IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 2010 OCTOBER 4 SIGNATURE

CASE NUMBER: 13762/10
DATE: 5 October 2010

DE SOLS TRADING CC (REG NO 2007/045376/23)
1st APPLICANT

ANITHA DUBARAM SINGH
2nd APPLICANT

V

THE GOVERNMENT OF SOUTH AFRICA
1st RESPONDENT

THE MINISTER OF DEFENCE
2nd RESPONDENT

THE MINISTER OF FINANCE
3rd RESPONDENT

THE CHAIR PERSON OF STATE TENDER BOARD
4th RESPONDENT

THE STATE TENDER BOARD
5th RESPONDENT

THE CHIEF DIRECTOR CONTRACT MANAGEMENT
6th RESPONDENT

NATIONAL TREASURY RSA
7th RESPONDENT

Judgment:
Mabuse J

JUDGMENT

MABUSE J:

1. The applicants sought confirmation of an interim order that had been granted to them on 16 March 2010. On the said date, the applicants had sought, and were granted, the following interim order:

"*1.1 Declaring that the First and Second Applicants are not listed on the National Treasury's database as companies or persons prohibited from doing business with the Government of the Republic of South Africa and/or the public sector, alternatively on any blacklists utilized within the system of the First to Sixth Respondents in prohibiting companies and/or persons from doing business with the Government of the Republic of South Africa;*

1.2 <u>In the alternative to subparagraph 1 above</u>, and if it is found that the First and/or Second Applicants is/are listed as companies or persons prohibited from doing business with the Government of the Republic of South Africa, removing the names of the First and Second Applicants from such a list;

1.3 Declaring that a certain contract bearing contract number B/RAT/2/07/08 for the supply of perishables in the Gauteng area, entered into by and between the First Applicant and the Second Respondent has not been lawfully cancelled by Second Respondent;

1.4 Declaring that the First Applicant is entitled to specific performance in terms of the said contract;

1.5 Directing the Second Respondent to reinstate the said contract with the First Applicant with immediate effect;

1.6 Directing the Second and Third Respondents and such further Respondents as that may oppose this application, to pay the *costs of this application on a scale as between attorney and client;*

1.7 Reserving the costs of the urgent applicant for adjudication by the Trial Court at the hearing of this matter."

In prayer 1 the applicants had obtained the following order:

"That a Rule Nisi do hereby issue returnable on 4 May 2010 when all the interested parties must show cause as to why the order I have read about should not be made final."

This application is opposed by the respondents.

2. **THE PARTIES**

2.1 The First Applicant is a close corporation, duly registered in terms of the provisions of the Close Corporation statutes of the Republic of South Africa, and not in terms of the Company Laws of the Republic of South Africa as alleged in the founding affidavit. It conducts its business at 206 Outeniqua Street, Unit 58 Val de Sol, Waterkloof Park here in Pretoria. It is represented herein by Anitha Dubaram Singh, who has been duly authorised by a resolution dated 3 March 2010 to proceed with an urgent application against the respondents and in addition to sign any affidavits in support of such application.

2.2 The Second Applicant is an adult business woman who resides currently at 206 Outeniqua Street, Unit 58 Val de Sol, Waterkloof Park, Pretoria. According to the membership records in the companies office of the application, the Second Applicant is the sole member of the First Applicant. It is also clear that the two applicants use one and the same physical address for business, in respect of the First Applicant and for residential, in respect of the Second Applicant, purposes.

3. **THE RESPONDENTS**

3.1 The Fourth Respondent is now defunct.

3.2 The Fifth Respondent is a juristic person established in terms of the provisions of section 2 of the State Tender Board Act No 68 of 1968 with its principal place of business located at Department of Finance in Vermeulen Street, Pretoria.

3.3 The Sixth Respondent is THE CHIEF DIRECTOR: CONTRACT MANAGEMENT; NATIONAL TREASURY; of this country whose offices are also located at 240 Vermeulen Street, Pretoria.

The principal legal representative of all the respondents in this application is the State Attorney.

4. **BACKGROUND**

4.1 The First Applicant was registered by the Second Applicant for the purposes of serving as a vehicle through which the Second Applicant wished to conduct business. One of the purposes for establishing the First Applicant was to successfully tender for tenders issued by the First Respondent.

4.2 On or about 4 July 2008 the Second Defendant invited tenders for supply and delivery of wet rations to units of the Second Respondent within the area of Pretoria. The estimated value of the contract involved in the said tender was R24 505 212,80. After all the processes had been followed, the tender was awarded to the First Applicant on 29 January 2009. The tender document comprised, among others, of Generally Bid Conditions, General Conditions of Contract and Declaration of Bidders' Past Supply Chain Management Practices which questionnaire had to be completed and submitted with the bid and which the Second Applicant completed and submitted. In terms of the Declaration of the Bidders' Past Supply Chain Management Practices, the applicants were required to answer the following question:

"Is the bidder or any of its directors listed on the National Treasury Database as companies or persons prohibited from doing business with the Public Sector?"

4.3 In the event that a bidder's name appeared on the aforesaid list, the prospective bidder was required to furnish further details. When the Second Applicant completed the bid documents in submitting the tender, she knowingly and wilfully failed to disclose that she was one of the directors and/or persons listed in the National Treasury Database. The declaration required a certification by the Second Applicant that the information she had furnished therein was true and correct and that in the event of the information being false, the contract entered into could be cancelled. Subsequent to the awarding of the tender to the First Applicant, the Second Respondent was advised that the name of the Second Applicant being the sole member of the First Applicant, appeared on the register of suppliers restricted from doing business with the public sector until 19 November 2013. On 21 July 2008 when she signed the First Applicant's bid documents the Second Applicant had according to the records of the Sixth Respondent, been restricted for a period of 10 years from doing any business with the public sector. On 28 April 2009 the Second Respondent directed a letter to the Second Applicant in which he pointed out that the Second Respondent had received written confirmation from the Sixth Respondent that she, as the sole member of the First Applicant appeared on the list of service providers who had be restricted from doing any business with the Government Experts of the Republic of South Africa, for the period November 2003 to November 2013. The bid documents and more specifically annexure SBS8 made provision for bidders to declare their past supply chain management practices including the blacklisting on the national Treasury database as persons prohibited from doing business with the public sector. The Second Applicant had made a misinterpretation by not divulging her status in the tender document and that in accordance with the Treasury Regulation 16A9 the Second Respondent's accounting officer was obliged to terminate the contract. In the same letter he requested the First Applicant to submit written reasons why the Second Respondent should not terminate the contract. It was also pointed out that failure to furnish such reasons within (14) fourteen days would be regarded as sufficient proof of absence of a reasonable explanation.

4.4 When it was brought to the notice of the Second Applicant that she failed to make the above disclosure, her attorneys responded by way of a letter to the effect that the Second Applicant was never formally informed by National Treasury that she had been blacklisted as she had never received any notification. According to the said letter she doubted the existence of such a fact. The said letter urged the Second Respondent to carefully reconsider all aspects contained in the letter itself, such as the fact that whilst being employed as a debtor's clerk with a firm known as "Reef Meat many years ago, she was told, after her departure from that particular firm, by her then employer that a company registered as Touch Tone Trading 62 (Pty) Ltd was placed on a blacklist by the Government and that her name was also mentioned; that she was never employed by Touch Tone Trading 62 (Pty) Ltd but merely assisted, during the period in which she was attached to the said firm with the debtors' book whilst she was employed at Reef Meat; that Touch Tone had launched a review application of the blacklisting and that the Second Applicant as a co-applicant and had signed a confirmatory affidavit because apparently her name was on the same blacklist, notwithstanding the fact that she had never been employed by Touch Tone: and that she had assumed that the said review application was successful as she had nothing at al to do with it. As the Second Applicant had indicated that she was reviewing a decision of the Second Respondent to cancel her agreement, the Second Respondent resolved on 30 July 2009 that the First Applicant could continue supplying the Second Respondent for a period of three months while the review process was still in progress. On 7 August 2009 the Second Respondent wrote a letter to the legal representatives of the Applicants and requested them to furnish them with proof of the legal process in terms of which it was reviewing the decision of the Second Respondent to cancel the agreement. The response from the Applicant's legal representative was only received on 29 September 2009. The Applicant's legal representative confirmed in the communication that the litigation was proceeding and, proved the launch of the review application furnished by the Second Respondent with a copy of the notice of set down which showed that the matter had been set down for hearing on 15 October 2009. On 15 October 2009 an order was granted by this court in terms of which the Applicant's review was removed from the roll and the Applicants were ordered to pay the wasted costs. On 29 October 2009 the Departmental Commercial Procurement Board decided to cancel the contract between the First Applicant and the Second Respondent with immediate effect.

4.5 The decision of the Second Respondent to cancel the agreement on 29 October 2009 was communicated to the First Applicant in a letter dated 3 November 2009 which read as follows:

"1. *Take note that this contract is cancelled with effect from 4 November 2009. This implies that you do not continue after this date with any service whatsoever to any points of supply involved.*

2. *Submit all your invoices as soon as possible for the settlement of your payment through the normal DOD channel for supplies that had been completed.*

3. Your points of supply have been informed accordingly.

Yours Faithfully

Secretary of Defence
Director General"

4.6 The parties' contract was reinstated on 5 November 2009 after the Applicant's legal representatives had written a long letter to the Second Respondent, once again relying on the fact that the Second Applicant had been blacklisted without being notified and without proper procedures having been followed, and stating that that kind of decision gave rise to the consideration of the cancellation of the agreement. On 5 November 2009 the Respondent had taken a decision to reinstate the agreement with immediate effect and the Applicants were notified in a letter dated 9 November 2009 by the Second Respondent. The reinstatement of the agreement between the Respondent and the First Applicant was done pending the progress on the outcome of the litigation regarding the blacklisting. On 25 February 2010 it was decided that the contract should be cancelled at the end of a period of 3 months, reckoned from 5 November 2009. In a letter dated 26 February 2010 addressed to the First Applicant by one Colonel Malaudzi of the Commanding Procurement Service Centre ("the CPSC"), which is attached to the Applicant's papers and marked annexure C10, the First Applicant was informed, among others, that:

"3. It is now 3 months since the contract was reinstated and yet the litigation between you and National Treasury has not been finalised or is nowhere near finalisation. In fact, we have been made aware that you have not taken any steps to either enrol the matter or expedite its enrolment.

> 4. *You are therefore informed that the Department cannot continue to carry this risk indefinitely and to act outside the regulatory framework that governs the state tenders as prescribed by the National Treasury. As such the Department, through its DCPB has decided to cancel the contract with effect from 1 March 2010."*

It is this letter of 26 February 2010 from the Second Respondent that triggered this application.

5. The applicants holds the view that the cancellation of the agreement by the Second Respondent on 26 February 2010 was unlawful on the basis that the Second Applicant was not informed by the Second Respondent or any other person for that matter that she had been blacklisted. On the other hand the Second Respondent is adamant that the agreement was lawfully cancelled. In my view the battlefield between the parties is whether in completing the bid documents of the first application on 21 July 2008 the Second Applicant knowingly failed to disclose that she had been blacklisted. The question is not whether or not she had been informed of the blacklisting bur whether or not she was on the blacklist, if so, whether or not she was aware of the fact of the blacklisting.

6. It is common cause between the parties, and I agree with the submission made by Mr. Tokota, that the First Applicant did not, as at the date on which the Second Applicant completed its bid documents, appear on the blacklist of the National Treasury. It is common cause that the Second Applicant has been on the black list since 20 November 2003. This constitute the primary reason why counsel for the Second Respondent argued that it is incompetent for the Applicants to seek the order set out in paragraph 1.1 of their notice of motion. I will deal with this point later in this judgment.

7. According to the Second Applicant, the cornerstone of the Applicant's case is that: (a) she in particular, had not been advised that she had been blacklisted; (b) she doubted the existence of such a blacklisting and was unwavering in her believe that because she had not been formally notified of her blacklisting, she could therefore complete the First Applicant's bid documents in anyway she wished; (c) that she had been inappropriately placed on the blacklist; and finally, the Second Respondent decided on the basis of the wrong information and in that manner arrived at a wrong decision to cancel the contract.

8. I hasten to make the following findings that:

   1. The National Treasury took a decision to blacklist the Second Applicant on 20 November 2003;
   2. The decision to blacklist the Second Applicant was communicated to her in writing in the letter dated 11 June 2004, which letter was addressed to Touch Tone Trading 62 (Pty) Ltd; at which point the First Applicant had not been floated.
   3. The Second Applicant knew or should have known that she personally had been blacklisted by the National Treasury;
   4. When she completed the First Applicant's bid documents, she knowingly and wrongfully failed to disclose that she had been blacklisted;
   5. She was less than candidate when in her founding affidavit she found common cause with the contents of the letter her legal representatives had written in which they indicated that she never was employed by Touch Tone.

   I make these findings on the following bases:

A letter dated 11 June 2004 from the Chief Director, Contract Management to Touch Tone Trading 62 (Pty) Ltd. at PO Box 4936, Pretoria states as follows:

"ATTENTION: SHOBANA SARJOO

The State Tender Board on 20 November 2003 ruled that your company, Touch Tone Trading 62 (Pty) Ltd. and it's associated members listed below be restricted for a period of 10 years to do business with the Government of South Africa;

1. Shobana Dubaram Sarjoo
2. Ralph Garth Sarjoo
3. Anitha Dubaram Singh"

Several other people's names were also listed.

9. Although this letter was not directly addressed to her, it was not directly addressed to Shobana Dubaram Sarjoo and Ralph Garth Sarjoo either. These two names I have just mentioned are names, just like the other names I have not mentioned by reason of the fact that they are of no use to this matter, in that list just like the Second Applicant's name. Considering that she was in the employ of the said Touch Tone as I found or somehow connected with Touch Tone as she claimed, there is in my view an inescapable conclusion that in whatever capacity she related to Touch Tone at the time she was informed about her blacklisting. In her founding affidavit, to be specific in paragraph 18 thereof, she stated that Shobana Dubaram Sarjoo is her sister and that her sister was married to Ralph Garth Sarjoo, the sole director and sole shareholder of Touch Tone Trading 62 (Pty) Ltd. In the premises, it is highly unlikely that, having received the said letter, neither of them would have informed her.

10. She is adamant in her replying affidavit that she was not aware that she had been blacklisted. The first paragraph of a letter dated 18 December 2002 which the Second Respondent had written to the Department of National Treasury states as follows:

"As per previous letters faxed to you, I urgently appeal to you for assistance concerning the name, my name being blacklisted. I have on several occasions called you, called your office as well but I am always been informed that you are not available. Please note this matter has come as a shock to me as I was never informed by your department that there was a problem with me and that I was going to be blacklisted.. As I have discussed telephonically with your secretary most of the staff that was employed for the company concerned have also been blacklisted and this ranges from the general cleaner to the receptionist."

11. Although this letter was dated 18 December 2002, in fact it has been so confirmed, was received by the National Treasury on 18 December 2008, a little over 5 months after she deposited the First Applicant's bid papers. She has not dealt with this letter in her replying affidavit, especially why the letter is dated 18 December 2002 which is obviously more than a year before the decision to blacklist her or stake. She does not deal with the fact that in the said letter she was already dealing with her blacklisting nor does she deal with the reason why it took so many years for her letter to reach the treasury.

12. The Second Applicant, as I found earlier, was not candid with the court. In both her founding and replying affidavits she denied on time without number that she was employed by Touch Tone. She admits that she deposed to an affidavit in which she said that she was at the relevant time employed by Touch Tone but denied that it was true. I wish to point out that the said affidavit related to another matter with case number 33443/04, in which the First

Applicant was Touch Tone and the Second Applicant in this matter was in that other matter the Fourth Applicant. The purpose of the said application was to review and set aside the very blacklisting which is now the subject matter of the current application. The Second Applicant cannot now pretend that she did not know what that other matter involved and that she was also affected by the blacklisting the review was challenging.

14. Accordingly I find that the Second Applicant's failure to disclose the fact that she had been blacklisted had induced the Second Respondent to enter into the contract with the First Applicant. Had the Second Applicant made it known to the Second Respondent that she is a member of the First Applicant and that she in particular had been prohibited from doing business with the Government, the Second Respondent would not had entered into the contract with the First Applicant. It is for that reason that on 1 March 2010 the Department finally cancelled agreement with the First Applicant because it was acting outside the regulatory that Govern State Tenders as prescribed by the National Treasury.

15. There are other grounds on the basis of which the Second Respondent was entitled to cancel the agreement concluded between it and the First Applicant. For instance Regulation 16A 9.1 (f) provides as follows:

"*The accounting officer or accounting authority must cancel a contract to a supplier of goods or services –*

(f) If the supplier committed any corrupt or fraudulent act during the biding process or the execution of that contract."

16. When the Second Applicant tendered on behalf of the Applicant, the tender was subject to the General Bid Conditions as well as

General Conditions of Contract. Paragraph 20(b) of the General Bid Conditions states that:

"<u>BIDDERS INCORRECT INFORMATION</u>:

Where a contract has been awarded on the strength of information furnished by the bidder, which, after the conclusion of the relevant agreement, is proved to have been incorrect, the Department may, in addition to any other legal remedy it may have cancel the agreement ..."

17. Furthermore paragraph 23.1(c) of the General Conditions of Contract provide for termination for the default and reads as follows:

"The purchaser, without prejudice to any other remedy for breach of contract, by written notice of default sent to the supplier, may terminate this contract in whole or in part:

(c) If the supply in the judgment of the purchaser, has engaged in corrupt or fraudulent practice in competing for or in executing the contract."

18. Accordingly the Department was acting within its rights when it cancelled the contract. See **Debtor Colour International (Pty) Ltd v Intermarket (Pty) Ltd. 2001(2) SA 284 (SCA) F-G**. See also **Park Ltd v TV and Radio Guarantee Company (Pty) Ltd 1985(4) SA 805 (A) 832 C-D**.

19. It will appear that the application, particularly with regard to paragraph 1.1 of the notice of motion is fraud with problems. The applicants seek a declaratory order that both of them are not listed on the National Treasury Database as companies or persons respectively prohibited from doing business with the Government

of the Republic of South Africa. I touched on this point earlier when I dealt very briefly though, with Mr. Tokota's contention. The major problem with this declaratory order that the Applicants seek regards the competency of this Court to grant such an order. The competency lies mainly in the fact that, firstly, the First Applicant is not blacklisted and secondly it is a fact that the Second Applicant is on the blacklist of the Sixth Respondent. Accordingly neither of the Applicants is interested in an existing right because the Applicants want confirmation of a situation that already exists.

20. It is also not competent for this Court to grant the two Applicants alternative relief that they seek in terms of clause 1.1 of their notice of motion because firstly, and as I already have indicated above, the First Applicant is not on the blacklist and consequently its name cannot be removed from the blacklist of the Sixth Respondent. Secondly it is a fact that the Second Applicant is on the blacklist of the Sixth Respondent and she has not made out a clear right entitling her to the removal of her name from the Sixth Respondent's blacklist.

21. The Second Respondent seems to rely heavily on, and is obsessed with the argument raised in the heads of argument for the Respondents in the review application that the reason to blacklist her has not been communicated to her and therefore did not constitute administrative action capable of being reviewed. In the Third and Sixth Respondent's duplicating affidavit which was deposed to by Ndleleni Willie Mathebula ("Mathebula"), the Third and Sixth Respondents hold the view that the Second Applicant is misleading if regard is had to her founding affidavit in which he had stated that, while she was employed as debtors' clerk with the firm known as Reef Meat many years ago she was told by her then employer that a company registered as Touch Tone Trading 62 (Pty) Ltd. was placed on a blacklist by the Government and that

her name was also mentioned. It will be recalled that she denied in the said paragraph that she was ever employed by Touch Tone Trading (Pty) Ltd. ("Touch Tone") and merely assisted them with their debtors' book at a certain point in time. What is important however with the contents of this paragraph is that it has become quite clear that the second applicant became aware of the fact that she had been blacklisted way back when she was informed by her employer that she was on the blacklist together with Touch Tone Trading 62 (Pty) Ltd. which decision she became aware of before she signed the confirmatory affidavits apply for the review thereof in December 2004. It is correct that the mere fact that the Second Applicant had been informed that her name was on the blacklist imposed a duty on her to investigate the circumstances under which she had been blacklisted.

22. I found it to be disingenuous for the Second Applicant to rely on the heads of argument for the Respondent in the review application. It is important to know that a party must make his case in the founding affidavit and not in arguments. Arguments are merely intended to influence the Court to decide in a particular way, they are not themselves a party's case. The Third and Sixth Respondent contend that there are two conflicting interests in this matter involving two separate departments. As far as the Second Respondent are concerned the interest therein concerned the cancellation of the contract in which the Third and Sixth Respondents had no interest whatsoever on the one hand, while on the other hand the Third and Sixth Respondents had to defend a decision which was taken in 2003 by the erstwhile State Tender Board which fell within the ambit of the Respondents and that had nothing to do with the Second Respondent.

23. I fully agree with counsel for the Second Respondent that as far as the declarations and the order sought regarding the cancellation and reinstatement of the contract are concerned, the cause of the

listing of the Second Applicant's name is actually irrelevant. It is the fact that she is listed, her knowledge of the listing and her failure to disclose it in her bid papers that are relevant. Accordingly the Second, Third and Sixth Respondents found common cause in that the Second Applicant is not a person interested in an existing right and issue at stake with regard to her blacklisting is purely academic. According to the Second, Third and Sixth Respondents there is another reason why this Court should decline to grant the Applicants the declaratory relief they seek. Firstly the question is whether the Second Applicant is a person interested in an existing right, whether such a question can be answered in the affirmative. Secondly the next question is whether the issue is one with regard to which the Court should exercise its discretionary power to make such an order. In this regard a number of factors come into play such as the availability of another remedy, considerations of justice, convenience and public policy and whether the matter concerns events that occurred in the past.

24. It has already been stated that the Second Applicant together with other Applicants had on 17 December 2004 issued review proceedings in which proceedings she was the Fourth Applicant in which the Fifth and the Sixth Respondents were cited. In that application the Applicants (including the Second Applicant) sought an order reviewing and setting aside the decision of the State Tender Board to blacklist, alternatively, restrict the Second Applicant from tendering for contracts or otherwise doing business with the Government. That review application has not been finalised and according to the information that this Court obtained from the parties, is still pending before this Court. Although the Second Applicant has raised the issue that such a review may be withdrawn because of the present application, it is still available to her to persue her remedies. Should the Second Applicant achieve such with the review, that would result in the declaration of the

decision to blacklist her nul and void and consequently her name would have to be expunged from the database of the blacklisted persons in the National Treasury Register.

25. Counsel for the Third and Sixth Respondent has argued that the Second Applicant was at all material times aware of her placement on the blacklisted persons since December 2004 and notwithstanding her knowledge of the facts of the blacklisting she has inordinately delayed in bringing of this application to the extent that the State Tender Board that took the decision is now defunct. In the result the Third and Sixth Respondents are now compelled to take responsibility for the actions or decisions of the now defunct State Tender Board. It was argued that the declaratory order sought by the Applicants concerns the events of the past. Relying on the authority of **Naptosa v Minister of Education, Western Cape 2001 (2) SA 112 (c) at p. 126 E-G** counsel for the Third and Sixth Respondents argued that a lower Court have since recognised the rule against unreasonable delay even in matters involving not only reviews but also relating to this declaratory orders and interdicts. In the aforementioned authority the Court stated as follows:

"I consider that the substantial delay in bringing these proceedings is another reason for exercising our discretion against the <u>grant of a declaratory order</u>. It is well established law that <u>undue delay may be taken into account in exercising a discretion as to whether to grant an interdict or a mandamus, or to grant relief in review proceedings</u>. The declaratory order, being as flexible as it is, can be used to obtain much the same relief as would be vouchsafed by an interdict or a mandamus. Where it is not necessary that a record of proceedings be <u>put before the Court, a declaratory order could serve as a review</u>.

Prejudice features large in deciding what is just or convenient. In the present case there is to my mind considerable prejudice to the

Department. Most of the educators in the Department, through their representative unions, accepted at the retrenchment discussions, albeit reluctantly, the way out of what was, for the Department and for them, an enormous dilemma. The fixed-term contracts of the educators were for three months. If an application for the relief now sought had been brought within a matter of weeks, the Department would have realised that the settlement was being challenged and might have declined to renew the contracts of those who were dissatisfied with the absence of benefits. It might have terminated the contracts of all fixed-term educators. Having regard to the gravity of the situation, it might even have requested and obtained an amendment of the subordinate legislation promulgated by the Minister. Fifteen months later, when the applicants launched their application, the time for remedial steps had passed. The Department found itself exposed to an expenditure for which it had not budgeted and which it could not afford without seriously compromising educational funding for the years 1999 and 2000. I do not say that any one of the above considerations by itself would have been decisive. Taken together, they constitute in my opinion a formidable hurdle in the way of the exercise of a discretion favourable to the applicants."

26. See also the case of **Mohlomi v Minister of Defence 1997 (1) SA 124 (CC) at p. 129 H to 130 A-B paragraph 11** in which the Court stated as follows:

"Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactory on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be

obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."

27. Accordingly the counsel for the Third and Sixth Respondents submitted that this Court should not exercise its discretion to get a declaratory order in favour of the Applicants where the Applicants had an alternative remedy. He holds the view that the Second Applicant must be restricted to the review proceedings that she has instituted and which are still pending in this Court. I therefore agree with the argument presented by the Third and Sixth Respondents that the relief sought by the Applicant may not be granted in the absence of a review for the setting aside of the decision that was taken by the now defunct State Tender Board. That decision still stands unless it is successfully challenged, this Court is not competent to set it aside simply by way of a declaratory order.

"Until the administrator's approval (and thus also the consequence of the approval) is set aside by Court in provisions of judicial review it exists in fact and it has legal consequences that cannot simply be overlooked."

See **Oudekraal Estates (Pty) Ltd v City of Cape Town 2004(6) SA 222 (SCA) at p. 242 paragraph 26**.

28. It is for the above reasons that on 10 September 2010 I granted the following order:

1) The interim order granted by this Court in favour of the Applicants on 16 March 2010 is discharged.
2) The application is dismissed with costs.

3) Costs shall include the costs of 16 March 2010, wasted costs of 7 September 2010 and the costs of two counsel.

4) The costs of 4 May 2010 shall be costs in the cause.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Applicant's Attorneys:	*Vezi & De Beer Inc. Attorneys*
Applicant's Counsel:	*Adv. CJ Van Coller*
2nd, 3rd & 6th Respondent's Attorneys:	*The State Attorney*
2nd Respondent's Counsel:	*Adv. JH Dreyer (SC)*
3rd & 6th Respondent's Counsel:	*Adv. BR Tokota (SC)*
Date Heard:	*8 September 2010*
Date of Judgment:	*5 October 2010*