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

CASE NUMBER: 37169/06
DATE HEARD: 23 & 24 OCTOBER 2007
DATE OF JUDGMENT: 21 FEBRUARY 2008

REPORTABLE

In the matter between:

ZIMPORT WATER SERVICE CC **APPLICANT**

and

THE MINISTER OF PUBLIC WORKS **RESPONDENT**

and

CASE NUMBER: 41073/06
DATE HEARD: 23 & 24 OCTOBER 2007
DATE OF JUDGMENT:

In the matter between:

DIRECTOR-GENERAL: DEPARTMENT OF PUBLIC WORKS **APPLICANT**

THE CHAIRPERSON: BID ADJUDICATION COMMITTEE **FIRST RESPONDENT**
ZIMPORT WATER SERVICES CC **SECOND RESPONDENT**
NETGROUP-VENN DIAGNOSTICS JOINT **THIRD RESPONDENT**
VENTURE MIDNIGHT SPARK TRADING CC **FOURTH RESPONDENT**
TDB AND C AGENCY **FIFTH RESPONDENT**
RADIO DETECTION **SIXTH RESPONDENT**
SETSEBI ENVIRONMENTAL SERVICE CC **SEVENTH RESPONDENT**

.....

JUDGMENT

.....

VISSER, AJ:

*** INTRODUCTION:**

1.The present proceedings ostensibly involve two applications, but on closer inspection it appears that each of the two applications contains different prayers for relief, each of which is tantamount to an independent application. I shall deal more fully with these different prayers or applications in due course.

2.The applications and the different prayers for relief all have their origin in an administrative process which led to the award of a tender contract. After that contract was concluded, it was discovered that an error, or more accurately, errors, had been committed during the evaluation process. The question which is to be decided in that regard is, *inter alia*, whether the error or errors can be considered to have been of such a material nature that it ought to serve as a ground for judicial review of the tender process which led to the award of the tender contract.

3.In this judgment I shall refer to the application brought by Zimport under case number 37169/06 as the "*Zimport application*" and to the application in case number 41073/06 as "*the review application*".

4.In order to facilitate the reading of this judgment, I shall refer to the applicant in the review application, who is also the respondent in the Zimport application, simply as "*the Department*" or "*the Director-General*", to the first respondent as the Bid Adjudication Committee, to the second respondent as "*Zimport*" and to the third respondent as "*Netgroup*", and if reference needs to be made to any the other parties,

it will be done by name.

5.I received valuable assistance from the written and oral arguments which were presented by counsel who appeared in the applications. Mr Tokota, with him Mr Mothle, appeared for the Department, while Mr Louw, assisted by Mr Ackermann appeared for Netgroup and Mr De Waal appeared for Zimport.

*** BACKGROUND:**

6.The sequence of events which led the parties to the portals of this court commenced on 2 June 2006, when the Department put out a request for tenders for a water saving project in the North West Province. The project involved the carrying out of works which would result in a saving on the Department's expenses for the provision of water, especially to mines and industries. Due to the nature of the tender, the tender was distinguishable from the standard type of tender which one frequently encounters, in that there was no remuneration payable to the successful tenderer who would become the contractor, but his remuneration would be constituted by a part of the said saving on water provision. The percentage which the contractor would retain as his remuneration, therefore constituted the "*tender price*".

7.The consequence of this was that the tender invited tenderers to specify what percentage of the savings would be retained by the tenderer, and what percentage was to be allocated to the credit of the Department. The higher percentage to be retained by the tenderer would obviously imply a smaller saving for the Department. Consequently, as far as "*pricing*" was concerned, the tenderer which proposed the smallest percentage of the saving to be retained by it, would result in its tender being considered as the "*best price*", as it

would render a higher percentage saving to the Department. As will be illustrated, it was this very situation which gave rise to the present litigation.

8.The closing date for tenders was the 7th June 2006. On that date the tenders were opened in public. The procedure which was followed, according to what was explained in the Department's affidavits, was that one member of the Bid Evaluation Committee would open the sealed tenders and read out the "*price*" of the tender for another member to record on a sheet of paper which contained the names of all the tenderers. The case for the Department was that certain Ms Selabe erroneously wrote the pricing of Netgroup as being 60% to be retained by it and 40% to be credited to the Department, while in fact Netgroup's tender was that 40% of the savings would be retained by it and 60% would be for the credit of the Department. I shall deal in more detail with this issue when I discuss the review application. This information was written on a sheet of paper, which was attached as page 35 of the papers. I shall henceforth refer to this particular form simply as "*page 35*". Page 35 is a printed form of the Department with spaces provided for the insertion of names and prices in respect of tenderers.

9.Acting upon the incorrect information written down on page 35, the Bid Evaluation Committee resolved on 21 June 2006 to recommend the acceptance of the tender by Zimport.

10.The Bid Adjudication Committee, having considered the tenders and the recommendations by the Bid Evaluation Committee, on the same day (21 June 2006) decided that the tender should be awarded to Zimport. Zimport was notified on 1 August 2006 that its tender had been accepted.

11.On 3 August 2006 a letter was addressed to the Department on

behalf of Netgroup by its attorneys, Messrs Len Dekker & Associates, in which certain information was requested from the Department, to wit: which bidder had been successful and a detailed breakdown of the points scored by the successful bidder and by Netgroup. The letter also requested the Department not to allow the contract with the successful tenderer to be implemented before the expiry of the period of 10 working days after the requested information had been provided to Netgroup.

12.In spite of this request, a formal written contract was entered into between the Department and Zimport on 8 August 2006. That contract has been attached to the papers. It is not necessary to refer to the provisions of that contract in detail. Suffices it to mention that *inter alia* in terms of the contract, there had to be a site identification where the works had to be executed. It was common cause that this site identification by the Department also took place on 8 August 2006.

13.It was stated in the affidavits on behalf of Zimport that it commenced executing the contract "*soon thereafter*". What this execution of the contract comprised of exactly, is in dispute. It is clear that no substantial execution of the contract had taken place by the time the Department placed the works on hold by a notice of suspension of the contract by letter dated 5 September 2006, written by the Acting Regional Manager of the Department of Public Works, Mr Liebenberg, to Zimport, to which I shall later refer *infra*. In view of the fact that no relief was claimed by Zimport in respect of the fact that certain works had been carried out by it at the time, it is unnecessary to decide what works had been carried out at the time and the fact that such works were executed by Zimport played no role in the applications.

14.On 6 October 2006, the Department advised Zimport that the

contract of 8 August 2006 was cancelled. It is this purported cancellation to which prayer 1 of the Zimport application is directed at.

15.On 28 August 2006, an internal memorandum by a Mr Lieberberg, who was in the employ of the Department, was produced. In that memorandum, Liebenberg expressed the view that nothing untoward had occurred in the evaluation process of the tenders, and that the award of the contract to Zimport was in order. On the same date, a letter was written by the Department to attorneys Len Dekker & Associates, in which the Department expressed the view that there was no error in the tender process and that the tender had properly been awarded to Zimport.

16.On 29 August 2006 a further letter was written by attorneys Len Dekker & Associates on behalf of Netgroup to the Director General of the Department. In this letter the following was, *inter alia*, stated:

> "*4. Your letter purport[s] to convey that the tender was awarded to the tender[er] with the highest total of points on the point scoring system.*
>
> *5 your calculation of the points is either incorrect or based on wrong information: Zimport Water Services CC ..... offered 40% of all water cost savings to the Department of Public Works ..... and that Zimport is entitled to 60% of all water cost savings.*
>
> *6 Our clients offered 60% of all water cost savings to the department and therefore our clients would be entitled to 40% of all water cost savings. .....*
>
> *7. Rectification of the point scoring system with regard to price in accordance with paragraph 5 and 6 above shows that our clients scored 77,59 points whereas Zimport only scored 71,63 points.....*
>
> *8. On your own reasoning as well [as] having regard to the Preferential Procurement Policy Framework Act No 5 of 2000, read with Regulation 6 (4) as referred to in R725 in Government Gazette number 22549 of 10 August 2001, the tender should accordingly have been awarded to our clients as the tender with the highest number of points scored.*

.....

13. *Subject to receiving your answer to the request for reasons, our clients intend to apply to the High Court that the award of the tender to Zimport be reviewed and set aside and that the relevant contract be awarded to our client*." [Words omitted by me.]

17. On 5 September 2006, a letter was written to Zimport by the Acting Regional Manager of the Department of Public Works, Mr Liebenberg, referred to above, which read:

> "*Due to administrative lapses in the award of this tender, the Department is suspending the execution of the contract with immediate effect. You are hereby instructed to stop working on this contract. The entire procurement process leading to and including the award will be reviewed and you will be informed of the results thereof. The Department is offering sincere apologies for any inconvenience caused*."

18. On 6 September 2006 a meeting took place between representatives of the Department and Netgroup. At this meeting it was apparently conceded on behalf of the Department that errors had been committed. The Department orally undertook to cancel the contract with Zimport immediately and to award the contract to Netgroup. *Prima facie* at least, this agreement or undertaking appears to have been unlawful in view of the fact that the tender had (rightly or wrongly, been awarded to Zimport, and a contract had been concluded (rightly or wrongly) with it, and had not lawfully been set aside or cancelled at that time.

19. One month thereafter, on 6 October 2006, the Department advised Zimport that the contract of 8 August 2006 was cancelled.

*** THE APPLICATIONS:**

20. The cancellation by the Department of the contract with Zimport prompted Zimport to move its application against the Department, as the only respondent, on 10 October 2006 (the Zimport application). In this application Zimport claimed the setting aside of the purported

cancellation of the contract by the Department and sought an order for specific performance of the contract ("*the application for specific performance*") in the following terms of its notice of motion.

> "*1. That the purported cancellation of the agreement between the applicant and respondent, dated 8 August 2006, is hereby set aside;*
> *2. The respondent is ordered to do all such things, perform all such acts and take all such steps, and procure the doing of all such things, the performance of all such acts and the taking of all such steps, which may be necessary incidental or conducive to giving effect to the terms, conditions and import of the agreement between the applicant and respondent dated 8 August 2006;*
> *3. That the respondent pays the costs of this application;*
> *4. Further and/or alternative relief*."

21.The Department reacted by launching the present review application on 11 December 2006, claiming for the award of the tender to Zimport to be reviewed and set aside. In the same application the Department also claimed that the contract concluded between itself and Zimport on 8 August 2006 be set aside by reason of the fact that the Department had made a "*clerical error*" during the process of considering and awarding the tender.

22.It is relevant to note that the Department withdrew its notice of cancellation of the Zimport contract, and replaced it with a notice that the execution of the contract was suspended pending the outcome of the review application.

23.In its review application, the Department requested the following orders:

> "*1. That the Bid Adjudication Committee award of tender number MMB 05/060 to Zimport Water Services CC dated 8th August 2006 as well as the contract concluded consequent to the award and entered into between the Department of Public Works and Zimport Water Services CC, be reviewed and set aside;*

2. That the adjudication of tender number MMB 05/060 be referred back to the Bid Adjudication Committee for re-adjudication;

3. Costs of suit only in the event of any opposition to the application by any of the Respondents; and

4. Further and/or alternative relief."

24.On 27 February 2007, Netgroup launched an application ("the *joinder application*") for it to be joined as a respondent in the Zimport application. In the same application Netgroup requested an order to the effect that the Zimport application and the review application be consolidated ("the *consolidation application*").

25.Also, still under the banner of the same application, Netgroup filed a counter-application, seeking that the tender be directly awarded by the Court to it. I shall refer to this application as "*the counter application*". The application was founded on the provisions of *section 8* of the *Promotion of Administrative Justice Act*, 3 of 2000 ("*PAJA"*). In the counter application, Netgroup supported the Departments prayer that the decision to award the tender to Zimport should be reviewed.

26.Netgroup further applied for an order, directing the Department to conclude a contract with it. I shall refer to this application as Netgroup's "*application to compel*".

27.In its notices of motion, the relief claimed by Netgroup was stated thus:

"*1. THAT Third Respondent (Netgroup) be joined in the application under Case No 37169/06 as Second respondent;*

2. THAT the Minister of Public Works N.O. be referred to as "First Respondent" under Case No 37169/06;

3. THAT the application under Case No 37169/06 and the Application under Case No 41073/06 be consolidated under case No 41073/06;

4. THAT the answering affidavit attached to this application as Annexure "AB3" is the answering affidavit of Third Respondent in both Case Nos. 37169/06 and 41073/06 as consolidated under Case No 41073/06;

5. IT is ordered that, in addition to the relief granted in terms of prayer 1

of the Applicant's notice of motion dated 11 December 2006 (under Case No 41072/06), the tender number MMB 05/060 is awarded to Third respondent and Applicant is ordered to conclude a contract with Third Respondent consequent to the said award;

6. THAT Second Respondent and any such that oppose the relief sought by Third Respondent be ordered to pay the costs of this application, jointly and severally, the one paying the others to be absolved;

7. THAT such further and/or alternative relief as the Honourable Court may deem fit be awarded to Third Respondent."

28.From the above it will appear that the practical effect of what transpired was that there are the following issues (or applications) to be decided:

(a) The relief sought by Zimport for an order declaring the purported cancellation of the contract of 8 August 2006 between it and the Department null and void;

(b) The relief sought by Zimport for an order compelling the Department to comply with the said contract;

(c) The review application by the Department, involving the setting aside of the decision to award the tender to Zimport;

(d) The application by the Department for an order declaring that the contract between it and Zimport is invalid;

(e) The application by Netgroup to be joined in the Zimport application;

(f) The application by Netgroup for the consolidation of the Zimport application with the review application;

(g) The application by Netgroup for an order that the Court grants the tender to it; and

(h) The application by Netgroup for an order compelling the Department to conclude a contract with Netgroup.

29.There are consequently no less than eight separate applications, or independent prayers for relief, admittedly interrelated, but still separate, in issue between the parties in the two applications.

30.As will be discussed later, I came to the conclusion that the fate of the relief referred to in paragraphs (b), (d), and (g) above, depend upon whether or not the review application in paragraph (c) above is successful. If the review is successful and if prayer 2 of the Zimport

application (the prayer for specific performance) is dismissed, the question would be whether prayer 5 of the Netgroup application should be granted. If it is decided that it should be granted, there is an end to the matter. If that prayer is not upheld, the remaining question would be whether the decision of the Department should simply be set aside, or whether the matter should be remitted to the Department together with instructions on how to deal with it.

31.All the customary affidavits have been filed in the Zimport application by Zimport and the Department. In the other applications all the customary affidavits have been filed by Zimport and Netgroup. Netgroup imported its affidavits in the review application into the Zimport application in its applications for joinder and consolidation. The Department did not file any opposition to the application for joinder and consolidation by Netgroup, not did it file any opposition to the application to compel by Netgroup. The Department furthermore filed no replying affidavits to the answering affidavits by Zimport and Netgroup in the review application.

*** NON-COMPLIANCE BY ZIMPORT TO FILE HEADS OF ARGUMENT TIMEOUSLY:**

32.On the 1st and the 8th of October 2007, complying with the directives of Deputy Judge President, Justice Shongwe, the Department filed heads of argument. Although Zimport was directed to file its heads of argument by the 1st of October 2007, it failed to do so.

33.The Department indicated that it reserved the right to supplement its heads in response to Zimport's heads when they became available.

34.Mr De Waal explained to me from the Bar that his client suffered a financial embarrassment, and only two days prior to 1 October 2007, did Zimport manage to retain the services of Mr De Waal, but had to abandon the services of senior counsel who had been briefed in the case up to that point. Mr De Waal completed the heads of argument as soon as possible thereafter.

35.Both Mr Tokota and Mr Louw indicated that no point was proceeded with in this respect, and that the matter should be allowed to proceed.

36.There is no cost implication as a result of the non-compliance by Zimport, to which I have referred.

37.Consequently, for so far as it might have been necessary, the late filing of heads of argument by Zimport was condoned with no order made as costs.

*** PRAYER 1 OF THE ZIMPORT APPLICATION TO DECLARE THE CANCELLATION BY THE DEPARTMENT OF THE CONTRACT TO BE VOID (CASE NUMBER 31769/06):**

38.Prayer 1 of the Zimport application to declare the purported cancellation by the Department of the contract to be void, and prayer 1 of the Department's application, which was supported by Netgroup, to declare the contract invalid, represent two sides of the same coin. Although counsel attempted to keep their arguments separate in

respect of each of the two prayers, they were for that reason not entirely successful in doing so.

39.In the present case, although the decision to award the tender to Zimport and the subsequent award of the tender to it might have been unlawful because of material errors in the process, it cannot be argued that the award was void *ab initio*. That award would consequently remain operative until set aside by a competent authority. (*African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 564F and 565A; *Minister of Justice v Bagattini and Others* 1975 (4) SA 252 (T) at 265G; *Jacobson v Havinga T/a Havingas* 2001 (2) SA 177 (T), at 181E-182; *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) at 161 [24]). It follows, in my judgment, that the contract between the Department and Zimport remained valid until lawfully set aside.

40.In respect of Zimport's prayer 1, it appears to me that the question is simply whether at the time when the Zimport application was issued, Zimport had a cause of action which could sustain the relief it claimed. It is clear to me that at that stage the purported cancellation of the contract by the Department was unlawful, as it was bound, as were all others, to its decision, award and the contract, until set aside. At the time when Zimport moved its application, no application for the review of the decision of the Department had been filed and no competent authority had set the award aside. True, there had been letters and conversations in this regard, but it would be unfair to have expected Zimport to have based its trust in those letters and conversations.

41.In my view, prayer 1 of the Zimport application must consequently be dealt with in accordance with the *status quo* when the application was launched and the question is simply whether Zimport was entitled to move its application to have the purported cancellation by the

Department set aside at the time when it did. In my view it was, and Zimport would ordinarily be entitled to be awarded the costs of its application. But it is my view that the entitlement of Zimport to persist in pursuing its prayer 1 became affected as soon as the Department launched the review application. This occurred on 11 December 2006. From that date I believe Zimport to have been placed at risk.

42.What the fate of the prayer for setting aside the purported cancellation thereafter might be, will depend largely upon the outcome and consequences of the review application, with which I shall deal in due course.

*** APPLICATION FOR JOINDER BY NETGROUP:**

43.Mr De Waal sensibly conceded that Zimport does not have an objection to the application for joinder by Netgroup.

44.Mr Tokota submitted on behalf of the Department that the joinder of Netgroup in the Zimport matter has only an impact on the question of costs. This presupposes that the joinder application succeeds and Netgroup be in fact joined.

45.The primary test for joinder is whether there is a direct and substantial interest in the subject matter of the litigation (See: *Morgan and Another v Salisbury Municipality* 1935 AD 167 at 170-1*; Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (AD) at 655-660; *Sheshe v. Vereeniging Municipality*, 1951 (3) SA 661 (AD) at 666-7; *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 165B-169H; *Rahim v Mahomed* 1955 (3) SA 144 (D) at 147B_H; *Kock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (AD) at 318D-319A; *United Watch & Diamond Co and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 415B-416G; *Khumalo v Wilkens and Another* 1972 (4) SA 470 (N) at 473H-475H: *Smith v Conolect* 1987 (3) SA 689 (W) at 690A-691 F).

46.*Sheshe*'s case is clear authority for the proposition that the Court has a discretion to order joinder, even where the direct and substantial interest in issue is not altogether clear.

47.In my view Netgroup does not resort under the category of a "*milkman, vintner or charwoman*" (see *Shese's case*). It is quite clear that it had a direct and substantial interest in the subject matter of the Zimport application, and that Zimport was at fault for not having joined Netgroup as a respondent in the application.

48.I am of the view that the application by Netgroup to be joined as interested party in the Zimport application should succeed.

*** APPLICATION FOR CONSOLIDATION BY NETGROUP:**

49.Once Netgroup is joined as a party in the Zimport application, it has *locus standi* to participate fully in the proceedings in both applications. This right also carries with it that Netgroup is then obliged to accept the concomitant obligations of a party to the applications, such as the possible liability for costs.

50.The right of Netgroup therefore *inter alia* includes the right to apply for the review application to be consolidated with the Zimport application.

51.Uniform Rule of Court 11 provides:

> "*Consolidation of Actions*
> *Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon_*
> *(a) the said actions shall proceed as one action;*
> *(b) the provision of rule 10 shall mutatis mutandis apply with regard to the action so consolidated; and*
> *(c) the court may make any order which to it seems meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said*

actions."

52.*Rule 11* provides for a discretion to be exercised in considering whether consolidation should be ordered if it "*appears to the court convenient to do so*". (*Stiff v Q Data Distribution (Pty) Ltd* 2003 (2) SA 336 (SCA); *Standard Bank of SA Ltd v Harris NNO (J A du Toit Inc Intervening)* 2003 (2) SA 23 (SCA) ([2002] 4 All SA 164) at 23H.) The Rule is silent on the question whose convenience it is which will be relevant. But it is unnecessary to attempt to answer that question in the present case, as long as it is accepted that the Court's convenience must be considered. In my view there is nothing in the Rule to oust a consideration of the Court's convenience.

53.It was submitted by Mr Louw that Netgroup was a part of the administrative process which gave rise to the conclusion of the contract between the Department and Zimport. That much appears to be clear, but it appears to me to be more particularly relevant to the question of joinder, rather than to the question of consolidation. Mr Louw further submitted, however, that it was that very contract which lies at the root of the complaint by Netgroup that it should have been awarded the contract. That much is equally clear. From these premises Mr Louw sought to draw the legal conclusion that the two applications before court are therefore inextricably linked, and should consequently be consolidated.

54.On behalf of Zimport it was agreed that all the applications should be heard together by a Judge during a single sitting. This much, therefore, seems to be common cause between all the parties. But, said Mr De Waal, this did not entail a concession that Netgroup is entitled to an order for consolidation. Counsel said that, although the distinction between the matters being heard together and the matters being consolidated might seem fanciful at first glance, it is relevant to

costs. Mr De Waal argued that the issue in the Zimport application fell squarely within the realms of the law of contract. The statute is the sole source of review of such action. These are two distinct issues, the one not dependant upon the other. As the Department is not relying on the law of contract in asking for the contract to be set aside, Netgroup's application for consolidation should fail for that reason.

55.Mr Tokota did not address the issue of consolidation at all, except to indicate that the Department will abide by the decision. The reason being that arrangements had been made by counsel with the Deputy Judge President that all the matters be heard by one Judge at a single sitting. Based upon this fact, Mr Tokota goes on to say that it is therefore immaterial whether there is now a consolidation of the applications or not. It is for that reason that the Director_General had adopted a neutral position and left that aspect to the court to decide and will abide the decision of the court.

56.I find myself in agreement with the submissions of Mr Tokota and Mr De Waal. No authority has been presented for the proposition that there might, in the present case, be some distinction if the two applications are consolidated as opposed to them simply be heard together by the same judge. Mr Louw did not advance any argument to indicate that there would be a material difference if the applications were to be consolidated as opposed to simply being heard together, or that appropriate orders can only be made in the applications if there was a consolidation. Certainly no material prejudice would seem to result if consolidation is not ordered. Nor did Mr Louw advance any argument on the question of possible prejudice as a matter for consideration in the exercise of my discretion.

57.That being so, I am unable to discover any "*convenience*" if the matters should be consolidated as opposed to both applications being

heard simultaneously by me, either to the Court or to the parties. In my view this translates into Netgroup not having shown the required "*convenience*" in order to support its application for consolidation.

58.Moreover, in stead of adopting the practical approach, adopted by Mr Tokota that there would be no inconvenience as long as both applications are heard by the same judge, Netgroup persisted with its application for consolidation. This must have a bearing on the question of costs, which I shall later discuss.

59.In the circumstances of the case, I am of the view that no case has been made out for the consolidation asked for by Netgroup, nor does it seem to me to be convenient to do so in view of the fact that the two applications were heard simultaneously and together by me. The application for consolidation must therefore fail.

*** *LOCUS STANDI* OF THE DEPARTMENT TO MOVE THE REVIEW APPLICATION:**

60.Neither counsel for both Zimport nor counsel for Netgroup contested the *locus standi* of the Department to seek a review of his own decision.

61.Mr Louw submitted that it was in the public interest and, given the circumstances of this case, obligatory for the Department to have approached the court to have its invalid administrative action reviewed and set aside. This is so, regardless of any protest by any party who stands to gain from the invalid action. (*Baxter: Administrative Law,* pp. 379-380; *J R de Ville: Judicial Review of Administrative Action in South Africa*, p. 68; *Pepcor Retirement Fund and another v Financial Services Board* 2003 (6) SA 38 (SCA) 59H-60B).

62.I find myself in agreement with this submission. I am unaware of any authority which would prevent the Department from having moved the review application as it did.

*** THE REVIEW APPLICATION (CASE NO.41073/06):**

63.In a review application such as the present, one is concerned with the following applicable legislation: *section 217* of the *Constitution of the Republic of South Africa,* Act 108 of 1996 ("*the Constitution*")*; sections 6 and 8* of *PAJA*; the *Preferential Procurement Policy Framework Act,* 5 of 2000 and regulations made thereunder; and the *Public Finance Management Act*, 1 of 1999.

64.In *Pennington v Friedgood* 2002 (1) SA 251 (C) (2003 (3) BCLR 298), Hodes AJ pointed out that judicial review under the *Constitution* and under the common law are not different concepts. Prior to the era of the constitutional dispensation the control of public power by the Courts through judicial review was exercised through the application of common_law constitutional principles. Under the constitutional dispensation such control is regulated by the *Constitution*. The common_law principles which previously provided the grounds for judicial review of public power have been subsumed under the *Constitution* and, insofar as they might continue to be relevant to judicial review, they gain their force from the *Constitution*. In judicial review of public power, the two are intertwined and do not constitute separate concepts. (Paragraph [14] at 257B/C _ F). Accordingly, the learned judge pointed out that since the advent of the new constitutional dispensation the required jurisdictional fact for success on judicial review is that the impeached conduct must constitute "*administrative action"*. It is clear that whether such conduct constitutes administrative action falls to be decided with reference to whether the action amounts to the exercise of public power or the performance of a public function. Whether that is so must be determined by reference, inter alia, to the source of the power exercised, the nature of such power, its subject_matter, whether it involves the exercise of a public

duty and how closely it is related, on the one hand, to policy matters, which are not administrative, and, on the other, to the implementation of legislation, which is. (Paragraphs [19] and [20] at 258H _ I/J and 259B/C _ C/D, para_ phrased.) This means that common_law review, as distinct from that review which gains its force from the *Constitution*, now applies only in a narrow field in relation to private entities that are required in their domestic arrangements to observe the common_law principles of the administrative law. (Paragraph [40] at 263A/B _ D-E.) See also: *Transnet Ltd v Chirwa* 2007 (2) SA 198 (SCA) ((2006) 27 ILJ 2294; [2007] 1 All SA 184; [2007] 1 BLLR 10) at 207 B – E; *Minister of Health and another N.O. v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC).)

65.In the circumstances of the present case, the Bid Adjudication Committee, when exercising its discretion in awarding a tender, had to do so with due regard to, and within the confines of, the said legislation. The decision of the Bid Adjudication Committee in awarding a tender was clearly an "*administrative action*" as defined in *section 1* of *PAJA*, in that it is an organ of State exercising a public function in terms of legislation, which is the *Preferential Procurement Policy Framework Act, 5 of 2000* and its regulations.

66.*Section 217(1) of the Constitution* requires an organ of state such as the Bid Adjudication Committee to act in a fair, equitable, transparent, competitive and cost-effective manner. *Section 38 (1)(a) (iii)* of the *Public Finance Management Act, 1 of 1999* imposes on the accounting officer of a State Department the duty to ensure that its procurement system should be fair, equitable, transparent, competitive and cost-effective.

67.The administrative action of the Bid Adjudication Committee had to meet with the requirements stated in *section 6 of PAJA*. The

requirements are divided between those involving the administrator and those involving the administrative action itself. (*section 6(2)(e)(iii), 6(2)(f), (h) and (i)*). The action has, *inter alia,* to be: (a) authorised by empowering legislation; (b) rationally connected to the purpose for which it was taken, the purpose of the empowering legislation and the information before the administrator; (c) constitutional and lawful; (d) based on relevant considerations and not be subject to a material mistake of fact.

*** THE ERROR:**

68.Mr Tokota submitted that an error was made at page 35 of the papers to which I have referred.

69.It was stated in her affidavit by a Ms Selabe, who was a member of the Bid Evaluation Committee, that she was the one who, on 7th June 2006, wrote down the pricing by the different tenderers on page 35. She stated that she wrote down the information which is contained at page 35 after the relevant information was read out aloud by her colleague, Mr Mothlathledi. In his affidavit, Mothlathledi confirmed this. Ms Selabe went on to state that in the case of Netgroup, she erroneously and accidentally wrote the word "*Department*" in stead of the word "*contractor*" on page 35, thereby recording percentages of the savings which were tendered to the incorrect party.

70.On page 35, Netgroup's as well as Zimport's names are to be found, written in manuscript under the column headed "*NAMES*". The following are the further relevant entries on page 35 under "*AMOUNT*" (signifying the tender price): next to the name of Netgroup, the following words and figures appear:

> "*60% owner 40 Department*."

On the face of it, this cryptic entry indicates that the tender by Netgroup was that 60% of the savings which would be generated,

would be retained by Netgroup as its remuneration, and that the balance of 40% thereof, would be credited to the Department.

Next to Zimport's name the following words and figures are entered:

"*60% & 40% to the Department*"

which suggests that the tender was identical to that of Netgroup.

71.In this regard, Hlabioa, in his affidavit, stated on behalf of the Department in paragraph 6.3:

> *"Instead of recording the offer from Net Group as 60% (rand value) for the Department (as owner) and 40% (rand value) for Net Group, the offer was erroneously recorded as 60% for the owner and 40% for 'the Department' instead of Contractor."*

72.To understand the relevance of this explanation and its relationship to the tender documents of Netgroup, the following explanation might be helpful: The official printed tender forms contain blank spaces for replies to various questions to be provided. Netgroup's tender forms were attached to the papers in the review application. At page 37 there is document which is headed "*Form of Offer and Acceptance*" which was evidently completed by Netgroup and submitted to the Department as part of the tender documents. Page 37 provides two blank columns for completion in respect of *"Rand (in words)*" and "*Rand (in figures)"*. In the column designated for entering the "*Rand (in words)*" of the tender price, the following hand written entry is found: "*Refer to Financial Proposal*". In the column for "*Rand (in figures)*" below the words "*Refer to Financial Proposal*", the following words, written in a different handwriting, appear:

"*(60% to owner and 40% to contractor).*"

According to the affidavits of Mr De Beer and Mr Triggol on behalf of Netgroup, they completed the latter information on page 37 and signed the document. This is born out by page 37 itself.

73.According to the evidence on affidavit of both the Department and Netgroup, this was the correct information if one accepts that "*owner*" refers to the Department and "*contractor*" refers to Netgroup. It was indeed common cause that this was the situation.

74.At pages 115 and 116 of the papers, a document entitled: "*Financial Proposal*" appears. This document clearly forms part of the tender documents which were submitted by Netgroup. Equally clearly, this document is the "*Financial Proposal*" to which reference was made on page 35. This document states in paragraph 3.1:

> "*The contract offers 60% of all water cost savings to the owner. This means that the contractor will be entitled to 40% of all water cost savings*."

75.This entry, which is in typewritten form, leaves no doubt that the tendered price of Netgroup for the tender was that 40% of the savings would be retained by it and that 60% of the savings would be for the credit of the Department. Page 35 is in clear conflict with the above pricing in that it professes that the pricing by Netgroup was that 60% of the savings would be retained by it and 40% would be for the credit of the Department.

76.In the case of Zimport, it is common cause that its tender was that 60% of the savings would be retained by it and 40% would go to the Department. It is thus quite evident that there was this error which occurred in the tender process, in so far as Netgroup's tender was considered on the basis of the wrong pricing.

77.On the basis of the foregoing, Mr Tokota submitted that the error was material and that the Department had made out a case for the review of its decision on the grounds thereof. It was submitted that this mistake had occurred during the process of evaluation of the bidders, and that it resulted in an incorrect evaluation being made and a wrong

decision being taken by the Bid Adjudication Committee. Mr Tokota relied for this proposition of the authority of *Pepcor's case (supra)* at p.59 para.47 where the following was stated:

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

See Also: *Government Employees Pension Fund and Another v Buitendag and Others* 2007 (4) SA 2 (SCA)

78.Mr De Waal vehemently opposed the review application. The reason for that is clear: if the review fails, Zimport will remain the successful tenderer in spite of the irregularities in the tender process, and its contract will remain intact.

79.Mr De Waal pointed out in respect of the alleged mistake which Selabe said she made when writing down what was called out at the opening of the tenders, that not only she, but all the functionaries who worked with the documentation thereafter, perpetuated the mistake. Counsel drew attention to the fact that Liebenberg, the then Acting Regional Manager of the Department, would also have had to miss the mistake. Similarly the Director General committed the same mistake.

Counsel said it can simply not be contended that none of the officials actually ever read the tender documents including the financial proposals. It cannot be suggested that all those functionaries simply perpetuated the mistake of Selabe. Counsel submitted that such a gross dereliction of duty should not be imputed.

80.Mr De Waal pointed out various further reasons why the allegations by the Department were not only improbable but in fact highly unlikely. Counsel said that if in fact there was a mistake (which Zimport apparently refused to accept) in the sense that page 35 did not correspond with Netgroup's tender document, this would have been noticed by the procurement officials when collating the documents. What is more is that the papers reflect that a five hour meeting by the Bid Evaluation Committee members was held where all the tender documents were allegedly considered. This consideration would have included the financial proposals by all tenderers, including that of Netgroup. This much is clear from the fact that points were allocated to each of the tenders in respect of price. After the aforementioned process a summary would have been made in order to compare who the best bidder was. Mr De Waal's submissions culminated in the submission that the alleged mistake was never made by Selabe, but that she had written down the correct information.

81.Mr De Waal submitted that Liebenberg's revisiting of the process and specifically the scores awarded to Zimport and Netgroup and his memorandum to the Director General remained unanswered by the Department. Netgroup simply explained this by saying that Liebenberg also made a mistake. The Director General's letter to Len Dekker & Associates, expressing confidence in the process and the scoring, also remains unanswered by the Department, and was also attempted to be explained as yet a further mistake.

82.Mr De Waal argued that Selabe did not state what was read out to her, and that her "*mistake*" is at best, vaguely described. She also did not reply to Zimport's answering affidavit. Her recordal does, in any event, not present an understandable record of the financial proposals of any of the tenderers. In any event, the attendance register could not be the sole source of information regarding the financial proposals to which tenders were scored nor could that be the only document to which all the officials would have referred when dealing with the tenders.

83.Mr De Waal stated that the conclusion was justified that the certain information entered on page 35 was added later. He said that this was alleged in Zimport's affidavits, but the Department failed to reply to that allegation. Netgroup's answer to these allegations was to deny that Netgroup altered any documents or completed them late. Mr De Waal argued that the simple fact that there are different handwritings to be found on page 35 and the obvious question regarding whose handwritings, namely whose they are, and when it was written, remained unexplained.

84.Mr De Waal submitted that the Department bore the *onus* to show on a preponderance of probabilities that the review application should succeed. In order to do so the Court should be able to find on the probabilities that a mistake was made by Selabe and that such mistake was never discovered by any of the other officials involved in the consideration of the tenders thereafter. This is so improbable, it was submitted, that I cannot come to that conclusion. The only probable conclusion is that even if Selabe had made an unclear or wrong recordal, no mistake was made thereafter. The tenders were correctly considered on the information contained in the other tender documents, were correctly scored and correctly awarded as confirmed

by Liebenberg and the Director General.

85.I am unable to agree with Mr De Waal's submissions. From the documentation in the review application it is quite evident that a material mistake was made as Netgroup's offer comprised an offer of 60% of all water cost savings to go to the Department and a 40% of all water cost savings to Netgroup, and not the other way around, as was recorded on page 35. The submission that the correct information as to pricing was in any event considered, cannot hold water, as it appears clearly that Netgroup scored the highest on the points scoring system. The only other possibility would be if there had been some fraudulent collusion.

86.Zimport's suggestion that Netgroup must have tampered with its tender documents is based on speculation and is highly improbable. If Netgroup tampered with its tender documents it would have had to have been after the opening of the tenders on 7 June 2006. In his letter dated 29 August 2006 Netgroup's attorney referred to and attached relevant pages of Netgroup's tender documents which emanated from before the 7th June 2006. At the date of the letter the tenders had already been considered by two committees and the contract awarded to Zimport. Why would Netgroup wait for the tender to be awarded before tampering with its documents? By then the original documents as filed could have been copied and disseminated amongst the members of the two committees, increasing the risk to Netgroup and whoever else was involved in the alleged fraud to have been caught out with reference to the contradictory, original documents. If Netgroup wanted to commit fraud it seems to me that it would have done so before the matter was considered by the evaluation and adjudication committees.

87.Mr Louw correctly pointed out that on the papers there is nothing to

justify a finding of dishonesty or collusion. Counsel submitted that if Zimport suffered financial loss due to the Department's conduct, it is free to institute a claim for damages in a separate action. But in the *interim*, there appears no reason why the contract should be upheld while the award is set aside. Mr Louw relied on the cases of *Herbert Parker and Another v Johannesburg Stock Exchange* 1974 (4) SA 251 (WLD) at 788A – 789C; *Pennington's case (supra)* at 256F–262D; *Chirwa's case (supra)*; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at 246E – 247A; and *Darson Construction (Pty) Ltd v City of Cape Town and Another* 2007 (4) SA 488 (CPD).

88.The fact is that Zimport's allegations of dishonesty are mere speculation, and have to be weighed against the Department's admission of its *bona fide* clerical error and the information which emanates from the documentation. The pricing of Netgroup on page 35 is clearly in conflict with the rest of the tender documents and the evidence. It is highly unlikely that an amendment to page 35 would have taken place without it being picked up and resulting in an exposure of the alleged fraudulent conduct. There is in any event no objective evidence on the papers which could support such a conclusion. Nor is it probability that the document at page *35*, was tampered with.

89.I suppose many would share Mr De Waal's incredulity in respect of the alleged incompetence of the relevant officials, given the chain of events to which he referred. But the fact of the matter is that there is no reason to reject the confirmed evidence of Selabe that she made the mistake, and that the other functionaries who worked with the documents simply did not pick it up. Once it appears, as it does, that it is clear from the papers that the tenders were evaluated and

adjudicated upon incorrect data, it appears to me to be the end of it. And, somewhat ironically, then all the other arguments of Mr De Waal in respect of tampering with documents and possible fraud only serve to fortify the justification for the conclusion that the review has to succeed, and the process set aside.

90.Mr Louw was constrained to agree with Mr De Waal that the tender process under review was fraught with incompetence. No one, from junior level to senior level (with the exclusion of Dr Phillips), noticed an elementary error which was allowed to perpetuate itself. Clearly, this is an indication that those burdened with the duty to properly apply their minds to the matter, did not do so. Similarly, those who were supposed to provide proper advice, failed to do so. This level of incompetence caused Netgroup to submit that there should be no remittal, let alone a re-advertising to have the process started afresh. Netgroup has no confidence in the process of adjudication and those administering same.

*** NON-RESPONSIVENESS:**

91.There was yet another error which crept into the evaluation process, in that the Bid Evaluation Committee considered that the tender of Netgroup was "*non-responsive*". This was clearly taken into account against recommending the tender of Netgroup for acceptance by the Bid Adjudication Committee.

92.What gave rise to this conclusion, was the fact that pages 5 and 6 of the tender form "*PA-16 Preference Certificate*" were considered by the Bid Evaluation Committee not to have been duly completed by Netgroup. These pages deal with a declaration in respect of equity. At the foot of page 5 the following is written in manuscript: "*SEE ATTACHED*:" Page 6, which deals with questions in respect of shareholders, was not completed at all.

93.According to the Department's own advice as recorded in a memorandum by Liebenberg, the fact that blank spaces are left in the relevant pages, simply means that the tenderer will be presumed not to have claimed preference points. In the "*PA-16 Preference Certificate*" which forms part of the tender, it is stated in clause 1.4:

"*Failure on the part of a tenderer to fill in and/or sign this form may be interpreted to mean that preference points are not claimed*."

No other sanction is stipulated. Consequently, according to the rules of the Department itself, Netgroup's tender could not, and should not, have been labelled "*non-responsive*".

94.The significance of having decided that Netgroup's tender was "*non-responsive*" in the respects mentioned, lies therein that, according to affidavits filed on behalf of the Department, the Bid Evaluation Committee decided not to recommend Netgroup's' tender for acceptance.

95.What makes it worse is that fact that Netgroup in truth and in fact did provide the relevant information for the purposes of claiming preference points, which was overlooked. That much appears from the very same *PA-16* form to which I have referred, at page 4, clause 8.

96.Mr Louw on behalf of Netgroup supported the application for the review of the decision to award the tender to Zimport and for the declaration of invalidity of the contract.

97.It is quite evident from the papers that material mistakes were made by the Bid Evaluation Committee which precluded a open, accurate, informed and fair evaluation of the tenders by the Bid Adjudication Committee. There are no disputes of fact in this respect on the papers. The only disputes which were raised, were raised in argument by Mr De Waal, but the arguments of counsel do not constitute evidence. The errors resulted in the bidder who obtained the highest scores and whose pricing was the best, not having been considered for the award

of the tender, and the process was consequently fatally flawed in that it did not represent a process which was fair, equitable, transparent, competitive and cost-effective as contemplated by *Section 217(1)* of the *Constitution*. Nor did it comply with the requirement that it had to based on relevant considerations and not be subject to a material mistake of fact, as stated in *section 6 of PAJA*. The review application must therefore succeed.

*** THE VALIDITY OF THE ZIMPORT CONTRACT:**

98.In view of my finding that the administrative process was fatally flawed and has to be reviewed and set aside, the validity of the Zimport contract must be investigated. Mr De Waal argued that the Department's prayer that the Zimport contract be set aside or declared invalid, should be dismissed. Counsel also argued that Zimport's prayer to compel should be upheld. As I have pointed out, these two issues go hand in hand, both depending upon whether the review application succeeds or not.

99.The first attack on the Department's prayer that the contract be declared invalid by Mr De Waal was that *PAJA*, and specifically the provisions relating to judicial review in *section 6* and the remedies in *section 8* thereof, only find application in respect of "*administrative action*", and not in common law relating to contracts. Mr De Waal argued on behalf of Zimport that the conclusion of the contract between the Department and Zimport was not administrative action which could be reviewed in terms of *PAJA*, as the Department's notice of motion in prayer 1 suggests. Counsel contended that Zimport's application is about a contractual relationship to the exclusion of anyone else.

100.In *PAJA* "*administrative action*" is defined in *section 1* as follows*:*

> *" 'Administrative action' means any decision taken … by –*

an organ of state, when –

exercising a power in terms of the constitution or a provincial constitution; or

exercising a public power or performing a public function

in terms of any legislation; or …" [Words omitted by me.]

101. It is clear that "*administrative action"* cannot be equated to the conclusion of a contract, or *vice versa*. "*Decision*" is in any event defined in *PAJA* and it does not include the conclusion (or cancellation) of a contract. In *Aquafund (Pty) Ltd v Premier of the Western Cape* [1997] 2 All SA 608 (C) where Traverso J (as she then was) stated:

> "It is well established that the acceptance of a tender results in a contract between the tenderer and the person who called for tenders and that the conclusion of such an agreement is not an administrative action .....But in my view the process of considering tenders and of making recommendations is distinct from the subsequent conclusion of an agreement". [Words omitted by me.]

In *Steenkamp's case (supra)* at 158 (paragraph 12) the following was said by Harms JA:

> "Everything, though, is not administrative law …The evaluation of the tender is, however, a process governed by administrative law. Once the tender is awarded, the relationship of the parties is that of ordinary contracting parties .....". [Words omitted by me.]

102. In the work of *Phoebe Bolton: The Law of Government Procurement in South Africa (Lexis Nexis Butterworths, 2007*), in chapter 2, the learned author distinguishes between four specific stages in the process of procurement by way of tender. Firstly, the pre-award period, i.e. the period prior to the actual award of the tender, secondly, the award period, i.e. the time when a tender is awarded to a preferred tenderer, thirdly, the stage when a contract is concluded and fourthly, the stage after the conclusion of a contract until completion of the contractual performance. The learned author comes to the

conclusion that except in very specific exceptions, the law governing stages 3 and 4 is primarily the private law of contract. While it may be arguable that stage 3 does not necessarily exclude administrative action, it is unnecessary to debate the issue, as in the present review, it is clear that process had reached stage 4, and consequently the Department was *prima facie* disentitled to look to *PAJA* as a source of authority for setting aside the contract.

103.Mr De Waal contended that when the Department purported to cancel the contract on 6 October 2006, the Department was obliged to have acted in terms of the law of contract, as the administrative process had by that time been exhausted. Mr De Waal argued that prayer 1 of Zimport's notice of motion exclusively concerns the law applicable to contracts, and excluded the administrative law. Counsel argued that the Department had failed to make out a case for the setting aside of the contract in common law. Counsel relied for this submission on the case of *Cape Metropolitan Council case (supra)*.

104.Mr Tokota correctly pointed out that the *Cape Metro case* is distinguishable on the facts from the present case. In the *Cape Metro case*, the cancellation of the contract was not based on the statutory provisions giving rise to the contract but on the existing relationship between the contracting parties in that during the existence of the contract there were substantial fraudulent claims which had been submitted and that such fraudulent claims constituted a material breach of the contract entitling the Cape Metropolitan Council to cancel that contract in terms of the law of contract. In the present matter the act of suspending the operation of the contract pending the review of the decision to award the tender and/or cancellation thereof was the exercise of a public duty on the part of the Director_General, not the exercise of a power in terms of the contract. The Director_General is

obligated in terms of *section 38(1)(a)(iii)* of the *Public Finance Management Act* 1 of 1999 to establish and maintain a provisioning system which is fair, equitable, transparent, competitive and cost effective (also: *section 217* of the *Constitution*). It was submitted that this would justify the action of suspension, taken by the Department. Mr Tokota submitted that the basis of the action taken by the Director_General was a precautionary measure and such measure is subject to the decision being set aside on review.

1.In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and others* 2001 (3) SA 1013 (SCA) the Supreme Court of Appeal dealt specifically with the cancellation of a contract concluded consequent upon a tender process. The issue for decision was whether the cancellation by the appellant (which was an "*organ of State"* as defined in *section 239* of the *Constitution)* of a contract it concluded with the first respondent amounted to "*administrative action"* as intended by *section 33* of the *Constitution*. The contract was entered into after the second respondent had successfully tendered to fulfil certain functions and duties of the appellant, viz the identification of non_paying levy payers and the collection of outstanding levies. The first respondent was subsequently substituted for the second respondent. The basis upon which the contract was sought to be cancelled, was founded in the law of contract, in that it was alleged that the first respondent had committed a material breach of the contract by submitting fraudulent commission claims in respect of the outstanding levies collected. The first respondent applied for the setting aside of the cancellation of the contract on the ground that its constitutional right to administrative justice had been violated by the termination of its appointment. Reliance was placed on *Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (AD)*, for the proposition

that their right to terminate the contract derived from a public power, and the Court *a quo* upheld the view in the contract was an "*administrative agreement*" for the purposes of *section 33* of the *Constitution*. On appeal, the Court held that *Zenzile* was no authority for the proposition that where a public authority derived its authority to enter into a contract from a public power, its authority to terminate the contract similarly derived from such power, thereby entitling the other contracting party to the benefit of the application of the principles of natural justice before cancellation of the contract which finds application in public law (Paragraph [11] at 1021D _ F). The Court concluded that it could not be said that the appellant had exercised a public power when it purported to cancel the contract, although it derived its power to enter into the contract with the first respondent from statute. It derived its power to cancel the contract from the terms of the contract and the common law. The test which was applied was that the appellant did not when it concluded the contract, do so from a position of superiority or authority, nor did it, when cancelling, find itself in a stronger position than the position it would have been in had it been a private institution. When it purported to cancel the contract, it did not perform a public duty or implement legislation, but purported to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract (Paragraph [18] at 1023H _ 1024C.) As the appellant had not purported to cancel the contract on the ground that it was satisfied of the existence of any of the circumstances referred to in its regulations, but on the ground that substantial fraudulent claims had been submitted to it, the appellant was entitled to terminate the contracts in terms of the law of contract. (Paragraph [20] at 1025A _ D.) Consequently the respondent was not entitled to claim the benefits of the rules of natural justice before

termination of the contract. Streicher JA, at 1023 H (paragraph 18) stated: *"The appellant is a public authority and, although it derived its power to enter into the contract with the first respondent from statute, it derived its power to cancel the contract from the terms of the contract and the common law. Those terms were not prescribed by statute and could not be dictated by the appellant by virtue of its position of a public authority. They were agreed by the first respondent, a very substantial commercial undertaking. The appellant, when it concluded the contract, was therefore not acting from a position of superiority or authority by virtue of its being a public authority and, in respect of the cancellation, did not, by virtue of its being a public authority, find itself in a stronger position than the position it would have been had it been a private institution. When it purported to cancel the contract it was not performing a public duty or implementing legislation; it was purporting to exercise a contractual right founded on the consensus of the parties in respect of a commercial contract. In all these circumstances it cannot be said that the appellant was exercising a public power. Section 33 of the Constitution is concerned with the public administration acting as an administrative authority exercising public powers, not with the public administration acting as a contracting party from the position no different from what it would have been in had it been a private individual or institution."*

I shall later revert to this case in a different context.

1. *Chirwa's case (supra)* also appears to support Mr De Waal's arguments. There, the respondent approached the High Court for the review and setting aside of a decision of the first appellant to dismiss her from her employment, as well as an order that she be reinstated on

the ground that the dismissal had violated her right to administrative action that was lawful, reasonable and procedurally fair, as enshrined in *section 33* of the *Constitution*. The High Court found that her dismissal constituted "*administrative action"*, that the common_law rules of natural justice applied to the decision to dismiss; that those rules had been breached when the decision to dismiss was taken; and that she was, accordingly, entitled to be reinstated. On appeal it was held by Mthiyane and Jafta JJA, that the decision to terminate the respondent's contract of employment did not entail "*exercising a public power or performing a public function in terms of any legislation*", and was therefore not "*administrative action*". The nature of the conduct involved was the termination of a contract of employment, which did not involve the exercise of a public power or performance of a public function in terms of any legislation. The mere fact that the first appellant was an organ of State did not impart a public law character to its employment contract with the respondent. The power to dismiss was to be found in the employment contract between the respondent and the first appellant. In dismissing the respondent, the first appellant was acting simply in its capacity as employer. It had consequently not been shown that the dismissal of the respondent constituted administrative action as defined in *PAJA*, nor that any of her rights in terms of *section 33* of the *Constitution* had been violated. (Paragraphs [14] and [15] at 208D _ 209D.)

2.Mr De Waal submitted that it is a matter of significance that the Department, even in its abortive attempt on 6 October 2006 to cancel the contract, relied neither on the law of contract nor the administrative law. In its prayer 1 of the present notice of motion for review, the Department does not attempt to rely on the provisions of the contract for the cancellation thereof. Mr De Waal reminded me that it was with

this prayer of the Department that Netgroup made common cause with in the application.

3.Mr De Waal submitted that it is abundantly clear from the record that Zimport and the Department viewed the actual conclusion of a contract as a distinct and separate stage from the procurement process. Counsel also referred to an affidavit which was filed by one Altus De Beer on behalf of Netgroup, in which he described it as

> ".....usual and correct for a successful tenderer to consult and agree with the particular state organ as to what the terms and conditions of the agreement resulting from the successful tender must be".

Mr de Beer proceeded to explain that a successful tenderer, after the administrative process has been completed and the tender awarded, is invited by the Department to conclude the final contract between the parties. Thereafter the terms are finalised and the agreement signed. This is what constitutes the agreement between the particular Department and the tenderer. In fact, said Mr De Waal, the Department had admitted that it was not entitled to cancel the contract on contractual principles. It admits that Zimport is not in default of any of its obligations in terms of the contract. None of the allegations by the Department could be construed as affording it a right to cancel the existing contract within the provisions of the law of contract.

4.The fact that the department did not rely on contractual grounds to set the contract aside, is clear on the papers. It is also apparent from the authorities cited above that the contract itself cannot be regarded as an administrative action, and as such, does not qualify to be reviewed according to the prescripts of administrative law.

5.Apart from being bound to the authorities quoted, I find myself in respectful agreement therewith. It follows that any cancellation of the contract by the Department had to be effected in terms of the law of

contract. But it appears to me that the facts of the present case place the matter on a different footing. If the review application is to be upheld, it would follow that it must necessarily affect that which followed the decision which is set aside. If there appears to have been some irregularity, error or unlawfulness in the process which presented the foundation for the contract, its viability would depend upon the materiality thereof.

6.In the *Oudekraal case (supra)*, the question which was considered was whether, or in what circumstances, an unlawful administrative act can simply be ignored, and on what basis the law might give recognition to such unlawful administrative acts. The appellant company was the owner of undeveloped land which contained certain graves. Its immediate predecessor in title secured the laying out and approval of the land as a township in terms of the *Townships Ordinance* 33 of 1934 (C). The township establishment process involved, among other things, the then provincial Administrator's grant of permission to establish the township, an endorsement on the title deed to the land by the Registrar of Deeds to the effect that it had been laid out as a township, and the opening in the deeds office of a township register. The Administrator granted permission, subject to certain conditions. It was held by the Court on appeal that the Administrator acted unlawfully in either being ignorant of the existence of the graves, or if their existence was known, it was ignored. It was further held that the presence on the land of religious and cultural sites of particular significance to a sector of the Cape Town community was a factor that should properly have been taken into account and evaluated, in coming to the decision whether to permit the establishment of a township (Paragraph [24] at 241D _ E.) However, the Court held that, although unlawful, the permission that was granted

by the Administrator could not simply be disregarded as if it had never existed. Until the Administrator's approval (and thus also the consequences of the approval) was set aside by a court in proceedings for judicial review it existed in fact and it had legal consequences that could not simply be overlooked. In my view, this judgment finds direct application in the matter before me. It is my view that the errors in the present case to which I have referred, are capable of presenting a ground for the setting aside of the contract between the Department and Zimport in the special circumstances of the case.

7.However, Mr De Waal pointed out that in its attempts to rely on the administrative law in order to found its prayer for the cancellation of the contract, the Department did not rely on any provisions of relevant legislation for such entitlement. Counsel referred to the following authorities by way of example: the *State Tender Board Regulations* published by *Government Notice R1733* on 5 December 2003; *the Preferential Procurement Regulations* published in *Government Notice R725* on 10 August 2001. These regulations, argued counsel, would entitle the Department to cancel a contract in instances where an element of fraud is later proved. See also: *section 2(1)(g)* of the *Preferential Procurement Policy Framework Act*, 5 of 2000.

8.What Mr De Waal says, is correct. But, as pointed out above, my understanding of the case of the Department is that the decision to award the contract to Zimport was part and parcel of the administrative process of considering and awarding the tender contract. If the decision to award the tender to Zimport is found to have been based upon a material error committed during the evaluation and adjudication process, it would be an irregularity which was committed during the administrative process which gave rise to the conclusion of the

contract. Should the administrative action be set aside on review, it would follow that the contract cannot survive, because it had been founded upon that irregular process.

9.Mr Tokota submitted that should I find that the decision of the Department must be set aside by virtue of the error, the Department cannot be forced to perform in terms of the Zimport contract for the following reasons: a) such contract flowed from an invalid administrative act; and b) it is against public policy to enforce a contract which was based on an invalid administrative act.

10.I find myself in agreement with these arguments. It seems to me that if upon all the facts and circumstances as they appear from the papers it is clear that what gave rise to the conclusion of the contract in the first place, had been an error in the administrative process which constituted invalid or voidable administrative action, I cannot avoid giving recognition to that fact. In this regard I cannot ignore the statement of Mr Malome Hlabioa in his affidavit on behalf of the Department where he states that the adjudication was not fair, equitable, transparent, competitive and cost effective as envisaged by applicable national legislation, and that this is the reason why the Department is seeking cancellation of a contract which resulted from a process which was tainted by clerical error.

11.In *Darson's case (supra)* the applicant had unsuccessfully tendered for a civil engineering contract that had been awarded by the first respondent to the second respondent. The first respondent had delegated its power to make decisions about the tenders to its chief financial officer in consultation with its director of legal services and an appointed staff member. However, the decision had been made without the prescribed consultation by the chief financial officer with the required parties. The applicant sought an order declaring that it

was entitled to have been awarded the contract and also claimed compensation for loss of profit in terms of *sections 8(1)(c)(ii)(bb)* and *8(1)(d)* of *PAJA*. Selikowitz J held that the award of the contract was reviewable under *section 6(2)(a)(ii)* and *6(2)(b)* of *PAJA* since the committee that took the decision was not authorised to take it, and the person who was authorised had failed to consult as he was required to. This meant that the proper authority had never taken a decision. Where an unauthorised administrator acted, its actions were clearly reviewable and could not be upheld. The incorrect administrator vitiated the process, and all the actions and decisions of that administrator which followed were invalid (at 500D _ G, 502F and 504A.) Applied to the facts of the present case, it would entail that the subsequent contract between the Department and Zimport must be regarded as being invalid.

12.Mr De Waal argued that prayer 1 of Zimport's notice of motion stood uncontested by the Department. Mr De Waal pointed out that Zimport had done nothing to justify a cancellation of the contract. Based upon these arguments, Mr De Waal asked that the Department's prayer that the contract be cancelled, be dismissed. As I have pointed out, although the Department purported to cancel the contract initially, it later abandoned that position and suspended the contract, pending the outcome of the review application. This must be taken to have been a concession that Zimport's view was correct. This in my view, does not, however, change the situation in respect of the errors committed during the tender process to which I have referred and their effect upon the contract.

13.Mr Tokota fairly conceded that the initial attempt by the Department to cancel the contract with Zimport was unlawful. He also, in my view quite correctly, conceded that it follows that Zimport was entitled to

launch its application in respect of prayer 1 at the time when it did. Mr Tokota submitted that the suspension of the contract, though admittedly not provided for either in the applicable legislation or in the contract itself, had been a wise precautionary measure to mitigate any damages that Zimport might continue to incur whilst there was a possibility that such contract may be set aside if the review application was successful. No point was made concerning the propriety or validity of the suspension, and I am consequently not called upon to express an opinion thereon. Counsel submitted that the remedy of Zimport, should the award be set aside, lies in a claim for damages provided it is able to postulate the grounds as set out in *Steenkamp's case (AD) (supra)*; *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA)). I find myself in complete agreement with the submissions of Mr Tokota.

14.Mr Tokota further submitted that the cancellation of an award of a tender which has been unlawfully awarded to the tenderer or the setting aside thereof does not leave the tenderer concerned without a remedy, depending upon the nature of the cause of action. If the successful tenderer has its tender set aside by a court it still has an opportunity to submit its tender when a fresh consideration is made. (*Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at 142 para.49). There is also another remedy available to such tenderer, if the facts support it, which lies in provisions of *section 8* of the *PAJA*. Therefore, it was submitted, Zimport's application ought not to succeed and that the Department's application ought to succeed.

15.Mr Louw argued, as did Mr Tokota, that the contract with Zimport was the consequence of an error. Relying on *Trinity Broadcasting (Ciskei) v ICA of SA* 2004 (3) SA 346 SCA at 353E-355A and *Rustenburg Platinum Mines Ltd v CCMA* 2007 (1) SA 576 SCA at 589I

– 590F, Mr Louw submitted that *Section 6(2)(f)* of *PAJA* applied, in that the record and the affidavits filed on behalf of the Department and Netgroup

> "*clearly show that First Respondent's decision is not rationally connected to the purpose for which it was taken, namely compliance with procurement legislation based on the points system as set out in the papers, neither is it rationally connected with the information before the First Respondent, in particular it does not comply with the provisions of the Public Finance Management Procurement Regulations*." (The "first respondent being the Bid Adjudication Committee.)

16.These arguments for Netgroup were, of course made on the assumption that its application for joinder would be successful. As I have decided that it should be, I consider the submissions made on behalf of Netgroup. Mr Louw argued that the question of the cancellation and/or suspension of the contract is interlinked with the reasons for the award thereof. My understanding of this argument is that, seeing that Zimport did not address the administrative aspects as well, but only the principles of the law of contract, his prayer 1 did not disclose a cause of action for the relief sought. I cannot agree. Zimport had no business with the administrative process when moving its prayer 1. It was only concerned with the reality that the Department had cancelled its contract.

17.Also, if the question of the cancellation and the suspension of the contract are interlinked with the grounds or reason for the award, I fail to see on what basis the question as to the validity of the contract should not also be so interlinked. Mr Louw's argument falls foul of the reality of the situation because of the ambivalence of the arguments in respect of the issues to which I have referred. It seems to me that the

arguments are the result of the fact that it was not at all times possible to define the separate arguments in respect of each of the issues. This problem resolves itself when it is realised that the issues of the setting aside of the cancellation of the Zimport contract by the Department, the validity or otherwise of the Zimport contract, and the prayer by Netgroup to be awarded the contract, depend upon the success or otherwise of the review application.

18.Mr Louw submitted that there are numerous examples where the award of a tender was set aside, the ensuing contract was also set aside. Counsel referred to the following cases where the award of tenders were reviewed and set aside, and the resulting contracts from the awards, declared null and void: *Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* [2005]4 All SA 487 (SCA); *Grinaker v Tender Board (Mpumalanga)* [2002]3 All SA 336 (T); *Uthingo Management (Pty) Ltd v Minister of Trade and Industry* And Others [2007]2 All SA 649 (T); *RHI Joint Venture v Minister of Roads and Public Works* and others 2003(5) BCLR 544 (Ck); *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* and others 1999(1) SA 324 (Ck).

19.Mr Louw contrasted the cases above with other cases which dealt with the situation where the administrative action could validly be attacked, but an order setting aside the contract was refused on grounds that the relief sought would amount to, *inter alia*, an academic exercise due to an expiry of time: *Sebenza Kahle Trade CC v Emalahleni Local Municipal; Barry Kotze Inspections CC t/a Bis in Joint Venture with Pugubye Investments (Pty) Ltd v City of Johannesburg* and others 2004 (3) BCLR 274 (T); *Tri-Cor Industries (Pty) Ltd v Chairman of Mpumalanga Tender Board And others* [1997]4 All SA 414; *Raubex (Pty) Ltd v Roads Agency Limpopo (Pty) Ltd And*

others [2006] JOL 17232 (T); *Dzindau Electrical Projects (Pty) Ltd v Westonaria Municipality And others* [2006] JOL 16924 (T).

20.Mr Louw submitted that the reason why the contract cannot be allowed to stand is to be found in the doctrine of legality: the State can exercise no power and perform no function beyond those conferred upon it by law. The acceptance by an organ of state of a tender in conflict with the provisions of statutory prescripts is an invalid act which falls to be set aside. The only exception where an ensuing contract will be allowed to stand despite the preceding process being vitiated is where setting it aside would be overly disruptive or practically impossible to be implemented. An example would be where the contract had been completed. *Bolton: op. cit.* p.318; Sapela *supra* 497 [28]. The legal foundation for the abovementioned exception is not a separation of administrative action from the ensuing contract in that the one is set aside and the other maintained. The administrative action preceding the contract remains flawed but is allowed to stand and consequently the contract also survives, not on its own independent footing, but because the court for discretionary reasons of its own allows the invalid administrative action to stand. (*Sapela supra* 498 [29].)

21.It was Netgroup's contention that the setting aside of the award in terms of the *PAJA* invalidates the contract concluded in terms of the vitiated tender process.

22.I find myself in agreement with Mr Louw’s arguments. The question is not on what grounds (administrative law or common law) the contract can or should be set aside, but rather whether a contract, concluded as a result of an unlawful administrative action, should be allowed to stand. In my view, the answer must be in the negative.

23.Mr De Waal lastly pointed out that the Department should have

asked for a declaratory order, rather than for an order of cancellation. I agree with this contention, but it seems to me that the Department's intentions and the grounds therefor were made clear in the review application.

24.Mr Louw agreed that the employment of the term "*cancellation*" is possibly less than perfect, in that it may indicate an involvement of the law of contract, which is correctly denied. The correct approach would be, as I have indicated, that the contract be declared invalid.

25.As a consequence, I am of the view that the Zimport contract should be declared invalid.

*** PRAYER 2 OF THE ZIMPORT APPLICATION TO ENFORCE THE CONTRACT:**

26.Mr Tokota submitted that if the application for review by the Department succeeds, prayer 2 of the notice of motion of Zimport, in which it asks for the Department to be compelled to honour the contract of 8 August 2006, must fail. The converse is, of course, also true: should the review application fail, it would follow, all other things being equal, that Zimport must succeed with this prayer.

27.Mr Louw submitted that the reasons for the Department not implementing the contract with Zimport, was that the administrative process which gave rise to the contract, was flawed. Without that foundation, the *causa* for the contract falls away and the contract itself cannot survive. This argument depends on a finding that the review application succeeds and the award of the tender to Zimport cancelled.

28.Mr Louw submitted, as did Mr Tokota, that if Zimport has suffered financial loss due to the Department's conduct, it is free to institute a claim for damages in a separate action. No grounds exist for the upholding of the contract should the award be set aside, counsel argued. I have already dealt and upheld this argument above.

29.It follows that Zimport's request that the Department be ordered to abide by the contract, must be dismissed. Consequently, Zimport's application in prayer 2 for an order to compel the Department to honour the contract between it and Zimport, fails.

*** FURTHER HEADS OF ARGUMENT ON BEHALF OF NETGROUP:**

30.Because the issue was dealt within a fourth set of heads of argument, handed in after I had reserved judgment in the matter, I feel obliged to make the following comments. Mr Louw was the last counsel to oral present argument in the case. It was my impression, borne out by the views of the other legal representatives, that Mr Louw had in the end addressed all the issues which affected Netgroup. After having reserved my judgment and I had adjourned, Mr Louw, in the company of Mr De Waal spoke to me in chambers. Mr Tokota was not present, although he was apparently invited to attend. Mr Louw indicated to me that he felt that he had not fully addressed all the issues. I immediately gave him permission to make any further submissions which he wished to make by way of further heads of argument, after having presented same to his opponents. Thereafter I received a letter from Mr Louw's instructing attorney which charged that I had cut short the argument of Mr Louw while he was still on his feet, and thereby had disallowed full argument by counsel.

31.As I disagreed with the allegation that I had cut the argument of Mr Louw short, I thereupon requested the recording of the proceedings to be played back to me. It transpired that Mr Louw had in fact terminated his arguments with the words: "*I cannot take the matter any further*". After that, I thanked all the legal representatives for their assistance and intimated that I would reserve my judgment in order to give proper attention to all the arguments which had been presented, adding that it would be unfair to the parties for me to do otherwise. During all this

time, Mr Louw never indicated to me in any way that he had not completed his arguments, or that he had been cut short. Nor did Mr Louw give any such indication to me when counsel spoke to me in chambers after I had adjourned.

32.I consequently replied by letter to Mr Louw's instructing attorney, pointing out that I did not cut Mr Louw short, that I was under the impression that he had in fact addressed all issues affecting Netgroup, and that he had indicated the termination of his arguments as stated above. I iterated that I had, in any event, given permission for Mr Louw to advance any further arguments which he wished to advance by way of written heads of argument. This letter was forwarded to the other legal representatives for comment if they so wished. I have received communications from the legal representatives of the other parties, which are in agreement with what I have stated above.

33.As a consequence of the leave which I had granted, Mr Louw and Mr Ackermann filed a fourth set of written arguments. In this fourth set of heads of argument Mr Louw saw fit to reiterate:

> "*At approximately 15h30 on 24 October 2007 the Honourable Court adjourned the matter and reserved judgment at a time when we were on our feet and making submissions in reply to Zimport's submissions on its application*."

34.As stated before, this allegation does not accord with my recollection of the events, nor the recording which was made at the time. The attitude expressed by Zimport's legal representatives in reply to my letter was in fact that the fourth set of heads of Netgroup did not take the matter any further. I have studied the fourth set of heads of argument, and I am constrained to agree that the matter is not taken any further thereby. Indeed the major part thereof appears to be a repetition of what had previously been stated in the other heads of

argument of Netgroup and during Mr Louw's address. I have dealt with all those issues in this judgment.

35.Although it was not made clear by Mr Louw as to what was intended to be referred to with the words: "....*Zimport's submissions on its application*", it would appear that Mr Louw was concerned about the submission by Mr De Waal that of that Zimport's prayer 1 (or prayer 2) was unopposed. It was submitted that the submission is incorrect as it was opposed. I have dealt with that issue above.

36.It was submitted that in any event the administrative process leading up to the signature of the Zimport/Department contract dated the 8th August 2006 was flawed, therefore void and consequently the contract of 8 August 2006 was also void and must be set aside as invalid. It will be observed that I have already dealt with this argument above, because Mr Louw had made these submissions during his address. This is a regurgitation of the arguments presented by Mr Louw, and which I have dealt with as well.

37.The new heads repeated that the said contract was not attacked by the Department and by Netgroup on any grounds having their origin in the law of contract. It is attacked on grounds of the administrative law, namely that the administrative process leading to the conclusion of the contract is fatally flawed and for that reason prayer 1 of the Department's application must be granted. The matter concerns the administrative law and not the law of contract. Reliance was placed on *Logbro Properties CC v Bedderson N.O. and Others* 2003 (2) SA 460 (SCA), at 466 – 468, paras. 7, 9 and 10; *Steenkamp's case (AD) (supra)* at 158, para. 12; *Bolton: op. cit.*, p 29.

38.Apart from further authorities which were presented in the new heads of argument, this particular argument was exhaustively made by Mr Louw during his address, and I have dealt therewith. I fail to

discover any fresh point in the new heads of argument which was not covered in Mr Louw's previous three sets of heads of argument and his oral address in Court.

39.Mr Louw argued that the setting aside of a cancellation of an invalid contract is an impossibility as there was in the first instance no contract to cancel. Mr Louw stated in his fourth set of heads:

> "*At best for Zimport (and then only if the contract is regarded as valid until set aside), the alleged cancellation of the contract by the Department constitutes a repudiation that was not accepted by Zimport. Thus, the essence of Zimport's application lies in prayer 2 of its notice of motion*."

Counsel further submitted that even if it is assumed that Zimport's prayer 1 could be granted, it remains a *brutum fulmen* with no substantial influence on the disputes and cannot be regarded as any substantial success in the matter. No elucidation was given of this submission, and no authority quoted in support.

40.In view of my findings in this judgment, I consider it unnecessary to deal with these submissions. As I have stated, in view of the conclusions which I reached, I am of the view that these submissions do not take the matter any further.

*** THE *SECTION 8* APPLICATION BY NETGROUP:**

41.In view of my decision that the review application must succeed, Netgroup's application that I should directly award the tender to it becomes relevant. In particular, this question gives rise to the further question as to what the ambit and content of the discretion is that the Department was called upon to exercise. The importance of establishing this question is in order to assist me to decide whether I am in at least as good a position as the Department was to exercise that discretion.

42.Netgroup contends that the matter should be dealt with by me, and that I should, on the evidence and facts appearing from the papers, to the extent that they show that Netgroup scored the highest points, forthwith award the tender to Netgroup and order the Department to enter into negotiations, followed by the conclusion of a contract with it.

43.Mr Louw relied on *Section 8 of PAJA* for these propositions. That *section* reads:

> *"(1)The court ...., in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable including orders –*

.....

.....

Setting aside the administrative action and –

.....

In exceptional cases -

> *(aa) Substituting … the administrative action …"* [Words omitted by me.]

44.The court is thus authorised in exceptional circumstances to make the award itself. Mr Louw submitted that there are indeed exceptional circumstances in the present case which would authorise me to make such a direct award of the tender to Netgroup. (*Logbo Properties CC (supra)* at p. 470G-J (paragraph 20); *Chirwa's case (supra)* at pp. 226 H and 227 A.)

45.Mr Louw, in arguing in support of prayer 5 of Netgroup's notice of motion, submitted that it must be born in mind that the project concerned was about the saving of water and public money. Consequently, Netgroup being the top scorer of all bidders, public interest requires that there should be no further waste of time, money and resources. Counsel said that it is abundantly clear from the documentation that from the outset Netgroup's tender entailed 60% of all savings to go to the owner or Department, and 40% to the

contractor or Netgroup. In any event, according to the Department's own advice as recorded in a memorandum by an employee of the Department, one Liebenberg, the blankness of the first page could not result in the tender being non-responsive. (*Bolton: op. cit.*at 277.)

46.Mr Louw said that the evidence clearly shows that there was a vital mistake causing an invalid administrative action, and that as the bidder with the best score, the tender should have been awarded to Netgroup.

47.Mr Louw argued that *section 8(1)(c)(ii) of PAJA* provides for correction by the Court in exceptional circumstances which would justify correction in stead of remittal. This is to be decided in view of the following:

(a) is the administrator left with any discretion;

(b) the importance of time considerations;
(c) the difference in circumstances (if any) between then and now;
(d) possible bias or incompetence on the side of the administrator;
(e) the willingness of the administrator to re-apply his mind.
(f) the competence of the Court vis-à-vis that of the administrator in deciding the matter. (*Bolton: op. cit.*, pp 320 – 322; See also: *Johannesburg City Council v Administrator, Transvaal and Another* 1969 (2) SA 72 (T) at 76D-H; *Grinaker's case (supra)* at 361 [85] and further.)

48.In the present case, Mr Louw submitted that I would be entitled to make the award bearing in mind that:

(a) the implementation of the award was stopped almost immediately when the mistake was noticed;

(b) both Zimport and Netgroup quoted percentages of savings, not fixed amounts which could be influenced by extraneous factors;
(c) the tender is about water saving in the arid North West province and was advertised in June 2006, causing time to be of the essence;
(d) the outcome of a reconsideration is a foregone conclusion and would be a waste of time, effort and money;

(e) there are no new factors to be considered upon reconsideration, the circumstances of then and now are the same;

(f) overall, public interest requires correction, not remittal.

49.Mr Louw submitted that in this matter the result of a referral back to the Department will, in the end, result therein that the Department can only exercise its discretion on the basis that Netgroup is awarded the contract. Netgroup has the highest number of points and in these circumstances and having regard to the rules applicable to the tender process, Netgroup must be awarded the contract. The award of the contract to Netgroup is a foregone conclusion, it was argued.

50.Mr Tokota, on the other hand, submitted that I should be loath to award the tender myself in stead of referring the matter for revaluation and re-adjudication. Counsel relied on the *Logbro's case*, to submit that it would be fair to grant other tenderers an opportunity to make further submissions to the adjudication committee before the tender is awarded. This is particularly so in view of the fact that the sixth respondent (Radio Detection) also scored higher on points than Netgroup during the initial evaluation process.

51.With reliance on *Cash Paymaster's case (supra)*, Mr Tokota submitted that I am not in as a good position as the Department to award the tender to Netgroup, and that I ought to remit the matter to the Department with instructions to restart the whole tender process afresh so that interested parties would have an opportunity to re_submit their tenders. Counsel said that in this way any damages which may have been suffered by any of the parties would be mitigated. Counsel argued that in any event, I am not in a position to consider all tenders, evaluate them, score them and award the tender, simply because all the relevant information is not before me. I consider this argument to be definitive of the issue.

52.Also, I should bear in mind that the relief claimed by Netgroup in its

application to compel goes further than a mere request that the tender be now awarded to it. It also seeks an order in terms whereof I must order the Department to conclude a contract with Netgroup. Mr Tokota points out that, apart from the fact that such relief is not contemplated by *section 8* of *PAJA,* it is unclear on what terms Netgroup would propose the Department to contract with it. From the replying affidavit and answering affidavit by Netgroup it is clear that further negotiations would have to be conducted regarding the finalisation of the terms of such agreement. Should I award the contract directly to Netgroup, I might well prejudice the Department by compelling it to conclude a contract with Netgroup, containing clauses which are unacceptable to the Department. In brief, I would interfere with the contracting freedom of the parties.

53.It is my view that the foundation of Mr Louw's arguments is fatally flawed in so far as the whole approach was based on the premise that the tenderer who scored the highest points, must, *ante omnia*, be awarded the contract. This is not correct. In respect of the discretion to be exercised by the Department, *Regulation 8 of the Preferential Procurement Regulations* stipulates that points for preference, functionality and price should be added in order to establish which tender scored the highest number of points. In terms of *regulation 9* the tender may, on reasonable and justifiable grounds, be awarded to a tender that did not score the highest number of points. Therein lies an aspect upon which the Department has to exercise a discretion. I am not in any position to exercise that discretion.

54.While Mr Louw submitted that, on the evidence, it is clear that, given the correct facts, Netgroup scored the highest points, as I have pointed out, the scoring of points is one of the issues for the discretion of the Department. It might be a minor issue, or it may make the

difference of one tenderer being successful above another by a narrow margin. The fact is that I do not have any idea how to calculate those points, and how to award them. Also, I have not been persuaded that I even have the authority to embark on such an exercise.

55.Mr Louw submitted that there is no evidence that suggests that this matter is one where, on reasonable and justifiable grounds, the tender should be awarded to anyone but the bidder with the highest score. Consequently the awarding of the tender to any bidder but Netgroup would fly in the face of the abovementioned provisions of the *Constitution*, *PAJA*, the *Preferential Procurement Policy Framework Act* and regulations as well as the Public Finance Management Act. (*Bolton: op. cit.* pp 77 – 80, 184 and 272 – 278; *Grinaker's case*; *Cash Paymaster's case (supra).*)

56.I have dealt with the fact that I do not consider myself qualified to exercise the discretion as to whether there are or are not reasons for awarding the contract to the tendered who did not score the highest points. It also seems to me that the question is not whether reasonable and justifiable grounds existed "*for awarding of the tender to any bidder than Netgroup*" but rather whether such grounds existed for not awarding the tender to the bidder who scored the highest points. Admittedly, this may appear to be splitting hairs, but it remains more accurate to approach the matter on the latter basis from the point of view of the discretion to be exercised, to which I have referred. The point raised by Mr Louw begs the question of a decision whether such reasonable and justifiable grounds existed or not. I cannot conceive how I can even begin to consider that question. For example, if the affidavits of Netgroup are to be believed, Zimport does not have the knowledge, expertise, equipment or experience which are possessed by Netgroup. These allegations have not been fully investigated on the

papers of the case or addressed in argument. Must I now first undertake an inquiry to establish which of Zimport and Netgroup should score the highest points in respect of these matters?

57.But even if, in a moment of unjustifiable enthusiasm, I convinced myself to undertake the exercise, I would immediately be met by insurmountable obstacles. I mention but one such obstacle: At page 41 of the Netgroup tender there appears a form which provides spaces in which the tenderer may "*claim*" points under certain categories. These categories are stated to be "*HDI Status*" (ostensibly referring to "*historically disadvantaged individuals*"), "*% Ownership*", "*Male*" and "*Female*". It is to be noted that under the "*HDI status*" is also included "*Disabled*" individuals. The form shows that Netgroup claimed under the "*HDI*" heading, 2.10 points; for "*Women*", 0.06 points, under "*Disabled*", 0.00 points, bringing up a total of 2.16 points. Directly under the column in which Netgroup claimed these points, there is a further column in which "*Venn Diagnostics*" claimed its points under the same headings. Their total is 1.82 points. The tender to which I have referred as the "*Netgroup*" tender, is in reality a tender by "*Netgroup/Venn Diagnostics Joint Venture*". I have been unable to find any guidelines as to how the points for each of these entities should be scored or whether there is a formula to be applied in the points scoring in the case of a joint-venture by which the individual points are to be calculated and approved. As it is, a reference to page 42 of the Netgroup tender sets out a "*Scoring Evaluation"* which contains a column indicating what the maximum points are, and a column for "*Points Awarded*". In spite of the points for the different categories having been claimed by Netgroup at page 41 of the tender, only HDI points were awarded to it. I would not know on what basis to approach the question of the correctness of these points awarded. Moreover the

points which were awarded total 2.53 points where it Netgroup had claimed 2.10 points at page 41. Again, I am not in a position to make any intelligence out of that.

58.Even if I had the insight, which I do not profess to have, to make logic of what I have stated above, there may well be other factors which come into play when the department exercises its discretion in this regard, of which I am totally unaware, simply because that issue was neither dealt with in the affidavits, nor raised in argument.

59.There are good reasons for the fact that Judges have traditionally been loathe to impose themselves in the position of the administrative functionaries, charged with the responsibility of implementing statutory administrative functions. The principle was lucidly stated in a number of decisions of our courts. I mention but the following:

In *Shidiack v Union Government [Minister of the Interior*], 1912 AD 642, Innes ACJ (as he then was) said at 651:

> "*Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own*."

In *Britten and Others v Pope* 1916 AD 150, Innes CJ said at 159:

> "*Whether one agreed with them (the Committee) would be irrelevant; the decision would be for them, not for the Court.....*"

In a minority judgment by De Villiers JA in *MacFie v Union Government*, 1924 AD 77 at 81, the learned Judge said:

> "*But the requirements of the section are satisfied if good cause has been shown to the Minister. Nor can the opinion of any other person , however competent, be substituted for that of the Minister.*"

In *Golden Arrow Bus Services v Central* RTB, 1948 (3) SA 918 (A) at

926 Centlivres JA said:

> "*Under the Act the merits of those applications had to be considered by the Central Board .....; a court of law has no jurisdiction to express an opinion on the merits .....*" [Words omitted by me.]

In *Northwest Townships (Pty) Ltd v The Administrator, Transvaal, and Another 1975 (4) SA 1 (T)* at 8C_G where it was held:

> "*It is well settled that when, by statute, a public official has been vested with jurisdiction to decide a matter affecting members of the public in the light of his own opinion of the relevant facts, or in the exercise of his own discretion, a Court is not entitled to interfere with that decision merely because it considers it to be wrong, or even if, in its view, the decision was an unreasonable one*."

In his article on *Discretions, Ouster Clauses and the Internal Security Act*, in the THRHR, 1983, p. 212 Nienaber said:

> "*The administrative organ has to decide whether it is desirable or expedient to exercise the discretion bestowed on him, and the Court is unable to substitute its own conclusion _ but the Court must hold that the administrative act is unlawful, if the prescribed jurisdictional facts are absent [Rabie 1978 THRHR, pp. 419 _ 426, and Rose_Innes Judicial review of Administrative Tribunals in South Africa [1963] at p. 100 and 101]*."

60.In the circumstances I believe that it would be foolish for me to attempt to reconsider the tenders with a view of awarding the tender to one or other of the tenderers. It follows that Netgroup's application that I now award the tender to it, as well as its prayer that I order the Department to conclude a contract with it, cannot be upheld.

*** REMITTAL OF THE MATTER:**

61.Having decided not to award the tender to Netgroup, as I was requested to do, the remaining question is whether I should simply set the decision of the Department aside, or whether I should remit the matter with instructions as to how to proceed.

62.Mr Tokota initially submitted that I should simply set the tender

process aside (which would have to include an order setting aside the contract with Zimport as well) and thereby leaving the Department at large to start the whole process from afresh. Counsel submitted that it would be just and equitable in the circumstances for the Department to re-advertise the tenders and to allow all of the tenderers to re-tender should they so wish. This was in conflict with prayer 2 of the notice of motion in the review application by the Department.

63.Upon reflection, however, Mr Tokota argued that in the event of me setting aside the decision of the Department, I ought to remit the matter to the Department, accompanied by instructions on how the matter is to be dealt with.

64.There are obvious repercussions attendant upon the matter being remitted for re-advertisement. For one thing, the secrecy which is inherent in the process has now been destroyed. So, for example, Mr Louw pointed out that the methodology of approach to the tender and the tender process which has in the past been successfully employed by Netgroup, is now an open secret for all to see. The potential prejudice is obvious. Remitting the matter for purposes of starting afresh may conceivably even give rise to material unfairness during and in the new bidding process.

65.It appears to me that it might not be prudent to direct the whole process to be conducted afresh, but rather to direct that the tenders, as they have been submitted, be re-evaluated, possibly by a freshly constituted Bid Evaluation and Adjudication Committee. With this in mind, assuming that I decide to allow the review application, to set the Zimport contract aside, to dismiss Zimport’s application to compel the Department to honour their contract, to dismiss Netgroup’s application that I award the tender to it, and to remit the matter, I have asked counsel to make proposals as to the form which such an order of

remittal should take

66.Mr De Waal's objection to a referral of the matter for re-adjudication relied squarely on prayer 1 of Zimport's notice of motion succeeding and prayer 1 of the Department's notice of motion, in so far as it asks for the contract to be set aside, failing. Should that happen, Zimport's contract would remain intact and the matter would then not be susceptible to remittal. Once I find, as I do, that the review application should succeed and the Zimport contract should be declared invalid, the objections of Mr De Waal become irrelevant. In fact, it then becomes to Zimport's advantage that the matter should be remitted, as that would at least keep its hopes alive.

67.Mr Louw argued that the delay which will be caused by ordering a remittal of the matter, will result in a waste of time, money and water resources. Presumably this means that I should simply set the decision aside without any further directions. But this would mean that the tender would have to be readvertised, which would even take up more time and waste more money.

68.In addition to the abovementioned factors, Mr Louw also argued that if the tender is remitted, the officials dealing with the matter may be influenced by the possibility that by awarding the tender to someone else than Zimport, the State might be faced with claims for damages. If the tender is to be re-advertised Netgroup will be prejudiced, because its existing tender will be known to other competitors, as well as the manner in which Netgroup had arrived at its tender price. Judged by the standard set by *section 217* of the *Constitution* such a new tender process might be transparent, but will not be fair. This is even more so in the light of the fact that Netgroup should have been the successful tenderer the first time round. Mr Louw relied on *De Ville, Judicial Review of Administrative Action in South*

Africa, p 337.

69.In view of what I had stated earlier, I am of the firm view that I am simply not in a position to make an enlightened decision on who the award should be made to. Had it simply been a matter of a mistake which gave rise to the process being fatally flawed, and the consequence in the absence thereof was clear, it would have been a different matter. But in the present case there are a number of factors present in addition. There are allegations and even proof of a further mistake in respect of a decision of "*non-responsiveness*" of Netgroup. There is the question of the evaluation of points under different categories to which I have referred, as well as the scope of the discretion of the Department. There are serious allegations which might point to fraud. I am not saying there was fraud. But there are allegations to that effect.

70.In all these circumstances, I would be wrong to attempt to enforce my own opinion upon the Bid Adjudication Committee. In any event, all or most of the criticisms raised by Mr Louw and Mr De Waal which I have referred to above, can be circumvented if I ordered that a fresh panel be appointed to act as the Evaluation Committee and the Adjudication Committee.

71.At my request, on the assumption that I might uphold the review application and decide against the claim by Netgroup to award the tender to it, and that I should decide to remit the decision to the Department, Counsel for Netgroup and the Department have favoured me with a draft, stating their agreed terms upon which this should be done. Mr De Waal had certain reservations about one paragraph of the draft which, counsel submitted, would unduly restrict the exercise of a free exercise by the Department's. Counsel discussed these objections, and in the result my understanding is that I was given a

choice of applying the terms agreed upon by Mr Tokota and Mr Louw.

*** COSTS:**

72.It is trite that costs are awarded to a successful party in order to indemnify him for the expense to which he had been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle upon which it is based. (*Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488 per Innes CJ.)

73.In respect of its application to have the purported cancellation by the Department of the Zimport contract set aside, I have determined that Zimport is entitled to certain of the costs. Inasmuch as Netgroup had been joined in the Zimport application, it too attracted an obligation in that regard, as I have stated above. The entitlement to a cost order by Zimport, must, as I have already pointed out, be tempered by the facts and circumstances of the case, particularly in view of the issue of the review application and the knowledge which was to be gained from the information contained in that application concerning the errors which had been committed by members of the Department.

74.Mr De Waal submitted that whatever the outcome of all or any of the applications may be, Zimport should not be ordered to pay any costs. Counsel submitted that if the Department and Netgroup are successful in its applications it will then be clear that the reason for all applications was to be found in the Department's negligent conduct. Counsel submitted that "*the hands of Zimport are indeed totally clean"*. Consequently, the Department should be ordered to pay Zimport's costs even if Zimport is unsuccessful with its opposition to any of the applications.

75.I cannot agree that because of the Department's employees'

conduct, Zimport (or Netgroup for that matter) should be considered to have received a right of unlimited litigation, even if it flew in the face of the facts and the law.

76.I also have difficulty in accepting Mr De Waal's "*clean hands*" submission. For one thing, as I have found, Zimport was clearly at fault in not having joined Netgroup in its application against the Department. Also, as I have indicated earlier, it is my view that by 11 December, 2006, when the Department filed its review application, Zimport proceeded with its application to compel the Department to abide by the contract at its own risk. It is also not insignificant that the Department had withdrawn its purported cancellation of the Zimport contract, and had replaced it with a mere notice of suspension. It is therefore arguable that after that withdrawal, prayer 1 of the Zimport application had become moot.

77.In the review application the Department claimed that the contract concluded between itself and Zimport on 8 August 2006 be set aside by reason of the fact that the Department had made a "*clerical error*" during the process of considering and awarding the tender. Even in the face of the clear documentary evidence that there had been such errors, Zimport persisted in arguing there was no error, and even alluded to fraud on the part of Netgroup during its arguments, for which there is no basis on the papers. There is much to be said for the proposition, as Mr Tokota and Mr Louw had submitted, that Zimport ought to have accepted the facts as they appear from the papers, and ought to have followed the route of claiming damages from the Department.

78.On behalf of Netgroup it was submitted by Mr Louw that there is something to be said for the submission of Zimport that the Department's conduct caused these proceedings and should bear all

the costs. I am of the view that it would be wrong for me to turn a blind eye to all other facts and considerations in the case which may have an influence upon the issue of costs.

79.I consider that Netgroup was entitled and justified to institute its joinder application. This I have already found in this judgment. Netgroup is certainly entitled to ask for the costs in respect thereof. But in view of the particular circumstances where there was from the inception no serious dispute about the joinder, it appears to me that Netgroup is not entitled to the costs of two counsel, or even the costs of senior counsel in respect of the joinder application. Nor did Mr Louw succeed in convincing me that it was.

80.The application for consolidation lost all meaning and import the moment when it became clear that the two applications were to be tried by the same judge. This occurred prior to 1 October 2006. At that stage in my view, that application should, apart from an argument as to costs up to that stage, have been abandoned, which Netgroup failed to do. In my view Netgroup should be ordered to pay the costs in respect of the consolidation application from the date upon which the Honourable Deputy Judge President indicated that the two applications were to be heard by the same judge and simultaneously.

81.Mr Tokota argued on behalf of the Department that the costs should follow the result. If the Department is successful with its review application, all the parties that have opposed the application ought to be ordered to pay the costs, including costs of two counsel. The same principle should apply to the Department, should it fail with its review application.

82.This submission is of course in line with what one might consider the normal situation to be. However, there exist considerations in the present instance which indicate that the approach should not be

followed. Firstly, there is the fact that it had been the conduct of members of the Department which caused the litigation, and that it has to be determined whether the opposition by Zimport and Netgroup had been reasonable or otherwise in the circumstances of the case. In this regard, I am of the view that because Netgroup's rights were clearly compromised by the decision of the Department, it was perfectly entitled to come to Court to ensure that the review application succeeded. In that endeavour, counsel for Netgroup did render valuable assistance to me in deciding the issue. By the same token, although the existing rights of Zimport were also in issue in the review application, its position appears to be on a different footing, as I have explained above.

83.In exercising my discretion generally in respect of all the disputes in the two applications, I bear in mind that the legal representatives of the Department did not waste time in unnecessarily opposing the applications for joinder or consolidation by Netgroup and the fact that the Department conceded that its purported cancellation of the Zimport contract was out of order and should be set aside, where it could have argued that the prayer had become academic. I have attempted to discount all these considerations in the cost orders which I shall make.

84. In all the circumstances, I make the following orders:

ORDERS:

1.In case number 37169/06:

1.1 Prayer 1 of the Zimport's notice of motion is granted.

1.2 The Department and Netgroup are ordered, jointly and severally, to pay Zimport's costs up to and including the date of the issuing of the review application on 11 December 2006, which costs shall include the costs of two counsel, where applicable.

1.3 The Department, Netgroup and Zimport shall each bear their own costs in respect of prayer 1 of the Zimport application, incurred after 11

December 2006.

1.4 Zimport's application in terms of prayer 2 of its notice of motion is dismissed with costs, which costs are to include the costs attendant upon the employment by the Department and Netgroup of two counsel.

1.5 Prayers 1 and 2 of Netgroup's application for its joinder is granted with costs, which costs shall include the cost attendant upon the employment of one counsel by Netgroup.

1.6 Prayer 3 of Netgroup's application for consolidation, is dismissed. Zimport is ordered to pay such costs as might have been incurred by Netgroup in this respect prior to 1 October 2006. Such costs are to include the costs of the employment of one counsel only. Netgroup is ordered to pay all costs incurred in respect of its prayer for consolidation incurred after 1 October 2006, which costs shall also only include the costs attendant upon the employment of one counsel.

1.7 No order is made in respect of prayer 4 of Netgroup's notice of motion.

1.8 Prayer 5 of Netgroup's notice of motion in which it claimed that tender number MMB 05/060 be awarded to it by the Court, and for an order directing the Department to conclude a contract with it, is dismissed with costs, including the costs of two counsel, where applicable.

2.In case number 41073/06:

2.1 Prayer 1 of the Department's notice of motion for the review and setting aside of the tender process, is granted.

2.2 The decision of 21 June 2006 by the Department's Tender Adjudication Committee to award tender number MMB 05/060 for support services to effect water cost reduction to Zimport, is reviewed and set aside.

2.3 The contract, dated 8 August 2006, entered into between the Department and Zimport as a consequence of the award of tender number MMB 05/060 to Zimport, is declared invalid, and is set aside.

2.4 The matter is remitted to be re-evaluated subject to and in accordance with the following directions:

2.4.1 The Director General of the Department of Public Works of the North West Province is directed to constitute a different Bid Evaluation Committee and a Bid Adjudication Committee, comprising of members none of whom had been a member of any relevant committee which previously was concerned with the evaluation, adjudication or award of tender number

MMB 05/060;

2.4.2 The freshly constituted committees must evaluate and adjudicate all tenders which had been received on 7 June 2006 on merit and in accordance with applicable legal prescripts, and by ignoring the information stated in page 35 of the papers in the application, and by considering the correct facts as set out in the tender documents of the tenderers;

2.4.3 The process described above shall be completed within a period of 30 (thirty) calender days from date of this order;

2.4.4 The decision in respect of the award of the said tender shall be communicated to all tenderers who had submitted tenders prior to 7 June 2006, with 7 (seven) business days from date of expiry of the 30 (thirty) calender days, mentioned in paragraph 2.4.3 above;

2.4.5 The newly appointed committees shall each keep proper minutes of all meetings during which the said tender is evaluated or adjudicated, which minutes shall be made available in typed format to any of the aforesaid tenderers who requests it;

2.4.6 No contract shall be concluded by the Department with the successful tenderer emanating from the aforesaid re-evaluation before a period of 14 business days had expired from the date upon which tenderers had been informed of the outcome of the fresh tender process, as contemplated above.

2.5 As far as the costs in respect of prayer 1 in case number 41073/06 are concerned, the following orders are made:

2.5.1 The Department is ordered to pay Netgroup's costs, which costs shall include the costs attendant upon the employment of two counsel;

2.5.2 Zimport is ordered to pay its own costs.

.....
L J L VISSER
Acting Judge of the High Court.

In CASE NUMBER: 37169/06:
FOR THE DG: ADV BR TOKOTA & ADV SP MOTHLE
FOR ZIMPORT: ADV PS DE WAAL
FOR NETGROUP (INTERVENING): ADV A LOUW SC & ADV MF ACKERMANN.

In CASE NUMBER: 41073/06:
FOR THE DG: ADV TOKOTA & ADV SP MOTHLE
FOR ZIMPORT: ADV DE WAAL
FOR NETGROUP: ADV A LOUW SC & MF ACKERMANN.