



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Reportable: No Of interest to other judges: No 02 June 2022 Vally J
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CASE NO: 16593/19

In the matter between:

DLAMINI INC.

Applicant

and

TRANSNET SOC LTD

First Respondent

ERNST & YOUNG ADVISORY SERVICES (PTY) LTD

Second Respondent

and

CASE NO: 23785/19

In the matter between:

DLAMINI INC.

Applicant

and

ERNST & YOUNG ADVISORY SERVICES (PTY) LTD

First Respondent

TRANSNET SOC LTD

Second Respondent

COVINGTON & BURLING (PTY) LTD

Third Respondent

MINISTER OF TRADE, INDUSTRY AND COMPETITION

Fourth Respondent

Judgment

Vally J

[1] There are two applications before me brought by a single applicant, Dlamini Inc. (Dlamini). Two respondents, Ernst & Young Advisory Services (Pty) Ltd (EY) and Transnet SOC Ltd (Transnet) are the same in both cases. Together with Dlamini they are the main protagonists in both matters. The first application is case number 16593/19. The second application is case number 23785/19. Two other respondents are cited in the second application. They are Covington and Burling (Pty) Ltd (Covington) and the Minister of Trade, Industry and Competition (Minister). Covington played no part in that litigation, whilst the Minister attended to one of the issues therein. The parties referred to the two cases as Dlamini 1 and Dlamini 2 respectively. For ease of reference I will adopt the same nomenclature.

DLAMINI 1Factual matrix

[2] On 1 June 2017 Transnet issued a Request For Proposal (RFP) for 'The appointment of transaction advisors to create an agile and integrated process in response to potential business ventures for a period of four months.' Parties interested in being appointed as the 'transaction advisors' were invited to bid for the appointment. One of the clauses in the RFP deals with the issue of Broad Based Black Economic Empowerment (B-BBEE) and socio economic obligations that a successful bidder is required to comply with. The clause in relevant parts reads:

'B-BBEE Joint Venture or Consortiums

Respondents [Bidders] who would wish to respond to the RFP as a Joint Venture (JV) or consortium with B-BBEE entities, must state their intention to do so in their RFP submission. Such Respondents must also submit a signed JV or consortium agreement between the parties clearly stating the percentage [%] split of business and associated responsibilities of each party. If such a JV or consortium agreement is unavailable, the partners must submit confirmation in writing of their intention to enter into a JV or consortium

agreement should they be awarded business by Transnet through this RFP process. This written confirmation must clearly indicate the percentage [%] split of business and the responsibilities of each party. In such cases, award of business will only take place once a signed copy of a JV or consortium agreement is submitted to Transnet.

Subcontracting

Respondents are required to submit proof of the subcontracting arrangement between themselves and the subcontractor. Proof of the subcontracting arrangement may include a subcontracting agreement.

If contemplating subcontracting, please note that a Respondent will not be awarded points for B-BBEE if it is indicated in its Proposal that such Respondent intends subcontracting more than 25% [twenty-five percent] of the value of the contract to an entity/entities that do not qualify for at least the same points that the Respondent qualifies for, unless the intended subcontractor is an EME with the capability to execute the contract.

...

The successful Respondent awarded the contract may only enter into a subcontracting arrangement with Transnet's prior approval.

The contract will be concluded between the successful Respondent and Transnet, therefore, the successful Respondent and not the sub-contractor will be held liable for performance in terms of its contractual obligations.

A person awarded a contract may not subcontract more than 25% [twenty-five percent] of the value of the contract to any other enterprise that does not have an equal or higher B-BBEE status level than the person concerned, unless the contract is subcontracted to an EME that has the capability and ability to execute the subcontract.

In terms of Section 8 of this RFP [the B-BBEE Preference Point Claim Form] Respondents are required to indicate the percentage of the contract that will be sub-contracted as well as the B-BBEE status of the subcontractor/s.'

[3] EY placed a bid on 15 June 2017. Its bid indicated that Dlamini would be one of the service providers. It said the following in this regard:

'EY has supplemented their team with Dlamini, a South African law firm to advise on the legal and regulatory aspect of the transaction, as well as with I-

manage, a 100% black-female advisory firm to contribute its procurement and human resources expertise while upscaling its skills in investment process and best practices.'

[4] Dlamini's involvement in the project reigned prominently in the bid documents. There were numerous references to its expertise. The curriculum vitae of the founder and director of Dlamini (Ms Nthabiseng Dlamini) and a subcontractor agreement between EY and Dlamini were included in the bid documents. The subcontractor agreement was signed on the same day as the bid was submitted. This agreement indicated that EY and Dlamini:

'... shall submit the Bid as a Team
... shall collectively produce the Bid in the manner set out herein. The Bid will include at a minimum all of Parties mandatory terms and conditions of business.

...
... hereby agree that upon the successful bidding by the Team and the subsequent awarding of Services to be rendered to the Client, the Parties shall enter into a Consortium Agreement. Such Consortium Agreement shall regulate the Services and deliverables (including where appropriate, support for each other) to be delivered by each Party.'

[5] Dlamini was to perform 30% of the work if the bid was successful.

[6] On 18 January 2018 Transnet informed EY that its bid was successful. On 16 January 2018, EY and Dlamini concluded a Letter of Intent (LOI). The LOI would remain in place until a Master agreement was concluded, or until 120 days from the date of signing had passed, whichever was the earlier date. On 23 January 2018 Transnet convened a meeting with EY. Dlamini and another of EY's subcontractors (I-Manage) were present at the invitation of EY. There all the parties discussed, amongst others, the practicalities of the implementation of the contract. At this meeting:

'[i]t became apparent to all present, including Dlamini, that EY had a different interpretation of the scope of services required when compared with Transnet's interpretation. For example, Transnet appeared to be seeking deliverables with a much greater level of detail than EY had assumed in its bid submission. Further, Transnet appeared to no longer want a PSP focus nor was it interested in an analysis of the 6 projects listed in clause 2.1(a) of the Scope of Work contained in the RFP.'

[7] The meeting concluded with Transnet requesting EY to draft a work plan. This was drafted and sent to Transnet on 25 January 2018. In terms of the work plan Dlamini was allocated the task to:

'lead the item on the work plan labelled '*develop proposed changes to applicable Regulatory and Legal Framework.*' (italics in original)

[8] In other words, despite the differences of opinion between EY and Transnet regarding the interpretation of the scope of work (and whether there was a need to undertake 'an analysis of the 6 projects listed in clause 2.1(a)'), EY still appreciated that there was a role for Dlamini in the performance of the contract.

[9] Transnet and EY met again on 28 January 2018 in order to attend to their different interpretations of the scope of work. Dlamini was not included in this meeting. Their different interpretations became even clearer during the discourse that took place. According to EY the differences focused on clause 2.1(b) of the Scope of Work described in the RFP:

'EY was of the view that the RFP required it to offer an analysis of current business case development practices and criteria without being required to actually develop the business case practices and criteria for Transnet. Transnet indicated that it did not want an analysis but needed EY to develop the business case practices and criteria. Transnet indicated that it wanted an "end to end process" (rather than a mere "framework") which it could "go live with."' (Underlining in original)

[10] EY made it known that based on its interpretation it had put in place an 'Infrastructure Team' to perform its obligations in terms of the contract. This was indicated to Transnet at the meeting. In response:

'Transnet indicated that even if the Infrastructure Team could not offer what it needed then surely there was another team in the so-called "innovation" space that could assist.'

[11] At this point both Transnet and EY were fully aware that not only were their respective interpretations of the scope of work different, but also that EY had not catered for the implementation of the contract as per the understanding of Transnet. They were also aware that Dlamini was to perform a substantial part of the work. Instead of accepting the incapacity of EY's team to perform the contract as per Transnet's interpretation and reconsidering the awarding of the contract to EY, Transnet asked EY to find another team to perform the work it sought. An email in response was sent to Transnet on 29 January 2018, wherein the following was recorded:

'... Further to our meeting ... and subsequent discussions internally at EY, it is clear that our interpretation of the scope/ key deliverables set out in the RFP... seems to be significantly different from what your expectations are.

... the differences between the respective interpretations as follows: Transnet had "much more granular" view on the "level of detail required", for example Transnet "indicated we need to produce all required approval templates ... we had viewed the deliverables at more of a framework/guidelines level"; "we had not allowed for any "live" testing of the developed governance and controls process ... and considered this out of scope"; "the emphasis and effort to be spent on case studies and international best practice seems to now be less important"; "the RFP was issued through the PSP Panel ... as such we had assembled expertise in these areas ... these skills seem largely irrelevant now".

Unfortunately given the above concerns, it is unlikely that we will be able to meet your expectations on the scope of work/key deliverables in the relatively short time available. As such, unless we can somehow reach a landing on the scope issues, we think it is in the best interest of both Transnet and EY, that EY withdraws from the project.'

[12] Transnet was unambiguously informed that EY was unable to perform the services required by the RFP, since EY's interpretation of its bid did not cater for what Transnet was looking for. In fact, it says that Transnet was looking for 'deliverables with a much greater level of detail that [it] had assumed in its bid submission.'

[13] EY made it patently clear to Transnet that, based on its understanding of its bid, it had 'assembled' a particular team to undertake the project. That team was not able to undertake the work Transnet believed it sought in terms of the RFP. EY was willing to accept that the different interpretations were irreconcilable and understood that as a result Transnet may have to reconsider the award, which, if it did, was not a problem for EY as EY was willing to withdraw from the project.

[14] Transnet, however, did not see it this way. It responded on the same day, saying that it was awaiting 'a revised work plan' from EY, and until that was received it would 'be premature for EY to consider withdrawing from the project at this stage.' It went further to say that its own interpretation of the scope of work was 'not cast in stone.' Interestingly, Transnet also recorded that the commencement date for the project was 22 January 2018, which had already passed.

[15] Transnet and EY met the next day, 30 January 2018. Dlamini was not present. They were not able to reconcile their different interpretations of the scope of work. However, that afternoon EY delivered a second draft of the work plan to Transnet and shared it with Dlamini. Dlamini responded the same day suggesting minor

changes. The next day, 31 January 2018, EY updated Dlamini on the outcome of the meeting with Transnet. EY informed Dlamini that there was no need for any further meeting for at least a week. Then, according to the deponent to EY's answering affidavit:

'Around this time [after 31 January] it finally became clear to EY that the different interpretations of the Scope of Work meant that the Infrastructure Team within EY was not best placed to deliver services that Transnet required. At this point it became clear that Transnet was seeking predominantly business advice rather than infrastructure advice.'

[16] We know that EY learnt at the meeting of 23 January 2018 – see [5] above – that its own interpretation of the scope of work was very different from that of Transnet. By 'around' 31 January 2018 EY came to realise that Transnet was not willing to accept that EY's interpretation of the scope of work should be implemented. It insisted that its own interpretation of the scope of work be implemented. This, despite the fact that EY informed Transnet that the team it had assembled to perform the work was incapable of performing the work Transnet sought.

[17] Thus far, EY was clear in its mind that it was its Infrastructure Team and not its Advisory Team that responded to the RFP, and that its Infrastructure Team was to subcontract 30% of the work to Dlamini. The work plan it furnished to Transnet was designed on the basis of this understanding.

[18] Nevertheless, around a week later – after 31 January 2018 - EY decided to convene an internal meeting between its Infrastructure Team and its Advisory Team. At the conclusion of this meeting EY decided that its Advisory Team should replace its Infrastructure Team and perform the work as per Transnet's interpretation of the scope. This was necessary because of Transnet's insistence that EY replace the

Infrastructure Team since it was not 'seeking infrastructure advice but business advice'.

[19] On 5 February 2018 EY informed Dlamini that it was engaging with Transnet and that it would revert to Dlamini in a 'few days' time regarding the official kick off plan and the dates relating to the implementation of the project.

[20] On 6 February 2018 EY's Advisory Team met with Transnet. Dlamini was not invited to the meeting. After the meeting the Advisory Team, on the instruction of Transnet, prepared its own work plan. This took place on 8 February 2018 and was presented to Transnet that same day. This work plan was radically different from the one prepared by EY's Infrastructure Team on 25 January 2018 (which had input from Dlamini) and which was presented to, and rejected by, Transnet. A month later, on 6 March 2018 - bear in mind the project was to commence on 22 January 2018 – see [13] above – Transnet accepted the work plan of the Advisory Team. This work plan removed all legal work from the services that EY's Infrastructure Team intended to deliver and on which its bid was based.

[21] There was a lull for over a month, and on 14 March 2018 Dlamini sought an update from EY. The response Dlamini received, per email, was:

'Sorry for the delayed reply. Unfortunately based on our various discussions with Transnet, it has emerged that there are a number of changes in the scope interpretation of this engagement since we originally responded to the RFP back in June 2017. For example the PSP focus, and PSP case studies has reduced radically with for example more emphasis on bringing innovative products to implementation etc.. This has led to a complete change in the make-up of the EY team best able to meet the client needs – i.e. myself and Kebu have been replaced by another EY team from a consulting background with a better matching experience to client needs.'

Given the change of scope interpretation, regrettably there is no longer need for specialist legal input so as such unfortunately there is no longer a role for Dlamini. My apologies that this has occurred but could not foresee [sic] this at time of tendering.' (Underlining added)

[22] Dlamini, wrote to EY on 27 July 2018 – four months and one week after receiving the letter – requesting that EY repeat the contents of the email on a letterhead of EY. EY did not respond to the request. On 23 August 2018 Dlamini sent another email to EY, this time expressing its disappointment about being abandoned by EY. The email reads:

'Please note that we have been requesting clarification and official written communication from you since January this year, as to why after we tendered with EY and was awarded the ... [the contract] with EY, but we are no longer your partners in the Project.

After attending the kick off meeting with Transnet and commenting on the proposed work program, there was no indication that our services were no longer required. If you claim, as you do below, that our services were no longer required was this communication from Transnet? If so, can you please provide us with such communication before close of business today, failing that we will have no option but to approach client directly.

The tendency to partner with companies for work and not share the work when it is awarded after a fair and open tender, is tantamount to fronting and Dlamini Attorneys do not engage in such practices. Now, if the Scope of work changes radically as you state below we then assume that the scope changed significantly for Treasury Regulations be applicable, and in such circumstances if we receive a letter from Transnet confirming compliance with same then we shall put this matter to rest' (Underlining added, otherwise quote is verbatim)

[23] Dlamini asked that EY respond to the email on the same day. EY did not do so. Importantly, Dlamini asked that EY provide them with written confirmation from Transnet that the scope had changed and that there was compliance with Treasury Regulations. It told EY that if such confirmation was provided it would regard the matter as closed. Not having received a response by 27 August 2018, Dlamini

penned another email to EY requesting that it be given 'written confirmation of the change of scope and confirmation that our services were no longer necessary.' On 27 August 2018 EY responded per formal letter explaining the position in full. It stated:

'We refer to the email exchange between [Dlamini] and [EY] dated 14 March 2018 in which [EY] advised of the change of interpretation of scope in the above mentioned engagement. ... [in that communication, EY informed Dlamini] that there are a number of changes in the scope interpretation of this engagement since EY and Dlamini Attorneys ("Dlamini") had originally responded to the RFP back in June 2017. Given the change of scope interpretation, regrettably there is no longer need for specialist legal input so as such unfortunately there is no longer a role for Dlamini.'

[24] EY went on to say that it was unable to secure a letter from Transnet to confirm its view that there was a 'change in the scope interpretation' since the contract was awarded. On this response, Dlamini, on 30 August 2018, decided to write to Transnet informing it that it had been excluded from benefitting from the contract awarded to the consortium headed by EY. In the same letter it asked Transnet to furnish it with certain information. The relevant portion of the letter reads:

- '6. Taking into account the feedback we received from EY in March and August 2018, we kindly request a letter from Transnet to confirm that:
 - 6.1. the scope of the services have been changed by Transnet. If so, then please provide us with communication from Transnet to EY to that effect;
 - 6.2 as a result of the change in scope, the services to be provided by Dlamini in terms of the Partnership's [Dlamini claimed that the relationship between it and EY was one of a partnership] response to the Transnet RFP are no longer required. If so, then please provide us with communication from Transnet to EY to that effect;
 - 6.3 the supplier development plan provided, and undertaken, by the Partnership ... has been complied with. If so, then please provide us with a copy of the approved supplier development plan; and

- 6.4 the services contemplated in the Transnet RFP have been rendered by EY, and whether the services rendered by EY in terms of the Transnet RFP have been paid.'

[25] Transnet interpreted the contents of the letter to be a recordal of a complaint and responded in the following terms:

- '1. Your letter of complaint dated 30 August refers.
2. We wish to record that at issue here is the interpretation of scope of work as opposed to change of scope that is being alleged by Dlamini Attorneys.
3. As you would know, the two concepts are completely different from each other and a change of scope would require mutual Agreement between EY and Transnet, and depending on the nature and extent of the change, a change of scope may, in certain circumstances, result in the award of the tender being cancelled and RFP re-issued.
4. This was not the case in this instance and we can confirm that EY is correct in saying their initial interpretation of scope was not completely aligned to Transnet's requirements.
5. Upon clarification and alignment in interpretation of scope between Transnet and EY, EY decided that another EY team, i.e. their strategy team, was best suited to deliver the project.
6. Upon Transnet agreeing, the project was handed over to the EY strategy team and delivered according to the scope that Transnet had defined in the RFP, LOI and MSA.
7. This is also confirmed by EY in the various correspondence between EY and Dlamini Attorneys, which correspondence appears to be the source of your complaint.
8. In the correspondence EY clearly stipulates that the issue at hand is around scope interpretation by EY – not a change in scope by either EY or Transnet.
9. With regards to your question on whether or not EY has complied fully with its SD requirements, we wish to confirm that EY has fully complied with its SD obligations.
10. We trust that this fully answers your questions.'

[26] Dlamini was dissatisfied with aspects of the response received from Transnet and on 21 November 2018 sought clarity as well as further information from Transnet. Transnet interpreted this request as a case of it being drawn into a conflict between EY and Dlamini. It attended to Dlamini's request in the following terms:

- '1. We refer to the above matter and your e-mail dated 21 November 2018.

2. From the onset, we must point out that we find it worrying that Transnet is being placed on terms by [Dlamini] to provide certain answers and information relating to subcontracting arrangements between [Dlamini] and EY
3. For the record, Transnet was not involved in the formation or discussions in relation to the formation of the Consortium between [Dlamini] and EY, but Transnet evaluated a tender on the basis of a joint proposal submitted by the Consortium.
4. Upon the award of the tender, a contract was concluded between Transnet and the Consortium in terms of which certain deliverables were agreed upon, and which deliverables were achieved by the Consortium and payment made by Transnet.
5. In this regard, to the extent that there may be a dispute between the Parties to the Consortium in relation to how the contract was performed, Transnet had taken a considered decision that such matters must be resolved by the Parties through the dispute resolution process (if any) in terms of the Consortium agreement.
6. In the circumstance, we regret to inform you that we are not in a position to assist you further in this matter and advise that all issues in relation to the performance of the above tender/Agreement by the Consortium be taken up with EY.'

[27] It is clear from the above that Transnet was:

- a. of the view that it was not its duty to ensure that the obligations of the Consortium were performed by the party identified in response to the RFP as the one that would perform the specific obligation.
- b. unwilling to assist Dlamini by providing it with the information as to what work was done by EY and how much was paid for it.

[28] Nevertheless, Dlamini wrote on 16 January 2019 to Transnet reminding it that the tender was awarded on the basis that it, Dlamini, was a party to the Consortium, and that despite this being the case, it was denied the opportunity to perform the legal work that the Consortium undertook to be performed by Dlamini. Therefore, it asked Transnet to provide it with:

- '3.1 The BEC/BAC Scoring sheets and Adjudication Reports;
- 3.2 The Report finalised by EY, including information on deliverables achieved;
- 3.3 The alleged Proof of Payment made to the "Consortium".'

[29] Transnet refused to furnish these documents. Dlamini sought them later by bringing its application in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), and by utilising rule 53 of the Uniform Rules of Court. It asked both Transnet and EY to furnish these documents (the record). Both Transnet and EY refused to do so.

The refusal to furnish the record

[30] Transnet filed a formal response to the rule 53 notice, wherein it said:

‘KINDLY TAKE NOTE that [Transnet] does not have a record in terms of which a decision was taken to exclude [Dlamini].’

[31] EY did not file a formal response to the notice. It dealt with the issue in a letter its attorneys sent to Dlamini and in its answering affidavit. It gave two reasons for its refusal: (i) it did not take any decision to exclude Dlamini from participating in the tender and, (ii) it was a private body, whose actions are not susceptible to judicial review, thus relieving it of any legal obligation to furnish a record. The letter its attorneys wrote states:

- ‘ ...
2. In regard to the alleged decision taken by [EY] we are instructed to record that [EY] did not “decide” to exclude Dlamini from the execution of the Tender. Instead, the need for Dlamini’s services fell away as a result of the proper interpretation of the scope of work.
 3. In addition to the above, and in response to the request for the record of the alleged decision, we are instructed to record that [EY] actions are not capable of being judicial reviewed; nor has our client exercised any public powers that render its actions capable of being judicial reviewed.
 4. In the circumstances, our client will not produce a record of the alleged decision.’ (Underlining added, otherwise quote is verbatim)

[32] In the founding affidavit, Dlamini said:

'G. Record and reasons

70. In terms of Rule 53(1)(b) of the Uniform Rules of Court, Transnet and EY are required to dispatch to the Registrar of this Honourable Court the record of their decision to exclude the applicant both from the execution of the project and from the economic benefits thereof, together with such reasons as Transnet and EY are by law required to give or desire to make.
71. The record must include,
- 71.1 EY's complete response to the request for proposal in terms of the RFP which it in fact submitted to Transnet;
 - 71.2 EY's section 8: B-BBEE Preference Points Claim Form in respect of the RFP which it in fact submitted to Transnet;
 - 71.3 Transnet's BEC and BAC scoring sheets and adjudication reports;
 - 71.4 The joint venture and/or consortium and/or subcontract agreement/s actually submitted by EY to Transnet in respect of the RFP;
 - 71.5 EY's complete working plan in its final form;
 - 71.6 EY's report that was finalised including information on deliverables achieved particularly in respect of proposals for changes to applicable Regulatory and Legal frameworks to streamline the required governance process;
 - 71.7 Proof of payment by Transnet to EY for execution of the RFP;
72. The reasons that Transnet and/or EY are required by law to give must include:
- 72.1 What was the initial interpretation of the scope;
 - 72.2 What was the later interpretation;
 - 72.3 How do the two interpretations differ;
 - 72.4 Why does the one interpretation entail exclusion of legal elements and the other not;
 - 72.5 Who came up with the idea that closer attention should be paid to the interpretation of scope;

- 72.6 When did EY first realise that their interpretation was not in line with Transnet's needs;
- 72.7 When did Transnet convey to EY that their interpretation was not in line with Transnet's needs;
- 72.8 Why was the applicant, whose role was to be directly affected by the change of interpretation, not consulted.
- 73 The applicant reserves its right to amend the relief sought and supplement its papers upon receipt of the record of the decision and the reasons therefor.'

[33] The list of questions posed by Dlamini are expressive of the rights conferred upon it as well as the legal duty imposed by rule 53 on Transnet and EY. They, however, do not constitute an exhaustive list of what the rule 53 record should contain.

[34] Transnet denied that PAJA applied and that the provisions of rule 53 have any bearing on the matter. It does not say however that this is the reason it refused to furnish the record. Instead it filed a formal response to the rule 53 notice simply stating that it 'does not have a record in terms of which a decision was taken to exclude Dlamini'.

[35] EY on the other hand made two claims: (i) it did not take any decision to exclude Dlamini from executing the tender and, (ii) it did not understand itself to be bound by the call for the record as rule 53 was inappropriately utilised by Dlamini.

[36] The first claim is strange. By its own version, EY was the party that had interpreted the scope of work initially and based its bid on its interpretation of the scope. Upon securing the contract it met with Transnet and at this very first meeting

it realised that its initial interpretation was erroneous. Apart from its various discussions with Transnet which took place between 23 January – 31 January 2018, it had internal discussions where it considered what to do given that it was its Infrastructure Team rather than its Advisory Team that bid for, and was prepared to undertake, the project. The conclusion of that discussion was that the Advisory Team would take over. Once that conclusion was reached, the intended role for Dlamini fell away. EY must have realised that it was now undertaking work that was very different from the one it bid for. And so, the decision to hand over the contract to the Advisory Team was a decision to hold on to the contract. Included therein was a decision to exclude Dlamini from engaging in the contract. It may well have been a single decision but it consisted of two parts: (i) allow the Advisory Team to perform work that it did not bid for and (ii) exclude Dlamini from any further engagement in the work. By taking this decision, EY lost sight of the fact that *ab initio* it had always catered for Dlamini's inclusion in the project. In these circumstances, for EY to claim that no decision was taken to exclude Dlamini is, I hold, not consistent with the facts. It is important to bear in mind that Dlamini was seeking a copy of the record of EY's meeting with Transnet, the record of its internal deliberations as well as those reflecting the internal deliberations of Transnet. It was legally entitled to all of these records from both Transnet and from EY.

[37] As for the second claim, this is simply incorrect in law. The decision not to continue with the services of Dlamini may well have constituted administrative action as envisaged in PAJA, or it may have been an exercise of public power.¹ Even if it is neither, the decision to exclude Dlamini may be reviewable in terms of the common

¹ *Trustees for the time being v BAE Estates* 2022 (1) SA 424 (SCA) at [18] – [25]; *Airports Company SA v ISO Leisure OR Tambo* 2011 (4) SA 642 GSJ at [43] – [62]

law.² Absent reference to the records it is not possible to reach any sensible conclusion on whether the reviewable grounds set out in PAJA or the common law have been established.³ Mr Maenetje for EY submitted that as it was certainly not an exercise of public power, it was no more than a refusal by one private party to conclude a contract with another private party. He drew attention to a *dictum* by myself in *Moropa*⁴ where I held that two decisions taken by a private pension fund to terminate contracts with another private party did not constitute an exercise of public power. There is however a difference between that case and the present one. This case involves a decision taken by Transnet to continue with the services of EY - which commenced with the awarding of a contract following a bidding process and therefore may have been an exercise of public power – which decision impacted on the decision of EY to exclude Dlamini from the execution of the contract. It is not possible to conclude with absolute certainty that the latter decision – that of EY - was not an exercise of public power, especially since the first decision – that of Transnet - may well have been an exercise of public power. The two decisions by EY's own version are inextricably linked. Therefore, to draw that conclusion one would have to have regard to the record.

[38] Crucially, it is the court having regard to all the facts, including those revealed by the record, that will have to make a decision as to whether PAJA or the common law grounds of review were correctly relied upon by Dlamini, and whether it appropriately utilised rule 53. It is legally incorrect for a party – especially one who is required by law to avail the record – such as Transnet or EY, to of its own accord

² Id at [41] – [50]

³ Dlamini did not bring its case in terms of the common law. However, it is possible that the court may find that common law grounds of review may be applicable. Of course, such a finding could only be made on the proven facts and without prejudice to Transnet and EY.

⁴ *Moropa v CINPF* 2021 (1) SA 499 (GJ) at [46]

make that decision. No party should usurp the role of a court. The correct approach would have been for them to provide the record without detracting therefrom, or waiving their rights thereto, and to raise the point that the record is irrelevant as there is no case in public law for them to answer. That, at the very least, is the duty of Transnet, which is an organ of state. It is also the duty of EY whose conduct was central to the entire procurement process. It was involved *ab initio* – by tendering – until the contract terms were fully implemented and finalised. And once it became embroiled in litigation involving the lawfulness of the contract – from tendering to performance of the contract – it had to abide the call made in terms of rule 53 to make available whatever part of the record it possessed. This is its duty as a law-abiding corporate citizen. It is required to assist the court.

[39] Dlamini had the option to seek an order compelling EY and Transnet to supply the record. It would, of course, be an interlocutory application. Doing so, however, would result in the matter on the merits being delayed until the interlocutory application was finalised. The cost of this – in time and money – constituted an insurmountable obstacle for Dlamini. Thus it elected not to pursue the application. For a small firm of attorneys with limited resources the election is reasonable.

[40] More important is the problem that is posed by the failure of Transnet and EY to furnish the record, for it has made it difficult for Dlamini to accept that its subsequent exclusion was neither *mala-fide* nor capricious, but was a consequence of an innocent mistake particularly on the part of EY.

[41] Dlamini expended time and money by participating in the tender and by attending the first meeting that took place between Transnet and EY once the contract was awarded. It had every reason to feel aggrieved by abruptly being denied the opportunity to benefit from the contract. It was told that there was a change in the interpretation of the scope by EY. The message it received raised suspicion that it was used to secure the contract and then abandoned once that objective was achieved. Nevertheless, it asked for a confirmation from Transnet that the scope of the contract had changed and, if so, whether there was compliance with Treasury Regulations. Dlamini said further that upon receipt of such confirmation it would, without more, accept the decision that there was no role for it in the implementation of the contract and would let the matter rest. But Transnet responded by saying that there was no change in the scope, and that it had no role to play in the change of the interpretation of the contract. Transnet was informed of this difference in the interpretation by EY and that Dlamini would not be involved anymore. The record of discussions to this effect are what Dlamini required to be part of the rule 53 record. It also sought the record of the deliberations that led to EY winning the bid. These would reveal to what extent Dlamini's status and its intended involvement in the contract affected the outcome of the bid. And following therefrom, it would reveal to what extent its subsequent exclusion would constitute a breach of the terms of the tender, and whether it constituted a violation of the terms or spirit of the B-BBEE Act.

[42] The fact that the record may subsequently be found to be irrelevant is no ground for disentitling Dlamini of the legal right conferred by rule 53. It cannot be gainsaid that, had Dlamini been given the record, (i) its case in public law may have been established, and/or (ii) unlawful conduct on the part of Transnet (and possibly

even EY) may have been exposed, or (iii) it may have come to the conclusion that it was legitimately excluded from participating in the execution of the work that was ultimately performed.

[43] Thus, the refusal by Transnet and EY to furnish those records is, I hold, unlawful and regrettable. It was also prejudicial to Dlamini.

[44] Simultaneously, Dlamini has a right not to compel them to comply with the provisions of rule 53: the provision of rule 53 calling for the record is there for its benefit. In this case, having elected to waive the benefit Dlamini has to accept, which it does, that the matter can only be determined on the papers before court.

Dlamini's case

[45] On 10 May 2019, Dlamini launched the application in Dlamini 1 wherein it sought three distinct forms of relief: (i) a declarator to the effect that excluding Dlamini from 'executing' the contract awarded to the Consortium amounted to a fronting practice as envisaged in the B-BBEE Act; (ii) a declarator to the effect that the decision of EY and/or Transnet to exclude it from 'executing' the contract is unconstitutional; and, (iii) an order requiring EY and/or Transnet to jointly and severally pay Dlamini 30% of all revenue derived from the execution of the contract.

[46] Dlamini invokes rights conferred by the Bill of Rights (BoR) chapter of the Constitution, particularly s 9(2) of the Constitution. It also sought succour in s 195 of the Constitution. Transnet as an organ of state is bound by the BoR.⁵ Transnet is

⁵ Subsections 8(1) and 8(2) of the Constitution provides:

also bound by s 195 of the Constitution, specifically ss 195(1)(a), (d), (g) and (i).⁶ The rational underpinning its case is that its exclusion from the contract violates the human dignity of the black women professionals associated with it. It effectively transforms the black women professionals into 'mere fodder for the advancement of the commercial interests of EY': their conduct constituted an act of fronting as envisaged in the B-BBEE Act. In essence, Dlamini contends that its constitutional rights, particularly those set out in s 9(2) of the Constitution, have been trampled on by Transnet and EY 'with impunity'. This occurred once EY, either unilaterally or with the collaboration of Transnet, decided to terminate the participation of Dlamini in the contract. Its right to participate in a state tender was thwarted by the exclusion; the means utilised to come to the decision to exclude it were non-transparent and therefore in breach of s 195(1)(g) of the Constitution.

[47] In its papers Dlamini relied on the provisions of PAJA, and in the alternative on the principle of legality, to secure the relief. At the hearing it asked that the court invoke its power to grant 'just and equitable' relief if its case in public law fails.

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

⁶ These subsections read:

195. Basic values and principles governing public administration.-

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- ...
- (d) Services must be provided impartially, fairly, equitably and without bias.
- ...
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- ...
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'

EY's and Transnet's response

[48] On the merits, EY's case is that it submitted a bid in response to the RFP, in which it said that Dlamini would perform that part of the RFP dealing with legal services. In its understanding, should the bid be successful, it would conclude a sub-contract agreement with Dlamini for Dlamini to provide legal services and be accordingly compensated. As '[t]he legal and regulatory framework that was originally envisaged in the bid submission was no longer required by Transnet' it decided not to include Dlamini in the project. The decision was a consequence of circumstances outside of its control.

[49] Transnet, on the other hand, denies that it changed the scope of the work or that it had any hand in the removal of Dlamini. After placing on record that the scope had not changed, that it had remained the same from the moment the RFP was issued until the implementation of the contract was finalised, it went on to say:

'What did in fact transpire is that, in one of the project meetings, it became clear to EY that it, did not fully understand the requirements of the project and as a result, EY needed to rework and adjust its project team.'

[50] It is clear from this that the position of Transnet and EY are not *ad idem*. Transnet lays all blame for the exclusion of Dlamini at the feet of EY. This is a position it adopted throughout its engagement with Dlamini. When Dlamini sought its intervention it said that the dispute regarding Dlamini's exclusion was a matter that fell exclusively within the purview of the relationship between Dlamini and EY. Whether this is correct or not we cannot say, as we are denied access to the records. Similarly with EY's version, which, as I show below, indirectly lays the blame at the feet of Transnet.

[51] Both Transnet and EY ask that Dlamini be non-suited for delaying the launching of its application.

Unreasonable Delay

[52] Undoubtedly Dlamini could have launched its application a few months earlier than it did. From the moment it was informed of the decision it took some time to exactly formulate its concerns or grievances, for example, it took four months to seek clarity on the decision. But at the same time, Transnet and EY did not always respond timeously to Dlamini.

[53] Dlamini's delay in any event was not of such magnitude as to justify it being denied access to court. Such a decision would not serve the interests of justice. This is particularly so in the light of the findings I make hereunder regarding the nature of Dlamini's complaint and the role of Transnet and EY both pre and during the litigation. Further, it is only part of the relief sought by Dlamini that attracts a time-bar – the part that is brought in terms of PAJA and on the grounds of legality. The part that concerns an allegation of fronting is not confronted with the same restriction. It will have to be decided- even if it is found that Dlamini unreasonably delayed the launching of its application. Accordingly, I decline the invitation by Transnet and EY to non-suit Dlamini.

Conclusions on the merits of Dlamini's case

[54] The facts do not support the contention that Dlamini, by its exclusion, was unfairly discriminated against in contravention of s 9(2) of the Constitution. Nothing

before me shows that Dlamini was excluded because its members were all black women. The mere fact that it was excluded and that all its members are black women are in themselves insufficient to allow for the conclusion that the exclusion was because of its racial and gender profile. Dlamini was excluded because Transnet chose to get EY to perform work that was very different from the work EY had bid for. By so doing it cannot be said the Transnet and EY acted in direct contravention of s 9(2) of the Constitution. It is one thing to find that the decision to get EY to do that work, and the subsequent decision of EY that there was no longer a role for Dlamini in the work it secured with Transnet were nontransparent and possibly even unlawful. But it is a completely different thing to find that those decisions were discriminatory. The facts simply do not allow for such a finding. A finding to that effect would constitute a leap in logic.

[55] As for the possible breaches of ss 195 and 217 of the Constitution are concerned these do not constitute a cause of action.⁷

[56] Accordingly, Dlamini's case has to fail on the merits.

Conclusion on the claim of fronting

[57] The B-BBEE Act defines 'Fronting' as:

'a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative –

- a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;

⁷ *Britannia Beach Estate (Pty) Ltd and Others v Saldanha Bay Municipality* 2013 (11) BCLR 1217 (CC); [2013] ZACC 30 at [16] – [17]. See further the cases cited therein

- b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
- c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or
- d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which-
 - (i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;
 - (ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available;
 - (iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis.'

[58] Both EY and Dlamini hold a level 1 B-BBEE status. Dlamini was included in the bid not because of its B-BBEE status but because of its legal expertise. The work that was performed by EY was accordingly performed by an entity that possessed the B-BBEE status required in the bid documents. As the work was undertaken by an entity enjoying a level 1 B-BBEE status it cannot be said that it or Transnet 'directly or indirectly undermine[d] or frustrate[d] the achievement of the objectives of [the B-BBEE] Act' or the implementation of any of the provisions of' the B-BBEE Act. Dlamini's exclusion from the contract may have been wrongful but it did not frustrate or undermine the B-BBEE Act.

[59] Further, the facts show that EY genuinely intended to get Dlamini to perform some of the work that it bid for. EY did not use Dlamini's name to secure the contract and then dispense with Dlamini once it secured the contract. The work that EY performed is not the same that it bid for. Whether it should have performed this work or not is one matter, but whether it fronted by performing this work is another. On the

former issue, I have already said that by performing the work Transnet and EY may have breached certain statutory prescripts as well as the procurement policies of Transnet. As for the latter issue, EY did not secure this work on the strength of its intention to sub-contract part of it to Dlamini. As soon as Transnet got EY to perform work which involved 'a greater level of detail than EY had assumed in its bid submission' and which excluded 'a PSP focus' as well as 'an analysis of the 6 projects listed in clause 2.1(a) of the Scope of Work contained in the RFP', it knew, or ought to have known, that Dlamini's involvement was not a pre-requisite for granting the contract to EY. Hence, it was not misled into awarding the contract to EY on the basis of an understanding that Dlamini was to perform some of the work. In other words, Dlamini was not used as a front to mislead Transnet into giving the contract to EY.

[60] Accordingly, I find that the allegation that Transnet and EY are guilty of fronting as defined in the B-BBEE Act is without merit.

Despite the conclusion on the merits, was Transnet and EY's conduct unlawful?

[61] Whether they have infringed the Public Finance Management Act 1 of 1999 or any other applicable statute would at this stage remain an open question. Reference to the record, of course, would settle the question. That said, the facts as curated by EY⁸, but not disputed by Transnet, clearly indicate that EY bid to provide a particular set of services (which included those to be provided by Dlamini), was willing to withdraw from the project altogether when it realised that it was mistaken as to what Transnet actually sought, but then allowed itself to be persuaded by Transnet to provide services for which it did not bid. So radically different was its interpretation

⁸ See [5] – [15] above

that it had to replace its entire team. Transnet 'no longer want[ed] a PSP focus nor was it interested in an analysis of the 6 projects listed in clause 2.1(a) of the Scope of Work contained in the RFP', or to put it differently, '[t]he legal and regulatory framework that was originally envisaged in the bid submission was no longer required by Transnet'. Transnet is silent on this allegation. It says that EY initially misunderstood the scope of work spelt out in the RFP. But if that was so then on its own version – which is also EY's version – the EY bid was not suited for the project. According to EY, it brought this fact to Transnet's attention when it offered to withdraw from the project, but Transnet urged it to find another team to undertake the work that Transnet wanted performed. The problem for both of them is that EY did not bid to perform that work. The work was suitable for its Advisory Team and not its Infrastructure Team. Instead, it got EY to undertake a task that EY did not bid for, or which its bidding team was ill-equipped to perform. This may very well have been unlawful. Put differently, Transnet may well have been legally obliged to withdraw the award and, if there were other bids, re-examine the bids or cancel the process as a whole and start again. EY, too, may have been legally obliged not to be party to Transnet's decision to not withdraw the award. In other words, EY may have acted unlawfully by performing work it did not bid for. In short, Transnet and even EY may have violated the procurement policies and principles of Transnet, and they both may have acted contrary to the Public Finance Management Act. But, it is not possible to come to a definitive conclusion as to whether one or both of them acted unlawfully without recourse to the record. It must be remembered that they are responsible for the absence of the record. That said, it would, I believe, be in the public interest that the matter be further investigated by Transnet and/or EY or by the Public Protector.⁹

⁹ See s 6 of the *Public Protector Act 23 of 1994*

Despite the conclusion on the merits, should a claim in private law be considered

[62] Dlamini specifically eschewed any reliance on the law of contract. It relied exclusively on the principles enshrined in public law for its remedy. It stated that it came to court to vindicate public law rights and not enforce a private contract. However, the question of whether it may have had a case in law of contract on the grounds that the conduct of EY contravened public policy and should therefore not be countenanced by the court was briefly raised at the hearing. Mr Ngalwana submitted that if this court were to come to the conclusion that Dlamini has, on the undisputed facts, made out a case in contract then this court, in the exercise of its powers to issue a just and equitable remedy, should award it all or at least some of the relief it asked for, especially the relief in the form of monetary compensation. The case in contract would be based on a contravention of public policy in enforcing or failing to enforce its agreement with Dlamini. Mr Ngalwana drew attention to a *dictum* of Froneman J in *Maphango* which reads,

‘Courts deciding constitutional matters may, and in some circumstances are obliged to, make any order that is just and equitable. These powers are not confined by the pleadings.’¹⁰

[63] This *dictum*, according to the submission, allows this court to fashion an appropriate remedy by making an order that is just and equitable regardless of whether a party sought such a remedy in its pleadings or not. In *Maphango*, a landlord of a residential property attempted to evict tenants in terms of the tenants’ unwillingness to consent to an increase in the monthly rental. Upon their failure to agree to a new term in the lease, the landlord, relying on another term in the lease agreement, terminated the leases. Hence, the eviction claim. The tenants challenged the landlord’s claim to eviction on a number of grounds, but what they did not do is

¹⁰ *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC) at [153]

rely on a provision in the Rental Housing Act, 50 of 1999 (Rental Act), which related to unfair practices by landlords and tenants. Having all the facts before it the Constitutional Court, per majority, found that the said provision bore relevance to their dispute, despite neither party having relied on it. Its reasoning was expressed by Cameron J as follows:

‘As I see it, the question before us is not whether the Act prohibited the landlord from terminating the tenants’ leases in order to secure higher rents, but whether the termination was capable of constituting an unfair practice. Whether it was an unfair practice, and what a just and fair ruling would be if it was an unfair practice, lies within the Tribunal’s [a tribunal established by the Rental Act] power to decide. If the termination is capable of constituting an unfair practice, I must consider what order this court should make.

In my view, neither the landlord nor the tenant fully appreciated the force of the Act’s provisions in litigating their dispute. But it would be wrong for this Court to take a narrow view of the matter that ignores the importance and impact of the statute. That would imply that this court could allow litigants to ignore legislation that applies to an agreement between them. Rule of law considerations militate against this.’¹¹

[64] The court did not make any factual findings outside of the averments made in the papers, nor did it pronounce on an issue of the public policy that is engaged by those facts. It looked to the applicable law, which the parties failed to recognise, and applied that law to their dispute. In other words, the factual findings were first made, the applicable law was identified and only thereafter was the order made. The order made was really one of postponing the appeal and allowing the tenants to lodge their complaint with the tribunal. The court made no findings, nor issued any order on the merits of the dispute.

[65] Another case relied upon by Mr Ngalwana is *KZN Joint Liaison Committee*.¹²

In that case the applicant, a committee representing an association of independent

¹¹ Id at [47] - [48]

¹² *KZN Joint Liaison Committee v MEC for Education* 2013 (4) SA 262 (CC)

schools in KwaZulu-Natal (committee), sought an order compelling the first respondent, the MEC, to pay certain monies. Its claim was founded in a subsidy the MEC promised to the schools represented by the committee. The subsidy was recorded in a notice sent to these schools. In time, and for economic reasons beyond the control of the MEC, he was unable to abide by the promise in full; unexpected budgetary constraints meant that he was only able to pay the schools a portion of the subsidy. The committee approached the court to enforce the promise in full. It prayed for an order compelling the MEC to pay the schools all of the subsidy promised. Its cause of action was a simple one: the promise constituted a binding obligation on the MEC and an enforceable right in its members' hands. Its entire case was pivoted on this claim. It did not rely on, but actually renounced, any remedies available to it in public law. After losing in the High Court and the Supreme Court of Appeal it approached the Constitutional Court. The MEC argued that the committee misconstrued its case by relying on the private law of contract. Its case should have been brought in public law.

[66] Cameron J writing for a majority of six judges¹³ – one of whom Froneman J wrote a separate concurring judgment, which I deal with below – found that the committee had failed to establish that the promise resulted in the formation of a binding contract between its members and the MEC. However, says Cameron J, by issuing the notice the MEC was acting in terms of the government's

‘duty under the Constitution in fulfilling the right to a basic education of learners at schools that benefit from the subsidy. And once government promises a subsidy, the negative rights of those learners – the right not to have their right to a basic education impaired – is implicated.’¹⁴

And so,

¹³ The minority consisted of four judges

¹⁴ *KZN Joint Liaison Committee*, n 4 at [45]

[48] Even the [notice] may not have given rise to an enforceable agreement between [the committee's members] and the MEC, it constituted a publicly promulgated promise to pay. And, once the due date for payment of a portion of the subsidy had passed, this created a legal obligation unilaterally enforceable at the instance of those who were intended to benefit from its promise. This is by no means new to our law. Before the Constitution, the Appellate Division found 'nothing peculiar' in the notion that the state can unilaterally make a promise to pay that becomes enforceable at the instance of those intended to benefit from it. In fact, the Court found it 'strange to think that the government's undertaking in terms of [a] notice can be made enforceable only once it has been accepted and converted into a contract.'¹⁵

[67] Froneman J, applying the basic principle of our law that a promise, if seriously made, is legally enforceable, came to the conclusion that the facts of the case were such that the committee had established that the promise resulted in the MEC voluntarily committing himself to the obligation. While agreeing with Cameron J that the matter could be decided on public law principles, the learned judge went further to say that the same outcome should be arrived at by applying the ordinary law of contract:

'I arrive at the same result even if one goes the route of contract.'¹⁶

[68] On the question of whether the case should be decided on public law principles or in terms of the principles enunciated in the law of contract, Froneman J held that either of the two approaches would be suitable. The reasoning is based on a trite principle articulated as follows:

[79] How important is the legal label one attaches to a set of facts upon which a party relies for a remedy under the law? Not decisively so, I would suggest, in a matter where the facts are not essentially disputed and no material prejudice to any party flows from whatever label is assigned to them by the formality of the law. This is that kind of case, but the opposing parties urged us to attach different labels to the facts upon which relief was sought, and

¹⁵ Id at [48]

¹⁶ Id at [108]

determine the outcome according to the label. The invitation should be resisted – substance should count, not form.’¹⁷

[69] Cameron J came to the conclusion that in terms of public law if the state makes a promise it becomes binding, once it is made. Froneman J does not quibble with this, but goes further and says on the facts a binding contract had arisen after the promise was made. Fundamentally though, the learned judges reached their conclusions by relying on the facts that were pleaded and agreed. They did not stray from those facts. This is manifest in Froneman J’s reference to the trite principle that the label used to describe a cause of action is really irrelevant. It is the facts that are before court that are most relevant in determining whether relief ought to be granted to a party or not. To be precise:

‘[93] There is thus nothing in principle that hinders one from enquiring whether the facts before us may attract the label of being a contract under our law. In that enquiry it will be useful to examine whether there is anything that prevents constructing this matter as one falling under the law of contract from both perspectives, the law of contract on the one hand and administrative law on the other.’¹⁸

[70] Dlamini’s name reigned prominently in the bid. It was indicated therein that it would be performing some of the work should EY secure the contract. It is also undisputed that there was an agreement between EY and Dlamini that upon the awarding of the contract, EY and Dlamini were to conclude a subcontracting agreement: this is a classic case of the parties having a legally binding agreement to conclude another agreement in due course and once a suspensive condition – such as the success of the bid - materialises. The subcontracting agreement was not concluded because EY decided that it could no longer accommodate a role for Dlamini in the work it undertook. Whether this constituted a failure on the part of EY

¹⁷ Id at [79]

¹⁸ Id at [93]

to relate in good faith towards Dlamini is a matter that would have had to be pleaded and proven. In other words, whether EY's conduct exposed it to a claim in contract law is an issue that could only be resolved when the court is invested with the full facts.

[71] At the same time, a court cannot, under the pretext of utilising its powers to make a just and equitable order, make an order independently of making factual findings upon which a cause of action can be identified. Orders follow therefrom: a court is not empowered to issue 'just and equitable' orders from thin air. It too is bound by the rule of law. Put simply, if a cause of action is absent then the power to grant appropriate relief is non-existent.

[72] In the present case, I cannot find that EY infringed the public policy by breaching its agreement to conclude the subcontracting agreement with Dlamini. The facts presented in the papers do not constitute sufficient material to justify such a finding. Accordingly, any relief that would have followed such a finding cannot be granted.

Costs

[73] Transnet and EY have succeeded in resisting Dlamini's claim. But they may not have done so had they complied with their legal duties to furnish the full record of what transpired during the assessment of the bids, the full record of their joint interactions after the first meeting of 23 January 2018, and the full record of their respective internal discussions after that meeting. Their failure to comply with their legal duty is a matter of concern and should not go unpunished. Had Dlamini been

granted access to these records it may well have elected not to pursue this application. It was forced to do so because Transnet and EY were not forthcoming from the moment it sought clarity, which lack of co-operation continued unabated until the case was finalised. Accordingly, I am of the view that Dlamini should be awarded its costs and that both Transnet and EY should jointly be liable for these costs. Dlamini asked for punitive costs. Given (i) Transnet's and EY's conduct in refusing to furnish the record is unlawful, (ii) the refusal prejudiced the case of Dlamini and (iii) it frustrated, if not defeated, the course of justice, I believe a punitive costs order would be appropriate.

DLAMINI 2

Factual matrix

[74] The case in Dlamini 2 as I demonstrate below is (i) fundamentally different from that in Dlamini 1 and (ii) turns exclusively on facts that are in the main common cause. Those facts are revealed in exchanges of sometimes lengthy emails between Dlamini, EY and Covington, Dlamini and EY and Dlamini and Transnet. Given their central importance to the determination of the issues in dispute it is necessary to quote at length from these emails.

[75] On 14 September 2017 Transnet issued an RFP for the provision of advisory services to prepare and conclude a joint development partnership for the development and operation of natural gas networks for a period of 36 months. It was a requirement of the RFP that whoever seeks to bid for the contract must meet 'pre-qualification criteria'

5.1 B-BBEE Joint Ventures or Consortiums

Respondents who would wish to respond to this RFP as a Joint Venture [JV] or consortium of B-BBEE entities, must state their intention to do so in their RFP submission. Such Respondents must also submit a signed JV or consortium agreement between the parties clearly stating the percentage [%] split of business and the associated responsibilities of each party. If such a JV or consortium agreement is unavailable, the partners must submit confirmation in writing of their intention to enter into a JV or consortium agreement should they be awarded business by Transnet through this RFP process. This written confirmation must clearly indicate the percentage [%] split of business and the responsibilities of each party. In such cases, award of business will only take place once a signed copy of a JV or consortium agreement is submitted to Transnet.

5.2 Subcontracting

As prescribed in terms of the Preferential Procurement Policy Framework Act (PPPFA), Act 5 of 2000, Preferential Procurement Regulations 2017, it is a prequalification criteria to participate in this RFP that Respondents subcontract a minimum of 20% [Twenty percent] of the total value of the contract to one or more of the following designated groups:

- **QSEs and/or EME's which are at least 51% owned by black people and/or black woman owned.**

A bid that fails to meet this pre-qualifying criterion will be regarded as an unacceptable bid.'

[76] On 13 October 2017 the third respondent (Covington) approached Dlamini on the suggestion of EY requesting that the two of them collaborate for purposes of securing the contract. Eventually, they both teamed up with EY in a consortium. On 31 October 2017 the consortium submitted its bid. On 13 July 2018 Dlamini received confirmation that the consortium had been awarded the tender. Dlamini was one of the EME's that EY was to use as a sub-contractor, and Covington was listed as the lead legal advisor. On 19 July 2018 the consortium had its first meeting post the award. On 25 July 2018 EY sent Dlamini a proposed master subcontracting

agreement (MSA). During August and September 2018 Dlamini, Covington and EY met a few times to discuss various drafts of the MSA. On 15 August 2018 Dlamini attended a legal work-stream kick-off meeting with Covington. On 22 August 2018 Dlamini sent EY comments on the proposed First Draft MSA. Thereafter EY and Dlamini continued to exchange drafts, with each commenting on the draft before returning it to the other. In the meantime, Dlamini and Covington commenced working on the project.

[77] In September 2018 the relationship between Covington and Dlamini began to sour. It commenced on 20 September 2018 with Dlamini sending a first draft of the Regulatory Report to Covington. Covington was not happy with the draft. It wrote to Dlamini on 25 September 2018 expressing its displeasure. It wrote:

‘It appears that your lawyers either did not understand the mandate or did not apply themselves to the task at hand, as large parts of the draft Regulatory Report are irrelevant (and unnecessary). Where the discussion was relevant, in many instances the discussion does not incorporate critical analysis of the issues discussed, and consequently the discussion delivers no or little value to the client. The draft also unnecessarily deals with upstream and downstream elements of the Project when the Project is a "midstream" storage, regas and pipeline project. There are no upstream and no downstream elements to the Project. The due diligence should be focused exclusively on the midstream. This will cut down on the excessive amount of repetition in the memorandum.’

[78] Included in its correspondence was a detailed response to Dlamini’s draft. Dlamini took offence at the response. It relayed its sentiments the next day:

‘We understand the mandate and have applied ourselves to the instruction at hand.

The fact we are comprehensive in our due diligence is not an indication of lack of understanding of what is required. We are not in agreement with some aspects of your reports and we are not quick to label you or jump to conclusion on your capability or lack thereof to deliver the mandate. I find it strange that at this point you think we do not understand the mandate when

we presented our approach to your firm and provided you with the presentation on and to date had no comments from your firm. I don't know if this is how treat your partners on joint mandates but your approach on resolving this is tasteless and totally flawed.' (Quote is verbatim)

[79] Covington wrote back the same day, stating that its response to the draft was intended to serve as 'constructive criticism'. It further made clear that it was 'the lead law firm' on the project:

'I am sorry that you have chosen to take offence to this, rather than to look at what is actually requested in our scope of work and to try to take constructive criticism for what it is. I am not sure exactly what approach you would have us take — your deliverable was late in getting to us, we had very little time to review, and we sent our initial comments to you alone and asked for a private conversation about the way forward.

While it is clear that significant effort has gone into your part of the draft report and the primary legislative acts have been identified, we were brought into this project (you will recall that Deon and I approached you about joining us) because of our extensive experience on LNG and gas pipeline projects and regulation, and I can tell you with certainty that the legal and regulatory review as it currently stands needs significant work. I am afraid that on this particular project we are the lead law firm and need to put our name behind the entire legal workstream, so we are going to have to be happy with the work product.'

[80] On the same day Dlamini responded:

'It is incorrect to create the impression that our report was unreasonably late. Both parties agreed to exchange reports on the 17th of September. When we realised we could not meet the deadline, we had the courtesy to call your office to request an extension and Kgabo from your office informed us that you were also experiencing the same challenges. We then agreed to provide our report on the 19th and then you still had not provided us with your draft report. On the 20th you still had not provided us with your report when we sent ours by midday. We only received your report on the evening of the 20th. We need to put to rest the notion that our report was late, your report was late as well.

Please do not patronise us regarding our efforts and capabilities. We have reviewed your work and can say the same thing regarding your work which I have sensitised Deon on. Your report has missed the point in that you are

attempting to pre-empting option and comment on “options” before the technical and finance work streams have provided their options analysis report. The inception report clearly sets out when this legal input is required from the legal work stream. So the report we have received from your firm needs significant work to comply with the requirements of the phase 1 deliverables. For instance there is a section in your report where the interpretation of section 56 of the National Ports Act is incorrect.

As much as you are capable we are more than capable to do the work on our own. You were sent to us by EY to partner with us based on the work we had done on this project previously, the Solar PV IPP we undertook with EY and generally similar projects we have undertaken in the energy space on our own. We were never consulted on you leading us. Our discussions with you was always on collaboration on this project. To this you find yourself as a lead and want to abuse your position, we refuse to be abused and lead in this fashion. We are more than capable to undertake this mandate on our own.

If you want to lead this stream we expect you to do so with integrity.’
(Quote is verbatim)

[81] Covington responded that evening:

‘I’m not sure why you are taking this attitude, but it is not helpful. I am going to respond to your specific statements below, but after this I really refuse to engage in a further email exchange. If you have an issue you want to discuss, I am happy to get on the phone.

Our report was ready over two weeks ago, but we explicitly agreed with you in our meeting at our offices on 13 September that we would not send it to you until we’d seen your report, since your report covered the critical legislation and was the larger report. That is why it was not sent to you, which you seem to have forgotten. You did indeed kindly inform us that you would be late in delivering the draft, but that does not derogate from the fact that it was delivered later to us than agreed, which gave us less time for review and interaction with you. That is why I mentioned this, nothing more..

We will check on the point you mentioned in our report; please send us your comments and we can discuss. We are happy to receive constructive comments on any of our drafting, particularly in areas such as the Port Act where you have more experience. That is why we are cross-checking each other’s work. That is why we provided you with the NDA for your comment. That being said, I do not agree that stating options cannot be a part of legal analysis per se, particularly where we have relevant experience from prior

regas/pipeline projects on what the most likely structures will look like. We will look forward to your comments.

Finally I want to be very clear that EY did not "send us to you"; we didn't tell EY we were even talking to you until after we had finished interviewing candidate firms and finalised our selection. As we are the lead law firm on the project EY considers Dlamini to be our subcontractor and was not involved in the process of selecting a local law firm. Deon and I knew who you were already and we decided to include Dlamini in the firms we spoke with.

We were brought into this project by EY because we have extensive international experience on LNG and gas pipeline projects. We also have over 15 years of experience working with EY on large-scale African energy and infrastructure projects, and they know that we can do the job (and that they can get along with us). Your firm does not have our level of experience on this specific type of project, but has other skills and experience that we do not have. Ergo, I think we are a good team. If you choose to view those facts as being patronising, then that is your interpretation, but I do not see why you think this has to be some sort of competition.

I have checked with Kgabo and she inadvertently inserted the Covington logo in the draft sent to you; as I mentioned it was not in the draft I approved for distribution. My apologies again, our inhouse forms all include the logo and our associates are trained from Day 1 to insert it in our drafts. She is aware of the issue and any joint work product will not have logos etc. in them going forward.

If you want to continue this conversation, let me know a time and number I can reach you.' (Quote is verbatim)

[82] The exchange of this correspondence must be read together with the comments on the draft prepared by Dlamini. These comments reflect a significantly different approach and understanding of the project, the applicable law and the role played by each of them. The exchange resulted in so much acrimony between the two that their working relationship deteriorated to the point where it compromised the quality of the service provided to Transnet.

[83] On 2 October 2018 Dlamini approached Transnet. It sent the draft Regulatory Report to Transnet and informed Transnet that once it has commented thereupon, a

final Report will be drafted and presented to EY. Transnet, it seems, did not respond to Dlamini, nor did it comment on the draft Report.

[84] On 8 October 2018 Dlamini wrote to Transnet requesting a meeting with Transnet to address: (i) its (Dlamini's) subcontracting arrangement with EY and Covington; (ii) the agreed work allocation between Covington and itself; (iii) its request that Transnet intervene where it and Covington have diverging views on the legal matters; and, (iii) the relationship between itself and Covington, which it characterised as an 'abusive' one. It also recorded that it would want to address its concerns that EY was not able to attend to its issues objectively.

[85] Transnet hosted a meeting between itself, Dlamini, Covington and EY on 15 October 2018. Transnet made it clear at that meeting that whatever subcontracting arrangements Dlamini, Covington and EY entered into was a matter for themselves. Dlamini said that it would be subcontracting directly with EY as per the bid document of the consortium. Transnet informed the meeting that Covington would have the final say on any legal issues where it and Dlamini disagreed, and lastly that it would only intervene in any dispute between Covington and Dlamini if Covington conducted itself in a manner that would be unprofessional or unethical.

[86] On 17 October 2018 Transnet sought Covington's views on the draft Regulatory Report sent to it by Dlamini on 2 October 2018. It also informed Dlamini that in future Dlamini should not send any reports directly to it, unless that report was signed-off by Covington.

[87] On 18 October 2018 Transnet wrote, per email, to EY stating that it is guided by, and relies upon, the vertical structure outlined in the EY bid response in which Covington was identified as Lead Advisor with Dlamini being subcontracted by, and providing support to, Covington. Transnet does not want to be involved in the disputes between Covington and Dlamini. It said:

‘... as both Dlamini and Covington are contracted to EY and not Transnet, we propose the EY attend to meet both Parties and outline what their respective responsibilities are in line with the Bid Response. Further we do not think that it is appropriate for your sub-contractors to be sending us the type of emails [those sent by Dlamini referred to above] and if there are issues in relation to this project, EY and its subcontractors should have proper channels on how to address such matters without involving Transnet.’ (Quote is verbatim)

[88] Aggrieved by Transnet’s response, Dlamini informed Transnet that it ‘felt oppressed’.

[89] On 29 October 2018, a fourth draft of the MSA was circulated but no agreement reached, and soon after EY produced a new draft (the fifth draft) and sent it to Dlamini.

[90] The disagreement between Dlamini and Covington did not abate post the 15 October 2018 meeting hosted by Transnet and the email penned by Transnet on 18 October 2018. The disagreement manifested itself in the work that was completed by Dlamini and Covington. Dlamini would issue a report, provide an opinion or comment on the possible legal consequences of any actions or steps that Transnet may adopt, and Covington would make changes to these, which Dlamini was not able to agree to.

[91] Further negotiations on the MSA continued during November 2018. The negotiations were tough and challenging for both Dlamini and EY. A key obstacle to concluding the MSA was the strained relationship between Covington and Dlamini. Central to this strained relationship was one individual from each side – Ms Dlamini the lead partner of Dlamini and Mr Govender from Covington. Both of them were central to each party's contribution to the project. There was some mention during these discussions that one or both of the two individuals should step aside for the sake of the project as a whole. This suggestion aside, the parties remained in deadlock.

[92] Dlamini wrote to Transnet on 7 November 2018 stating:

'We write this e-mail fearing that you may respond in a way that will and further embarrass us and erode whatever small role and participation we still have in this project. However, since the last time you wrote the two e-mails below, we have continued to work with Covington as you have directed at our meeting of 15 October 2018 (i.e. Covington having the last word on any disagreement we may have on legal principles) but the fact that Covington has the last word on deliverables where we have agreed Dlamini Attorneys will take the lead hampers the quality of every deliverable to the extent that it is almost impossible for us to have an opinion or say on any work produced by the legal work stream. We now have to prepare a presentation on the two deliverables under your consideration and we do not agree with certain conclusions reached in the deliverables which were circulated to you, in particular on the second deliverable. We are now faced with a dilemma of having to present on work product that we are not 100% in agreement with on fundamental legal principles.

We draw your attention to the fact that the failure to schedule regular legal work stream meetings is impacting on our ability to meaningfully participate in this project since we have to be content with whatever Covington's last word is on deliverables where we have agreed Dlamini Attorneys will take the lead. We were hoping that the legal work stream meeting would allow for fair discussions on legal issues and to the extent that we are not in agreement with Covington, you as Client representative can fairly rule on legal issues which we are not in agreement. To continue working under what we have complained about before and after your directive of 18 October 2018 makes it impossible to have meaningful participation in this project. We are now left

with a watching brief mandate in this project and three years is a very long time to hold on to a watching brief.

Kindly confirm your availability for the legal work stream meeting in the hope that we can reach agreement on some of these fundamental legal principles.’
(Quote is verbatim)

[93] Transnet responded to Dlamini on 13 November 2018. It reiterated what it had said on 18 October 2018: that it was EY which had responded to the bid, and that Covington was the lead legal advisor, and that it should not be drawn into any dispute between the subcontracting partners of EY, or even between EY and any of its subcontracting partners. It advised Dlamini not to correspond with it on any of these issues, but to rather raise them with EY.

[94] In the meantime, the discussions regarding the MSA continued. By this stage the sixth draft was in circulation. Dlamini responded thereto on 15 November 2018 indicating that it was not satisfied with certain aspects and suggested some changes. On 21 November 2018 Dlamini wrote to EY complaining about being undermined and disrespected. It wrote:

‘As you may be aware, we previously raised our concerns around the hostility we have encountered at the hands of our colleagues, Covington. Since the submission of the legal team's first report we have been overruled by Covington on a number of matters, but more importantly on legal matters where Dlamini Attorneys and Covington have diverging views. On such occasion, we approached Siphso Risiba of Transnet Legal requesting his intervention and ruling on such legal matters, but instead of confirming the resolutions reached at our meetings, he issued the directive that Covington (as lead of the legal team) has the last word on all legal matters, as well as the directive on the 18th of October (attached for ease of reference) which contradicts the collaborative arrangements between the two law firms.

Furthermore, we are continuously and deliberately excluded from pivotal correspondence with members on this project such as the stakeholder engagement team, the technical team and yesterday Siphso, which issue we

have raised with Covington on a weekly basis but to no avail (we attach correspondence to this effect).

Although we have been forced to abide by Siphos directives and acknowledge Covington's role as lead of the legal team, Covington's conduct and Siphos directives continuously erode the collaborative arrangements in place. This has resulted in Covington reaching certain legal conclusions which we do not agree with and such conclusions relate to matters that have a fundamental impact on the project as a whole.' (Quote is verbatim)

[95] A seventh draft was sent by EY to Dlamini on 29 November 2018.¹⁹ On the same day EY wrote to Transnet seeking consent to replace Dlamini as a subcontractor. Its letter reads:

'EY was awarded the tender for the Project and would act as prime contractor to Transnet and the other parties would act as subcontractors to EY. EY subsequently went about putting in place subcontractor agreements with the various subcontractors involved in the Project, including Dlamini. The vast majority of the subcontractor agreements are in place and the remaining subcontractor agreements being finalised. This is, unfortunately not the case with the subcontract with Dlamini. Despite EY's best efforts Dlamini are proving to be quite challenging in negotiating the subcontractor agreement. As you are aware they have approached Transnet, in contradiction of Transnet's wishes with complaints about Covingtons and Burling ("Covingtons") and EY. EY requested Dlamini to engage with EY only in relation to subcontracting matters, which Dlamini has not done. Covington are international experts in the field of oil and gas transactions and working together with Dlamini have reported a sub-standard of work from Dlamini as well as "bullying" tactics used by Dlamini, this has resulted in Covington "walking on eggshells" around Dlamini in order to accommodate demands from them. This is wasting time and effort which we can ill afford. As the Project is set to take place over a period of three years, EY as the prime contractor, has a duty towards Transnet that all our subcontractors work well together in a collegial and professional fashion. This assists EY in ensuring a high level of quality in the work we present to Transnet and the current situation may detract from that intent, which we are not prepared to accept. EY has just received a marked-up draft (one of many) from Dlamini. We are attempting to meet them in the middle but it is becoming increasingly apparent that Dlamini are not willing to compromise on their position. This makes it near impossible to contract with them and even if such contracting is possible, we are concerned about the longevity and efficacy of the relationship due to their behavior throughout this process, especially their behavior towards Transnet - our end Client.

¹⁹ EY claims that this is the eighth draft. Whether it is the seventh or eighth draft is of no moment for the conclusion I reach in the matter.

Consequently, we wish to inform Transnet that we may be forced to replace Dlamini with another empowered law firm who matches Transnet's criteria, should you have any objection to this step we request you to provide your urgent response to this letter, if we receive no reply from you by 3 November 2018 we will assume you are in agreement. Apologies to burden you once more with matters relating to sub-contractors.' (Quote is verbatim)

[96] The next day, 30 November 2018, EY received a response from two employees of Transnet saying that they would not object 'provided that the law firm' which replaces Dlamini has 'the same B-BBEE' credentials as Dlamini. The response was confirmed by two more senior employees of Transnet. On 4 December 2018 Dlamini rejected the seventh draft.

[97] An eighth draft was sent to Dlamini on 10 December 2018. On 11 December 2018 EY informed Dlamini that if it did not accept this particular draft it would remove Dlamini from the project. Dlamini responded that it would accept the fifth draft and that its main partner, Ms Dlamini, would step aside and the person from Covington who was actively involved in the project - Mr Govender - should also be asked to withdraw from the process so that the two firms could co-operate more effectively. On 12 December 2018 EY informed Dlamini that the eighth draft was the only one on the table, and similarly the withdrawal of Mr Govender was not negotiable. Dlamini refused to accept the draft indicating that it was being coerced by EY to accept terms that were not acceptable to itself. It refused to sign the draft and EY refused to change it. On 14 December 2018 Dlamini was removed from the project.

[98] On 15 January 2019 EY confirmed that it had removed Dlamini from the project, but gave Dlamini an opportunity to reconsider its position on accepting the eighth draft without any amendments from Dlamini. The email in this regard reads:

'Further to my mail on 14 December 2018 please note that we have not accepted any of your counter-proposals and we confirm that your mandate has been withdrawn in accordance with my email of 11 December 2018, due to your non-acceptance of our terms.

Nonetheless, in the event you wish to work with us again on the project, we look forward to receiving a signed copy of the agreement (attached) by close of business tomorrow 16 January 2019 along with an email confirming agreement to the terms of my email of 11 December 2019, failing which we will deem our offer to be finally rejected.'

[99] Dlamini refused to accept this draft. It replied to EY placing certain facts on record:

'We refer to our e-mail of 12 December 2018 from Ayanda, our e-mail below and your e-mail of yesterday which does not address the concerns raised below.

As you are aware, we have deliverables due end of March in terms of the project timelines and we note that we have not been copied on any communication since 13 December 2018. Please confirm if you have unilaterally removed Dlamini Attorneys from the project making it impossible for us to perform.

Further, please confirm, as per your e-mail from yesterday, you intend to remove us from the project if we refuse to sign under duress your version of a master subcontractor agreement which contains provisions that the parties had not reached consensus on, namely:

1. to accept the insertion of clause 15 (Independence), which relates to the professional independence requirements EY must comply with in relation to its audit clients. This provision requires Dlamini Attorneys to assist EY with complying with these requirements by not only disclosing to EY that its directorships or shareholdings of 5% or more in any entity on an on-going basis; but should EY determine in its sole discretion that there are professional independence concerns, then Dlamini Attorneys agrees to resign from a position, decline an offer, relinquish its shares in such entity. Notable the provisions of clause 15 apply to any director, officer or trustee of Dlamini Attorneys and/or Dlamini Attorneys' directors, trustees, executive officers, shareholders holding 5% or more, subsidiaries, associated entities or parent company. EY is not contracted with Dlamini as its auditors, so we do not understand why we must agree to such a provision. Furthermore, this clause didn't appear in any of the previous iterations of the master subcontractor agreement. If it was of such importance why is it only being incorporated so late in the negotiation. The rationale provided by EY on 29 November 2018 for this provision's sudden insertion as a regulatory

requirement in terms of section 90 of the Companies Act, does not align with the requirements set out in section 90 of the Companies Act. Section 90 of the Companies Act merely sets out the requirements to appoint an auditor. The obligations here are quite onerous and unreasonable in the circumstances;

2. to accept the insertion of Schedule 5 (Framework for Legal Teams' Collaboration) which contain provisions that are unjustifiably onerous, unreasonable and oppressive. Dlamini Attorneys agreed working arrangements with Covington before and after the award of the Project. To disregard such collaborative arrangements and attempt to contract for and on behalf of parties with such oppressive terms is unreasonable. It is not clear to us why such terms and conditions with the level of detail would be required on a mandate where each work-stream has a client approved fixed budget (irrespective of Individual charge out rates) and payment is based on reaching client approved milestones and deliverables are necessary. It is clear that this schedule has been drafted taking into account comments from Covington and Transnet, but none of ours.

We note that EY expects Dlamini Attorneys to accept the abovementioned terms by close of business today to secure our continued participation on this project. However, we find it disappointing that EY expects us to sign an agreement under duress and in total disregard of our request for a meeting with EY, the concerns raised through the project and those raised on our e-mail dated 12 December 2018. In light of the above, should EY insist on removing Dlamini Attorneys from this mandate, please could you provide us with official confirmation of our removal from this project.' (Quote is verbatim)

[100] On 17 January 2019 EY sent Dlamini written confirmation of its decision to remove Dlamini from the project. Dlamini was replaced by another firm, Shandu Attorneys (Shandu), which enjoys the same B-BBEE status as Dlamini. Transnet was informed in advance of Shandu being appointed as the replacement for Dlamini. It had no difficulty with the decision and endorsed it.

The relief sought

[101] Dlamini asks this court to: (i) declare its removal from the project by EY acting unilaterally and/or in concert with Transnet to be 'unlawful as it is not founded on any law, contract or other prescript.'; (ii) declare that the removal of Dlamini is not

rationally related to Dlamini's obligations in terms of the tender; (iii) declare that the removal of Dlamini is unconstitutional and unlawful because it undermines the objectives of the B-BBEE Act; (iv) declare that the failure of Transnet to intervene and prevent Dlamini's removal to be unconstitutional as it abdicated its responsibility to ensure compliance with the B-BBEE Act; (v) review and set aside EY's decision to remove Dlamini from the project; (vi) review and set aside Transnet's 'failure to intervene and stop' Dlamini's removal from the project; and, (vii) order EY to pay Dlamini an amount of R10 777 612,02 (Ten million Seven Hundred Seventy-Seven Thousand Six Hundred and Twelve Rand and two cents).

[102] Dlamini also claims that both EY and Transnet, by removing it from the project, have made themselves guilty of committing the offence of fronting as set out in the B-BBEE Act.

[103] As with Dlamini 1, Dlamini's case in Dlamini 2 is founded in public law. It asks this court to find that its exclusion and/or removal from enjoying the benefits of the contracts to be unlawful and unconstitutional; violates the human dignity of black women professionals associated with it, and effectively transforms the black women professionals into being 'mere fodder for the advancement of the commercial interests of EY.' It is also unconstitutional for undermining the achievement of the objectives of the B-BBEE Act.

[104] As with Dlamini 1 Dlamini relied on the provisions of PAJA in its quest to review and set aside the decision of Transnet to remove it from the contract, or to fail to intervene with EY in order to prevent the removal. Again, the application was

brought in terms of rule 53. In Dlamini 2 though Transnet and EY furnished an incomplete record.

[105] Dlamini had expertise in natural gas contracts. It claims that it is for that reason it was included in the bid, and absent its inclusion, EY would not have succeeded in its bid.

EY's case

[106] EY claims that it had a Level 1 B-BBEE status at the time it bid for the contract. It further denied that it secured the contract on the strength of Dlamini's name or involvement in the bid. Thus, the indication in the bid documents that Dlamini would be performing some of the legal work did neither strengthen nor weaken the chances of the bid succeeding. Covington was always the main subcontractor for legal work. However, it concedes that by including Dlamini it was able to satisfy the pre-qualification requirement that 20% of the contract should be sub-contracted to exempted micro-enterprises (EMEs) or qualifying small-business enterprises (QSEs) that are more than 51% black-owned. EY's intention was to award 12% of the sub-contracted share of the contract to Dlamini. The contract involved providing a complex set of services – part of which was legal advisory services - which EY could not provide on its own. At the same time, it was the party that bid for the contract and that concluded a contract with Transnet. It had to engage various service providers, and had to co-ordinate the work done by each of the service providers in order to fulfil its obligations in terms of the contract. The legal advisory services could not be provided by one firm only. However, it had agreed to grant Covington lead legal advisor status and this was revealed to all the parties,

including Dlamini. Covington, according to EY, 'is one of the most experienced and knowledgeable group of lawyers in the gas market globally.' From the moment the bid was placed, Transnet was informed of this and it agreed thereto. Having succeeded with the bid EY concluded an agreement with Transnet – the EY Transnet Services Agreement – which regulated the relationship between EY and Transnet. The agreement allowed for EY to employ sub-contractors who may perform any obligation that befalls EY. The contract between EY and the subcontractor did not involve Transnet. While the agreement allowed EY to engage subcontractors, it provided that the performance by the sub-contractors would be regarded as performance by EY. EY, not Transnet, would issue instructions to the subcontractors. Any problems with performance by the subcontractor, such as inadequate or non-performance, would be regarded as inadequate or non-performance by EY. And so, Transnet would look to EY and not the subcontractor for its remedies. In the words of the contract, the subcontractors would be treated as 'employees' of EY and EY would 'remain liable for any acts of omissions and Defaults of the' subcontractor or the personnel of the subcontractor. The agreement goes further to say that Transnet would have no claim against the subcontractor at all. As a result, claims EY, it is imperative that EY have the utmost faith and trust in the subcontractors it appoints. It is with this in mind that it attempted to conclude an agreement – the MSA - with Dlamini. Dlamini would be providing services to EY and not Transnet. EY, not Transnet, would have to compensate Dlamini. Dlamini simply refused to accept this as the basis of the MSA. Put differently, Dlamini did not want to be restricted to dealing with EY, it wanted to be free to deal with Transnet. This, it says, is manifest in the fact that it wrote directly to Transnet on more than one occasion and

complained about the treatment it received at the hands of EY and particularly Covington.

[107] It had replaced Dlamini with Shandu, and as Shandu enjoys the same B-BBEE credentials as Dlamini any suggestion that it is guilty of fronting is without merit. However, should this court find that its actions fall foul of the fronting provisions of the B-BBEE Act, it calls for an order declaring the specific sections of the said Act which defines fronting and which criminalises it to be unconstitutional. The order is only sought if it is found that EY's conduct amounts to fronting.

Transnet's case

[108] Transnet's case is that EY and another entity, Mott McDonald (Pty) Ltd, submitted a joint bid in response to its RFP. EY was identified as the main party. From inception EY informed it that it would be subcontracting with Covington and Dlamini to provide the legal services should it be awarded the contract, but that Covington would be the lead firm with regard to providing legal advisory services. In that sense Covington was distinguished from other subcontractors. Its QSE and SME credentials were part of the consideration in the assessment of the bid. Dlamini was identified as one of the EME supporting firms that EY would engage along with other entities such as Covington, but it did not enjoy the same status as Covington. The RFP required that a minimum of 25% of the contract should be subcontracted to other parties. In the bid EY indicated that it would subcontract 42% of the contract. When the disagreements between Covington and Dlamini surfaced, Dlamini sought Transnet's intervention and when the response it received did not suit it it turned against Transnet. Transnet understood the request of Dlamini to be a call for

adjudicative intervention and it had neither the 'legal duty' nor the 'capacity' to undertake this.

[109] Further, EY was informed on many occasions that the contracts it concluded with subcontractors were a matter for itself and the subcontractors. It, not the subcontractors, was obligated to furnish the services for which it would be compensated. This message was conveyed to Dlamini on more than one occasion. Dlamini's issue is solely an issue for Dlamini and EY. When asked by EY for authorisation to replace Dlamini with Shandu it duly granted the request. As the two entities are identical in terms of their BEE status the allegation of fronting is ill-founded. Similarly with the allegation that the objects of the B-BBEE Act were compromised or undermined.

No case in public law

[110] In contrast to Dlamini 1, in Dlamini 2, (i) there was no allegation of a change in interpretation of the scope of work identified in the RFP and the bid, (ii) there was no change in the work that EY performed, (iii) there was a substantial amount of negotiations between EY and Dlamini regarding the role and function Dlamini would play in the execution of the contract, (iv) Dlamini was always aware as to why it was removed from the execution of the contract, and (v) the facts as set out in the correspondence quoted above are the only ones relevant for the determination of the merits of Dlamini's application.

[111] The problem that Dlamini encountered and which gave rise to this litigation was a breakdown of the negotiations concerning the conclusion of the MSA. The

fundamental reason for the breakdown was the unwillingness of Dlamini to accept a role subordinate to that of Covington. There were numerous attempts to address all of its concerns save for its subordinate role. This was a red line for it and for EY. But Dlamini was in no position to dictate to EY what EY - as the successful bidder and the party that bore the full risk of legal action should any of its subcontracting partners fail to perform any of the obligations EY undertook *vis a vis* Transnet - should do. It must accept that its refusal to agree to any one of the eight drafts of the MSA was a major, if not sole, contributing factor for its removal. There is no attack on the bidding process, or on the awarding of the contract to EY.

[112] There is therefore no case in public law. This is a case of two private parties failing to conclude a contract. Here, unlike in Dlamini 1 the *dictum* in *Moropa*²⁰ is apposite. No case in private law has been pleaded, and in any event a case in private law cannot be founded on these facts.

Failure to provide a complete record

[113] I am not unmindful of the fact that in Dlamini 2 both Transnet and EY failed to file a complete record in terms of the rule 53 notice. There is however no need for a record in this matter as the bid and any communication between Transnet and EY that is relevant for the determination of the dispute was revealed to Dlamini before the litigation commenced and during the litigation. The failure to file a record certainly did not defeat the course of justice.

Fronting

²⁰ See [37] and n4 above

[114] Dlamini was replaced by Shandu. Like Dlamini, Shandu is an exclusively black women partnership of legal professionals. It enjoys a Level 1 B-BBEE status. EY was fully transparent with it and with Transnet as to the problems it faced and the solution it intended to apply, which was to replace Dlamini with Shandu. Hence, for this and for the same reasons set out in Dlamini 1, there is no basis for the allegation that by replacing Dlamini with Shandu EY engaged in the unlawful conduct of fronting. Dlamini's claim to this effect is, to repeat what is said in Dlamini 1, without merit.

Constitutionality of the B-BBEE Act

[115] As there has been no 'fronting' the conditional counter-application of EY falls away. Nothing more need be said about it, save to record that the Minister who was the only party that opposed it did not seek any costs.

Conclusion

[116] For the reasons set out above, the application stands to be dismissed.

Costs

[117] Dlamini has failed in its application. The events in Dlamini 1 and in Dlamini 2 occurred around the same time. There can be little doubt that Dlamini was hurting from its experience in Dlamini 1, and this understandably would have influenced its decision to embark on the litigation in Dlamini 2. In the circumstances I hold that it would serve the interests of justice if all parties were to bear their own costs.

[118] All that remain is for me to thank the legal representatives for their assistance in this matter.

[119] OrdersIn case number: 16593/19

- 1 The application is dismissed.
- 2 The first and second respondents are to pay the costs of the application including the costs of two counsel to be taxed on an attorney and client scale.

In case number: 23785/19

- 1 The application is dismissed.
- 2 There is no order as to costs.

Vally J

Dates of hearing: 14-15 March 2022
 Date of Judgment: 2 June 2022

In matter number 16593 (Dlamini 1)

For the applicant: V Ngalwana SC with F Karachi
 Instructed by: Dlamini Inc
 For the first respondent: N Maenetje SC with Kerry Williams
 Instructed by: Webber Wentzel
 For the Second respondent: M Motsoeneng (Director), V Khathide (PA) and R Mphosi (Candidate Legal Practitioner)
 From: Motsoeneng Bill Attorneys

In matter number 23785 (Dlamini 2)

For the applicant: V Ngalwana SC with F Karachi
 Instructed by: Dlamini Inc
 For the first respondent: N Maenetje SC with Kerry Williams
 Instructed by: Webber Wentzel
 For the second respondent: M Motsoeneng (Director), V Khathide (PA) and R Mphosi (Candidate Legal Practitioner)
 From: Motsoeneng Bill Attorneys
 For the fourth respondent: G Marcus SC with M Salukazana

Instructed by:

State Attorney