

WANTED: A PRINCIPLED APPROACH TO
THE BALANCING OF PUBLIC POLICY
CONSIDERATIONS. *STEENKAMP NO V
PROVINCIAL TENDER BOARD,
EASTERN CAPE*

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It matters how judges decide cases¹

1 Introduction

*Steenkamp NO v Provincial Tender Board, Eastern Cape*² is unlikely to generate too much controversy in academic circles or in the profession. The majority decision entrenches the *status quo* in so far as the delictual liability of tender boards is concerned. And apart from the majority judgment's rather confounding comments that appeared to conceive the subject of remedies in rather rigid and dichotomous terms, nothing in the written text appears outwardly contentious. Even the disagreement between the majority and the minority concerns a point of law upon which reasonable people could disagree.

However, that is not to say that the judgment does not raise any issues of interest and concern. My aim in this note is to reflect upon, and where appropriate critique, the manner in which the majority and minority arrived at their respective positions with respect to the

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¹ See R Dworkin *Law's empire* (1986) 1.

² 2007 3 BCLR 300 (CC).

determination of wrongfulness. In particular, I will consider the manner in which the both judgments dealt with the balancing of the public policy considerations raised. I critique the rather thinly substantiated, individualised and subjectivised approach of the majority to the balancing of the policy considerations. In particular, I take issue with the fact that the majority's approach is focused on justifying the outcome of the matter as and between the parties, thus missing an important opportunity to guide us on how matters involving similar considerations should be approached in future. I then contrast this approach with the minority's clearer identification of the values and interests represented by the policy considerations raised.

The minority's approach to the balancing of policy considerations – grounded in the principle of proportionality – is to be preferred. Proportionality does not simply require that courts clearly identify the competing values or interests at stake in a dispute. Properly conceived, proportionality demands that courts elaborate in some detail the reasons that support their conclusions.

2 Background and facts

Although judgment in *Steenkamp* was handed down in 2006 and reported in 2007, the facts giving rise to this matter preceded the Constitutional Court's decision by over a decade. The matter has its origins in disputed tender proceedings in the Eastern Cape. In 1996, Balraz Technologies (Pty) Ltd ('Balraz') was awarded a tender by the provincial tender board. However, that award was subsequently set aside in review proceedings instituted by one of the unsuccessful tenderers, Cash Paymaster Services (Pty) Ltd.³ In *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province*, the court held that given the irregularities in the tender adjudication process, the tender board had acted in an administratively unfair manner.

Unfortunately, Balraz did not survive to tender another day. It was placed under final liquidation before it could retender. As a result, all future claims relating to the original tender were instituted by Balraz's liquidator. At the trial court, the applicant, Balraz's liquidator, was unsuccessful in its claim for the recovery of out-of-pocket expenses incurred as a result of its having commenced to deliver services as per the contract arising out of the original tender award. The court held that the applicant's status as an unregistered entity at the time of submitting its tender documentation rendered the tender award void. No relationship giving rise to a duty of care could have arisen as and between itself and the tender board. Put

³ For the review decision, see *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 1 SA 324 (Ck).

differently, the conduct of the tender board *vis-à-vis* the applicant could not be properly conceived as being wrongful.

Undeterred by this outcome, the applicant appealed to the Supreme Court of Appeal. That appeal was dismissed. The Supreme Court of Appeal's decision focused on the delictual liability of the tender board as a public body. It held, on grounds of public policy, that neither statute nor common law ought to be extended to cover alleged delictual damages caused by the tender board (to the applicant) that were of a purely economic nature. The Supreme Court of Appeal held so despite the fact that it had found that the tender board had acted negligently (albeit in good faith).

3 The majority decision⁴

In the Constitutional Court, the issue was crystallised as follows: Can a once successful tenderer recover its out-of-pocket expenses incurred after the contract was awarded, but before the said award was set aside on review?⁵ The majority judgment, delivered by Moseneke DCJ, turned on whether or not the respondent's decision to award the tender to the applicant, whilst in breach of its constitutional and statutory mandate to exercise its powers in an administratively fair manner, was wrongful in a delictual sense.⁶ The respondent had conceded that it had acted in an administratively unfair manner, albeit in good faith, when it assessed and awarded the tender to Balraz.⁷

In considering the import of the tender board's failure to uphold the principles of administrative justice, the majority rejected the idea that the breach of a constitutional or a statutory duty should as a matter of course be regarded as being delictually wrongful. According to the majority, the determination of wrongfulness giving rise to the recognition of a duty of care and liability on the part of a defendant could not be made without having regard to public policy considerations of what was fair and reasonable in the particular circumstances.⁸

⁴ I do not consider the concurring decision delivered by Sachs J because the issues raised therein are not germane to those presently under consideration.

⁵ Two other issues were raised in the Constitutional Court: firstly, whether or not there was a constitutional issue raised; and secondly, whether or not it was in the interests of justice to consider the matter. These issues will not be discussed in this note. For present purposes it suffices to say that in both instances the decision of the court was in the affirmative.

⁶ See sec 187 of the Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution) and sec 217(1) of the Constitution of the Republic of South Africa, 1996 ('Final' Constitution); and the State Tender Board Act 2 of 1994 (Repealed by Provincial Tender Board Repeal Act (Eastern Cape) 6 of 2004).

⁷ *Steenkamp* (n 2 above) para 36.

⁸ *Steenkamp* (n 2 above) para 37.

In holding that the applicant's claim must fail, the majority held that the applicable constitutional and statutory provisions in terms of which the tender board acted did not envision a tenderer in the position of Balraz having a claim to damages.⁹ Instead the majority took the view that had Balraz been prudent in the circumstances, it would have utilised other avenues of redress available to it to mitigate its risk of loss.¹⁰ For example, according to the majority, Balraz could have tendered again after the adverse outcome of the review proceedings.¹¹ Alternatively it could have negotiated for a right to reimbursement for out-of-pocket expenses at the time of contracting in order to safeguard it from loss in the event of the tender award being overturned on review.¹²

In concluding that Balraz was not owed a duty of care by the tender board, the majority held that no rights or values in the Constitution would justify an extension of the ambit of the law of delict in the manner sought. In reaching this conclusion, the majority found that compelling public policy considerations required that it provide some level of immunity to tender boards that made innocent but negligent decisions.¹³ One such policy consideration that weighed heavily on the majority was a deep-seated concern that an extension of liability in the manner sought would open the floodgates of litigation by unsuccessful tenderers. This prospect, the majority feared, would have the undesirable consequence of eroding the efficacy of the tendering process and tarnishing the image of tender boards in the public's eyes.¹⁴ Given that the majority had disposed of the matter on the basis of wrongfulness, the majority declined to answer questions relating to the validity of Balraz's tender or the tender board's negligence.¹⁵

4 The minority decision

Langa CJ and O'Regan J, in delivering the dissenting minority judgment, identified one especially critical ground upon which they

⁹ *Steenkamp* (n 2 above) para 47.

¹⁰ Moseneke DCJ, clearly unmoved by the applicant's contentions, makes this point when he writes that '[o]n the facts, Balraz wasted no moment to accept the tender award. But once the order to supply goods and services was made by the department, Balraz should have curbed its commercial enthusiasm as it was well within its right to require that its initial expense not lead to its financial ruin should the award be nullified. Balraz unnecessarily chose the more hazardous course which is to incur mainly salary expenses of directors without fashioning out an appropriate safeguard. Its loss could have been easily curbed by prudent conduct and precaution.'⁷ *Steenkamp* (n 2 above) para 52.

¹¹ *Steenkamp* (n 2 above) para 49.

¹² *Steenkamp* (n 2 above) para 50.

¹³ *Steenkamp* (n 2 above) para 55(a).

¹⁴ *Steenkamp* (n 2 above) para 55(b).

¹⁵ *Steenkamp* (n 2 above) para 61.

differed with the majority, namely the determination of wrongfulness on the part of the tender board. Langa CJ and O'Regan J deemed it important to characterise the applicant's claim as one of pure economic loss. Such a characterisation had historically played a part in the courts' disinclination to recognise a duty of care.¹⁶

According to the minority, the nature of the wrongfulness inquiry in the post 1994-era must, in essence, accord with the norms and the values of Constitution. In a matter such as the one before the Court, the minority held that the following norms or principles had to be taken into account when determining wrongfulness:

(1) The need to guarantee that successful tenderers have an enduring faith in the tender process and the resultant contracts. Such a guarantee ensures that tenderers commence to deliver on their contracts timeously without having to labour under the fear of facing financial ruin in the event that a tender is subsequently set aside through no fault of their own. Further, a failure to provide such a guarantee posed a greater risk of financial ruin to smaller or new business enterprises that government procurement policies sought to promote.¹⁷

(2) The need to properly differentiate between claims for damages arising out of loss of profit instituted by an unsuccessful tenderer on the one hand; and damages resulting from out-of-pocket expenditure incurred by an initially successful tenderer who had commenced to deliver services in accordance with its contractual obligations. The former would constitute a windfall claim and the latter a claim for reimbursement for services rendered.¹⁸

(3) The need to promote accountability in the entire tender process in order to ensure that once successful tenderers who incur out-of-pocket expenditure spent in the good faith fulfilment of a tender contract were not unduly burdened with unrecoverable expenditure. Such a burden would inevitably have a detrimental impact on the future delivery of tender obligations.

Having considered the factors set out above, the minority concluded that in the circumstances of the case, the tender board acted wrongfully, owed the applicant a duty of care, and thus created the basis for a claim for delictual damages.

¹⁶ *Steenkamp* (n 2 above) para 67.

¹⁷ *Steenkamp* (n 2 above) para 82.

¹⁸ *Steenkamp* (n 2 above) para 83.

5 Comparing the approach of the majority and the minority to the balancing of public policy considerations

My focus in this section will be on what I take to be the main point of disagreement between the two opinions: namely the approach to the balancing of public policy considerations. I will not, therefore, concern myself with the actual decision reached on the non-constitutional point of delictual wrongfulness. For purposes of this note I am satisfied that the Court could conceivably have gone either way.

5.1 Wrongfulness as a requirement for delictual liability

Before I turn squarely to the central concern of this note, namely the balancing of public policy considerations I want to consider briefly the requirement of wrongfulness as an element of delictual liability. The requirement of wrongfulness is a *sine qua non* for the attachment of delictual liability. Wrongfulness, in a delictual sense, is said to exist where particular conduct either infringes upon a person's legally recognised right or where it results in the breach of a legal duty owed to a person by another.¹⁹ According to Neethling *et al*, whether particular conduct is in fact wrongful is determined with reference to the legal convictions of the community or the community's *boni mores*. This inquiry, according to the authors, entails an objective test based on the criterion of reasonableness. The pertinent question to ask is whether or not the conduct in question was justifiable or unjustifiable.²⁰

In the context of the wrongfulness inquiry, the determination of reasonableness requires (a) that a court must take into consideration all the circumstances of the matter pertaining to the parties and (b) that a court must consider issues of public and legal policy in making a value judgment as to how the alleged wrongdoer's conduct should be viewed by society.²¹ The second proviso requires that the

¹⁹ JR Midgley & JC Van der Walt 'Delict' *LAWSA* (2nd ed, 2005) Volume 8(1) para 60. See also J Neethling *et al Law of delict* transl & ed J Knobel (5th ed, 2005) 31.

²⁰ Neethling *et al* (n 19 above) 34.

²¹ See *Olitzki Property Holdings v State Tender Board and Another* 2001 8 BCLR 779 (SCA) para 12 (Cameron JA commenting on how reasonableness is determined puts it as follows: 'The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community. This appreciation must unavoidably include the application of broad considerations of public policy determined also in the light of the Constitution and the impact upon them that the grant or refusal of the remedy the plaintiff seeks will entail.' (footnotes omitted).) See also *Minister of Safety and Security v Van Duivenboden* 2002 6 SA

reasonableness of particular conduct be determined in terms of the legal convictions of the community.²² Historically, the test for reasonableness in this context has been described as being open-ended and flexible. It necessarily takes cognisance of the ever-evolving nature of the legal convictions of the community.²³

5.2 The important role of public policy considerations in determining wrongfulness in novel situations

The role played by public policy considerations in the determination of reasonableness in areas where liability has not previously been established cannot be overstated.²⁴ Van Aswegen, writing in the pre-constitutional era, pointed out that the most important role played by policy considerations has been in ‘the new developments, expansions and adaptations to the settled body of delict law.’²⁵ The overriding utility of public policy considerations is that they afford the court an opportunity to consider novel problems for which there is no precedent or authority. In other words, despite the clearly open-ended nature of the concept of ‘public policy’, the concept, at the very least, requires judges to provide some level of principled reasoning grounded in social policy for the decisions that they make.

The importance of public policy has been entrenched further in the current constitutional dispensation. Significant developments have occurred in extending the limits of delictual liability through the recognition of new duties of care. These new duties have often been

431 (SCA) para 16; *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [2003] 2 All SA 465 (SCA) para 41.

²² Neethling *et al* (n 19 above) 34. See also A Fagan ‘Rethinking wrongfulness in the law of delict’ (2005) 122 *South African Law Journal* 90 93-94. Although, strictly speaking, it is outside the scope of this paper, it is worth mentioning that the Fagan’s robust analysis of wrongfulness as an element of delict in the aforementioned article has ignited a debate with respect to the manner in which our courts engage in the wrongfulness inquiry (and its relationship to negligence). See J Neethling ‘The conflation of wrongfulness and negligence: Is it always such a bad thing for the law of delict’ (2006) 123 *South African Law Journal* 204; RW Nugent ‘Yes, it is always a bad thing for the law: A reply to Professor Neethling’ (2006) 123 *South African Law Journal* 557; J Neethling & JM Potgieter ‘Wrongfulness and negligence in the law of delict: A Babylonian confusion?’ (2007) 70 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (2007) 120; J Neethling & JM Potgieter ‘In (self)defence of the distinction between wrongfulness and negligence’ (2007) 124 *South African Law Journal* 280; and A Fagan ‘Blind Faith: A response to Professors Neethling and Potgieter’ (2007) 124 *South African Law Journal* 285.

²³ See Midgley *et al* (n 19) para 60. See also *Amod v Multilateral Motor Vehicle Fund (Commission for Gender Equality Intervening)* 1999 2 All SA (SCA) para 23.

²⁴ MM Corbett ‘Aspects of the role of policy in the evolution of our common law’ (1987) 104 *South African Law Journal* 67.

²⁵ A van Aswegen ‘Policy considerations in the law of delict’ 1993 (56) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 171; See also Midgley *et al* (n 19 above) para 60.

rooted in the ‘constitutionalisation’ of public policy. In *Carmichele*,²⁶ the Constitutional Court recognised that in making the type of value judgments required in order to determine wrongfulness in novel situations, the constitutional injunction contained in s 39(2) requires all courts to promote the spirit, object and purport of the bill of rights.²⁷ In deciding to extend the delictual liability of police officers and prosecutors to instances wherein the wrongful conduct constituted an actionable omission, the *Carmichele* Court accepted that the determination of wrongfulness demands that some regard be paid to public policy considerations. Ackermann J and Goldstone J wrote:

Before the advent of the [Interim Constitution], the refashioning of the common law in this area entailed ‘policy decisions and value judgments’ which had to ‘reflect the wishes often unspoken, and the perceptions, often dimly discerned, of the people’. A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what ‘the (c)ourt conceives to be society’s notions of what justice demands’. Under s 39(2) of the Constitution concepts such as policy decisions and value judgments reflecting ‘the wishes ... and the perceptions ... of the people’ and ‘society’s notions of what justice demands’ might well have to be replaced, or *supplemented and enriched* by the appropriate norms of the objective value system embodied in the Constitution.²⁸ (emphasis added)

The Court’s acknowledgment of the fact that the advent of the Constitution has established ‘an objective normative value system’ has influenced the development of notions of public policy and, concomitantly, the understanding of what constitutes the legal convictions of the community.²⁹ The influence of this ‘phrase’ has led

²⁶ See *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) (hailed as a groundbreaking judgment that saw the extension of the delictual liability for omissions to instances in which the police and public prosecutors failed to act in circumstances where they could have prevented the plaintiff from being raped). Section 39 (2) of the Constitution reads as follows: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

²⁷ Woolman has made the point that the effect of sec 39(2) is to place a mandatory injunction on all courts to interpret all laws in a way that promotes the spirit, purport and objects of the Bill of Rights. Put differently, sec 39(2) establishes an interpretive canon that dispels any notions of judicial discretion. In accordance with this view, a failure by the lower courts to fulfil the obligation imposed by sec 39(2) renders their decisions susceptible to constitutional review by the Constitutional Court. See S Woolman ‘Application’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2005) ch 31. See also F Michelman ‘The rule of law, legality and the supremacy of the Constitution’ in Woolman *et al* (eds) (above) ch 11.

²⁸ *Carmichele* (n 26 above) para 56 (footnotes omitted).

²⁹ See Woolman ‘Application’ in Woolman *et al* (eds) (n 27 above) 31-93, for a discussion on the origins, application and problems with use of the phrase ‘an objective normative value system’ in South African constitutional jurisprudence.

to positive developments in the lower courts. *Olitzki*,³⁰ *Premier, Western Cape v Fair Cape Property Developers*,³¹ and the Supreme Court of Appeal decision of *Steenkamp*³² all turn on the grounding of fairness and reasonableness in terms of constitutional rights and constitutional norms.³³

However, in spite of these positive developments, a couple of important questions are left unanswered. How does a court determine what public policy considerations to take into account when engaging with the wrongfulness inquiry in a novel situation? And further, is there a principled basis upon which courts go about balancing public policy considerations; or is it a purely a matter of judicial discretion? In fact, what becomes evident from a review of the South African academic literature and case law is that although the determination of wrongfulness is ultimately a legal question, no explicit legal rules or principles guide the selection or the deployment of public policy considerations.³⁴

So despite the apparent mandatory injunction of s 39(2), the courts enjoy and exercise a wide discretion with regard to the type of public policy considerations that they deem appropriate and relevant in any particular situation. At a minimum, the litigants' pleadings will influence the choice of policy considerations. However the courts, as was demonstrated in *Carmichele*, must consider, *mero motu*, other relevant policy considerations including those that flow from our basic law. While sound reasons exist for this type of judicial discretion – the inevitability of novel disputes – the same considerations do not

³⁰ *Olitzki* (n 21 above) para 31.

³¹ *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [2003] 2 All SA 465 (SCA) para 33.

³² *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] 1 All SA 478 (SCA) para 25 (*Steenkamp* (SCA)).

³³ See *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. In this matter, Chaskalson CJ emphatically pronounced that 'there is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.' Although the context and issues under consideration when Chaskalson CJ made this pronouncement were quite different from the issues under consideration presently, the potency of this holding can equally be extended to the present context. This is to say that the courts have, in my opinion, correctly recognised the overarching influence of the Constitution such that even in the determination of matters of public policy, such determination must be made within the rubric of constitutional norms and principles. See also B Leinius & JR Midgley 'The impact of the Constitution on the law of delict' (2002) 119 *South African Law Journal* 20; Neethling *et al* (n 19 above) 36.

³⁴ See van Aswegen (n 25 above) 174. She considers the philosophical underpinnings of the nature of policy considerations and whether or not they can appropriately be considered to constitute legal rules when applied in judicial decision-making. Although Van Aswegen argues convincingly that policy considerations when invoked by judges are equally part of the law as other legal sources, she does not deal with the question as to how judges should decide on what these considerations are to be, nor how they should be applied in a particular instance.

come into play when it comes to the determination of *how* competing public policy considerations should be assessed and reconciled.

5.3 A comparative evaluation of the approach taken by the majority and the minority to the balancing of policy considerations

In *Steenkamp*, both the majority and minority judgments took into account similar policy considerations with respect to the impact that an extension of delictual liability would have on the functioning of tender boards.³⁵ However, the two judgments came to vastly different conclusions as far as the weight to be attached to these considerations is concerned and whether the tender board acted wrongfully. The majority was clearly moved by arguments advanced against the extension of liability, whilst the minority was less persuaded. The arrival at different conclusions is not something that in itself is notable. Different judges will disagree regarding the construction of the facts and proper application of the law. I would even go so far as to contend that such differences of opinion amongst judges are a desirable feature of any legal system that is attuned to the contested views of the role of law from different sectors of a heterogeneous polity. However, for present purposes my concern is not with the different conclusions reached by judges of the majority and the minority. It remains, rather simply, focused on the manner in which they engage competing policy considerations.

One major problem with the majority's approach to wrongfulness is that it reveals a decidedly individualised inquiry that places undue emphasis on Balraz's particular circumstances and fails to focus on the public policy considerations underlying its claim.³⁶ It would appear from the majority decision that although the majority does take cognisance of the public policy grounds raised by the plaintiff, it did not seriously engage them.³⁷ By way of contrast, the considerations of public policy in support of not extending liability to

³⁵ See *Steenkamp* (n 2 above) paras 49-50 & 55 (majority judgment) and paras 87-92 (minority judgment).

³⁶ See *Steenkamp* (n 2 above) paras 43-46 (majority judgment).

³⁷ In fact Moseneke DCJ, *Steenkamp* (n 2 above) para 47, states: 'I must at the outset say that the submissions of the applicant are attractive but not sustainable'.

tender boards, although also not engaged with at great length,³⁸ are considered in a decidedly more objective fashion that clearly identifies the public interests that they seek to promote without subjectivising the inquiry to focus on the conduct of *this* particular tender board. Ultimately, the competing public policy considerations pit the individualised considerations of the applicant against the potentially negative social consequences and public interest concerns that militate against the extension of delictually liability to tender boards. The entire exercise ineluctably results in the emasculation of the applicant's claim. This diminishment of the applicant's (public policy) interests not only creates an extra hurdle for the applicant, but unjustifiably shifts the focus away from the open and candid consideration of competing interests that a proportionality exercise demands when determining the question of wrongfulness.

Put somewhat differently, the primary problem with the approach taken by the majority is its failure to identify and elaborate upon the values and interests underlying the applicant's claim for a delictual remedy and properly weighing them up against the competing values and interests of the tender board as a public body. The applicant had an underlying right to administrative justice³⁹ and a right to appropriate relief.⁴⁰ And yet neither the right nor the desired remedy is engaged by the majority's opinion. Instead the majority's reasoning is predicated on the belief that the applicant should have shown that it had done everything within its power to mitigate its loss before it could allege wrongfulness.

The minority opinion takes a markedly different approach to the identification, elaboration and assessment of competing policy considerations when determining the question of wrongfulness. The minority's approach, although also clearly grounded in the factual matrix of the matter before the court, is more deliberate in the manner in which it engages with these competing considerations. By this I simply mean that the minority's approach displays a more deliberate effort to identify the societal and public interests that

³⁸ See *Steenkamp* (n 2 above) para 55: Moseneke DCJ holds that the majority concur with the 'significant findings and conclusions' of the Supreme Court of Appeal. It is interesting to note that Moseneke DCJ finds it adequate to concur in this fashion and simply leave the matter there. What makes this fact all the more peculiar is the fact that earlier on in the decision the Deputy Chief Justice goes to some length to justify the constitutional importance of the matter at hand; and its potential to influence the future development of the law in respect of appeals to private law remedies in matters that are clearly founded in public law. See *Steenkamp* (n 2 above) paras 17-23.

³⁹ See sec 33(1) of the Constitution: 'Everyone has the right to for the right to administrative action that is lawful, reasonable and procedurally fair.'

⁴⁰ Section 38 of the Constitution affords a person a right to approach a court seeking 'appropriate relief' where that person alleges that their rights have been infringed.

underpinned the applicant's claim.⁴¹ Although not expressly articulated in these terms, the minority approach to the assessment of public policy considerations would appear to be grounded in the principle of proportionality.⁴²

⁴¹ The best way to illustrate this point is by way of example. The approach of the majority and that of the minority differ on the point of whether or not the law should be developed to accommodate a claim for out-of-pocket expenses instituted by a once successful tenderer. The majority position on this point is set out as follows:

The residual question is whether there is justification to develop the common law to embrace this narrow claim for damages based on out-of-pocket expenses in favour of an initially successful tenderer where the award is subsequently set aside by the court and the tenderer retains the right to participate in the subsequent tender process. I think not. First, there is no magic in characterising financial loss as out-of-pocket. If public policy is slow to recompense financial loss of disappointed tenderers it should not change simply because of the name the financial loss bears. Second, even if there may not be a public law remedy such as an interdict, review or appeal this is no reason for resorting to damages as a remedy for out-of-pocket loss. This is so because first, as I found earlier, the loss may be avoided and second it is not justified to discriminate between tenderers only on the basis that they are either disappointed tenderers or initially successful tenderers. To do so is to allot different legal rights to parties to the same tender process. There is no justification for this distinction particularly because ordinarily both classes of tenderers are free to tender again should the initial tender be set aside. *Steenkamp* (n 2 above) para 54.

The minority position on this point is set out as follows:

A claim for out-of-pocket expenses, however, is a far more modest claim. Moreover, the inability to recover out-of-pocket expenses may well render smaller and less financially viable tenderers at risk of liquidation. Indeed, such was the case here. In our country, government procurement is one of the key mechanisms for ensuring that those previously locked out of economic opportunity by the policies of apartheid, are given an opportunity to participate. By definition such companies and individuals are often new, small and not financially robust. In our view, this is an additional and important factor which supports our conclusion that both Moseneke DCJ and the Supreme Court of Appeal are incorrect to conclude that aquilian liability cannot arise on the circumstances of this case. *Steenkamp* (note 2 above) para 80.

⁴² See *Steenkamp* (n 2 above) para 69. Although Langa CJ and O'Regan make no direct reference to the principle of proportionality, it is, in my view, implicit in their approach to the balancing of policy considerations: 'Determining whether conduct is wrongful or unlawful for the purposes of aquilian liability, as has been stated on many occasions, essentially involves a question of legal policy which must be answered in the light of the norms and values of our society and, since 1994, in the light of the norms of our Constitution. Even though the question is a normative one, it is not to be answered on the basis of 'an intuitive reaction to a collection of arbitrary factors', but instead requires an identification of the relevant norms followed by an analysis and, if necessary, balancing of those norms to determine the outcome.' (para 70) (emphasis mine and footnotes omitted.)

6 The principle of proportionality: A possible basis upon which the balancing of public policy considerations should be performed?

The principle of proportionality is firmly established in South African constitutional law. The invocation of the principle of proportionality has been experienced mainly within the context of limitations analysis.⁴³ The most fundamental idea underlying the principle of proportionality is that courts will candidly assess the competing rights, values and interests reflected in both the asserted constitutional norm and in the existing law that allegedly impairs that norm.⁴⁴ In other words, the principle of proportionality requires more than a mechanical exercise of summing up on some imagined scale the respective virtues of the two sides to the disputes. Chaskalson P, in *S v Makwanyane*, offers up a lucid exposition of the nature of the principle of proportionality and what it entails:

The limitation of constitutional rights for a purpose that is reasonable and necessary in democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33 (1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for an 'open and democratic society based on freedom and equality', means there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.⁴⁵

The value of the principle of proportionality would appear to be most apparent in those areas or instances where the courts must address rather novel issues, where no clear legal rule or precedent exists and where important matters of principle are at stake.⁴⁶ In such instances the principle of proportionality will require a court deciding upon such

⁴³ Section 36 of the Constitution provides the test for the limitation of constitutional rights.

⁴⁴ See S Woolman & H Botha 'Limitations' in Woolman *et al* (eds) (n 27 above) ch 34; I Currie & J de Waal *The Bill of Rights handbook* (5th ed, 2005) 172-8; G Erasmus 'Limitation and suspension' in D van Wyk *et al* (eds) *Rights and constitutionalism: The new South African legal order* (1994) 629.

⁴⁵ 1995 3 SA 391 (CC) para 104. This dictum has been cited with approval in many subsequent cases. See, eg, *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 1 SA 6 (CC) para 33.

⁴⁶ An obvious example of such an issue is where a law is being challenged for violating the rights protected in the Bill of Rights. In most instances there will be some right demand – fundamental and therefore worthy of constitutional protection – being pitted against some law that will often seek to attain some important societal purpose.

an issue to make explicit, at least, the following: the exact nature of the conflict; what the competing or conflicting values or interests are and the importance of these; and the substantive reasons for choosing one set of values or interests over the other. In other words, the principle of proportionality demands that where the courts are required to engage in the exercise of balancing they should do so in a manner that clearly identifies all the pertinent competing values or interests, before weighing these up and providing fully substantiated conclusions. This type of application of the principle of proportionality is one that we have become accustomed to seeing at work in our bill of rights jurisprudence.

The application of the principle of proportionality or at the very least an approach that is closely akin to it is nothing novel in delict. Courts have often had to consider whether or not to extend liability. In *Carmichele*, Judges Ackermann and Goldstone allude to the importance of [the principle of] proportionality:⁴⁷

... in determining whether there was a legal duty on the police officer to act, Hefer JA in *Minister of Law and Order v Kadir* referred to weighing and striking a balance between the interests of the parties and the conflicting interests of the community. *This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights*, but that exercise must now be carried out in accordance with the ‘spirit, purport and objects of the Bill of Rights’ and the relevant factors must be weighed in the context of [a] constitutional State founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values. (emphasis added)

The core of the idea underlying the principle of proportionality and how it can add an important dimension to public policy considerations in the determination of wrongfulness was powerfully captured by Nugent JA in *Van Duivenboden*:

When determining whether the law should recognise the existence of a legal duty in any particular circumstances what is called for is not an intuitive reaction to a collection of arbitrary factors, but rather a *balancing against one another of identifiable norms*.⁴⁸ (emphasis added)

A similar approach to rethinking public policy considerations grounded in an application of the principle of proportionality was also followed in *Steenkamp* (SCA).⁴⁹ The Supreme Court of Appeal’s judgment – like the minority’s opinion in the Constitutional Court – illustrates how the principle of proportionality can be applied in the

⁴⁷ *Carmichele* (n 26 above) para 43.

⁴⁸ *Van Duivenboden* (n 26 above) para 21.

⁴⁹ *Steenkamp* (SCA) (n 32 above).

determination of wrongfulness. The SCA's decision accomplishes this task by meticulously identifying and engaging with the public policy considerations it deemed relevant to the determination of wrongfulness.⁵⁰ The SCA focused on the public and societal interests that underlay both the appellant's claim for a remedy and the respondent's denial of liability. Although the final decision with respect to wrongfulness in the Supreme Court of Appeal accords with that of the majority of the Constitutional Court, it is certainly more palatable. It gives due consideration to the competing rights and interests of both the applicant and the respondent in an objective and judicious manner. In short, the conclusion reached as to the question of wrongfulness in the Supreme Court of Appeal decision is more transparently reasoned and does not leave one with an uneasy sense that the exercise of balancing masks the subjective whims of judges.⁵¹

7 Conclusion

Again. My discomfort with the Constitutional Court's majority decision in *Steenkamp* is not with its conclusion that the conduct of the tender board was not wrongful. The matter really could have gone either way. However, my main concern and the reason for writing this note is to take issue with the unsatisfactory and somewhat opaque manner in which the majority reached its conclusion. The most profound shortcoming of this decision is that it leaves the Constitutional Court vulnerable to the critique that the ultimate conclusion as to wrongfulness reflects a mere subjective preference rather than a decision grounded in principle. That some may consider this charge to be unfair criticism is undoubted. However, as long as courts continue to engage in an amorphous balancing exercise, critiques such as mine will be difficult to rebut. A failure to develop a principled framework will always leave those who are sitting on the wrong side of a decision in which public policy considerations were considered with reason to be sceptical about what actually animated

⁵⁰ See *Steenkamp (SCA)* (n 32 above) paras 29-44

⁵¹ See Woolman & Botha (n 44 above) 34-93 to 34-104 9: The authors provide a sustained critique of the concept of balancing and its relationship with proportionality; in particular, the inappropriateness of the balancing metaphor in constitutional adjudication.

a court's decision.⁵²

Steenkamp has given us an opportunity to consider how the exercise of balancing policy considerations might be profitably supplanted by a more principled framework. The principle of proportionality is a useful departure point in the creation of such a framework. The appeal of this principle, to my mind, is that it is already established in our law, and more importantly, that it accords with the unarticulated practices that have already taken hold in our courts under the new constitutional dispensation.

⁵² In a recent article Stuart Woolman has raised similar concerns about the Constitutional Court's thin reasoning. Woolman objects to this minimalist mode of adjudicative reasoning by the Constitutional Court for several reasons, not least of which is that he considers it to be tantamount to abdication by the Constitutional Court of its responsibility to develop clearly articulated rules and to provide clearly substantiated reasons for its decisions. These clearly articulated rules and substantiated reasons are, according to Woolman, essential for purposes of developing a coherent constitutional jurisprudence that informs political discourse, as well as serving to guide the lower courts and the other coordinate branches of government. S Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762 784-787. See also F Michelman 'On the uses of "interpretive charity": Some notes on application, avoidance, equality and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1 (Contends that while the judgments in question are thinly reasoned, they can, if patiently (and charitably) assessed, and if given sufficient expiation by commentators, be reconstructed so as to avoid some of the alleged problems with both their form and substance.)