4 SEPTEMBER 2007

REPORTABLE

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Case Number: 15182/2004 Heard on: 01/08/2007

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For the plaintiffs: Adv F DU TO IT SC & J A MEYER

For Defendants: Adv B R TOKOTA, SC & N A R NGOEPE

In the matter between:

DISPERSION TECHNOLOGY (SA) (PTY) L TO *tla* PELO HEALTHCARE

Plaintiff

and

THE STATE TENDER BOARD THE MINISTER OF HEALTH

First Defendant Second Defendant

JUDGMENT

LOUIS VISSER, AJ:

1.This is an exception by the defendants to a declaration filed by the plaintiff. The defendants were represented by Mr Tokota SC, with him Mr Ngoepe and the plaintiff was represented by Mr du Toit

SC, assisted by Mr Meyer.

3.The plaintiff imports and sells products which are used by the Department of the Minister of Health in its hospitals and clinics. I shall refer to the plaintiff as "the plaintiff'. The first defendant is the State Tender Board, to which I shall refer as such in this judgment. The second defendant has been cited in its representative capacity of the Department of Health. For purposes of clarity I shall refer to the second defendant as "the Department of Health". When reference is made to the State Tender Board and the Department of Health collectively, I shall refer to them as

"the defendants".

* **THE TENDER PROCESS:**

3.During about June 2003 the State Tender Board invited tenders for the Department of Health's end users for the supply of certain medical equipment for a contract period of 1 October 2003 to 30 September 2005 which period was subsequently extended to 31

December 2005.

4.In reaction to the call for tenders, the plaintiff submitted tenders during July 2003 for the supply of 7 items of intravenous catheters under tender numbers RT299-15-01 to RT299-15-07. It transpired that tender numbers RT299-15-06 and RT299-15-07 were awarded to the plaintiff, but that the tenders under tender numbers RT299-15-01 to RT299-15-05 ("the relevant tenders" or "-items") were not awarded to the plaintiff or, in fact, to any other tenderer, due to a decision by the State Tender Board not to procure those items but to withdraw them from the tender process. It is this decision which the plaintiff seeks to attack.

5.It is common cause that the tender process and the issues which arose in the present case are subject to the provisions of the *State Tender Board Act,* 86 of 1968 and *sections* 33 and 217 of the *Constitution,* 1996, read with the provisions of the *Promotion* of *Administrative Justice Act* No.3 of 2000 *("PAJA").* To this list, the Regulations made in terms of the *State Tender Board Act* must be added as governing the tender process. The current regulations in force are those published in the *Government Gazette* under number R.1237, dated 1 July 1998. I shall refer to these regulations again in due course. The *General Conditions and Procedures (ST* 36), applicable to the State Tender Board, are also applicable to the present tenders and the issues which

have evolved between the parties.

* **THE REVIEW APPLICATION:**

6.Being dissatisfied with the decision of the State Tender Board not to award the relevant tenders to it and withdrawing the tenders from the tender process, the plaintiff initiated review proceedings by way of application during 2004 to review and set aside the decision to cancel the procurement of the items and not to award the relevant items to the plaintiff. These proceedings were launched in terms of the provisions of the *PAJA.* The defendants opposed the review application, and filed opposing papers.

7.At the hearing of the review application, Rabie J made an order by agreement between the parties referring the matter to trial in terms of *Rule 6(5)(g)* of the *Uniform Rules* of *Court.* This course was clearly taken as all concerned acknowledged that material disputes of fact existed in the review application which could not

be decided on the affidavits.

8.After delivery of a declaration by the plaintiff, the defendants signified their intention to raise an exception thereto, leading to an amended declaration, and the present exception being raised

thereto.

* **POSSIBLE IRREGULARITY:**

9.It needs to be mentioned that, apart from the affidavits and annexures in the review application, a voluminous record of the proceedings of the State Tender Board and its subservient committees, pertaining to the tender process in the present instance, was filed and was contained in the court file.

10. Upon receiving the court file, i noticed from the practice note which was filed by counsel for the defendants that I was requested to read the papers. I considered that to refer to all the papers, which, obviously, included the record of proceedings. It must be mentioned that the practice note of counsel of the plaintiff only requested me to read the declaration and the notice of exception, as would be normal in the case of an exception. However, as I felt that I could not ignore the practice note of the defendants, who are, after all, *dominis litis* in the exception, I read the papers as requested. This included the papers filed in the review application as well as the record of proceedings.

11.Having read all the papers, as requested, it occurred to me that the present case might not be different from the normal situation pertaining to exceptions, where only the pleading excepted to as

well as its annexures, and the notice of exception are to be taken into account. It appeared to me that it had possibly been irregular for me to have taken note of the contents of the record of proceedings and/or the other papers filed in the review application.

12. I might mention that the reading of the papers filed in the review application (apart from the record of the proceedings) turned out not to have been irregular, and if it was, of no consequence, in view of the references made thereto by counsel on both sides in their arguments, during which I was required to take note of its contents.

13. In view of the above, at the commencement of the hearing, I requested both counsel to present their views on whether it was proper and regular for me to have taken note of the contents of the record proceedings. Both counsel submitted that it is only the declaration and annexures thereto as well as the notice of exception which should be considered. I thereupon invited both counsel to inform me whether they had an objection against me hearing the matter, in the light of the circumstance of me having become aware of the contents of the record of proceedings. Both counsel assured me that even though it might have been irregular, they had no objection to me hearing the exception. I appreciate the views expressed by both counsel that they felt that I would not allow myself to be influenced by my knowledge of what appears from the record of proceedings.

14. However, having crossed that bridge, I then requested counsel to inform me whether the rule of evidence would apply which

prescribes that when reference is made to part of a document, the whole document becomes admissible as evidence. The reason for my concern was that certain extracts of the record of proceedings were attached as annexures to the declaration, and certain paragraphs of the declaration itself referred to and/or were based upon what appears from the record of proceedings, raising the question whether the whole of the record of the proceedings did not thereby become part of the evidence referred to in the declaration to which regard must be had in the exception.

15. Mr du Toit contended in the negative, while Mr Tokota preferred to make no submissions in this regard. In fairness to the plaintiff, whose pleading is being excepted against, I resolved, and therefore indicated, that I shall close my mind to the contents of the record of proceedings which I had read, and that I would only

> consider what is stated in the declaration and the annexures attached thereto, the notice of exception, written argument filed by counsel and such other documents as counsel requested me to have regard to. In doing so, I do not profess to find that the record of proceedings did not in fact become incorporated by necessary inference by virtue of the references made thereto in the declaration, but simply because that was what I was requested by
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> both counsel to do.

* **THE DECLARATION:**

16. The scheme of the declaration falls into two main parts: the first deals with the review; and the second with a claim for consequential damages. The claim for damages on its part is divided into two parts: first, a claim for consequential damages in

terms of *s8(1) (c)(ii) (bb) PAJA* (the "statutory claim"), and second, a claim for consequential damages based in common law ("the common law claim"). The latter claim itself is again subdivided into two parts, being a claim based on alleged *mala fides* fraud, and secondly a claim based on negligence.

17. In respect of both categories, the exception is based on the declaration being both vague and embarrassing and disclosing no cause of action.

* **THE DECISION TO BE REVIEWED:**

18. The declaration states that on 26 September 2003 the Tender Evaluation Committee recommended the award of the tender in respect of the relevant items to the plaintiff and that the Tender Recommendation Committee subsequently likewise recommended it. Subsequent thereto the Office, in a memorandum dated 2 October 2003, recommended to the State Tender Board that the relevant tender be awarded to the plaintiff. Those recommendations were approved by the Board subject to a limited investigation to be done by the Office and which investigation did not, and could not, have a bearing on the awarding of the tender to the plaintiff. It followed that the Office had to finalize the award of the tender to the plaintiff. The Office indeed completed the documentation to give effect to the award of the tender to the plaintiff. Thereafter, however, the Office inexplicably recommended to the Board that the items in issue be cancelled. The declaration avers that no evidence existed to support that recommendation. It is stated that without applying its mind the State Tender Board merely approved those

set out the facts and all circumstances upon which a court could arrive at the conclusion that such change of mind by the Board, was unlawful. In this regard, Regulation R.1237 (supra) provides

ins5(b):

"b) the Board may, where an offer relates to more than one item, accept such offer in respect of any specific item or items."

20. It was submitted by Mr du Toit that on 9 october 2003 the State Tender Board took a decision which entailed the following:

> The award of the relevant items to the plaintiff was approved alternatively approved in principle.
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> If other tenderers had been passed over the Office had to verify the reasons given by the Department of Health for such tenderers not having submitted samples.
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> After that had been completed the Office was delegated to inform the recornmended tenderer (plaintiff) of the aVv'ard of the relevant items to it.

21. The memorandum of 9 October 2003 indicates that the State Tender Board queried certain matters. This memorandum is attached to the declaration as an unmarked annexure and it reads:

> "Approved except for items where tenders had been passed over for not submitting samples.
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> The Board further resolved that:
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> The Department (of Health) must confirm, in writing, the reasons for passing over these offers;
> the Office verify the reasons given by the Department/Institution for tenderers who did not submit samples;
> The Office be delegated to finalise the items upon receipt of the Department's confirmation; ....."

[Emphasis supplied.]

22.What is abundantly clear from this memorandum is that there was at best a qualified or provisional, as opposed to a final, approval, subject to two proviso's: a) an explanation had to be given in respect of the matter of passing over certain offers, and b) the confirmation of the awards by the Department of Health.

23.It transpired that the State Tender Board, upon the receipt of certain information, decided not to award the tender in respect of catheters without ports to anyone, but to withdraw those items from the tender process. To put it bluntly: the Department refused to confirm the award of the tenders both to the plaintiff as well as to anyone else. This much appears from the declaration itself, where it is alleged that these were the tenders of the plaintiff, and that they related to tenders for the supply of catheters without

24.But Mr du Toit argued that in paragraph 5.3 of the declaration it is specifically mentioned that the recommendation that the relevant items be awarded to the plaintiff is contained in paragraph 2.3.1 of the memorandum (annexure "DT1 "). In the same paragraph it is alleged that the relevant pages of annexure "C" referred to in paragraph 2.3.1 of the memorandum are annexed to annexure "DT1".

25.When reference is made to those pages of the said annexure "DT1" one will observe that in the right column under the heading "Tender Recommended" next to the relevant items "RT299-1501 MF to RT299-15-07MF" the name of the plaintiff is reflected indicating it to be a recommendation that the tender in respect of

the relevant items be awarded to the plaintiff.

26. It was argued by Mr du Toit that there can simply be no misunderstanding, confusion, ambiguity, vagueness or embarrassment. In any event, so it was argued, the allegation is pertinently made in paragraph 5.3 of the declaration that the recommendation was made to the State Tender Board that the relevant items be awarded to the plaintiff. I have to confess that the explanation given by Mr du Toit is not as clear to me. I say this for the following reasons:

1. Annexure "DT1" professes to be a memorandum by the Office, presumably directed to the State Tender Board, dated 2 October 2003. It cannot be argued, nor was it in fact argued on behalf of the plaintiff, that the Office is authorised to make any decisions in respect of the award of tenders. It is the State Tender Board that is charged with the function and authority of deciding what tenders are to be awarded and to whom. As stated before, the basis of the review is an attack on the decision of the State Tender Board, not the Office.

2. Paragraph 2.3.1 of the memorandum, which Mr du Toit says represents the basis for the allegation contained in paragraph 5.3 of the declaration, it is a subparagraph under paragraph 2, which is headed: "RECOMMENDATION". Paragraph 2.1 is headed: "THE ONLY (PRICES REASONABLE) AND TO SPECIFICATION" (whatever that means). In this respect reference is made to Annexure "A". Paragraph 2.2 is headed: "THE HIGHEST POINTS AND TO SPECIFICATION" and under this heading a reference is made to an Annexure "B". Paragraph 2.3 is headed: "THE

HIGHEST POINTS TO SPECIFICATION". Paragraph 2.3.1, relied upon by Mr du Toit, reads:

> "Please refer to Annexure "C" for a summary of the items which fall into this category."

A reference to annexure "OT1" shows that there are 3 documents attached to the memorandum. But there is no annexure "A", "B" or "C" attached to the declaration. This, in itself, presents vagueness and embarrassment.

3.What the declaration might have had in mind with its reference to the pages which are attached to the memorandum, is, as I have pointed out, a reference to the last column on the first to pages under the heading:

> "Tender Recommended", where, *inter alia,* the name of the plaintiff appears in respect of the relevant tenders. The reference to the third page, which might or might not be
> Annexure "C", could possibly have been to the \J\Jords
> "Approved except for items where tenders have been passed over for not submitting samples". None of this, however, appears clearly from a reading of the declaration and the annexure.

27.From the what has been stated above, it appears to me that the defendants will be required to guess at what the plaintiff is referring to as the facts intended to support the conclusions which it seeks to be drawn. Even if those inferences are correctly identified by me above, the criticism remains that those

> references do not support a ground for review or a cause of action for the payment of damages.

28. Moreover, it seems to me that the reasons of the State Tender

Board not confirming the relevant tenders are to be found in paragraph 5.12 of the declaration itself, where it is alleged that in a memorandum dated 30 October 2003, the Office recommended to the State Tender Board that the relevant five items be cancelled and that the plaintiff's tender in respect of the other two should be awarded. This recommendation was motivated as

follows:

> "The revised recommendation that some of the items are to be cancelled is based on the facts that the participating institutions are not satisfied with the quality of the products available and that there are suitable alternative products on tender that can be used. In most provinces these products are not used any more and it would be unfair to award these items if there is not a real off take during the contract period."

[My emphasis.]

I interject here to point out that this recommendation was quoted *verbatim* by the plaintiff in paragraph 5.12 of the declaration, thereby constituting a clear conflict of allegations in the declaration.

29. There is clearly no ground stated for the allegation in the declaration that no evidence and/or information existed to support the recommendation of 30 October 2003 by the Office to the State Tender Board. In point of fact, regard being had to the allegations and facts contained in the declaration, to which I have referred above, and this contributes to the vagueness and embarrassment

of the declaration.

30. The plaintiff is compelled, so it appears to me, to make out a case that Annexure "OT1" was a firm and final decision, giving rise to a

cause of action to the plaintiff. If the plaintiff should fail to do that, the allegations and the annexure are simply without purpose. This has not been done and the reference to the annexure leaves the matter hanging in the air.

31. It was alleged in the declaration and argued by Mr Du T oit that the State Tender Board acted in various ways which constitute reviewable conduct, giving rise to a right of review. One of the allegations of fact in support of this contention, is that the decision of the State Tender Board was taken capriciously , due consideration of relevant facts, and indeed, was taken fraudulently. But even so, no factual basis is set out for these allegations in the declaration.

32. Mr du T oit argues that to expect the plaintiff to have done so would be to expect it to have pleaded *facta probantia,* it is not required to do. But this is not so. What is expected of a plaintiff in the position of the present plaintiff, was aptly summarised in the case of *Tuckers Land and Development Corporation Loots,* (4) SA 260 (T). In his judgment on appeal, Nestadt J (as he then was) delivering the judgment of the court, said at 263G-264A:

> "The failure to allege a fact, the onus of proof whereof is on the plaintiff, will generally, if that fact be essential to the cause of action, result in the excipiability of the summons. Despite the Courts adopting an indulgent, less meticulous, more liberal attitude towards pleadings in magistrates' courts (as compared with those in the Supreme Court) it is nevertheless required that the claim should be set out in such a way that the liability of the defendant, at least in principle, follows as a necessary consequence from the allegations expressly set out or necessarily implied in the particulars of claim. *(Nees and Korving Louters* (4) SA 300 (N)). It may be said immediately that no reliance

> was placed on behalf of the plaintiff on any implication. Nor did I understand it to be argued that the principle that an exception on the ground that a pleading does not disclose a cause of action will only be upheld if on all its possible meanings no cause of action is disclosed *(Amalgamated Footwear* & *Leather Industries Jordan* & *Ltd* (2) SA 891 (C)) applied. In my view it does not. If a vital ingredient of plaintiffs cause of action is missing then the summons is excipiable and, furthermore, the requirement of prejudice to the defendant (see *Rule* (5)(a)) would be
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> satisfied."

In the present case it has not been contended on behalf of the plaintiff that any *onus* proof rests upon the defendants in this case.

In my view, the allegations by the plaintiff that the officials of the State Tender Board failed to apply their minds, acted *mala fide* fraudulently, or with bias, or with an ulterior motive, or any of the criticisms levelled in paragraph 6 of the declaration, are simply devoid of factual support in the declaration.

33. It is stated that thereafter the Office prepared the necessary documentation to reflect and inform the plaintiff that the tender had been awarded to the plaintiff. Whether this is so or not, does not appear to me to be of any consequence. This was not alleged by the plaintiff to be anything other than a procedural step in the tender evaluation process. It certainly was not alleged to be the actual decision to award or not to award the tenders, taken by the State Tender Board. I shall again make reference to this issue.

34. The declaration further avers that investigation by the Office of the reasons for certain tenderers not having submitted samples and also the subsequent discovery of an administrative error (which are not relevant presently) did not and could not affect the tender

of the plaintiff. But on the facts to which I have referred above, it is clear that the question of the confirmation by the Department of Health did affect the tenders of the plaintiff. They did not want catheters without ports. I have already pointed out that the declaration itself alleges that the plaintiff did not tender for catheters with ports, which was what the State Tender Board eventually decided to purchase. Thus the tender of the plaintiff was, on the facts stated in the declaration itself, pertinently affected. The declaration appears to me to be vague and embarrassing in this respect as well.

35. The declaration also alleged that the relevant items are the largest of all surgical items both in volume and in monetary value of the tender. I am uncertain what the plaintiff seeks to make of this allegation. If the plaintiff wishes to rely on this allegation for any inference to be drawn (which is obscure) it must be considered that the allegation is vague. If the plaintiff does not rely on the facts to which I have referred, the question arises as to why the allegations are contained in the declaration at all. This is an aspect of vagueness in my view. How must the defendants know what the plaintiff wishes to make of the allegations if the plaintiff does not tell them himself?

36. In paragraph 6.2 of its declaration the plaintiff alleges that the decision of the State Tender Board as an administrative action includes the administrative work of the Office referred to and which precipitated the ultimate decision of the State Tender Board. Again, this statement, as a broad statement can be accepted, provided that it is not intended to elevate the recommendations of the Office to the status of decisions of the

State Tender Board.

37. In paragraph 6.3 of the declaration, the plaintiff alleges:

"6.3 By simply endorsing the recommendation to cancel the tender in respect of the items in issue, First Defendant 6.3.1 ignored the limited mandate given to the Office per its decision of 9 October 2003;

6.3.2 did not take into account that there was no evidence and/or information to support the motivation for such recommendation;

6.3.3 failed to perform any proper consultation, deliberation, enquiry and/or investigation in regard to the reasons for the recommendation directly contrary to the previous recommendation and its previous decision including a direction in this regard to the Office;

6.3.4 did not apply audi alteram partem by failing to hear the plaintiff on its intended cancellation of the items in issue prior the taking of that decision."

The "limited mandate" to which the declaration refers is misleading. The mandate included a reference to and approval by the Department of Health. Of this aspect, no mention is made by the plaintiff in its declaration.

38. There was indeed "other evidence and/or information to support the motivation for such recommendation", contrary to what the declaration alleges. Again the evidence and motivation appears from the declaration itself where reference is made to the fact that it was recommended that the purchase of the relevant items should not be proceeded with. The same applies to the allegation in respect of the alleged failure to perform enquiries and/or investigations in regard to the reasons for the decision not to purchase the relevant items.

39. There are no indications in the conclusions drawn in the declaration, as to which of the facts and allegations therein made, are relied upon by the plaintiff in support of its contentions. In

fact, as will appear from the declaration itself, the State Tender Board did not "simply endorse" the recommendation to cancel the tender in respect of the items in issue; has not been shown on the facts to have ignored any mandate given to the Office in its memorandum of 9 October 2003; did in fact take into account the evidence which the plaintiff itself has alluded to in the declaration; and was not shown to have failed to perform any proper consultation, deliberation, enquiry and/or investigation in regard to

the reasons for the recommendation.

40. No basis is pleaded for the conclusion that the State Tender Board unlawfully failed to allow of the *audi alteram partem* principle to the plaintiff, by not giving the plaintiff the opportunity of being heard. In this respect Mr Tokota argued that no facts or legal foundation in support of this claim of entitlement are contained in the declaration in order for the defendants to understand with some certainty what the basis of this alleged entitlement is. In fact the plaintiff has failed to state any fact or circumstance which might entitle him to being heard.

41. In addition, the declaration, in paragraphs 5.16 and 5.17, alludes to enquiries made on behalf of the plaintiff. It is alleged that the plaintiff's contentions in respect of what the "real reason" for the refusal to award the relevant items to the plaintiff was, had been conveyed to the State Tender Board. This is corroborated by a letter dated 3 December 2003 in which it is indicated that the Office "would consider the re-evaluation of items 15-01-1505

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which were not awarded in terms of the above-mentioned contract". That letter was attached as Annexure "OT5" to the declaration. The letter refers to "discussions held on 26 November 2003". Otherwise than what is alleged in the declaration, it appears, at least *prima facie,* that the plaintiff was given the opportunity of being heard in regard to its complaints. But the important point remains that the plaintiff has failed to state facts in support of conclusions which it seeks to be drawn, thereby rendering the declaration vague and embarrassing.

42. In my view the *audi alteram partem* rule did not, in any event, apply during any stage of the deliberation- and investigation process, and the reliance thereon by the plaintiff is misplaced. Even if it did apply, the declaration in paragraphs 5.16 and 5.17 makes it clear that the *audi alteram partem* principle was applied.

43. It appears to me that Mr du Toit's argument as well as the declaration, omit the critical part of the Office being delegated to finalise items "upon receipt of the Department's confirmation". On the plain wording of the memorandum, this stipulation was quite separate from the issue of the "passing over" of certain tenderers. In this respect the affirmations in the declaration are clearly contradicted by the memorandum, rendering the declaration

vague and embarrassing.

44. Relying on the stated facts, the plaintiff in paragraph 6.1 of its declaration contends that it is, in terms of *sections* 6, 7 *and* s8(1)(c) of *PAJA,* entitled to have the State Tender Board's decision of 6 November 2003 reviewed and set aside. If this is intended to mean that a party may institute review proceedings in

terms of the provisions of *PAJA,* is no criticism. But if the words are intended to mean that the plaintiff has made out a case of review on the facts alleged, I beg to differ. More particularly, in paragraph 6.4 the plaintiff alleges that the facts alleged by it constitute grounds for review as provided for in terms of 56(2) of *PAJA.* allegation is to the effect that the facts which are recited in the declaration show that plaintiff is entitled to rely on

one or more of those grounds mentioned.

45.In this regard, Mr du Toit submitted that the Defendants had made a fundamental mistake of reading certain allegations as contained in specific paragraphs in the declaration out of context and thereby disregarding other relevant allegations and paragraphs. Mr du Toit submitted that the whole of paragraph 5, paragraph 6 as well as paragraph 4.5 (referred to in paragraph 5.15) must be read together. It will then become abundantly clear what the plaintiff's case is, it was submitted. It seems to me that when all the allegations are read together the situation remains as clear as mud. It must be borne in mind that each of paragraphs 5 6 contains a number of sub-paragraphs. The view propagated by Mr du T oit that one must read all the allegations in the declaration to discover which of them supports which conclusions asked to be drawn, is precisely what lies at the root of the problem. The defendants are expected to guess which of those facts are intended to support which conclusions the plaintiff wishes to draw. As I have been at pains to point out, no grounds were put forward by the plaintiff in its declaration which can be rationally connected to the conclusions which it seeks to be drawn in this sub-paragraph. Therein lies the complaint of the defendants.

46.Mr Tokota argued that it is quite conceivable that a pleading may contain all the necessary allegations as to fact or circumstance which are necessary to support a cause of action or defence, but still be vague and embarrassing. What springs to mind is the situation where, such as was done in the present case, a list of allegations is recited in the declaration and thereafter a list of possible legal principles which may be applicable is recited, without making it clear what legal principle is alleged to apply to what particular fact or facts, stated in the pleading. A rule of thumb might be to ask whether guesswork is necessary to determine that question. If one has to guess as to what facts were intended by the pleader to apply to what legal principles or *vice versa,* it seems to me that the pleading is, per definition,

vague and embarrassing.

47~ A reading of the declaration shows that in paragraph 5.4 an alleged decision was taken by the State Tender Board which approved the tender of the plaintiff in respect of the relevant items. It appears to be common cause that the plaintiff was never informed of an acceptance of any of the relevant items by, or on behalf of, the State Tender Board. At least *prima facie,* no rights could have accrued to the plaintiff by virtue of what is stated in paragraph 5.4. in view of this omission, the defendants are left in the dark as to what the plaintiff intends making of it, and on what grounds. In my view, in this respect, the declaration is vague and

embarrassing.

48.The subparagraph then continues to refer to the "said decision" as being annexed as annexure "OT2". A reference to annexure "OT2" will disclose that the annexure is a draft court order and

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does not contain any decision by the State Tender Board. In this sense too, the declaration is, in my view, vague and embarrassing.

49. Du Toit argued that the chain of events which unfolds itself when reading the declaration as a whole, constitutes the facts supporting the conclusion that the decision was arrived at through fraud. I disagree. Not a single fact, related by the plaintiff, vaguely suggests that the State Tender Board members acted *mala fide* in counselling and withdrawing the relevant items from the tender process. The plaintiff itself has quoted the contents of the memorandum in this regard in paragraph 5.12 of the declaration, which I have referred to above. There is consequently no fact or circumstance which the plaintiff alleges in support of the conclusion that no evidence existed to support the recommendation for the decision of the State Tender Board to withdraw the relevant items from the tender process without applying its mind. Lastly, I am unable to comprehend how the recommendation of the Office that the intravenous catheters of the same size, but those with ports, be awarded to PALMED, can have any relevance to the plaintiff's case, in view thereof that the plaintiff admitted that it did not tender for intravenous catheters with ports.

50. Having carefully listened to the argument presented by Mr du Toit, I am left unconvinced that the declaration is not vague and embarrassing, at least in the respects which I have pointed out above.

* **ALLEGED LEGITIMATE EXPECTATION:**

51.The declaration states that prior to the tender process, the relevant tender items, including the plaintiff's product, had been extensively used by the Department of Health. It was pleaded that the plaintiff's product had in the past been bought off tender by the Department of Health when the then contracted supplier (PHODISO) could not deliver. The declaration states that the use of the plaintiff's product occurred to the satisfaction of end users. The declaration goes on to allege that the plaintiff's tender complied with all requirements and that it was the lowest acceptable offer submitted to the State Tender Board. These allegations are ostensibly included in order to show a foundation for the claim that the plaintiff had a so-called legitimate expectation that the its tender would be accepted.

52.The fact of the matter is, however, that the plaintiff did not tender for catheters with ports, which was what the State Tender Board eventually decided to purchase. It cannot be imagined how the plaintiff could have had a legitimate expectation to be awarded a tender for catheters which it did not tender for. Similarly, the plaintiff cannot claim to have had a legitimate expectation that the State Tender Board would not accept catheters with ports. No foundation is laid for such an expectation, and if the plaintiff in fact had such an expectation, it was ill founded. No facts are stated to support the conclusions which the plaintiff seeks to draw. In addition, the allegations in this respect fly in the face of the authority of the State Tender Board to decide on which tenders it would accept. Regulation R.1237 (supra) provides in s 5(a):

> "the Board shall not be obliged to accept the lowest or any offer."

The *General Conditions and Procedures (ST*), applicable to

the State Tender Board, provides in paragraph 24.3:

> "The Aboard is not obliged to accept the lowest or any tender."

And in paragraph 24.4:

> "The Board may, where a tender relates to more than one item, accept such tender in respect of any specific item or items and, subject to the provisions of paragraph 27, also accept part of the specified quantity of any specified item or items."

53. From these provisions it appears that the plaintiff could not reasonably have held a legitimate expectation that its tenders in respect of the relevant items would be accepted. It does not appear to me that any legitimate expectation which the plaintiff had, could have extended beyond the expectation that the State Tender Board would fairly consider all tenders according to the regulations and statutory provisions applicable to it and to the tender process, and that it would give effect to the requirements of the Constitution that the process be conducted in accordance with a system which is fair, equitable, transparent, competitive and cost-effective (s 217). I find no allegation of fact which supports the conclusion that the State Tender Board failed in this respect. In my view, the declaration alleges no fact or circumstance from which the inference or deduction can be drawn that the State Tender Board did not comply with these requirements, or that it was compelled to award the tenders to the plaintiff.

54. In this regard it was argued by Mr Tokota that the legitimate expectation, alleged by the plaintiff, appears to be based upon discussions which were held between representatives of the plaintiff and representatives of the State Tender Board and on the contents of annexure "OT5", attached to the declaration. It was argued that the declaration does not contain the necessary

averments to establish a cause of action for the legitimate expectation which the plaintiff contends for. It is also not alleged why the legitimate expectation could be said to have been a reasonable one in the circumstances. It is not alleged in the declaration whether the officials with whom consultations were held, (paragraphs 5.16 and 5.17) were authorised to make a final decision, or to evoke a legitimate expectation with the plaintiff. Mr Tokota argued that what clearly appears from all the allegations contained in the declaration, is that in fact the relevant decision still had to be made. It was further argued that it is unclear upon which part of annexure "OT5" the plaintiff could have based a legitimate expectation that the relevant tenders would be awarded

to it. I agree with these submissions.

* **GROUNDS FOR THE EXCEPTION:**

55.Mr Tokota argued that paragraphs 5.1 to 5.9 of the declaration appear to be a repetition or narrative of the contents of the plaintiff's founding affidavit and a narrative of evidence which the plaintiff intends to produce at the trial, without any clarity being provided in respect of what conclusions the plaintiff asks to be drawn from each of the facts related in the narrative. He illustrated this with reference to the contents of the founding affidavit and compared that contents with that in the declaration in order to make his point. It needs to be stated in passing that Mr du Toit offered no objection to the fact that reference was made by Mr Tokota to the contents of the papers in the application for review. I

alluded to this, earlier in this judgment.

56. In respect of the issue of vagueness and embarrassment, Mr du

Toit argued that paragraphs 5.1 to 5.17 of the declaration are not simply a narration of evidence that is to be led at the trial. Those paragraphs contain the *facta probanda* constituting the grounds on which the plaintiff relies, he submitted. The *facta probantia* to prove the pleaded *facta probanda* need not be pleaded and will be led at the trial. A cause of action does not exist in the air but a litigant must plead the underlying facts *(facta probanda)* on which he/she relies. I believe that this is precisely what Mr Tokota

argued the plaintiff has not done.

57. Mr Tokota argued that the repetition of the contents of an affidavit in a declaration *per* se constitutes a ground for exception which entitles the defendants to the present exception being upheld. In this regard Mr Tokota sought to rely on a Labour Court case in the matter of *Botha* v *Minister* of *Foreign Affairs and Ana,* (2000) 21 ILJ 2636 at 2639, para. [10], where it was stated:

> "It is unobjectionable for a pleader to attach copies of the documents to the statement of case. It is a matter of style. It is a different matter where the statement of case incorporates the annexures by reference. This is usually unhelpful and confuses an affidavit or affirmation with the pleading. Indeed it is the nub of the submissions by Mr *Takata,* who appeared for the respondents, that notwithstanding that the application was referred to trial Ms Botha's representatives have substantially reproduced her affidavit as a pleading."

Landman J concluded that in those circumstances the pleading was vague and embarrassing and he upheld an exception to the pleading.

While I am in complete agreement that the circumstances described by Landman J can give rise to a pleading being vague and embarrassing, I would respectfully point out that it would

depend upon the circumstances of each case whether a repetition of the contents of an affidavit in a pleading would indeed render the pleading excipiable. If those allegations, so copied, do constitute a cause of action, and the declaration does comply with the requirements of *Rule* 18, the fact that it was a repetition of the contents of an affidavit would appear to be irrelevant. I would caution myself, therefore, not to elevate the fact of a repetition of the contents of an affidavit in a pleading to a legal rule or principle that such pleading would, as a consequence, necessarily be excipiable. The proper approach appears to me to be to consider whether the declaration contains a cause or causes of action, based upon allegations of fact and/or circumstances in support thereof, which are stated in the declaration. If the conclusion is in the affirmative, then the fact that the contents of an affidavit was copied into the declaration, is of no consequence. I shall therefore inquire on the facts of the present exception, whether the declaration meets these requirements.

58. In my approach to the issues in the case, I have cautioned myself not to innoculate the requirements pertaining to affidavits onto pleadings. The deponent to an affidavit is required to state such facts in the affidavit as will allow of the court to come to the conclusions which the deponent asks the court to draw. This requirement does not necessarily apply to a pleading, where it is not required to plead the *facta probantia,* but only the *facta probanda.*

59. Mr Tokota argued that the whole of paragraph 5 of the declaration fails to comply with *Rule* 18(4) of the *Uniform Rules* of *Court,* in that it does not contain

> " .....a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto."

60. Mr Tokota pointed out that Annexure "OT1" to the declaration consists of seven typed pages. This annexure is a memorandum of the Office of the State Tender Board ("the Office"), dated 2 October 2003, directed to the State Tender Board. The document is clearly extracted from the record of proceedings. It was argued that the plaintiff failed to point out with sufficient clarity so that it could be comprehended with reasonable certainty which passages the plaintiff sought to rely upon in annexure "OT1", and that, consequently, the declaration is vague and embarrassing in this respect. It was further pointed out on behalf of the defendants that annexure "OT1" contains references to other documents, and that it is unclear whether the plaintiff relies on those documents as well, and if so, on what portions thereof, and precisely what case is sought to be made in respect of those other annexures. In this regard reliance was placed on the judgment in *Swissborough Diamond Mines (pty) Ltd* v *Government of the RSA,* 1999 (2) SA 279 at 324F-H. I am in agreement with this submission.

61. Regard being had to the contents of paragraph from 5.1 to 5.6, it was argued that the defendants are left to speculate what case the plaintiff sought to make out. That this is so, is clear.

62. Mr Tokota argued that no facts or grounds are alleged to support the statement in paragraph 5.6 of the declaration that annexure "OT3" was prepared with the purpose of informing the plaintiff that

it had been awarded the tender in respect of the relevant items, and whether or not the plaintiff was indeed so informed. Again, this submission cannot be faulted.

63. He further submitted that paragraphs 5.7 to 5.21 of the declaration do not reflect a clear and concise statement of material facts upon which reliance is placed for any specified cause of action so as to enable the defendants to respond thereto. I have sympathy for this predicament in which the defendants must obviously find themselves.

64. Mr Tokota submitted that no basis was alleged in the declaration for the State Tender Board to have been under an obligation in law to inform the plaintiff of the contents of annexure "OT3" , as is alleged in paragraph 5.10 of the declaration. The declaration alleges in this sub-paragraph that the Office was legally bound to inform the plaintiff "pursuant to the First Defendant's decision referred to in paragraphs 5.4 and 5.5 *supra,* the tender in respect of the relevant items had been awarded to the plaintiff, alternatively to recommend to the First Defendant that the said tender be so awarded". What was submitted to be vague, is that neither the grounds for the claim of entitlement by the plaintiff to be notified of these circumstances, nor the ground for its entitlement to have been notified at that stage of the proceedings that the State Tender Board has accepted the plaintiff's tender, is to be discovered in the facts contained in the relevant subparagraphs. I agree with this submission as well.

65. With reference to paragraph 5.10, read with paragraph 5.5 to 5.9 of the declaration, Mr Tokota argued that it was the plaintiff's

version that there were errors and flaws in the first recommendation by the Office of the State Tender Board. In spite of this, the plaintiff claims that it should have been awarded the tenders which had been withdrawn. It was submitted that this claim remains unexplained, and the errors and flaws which the plaintiff had alleged in its declaration had not been discounted or distinguished from the plaintiff's case. It is clear to me that the above constitutes vagueness of the declaration.

66. In paragraphs 5.10 to 5.14 of the declaration the plaintiff appears to rely on an internal memorandum of the State Tender Board, with reference to annexure "DT 4" which is attached to the declaration. Mr Tokota pointed out that the plaintiff does not disclose in his declaration whether he alleges that the said memorandum forms the foundation of any cause of action of the plaintiff and if so, precisely what the nature thereof might be. I agree.

67. It was said that while the declaration states that the State Tender Board did not apply its mind with regards to the contents of annexure "DT 4", the defendants are left to speculate as to what precisely is being alleged not to have properly considered in that annexure, in order to comprehend what the cause of action is, and what it is based upon. This submission cannot be faulted.

68. In respect of paragraphs 5.19 to 5.21, Mr Tokota submitted that it is not clear to the defendants what cause of action was being made out.

69. He submitted that paragraph 6, read with paragraph 5, contains

conclusions of law and lays no foundation for review, as contemplated in *PAJA.*

70. It is, in my view, patently obvious that the declaration is either vague and embarrassing in that it failed to provide facts and/or circumstances to support each of the conclusions which are sought to be drawn, or in that the declaration is contradictory of itself in the respects alluded to.

* **STATUTORY CLAIM FOR DAMAGES:**

71. It was submitted by Mr du Toit that the administrative work of the Office and the functions and powers of the State Tender Board were performed and exercised in terms of the provisions of the *State Tender Board Act* No. 86 of 1968. That was, however, subject to s 217(1) of the *Constitution* of 1996 which reads:

> "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."

72. It was pointed out that the calling for and the adjudication of tenders by the State Tender Board constituted administrative action *(Cape Metropolitan Council* v *Metro Inspection Services (Western Cape)* CC *and Others* 2001 (3) SA 1013 (SCA) para [191 p1 024) and that s 33 of the 1996 Constitution dealing with just administrative action is therefore applicable. *PAJA* was enacted in terms of s 33(3) of the *Constitution* to give effect to the rights entrenched therein.

73. These submissions were made to set the scene for the

submission that s8(1) *(c)(ii) (bb) PAJA,* of a cause of action to the plaintiff for consequential damages. That subsection

reads:

"8. Remedies in proceedings for judicial review -
(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 -
(a) …
(b) …
(c) setting aside the administrative action and -
(i) ….
(ii) in exceptional cases -
(aa) …
(bb) directing the administrator or any other party to the proceedings to pay compensation" .

[Omissions from original text by me.]

74.In paragraph 7 of the declaration the plaintiff contends that should the decision of the State Tender Board be reviewed and set aside it would be just and equitable that compensation be granted to it In terms of s8(1) *(c)(ii) (bb) PAJA.* paragraph 8 of the declaration, plaintiff contends that on a correct interpretation of *s8(1)(c)(ii)(bb) PAJA,* should be compensated for its consequential loss suffered. The damages are then quantified in the amount of R2,880,667.44. This claim is based, so it was argued, on the provisions of s *8(1)(c)(ii)(bb) PAJA* with the provisions of the *State Tender Board Act* and *sections 33* 217 of the *Constitution 1996.*

75.It was submitted by Mr du Toit that the underlying facts pertaining to the main cause of action *(s8(1)(c)(ii)(bb) PAJA) inter alia* that the State Tender Board and/or the officials in its Office

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when performing their administrative functions and powers, *inter*

alia was biassed, acted for an ulterior purpose and/or acted in bad faith. There are two inherent problems in these submissions. The first is that the right to claim compensation must, on the facts of the case, be based upon the statutory provision itself. The second is that no facts were stated in the declaration in support of the allegations of bias, ulterior purpose and/or bad faith in the declaration. I consequently agree with Mr Tokota that the declaration is at least vague and embarrassing in this respect.

76. Mr Tokota argued that in paragraph 7.1 the declaration avers that it would be just and equitable in terms of *PAJA,* that the plaintiff shall be awarded compensation in view thereof that the contract for which the plaintiff had tendered, has expired. He said that in paragraph 7.2 the declaration claims that the contract be awarded to the plaintiff. It is argued that these two paragraphs are mutually destructive and creates vagueness and embarrassment. Mr

> Tokota submitted that paragraph 8 of the declaration also contradicts paragraph 7.2, referred to above. In my view, the defendants have misread and/or misunderstood the import of paragraph 7.2. There appears to me to be no contradiction in these sub-paragraphs.

77. It was also submitted that paragraphs 7 and 8 fail to disclose a cause of action for the statutory claim for damages. I cannot agree. The necessary averments are indeed made in the declaration that the plaintiff is entitled to statutory damages on the grounds stated in sub-paragraphs 7.1 and 7.2. Whether such claim is sustainable in law on the facts averred, and therefore constitutes a cause of action, is another matter.

78. It was submitted by Mr Tokota that neither the State Tender Board Act 1968 in terms of which the tender was issued nor *PAJA* affords a claim for consequential damages to an aggrieved party. No statutory legal duty is imposed on the State Tender Board to compensate a disappointed tenderer for his loss of profit. This being so, it was contended that the plaintiff's declaration does not disclose a cause of action for consequential damages under *s8(1)(c)(ii)(bb)* of *PAJA* in paragraphs 8 to 11 of the declaration.

79. This submission is somewhat obscure. In my view there are more than one issue being addressed in the submission. The first is that a duty of care does not exist without that duty having been established in law or on the facts. This has certainly not been done in the declaration. There is no specific reference to either a statutory provision, or a factual situation which can arguably have given rise to the alleged duty of care. The other issue which is encompassed in the submission is the obligation to pay damages.

It is trite that any right in administrative law to claim and be awarded damages, must be founded on the statute itself. In the case of *PAJA,* there is such a right, but that right is restricted to "compensation" in cases where there are "exceptional

circumstances" .

80. In *Steenkamp N.* . v *Provincial Tender Board, Eastern Cape,* 2006 (3) SA 151 (SCA) in [24}, at 161d, Harms JA said:

> "[24} Since the adoption of the interim Constitution, the common-law principles of administrative law have been subsumed by a constitutional dispensation and every failure of administrative justice amounts to a breach of a constitutional duty, which raises the question whether, under the Constitution, damages are an appropriate remedy. The problem becomes more complex since the

adoption of the Promotion of Administrative Justice Act 3 of 2000 (which does not govern this case) which sets out the remedies available for a failure of administrative justice. It Dlay not be without significance that an award of damages is not one of them. although an award of 'compensation' in exceptional circumstances is possible. This could imply that remedies for administrative justice now have to be found within the four corners of its provisions and that a reliance on common-law principles might be out of place. One aspect must nevertheless be kept in mind. A failure of administrative justice is not per se unlawful (in the sense of being contra legem): it simply makes the decision or non-decision vulnerable to legal challenge and, until set aside, it is valid. The award of the tender in this case was not unlawful, it was merely vulnerable. I raise this to indicate that an act by an administrator, which is entirely unauthorised (whether expressly or impliedly) or which violates some or other legal prohibition will probably not be subject to the constraints as to remedy that I have mentioned. For instance, in Cameau the relevant Minister was held liable in damages for a purported administrative decision which he was not authorised to make at all. His decision was not only wrong, it was impermissible. Proper categorisation of the administrative error is therefore also important because it is unhelpful to call every administrative error 'unlawful', thereby implying that it is wrongful in the delictual sense, unless one is clear about its nature and the motive behind it.

[25] Questions of public policy and the question of whether it is fair and reasonable to impose delictual liability are decided as questions of law, and it is necessary to identify the relevant policy considerations and not to react intuitively to a collection of arbitrary factors. Evidence may be required in order to enable the Court to identify the policy considerations that could apply in the particular factual matrix because factors that are relevant in one context (eg negligent misrepresentation) could hardly be relevant in another such as the present where administrative law issues arise. "

[Emphasis supplied.]

81. Moseneke DCJ delivered the judgment of the majority decision in the Constitutional Court in *Steenkamp's* case (reported in 2007

(3) SA 121). In paras (30) at 135A1B-D the following is said:

> "Examples of public remedies suited to vindicate breaches of administrative justice are to be found in s8 of the *PAJA.* It is indeed so that s8 confers on a court in proceedings for judicial review a generous jurisdiction to make orders that are 'just and equitable'. Yet it is clear that the power of a court to order a decision-maker to pay compensation is allowed only in 'exceptional cases'. It is unnecessary to speculate on when cases are exceptional. That question will have to be left to the specific context of each case. Suffice it for this purpose to observe that the remedies envisaged by s8 are in the main of a public law and not
>
> private law character."

[Emphasis supplied.)

82. Specifically in respect of the statutory claim for damage, based on *PAJA,* Mr du Toit argued that the exceptional circumstance in the present case was the fact that the tender contracts have already expired and that consequently, it would serve no purpose to

> awaid the tender to the plaintiff. That, so it is submitted, constitutes an exceptional circumstances in terms of the *PAJA.* I beg to disagree. If this submission were to be upheld, it could lead to the untenable situation that a person in the position of the plaintiff, can delay taking appropriate action until after the contract had been completed and then to claim consequential damages. It must also be borne in mind that any "compensation" in terms of *PAJA* is conditional upon the review being successful.

83. But it is unnecessary and perhaps inappropriate for me to venture an opinion in this regard. It will be for the trial court to decide the issue. What is clear, however, is that the alleged entitlement to "damages" by the plaintiff is ex *facie* the wording of *s8(1)(c)(ii)(bb)* of *PAJA,* not authorised. *Steenkamp's* case makes it clear that there is a distinction to be drawn between "damages" and

"compensation". It appears therefore that the plaintiff's statutory claim cannot be based on *PAJA.*

* **COMMON LAW CLAIM FOR DAMAGES - FRAUD:**

84.It was conceded by Mr Tokota that fraud might establish a cause of action for consequential damages in administrative law. He argued, however, that no allegations are contained in the declaration which can support a conclusion that the officials of the State Tender Board or its subservient committees, acted fraudulently. With this statement I fully agree.

85.It was further submitted that in paragraphs 12 to 14 of the declaration, the reference to the failure to award the tender to the plaintiff, does not give rise to a delictual claim for consequential damages by a disappointed tenderer and that the plaintiff's declaration therefore does not disclose a cause of action. Again, I agree.

86.In view of the foregoing, Mr Tokota submitted that the declaration was either vague and embarrassing, or failed to disclose a course of action.

87.Strong reliance was placed by Mr du Toit on *Transnet Ltd Sechaba Phatascan pty) Ltd,* (1) SA 299 (SCA) and *Minister of Finance and Others Gore N.O.,* (1) SA 111 (SCA). Both these cases are distinguishable from the present in that fraud was found to have influenced the decisions of the Tender Board. That distinction appears from the judgment in the latter case, at 140 in para. [88] where it was said:

> "In our view, speaking generally, the fact that a defendant's conduct was deliberate and dishonest strongly suggests that liability for it should follow in damages, even where a public tender is being awarded. In *Olitzki* and *Steenkamp* the cost to the public purse of imposing liability for lost profit and for out-of-pocket expenses when officials innocently bungled the process was among the considerations that limited liability. We think the opposite applies where deliberately dishonest conduct is at issue: the cost to the public of exempting a fraudulent perpetrator from liability for
> fraud would be too high."

*** CLAIM FOR CONSEQUENTIAL DAMAGES BASED ON**

NEGLIGENCE:

88.In paragraphs 10 and 11 of the declaration, the plaintiff, in the alternative, relies on the common law to found a delictual claim. It was argued that the alternative delictual claim is based on the same facts as those underlying the statutory claim. It follows that the same problems in respect of vagueness and embarrassment as well as failure to disclose a cause of action, manifest themselves in the present circumstances as well.

89.The plaintiff's alternative common law cause of action is based on a delictual claim on the ground of negligence. It was submitted by Mr du Toit that since the advent of the new constitutional dispensation, damages claims by victims of improper administrative processes by the State, whether based on a statute as constitutional damages or pure common law Aquilian delictual claims, have been in the melting pot. Mr du Toit referred me to *Knop* v *Johannesburg City Council,* 1995 (2) SA 1 (A). This was a case which was decided prior to the Interim Constitution of 1993. It was held at 33C-E:

> "On the other hand, considerations of convenience militate strongly against allowing an action for damages; the threat of such an action would unduly hamper the expeditious consideration and disposal of applications by the Local Authority in the first instance. That is not to say that the Local Authority need not exercise due care in dealing with applications; of course it must, but the point is that it would be contrary to the objective criterion of reasonableness to hold the Local Authority liable for damages if it should turn out that it acted negligently in refusing an application, then the Applicant has a convenient remedy at hand to obtain the approval he is seeking. To allow an action for damages in these circumstances would, I am convinced, offend the legal convictions of the community".

90. Other cases, relied upon by Mr du Toit are those in which, our law has recognised delictual claims, based on negligence where injury or damage is caused by the unlawful negligent conduct of

> servants of the State, such as cases of unlawful arrest, failure to take proper care in avoiding danger to pedestrians and motorists, and the like. Those cases are clearly distinguishable from the present case. In *Fose* v *Minister af Safety and Security* 1997 (3) SA 786 (CC), relied on by Mr du Toit, the plaintiff had claimed constitutional damages over and above the amounts he would be entitled to recover for patrimonial loss, pain and suffering, loss of amenities, *cantumelia* and other general damages in delict, because of wrongs committed by the Minister's employees against him. Ackerman J, delivering the judgment of the Constitutional Court, made exhaustive reference to the law in this respect, as it applied in other countries. At p. 825 *et seq,* the learned Judge, dealing with so-called "constitutional damages", IS reported to have said:

"[66] In the present case the Court is confronted with the narrow issue of whether, in addition to the damages which plaintiff has pleaded in claims '81' and '82', he is entitled to any further constitutional damages which, on the plaintiffs argument, would include an amount for the vindication of the infringed rights in question and for punitive damages.

Damages for the vindication of the plaintiffs rights

[67] In the present case there can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgment finding that he was indeed assaulted by members of the police force in the manner alleged, be warded substantial damages. This, in itself, will be a powerful vindication of the constitutional rights in question, requiring no further vindication by way of an additional award of constitutional damages.

[68] I have considerable doubts whether, even in the case of the infringement of a right which does not cause damage to the plaintiff, an award of constitutional damages in order to vindicate the right would be appropriate for purposes of s 7(4). The subsection provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiffs right even in the absence of an award of damages. It is unnecessary, however, to decide this issue in the present case.

Punitive damages

[69] This brings me to the final and most debated question, namely whether in the F present case any additional amount of punitive constitutional damages can be awarded to the plaintiff over and above the amounts he would be entitled to recover for patrimonial loss, pain and suffering, loss of amenities, contumelia and other general damages. Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying

> and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.

[70] All this notwithstanding, I have come to the conclusion that we ought not, in the present case, to hold that there is any place for punitive constitutional damages. I can see no reason at all for perpetuating an historical anomaly which fails to observe the distinctive functions of the civil and the criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution."

As stated, the present case is distinguishable. Here there was no delictual act, conduct or omission.

91.The plaintiff attempts to attach a delictual (fraudulent or negligent) omission to the conduct of the officials of the State Tender Board, or negligent or fraudulent conduct in withdrawing the relevant items from the tender process. This is a far cry from the sort of case in which our courts have allowed claims for delictual damages. In *Fose's* , for example, Ackerman J a clear distinction between the normal damages cases to which I have referred, and claims for punitive damages over and above such claims. In paragraph [72] at 8271-828C stated:

> "[72] In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments A 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', 190 it seems to me to

> be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are B already fully compensated for the injuries done to them, with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.".

92. Mr du Toit also relied on the case of *Minister of Safety and Security* v *van Duivenboden* 2002 (6) SA 431 (SCA) which concerned the negligence of the police in relation to the issue of a firearm license to a person who was clearly not fit to possess a firearm and with which firearm that person caused injuries to the plaintiff. In paragraph [12] at 441 E-442B Nugent JA expressed himself as follows:

> "Negligence, as it is understood in our law, is not inherently unlawful - it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful.. .... A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm ..... Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also capable as determined by the application of the separate test that has consistently been applied by this court in (Kruger v Coetzee (1966) (2) SA 428 (A) at 430E-F), namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.. .....it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy the omission ought to be actionable." [Omissions by me.]

What is made clear in this judgment is that negligent conduct must be unlawful before it becomes actionable. This begs the

question whether administrative action, such as the taking of a decision in the present case, is unlawful, giving rise to the right to claim damages on the ground of negligence. As I read the judgment, it does not deal with that question. The judgment begs the question whether "the law recognises the existence of a legal duty", and certainly does not suggest that in a case such as the present, such an actionable legal duty exists. This should come

as no surprise, because the judgment dealt with the normal case of negligent conduct by the servants of the state in performing their duties, and not with a situation of administrative action, which concerns the taking of decisions in respect of the award of

tenders.

93.Mr du Toit also referred to the cases of *Jayiya Member the Executive Council for Welfare, Eastern Cape and Another 2004*

(2) SA 611 (SCA), *Kate v MEC for Department* of *Welfare, Eastern Cape* 2005 (1) SA 141 (SE) and *Dunn Minister Defence and Others* (2) SA 107 (T), none of which is of any assistance to the plaintiff in the present case, in my view.

94.In support of the plaintiff's claim for compensation based on a common law claim for delictual damages, Mr du Toit also sought to rely on *Olitzki Property Holdings State Tender Board and Another2001* (3) SA 1247 (SCA). In that case an unsuccessful tenderer for the provision of office space to a provincial government instituted a claim for the profits it would have made from rentals if it had been awarded the tender and of which opportunity he was deprived by the alleged misconduct of the State Tender Board during the tender process. In the course of his judgment in the appeal, declining such relief to the

unsuccessful tenderer, Cameron JA mentioned *inter alia*

following considerations in paragraph [11] at 1256F-12578:

> "[11] It is well established that in general terms the question whether there is a legal duty to prevent loss depends on a value judgment by the court as to whether the plaintiffs invaded interest is worthy of protection against interference by culpable conduct of the kind perpetrated by the defendant. The imposition of delictual liability (as Prof Honore has pointed out) thus requires the court to assess not broad or even abstract questions of responsibility, but the defendant's liability for conduct 'described in categories fixed by the law'. *Tony Honore Responsibility and Fault* (1999) page 101. This process involves the court applying a general criterion of reasonableness, based on considerations of morality and policy, and taking into account its assessment of the legal convictions of the community *Government* of *the Republic* of *South Africa v Basdeo and Another* 1996 (1) SA 355 (A) at 367E - G and now also taking into account the norms, values and principles contained in the Constitution. Overall, the existence of the legal duty to prevent ioss 'is a conclusion of law depending on a consideration of all the circumstances of the case' . *Knop v Johannesburg City Counci/1995* (2) SA 1 (A) at 27F-G".

Tile *Olitzki* '.vas under *s187* the *Interim Constitution* with the

State Tender Board Act . In paragraph [15] at 1258G-12598

the following is said:

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

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

In paragraphs [16] to [31] at 1259B-1263G it is concluded that the interim Constitution did not grant such relief to the unsuccessful tenderer in that case.

95. It was submitted by Mr du Toit that the *Olitzki* matter may be distinguished from the present matter on the bases that a) *Olitzki's* case was not decided under the provisions of *PAJA* whereas *s8(1)(c)(ii)(bb)* of *PAJA* clearly provides for compensation payable to the plaintiff in the present matter; b) in *Olitzki* the tender was awarded but not to the plaintiff. One might add: c) in that case there 'vvas an allegation of fraudulent conduct on the part of the functionaries.

96. Mr du Toit submitted that in the present matter the tender was cancelled and awarded to no one, which decision the plaintiff alleges was arrived at on the grounds set out in the declaration; in *Olitzki* the plaintiff did not invoke his remedies of an interdict and review proceedings but simply issued summons claiming consequential damages. In the present proceedings there was no option for the plaintiff to apply for an interdict. It instituted review proceedings in which it also claimed compensation under the provisions of *PAJA* and in the alternative by the common law delictual action.

Mr du Toit did not explain how these differences should be applied in favour of the plaintiff in the present case. I can see

none.

97.Mr du Toit attempted to distinguish the *dictum Steenkamp's* (supra) from the plaintiff's case, by submitting that in the present case, reliance was placed on a lack of good faith (fraud), whereas that was not the case in *Steenkamp. Steenkamp's* se the plaintiff had instituted a claim for damages in circumstances where his part of a split tender was initially successful but the award was set aside on review at the behest of an unsuccessful tenderer. The plaintiff then sued the Tender Board for the alleged loss it suffered as a result of the first decision to award the tender to it. Its claim was based on an allegation that the State Tender Board owed it a duty in law to a) exercise its powers and perform its functions impartially and independently, take reasonable care in the evaluation of tenders,

c) properly evaluate tenders 'vvithin parameters, and d)
to ensure that the award of tenders is reasonable in the circumstances. The plaintiff disavowed reliance on lack of good faith. Secondly, the plaintiff relied on negligence of the Tender Board to found a claim for its damages in delict. Harms JA referred to the grounds upon which negligence was founded in para. [5] at 156 E as follows:

> "The Board was, according to the allegations, negligent ..... because it failed to take reasonable care in the evaluation and investigation of tenders by disregarding the recommendations of two technical evaluation committee's' "

[Words omitted by me.]

In dealing with negligence as a causes of action in context, Harms JA said at 155, para. [1]:

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

In para. [32] at 165B, Harms JA said:

> "This (the effect of that there were no fixed parameters within which the board had to act) meant that the board had to exercise a discretion or value judgment. In general, public policy concentrations do not favour the recognition of damages claims for the wrong exercise of a discretion negligently made,"

Reference to this regard was made to *Knop v Johannesburg City Council,* (2) SA 1 (A).

98. The decision of the Supreme Court of Appeal in *Steenkamp* confirmed by the Constitutional Court. I am bound to the decision in *Steenkamp.* I find myself respectfully in complete agreement with that decision. It follows that, as the law stands at present, the plaintiff has no claim in delict, based on negligence, for consequential damages against the defendants. Consequently, the alternative delictual claim based on negligence must be held to be bad in law, and consequently the declaration fails to disclose a cause of action in that respect.

99. Lastly, Mr du Toit submitted that it would be undesirable to allow an exception at this juncture, because the trial court will be in a far better position to decide, after having heard the evidence, under which cause of action the plaintiff must be offered redress for the administrative wrongs committed by the State Tender Board

and/or its officials. Apart from noting the presumption that the court will offer redress to the plaintiff, which appears premature, this argument does not appear to me to address the complaints raised in the exception. I have made it clear in this judgment that I do not consider the merits of the case, but that I only consider the requirements and provisions relating to exceptions. Admittedly, when the question of failure to disclose a cause of action is considered, the exercise will be conducted in close proximity of the merits of the allegations so investigated. But even so, I believe that there is nothing in this judgment which presumes to bind the court which will try the matter eventually.

100. In the circumstances I have concluded that the plaintiff's declaration is vague and embarrassing in respect of the aspects referred to. The declaration also to my mind, fails to disclose a cause of action in tile pointed out, particularly in respect of the alternative claims for damages based upon the common law.

101. I am of the view that the plaintiff should be permitted to amend its declaration in respect of the parts which are vague and embarrassing. This the plaintiff may do, if so advised, without the necessity of giving notice of amendment in terms of *Rule 28.*

In the premises, I make the following orders:

1.The exception to the declaration on the grounds that it is vague and embarrassing, as well as on the grounds that it discloses no cause of action, is upheld, and the declaration is set aside.
2.The plaintiff is permitted to amend its declaration within a period of fourteen (14) court days, if so advised.
3.The plaintiff is ordered to pay the costs of the exception, including the costs attendant upon the attendance of two counsel.

LOUIS VISSER, AJ. 4

SEPTEMBER 2007.