IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 061838/2022

In the matter between:

MEDITERRANEAN SHIPPING COMPANY (PTY) LIMITED Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

17/05/24
DATE

[redacted]
SIGNATURE

TRANSNET FREIGHT RAIL First Respondent

MAERSK LOGISTICS AND SERVICES SA (PTY) LIMITED Second Respondent

CC INTER AFRICA (PTY) LIMITED Third Respondent

THE COOL TRAIN (PTY) LIMITED Fourth Respondent

TISEN INVESTMENTS (PTY) LIMITED Fifth Respondent

JUDGMENT

Tuchten J:

1 This is a review of a decision by the first respondent (Transnet) to issue and publish a request for commercial proposals (RCP) for a tender in regard to a Transnet siding in Bellville, Western Cape (the

premises), for a minimum period of five years (claim 1); and, or in the alternative, a review of Transnet's decision to award the tender to the second respondent (Maersk) (claim 2); and, or in the alternative, a review of Transnet's decision to reject the bid of the applicant (MSC) pursuant to the tender (claim 3). The decision was made within the division of Transnet called Transnet Freight Rail but nothing turns on this. In each case MSC asks that the applicable decision be set aside.

2 The third, fourth and fifth respondents were joined to the review by order of this court on 23 November 2023. None of them have participated in the review. Transnet and Maersk appeared by counsel and oppose the review.

3 In addition to the merits which I have outlined above, there are other issues before me. Maersk contends that MSC has no standing to bring the reviews contemplated by claims 2 and 3 because MSC was disqualified from proceeding further at the technical threshold stage. Maersk and Transnet contend that MSC is precluded from advancing its claim 1 on the ground that MCP failed to attack the RCP until after MCP learnt that its bid was not successful. MSC accepts that the review was commenced outside the 180 day period referred to in s 7

of the Promotion of Administrative Justice Act,[1] (PAJA). It seeks an appropriate extension of the time period.

4 Maersk for its part contends that if the review is successful on the merits, any just and equitable order made pursuant to s 8(1) of PAJA should not interfere with Maersk's contract with Transnet concluded pursuant to its successful bid and allow that contract to proceed to completion.

5 At the conclusion of oral argument, however, counsel told me that the parties asked that the adjudication of a just and equitable remedy to stand over for later adjudication. I acceded to this request in principle.

6 Because of the application to extend the s 7 time period and the attack on MSC's timing of its claim 1 challenge, dates are important. Transnet published the RCP on 14 April 2022. On 5 July 2022, MSC was notified that its bid had been unsuccessful. The review was launched by notice of motion dated 21 December 2022. The review was preceded by an urgent application for an interim interdict, which MSC launched by notice of motion dated 22 July 2022. In the interdict application, MSC asked that, pendente lite, Transnet be interdicted from further implementing its decision to award the tender to Maersk *and* from

---

1 3 of 2000

concluding any contracts pursuant to the award of the tender *alternatively* giving any further effect to any contracts which might have been concluded pursuant to the award of the tender to Maersk.

7 The interim interdict application finally came before Maritz AJ and was argued on 26 October 2022. The learned acting judge reserved. On 5 December 2022, Maritz AJ dismissed the interdict application and gave a punitive costs order against MSC.

8 One of the consequences of the order in Maersk's favour in the interim interdict application was that Maersk continued to develop the premises.

9 There were delays by Transnet in providing the full record to MSC. The full record was only delivered on 14 June 2023.

Background

10 On 14 April 2022, Transnet published the RCP for Tender No. CP2422, for the lease of the premises. The RCP refers to a lease for a minimum period of 5 years. This was not merely a lease of property in the usual sense. It entailed the development of the property to increase containerised volumes of goods moved on rail, as opposed

to road, and to contribute to social and economic development. MSC, Maersk and the third to fifth respondents submitted bids. Maersk was the successful bidder. Although the RCP invited bids for a minimum period of five years, Transnet ultimately awarded Maersk a lease for twenty years.

11 The RCP called on prospective bidders to submit a volume and operational plan providing, amongst other things, for a rail volume guarantee for the Bellville Container Terminal and aligned to the specific facility throughput capability "as quoted by" Transnet; to submit an investment plan; to submit a commercial rental offer; to submit a community development plan; to meet Transnet's safety, health, environmental and quality (SHEQ) requirements; and to undergo a company and credit risk assessment. The RCP prescribed a nine step evaluation process.

12 Step One, called "governance and legal", was intended to assess the bidders' administrative responsiveness, including whether the bid was lodged on time, whether all "Returnable Documents and/or schedules" were completed and returned by the closing date, and the validity of the Returnable Documents. To progress to Step Two, a bidder had to pass Step One.

13 Steps Two to Seven were intended to test the functionality of a bid. These steps contained five "Measures". Bidders had to score a minimum of 70% to progress to the next evaluation test. The five Measures and the points they contributed, totalling 100 points, were:

13.1 Volume and operational commitments 30

13.2 Investment 50

13.3 Commercial rental 1

13.4 Risk, safety, health, environmental compliance and business continuity 5

13.5 Transformation and community development 14

14 The Measures for volume and operational commitments, investment, and transformation and community development, all contained sub-measures. Transformation and community development provided for 10 points for the bidder's "Community Development Plan" and 4 points for "B-BBEE Rating".

15 A scoring table was provided to show how the points for each measure or sub-measure were scored. The top three bidders with the highest scores were to proceed to Step Eight. Step Eight provided for company and credit risk assessments of the top three bidders which had met the

functionality threshold. Step Nine was the award of business to and the conclusion of a contract with the preferred bidder.

16 MSC progressed past Step One but on 5 July 2022 was notified by Transnet that its bid had been unsuccessful, with Maersk the sole successful bidder. Transnet gave its reasons for its decision as follows:

> The primary reason your company was unsuccessful on this occasion is due to your bid failing to meet the requirements of the following:
>
> - Technical threshold for volume of 20 points with your score of 11.2 points.
> - Technical threshold for investment of 50 points with your score of 19,6 points.

17 Pursuant to its success in being awarded the tender and resisting the interim interdict application, Maersk proceeded to develop the premises through what Maersk calls the Belcon Logistics Park Project (Belcon). Belcon comprises three major components: a depot, a cold store and a warehouse. It is intended to handle both imports and exports of, for example, fruit. The cold store is designed to extend the life of the fruit. It is not in dispute that there is a pressing need for such facilities in the Western Cape. The planning for Belcon has been completed. The site has been cleared of previously existing buildings. Erection of structures is under way. All consultants have been

appointed. The depot has been in operation since February 2023. Maersk anticipates that practical completion will take place in March 2025 and site operations will start in May 2025.

18 It is further not disputed that if Belcon is not completed and brought into operation, infrastructural pressures to meet increasing industry demands during what is described as the reefer season (local fruit harvesting times) will be exacerbated, to the prejudice of local fruit farmers and importers, as well as to Maersk itself.

19 Maersk estimates that its initial spend for Belcon will be in the region of R700 million, of which a sizeable amount has already been spent or committed. The setting aside of Maersk's contract with Transnet would bring about loss of investment, short term jobs and long term job creation, particularly in construction related employment. If the project is stopped, Maersk will be exposed to major penalties, professional fees and claims for loss of profits and other damages.

20 In summary, therefore, setting aside of Maersk's contract with Transnet consequent upon the award of the tender would thus result in loss of employment, loss of revenue to the South African state, reduced exports, loss of supply to a market already experiencing logistics pressure and the loss or delay of anticipated social development

benefits, amongst which is the need to reduce the volume of goods carried by road in favour of rail.

Statutory framework and the approach of a court to this kind of review

21 MSC submits that the legislative framework in which MSC's challenges to the RCP and its outcomes must be evaluated are s 217 of the Constitution, the Preferential Procurement Policy Framework Act,[2] (the PPPFA) the Preferential Procurement Regulations, 2017 (the 2017 Regulations) and, of course, PAJA.

22 The 2017 Regulations were held by the SCA to be inconsistent with the PPPFA and invalid. But the declaration of invalidity was suspended for a period and counsel are agreed that the 2017 Regulations apply in the present case.

23 Section 2 of the PPPFA provides as follows:

> (1) An organ of state must determine its preferential procurement policy and implement it within the following framework:
> (a) A preference point system must be followed;
> (b)(i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for

---

2 5 of 2000

specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;

(iii) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;

(d) the specific goals may include-

(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;

(ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette 16085 dated 23 November 1994;

(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;

(f) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and

(g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.

(2) Any goals contemplated in subsection (1) (e) must be measurable, quantifiable and monitored for compliance.

24 Maersk contends that the present tender is not one in which Transnet proposed to contract for goods or services within the meaning of s 217 of the Constitution.

25 It seems to me that unless I decide that MSC has prospects of success on the merits, I shall not reach the other issues I have outlined. I shall therefore first consider the merits. For that purpose, I shall assume that MSC has standing to bring the review and that the RCP invited prospective bidders to contract with Transnet for services as contemplated by s 217 of the Constitution.

26 In approaching this question, I have regard, inter alia, to the following principles. Unfairness in the outcome or result of an administrative decision is not a ground for judicial review unless the exercise of the power or performance of the function was so unreasonable that no reasonable person could have so acted. The primary focus in scrutinising administrative action is the fairness of the process, not the substantive correctness of the outcome.[3]

---

[3] *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 1 SA 604 CC para 42

27 A court should not attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker.[4]

28 With effect from 25 March 2022, Transnet approved an addendum to its supply chain policy to allow Transnet to include specific provisions for preferential procurement in its procurement processes. It resolved to continue to apply the two preference point systems provided for in s 2(1) of the PPPFA.

Claim 1

29 MSC contends that the scoring system adopted by Transnet in the RCP did not comply with s 2(1) of the PPPFA and the 2017 Regulations. Its submission is that a minimum of either 80 or 90 points must be allocated for price.

---

4 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 CC para 48

30 I do not agree. The reference in s 2 of the PPPFA is to price in relation to "specific goals as contemplated in paragraph (d)". The provisions in question do not prescribe that price must inevitably be scored out of 90 of a potential 100 points.

31 In the present case, the lease was coupled to an obligation to develop the premises. A good deal of flexibility, knowledge of the subject matter of the RCP and skill was required to enable Transnet to devise and implement a scoring system that did justice to the need for compliance with Transnet's administrative requirements detailed in the RCP and the potential complexity of the logistical solutions proposed by each bidder to develop the premises to the maximum public advantage.

32 I therefore reject MSC's contention that the scoring system adopted by Transnet in the RCP did not comply with s 2(1) of the PPPFA and the 2017 Regulations.

33 In an alternative submission, MSC contends that Transnet impermissibly failed to adhere to its preferential procurement policy (the policy) thus, it is argued, rendering the RCP invalid.

34 The evidence of the policy which is before me is contained in a statement issued by Transnet on 31 March 2022. The statement reads:

> Pursuant to section 217(2) of the Constitution, the Transnet ... Board of Directors has approved an addendum to the company's Supply Chain Management (SCM) Policy - effective 25 March 2022 - to allow Transnet to include specific provisions for preferential procurement in its procurement processes.
>
> The Board of Directors resolved to continue applying the 80/20 and 90/10 preference point system provided for in section 2(1) of the [PPPFA] in order to promote preferential procurement in its processes, demonstrating the company's continued commitment to transformation and empowerment.
>
> The Board has determined monetary thresholds for the application of the 80/20 and 90/10 preference point systems that will continue to provide certainty to bidders and Transnet's procurement processes until new Preferential Procurement Regulations are promulgated or the Constitutional Court judgment is clarified.
>
> The approach aligns with the Constitutional Court ruling that policies of organs of state should take charge of driving transformation and preference in procurement to give effect to section 217(2) of the Constitution.

35 There is no evidence of the "monetary thresholds" determined by Transnet's board. To advance its argument, MSC would have to show that the RCP did not meet the 90/10 threshold.

36 In addition to the empowerment category, which counsel accepted was dealt with in the RCP under the sub-rubric of "B-BBEE", one of the goals of the RDP programme "as published in Government Gazette 16085 dated 23 November 1994",[5] was "MEETING BASIC NEEDS AND BUILDING THE INFRASTRUCTURE".

37 So all 14 points provided for under the heading "Transformation & Community Development" qualified as preferential procurement as contemplated in the PPPFA.

38 Moreover, MSC's contention implies that a policy of an organ of state must be applied as rigidly as if it were a statutory measure. That is not so. This point was articulated in *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another*:[6]

> The adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one, requiring the balancing of a range of competing interests or considerations, as well as specific expertise on the part of a decision-maker. A ... court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision-maker. Once it is

---

5 Section 1(d)(ii) of the PPPFA

6 2016 2 SA 167 SCA para 19; footnotes omitted.

> established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly, and that those affected by it should be aware of it. An affected party would then have to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy.

39 As I read this dictum, it is open to an organ of state itself to depart from its policy where there is something exceptional in the case in question. In my view this has been amply demonstrated by the nature of the procurement at issue in the present case.

40 The primary attack on the RCP, as developed by counsel in argument was this: that the RCP impermissibly lumped together in its evaluation of functionality (a part of Steps Two to Seven) Transnet's requirements that a bidder should present a "Community Development Plan" and have a "B-BBEE Rating". In Step Seven, a bidder's Community Development Plan scored a maximum of 10 points. B-BBEE Rating scored a maximum of 4 points. These social development factors, thus counsel, ought to play no part in an evaluation of price or functionality. By conjoining them to its functionality analysis, the RCP fatally failed to implement the legislative scheme I have described.

41 Functionality in the present context means whether the individual bidder is able to provide the goods or service identified in the tender documents for procurement. Reg 5 of the Regulations deals with functionality and prescribes certain characteristics of functionality that must, if the tender in question is to be evaluated on functionality, be present and certain aspects of scoring applicable to functionality. Reg 5 further prescribes that a bidder who qualifies for functionality must further be evaluated for price.

42 Steps Two to Seven included a component for "Rental Offer", for which only 1 point was to be scored. Counsel submitted that Rental Offer equated to price, with the result that the RCP was not statutorily compliant because the permissible boundary between price and transformation goals (80/20 or 90/10) was not observed. Functionality, thus counsel, must be evaluated *before* price and transformation goals.

43 Fundamental to counsels' argument is that Rental Offer equates to price. I disagree. The dichotomy referred to by counsel works for simple procurements of goods or services. To take two homely examples: the procurement of a quantity of computer paper or a courier service is neutral. The ruling price of a ream of computer paper or of a trip between two places does not depend on the transformation status of the bidder. It is therefore rational to establish price

independently of transformation goals and only then to weigh in the desired premium for transformation goals.

44 But in the present case, the goods and services sought by Transnet in the RCP were not transformation neutral. This was made clear in the RCP in sections 1 and 2:[7]

> There are certain properties in the property portfolio of Transnet ... that are strategic and productive assets - vehicles for economic development, service delivery and transformation. To ensure effective utilisation of these properties as strategic enablers for rail logistics solutions to complement an end to end logistics service to the market ... Transnet set out to review the processes for leasing/letting [Transnet] property and sidings. Some of these properties serve as the rail connectivity between the "Port" and "Back of Port" Terminals/Hubs that represent a geographical area to consolidate consignments for domestic regional and export transport.
>
> These include but are not limited to a process that:
>
> - Ensures effective management of {Transnet] Properties as Strategic Enabler for Rail Logistics Solutions through diligent positioning of these to compliment an end to end efficient logistics service to the market.
> - To work with private sector to unlock investment focused on improved efficiency in the supply chain, reducing complexities and the cost of doing business to enable volume growth from road to rail.

---

7 I have made minor typographical corrections where I thought these were warranted.

- Encourage sustainable development and community upliftment.

Transnet is therefore embarking on an open process for Commercial Proposals for leasing of some of its sidings to allow all sectors to have open access to compete for the lease of sidings.

- The scope entails the leasing of Transnet ... sidings/facilities across the various corridors of the business and involving various commodities for a minimum period of five ... years.
- The scope further includes the provision of all services required at a rail siding/facility to allow for the transportation of freight by rail over the lease period. All Sidings/facilities may operate as a Common User or Multi User facility for bulk mining or other commodities depending on [Transnet's] requirements.

...

45 This extract shows that part of what Transnet wanted to procure was community upliftment. That is one of the purposes of s 217(2) of the Constitution. Community upliftment is a species of the advancement of categories of persons disadvantaged by unfair discrimination contemplated in s 217(2)(b).

46 The minimal points allocation (one point) for price in the RCP shows that it is not correct to equate Rental Offer with price in the sense that price would feature in what I have called a simple procurement. What Transnet wanted to procure through the RCP was a proposal for a

development that it believed would achieve the purposes set out, lucidly in my view, in the extract from the RCP I have just quoted. One of those purposes was the advancement of previously disadvantaged persons. It was correctly not contended by counsel for MSC that Transnet was precluded by the legislation to which I have referred from putting an invitation to propose a development which included such a component out to tender. It was not, correctly so, contended that the transformation goal component (14 out of an available 100 points) was of itself disproportionate so that it offended against the values in the applicable legislation.

47 To summarise on this point: The transformation goals were not a premium to be superimposed on the price of the goods or service sought to be procured as an extra expense to be born by the state in the quest to recognise the injustices and heal the divisions of our past, as the preamble to the Constitution has it. They were an intrinsic part of the goods and services sought to be procured. As such it was permissible for Transnet to ask bidders to demonstrate in their bid responses that they could deliver on Transnet's lawful desire to achieve transformation goals and to award points based on a bidder's demonstrated capacity to deliver them. That component was rightly included in the functionality section because functionality analysis is an

interrogation of the capacity to deliver what the organ of state wants to procure.

48 I therefore hold that the attack on the RCP based on functionality must fail.

49 MSC argues that the RCP is impermissibly vague, on three grounds. The first is that the RCP did not state whether the 80/20 or the 90/10 preference point system applied. But the RCP was clear that 14 points would be available under this head and how these points were to be allocated. There is nothing vague about that.

50 The second ground of supposed vagueness is that the RCP did not indicate what the rail facility's throughput capacity was. One of the sub-categories in "Volume & Operational Commitments" is "Minimum volume guarantee aligned to the rail siding throughput capacity".

51 This alleged vagueness did not give any of the tenderers, including MSC, any difficulty. Each of them submitted a bid with a proposed guarantee. There was no prior objection or request for clarification by anybody prior to bid submissions. I conclude that there was no vagueness apparent to the group of tenderers who must have known the basis of what they were tendering for. Moreover, the RCP referred

to the throughput capability "as quoted by" Transnet. A bidder would find out what throughput capability Transnet had quoted by asking Transnet. It seems that MSC did not pose the question to Transnet. If MSC did not know what Transnet's quoted throughput capability was, it only had itself to blame.

52 Much the same applies to the third ground of supposed vagueness: that the RCP called for bids for leases for a minimum of five years and did not specify the terms of the offered lease more closely. Once again, there is no vagueness in this provision: each tenderer knew that it could not bid for a lease for a period shorter than five years. Each bidder was at large to propose to Transnet a lease for any period of five years or longer, depending on what the individual tenderer was able to offer. Each bidder was at large to seek clarification about what period Transnet would regard as optimal, given the development contemplated by the bidder.

53 In addition, the RCP invited bidders who found any of the terms or conditions proposed by Transnet in the RCP to be unacceptable, to propose alternatives together with their bids. Transnet's legal advisors would then review the alternative proposed. *A material* departure from any term or condition could result in disqualification. Bidders accepted, when they submitted bids in response to the RCP, that they had no

ground of complaint in respect of an aspect of the RCP which was allegedly unclear where they failed to seek clarification.

54 I therefore conclude that none of the complaints of vagueness have substance. They look like afterthoughts, raised to build a case, rather than concerns which impacted upon the manner in which MSC responded to the RCP.

55 MSC makes the point that PAJA requires an administrator to give interested parties a reasonable opportunity to make representations and contends that the period of eight working days given to potential bidders was neither practical nor reasonable.

56 Maersk, on the other hand, asserts that the time given was adequate for the purpose. MSC's response is that Maersk had prior knowledge of the subject of the RCP, because Maersk had previously made an unsolicited offer to Transnet to buy the premises. On this basis, MSC argues that Maersk must have carefully investigated the feasibility of the project.

57 No party formally asked for an extension of time. For certain technical reasons MSC submitted its bid after the deadline prescribed and asked Transnet to accept its late bid. Transnet agreed to do so. If MSC had

seriously believed that the period given for response was inadequate, it would probably have asked for an extension. The complaint of insufficient time appears to be an afterthought.

58 Indeed, when submitting its bid, MSC declared that it had been provided with sufficient access to relevant Transnet sites and related Transnet information and had been given sufficient time to conduct a thorough due diligence of Transnet's operations, business requirements and assets.

59 Be all that as it may, there is a dispute of fact as to what constituted a reasonable time. There was no request for evidence and the version of the respondents must therefore prevail. I therefore reject the argument that the RCP ought to be set aside because insufficient time was given for prospective bidders to respond.

60 MSC complains that Maersk had prior knowledge of the nature of the premises from its interaction with Transnet prior to the publication of the RCP when Maersk made an unsolicited, and unsuccessful, offer to buy the premises. The allegation that this gave Maersk an unfair advantage does not rise above the level of speculation and is in any event denied by Maersk. At best for MSC, therefore, there is a dispute

of fact. As there was no request for evidence, Maersk's denial must prevail.

61 MSC contends that Transnet deviated from the approved "Go-To-Market" approach and adopted an incorrect scoring methodology. The basis for this ground of review is a presentation dated, or made on, 22 November 2021. The presentation was made to Transnet's freight rail executive committee titled Transnet Freight Rail Sidings Reform: Commercial-Based Property Lease Framework. The presentation advocated a "Go-To-Market" approach for Greenfields leases, as opposed to existing leases, and presented a model containing scoring measurement criteria.

62 The minutes of the committee record that the committee noted the submissions and resolved to approve the revised property lease categories and the related go to market approach.

63 This approval was not expressed at board level and does not even rise to the level of a policy, in the sense I have previously discussed. In its terms, it is not prescriptive of the way in which Transnet RCPs should be framed. Transnet appears to have taken the view that the RCP for the siding at Belville was a special case, calling for a specially framed RCP. Quite apart from the general status of the presentation and the

character of the approval of Transnet's executive committee, I do not think that Transnet was bound in the present case to apply the scoring method contained in a presentation about broad policy to be applied in the future and not linked to any specific Transnet project, let alone the lease of the premises. This ground of review cannot succeed.

Claims 2 and 3

64 The primary attack of counsel for MCP in support of these claims was that certain of Maersk's non-compliant documents were used for scoring. The RCP distinguishes between categories of Returnable Documents. One of these categories is Returnable Documents Used for Scoring. Included in that category are volume commitment letters from cargo owners and proof of security funding. The sanction for failing to submit a Returnable Document Used for Scoring was that the bidder would receive an automatic score of zero for the applicable evaluation criterion.

<u>The volume commitment letter attack</u>

65 The scope of the procurement which Transnet wished to achieve through the RCP was the enhancement of the transport of goods by rail rather than road. Transnet therefore wanted bidders to commit to

an anticipated volume which each bidder believed would flow through the facility the bidder offered to develop at the siding. Section 2.1 therefore called on bidders to provide a "rail volume guarantee". The third bullet point in section 2.1 reads:

> If the bidder is the cargo owner, then the bidder shall submit a commitment letter confirming that they are the cargo owner. If the bidder is an operator, then the bidder shall submit a commitment letter from the cargo owner. With regard to the "Letter of commitment" - a draft letter will be provided, and must be utilized by bidders as a template for the Prospective Tenants to confirm the source of their volumes (as per the attached **Bid Evaluation Response Annexure F**)[8]

66 The draft letter (the annexure F mentioned immediately above) provides in section 1 ("Applicable to Cargo Owners") for a commitment by a cargo owner to an offtake agreement of tonnage per annum from the siding. Section 2 ("Applicable to 3rd Party") provides equally for a commitment by a cargo owner to an offtake agreement of tonnage per annum from the siding.

67 Although the RCP talks of a volume guarantee, when the RCP is read with the draft letter what was required was not a guarantee in the strict sense but a letter of comfort to Transnet from the cargo owner whose

---

8 Emphasis as in the text.

goods were proposed to be transported through the siding, to enable Transnet to evaluate its anticipated revenue from the carriage of these goods.

68 This worked when there was a single "cargo owner". But what was to happen when, as in Maersk's model, there were numerous cargo owners? This was because Maersk's proposal anticipated numerous cargo owners, for example the fruit farmers of the Western Cape who might wish to make use of the facility proposed by Maersk, namely a depot, a cold room and warehouses. And those fruit farmers individually might change over the period of the proposed lease between Transnet and Maersk.

69 Objectively therefore, the strict terms of the draft letter did not fit into the development proposed by Maersk.

70 Maersk's evidence is that a briefing session on 21 April 2022, which MSC did not attend, Transnet indicated that prospective bidders were required in relation to volume commitment to provide a "signed letter of commitment on volumes from product owners/shipping line/LSP etc. This forms part of the portfolio of evidence for scoring". LSP is an acronym for logistics service provider.

71 Maersk is a logistics service provider and pursuant to the clarification, provided a volume commitment letter which satisfied Transnet. It was not suggested that Maersk's volume commitment letter in any way fell short in its substance. The point is a narrow one, namely that the RCP talks of such a letter from a cargo owner and from nobody else.

72 In fact, MSC, as the shipping line moving cargo for various cargo owners, provided a similar commitment letter. In a letter dated 3 May 2022, MSC stated that it committed as "Shipping line moving cargo for various cargo owner" to an offtake agreement. This was not in strict accordance with the draft letter but was in accordance with the clarification.

73 I therefore conclude that the volume commitment letter provision in the RCP was clarified to all the bidders and that the volume commitment letter submitted by Maersk was compliant with the provision of the RCP as clarified. This ground of review must accordingly fail.

The proof of self-funding letter attack

74 The first bullet point in section 2.2 of the RCP reads:

> Should bidder be investing on the site, please provide the amount/quantum of the investment, and the projected Asset

> Value at the end of Lease tenure. A detailed Investment Plan, including the source of, and security provided for funding is also required. Bid Evaluation Response Annexure F (Detailed Investment Plan and Discounted Cash Flow).[9]

75 MSC complains that Maersk was awarded points for submitting a letter from its holding company stating that it would inject the funds needed for the project. MSC asserts that what was required was a letter from an auditor. The requirement of a funding document is dealt within the RCP in two places: in the scoring schedule where there is merely a reference to "Proof of self-funding" and in the more detailed description of Returnable Documents Used for Scoring" where there is reference to a "letter from an Auditor confirming ability to self-fund the initiative". The provision is therefore ambiguous.

76 Maersk's evidence is that it sought clarification from Transnet as to whether a confirmation letter of self-funding from its holding company would suffice and that Transnet confirmed that such a letter from the holding company would suffice. This clarification was not communicated to MSC.

---

9 Once again, I have made minor typographical corrections.

77 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others*[10] laid down the test for evaluation of flaws in the procurement process. The Constitutional Court disapproved of certain conclusions that might have been drawn in the court below and held that the first step is always to determine whether an irregularity occurred. The next, distinct, step is to establish if, that being the case, a ground of review has been established. If a ground of review is established, there is no shying away from it and a declaration under s 172(1)(a) of the Constitution must follow.[11] The next step will be to determine a just and equitable remedy under s 172(1)(b). The judgment holds that whether an irregularity occurred, in the sense of a departure from strict compliance with legal requirements in the procurement context, which the judgment called the materiality of compliance with legal requirements, depends on the extent to which the purpose of the requirements is attained.[12] I quote from the judgment:[13]

> Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between

---

10 2014 1 SA 604 CC

11 At paras 24-25

12 Para 22(b)

13 Para 30; footnotes omitted

'mandatory' or 'peremptory' provisions on the one hand and 'directory' ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, *the central element is to link the question of compliance to the purpose of the provision*. In this court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being 'whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose'. This is not the same as asking whether compliance with the provisions will lead to a different result.

78 And further:

Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable

> and justifiable, and the process of change must be procedurally fair.[14]

79 And finally:

> In accordance with the approach set out above it is now necessary to consider whether the evidence on record establishes the factual existence of any irregularities and, if so, whether the materiality of the irregularities justifies the legal conclusion that any of the grounds for review under PAJA exist.[15]

80 In my view, the ambiguity in the RCP coupled with the statement from Transnet that a letter from the holding company itself would suffice is an adequate basis for concluding that the RCP did not *prescribe* that the relevant letter had to come from an auditor. There is no special character in the present context of a letter from an auditor. It was argued by counsel for MSC that an auditor would be likely to know whether the bidder did in fact have sufficient financial resources to self fund the project proposed by the bidder. I am by no means convinced that this is so but the purpose of the provision was to give comfort to Transnet about whether the bidder did in fact have access to the necessary resources to fund the project it proposed.

---

14 Para 40; again footnotes are omitted.

15 Para 57

81 If I am wrong about the ambiguity, Maersk did not simply assume that it was entitled to depart from the strict language of the RCP. It used the procedure prescribed by Transnet itself for this purpose. By email sent on 28 April 2022, Maersk asked Transnet to confirm "100%" that a letter of support from Maersk's holding company would suffice[16] to establish self-funding. Transnet responded in an email sent to Maersk on 29 April 2022: "A letter from the holding company will suffice as Proof of Self Funding."

82 This was not a case, therefore, in which the bidder of its own accord simply departed from the strict language. It provided the proof that Transnet itself said would suffice for its purposes. There is no reason to doubt Transnet's word on the question. Once again the content and probity of the self-funding letter are not challenged. The letter from Maersk's holding company committing the holding company to supply the necessary funding for the project proposed by Maersk achieved the purpose for which the self-funding letter provision was framed.

83 The supposed provision in the RCP that the letter had to come from an auditor is therefore not material. This ground of review can therefore not succeed.

---

16 The words "would suffice" were cut off from the copy of the email provided to me; but the context makes it clear that these words, or similar language, should be inferred.

84 I therefore conclude that no administrative injustice took place when Transnet preferred the bid of Maersk to the bid of MSC. It is not for this court to determine whether the logistical solution proposed by Maersk was objectively better than those proposed by the other bidders. The process followed by the publication of the RCP and the evaluation of the bids that followed has not been shown to have been illegal or unfair in any respect.

85 That really disposes of the case before me. Counsel were agreed that if I concluded that no review grounds had been established, I need not deal with the other issues raised and argued before me. I nevertheless think that it would be appropriate to give my views on one of these issues.

Is the challenge to the validity of the RCP impermissibly late?

86 This point was extensively addressed in oral argument. Its foundation is an *obiter* observation by Rogers J in *SMEC SA (Pty) Ltd v City of Cape Town*:[17]

> If SMEC considered that the decision to go out to tender ... was unlawful, it should have launched a timeous challenge once the tenders were issued ... . But instead of challenging

---

17 [2022] ZAWCHC 131 para 92

> the decision to issue the tenders on supposedly objectionable terms, SMEC participated in the tenders, allowed the tender evaluation processes to run their course, internally appealed against the decisions to reject its bids as non-responsive, and only launched review proceedings ... after it had failed in its quest to be the successful bidder.
>
> In principle, it seems undesirable that a bidder should be at liberty to "take a chance" in the hope that it will be awarded the tender, keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid. However, in view of the conclusion I have reached on other aspects, I need not finally decide this point.

87 In *IN2IT Tech (Pty) Limited v Gijima Holdings (Pty) Limited and others*,[18] a full bench in this Division held, after quoting the passage above extensively:

> I respectfully adopt the reasoning and views of Rogers J that it is undesirable for a bidder to take a chance in the hope that it will be awarded the tender and 'keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid'. For this reason alone, Gijima's rationality argument stands to be rejected.

---

18 2023 JDR 1423 GJ

88 *TMT Services & Supplies (Pty) Ltd City of Johannesburg and Another*[19] was a case in the Western Cape High Court where a bidder had not brought a challenge to the tender specifications until after it had been unsuccessful in the bidding process. After referring to both *SMEC* and *IN2IT*, the court held[20] that in such circumstances, unless the process can otherwise be found to have been unlawful, a bidder should not be allowed to participate in a tender only to challenge it when the decision goes against it. The court held that the requirement of fairness in the process cut both ways. Thus, bidders who adopted such a strategy should not be allowed to raise unfairness as a ground by way of a subsequent challenge which is brought more than 180 days after the time they first became aware of the unfairness on the basis of a tender or its specifications. This is a strong indication that the learned judge in *TMT* located his conclusion within the framework of s 7(1) of PAJA.

89 Building on this foundation, counsel for Maersk submitted that the decision by MSC to participate in the tender process was *by itself* fatal to the challenge to the RCP which forms the basis for claim 1. Counsel submitted that the principle to be extracted from these dicta, (binding on me, counsel said, in the light of *IN2IT)* was that a new ground of resistance to a claim that tender terms are invalid had been identified.

---

19 Case no. 1365/23; judgment delivered on 27 March 2024

20 Para 49

The dogmatic basis for the ground of resistance, thus counsel, was to be located in waiver, election and estoppel.

90 Counsel for MSC submitted, on the other hand, that a failure to bring the tender terms challenge by a bidder until after it had participated in the bidding process was relevant to whether or not there had been unreasonable delay, as that concept is used in s 7(1) of PAJA and legality review jurisprudence.

91 I myself am inclined to favour the more supple approach which treats the failure to bring such a challenge at the earlier opportunity as a species of unreasonable delay. For one thing, the more rigid approach would preclude a court potentially from doing justice in a deserving case and would potentially fall foul of the principle that, all other things being equal, an administrative action executed in an illegal fashion may not be allowed to stand and *must* be declared invalid under s 172(1)(a) of the Constitution.

92 However, in evaluating the question I shall assume in favour of MSC that the challenge is grounded in unreasonable delay. This species of unreasonable delay is not so much concerned with the delay in the time taken to bring the challenge as its timing: that it is brought after the bidding process has been completed and a winning bidder

announced. In such a case, prejudice will be a significant factor as will the reasons why the claim 1 challenge was only brought at that stage.

93 In the present case, I do not fault MSC for the time it took it to bring the claim 1 challenge. However, there are clear indications that MSC and its attorney thought about bringing a claim 1 challenge and elected first to participate in the bidding process and then, in the language of Rogers J, keep in reserve an attack on the validity of the tender terms.

94 This appears from a letter dated 6 May 2022 written by MSC's attorney to Transnet. MSC's bid had initially been rejected on the ground that it was submitted too late.[21] In the letter, MSC asked for a copy of the procurement policy applicable to the commercial proposal in the RCP and advice as to what internal process (if any) was applicable in the circumstances. The letter concluded:

> All of [MSC's] rights, including its right to challenge the lawfulness and validity of the procurement process undertaken by Transnet herein, are fully reserved.

---

21 Transnet subsequently reversed its decision to reject MSC's bid on the ground of late submission.

95 This quoted passage is to my mind is a strong indication that MSC was, on 6 May 2022, aware of its right to bring a claim 1 type challenge and had given such a challenge some thought. This was after MSC had decided to participate in the bidding process but before it learnt that its bid had been scored but found to be unsuccessful.

96 In the present case, the prejudice to the public if the procurement process were to be interrupted by judicial direction will be profound. I have described this prejudice above and need not repeat it. There will also be significant prejudice to Maersk, which I have similarly described.

97 Counsel for MSC submitted that a bidder in a public procurement process such as the present inevitably is aware that the smooth course of the contract he has procured may be interrupted by judicial proceedings. Maersk was aware of this risk, thus counsel, and proceeded with the Belcon Project nevertheless.

98 *In Tshwane City v Afriforum and Another,*[22] the argument was advanced that an organ of state in whose favour an application to rename streets had been granted ought not to have proceeded to implement that decision because an urgent application to implement

---

22 2016 6 SA 279 CC

it had been launched and was pending. In response to this argument that then Chief Justice said this:[23]

> It needs to be stated categorically, that no aspect of our law requires of any entity or person to desist from implementing an apparently lawful decision simply because an application, that might even be dismissed, has been launched to hopefully stall that implementation. Any decision to that effect lacks a sound jurisprudential basis and is not part of our law. It is a restraining order itself, as opposed to the sheer hope or fear of one being granted, that can in law restrain. To suggest otherwise reduces the actual grant of an interdict to a superfluity.
>
> For these reasons there was no obligation on Council to desist from removing old street names upon becoming aware that an urgent application for a restraining order had been filed. Only sheer choice or discretion, but certainly not any legal obligation or barrier, would lead to action being desisted from in anticipation of a successful challenge or application for an interdict.

99 I accordingly discount from this analysis that to an extent Maersk was, in the time honoured phrase, the author of its own misfortune.

100 The relevant factors where an applicant seeks an extension of the period referred to in s 7 of PAJA generally include the nature of the relief sought; the extent and cause of the delay; its effect on the

---

23 Paras 74-75

administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success.[24] Much the same will apply, in my view, when an applicant seeks to resist a challenge that it has unreasonably delayed. Whether an applicant in a case such as the present has to demonstrate in its founding papers that there has been no delay appears to be an open question.[25] I shall therefore assume in favour of MSC that it was not required to make out a case in its founding papers for condonation of its timing delay.

101 To my mind, in adjudicating this question, the prejudice to the public, to Transnet and to Maersk itself if condonation of the timing delay is granted is the decisive factor. There is no suggestion of any misconduct by Transnet, Maersk or anybody else. The anticipated benefits which should accrue from the completed Belcon Project will be substantial. MSC's prospects of success, on the assumptions I have made in its favour, are slender. Any success which MSC might achieve is unlikely to result in material benefit to MSC. Delays to the Belcon project would potentially have serious adverse consequences for the public, Transnet and Maersk. MSC elected to delay its claim 1

---

24 *Cape Town City v Aurecon Sa (Pty) Ltd* 2017 4 SA 223 CC para 46

25 *Mostert NO v Registrar of Pension Funds and Others* 2018 2 SA 53 SCA para 38

challenge with knowledge that it had a right to mount such a challenge. Either MSC had been advised before its attorney wrote the letter dated 6 May 2022 that its prospects of success on the claim 1 challenge were slender or MSC made a deliberate commercial decision to defer bringing such a challenge in the hope that it would be the successful bidder.

102 Had I not decided to dismiss the review in its entirety on the merits, I would therefore have upheld the attack on claim 1 based on the decision to defer bringing a review of the RCP until MSC learnt whether its bid had been successful.

Costs

103 Costs must follow the result. Counsel were agreed that costs should be taxed on Scale C.

Order of court

104 I make the following order:

1 The claims for orders in terms of paragraphs 1, 2 and 3 of the amended notice of motion dated 29 June 2022 are all dismissed.

2 The applicant must pay the costs of the first and second respondents in the application, including the costs of senior and junior counsel, taxed on Scale C in terms of rule 69.

NB Tuchten
Judge of the High Court
17 May 2024

Heard on 6 and 7 May 2024

For the applicant:
Adv CJ Pammenter SC and Adv JC Prinsloo
Instructed by
Cox Yeats
Umhlanga Ridge

For the first respondent:
Adv B Makola SC and Adv P Plaaitjies
Instructed by
Puke Maserumule Attorneys
Randburg

For the second respondent:
Adv G Budlender SC and Adv A Nacerodien
Instructed by
Webber Wentzel Attorneys
Cape Town