CASE NO.548/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

The Premier of the Free State Provincial Government	First Appellant
The Director-General of the Free State Provincial Government	Second Appellant
The Member of the Executive Council for the Department of Finance, Expenditure and Economic Affairs of the Free State Provincial Government	Third Appellant
The Chairman of the Free State Provincial Tender Board	Fourth Appellant

and

Firechem Free State (Pty) Limited	Respondent

BEFORE: HEFER, HARMS, SCHUTZ JJA, FARLAM and

MPATI AJJA

HEARD: 16 MAY 2000

DELIVERED: 29 MAY 2000

Tender boards - proper tender procedures - interpretation of contracts - presumption of legality - agreements to agree - severance - fictional fulfilment - record - costs of disallowed - practice note - part of counsel’s fees disallowed.

W P SCHUTZ

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J U D G M E N T

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SCHUTZ JA:

[1] "As I said I was not trying to outwork the Tender Board I was trying to do it through the Tender Board in a different way." These words were spoken in evidence by Mr McNaught, the chairman of the respondent, Firechem (Pty) Ltd ("Firechem"). The question arises whether there is room for the "different way" adopted, in the light of the peremptory terms of s 4 (1) of the Tender Board Act 2 of 1994 of the Free State ("the Act"), which states that the Tender Board "shall have the sole power to procure supplies and services for the Province." Despite this provision, the Tender Board, so runs Firechem's argument, was permitted to

and did allow others to conclude a procurement contract which contradicted a contract already established by the Board's acceptance of a tender. The sustainability of this argument is the main question in the appeal. The appellants are the Premier, the Director-General, the MEC for Finance, Expenditure and Economic Affairs and the chairman of the Provincial Tender Board of the Free State. They were the unsuccessful defendants in an action heard by Edeling J in the OPD. Leave to appeal was granted on petition to the Chief Justice.

[2] Mr McNaught was an experienced marketer of cleaning materials. His sales were supported by the training of staff in the use of these materials. Late in 1994 he conceived a plan to obtain a contract for the supply of all the Free State Province's cleaning material needs by negotiating a contract without going through tender procedures. Having obtained an introduction to Dr Setai, the Director General, he was given permission to conduct a survey of the Province's needs. This entailed visiting numerous hospitals, schools and the like, which, together with

preparing a detailed report, cost Firechem a large sum of money. When the report was presented it was accompanied by a draft contract. The vicissitudes of this contract form an important part of the story as it unfolds. Attached to the draft was an annexure C. This set out details of the proposed supplies of particular items, department by department, and month by month. The draft proposed that the Province would be obliged to take those quantities. The term was to be seven years.

[3] Firechem's proposal contained important attractions. Instead of importing materials, it would set up a factory to make them in the Free State, which would employ local staff for the great majority of jobs. Firechem would also help to establish supporting businesses for previously disadvantaged entrepeneurs, in fields such as transport and palette making. Moreover, provincial staff would be regularly motivated and trained in the use of cleaning materials.

[4] The presentation of Firechem's detailed proposals took place at a further

meeting with Dr Setai in March 1995 at which Mr Hendriks of the Department of Finance was present. The Tender Board fell under the Finance Ministry and Mr McNaught gathered that Mr Hendriks had been asked to attend as he was the link between the Department and the Board. Mr Hendriks made it quite clear that there could be no contract without the normal tender procedures being followed. This was a disappointment to Mr McNaught, but he did not give up. In May 1995 he requested a meeting with the Premier, Mr Lekota, on the subject of "new investment and RDP in the Free State." The Premier's response was that this subject was the responsibility of Mr Magashule, the MEC for Economic Affairs. It was in this way that a department other than the Finance Department became involved. Mr McNaught had several meetings with Mr Magashule and made a presentation to the Tender Board. Eventually, on 15 August 1995, he met the Premier. The latter gave his support in principle to the award of a provincial contract to Firechem along the lines of the proposal and the annexed draft contract, but indicated that the

Executive Council would have to make the decision. Mr McNaught was to be given the opportunity to make a presentation to that body. A document headed Motivation was submitted for the use of the Council. It concluded by saying that "Firechem is however open to negotiation relating to the terms, period and conditions of proposed contract."

[5] In the meantime Mr Hendriks reported to Mr Magashule that to comply with the Interim Constitution (requiring fairness, publicity and competitive procedures) any proposed contract should be put out to tender and would have to be approved by the Tender Board, which had the sole power to procure supplies and services. A suitable contract could be formulated with the assistance of Firechem and other interested parties. The contract would make provision for building a factory in the Free State, employing a certain minimum of local workers and so on. Tenderers would be requested to tender on the basis that they would comply with these conditions. If matters were ordered in this way no one would have reason to be

dissatisfied. Mr Hendriks commented critically on Firechem's existing draft contract saying i a that a term of seven years was abnormally long for a contract of exclusive supply. The contents of this memo were not known to Mr McNaught at the time. However, Mr Hendriks's points had gone home and on 20 September 1995 the Executive Council passed a resolution to the effect that legislative requirements with regard to tenders must be followed. Further, the Tender Board was to review, and if necessary revise the tender documents in relation to cleaning materials.

[6] In consequence, on 22 September 1995 the Executive Council instructed the Tender Board that an existing invitation to tender should be cancelled. Before a new advertisement was published a new set of tender documents was to be prepared and considered by the Departments of Finance and Economic Affairs.

[7] On 3 October 1995 the MEC for Finance, Mr Makgoe, communicated the Council's decision in the following recorded terms:

"1 That the project was accepted *in principle*;

2 But that it had to go out on general tender to ensure 'transparency and not to contravene the law (Interim Constitution)'

3 . . .

4 That existing tender contracts be extended for three months;

5 That specifications along the lines of Firechem's proposal be drawn up by Tender Board, and

6 Be advertised within . . . three months . . .

7 Any company in the field could tender . . .

8 Terms like duration of the contract, SMME [Small Micro Medium Enterprises] Development, Social Responsibility, Affirmative Action, actual investment, cost incurred by Government, etc to be negotiated with tenderers in the final stages of the decision - making process before contract is awarded (was not very clear on this).

9 No preferences granted to Firechem on the following grounds:

- Firechem is not a 'Free State Company';
- 'Playing field to be levelled';

. . ."

[8] In his evidence in chief Mr McNaught said with reference to par 8 just quoted:

"My understanding of that was that once the successful tenderer or tenderers had been given their tender award that they would be able to make additions or to put other inputs into the contract that were not necessarily specified in the tender document, the reason for that being that the tender

document although it was more comprehensive than the previous tender that had been withdrawn, it still was lacking in certain points that it could have had in."

[9] As will become apparent as the story unfolds, this proposition is vital to Firechem's case. I shall come back to it, so will confine myself to two comments at this stage. First, par 8 speaks of negotiations before contract award. McNaught contemplates negotiations after award. As will become apparent there were negotiations both before and after award. Secondly, McNaught speaks of additions where something was "not necessarily specified in the tender document." As will further become apparent he has to face difficulties arising out of making additions where something was so specified.

[10] To revert to the narrative, the invitation to tender was published on 29 December 1995. The document commences:

"Tender VT 20132/96 For Disinfectants and Cleansing Agents: Province Free State: Bloemfontein

1 In terms of a notice published in the Provincial Gazette of 1995/12/29

and in accordance with the Provincial Tender Board Regulations promulgated under Provincial Notice no 12 of 14 September 1994 tenders are invited for the supply of the above for the period 1996/03/01 till 2000/02/28 [ie a period of four years]."

Further relevant terms are:

"4 Prices must hold good for 90 days and will thereafter be binding on the successful tenderer.

5 . . .

6 The following documents are attached hereto and tenderers must assure [sic] that all the relevant documents are returned.

(i) Tender forms

(ii) Conditions of Contract

(iii) Specifications (Quantity lists).

7 . . .

8 The conditions contained in the VST 36 (General Conditions and Procedures) and the attached VST 6 and VST 8 [the tender form], as well as any other conditions accompanying this request, are applicable.

. . ."

Certain "Important Conditions" which were attached require mention:

"1 Tenders are scheduled mechanically in this Office of the Tender Board. The tender forms have consequently been drawn up so that certain essential information is to be furnished in a specific manner.

Any additional particulars shall be furnished in the enclosed questionaire or in a separate annexure.

2 The tender forms should not be retyped or redrafted . . .

11 Orders shall be placed directly by the Provincial Departments and other approved instances

. . .

15 These conditions form part of the tender and failure to comply therewith may invalidate the tender."

Certain "Additional Important Conditions" also require mention:

"1 Background

1.1 The tender will be divided into five regions as indicated on attached map.

. . .

1.6 The tenderer intends to manufacture, market and distribute its products to the Purchaser.

1.7 The tenderer will provide Training officers in the selection, use and application of the products as described in the above-mentioned clause.

. . .

1.9 The tenderer will promote hygiene and cleanliness through direct training methods, and supply products *on order* to the Purchaser.

2 Successful Tenderer's Obligations.

2.1 The tenderer agrees that it will during the term hereof

2.2 *receive orders* from the purchaser for *products as listed in the*

tender documents.

2.3 deliver such products . . .

2.4 provide at no additional cost to the Purchaser, Training Officers, for:

2.4.1 training of new personnel as Training Officers;

2.4.2 training designated staff . . . in the choice, use, demonstration and application of the products; and

2.4.3 assisting staff . . . in use and application of the products.

2.5 employ a minimum of 95% . . . of its staff for administration, training, transport, factory operations, managers and storemen from Free State residents.

2.6 furthermore, will also whenever practicable, assist emerging business by offering contracts to them in support of the principles of Reconstruction and Development Program to, for example supply of transport, paper products, other goods and services.

. . .

4 Price

4.1 The price of the product/s will be as tendered.

5 Duration

5.1 This contract shall endure for the initial term, as stated in the tender documents;

5.2 Thereafter, this contract may be extended for periods of 3 . . . months at a time when the need therefor arises.

6 Purchase Orders

6.1 The Purchaser will ensure that proper order are furnished for products to be supplied by the Tenderer.

7 Delivery

7.1 The tenderer will *deliver the products ordered in terms as tendered*

. . .

7.3 The tenderer *will deliver the goods, ordered by the departments . . .*"

(Own emphasis.)

[11] It will be observed that these "Additional Important Conditions" introduce into the conditions of tender the kind of special inducements that Firechem had offered initially and which the Executive Council had decided other applicants should be given the opportunity to match.

[12] Firechem's tender, which was signed on 22 January 1996, was on the prescribed form, which reads in part:

1 "I/We hereby *tender to supply all or any of the supplies* as and/or to render all or any of the services *described in the attached documents to the* Provincial Legislature *on the terms and conditions and in accordance with the specification stipulated in the tender documents* (and which shall be taken as part of, and incorporated into, this tender) at the prices and on *the terms regarding time for delivery and/or execution inserted* therein.

2 I/We agree that -

(a) . . .

(b) this tender and its acceptance shall be subject to the terms and conditions contained in the General Conditions and Procedures (VST 36) . . .

3 I/We furthermore confirm that I/we have satisfied myself/ourselves as to the correctness and validity of my/our tender . . .”

(Own emphasis.)

The last page of the tender drew attention to certain “Important Conditions” on the reverse side. Three of them read:

“2 Tenders should be submitted on the official forms and should not be qualified by the tenderer’s own conditions of tender. Failure to comply with these requirements or to renounce specifically the tenderer’s own conditions of tender, when called upon to do so, may invalidate the tender.

3 If any of the conditions on this tender form (VST 8) are in conflict with any special conditions, stipulations or provisions incorporated in the tender, such special conditions, stipulations or provisions shall apply.

3 This tender is subject to the Tender Board regulations made in terms of section 9 (1) of the Tender Board Act, . . ., and the General Conditions and Procedures (VST 36) as published . . .”

After certain other annexures to the tender form there follows a series of

pages each of which names and describes a product in accordance with a quality specification. The names are trade names such as Exclude, Stericlean and Pacify. Each product has an item number and a unit tender price is quoted. In each case under the heading "Quantity" the words "As required" have been typed in. In cross-examination Mr McNaught agreed that this meant that specific quantities were not stated in the tender, so that, as required by the departments, orders would be placed. Firechem would have to supply in accordance with these orders.

[13] It will be remembered that Firechem's tender was dated 22 January 1996. Tenders closed on the 24th. On the 30th Firechem submitted a further document to the chairperson of the Tender Board. Firechem referred to its tender and went on to say that an attached addendum showed that "there have been vital omissions in the Tender. Essential products have not been included in the range but are needed for daily use in Government Departments." What gave rise to this letter, according to the unchallenged evidence of Mr McNaught, was the following. Being very

unhappy about the omissions he spoke to the MECs for Finance and Economic Affairs with a view to the tender being withdrawn and supplemented. This they were unwilling to do, particularly as the tender had already been delayed once. Their advice to him was to write to the Tender Board, pointing out what he felt were omissions, and offering the Tender Board "that I [McNaught] would, if successful in tendering, make up the differences." Annexed to the letter of 30 January 1996 was a list of 13 omissions. An annexure to the letter proceeded: "These were omitted from Tender no VT 20132/96 and the Seller requests permission to supply these products as per its delivery schedule." In evidence Mr McNaught said that by this schedule he meant the annexure C to the draft contract annexed to his proposal of March 1995, to which I have made reference earlier.

[14] The letter of 30 January 1996 raised two further matters. The one was that there was no definition of SMME development. Permission was sought to discuss this matter with the Board before final adjudication. The other was a request that

Firechem be allowed to supply in industrial sized, not supermarket sized containers. This also Firechem wished to discuss with the Board.

[15] On 10 May 1996 a recommendation was made to the Board by an Action Committee that had been appointed some time before. It consisted of officials from both departments and from the Board. The recommendation was that contracts be concluded in terms of s 4 (1) (a) of the Act. The recommendation reflected that there had been 41 tenderers, but of the ten lowest only two intended manufacturing in the Free State, namely Firechem and a company called Khotso. The Action Committee recommended that the tender be awarded to those two, Firechem to get the Bloemfontein, Western, Southern and Northern regions and Khotso the Eastern region, both for a period of five years. Some of the reasons for making the award to Firechem were said to be the following:

> "4 In a separate contract to be signed between the Province and Firechem (refer annexure B) Firechem has committed themselves to:
>
> (i) Provide at no additional cost to the Province, Training Officers,

for:

(i) Training new local personnel as Provincial Training Officers.

(ii) Provide at no additional cost, equipment in quantities required for application of the product, ownership of which will vest in the Province.

(iii) Construct a manufacturing plant for the products within the Welkom area and have regional offices at Bloemfontein and Phuthaditjhaba. . . .

(iv) Employ a minimum of 95% of its staff for administration, training, transport and factory operations from Free State residents.

(v) Firechem will issue a tender for transportation of the products. . . .

(vi) Firechem will assist a local emerging entrepeneur to establish a woodworking business . . .[to manufacture palettes] . . .”

The recommendation ended on this note:

“It must be noted that the approval of the Tender Board for VT 20132/96 is subject to the contract (Annexure B) being signed by the Province and Firechem.”

As will be seen later, a similar provision eventually found its way into the letter accepting the Tender.

[16] No annexure B was attached to the document discovered by the appellant, but in his evidence Mr McNaught said that Mr Sebusi, head of the office of the Tender Board, well knew what the form of the contract was (Mr McNaught's implication being that it was along the lines of the draft contract annexed to the original proposals.) Annexure B was never produced during the course of the litigation, so that we are left to speculate about its precise content. Mr Pillay, who was a member of the Tender Board staff and the Action Committee at the time, gave evidence for Firechem (he had since left the employ of the Province). Although there was some hesitation about his evidence, the upshot was that there was no Annexure B attached to the recommendation. But he said that he and the other members of the Action Committee were aware of the contents of the draft contract which had accompanied Firechem's original submission (that is in 1995). The members of the Tender Board, he said, would not have reached their decision without being similarly aware. But as to what the content of the contract to be

signed between the Province and Firechem was to be, he said the following:

> "This other company Khotso, this company did not undertake to build a plant or to do this and that and supply training *et cetera*? . . . No, they did not. . . .
>
> Is that the reason why there should have been another contract with Firechem but not with Khotso? . . . The contract with Firechem was to look after the interest of the Province, to enter into a contract to make sure that their promises to the Province were adhered to
>
> Court: Promises in regard to what? . . . In building the factory.
>
> And the SMME's and so on? . . . And the SMME development."

[17] It is important to notice that no draft contract accompanied the tender documents. This was confirmed by Mr Pillay.

[18] Mr Pillay said that the recommendation of a five year contract was intended and that the stipulation of a four year period in the invitation to tender was a mistake. Everyone involved in the discussions had five years in mind. The admissibility of some of Mr Pillay's statements will be considered later.

[19] A meeting of the Board on 14 May 1996 reached no final decision. It dealt with some formal matters and decided that the manufacturing plants should be

visited, which was later done.

[20] On 29 May 1996 the Tender Board made its decision, as follows:

> "The Board decided to approve as recommended on the following condition,:
>
> Khotso . . .
>
> . . .
>
> Firechem Free State: Bloemfontein, Northern, Western, and Southern Regions.
>
> 1 The contract shall be jointly drawn up by Economic Affairs and the State Attorney and will be jointly signed by the Province and Firechem.
>
> . . .
>
> 5 Purchasing orders of all user departments to be monitored on order to provide the Province with a clear analysis of the Expenditure for one year. Monthly reports to be submitted to the Office of the Provincial Tender Board.
>
> 6 Monitoring mechanisms must be in place in order that the committed investment by Firechem is adhered to."

[21] On 31 May 1996 the critical document in this case, the acceptance of Firechem's tender, was issued. In part it reads:

"Sir/s

TENDER VT 20132/96 FOR DISINFECTANTS AND CLEANSING AGENTS:

PROVINCE FREE STATE: BLOEMFONTEIN: NORTHERN, WESTERN, AND SOUTHERN REGIONS

PERIOD: 1996/03/01 TILL 2000-02-28 sic

CLIENT DEPARTMENT: VARIOUS USER DEPARTMENTS

1 Your tender VT 20132/96 dated 1996/01/22 *has been accepted subject to all the terms and conditions embodied therein, for the supply of the items indicated hereunder and/or as further specified in the annexure(s)*.

2 Tender approved *on condition that a contract jointly drawn up by Economic Affairs and the State Attorney be signed by the Province and Firechem*.

3 SABS and ISO 9002 be strictly adhered to and officials of the Tender Board and SABS Bloemfontein Branch, be allowed to conduct spot checks on delivery at any given time.

4 Clear time frames be provided on the completion and functioning of the Plant.

5 Inspection of the Plant to be conducted by officials on a regular basis.

6 *Purchasing orders of all user departments to be monitored in order to provide the Province with a clear analysis of the Expenditure for one year*. *Monthly* reports of orders to be submitted to the Office of the Provincial Tender Board.

7 *This letter of acceptance constitutes a binding contract but no delivery should be effected until written official orders*, which inter alia indicate delivery instructions, *have been received*. Orders will be placed, by the participating bodies listed in the tender documents and on whose behalf the contract has been arranged, as and when required

during the contract period."
(Own emphasis.)

There followed a table listing 56 items against Firechem's tendered prices. The "Basis of Delivery" in each case was stated to be "As Tendered." The "Brand" in each case was stated to be "According to specification and as tendered."

[22] It should be noticed the period stated in the acceptance, 1996/03/01 till 2000-02-28 (sic), is four years, as stated in the invitation to tender. The recommendation to the Board had been five years, and that was the period for which it had decided the contract should be awarded.

[23] The first question that arises is whether a contract such as was envisaged by paragraph 2 of the letter of acceptance was concluded. Firechem relies upon a contract signed on 7 June 1996 (referred to as "the delivery contract"). According to Mr McNaught's unchallenged evidence, after further negotiations he was

requested to attend at Mr Magashule's office (he was the MEC for Economic Affairs) in order to sign. The State Attorney, Mr Botha, was present at the signing ceremony. Mr Botha had been furnished with a copy of the proposed contract on the previous evening. Mr McNaught signed on behalf of Firechem. Mr Magashule asked Mr Botha if he was comfortable with the document and received an affirmative answer. After paging through the contract he called for Mr Osmond, chief director of the department, to sign on behalf of the Province, but it was found that he was away. Mr Magashule then asked Mr Neels van Rooyen, who was present at the meeting, to sign. This he did. Mr van Rooyen was a deputy director in the Department of Economic Affairs, bearing particular responsibility for SMME development.

[24] The signed contract was a lineal descendant of the draft which had been annexed to Firechem's March 1995 proposals. It dealt *in extenso* with the obligation to build a local factory and employ local employees, to train staff, to

issue a tender for the provision of transport services, to assist a woodworking entrepeneur and so forth, in accordance with what has been set out at length above. This calls forth no comment. But some of the other terms arouse immediate comment. For one, the initial term was five years, automatically renewable for a further five years, ie the contract was for ten years. For another, Firechem was obliged to supply and the Province was obliged to accept delivery of quantities of the product in accordance with the annexed schedule C. This schedule was eight pages long and detailed supplies to each department month by month for a 12 months period. The total price for a year was ± R17.8 million without VAT. The total quantity of each product to be supplied to each department over a 12 months period was also specified.

[25] In short, this is not a contract under which the Province determines the quantity of its purchases by placing orders, but a contract in terms of which it is obliged to accept deliveries of fixed quantities for a ten year period. The prices are

fixed, subject to escalation of 10% p a, as provided in the tender. Such a fixed quantities contract is at variance with the invitation to tender, Firechem's tender ("as required") and the letter of acceptance.

[26] A further feature of annexure C is that it includes within it the "omissions" to which Firechem had drawn attention in its letter of 30 January 1996 (Mr McNaught conceded as much). These items were never put out to tender, so that the other tenderers had not had an opportunity to tender for them either in the overall tender or separately. Similarly, the fixed quantities and the ten year period, as appears from what I have said already, did not form part of the invitation to tender.

[27] Section 6 (4) of the Act requires that all decisions of the Board shall be recorded. No resolution of the Board has been produced which amends the acceptance letter of 29 May 1996, or which delegates to another the power to do so (provision is made for delegation in s 5 of the Act). So, one is bound to ask,

by virtue of what can the delivery contract be one of the kind contemplated by the letter of acceptance?

[29] Firechem's answer is to refer to the decision approving the recommendation that "the contract (Annexure B)" be signed, read against the background of various negotiations and alleged agreements between Mr McNaught and representatives of the Province prior to the letter of acceptance. The members of the Tender Board were fully apprised of the contents of Annexure B (so it is argued) and intended that a contract akin to it would be concluded. What is striking is the pointlessness of such a procedure. First the Board calls for tenders. Then it adjudicates them. Then it selects one on the tendered terms. Then it allows the whole matter to pass out of its hands to another department, which is entitled to undo all its work. Mr Pillay's evidence was sought to be relied upon by Firechem as supporting its contention that the Board envisaged a contract along the lines of the later delivery contract. Whether that is the true import of Mr Pillay's evidence is open to serious

question, in the light of the passage I have quoted above as to what he thought the Board's intentions were.

[29] But I do not think that the case is to be decided upon the basis of Mr Pillay's views. To do so would be to ignore the parol evidence rule in a fundamental way. It is not for him to tell us what the Board intended, when the Board has expressed its intentions in words that are capable of ready interpretation. One must ask oneself what was expressed to be intended when the acceptance referred to "a contract . . . signed by the Province and Firechem." This expression must be read together with the statement that "This letter of acceptance constitutes a binding contract . . .." If the contract brought into being by this acceptance was to bind, then the further contract envisaged could not be one which contradicted it. What must have been intended was something additional to the tender contract already concluded, such as one dealing with the inducements offered by Firechem, for instance building a factory in the Free State, or, conceivably one dealing with the

details of the tender contract but not so as to contradict it or the provisions of the Act.

[30] Support for this interpretation is provided by the presumption that a lawful contract, one in accordance with the Act and proper tender procedures, was intended. Having regard to the prior history the delivery contract was certainly not one in accord with the Act or such procedures. That is so because to allow a tender board to withhold from the body of tenderers its intention to conclude a secret agreement with one of them, an agreement which the others have never seen and have had no chance to match, would be entirely subversive of a credible tender procedure. One of the requirements of such a procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled

to tender for the same thing. Competiveness is not served by only one or some of the tenderers knowing what is the true subject of tender. One of the results of the adoption of a procedure such as Mr McNaught argues was followed is that one simply cannot say what tenders may or may not have been submitted, if it had been known generally that a fixed quantities contract for ten years for the original list of products, and some more, was on offer. That would deprive the public of the benefit of an open competitive process. It is not to be assumed that the Board intended to visit the iniquities that I have mentioned upon the body of tenderers, or upon the public generally. Indeed the contrary is to be presumed - that in referring to "a contract" a lawful contract was intended.

[31] Once this conclusion is reached the emphasis placed by Firechem on the signing ceremony is seen to be misplaced. Mr McNaught stressed that the contract was signed on the Province's behalf by a deputy director on the instructions of the MEC for Economic Affairs and in the presence of the State Attorney. However,

the undisputed evidence of the deputy chief legal advisor of the Province, Mr Wessels, called as a witness for the Province, was that Mr van Rooyen, even Mr Magashule, neither of them, was empowered to sign on behalf of the Tender Board. Proper delegation lacking, that opinion, founded on the Act, appears to be wholly in accordance with the Act.

[32] The reason why I have not so far made mention of s 187 of the Interim Constitution (Act 200 of 1993) is that the unconstitutionality of the Tender Board's actions in authorising a secret contract's conclusion was not pleaded nor explored in evidence. If it had been open to us to apply them that section's requirements of fair, public and competitive tender processes, administered by impartial and independent tender boards, would merely have strengthened the Province's case.

[33] In finding for Firechem Edeling J referred to the arguments raised by the Province which have been explored so far. They were dismissed in one sentence reading "With the exception of the ten year period, I do not regard any of these

aspects of material importance or consequence." The ten year period also proved no obstacle. Some time after the delivery contract had been signed, after a query was raised by the State Attorney as to its duration, Mr McNaught replaced one of the pages. The effect was to reduce its duration to five years, which both Mr McNaught and Mr Pillay stated in evidence was what the Tender Board had intended (this despite the fact that both the invitation to tender and the acceptance of tender stipulated a four years period). Edeling J rectified the contract to reduce its term to five years. Even if this rectification was competent, in regard to quantities and omissions the judgment *a quo* simply passes over the questions raised and deserves no further consideration.

[34] Mr Potgieter, for Firechem, attempted to save the situation by arguing, in the alternative, for severance. Those parts of the delivery agreement which contradicted the acceptance of the tender were to be severed, leaving an agreement, attenuated, yet still in force. The first difficulty I have with this argument

is that severability was not pleaded, nor explored in the trial (never mind fully explored), so that it is too late to try to raise it now. But in any event, Mr McNaught's own evidence is wholly contradictory of readiness on his part to accept a contract without fixed quantities. His professed readiness, expressed in correspondence, to renegotiate the delivery contract after objections to it were raised, must be seen against the background of his earlier evidence. The delivery contract was aimed at providing guarantees for both parties, he stated, firm undertakings on Firechem's part as to building a factory and so forth and firm undertakings by the Province as to the quantities it was obliged to take. When it had become clear that the Province was prepared to pay damages rather than be bound to Firechem, he commenced his proceedings by way of motion, claiming an order that the Province give effect to the delivery contract. The enforceability of that contract is the essential dispute in the case. Accordingly there is no room for severance. There are further reasons why severance is not a possibility. One is that

the court is being asked to carve out the terms of a contract upon which the parties were to agree. Another is that the severance contended for involves a complete contradiction of Firechem's case. Firechem's contention was that the Province's stand that the tender contract was binding amounted to a repudiation. Now it contends that the delivery contract be cut down to conform with that very tender contract.

[35] Mr Potgieter's final argument was that because of the Province's refusal to recognise the delivery contract or negotiate a further one, the "condition" which he submitted was contained in paragraph 2 of the acceptance of the tender had been fictionally fulfilled against the Province. If correct, this would have the desirable consequence, from Firechem's point of view, that it would have the right to supply all the Province's needs for at least four years, without having to erect a factory, or do the other things envisaged. I have so far refrained from speaking of the provision in question as a condition, or of its fulfilment. That has been deliberate.

As Christie *The Law of Contract in SA* 3ed 152 explains, it is somewhat of a solecism to describe as a conditional contract one in which the condition is purely potestative (the *si volam* of Roman law), as such a provision is destructive of any enforceable agreement. Nor does it matter if the provision is cast as a term: Christie (op cit) 109. The result is the same. Accordingly, if the provision is potestative it does not matter for present purposes whether it is classified as a condition or a term. In either case enforcement is dependent upon the will of both parties, in this case particularly the will of the Province. An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree: *Scheepers v Vermeulen* 1948 (4) SA 884 (O) at 892, *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) 809 (A) at 828 I. Such a discretion was vested in the parties as they were to sign "a contract" the precise terms of which were not fixed in the letter of acceptance, which, unlike the Action Committee's

recommendation, did not refer to annexure B. As the Tender Board neither awarded a contract for the whole of the Free State nor exactly followed that Committee's recommendations as to demarcation, the elusive annexure B, whatever it did contain, could not have served as the contract to be signed. There was, accordingly room for a breakdown in negotiations before a contract was concluded. The position is similar to that described in *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 567 A-C:

> "Since this provision was couched as a suspensive condition, it cannot, in my judgment, be said that the parties could have intended to have had a binding agreement simply upon the exercise of the option. They had expressly agreed that only a fuller arrangement would have bound them to the joint venture. Fulfilment of the condition was necessary and the condition required *consensus* of the parties. It is thus not a case where the exercise of the option would have given rise to a contract and that other terms would merely have been left for later negotiation and agreement. I therefore am of the view that the exercise of the option could not have given rise to a contract with certain or ascertainable terms and that on this ground the 'farm-in' clause is void for vagueness."

[36] Not only was there room for a breakdown in negotiations. If we are to ignore

the delivery contract that is what happened. The delivery contract has to be ignored because to give effect to it would be to countenance unlawfulness. The Province was under a duty not to submit itself to an unlawful contract and entitled, indeed obliged, to ignore the delivery contract and to resist Firechem's attempts at enforcement. Its acts in doing so did not amount to an unlawful repudiation. Nor, for the reasons already given, could matters be saved by severance.

[37] Under these circumstances Firechem's resort to the doctrine of fictional fulfilment of a condition is futile. Even if the provision were technically a condition the Province was under a duty not to fulfil it in the way that Firechem required. Nor does it make any difference if the provision is a term and resort is had to the analogous principle applicable to the frustration of the performance of a term: see Christie (op cit) 167-8.

[38] The unlawfulness which would be involved in the fulfilment of the provision on Firechem's terms is not the only ground for concluding that fictional fulfilment

cannot operate. As a matter of interpretation of the acceptance letter, seen against its background, it could not have been the intention of the parties that the tender contract should bind the Province without its receiving the collateral benefits which had all along been an important, even decisive factor in the award of the tender. The accepted tender was never intended to stand on its own as a contract.

[39] Although the Province is successful in its appeal, comment must be made about the conduct of the Tender Board in particular. The Province called no witness who had been a member of the Board or one of its officials. Consequently this court as well as the public are left to speculate, as far as the record in this case might inform, as to quite what happened when the tender was awarded to Firechem. Further criticism is attracted to the Province by the manner in which the appeal was prosecuted once the Province had lost below.

The Record - Condonation - Costs

[40] The record should have been filed on 30 December 1998. It was filed on 16

July 1999. Application has been made for condonation of the late filing, which has been opposed. When it was filed the record was in a lamentable state. This has wasted a great deal of judicial time and made what should have been something quite straightforward, a burden. Nor was this state of affairs helped by the filing of a proper practice note. The note was entirely deficient. When the record was filed the new rules of the Supreme Court of Appeal had been in operation for over six months. They were simply ignored by the State Attorney. [41] In support of the condonation application it was said that the initial delay resulted from a misunderstanding between the State Attorney and Sneller Transcriptions (Pty) Ltd as to whether merely the oral evidence (only some 270 pages) or also the exhibits should be prepared. Then there was a difficulty about the quality of some of the exhibits, even when the court file was examined. But the number of exhibits involved was not large. The general impression is one of a lack of urgency. However, balancing the degree of non-compliance against other relevant factors

such as prospects of success and the importance of the issues raised, I consider that condonation should be granted. The appellants will have to pay the wasted costs of the opposed application for condonation, as opposition was justified.

[42] As I have indicated, the record was in a lamentable state. To give some examples: Many quite unnecessary documents were included. Thus the petition to the Chief Justice requesting leave to appeal and the whole of the opposed motion proceedings preceding the reference to trial (running to 254 pages) were included. As a result we were presented with 20 volumes of record. Bulk was also added by the duplication or triplication of annexures sometimes in a clump, sometimes widely dispersed. It would have required a mathematician deeply versed in chaos theory to work out the system. For instance, there were two copies of the judgment of the court *a quo*. Unfortunately for myself I read the first that I discovered. It happened to be the indistinct copy. Bulk was also added by unnecessary retyping. Rule 8 (6) (b), which states that printed contracts should not be retyped if there is

a clear photostatic copy available, was ignored. (In some cases retyping was necessary, but I am not speaking of those cases). Had there been a proper index, that would have alleviated the problems. But there was not. Rule 8 (6) (c) requires that the original pagination should be retained where possible. Where it is not retained on the original pages then the index should have a second column reflecting the old numbers. As no such column was provided and as the index did not show where Exhibit B started, there had to be a search for documents contained in that lengthy exhibit. The matter was made worse because Rule 8 (6) (d) (ii), requiring the transposition of references to exhibits in the record to the numbers in the appeal record, was also ignored. Nor were exhibit numbers indicated on the top of every page of exhibits, as required by Rule 8 (6) (d) (i). Matters would have been improved if a core bundle, such as is required by Rule 8 (7) in appropriate cases (of which this was certainly one, given the state of the record) had been provided. But it also was not. Finally, no heed was paid to Rule 8 (6) (g) (ii) which requires

that volumes are to be so bound that upon being eased open they will lie open without manual or other restraint and upon being so opened and thereafter repeatedly closed, the binding is not to fail. Because of this non-compliance alone the Registrar should have rejected the entire record. There is good reason for this rule. Records are meant to be read, not fought with.

[43] Before the hearing of the appeal the State Attorney was asked to give reasons why because of all the unnecessary inclusions in the record be should not be ordered to pay the costs of preparation and perusal of the record *de bonis propriis*. A lengthy explanation was given stressing that the Tender Board's file had disappeared, that Firechem's attorneys were unco-operative and that the particular attorney involved was bearing a very heavy work load. The State Attorney may count himself lucky that we have decided, taking all the circumstances into account, not to order costs *de bonis*.

[44] But the state of the record as a whole is such that a punitive order must be

made. This court has warned often enough. The order that I propose is that nothing may be recovered as between party and party for the preparation of the record.

[45] That leaves the practice note which must accompany the heads of arguments in terms of the Practice Direction set out at 1997 (3) SA 345-346 (SCA) and the heads of argument themselves. The importance of that part of the Practice Direction requiring an indication of which parts of the record need not be read was explained and stressed in *Caterham Car Sales & Coachworks Ltd* v *Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) at 954 H - 955 B. Barely any attempt to comply was made by Mr C H G van der Merwe SC and Mr J Y Claasen who signed the heads. This case cried out for a careful attempt. Further, scant attention was paid to Rule 10 (3) in drawing the heads. References to specific pages and paragraphs were absent. No chronology was provided, nor copies of subordinate legislation which had been referred to. Again, this court has spoken

often enough. The order which I propose is that all the fees relating to the appeal of the two counsel concerned be limited to those taxable on a party and party basis, limited both between party and party and in relation to their own client.

[46] When Firechem's application was referred to trial on 10 October 1996 costs were reserved, as also the question whether the costs of two counsel should be awarded. Edeling J awarded these costs, including the costs of two counsel, to Firechem. That order has to be reversed.

[47] Edeling J in finding for Firechem also awarded it costs on the attorney and own client scale. There were several reasons given for doing so, including his view that the Province had absolutely no case and knew it all along, yet persisted in its defence. In the light of our conclusions, Edeling J was quite wrong. But an additional reason for the special order was the appellants' great tardiness in making proper discovery, which led to the necessity for Firechem to prepare and set down an application to compel discovery, to serve two rule 35 (3) notices, to move for

and obtain an order to compel compliance with the same, to set down a further application to the same effect to co-incide with the commencement of the hearing of the trial and to spend a day perusing a number of files and a box of documents produced during the trial. Edeling J's order will have to be set aside, but Firechem is entitled to all its costs relating to the procedural steps described. It should also be granted one day's costs on the attorney and client scale, such costs to include the costs of two counsel.

[48] In the result:

1 Condonation of the late filing of the record is granted.

2 The appellants are to pay the costs of the condonation application jointly and severally.

3 The appeal is allowed.

4 The respondent is ordered to pay the costs of appeal save for the costs of the appeal record under items B and C of rule 18.

5 Costs of two counsel are allowed, subject to par 6.

6 The appellants' counsel are not entitled to recover more than their taxed party and party costs.

7 The order of the Court *a quo* is set aside and replaced by the following

"A The plaintiff's claim is dismissed with costs including the costs of two counsel save for the costs of one day.

B The plaintiff is to pay the costs reserved on 10 October 1996, including the costs of two counsel.

C The defendants are to pay jointly and severally all the costs relating to the plaintiff's application to compel discovery, two rule 35 (3) notices and the two applications to compel compliance with the same; and the plaintiff's costs for one day of trial on the attorney and client scale, such costs to include the costs of two counsel."

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
HEFER JA
HARMS JA
FARLAM AJA
MPATI AJA