the second appellant (Kwanda) submitted that the relief sought by the respondent should be denied based on the fact that they failed to launch an application for an interdict at an early stage of the proceedings and relied on the decisions in the *Olitzki* and the *Darson Construction* matters.[33] The Court found that the facts in this case cannot be compared to those in either the *Olitzki* or the *Darson Construction* cases. In the *Olitzki* matter it was specifically found that the plaintiff would have been entitled to an interdict, and in this matter there is no guarantee that an application for an interdict would have been successful. The court also noted that an application for an interdict in this matter would most definitely have

[29] 2009 4 SA 628 (SCA) para 19.
[30] *Id* para 14.
[31] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA).
[32] Darson Construction (Pty) Ltd v City of Cape Town 2007 (4) SA 488 (C).
[33] 2009 (4) SA 628 (SCA*)* para 11.

been opposed.[34] The court based its finding in this regard on the following facts:

> The conclusion of the contract with Kwanda could not have been interdicted because NRG, through no fault of its own, only came to know of the award of the tender to Kwanda after the contract had been concluded. Given that the contract was already in existence, the balance of convenience would have been a major issue; and it appears from the papers that Eskom required removal of the material fairly urgently as the previous contract had lapsed at the end of April 2007, and the R35M Tender Committee expressed concern at its meeting on 1 June that Eskom might be facing the threat of backlog building up.[35]

The court emphasised the fact that the claims in the *Olitzki* and *Darson Construction* matters were for damages and that it is common cause that a person claiming damages must limit its loss. On this point I found the court's reasoning interesting and wish to illustrate the conclusion drawn by quoting the following:

> That principle finds no application in the present matter. And finally on this point, I have difficulty in understanding how it lies in the mouth of either Eskom or Kwanda to assert that the trial court should not have set the award of the tender aside because NRG did not attempt to protect them against themselves by bringing interdict proceedings that might have mitigated the prejudice they would suffer by the conduct that they were wrongly intent on pursuing. The boot was on the other foot. The position in which they found themselves before the court a quo was not due to NRG's inaction; it was due to their persistence in asserting the validity of the award of the tender in the face of the valid challenge by NRG.[36]

(2) The court emphasised the fact that this matter is also clearly distinguishable from the *Sapela* matter in that the latter was an exceptional case, where it was impractical to start the tender process over again for the completion of the remaining work. In this matter however the work involved the *ad hoc* collections of material, and each instruction of Eskom to the contractor constituted a separate agreement incorporating the terms of the original

[34] *Ibid.*
[35] *Ibid.*
[36] *Id* para 13.

contract. The court noted that any contractor could do that even at such a late stage.[37]

(3) The court finally noted that the facts in the *Millennium Waste Management* matter cannot be compared to the facts in this matter as there are no public policy considerations which "*militate against the setting aside of the award of the tender."*[38]

The SCA found that the award of the tender to Kwanda was seriously defective and based on that together with the considerations as listed above the appeal was dismissed with costs. After the discussion of the *Moseme* matter hereunder, the outcome of the *Eskom* judgment will be referred to in order to determine under which circumstances an invalid award of a tender will be set aside.

4.6 *Moseme Road Construction* – setting aside a tender award: inappropriate in the circumstances

4.6.1 A description of the essential facts as described by the SCA

The PPPF Act[39] prescribes the framework for the implementation of any preferential policy, which provides that organs of state must determine their preferential procurement policy based on a points system. In terms of s 2(1)(f) of the act contracts must be awarded to the tenderer who scores the highest points unless objective criteria are relevant and justifies the award to another tenderer.

Tenders were invited for the construction of a section of Beyers Naude drive in Gauteng by the Gauteng Department of Public Transport. The tender invitation that was advertised specified the criteria in order to qualify as civil engineering contractors that were capable of performing contracts having a value of more than R100m. The Respondents (King Civil Engineering, hereinafter referred to as King) did not qualify in terms of this advertisement. The second Appellant (Moseme Road Construction, hereinafter referred to as Moseme), who was the successful tenderer qualified. At the time when a compulsory site meeting was held before the tender was awarded, in question on behalf of King, the parties that attended the meeting were informed that those with a lower classification could also tender. King fell in the

[37] *Id* para 16.
[38] *Id* para 17.
[39] Act 5 of 2000.

lower group and tendered. King's tender scored the highest points. The Departmental Acquisition Council however disqualified King's tender, "on the rule of unfair competition and awarded the contract to Moseme."[40] It was found that it would have been unfair to award the tender to King if other contractors who would potentially have qualified in terms of the amended tender specifications had no knowledge of the amendment, which was never advertised. King's tender was therefore disqualified due to a mistake made by the Department. King was not aware of this error, or that the information that was given at the meeting was in actual fact wrong.

4.6.2 The decision of the High Court

King launched an application on an urgent basis for an interim interdict. The application was dismissed on the ground of 'balance of convenience.'[41] King then proceeded with an application for review and the setting aside of the award. King also requested the court to award the contract to it on the basis that its tender was for the lowest price, scored the highest points and was recommended during the evaluation process.[42] Moseme only opposed the prayer in King's application that dealt with the request to have the contract awarded to it, and by way of a counter-application sought a declaratory order, that the contract should remain extant notwithstanding the review. King's application was opposed in its entirety by the Department. The court a quo decided in King's favour and found the award to be reviewable, on the basis that:

> The decision was taken arbitrarily; that the matter had not been considered properly; and that the Department had taken irrelevant considerations into account.[43]

The court a quo found it to be just and equitable to set aside the award of the tender to Moseme, based on the fact that it was an 'exceptional case' under PAJA awarded the contract to King. The SCA set the High Court's order out as follows:

> It then proceeded to consider whether to remit the matter to the Council for reconsideration or to award the contract to King because it was an exceptional case under PAJA. It adopted the latter option on both a legal and a factual basis. The legal ground was that since King had

[40] *Moseme* para 5.
[41] *Id* para 6.
[42] *Ibid*.
[43] *Id* para 8.

> scored the highest points and had submitted the lowest tender it was a foregone conclusion that the Department was obliged in law to award the contract to King, and that it would have been a waste of time to remit the matter for reconsideration.[44]

On a factual basis the court noted that it was not impracticable to set aside the decision as the contract was 're-measurable', which meant that both King and Moseme would only be paid for the actual work that they have done.

4.6.3 The judgment of the Supreme Court of Appeal

In the assessment of the high court's judgment the SCA referred to the *Oudekraal*[45] judgment where it was said that:

> It will be apparent from that analysis that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced – the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others – and for that reason it will be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.

Based on this view the SCA noted that it was only necessary to decide whether the Council was legally obliged to award the contract to King and, if not, whether it was appropriate for the high court to have done so. The SCA found that King's tender had to be disqualified and that it was not as 'matter of law' entitled to the contract.[46] The SCA found that the court a quo erred in this aspect.[47]

The SCA further clearly distinguished the facts in this case from those in the *Sapela* and *Eskom Holdings* matters. The court rightfully stipulated that in the *Eskom Holdings* matter the successful tenderer was partially to blame for the 'tainted award

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[44] *Id* para 9.
[45] *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 38.
[46] *Moseme* para 14.
[47] *Ibid.* The SCA based its finding on the fact that a preferential system was introduced by the regulations under the Construction Industry Development Board Act. In terms of r 25 in 'soliciting a tender the employer must stipulate that only tender offers by contractors who are registered in the category of registration required in terms of r 25 (3) may be evaluated in relation to that contract.' The contractor grading designation must be based on the estimated tender value. This tender value exceeded R100m. 'The regulation states further that on receipt of tender offers the employer must determine the final lowest category of registration required for their evaluation and that a tender offer received from a contractor who does not then qualify must be rejected.' The tender fell within the higher classification and King's tender had to be disqualified irrespective of the advertisement or tender documents.

as its tender was flawed,' which is not the case in this matter.[48] The court also emphasised the fact that the issue on appeal is whether the court a quo made the correct order. In the *Sapela* matter the relief sought was not granted based on the circumstances and the impracticability if the award is set aside. The court clearly stipulated that the argument of Moseme that the contract was now near completion and therefore the award should not be set aside is conceptually problematic. In this regard the court noted the following:

> Supervening events cannot affect the answer although they might conceivably affect enforceability on the ground of supervening impossibility.[49]

The court also referred to the order in the *Millennium Waste Management* case and emphasised the fact that, that award was divisible and related to the provision of services, and that the SCA upon finding a defect in the award did not merely set aside the award, but 'crafted an order with care to suit the occasion.'[50] The court a quo found that the contract is re-measurable, the SCA however pointed out that the implications thereof may be detrimental and are easier said than done. The SCA referred to the fact that, and I am in agreement hereof, that each contractor will weight and price items differently.

The court also stressed the fact that in the case of corruption or fraud where the successful tenderer is not also an innocent tenderer the problems as set out above may not be of any relevance. In this matter Moseme is innocent and the court a quo should have taken cognisance of that fact.

The appeal was upheld with costs and in conclusion the learned judge noted that the court a quo believed incorrectly that King was entitled to the contract and did not fully estimate the consequences of the order, and erred in its discretion. It was found that King is not entitled to any relief notwithstanding the inadequate administrative process.[51]

In conclusion I turn now to deal with the question posed in the beginning of this chapter by referring to the outcome of the various judgments discussed above.

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[48] *Id* para 17.
[49] *Ibid.*
[50] *Id* para 18.
[51] *Id* para 21.

4.7 Under which circumstances will an invalid administrative decision, where a government tender was awarded to a specific party actually be set aside?

It was noted by Hoexter that an administrative action or decision remains enforceable until such time as it is declared invalid by the court, at which point the decision will be of no force or effect and the invalidity is therefore retrospective in nature.[52] Hoexter further notes that setting aside an invalid decision is the logical consequence of declaring the decision to be invalid.[53] It is however clear that an administrative decision continues to have effect until the decision is specifically set aside by the court and not every administrative action will necessarily or logically be set aside and will cease to have effect when it is declared to be invalid by the court. In the *Sapela* matter the SCA found that the award of the tenders to the successful tenderer was indeed invalid when it was made but the decision was not set aside.[54] If the decision is not set aside it remains to be enforceable, and it would therefore be more appropriate to state that an administrative action or decision continues to have effect until such time as it is set aside by the court. In this regard Hoexter refers to the *Oudekraal Estates*[55] matter where the SCA pointed out that 'until an illegality is set aside by the court it exists in fact and is capable of having legally valid consequences'. The SCA stated it as follows:

> The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.[56]

If one look at the orders that were granted under the circumstances of each specific case that were discussed in this chapter it is definitely not an easy task, if at all possible, to lay down the exact circumstances under which an invalid award will actually be set aside. If it was possible there would not have been such a vast difference, for example between the decisions reached by the high court and those of the SCA. Potential litigants would then have been in the fortunate position

[52] Cora Hoexter Administrative Law in South Africa (2007) at 484.
[53] *Id* at 485.
[54] *Chairperson STC v JFE Sapela Electronics* 2008 (2) SA 639 (SCA) para 29.
[55] *Oudekraal Estates v City of Cape Town* para 26.
[56] *Ibid.*

enabling them to calculate their risk more carefully before engaging in litigation and tender committees would have been more cautious when making their decisions, knowing that an invalid decision would necessary lead to the setting aside of the award. The court rolls would in return not be as occupied by these types of matters.

It is however possible to determine some circumstances that the court will bestow the necessary attention to when a decision to set aside an award has to be made.

These circumstances can be summarized as follows:

(a) If the award is set aside and it is determined that the award is reviewable will the relief sought be capable of practical implementation?[57]
(b) A balance has to be reached between the interests of all the relevant parties.[58]
(c) What effect will the setting aside of the award and consequently the disruption of the contract have on the public?[59]
(d) What is the nature of the contract and the work that needs to be performed under the contract – is the contract re-measurable?[60]
(e) What effect will the setting aside of the award have on the public purse?[61]
(f) Was the successful tenderer innocent?[62]

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[57] In the *Sapela* matter the court found that although the award of the tender to Nolitha was reviewable, due to the extent of the work already performed by the contractor, the impracticability of attempting to start the tender process over again for the completion of the remaining work and the problems that may arise in relation to both the tender process and the work that still needs to be performed it would be inappropriate to set aside the invalid administrative act: *Id* para 27.

[58] In *Millenium Waste Management* para 33 Jafta JA explained that the 'guideline in granting an order that is just and equitable involves a process of striking a balance between the applicant's interests, on the one hand and the interests of the respondents, on the other hand'.

[59] *Id* para 28 Jafta JA held that 'from the point of view of the public serious questions arise if the contract is now terminated. The service is for the removal and safe disposal of medical waste from all public hospitals in Limpopo Province. The removal and disposal of medical waste must be carried out without interruption and the province does not have the capacity to step in itself if the contract is now terminated'.
In *Eskom Holdings* para 17 Cloete JA emphasised that … 'it was not Eskom's case on the papers that disruption would have any significant consequences for it or the public generally'.

[60] In para 16 of the *Eskom Holdings* matter the court emphasised the fact that 'the work under the contract involved the ad hoc collection of material'. It was clear that re-measuring that contract for the work that still needed to be performed could easily be done.

[61] In *Millenium Waste Management* para 29 Jafta JA held that 'there is one further interest to be brought to account that changes the picture, and that is the public purse'.

[62] *Id* para 26 Jafta JA made a very important point which may have been detrimental for the successful tenderer if the circumstances were the opposite, it was noted that: 'there is no suggestion that the consortium was complicit in some way in bringing about the exclusion of the tender – had that been shown it would have been appropriate to set the decision aside for that reason alone – and it must be accepted that it is an innocent party'.
In *Eskom Holdings* para 21, the court found that the successful tenderer was partially to blame for the

These circumstances are merely based on the outcome of the various judgments that were discussed and each case should be scrutinized on its own facts in order to decide whether to proceed with an application for review of a tender award. There are many other circumstances that may be relevant or that might become relevant as a case progress and these factors that were listed should merely be considered as guidelines than trite law.[63]

4.8 Conclusion

It is clear from the outcome of the *Millennium Waste Management* case that the court is willing to act robustly, if the circumstances of the case permit it to do so, in order to reach a just and equitable order.

position that it was in, in that it submitted a flawed tender to Eskom and was not an 'innocent bystander'. Harms DP also emphasised the fact that the successful tenderer was innocent in the Moseme Road Construction matter and held that: ' the learned judge, in reaching his conclusion, failed to have any regard to the position of the innocent tenderer.

[63] For example refer to *Viking Pony Africa Pumps v Hidro-Tech Systems* (SCA- judgment) where the court found that an organ of state has a duty to act when it detects that a preference has been obtained on a fraudulent basis.

CHAPTER 4 – JUDICIAL REMEDIES IN REVIEW PROCEEDINGS

4.1 Introduction

"The utility of any system of judicial review depends largely on the effectiveness of its remedies."[1] This view expressed by Hoexter is significantly important, for without effective remedies that will ensure a proper vindication of parties' rights the entire review process will be worthless and of no force or effect. The main focus of this chapter is a discussion and critical analysis of the interpretation of the courts' views and judgments on the various other remedies available to litigants under the provisions of s 8(1)[2] of PAJA, where the award of a government tender is the source of the litigation.

Are our courts willing to act robustly by interfering with the awards of government tenders in order to ensure that a just and equitable decision is made? The reason why this question is raised and needs to be answered is in order to determine under which circumstances will an invalid administrative decision where a government tender was awarded to a specific party actually be set aside.

In order to answer the question set out above I dealt with four different judgments which are discussed hereunder.

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[1] Hoexter Administrative Law in South Africa (2007) at 462.

[2] Section 8(1) of PAJA provides that:

(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders-
  (a) Directing the administrator-
    (i) to give reasons; or
    (ii) to act in the manner the court or tribunal requires;
  (b) prohibiting the administrator from acting in a particular manner;
  (c) setting aside the administrative action and-
    (i) remitting the matter for reconsideration by the administrator, with or without directions; or;
    (ii) in exceptional cases-
      (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
      (bb) directing the administrator or any other party to the proceedings to pay compensation;
  (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
  (e) granting a temporary interdict or other temporary relief; or
  (f) as to costs

4.2 What effect will time have on the outcome of a reviewable award - the *JFE Sapela Electronics* case

In the matter of *Chairperson, STC v JFE Sapela Electronics*[3] the SCA was faced with the difficult question of whether to set aside an invalid administrative act, under circumstances where a vast period of time has already lapsed since the decision was made and the award was granted.

4.2.1 A brief description of the facts

The third respondent Nolitha Electrical and Construction (Pty) Ltd (Nolitha) was the successful tenderer for three separate contracts to perform certain repair and maintenance work at three separate prisons in the Western Cape for the Department of Public Works, who was the second appellant in the matter. Two companies, who were both unsuccessful tenderers launched an application in the High Court for the review and setting aside of the award of the tenders, and were successful in their application, the High Court set aside the award of the tenders and declared the contracts entered into between the third respondent and the second appellant to be null and void. The two companies who were the unsuccessful tenderers were JFE Sapela Electronics (Pty) Ltd (Sapela) and JFE Power Distribution (Pty) Ltd. The first appellant in the matter was the chairperson of the Department of Public Works' (DPW) Standing Tender Committee which functions as the DPW's head office. The basis on which the application was brought is set out in the following summary and I deem it necessary to quote this passage:

> In the case of the first two tenders, the third respondent had quoted nominal amounts for a whole section of the work in the knowledge that it would not have to perform the work; and, in the case of the third tender, that, after tenders had been opened, the second appellant and third respondent had agreed to reallocate amounts over tendered for two items of work to items for which the third respondent had under tendered.[4]

4.2.2 Judgment of the SCA - appropriate in the circumstances?

The SCA came to the conclusion that the tenders submitted by Nolitha should have been rejected[5], but for purposes of this dissertation I considered it unnecessary to

[3] 2008 (2) SA 638 (SCA).
[4] *Id* at 639.
[5] This stance was emphasised in paragraph 15: "It follows that in my view both Nolitha's Drakenstein tender

discuss the reasoning of the court behind this finding as the main focus is whether the actual judgment of the court constituted appropriate relief under the circumstances of the case and to determine under which circumstances an invalid decision will in actual fact be set aside by the court. In order to determine these factors I find it important to quote his Honourable Justice Scott who noted that:

> Had the application in the court below been adjudicated when proceedings were launched Sapela and Reticulation (the respondents) would no doubt have been entitled to the relief they sought. But given the inevitable effluxion of time and the extent of the work performed by Nolitha between the launching of proceedings and the granting of judgment, the question that arises is whether the relief sought, and granted, was capable of practical implementation.[6]

The court's standpoint in this regard makes it clear that not only are litigants faced with the onus of proofing that an administrative action is reviewable but are also burdened with the issue of ensuring that the matter is expeditiously ventilated. This obligation may in some circumstances be impossible to accomplish.[7] In this case not even the respondents' prompt reaction after it came to their attention that the contracts were awarded to Nolitha, could guarantee the relief that they sought.[8] The court found that it would be impracticable to start the tender process over again for

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and Worcester tender were unacceptable and should have been rejected." Scott JA also noted in paragraph 19 that: "In the present case, what in effect occurred is that Nolitha's tender, with the latter's written consent, was adjusted by the reallocation of an amount overqouted for one or, rather, two items, to 'most of the remaining maintenance items for Installations A to p' for which Nolitha had underquoted. The effect was apparently to convert a tender from one regarded by the engineer as unbalanced and a financial risk to one which was acceptable. But the offer made by Nolitha, as embodied in its tender, was not the one ultimately accepted. What was accepted was in truth an offer that was made on 7 November 2003, some two months after the closing date for tenders. In my view this was enough to strip the tender process of the element of fairness which requires the equal evaluation of tenders. It follows that the acceptance of the Nolitha tender and the award of the contract were correctly held by the court a qou to be reviewable."

[6] *Id* para 20.

[7] If one only considers the obstacles that an applicant might be faced with in order to set a matter down for hearing on an urgent basis, it is easy to grasp how heavily this burden lies upon the shoulders of the applicant. In order to succeed with an urgent application, grounds for urgency needs to be proven, and to proof these grounds, the applicant has to be in possession of certain facts including at least the facts upon which the administrator based its decision. If a matter is not set down for hearing on an urgent basis and the matter is opposed, which is the case in most of these matters; it might take months before the matter is actually heard. It is clear that these are difficult obstacles to overcome.

[8] The court emphasised their position in paragraph 26 and stated: "Within a day or two of becoming aware of the award of the Helderstroom tender the respondents wrote to the Ministry expressing their concern over the tender process. As early as 26 January 2004 they wrote to the DPW requesting the documents necessary to enable them to ascertain their rights with regard to a possible review. The request was refused. A subsequent attempt to invoke the provisions of the Promotion of Access to Information Act was similarly unsuccessful. Ultimately they were obliged to institute proceedings even before they were fully apprised of the facts necessary to substantiate the review. The documents they sought were eventually furnished to them on 23 March 2004, almost two months after their initial request. It was only then that they were able to file a supplementary affidavit properly substantiating the relief they sought. In my view they were not in any way to blame for a delay in initiating proceedings or brining them to finality.

the completion of the remaining work, and emphasised that if the court a quo's order is followed it would give rise to 'a host of problems' in relation to both the tender process and the work to be performed.[9] The court noted that "in appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act"[10] and referred to the view expressed in the *Oudekraal Estates*[11] matter, which reads as follows:

> It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.[12]

Although it was found that there was no culpable delay on the part of the respondents, the court found that the circumstances of the case are of such a nature that an invalid administrative act must be permitted to stand.

It is clear that an administrative act (and for relevance of this dissertation an award of a government tender) will not automatically be set aside if it was found that the granting of the award to a specific tenderer was invalid. The circumstances, merits and the consequences if the award is set aside, have to be evaluated first in order to determine whether the setting aside of the invalid administrative act should be permitted. In these circumstances where the invalid administrative act is not set aside, and specifically where the aggrieved party was an honest tenderer and a *bona fide* party to the litigation it is difficult to argue that the judgment that was granted was appropriate and constituted effective relief as envisaged in s 38 of the Constitution. If one however considers the reasoning behind the court's finding it is clear that in some circumstances, the relief granted may seem to be appropriate but does not necessary constitute effective relief.[13] The courts are faced with the difficult task of balancing the interests of the relevant parties as well as the interest of the public on whose behalf the administrative body is suppose to act. This stance was emphasised in the matter of *Millennium Waste Management*[14] which will be discussed hereunder. It is important to note that the circumstances of each case

[9] *Id* para 27.
[10] *Id* para 28.
[11] 2004 (6) SA 222 (SCA).
[12] *Id* para 36 at 246D.
[13] For an explanation of the terms 'effective and appropriate relief refer to paragraph 1.2 of chapter one hereof.
[14] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA).

plays a pivotal role in the court's finding especially where an application is launched in order to set aside and invalid award, at this early stage it is already clear that the court will not automatically set aside an award even if it was found that the administrative act was in actual fact invalid.

4.3 A Just and Equitable Order – the *Millennium Waste Management* judgment

In this matter the court clearly illustrated that the remedies under s 8 of PAJA are flexible in nature providing the court with the necessary means to formulate just and equitable orders, orders that properly protect the interests of the relevant parties.

4.3.1 A brief overview of the facts

Tenders were invited for the removal of medical waste from public hospitals by the Limpopo Department of Health and Social Development. The tender was awarded to a consortium of companies, hereinafter referred to as the "consortium". The applicant- Millennium Waste Management (Pty) Ltd (hereinafter referred to as 'Millennium Waste') was one of a number of tenderers, its tender was however disqualified by the departmental tender committee due to non-compliance with administrative requirements. This non-compliance was not the fault of Millennium Waste, but notwithstanding this fact its tender was not considered. The applicant applied to the High Court for the review and setting aside of the tender decision but was unsuccessful in its application, upon appeal to the SCA the court found that the tender of Millennium Waste was mistakenly disqualified and that the tender decision was reviewable.

4.3.2 The judgment of the SCA

In order to express and draw the necessary attention to the court's attitude when this matter was adjudicated, and even more so due to the relevance of this approach to my dissertation, I find it essential to quote the court's interpretation of s 8 of PAJA and of what would suffice as a just and equitable order

> The question of relief remains for consideration. While acknowledging that there was no culpable delay on the part of the appellant to institute review proceedings, exercising its discretion the court below dismissed the application with costs. In so doing the court overlooked the provisions of s 8 of PAJA which require that any order granted in matters such

> as this be just and equitable. This guideline involves a process of striking a balance between the applicant's interests, on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself, as the court below did, to the interests of the one side only. Furthermore, the section lists a range of remedies from which the court may choose a suitable one upon a consideration of all relevant facts. The dismissal of the application by the court below does not constitute appropriate and effective relief contemplated in s 38 of the Constitution. In view of the court a quo's error this court is entitled to interfere with the order granted.[15]

It is apparent from this passage that the court recognized the fact that orders made in terms of s 8 of PAJA should be made in line with the qualification of being just and equitable. This important directive should always be the starting point of any judgment passed under the provisions of PAJA, and with this in mind the court will ensure that appropriate and effective relief is granted.

The court recognised the difficulty that is presented by invalid administrative acts, as described in the *Oudekraal Estates*[16] matter and noted that a contract is almost immediately acted upon by acceptance of a tender, which may cause devastating consequences for both the innocent tenderer and the public if the contract is rendered invalid from its inception.[17] Notwithstanding this remark the court found a way of protecting the interests of all the relevant parties, and ensuring that the rights of the aggrieved tenderer are properly protected by formulating a very specific judgment.

The court identified four interests that needed to be taken into account in the exercising of its discretion:

(a) The first interest was that of the appellant, and specifically the loss it had suffered for not having its tender considered.[18]

(b) Secondly the court emphasised the fact that the consortium was an innocent party, as there was no suggestion that it was complicit in some way bringing about the exclusion of the appellant's tender.[19]

[15] *Id* para 22.
[16] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).
[17] 2008 (2) SA 481 (SCA) para 23.
[18] *Id* para 25.
[19] *Id* para 26.

(c) Thirdly the court considered the nature of the work that needed to be performed under the contract and noted that the service is for the removal and safe disposal of medical waste from all public hospitals in Limpopo Province that must be carried out without interruption and that the province does not have the capacity to step in itself if the contract is terminated.[20]

(d) The final interest that the court considered was the public purse. In this regard the court emphasised the fact that the consortium's price to provide the service was vastly more than that of the appellant, and even if the decision is set aside at this late stage, 29 months of the contract still remained which will make an enormous difference to the public purse if the appellant is indeed able to render the service at the price it had offered. The court however stressed the fact that at this stage it is all a matter of speculation. I deem it necessary to quote the court's explanation in this regard:

> It is only if the appellant's tender is now evaluated and found to be acceptable, and the decision to accept the consortium's tender is not set aside, that any loss will occur. But if the appellant's tender were not to be accepted, and the decision to appoint the consortium has meanwhile been set aside, nothing will have been gained and there is the real prospect that loss and disruption might occur.[21]

In reaching its decision the court stressed the fact that an order should be made that creates certainty and that properly protects the rights of all the parties including the public.[22]

The court ordered that the tenders must be evaluated by the tender board itself and that the decision to accept the consortium's tender must only be set aside if the appellant's tender is found to be accepted.[23] The court rightfully recognised the fact that the consortium (who is an innocent tenderer) might suffer a loss, if the tender of the appellant is accepted, but this loss is inevitable if one accommodates the loss of the public purse. It is clear from this passing that the interest of the public purse is an extremely relevant and important factor that the courts consider in determining which

[20] *Id* para 28.
[21] *Id* para 30.
[22] Id para 32. The court noted that: "*An order to that effect vindicates the appellant's rights to the full while it prevents the potential for disruption to the service, and it avoids unwarranted loss to the public purse.*"
[23] *Ibid*.

remedies will properly vindicate the aggrieved parties' rights. It is a consideration that can never be overlooked, no matter what the loss is that an aggrieved or innocent tenderer might suffer.

The court formulated its order in very exact terms, ensuring that there will be no further undue delay or confusion that might be to the detriment of the appellant.

4.4 A critical analysis of the differences between the *Sapela and Millennium Waste Management* judgements – which one should be preferred?

It is clear from both judgments that the court emphasised the position of the successful tenderer at the time when the award was granted to it. The question is whether the successful tenderer is also an innocent tenderer. This aspect was significantly pointed out in both the judgments.

The fact that neither of the unsuccessful tenderers could be blamed for the time period that has lapsed since they became aware of the invalid administrative act up until the point where the matter was brought to finality was noted in both cases. Notwithstanding these similarities two completely different decisions were reached. If one however considers the nature of the different contracts it is understandable that an exact same order in both instances is simply not possible. This once again reiterates the tremendous difficulty the courts are faced with in adjudicating these types of matters. Not only should the interests of all relevant parties be protected as was stressed in the *Millennium Waste Management*[24] case but by protecting these interests an appropriate and effective decision has to be reached.[25] The court properly vindicated the rights of the unsuccessful tenderer in the *Millennium Waste Management* case, but given the circumstances and the nature of the contract it was able to do so. A perfect balance was strike between the rights of the successful and unsuccessful tenderer as well as the public. The fact that the nature of the contract allowed the court to reach this decision makes one realize that this is another factor that an applicant should consider before approaching the court for the necessary relief. If it is ascertainable from the facts that are at the disposal of the applicant, that a contract have already been acted upon by a successful tenderer or the work will commence before the matter will be finalised it is necessary to consider launching an

[24] 2008 (2) SA 481 (SCA).
[25] *Id* para 22.

application for an interim interdict. This however is also easier said than done. On this point the court in the *Millennium Waste Management* matter noted the following:

> The DPW made it quite clear in correspondence that it was not prepared to suspend the work or to withhold from Nolitha access to any of the installations. It is true that the respondents did not proceed with their threatened interdict but, as explained in the replying affidavit, access to all the installations had by then been granted to Nolitha. Any application for an interdict would in any event have been opposed by the appellants.[26]

Unfortunately an applicant will never be in a position where the outcome of legal proceedings are predictable as it is clear that there is no specific recipe that can or should be followed. The facts at hand are dealt with in a manner that is suitable at that point in time, and it is easy to judge the manner in which proceedings were instituted, in retrospect, without considering the difficulties the party was faced with when the process commenced.

In the *Sapela* matter the circumstances simply did not favour the unsuccessful tenderer at the time when the matter was finalised, and the rights of the aggrieved party could not be properly protected.

It is easy to state that the court erred in its decision in the *Sapela* matter and that the judgment in the *Millennium Waste Management* matter should be preferred but this simple attitude towards a fairly difficult issue would be nothing less than naïve. One cannot merely compare the two judgments and prefer the one to the other, the judgments should be considered in line with the unique set of facts of each matter and this is also evident from the outcome in both the *Eskom Holdings*[27] and *Moseme*[28] matters that will be discussed hereunder. It is however important to note that the judgment in the *Millennium Waste Management* case was a positive development for our public law jurisprudence.

[26] *Id* para 26.
[27] *Eskom Holdings Ltd & another v The New Reclamation Group (Pty) Ltd* 2009 4 SA 628 (SCA).
[28] *Moseme Road Construction CC v King Civil Engineering CC* 2010 (4) SA 359 (SCA) (*Moseme*).

4.5 Setting aside an invalid award – illustrated in the *Eskom Holdings* matter

Due to the simplicity of the facts in this case I found it unnecessary to discuss it in great detail and will only refer to the facts briefly. Eskom Holdings Limited (Eskom) who was the first appellant in this matter awarded a tender for the collection and disposal of scrap metals to the second appellant – Kwanda Ferro-Alloy African Resources (Pty) Ltd (Kwanda). The respondent – New Reclamation Group (Pty) Ltd (NRG) was an unsuccessful tenderer who succeeded with the relief sought in the court a quo. The award of the tender to Kwanda was set aside and the High Court ordered both Eskom and Kwanda to pay the costs of NRG. Upon appeal the appeal was dismissed with costs and the SCA found that the award was rightfully set aside by the court a quo.[29] It is also important to note that Kwanda was partially to blame for the invalid award because its tender was flawed.[30]

The SCA drew a clear distinction between the facts and circumstances in this case from those in the *Olitzki*[31], *Darson Construction*[32], *Sapela* and *Millennium Waste Management* cases, which once again clearly illustrates that it is not possible to merely base the chances of success of one matter upon the outcome of another. Each set of facts are uniquely evaluated by the courts in order to reach a decision. These distinctions were briefly illustrated by the SCA as follows:

(1) During the appeal proceedings the second appellant (Kwanda) submitted that the relief sought by the respondent should be denied based on the fact that they failed to launch an application for an interdict at an early stage of the proceedings and relied on the decisions in the *Olitzki* and the *Darson Construction* matters.[33] The Court found that the facts in this case cannot be compared to those in either the *Olitzki* or the *Darson Construction* cases. In the *Olitzki* matter it was specifically found that the plaintiff would have been entitled to an interdict, and in this matter there is no guarantee that an application for an interdict would have been successful. The court also noted that an application for an interdict in this matter would most definitely have

[29] 2009 4 SA 628 (SCA) para 19.
[30] *Id* para 14.
[31] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA).
[32] Darson Construction (Pty) Ltd v City of Cape Town 2007 (4) SA 488 (C).
[33] 2009 (4) SA 628 (SCA*)* para 11.

been opposed.[34] The court based its finding in this regard on the following facts:

> The conclusion of the contract with Kwanda could not have been interdicted because NRG, through no fault of its own, only came to know of the award of the tender to Kwanda after the contract had been concluded. Given that the contract was already in existence, the balance of convenience would have been a major issue; and it appears from the papers that Eskom required removal of the material fairly urgently as the previous contract had lapsed at the end of April 2007, and the R35M Tender Committee expressed concern at its meeting on 1 June that Eskom might be facing the threat of backlog building up.[35]

The court emphasised the fact that the claims in the *Olitzki* and *Darson Construction* matters were for damages and that it is common cause that a person claiming damages must limit its loss. On this point I found the court's reasoning interesting and wish to illustrate the conclusion drawn by quoting the following:

> That principle finds no application in the present matter. And finally on this point, I have difficulty in understanding how it lies in the mouth of either Eskom or Kwanda to assert that the trial court should not have set the award of the tender aside because NRG did not attempt to protect them against themselves by bringing interdict proceedings that might have mitigated the prejudice they would suffer by the conduct that they were wrongly intent on pursuing. The boot was on the other foot. The position in which they found themselves before the court a quo was not due to NRG's inaction; it was due to their persistence in asserting the validity of the award of the tender in the face of the valid challenge by NRG.[36]

(2) The court emphasised the fact that this matter is also clearly distinguishable from the *Sapela* matter in that the latter was an exceptional case, where it was impractical to start the tender process over again for the completion of the remaining work. In this matter however the work involved the *ad hoc* collections of material, and each instruction of Eskom to the contractor constituted a separate agreement incorporating the terms of the original

[34] *Ibid.*
[35] *Ibid.*
[36] *Id* para 13.

contract. The court noted that any contractor could do that even at such a late stage.[37]

(3) The court finally noted that the facts in the *Millennium Waste Management* matter cannot be compared to the facts in this matter as there are no public policy considerations which "*militate against the setting aside of the award of the tender."*[38]

The SCA found that the award of the tender to Kwanda was seriously defective and based on that together with the considerations as listed above the appeal was dismissed with costs. After the discussion of the *Moseme* matter hereunder, the outcome of the *Eskom* judgment will be referred to in order to determine under which circumstances an invalid award of a tender will be set aside.

4.6 *Moseme Road Construction* – setting aside a tender award: inappropriate in the circumstances

4.6.1 A description of the essential facts as described by the SCA

The PPPF Act[39] prescribes the framework for the implementation of any preferential policy, which provides that organs of state must determine their preferential procurement policy based on a points system. In terms of s 2(1)(f) of the act contracts must be awarded to the tenderer who scores the highest points unless objective criteria are relevant and justifies the award to another tenderer.

Tenders were invited for the construction of a section of Beyers Naude drive in Gauteng by the Gauteng Department of Public Transport. The tender invitation that was advertised specified the criteria in order to qualify as civil engineering contractors that were capable of performing contracts having a value of more than R100m. The Respondents (King Civil Engineering, hereinafter referred to as King) did not qualify in terms of this advertisement. The second Appellant (Moseme Road Construction, hereinafter referred to as Moseme), who was the successful tenderer qualified. At the time when a compulsory site meeting was held before the tender was awarded, in question on behalf of King, the parties that attended the meeting were informed that those with a lower classification could also tender. King fell in the

[37] *Id* para 16.
[38] *Id* para 17.
[39] Act 5 of 2000.

lower group and tendered. King's tender scored the highest points. The Departmental Acquisition Council however disqualified King's tender, "on the rule of unfair competition and awarded the contract to Moseme."[40] It was found that it would have been unfair to award the tender to King if other contractors who would potentially have qualified in terms of the amended tender specifications had no knowledge of the amendment, which was never advertised. King's tender was therefore disqualified due to a mistake made by the Department. King was not aware of this error, or that the information that was given at the meeting was in actual fact wrong.

4.6.2 The decision of the High Court

King launched an application on an urgent basis for an interim interdict. The application was dismissed on the ground of 'balance of convenience.'[41] King then proceeded with an application for review and the setting aside of the award. King also requested the court to award the contract to it on the basis that its tender was for the lowest price, scored the highest points and was recommended during the evaluation process.[42] Moseme only opposed the prayer in King's application that dealt with the request to have the contract awarded to it, and by way of a counter-application sought a declaratory order, that the contract should remain extant notwithstanding the review. King's application was opposed in its entirety by the Department. The court a quo decided in King's favour and found the award to be reviewable, on the basis that:

> The decision was taken arbitrarily; that the matter had not been considered properly; and that the Department had taken irrelevant considerations into account.[43]

The court a quo found it to be just and equitable to set aside the award of the tender to Moseme, based on the fact that it was an 'exceptional case' under PAJA awarded the contract to King. The SCA set the High Court's order out as follows:

> It then proceeded to consider whether to remit the matter to the Council for reconsideration or to award the contract to King because it was an exceptional case under PAJA. It adopted the latter option on both a legal and a factual basis. The legal ground was that since King had

[40] *Moseme* para 5.
[41] *Id* para 6.
[42] *Ibid*.
[43] *Id* para 8.

> scored the highest points and had submitted the lowest tender it was a foregone conclusion that the Department was obliged in law to award the contract to King, and that it would have been a waste of time to remit the matter for reconsideration.[44]

On a factual basis the court noted that it was not impracticable to set aside the decision as the contract was 're-measurable', which meant that both King and Moseme would only be paid for the actual work that they have done.

4.6.3 The judgment of the Supreme Court of Appeal

In the assessment of the high court's judgment the SCA referred to the *Oudekraal*[45] judgment where it was said that:

> It will be apparent from that analysis that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced – the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others – and for that reason it will be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.

Based on this view the SCA noted that it was only necessary to decide whether the Council was legally obliged to award the contract to King and, if not, whether it was appropriate for the high court to have done so. The SCA found that King's tender had to be disqualified and that it was not as 'matter of law' entitled to the contract.[46] The SCA found that the court a quo erred in this aspect.[47]

The SCA further clearly distinguished the facts in this case from those in the *Sapela* and *Eskom Holdings* matters. The court rightfully stipulated that in the *Eskom Holdings* matter the successful tenderer was partially to blame for the 'tainted award

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[44] *Id* para 9.
[45] *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) para 38.
[46] *Moseme* para 14.
[47] *Ibid.* The SCA based its finding on the fact that a preferential system was introduced by the regulations under the Construction Industry Development Board Act. In terms of r 25 in 'soliciting a tender the employer must stipulate that only tender offers by contractors who are registered in the category of registration required in terms of r 25 (3) may be evaluated in relation to that contract.' The contractor grading designation must be based on the estimated tender value. This tender value exceeded R100m. 'The regulation states further that on receipt of tender offers the employer must determine the final lowest category of registration required for their evaluation and that a tender offer received from a contractor who does not then qualify must be rejected.' The tender fell within the higher classification and King's tender had to be disqualified irrespective of the advertisement or tender documents.

as its tender was flawed,' which is not the case in this matter.[48] The court also emphasised the fact that the issue on appeal is whether the court a quo made the correct order. In the *Sapela* matter the relief sought was not granted based on the circumstances and the impracticability if the award is set aside. The court clearly stipulated that the argument of Moseme that the contract was now near completion and therefore the award should not be set aside is conceptually problematic. In this regard the court noted the following:

> Supervening events cannot affect the answer although they might conceivably affect enforceability on the ground of supervening impossibility.[49]

The court also referred to the order in the *Millennium Waste Management* case and emphasised the fact that, that award was divisible and related to the provision of services, and that the SCA upon finding a defect in the award did not merely set aside the award, but 'crafted an order with care to suit the occasion.'[50] The court a quo found that the contract is re-measurable, the SCA however pointed out that the implications thereof may be detrimental and are easier said than done. The SCA referred to the fact that, and I am in agreement hereof, that each contractor will weight and price items differently.

The court also stressed the fact that in the case of corruption or fraud where the successful tenderer is not also an innocent tenderer the problems as set out above may not be of any relevance. In this matter Moseme is innocent and the court a quo should have taken cognisance of that fact.

The appeal was upheld with costs and in conclusion the learned judge noted that the court a quo believed incorrectly that King was entitled to the contract and did not fully estimate the consequences of the order, and erred in its discretion. It was found that King is not entitled to any relief notwithstanding the inadequate administrative process.[51]

In conclusion I turn now to deal with the question posed in the beginning of this chapter by referring to the outcome of the various judgments discussed above.

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[48] *Id* para 17.
[49] *Ibid.*
[50] *Id* para 18.
[51] *Id* para 21.

4.7 Under which circumstances will an invalid administrative decision, where a government tender was awarded to a specific party actually be set aside?

It was noted by Hoexter that an administrative action or decision remains enforceable until such time as it is declared invalid by the court, at which point the decision will be of no force or effect and the invalidity is therefore retrospective in nature.[52] Hoexter further notes that setting aside an invalid decision is the logical consequence of declaring the decision to be invalid.[53] It is however clear that an administrative decision continues to have effect until the decision is specifically set aside by the court and not every administrative action will necessarily or logically be set aside and will cease to have effect when it is declared to be invalid by the court. In the *Sapela* matter the SCA found that the award of the tenders to the successful tenderer was indeed invalid when it was made but the decision was not set aside.[54] If the decision is not set aside it remains to be enforceable, and it would therefore be more appropriate to state that an administrative action or decision continues to have effect until such time as it is set aside by the court. In this regard Hoexter refers to the *Oudekraal Estates*[55] matter where the SCA pointed out that 'until an illegality is set aside by the court it exists in fact and is capable of having legally valid consequences'. The SCA stated it as follows:

> The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.[56]

If one look at the orders that were granted under the circumstances of each specific case that were discussed in this chapter it is definitely not an easy task, if at all possible, to lay down the exact circumstances under which an invalid award will actually be set aside. If it was possible there would not have been such a vast difference, for example between the decisions reached by the high court and those of the SCA. Potential litigants would then have been in the fortunate position

[52] Cora Hoexter Administrative Law in South Africa (2007) at 484.
[53] *Id* at 485.
[54] *Chairperson STC v JFE Sapela Electronics* 2008 (2) SA 639 (SCA) para 29.
[55] *Oudekraal Estates v City of Cape Town* para 26.
[56] *Ibid.*

enabling them to calculate their risk more carefully before engaging in litigation and tender committees would have been more cautious when making their decisions, knowing that an invalid decision would necessary lead to the setting aside of the award. The court rolls would in return not be as occupied by these types of matters.

It is however possible to determine some circumstances that the court will bestow the necessary attention to when a decision to set aside an award has to be made.

These circumstances can be summarized as follows:

(a) If the award is set aside and it is determined that the award is reviewable will the relief sought be capable of practical implementation?[57]
(b) A balance has to be reached between the interests of all the relevant parties.[58]
(c) What effect will the setting aside of the award and consequently the disruption of the contract have on the public?[59]
(d) What is the nature of the contract and the work that needs to be performed under the contract – is the contract re-measurable?[60]
(e) What effect will the setting aside of the award have on the public purse?[61]
(f) Was the successful tenderer innocent?[62]

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[57] In the *Sapela* matter the court found that although the award of the tender to Nolitha was reviewable, due to the extent of the work already performed by the contractor, the impracticability of attempting to start the tender process over again for the completion of the remaining work and the problems that may arise in relation to both the tender process and the work that still needs to be performed it would be inappropriate to set aside the invalid administrative act: *Id* para 27.

[58] In *Millenium Waste Management* para 33 Jafta JA explained that the 'guideline in granting an order that is just and equitable involves a process of striking a balance between the applicant's interests, on the one hand and the interests of the respondents, on the other hand'.

[59] *Id* para 28 Jafta JA held that 'from the point of view of the public serious questions arise if the contract is now terminated. The service is for the removal and safe disposal of medical waste from all public hospitals in Limpopo Province. The removal and disposal of medical waste must be carried out without interruption and the province does not have the capacity to step in itself if the contract is now terminated'.
In *Eskom Holdings* para 17 Cloete JA emphasised that … 'it was not Eskom's case on the papers that disruption would have any significant consequences for it or the public generally'.

[60] In para 16 of the *Eskom Holdings* matter the court emphasised the fact that 'the work under the contract involved the ad hoc collection of material'. It was clear that re-measuring that contract for the work that still needed to be performed could easily be done.

[61] In *Millenium Waste Management* para 29 Jafta JA held that 'there is one further interest to be brought to account that changes the picture, and that is the public purse'.

[62] *Id* para 26 Jafta JA made a very important point which may have been detrimental for the successful tenderer if the circumstances were the opposite, it was noted that: 'there is no suggestion that the consortium was complicit in some way in bringing about the exclusion of the tender – had that been shown it would have been appropriate to set the decision aside for that reason alone – and it must be accepted that it is an innocent party'.
In *Eskom Holdings* para 21, the court found that the successful tenderer was partially to blame for the

These circumstances are merely based on the outcome of the various judgments that were discussed and each case should be scrutinized on its own facts in order to decide whether to proceed with an application for review of a tender award. There are many other circumstances that may be relevant or that might become relevant as a case progress and these factors that were listed should merely be considered as guidelines than trite law.[63]

4.8 Conclusion

It is clear from the outcome of the *Millennium Waste Management* case that the court is willing to act robustly, if the circumstances of the case permit it to do so, in order to reach a just and equitable order.

position that it was in, in that it submitted a flawed tender to Eskom and was not an 'innocent bystander'. Harms DP also emphasised the fact that the successful tenderer was innocent in the Moseme Road Construction matter and held that: ' the learned judge, in reaching his conclusion, failed to have any regard to the position of the innocent tenderer.

[63] For example refer to *Viking Pony Africa Pumps v Hidro-Tech Systems* (SCA- judgment) where the court found that an organ of state has a duty to act when it detects that a preference has been obtained on a fraudulent basis.

CHAPTER 5 - CONCLUSION

5.1 Introduction

All matters involving any form of an administrative act, especially government procurement processes, should be dealt with the necessary care. Attention should always be drawn to the rights and principles enshrined in our Constitution, especially in a country where so many citizens have access to limited resources and are dependent on the government. A government can only function successfully if it is administered correctly and effectively. Government Procurement is a major component in the successful functioning of a government. All governments need goods and services in order to function and therefore the development of government procurement jurisprudence is significantly important. Aside from the fact that government procurement has an influence either directly or indirectly on every South African citizen[1], it is also a useful instrument in advancing the development of those affected by apartheid. In order to emphasize the importance of government procurement Bolton illustrated that

> in South Africa, public sector procurement is estimated to amount to approximately 14% of gross domestic product (GDP). In United Kingdom, it is estimated that the total value of public procurement (excluding the procurement of public corporations) was £ 117 billion in 2002/3 and in the United States, the monetary value of public sector contracts given to the private sector is estimated to be about 15% of GDP.[2]

Due to the importance of government procurement in South Africa the entire process which in many instances includes the process of litigation should be dealt with in a manner where the outcome thereof is nothing but effective and appropriate in the circumstances. In this chapter and after having had the opportunity to discuss and critically analyze a number of cases concerning government tenders I conclude my dissertation with the following aspects:

(a) firstly how the courts interpret and apply the remedies as listed in PAJA, with specific reference to the procurement process; and

[1] For example the Government performs its duties, and procures goods and services to the benefit and ultimately for its citizens, bearing in mind that these duties are performed with the availability of the tax payers money.
[2] Bolton *The Law of Government Procurement in South Africa* (2007) 3.

(b) in conclusion whether the actual orders granted should be construed as being effective and appropriate.

5.2 The court's interpretation and application of the remedies under PAJA

Section of 8 of PAJA makes provision for a wide range of remedies that are to the disposal of an aggrieved tenderer in proceedings under judicial review. It is important to note that notwithstanding the various specific remedies that are listed in PAJA the courts are afforded a discretion and are not limited to the specific list of remedies only. Section 8 specifically stipulates that the court may grant any order that is 'just and equitable', which make all remedies discretionary in nature. Bolton also emphasised this aspect and noted that

> In considering the availability of remedies in review proceedings, it will be seen that the majority of remedies are discretionary and may be denied on the grounds of unreasonable delay or conduct on the part of the applicant, or if the circumstances of the case would make the remedy futile or inefficacious, or if general public inconvenience and hardship to a specific third party (the other party to the agreement) will result.[3]

This discretion or general power however does not make the court's task any easier and should be construed as more of a burden, as not only is the discretion qualified by the terms: 'just and equitable' but the courts are now also faced with the duty of shaping a remedy that suites the circumstances and that is just and equitable. Surely it would have been much easier for the courts to merely apply a specified list of remedies that they were bound by to each set of facts. The qualification of the orders that the courts should grant, is aimed at a proper vindication of the rights protected by the Constitution and to illustrate this fact de Ville noted that

> The general power granted under section 8 gives expression to section 38 of the Constitution which allows a court, in the event of the infringement of a fundamental right, to 'grant appropriate relief' and section 172(1)(b) to 'make any order that is just and equitable.[4]

I turn now to examine the application of the different remedies.

[3] *Id* at 316.
[4] De Ville *Judicial Review of Administrative Action in South Africa* (2003) 325.

5.2.1 Directing the administrator to give reasons

In section 8(1)(a)(i) of PAJA provision is made for a remedy in terms whereof a court or tribunal directs an administrator to give reasons for the decision it has made. An unsuccessful tenderer can therefore approach the court for an order in terms whereof a government body is obliged to give reasons for the award of a tender to the successful tenderer. In the *JFE Sapela* matter the court held that:

> persons whose rights have been materially and adversely affected by administrative action is in terms of section 33(2) of the Constitution and section 5(1) of PAJA entitled to be given reasons for the action. A tenderer whose tender is rejected has a right to be given reasons for the rejection of his tender… A tender condition that provides that no reasons will be given is invalid as being in conflict with the provisions of section 33 of the Constitution.[5]

The instances under which this remedy will be used are listed by Bolton as follows:

(a) where an organ of state failed to provide reasons within 90 days after receiving a request for reasons as provided for in section 5(2) of PAJA;
(b) where an organ of state declines to give reasons based on grounds that are not reasonable and justifiable as laid down in section 5(4) of PAJA; and
(c) where an organ of state fails to automatically furnish reasons when required to do so in terms of a notice published by the minister in the Government Gazette as provided for in section 5(6) of PAJA.[6]

The right to reasons for government procurement decisions is of course a key remedy if we consider the principle of fairness and transparency as stated by Bolton[7], but the practical implication of first pursuing a case in terms whereof an order directing the administrator to give written reasons for the award or non-award of a tender to a specific party may have a devastating effect on a case if an application for review is launched thereafter, except if the application is brought on an urgent basis. The reason being that in government procurement matters one is racing against time, which is of the essence if an order for the setting aside of an award is sought. This was also made abundantly clear in the *JFE Sapela* matter, where the court held that

[5] 2004 (3) All SA 715 (C) at 731*h* – 731*b*.
[6] Bolton (note 2 above) at 323.
[7] *Ibid.*

> In my view the circumstances of the present case as outlined above are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand.[8]

5.2.2 Setting aside the administrative action

When a court sets aside an administrative action in terms of section 8(1)(c) of PAJA, (as also noted in chapter 4), it may either remit the matter for reconsideration by the administrator or in exceptional cases substitute or vary the administrative action.

What does the setting aside of an administrative action and remitting the matter for reconsideration mean? Bolton described it as follows:

> The remedy of setting aside means that the court quashes or nullifies the decision to award a tender and remits the matter for reconsideration by the administrator with or without directions. Thus instead of making a new decision, as would usually be the case in appeal proceedings, the court orders the relevant body to reconsider the award of the tender.[9]

It is only in exceptional cases (which is the qualification stipulated in PAJA) that the court itself, awards the tender instead of remitting the matter to the administrator for reconsideration. Bolton referred to the circumstances under which the court will depart from the ordinary course and listed the following considerations:

(a) Whether the administrator in question is left with any discretion in the matter or whether the end result is a foregone conclusion;
(b) The importance of time considerations in the present context;
(c) The willingness of the administrator to re-apply its mind to the issues at stake;
(d) Indications of bias or incompetence on the side of the administrator;
(e) The competence of the court *vis-á-vis* that of the administrator in deciding the matter.[10]

It is clear as Hoexter stated that "the courts respect for the distinction between appeal and review makes them reluctant to usurp the decision-making powers that the legislature has delegated to the administration."[11]

It is apparent from the discussion in chapter 4 that the courts are reluctant to set aside an administrative decision merely because the act is invalid. There are several factors that the court has to take into consideration, and one cannot assume that an

[8] *Sapela* (SCA) para 29.
[9] *Id* at 318.
[10] Bolton (Note 2 above) at 322.
[11] Hoexter *Administrative Law in South Africa* (2007) 485.

invalid administrative act will automatically be set aside if the validity thereof is challenged and found to be invalid. The circumstances of each case will ultimately determine if an invalid administrative act will be set aside. A very important factor that an aggrieved tenderer should consider when deciding to approach the court for relief is the issue of time. For example in the matter of *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council and Another*[12] the court held that:

> Should an order be made in terms of prayer 1 it would be meaningless and have no practical effect for the simple reason that the contract in question has not only been awarded but completed. A court will not decide abstract academic or hypothetical questions unrelated to a right… From the time the plaintiff withdrew its application for temporary relief on 19 June 2001 it must have become more and more apparent that, with the passage of time, the contract which had been awarded by then to the second defendant would be completed and, probably, within the contract determined period of eight months.[13]

The court took the same stance in the *JFE Sapela* matter, referred to herein above and discussed in chapter 4.

The nature of the contract and the work that has to be performed under the contract also plays a crucial role in the decision of the court, as demonstrated in both the *Millennium Waste Management* and *Eskom Holdings* matters, also under discussion in chapter 4, and specifically in circumstances where the work has already commenced by the successful tenderer. If the contract is re-measurable and could be continued by another contractor the courts would more likely set aside the award.

It is an impossible task to draw up a list that will include all the scenarios under which an invalid administrative act will be set aside, the only conclusion is that the circumstances of each case will ultimately determine if an invalid administrative act will be set aside.

5.2.3 Declaratory Orders

a) Declaration of rights

Provision is made for a declaration of rights in section 8 (1)(d) of PAJA which allows for orders, ‘declaring the rights of the parties in respect of any matter to which the

[12] (2003) 2 All SA 240 (T)
[13] *Id* para 348b-d.

administrative action relates', which in return gives effect to section 38[14] of the Constitution. In essence a declaratory order enables a court to declare parties rights or 'to state the legal position'.[15] Bolton described this remedy in the context of government procurement as follows:

> An aggrieved tenderer in the government procurement process can therefore approach the court for an order declaring its rights *vis-á-vis* an organ of state (and vice versa). The remedy is discretionary in nature and, when granted, a court simply declares whether or not a right exists and/or the scope of such rights.[16]

Hoexter noted that a declaration of rights is a 'flexible remedy which can assist in clarifying legal and constitutional obligations and it is particularly useful in that it enables parties to obtain a final (though appealable) determination of their rights before a dispute has arisen, and therefore before any harm has actually been done'.[17] I am however not convinced that this remedy is such a useful tool in the government procurement context especially for an aggrieved tender. In most cases the harm has already been done by the time the aggrieved tenderer approaches the court for effective relief. An example and in most instances the biggest obstacle that the aggrieved tenderer faces is that the successful tenderer has already started to perform the work under the contract. An application seeking a declaration of a parties rights would in this case be a fruitless exercise as the aggrieved tenderer would still not be in a position where the successful tenderer is ordered to, for example, be prohibited from commencing or to continue with the contract. The courts are also in some instances cautious to issue declaratory orders, and in order to illustrate this I deem it necessary to quote the following passage of Bolton:

> the courts hold that there must be some material advantage obtainable from the relief sought and that they will not exercise jurisdiction to answer abstract, academic or hypothetical questions which have no tangible benefit to the applicant. In *Tri-Cor Industries (Pty) Limited v Chairman of the Mpumalanga Tender Board and Others*, the applicant (an unsuccessful tenderer) asked the court to set aside the tender board's decision to award the tender to the third respondent and that the court order the tender board to award the tender to it instead. In the alternative, the applicant asked the court to declare the award of the tender to the third respondent invalid, and that the court declares that the tender ought to have been awarded to

[14] Section 38 of the Constitution provides that a court may issue a declaration of rights if it is alleged that a right or rights contained in the Bill of rights is infringed or threatened.
[15] Hoexter (note 11 above) at 493.
[16] Bolton (note 2 above) at 324.
[17] Hoexter (note 11 above) at 493.

> it (the applicant). The application was refused. It was common cause that the applicant planned to sue not the tender board but the Mpumalanga Government, who was not formally before the court, for damages. The court found that the applicant was seeking judgment that the Mpumalanga government will be liable for any damages the applicant may have suffered. In other words, it was trying to establish liability via the back door and not, as is usual, in an action which in any case will have to be brought for damages and that would include proving the merits.[18]

The party seeking the declaratory order has to prove that it will benefit materially from the declaration of the rights in question and that the declaration would not merely amount to the 'answering of theoretical or hypothetical questions'.[19]

b) Declarations of invalidity

Bolton noted that in terms of 'Section 172(1)(a) of the Constitution a court in deciding a constitutional matter that falls within its power, must issue a declaration of invalidity if it finds that a law or conduct is inconsistent with the Constitution'.[20] An unsuccessful or aggrieved tenderer however might face great difficulties in pursuing this route, as the courts will only declare the conduct invalid if the declaration will have a material effect and would not be too disruptive. In the matter of *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*[21] the court determined that a declaration of invalidity will not be issued if in doing so it will not 'produce a concrete or tangible result… beyond the bare declaration'.

5.2.4 Interdicts

In sections 8(1)(a)(ii), 8(1)(b) and 8(1)(e)[22] of PAJA provision is made for the granting of an interdict in matters of an administrative nature. Interdicts can be divided into two categories namely mandatory interdicts and prohibitory interdicts which can either be interlocutory or final. 'A final interdict is usually sought by way of action procedure, although it may be granted on application where no *bona fide* factual dispute exists'.[23] In seeking a final interdict a party has to proof the following:

1) s/he has a clear (or definite) right which is being infringed;

[18] Hoexter (note 11 above) at 324.
[19] *Id* at 325.
[20] Bolton (note 2 above) at 325.
[21] 1997 (3) SA 514 (CC) para 15.
[22] For a description of the different sections refer to footnote 2 in chapter 4.
[23] De Ville (note 4 above) at 364.

2) an injury actually committed or reasonable apprehended; and
3) there is no other satisfactory remedy available to the applicant.[24]

With an interlocutory interdict one seeks temporary relief either until the interdict is made final or pending the outcome of a main action or application and in most instances where government procurement is concerned pending the outcome of an application for review. In the matter of *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town v LF Boshoff Investments (Pty) Ltd*[25], Corbett J set out the requirements for a temporary interdict pending determination of the main action as follows:

1) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
2) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
3) that the balance of convenience favours the granting of interim relief; and
4) that the applicant has no other satisfactory remedy.[26]

When a mandatory interdict is granted against the state it is known as a *mandamus*, and it 'requires an organ of state to act in the manner the court or tribunal requires'.[27] I will deal with mandatory and prohibitory interdicts separately.

a) Mandatory Interdicts

Seeking a mandatory interdict against an organ of state in matters concerning government procurement can be a very valuable instrument. This remedy can for example be used in order to compel the specific administrative body to act in a specific manor or to perform a statutory duty. Eventhough this remedy is useful it is not without obstacles. As Hoexter noted

> because mandatory interdicts require positive action to be taken, a court will take the difficulty of enforcement into account when deciding whether to grant the order. Where discretionary powers are at issue, the court will usually order the body to exercise its discretion rather than

[24] *Id* at 365.
[25] 1969 (2) SA 256 (C) 267B – E.
[26] De Ville (note 4 above) at 366 – 367.
[27] Bolton (note 2 above) at 326.

> to exercise it in a particular way; for example, to consider an application rather than to grant it.[28]

The aggrieved tenderer bears the onus of proofing that the public authority has a clear duty to perform the specific act, and does not have discretion in the matter. This position was illustrated in the matter of *Vulindlela Furniture Manufacturers (Pty) Ltd v MED, Department of Education and Culture, Eastern Cape, and Ohters*[29], the court found that

> the Provincial Tender Board Act, the Regulations and the directives and instructions there under do not place a duty on the tender board to act in a certain manner as argued by the applicant. They instead afforded the tender board a discretion to adopt a course of action which it considered to be desirable. In such instances, the court held, if the discretion is exercised in a proper manner, it will not amount to a violation of the legal provisions relied upon by the tender board. The court found that the applicant was not entitled to a mandamus for an alleged failure on the part of the tender board to perform a duty. A mandamus will only be granted where the public authority is under a clear duty to perform the act ordered. Where the public authority has a discretion in the matter, the order will only extend to directing the authority to comply with its duty of deciding the matter properly.[30]

b) Prohibitory Interdicts

A prohibitory interdict in the government procurement context prevents, or may prevent an administrator or a specific contractor from commencing with illegal action or puts a stop to continuing illegal action. If an interlocutory prohibitory interdict is granted pending the outcome of a review application, it might in many instances have a positive influence on the outcome of a review application. An aggrieved tenderer can approach the court on the basis of seeking an interim interdict in order to suspend the conclusion or commencement of work under a contract pending the outcome of an application for review. This remedy is vitally important and in some instances if not sought on an urgent basis detrimental for an applicant's case in proceedings under review. It is clear from the outcome of the various cases under discussion in the previous chapters, that the court in granting effective relief in a matter concerning government procurement is faced with balancing the rights of all parties effected by the administrative decision, and in most instances the successful

[28] Hoexter (note 11 above) at 496.
[29] 1998 (4) SA 908 (Tk).
[30] Bolton (note 2 above) at 327.

tenderer commences with the work under the contract almost immediately after the award is granted. If the setting aside of the award or continuation of the work under the contract by another party other than the successful tenderer is not practically enforceable the courts are reluctant in setting the administrative act aside and substituting the decision of the administrative body or remitting it back to the administrative body for reconsideration. These reasons make this relief and in most instance this temporary relief significantly important.

The nature of the contract is a very important factor that the court will take into consideration insofar as the delay in performance is concerned and is more likely to refuse the interim relief if the delay may pose a threat to the lives or health of the public. This was also illustrated in the *Millennium Waste Management* case under discussion in chapter 4. In formulating its order the court ensured that there would be no undue delay in the removal of the medical waste that might cause harm to the public.

In the matter of *Phillips Medical Customer Support (Pty) Ltd v Eastern Cape Provincial Tender Board and Others*[31], the applicant's tender was excluded based on the failure to comply with certain tender requirements, the successful tenderer's tender, was also not in compliance, the applicant successfully applied for an interdict in order to prevent the successful tenderer from commencing with the work under the contract pending the review proceedings.

It is clear that an unsuccessful tenderer should seriously consider applying to court for this interim relief especially in circumstances where an application for review might take some time, which is in most cases the position.

5.2.5 Compensation under PAJA and the Constitution

Due to the lengthy discussion of the compensation remedy under the provisions of PAJA as well as the Constitution in both chapters 2 and 3, I will not deal with this aspect in great detail in this chapter. It is however necessary to emphasize the fact that the courts have thus far been exceptionally cautious in awarding damages to tenderers as a result of a tender award being invalidated. Bolton laid down a few very important principles that are considered where compensation under the

[31] (2003) JOL 11118 (E).

provisions of PAJA is claimed and for purposes of this discussion I find it necessary to quote these principles:

1) what will amount to 'just and equitable' compensation in terms of section 8 of PAJA will depend on the circumstances of each case and the particular right which has been infringed;
2) compensation under section 8 of PAJA should be claimable only where a court is asked to review administrative action in the sense of setting aside or correcting the decision and not where the action or omission has already been completed and has no other legal force or effect apart from the loss it caused to the person concerned – the person would instead have to institute a claim in delict even though the action concerned amounts to administrative action;
3) compensation awards should in general be relatively small; and
4) the award of compensation, like most other remedies provided for in PAJA is discretionary.[32]

Apart from the principles as stipulated above the consideration of the public's purse also carries a tremendous amount of weight in the court's decision, to grant an order directing the administrative body to pay compensation.

5.2.6 Cost orders

In terms of section 8(1)(f) of PAJA a court or tribunal may grant an order as to costs in proceedings for judicial review. When dealing with a constitutional right s 172 of the Constitution allows a court to make any decision that is 'just and equitable', and s 38 enables a court to grant 'appropriate relief' when a person alleges that a right in the Bill of rights has been infringed or threatened, this may in some instances include cost orders. It however remains within in the discretion of the court, which discretion should be exercised 'judicially on a proper consideration of all relevant circumstances'.[33] The courts have often been reluctant to grant cost orders against administrators that litigate in good faith, and the reasoning behind this might be the fact that the courts do not want to discourage public officials to perform their duties diligently. On the other hand they have generally 'been ready to award costs against

[32] Bolton (note 2 above) at 331 – 332.
[33] *Id* at 340.

official who act mala fide or whose actions are grossly irregular, contemptuous of court orders or otherwise reprehensible'.[34]

In the context of government procurement the courts have in several instances made an order as to costs, and take various circumstances into account in making the decision about the payment of costs. In the *JFE Sapela*[35] matter for example the court ordered the appellants (the public officials) to pay the costs of the proceedings in both the SCA as well as the court *a qou,* of the unsuccessful tenderers, eventhough the appellants were successful and their appeal was upheld. The SCA reasoned that it was clear that the unsuccessful tenderers attempts to finalize the review proceedings as expeditiously as possible were frustrated by the appellants, as well as the fact that the actions of the appellants forced the respondents to launch an application without all the necessary information at hand and due to no fault of their own the relief sought by the unsuccessful tenderers are now denied.

In the concurring judgment in the *Eskom Holdings* matter Theron AJA took the same stance as the court in the *JFE Sapela* matter and stated that there are special circumstances why the Department should pay the costs of the unsuccessful tenderer. Theron AJA noted that

> In appropriate circumstances, a court should be innovative and use its discretion as a tool 'for avoiding or minimising injustice'….King was entitled to participate in a procurement process that was fair, equitable, transparent, competitive, and cost-effective. I accept, as does Harms DP, for purposes of this judgment, that it was the Department's negligence and unjustified disqualification of King's tender that resulted in the latter approaching the high court for relief. King approached the court expeditiously in order to protect a legitimate interest but it has not, in my view, received effective protection or relief.[36]

It is apparent that even where cost orders are concerned the circumstances of each case are evaluated on the unique set of facts as well as the turn of events and in other words how the matter was pursued by all the relevant parties in order to determine what would suffice as being just and equitable.

[34] Hoexter (note 11 above) at 508.
[35] *Sapela* para 30.
[36] *Eskom Holdings* para 26.

5.3 Conclusion - the actual orders granted should it be construed as being effective and appropriate.

In *Fose v Minister of Safety and Security*[37] Kriegler J expressed 'appropriate relief' as follows:

> When something is appropriate it is 'specifically fitted or suitable'. Suitability in this context is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chap 3. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate.

It is clear from this passage as well as the orders granted by the courts in the different cases under discussion in the various chapters that the right infringed the nature of the infringement and very importantly the circumstances of each case will provide guidance as to what constitutes appropriate relief and ultimately what will suffice as an effective remedy.

As stated in chapter one hereof the courts are faced with a tremendous difficulty in formulating orders that are just and equitable and that properly vindicates the rights of the aggrieved tenderer. It is impossible for the courts to turn a blind side to the implications that a specific remedy might have on for example a successful tenderer or the public, and it is in the balancing of the various interests where the complexity lies.

It would be wrong to simply draw the conclusion that in proceedings under review where an invalid administrative act is permitted to stand the court order is not effective or appropriate. One must have cognisance of the circumstances under which the invalid act was permitted to stand in order to determine if the court gave effect to the provisions under the Constitution and/or PAJA.

In the end a fine balance should be struck between the aggrieved tenderer's right to an effective remedy, and the interests of all the other relevant parties including in some instances the interest of a *bona fide* successful tenderer.

[37] 1997 (3) SA 786 (CC) para 97.

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