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DISPUTE RESOLUTION ALERT

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A dark cloud has always loomed over government tenders in South Africa, but it seems that since the National State of Disaster, the controversy of these tenders has come to the forefront once again.

The exposure of corruption during the National State of Disaster has drawn public and legal scrutiny on the nature of contractual relationships between the State and private entities. Whilst this controversy has dominated headlines and fueled public outcry, it has reignited debates regarding the interface between private and public law remedies in the event where a private entity contracts with the State.

Digressing from the realms of tender corruption, particularly during this period where same is of constant debate, a particularly challenging situation arises when a private entity is awarded a tender as a result of the negligent, but *bona fide*, conduct of the State. In this instance, an innocent tenderer is awarded a tender by the State in error whereafter such tender is set aside. The question here is whether such innocent tenderer in this respect has a right of recourse against the State for damages it has suffered as a result of the State's *bona fide* or *mala fide* conduct in the award of the tender.

In this respect, it is necessary to assess the legal remedies available to entities contracting with the State. A useful starting point is the Constitutional Court's decision in *Steenkamp NO v Provincial Tender Board*, EC 2007 (3) SA 121 (CC).

The *Steenkamp* case involves a delictual claim for damages by a successful tenderer when such tender was set aside due to the irregular and unfair awarding by the

State. In this case the successful tender, by Balraz Technologies (Pty) Ltd (Balraz), was set aside due to the fact that the decision-making process of the tender board was determined to be irregular and administratively unfair.

The High Court dismissed Balraz's claim for damages, whereafter the Supreme Court of Appeal upheld this decision in that "*policy considerations precluded a disappointed tenderer in the position of the applicant from recovering delictual damages that were purely economic in nature. Neither the statute under which the tender was issued nor the common law imposed a legal duty on the tender board to compensate for damages where it had bona fides but negligently failed to comply with the requirements of administrative justice*" [emphasis added].

In this respect, it was found that the economic loss of a successful tenderer (when such tender is set aside) arising from an administrative breach (and in this case, a *bona fide* but negligent breach) is not actionable in delict.

In accordance with the *Steenkamp* case, the following aspects require consideration:

Wrongfulness: A claim for damages resulting from an incorrect award of a tender is based on a delictual claim for damages under the scope of private law. In this case, the delictual claim was based on an alleged duty of care owed to Balraz by the tender board. A significant consideration, however, is required to be given to public law in that the public law remedy for such injustice would be to correct the administrative injustice (and to set aside such administrative decision) – without the consideration of awarding damages to an innocent party.

Courts to try a little TENDERness? ...continued

The decision in the *Steenkamp* case is an important reminder of the levels of care that parties ought to adopt when contracting.

Policy Considerations: The Supreme Court of Appeal in this matter made the decision that policy considerations precluded an administrative body, such as a tender board, from delictual liability for pure economic damages, sustained by the negligent, yet *bona fide*, award of a tender. It was further noted by the Constitutional Court that “[a] potential delictual claim by every successful tenderer whose award is upset by a court order would cast a long shadow over the decisions of tender boards”.

The Constitutional Court found that the tender board in this case did not owe Balraz a duty of care and therefore its conduct (in negligently awarding the tender) was not wrongful. Balraz’s appeal was subsequently dismissed.

This decision, whether made on the back of policy considerations or principles of public law, may instill an overly circumspect approach for prospective tenderers, before and after an award of a tender. On the one hand: once a tender is awarded, the successful tenderer has a contractual duty to fulfill with the State. On the other hand: it would be unable to claim out-of-pocket expenses should the tender be set aside due to the State’s negligent but *bona fide* conduct.

Would the Court react differently in the instance where the award of a tender by the State to an innocent tenderer was tainted by *mala fides* - would the (innocent) successful tenderer be able to claim damages against the State in this regard? This question was not decided in the *Steenkamp* case.

This begs the question of whether in the circumstances when a tender is incorrectly awarded to an innocent tenderer (and that tenderer is out of pocket when the tender is set aside), *bona fides* and *mala fides* aside, there should be a level of accountability on the State, especially in the event that a tenderer has limited alternative remedies open to it once the award of the tender has been set aside.

The decision in the *Steenkamp* case is an important reminder of the levels of care that parties ought to adopt when contracting. This is of particular importance in the current climate in which procurement processes have been escalated in response to the global pandemic. The above notwithstanding, while the majority decision in *Steenkamp* clarifies the situation where the state has acted in a *bona fide* yet negligent manner, it does not address cases of *mala fide* conduct of the State. Nonetheless, it remains essential that private entities contract with the possibility of being left out-of-pocket for the *bona fide* yet negligent acts of the State.

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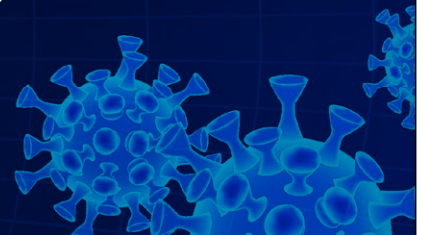
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