

**THE JUDICIAL DISCRETION TO ALLOW UNLAWFUL GOVERNMENT
PROCUREMENT AWARDS TO STAND: JUSTIFICATION AND
IMPLICATIONS FOR THE PRINCIPLE OF LEGALITY AND THE RULE OF
LAW**

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Abstract

The development of subjecting government procurement awards to judicial review is a relatively recent development in South African law. It accords with a similar development in the United States, as well as South Africa's own constitutional requirements of transparency and public accountability.

Given the often lucrative nature of public contracts, challenges to the lawfulness of government procurement awards have become a regular occurrence in South Africa. However, the setting aside of such an award does not automatically follow upon a finding of unlawfulness. For a number of reasons, a court may decline to set aside an unlawful government procurement award.

This raises a number of interesting questions, particularly with regard to how such a decision may be reconciled with, and the implications this may have for, the principle of legality and the Rule of Law. This dissertation will address these issues, arguing that, ultimately, the concerns are resolved by appreciating the nature of the principle of legality, and the Rule of Law's place as a value in society.

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Chapter 1

INTRODUCTION

1.1 The judicial review of government procurement

In South Africa the decision of a government department or agency to award a public tender for goods or services has become 'a fruitful source of litigation'.¹ So much so that the courts have expressed concern at the number of applications for the review and setting aside of tender awards that come before them.² This is due in large part to the following three features of this area of the law. Firstly, the process by which a government tender is awarded constitutes administrative action³ for the purposes of the Promotion of Administrative Justice Act⁴ (the PAJA). Secondly, unsuccessful tenderers have locus standi to challenge the award of a government tender.⁵ Thirdly, the legal framework of government procurement in South Africa is unsatisfactory in that it is 'far from coherent or structured in any systematic way'.⁶ Ultimately, there is a 'myriad [of] rules and regulations that apply to tenders' from which unlawfulness in the award process may stem.⁷

Government tender awards are generally challenged by way of judicial review, with the review and setting aside of the award being the remedy most sought after.⁸ Litigation concerning the award of a government tender typically involves an unsuccessful tenderer complaining of some defect in the award of the tender sufficient to render the award unlawful and invalid, with a

¹ *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) para 1.

² *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) para 7.

³ *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) para 5.

⁴ Act 3 of 2000.

⁵ *Sanyathi Civil Engineering and Construction (Pty) Ltd and Others v Ethekwini Municipality and Others* (KZP) unreported case no 7538/11 (30 September 2011) para 109.

⁶ Geo Quinot 'Enforcement of Procurement Law from a South African Perspective' (2011) 6 *Public Procurement Law Review* 193 at 194.

⁷ *Moseme* supra note 1 para 1.

⁸ *Ibid.*

view to having the award set aside and, ideally, being awarded the contract themselves.⁹

In the event that a court finds a government tender to have been awarded unlawfully it must declare that award invalid. This is mandated by the Constitution.¹⁰ The court must then grant, in line with the PAJA, 'any order that is just and equitable'.¹¹ Typically, the courts at this stage will be concerned with whether or not to set aside the unlawful award, 'the order that the court would usually give in the event that a ground of review is shown to exist'.¹²

1.2 The judicial discretion to set aside unlawful tender awards

The setting aside of an unlawful government tender award does not automatically follow upon a finding of invalidity. Rather, the court has a discretion whether or not to set it aside, with the implication being that the court may choose not to do so. As the Supreme Court of Appeal (SCA) in *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*¹³ stated: 'In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act'.¹⁴

In such a situation the unsuccessful tenderer will be left 'without any effective remedy'.¹⁵ This is despite both the breach of its right to just administrative action and its ultimate success in challenging the lawfulness and validity of the award in question. Furthermore, the unlawful tender award will stand and the contract will be allowed to run its course. The public authority in question would then also have acted outside the scope of its powers, seemingly without consequence.

⁹ Ibid.

¹⁰ Constitution of the Republic of South Africa, 1996 s 172(1)(a).

¹¹ S 8(1).

¹² J R de Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) 336.

¹³ 2008 (2) SA 638 (SCA).

¹⁴ Ibid para 28.

¹⁵ Moseme supra note 1 para 1.

1.3 The Rule of Law and the principle of legality

In South Africa the Rule of Law is a foundational value of the Constitution.¹⁶ As is now well-known, in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*¹⁷ the Constitutional Court (CC) drew upon the Rule of Law to assert the 'fundamental principle...that the exercise of public power is only legitimate where lawful'.¹⁸ This principle is, of course, the principle of legality.¹⁹ It holds that 'the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law'.²⁰ In other words, 'the exercise of power must be authorised by law'.²¹ Accordingly, the exercise of all public power is subject to judicial control based on constitutional grounds.²²

Importantly, '[t]he logical concomitant of this is that an action performed without lawful authority is illegal or ultra vires – that is to say, beyond the powers of the administrator'.²³ Public functionaries may therefore not do anything in their capacity as such unless they are authorised to do so. Should they act beyond the limits of their authority those actions will be unlawful and invalid. Furthermore, the courts are obliged to uphold the Rule of Law.²⁴

1.4 Research question

In light of the above, how can we make sense of the courts' discretion to allow unlawful government tender awards to stand? After all, doing so would seem to undermine both the principle of legality and the Rule of Law. The difficulty in allowing unlawful administrative decisions to stand was

¹⁶ Constitution, 1996 s 1(c).

¹⁷ 1999 (1) SA 374 (CC).

¹⁸ *Ibid* para 56.

¹⁹ Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 122.

²⁰ *Fedsure* supra note 17 para 58.

²¹ Hoexter op cit note 19 at 255.

²² Geo Quinot 'Towards Effective Judicial Review of State Commercial Activity' (2009) 3 *TSAR* 436 at 437. Also see Hoexter op cit note 19 at 121-3.

²³ *Ibid* at 255-6.

²⁴ Constitution, 1996 s 1(c) read with s 165(2).

acknowledged by the CC in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*.²⁵ In what is now a frequently cited passage in cases concerning unlawful tender awards²⁶ the court stated that '[t]he apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions'.²⁷ Furthermore, '[t]he rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent'.²⁸

The court does not explicitly state that allowing unlawful administrative acts to stand undermines the Rule of Law. However, this is certainly implied. In what way, then, is the Rule of Law undermined, if any? If it is undermined in some way, is this permissible? More explicitly, the court seems to regard the principle of legality as 'ameliorated' when it is breached by some action which is not then set aside on review. This is a peculiar claim, as it suggests that part of the principle of legality is the requirement that unlawful administrative acts be set aside.

Allowing unlawful tender awards to stand therefore seems to conflict with, and have implications for, the principle of legality and, accordingly, the Rule of Law. Given this apparent conflict, we may ask the following questions. Firstly, is it appropriate to allow an unlawful tender award to stand, and how may we justify the courts doing so? Secondly, in what ways are the principle of legality and the Rule of Law affected by doing so, if any? This dissertation will attempt to answer these questions.

²⁵ 2011 (4) SA 113 (CC).

²⁶ This case concerned not the award of a government tender, but the unlawful granting of prospecting rights by the State. However, judgments concerning unlawful government tender awards frequently cite this case at the remedial stage of the enquiry. See for example *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) para 97.

²⁷ *Bengwenyama Minerals* supra note 25 para 85.

²⁸ *Ibid.*

It is perhaps important at the outset to note that the fact that the courts may have a discretion to allow unlawful tender awards to stand does not answer either of these questions. That the courts have such a discretion is, after all, merely a descriptive fact which anticipates the questions posed above, to which the courts have not provided answers. At most, the courts have justified allowing unlawful tender awards to stand with reference to difficulties associated with setting the award aside,²⁹ and the public interest.³⁰ These justifications are, however, rather thin, and do not resolve the deeper theoretical concerns alluded to above.

On the issue of the implications that allowing an unlawful tender award to stand may have for the Rule of Law and principle of legality, the courts have provided no discussion at all. Discerning any potential implications is also by no means apparent. It involves a theoretical enquiry into both the nature of the Rule of Law and the courts' understanding of it. This is no easy task. Discussions concerning the meaning of the Rule of Law are generally fraught with difficulty.³¹ However, given its importance, it is a debate which, as Price notes, 'South African lawyers cannot contentedly abstain from'.³²

1.5 The relevance of government procurement

Of course, allowing any unlawful administrative act to stand would present similar difficulties, if not the same, as those involved in allowing unlawful tender awards to stand. The question which then arises is why one would choose to answer the questions identified above within a broader discussion of government procurement. Several reasons may briefly be proffered for this. Firstly, as has already been pointed out, these awards frequently give rise to legal challenge. Furthermore, by the time a court is called upon to set aside

²⁹ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v The Chief Executive Officer of the South African Social Security Agency and Others* (NGHC) unreported case no 7447/12 (28 August 2012) para 78.

³⁰ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) para 28.

³¹ Alastair Price 'The Evolution of the Rule of Law' (2013) 130 SALJ (4) 649 at 660.

³² *Ibid.*

an unlawful tender award, work on the contract may have already commenced. This may make it difficult for the court to set aside the award, giving rise to those very problems with which this dissertation is concerned. As such, unlawful tender awards provide an excellent case-study in which to address the subject matter of this dissertation.

Secondly, despite the subject's obvious importance,³³ the study of government procurement in South Africa has generally been neglected.³⁴ Literature on the topic is therefore sparse.³⁵ By addressing the subject matter of the dissertation within a broader discussion of government procurement, a contribution to the subject can hopefully be made.

1.6 Structure of the dissertation

Chapter 2 will discuss the development of subjecting government procurement decisions to judicial scrutiny – a development which necessarily precedes the decision of whether or not to set aside an unlawful tender award. In particular, the jurisdictions of the United States and England will be discussed. A discussion of these jurisdictions is instructive for the following reasons. First, English law has had a 'commanding role in South Africa's constitutional history' and the United States bears 'constitutional similarities with South Africa today'.³⁶ Secondly, and perhaps more importantly, these jurisdictions represent divergent views on the issue of subjecting government procurement to judicial scrutiny, informed in large part by conflicting underlying policy choices. The methodology employed will entail a historical comparison of the judicial approaches of these jurisdictions to recognising the locus standi of aggrieved bidders to challenge government tender awards, and the underlying policy concerns informing the decision of whether or not to do so.

³³ Phoebe Bolton *The Law of Government Procurement in South Africa* (2007) v.

³⁴ *Ibid.* See also Geo Quinot and Sue Arrowsmith *Public Procurement Regulation in Africa* (2013) xiii.

³⁵ Bolton *op cit* note 33 at v.

³⁶ Hoexter *op cit* note 19 at 3.

Chapter 3 will look at how the courts determine whether or not the award of a government tender is unlawful. This is important as a finding of unlawfulness is necessarily anterior to the decision of whether or not to set that award aside. The determination of lawfulness in government procurement has been a controversial topic in need of clarification for some time. On some occasions, the courts have demanded strict compliance with the procurement framework, whereas in others non-compliance has been permitted. Until recently there has also been a tendency to conflate the lawfulness and remedial enquiries, which has only recently been rectified in the seminal case of *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*.³⁷

Chapter 4 will look at how the courts decide whether or not to set aside unlawful government procurement awards. This determination typically involves a balancing of various interests. Given that the courts have a duty to provide effective relief³⁸ there is a clear conflict between this duty and the decision to allow an unlawful tender award to stand. In light of this conflict, this chapter will look at whether the decision not to set aside an unlawful tender award is appropriate, and how this decision may be justified.

Chapter 5 will seek to understand what effect, if any, allowing unlawful tender awards to stand may have on the principle of legality and the Rule of Law. If the Rule of Law is somehow undermined by such a decision, we will consider how this may be permissible given the Rule of Law's constitutional significance. In answering these questions, the development and requirements of the principle of legality will be considered. This chapter will also consider the Rule of Law from a theoretical perspective, as well as how it functions in modern South African constitutional law.

Chapter 6 will, in conclusion, provide a summary of the main arguments raised in the dissertation.

³⁷ 2014 (1) SA 604 (CC).

³⁸ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

Chapter 2

THE REVIEWABILITY OF GOVERNMENT PROCUREMENT IN SOUTH AFRICA

2.1 Introduction

Challenges to government procurement awards have become a regular occurrence in South African courts.¹ Indeed, the courts often lament their being 'placed in an invidious position in exercising their administrative law discretion' upon finding such an award to be unlawful.² Depending on the scale and significance of the tender in question, it may be incredibly difficult to determine whether setting aside the award would be appropriate, despite its unlawfulness.³

Litigation involving government procurement awards has a number of negative consequences. It adversely affects those contractors who rely heavily on government contracts to sustain their business.⁴ As Pierson notes, '[f]rom the successful bidder's point of view, the contract award created a firm obligation which bound him to begin performance or risk cancellation of the contract for default'.⁵ A challenge to the award makes the position of the winning bidder far less secure. In addition, contractors may to a large extent rely on receiving government contracts, especially 'where such contracts are

¹ *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) para 1; *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) para 1; *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v The Chief Executive Officer, South African Social Security Agency and Others* 2013 (4) SA 557 (SCA) para 1.

² *Moseme* supra note 1 para 1.

³ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 96.

⁴ Sue Arrowsmith, John Linarelli, and Don Wallace, Jr *Regulating Public Procurement: National and International Perspectives* (2000) 9.

⁵ Richard R Pierson 'Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale, and Effect on the Procurement Process' (1970) 12 *Boston College Industrial and Commercial Law Review* 1 at 24-5.

for complex items which have no market other than the government agency that procured them'.⁶

Most significant, however, are the adverse effects the delay in the procurement of goods and services has on the intended beneficiaries,⁷ especially where the implementation of development and social policy is concerned.⁸ As Arrowsmith notes, government procurement is often utilised 'to support general social, political and economic objectives of government not directly connected with the actual purchase'.⁹ This development has therefore had, and continues to have, significant consequences for the procurement regime itself and the implementation of public programmes.

2.2 The historical development of subjecting government procurement to judicial review

2.2.1 Immunity from review

Historically, and across jurisdictions, there has generally been a reluctance to subject government procurement decisions to judicial review. The reasons for this differ, often relating to differences in institutional design. For example, the reluctance in England stems in large part from concerns of 'constitutional competence',¹⁰ meaning that those courts have thought it inappropriate to review decisions thought to be the sole preserve of a different and, importantly, elected arm of the state. In the United States, however, the initial reluctance to subject government procurement to judicial review stemmed mostly from the concern that to do so would significantly curtail government effectiveness.¹¹

⁶ Ibid at 25.

⁷ Ibid. See also *AllPay* (CC) supra note 3 para 4 where the court stated that 'procurement...palpably implicates socio-economic rights'.

⁸ Arrowsmith et al *Regulating Public Procurement* op cit note 4 at 10-11 and 257; Phoebe Bolton 'The Use of Government Procurement as an Instrument of Policy' (2004) 121(1) SALJ 619 at 624.

⁹ Sue Arrowsmith *Government Procurement and Judicial Review* (1988) 81.

¹⁰ Geo Quinot 'Towards Effective Judicial Review of State Commercial Activity' (2009) 3 TSAR 436 at 437.

¹¹ Richard E Speidel 'Judicial and Administrative Review of Government Contract Awards' 37 *Law and Contemporary Problems* 63 at 74.

Arrowsmith, writing from the perspective of common law jurisdictions, has noted that historically there has been a tendency to regard government procurement as 'substantially immune from judicial review'.¹² The reasons for this are that, firstly, 'contractual capacity is not peculiar to governments but is shared by most legal persons'.¹³ Secondly, it is typically the 'ordinary private law' which regulates those contracts entered into by government.¹⁴ Thirdly, the decision to contract is perceived as consensual whereas 'governmental powers to regulate...are seen to be characterised by an element of compulsion'.¹⁵ Finally, government contracting has been regarded as being of a 'commercial' or 'business' nature.¹⁶

Arrowsmith also notes the following theoretical difficulty in subjecting government procurement to judicial review. Judicial review is generally regarded as having a statutory basis, meaning that 'the courts are...simply ensuring that the government does not exceed the...limitations of the power conferred by the legislature'.¹⁷ However, where the source of the government's power to contract arises not from statute, but some other common law power, 'the traditional juristic explanation for judicial review has no application'.¹⁸

It is doubtful whether the fact that there are contractual or commercial aspects to government procurement should dispose of the issue of whether such decisions should be free from judicial scrutiny. In procuring goods and services, the state acts in the public interest and utilises public funds. As such, the public has a very real interest in how such contracts are awarded. This supports the view that accountability through judicial scrutiny of these decisions is in fact warranted. Furthermore, the basis of the theoretical difficulty

¹² Arrowsmith op cit note 9 at 8.

¹³ Ibid at 13.

¹⁴ Ibid at 14.

¹⁵ Ibid at 16.

¹⁶ Ibid at 19.

¹⁷ Ibid at 132.

¹⁸ Ibid.

noted above would also be far less problematic in a jurisdiction founded on constitutional, as opposed to parliamentary, sovereignty.

2.2.2 South Africa

South Africa's own historical reluctance to subject government procurement to judicial review stems primarily from its pre-democratic experience of parliamentary sovereignty. Prior to 1994 the procurement process in South Africa was to a large extent regulated in terms of the State Tender Board Act.¹⁹ A perusal of this Act shows that the procurement process was by no means fair, equitable, or transparent. The Act allowed for the establishment of the State Tender Board²⁰ which had the 'power to procure supplies and services for the State'.²¹ Among the more notable powers given to the State Tender Board in order to perform this function were, firstly, that it could 'in any manner it may deem fit, invite offers and determine the manner in which and the conditions subject to which such offers shall be made'²² and, secondly, 'without giving reasons therefor, accept or reject any offer for the conclusion of an agreement'.²³

As De la Harpe notes, not only was procurement to some extent shrouded in secrecy,²⁴ but complainants were often without legal recourse.²⁵ Unsuccessful tenderers did not have rights to information or to be given reasons.²⁶ Furthermore, '[s]ubstantive principles of public procurement like transparency, accountability and fairness and equitability were not adhered to'.²⁷ Lastly, the government of the time could shield itself from 'public and legal scrutiny' by relying on what it deemed to be the 'public interest'.²⁸ Clearly

¹⁹ Act 86 of 1968.

²⁰ S 2.

²¹ S 4(1).

²² S 4(1)(b).

²³ S 4(1)(d).

²⁴ Stephanus Petrus le Roux De la Harpe *Public Procurement Law: A Comparative Analysis* (unpublished doctoral thesis, University of South Africa, 2009) at 518.

²⁵ *Ibid* at 519.

²⁶ *Ibid* at 268.

²⁷ *Ibid* at 268.

²⁸ *Ibid*.

the pre-1994 procurement framework in no way resembled the current procurement regime which, according to the Constitution,²⁹ must be 'fair, equitable [and] transparent',³⁰ and which forms part of a public administration which requires both accountability³¹ and transparency.³²

The recent development in subjecting government procurement to judicial review, and recognising the locus standi of unsuccessful bidders, took some time. This was even after the coming into force of the interim³³ and final Constitutions, and the Promotion of Administrative Justice Act³⁴ ('the PAJA'). As in other jurisdictions, there was initially some reluctance to these developments. However, unlike in other jurisdictions, this reluctance was not due to issues pertaining to theoretical justifications for judicial review and common law powers to contract. Rather, it had to do with appreciating the newly entrenched right to just administrative action and the definition of 'administrative action' in the PAJA.

The PAJA defines administrative action as

'any decision taken, or failure to take a decision 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 a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect'.³⁵

A number of early constitutional era decisions grappled with the issue of whether or not the procurement process met this definition of administrative action. In *Umfolozu Transport (Edms) Bpk v Minister van Vervoer en Andere*,³⁶ the Supreme Court of Appeal (SCA) held that the process preceding the

²⁹ Constitution of the Republic of South Africa, 1996.

³⁰ S 217.

³¹ S 195(f).

³² S 195(g).

³³ Constitution of the Republic of South Africa, Act 200 of 1993.

³⁴ Act 3 of 2000.

³⁵ S 1.

³⁶ [1997] 2 All SA 548 (A).

conclusion of a tender contract was administrative in nature. The court reasoned as follows:

'Wat kontraksluiting hier voorafgegaan het, behels suiwer administratiewe handelinge en beslissings aan die kant van die betrokke amptenary, en veral die Raad, en boonop in 'n sfeer wat met die besteding van openbare gelde in die openbare belang deur 'n openbare liggaam te doen het. Natuurlik is die onderdaan in hierdie omstandighede op 'n regverdige en billike prosedure geregtig'.³⁷

This reasoning was later reaffirmed by the SCA in *Transnet Ltd v Goodman Bros (Pty) Ltd*.³⁸ The court held that even though Transnet was a private company the government exercised 'ultimate control' over it by virtue of the fact that it owned 'all the shares in it'.³⁹ Furthermore, Transnet still provided a 'general service to the public' and had a 'near-monopoly over rail transport'.⁴⁰ Accordingly, 'the actions of Transnet in calling for and adjudicating tenders constituted administrative action'.⁴¹

That the process of government procurement constitutes administrative action is undoubtedly correct. Firstly, it is authorised by s 217 of the Constitution and accordingly constitutes the 'exercise of a power in terms of the Constitution'.⁴² Secondly, it utilises public funding and is done in the public interest thus making it a 'public power' and a 'public function'.⁴³ As the Constitutional Court (CC) noted in *Steenkamp NO v Provincial Tender Board, Eastern Cape*,⁴⁴

'when a tender board evaluates and awards a tender, it acts within the domain of administrative law. Its decision in awarding or refusing a tender constitutes an administrative action. That is so because the decision is taken by an organ of state which wields public power or performs a public function in terms of the Constitution or legislation and the decision

³⁷ At 552-3. Translated as: 'What preceded the contract here involved purely administrative actions and decisions on the part of the officials involved, and especially the Council, and also involved the expenditure of public money in the public interest by a public body. Of course, the subject in this situation is entitled to a fair and equitable procedure'.

³⁸ 2001 (1) SA 853 (SCA).

³⁹ *Ibid* para 8.

⁴⁰ *Ibid*.

⁴¹ *Ibid* para 9.

⁴² PAJA s 1.

⁴³ *Ibid*.

⁴⁴ 2007 (3) SA 121 (CC).

materially and directly affects the legal interests or rights of tenderers concerned'.⁴⁵

In *Logbro Properties CC v Bedderson NO and Others*⁴⁶ the SCA once again asserted what it by now regarded as 'obvious', namely that

'the tender process constitute[s] "administrative action" under the Constitution...which entitled the appellant...to a lawful and procedurally fair process and an outcome, where its rights were affected or threatened, justifiable in relation to the reasons given for it'.⁴⁷

The most significant consequence of the fact that the government procurement process constitutes administrative action is that it is reviewable in terms of any of the grounds listed in s 6 of the PAJA.⁴⁸ The next logical issue then is who may apply for the review of a government procurement award believed to be unlawful. Naturally, the fact that government procurement awards are reviewable will be of little consequence to a person aggrieved thereby if they are not entitled to challenge the award.

Typically, it will be an unsuccessful bidder, aggrieved at having lost the contract tendered for, who will want to challenge the award.⁴⁹ Initially, the issue of locus standi of an unsuccessful tenderer was a contentious one, particularly in relation to a request for information regarding the awarding of a tender. The reason for this can be attributed to the wording of s 24 of the interim Constitution, which seemed to make the rights to lawful administrative action,⁵⁰ procedurally fair administrative action,⁵¹ and to be furnished with reasons⁵² contingent on the applicant's rights, interests, or legitimate expectations being affected or threatened.⁵³

⁴⁵ Ibid para 21.

⁴⁶ 2003 (2) SA 460 (SCA).

⁴⁷ Ibid para 5.

⁴⁸ S 6(1).

⁴⁹ *Moseme* supra note 1 para 1.

⁵⁰ S 24(a).

⁵¹ S 24(b).

⁵² S 24(c).

⁵³ S 24.

An early example of the courts' reluctance to grant unsuccessful tenderers locus standi is *SA Metal Machinery Co Ltd v Transnet Ltd*⁵⁴ where Heher J stated as follows:

'[T]he applicant falls into that category of tenderers who prepare and submit their offers entirely at their own risk and who...does not even have a legitimate expectation that his tender will be considered at all...Unless and until his tender is accepted, a person in the position of the applicant is effectively a stranger to the tender process and therefore to the administrative action. The applicant's interest...does not in my view possess the qualities which merit constitutional protection against unlawful administrative action such as to bring it within section 33(1) [of the Constitution]. For the same reason the award of a tender in the circumstances under consideration...does not entitle the applicant to reasons, either for the granting of a tender or for its own lack of success in that regard'.⁵⁵

A contrary view was taken in *Aquafund (Pty) Ltd v Premier of the Province of the Western Cape*.⁵⁶ This case concerned not an application for the judicial review of a tender award, but an application in terms of s 23 of the interim Constitution for the furnishing of information and documents relating to a tender.⁵⁷ On this issue Traverso J (as she then was) held as follows:

'[T]he consideration of the tender was an administrative action and...the applicant was accordingly entitled to lawful administrative action as meant in section 24 of the [interim] Constitution. If the applicant is entitled to lawful administrative action, it must, in my view, follow that it will be entitled to all such information as may be reasonably required by it to establish whether or not its right to lawful administrative action has been violated. The applicant will reasonably require this information to make an informed decision on the future conduct of the matter'.⁵⁸

The approach taken in *SA Metal Machinery* was later rejected and the approach of *Aquafund* endorsed by the SCA in *Goodman Bros*.⁵⁹ Since then the South African courts have in a number of cases held that unsuccessful bidders have locus standi to challenge the award of a tender. In *Olitzki*

⁵⁴ (WLD) unreported case no 30825/97 (22 March 1998).

⁵⁵ *Ibid*.

⁵⁶ 1997 (7) BCLR 907 (C).

⁵⁷ *Ibid* at 909.

⁵⁸ *Ibid* at 915-16.

⁵⁹ *Transnet v Goodman Bros supra* note 38 para 43, 10-12.

*Property Holdings v State Tender Board and Another*⁶⁰ the SCA accepted that the 'irregular, unreasonable and arbitrary conduct in the tender process certainly breached the plaintiff's rights in s 24 [of the interim Constitution]'.⁶¹ Furthermore, the SCA in *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd*⁶² noted that '[o]rdinarily, where there has been a reviewable irregularity in the award of the tender, an unsuccessful tenderer would be entitled to call for the award to be set aside'.⁶³

Related to the issue of locus standi is the requirement in the PAJA that an act will only constitute administrative action if it 'adversely affects the rights of any person and which has a direct, external legal effect'.⁶⁴ The import of this section was considered in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*⁶⁵ where the SCA held that this section meant that 'administrative action is action that has the capacity to affect legal rights'.⁶⁶ This paragraph was relied on by the court in *Sanyathi Civil Engineering and Construction (Pty) Ltd and Others v Ethekwini Municipality and Others*⁶⁷ in recognising that unsuccessful tenderers have locus standi to challenge the award of a tender.⁶⁸ This view also accords with the reasoning adopted in *Aquafund* where Traverso J alluded to the fact that unless an unsuccessful tenderer can approach a court they may not be able to know whether their rights to just administrative action have in fact been infringed.⁶⁹ Accordingly, as it stands the South African position is that 'unsuccessful

⁶⁰ 2001 (3) SA 1247 (SCA).

⁶¹ *Ibid* para 33.

⁶² 2009 (4) SA 628 (SCA).

⁶³ *Ibid* para 11.

⁶⁴ S 1.

⁶⁵ 2005 (6) SA 313 (SCA).

⁶⁶ *Ibid* para 23.

⁶⁷ (KZP) unreported case no 7538/2011 (30 September 2011).

⁶⁸ *Ibid* para 109.

⁶⁹ *Aquafund* *supra* note 56 at 915. However, it should be borne in mind that the court in this case was dealing specifically with an application for the request of information relating to a tender.

tenderers...automatically have locus standi to challenge the award of the tender'.⁷⁰

Other countries have generally not subjected their procurement regimes to the level of judicial scrutiny that South Africa has. As Quinot notes, 'South African law has probably gone further than most other common law systems in accepting generally that the adjudication and award of *all* public tenders amount to administrative action subject to judicial review'.⁷¹ As a result, the judicial review of tender awards has become 'a central constitutional mechanism to control the exercise of public power' in this area of the law.⁷²

2.3 Judicial review of government procurement in comparative context

2.3.1 The United States

The well-documented experience in the United States provides a good illustration of the policy issues involved in subjecting government procurement to judicial review.⁷³ In several cases prior to 1970, challenges to procurement decisions were regularly dismissed. *Perkins v Lukens Steel Co*⁷⁴ concerned a challenge to an erroneous wage determination made by the Secretary of Labour pursuant to the relevant procurement legislation.⁷⁵ In the Supreme Court's view

'[t]he Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act'.⁷⁶

⁷⁰ Sanyathi supra note 67 para 109.

⁷¹ Quinot op cit note 10 at 439.

⁷² Ibid at 436.

⁷³ See Pierson op cit note 5; Speidel op cit note 11; John S Pachter 'The Need for a Comprehensive Judicial Remedy for Bid Protests' (1986) 16 *Public Contract Law Journal* 47; Darryl A Rice 'Judicial Review for Disappointed Bidders on Federal Government Contracts' (1972) 26 *Southwestern Law Journal* 384.

⁷⁴ 310 US 113 (1940).

⁷⁵ Ibid at 117.

⁷⁶ Ibid at 129.

In *Lind v Staats*⁷⁷ the plaintiffs sought the cancellation of a government contract, as well as the restraining of any performance of the contract pending the outcome of the challenge.⁷⁸ The court, in denying the relief sought, referred to the above dictum in *Perkins*.⁷⁹ Furthermore, the court noted that

'[t]he relief sought by plaintiffs creates great policy problems and brings into play the distinctions between powers of government. It does not require much imagination to anticipate the chaos which would be caused if the bidding procedure under every government contract was subject to review by court to ascertain if it was fairly and properly done, and the corresponding damage and delay which would be done to government business if the injunctive power of the court was used to stay contractual activities pending judicial decision. Therefore, the Court concludes that the evidence fails to establish that the plaintiffs have standing to sue, or that there is any strong likelihood that they would succeed in their action'.⁸⁰

As Pierson notes, the primary impediment to disappointed bidders obtaining relief was that they were denied locus standi.⁸¹ This position was justified on the following two bases. Firstly, 'the procurement statutes were enacted for the benefit of the public and were not intended to confer any enforceable rights on individual bidders'.⁸² Secondly, 'judicial review of government contracts would disrupt the even and expeditious functioning of government' and cause 'damage and delay...to government business'.⁸³

However, as the scale and importance of government procurement increased, it was recognised that

'more individuals are affected by or involved in the procurement process and...are becoming increasingly concerned about whether that process is administered fairly and in accordance with the relevant statutes and regulations, rather than in accordance with the well-intentioned desires of a government department or agency'.⁸⁴

⁷⁷ 289 F Supp 182 (ND Cal 1968).

⁷⁸ Ibid at 184.

⁷⁹ Ibid at 185.

⁸⁰ Ibid at 186.

⁸¹ Pierson op cit note 5 at 2.

⁸² Ibid at 8.

⁸³ Ibid at 41-2.

⁸⁴ Ibid at 5.

Denying disappointed bidders locus standi to challenge government procurement awards on the basis that bidders had no right to a contract also became increasingly unsatisfactory.⁸⁵ In the seminal decision of *Scanwell Laboratories, Inc v Shaffer*,⁸⁶ which concerned bids to the Federal Aviation Administration for aircraft landing systems,⁸⁷ the right of an unsuccessful bidder to challenge a government contract award was recognised.⁸⁸ After a lengthy analysis of the legal decisions concerning standing, the court noted that

‘[t]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a “private attorney general”’.⁸⁹

As Pierson notes, the idea that an unsuccessful bidder acts for the public interest is ‘an obvious fiction which only those who stand to gain economically from its acceptance can embrace as a reflection of reality’.⁹⁰ Unsuccessful bidders challenging decisions to award government contracts clearly do so out of their own economic interests. Denying this reality and dressing up the justification for locus standi in the clothes of the ‘public interest’ distracts us from the essential question, which Pierson frames as follows:

‘[I]s the public interest in having...procurement...both committed by fair and established rules, and at the same time spent in the most economical and efficient manner, best served by permitting unsuccessful bidders to contest the legality of government contract awards?’⁹¹

The experience in the United States, like in South Africa, illustrates a jurisdiction discarding its reluctance to subject government procurement to judicial review and coming to appreciate the importance of accountability over concerns of government effectiveness. However, this view is not universally shared. As we will now see, the far more conservative approach in

⁸⁵ Ibid at 9-10.

⁸⁶ 424 F2d 859 (DC Cir 1970).

⁸⁷ Ibid at 860.

⁸⁸ Ibid at 876.

⁸⁹ Ibid at 864.

⁹⁰ Pierson op cit note 5 at 14.

⁹¹ Ibid at 15.

England continues to pose problems, both practical and doctrinal, in this area of the law.

2.3.2 England

The availability of judicial review as a remedy in tender disputes in England 'has caused difficulty for as long as judicial review has existed in anything like its modern form'.⁹² This aspect of English administrative law has been described as 'overly complex' and is considered a diversion away 'from a proper consideration of important substantive issues'.⁹³

In England procurement awards are significantly less amenable to review than in South Africa. English courts have in a number of cases held that for a tender decision to be rendered amenable to review there must be a sufficient 'public law element'.⁹⁴ What this element is, however, is not entirely clear. This has resulted in a test which is 'insufficiently clear to be workable and in some cases produces the undesirable result of limiting the proper reach of public law'.⁹⁵ The following cases will illustrate this.

*R v Lord Chancellor's Department Ex p Hibbit and Saunders*⁹⁶ concerned the application for 'judicial review of a decision of Lord Chancellor...to award a contract for court reporting services for the Chelmsford group of courts'.⁹⁷ The applicants argued that they were treated unfairly in two respects with regard to the tender procedure. Firstly, they argued that they had been disqualified on the basis of secret criteria, and as a result had been prevented from making a second, reduced bid whilst other tenderers were so allowed. Secondly, they argued that a criterion of the tender, which required tenderers to account for the price of staff, had been secretly waived. As a result, those

⁹² S H Bailey 'Judicial Review of Contracting Decisions' (2007) *Public Law* 444.

⁹³ *Ibid.*

⁹⁴ See S H Bailey 'Judicial Review and the Tendering Process. A note on *R (on the application of Menai Collect Ltd and North West Commercial Services Ltd) v Department of Constitutional Affairs and Swift Credit Services Ltd (Interested Party)* and *R (on the application of Gamesa Energy UK Ltd) v National Assembly for Wales*' (2007) 1 *Public Procurement Law Review* 11.

⁹⁵ Bailey *op cit* note 92 at 445.

⁹⁶ *The Times*, March 12, 1993, [1993] COD 326.

⁹⁷ *Ibid.*

tenderers who did not account for this in their bid were able to price lower than those in the applicant's position who had so accounted.

The court ultimately concluded that 'the procedures here followed by the respondent were, in part at least, unfair'.⁹⁸ The applicants had a legitimate expectation 'that tenderers would not be able, subsequently, to submit reduced bids'.⁹⁹ As other tenderers were invited to submit lower bids the applicants were prejudiced. Furthermore, the fact that the applicants submitted their bid 'on a basis which the respondent chose not to maintain' also resulted in unfairness.¹⁰⁰

Having found that the applicants were treated unfairly in the tender process the court then considered whether or not they were entitled to judicial review. The court accepted as common cause the following: first, 'that the Lord Chancellor was susceptible to review',¹⁰¹ '[s]econdly, that that susceptibility exists only in relation to those of his decisions which are either in some way statutorily underpinned or involve some other sufficient public law element as to which there is no universal test',¹⁰² and '[t]hirdly, that the test to be applied is..."[t]o look at the subject-matter of the decision which it is suggested should be subject to judicial review and by looking at that subject-matter then come to a decision as to whether judicial review is appropriate"'.¹⁰³

The court, per Rose LJ, accepted that the commercial nature of the procurement did not in itself 'take the case outside the ambit of public law'.¹⁰⁴ However, the court ultimately concluded that the subject-matter of the case at hand was not one where judicial review was appropriate. The court dismissed the notion that procurement decisions could be equated with, for

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

example, immigration decisions, 'control of which is the especial province of the State and where, in consequence, a sufficient public law element is apparent'.¹⁰⁵ Surprisingly, the court refused the application for review even though the court found that the applicants had been treated unfairly.¹⁰⁶

The court also noted, in a concurring judgment per Waller J, that

'[i]n considering whether a decision can be judicially reviewed, it is critical to identify the decision and the nature of the attack on it. Unless there is a public law element in the decision, and unless the allegation involves suggested breaches of duties or obligations owed as a matter of public law, the decision will not be reviewable'.¹⁰⁷

Accordingly, the applicants had to show that they had 'rights to which they were entitled as a matter of public law', and that these rights were infringed.¹⁰⁸ Such a public law obligation did not necessarily follow from the fact that 'the Lord Chancellor's Department is a governmental body carrying out governmental functions and appointing persons to public office'.¹⁰⁹ There must be 'some other element that gives rise in addition to a public law obligation'.¹¹⁰ Waller J noted that the obligations created when a government enters into a contract are those created in terms of the contract. Accordingly, the obligations will be private law obligations. Something more, namely a public law element, is required for additional public law obligations.

The fact that the government was acting in terms of a statute did not necessarily provide an additional public law element.¹¹¹ In some circumstances it may, but this would depend on the wording of the particular statute. Crucially, 'to have a right which can...be the subject of review that right must flow from the statute if it is to a statute that one has had to look for providing the public law element'.¹¹² In other words, the statute itself must

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

impose public law obligations. Ultimately the court found that the 'procedure itself was no different from any other procedure adopted in ordinary commercial contract situations' and thus 'lacked a sufficient public law element to found such relief'.¹¹³

*R (on the application of Menai Collect Ltd) v Department for Constitutional Affairs*¹¹⁴ concerned 'an application for judicial review...[of] a contract for the provision of "enforcement services" for Magistrates' Courts on the Wales and Chester Circuit'.¹¹⁵ Notably, the contracts were entered into on the basis of a statutory power.¹¹⁶ The applicants contended that a report taken into consideration by the decision-maker was misleading; that information taken into account in coming to a decision to award the contract was in fact false; and that statistical information necessary to enable a comparison between bidders was not taken into account in doing so.¹¹⁷ Furthermore, the subject matter of the decision involved a public law element due to the fact that 'it was classically a decision relating to the identity of persons engaged to exercise coercive powers of the state'.¹¹⁸

After a lengthy analysis of the case law relating to judicial review of procurement the court referred approvingly to the reasoning adopted in *Hibbit and Saunders*.¹¹⁹ The court concluded that, although the agency was exercising a statutory power, this by itself did 'not confer the necessary public element to subject the decision criticised...to judicial review'.¹²⁰ The court reasoned that

'the tender evaluation process was an essentially commercial process, notwithstanding the nature of the services which are to be the subject of the contract' and that cases where a 'true public law element' was

¹¹³ Ibid.

¹¹⁴ [2006] EWHC 724 (Admin).

¹¹⁵ Ibid para 1.

¹¹⁶ Ibid.

¹¹⁷ Ibid para 20.

¹¹⁸ Ibid para 35.

¹¹⁹ Ibid para 47.

¹²⁰ Ibid para 41.

present were those involving 'bribery, corruption, implementation of unlawful policy and the like'.¹²¹

The court noted that it was 'inappropriate' for the court to re-evaluate the tenders as it did not have the necessary 'material or expertise...to "second guess" the judgment of the Panel' which was 'in the realm of commercial judgment'.¹²² The court thus explicitly acknowledged the issue of institutional competence as a factor which weighed against subjecting procurement decisions to judicial review.

*R (on the application of Gamesa Energy UK Ltd) v National Assembly for Wales*¹²³ concerned an application for the judicial review of a decision to lease forestry land to be used for the operation of wind farms.¹²⁴ The claimant was excluded at the pre-qualification stage of the tender process on the strength of its 'pre-qualification questionnaire' and was accordingly not invited to tender its bid.¹²⁵

The claimant argued that its exclusion was 'flawed, irrational and unfair, and/or...taken in breach of a legitimate expectation'.¹²⁶ The claim of irrationality was based on the marking scheme applied to the pre-qualification questionnaire. Essentially, the claimant argued that this scheme was irrational in that '[i]t penalised the claimant...for disclosing too many developments which it had conducted in the past and for giving details of projects which were in a relatively early stage of development'.¹²⁷ The defendants argued that they 'were lawfully entitled to choose such a system' which 'was fairly and equally applied to all potential bidders'.¹²⁸

¹²¹ Ibid para 47.

¹²² Ibid para 51.

¹²³ [2006] EWHC 2167 (Admin).

¹²⁴ Ibid para 2.

¹²⁵ Ibid para 3.

¹²⁶ Ibid para 4.

¹²⁷ Ibid para 5.

¹²⁸ Ibid para 6.

Having concluded that the 'power and authority' of the defendants to embark on the tender process in question was sourced in statute,¹²⁹ the court proceeded to the question of whether the decision challenged was open to judicial review. The court noted that the determination of whether or not any decision does in fact have the necessary public law element to make it susceptible to judicial review 'is often as much a matter of feel, as deciding whether any criteria are met'.¹³⁰

The court referred approvingly to the approach taken in *Hibbit and Saunders* and *Menai Collect*, thus reaffirming the centrality of a sufficient public law element to the enquiry.¹³¹ With regard to the requirement of a public law element, the court noted that it is not always easy to determine whether or not this is present in a particular case.¹³² The court also noted that it was significant that the necessary public law element need be 'sufficient'.¹³³ The court accepted that the exercise of statutory powers and the expenditure of public funds were both public law elements, but the question remained whether or not this was enough to bring 'the claim within the purview of challenge on public law grounds', as a challenge of fraud 'undoubtedly' would.¹³⁴

The court ultimately held that the defendants 'were not obliged by statute' to carry out the pre-qualification process complained of, and that the defendant enjoyed significant latitude in how it went about this process in the event that it chose to do so, 'provided it was in good faith and untainted by corruption et cetera'.¹³⁵ In the present case there were 'no sufficient public law aspects to the challenge to make it amenable to judicial review'.¹³⁶ The court did not go so far as to exclude the possibility of a public law challenge

¹²⁹ Ibid para 34.

¹³⁰ Ibid para 13.

¹³¹ Ibid para 61-2.

¹³² Ibid para 66-7.

¹³³ Ibid para 67.

¹³⁴ Ibid.

¹³⁵ Ibid para 74.

¹³⁶ Ibid para 77.

to the tendering process on the basis of irrationality, but noted that such situations would be 'rare'.¹³⁷

The court also noted that there were sound reasons of policy 'why matters of this sort should not generally be open to challenge on the ground of irrationality', namely that '[t]he extension of public law into matters of that kind could be regarded as creating an unreasonable impediment to impose on a public body in circumstances such as the present'.¹³⁸

2.3.3 Commentary on the English approach

2.3.3.1 Conflating jurisdiction with relief

The first problem with the English approach is that it does not clearly distinguish between two distinct issues, namely whether or not a decision is in fact capable of being reviewed – a question of jurisdiction – and whether or not the decision should be reviewed – a question of relief. This is perhaps not a problem exclusive to England. As Hoexter notes, difficulties with the word 'review' arise due to the fact that it tends to be used both as a verb and as a noun.¹³⁹ 'Review' could refer to the process whereby an application is brought in which a decision is challenged. It could also refer to a court granting relief in the form of reviewing and setting aside the decision complained of.¹⁴⁰

In the cases discussed above it is often not clear in what sense the word review is being used. In *Hibbit and Saunders*¹⁴¹ the court accepted that the Lord Chancellor was susceptible to review, implying that the decisions of the Lord Chancellor are subject to the review *jurisdiction* of the courts. However, such susceptibility exists only in relation to those decisions which involve an adequate public law element. In this sense being 'susceptible to review' really means a *successful* application for review, namely obtaining the relief sought.

¹³⁷ Ibid.

¹³⁸ Ibid para 79.

¹³⁹ Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 518.

¹⁴⁰ Ibid.

¹⁴¹ Supra note 96.

This is evidenced by the court concluding that '[t]he decision lacked a sufficient public law element to found such relief'.¹⁴² What the phrase 'susceptible to review' means therefore becomes unclear as it now incorporates an element determinative of review as relief, and not merely jurisdiction. In this way the jurisdiction enquiry is to some extent conflated with the remedial enquiry.

Apart from semantic confusion, there are other reasons why it is desirable to clearly separate issues of jurisdiction from those of relief. Firstly, the issue of relief should logically follow only after the question of jurisdiction has been dealt with. In other words, jurisdiction is logically anterior to relief. It may be that a court does in fact have jurisdiction to hear a matter, but that review as a form of relief would simply not be appropriate in the circumstances.

2.3.3.2 The requirement of a 'public law element'

The second difficulty with the English approach is that whether or not a decision is capable of being reviewed, and whether or not relief should be given, is dependent on the presence or absence of a 'sufficient public law element'. The court in *Hibbit and Saunders* held that in order to determine whether or not a public law element is present one must look at the subject matter of the decision and determine 'whether judicial review is appropriate'.¹⁴³ By conflating the susceptibility and outcome enquiries the English courts are in fact, although not explicitly, deciding the substantive enquiry in the language of the amenability enquiry. This approach is logically unsound. It has also resulted in confusion as to whether some procurement decisions are 'immune from judicial review even if they are irrational or unfair',¹⁴⁴ and leaves the English law with decidedly less idea of what lawfulness and procedural fairness in this area of the law requires.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Bailey op cit note 94 at 11.

Bailey, in commenting on these and other cases, has argued, not surprisingly, that the English approach to the judicial review of government procurement is unnecessarily complicated.¹⁴⁵ He argues that it 'requires impossible distinctions to be drawn' and that too much time is spent, and wasted, on addressing the amenability enquiry instead of the substantive enquiry which should follow.¹⁴⁶ He further argues that the test is 'inherently unclear' and that the authorities which rely on the test 'cannot...provide sufficient guidance' in new cases that come before the courts.¹⁴⁷ Ultimately the 'public law element test' detracts too much from the more important issues, namely 'the particular public law grounds raised on the facts of the case'.¹⁴⁸

Bailey suggests that a better approach would be as follows: First, '[i]s the decision to award the contract amenable to judicial review?'¹⁴⁹ For this question to be answered in the affirmative it is sufficient that the decision be 'taken in the exercise of a statutory power',¹⁵⁰ in which case the agency concerned would be under certain public law obligations. Secondly, 'the content of those obligations' must be determined, this being 'heavily context specific'.¹⁵¹ Thirdly, have any of these obligations been breached?¹⁵²

This approach has much to commend it. It explicitly separates the jurisdiction and remedial enquiries. It also recognises that the jurisdiction enquiry should not be the difficult or time-consuming question. The primary focus of the court should be what public law obligations exist and whether or not they have been breached. Framing the entire enquiry as a single enquiry focusing on the existence of a public law element is unsatisfactory and continues to perpetuate the problems of the courts being 'highly reluctant

¹⁴⁵ Ibid at 18.

¹⁴⁶ Ibid at 19.

¹⁴⁷ Bailey op cit note 92 at 462.

¹⁴⁸ Ibid.

¹⁴⁹ Bailey op cit note 94 at 18.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

to...regard public contracting awards as having a reviewable public law element...or...[to] substantively assess alleged defects in the decisions contracting authorities reach'.¹⁵³

2.4 Evaluating the South African approach to the judicial review of government procurement

The most important difference between the South African and English approaches is the extent to which such awards are reviewable. In South Africa such awards are essentially completely susceptible to review, whereas in England whether or not an award is susceptible to review depends on the presence or absence of a sufficient public law element.

Interestingly, the English approach to the susceptibility of procurement decisions to judicial review draws a strong analogy with the South African experience of judicial review of administrative action in general. As Hoexter notes, the 'cumbersome and convoluted' definition of administrative action in the PAJA has led to two significant problems.¹⁵⁴ The first is that the definition, by virtue of its 'narrowness',¹⁵⁵ has 'severely circumscribed the realm of administrative action'.¹⁵⁶ The second is that the resulting threshold requirement has led the courts to focus primarily on whether or not an act constitutes administrative action to the neglect of the more important enquiry, namely what 'the precise content of lawfulness, reasonableness, and fairness in particular cases' is.¹⁵⁷ As a result these notions are underdeveloped in terms of the PAJA. For Hoexter this is a serious problem as this subsequent enquiry contains 'the essential questions on which our courts ought to be spending their time and energy'.¹⁵⁸ Hoexter calls this the 'distracting effect of the concept of administrative action' – a focus on the question of whether the

¹⁵³ Rory Ashmore 'Judicial Review and Public Procurement: R. (on the application of Greenwich Community Law Centre) v Greenwich London Borough Council' (2012) 3 *Public Procurement Law Review* 144 at 147.

¹⁵⁴ Cora Hoexter "'Administrative Action" in the Courts' (2006) *Acta Juridica* 303 at 306.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* at 303.

¹⁵⁷ *Ibid* at 309.

¹⁵⁸ *Ibid.*

threshold requirement is met with a 'tendency for cases to fizzle out' once this question has been answered.¹⁵⁹

A further feature of South African administrative law under the PAJA noted by Hoexter is what she calls '[a]dministrative action as code'.¹⁶⁰ By this she means that 'the results of the administrative action enquiry are disturbingly contingent and easily manipulated'.¹⁶¹ Courts tend to decide cases in terms of whether or not a decision constitutes administrative action as opposed to engaging with 'the far harder work of articulating their views about the substance of the case'.¹⁶² Ultimately, 'the courts are effectively encouraged to use code instead of giving explicit recognition to whatever feature is really driving them in a particular case'.¹⁶³ As we have seen above, these problems are clearly reflected in the English approach to determining the presence of a sufficient public law element.

Importantly, because the government procurement process constitutes administrative action, review proceedings in South African tender disputes are able to avoid these problems entirely. Because the decision to award a tender constitutes administrative action the courts are free to focus on the substantive issues of the particular case. At least in this respect the South African approach seems preferable to that of England.

However, while the problems presented by the English approach may provide much to write about, they may not be as significant as those associated with South Africa. As already mentioned, the right of unsuccessful bidders to take tender awards on review in South Africa has resulted in such applications coming before the courts in droves, with consequences for the timeous implementation of public programmes. The fact that government procurement awards are less amenable to review in England means that these

¹⁵⁹ Ibid.

¹⁶⁰ Ibid at 311.

¹⁶¹ Ibid.

¹⁶² Ibid at 312.

¹⁶³ Ibid.

problems can be avoided. One of the principal issues facing the South African procurement regime, then, is how to mitigate these undesirable consequences.

Quinot argues that the South African approach is unsatisfactory.¹⁶⁴ Whilst accepting that 'constitutional and institutional competence concerns' do not provide 'forceful arguments to avoid judicial review' of procurement decisions,¹⁶⁵ considerations relating to an 'efficient and effective state administration' do.¹⁶⁶ This is because, according to Quinot, the cost and delays involved in litigation are necessarily inimical to the principle of cost-effectiveness – a 'core principle' of procurement.¹⁶⁷

A solution proposed by Quinot is to focus on the remedies that may be available, with such an approach creating a 'filter' to such applications.¹⁶⁸ The essence of the argument would seem to be that a proper understanding of what an appropriate remedy should be in the circumstances can to some extent determine the reviewability of the administrative act in question.¹⁶⁹ To illustrate, Quinot notes that in those cases where an administrator takes a decision beyond the scope of their powers¹⁷⁰ this should result in the invalidity of the decision. This is because 'here the function of judicial review as a constitutional control over the exercise of state power outweighs efficiency and certainty concerns'.¹⁷¹ This differs from those decisions where the administrator acted within their powers but followed an irregular procedure,¹⁷² in which case 'review should in principle not be able to result in invalidity'

¹⁶⁴ Quinot op cit note 10 at 440.

¹⁶⁵ Ibid at 439.

¹⁶⁶ Ibid at 440.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid at 443.

¹⁶⁹ Ibid at 442-7.

¹⁷⁰ Ibid at 444 footnote 56.

¹⁷¹ Ibid at 444.

¹⁷² Ibid at 444 footnote 57. Quinot notes this would include acting procedurally unfairly and unreasonably.

because 'in these cases efficiency and certainty generally favour the continued factual validity of the commercial conduct'.¹⁷³

Quinot does not go so far as to propose a rule barring the application for review, even of those decisions where relief in the form of review should, according to him, not be forthcoming.¹⁷⁴ However, 'the level of judicial *intervention* should vary depending on the type of challenge'.¹⁷⁵

A number of concerns present themselves with this approach. Firstly, it is not entirely clear why distinguishing between the legality and the procedural fairness of a decision should determine whether or not review as relief should follow. Section 33 of the Constitution requires that administrative action be both lawful and procedurally fair. It is not clear that there is a hierarchy among these principles which could determine the availability of review as relief. This makes it difficult to draw a principled distinction between them which would allow invalidity in the event of the breach of one but not the other.

Perhaps more important is that, in the context of procurement, what Quinot refers to as 'strict legality grounds'¹⁷⁶ would seem to incorporate procedural fairness. This is because s 217 of the Constitution states that '[w]hen an organ of state...contracts for goods or services, it must do so in accordance with a system which is fair'. As such, in the context of procurement, fairness becomes part of the legality enquiry – the authority of the administrator is constrained in that they must act fairly when awarding tender contracts. If they do not act fairly when doing so, then it seems they have acted beyond the scope of their powers, thus rendering any act so performed invalid not only on the basis that it was procedurally unfair, but also on the basis of unlawfulness.

Furthermore, procedural fairness depends on the facts of the case.¹⁷⁷ As such, it may not be appropriate to adopt an approach whereby in principle

¹⁷³ Ibid at 444.

¹⁷⁴ Ibid at 444-5.

¹⁷⁵ Ibid at 445.

¹⁷⁶ Ibid at 444.

¹⁷⁷ *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) para 13.

procedural fairness should not result in invalidity. Depending on the facts, certain cases may cry out for invalidity on the basis of procedural fairness. On the contrary, there may be cases where a decision is taken in breach of strict legality grounds but where the circumstances are such that a court should decline to set the decision aside. This could be due to a number of reasons, for example impracticability, public harm, or the absence of any bad faith.

Secondly, by having circumstances which in principle are not amenable to review, a legal system opens itself up to the unsatisfactory state of affairs presented by the English approach, where it is possible to apply for review, but where effective relief is unlikely to be forthcoming. This is disingenuous. An unsuccessful bidder who has incurred the expense of applying for review should be entitled to expect the possibility of effective relief in the event their application is heard.

A focus on remedies also leads us to look less at the substantive issues of the case, and, as we have seen, this is something that should be avoided. Another possible solution would seem to be to flesh out what the substantive requirements of such decisions require i.e. what exactly lawfulness and fairness require in the context of procurement awards. In this way administrators may know better what is required of them. It is clear that the South African procurement regime needs to rein in the large number of applications for the judicial review of tender awards. However, any attempt to do so must take cognisance of the fact that, firstly, the award process constitutes an exercise of public power and, secondly, that in South Africa the exercise of all public power is subject to judicial scrutiny. Given this framework, it would not seem possible to limit the reviewability of these awards. Rather, the solution would seem to lie elsewhere. As Speidel notes

'the most effective ways to control and improve the quality of administrative discretion may be further to clarify and amplify the standards for decision at the action level and to establish solid procedures for internal administrative review'.¹⁷⁸

¹⁷⁸ Speidel op cit note 11 at 90.

Essentially, the solution best-suited to South Africa's current problem would be improving the quality of decision-making pertaining to procurement awards. Given the expense of litigation, it is unlikely that the majority of procurement challenges are brought without any prospect of success.¹⁷⁹ Tenderers surely do not expect to win every award for which they bid. However, given the financial importance of receiving a tender award, it is understandable that bidders will seek relief if they perceive an award to be irregular. Arguably, increasing the incidence of lawful procurement decisions should decrease the number of applications for review.

2.5 Conclusion

The development in South Africa that government procurement awards are subject to judicial review at the instance of an unsuccessful bidder is a significant one. It is a break from both the pre-1994 position and the historical trend in some common law jurisdictions in terms of which such decisions were regarded as largely immune from review. It also accords squarely with South Africa's approach of subjecting the exercise of all public power to constitutional control.

As government procurement in South Africa constitutes administrative action, the review process is able to avoid those problems associated with both the judicial review of non-administrative action and the approach adopted in England. Unfortunately, the South African approach has resulted in the courts being plagued by applications for the review of government tender awards. One solution to this problem would be to simply limit the reviewability of these decisions in some way. However, this would present problems of its own. Arguably, the solution to the problem lies not in limiting the scope of judicial review, but in better decision-making on the part of those officials tasked with making the awards.¹⁸⁰

¹⁷⁹ This is also borne out by how frequently applications for review are successful.

¹⁸⁰ The legal framework of government procurement in South Africa is also unwieldy and overly complex. Arguably, the streamlining and simplification of this system would assist in reducing

Because these decisions are reviewable, courts may not shy away from the task of deciding whether or not to set aside an unlawful award, despite the difficulties associated with this decision. Of course, the courts need only make this decision once they find that the award is in fact unlawful. It is therefore important to understand, firstly, the legal framework of government procurement to which government agencies are bound when awarding government tenders and, secondly, how the courts determine whether or not such an award is unlawful.

the incidence of applications for the judicial review of government procurement awards. See 3.2.

Chapter 3

THE NATURE AND DETERMINATION OF UNLAWFULNESS IN GOVERNMENT PROCUREMENT AWARDS

3.1 Introduction

According to Hoexter, lawfulness in the context of administrative action means, quite simply, 'that administrative actions and decisions must be duly authorised by law and that any statutory requirements or preconditions that attach to the exercise of the power must be complied with'.¹

However, the determination of lawfulness in government procurement presents a story of some confusion and disagreement in the courts. In some instances the courts have required strict compliance with the procurement framework.² In others they have been willing to overlook flaws.³ What exactly compliance requires has therefore been a contentious issue. In the seminal case of *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*⁴ the Supreme Court of Appeal (SCA) held that, despite the peremptory nature of procurement law, irregularities in the tender process must be consequential in order to be reviewable.⁵ This approach was discarded by the Constitutional Court (CC) on appeal.⁶ The CC dismissed the idea of an 'inconsequential irregularity' as being relevant to the determination of lawfulness. Instead the court held that whether or not an irregularity is material depends on whether the purpose of the provision is given effect to.⁷

¹ Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 253.

² See *Sanyathi Civil Engineering and Construction (Pty) Ltd v eThekweni Municipality, Group 5 Construction (Pty) Ltd v eThekweni Municipality* (KZPHC) unreported case no 7538/11 (24 October 2011) para 21; *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Another* (WCHC) unreported case no 21158/12 (6 February 2013) para 72 and 111.

³ See *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) para 21.

⁴ 2013 (4) SA 557 (SCA).

⁵ *Ibid* para 96.

⁶ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC).

⁷ *Ibid* para 22.

The legal framework of government procurement is complex. As the courts have recognised, administrators calling for and awarding tenders are 'bound by the Constitution, the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), the Preferential Procurement Process, its own tender policy and the common law'.⁸ Frequently, s 217 of the Constitution⁹ plays a central role in the determination of unlawfulness, despite there being a number of statutes and regulations which themselves regulate government procurement.¹⁰

A comprehensive treatment of the law of government procurement in South Africa is not required to understand lawfulness in this area of the law.¹¹ However, an overview of the legal framework of this subject is certainly helpful.¹²

3.2 The legal framework of government procurement in South Africa

3.2.1 The Constitution

The foundational provision for government procurement in South Africa is s 217 of the Constitution, which provides as follows:

'(1) When an organ of state in the national, provincial, or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

⁸ *VE Reticulation (Pty) Ltd and Others v Mossel Bay Municipality and Others* [2013] 2 All SA 489 (WCC) para 24.

⁹ Constitution of the Republic of South Africa, 1996.

¹⁰ See 3.2.2.

¹¹ For such a comprehensive treatment see Phoebe Bolton *The Law of Government Procurement in South Africa* (2007).

¹² Geo Quinot 'Enforcement of Procurement Law from a South African Perspective' (2011) 6 *Public Procurement Law Review* 193 at 193.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

Section 217 is significant for a number of reasons. Whilst it is doubtful that it is the source of the state's contractual capacity,¹³ it is certainly 'the source of [governmental] procurement regulation'.¹⁴ Section 217 has been described judicially as 'the foundation for all public procurement',¹⁵ 'the starting point' of any enquiry into such activity,¹⁶ and the provision according to which such activity is 'governed'.¹⁷ In any application for the review of government procurement awards, the courts invariably start with a recognition that s 217 governs the enquiry.

Furthermore, s 195 of the Constitution sets out the values and principles which govern the public administration. This section states that the public administration 'must' be governed by, among others, the following principles: '[a] high standard of professional ethics',¹⁸ '[e]fficient, economic, and effective use of resources',¹⁹ the impartial, fair, and equitable provision of services,²⁰ and accountability.²¹ Although the principles in s 195 'appear to impose duties without giving rise to justiciable rights',²² there is little doubt that government procurement 'is also subject to the principles in s 195(1) of the Constitution'.²³

¹³ Geo Quinot 'Towards Effective Judicial Review of State Commercial Activity' (2009) 3 *TSAR* 436 at 446 footnote 73. Quinot argues that s 217 cannot be the source of government's contractual capacity. Similarly, Bolton op cit note 11 at 74 footnote 8 states that '[e]ven if s 217 does not apply, the Constitution would in principle still be the source of the power to contract'.

¹⁴ Quinot op cit note 13 at 446.

¹⁵ *Rainbow Civils* supra note 2 para 55.

¹⁶ *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) para 11.

¹⁷ *Moseme* supra note 3 para 2.

¹⁸ S 195(1)(a).

¹⁹ S 195(1)(b).

²⁰ S 195(1)(d).

²¹ S 195(1)(f).

²² Hoexter op cit note 1 at 19.

²³ *Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others* 2008 (4) SA 346 (T) para 21.

3.2.2 Legislation

A number of statutes together comprise the legislative scheme for government procurement in South Africa. Among these are the Public Finance Management Act (the PFMA),²⁴ which applies to procurement at the national and provincial levels, the Local Government: Municipal Finance Management Act (the MFMA),²⁵ which applies to procurement at the municipal level, and the Preferential Procurement Policy Framework Act (the PPPFA),²⁶ which applies to all procurement undertaken in terms of s 217(2) and (3) of the Constitution. Taken together, these pieces of legislation, along with their regulations, can be said to constitute 'the core of public procurement law'.²⁷ In addition, the Local Government: Municipal Systems Act²⁸ is also applicable.

As the decision to award a tender also constitutes administrative action²⁹ it must be done in accordance with both s 33 of the Constitution and the Promotion of Administrative Justice Act (the PAJA).³⁰ Administrators awarding tender contracts are therefore required to comply not only with the applicable constitutional provisions and legislation. They are also required to ensure that the process of awarding the tender adheres to the requirements of administrative justice.³¹

3.2.3 A fragmented, burdensome and problematic procurement regime

The disjointed legal framework regulating government procurement outlined above is far from satisfactory. As Quinot notes, the various sources of regulation 'provide a normative framework for the development of a coherent

²⁴ Act 1 of 1999.

²⁵ Act 56 of 2003.

²⁶ Act 5 of 2000.

²⁷ Quinot op cit note 12 at 194.

²⁸ Act 32 of 2000.

²⁹ *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) para 5.

³⁰ Act 3 of 2000.

³¹ *Joubert Galpin and Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) para 58.

system of public procurement regulation'.³² Ultimately, however, 'the regulatory regime remains highly fragmented and all but coherently organised'³³ and instead resembles a 'hodge podge of rules from all the major branches of the law'.³⁴

Such a legal framework increases the burden on administrators awarding tenders in ensuring the lawfulness of the decision taken. As such, it is conceivable that there will often be discrepancies between the legislative requirements and the process followed. As the SCA noted in *AllPay*, '[t]here will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised intensely with the object of doing so'.³⁵

The complexity of the procurement framework necessarily contributes to the plethora of cases in which procurement awards are taken on review.³⁶ As the SCA recently remarked:

'The necessity to comply with the obligations imposed by s 217...has resulted in the enactment of numerous interrelated statutes, regulations and directives. This, in turn, has given rise to a convoluted set of rules and requirements that have proved to be fertile ground for litigation with the law reports becoming littered with cases dealing with public tenders'.³⁷

This is far from ideal. The legal framework of government procurement should result in an efficient and effective procurement regime in order for those programmes forming the subject matter of the awards to be implemented timeously.

³² Quinot op cit note 12 at 194. Quinot refers specifically to the principles contained in s 217. However, there would seem to be no reason why the same would not apply to the principles in s 195 and the rights in terms of s 33 and the PAJA.

³³ Ibid at 194.

³⁴ Ibid at 193.

³⁵ Supra note 4 para 21.

³⁶ *Moseme* supra note 3 para 1.

³⁷ *Dr JS Moroka Municipality and Others v Betram (Pty) Ltd and Another* [2014] 1 All SA 545 (SCA) para 8.

3.3 The peremptory nature of government procurement law

The legal framework regulating government procurement is peremptory, meaning that the various legal rules and regulations must be complied with.³⁸ This is evidenced by both the prevalence of the word 'must' in s 217 and much of the primary legislation, as well as numerous judicial pronouncements confirming this. It is also a principle of statutory interpretation that 'language of a predominantly imperative nature such as "must" is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction'.³⁹ Administrators awarding government tenders may therefore not deviate from the prescribed framework. Indeed, 'the Constitution and the legislation pertaining to procurement are emphatically prescriptive'.⁴⁰

It is not difficult to see why this is so. Government procurement has been described judicially as 'notoriously subject to influence and manipulation'.⁴¹ Unfortunately, the South African experience has seen government procurement be plagued by corruption.⁴² Indeed, 'the high standards that the Constitution sets seem to be more honoured in the breach than in the observance'.⁴³ This is problematic because government procurement is funded by public money and must be done in the public interest.⁴⁴ It is also in the public interest that competent contractors able to render performance in terms of public contracts are not deterred from submitting bids.

A peremptory procurement regime aims to minimise corruption, ensure fairness for those bidding, and ensure the continued integrity of the

³⁸ *Sanyathi* supra note 2 para 26.

³⁹ *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA) para 32.

⁴⁰ *Sanyathi* supra note 2 para 47.

⁴¹ *Minister of Social Development and Others v Phoenix Cash and Carry – PMB CC* (SCA) unreported case no 189/06 and 244/06 (26 March 2007) para 1.

⁴² *Viking Pony Africa Pumps (Pty) Ltd and Others v Hidro-Tech Systems (Pty) Ltd* (SCA) unreported case no 175/09 (25 March 2010) para 2.

⁴³ *Phoenix Cash and Carry* supra note 41 para 1.

⁴⁴ *AllPay* (SCA) supra note 4 para 19.

procurement regime.⁴⁵ Indeed, the 'high standard of governance of public administration...is prescribed in order to prevent corruption'.⁴⁶

A peremptory regime also accords with the separation of powers in that courts are able to scrutinise and set aside decisions on the basis of non-compliance with prescribed legal rules as opposed to whether or not an administrator exercised their discretion appropriately. If the procurement regime were to afford administrators a wide discretion in awarding tenders the courts would find themselves in the uncomfortable position of second-guessing administrative decisions. This would then 'draw the courts into the merits of administrative decisions, thereby breaking down the ground between appeal and review'.⁴⁷

3.4 The basis of unlawfulness in government procurement

3.4.1 Non-compliance with s 217

To a large extent the lawfulness or otherwise of a procurement award is determined with reference to s 217. For example, in *Telkom SA Ltd v Merid Trading (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others*⁴⁸ the court stated that '[t]he Constitution lays down minimum requirements for a valid tender process'⁴⁹ and that '[t]he question to be decided is whether the procedure followed...was in compliance with s 217'.⁵⁰

In fact, s 217 often plays a central role to the determination of lawfulness even where other legislative provisions are concerned. For example, in government procurement only those tenders deemed acceptable in terms of the PPPFA are 'eligible for consideration'.⁵¹ Acceptability is therefore a 'threshold requirement'.⁵² The acceptance of a tender which is not

⁴⁵ *Sanyathi* supra note 2 para 34 and 103.

⁴⁶ *Ibid* para 103.

⁴⁷ Hoexter op cit note 1 at 327.

⁴⁸ (NGHC) unreported case no 27974/10 and 25945/10 (7 January 2011).

⁴⁹ *Ibid* para 12.

⁵⁰ *Ibid* para 14.

⁵¹ *JFE Sapela* supra note 16 para 11.

⁵² *Ibid* 11-12.

acceptable is 'an invalid act and falls to be set aside'.⁵³ As such, tenders that do not constitute acceptable tenders should in principle be disqualified.

An acceptable tender is defined in the PPPFA as 'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'.⁵⁴ According to this definition the acceptability of a tender is determined solely by reference to the contents of the tender document.

However, despite the definition of an acceptable tender the SCA has held that the tender document is not the primary determinant of acceptability. In *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*⁵⁵ the issue involved the acceptance of an unacceptable tender. The tender in question was for the repair and maintenance of prisons in the Western Cape.⁵⁶ The third respondent had submitted a bid for substantially less than the first respondent.⁵⁷ As a result the third respondent was awarded the tender. Given that cost-effectiveness is 'normally the primary concern for organs of state when they contract for goods and services'⁵⁸ it would seem that the Department had good reason to award the third respondent the tender. However, upon closer inspection it became clear that the third respondent had quoted the low price that it did with a view that some work would not have to be done.⁵⁹ The first respondent argued that, by pricing as it did, the third respondent 'gained an unfair advantage over other tenderers' and that its bid was not an acceptable tender and should have been disqualified.⁶⁰

⁵³ Ibid.

⁵⁴ S 1.

⁵⁵ Supra note 16.

⁵⁶ Ibid para 1.

⁵⁷ Ibid para 4-6.

⁵⁸ Bolton op cit note 11 at 99.

⁵⁹ Supra note 16 para 4-5.

⁶⁰ Ibid para 7.

The court noted that whether or not a tender was acceptable was to be determined not merely on the basis of compliance with the tender document. Rather,

‘[t]he definition of “acceptable tender” in the Preferential Act must be construed against the background of the system envisaged by s 217(1) of the Constitution, namely one which is “fair, equitable, transparent, competitive and effective”. In other words, whether “the tender in all respects complies with the specifications and conditions of tender as set out in the tender documents” must be judged against these values’.⁶¹

By pricing as it did, ‘in effect omit[ting] from [its] tender a whole section of the work’, the third respondent gained an ‘unfair advantage over competing tenderers’.⁶² The court held that such a tender was inimical to the values contained in s 217 and therefore was not an acceptable tender as required by the PPPFA.⁶³ Accordingly, the award of the tender to the third respondent on the strength of an unacceptable tender was unlawful and invalid.⁶⁴

It is notable that the court resorts to s 217 in determining the lawfulness of the administrator's actions in accepting the tender. Section 1 of the PPPFA is clear; an acceptable bid is one which complies with the tender document. However, determining acceptability solely by reference to the tender document could be problematic if bids which otherwise complied therewith also somehow undermined s 217. This is avoided by judging the acceptability, and therefore lawfulness, of a bid against the requirements of s 217. Section 217 therefore provides a safeguard to the acceptance of bids which the definition of an acceptable tender in s 1 of the PPPFA lacks.

3.4.2 Non-compliance with legislation

Lawfulness is not always determined by reference to s 217. There is an array of statutory and regulatory provisions with which any given tender award must

⁶¹ Ibid para 14.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

comply. Often lawfulness is determined on the basis of compliance with these provisions without reference to s 217.

The Constitution specifically contemplates making provision for giving preference to historically disadvantaged individuals when awarding tenders.⁶⁵ This is given effect to by the PPPFA. Section 2 of this Act states as follows:

‘(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A preference point system must be followed:

(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

(c) Any other acceptable tenders which are higher in price must score fewer points, on a *pro rata* basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

(d) The specific goals may include –

(i) Contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) Implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;

(e) Any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) The contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraph (d) and (e) justify the award to another tenderer.’

A number of features stand out from s 2. Firstly, a maximum number of points, depending on the size of the contract, may be awarded for those goals

⁶⁵ S 217(3).

referred to in subsection (d). Secondly, a tender must be awarded to the tenderer who scores the highest number of points. Thirdly, a tender may be awarded to a tenderer who does not score the most points provided 'objective criteria in addition to those contemplated in paragraph (d) and (e) justify' doing so. The question which then arises is whether or not the gender and racial preferences of a bidder who does not score the most points may constitute such objective criteria justifying the award of the tender to that bidder in terms of subsection (1)(f).

*Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) and Others*⁶⁶ concerned the decision to award a contract for the construction of a section of road in Mpumalanga.⁶⁷ The tender document in question had stipulated that the PPPFA and its regulations would apply and that '[a] maximum of 20 points shall be allocated for the participation of HDIs (Historically disadvantaged Individuals) as equity owners in the contracting firm or joint venture'.⁶⁸

The relevant consultant employed to assess the bids had recommended Grinaker's bid on the basis that it scored the most points and was for the lowest price and, furthermore, 'that no objective criteria exist[ed] to justify the award of the contract to another tenderer'.⁶⁹ The tender committee accordingly recommended that Grinaker be awarded the contract on the basis that it was experienced, had resources, and would 'enhance the Government's policy of empowerment and SMME participation in the Provincial economy'.⁷⁰ Despite these recommendations the Tender Board resolved to award the tender to another bidder.⁷¹ The Board gave a number of inconsistent and contradictory reasons as to why it took the decision to the award the tender to whom it did.⁷²

⁶⁶ [2002] 3 All SA 336 (T).

⁶⁷ *Ibid* para 1-3.

⁶⁸ *Ibid* para 4.

⁶⁹ *Ibid* para 11.

⁷⁰ *Ibid* para 15.

⁷¹ *Ibid* para 16.

⁷² *Ibid* para 35-7.

Ultimately, the court found the decision of the Tender Board reviewable on a number of grounds.⁷³ The Tender Board had been of the opinion that the original points awarded to their preferred bidder for equity considerations were too low, and accordingly revised those points upwards by a substantial margin.⁷⁴ In doing so, however, the Tender Board did not act in accordance with the applicable regulations but on the basis of the importance it attributed to 'the extent of participation in the implementation of the contract, the skills transfer, the relative involvement of other HDI subcontractors, [and] the number of HDI individuals involved' with its preferred bidder.⁷⁵ Essentially, the Tender Board attributed more importance to the historical disadvantage and equity considerations of its preferred bidder than that allowed by the PPPFA and its regulations.

The court, in its exposition of s 2(1) of the PPPFA, held that the Tender Board was in fact

'obliged to award the tender to the tenderer who had scored the highest points namely [Grinaker], "unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer", as provided in section 2(1)(f) of the Procurement Act'.⁷⁶

The court held that the words 'in addition to' mean 'over and above'⁷⁷ i.e. considerations other than those for which provision had already been made. In this regard the court held that

'[p]aragraph (f) [of s 2(1) of the PPPFA]...contemplates objective criteria over and above those contemplated in paragraphs (d) and (e). The criteria contemplated in paragraphs (d) and (e) would, if the specific goal is clearly specified in the invitation to submit a tender, be the basis for the award of a maximum of ten points. To my mind, the legislature therefore envisaged that over and above the objective criteria contemplated in paragraphs (d) and (e), there might be were [sic] objective criteria justifying the award to another tenderer than the tenderer who had scored the highest points. To put it differently, the legislature did not intend that criteria contemplated in paragraphs (d) and (e), should be taken into account twice, firstly in determining what score was achieved out of ten

⁷³ Ibid para 52-3.

⁷⁴ Ibid para 49.

⁷⁵ Ibid para 50.

⁷⁶ Ibid para 54.

⁷⁷ Ibid para 56.

in respect of the criteria contemplated in these paragraphs and, secondly, in taking into account those selfsame criteria to determine whether objective criteria justified the award of the contract to another tenderer than the one who had scored the highest points'.⁷⁸

The Tender Board had been of the opinion that it was entitled to consider empowerment as an objective reason justifying the awarding of the tender to the successful bidder, even if this meant awarding the tender to a bidder who did not tender the lowest price. In this regard the Tender Board thought itself entitled to 'pay a premium for empowerment' as long as the tender was within budget.⁷⁹ The court, however, disagreed.⁸⁰ It held that the legislature had made provision for empowerment as a consideration to be taken into account 'in the point system'.⁸¹ As the Tender Board was of the opinion that it was entitled to take into account the successful bidder's empowerment credentials a second time, it had 'failed to apply its mind' and 'did not understand the behests of the statutes that it had to apply'.⁸² Accordingly, its decision to award the tender to the successful bidder was unlawful.

Similarly, in *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Others*⁸³ one of the grounds of review was that the administrator was of the view that awarding the tender to the winning tenderer would result in 'increas[ed] access of black women to economic activities'.⁸⁴

The court referred approvingly to the dictum in *Grinaker* and held that, as the winning tenderer had already been awarded preference points based on affirmative action and BEE considerations, the administrator was not entitled to take such considerations into account a second time.⁸⁵ In this respect the court held that the administrator had

'failed to appreciate that his power was confined to the four corners of the Procurement Act, the Procurement Regulations and the Tender

⁷⁸ Ibid para 60.

⁷⁹ Ibid para 65.

⁸⁰ Ibid para 66.

⁸¹ Ibid.

⁸² Ibid para 68.

⁸³ Supra note 2.

⁸⁴ Ibid para 51.

⁸⁵ Ibid para 97.

Document, and that he had no general discretion to take into account considerations of race and gender or affirmative action outside of the specific parameters laid down therein'.⁸⁶

The court considered it significant that the B-BBEE Act and codes of good practice had already been taken into account in formulating the tender in question,⁸⁷ as the organ of state in question was 'obliged' to do.⁸⁸ In the result, any gender and racial preferences were 'already built in to the very matrix of the tender'.⁸⁹ As such, the decision to award the tender was 'materially influenced by an error of law, as contemplated in section 6(2)(d) of PAJA'.⁹⁰

3.4.3 Lawfulness unrefined

The preceding discussions show that in some cases the courts determine the lawfulness or otherwise of an award with reference to s 217, whereas in others they do not. Government procurement is comprehensively regulated by statute, regulations, and directives, all far more detailed than the five principles contained in s 217. Why, then, is s 217 determinative of unlawfulness in some cases but not in others?

3.4.3.1 The incorporation of s 217 into the legislation

Section 217(1) says that the contracting of goods and services must be done in accordance with a 'system which is fair, equitable, transparent, competitive and cost-effective'. In *Steenkamp NO v The Provincial Tender Board, Eastern Cape*⁹¹ the CC recognised that s 217

'lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective'.⁹²

⁸⁶ Ibid.

⁸⁷ Ibid para 103.

⁸⁸ Ibid para 102.

⁸⁹ Ibid para 104.

⁹⁰ Ibid para 106.

⁹¹ 2007 (3) SA 121 (CC).

⁹² Ibid para 33.

Despite s 217 referring to a 'system', the courts have interpreted s 217 as demanding that the procurement process must be 'fair, equitable, transparent, competitive and cost-effective'.⁹³ The reason for this lies in the wording of much of the legislative framework itself, which often simply repeats the requirement that procurement be fair, equitable, transparent, competitive and cost-effective, without really prescribing how this is meant to be achieved. For example, the regulations promulgated in terms of the PFMA prescribe that '[t]he accounting officer or accounting authority...must develop and implement...an effective and efficient supply chain management system for...the acquisition of goods and services.'⁹⁴ In addition, the supply chain management system 'must be...fair, equitable, transparent, competitive and cost-effective'.⁹⁵

The Local Government: Municipal Finance Management Act states that '[t]he supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive, and cost-effective'.⁹⁶ Again, these are the same principles listed in s 217. In terms of regulations promulgated under the Act, '[e]ach municipality and each municipal entity must...implement a supply chain management policy that...gives effect to...s 217 of the Constitution...and is fair, equitable, transparent, competitive, and cost-effective'.⁹⁷

Little, then, is actually provided by way of normative guidance on how the substantive principles of s 217 are meant to be achieved. It is then not surprising that the courts refer to s 217 for this purpose. As the CC recently stated:

'[t]he legislative framework for procurement policy under section 217...thus provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a

⁹³ *Telkom SA* supra note 48 para 12.

⁹⁴ GN 225 in GG 27388 of 15 March 2005 reg 16A3(1).

⁹⁵ *Ibid* reg 16A3(2).

⁹⁶ S 112.

⁹⁷ GN 868 in GG 27636 of 30 May 2005 reg 2(1).

given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity, lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness or any other review ground under PAJA'.⁹⁸

In this sense, unlawfulness in the context of government procurement awards is really unconstitutionality,⁹⁹ the irregularity in question being an infringement of one or more of the requirements contained in s 217.

3.4.3.2 Varying degrees of comprehensiveness in the procurement framework

We saw earlier that in those cases involving s 2(1)(f) of the PPPFA the courts frequently refer to the intention of the legislature.¹⁰⁰ However, they do not do this with the definition of an acceptable tender contained in s 1. One possible reason for the difference in approach would be that s 2(1)(f) is far more detailed and comprehensive than the definition of an acceptable tender contained in s 1. Furthermore, s 2(1)(f) deals with policy considerations that the legislature clearly spent more time applying its mind to than the definition of an acceptable tender.

A plain reading of s 2(1)(f) also does not present the same concern that the definition of an acceptable tender does. The definition of an acceptable tender suggests that acceptability is determined solely with reference to the relevant tender document. As such, it is more reasonable to defer to the intention of the legislature as an interpretative device with regard to s 2(1)(f) than to s 1. This is amplified by the fact that it is unlikely that the legislature could have intended for lawfulness to be determined solely on the basis of a tender document which it will have no hand in drafting. By imposing the requirements of s 217 onto the definition of an acceptable tender, the courts ensure that lawfulness is determined in accordance with those objective standards which

⁹⁸ *AllPay* (CC) supra note 6 para 43. Footnotes omitted.

⁹⁹ *Ibid* para 93. The court declared the decision to award the tender not simply unlawful, but 'constitutionally invalid'.

¹⁰⁰ See 3.4.2 above.

remain the same for all tenders submitted, as opposed to tender documents which may be different from one another.

Section 2(1)(f) also provides comprehensive regulation to that which it aims to regulate. The same cannot be said for the definition of acceptable tender in s 1. Arguably, this is the primary reason why s 217 is resorted to with the latter but not the former.

3.5 The requirement of materiality in unlawful irregularities

We are now in a position to consider what kind of deviations from the procurement framework result in unlawfulness. As the SCA noted in *AllPay*, for an irregularity or defect to result in unlawfulness it must somehow be 'in conflict with the law'.¹⁰¹ The question we are then concerned with is what makes an irregularity in conflict with the law.

3.5.1 Separating the lawfulness and remedial enquiries

Before addressing this issue it is useful to first consider a related issue which has until recently confused the determination of unlawfulness in tender disputes. This has been the tendency of the courts in some cases to determine the unlawfulness of the award with reference to whether or not the award should be set aside. In *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another*,¹⁰² the successful tenderer, King, initially did not qualify to tender as it was not classified as a contractor 'considered capable of performing contracts having a value in excess of R100m'.¹⁰³ This requirement was later seemingly withdrawn. King thereafter submitted another bid, scored the highest number of points, and was recommended for the contract.¹⁰⁴ However, King's tender was subsequently

¹⁰¹ *AllPay* (SCA) supra note 4 para 58.

¹⁰² Supra note 3.

¹⁰³ Ibid para 4.

¹⁰⁴ Ibid para 5.

disqualified on the basis of unfair competition and the contract was awarded to Moseme.¹⁰⁵

The High Court set aside the decision to award the tender to Moseme on the basis 'that the decision was taken arbitrarily, that the matter had not been considered properly, and that the department had taken irrelevant considerations into account'.¹⁰⁶ Importantly, the High Court then awarded the contract to King.¹⁰⁷

The SCA disagreed with the ease with which the High Court set aside the award and awarded the contract to King. The court held that '[a] declaration of invalidity of the tender award in this case can also not be considered in isolation. One has to consider the possible consequences'.¹⁰⁸ The SCA concluded that the High Court failed to 'consider the degree of the irregularity' and held 'that King, in spite of the imperfect administrative process, [was] not entitled to any relief. Not every slip in the administration of tenders is necessarily to be visited by judicial sanction'.¹⁰⁹

The import of the SCA's statements is problematic. This is because s 172(1)(a) of the Constitution says that a court must declare invalid any conduct inconsistent with the Constitution. The potential consequences of such a declaration, if any, should not feature in the court's determination. They are only taken into account when determining a just and equitable order in terms of s 172(1)(b).

In the seminal case of *AllPay* the SCA in its judgment again conflated the issues of lawfulness and remedy. This case concerned a challenge by AllPay to the award of a tender to Cash Paymaster Services for the payments of social

¹⁰⁵ Ibid.

¹⁰⁶ Ibid para 8.

¹⁰⁷ Ibid para 9.

¹⁰⁸ Ibid para 12.

¹⁰⁹ Ibid para 21.

grants to some 15 million people in all nine provinces of the Republic¹¹⁰ with an estimated value of R10 billion.¹¹¹

The High Court had found that the award to CPS was unlawful and invalid.¹¹² In the court's view the reduction in AllPay's score was irrational,¹¹³ there was a failure to assess the BEE partners of CPS who were to perform the majority of the contract,¹¹⁴ and CPS had failed to comply with the mandatory requirement of submitting separate bids for each province.¹¹⁵ However, despite this finding, the High Court did not set aside the decision to award the tender to the successful bidder.¹¹⁶

In its judgment the SCA recognised that irregularities frequently present themselves in the context of tender awards.¹¹⁷ However, in its view 'a fair process does not demand perfection and not every flaw is fatal'.¹¹⁸ Furthermore, the SCA pointed out that '[i]t would be gravely prejudicial to the public interest if the law was to invalidate public contracts for inconsequential irregularities'.¹¹⁹ In the SCA's view, then, the potential effects of declaring an award invalid is at least a factor to be considered in determining the lawfulness or otherwise of an award.

However, prejudice to the public interest could only arise if an award is set aside. This is a question of remedy, to be considered only once an unlawful irregularity in the award process is found. As in *Moseme*, the fact that the court does regard the setting aside of the award as relevant to the lawfulness

¹¹⁰ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v The Chief Executive Officer of the South African Social Security Agency and Others* (NGHC) unreported case no 7447/12 (28 August 2012) para 6.

¹¹¹ *Ibid* para 5.

¹¹² *Ibid* para 80.

¹¹³ *Ibid* para 58.

¹¹⁴ *Ibid* para 65.

¹¹⁵ *Ibid* para 66.

¹¹⁶ *Ibid*.

¹¹⁷ *Supra* note 4 para 21.

¹¹⁸ *Ibid*.

¹¹⁹ *Ibid*.

enquiry shows that it at least to some extent conflates the lawfulness enquiry with the remedial enquiry.

This issue was finally resolved on a further appeal in *AllPay*, where the CC rejected the idea that 'the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist'.¹²⁰ The court also rejected the idea that 'even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in determining the validity of administrative action'.¹²¹ In the CC's view such an approach 'undermines the role procedural requirements play in ensuring even treatment of all bidders',¹²² and that 'it overlooks that the purpose of a fair process is to ensure the best outcome'.¹²³

The court therefore unequivocally separates the lawfulness enquiry from that of a just and equitable remedy. It is now clear that whether or not an administrative decision in the context of procurement awards is lawful or not does not require a consideration of what the potential consequences of such a finding would be. Any such consequences are only brought into account and given due consideration when, in the event of a finding of unlawfulness, the court must determine a just and equitable remedy. The court calls this a 'clear distinction, between the constitutional invalidity of administrative action and the just and equitable remedy that may follow from it'.¹²⁴

3.5.2 The notion of fundamental irregularities

In *Sanyathi* the court considered whether the irregularity in question – the granting of an award on the strength of an unlawful tender notice – was 'formal, superficial and easily remedied' or a 'fundamental illegality'.¹²⁵ The court held that such an irregularity was in fact 'fundamental'¹²⁶ and

¹²⁰ *Supra* note 6 para 23.

¹²¹ *Ibid.*

¹²² *Ibid* para 24.

¹²³ *Ibid.*

¹²⁴ *Ibid* para 26.

¹²⁵ *Sanyathi* *supra* note 2 para 12.

¹²⁶ *Ibid* para 18.

'foundational',¹²⁷ reasoning that 'the deviation from s 2(1)(b) of the PPPFA contaminates the core of the tender'.¹²⁸ As a result, the subsequent award of the tender based on this irregularity was unlawful and invalid¹²⁹ as it was contrary to the requirements of s 217.¹³⁰

Similarly, in *Rainbow Civils* the court held that a tender awarded on the strength of a tender document containing inconsistencies and contradictions was irregular and unlawful.¹³¹ The court noted that such irregularities were 'material as they relate to a fundamental part of the tender process'.¹³² The court noted that 'the imperatives of fairness and transparency, laid down in section 217(1) of the Constitution, dictate that prospective tenderers should be properly informed of the tender evaluation criteria to be applied'.¹³³

At least in these two cases the idea that an irregularity is in some sense fundamental features prominently in the courts' finding of unlawfulness. This by itself is unsatisfactory, as it leaves us in no better position in distinguishing between fundamental and non-fundamental irregularities. What the courts seem to imply, however, is that the unlawfulness of the irregularity depends on whether or not it offends the requirements of s 217. In this sense a fundamental irregularity is simply one which has the effect of undermining s 217. Section 217 thus provides the benchmark against which we may measure whether or not an irregularity is unlawful. Such an approach is beneficial given the many different ways in which an irregularity may be present.

3.5.3 Linking lawful compliance with the purpose of the provision

The CC's judgment in *AllPay* presents the most comprehensive and recent authority on the legal principles applicable to the determination of unlawfulness in government procurement. In it the court lays down the

¹²⁷ Ibid para 21.

¹²⁸ Ibid.

¹²⁹ Ibid para 25 and 40.

¹³⁰ Ibid para 33.

¹³¹ *Rainbow Civils* supra note 2 para 74.

¹³² Ibid.

¹³³ Ibid para 72.

procedure to be followed in determining whether or not an irregularity is material. This is done by determining 'factually, whether an irregularity occurred'¹³⁴ and, secondly, whether such irregularity 'amounts to a ground of review under PAJA'.¹³⁵ This second enquiry is a 'legal evaluation [which] must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision'.¹³⁶ The court also reaffirms the centrality of s 217 and the legislation making up the procurement framework to the determination of whether or not a ground of review has been established under the PAJA.¹³⁷

The two areas in which the CC disagreed with the SCA was on the issue of black economic empowerment and the effect of Bidders Notice 2. The Request For Proposals had provided that bidders could claim 'preference points' based on black equity ownership and that 'tenders would be evaluated using a system which awards points on the basis of the tendered price and equity ownership'.¹³⁸ Tenderers were thus able to score higher and achieve a greater likelihood of success depending on their BEE status. AllPay had argued that as SASSA had not satisfied itself to the BEE credentials of CPS's partners (who were to perform a substantial portion of the contract) the decision to award the decision to CPS was unlawful.

The SCA had held that the failure on the part of SASSA to assess the BEE partners of CPS did not constitute a reviewable irregularity as 'SASSA was not required by law to assess the companies',¹³⁹ there was no unfairness to AllPay,¹⁴⁰ and as SASSA could guard against any risk by imposing contractual conditions on CPS its decision was not irrational or unreasonable.¹⁴¹

¹³⁴ *AllPay (CC)* supra note 6 para 28.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid* para 32-45.

¹³⁸ *Ibid* para 66.

¹³⁹ *AllPay (SCA)* supra note 4 para 66.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

AllPay also contended that Bidders Notice 2 was irregular because it had the effect of making biometric verification compulsory, whereas the Request for Proposals had merely regarded this as a preference.¹⁴² The SCA rejected the notion that Bidders Notice 2 had the effect of changing 'what had been asked for in the RFP'.¹⁴³ Instead,

'Bidders Notice 2 made a difference to bidders only if they did not have the mandatory solution and were bidding against others who also did not have the solution. Before Bidders Notice 2 their bids would have been considered. After Bidders Notice 2 their bids would be rejected. But it made no difference to such a bidder who was in competition with a bidder who did have the mandatory solution. In that competition bidders were told by clause 3.3.1 that the mandatory solution would be chosen above other solutions. *Bidders Notice 2 placed the bidder in no worse position. His or her solution would not have been chosen in any event. The notice informed the bidder only that he or she need not bid at all*'.¹⁴⁴

The SCA places great store on the effect of Bidders Notice 2 in determining whether or not it resulted in unfairness. The court's argument is essentially thus: as the RFP already listed biometric verification as a preference, it was bound to accept any tender that offered such a solution over any other tender that did not. And as Bidders Notice 2 now made biometric verification a requirement, it would make no difference in the circumstances to the position of AllPay vis-a-vis CPS. This is because if the tender was awarded according to the requirements of the RFP CPS would be preferred over AllPay because it offered a preferred solution which AllPay did not. If the tender was awarded according to Bidders Notice 2 (which it was) CPS would be, and was, preferred over AllPay as it offered a required solution which AllPay did not. In short, AllPay would have lost under both sets of requirements and, as such, Bidders Notice 2 could not result in unfairness to AllPay.

The CC disagreed with the SCA on both counts. It held that black economic empowerment in the context of procurement requires '[s]ubstantive empowerment, not mere formal compliance'.¹⁴⁵ Accordingly,

¹⁴² Ibid para 71.

¹⁴³ Ibid para 73.

¹⁴⁴ Ibid para 74. My emphasis.

¹⁴⁵ AllPay (CC) supra note 6 para 55.

this placed 'an obligation on SASSA to ensure that the empowerment credentials of the prospective tenderers were investigated and confirmed before the award was finally made'.¹⁴⁶

As SASSA failed to satisfy itself as to the BEE credentials of CPS and its partners 'the true goal of empowerment requirements was never given effect to'.¹⁴⁷ In other words, the purpose of the relevant empowerment requirements was to ensure the attainment of substantive empowerment. As the empowerment credentials of CPS were not investigated the purpose of the provision could not be achieved, thus making the irregularity material.¹⁴⁸

On the issue of biometric verification the CC found that Bidders Notice 2 caused confusion not only among bidders, but even among members of the BEC and BAC.¹⁴⁹ It resulted in AllPay's score being lowered below 70% and thus effectively disqualifying AllPay from the process. As such, 'no comparison of the competitiveness of AllPay's and Cash Paymaster's bids was made regarding price'.¹⁵⁰ There was thus 'vagueness and uncertainty about the nature and importance of the verification requirements in relation to payments' which were 'highly material'.¹⁵¹ The court held that this created confusion on both the issue of whether or not the evaluation of the bids was to be done on the basis of biometric verification being mandatory or preferable and at what stage such biometric verification had to be done.¹⁵² Accordingly, the tender was reviewable under s 6(2)(i) of the PAJA.¹⁵³ Furthermore, the court acknowledged that this has the effect of rendering the tender process unfair.¹⁵⁴ This is because

'[t]he purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive.

¹⁴⁶ Ibid para 69.

¹⁴⁷ Ibid para 70.

¹⁴⁸ Ibid para 72.

¹⁴⁹ Ibid para 78.

¹⁵⁰ Ibid.

¹⁵¹ Ibid para 79.

¹⁵² Ibid para 80.

¹⁵³ Ibid para 87.

¹⁵⁴ Ibid para 88.

Because of the uncertainty caused by the wording of the Request for Proposals and Bidders Notice 2, that purpose was not achieved in this case'.¹⁵⁵

The case of *AllPay* represents most clearly the dilemma that is faced when courts are asked to pronounce on the validity of large-scale tender awards, the setting aside of which has the potential to cause massive disruption to public programmes and which could be detrimental to the public interest. That the SCA and the CC took such divergent views on the lawfulness of the award is also significant. The SCA had held that irregularities that were inconsequential were not material. The CC held that lawfulness is to be determined not on the basis of whether or not such irregularity affects the outcome of a decision, but on the basis of whether or not the purpose of a requirement is given effect to.

The CC also links the purpose of a tender with the requirements of s 217. Ultimately, it seems that lawfulness in tender disputes is to be determined by whether or not the purpose of a provision, gleaned from 217, is given effect to. In the CC's own words '[t]he materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained'.¹⁵⁶ Interestingly, this test is substantially the same as that adopted by the SCA in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others*¹⁵⁷ where the court said as follows: '[i]n determining whether this non-compliance rendered the appellant's tender unacceptable, regard must also be had to the purpose of the declaration of interest in relation to the tender process in question'.¹⁵⁸ The CC in *AllPay* thus reaffirms this.

A notable concern with this test is that, whilst it may assist lawyers and judges in determining the lawfulness or otherwise of a tender award once a dispute has arisen, it may be of little assistance to administrators tasked with the awarding thereof. We have already seen how unwieldy the procurement

¹⁵⁵ Ibid para 92.

¹⁵⁶ Ibid para 22.

¹⁵⁷ 2008 (2) SA 481 (SCA).

¹⁵⁸ Ibid para 19.

framework is. Accordingly, there may be any number of provisions relevant to the award of a specific tender. Working out the purpose of a provision, if there is in fact only one, may not be workable in practice. The purpose of a certain provision may also not be clear. This is problematic as administrators should be able to rely on clear provisions to guide their decision-making, and to maximise the incidence of legality of those decisions made. The procurement framework is anything but clear. Throwing into the mix an enquiry into the purpose of those provisions may add more complexity and confusion to an already complex and confused area of law.

3.6 Conclusion

The legal framework of government procurement, and therefore the framework within which lawfulness is to be determined, is unwieldy and overly complex. As the CC noted in *AllPay*:

'Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act provide the constitutional and legislative framework within which administrative action may be taken in the procurement process'.¹⁵⁹

Given such a framework within which to work, it is little wonder that '[c]ases concerning tenders in the public sphere are coming before the courts with disturbing frequency'.¹⁶⁰ Although the courts in almost every tender dispute recognise at the outset that s 217 of the Constitution governs the enquiry, it is not always clear what this means. At times lawfulness is determined solely by reference to s 217, although it may also be determined on the basis of non-compliance with specific legislative provisions.

The courts have also at times failed to separate the issues of unlawfulness and remedy, which led to the idea that the consequences of declaring an award invalid may to some extent count as reason not to find the award

¹⁵⁹ *AllPay* (CC) supra note 6 para 45.

¹⁶⁰ *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) para 1.

unlawful. This has been rectified by the CC in *AllPay*. Remedial concerns are not relevant to the determination of lawfulness.

Once a court has declared an award unlawful, it must then engage with the question of a just and equitable remedy, which to a large extent concerns the decision of whether or not to set aside the unlawful award. This determination must take into account a number of potentially conflicting considerations. Given that a court may decline to set aside such an award, which itself was an infringement of the principle of legality, such a decision requires proper justification.

Chapter 4

THE SETTING ASIDE OF UNLAWFUL GOVERNMENT PROCUREMENT AWARDS

4.1 Introduction

Aggrieved bidders would no doubt expect a court to set aside an unlawful tender award. After all, the courts have a duty to provide effective relief in the event that the breach of a right is shown. The aggrieved bidder, in addition to the costs incurred in litigating and proving the unlawfulness of the award, may have also won the tender, had it not been awarded unlawfully.

However, in deciding whether or not to set aside an unlawful tender award, the courts must take into account more than just these considerations. For example, there may be practical difficulties involved in setting aside the award. Furthermore, it may be that the interests of the aggrieved bidder are not the only interests relevant to the court's determination. Ultimately, the court's task may not be an easy one, especially since unlawful tender awards infringe the principle of legality.

4.2 The right/s infringed in unlawful tender awards

4.2.1 Introduction

Typically, it will be the infringement of a legal right which induces a litigant to seek legal redress and which justifies a court granting that party some form of relief.¹ The purpose of a remedy, then, is to provide some form of redress for the party who suffered due to the breach of a legal right.² Accordingly, the remedy granted would then seem to depend at least to some extent on the nature of the right infringed and the nature of the interests being vindicated.

¹ Michael Bishop 'Remedies' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2013) (Revision service 5) 9-5.

² Ibid.

To properly understand a remedy it is therefore important to also understand the nature of the right infringed.

In cases concerning unlawful tender awards the litigant approaching the court is almost always an aggrieved tenderer,³ which suggests that any right infringed in these cases is one held by that tenderer. As the tender process constitutes administrative action⁴ unsuccessful tenderers invariably plead the breach of the right to just administrative action when seeking relief. Arguably, then, the right infringed in such cases is simply that of just administrative action, contained in s 33 of the Constitution⁵ and given effect to by the Promotion of Administrative Justice Act⁶ (the PAJA). However, two features of South African public procurement suggest that the right infringed in unlawful tender awards may be something more than simply just administrative action.

4.2.2 A right over and above just administrative action

In order to ensure government tenders are awarded fairly, the legal framework makes use of a points system in that it prescribes that tenders must be awarded to the tenderer who scores the most points. The Preferential Procurement Policy Framework Act⁷ (the PPPFA) stipulates that 'the contract must be awarded to the tenderer who scores the highest points unless objective criteria...justify the award to another tenderer'.⁸ The regulations promulgated in terms of the PPPFA repeat this requirement.⁹ In the municipal sphere, the Local Government: Municipal Finance Management Act¹⁰ (the MFMA) stipulates that 'each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of [that] Part'.¹¹ The regulations promulgated in terms of s 111 stipulate that the supply

³ *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) para 1.

⁴ *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) para 5.

⁵ Constitution of the Republic of South Africa, 1996.

⁶ Act 3 of 2000.

⁷ Act 5 of 2000.

⁸ *Ibid* s 2(1)(f).

⁹ GN 9544 in GG 34350 of 8 June 2011 reg 6(5) read with reg 7(1).

¹⁰ Act 56 of 2003.

¹¹ *Ibid* s 111.

chain management policy of a municipality must be 'consistent with other applicable legislation',¹² other applicable legislation being defined to include the PPPFA.¹³ Likewise, the regulations¹⁴ promulgated in terms of the Public Finance Management Act¹⁵ (the PFMA) – which applies to procurement in the national and provincial spheres – states that the supply chain management system adopted in terms thereof 'must...be consistent with the [PPPFA]'.¹⁶

Read together, the upshot of these requirements is that all national, provincial, and municipal supply chain management policies must provide that tenders are to be awarded to the bidder scoring the highest number of points unless objective criteria justify otherwise. This would seem to impose a duty on the relevant administrator to award any tender to that tenderer who in fact scores the most points, assuming there are no objective criteria justifying otherwise. Arguably, the tenderer scoring the most points then has a legal right to receive that tender for which they bid, in addition to the right to just administrative action.

*RHI Joint Venture v The Minister of Roads and Public Works, Eastern Cape and Others*¹⁷ is instructive in this regard. In this case the tender forming the subject matter of the dispute was awarded not to the bidder scoring the most points, namely RHI,¹⁸ but to another bidder. The court found that the body awarding the tender had acted unlawfully in that it had awarded the tender on the basis of criteria which could not be considered objective in terms of the PPPFA.¹⁹ Importantly, the court noted that 'had the Tender Board applied the provisions of the PPPF Act in a proper manner, it was obliged to award the tender to the applicant'.²⁰ In making this statement the court clearly suggests, firstly, that the PPPFA requires tenders to be awarded to those bidders who

¹² GN 868 in GG 27636 of 30 May 2005 reg 2(1)(d).

¹³ Ibid reg 1.

¹⁴ GN 225 in GG 27388 of 15 March 2005.

¹⁵ Act 1 of 1999.

¹⁶ Reg 16A3.2(b).

¹⁷ 2003 (5) BCLR 544 (Ck).

¹⁸ Ibid para 9.

¹⁹ Ibid para 40.

²⁰ Ibid para 49.

score the most points and, secondly, that administrators awarding tenders have an obligation to award the tender to the bidder scoring the most points, provided there are no objective criteria justifying otherwise.

4.2.3 Awarding a tender to an initially unsuccessful tenderer

The second aspect of tender disputes that suggests a right in addition to that of just administrative action is that in some cases the courts order that the contract be awarded to the unsuccessful bidder who, but for the unlawful award, would have received the tender. Again in the case of *RHI Joint Venture* the court, upon finding the award of the tender forming the subject matter of the dispute to be unlawful, ordered that the tender be awarded to the applicant.²¹

Likewise, in *Trencon (Pty) Ltd v The Industrial Development Corporation of South Africa Limited and Another*²² Trencon had both scored the most points²³ and been recommended for the award.²⁴ Despite this, the IDC had awarded the tender to another bidder. The High Court found the award to be unlawful on the basis that the decision to do so was influenced by a material error of law²⁵ and awarded the tender to Trencon. On appeal, the Supreme Court of Appeal (SCA) reversed this order on the basis that no exceptional circumstances existed to justify awarding the tender to Trencon.²⁶ However, on a further appeal, the Constitutional Court (CC) reinstated the order of the High Court that Trencon be awarded the tender, on the basis that the court was 'in as good a position as the IDC to award the tender to Trencon',²⁷ and that the

²¹ Ibid para 51.

²² (NGHC) unreported case no 58961/12 and 70100/12 (3 June 2013).

²³ Ibid para 49.

²⁴ Ibid para 50.

²⁵ Ibid para 44.

²⁶ *Industrial Development Corporation of South Africa Ltd v Trencon Construction (Pty) Ltd and Another* [2014] 4 All SA 561 (SCA) para 20.

²⁷ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) para 57-58.

decision to award the tender to Trencon was ultimately a 'foregone conclusion'.²⁸

4.2.4 The rejection of a right to be awarded a government tender

The preceding discussions show that it is at least arguable that a bidder who scores the most points in a tender process has a legal entitlement to receive that award, over and above the right to just administrative action. Such a right also seems distinct from the right to just administrative action. However, this idea has not been emphatically accepted, and the SCA seems to have rejected it. In *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another*²⁹ the SCA had to consider whether the court a quo was correct in holding that the tender had been unlawfully awarded to the successful bidder and that the relevant administrator 'was obliged to award the contract' to the unsuccessful bidder.³⁰ The court ultimately found that the court a quo erred in both respects and that the unsuccessful tenderer in this case 'was not as a matter of law entitled to the contract'.³¹

Moseme, however, must be read with caution when approaching the question of whether an unsuccessful tenderer who objectively scores the most points has a legal right to such award. The principal reason the SCA found that the unsuccessful tenderer was not entitled to the contract was that its bid did not in fact comply with the relevant regulations and should have been disqualified.³² As such, although *Moseme* certainly suggests that tenderers do not acquire a right to receive a tender for which they bid, this is not the ratio of the decision. *Moseme* therefore does not answer the question of whether an unsuccessful tenderer has such a right. It only leaves us wondering whether

²⁸ Ibid para 71.

²⁹ Supra note 3 para 1.

³⁰ Ibid para 12.

³¹ Ibid para 14.

³² Ibid para 14.

the unsuccessful tenderer concerned would have had a legal entitlement to the contract had it complied with the regulations.

The SCA's judgment in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*³³ provides probably the strongest suggestion so far that an unsuccessful bidder does not have a legal right to receive a contract for which they bid. In its judgment the SCA held that 'bidders do not have a right to a contract' and that there is no 'basis upon which a bidder could be said to have a legitimate expectation of being heard in the course of a tender evaluation'.³⁴ These statements seem to reject emphatically the notion that an unsuccessful bidder in tender disputes could have any right over and above that of the right to just administrative action.

Ultimately, it seems that aggrieved bidders do not have a right to receive a tender award on the strength of a tender which scores the highest points. This is despite both what the procurement framework suggests and the fact that in some cases the courts award disputed tenders to such bidders. Furthermore, aggrieved bidders already have recourse in the guise of the PAJA and breach of the right to just administrative action. Indeed, this seems to make it unnecessary to recognise any such further right to receive a tender award, as there already exists a developed legal framework within which to resolve these disputes. The implication of this is that receiving a tender award as a result of lawful administrative action is probably best regarded as a consequence of the right to just administrative action, and not the content of the right itself.

³³ 2013 (4) SA 557 (SCA).

³⁴ *Ibid* para 95.

4.3 The courts' approach to setting aside unlawful tender awards

4.3.1 Introduction

Tender disputes are constitutional in nature.³⁵ As such, the remedial stage is governed by s 172 of the Constitution, which states that '[w]hen deciding a constitutional matter within its power, a court...may make any order that is just and equitable'.³⁶ The PAJA, which also finds application due to the administrative nature of the award process, similarly prescribes that a court 'may grant any order that is just and equitable'.³⁷ The only order that a court is obliged to make is to declare any unconstitutional conduct invalid. This is because s 172 states that a court 'must declare that any...conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency'.³⁸ Apart from the obligation to declare unlawful tender awards invalid, the courts in tender disputes clearly enjoy a wide discretion when making an order.

The remedy with which we are primarily concerned is the setting aside of an unlawful tender award. This remedy is particularly noteworthy due not only to its practical effect and obvious appeal to an unsuccessful tenderer, but also the fact that by and large this form of relief is what unsuccessful tenderers seek when taking the decision to award a tender on review.³⁹ The setting aside of an award is also a necessary precondition to the unsuccessful tenderer having another chance at obtaining the contract. Applications for the judicial review of government tender awards are thus invariably concerned with the setting aside of those awards.

The starting point of any enquiry into the remedial stage of a tender dispute is s 8 of the PAJA. Time and again courts begin their remedial

³⁵ Constitution, 1996 s 217.

³⁶ S 172(1)(b).

³⁷ S 8(1).

³⁸ S 172(1)(a).

³⁹ See *Moseme* supra note 3 para 1 where Harms DP states that '[c]ourts...are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them'.

determinations with this provision.⁴⁰ Both the setting aside of an unlawful tender award and the granting of a tender award to the unsuccessful tenderer are contemplated as remedies in s 8.⁴¹ However, whether or not a court will grant either or both of these remedies depends on whether it would be just and equitable to do so.⁴²

4.3.2 The setting aside of an unlawful tender award as a just and equitable remedy

The remedial stage in tender disputes is said to entail a 'process of striking a balance between the applicant's interests, on the one hand, and the interests of the respondents, on the other'.⁴³ Furthermore, the public interest necessarily has a role to play in this determination.⁴⁴ In *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others*⁴⁵ the court pointed out that an order setting aside an unlawful tender contract

'can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large...Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable'.⁴⁶

Similarly, in *Sanyathi Civil Engineering and Construction (Pty) Ltd v eThekweni Municipality, Group 5 Construction (Pty) Ltd v eThekweni Municipality*⁴⁷ the court held that courts must 'strike a balance between the

⁴⁰ See for example *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) para 22; *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Another* (WCHC) unreported case 21158/12 (6 February 2013) para 115; and *Sanyathi Civil Engineering and Construction (Pty) Ltd v eThekweni Municipality, Group 5 Construction (Pty) Ltd v eThekweni Municipality* (KZPHC) unreported case 7538/11 (24 October 2011) para 100.

⁴¹ S 8(1)(c).

⁴² S 8(1).

⁴³ *Millennium Waste Management* supra note 40 para 22.

⁴⁴ *Ibid* para 23. Also see *Rainbow Civils* supra note 40 para 115 where it was stated that the exercise of the court's discretion to grant any remedy that is just and equitable 'involves a balancing between the interest of the disappointed tenderer, the interests of the successful tenderer, and the interests of the public at large'.

⁴⁵ *Supra* note 40.

⁴⁶ *Ibid* para 23.

⁴⁷ *Supra* note 40.

interests of the administrative body, the unsuccessful tenderers, the successful tenderer and...the public'.⁴⁸

4.3.2.1 The unsuccessful tenderer's interests

The interests of the unsuccessful tenderer are relatively clear. Firstly, the unsuccessful tenderer's right to just administrative action is undermined in an unlawful tender process. Secondly, the unsuccessful tenderer has a very real commercial interest in being given a fair opportunity to bid for a public tender contract. The unsuccessful tenderer may also rely heavily on government contracts to sustain its business, and may even be performing the type of work to be done in the tender under an already existing contract. In such a case they would have a very real interest in being awarded the new tender contract in order to continue with the type of work already being performed.

4.3.2.2 The successful tenderer's interests

Whether or not any interests of the successful tenderer are to be taken into account would seem to depend on whether or not the successful tenderer was either innocent or somehow complicit in the unlawfulness of the award. In the latter scenario it is unlikely that the interests of the successful tenderer would have any bearing on the determination of whether or not to set aside the award. In *Millennium Waste Management* the unsuccessful tenderer had been unlawfully excluded from the tender process. The court noted that if the successful tenderer 'was complicit in some way in bringing about the exclusion of the tender...it would have been appropriate to set aside the decision for that reason alone'.⁴⁹ Accordingly, it would seem that only those interests of an *innocent* successful tenderer are to be taken into account in determining a just and equitable remedy.

The most obvious interest relevant to an innocent successful tenderer in such cases relates to whether or not the tenderer will retain the contract or lose

⁴⁸ Ibid para 100.

⁴⁹ Supra note 40 para 26.

it. The extent of this interest would also depend on whether the successful tenderer has already started performing in terms of the contract and incurred any expense in doing so. Again, in *Millennium Waste Management*, the court noted that the

'decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often followed by further contracts concluded by the tenderer in executing the contract'.⁵⁰

In fact, in such cases it would seem that the successful tenderer becomes 'obliged to perform' under the contract they have been awarded.⁵¹ In *Steenkamp NO v The Provincial Tender Board, Eastern Cape*⁵² it was noted in the minority judgment that '[a] successful tenderer...is a bearer of obligations to comply with the contractual obligations it undertakes once the tender has been awarded'.⁵³

4.3.2.3 The public interest

When dealing with the interests of the different parties hoping to acquire procurement contracts, it must be remembered that '[p]ublic procurement is not a mere showering of public largesse on commercial enterprises. It is the acquisition of goods and services for the benefit of the public' the interests of which are 'as material' to the determination of the dispute as are those of the parties thereto.⁵⁴ In fact, the public interest is arguably the most important interest taken into consideration in determining whether or not to set aside an unlawful tender award.⁵⁵

⁵⁰ Ibid para 23.

⁵¹ Ibid para 27.

⁵² 2007 (3) SA 121 (CC).

⁵³ Ibid para 80.

⁵⁴ *AllPay (SCA)* supra note 33 para 19.

⁵⁵ See *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) para 32 where the court noted that 'in the context of public procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity...but also in relation to the effect of the order on future procurement'.

This is perhaps easy to overlook, given that the parties in tender disputes are generally the unsuccessful tenderer, the successful tenderer, and the relevant public body awarding the tender. Unsuccessful tenderers also typically allege a breach of their own rights, and not any direct wrong to the public. However, to focus solely or even primarily on the rights of an aggrieved tenderer is to lose sight of the broader public interests which government tenders are meant to serve. As such, a court fashioning an appropriate remedy must take these broader interests into account. As the CC noted in its 'remedy judgment' in *AllPay*,

'[t]he primacy of the public interest in procurement...must also be taken into account when the rights, responsibilities, and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range'.⁵⁶

The public interest itself consists of a number of different, sometimes 'competing considerations'.⁵⁷ On the one hand there is the consideration of legality which 'undoubtedly requires that administrative action be lawful'.⁵⁸ This consideration is rooted in the idea that the public has a very real and significant interest in public officials complying with, and obeying, the law. It is in the public interest that administrators do not exceed the bounds of their authority. On the other hand there is the consideration of certainty which 'requires finality of administrative decisions and the exercise of administrative functions'.⁵⁹ This consideration is informed by the notion that the public often acts on the basis of administrative acts and should be able to assume that such acts are lawful.⁶⁰ If members of the public cannot have confidence in the belief that those administrative actions on which they base their decisions are lawful, obvious problems relating to uncertainty and insecurity over one's own position can arise.⁶¹

⁵⁶ *Ibid* para 33.

⁵⁷ *Rainbow Civils* supra note 40 para 116.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA) para 33.

⁶¹ *Ibid*.

The consideration of finality is also said to include 'considerations of pragmatism and practicality'.⁶² To a large extent this concerns the feasibility of setting aside a contract on the strength of which the successful tenderer has already started performing. Two other significant public interests relevant to the determination of whether or not to set aside unlawful tender awards are, firstly, the financial burden associated with this course of action and, secondly, the disruption caused by setting aside the contract, particularly with regard to those meant to benefit from the services or goods procured.

Considerations such as these were central to the court's decision not to set aside a tender award in *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*.⁶³ This was despite the fact that the court found the award to be unlawful⁶⁴ and that the unsuccessful tenderer applying for the review was 'not in any way to blame for a delay in initiating proceedings or bringing them to finality'.⁶⁵ Ultimately, 'the impracticability of attempting to start the tender process over again for the completion of the remaining work' if the contract were set aside would be both 'disruptive' and 'give rise to a host of problems'.⁶⁶

Likewise, in *Millennium Waste Management*, a case concerning a tender 'for the provision of services relating to the removal, treatment and disposal of healthcare waste material from hospitals',⁶⁷ the disruption that would occur were such tender contract to be set aside played a central role in the court's determination.⁶⁸ In the court's view '[t]he removal and disposal of medical waste must be carried out without interruption'.⁶⁹ Ultimately, the court ordered that the tender contract be set aside only if, on a re-evaluation of the appellant's tender, its tender ought to have been accepted,⁷⁰ thus 'taking into

⁶² *Rainbow Civils* supra note 40 para 116.

⁶³ 2008 (2) SA 638 (SCA) para 27.

⁶⁴ *Ibid* para 14.

⁶⁵ *Ibid* para 26.

⁶⁶ *Ibid* para 27.

⁶⁷ *Supra* note 40 para 1.

⁶⁸ *Ibid* para 28.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* para 35.

account the public interest' in not having the services in question being interrupted.⁷¹

AllPay provides a good example of how public contracts can be so significant and of such magnitude that to set them aside would result in 'immense disruption...with dire consequences to millions of the elderly, children and the poor'.⁷² In that case, it will be recalled, the High Court had found the award in question to be unlawful.⁷³ However, despite this finding, it decided not to set aside the award.⁷⁴ Its reasons for doing so were essentially that any legality concerns were outweighed by the danger inherent in the likelihood that the payments of social grants would be interrupted.⁷⁵ Although the SCA, on appeal, did not find that the tender award in question was unlawful,⁷⁶ the following statement from the court, referring to the amicus curiae's concern in the event that the award should be set aside, is telling: 'they had no cause for concern. It is unthinkable that that should occur'.⁷⁷

In *Rainbow Civils* the court considered the 'crucial consideration' in deciding whether or not to set aside an unlawful tender contract to be the fact that no work relating to the tender had been performed and that, accordingly, no public expenditure had yet taken place.⁷⁸ As such, setting aside the tender 'would not...result in any loss to the public purse through waste or duplication'.⁷⁹

⁷¹ Ibid para 32.

⁷² Supra note 33 para 99.

⁷³ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v The Chief Executive Officer of the South African Social Security Agency and Others* (NGHC) unreported case no 7447/12 (28 August 2012).

⁷⁴ Ibid para 80.

⁷⁵ Ibid para 78.

⁷⁶ *AllPay* supra note 33 para 96.

⁷⁷ Ibid para 99.

⁷⁸ Supra note 40 para 120.

⁷⁹ Ibid.

4.3.3 Weighing the various interests relevant to setting aside an unlawful tender award

As we have already seen, the setting aside of a tender award could have 'catastrophic consequences' for the successful tenderer,⁸⁰ and possibly also for any number of innocent contractors further down the contractual chain. In addition, the various public interests must also be considered. The question which then presents itself is how all these different interests are to be weighed in the court's determination of whether or not to set aside an unlawful tender award.

In *Millennium Waste Management* the interests of the successful tenderer were clearly an important, albeit not the overriding, consideration in such determination.⁸¹ In contrast, in *Rainbow Civils* the position of the innocent successful tenderer did not carry much weight in the court's determination.⁸² To a large extent this would seem to be because the expenses incurred by the successful tenderer were for assets that could still be utilised by the business in future.⁸³ As such, the court did not consider these expenses, or even 'the failure to submit a tender for another contract',⁸⁴ as 'constitut[ing] real prejudice...in the sense of a detrimental alteration of [the successful tenderer]'s position in anticipation of the validity of the tender award'.⁸⁵ In addition, whilst the successful tenderer in *Rainbow Civils* was innocent in the sense that it did not have a hand in bringing about the unlawfulness of the award, it 'was the author of its own misfortunes' in that it failed to ensure its tender was not irregular.⁸⁶

The weight accorded to the disruption caused by the setting aside of an unlawful tender contract differs depending on the nature and extent of both

⁸⁰ *Millennium Waste Management* supra note 40 para 23.

⁸¹ *Ibid* para 27.

⁸² *Supra* note 40 para 123-4.

⁸³ *Ibid*.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*.

⁸⁶ *Ibid* para 125.

the service and the disruption. In *Millennium Waste Management*, the disruption was accorded significant weight as the nature of the service was crucial, namely the management and disposal of medical waste.⁸⁷ On the other hand, in *Rainbow Civils* the disruption to be caused by setting aside the contract was accorded little weight.⁸⁸ The difference had to do with the facts in each case. In *Millennium Waste Management* the province of Limpopo would not itself have been able to provide the services forming the content of the tender contract should such contract be set aside,⁸⁹ whereas in *Rainbow Civils* the service in question, namely 'the daily cleaning of some 133 schools and 13 clinics, and the clearing of vacant provincial land of vegetation and refuse',⁹⁰ had to date been carried out by the relevant department who could continue to do so should the contract be set aside.⁹¹ In addition, almost no weight was accorded to the fact that the necessary employees would not benefit from the employment generated by the contract in *Rainbow Civils* should it be set aside.⁹²

Ultimately, the weight to be accorded to the interests of a specific tenderer would depend on the facts of the case, whether the tenderer had taken steps to protect its position or mitigate its loss, and the extent of the prejudice suffered by the tenderer were the award to be set aside. The weight accorded to various public interests is also fact specific, depending to a large extent on the nature and degree of the harm and the likelihood of it occurring should the award be set aside.

In the event that the harm involved in setting aside an unlawful tender award outweighs legality considerations, a court will in all likelihood decline to set aside that award. Given the apparent conflict that exists with such an order, such an approach calls for justification.

⁸⁷ Ibid para 28.

⁸⁸ Supra note 40 para 121.

⁸⁹ Supra note 40 para 28.

⁹⁰ Supra note 40 para 3.

⁹¹ Ibid para 121.

⁹² Ibid para 122.

4.4 Justifying the decision to allow an unlawful tender award to stand

4.4.1 Ubi jus, ibi remedium

There is a line of thought, especially in the constitutional context, which emphasises the need for a remedy in the event of a breach or infringement of one's right. This can be expressed as 'ubi jus, ibi remedium' – translated as '[w]here there's a right, there must be a remedy'.⁹³ The idea that rights must have remedies is informed by the functions which remedies perform, namely that they 'define abstract rights and enforce otherwise intangible rights'.⁹⁴ In other words, remedies give effect to rights. Without a remedy, a right is either meaningless, useless, or both. As Bishop notes, '[t]here would be no point in possessing a right, in terms of law, that offered no relief to the person who sought its enforcement'.⁹⁵

We can see the force in this argument more clearly if one considers what the nature of rights would be in the absence of any remedies. As Thomas explains, without remedies rights would lose their 'enforcement power' and would 'simply become something that one should do, but not something that one is compelled to do'.⁹⁶ The danger in this is that, in the absence of remedies, the normative force of legal rights would become watered down to such an extent that 'rights may simply be ignored'.⁹⁷ Zeigler, in exploring the normative aspect of why rights should have remedies, goes so far as to say that 'a right without a remedy is not a legal right; it is merely a hope or a wish'.⁹⁸ In addition, a duty that cannot be enforced 'is not really a duty; it is only a voluntary obligation that a person can fulfil or not at his whim'.⁹⁹ Accordingly, it would seem that the ability to enforce one's rights through obtaining a remedy is

⁹³ Tracy Thomas 'Ubi jus, ibi remedium: The Fundamental Right to a Remedy Under Due Process' (2004) 41 *San Diego Law Review* 1633 at 1636.

⁹⁴ *Ibid* at 1638.

⁹⁵ Bishop *op cit* note 1 at 9-7.

⁹⁶ Thomas *op cit* note 93 at 1639.

⁹⁷ *Ibid* at 1640.

⁹⁸ Donald Zeigler 'Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts' (1986) 38 *Hastings Law Journal* 665 at 678.

⁹⁹ *Ibid* at 678.

what moves rights from the realm of prospect to that of certainty, and duties from the realm of discretionary to that of obligatory.

The claim that rights should have remedies is also informed by the purposes which rights are thought to serve. Rights ensure the regulation of social behaviour and advance individual well-being.¹⁰⁰ Importantly, rights also 'assist society in treating people equally' and promote order and predictability, thus enabling people to act upon reasonable expectations in managing their affairs'.¹⁰¹ When rights are not given effect in the form of a remedy there are consequences. Firstly, the denial of a remedy in the event of a breach thereof sends a signal that such breach is 'acceptable' and that the victim 'lacks worth'.¹⁰² Secondly, in those situations where some are granted remedies for certain violations but others are not, issues of unequal application of the law arise.¹⁰³

The likelihood that a remedy will be forthcoming in the event one's right is breached also has implications for the deterrence of similar breaches in future. This is because the presence of an effective remedy would seem to be a consideration in any would-be transgressor's evaluation of whether or not to breach another's rights. In the absence of any effective remedy, the pool of reasons for not so transgressing is diminished. In other words, one has less reason to respect the rights of others if there is unlikely to be an effective remedy forthcoming in the event that one breaches another's rights.

It would seem, then, that remedies perform at least two functions: they vindicate present breaches of rights, and they go some way to deterring future breaches of rights. In the context of government procurement the significance of these insights would seem to be as follows. Firstly, setting aside an unlawful tender award provides the necessary relief to vindicate the right to just administrative action of the unsuccessful tenderer. Without this relief the

¹⁰⁰ Ibid.

¹⁰¹ Ibid at 679.

¹⁰² Ibid.

¹⁰³ Ibid.

unsuccessful tenderer would have suffered a violation of rights and been afforded no remedy, rendering the right to just administrative action nugatory.¹⁰⁴ It also sends the signal that tenderers must be treated equally and, as a result, fairly – as required by s 217 of the Constitution.

Secondly, administrators awarding tenders are more likely to ensure that tenders are awarded lawfully – a deterrence of future breaches – if they have reason to believe that a remedy, in the form of an order setting aside the tender contract, will be forthcoming in the event that a tender is awarded unlawfully. This proposition is of course open to doubt on various grounds.¹⁰⁵ However, as Levinson notes, 'government officials in many contexts will be less likely to respect constitutional rights that are not backed by remedies'.¹⁰⁶

¹⁰⁴ This is assuming that there are no other remedies forthcoming which adequately vindicate the rights of the wronged tenderer. One such alternative remedy would be to compensate the wronged tenderer for any loss suffered as a result of being deprived of a tender awarded unlawfully. However, in a number of cases the extent to which this form of relief may be claimed in tender disputes has been severely circumscribed. In *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para 30-1 the court held that a breach of s 187 of the interim Constitution did not give rise to a claim for lost profits, reasoning that there was 'no basis of interpretation and applicable principle of public policy entitling the plaintiff to claim its lost bargain'. In *Steenkamp NO* supra note 52 para 56 the court refused a claim for delictual damages based on out-of-pocket expenses, reasoning that there are 'no public policy considerations and values of our Constitution which justify adapting or extending the common law of delict to recognise a private law right of action to an initially successful tenderer who has incurred a financial loss on the strength of the award which is subsequently upset on review by a court order'. In *Darson Construction (Pty) Ltd v City of Cape Town and Another* [2007] 1 All SA 393 (C) at 411-12 the court reaffirmed that unsuccessful tenderers are not entitled to claim loss of profits. However, the court in this case was prepared to award the wronged tenderer its out-of-pocket expenses for preparing its bid, at 421. In *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) para 13 a claim in damages for loss of profits was allowed, but in circumstances where the wronged tenderer was deprived of an award due to the fraudulent conduct of the procuring entity. The current position is therefore that tenderers do not have a delictual claim for being denied a tender due to unlawfulness in the process, unless they can prove that the loss sustained was occasioned by the fraud of the procuring entity.

¹⁰⁵ For example that the setting aside a tender contract poses no serious threat to the administrator awarding the tender (unless of course there are more serious implications involved such as loss of office or criminal sanction).

¹⁰⁶ Daryl J Levinson 'Rights Essentialism and Remedial Equilibration' (1999) 99 *Columbia Law Review* 857 at 911.

In South African law the locus classicus of the idea that a right requires a remedy is found in *Minister of the Interior and Another v Harris and Others*¹⁰⁷ where the court stated

‘[t]here can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium*’.¹⁰⁸

This statement has since been affirmed by the CC. In *August and Another v Electoral Commission and Others*,¹⁰⁹ in which the CC concluded that denying prisoners the ability to vote breached their constitutional right to do so,¹¹⁰ the court relied on this passage in emphasising the need for a remedy.¹¹¹ Clearly, then, the idea that a right requires a remedy is part of modern South African constitutional law. However, it is open to doubt that the ‘ubi jus, ibi remedium’ principle, and its adoption in South African law, can mean that a remedy which fully vindicates the breach of a right *must* be forthcoming in every dispute.

4.4.2 Interest Balancing and Rights Maximising

In analysing the courts’ discretion in refusing to set aside an unlawful tender award it is useful to consider the following passage of the CC in *Fose v Minister of Safety and Security*:¹¹²

‘[T]his Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts

¹⁰⁷ 1952 (4) SA 769 (A).

¹⁰⁸ Ibid at 780-1.

¹⁰⁹ 1999 (3) SA 1 (CC).

¹¹⁰ Ibid para 36.

¹¹¹ Ibid para 34.

¹¹² 1997 (3) SA 786 (CC).

have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal'.¹¹³

The preceding passage is clearly an endorsement of the *ubi jus, ibi remedium* principle, subject to certain limitations. With regard to the courts' duty to afford victims effective relief, we see that this duty is constrained by the 'bounds of the Constitution'. This clearly suggests a limitation on the principle of effective relief and indicates that whether or not effective relief will be forthcoming in a particular case depends on whether or not there are other provisions in the Constitution which serve to limit such relief. Furthermore, the court in *Fose* emphasises that relief should not lightly be withheld on account that a remedy may not be apparent, and that courts should be creative in providing relief. *Fose* is therefore authority for the proposition that courts have a duty to do all they can to provide a remedy where a case for doing so has been made out, and should be slow to deny a remedy unless there are very good reasons for doing so.

In *Hoffmann v South African Airways*¹¹⁴ the CC gave further content to the notion of appropriate relief, when it held that

"“appropriate relief” must be construed purposively, and in the light of s 172(1)(b), which empowers the Court, in constitutional matters, to make “any order that is just and equitable”. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate’.¹¹⁵

Furthermore,

‘[f]airness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration’.¹¹⁶

¹¹³ Ibid para 69.

¹¹⁴ 2001 (1) SA 1 (CC).

¹¹⁵ Ibid para 42.

¹¹⁶ Ibid para 43.

Accordingly, the court held that '[t]he determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy'.¹¹⁷

The court in *Hoffmann* thus explicitly acknowledges that the notion of fairness relevant to the enquiry involves fairness not only to the plaintiff or applicant to the dispute, but also fairness to the opposing party. Perhaps more importantly, the notion of fairness may, depending on the circumstances, require fairness to other persons not party to the dispute and who may have a very real interest in the outcome thereof.

Importantly, with regard to the balancing process required in the determination of a just and equitable remedy, the court in *Hoffmann* held that

'[t]he balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case'.¹¹⁸

The CC has therefore clearly endorsed the idea that there may be a number of different and competing considerations to be taken into account, over and above those of the wronged party, in deciding what may constitute appropriate and effective relief. This is despite the *ubi jus, ibi remedium* principle forming part of South African constitutional law. This accords with the approach taken by the courts in deciding whether or not the setting aside of an unlawful tender award would constitute a just and equitable remedy. In those cases interests over and above those of the wronged tenderer are taken into account, and there may be other objectives in addition to the vindication of a right which are relevant.

¹¹⁷ Ibid para 45.

¹¹⁸ Ibid.

The courts in tender disputes have therefore emphatically endorsed that remedial approach which Gerwitz calls 'Interest Balancing'.¹¹⁹ This remedial approach is predicated on the idea that, especially in a constitutional context, there may be a number of competing interests all relevant to the determination of a just and equitable remedy.¹²⁰ This approach is in contrast to that remedial approach Gerwitz calls 'Rights Maximising' which aims only to ensure that the victim of a breach of a right receives the most effective remedy possible, where efficacy is understood as 'eliminating the adverse consequences of violations suffered by victims'¹²¹ and which resonates with the *ubi jus, ibi remedium* principle. The crucial distinction between the two approaches is that under Interest Balancing the relief afforded to the victim of a breach may be limited by any number of other interests relevant to the enquiry. However, with Rights Maximising the provision of effective relief to the victim is the only consideration deemed relevant to the enquiry; the concerns of other stakeholders do not serve to curtail the remedy afforded to the victim.¹²²

4.4.3 Preferring Interest Balancing over Rights Maximising

There are a number of reasons why a court would opt for an Interest Balancing approach when determining a just and equitable remedy. As Gerwitz notes, '[w]hile it may seem that complete remedial effectiveness for victims is always possible...the complexities of the remedial enterprise undermine this view'.¹²³ Two considerations in particular support this claim. Firstly, 'there may be more than one legally relevant remedial goal'.¹²⁴ The problem this poses for attaining the most effective remedy for the victim is that these goals may themselves conflict. In such a situation it may not be possible to achieve one legally relevant goal 'without requiring some sacrifice of

¹¹⁹ Paul Gerwitz 'Remedies and Resistance' (1983) 92(4) *Yale Law Journal* 585.

¹²⁰ *Ibid* at 591.

¹²¹ *Ibid*.

¹²² *Ibid* at 591.

¹²³ *Ibid* at 593.

¹²⁴ *Ibid* at 594.

another'.¹²⁵ Judges are then 'compelled to evaluate the relative importance of conflicting remedial goals' and 'choose which goals to compromise'.¹²⁶ In tender disputes this tension is clearly felt where there is a threat of harm to a section of the public were an unlawful contract to be set aside. Avoiding harm to the public is clearly a remedial goal important enough to be at least considered alongside the interests of the unsuccessful tenderer in fashioning a just and equitable remedy.

Secondly, a court may be prevented from granting a perfect remedy to the victim of a breach due to 'instrumental difficulties in achieving remedial goals'.¹²⁷ Whilst Gerwitz mentions this difficulty in the context of 'an ambitious injunction',¹²⁸ the practical difficulties associated with setting aside unlawful tender awards are very real indeed. As we have already seen, where work has already started, or nearing its completion, setting aside the contract may be impractical. Moreover, where there is the potential for significant disruption should a contract be set aside the court may be inclined not to follow such a course of action.

Gerwitz notes that despite the widespread adoption of Interest Balancing as a remedial approach in constitutional cases, it is not always acknowledged as 'legitimate'.¹²⁹ To a large extent this seems to be informed by the belief underlying Rights Maximising, namely that breaches of rights should be remedied as best they can.¹³⁰ It would also seem to be much easier to justify a Rights Maximising approach.¹³¹ Such an approach also has intuitive appeal. It aims to grant as much relief as possible to the actual victim who has suffered as a result of a breach of their rights – which accords squarely with the idea of a remedy. Interest Balancing, on the other hand, brings to the fore considerations of those whose rights have not been infringed and who are not

¹²⁵ Ibid.

¹²⁶ Ibid at 595.

¹²⁷ Ibid at 596.

¹²⁸ Ibid.

¹²⁹ Ibid at 600.

¹³⁰ Ibid at 601.

¹³¹ Ibid.

victims, and allows these considerations to limit the remedy afforded to the actual victim.

Another concern that presents itself when preferring Interest Balancing over Rights Maximising is that it 'may lead the courts to approve a general conception of Interest Balancing that undervalues the importance of vindicating rights'.¹³² An important feature of constitutional rights is that they have been given their status as rights precisely because it is recognised that those values which inform them are important enough to warrant this form of protection. The adoption of Interest Balancing as a remedial approach may undermine this feature of rights and, accordingly, a 'Constitution's allocation of rights would be subject to a de novo utilitarian reevaluation in particular cases'.¹³³

It would seem that, despite these concerns, Interest Balancing as a remedial approach can be justified in a number of ways, especially in a constitutional context. Firstly, balancing different interests in fashioning a just and equitable remedy is in fact itself part and parcel of 'equitable remedies'.¹³⁴ Implicit in the notion of equity is fairness, which may involve 'an appeal to substantive fairness'.¹³⁵ Secondly, 'vindicating a constitutional remedial interest may clash with another constitutional interest'.¹³⁶ Accordingly, when constitutional interests clash a court is forced to balance them as they have become relevant to the enquiry. It seems inimical to a constitutional enterprise to disregard those interests for which provision is made in a Constitution, and which stand to be implicated, when determining a just and equitable remedy. This point would seem to be related to the further idea that society has values and interests over and above that of remedial effectiveness.¹³⁷ Given that society has other such values and interests it would

¹³² Ibid at 607.

¹³³ Ibid.

¹³⁴ Ibid at 603.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid at 604.

undermine those values and interests were they to be ignored in the determination of a just and equitable remedy.

It should also be remembered that

'an effective remedy is often not possible without imposing significant and direct costs on selected third parties who are non-violators. Remedial burdens are easiest to justify when the cost-bearer of the remedy is also the wrongdoer who violated the [victim's] rights'.¹³⁸

In the context of tender disputes, the setting aside of an unlawful tender could place significant financial burdens on the State, directly affecting the public in the process. Such a remedy, which while effective for the unsuccessful tenderer, could also have drastic and far reaching consequences for the intended beneficiaries of the good or service procured. *AllPay* is an excellent example of this. In the circumstances of this case a court, when fashioning a remedy, simply cannot fail to take into account the interests of millions of the country's most vulnerable people reliant on government grants, and who are in no way to blame for the unlawfulness of the award. Given what has been said, in disputes such as those evidenced by *AllPay*, Interest Balancing is not merely the more appropriate remedial approach. It is in fact the only viable remedial approach.

4.5 Conclusion

When a public tender is awarded unlawfully the principle of legality is breached and the right to just administrative action of any other tenderers who submitted bids for that contract is infringed. For a tenderer who, but for the unlawful award, would have received the tender, the wrong or harm is that much more tangible. In deciding what constitutes a just and equitable remedy, however, the court does not focus solely or even primarily on the interests of any wronged tenderer. Instead, the courts take into account the broader interests of the public which stand to be affected by any interruption which may result from the setting aside of an unlawful tender award.

¹³⁸ Ibid.

The implication of this is that a court faced with an unlawful tender award may decide that setting the award aside does not constitute a just and equitable remedy, despite the unlawfulness of the award. That the courts may do this is not controversial; it is part of their administrative law discretion in determining a just and equitable remedy.

However, justifying the courts' power to do so requires more than the acknowledgment that this power exists, or that some interests outweigh others. One way of justifying the courts' approach is to contrast the remedial approach of Rights Maximising with that of Interest Balancing. Although Rights Maximising may have some initial appeal given that it aims to fully vindicate the right infringed, we have seen that this is often simply not feasible. This is because, as Interest Balancing recognises, fully vindicating some rights may result in external harm. This becomes even more concerning when those who stand to be adversely affected are not to blame and, as in the case of government procurement awards, may even be those meant to benefit from the administrative act in question. Courts are therefore compelled to consider the broader public interest when deciding whether or not to set aside an unlawful tender award, especially when doing so could have implications for the rights of others.

In this way, then, we may make sense of how to justify the courts' making use of a balancing enquiry in deciding whether or not to set aside an unlawful tender award. However, this raises questions concerning the implications this may have for the principle of legality and the Rule of Law, the latter being a founding value of the Constitution which the courts are obliged to uphold.

Chapter 5

IMPLICATIONS OF UNLAWFUL TENDER AWARDS FOR THE PRINCIPLE OF LEGALITY AND THE RULE OF LAW

5.1 Introduction

Allowing unlawful administrative decisions to stand presents a number of difficulties for a legal system dedicated to upholding the Rule of Law. In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*¹ the Constitutional Court (CC) regarded the refusal to set aside unlawful administrative decisions as capable of affecting both the principle of legality and the Rule of Law.² Although the court did not elaborate, its comments are significant given the Rule of Law's foundational status in the Constitution.³ This chapter will explore this issue in detail, and will seek to understand what these effects are and their implications. Furthermore, we will look at how a court may allow an unlawful tender award to stand despite its duty to uphold the Rule of Law.

The Rule of Law has not been comprehensively defined in South African jurisprudence. As such, it is useful to consider it from both a theoretical perspective as well as how it has been developed by the courts to date. To a large extent the Rule of Law has been developed via the principle of legality. It will be argued that the key to answering the questions posed above lies in appreciating the nature of the Rule of Law and the principle of legality, and how they operate.

¹ 2011 (4) SA 113 (CC).

² *Ibid* para 85.

³ Constitution of the Republic of South Africa, 1996 s 1(c).

5.2 The Rule of Law

5.2.1 Contestation and uncertainty

The Rule of Law is 'an ancient political ideal'.⁴ Surprisingly, despite its ancient origins, its exact scope remains unclear.⁵ Instead, it is regarded as a 'contested' and ambiguous concept⁶ and is often described as a 'loaded term',⁷ with its meaning dependent on the context in which it is used. This has led some commentators to regard it as devoid of any meaning whatsoever.⁸ Beatty argues that the uncertainty and plethora of meanings associated with the Rule of Law has resulted in a 'fuzzy and confused' concept incapable of providing the necessary benchmark 'against which the records of governments can be measured'.⁹

Mathews, recognising the plethora of 'conflicting...formulations of the Rule of Law',¹⁰ draws attention to the fact that some of the blame for this can be laid at the doors of those 'who seek to infuse it with a beneficent but vague and all-embracing philosophy'.¹¹ By this, Mathews means that incorporating the Rule of Law with all the ideals of justice leaves us with a suspect¹² and increasingly useless¹³ concept. These sentiments are echoed by Raz who states that if we insist that the Rule of Law incorporates such ideals then 'the term lacks any useful function'.¹⁴ The danger in this is that the Rule of Law then

⁴ Alistair Price 'The Evolution of the Rule of Law' (2013) 130 *SALJ* 649 at 650. See also Brian Z Tamanaha *On the Rule of Law: History, Politics, Theory* (2004) 7; Tom Bingham *The Rule of Law* (2010) 1; Jeremy Waldron 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137 at 141; Anthony Mathews *Law, Order, and Liberty in South Africa* (1971) 5.

⁵ Martin Loughlin *Foundations of Public Law* (2010) at 313.

⁶ Margaret Radin 'Reconsidering the Rule of Law' (1989) *Boston University Law Review* 781 at 791 and 819; Waldron op cit note 4 at 118-121.

⁷ Waldron op cit note 4 at 138.

⁸ Judith Shklar 'Political Theory and the Rule of Law' in Allan C Hutcheson & Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology* (1987) 1.

⁹ David Beatty 'Law's Golden Rule' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* (2009) 99-101.

¹⁰ Mathews op cit note 4 at 1.

¹¹ *Ibid.*

¹² *Ibid* at 17.

¹³ *Ibid* at 28.

¹⁴ Joseph Raz 'The Rule of Law and its Virtue' (1977) *Law Quarterly Review* 93 at 195-6.

becomes watered down to the extent that it becomes a mere political slogan 'susceptible to being used for ideological purposes'.¹⁵ Accordingly, it 'must be deployed with precision'.¹⁶

Despite this contestation and uncertainty, attempts to accurately demarcate the boundaries of the Rule of Law remain important. As Craig notes, the Rule of Law is 'a central principle of constitutional governance'.¹⁷ For him, this is reason enough to 'be as clear as possible about its meaning'.¹⁸ Mathews regards the 'necessity of reaching a clear understanding' of the Rule of Law as 'obvious'.¹⁹ In the South African context, the Rule of law is a foundational value of the Constitution.²⁰ Given its importance, there is undoubtedly a need to properly understand it.²¹

5.2.2 Understanding the Rule of Law

At the very least, there is some consensus that the Rule of Law 'requires [that] government officials and citizens be bound by and act consistently with the law'.²² For Bingham, the idea that officials in power must comply strictly with the law is 'fundamental' and 'at the very heart of the rule of law'.²³

Mathews argues that this core idea is in fact the principle of legality.²⁴ He states that the Rule of Law simply cannot be defined without legality as its central element.²⁵ For Mathews, the importance of this aspect of the Rule of

¹⁵ Loughlin op cit note 5 at 314.

¹⁶ Ibid.

¹⁷ Paul Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1977) *Public Law* 467 at 487.

¹⁸ Ibid.

¹⁹ Mathews op cit note 4 at 1.

²⁰ Constitution, 1996 s 1(c).

²¹ Price op cit note 4 at 660.

²² Brian Z Tamanaha 'A Concise Guide to the Rule of Law' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* (2009) 3.

²³ Bingham op cit note 4 at 60.

²⁴ Mathews op cit note 4 at 3.

²⁵ Ibid at 3.

Law is not merely its focus on government being constrained by law, but on 'the reign of law over [governmental] authority'.²⁶

Tamanaha argues that the Rule of Law is an inherent good.²⁷ However, we would still want to know what makes the Rule of Law good in order to understand why we should value it. For Raz the value of the Rule of Law lies in its ability to do three things. Firstly, it guards against the exercise of arbitrary power.²⁸ This does not mean that power can never be exercised arbitrarily in a society which subscribes to the Rule of Law. But it does mean that in such a society the likelihood of arbitrary rule taking hold would be reduced.²⁹ Secondly, the Rule of Law ensures 'the protection of individual freedom'.³⁰ It does this by providing 'stable, secure frameworks' for people so that they may conduct their lives with predictability and certainty.³¹ Thirdly, the Rule of Law ensures respect for human dignity.³²

5.2.3 Restraining governmental power

The idea of the Rule of Law arose out of the realisation that democracy alone cannot keep tyranny at bay.³³ A democratically elected government must also itself be subject to law, and there must be mechanisms in place to ensure the state's compliance with the law. This aspect of the Rule of Law is informed by the perennial concern of holding to account those in power.

Loughlin argues that the 'dynamic between power and liberty' has been the driving force behind constitutional development.³⁴ He argues further that '[s]ince the powers of government in the modern era are extensive, the key political value of liberty can be maintained only by ensuring that these powers

²⁶ Ibid at 5-6.

²⁷ Tamanaha op cit note 22 at 3.

²⁸ Raz op cit note 14 at 202-3.

²⁹ Ibid at 203.

³⁰ Ibid at 203-4.

³¹ Ibid.

³² Ibid at 204.

³³ Tamanaha op cit note 22 at 8.

³⁴ Loughlin op cit note 5 at 312.

are confined, channeled, and checked'.³⁵ As Krygier notes, '[i]f the laws are there but governments bypass them, it is not the law that rules'.³⁶ Throughout history, as governments came to regulate more aspects of social life than they had before and the extent of their powers of coercion increased, so did the need arise for a check on these powers.³⁷ This is especially true of governmental regulation which encroaches increasingly on the private sphere of life.

The perennial problem of corruption in modern governments shows that there exists always a concern that 'government officials may be unduly influenced in their government actions by inappropriate considerations'.³⁸ The Rule of Law seeks to minimise this. Tamanaha argues that the Rule of Law serves to restrain the exercise of government power by, firstly, limiting what they may do and, secondly, prescribing how they must go about doing that which they are required or permitted to do.³⁹ In doing so, the law imposes limits on the considerations for which such officials may act, thus reducing the risk that they will act for considerations not sanctioned by law. As we saw in Chapter 3 one of the reasons for adopting peremptory legislation in government procurement is to curtail corruption.⁴⁰

Arbitrary power, being the use of 'public powers for private ends',⁴¹ is further curtailed by laws that prescribe what laws may be promulgated. There can be no Rule of Law if officials are free to pass laws which only serve their own personal interests. As explained by Raz, '[t]he arbitrary use of power for personal gain, out of vengeance or favouritism is...drastically restricted by close adherence to the rule of law'.⁴²

³⁵ Ibid.

³⁶ Martin Krygier 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* (2009) 66.

³⁷ Loughlin op cit note 5 at 324.

³⁸ Tamanaha op cit note 22 at 8.

³⁹ Ibid at 4.

⁴⁰ See section 3.

⁴¹ Raz op cit note 14 at 203.

⁴² Ibid.

It would appear to be a necessary, although not sufficient, condition for the existence of the Rule of Law that public officials act in a manner that is in accordance with the law. This can be seen from Raz's exposition on the difference between *conforming* to the law and *complying* with the law.⁴³ Briefly, conforming to the law means simply that one's actions and the requirements of the law are congruent. On the other hand, compliance with the law means that one's actions conform to the law 'because it is recognized that one's actions should conform to the law'.⁴⁴ Only when the law is followed because it is recognised that the law must be followed may we say that law's authority is respected and it is the law that rules.

One problem which arises in holding governments to the requirement of legality is that it may at times frustrate them in their efforts to govern.⁴⁵ However, the ability of a government to govern is not solely determined by the presence or absence of laws. It is also determined by, among other things, the presence or absence of political will and competent officials. Furthermore, if officials are frustrated in their attempts to govern due to a lack of laws with which they may comply one answer would be to promulgate the necessary enabling laws. It should also be remembered that effective governance is not the only value of modern society. The argument that the Rule of Law may serve to frustrate governments in their attempts to govern misses the point of why we value the Rule of Law in the first place, namely to provide a counterweight to the asymmetrical power of the state, and the dangers associated with it.

5.2.4 Instrumental and substantive conceptions of the Rule of Law

Radin argues that the contested nature of the Rule of Law stems in large part from 'differences in emphasis of its instrumental and substantive aspects'.⁴⁶ According to the instrumental version 'the Rule of Law is a

⁴³ Joseph Raz *Practical Reason and Norms* 2 ed (1990) 178-9.

⁴⁴ *Ibid.*

⁴⁵ Tamanaha *op cit* note 22 at 5.

⁴⁶ Radin *op cit* note 6 at 782.

prerequisite for any efficacious legal order'.⁴⁷ In other words, the efficacy of a legal system requires, as a necessary precondition, the presence of the Rule of Law. Without it, a legal system would fail in its attempts to guide the behavior of those subject to it. Essentially, this means 'there must be rules...capable of being followed'.⁴⁸ Radin calls these two requirements 'know-ability' and 'perform-ability'.⁴⁹ People must be able to know the rules to which they are subject, and those rules must be such that people are able to comply with them.⁵⁰

Loughlin persuasively argues that the instrumental version of the Rule of Law in fact more closely resembles 'rule by law' as opposed to rule of law.⁵¹ On this conception, 'law is the essential means through which the business of governing is conducted'.⁵² Although essential, this is merely 'formal'.⁵³ The instrumental version of the Rule of Law is, for Loughlin, unable to ensure that those in power are themselves subject to the law, as the rule by law is in fact the 'rule of persons'.⁵⁴

Importantly, the instrumental version of the Rule of Law is not concerned with 'more general constitutional values, such as those that flow from democracy or broader ideas of social justice',⁵⁵ 'fairness...and autonomy or dignity of persons'.⁵⁶ These are said to be '[s]ubstantive ideals'.⁵⁷ As a result, it is often said that an autocratic regime is capable of adhering to the instrumental version of the Rule of Law precisely because, on this understanding, the Rule of Law does not require anything more than rules which are capable of being followed.⁵⁸ The content of those rules and their

⁴⁷ Ibid at 783.

⁴⁸ Ibid at 785.

⁴⁹ Ibid at 786.

⁵⁰ Ibid.

⁵¹ Loughlin op cit note 5 at 332-5.

⁵² Ibid at 332-3.

⁵³ Ibid at 333.

⁵⁴ Ibid.

⁵⁵ Ibid at 335.

⁵⁶ Radin op cit note 6 at 786.

⁵⁷ Ibid.

⁵⁸ Mathews op cit note 4 at 3.

normative worth are of no concern to an instrumental understanding of the Rule of Law. As a result, Mathews regards such an understanding of the Rule of Law as 'too empty and meaningless to be of any service'.⁵⁹

This has led to the idea that any adequate notion of the Rule of Law must incorporate certain substantive values. The substantive version of the Rule of Law 'holds that the Rule of Law embodies tenets of a particular political morality'.⁶⁰ To a large extent, the substantive version of the Rule of Law is premised on the promotion of liberalism.⁶¹ In order to promote liberty, assumed to be 'the fundamental substantive value', a legal system must possess certain characteristics, for example the absence of retrospective laws and the treating alike of like cases.⁶² In this way the government is restrained and the liberty of the individual is promoted.

It is this characteristic of the substantive version of the Rule of Law that allows it to guard against autocracy. Loughlin argues that the substantive version of the Rule of Law is concerned with 'legitimate political rule' and 'curbing arbitrariness across the entire governing regime'.⁶³ Given that liberty assumes a central position in the substantive version of the Rule of Law any institutional threat to liberty would need to be safeguarded against. The substantive version of the Rule of Law is said to do this by incorporating the separation of powers and the independence of the judiciary as central values.⁶⁴ In this way power is dispersed rather than consolidated,⁶⁵ and sufficient checks on such power are put in place.⁶⁶ The possibility of power being monopolised is limited and autocratic possibilities are thereby

⁵⁹ Ibid.

⁶⁰ Radin op cit note 6 at 783.

⁶¹ Ibid at 790.

⁶² Ibid at 788.

⁶³ Loughlin op cit note 5 at 336.

⁶⁴ Ibid. It is unclear whether or not the separation of powers and the independence of the judiciary are the sole preserve of a substantive conception of the Rule of Law. Raz, for example, regards these as forming part of a formal conception of the Rule of Law.

⁶⁵ Ibid.

⁶⁶ Ibid.

undermined.⁶⁷ The danger posed to individual liberty by those with power is then also diminished.

Why one would advocate for a substantive version of the Rule of Law is certainly understandable. The idea that the Rule of Law consists of important values over and above that of the state being subject to law is appealing for obvious reasons. If a substantive version of the Rule of Law is in fact 'necessary to fairness, human dignity, freedom, and democracy'⁶⁸ one would be hard-pressed to argue against it. Furthermore, if the Rule of Law can be defined to incorporate values such as democracy and social justice, then a government bound by the Rule of Law would be bound by those values. However, it is not clear that this is in fact necessary.

Despite the substantive version of the Rule of Law's appeal, it would seem that an instrumental understanding of the concept still has much to commend it. Much of the credit for this can be given to Raz, who argues that '[t]he rule of law means literally what it says: The rule of the law'.⁶⁹ Essentially, this means that 'government shall be ruled by law and subject to it'.⁷⁰ This conception of the Rule of Law would seem to be little more than the principle of legality. For Raz this conception of the Rule of Law consists of two things: firstly, that people obey the law and, secondly, that the law is such that it can in fact guide people's behavior.⁷¹

Raz argues that a number of principles flow from this basic formal conception of the Rule of Law and which he believes fall into two distinct groups. Without enumerating all of them, it is worth pointing out that, on the one hand, there are those principles which ensure that the law is capable of guiding behavior,⁷² for example that the law be clear, prospective, and

⁶⁷ Ibid.

⁶⁸ Radin op cit note 6 at 791.

⁶⁹ Raz op cit note 14 at 196.

⁷⁰ Ibid.

⁷¹ Ibid at 198.

⁷² Ibid at 202.

stable.⁷³ On the other hand, there are principles which ensure that the 'legal machinery of enforcing the law' will not be 'distorted' and that the legal system maintains its ability to 'supervis[e] conformity to the rule of law and provide effective remedies in cases of deviation from it'.⁷⁴ Principles which would fall into this category include the independence of the judiciary being guaranteed and the power of the courts to review administrative action.⁷⁵ Raz therefore contests the idea that judicial independence is the sole preserve of the substantive version of the Rule of Law.

For Raz the Rule of Law 'is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man'.⁷⁶ Thinking of the Rule of Law in a way that incorporates such substantive ideals deprives the term of 'any useful function'.⁷⁷ Accordingly, for the Rule of Law to have any value it must be thought of in this narrow sense.

Understandably, those who disagree with Raz's separation thesis would argue that holding a government to a narrow conception of the Rule of Law would fail to guard against certain evils associated with such an asymmetric power relationship. Raz is aware of this and has the following to say: 'the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged'.⁷⁸ This is an important and fundamental point. It illustrates the fact that one need not use the term Rule of Law to denote everything which is desirable in a legal system. In fact, there appear to be good reasons not to. The Rule of Law is certainly a valuable and desirable aspect of modern governance which has much to commend it. However, there are other equally, perhaps more, important values. It is unclear why we should think that all such values are somehow part of the Rule of Law. At the very least, insisting

⁷³ Ibid at 198-200.

⁷⁴ Ibid at 202.

⁷⁵ Ibid at 200-1.

⁷⁶ Ibid at 196.

⁷⁷ Ibid.

⁷⁸ Ibid.

that the Rule of Law consists of values such as democracy and open-ended ideals such as social justice can cause confusion. This is because we are then uncertain of the parameters of the Rule of Law and the concept becomes confused. Furthermore, substantive values such as democracy and equality are desirable for their own reasons, and it is for these reasons one may advocate their recognition and protection. Incorporating them into the Rule of Law in the hope that their stature and importance will be heightened as a result fails to appreciate this.

5.2.5 The Rule of Law as an ideal

Importantly, Raz notes that the Rule of Law 'is a political ideal which a legal system may lack or may possess to a greater or lesser degree'.⁷⁹ The extent to which a legal system succeeds in adhering to the Rule of Law is then itself 'a matter of degree'.⁸⁰ Loughlin, arguing along similar lines, goes so far as to say that the Rule of Law is an ideal which is in fact 'unrealizable in practice'.⁸¹ This is not to say there is no value in the Rule of Law. There is, but 'only for its aspirational qualities'.⁸² Similarly, Endicott argues that

'[t]he rule of law is unattainable. Communities never achieve it completely...To the extent that officials do not conform to the law, the community fails to attain the ideal of the rule of law. Perhaps no community has even got very close to the ideal'.⁸³

To escape this conclusion, argues Endicott, would require a revision of the Rule of Law itself.⁸⁴

An appreciation of the Rule of Law being unattainable can go a long way to understanding how violations of the Rule of Law affect it. Given the overriding importance with which the Rule of Law is regarded, it is easy to assume that it must always be upheld. However, if the Rule of Law is in fact an

⁷⁹ Ibid at 196.

⁸⁰ Ibid at 210.

⁸¹ Loughlin op cit note 5 at 314.

⁸² Ibid.

⁸³ Timothy A O Endicott 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1 at 1.

⁸⁴ Ibid.

unrealizable ideal then this is certainly mistaken. Less than perfect adherence to the Rule of Law may also not necessarily be a bad thing. As long as a legal system as a whole strives towards, and generally succeeds in, upholding the Rule of Law deviations from it may be permitted.

In certain circumstances it may even be desirable to permit deviations from the Rule of Law. This point is clearly articulated by Raz who holds that the Rule of Law is but one among any number of values in a given society.⁸⁵ Importantly, adherence to the Rule of Law serves to promote those goals which themselves are promoted through the law. In this way we can see that the Rule of Law 'fulfils a subservient role. Conformity to it makes the law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal'.⁸⁶

This is a crucial observation. It shows that we value adherence to the Rule of Law for certain reasons, namely for its ability to help achieve those social goals pursued through the law, not for its own sake. At times, there may be other important social goals 'incompatible with the rule of law'.⁸⁷ In such cases one should not be too quick to jettison the pursuit of those goals simply because it conflicts with the Rule of Law. As noted by Raz, '[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty'.⁸⁸ Essentially, we must remember that there may be times when adherence to the Rule of Law will frustrate an important social goal. Such a situation may in fact call for the Rule of Law to be contravened in order to achieve a correspondingly greater value of good.

*Minister of Public Works v Kyalami Ridge Environmental Association*⁸⁹ provides a good illustration of how such goals may at times conflict. The essential issue in this case was whether or not the state had acted lawfully in

⁸⁵ Raz op cit note 14 at 210.

⁸⁶ Ibid at 211.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ 2001 (3) SA 1151 (CC).

erecting an emergency camp for displaced flood victims.⁹⁰ The respondents argued that the State had acted outside the ambit of its powers, that there was in fact no enabling legislation in terms of which it had taken action, and that, as a result, its actions were unlawful and liable to be set aside.⁹¹ The High Court had agreed that the State's actions were unlawful.⁹²

On appeal, the CC acknowledged 'that government can only establish transit camps for the victims of the floods if the power to do so is conferred on it by law'.⁹³ In finding that the State's actions were in fact lawful, the court agreed that there was no legislation in place in terms of which the State could act.⁹⁴ Rather, the court sources the State's authority from 'its constitutional obligations, to its rights as owner of the land, and to its executive power to implement policy decisions'.⁹⁵ The court could see

'no reason why the government as owner of property should not under our law have the same rights as any other owner. If it asserts those rights within the framework of the Constitution and the restrictions of any relevant legislation, it acts lawfully'.⁹⁶

Having found the State's actions to be lawful, the court was able to avoid having to condone any unlawfulness on the State's part. The State and those in need of emergency assistance were clearly fortunate in that the relevant piece of land was available. However, it is easy to see how, with different facts, a court would have had to make a difficult choice between condoning non-compliance with the Rule of Law and frustrating an important social goal. Were the State not able to access suitable vacant land, or only land to which restrictions applied, the lawfulness of its actions would be far less certain.

In such a situation a court would clearly be justified in condoning a breach of the Rule of Law given the very significant human interests at stake. The court could acknowledge that the Rule of Law is important, but that providing

⁹⁰ Ibid para 33.

⁹¹ Ibid.

⁹² Ibid para 13-14.

⁹³ Ibid para 35.

⁹⁴ Ibid para 51.

⁹⁵ Ibid.

⁹⁶ Ibid para 40.

disaster relief in difficult circumstances is vital. In such a situation the importance of providing relief for those in need would clearly outweigh the need to adhere to the Rule of Law. In fact, adherence to the Rule of Law in such a situation would seem to serve no purpose at all, other than for its own sake. However, following Raz, sacrificing the social goal of providing such relief 'on the altar of the rule of law' would certainly 'make the law barren and empty'.⁹⁷ This approach appreciates that the Rule of Law is an ideal, that adherence to it is a matter of degree, and that in practice deviations from it may be necessary in order to promote other social goals.

It is therefore a mistake to assume that the Rule of Law, especially a formal conception thereof, must be upheld at all costs. Doing so is of course understandable, as it goes some way to ensuring the State abides by and adheres to the law. However, the Rule of Law is one value among many. Other social goals may at times conflict with and override it. When they do, adherence to the Rule of Law may conflict with the requirements of justice.

One way of avoiding having to choose between competing interests is with what Beatty calls 'law's golden rule', namely the idea of proportionality.⁹⁸ This principle is essentially 'a test of fairness and reciprocity' which demands a balancing of interests.⁹⁹ Beatty, however, regards this as part of the Rule of Law itself, its incorporation capable of 'making the concept the best it has ever been'.¹⁰⁰ One of the virtues of this principle is that it allows judges to make decisions 'compatible with our basic ideas about democracy' and 'justice'.¹⁰¹

The similarity between Raz's separation thesis and Beatty's proportionality thesis is that they both envisage a weighing up of certain interests. However, the crucial difference seems to be that, whereas Raz regards the Rule of Law as one value among many to be considered when weighing up various

⁹⁷ Ibid.

⁹⁸ Beatty op cit note 9 at 101.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid at 104.

interests, Beatty regards the weighing up of interests as a principle of the Rule of Law itself. For Raz, the Rule of Law does not contain a principle of proportionality; for Beatty it does. Accordingly, Beatty regards the Rule of Law as an ultimate principle within which disputes are resolved via the principle of proportionality.

This idea certainly has a natural appeal. However, as Beatty's thesis regards the principle of proportionality and justice as part of the Rule of Law, it suffers from the same defects as other substantive versions of the concept. Imbuing the Rule of Law with a range of ideas which are complex enough on their own simply makes the Rule of Law even more obscure. It is also not clear why one would have to regard the principle of proportionality as part of the Rule of Law, as opposed to a separate principle with which to resolve conflicts of priorities. At least for this reason, Raz's separation thesis would seem to be preferable.

5.3 The Rule of Law in South Africa

5.3.1 Introduction

Despite the Rule of Law being a foundational value of the Constitution, the South African courts have to date not formulated any comprehensive definition or understanding of it. Rather its development has been, and continues to be, 'an ongoing process of gradual evolution'.¹⁰² The most significant of such development has undoubtedly been the introduction and development of the principle of legality, which seems to have become the primary vehicle through which the Rule of Law is given effect.

The Rule of Law and the principle of legality are not, however, one and the same. Although the CC in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*¹⁰³ stated that it was not necessary to decide '[w]hether the principle of the rule of law has

¹⁰² Price op cit note 4 at 649.

¹⁰³ 1999 (1) SA 374 (CC).

greater content than the principle of legality',¹⁰⁴ it is clear that the Rule of Law is in fact a 'broader concept' than the principle of legality.¹⁰⁵ As we will see, the two concepts also seem to function differently, with implications for how they are affected by non-compliance or non-adherence.

5.3.2 The Principle of Legality

As we saw in Chapter 1 the CC in *Fedsure* held that 'it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful'.¹⁰⁶

Furthermore, it is

'central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law'.¹⁰⁷

This is the principle of legality which essentially 'requir[es] all exercises of public power...to conform to certain accepted minimum standards'.¹⁰⁸ At its most basic, the principle of legality requires 'wielders of public powers [to] act within their powers'.¹⁰⁹

Since its introduction the principle of legality has been developed to encompass more than this initial idea. In *Masetlha v President of the Republic of South Africa and Another*¹¹⁰ the CC stated that, when acting in accordance with an empowering provision, the President 'must not misconstrue the power conferred' and that 'the decision must be rationally related to the purpose for which the power was conferred'.¹¹¹

¹⁰⁴ Ibid para 58.

¹⁰⁵ Cora Hoexter *Administrative Law in South Africa* (2012) 125.

¹⁰⁶ *Fedsure* supra note 103 para 56.

¹⁰⁷ Ibid para 58.

¹⁰⁸ Cora Hoexter 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165 at 184.

¹⁰⁹ Ibid at 183.

¹¹⁰ 2008 (1) SA 566 (CC).

¹¹¹ Ibid at 181-3 referring to *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 148.

This requirement of rationality has its origins in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others*,¹¹² where the CC held that the exercise of public power must be 'rationally related to the purpose for which the power was given'.¹¹³ In *Democratic Alliance v President of the Republic of South Africa and Others*¹¹⁴ the CC described rationality review as 'an evaluation of the relationship between means and ends'.¹¹⁵ The court held that

'if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose'.¹¹⁶

These developments of the content of the principle of legality have been significant for purposes of holding public power to account. The surprising extent of this development can be attributed in large part to the restrictive definition of administrative action contained in the PAJA.¹¹⁷ The principle of legality conveniently 'operates as a residual repository of fundamental norms about how public power ought to be used' and is, accordingly, 'a wonderfully useful and flexible device'.¹¹⁸

5.3.3 Additional requirements of the Rule of Law

Given that the principle of legality is an aspect of the Rule of Law, the Rule of Law must consist of *at least* the principle of legality. As we saw earlier, Mathews regards the principle of legality as the core aspect of the Rule of Law.¹¹⁹ As the Rule of Law is a broader concept than the principle of legality, it must also then consist of something more.

The Rule of Law seems to contain a number of other principles not necessarily implied by the principle of legality. For example, Raz notes that the

¹¹² 2000 (2) SA 674 (CC).

¹¹³ *Ibid* para 85.

¹¹⁴ 2013 (1) SA 248 (CC).

¹¹⁵ *Ibid* para 36.

¹¹⁶ *Ibid* para 40.

¹¹⁷ *Ibid*.

¹¹⁸ Hoexter *op cit* note 108 at 183.

¹¹⁹ Mathews *op cit* note 4 at 3.

Rule of Law necessarily includes the independence of the judiciary and the courts having the power to review public acts.¹²⁰ Mathews agrees that an independent judiciary is part of the Rule of Law, but only in the sense that it is a necessary requirement with which to ensure the practical realisation of legality.¹²¹ As such, judicial independence and the principle of legality are related, but the former is not necessarily a part of the latter.

In a number of decisions the South African courts have drawn on the Rule of Law to justify a number of such principles. In *Dawood v Minister of Home Affairs*¹²² the CC held that '[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner'.¹²³ In *Zondi v MEC for Traditional and Local Government Affairs*¹²⁴ the CC held that '[t]he right of access to courts is an aspect of the rule of law'.¹²⁵ In *Mphahlele v First National Bank of South Africa Limited*¹²⁶ the CC held that '[t]he rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they normally account for their decisions is by furnishing reasons'.¹²⁷

The Rule of Law has also been said to require that public officials must 'use the correct legal process' and 'may not simply resort to self-help'.¹²⁸ These requirements were reaffirmed by the CC in *Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd.*¹²⁹ The essential issue here was whether an organ of state may ignore the defective decision of an official without formally applying for the review and setting aside

¹²⁰ Raz op cit note 14 at 200-1.

¹²¹ Mathews op cit note 4 at 14.

¹²² 2000 (3) SA 936 (CC).

¹²³ Ibid para 47.

¹²⁴ 2005 (3) SA 589 (CC).

¹²⁵ Ibid para 82.

¹²⁶ 1999 (2) SA 667 (CC).

¹²⁷ Ibid para 12.

¹²⁸ *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2014 (2) SA 228 (CC) para 86.

¹²⁹ 2014 (3) SA 481 (CC).

of that decision, and whether a court may set that decision aside where no such application is before it.¹³⁰ The court held that

'[e]ven where the decision is defective...government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it'.¹³¹

5.3.4 Distinguishing the Rule of Law from the principle of legality

Apart from being a broader concept than the principle of legality, the Rule of Law may also be distinguished from it by differences in the ways they operate. As has already been shown, the Rule of Law is a principle and an ideal that in practice is realised to a greater or lesser extent. The principle of legality, however, and despite its name, seems to operate as a rule prohibiting public officials from acting outside the bounds of their authority.

As Dworkin notes, rules apply in an 'all-or-nothing fashion', as opposed to principles.¹³² Likewise, the formulation of the principle of legality suggests that it is a rule. This is because it too seems to apply in an all-or-nothing fashion. Any public power or function exercised without authorisation is invalid. This is clearly an all-or-nothing enquiry; either there was authorisation at the time the power was exercised or the function was performed, in which case it is lawful and valid, or there was not, in which case it is unlawful and invalid.

The implications of distinguishing the Rule of Law from the principle of legality in this way are important for understanding how they are affected by non-compliance. Understood as a rule, a contravention of the principle of legality does not have any effect on the rule itself. This is because, despite the contravention, the rule continues to exist just as it did before. The same applies when the principle of legality is adhered to. Its incidence is therefore neither

¹³⁰ Ibid para 64.

¹³¹ Ibid.

¹³² Ronald Dworkin *Taking Rights Seriously* (1977) at 22-31.

lessened nor increased through contravention or adherence. In either case it is simply unaffected.

The Rule of Law, however, is affected by non-compliance. As we have seen the Rule of Law does not operate as a rule. Its core idea is that the law should have authority over power. It is a principle and an ideal which is observed to a greater or lesser extent. It may operate as a consideration to be taken into account in a specific enquiry, for example when conflicting social goals are at stake. In such a situation the Rule of Law may provide more or less weight towards the determination of an outcome, rather than determining the outcome as a rule would.

5.3.5 The Rule of Law as a formal principle

In South Africa there are good reasons for thinking that the Rule of Law refers to the formal conception supported by Raz's separation thesis. When one looks at section 1 of the Constitution one sees that the Rule of Law is not the only foundational value. In addition the following values are listed: human dignity, equality, human rights and freedom,¹³³ '[n]on-racialism and non-sexism',¹³⁴ '[s]upremacy of the Constitution',¹³⁵ '[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government'.¹³⁶

Looking at this list it is clear that there are a number of substantive values contained in s 1. There is thus no need for the Rule of Law to encompass them all. The very fact that values such as human rights, equality, and democracy are included as foundational values provide reason enough for their fundamental significance and protection. One may wish to argue that the Rule of Law nevertheless must be understood in a substantive sense

¹³³ S 1(a).

¹³⁴ S 1(b).

¹³⁵ S 1(c).

¹³⁶ S 1(d).

encompassing these values. However, the very calibration of the Constitution suggests otherwise.

5.4 Unlawful tender awards, the principle of legality and Rule of Law

5.4.1 Implications for the principle of legality

The claim that allowing unlawful tender awards to stand somehow undermines the principle of legality seems to be premised on the assumption that the principle of legality requires unlawful tender awards to be set aside.

In *Bengwenyama Minerals* the CC stated that

'[i]t would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it'.¹³⁷

As authority for this statement the CC relied on the following dictum of the SCA in *Eskom Holdings Ltd and Others v The New Reclamation Group (Pty) Ltd*¹³⁸ where the court stated that '[t]he principle of legality would require that an invalid administrative decision be set aside'.¹³⁹ The SCA therefore explicitly assumes that part of the principle of legality is that unlawful administrative acts must be set aside.

However, the above dicta in *Eskom Holdings* and *Bengwenyama Minerals* are not entirely congruent. Only in the former, and earlier, case did the court explicitly state that the principle of legality requires unlawful administrative acts to be set aside. In the latter case, the court does not go so far. Rather, the court emphasises the obligation to declare unlawful conduct invalid, and that any further order is within the discretion of the court.

¹³⁷ Supra note 1 para 84.

¹³⁸ 2009 (4) SA 628 (SCA).

¹³⁹ Ibid para 9.

More recently, in *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*¹⁴⁰ it was again suggested that the courts are in fact required to set aside unlawful administrative acts, and that allowing them to stand is in fact a departure from this position. In referring the above dicta from *Bengwenyama Minerals* the court said

'I believe it is fair to say that [the CC] made it clear that, even though courts always retain a discretion to refuse to award a remedy when unlawfulness is found, the default position is that the principle of legality should be upheld and vindicated, and that there should be compelling reasons to override this default position'.¹⁴¹

The court does not explicitly state that it is the principle of legality which requires unlawful administrative acts to be set aside. However, its reference to the need to vindicate the principle of legality suggests that the reasons for doing so stem from the principle of legality itself, and not from reasons external to it. This suggests a belief that the principle of legality itself calls for acts contravening it to be set aside, rather than other reasons relevant to a remedial enquiry.

However, it is not clear that the principle of legality does require invalid administrative acts to be set aside.¹⁴² We have seen that the principle of legality operates as a rule. It stipulates a number of criteria with which the exercise of public power must comply in order to be lawful and valid, for example that it be legally authorised and rationally related to the purpose for which the power was given. The principle of legality, as it is usually formulated, does not also stipulate what is to happen in cases of its contravention.

There is good reason for thinking that the principle of legality does not in fact require the setting aside of unlawful administrative actions. As was discussed in Chapter 3, the lawfulness enquiry is separate from the remedial enquiry. This follows from the wording of s 172 of the Constitution, which requires

¹⁴⁰ 2014 (4) SA 148 (ECP).

¹⁴¹ *Ibid* para 97.

¹⁴² Notably, the court in *Eskom Holdings* does not provide authority for its proposition that it does.

unlawful conduct to be declared invalid.¹⁴³ Upon declaring such conduct invalid, the court 'may make any order that is just and equitable'.¹⁴⁴ Section 172 does not require that unlawful administrative actions be set aside, only that they be declared invalid. The fact that explicit reference is made to courts being given the power to make any order that is just and equitable is itself telling; it is in the court's discretion to grant an appropriate order, a discretion which is not conditional.

This approach was emphasised in *Kirland* where the minority stated that 'in deciding a constitutional matter, a court adopts a two-stage approach where an enquiry involves the determination of constitutional invalidity. During the first stage, once a court finds that the impugned conduct is inconsistent with the Constitution it must make a declaration of invalidity. This does not involve the question whether the order is just and equitable. The latter enquiry belongs to the second stage'¹⁴⁵ during which 'a court enjoys a discretionary choice'.¹⁴⁶

The courts' continual reference in cases involving unlawful tender awards to *Bengwenyama Minerals* and an 'amelioration' of legality therefore must mean that, although the principle of legality usually requires the setting aside of unlawful administrative actions, the courts may at times decline to do so.¹⁴⁷ However, this line of reasoning conflicts with the now well-entrenched two-stage approach, as well as the courts' discretion to grant a just and equitable remedy.

Given that the principle of legality seems to merely prohibit unlawful tender awards, and not require their setting aside, the implications for it which arise from a court allowing an unlawful tender award to stand are simply none whatsoever. The requirements of the principle of legality assist in determining whether an action was lawful or not. The content of the principle does not

¹⁴³ S 172(1)(a).

¹⁴⁴ S 172(1)(b).

¹⁴⁵ *Supra* note 129 para 60.

¹⁴⁶ *Ibid* para 61. Although part of the minority judgment this approach is in fact correct as it merely reaffirms the approach adopted and confirmed in a number of earlier decisions.

¹⁴⁷ It could not mean, for instance, that the relevant aspect of the principle of legality infringed, for example rationality, did not require a rational decision to be made in the relevant case and therefore that the act is not unlawful as a result.

change as a result of the unlawful award being allowed to stand; the action is still considered unlawful, and the same action would also be considered unlawful in future.

As such, it makes little sense to regard the principle of legality as ameliorated when unlawful tender awards are allowed to stand. The principle of legality simply does not dictate what is to be done in the event of its breach. This latter enquiry falls squarely within the constitutionally sanctioned discretion of the courts, and is a remedial concern separate from the lawfulness enquiry.

5.4.2 Implications for the Rule of Law

Unlike with the principle of legality, allowing unlawful tender awards to stand does have implications for the Rule of Law. This is because the Rule of Law is not a rule, but a principle and an ideal to be aspired to. As such, it is almost certainly unrealisable in practice, meaning that it is inevitable that at times it will not be complied with it. As the CC noted in *Kirland*

‘the Constitution foresees that the administration that would answer to it would be imperfect. Those charged with state administration will inevitably on occasion fall short of the high aspiration of just administrative action’.¹⁴⁸

Being an ideal, when the Rule of Law is undermined there is then ‘less’ of it than were it adhered to. As such, it is then realised to a lesser degree than if it were not undermined, and so its incidence is less. This aspect of the Rule of Law has been recognised by the CC. In *Bengwenyama Minerals* the CC stated that ‘the rule of law must never be relinquished’.¹⁴⁹ In the context of this passage the court recognised that at times the Rule of Law will be undermined.

In *Kirland* the CC stated that ‘[t]he law does not allow us to uphold the rule of law while at the same time circumvent and undermine it. In the long run, shortcuts of this kind will erode the rule of law as one of the foundational values of our Constitution’.¹⁵⁰ Two features stand out from this passage. First,

¹⁴⁸ Supra note 129 para 91.

¹⁴⁹ Supra note 1 para 85.

¹⁵⁰ Supra note 129 para 114.

the court again recognises that the gradual undermining of the Rule of Law over time can lessen the incidence of the Rule of Law, meaning that there would be less of it than if it were consistently upheld. In this the court is correct. This also accords with what has been said about the Rule of Law so far, namely that as an ideal it is upheld to a greater or lesser extent.

Secondly, the court seems to imply that the Rule of Law may not be undermined. In this the court is almost certainly incorrect. This also contradicts what was said in *Bengwenyama Minerals*. We have seen that it cannot be a requirement that the courts uphold the Rule of Law come what may. The Rule of Law is one among a number of values of a legal system, and its true value lies primarily in its ability to ensure the realisation of other social goals. Adherence to the Rule of Law for its own sake therefore makes little sense.

Of course there is the danger that the Rule of Law may be relinquished if it is undermined to such an extent that law ceases to have authority over official power. However, this concern by itself does not provide a sufficient reason to ensure that the Rule of Law is never undermined. Rather, it provides a reason to ensure that the Rule of Law is generally aspired to, and then only insofar as it ensures the realisation of other valuable social goals. If in some situations maintaining the Rule of Law is incompatible with an important social goal, then undermining the Rule of Law may be entirely appropriate. Allowing an unlawful tender award to stand in circumstances where setting it aside would cause significant harm is simply an example of this occurring in practice; the court sanctions the Rule of Law being undermined in order to achieve a social goal the realisation of which is deemed more important in the circumstances.

5.5 Conclusion

It is not a requirement of the principle of legality that unlawful tender awards must be set aside. The principle of legality is a rule according to which the lawfulness of public actions may be determined. The subsequent remedial enquiry is a separate concern altogether, within the discretion of the courts.

The outcome of this remedial enquiry, which may be to allow an unlawful tender award to stand, does not have an effect on the requirements of the principle of legality; the tender award in question would still be unlawful.

With the Rule of Law, things are different. The Rule of Law functions as a principle, and an ideal which in practice is upheld to a greater or lesser degree. There are also good reasons for understanding the Rule of Law in formal terms in South Africa. It is, after all, one among a number of foundational values of the Constitution, and a significant number of other substantive values which could otherwise be considered part of the Rule of Law are provided for elsewhere in the Founding Provisions and the Bill of Rights.

Although unlawful tender awards clearly undermine the Rule of Law, courts are not bound to uphold it no matter the cost. The Rule of Law must be considered *alongside* other valuable social goals, the totality of which may demand the undermining of the Rule of Law. In this way a court's decision to allow an unlawful tender award to stand, which arguably sanctions the Rule of Law being undermined, can be properly understood, despite the Rule of Law's foundational significance and the courts' duty to uphold it.

Chapter 6

CONCLUSION

The development of subjecting government procurement to judicial scrutiny in South Africa has presented a number of issues. First, the procurement regime itself has come under strain given the frequency of challenges to very significant procurement decisions. Secondly, the courts have been forced to play an increasingly important role in exercising oversight of these decisions. An unenviable procurement framework, official incompetence, and widespread corruption have not helped matters. As it stands, unsuccessful tenderers will for the foreseeable future continue to request the courts to set aside procurement decisions suspected of being awarded unlawfully. Unfortunately, this will continue to delay the implementation of those policies which form the basis of the government tenders in question.

A sound approach to determining the lawfulness of these awards is therefore essential. In this regard, the unequivocal separating of the lawfulness and remedial enquiries has been a welcome development. It accords squarely with s 217, and ensures that courts will not be distracted by remedial concerns in determining the lawfulness or otherwise of an award.

Inevitably, the facts of a case may be such that the court declines to set aside an unlawful tender award. Such a decision is not justified by the courts having a discretion to do so. Rather, it is justified by the totality of reasons which favour adopting an Interest Balancing approach over a Rights Maximising one. This is especially so in cases concerning tender awards, where there are often significant interests in addition to those of the tenderers in question, and where affording relief typical of a Rights Maximising approach would harm the interests of innocent parties.

Awarding a government tender unlawfully undoubtedly contravenes the principle of legality. Perhaps because of this, the decision to allow an unlawful

tender award to stand may be perceived as conflicting with the principle of the legality, with concerns for its consequences for the Rule of Law.

It is not entirely unreasonable to assume that the principle of legality requires unlawful tender awards to be set aside. The principle of legality does, after all, prohibit unlawful acts. However, when the concept is considered in more detail it seems that it does not necessarily require that unlawful tender awards be set aside. What the principle of legality does is to provide a number of requirements according to which the lawfulness of public actions may be determined. In this way the principle of legality operates as a rule, prohibiting those acts which do not conform to its requirements.

Nothing about this requires a public act which contravenes the principle of legality to be set aside. Furthermore, when both s 172(1) of the Constitution and s 8(1) of the PAJA are considered it is seen that the courts, far from having an obligation to set such acts aside, in fact have a discretion to grant any order which they consider to be just and equitable. This includes an order whereby the unlawful award is left undisturbed. The principle of legality therefore does not impose an obligation on the courts to set aside these awards. Any concern that legality is somehow 'ameliorated' by allowing unlawful tender awards to stand is therefore misplaced. There is no requirement of the principle of legality which is not given effect to when unlawful tender awards are allowed to stand, and as such it is not affected by such an order.

As far as the Rule of Law is concerned, its incidence is clearly diminished when a government tender is awarded unlawfully. Given that the courts are obliged to uphold the Rule of Law it may seem that these awards must be set aside. This, however, depends on how we understand the Rule of Law. If the Rule of Law were the apex substantive principle of law to which all else was subordinate then perhaps it would require that unlawful tender awards be set aside.

However, this is almost certainly not what the Rule of Law means in South Africa. It is an ideal to be aspired to, and it also stands alongside a number of other substantive principles in the Constitution, and so need not encompass them all. Contraventions of the Rule of Law from time to time are also inevitable. As such, the mere fact of contravention should not be the sole determinant of whether or not the contravening act should be set aside. It may feature in the court's determination, as principles do, but ultimately the question of whether or not acts performed in contravention of the Rule of Law should take cognisance of broader societal interests. This is required if an order is to be made that meets the requirement of being just and equitable.

Total adherence to the Rule of Law should clearly not be pursued at all cost. There may at times be social goals which conflict with the Rule of Law, and where adhering to the Rule of Law may come at too great a price. In such circumstances it is entirely reasonable to allow the contravention of the Rule of Law. Government tender awards inevitably concern social goals. Setting them aside may therefore come at a significant social cost. If, in a specific case, this social cost is too great, the court should indeed decline to set the relevant award aside. By doing so the court would not be relinquishing its judicial function to uphold the Rule of Law. Rather, it would be making an order which recognises the Rule of Law's true value, and its position as a value in the Constitution.

BIBLIOGRAPHY

Primary Sources

Legislation

Constitution of the Republic of South Africa, 1996.

Constitution of the Republic of South Africa, Act 200 of 1993.

Local Government: Municipal Finance Management Act 56 of 2003.

Local Government: Municipal Systems Act 32 of 2000.

Preferential Procurement Policy Framework Act 5 of 2000.

Promotion of Administrative Justice Act 3 of 2000.

Public Finance Management Act 1 of 1999.

State Tender Board Act 86 of 1968.

Regulations

GN 225 in GG 27388 of 15 March 2005.

GN 868 in GG 27636 of 30 May 2005.

GN 9544 in GG 34350 of 8 June 2011.

Case law

- South Africa

AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC).

AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (4) SA 179 (CC).

AllPay Consolidated Investment Holdings (Pty) Ltd and Others v The Chief Executive Officer, South African Social Security Agency and Others 2013 (4) SA 557 (SCA).

AllPay Consolidated Investment Holdings (Pty) Ltd and Others v The Chief Executive Officer of the South African Social Security Agency and Others (NGHC) unreported case no 7447/12 (28 August 2012).

Aquafund (Pty) Ltd v Premier of the Province of the Western Cape 1997 (7) BCLR 907 (C).

August and Another v Electoral Commission and Others 1999 (3) SA 1 (CC).

Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC).

Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA).

Darson Construction (Pty) Ltd v City of Cape Town and Another [2007] 1 All SA 393 (C).

Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC).

Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC).

Dr JS Moroka Municipality and Others v Betram (Pty) Ltd and Another [2014] 1 All SA 545 (SCA).

Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA).

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC).

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

Grey's Marine Hout Bay and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA).

Grinaker LTA Ltd and Another v Tender Board (Mpumalanga) and Others [2002] 3 All SA 336 (T).

Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another 2014 (2) SA 228 (CC).

Hoffmann v South African Airways 2001 (1) SA 1 (CC).

Industrial Development Corporation of South Africa Ltd v Trencon Construction (Pty) Ltd and Another [2014] 4 All SA 561 (SCA).

Joubert Galpin Searle Inc and Others v Road Accident Fund and Others 2014 (4) SA 148 (ECP).

Logbro Properties CC v Bedderson NO and Others 2003 (2) SA 460 (SCA).

Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC).

Member of the Executive Council for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC).

Metro Projects CC v Klerksdorp Local Municipality 2004 (1) SA 16 (SCA).

Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others 2008 (2) SA 481 (SCA).

Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith 2004 (1) SA 308 (SCA).

Minister of Public Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC).

Minister of Social Development and Others v Phoenix Cash and Carry – PMB CC (SCA) unreported case no 189/06 and 244/06 (26 March 2007).

Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A).

Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another 2010 (4) SA 359 (SCA).

Mphahlele v First National Bank of South Africa Limited 1999 (2) SA 667 (CC).

Olitzki Property Holdings v State Tender Board and Another 2001 (3) SA 1247 (SCA).

Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010 (1) SA 333 (SCA).

Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC).

President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC).

RHI Joint Venture v The Minister of Roads and Public Works, Eastern Cape and Others 2003 (5) BCLR 544 (Ck).

Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Another (WCHC) unreported case no 21158/12 (6 February 2013).

SA Metal Machinery Co Ltd v Transnet Ltd (WLD) unreported case no 30825/97 (22 March 1998).

Sanyathi Civil Engineering and Construction (Pty) Ltd and Others v Ethekewini Municipality and Others (KZP) unreported case no 7538/11 (30 September 2011).

South African Post Office v De Lacy 2009 (5) SA 255 (SCA).

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC).

Telkom SA Ltd v Merid Trading (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Ltd and Others (NGHC) unreported case no 27974/10 and 25945/10 (7 January 2011).

Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality, and Others 2008 (4) SA 346 (T).

Transnet Ltd v Goodman Bros (Pty) Ltd 2001 (1) SA 853 (SCA).

Transnet Ltd v Sechaba Photoscan (Pty) Ltd 2005 (1) SA 299 (SCA).

Trencon (Pty) Ltd v The Industrial Development Corporation of South Africa Limited and Another (NGHC) unreported case no 58961/12 and 70100/12 (3 June 2013).

Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC).

Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere [1997] 2 All SA 548 (A).

VE Reticulation (Pty) Ltd and Others v Mossel Bay Municipality and Others [2013] 2 All SA 489 (WCC).

Viking Pony Africa Pumps (Pty) Ltd and Others v Hidro-Tech Systems (Pty) Ltd (SCA) unreported case no 175/09 (25 March 2010).

Zondi v MEC for Traditional and Local Government Affairs 2005 (3) SA 589 (CC).

- **England**

R v Lord Chancellor's Department Ex p Hibbit and Saunders The Times, March 12, 1993, [1993] COD 326.

R (on the application of Menai Collect Ltd) v Department for Constitutional Affairs [2006] EWHC 724 (Admin).

R (on the application of Gamesa Energy UK Ltd) v National Assembly for Wales [2006] EWHC 2167 (Admin).

- **United States of America**

Lind v Staats 289 F Supp 182 (ND Cal 1968).

Perkins v Lukens Steel Co 310 US 113 (1940).

Scanwell Laboratories, Inc v Shaffer 424 F2d 859 (DC Cir 1970).

Secondary Sources

Books and chapters

Arrowsmith, S *Government Procurement and Judicial Review* (1988) Carswell, Toronto.

Arrowsmith, S Linarelli, J and Wallace, Jr, D *Regulating Public Procurement: National and International Perspectives* (2000) Kluwer Law International, Deventer.

Beatty, D 'Law's Golden Rule' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* (2009) Hart Publishing, Portland.

- Bingham, T *The Rule of Law* (2010) Penguin, London.
- Bishop, M 'Remedies' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2013) (Revision service 5) Juta & Company.
- Bolton, P *The Law of Government Procurement in South Africa* (2007) LexisNexis, South Africa.
- De Ville, J R *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) LexisNexis, South Africa.
- Dworkin, R *Taking Rights Seriously* (1977) Duckworth, London.
- Hoexter, C *Administrative Law in South Africa* 2 ed (2012) Juta, Cape Town.
- Krygier, M 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* (2009) Hart Publishing, Portland.
- Loughlin, M *Foundations of Public Law* (2010) Oxford University Press, Oxford.
- Mathews, A *Law, Order, and Liberty in South Africa* (1971) Rustica Press, Wynberg.
- Raz, J *Practical Reason and Norms* 2 ed (1990) Oxford University Press, Oxford.
- Shklar, J 'Political Theory and the Rule of Law' in Allan C Hutcheson & Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology* (1987) Carswell, Toronto.
- Tamanaha, B Z 'A Concise Guide to the Rule of Law' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* (2009) Hart Publishing, Portland.
- Tamanaha, B Z *On the Rule of Law: History, Politics, Theory* (2004) Cambridge University Press, Cambridge.
- Quinot, G and Arrowsmith, S *Public Procurement Regulation in Africa* (2013) Cambridge University Press, Cambridge.

Journal articles

- Ashmore, R 'Judicial Review and Public Procurement: R. (on the application of Greenwich Community Law Centre) v Greenwich London Borough Council' (2012) 3 *Public Procurement Law Review* 144.
- Bailey, S H 'Judicial Review of Contracting Decisions' (2007) *Public Law* 44.
- Bailey, S H 'Judicial Review and the Tendering Process. A note on R (on the application of Menai Collect Ltd and North West Commercial Services Ltd) v Department of Constitutional Affairs and Swift Credit Services Ltd (Interested Party) and R (on the application of Gamesa Energy UK Ltd) v National Assembly for Wales' (2007) 1 *Public Procurement Law Review* 11.

- Bolton, P 'The Use of Government Procurement as an Instrument of Policy' (2004) 121(1) *SALJ* 619.
- Craig, P 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1977) *Public Law* 467.
- Endicott, T A O 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1.
- Gerwitz, P 'Remedies and Resistance' (1983) 92(4) *Yale Law Journal* 585.
- Hoexter, C "'Administrative Action" in the Courts' (2006) *Acta Juridica* 303.
- Hoexter, C 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165.
- Levinson, D J 'Rights Essentialism and Remedial Equilibration' (1999) 99 *Columbia Law Review* 857.
- Pachter, J S 'The Need for a Comprehensive Judicial Remedy for Bid Protests' (1986) 16 *Public Contract Law Journal* 47.
- Pierson, R R 'Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale, and Effect on the Procurement Process' (1970) 12 *Boston College Industrial and Commercial Law Review* 1.
- Price, A 'The Evolution of the Rule of Law' (2013) 130 *SALJ* (4) 649.
- Quinot, G 'Enforcement of Procurement Law from a South African Perspective' (2011) 6 *Public Procurement Law Review* 193.
- Quinot, G 'Towards Effective Judicial Review of State Commercial Activity' (2009) 3 *TSAR* 436.
- Radin, M 'Reconsidering the Rule of Law' (1989) *Boston University Law Review* 781.
- Raz, J 'The Rule of Law and its Virtue' (1977) *Law Quarterly Review* 93.
- Rice, D A 'Judicial Review for Disappointed Bidders on Federal Government Contracts' (1972) 26 *Southwestern Law Journal* 384.
- Speidel, R E 'Judicial and Administrative Review of Government Contract Awards' 37 *Law and Contemporary Problems* 63.
- Thomas, T 'Ubi jus, ibi remedium: The Fundamental Right to a Remedy Under Due Process' (2004) 41 *San Diego Law Review* 1633.
- Waldron, J 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137.

Zeigler, D 'Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts' (1986) 38 *Hastings Law Journal* 665.

Theses

De la Harpe, S P L *Public Procurement Law: A Comparative Analysis* (unpublished doctoral thesis, University of South Africa, 2009).