IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case No. 11477/2003

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
DATE 11/12/07 SIGNATURE

In the matter between:

BRIAN PATRICK DE LACEY — First Plaintiff

BARRY JACK BEADON — Second Plaintiff

and

SOUTH AFRICAN POST OFFICE — Defendant

JUDGMENT

HARTZENBERG, J:

Introduction.

[1] The plaintiffs are cessionaries of the claim of a consortium, Cornastone e-Commerce Services (Pty) Ltd (Cornastone), against the defendant. The defendant is the South African Post Office ("SAPO" or "the defendant") an organ of State. The plaintiffs' claim against SAPO is the sequel to a tender process, initiated by SAPO during February 2002, when it advertised for tenders for the supply of a biometric payment system for the

North West Province. Cornastone was one of about 50 entrepreneurs that tendered and was one of three of the bidders, who were short listed.

[2] The payment of social pensions and other State grants (hereinafter only referred to as pensions) has been problematical, throughout the country, for quite some time. The State looses massive amounts of money monthly through large scale fraud. When pensioners are paid in cash there are social malpractices that lead to hardship, like the physical robbing of pensioners of there money, by thugs or exploitation by unconscionable friends or family members. Cash payments entail the availability of large amounts of cash in specially equipped vehicles, from which the payments are made in some instances. It invites and leads to daring robberies which often lead to loss of life. Cash payments require of pensioners to wait in long queues under most uncomfortable conditions. It is evident that electronic transfers to accounts from which the pensioners can withdraw money as and when required can overcome most of the problems.

[3] The payments to pensioners are largely outsourced. Usually tenders are called for. To be awarded a contract, can be a lucrative affair. The party who does the payments gets paid per transaction. Transactions are both the registration of beneficiaries for pension payments or grants and the monthly payments to the beneficiaries every month. If one bears in mind that the plaintiffs allege that they would have made a net profit of more than R116 million over the first four years in the North West Province one gets an idea of how lucrative such a contract can be.

[4] Traditionally SAPO paid a large percentage of all social pensions. There are post offices all over the country and it is accordingly convenient that pension payments be

made at post offices. A notion developed, in government circles, that as SAPO is the "paymaster of the nation", it should be given an opportunity to develop an efficient biometric payment system so that it can pay the social pensions. Towards the end of 2001 and beginning of 2002 there was pressure on SAPO to provide a system for the North West Province. It was regarded as a pilot project. There was a distinct prospect that if such a system could be implemented that SAPO would be awarded contracts, country wide.

[5] The plaintiffs and in particular the first plaintiff had been involved in the advent and development of the electronic banking payment system and were aware of the need for an efficient biometric payment system for social pensions. There was a lot of interaction between the first plaintiff and some of the SAPO officials who were involved with the development of the biometric payment system, and in particular with one Andrew Topper, since 2000. The plaintiffs with other members tendered for a contract in the Eastern Cape during 2001. They actually went to the Eastern Cape and gave a demonstration of how the system would work. That system would not be an "on-line" system. They did not get the tender. They also tendered in a close tender for the biometric payment system for North West Province towards the end of 2001 but SAPO decided that there had to be an open tender. A lot of information known in SAPO about the requirements of a biometric payment system emanated from the plaintiffs.

[6] The tender in question, tender number 2002/7/BIO.PAYMT/HVN, was invited during February 2002. The tender was subject to the provisions of the Preferential Procurement Policy Framework Act, No, 5 of 2000 ("the PPPFA") and the regulations promulgated thereunder. SAPO provided a Request for Proposal (RFP) in which prospective bidders were supplied with sufficient information "on the proposed Post Office

Biometric Solution". It was expected of bidders to present solutions for the proposed system. The evidence about the RFP and the subsequent compulsory meeting, that had to be attended by bidders, makes it plain that what were required were the development, implementation and management of an outsourced technology solution. I do not understand the RFP to have called for an already fully developed and functional system.

[7] The chronology of the relevant stages and actions in respect of the tender were roughly as follows: Tenders were invited in terms of a letter dated 19 February 2002. There was a compulsory tender briefing on 22 February 2002. The written response to the tender invitation had to be submitted before 11:00 on 18 March 2002. The tender responses were opened under the supervision of Mr. Venter and Ms Snyders of KPMG on 19 March 2002. There was an evaluation of the different bids by the evaluation committees (technical, finance and BEE) thereafter. On 9 April 2002 Cornastone was informed that its bid had been short-listed and that it had to make a representation to the evaluation committees on 15 April 2002. The date was afterwards changed to 18 April 2002. The short-listed bidders were requested to answer a series of 16 questions dealing not only with technical aspects but also with the contractual relationship between the different members of each consortium and the financial [illegible] of a consortium supported by financial statements and tax certificates. There was a presentation on 18 April. During the presentation, one of the bidders, Kumo Consortium ("Kumo") was represented by an entity Labat Africa ("Labat"). The spokesperson for Kumo and Labat was one Brian van Rooyen, Labat was not one of the consortium members of Kumo according to the original tender response. Cornastone dealt with certain technical questions that were raised at the presentation in a letter dated 26 April 2002. Not long after 18 April 2002 the first plaintiff voiced his concern about the conduct of Topper to the other members of the consortium

and in particular expressed the fear that he could impair Comastone's cause materially. Mrs Richter one of the members of the technical evaluation committee had reservations about the question whether Kumo still qualified as a bidder in the light of the late arrival of Labat. She asked the opinion of the legal adviser Mr. Naude, who felt that Labat's presence could compromise the whole tender and that Labat was to be excluded from any possible award.

[8] On 25 June 2002 Mr. Ratshefola of Comastone addressed a letter to the manager of purchasing and materials management of SAPO. It was indicated that Labat was not a member of the original consortium but acted at the presentation as if it played a leading role in the consortium. Mr. Ratshefola enquired whether the RFP provided for a change in the composition of the consortium. SAPO acknowledged receipt of the letter but failed to respond to it. On 2 September the tender was awarded to Kumo. The award was conditional in that, amongst others, Kumo had to lower its price to that of Comastone and had to arrange that Altech remains a member of the consortium. It seems evident that Mr. Naude's advice, to the effect that Labat was not to be involved in the Kumo tender, was disregarded as great excitement was caused by the negotiations between Labat and the subsidiary company of Altech and there was no qualification to the effect that Labat was not to be included in the consortium. Comastone voiced a complaint and was informed that SAPO had appointed its own Ombudsman, one Mr. Rulashe. The plaintiffs informed Mr. Rulashe of conduct of Topper of about a year earlier (he suggested that he be paid an amount of R150 000 and that a friend of his, Mr. Inman, be given a job). He wrote a report and Ernst and Young was commissioned to investigate the tender process. SAPO cancelled the tender to Kumo on 27 September 2002 allegedly because of operational requirements.

[9] Cornastone insisted that the tender be awarded to them and left no stone untouched to get that done. After having approached the Public Protector and having been informed that the only remedy was to sue SAPO, the present action was instituted. The plaintiffs obtained a cession of its claim from the Cornastone consortium. The senior members of the eponymous member of the Cornastone consortium, a BEE company, did not want to get involved with litigation with SAPO as their company was involved in a contract with SAPO.

[10] The plaintiffs have three claims against SAPO. Claim A was for an amount of R107 950 672,00. It is alleged that Cornastone should have been the successful bidder. A number of the flaws that the plaintiffs allege contaminated the tender process were: that it was biased, inadequate and generally unsatisfactory; that it was not conducted in accordance with the PPPFA; that of the parties that evaluated the tender were not qualified to do so and that some were guilty of gross misconduct and/or corruption; that there were anomalies in the Kumo bid as a result of which Kumo should have been disqualified; that there were unacceptable relationships between some of SAPO's employees and members of Kumo and that SAPO owed Cornastone a duty of care to ensure a fair and honest evaluation, and in breach thereof allowed an unfair and biased evaluation to be done, unfairly favouring Kumo. Acceptance of Cornastone's tender would have resulted in it making a net profit of the aforesaid R107 950 672,00[1]. In Claim B the plaintiffs claimed R405 916 841,00[2]. The claim was on the same basis as Claim A except that it was the plaintiffs' case that a successful tender in the North West Province would have led to countrywide contracts. Claim B was the alleged net profit that would have been made in other provinces. Claim C is a claim for statement and debatement of an account and for

[1] During closing argument a re-calculation on behalf of the plaintiffs came to over R116 million.
[2] There was also a re-calculation that was submitted during argument and which amounted to R373 million

payment of what may be found to be due. The basis for the claim is that there was a confidentiality agreement between Cornastone and SAPO. SAPO was not entitled to make use of Cornastone's confidential information if it did not accept the tender. In breach of that obligation it made use of the information and developed its own biometric payment system.

[11] A number of issues manifested themselves and were in contention all along: 1.Whether the solution proposed by Cornastone did in fact comply with what was required by SAPO in the RFP. 2. Whether Kumo's tender received an unfair advantage due to misconduct on behalf of SAPO. 3 Whether Kumo had to be disqualified. 4. Whether the tender process failed, due only to incompetence or whether there was dishonest manipulation. 5. What the defendant was to do when it discovered that the award of the tender to Kumo was a mistake. 6. Whether the plaintiffs and Cornastone supplied confidential technical information to SAPO. 7. Whether SAPO used such confidential information wrongfully to develop its own biometric payment system. 8. Whether Cornastone's tender was not an unlawful tender due to (a) the close relationship that existed between the two plaintiffs and Topper prior to the invitation to tender, and (b) Cornastone's failure to warn SAPO about irregularities in the tender process at an earlier stage. 9. Whether damages for loss of profits are at all recoverable in the light of the provisions of the Constitution and the legislation in respect of the procurement of assets, and if so, 10. What the quantum of the damages should be.

Did Cornastone's tender offer a solution as required by SAPO ?

[12] I have already indicated that in my view the tender did not call for a fully developed and functional system, at the time of submission of the tender. It must be remembered that there were approximately 150 pay points and that the RFP envisaged a roll-out of units by 1 July 2002. SAPO needed, as the so called "front-end", on the counter of each of the pay points a number of off-the-shelf devices which were integrated and could scan the barcode of an identity book, register the fingerprints of the pensioner, take a photograph of the pensioner, read a smart card and remit information through the "back-end" switch to at least the Post Office Pension System (POPS) and the smart card manufacturer. The personal information of the pensioner who wants to get registered is correlated with the information on the Social Pensions (Socpen) file, to ensure that there is no duplication. It is then sent to the card manufacturer where a card containing the individual's photograph and on which the fingerprints[3] were stored, would be made and later on made available to the individual. Upon receipt of the smart card, on which there would be a magnetic stripe the smart card reader had to be able to identify the pensioner involved, and activate the switch so that the system could confirm whether there were monies available to be drawn by the pensioner. What was important is that the devices on the counter had to be linked to the Socpen file and were eventually to be linked to the Post bank so that the pensioner could draw money not only over the counter at the post office but also at the ATM's of commercial banks.

[13] It is evident that it could not have been expected of any bidder, before having been awarded the tender, to obtain all the hardware necessary to have a functional system in the province. The bidder had to make it clear that it could obtain the hardware but more importantly that it would be able to integrate the different devices to perform the required

[3] Prints of all ten fingers of an applicant were to be taken.

functions. There was a presentation on 18 April 2002 where the bidders had to demonstrate how their solutions would work in practice. The evaluation committee did not give any indication that the systems of either Kumo or Cornastone did not comply with the requirements. The first plaintiff gave evidence about the presentation and how a special link had been created with Standard Bank's EMV test centre. Moreover the plaintiffs gave a presentation in the Eastern Cape during 2001 and were invited to a closed tender towards the end of 2001. If one compares this situation to say, an invitation to tender for the installation of a security system in a large building, it is clear that no more is expected than an explanation of the design of the installation and the materials that will be used.

[14] The defendant maintains that Cornastone's tender was not an acceptable tender. If that was really the position, it is amazing that it made the short-list. Added to that is the other argument of the defendant that Cornastone had an unfair advantage because of the prior dealings with employees of SAPO which caused the award of the tender to Cornastone as a foregone conclusion. It is difficult to see why a party with that much of an advantage would not have been able to submit a tender that complied with the RFP. However, the defendant interpreted the minutes of a meeting, which was held by members of the Cornastone consortium on 2 June 2002, as a clear indication that the tender did not comply with the requirements. The minutes were kept by one Mynhardt Kapp. It was also argued that Cornastone did not comply with the requirements in respect of EMV[4]. It transpired from the minutes that a number of things still had to be done, like work on the front-end system, a comparative solution for the local server, the development of a registration unit, the development of the front end system by Pieterse and other things.

[4] EMV stands for Europay, Mastercard and Visacard. The three entities were in the process of developing safety standards

[15] If one thinks about the short time allowed for tenders to be submitted and the fact that a roll-out by 2 July was envisaged then one would have expected the tender award to have been made not very long after 18 April. The things that still had to be done on 2 June may very well have been done, much earlier, had the tender been awarded to Cornastone prior to 2 June. It would have been foolish to do those things before the consortium had certainty about the award. It was explained that Pieterse, would build a board to integrate the front end. In the Eastern Cape a PC was used for that purpose. That Pieterse was able to build such a board is beyond dispute as he did just that in Mpumalanga with the Empilweni project. To have commissioned him to build the board before getting the contract could easily, and with hindsight would, have been a complete waste of money. Mr. Fabricius argues that the first plaintiff's evidence was that Pieterse had already built the board and had already inserted it in the Ingenico device. As far as that is concerned it seems to me that the two of them may have been at cross purposes during cross-examination. At that stage the defendant's attack was aimed at the plaintiffs' claim of intellectual property rights in the solution. The first plaintiff explained why the solution was a novel one, only known to the consortium at that time, and was not really dealing with what had actually been built and what not. Mr Fabricius had the picture of a board that had to be built into the device in his mind. Pieterse made it clear that one was not to open the device lest it lost its EMV level 1 certification. The first plaintiff did not explain how the board was to be built into the Ingenico device. More importantly the first plaintiff gave clear evidence that Pieterse had designed the board but had not yet soldered the board as that task would be outsourced[5]. At the stage when this cross-examination took place my own understanding of the Cornastone proposal and the integration of the components was much more superficial than what it was at the close of the defendant's case. I do not think

[5] Vol. 8 p 665.

that Mr. Fabricius's criticism of the plaintiffs' case in this respect is as serious as he thinks that it is.

[16] Pieterse gave evidence. He is an introverted but hyper intelligent person[6]. He likes writing programs and developing Information Technology systems. He does not like meetings and definitely hated it to have to give evidence. There was a time that it was clear that he dearly wanted to get out of court. Mr. Fabricius wants the court to accept that as he testified that he had not build the board, which would have integrated the components, Cornastone's tender was fatally flawed. It overlooks the fact that he was involved in the Eastern Cape tender and that he created an integrated system for Empilweni.

[17] As for EMV, the situation is that although hardware that were EMV level 1 compatible were available. EMV level 2 could not be achieved before installation of a system and before it had been tested for some time after installation. What is more, at the time of the tender not even the systems of the commercial banks were EMV level 2 compliant. The impression that I got is that someone in the employment of the defendant, probably Topper, who did not understand the concept of EMV compatibility, at a late stage introduced questions in respect thereof. The answers could be used to discredit a bidder if necessary. During the evaluation process a statement was made that as Cornastone was not EMV level 2 compliant at the time of submission of the tender it should have been disqualified. It was absolute nonsense as it was an impossible requirement for any bidder to comply with. This submission is close to being on a par with the suggestion to the first plaintiff in cross-examination, that because there were no Service Level Agreements between Cornastone and SAPO in place, at the time of tender, Cornastone's tender was

[6] He invented the somewhat quaint name "Solid Liquid" for the business of himself and his partner.

fatally flawed. It is difficult to understand with whom Cornastone had to enter into Service Level Agreements, and when. Those agreements are only entered into between the organ of State and the successful tenderer after the award had been made.

[18] I am satisfied that the tender submitted by Cornastone complied with the requirements of the RFP. I also accept the first plaintiff's evidence that if given the contract the consortium would have been able to have the system up and running within a relatively short period after the award of the tender. The defendant's criticisms about who owned the intellectual property and the entering into subcontractor agreements are without substance as it is clear that all the members of the consortium were anxiously waiting for the award and had agreement as to what was to happen once a contract had been concluded. They had supplied the defendant with all the information required and with all the statements and written proof needed. I am persuaded by the evidence that Cornastone submitted a workable tender and was able to provide an efficient biometric payment system to the defendant within a reasonable time.

Did Kumo's tender receive an unfair advantage?

[19] The evaluation committees placed Cornastone first in respect of BEE and finance but placed Kumo first in respect of technical ability. During the trial much effort was put into an exercise which was aimed at indicating that the Technical Evaluation Committee was biased in favour of Kumo and against Cornastone. The committee consisted of Mr. Topper, Mr. Prins and Mrs Richter. The members of the committee were not really qualified to do the evaluation. Mr. Prins, a very decent and solid citizen and senior employee of SAPO did not have the technical background to understand what was

required and what was offered. On top of that, all the members were completely wrong about EMV requirements. The evidence, and that includes the evidence of the defendant's expert, Dr. van der Merwe, leads to the conclusion that Topper dishonestly manipulated the scoring by the members. Apart from the fact that an irregularity was exposed through this evidence it is not really necessary to compare the Kumo tender and the Cornastone tender as it is clear from reasons that will emerge that Kumo should have been disqualified, for a number of reasons.

Should Kumo have been disqualified?

[20] Paragraph 6.3.1.2 of the RFP provides:

"if the proposal is submitted by a consortium, each company forming part of the consortium must complete Annexure G individually and submit it as part of the proposal"

"Annexure G" is a four page document styled "Proposal Questionnaire" which required information about the price basis, payment, delivery, payment terms, validity period of proposal, conditions of purchase, production facilities, supplier questionnaire, quality assurance, compliance to specification and sub-contracting. The proposal received on 18 March 2002 from one Dawid Fourie, showed the main consortium partners of Kumo Consortium to be Trans-Xact Systems, Retail Logic Ltd and Square One. The sub-contractors were: Altech Card Solutions, Africard, Power Electronics, Alpine Gulf Equipment and Peregrine Asset Finance. Dimension Data's logo also appeared amongst the sub-contractors.

[21] At the presentation of 18 April 2002 Mr. van Rooyen of Labat explained that Labat was the prime contractor and that Kumo Technology, Trans-Xact Systems, Altech Card Solutions, Retail Logic UK, Dimension Data and Square One Solutions were sub-contractors. There was also mention of another company Dautech Computers. Where Labat did not feature in the original submission it is clear that there could not have been any filled out answered questionnaire G of Labat's in the possession of the defendant. With Labat taking over as prime contractor that is non compliance of such a serious nature that it cannot be said that Kumo was represented at the presentation at all. Labat clearly was not entitled in its own right to be there. As a matter of fact Mr. Van Rooyen admitted in evidence that if he was requested to leave he would have done so. Mr. Van Rooyen represented Labat, which means that there was no representation for Kumo at all. Moreover the Kumo tender was bolstered by rumours of a take-over of Altech by Labat. It was a complete misrepresentation of negotiations between a subsidiary company of Altech to take over Labat. That it impressed members of the Tender Committee is evident because when the tender was awarded to Kumo during August 2002 it was on the condition that "Altech to remain the principal technology partner."

[22] The fact of the matter is that there were no fixed consortium agreements. It must have been evident that there was no proper compliance with the requirements of the RFP by Kumo. There were also no financial statements, as required, or tax certificates, supplied by Kumo. As far as BEE is concerned Kumo also failed to comply and on that score also should have been disqualified. One cannot but get the impression that Topper was manipulating things to get the tender awarded to Kumo at all cost. In my view there were valid reasons why Kumo's tender should not have been short-listed. However that

may be, Kumo should have been disqualified on 18 April 2002 when it was not represented and Labat made a surprise entrance into the process.

Did the tender process fail, due only to incompetence, or did it fail aa a result of *mala fide* manipulation?

[23] The tender process from the beginning to the end was done by SAPO employees. KPMG was only involved at the opening of the tenders. The people who compiled the RFP called for tenders and appointed the evaluation committees. Topper was involved in all those activities and was then also one of three members of the technical evaluation committee. The evaluation committee members advised the members of the tender board. The tender board made a recommendation to the main board and the chief executive officer had to adopt the recommendation. This situation is different from the case where a department calls for tenders and the State tender board gets briefed by the department and then takes over the whole tender process[7]. The important decision is taken by an outside body which is not involved in the day to day running of the department.

[24] The report by Ernst and Young makes it very clear that the whole tender process was flawed. In stead of having knowledgeable people appointed to evaluate the requirements and the tenders the technical committee that was appointed comprised of members who were not qualified to do that. They worked with a set of guiding principles which was compiled by KPMG for a different project. They made recommendations to the tender board. The members of the tender board were even less informed about the requirements and the quality of the tenders. The main board had to make a

[7] See Act 86 of 1968.

recommendation on the strength of the efforts of the evaluation committees and the tender board. It is difficult to see how they could really make an informed decision. What is even more perturbing is that Mrs Richter gave evidence that she made an evaluation of Labat because a member of the Tender Board who was instructed by a senior official had asked her to do the evaluation. The fact that Kumo's tender was accepted on condition that it lowers its price to the price tendered by Cornastone makes a complete farce of the whole tender process ..

[25] Mrs. Lefoka, the acting chief executive officer, who incidentally attended some of the Tender Board meetings and did not really know what was required, gave evidence and maintained that the whole tender process speaks of negligence and incompetence but not of dishonesty and corruption. That there was also negligence and incompetence is without doubt but that there was also dishonest manipulation and corruption seems to be inevitable. There was a disciplinary hearing where allegations of improper conduct against Topper were investigated and he was dismissed. He was not the only person who left the employment of the SAPO. The same happened to the chairman of the tender board. There were others of the relevant employees who also left under a cloud, like Mrs Richter. The chief executive officer of the time also left, although he changed from the post office to M-Net. There was not really a senior official who had the knowledge to defend the actions of SAPO.

[26] One knows from the evidence that Topper was touting for a bribe and a job for Inman. Inman was one of the leading figures in the original Kumo bid. Kumo underwent a non permissible change of composition during the tender process. In stead of the tender being awarded so that the roll-out could begin by 2 July, which one would have expected if

the tender was dealt with objectively and efficiently, the process dragged on and on. Mrs. Richter was concerned about Labat's presence on the scene. Naude was of the opinion that it could compromise the tender. Cornastone informed the CEO of the flaw in the tender due to Kumo's position. Yet the award of the tender was recommended by the tender board to the main board and confirmed by the CEO. It is accepted that Topper fraudulently, due to circumstances of which only he was aware, underplayed the Cornastone tender and supported the Kumo tender. It could not have been the only irregularity. It must have been obvious to some of the senior members that Kumo had to be disqualified. Labat's late appearance was patently obvious. The fact that that did not happen can only lead to a conclusion that a person or persons, other than Topper, with influence, did not want Kumo to leave the scene. It is unlikely that it was only because of the good impression that was made by Kumo's tender bid, Inman or Van Rooyen. It is impossible that Topper's conduct could remain unnoticed unless there was higher up in the hierarchy also manipulation coinciding with Topper's aims. In my view apart from negligence, incompetence and Topper's manipulation, there must have been further actions with ulterior motives that led to the non detection of all the irregularities, and the decision to award the tender to Kumo. I am mindful of Mr. Fabricius's argument that originally the plaintiffs' main contention was that Topper's actions were the prime reason for the wrong award. I do not agree with the argument because before the commencement of the trial the plaintiffs' pleadings already alleged improper conduct throughout the SAPO administration. Labat's dramatic entrance could only have passed unnoticed if influential persons kept their eyes shut.

What was the defendant to do, when it realised that the award to Kumo was a mistake?

[27] Leaving aside, for the moment, the question whether Comastone's tender was also prone to be rejected, because of conduct that will be discussed further on in this judgment, it must be considered what the defendant could and had to do when it realised that it was wrong to award the tender to Kumo. The defendant was bound by section 217 of the Constitution and by the provisions of the PPPFA, and the Regulations promulgated in terms thereof. The service that it had to procure was highly technical and would cost the defendant a large sum of money over a period of years. In terms of regulation 10(4) of the regulations, promulgated in terms of section 5 of the PPPFA in Government Notice R725 of 10 August 2001, there are only three circumstances under which an organ of state may cancel a tender before an award is made, namely:

1. If due to changed circumstances there is no longer a need for the goods or services tendered for:
2. there are insufficient funds to cover the expenditure; or
3. no acceptable tenders were received.

Regulations 10(1), (2) and (3) are not relevant as they deal with a situation where unacceptable tenders were received and the tender has to be cancelled for that reason. What is of importance though is the fact that in terms of regulation 10(3) the organ of state is obliged to re-invite tenders. It is evident that there is no provision in the regulations in terms of which the defendant was entitled to cancel the tender. It could only cancel it before the award was made, but did not do so. There is no provision to cancel it after a tender has been accepted.

[28] On the other hand it must have dawned upon the defendant that the award of the tender to Kumo was a mistake that was prone to be set aside on review. That was when it started to advance reasons for the suspension and eventual cancellation of the tender, as for instance "operational reasons" or "change in requirements". Administratively, and realising that the award of the tender to Kumo was irregular, there were a number of logical options open to the defendant. It could inform Kumo that the award of the tender to it was a mistake and could have withdrawn the award. Having done that there were two suggestions by the secretary of the tender board.. It could award the tender to the second bidder, Cornastone or it could cancel the tender and fast track a new tender with only a handful of invitees. The withdrawal of the tender to Kumo could not pose much of an economic threat as Kumo's conduct to change horses in midstream was clearly irregular and then there were also all the other deficiencies that accompanied its tender. In my view the defendant had to inform Kumo that the award to it was a mistake and had to withdraw the award. It could have awarded the tender to the best remaining tenderer or it could have gone onto a fast-track tender to a number of eligible entities. By deciding not to go out on tender it negated the provisions of the PPPFA and section 217 of the Constitution and thwarted the expectations of entities with a legitimate interest to supply the service as a result of the previous tender. It exposed itself to valid suspicion that it utilized confidential information received during the tender process to develop its own system.

Did Cornastone and the plaintiffs supply confidential technical information to the defendant?

[29] The RFP provided for a mutual confidentiality agreement to be signed before delivery of the tender documents. As has been explained above it was obvious that the

solution required would entail the integration of items of hardware that were readily available "off the shelf". What was important was that a solution was to be devised that would cater for the pensioner's safety and comfort, through the employment of a special method or mode or device that could make the different hardware components speak to one another, to achieve that object. The evidence makes it clear that the information technology field is not only highly competitive but also developing extremely fast. To illustrate. The system under scrutiny in *Minister of Finance and Others v Gore N O*, 2007 (1) SA 111 (SCA) was for monthly payments at pay points from specially equipped vehicles, after physical identification of the pensioner through his fingerprint. At the time it was a first that would solve many of the, then existing, problems. The tender in this case envisaged the monthly electronic transfer of the pensioner's pension to an account from which the pensioner could, with the aid of a card, withdraw so much money as he needed, at that stage, at a post office or at an ATM. Third party payments were even envisaged. The tenders in the *Gore* matter were submitted on 11 April 1994 whereas the tenders in this matter were submitted on 18 March 2002, approximately 8 years later. A comparison of the two modes of payment shows that the 1994 concept was archaic in relation to the 2002 concept.

[30] The officials in the different organs of state, in this case SAPO, are not experts in the information technology field. In this case SAPO needed to utilize the latest development in the field. The SAPO employees had to get information from the private sector. They had to interact with different competitors in this field. The competitors would not like their confidential information to be conveyed to their rivals or used by SAPO unless they got some *quid pro quo* for the use thereof. When they are invited to tender they are requested to provide technical information. In this particular case technical information

of a confidential nature was supplied by Cornastone. It is only necessary to look at Cornastone's answer to the RFP, paragraph 6 under the heading "System Architecture"(pages 123 -138) It is spelled out in great detail what hardware components will be used, how they will be interlinked and how they will be linked to outside entities like Socpen, the Smart card manufacturers, HANIS[8] etc. It deals with inter alia Cornastone's solution for the contingency of lost cards. The information would have been of invaluable value to an entrepreneur turning to this field for the first time. That explains two complaints on which Mr Fabricius relies, and which will be dealt with in a different context later on, namely letters from Smartec and AST[9] both dated 28 February 2002 which respectively read:

> *"The above can only lead to the conclusion that SAPO spent considerable time developing a solution for this project and in order to lend a modicum of transparency to this process, has issued a public tender which only one chosen supplier can fulfil."* and

> *"The RFP contains unacceptably short time scales for RFP responses for a project of this magnitude. The RFP does not require mere hardware and bits of software, but an integrated solution including the unique requirements of the Post Office plus various interfaces for both the present solution as well as for future requirements.*
>
> (Mr. Fabricius's underlining)

It indicates that Smartec and AST recognized that to be able to submit a workable solution a lot of research, planning and development was essential. Biometric scanners were

[8] Home Affairs National Identification System – a comprehensive fingerprint data base of more or less everybody in the country.
[9] Entities that wanted to tender for the project.

available, as were bar code readers, cameras, card readers etc. Back-end switching, that would allow interfacing with outside entities such as Socpen, Smart card manufacturers and commercial banks, was also available. The entrepreneur that wanted to supply the solution had to work out in great detail how these devices were to be integrated. The research that led to the solution entailed the acquisition of formerly unknown information. The only logical conclusion is that amongst the information imparted by Cornastone to SAPO there must have been confidential information which in the hands of a competitor of Cornastone would give to that competitor an unearned and unfair advantage.

Did the defendant use Cornastone's technology to establish its own Biometric Payment System?

[31] According to the plaintiffs' third claim, as formulated in the particulars of claim, Cornastone made confidential technology available for the purposes of the tender. It was a term of the tender agreement that that if Cornastone's tender turned out to be unsuccessful the Defendant would not utilize the confidential technology for any other purpose including utilizing it to establish its own biometric payment system. It is alleged that in breach of the agreement the defendant utilized the technology to develop its own biometric payment system and that the defendant is accordingly enriched and Cornastone impoverished as a result thereof and that in the circumstances the defendant is obliged to account to the plaintiff and to pay to the plaintiff such monies as may turn out to be payable after debatement of the account.

[32] As has been indicated hereinbefore Cornastone did indeed supply the defendant with confidential information about the technology. It is the plaintiffs' claim

that the defendant wrongfully used that information to develop its own biometric payment system and that they are accordingly entitled to claim damages. Because the amount of the damages is unknown it can only be properly ascertained by making use of the defendant's income figures. For that reason the plaintiffs allege that they are entitled to a statement of account by the defendant. It is so that confidential information can be protected either by an interdict or by a claim for damages[10]. To qualify for protection the information must not only be useful but it must have the necessary quality of confidentiality and the plaintiff must at least have a quasi-proprietary or legal interest in the information[11]. To be useful it must be capable of application in the trade, or industry, not be public knowledge or property and be of economic value[12]. The relationship between the plaintiff and the defendant must be such that the defendant is duty bound not to divulge its knowledge of the confidential information but rather to preserve the confidentiality[13]. An instance of improper use of confidential information will be the use thereof as a springboard to compete directly with the owner thereof.

[33] The plaintiffs maintain that they made confidential information available to Cornastone which in turn made it available to the defendant as part of the tender process. They maintain that in terms of the confidentiality agreement the defendant was not entitled to make use of the information or to pass it on to a competitor. The argument is that it was improper to make the information available to e-Centric which was one of the members of the Cornastone consortium.

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[10] *Van Castricum v Theunissen*, 1993 (2) SA 726 (T) at 730 and *Waste Products Utilisation (Pty) Ltd v Wilkse and Anor*, 2003 (2) SA 515 (W) at 570, *Harvey Tiling Co.(Pty) Ltd vRodomac*, 1977 (1) SA 316 (T)
[11] *Gordon Lloyd Page & Associates v Rivera & Another*,2001 (1) SA 88 (SCA) at 95E para. [10].
[12] *Alum Phos (Pty)Ltd. V Spatz* [1997] 1 All SA 616 [W]
[13] *Multi Tube Systems (Pty) Ltd v Pointing*, 1984 (3) SA 182 (D) and *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd.* 1981 (2) SA 173 (T) at 191

[34] The position was that after cancellation of the tender during November 2002 the defendant did not award the tender to Cornastone or did not invite a small number of tenders on a so-called "fast track". Ms. Lancaster indicated that there was enough know-how in SAPO to develop its own biometric payment system. She invited Scott from e-Centric to develop such a system to be ready by the end of February 2003. e-Centric was to provide the switching facilities for the Cornastone consortium and was in possession of the information in respect of which Cornastone claims confidentiality. Scott's evidence was that e-Centric had developed a system by the end of February 2003 and that they registered a number of pensioners. It is common cause though that SAPO did not utilise e-Centric's solution but commissioned Mr. Nana of iSolve to develop a system which eventually became operative during the second half of 2004. The system was developed to link it to a secure data base, the Trust Centre.

[35] What the plaintiffs find particularly repulsive is that Ms. Lancaster arranged for payment of e-Centric of an upfront amount of R733 590,00 and not long thereafter of a further amount of R643 500,00 plus VAT. On top of that e-Centric was paid an amount of R1,7 m. for computers on which to store the data and as a back-up. If the Cornastone tender had been accepted the tender provided that e-Centric was to render the service with its own equipment both for the original capturing of data and for the back-up. All that e-Centric would get would be a fee of R0,33 per transaction. It is highly unlikely that Scott through competitive pricing could earn the monies that had been paid to him. Moreover he did not buy a single piece of equipment for which he received the sum of R1,7 m.

[36] The indications are strong that e-Centric must have made use of the information in the Cornastone tender to have been able to present a front end system by the

end of February 2003. SAPO was aware of the fact that as consortium member e-Centric was only involved with the switching and not with the front-end system. Both SAPO and e-Centric were aware that but for the information in the Cornastone tender it would have been well-nigh impossible for e-Centric to develop a system by end February 2003. If the defendant would have used the e-Centric solution it would not have been an unfair inference to accept that the income derived had been made possible by the unlawful use of Cornastone's confidential information.

[37] The defendant did not use the e-Centric solution but iSolve's. Nana gave evidence and denied that he made use of the information contained in the Cornastone tender. He fancied his solution as superior to that of Cornastone and was particularly proud of his "I am alive" feature which was not provided by Cornastone. It entailed that SAPO could require of pensioners to visit a post office every six months and to prove that they are alive by a live fingerprint check. It would avoid the payment of pensions to people who were already dead, for too long a period. In my view it has not been proved that any of the income earned by the defendant was earned as a result of the unlawful use of Cornastone's confidential information. In my view the plaintiff cannot succeed in respect of claim C.

[38] A further possible reason why the plaintiffs ought not to succeed in respect of claim C is that Claim C is a duplication of Claim A. If they are successful in respect of claim A they receive lost income as damages. If the tender was awarded to Cornastone a further solution would not have been necessary. There would not have been an unlawful use of the confidential information of Cornastone. It seems to me that if the plaintiff succeeds in respect of claim A that there will be a duplication of damages if the defendant is also mulcted with damages for the use of the information that would not have been used.

Was Cornastone entitled to tender, and if so, did the consortium not disqualify itself by not exposing the irregularities in the tender process earlier?

[39] In this regard it is necessary to look at the relationship between the plaintiffs and the employees of the defendant before the invitation to tender and during the tender process. It is also necessary to look at what information became available to the plaintiffs during the tender process, how it became available and how they chose to deal with it.

[40] The last witness who testified was Scott of e-Centric. When he arrived in Pretoria from Cape Town where e-Centric's main place of business is, he had copies of e-mail messages that emanated from the first plaintiff, with him. His evidence was that he had made the documents available to the defendant. Neither the plaintiffs nor the defendant made discovery of the documents. The first plaintiff gave evidence about information on his hard drive that he had lost. The plaintiffs did not object to the admission of the documents. On the whole it seems rather convenient for the first plaintiff to have lost those documents, if that is the way his evidence is to be interpreted, as they could have been the source for rather uncomfortable cross-examination.

[41] On 24 April 2002 he wrote to Messrs. Nevuthalu, Ratshefola and Cronje from the Cornastone partner of the Cornastone consortium, Mike Scott of e-Centric, Mynhardt Kapp and the second plaintiff as follows:

"I have conducted my own SWOT analysis on our current position at SAPO vis. a vis. the biometric payments opportunity. In the final analysis I believe that we have one threat and that is Andrew Topper. My reasons are as follows:

1. *In all discussions with Andrew leading up to the issuing of the tender he never once mentioned Kumotech. He spoke freely of the competition for us coming from Net 1 Applitec, Arriva, Transpay, AST. This clearly indicates that he was "protecting" Kumotech". If you don't know who the opposition is you cant find out about them.*

2. *When we discovered via Hensa van Niekerk (SAPO procurement) that Kumotech was on the shortlist Barry called Andrew and questioned him re Kumotech. He denied any knowledge of them saying he did not know who they were. This obviously indicates that he wanted to create the impression he had no dealings with Kumotech. What they call a "dummy pass".*

3. *We developed the Point of Sale concept and biometrics for SAPO over a 14 month period. The specs for the system that I produced were sent to Andrew at his request. 95% of the specs were included verbatim in the tender spec. The 5% that were not included were the Hanis requirements.*

4. *Our information tells us that we came second in the technical evaluation. Andrew Topper was the head of the technical evaluation team. Question has to be asked, if we architected the system and 95% of the spec we developed was used verbatim in the tender and in our assessment we were 100% complaint*

(sic) how did we come second. Remember we use worldclass partners who are world leaders in their fields. Ingenico, no 1 in world (ref Nilsan reports), Symbols, 70% of the global barcode market and extensively used by SAPO already, Secugen probably No.2 at this stage behind Sagem but gaining market share rapidly. Backend that is installed and working and delivering services to SAPO. Full compliance to all requirements for standards and certifications. Given all the above why and how did we come second. What makes it more suspicious is that Andrew claims no knowledge of Kumotech. So essentially they just popped out of the woodwork at the last minute and have technical solution that is superior to ours. What they call "smelling a rat".

5. *In my opinion Topper asked a question in the presentation that I believe was designed to create doubt. The question was around the IP of the system. He really had no grounds for this question and was quick to explain to me after the presentation that he had to ask the question to clear up any doubts. There has never been a doubt re the IP and Andrews question was designed to cause doubt.*

6. *Question is why would Andrew Topper want to favour Kumo Technologies over Cornastone. The answer is based on my personal knowledge of the individual and my understanding of his personal goals. I would appreciate that this information is treated sensitively and is understood in the context of this deal. I re emphasis(sic) that it is my personal opinion.*

-Andrew is very uncomfortable at SAPO and has openly requested on several occasions that I get him out of SAPO. I have stayed clear of this. As such I believe that any opportunity Andrew has to extricate himself from SAPO he will take. He has been openly critical of of SAPO and Sheila to both Barry and I.

- Tim Inman (Kumotech) is a close friend of Andrew and his confidante. We must not underestimate this relationship. Andrew has used Tim in the past to prepare his presentations etc. Andrew often visits Tim on his way home. Andrew stays in the south of JHB and Tim in Edenvale

- Andrew plays Sheila all the time and has a very close working relationship with her. Sheila is totally influenced by what Andrew says. I worked with them on the Northern Cape and Eastern Cape welfare tenders and travelled with both of them. I understand fully and have witnessed first hand Andrews manipulative nature.

-This is conjecture but I am pretty sure that Tim Inman would have offered Andrew a position at Kumotech should they be successful in securing the tender. This is in line with Andrew's goals and would be his passage out of SAPO. Given Andrew's background and experience he will find it difficult to secure a position in the private sector other than if he went into the security industry. Im am of the view that the only way he will secure a position in our industry in the private sector is through manipulation. i.e. using his current position to manipulate himself into the private sector.

-A friend of mine in the industry who knows Tim Inman asked him about how his presentation went at SAPO. Tim's response was "excellent, I had them eating out of my hand, I can't wait to see De Lacey's and Frost's (Transpay) reaction when they find out that Inman has won the business". Inman went on to say that he had been working closely with Topper in the background and that he has no doubt that they will win the business.

-My personal view of Andrew is that he is a threat due to the fact that his own agenda is first on the list then comes his employer SAPO. He is an ex permanent force army colonel (left the army in the mid 90's) who does not have an understanding of business and business ethics. We need to appreciate that his background and training was in an era (of) covertness and manipulation. He is a master manipulator and will use any means to achieve his own goals. His goal right now is to set himself up outside of SAPO. His mate Tim Inman is in the country on a temporary work permit (UK citizen) and my opinion (shared by 90% of the people who have had dealings with him) is that he is a con artist.

-. This all may be a bit of paranoia on my behalf but having been around the industry for a long time with the scars to prove it, I believe we need to counter every possible threat. This is the only threat that concerns me. I do believe that Andrew has complete control over Sheila's recommendation and can manipulate and present facts to suit himself. I believe that us coming second in the technology evaluation is absolute proof of this and signals his intentions.

8. *In summary I believe we need to take cognisance of the above and be aware of the possible threat and have a strategy to counter. I have tried 3 times to call Andrew this week but he is not taking or returning my calls. This indicates that he wants to keep me at a distance. He knows I saw Tim Inman at the presentation as I confronted him about it. His response to me asking him what Tim Inman was doing at the presentation was "I wonder what Tim is doing here." I am available at any time to discuss this potential threat and how to neutralise it. "*

[42] The first plaintiff prepared a 10 page document in which he speculated but analysed the tender evaluation and concluded that there had to be many distortions of the Cornastone tender for it not to have been placed first in respect of technology. He concluded that the evaluation must have been biased in favour of Kumo. He compiled a score sheet and promptly scored Cornastone 100%. I am not so sure about the impartiality of that evaluation but cannot really fault it.

[43] An e-mail of 5 June 2002 indicates that the first plaintiff was in contact with Hensa van Niekerk, the purchasing and materials manager, procurement of SAPO between 3 and 5 June and that she was informed by the tender committee that they would present their recommendation to the executive committee soon. He also spoke to Topper who informed him that the meeting with the executive committee would only be held the next week, that he did not know what was going on and that he only got questions that he had to answer. According to him both Topper and Hensa van Niekerk were of the opinion that the matter would be finalised within the 90 day period which was to expire on 18 June. He speculated that Topper was pushing for a dual award and that he was feeding the tender

committee with information. He found it disturbing that if Topper was being asked for information he did not revert to them for clarification. He considered requesting a meeting with the financial director of SAPO to explain to him the negative financial implications caused by a delay in the award of the tender and how it embarrasses tenderers who work according to time tables.

[44] On 3 September and after the plaintiffs became aware that the tender had been awarded to Kumo the first plaintiff wrote the following e-mail to Mr. Nevhutalu of the Cornastone member of the consortium, Mr. Cronje, Mr. Kapp and Mr. Scott, under the heading "SAPO":

> *"I have discussed the above with Transpay and subsequently given it a lot of thought. At the outset let me record that I understand fully that our respective priorities with regard to this tender are different. However please understand that from Barry and my perspective we have put everything into it. This has been done with the hope of starting a business that we know can grow into a substantial annuity revenue business.*
>
> *As matters stand we have been "played" by Topper who, as I have repeatedly said, has his own Agenda. I believe that we have more than sufficient factual evidence to prove to the tender committee that Topper has been grossly biased towards Inman and has been following his own agenda and not the interests of SAPO. In the presence of Barry, Topper has asked me for R150 000, he has asked me to give Tim Inman a job and he has asked me to give him a job. When I refused all these requests he got Inman to set up a company and Topper has supported it. Maybe my*

punishment for not meeting his conditions of doing business with him. No doubt all our information and technologies etc. has been handed to Inman. However Topper has made a lot of mistakes and many of the claims he has made re Inman and the Inman System are frankly lies. As an example I have personally run a check on Inman both in SA an internationally. He has NO record of being involved in any payment or smartcard projects, he has no formal or tertiary qualifications and could easily find himself on the end of a fraud scam in SA if someone fed available information to the appropriate authorities. Furthermore he is "Blair citizen" on a temporary work permit (not quite vogue at the moment). SAPO have to be told what real expertise they are getting. Yet Topper claims Inman has vast international payment and smartcard expertise etc. etc. There are several more such examples. This is typical of Topper's style. He has made some awful derogatory remarks to us about his superiors and how ease it is to con them.

Topper has also totally underestimated Transpay who as a bunch of lawyers check out everything. And they are political lawyers. They are going full tilt for Topper. Incidentally they would have accepted the decision if it were Cornastone.

As an ex sentinel cubicle I fully appreciate that the race is not over until the finishing line is broken. I see the fax as been somewhere on the bend with the finishing line still a long way away. We know from our selling days that a company is at its most vulnerable once they have got the order, that's typically when the fight begins.

I have attached a letter that I would like to give to SAPO at my meeting there tomorrow afternoon. I believe it is courteous, respectful and in the interests of SAPO. If we are able to secure a meeting with the tender committee we will be able

to give them a presentation based on what we have that will have to make them at least reconsider. Bearing in mind that Transpay will approach them more from a empowerment / political view. Transpay claim they have all the detail on the Inman consortium and it wont stand up.

Thus if we concentrate on Topper and the system and Transpay on the empowerment / politics Topper is definitely going to be exposed.
I believe we all owe to ourselves not to take this lying down and at least put up a bit of a fight. Believe me if you have met Tim Inman you would come out fighting.

[45] From the evidence and in particular from what has been referred to in the previous paragraphs the following observations about the relationship between the plaintiffs and the employees of SAPO and their conduct prior to, during and after the tender process seem to be in place:

1. The first and the second plaintiffs were extremely keen to develop a biometric payment system involving smart cards and to get a contract with SAPO. They knew that it would be a very lucrative contract.

2. They were interacting with the employees of SAPO since about 2000. In the process they gave a lot of information to the SAPO employees. There were other entrepreneurs who also wanted to get the business like Net 1, Applitec, Arriva, Transpay and AST. Topper informed them about those entities' interest to get the business.

3. Cornastone accepted that it had an edge over the other tenderers because of their previous dealings with SAPO.

4. The time period to submit tenders was very short. It would be difficult for an entity, without prior development of a system, to submit a workable tender timeously.

5. They knew that Topper wanted to procure personal gain illegally out of the tender. They knew that if they gave him R150 000 and a position in the private sector that he would manipulate the process so that they would get the tender. They refused to do so.

6. An employee or employees of SAPO leaked information about the tender evaluation and the progress of the tender process to the Cornastone member of the Cornastone consortium.

7. The first and the second plaintiff were constantly trying to get information about the status of the process and what other entities tendered. In the process they contacted Topper and Hensa van Niekerk.

8. Very shortly after the presentation of 18 April 2002 they had a strong suspicion that Kumo's presence on the scene was orchestrated by Topper. They had a strong suspicion that Topper's question about the ownership of the intellectual property was a deliberate ruse to cast doubt about their ability to comply with the RFP.

9. They decided to let the process go its way and hoped that Cornastone would get the tender but decided to challenge an award to Kumo.

10. When they got information that Kumo was a strong favourite to get the tender they wrote a letter to SAPO indicating that the Kumo tender was flawed.

11. The first plaintiff contemplated approaching the financial manager of SAPO to explain the financial implications of the delay to him but did not do so.

12. After they had heard of the award of the tender to Kumo they pulled out all stops to get the tender reversed.

[46] The first question to address is whether the plaintiffs were disqualified from tendering because of their previous interaction with SAPO. They were working very closely with SAPO during 2001 in respect of the tender for the Eastern Cape. The system which they wanted to implement was, by and large, the same than the one that they proposed for the North West tender. So good was the relationship that they were invited to take part in a closed tender for North West which would in all probability have resulted in them getting the tender. On the other hand it is clear that entities like Net 1, Applitec, Arriva, Transpay and AST were also interacting with SAPO with a hope to acquire the biometric payment contract. By February 2002 it was really urgent to get a proper contract in place.

[47] In my view the mere fact of interaction between the plaintiffs and SAPO employees does not disqualify the plaintiffs from being involved in a subsequent tender. After all the SAPO employees were not experts in this highly specialised field. They had to get their information from somewhere. The somewhere was obviously the private sector and people like the plaintiffs and those involved in Net 1, Applitec, Arriva, Transpay and AST. If in the process the suggestions of one entity are accepted and included in the requirements of SAPO, giving it an advantage over other entities, it is the natural result of the interaction between SAPO and the industry. As long as everybody acts openly and honestly there is nothing wrong with the interaction. What is more it must have been known in the industry that SAPO had this need and there was nothing which prohibited other entities to do exactly what the plaintiffs did.

[48] There is no really motivated suggestion by any witness who testified for the defendant, other than to agree with Mr. Fabricius, that the plaintiffs acted improperly. The plaintiffs attacked the bona fides of SAPO employees and that of Topper in particular. Although Topper made an appearance in court during the early days of the trial, the defendant did not see fit to call him as a witness to unearth improper conduct by the plaintiffs. What is known is that Topper suggested improper conduct to the plaintiffs and that they refused to become a party to such conduct. Mr. Fabricius argued that the fact that in the Ernst and Young report an adverse suggestion was made about Topper's interaction with the first plaintiff is an indication that the first plaintiff acted improperly. The author of that report did not have the benefit of a very long trial. I am satisfied that the plaintiffs' conduct was businesslike but with an obvious and expressed motive to secure a contract.

In my view that did not disqualify them to be part of the consortium that submitted a tender.

[49] As far as the period allowed to interested parties to tender is concerned, it must be accepted that SAPO was under pressure to come forward with a workable payment process. Moreover the idea behind an open and transparent tender does not entail that everybody must be given enough time to set up an organisation through which it can do research and prepare a tender. In the case of an open tender one expects that entrepreneurs in the particular field will be interested to tender. They have the necessary expertise. In this case it is clear that it was known in the industry that SAPO needed a system and there were interested entities. More than fifty parties uplifted tender documents and fifty tenders were submitted. In my view there is no substance in the complaint by Smartec and AST to which I have referred when I discussed the question whether confidential information was given to SAPO by the plaintiffs and Cornastone, that too short a time was given to react to the tender with the object to give an improper advantage to some of the interested parties. In any event it is clear that Cornastone was not party to a decision about the date on which the tenders were to be submitted. In my view there was not anything improper in Cornastone's actions, until the tenders were submitted, that disqualified it from tendering.

[50] The next question then is whether Cornastone acted improperly during the tender process. The very first thing is that the evaluation results were leaked to the Cornastone member of the consortium and thereafter it came into the hands of the first plaintiff. SAPO is a large organisation. There is no evidence exactly who in SAPO gave the information to whom. In any event it was given *ex post facto* and Cornastone did not use the information to try and influence the tender committee. There must have many

rumours during the time that the award of the tender was pending. The first plaintiff for instance got a telephone call from someone in the industry which indicated to him that the tender would not be awarded to them. The fact of the matter was that the plaintiffs had a suspicion that there was foul play but apart from the letter about the eligibility of Kumo to be awarded the tender the plaintiffs did nothing to influence the people in SAPO about the outcome of the tender. The letter relied on the fact that Labat came in late, something that was evident ever since 18 April. It was directed at the CEO and enquired whether Labat's late entry was permissible. That in my view is conduct that does not taint the tender process as such with impropriety.

[51] The fact of the matter is that the plaintiffs had a suspicion and a fear that Topper had acted improperly. They had no evidence to prove it. They did not get evidence before they complained to the ombudsman and the Ernst and Young report. They cherished hopes that the tender committee and the executive committee or top management would realise that the tender could not be awarded to Kumo. Whether it is wise to bring a review application, before a decision has been taken, on flimsy grounds of suspicion that because an employee acted improperly and that that may influence the ultimate decision, seem to me to be debatable. In my view the conduct of the plaintiffs to await the award of the tender and thereafter to go to the ombudsman and eventually to the Public Protector and on his advice to institute this action was reasonable. I do not find that the plaintiffs' conduct was such that as a result thereof they are disqualified from raising the fact that the tender process was flawed.

[52] Another way in which one can enquire whether Cornastone's conduct during the tender process was so subversive that it cannot claim that it acted in the spirit of section

217 of the Constitution and the PPPFA is to ask what should have happened when it was discovered that Kumo's presence contaminated the tender process. Mr. Fabricius argues that the remedy in the case of a bungled tender is to tender in the subsequent tender. He says that that would be in accordance with PAJA and that a wrong administrative decision does not give rise to a claim for damages except in very exceptional circumstances. He says that the plaintiffs should have had the tender process reviewed and the result would have been that the defendant would have been compelled to call for a new tender and that Cornastone could then tender on equal footing with other tenderers. In this case one knows that the defendant decided not to call for another tender on the advice of Ms. Lancaster. It is an objective fact which eliminates that possibility. But if Cornastone was entitled to tender, in such a process, a la the defendant, by implication it did not act improperly during the period leading to such belated but forced tender.

What damages did the plaintiffs prove?

[53] At the early stages of the trial I was under the impression that there would be a serious fight about the quantum of the damages. There were expert notices filed on behalf of the defendant indicating that the evidence by the plaintiffs' expert Mr. De Aguiar would be severely criticised. Eventually the issue faded. The plaintiffs' calculation starts off from the basic information about the number of pensioners that were expected to be registered and later on paid. Mr. De Aguiar initially worked on a number in the vicinity of 450 000. Later on it transpired that over 600 000 pensioners were registered. The calculation is a mathematical one.

[54] In respect of claim A the plaintiffs' initial calculation came to R107 million and during argument a recalculation of over R116 million was submitted. The plaintiffs also contend that they are entitled to interest at 15,5%. There is no reason not to accept those figures. The calculation, however, does not provide for possible contingencies like problems encountered with the equipment, possible legal intervention by competitors or a change of government policy having an effect on the profitability of the project. Moreover the calculation is premised upon a duration for the contract for four years. In practice we know that the SAPO contract developed by iSolve was terminated strictly after three years. One knows that hundreds of viability studies are done where handsome profits are projected where a great percentage of them in practice do not come up to the projections. I regard the calculations as no more than an aid to fix the amount of the lost profits. In my view a deduction must be made for the aforementioned contingencies. As far as claim A is concerned I am prepared to find that the plaintiffs' calculations, inclusive of possible claims for interest come to R120million. In my view it would be fair in this case to allow for a contingency factor of 50%. The plaintiffs' lost profits are fixed in an amount of R60million.

[55] As far as claim B is concerned i.e. a finding that the plaintiffs would automatically have been allowed to get contracts countrywide, I have come to the conclusion that the plaintiffs have failed to persuade me that that would have happened. I have already indicated that the development of the technology in this field is extremely fast and sometimes very innovative. Then it is also clear that the competition in this field is very severe. Moreover there are a number of existing contractors rendering a service who would compete with the plaintiffs. Then the same could have happened to the plaintiffs than what happened to the system developed by iSolve, i.e. that it was just not renewed

after three years. There could have been a change in Government policy. In the result I find that the plaintiffs failed to prove that they suffered damages on the basis set out in claim B.

Causation.

[56] Cornastone submitted a tender. If the tender had been awarded to it, it would have made a profit of R60 million. Topper acted fraudulently in the scope of his employment and there must have been other employees who could have influenced the outcome of the process to a different result than to what it came, who corruptly turned a blind eye. If one thinks away the dishonest conduct of the defendant's employees and applies the "but for" test[14] the question is whether Cornastone would have been awarded the tender. In my view the evidence overwhelmingly points thereto that in normal circumstances Cornastone would have been awarded the tender. There was an urgent need for a workable solution. Some of the members of the Cornastone consortium had already shown their expertise. At the presentation of 18 April 2002 it demonstrated that it could implement its solution. The hardware partners were leaders in the field. The evaluation would have indicated that the Cornastone tender complied with all the necessary requirements. E-Centric, was already rendering a switching service to SAPO. The eponymous member of the Cornastone consortium was equally, already rendering a service for SAPO. There were really no negative aspects of the Cornastone tender.

Wrongfulness.

[14] *Minister of Finance and others v Gore N.O.*2001 (1) SA 111(SCA) at 125 A-B para. [32]

[57] Mr. Fabricius relies heavily on the judgments in *Steenkamp N. O. v Provincial Tender Board Eastern Cape* 2007 (3) SA 121 (CC) and *Olitzki Property Holdings v State Tender Board and Another*, 2006 (3) SA 151 (SCA). In the *Steenkamp* matter a tender was awarded to the successful tenderer. The tenderer immediately started implementing the tender and in the process incurred expenses of over R4million. An interested party applied for the setting aside of the tender on the ground that the successful tenderer had not been eligible to be awarded the tender as it (a company) had not been incorporated when the tender documents were submitted. The tender was set aside. The expenses incurred were a complete loss for the company. It was liquidated. The liquidator sued for the expenses. It is to be borne in mind that the plaintiff's conduct was the main reason for the setting aside of the tender.

[57] In the *Olitski matter* an unsuccessful tenderer who was not awarded the tender contended that it should have been awarded the tender had it not been for misfeasance in the actual award. It sued for lost profit. The court discussed the question whether the defendants owed the plaintiff a duty not to cause it economic loss and dealt with considerations that are to be taken into account to answer the question. An important consideration for not awarding damages to the plaintiff was that it would be unduly onerous on the public purse to award damages as that would amount to the organ of state paying double for the service or commodity in question.

[58] Mr. Fabricius argues that in this case it would be wrong to find that the defendant owed a duty to Cornastone not to cause it economic loss. The defendant is an organ of state and it would be an undue liability on the public purse to mulct the defendant

with the payment of lost profit. It would mean that in every case of inept handling of tenders there would be the possibility of the state paying nearly double for the procurement of the commodity, the *quid pro quo* to the successful tenderer and an amount as lost profits to the unsuccessful tenderer.

[59] In para. [55] on page 144 of the *Steenkamp* matter Moseneke DCJ expressed the following views:

> "*(a) Compelling public considerations require that the adjudicators of disputes, as of competing tenders, are immune from damages claims in respect of their incorrect or negligent but honest decisions. However, if an administrative or statutory decision is made in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision, different public policy considerations may well apply.*
>
> *(b) Legislation governing the tender board in this case is primarily directed at ensuring a fair tendering process in the public interest. Where legislation has a manifest purpose to extend protection to individual members of the public or groups, different consideration may very well apply. Again whether or not delictual liability ought to attach even in that case will be dependant on the factual context and the relevant policy considerations."*

(My underlining)

[60] Mr. Fabricius argues that since the advent of the Constitution in the case of a bungled tender the aggrieved party does not have a delictual claim against the defendant.

He says that at most the plaintiffs may have a constitutional claim where the court taking all relevant factors into account may award an amount to the plaintiffs that it considers just.

[61] The flaw in Mr. Fabricius's argument is that in both the *Olitzki* and in the *Steenkamp* matters it was accepted by the courts that the relevant tender boards acted honestly. I have found that the tender process in this matter was greatly influenced by corrupt and dishonest conduct and fraud in the case of Topper. Moreover the conduct was the conduct of the employees of the defendant within the scope of their employment with the defendant. In *Minister of Finance and Others v Gore N.O.*, 2007(1) SA 111 (SCA) this aspect was discussed in detail by Cameron *et* Brand JJA, in paragraphs [81] – [90]. The court found that state of mind is a very relevant consideration for the decision whether wrongfulness exist or not. In paragraph [87] the following was said:

> *We do not say that dishonest conduct will always be wrongful for the purposes of imposing liability, but it is difficult to think of an example where it will not be so"*

[62] The court found that liability was to follow even if the dishonesty was that of the State Tender Board itself. The court pointed out that the defendants were found to have been vicariously liable for the conduct of two of their employees. The question was posed whether there was a possible basis upon which immunity could be imposed on the employees, who acted fraudulently. The answer was given that there was no room for immunity.

[63] In *Transnet Ltd. V Sechaba Photoscan (Pty) Ltd*, 2005 (1) SA 299 (SCA) the defendant was held delictually liable for fraudulent manipulation of a tender process. The

court awarded lost profits to the plaintiff. In my view I am bound by the decisions in the *Gore*, and the *Sechaba* matters and they indicate that the plaintiffs have a claim for lost profits. It follows then that judgment is to be granted to the plaintiffs in respect of claim A in an amount of R 60million and that claims B and C are to be dismissed.

Costs.

[64] A great portion of the time spent in court was used to investigate whether the plaintiffs had any intellectual property rights as a result of a misconception of what claim C really entailed. Claim C was a claim for damages as a result of wrongful use of confidential information and not a claim based on the infringement of intellectual property rights. The plaintiffs did not succeed with claim C. On the other hand the action was the result of dishonest conduct by employees of the defendant. Mr. Novitz argues that costs must be awarded to the plaintiffs on a punitive scale because of a number of ways in which the defendant conducted the trial: He is unhappy because the defendant amended its plea on a number of occasions and says that it caused the plaintiffs unnecessary expenses. He complains because the defendant denied the existence of the Ernst & Young report, which necessitated threats of action to compel discovery. He also complains that the defendant did not act properly by pretending that a memo of the Ombudsman was his report. He also complains that the plaintiffs were compelled to ask for discovery of material documents. An aspect that cropped up during the trial every now and then and which irked the plaintiffs and eventually also the defendant was the fact that the defendant had asked the plaintiff for certain documents, which were handed to the defendant in court, and which according to the plaintiff contained confidential information When the plaintiffs wanted the documents back, one of which was in manuscript, the defendant failed to return them.

There was an explanation of a storm ruining all documents in adv. Jacobs's chambers and then it was at a time when the defendant changed from one firm of attorneys to another. To compound the problem there is no record of the proceedings in court on a relevant day. Another complaint is that the defendant produced unnecessary documents, cross-examined the first plaintiff unduly long, called witnesses who gave irrelevant evidence and gave notices of expert witnesses in respect of inadmissible or irrelevant evidence or of witnesses that were never called.

[65] The defendant is a huge organisation. One can understand that some of the conduct complained of was the result of a lack of interaction between various departments and individuals, especially as it is to be borne in mind that some of the *dramatis personae* were no longer in the employment of the defendant during the trial some four and five years along the line. I am satisfied that the plaintiff was substantially successful and that the conduct of the defendant, during the trial, does not warrant a special order for costs. The plaintiff is entitled to its costs on party and party scale.

Leave to appeal.

[66] The order which I am about to make will be a disappointment to both parties. The plaintiff was hoping for damages in an amount of the order of R500 million. The defendant does not believe that the plaintiff is entitled to anything. I do not think that the parties are going to take this judgment lying down. There are many aspects which may have been approached differently by a different court like findings of fact, and in particular what the effect of section 217 of the Constitution and the PPPFA is on this action. It will be inconvenient for the parties and for the court to deal with applications for leave to

appeal, in an involved matter like this, some months later. This is a case where leave to appeal is to be given. The issues are of such a nature that they require the attention of the Supreme Court of Appeal.

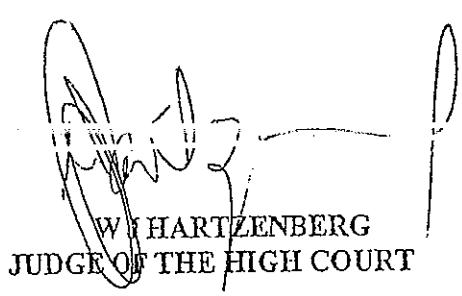
The following order is made:

1. The defendant is to pay an amount of R60 million to the plaintiff in respect of claim A.

2. Claims B and C are dismissed.

3. The defendant is to pay the plaintiffs' costs.

4. Leave is granted to all the parties to appeal to the Supreme Court of Appeal, if so advised.



W J HARTZENBERG
JUDGE OF THE HIGH COURT

Representation:

For the plaintiffs:

Adv M Novitz
Novitz Attorneys.

For the defendant:

Adv H J Fabricius SC
Adv H J Jacobs
Mahlangu Inc. Attorneys