CASE NO.373/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

Transnet Limited Appellant

and

Goodman Brothers (Pty) Ltd Respondent

BEFORE: HEFER ADCJ, HARMS, OLIVIER, SCHUTZ JJA and

MTHIYANE AJA

HEARD: 19 SEPTEMBER 2000

DELIVERED: 9 NOVEMBER 2000

Duty to give reasons to unsuccessful tenderer under the Constitution - administrative action - right or interest to obtain reasons.

W P SCHUTZ

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J U D G M E N T

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SCHUTZ JA:

[1] This appeal raises the question whether the Constitution obliges the appellant, Transnet Ltd ("Transnet"), once a part of government as the South African Railways and Harbours, now a limited company owned by the government, to give reasons to an unsuccessful tenderer who asks for reasons, why another has been preferred over him. The matter came before Blieden J, whose decision in favour of such an unsuccessful tenderer, the respondent, Goodman Brothers (Pty) Ltd ("Goodman"), is reported as *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W). The detailed facts may be gleaned from this report.

[2] The case before us can be decided on s 33 of the 1996 Constitution.

Pending the passing of legislation by the national legislature such as is envisaged by subsections 32(2) and 33(3), item 23 of Schedule 6 provides for an interim reading of subsections 33(1) and (2). As the tenders with which we are concerned were dealt with before any such legislation had been passed, the interim reading has application. It reads:

> "Every person has the right to -
> (a) lawful administrative action where any of their rights or interests is affected or threatened;
> (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
> (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been public; and
> (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

[3] It is (c) particularly with which we are concerned. As it falls within the Bill of Rights (Chapter 2) it is one of the cornerstones of our democracy and is limitable only to the extent allowed by s 36.

[4] Three matters have to be decided in order to determine whether (c) entitles Goodman to reasons. They are: first, whether calling for and adjudicating tenders constituted "administrative action", secondly, whether Goodman had a "right" or an "interest", and thirdly, whether, if he did, the right or interest was "affected". Section 39 enjoins that when interpreting the Bill of Rights a court must promote the values that underlie an "open" and democratic society based on human dignity, equality and freedom.

[5] Before dealing with each of these points it is useful to look at the background against which the Constitution is set and which explains many of its provisions. Baxter *Administrative Law* (1989) at 741 sums up the position as it was:

> "In the absence of statutory authority there is no general duty upon public authorities to give reasons. Although the state of the law has been widely criticized, no general legislative provision has been enacted to correct the situation."

The value of giving reasons is set out by the same author at 228, as follows:

> "In the first place, a duty to give reasons entails a duty to *rationalize* the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining *why* a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conducive to public confidence in the administrative decision-making process. Thirdly - and probably a major reason for the reluctance to give reasons - rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications."

[6] The Constitution has plainly set out to remedy the previous position and without even dealing with particular words or resorting to authority, to my mind a straightforward reading of the words leads to the inevitable conclusion that the former deficiency has been remedied in a case such as is before us. If it is necessary to resort to s 39 (which I do not think it is), then I do not consider that an "open . . . society" countenances the type of secrecy in the tender process, such

as Transnet contends is permitted by the Constitution.

[7] Turning to the first question, whether administrative action was involved, it has already been held in this court that the State Tender Board's handling of tenders for transport service for the government, constituted administrative action - in *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (SCA) at 552 j - 553 a. Howie JA pointed out that the steps that had preceded the conclusion of a contract were purely administrative actions and decisions by officials, whilst in addition public money was being spent by a public body in the public interest. Naturally, said Howie JA, in such a case the subject is entitled to a just and reasonable procedure. I agree entirely. Moreover, the same considerations apply to Transnet.

[8] I do not think that anything can be made of the fact that Transnet is now a limited company. The government still owns all the shares in it and thus has ultimate control. It still provides a general service to the public, even though it is

now competition- and profit-orientated. It still has a near - monopoly over rail transport.

[9] It was presumably for reasons like these that counsel for Transnet conceded that some of its actions amount to acts of administration. But a distinction was sought to be drawn between different kinds of action. In this connection reliance was placed on the judgment of the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paras 140-141, pp 66-67. There it was stated that in determining whether an act is an administrative act the emphasis should be on the function rather than the functionary, not on the arm of government to which the actor belongs but on the nature of the power exercised. From this it followed that the exercise of some of the powers of a member of the executive (the President in that case) amounted to administrative action whereas exercises of other powers did not. This reasoning was sought to be extrapolated to the procurement activities of

Transnet. Some of its actions are administrative. Others are not. Thus, so proceeded the argument, when Transnet invites tenders for the supply of locomotives, its acts administratively. But when it invites tenders for toilet paper, or, as in this case, gold watches, it does not. I fail to see how such a distinction is to be drawn, particularly where, as in this case, the purchase of watches is clearly incidental to the exercise of Transnet's general powers. The gold watches are bought so that they may be used to secure the loyalty of employees, much as salaries are paid to secure their services. For the reasons given I am of the view that the actions of Transnet in calling for and adjudicating tenders constituted administrative action, whatever contractual arrangements may have been attendant upon it.

[10] Turning to the second question, the "right" or "interest", Transnet relied on the unreported judgment of Heher J in *SA Metal Machinery Co Ltd v Transnet Ltd* (WLD 9 March 1998), in which the learned judge held that a person in a position

such as Goodman was, was "effectively a stranger to the tender process" (the passage is more fully quoted at 996H - 997A of Blieden J's judgment) and therefore had no protectable right or interest entitling him to just administrative action. If that were correct, every applicant for a permit would likewise have no right or interest. By contrast with the decision of Heher J, in *Aquafund Pty Ltd v Premier of the Province of the Western Cape* 1997 (7) BCLR 907 (C) Traverso J identified the right (at 913 I) as the right to obtain the information which the tenderer reasonably required in order to enable him to determine whether his right to lawful administrative action provided for in the interim Constitution had been violated. For instance, reasons given may tell a tenderer that his goods did not comply with the specification. He, knowing that they did comply, would then be able to take the matter further. Without reasons he might be without remedy.

[11] Another valid approach is that the tenderer has the rights to lawful and procedurally fair administrative action provided for in par (a) and (b). The rejection

of a tender affects these rights and they are protected by par (c).

[12] As to whether Goodman's rights were "affected" (the third question), I do not think there is any doubt about it if the first two questions are settled adversely to Transnet in the manner already expressed. Without reasons Goodman is deprived of the opportunity, to which he is entitled, to consider further action.

[13] Further matters considered in the court below have fallen by the wayside. As will be seen at pp 997H - 998D and 1001F, Transnet unsuccessfully contended *a quo* that, failing all else, it could rely on a waiver of rights clause in the tender conditions. During argument in this court that contention was dropped (wisely I would think).

[14] Although s 217 of the Constitution was relied upon by Goodman as an alternative basis for relief, it is not necessary to say anything about that section, and therefore also not necessary to decide whether Transnet is an "organ of State".

[15] There was no cross-appeal against the court *a quo's* finding (at 999 C - 1001

E) that Goodman was not entitled to further information of the various tenders.

[16] Finally, I would suggest that once Transnet gets into the habit of giving reasons, when asked to do so, it will find the exercise a healthful one.

[17] The appeal is dismissed with costs.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
HEFER ADCJ
HARMS JA
MTHIYANE AJA

OLIVIER JA

[1] The judgment of the court *a quo* which is the subject matter of this appeal has been reported as ***Goodman Bros (Pty) Ltd v Transnet Limited*** 1998 (4) SA 989 (W). That judgment was the last in a series of three judgments, all concerning the appellant, and all raising similar and difficult issues of constitutional importance. A divergence of opinion has emerged from these judgments. The two

other judgments are ***ABBM Printing and Publishing (Pty) Limited v Transnet Limited*** 1998 (2) SA 109 (W), also at 1997 (10) BCLR 1429 (W) ("***ABBM***"; references are to the judgment as reported in the *SA Law Reports),* and ***SA Metal Machinery Co Limited v Transnet Limited***, an unreported judgment of the Witwatersrand Local Division, case no 30 825 / 97, delivered on 22 March 1998 ("***SA Metal***").

[2] The appellant ("Transnet") observes the old custom of rewarding its long-serving employees with expensive watches. Jewellers and suppliers of watches are invited biennially to submit tenders for the supply of suitable watches. Since 1994 the respondent ("Goodman") had supplied Transnet with these watches pursuant to successful tenders awarded to it. That Transnet had no cause for complaint in respect of the performance by Goodman of its obligations, is not disputed.

[3] On 26 August 1997 Transnet issued a written invitation to interested parties to tender for the supply such watches to one of its business units, Spoornet, for a period of two years, commencing on 1 January 1998 and terminating on 31

December 1999.

[4] Apart from the conditions of tender (whose significance I address below), the written invitation to tender provided specifications of the wrist watches sought.

[5] The respondent and six other tenderers submitted their written tenders timeously.

[6] The tender was awarded by Transnet's tender board to F Bacher & Company (Pty) Limited ("Bacher"), which undertook to supply *Pierre Cardin* wrist watches.

[7] In January 1998 Goodman, acting through its attorney, addressed a letter to Transnet, pointing out that for four years it had supplied Spoornet with watches, and requesting Transnet to furnish it with the reasons for its decision to grant the tender to Bacher and also with a comprehensive list of documents relating to the tender and the procedure followed by Transnet in awarding the tender.

[8] The letter requesting the said reasons and documentation sets out

the basis of the entitlement relied upon by Goodman. The relevant parts read as follows:

> "2 Our client wishes to establish that the tender procedure, the process of tender adjudication, and the outcome of such adjudication, has not infringed our client's rights or legitimate expectation that the Transnet Tender Board and its functionaries, would fairly, responsibly and honestly consider all tenders submitted and would properly apply its mind in arriving at a decision regarding the award of the tenders.
>
> 3.1 In terms of Section 33 of the Constitution of the Republic of South Africa Act No. 108 of 1996 ("The Constitution') our client is entitled to administrative action that is 'lawful, reasonable and procedurally fair'.
>
> 3.2 Transnet is clearly an organ of state as defined in the Constitution since it is a functionary or institution 'exercising a public power or performing a public function in terms of any legislation'.
>
> 3.3 The Transnet Tender Board, and other persons involved in the Tender adjudication process exercised administrative powers on behalf of an organ of state, namely Transnet.
>
> 3.4 It is accordingly our client's contention that the process of consideration of tenders constitutes administrative action and that our client is therefore entitled to all information it may reasonably require to establish whether or not its right to lawful administrative

action has been violated.

4 The administrative actions by the Transnet Tender Board which is an administrative body has adversely affected our client's rights and, our client is accordingly entitled in terms of Section 33 (2) of the Constitution to written reasons for the decisions of the Tender Board and hereby asks for the same."

[9] To this request, Mr D A Dludlu, the Chairman of the Transnet Tender Board, replied in a letter dated 3 February 1998:

"4 I further wish to let you know that it is not the policy of Transnet to provide reasons for its decisions to unsuccessful tenderers (see the provision of clause 10 (a) of the conditions of tender (Form U S 7) that your client has agreed to be bound by)."

[10] Clause 10 (a) of the conditions of tender, to which Mr Dludlu referred, reads as follows:

"The Company does not bind itself to accept the lowest or any tender/quotation nor will it assign any reason for the rejection of a tender/quotation."

[11] Apparently to make doubly sure that Transnet's attitude was not misunderstood, the following letter was written on a letterhead of Transnet by the

Chief Executive of Promat, a division of Transnet, on 4 February 1998 and delivered to Goodman's attorney:

> "Herewith acknowledgment of your correspondence. As the purchasing support business unit of Transnet, Promat concurs with the views expressed by the Chairman of the Tender Board, correspondence dated 3 February 1998. In addition, kindly note that Transnet is in control of its own destiny hence it reserves the right to award business, within the ambit of the highest standards of ethical code, to whom it deems appropriate. The Company is under **no** obligation to furnish reasons for non award." (My correction)

[12] Thereafter Goodman launched the application now under consideration. Repeating its allegations that it was entitled, by virtue of the provisions of sections 33 and**/**or 217 of the Constitution to relief against Transnet, it claimed orders in the following terms:

> "1 Declaring that the words 'nor will it assign any reason for the rejection of a tender/quotation ... ' contained in the Respondent's document styled 'General Condition of Promat Tenders, Contracts and Orders' to be in conflict with the provisions of Section 33 and/or Section 217 of the Constitution of the Republic of South Africa, Act No. 108 of 1996 and declaring further that the provision containing those words

is to that extent invalid.

2 Ordering the Respondent to provide the Applicant with written reasons for the rejection of the Applicant's tender for the supply and delivery of wrist-watches to the Respondent in terms of Tender No. 1080 97276, such reasons to be provided within the time period stipulated by this Honourable Court.

3 Directing the Respondent to provide to the Applicant within the time period stipulated by this Honourable Court, with the following:

3.1 Copies of all Tenders received by the Respondent in response to Tender enquiry No. 1080 97276;

3.2 A schedule setting out the dates upon which each and every Tender was received by the Respondent.

3.3 Copies of all documentation relating to the establishment and operation of the Respondent's Tender Board.

3.4 Full details in writing detailing how the members of the Respondent's Tender Board are selected, how the Tender Board is constituted and the procedures to be followed by the Tender Board in adjudicating upon and selecting tenders.

3.5 Copies of all reports, minutes and other documentation of whatever nature received by the Respondent's Tender Board, which were submitted in response to Tender enquiry No. 1080 97276.

3.6 Copies of all contracts concluded by the Respondent with any

successful party or parties in response to tender enquiry No. 1080 97276.

3.7 Copies of all brochures and all technical specifications received by the Respondent in respect of the wrist-watches which were included in the successful tender under tender No. 1080 97276.

4 Directing that the Respondent shall pay the costs of this Application on the attorney and client scale."

[13] This application was met with an opposing affidavit by one Leon Raath, the chief executive of Promat, on behalf of Transnet. This affidavit raised the following points:

(i) The other tenderers should have been joined in the proceedings;

(ii) Transnet is not an organ of state, subject to administrative scrutiny;

(iii) In calling for and awarding the tenders now under consideration, Transnet did not perform an administrative act;

(iv) Goodman has no right, interest or legitimate expectation to be protected, but that even if it had such a right, interest or expectation, this has not been threatened by Transnet in any way;

(v) That clause 10 (a) of the tender conditions amounts to a waiver of any right that Goodman might have had to be furnished with the reasons requested by it.

[14] The matter came before Blieden J. He granted prayers 1 and 2 of the application, with costs. He refused prayer 3, *i e* that the documents requested by Goodman be delivered to it. The learned judge later granted Transnet leave to appeal to this Court against paragraphs 1 and 2 of his order, as well as the costs order. There is no cross-appeal by Goodman against the refusal by Blieden J of the said prayer 3. The correctness of such refusal is, therefore, not in issue in this Court.

[15] In its application Goodman relied on certain Constitutional grounds for the relief claimed, and it also sought to question the award of the tender to the successful tenderer on the factual ground that the watches to be supplied by the latter did not meet the written specifications set out in the invitation to tender. The court *a quo* rejected the latter ground of attack, and there is no cross-appeal against that decision. Nothing more needs to be said concerning this aspect.

[16] The two remaining issues before us are therefore :

(a) Whether Goodman was entitled to the declaratory order

issued by the court *a quo* that the words "... nor will it assign any reason for the rejection of a tender / quotation ..." in Transnet's tender document are in conflict with the provisions of section 33 and/or section 217 of the Constitution of the Republic of South Africa Act 108 of 1996. ("the Constitution"); and

(b) Whether Goodman was entitled to an order that Transnet is to provide it with written reasons for the rejection of the tender now under discussion.

[17] Logically, the first issue to be addressed is whether Transnet is obliged to furnish Goodman with the reasons for its decision not to accept Goodman's tender and to award the tender to Bacher. Only if the answer is in the affirmative, and the legal basis of such obligation has been determined, does the waiver issue become relevant.

Transnet's obligation to furnish Goodman with the reasons for its said decision.

[18] In a nutshell, the dispute between the parties on this issue is this :

Goodman says that Transnet, in calling for tenders and deciding to accept a

particular tender, performed an administrative act to which the Constitution is applicable. Goodman avers that the Constitution in such a case obliges the functionary to give reasons for its decision if requested to do so by an unsuccessful tenderer. Transnet, on the other hand, says it acted in a private, commercial capacity and took part in ordinary contractual activities, to which the Constitution does not apply; it denies that it performed an administrative act.

[19] Can Goodman base an entitlement to the reasons now under discussion on the provisions of the Constitution?

[20] Goodman based its entitlement to be furnished with the said reasons on two separate sections of the Constitution, *viz* sections 33 (1) and (2) and section 217.

By virtue of item 23 (2) (b) of Schedule 6 of the Constitution, sections 33 (1) and (2) must be deemed to read as follows:

> *"Every person has the right to -*
>
> *(a) lawful administrative action where any of their rights or interests is affected or threatened;*

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

(*En passant* it can be noted that sections 33(1) and (2) can only be taken to read as set out above until the legislation envisaged in sections 32 (2) and 33 (3) of the new Constitution becomes operative. The envisaged legislation was passed by Parliament and published on 3 February 2000 as the Promotion of Administrative Justice Act 3 of 2000. It comes into operation on a date yet to be fixed by the President by proclamation in the *Gazette* - see section 11. The appeal, in any event, must be decided on the law as it stood when the Court *a quo* delivered its judgment.)

[21] Section 217 (1) of the Constitution reads as follows :

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

[22] It is useful to emphasize the differences between the deemed sections 33 (1) and (2) on the one hand and section 217 (1) on the other. The former provisions **apply to every person**, giving to him or her a **right to lawful and procedurally fair administrative action** whether a contract or other legal obligation has come into existence or not; the latter provision places an obligation on " ... **an organ of state** in the national, provincial or local sphere of government**, or any other institution identified in national legislation**", and can be relied upon by every person with whom the organ of state or other institution therein mentioned "**contracts for goods or services**". It may well be that the words "**contracts for goods and services**" must be given a wide meaning, similar to "negotiates for" *etc* (contrast ***Fundstrust (Pty) Ltd (In liquidation) v Van Deventer*** 1997 (1) SA 710 (A) at 726 B - D; 735 C - D and 735 I - 736 C) but even in that sense section 217 (1) is more

limited and specific than sections 33 (1) and (2).

Are sections 33 (1) and (2) applicable?

[23] In order to succeed on the basis of sections 33 (1) and (2) of the Constitution, Goodman has to convince this Court that Transnet, in calling for tenders and awarding the tender now under discussion, performed an administrative action or administrative actions as envisaged by the said provisions. Goodman argued that while the precise extent of what is encompassed by the term "administrative action" is a matter of some uncertainty, in the context of the present appeal it is a non-issue. This is so, it argued, because this Court has already held - in ***Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere [1997] 2 All SA 548 A at 552 i - 553 c*** - that the invitation for, receipt of and the appraisal of tenders, constitutes an administrative action for the purposes of section 24 of the Interim Constitution and thus for the purposes of section 33 of the Constitution.

[24] The judgment in ***Umfolozi Transport*** is not necessarily applicable because in that case it was clear that the second respondent, the State Tender

Board, which was instituted by the State Tender Board Act 86 of 1968, acted as the agent of the State (see 551 a and 554 a of the report). It is in that context that Howie JA said the following at 552 i of the report:

> "Wat die tweede en derde betoogspunte betref, is daar gedurende die aanhoor van die appèl die vraag geopper, oor die antwoord waarop die advokate dit nie eens was nie, of administratiefregtelike beginsels op die onderhawige aangeleentheid van toepassing is. Ek het geen twyfel nie dat die antwoord bevestigend moet wees. Wat kontraksluiting hier voorafgegaan het, behels suiwer administratiewe handeling en beslissings aan die kant van die betrokke amptenary, en veral die Raad, en boonop in 'n sfeer wat met die besteding van openbare gelde in die openbare belang deur 'n openbare liggaam te doen het. Natuurlik is die onderdaan in hierdie omstandighede op 'n regverdige en billike prosedure geregtig.
>
> Dit dien daarop gelet te word dat as daardie vraag deur die Hof *a quo* beslis moes word dit die bepalings van art 187, saamgelees met art 24, van die tussentydse Grondwet, Wet 200 van 1993, sou moes afgedwing het, welke bepalings ten tyde van die Raad se optrede reeds gegeld het en wat by oorweging van tenders waar dienste vir die Staat verkry word, toepassing van administratiefregtelike beginsels vereis. (Vergelyk in hierdie verband ***Claude Neon Ltd v Germiston City Council and another*** 1995 (3) SA 710 (W) te 720 H - 721 B, en ***GNH Office Automation CC and another v Provincial Tender Board and others***

1996 (9) BCLR 1144 (Tk)."

(In the context of possible bias on the part of the State Tender Board, Howie JA later in his judgment discussed the question whether the Board could be seen as part of the "staatsowerheid", or as a "staatsliggaam". He inclined to the view that it was not; in terms of section 4 of the relevant Act the Board did act on behalf of the State but there was no control of the Board by the State and half of the Board members were not civil servants. But for the purposes of the judgment Howie JA did not decide the point, assuming in favour of the appellant that the Board was a "staatsinstelling".)

[25] The decisions relied on by Howie JA in the said judgment make it clear that the learned judge, when deciding that the award of a tender was an administrative action had in mind instances of administrative acts performed by *public officials*. In the case of ***Claude Neon Ltd v Germiston City Council and Another*** 1995 (3) SA 710 (W) the act under consideration was an undertaking given by one Verhage in his capacity as secretary of the Germiston City Council.

It is clear that Verhage was acting as a public official. In the case of ***Jeeva and Others v Receiver of Revenue, Port Elizabeth, and Others*** 1995 (2) SA 433 (SE) the conduct of an enquiry by a commission appointed in terms of sections 417 and 418 of the Companies Act 61 of 1973, authorised by the Master of the Supreme Court and held under the machinery of the Companies Act, came under scrutiny. Jones J held that such an enquiry was quasi-judicial in nature. It therefore amounted to administrative action for the purposes of section 24 of the interim Constitution (the present sections 33 (1) and (2) - see the report at 443 I - J). The action was performed by a public official, *viz* a commissioner appointed by the Master of the Supreme Court

[26] Transnet argues that the present case is clearly distinguishable from ***Umfolozi Transport, Claude Neon*** and ***Jeeva***, because in inviting, considering and awarding the tenders now under discussion it acted in a purely private capacity and not in the sphere of expending public funds in the public interest as a public body - see the formula used by Howie J in ***Umfolozi*** at 552 i.

[27] I must, therefore, deal with the question : what is meant by "administrative action" in sections 33 (1) and (2) of the Constitution? The Constitution does not define this term.

[28] Administrative law is defined by David Foulkes as

> " ... the law relating to public administration. It is concerned with the legal forms and constitutional status of public authorities; with their powers and duties and with the procedures followed in exercising them; with their legal relationships with one another, with the public and with their employees; and with the wide range of institutions, both internal and external to themselves, which seek, in varied ways, to control their activities."
>
> (*Administrative Law*, 8th ed, Butterworths, London 1995 at 1)

or, simply, by Jones and Thompson as

> " ... the law relating to the administration of Government"
>
> (in *Garner's Administrative Law*, 8th ed, Butterworths, London, 1996 at 4 - 5. See *cf* P P Graig, *Administrative Law*, 2nd ed, Sweet and Maxwell, London, 1989 at 3 *et seq*.)

[29] This is also the view taken by South African writers. Baxter

(*Administrative Law*, Juta and Co, Cape Town, 1984, reprint 1989 at 2) sees the administrative law as that branch of public law which regulates the legal relations of public authorities, whether with private individuals and organisations, or with other public authorities. (See also M Wiechers, *Administratiefreg*, 2nd ed, Butterworths 1984 at 2; F Venter, *Die afbakening van staats- en administratiefreg* 1977 TSAR 237 at 241; Boulle, Harris and Hoexter, *Constitutional and Administrative Law : Basic Principles*, Juta & Co Cape Town, 1080 at 80; Y Burns, *Administrative Law under the 1996 Constitution*, Butterworths, Durban, 1998 at 41 *et seq*)

[30] Consistent with the object of the administrative law, the essential characteristics of the concept of **administrative action** are seen as the exercise of a public (*i e* governmental) function by a public authority or official affecting the rights of or legitimate expectations of or involving legal consequences to the individual (see generally Baxter, *Administrative Law*, 344 *et seq;* Wiechers, *Administratiefreg*, 96 *et seq,* especially 100 :

" ... **administratiewe handelinge** ... d w s handelinge wat deur die staatsadministrasie verrig word"; Boulle, Harris and Hoexter, *Constitutional and Administrative Law*, 88 *et seq*)

[31] The identification of an administrative action in contrast to an act regulated by private law, has become more difficult with the increasing use by the state of private law institutions, notably contract, to perform its duties. This takes place by privatisation, delegation, outsourcing, *etc* (see A Cockrell *"Can you paradigm?" - Another perspective on the public law / private law divide?* 1993 *Acta Juridica* 227; Yvonne Burns, *Government contracts and the public / private law divide*, vol 13, no 2 *S A Public Law*, 1998 at 234 *et seq*)

[32] The present case highlights the problem just mentioned. Before 1989, the public transport services were conducted under control of a central South African government department as the South African Transport Services. In 1989, however, parliament passed the Legal Succession to the South African Transport Services Act 9 of 1989 ("the Succession Act"), which created the appellant,

Transnet Limited, as a public company. Hence the argument by Transnet that, because of the said privatisation, it is not an organ of state, nor a part of the public administration, nor does it perform a governmental function nor does it exercise a public power or function: in asking for and awarding the tender now under consideration it avers it did not perform an administrative act or action. This is the argument which Goodman has to meet.

[33] Before the introduction of the interim Constitution it was not necessary to define the concept of "administrative action" with precision. By and large, the *criteria* have usually been that an administrative action requires a decision (and resultant action) taken in the exercise of a public power or the performance of a public function, affecting the rights, interests or legitimate expectations of others (see ***Administrator, Transvaal and Others v Zenzile and Others*** 1991 (1) SA 21 (A) at 33 J - 36 A; ***Administrator, Natal and Another v Sibiya and Another*** 1992 (4) SA 532 (A) at 538 E - 539 E). Following these, and English cases, it was held in ***Toerien en 'n Ander v De Villiers NO en 'n Ander***

1995 (2) SA 879 (K) that the dismissal of a university employee by the Council of the University of Stellenbosch was subject to review in terms of the administrative law.

[34] The legislative concept of 'administrative action' has now been introduced in section 24 of the interim Constitution and has been retained in section 33 of the Constitution of 1996. Our courts have not yet defined the parameters of the concept. No doubt it will be defined and redefined in future. A final definition is not possible, nor called for, in this judgment. The following has so far emerged from recent decisions:

34.1 Administrative law, which occupies a special place in our jurisprudence, is an incident of the separation of powers under which courts regulate and control **the exercise of public power** by the other branches of government - ***Pharmaceutical Manufacturers Association of SA and Others : In re : Ex Parte Application of President of the RSA and Others*** 2000 (3) BCLR 241 (CC) at 260 [45], 263 [51], 270 [79] and 272 [85] per Chaskalson P.

34.2 Administrative law and the power of the courts to

pronounce on the validity of the exercise of public power by the executive and other functionaries are not limited to administrative actions as envisaged in section 33. So, for example, it was held that the power of the President to promulgate a statute was not an 'administrative action', yet it is subject to constitutional review in the wider sense of that term - ***Pharmaceutical Manufacturers***, *supra*, at 270 [79] and 271 [82] *et seq.*

34.3 The question relevant to section 33 of the Constitution is not whether the action is performed by a member of the executive arm of government, but whether the task itself is administrative or not. The answer is to be found by an analysis of **the nature of the power being exercised** - ***President of the RSA and Others v SARFU and Others*** 1999 (10) BCLR 1059 CC at 1119 [141].

34.4 The implementation of legislation is an administrative responsibility, and will ordinarily constitute 'administrative action' within the meaning of section 33 - ***SARFU***, *supra*, at 111 [142].

34.5 What has to be taken in consideration is, *inter alia*, the source of the power exercised, as well as

" ... the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is

related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is." (See ***SARFU***, *supra*, at 1120 [143.])

34.6 Whilst section 24 of the interim Constitution - presently sections 33 (1) and (2) of the Constitution - applies to the exercise of powers delegated by an elected local government council to its functionaries, it is not applicable to the by laws made by the council itself: t

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and Others, 1999 (1) SA 374 (CC) at 394 [41] and [42]; see also ***Ernst and Young and Others v Bainash and Others***, 1999 (1) SA 1114 (W) at 1145 F - H.

[35] Earlier I referred to the Promotion of Administrative Justice Act 3 of 2000, which has not yet been promulgated. The definition of 'administrative action' in section 1 (i) is instructive. It reads :

*"(i) '**administrative action**' means any decision taken, or any failure to take a decision , by -*

(a) an organ of state, when -

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include - ... "

For present purposes, section 1 (i) (b) is noteworthy. It gives recognition to the fact that administrative action can be taken by a person, other than an organ of state, **when exercising a public power** or **performing a public function in terms of an empowering provision, etc**.

[36] I can now proceed to consider whether Transnet's decision to request tenders, the consideration thereof and the decision to award the tender amounted to 'administrative action' for the purpose of sections 33 (1) and (2) of the Constitution. I do so on the basis that, irrespective of whether Transnet is an organ of state or a juristic person other than an organ of state, the threshold

requirement is that it exercised **a public power or performed a public function**.

[37] From the history of the creation of Transnet, as it appears from the provisions of the Succession Act, one can only deduce that all the powers and functions of the former S A Transport Services were transferred to Transnet, who is now obliged to exercise the said powers and perform the said functions. In doing so, Transnet merely stepped into the shoes of the SA Transport Services. Like the latter, it is performing a public service and function and exercising all the powers of a government department. Furthermore, the State is the only member and shareholder of Transnet

(section 2 (2)); the entire commercial enterprise of the State ("previously existing as the South African Transport Services") including all assets, liabilities, rights and obligations were transferred to Transnet (section 3 (2)); the State is the only member and shareholder of Transnet and it controls Transnet; an employee of Transnet is deemed to be an employee of the State (section 9 (2)); Transnet is obliged to provide a service that is in the public interest (section 15); the Minister

of Transport is entitled to make regulations on a large range of matters relating to the control and functioning of Transnet (section 30).

[38] From the aforegoing it follows that Transnet, generally speaking, is exercising the public powers and performing the public functions, in terms of the Succession Act, of or on behalf of a government department. Once again, generally speaking, one would say that in doing so it is performing administrative actions for the purposes of section 33 of the Constitution.

But, as the decision in ***SARFU*** shows, one must be especially careful of generalisations in this area. Some acts of a functionary may amount to administrative actions, others may not. The question is whether the particular decisions now under consideration, *i e* in connection with the tender, are administrative actions.

[39] In my view, this question must be decided in favour of Goodman. The power exercised by Transnet arose from the legislation under discussion and directly related to affairs not confined to the internal affairs of Transnet. Public

funds and eventually state responsibility are involved.

[40] It was further argued on behalf of Transnet that even if its conduct amounted to an administrative action Goodman was not entitled to relief under section 33 of the Constitution, because none of its rights, interests or legitimate expectations, as required by subsections (a), (b) or (c) were infringed or threatened. Which rights, interests or legitimate expectations of Goodman, Transnet questioned, were affected or threatened by its conduct?

[41] One of the most fundamental rights guaranteed in our Bill of Rights appears in section 9. It is the right to equality: "Everyone is equal before the law and has the right to equal protection and benefit of the law ... ", (subsection (1)). "Equality includes the full and equal enjoyment of all rights and freedoms ... " (subsection (2)). Subsection (4) further provides that "No person may unfairly discriminate directly or indirectly against anyone on one or more ..." of the grounds set out in subsection (3).

[42] One need hardly look further for a more obvious fundamental right

which justifies the application of section 33 of the Constitution to the present case. The right to equal treatment pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual : you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally. The right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action.

[43] In my view, Goodman was entitled to the protection of section 33 of the Constitution. I agree, therefore, with the remarks of Traverso J in ***Aquafund (Pty) Ltd v Premier of the Province of the Western Cape***, *supra* at 915 I - 916 F about the nature of rights that must be protected. I also agree with the view expressed by Schwartzman J in ***ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd***, *supra* at par [21] that the applicant in that case, as does the appellant in the present case, required the information sought in order to decide

whether it had any claim for relief against the respondent. Conversely, I disagree with the opposite view taken by Heher J in an unreported decision in ***SA Metal Machinery Co Limited v Transnet Limited*** (case no 30825 / 97 of 22 March 1998 of the Witwatersrand Local Division) in which he is reported as stating:

> "On the facts of this case, the applicant falls into that category of tenderers who prepare and submit their offers entirely at their own risk and who cannot fall back on the protection of special conditions. Such a tenderer, absent special facts such as the undertaking in ***Claude Neon*** case *supra*, does not even have a legitimate expectation that his tender will be considered at all. ... In these circumstances, why should his 'interest' in the tender adjudication process be regarded as deserving a protection under section 33 of the Constitution? That section is not concerned with the public interest element of the administrative action, for example transparency or absence of corruption, but in the claim of an individual to lawful treatment. Unless and until his tender is accepted, a person in the position of the applicant is effectively a stranger to the tender process and therefore to the administrative action. The applicant's interest, such as it may be, does not in my view possess the qualities which merit constitutional protection against unlawful administrative action such as to bring it within section 33 (1). For the same reason the award of a tender in the circumstances under consideration to Interline Investment

Corporation does not entitle the applicant to reasons, either for the granting of a tender or for its own lack of success in that regard."

For the reasons set out above, such an approach is wrong and inimical.

[44] In the light of the conclusion hereinbefore reached, it is not necessary to decide whether section 217 (1) of the Constitution would also give Transnet a basis for the relief claimed by it, and whether Transnet is an organ of state, *etc*.

Waiver

[45] As in the ***ABBM***-case, *supra*, Transnet relied on clause 10 (a) of its tender conditions as a basis for the argument that Goodman Brothers had waived its constitutional rights to be furnished with reasons. This argument was rejected in ***ABBM*** at 118 par [17.3]

[46] Counsel for Transnet, not relying on any specific authority, submitted that there is no general rule that the rights set out in the Bill of Rights cannot be waived. Reference was made to the right to remain silent (see 35 (1) (a) of the 1996 Constitution) in criminal matters, which, he said, can be waived. Some rights,

counsel conceded, cannot be waived, *e.g.* the right to life. The right to just administrative action, including the right to be furnished with reasons, so counsel argued, is not of such fundamental nature or importance that it cannot be waived.

[47] In my view, the correct approach to the question of waiver of fundamental rights is to adhere strictly to the provisions of section 36 (1) of the Constitution. It provides that:

> *"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent ..."* etc.

[48] A waiver of a right is a limitation thereof. One must be careful not to allow all forms of waiver, estoppel, acquiescence, *etc* to undermine the fundamental rights guaranteed in the Bill of Rights. In my view, a strict interpretation of section 36 (1) is indicated. Transnet has not made out a case that the waiver it relies upon is warranted by a law of general application.

[49] It follows that the appeal must be dismissed with costs.

P J J OLIVIER JA