



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

CASE NO: 28814/2020

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED:

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DATE

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SIGNATURE

In the matter between:

URBAN ICON (PTY) LTD

Applicant

and

SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LTD

First Respondent

NYELETI CONSULTING (PTY) LTD

Second Respondent

ILIFA AFRICA ENGINEERS

Third Respondent

BVI CONSULTING ENGINEERS WESTERN CAPE (PTY) LTD

Fourth Respondent

THE MINISTER OF FINANCE

Sixth Respondent

JUDGMENT

THE MINISTER OF TRANSPORT

Seventh Respondent

TOLMAY J

1. The applicant (Urban Icon) approached the court on an urgent basis in July 2020 and sought in Part A of the application interdictory relief against the first four respondents pending the determination of Part B of the application. The first respondent (SANRAL) and the third respondent (ILIFA) opposed the application. None of the other respondents entered an appearance to defend. Part A was not proceeded with, and no relief is sought pertaining to Part A. This court is accordingly, but for the costs of Part A, only to determine Part B.
2. In Part B, Urban Icon seeks to review and set aside five decisions by SANRAL. Four of the decisions relate to the award of contracts to the second, third and fourth respondents. The fifth decision Urban Icon seeks to set aside relates to a decision by SANRAL not to award any further contracts for a period of one year to it for purposes of establishing whether it, as a recently established entity, could deliver on the tenders awarded to it. Urban Icon also seeks a declaration of invalidity in respect of the contracts entered into between SANRAL and each of the respondents, consequent on the decision to award the tenders. ILIFA contends that if the court

were to find that there are valid grounds of review, the court is enjoined to formulate a just and equitable remedy in terms of Section 172(1) of the Constitution¹ and section 8(1) of the Promotion of Administrative Justice² (PAJA).

3. During the period from March to July 2017, SANRAL advertised several tenders for consulting engineering services for the improvement of roads, namely bid no. R524-010-2019/3F; R524-010-2019/4F; R501-030-2019/1F; R511-020-2018/1F; R511-020-2018/2F; R565-010-2019/2F and R040-050-2020/1F. Urban Icon was registered as a company during March 2017, at virtually the same time as the first tender was advertised. It submitted bids and was the highest scoring bidder in respect of all seven tenders. It appeared to SANRAL that there was a significant risk associated with awarding all the tenders to Urban Icon, despite the fact that it was the highest scorer in all the tenders. During 2019, Urban Icon was awarded tenders no. R524-010-2019/3F, R524-010-2019/4F and R501-030-2019/1F.

4. According to SANRAL these tenders related to the design and construction monitoring of roads which were less complex and posed less of a risk to SANRAL. The remaining tenders (the impugned tenders), which related to the construction monitoring of roads with a higher traffic volume, which were riskier and more complex, were awarded to the second highest scoring bidders which were the second, third and fourth respondents (the successful bidders), who were not new entrants and according to SANRAL had proven track records in providing

¹ Act 108 of 1996.

² Act 3 of 2000.

engineering design and construction. Urban Icon is of the view that all the tenders should have been awarded to it as it was the highest scoring bidder.

5. Bidders were first assessed on “responsiveness” which included testing if the bidder met the eligibility requirements as stated in the tender documents. All bidders who met the eligibility requirements were then evaluated on functionality. Urban Icon met the minimum functionality points and qualified for further evaluation in terms of the price and preference points system. Urban Icon scored the highest points in terms of the price and preference point system in respect of the impugned tenders. On an individual basis, Urban Icon appeared to be the correct candidate for each of the projects.

6. Initially, on 8 November 2017, it was recommended that tender bids no. R511-020-2018/1F and R511-020-2018/2F be awarded to Urban Icon. Mr. Moloto, a project manager at SANRAL conducted an assessment of Urban Icon’s financial ability, as well as its capacity to perform its obligations in respect of the two tenders awarded to it. Based on the information available, Mr. Moloto took the view that Urban Icon did not pose a serious financial risk. Consequently, during May 2018, the recommendation of 8 November 2017 was approved by the Management Bid Adjudication Committee (MBAC) on 16 February 2018 and by SANRAL’s Contracts Committee, on 6 March 2018. The approval by the Contracts Committee stated that Urban Icon’s appointment was subject to it being called in to indicate, officially, if it had the requisite capacity to deliver and/ or perform in terms of the tenders.

SANRAL stated that there was a concern as some of the projects were to run concurrently and Urban Icon was a new entrant and did not have a proven track record. The projects collectively amounted to close to R700 000 000.00 (seven hundred million rand).

7. A meeting was held on 7 September 2018 between Urban Icon and officials of SANRAL where the resources of Urban Icon was discussed, especially the technical staff required for the design and construction monitoring for the two projects. It transpired from this meeting that Urban Icon was 100% black female owned, but the specialist/ key personnel involved in the delivery of the projects that were put forward in Urban Icon's tender submissions in relation to the impugned tenders were individuals who were not shareholders, nor in the employ of Urban Icon. The other concerning aspect that arose, was that Urban Icon had no proven track record and the cumulative amount for the three projects that it had previously performed was far less than the value of even one of the tenders that it bid for.

8. On 18 September 2018, MBAC resolved that a letter detailing further information from Urban Icon was required and a Mr. Essa, who was a consultant to SANRAL, was mandated to obtain the relevant information from Urban Icon and conduct a risk assessment/ due diligence in respect of Urban Icon's capacity. Urban Icon questioned Mr. Essa's authority to conduct a risk assessment/ due diligence. SANRAL however pointed out that Mr. Essa was properly appointed in accordance with its procedure dealing with the appointment of consultants and his knowledge of

the industry and the processes in SANRAL placed him in a position to undertake the investigation as required by MBAC.

9. On the instructions of MBAC, correspondence was exchanged between Mr. Essa and Urban Icon between the period 27 September and 30 October 2018. In this correspondence, Mr. Essa attempted to obtain the necessary confirmation that Urban Icon did have the capacity to carry out the tenders. Urban Icon was dissatisfied with the manner in which SANRAL proceeded to determine its capacity. Urban Icon was of the view that the demands by SANRAL for Urban Icon to provide evidence of its ability to perform the works fell outside of SANRAL's rights when assessing the tenders, and appeared to be motivated by suspicion because it was 100% black female owned. SANRAL however argued that the request was bona fide and in compliance with section 2(1)(f) of the Preferential Procurement Policy Framework Act³ (PPPFA), as well as the Standard Conditions of Tenders.

10. On 27 September 2018, Mr. Essa, on instructions of MBAC requested certain documentation relevant to Urban Icon's ability to execute on the tenders. On 18 October, Urban Icon responded and only provided some of the information and complained that some of the information requested was not required in the tender documents. On 19 October, Mr. Essa responded and explained the reasoning behind the request for further information. On 30 October 2018, Urban Icon

³ 5 of 2000.

responded and the response showed that the cumulative amount of the three projects completed by Urban Icon was far less than the value of a single tender it bid for. It also indicated that Urban Icon was a sub-contractor in respect of two of the three projects, furthermore, one of its references was a company related to it. The engagement with Urban Icon also revealed that it had a high reliance on external experts, who had their own companies and were also involved in other SANRAL projects. According to SANRAL this raised concerns about their capacity. Urban Icon indicated in addition that it required a two-month leeway between the implementation of the projects which were packaged into two packages and further subdivided into sub-packages.

11. The correspondence from SANRAL emphasized the fact that Urban Icon was in the running for several tenders and that fact informed the decision to establish Urban Icon's experience, capability, capacity and sustainability based on the engagements with Urban Icon. Mr. Essa concluded that awarding all the tenders to Urban Icon would pose an unacceptable commercial risk as Urban Icon had only completed minor contracts, its proven track record did not warrant awarding simultaneous large tenders to it and the high reliance on external experts presented a high risk. A withdrawal of these external experts would render Urban Icon without sufficient capacity to execute in respect of multiple projects. The decision was also made to monitor Urban Icon and not to award any further tenders to it for a period of twelve months, this period has since lapsed.

12. Mr. Essa recommended that SANRAL provide a reasonable workload to Urban Icon and advised that once it has settled and stabilized its employees, structures and systems, it would be able to bid on future tenders. On this basis, Mr. Essa initially recommended that tenders no. R511-020-2018/1F and R511-020-2018/2F be awarded to Urban Icon. On 12 December 2018 MBAC convened a meeting to which Mr. Essa was invited. After this meeting it was decided that tender no. R524-010-2019/3F could also be awarded to Urban Icon. The Contracts Committee was of the view that there was a reasonable risk that Urban Icon would not be able to deliver on all seven contracts and on 5 April 2019 the Contracts Committee revoked its decision to award the rest of the tenders to Urban Icon and they were awarded to the second highest bidders.

13. After finding out that the impugned tenders were not awarded to it, Urban Icon on 3 April 2020 addressed correspondence to SANRAL in which it, inter alia, requested reasons for the awards and an undertaking that SANRAL would not conclude and implement contracts with the successful bidders. These reasons were provided on 4 June 2020. Urban Icon was not satisfied with the reasons and launched this application.

14. Urban Icon raised various grounds of review, which were that:
 - 14.1 It was of the view that the assessment over and above the functionality assessment was irregular as it submitted the highest scoring bid it should have been awarded all the tenders.

14.2 The successful tenderers were improperly allowed to vary their bids.

14.3 SANRAL unreasonably and improperly found that Urban Icon posed an unacceptable commercial risk.

14.4 Mr. Essa's involvement was unlawful.

14.5 SANRAL unlawfully relied on paragraph 5(13) (b) of the Conditions of Tender, acted ultra vires as it had no authority to impose the monitoring decision and Urban Icon did not have a fair hearing on the proposed ban.

15. The following issues arise for determination:

15.1 Whether the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) permits a due diligence and risk evaluation on a holistic basis, and in the context of many tenders submitted by the tenderer for a number of projects to be simultaneously delivered after functionality and price scoring, or whether such assessment must be limited to the functionality and the 90/10 scoring.

15.2 If SANRAL could perform such an assessment in principle, whether the invitation to tender disclosed that it would do so and, if not, whether that rendered the award procedurally unfair.

15.3 Whether there were objective criteria as envisaged in section 2(1) (f) of the PPPFA which justified the award of the tender to the successful tenderers.

15.4 Whether the requirements in paragraph 5.13 of the Standard Conditions of Tender that a tenderer may not constitute an unacceptable commercial risk constitutes an objective criterion as contemplated in section 2(1) (f).

15.5 To the extent that there was non-compliance by SANRAL, whether this was material given the purpose and spirit of the relevant provisions.

15.6 If the court should find that the impugned tenders were inconsistent with the Constitution and invalid, what, if any, remedial relief ought to be awarded, in particular whether the awards of the impugned tenders should be set aside; and whether it is permissible and just and equitable for the court to award what remains of the contracts to Urban Icon, or to refer it back to SANRAL for re-determination.

16. Before dealing with the grounds of review and legislation, another issue needs addressing first. It was argued on behalf of SANRAL that it was obliged to comply with the Construction Industry Development Board Act⁴ (CIDB Act) and CIDB Regulations, a view that was not shared by Urban Icon. It was pointed out by Urban Icon that compliance with the CIDB Act and CIDB Regulations were never raised by SANRAL as a reason for its impugned decision, nor did the record show that it informed SANRAL's decision. The tender documents did not require the bidders to be registered contractors and the second to fourth respondents were also not registered contractors. As this issue was not raised by SANRAL as a reason for its decision to award the tenders in the manner that it did, it will not be appropriate to rely on it at this belated stage.

17. It was argued on behalf of SANRAL that the monitoring decision did not constitute an administrative action as it did not have any direct external legal effect, and even

⁴ 38 of 2000.

if it was, it was inconsequential because SANRAL would in any event not have awarded Urban Icon tenders in addition to the tenders awarded to it, because of the unacceptable commercial risk explained above. It is clear from the record and papers filed that the monitoring decision was a result of the due diligence which resulted in the finding of an unacceptable commercial risk and was not the reason for not awarding the tender to Urban Icon. The monitoring decision did not constitute an administrative action which is subject to review as it did not have any external legal effect when evaluated on its own and as the period has expired it is no longer a life issue that requires determination.

18. Urban Icon is of the view that there was an untoward reason for not awarding all seven tenders to it and questioned whether Mr. Essa was entitled to do the due diligence and concluded that his involvement was unlawful. Mr. Essa was appointed by MBAC as a consultant according to SANRAL's procedures and no objective evidence was provided to prove that his appointment was either irregular or unlawful. He did the due diligence in accordance with a lawful instruction from SANRAL. He was at pains to explain his reasoning and concerns in the correspondence and Urban Icon was given ample opportunity to address these concerns. There is no legitimate basis for the suspicion that he was suspicious of Urban Icon's ability because it is 100% black female owned.

19. It is common cause that the procurement process and the tenders were subject to inter alia sections 33 and 217 of the Constitution, PAJA, the PPPFA and the PPPFA Regulations. A procurement system that is “fair, transparent and cost-effective” should be followed in terms of section 217 of the Constitution. SANRAL argued and correctly so, that the ability of a tenderer to deliver bears directly on whether the tender would be cost-effective, to merely tick the boxes regarding price and preference is not sufficient if the entity is unable to do the job⁵.
20. The PPPFA is the legislation that gives effect to the system envisaged in the Constitution. The PPPFA generally requires that tenders be awarded to the bidder who scores the most points according to a weighted system, subject to certain exceptions. The first exception relates to functionality and is not relevant to this matter. The second is the exception set out in section 2(1)(f) of the PPPFA which stipulates that “the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraph (d) and (e) justify the award to another tenderer”. The first step is to determine which tenderer scored the highest points and the next step would be to determine whether objective criteria in addition to those contemplated in paragraphs (d) and (e) exist which may justify the award to another tenderer⁶.
21. It was argued on behalf of Urban Icon that having passed the functionality evaluation and being the highest scoring bidder, SANRAL was obliged to award all

⁵ Wattpower Solutions CC and another v Transnet SOC Limited (2022) 1 ALL SA 892 (KZD).

⁶ Grinaker LTA v Tender Board (Mpumalanga) and Others (2002) 3 ALL SA 336 (T).

seven tenders to it and was not entitled to investigate its actual capacity as the exact nature of such scrutiny was not set out in the tender documents. SANRAL said that this argument is not sustainable. I agree with SANRAL's argument that if a bidder passed the functionality assessment it does not mean that the objective criteria assessment has also been passed. I agree that even though the two assessments consider the same general topics the assessments are different. The second assessment is indeed, by its very nature, more extensive than the functionality assessment. In this instance, Urban Icon was given advance notice of the reason for due diligence and was given an opportunity to prepare for, and address the concerns raised.

22. At the time that the tenders concerned was advertised, the 2017 Preferential Procurement Regulations were in force. Regulation 11 thereof provides that the contract may be awarded to a tenderer that did not score the highest points only in accordance with section 2(1) (f) of the PPPFA and that if an organ of state intends to apply objective criteria in terms of the section, the organ of state must stipulate the objective criteria in the tender documents. These objective criteria were stipulated in paragraphs 5.11.4 and 5.13 of the Conditions of Tender. Paragraph 5.11.4 (d) provides that the tenderer with the highest number of points will be recommended unless there are compelling reasons not to do so. Paragraph 5.13 of the Standard Conditions of Tender that deals with the acceptance of a tender offer reads in relevant part as follows: "*Accept a tender offer should it be considered not to present any unacceptable commercial risk, only if the tenderer*

a)

b) can, as necessary and in relation to the proposed contract, demonstrate the possession of the professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, expertise and personnel, to perform the contract,

c).....;

d).....;

e)

f)"

The tender documents made provision for a due diligence to be performed and there was nothing untoward in SANRAL's decision to do so. The reliance on 15(3) (b) of the Conditions of Tender cannot by any stretch of the imagination be unlawful. To the contrary it would have been irresponsible not to do so under the prevailing circumstances of this case. Urban Icon was given ample opportunity to address the concerns raised and the allegation that it was not given a fair hearing is without merit.

23. It was argued on behalf of SANRAL that as the PPPFA does not define objective criteria, the phrase must be understood in its plain meaning and the meaning that has been given to it by the courts. In *Lohan Civil-Tebogo Joint Venture en Andere v Mangaung Plaaslike Munisipaliteit en Andere*⁷ the applicant's bid scored the highest

⁷ (508/2009) [2009] ZAFSHC 46 (6 APRIL 2009).

points under the preference-points assessment, but the tender documents provided that the tenderer's past performance in engineering works of comparable magnitude and the degree to which it possessed the necessary technical, financial and other resources to enable it to complete the work within the contract period would be taken into account. The court held that these criteria were objective criteria within the meaning of the PPPFA.

24. In *Simunye Developers CC v Lovedale Public FET College*⁸ it was held that objective criteria "would invariably relate to work in accordance with the tender specifications". It was also said that these criteria would often relate to the track record of a tenderer in other related projects and the duty of a state organ to ensure that an appointment of a tenderer should result in value for money. It goes further to say that to award a tender in the face of objective criteria which puts serious doubts on the tenderer's ability to complete the work satisfactorily and in accordance with the tender specifications may constitute wasteful expenditure. I am in agreement with the reasoning, as state organs have a duty to ensure that money from the fiscus is spent in a manner that will advance the common good and to do so, a tenderer must have the ability and resources to complete the work required by the tender. The ability to complete the work by a relative new entrant into the arena, especially where several tenders of a complex nature and huge financial exposure are involved, must constitute objective criteria as envisaged in the applicable legislation.

⁸ 2010 JDR 1568 (ECG) at para 34.

25. The PPPFA Regulations define “functionality” as “the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents”. In terms of regulation 5(5) a tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents would not be regarded as an acceptable tender. Regulation 5(7) provides that each bid that obtained the minimum qualification score for functionality must be evaluated further in terms of price and the preference point system and any objective criteria envisaged in Regulation 11. The objective criteria referred to in Regulation 11 are the objective criteria contemplated in section 2(1)(f) of the PPPFA.⁹ SANRAL argued that it is clear from the language and scheme of the PPPFA and the applicable regulations that functionality is simply a threshold assessment to determine if a bidder has the minimum attributes necessary to provide the services as specified in the tender documents. It was argued correctly that an assessment into functionality and an objective criteria assessment may consider similar general topics, but the assessments are not the same for three reasons:

25.1 The functionality assessment occurs before the preference points assessment and the objective criteria assessment occurs after the preference points assessment.

25.2 The functionality assessment is ordinarily a binary assessment of all timeously submitted bids. The due diligence assessment is an assessment of the highest scoring bid vis-a-vis one or more other acceptable bids.

⁹ Ibid, regulation 11.

25.3 The purpose of the functionality assessment is to determine whether bids are acceptable or not. The purpose of the due diligence assessment is to determine whether the tender should be awarded to a bidder other than the highest scoring bidder.

26. Urban Icon's argument on the other hand is that once it passed the binary functionality assessment SANRAL was obliged to assess it in terms of the 90/10 principle. Thereafter it was not permissible to take into consideration any other factor, including the fact that the tenderer was to be appointed to deliver all seven projects. Urban Icon's argument basically is that if such considerations were relevant, they ought to have been included in the tender documents. However, this proposition loses sight of the fact, as was correctly argued by SANRAL, that the ability to deliver on a number of tenders cumulatively would not be included in the subject matter of each individual tender. I agree that the consideration of the capacity and ability of a tenderer to deliver on more than one tender is a relevant and rational consideration. The holistic approach argued for by SANRAL is both rational and in accordance with the applicable legislation. To ignore the background and facts would be particularly shortsighted and could have devastating consequences for SANRAL and also for the country. A contextual approach is therefore called for, taking into account the ability of a tenderer to perform in seven tenders, simultaneously is both lawful and rational, even if the individual tenders did not make provision for such an eventuality.

27. In *Khosa v Minister of Social Development*¹⁰ the court stated that the test for rationality is a relatively low one, as long as the purpose of government is legitimate and “the connection between the law and the government purpose is rational and not arbitrary...”. It can hardly be argued that for a state entity to take into consideration the ability of a tenderer to deliver on several tenders simultaneously is irrational or untoward. Despite the fact that *Waco Africa (Pty) Ltd v Eskom SOC Limited and others*¹¹ is not on all fours with the present matter, I agree with SANRAL’s argument that the principle enunciated in the reasoning of the court that, in principle it is rational for a state owned entity to consider as part of its assessment the ability of a single contractor to deliver a single project with a multitude of elements, as was the case in that matter, could equally be applied in circumstances where the ability of one contractor to deliver on several tenders simultaneously is taken into consideration. SANRAL argued that the various features of the bids viewed collectively were noteworthy and informed the key focus of the due diligence that followed. This much is clear when one considers all the facts. SANRAL did not arbitrarily exclude Urban Icon from the tenders, but awarded three tenders to it and made it clear that once the ability to perform was established it would be considered for further tenders. The approach was both sensible and considered and the perceived bias that Urban Icon expressed is not borne out by the objective facts.

28. To consider whether a tenderer constitutes an unacceptable commercial risk, SANRAL could and should indeed have inquired whether Urban Icon could, in

¹⁰ 2004 (6) SA 505 (CC) at para 67.

¹¹ 2022 JDR2589 (GJ).

relation to the tenders demonstrate the possession of the professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation expertise and personnel to perform the different contracts. As was correctly argued by counsel for ILIFA, once it is established that there were objective criteria that justified the award of the tender concerned to someone other than the tender that scored the highest points, the only relevant question is whether SANRAL's decision was based on objective criteria which were reasonable and justifiable.¹²

29. Regarding the allegation that the successful tendered were permitted to vary their bids, no factual basis was provided. SANRAL only after awarding the tenders to the second highest bidders, negotiated a downwards adjustment.
30. An evaluation of the prevailing facts and circumstances of this case for the reasons set out above do not support any of the grounds of review raised, as a result the application must be dismissed.
31. One further point raised by counsel for ILIFA needs mentioning and even if the conclusions referred to above are found to be incorrect, the application must fail for this reason alone. The tenders concerned relate to the supply of consulting engineering services and to practice in the engineering profession a person is

¹² WJ Building and Civil Engineering Contractors CC V Umhlatuze Municipality and Another 2013 (5) SA 461 (KZD) at para 12.

obliged to register in terms of section 19 of the Engineering Professions Act¹³, in one of the categories recognized in section 18(1) of that Act. Section 18(2) provides that no person may practice in any of the categories as contemplated in section 18(1) being a professional or candidate engineer, a professional or candidate engineering technologist, a professional or candidate engineer, or a professional or candidate engineering technician unless registered in the category. Neither Urban Icon or any of its directors are registered in any of the categories mentioned in section 18(1).

32. The Tender Conditions provide in clause 4.1 that certain criteria for eligibility may be set in the Tender Data to which a prospective tenderer must comply, and that a failure to satisfy eligibility criteria is a breach of the conditions of tender, and as such will result in instant disqualification of the tenderer. SANRAL set in clause 4.1.1 of the Tender Data the requirement that the tenderer must be registered as a Consulting Engineering Firm. Urban Icon did not present any evidence whatsoever that it was registered as a Consulting Engineering Firm at the time that it submitted its bid documents in regard to the tenders concerned, or at any other relevant time. Consequently, Urban Icon was also disqualified from being considered for the award of the tenders and for this reason too, the review must fail.

33. The costs should follow the result, and as Urban Icon for all practical purposes abandoned Part A, it should also pay the costs of Part A.

¹³ Act 46 of 2000.

The following order is made:

1. The application is dismissed.
2. The applicant to pay the costs of the first and third respondents, pertaining to Part A and B of the application, which costs will include the costs of two counsel and senior counsel where applicable.

R G TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For Applicant:	Adv MI Maunatlala Adv P Buckland Instructed by Malose Matsaung Attorneys
For First Respondent:	Adv A Milovanovic-Bitter Adv PJ Daniel Instructed by ENS Africa
For Third Respondent:	Adv SD Wagener SC Instructed by Weavind & Weavind

Date of hearing: 25 July 2023

Date of delivery: 11 December 2023