IN THE KWAZULU - NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA CASE NO. 11445/2010

REPORTABLE

In the matter between:

SOUTH AFRICAN CONTAINER STEVEDORES (PTY) LTD	Applicant
and	
TRANSNET PORT TERMINALS	1st Respondent
NATIONAL PORTS AUTHORITY	2nd Respondent
PORT SIDE STEVEDORING SERVICES (PTY) LTD	3rd Respondent
UNITED MARINE INDUSTRIAL CC t/a RAINBOW MARINE & INDUSTRIAL	4th Respondent
GREYSTONES CARGO SERVICES (PTY) LTD	5th Respondent
DP WORLD CARGO SERVICES (PTY) LTD	6th Respondent
PACE CONTAINER STEVEDORES CC	7th Respondent
THEKWENI MARINE SERVICES CC	8th Respondent

JUDGMENT

NDLOVU J

[1] In this matter, which was launched in terms of Rule 53 of the Uniform Rules of Court, the applicant sought an order reviewing and setting aside the decision made by the first respondent on 30 August 2010

which reduced the applicant's container handling volumes as part of a tender process ("the impugned decision") under an invitation to tender headed with the following preamble:

> "Provision of container stevedoring services for Transnet Limited trading as Transnet Port Terminals (hereinafter referred to as "TPT") at the ports of Durban (Pier 1 and Durban Container Terminal or "DCT"), Port Elizabeth (Port Elizabeth Container Terminal), Ngqura (Ngqura Container Terminal) and Cape Town (Cape Town Terminal including vessels diverted from Cape Town Container Terminal to the Cape Town Multi-Purpose Terminal due to construction) for a period of two years. ('the tender')".

The tender was given the label "Request For Proposal" ("the RFP") and included in the applicant's founding papers.[1]

[2] The notice of motion consisted of two parts, being part A and part B. The matter was initially brought before the court on an urgent basis whereby the applicant sought interim relief (contained in part A and of the notice of motion) whereby the first respondent's decision aforesaid would be suspended pending this review application, the relief sought in respect of which is contained in part B of the notice of motion. When the matter served before the court for the first time on 1 October 2010 it was struck of the roll on the grounds of lack of urgency.

[3] In the meantime the applicant and the first respondent (the latter being the only respondent opposing the application) filed all the relevant papers including their heads of argument. Hence the matter was ready for argument on the issue of final relief, namely the review application, which was specially set down on 9 November 2010, but could not be finalised on that day. It was reinstated for further argument on 7 January

1 Annexure "WM1"

2011. On the former date the applicant was represented by Mr *A Stewart SC,* with him Mr *M du Plessis,* but on the latter, as a result of Mr *Stewart* being no longer available, by Mr *du Plessis*. Throughout the first respondent was represented by Mr *CJ Pammenter SC,* with him Mr *DJ Saks*.

[4] The second respondent was cited by virtue of the interest it had in the provision of port services and the functioning of port terminals, but no relief was sought against it. The third to eighth respondents, together with the applicant, tendered for the stevedoring services referred to in the RFP, which was the subject of the current dispute. (Subsequently it transpired from the first respondent's answering papers that the third respondent was in fact unsuccessful with its tender, and therefore ought not to have been cited at all, it seems). Accordingly, the fourth to eighth respondents had an interest in the outcome of the dispute adjudication on the basis that it might affect the volumes of work allocated to them in terms of the first respondent's decision now sought to be reviewed and set aside. Otherwise no relief was sought against the fourth to eighth respondents. As will become apparent shortly, the RFP was in actual fact the second tender issued by the first respondent in connection with the provision of stevedoring services at the ports concerned.

[5] The applicant is a duly registered company which carries on business of container stevedoring from the ports of Durban, Port Elizabeth, Ngqura and Cape Town. It was formerly known as South African Stevedores (SAS).

[6] The first respondent, Transnet Port Terminals ("TPT"), formerly known as South African Port Operations ("SAPO"), is a business division of Transnet Limited, a duly registered public limited company formed pursuant to the provisions of the Legal Succession to the South African Transport Services Act, 1989.[2] Reference to the first respondent, hereinafter, shall mean reference to TPT and the two citations are used interchangeably.

[7] Previously, SAS was generally responsible for all forms of stevedoring, including container stevedoring, at the container terminals throughout the Republic. As a result of the significant growth in container handling the applicant was formed out of SAS, registered in 2002 and the business of container stevedoring was then located in the applicant. At the time the applicant procured its stevedoring business directly from the shipping lines which called at the ports for the loading and discharging of containers.

[8] However, in or about 2003 the first respondent (then operating under the former name SAPO) became the procuring entity on behalf of the shipping lines for the provision of stevedoring services. As to how the stevedoring operations were conducted during the period 2003 to 2007, for instance, in the relation to the identity of an entity or entities which provided the service, what volumes were available for allocation and the methodology followed in that regard, remained unclear on the papers and the parties did not seem to agree thereon. However, that aspect of the matter was of no significance to the present application.

2 Section 2 of Act 9 of 1989

[9] In 2007 the first respondent, for the first time, formalised its contractual working relationship with the stevedoring service providers by putting the provision of stevedoring services at the ports out to tender (hereafter referred to as "the first tender"). Successful tenderers in respect of the first tender included the applicant, the fourth, fifth, sixth, and seventh respondents.

[10] In terms of the first tender the period of service was due to endure for two years but the period was extended by a further year, which was then due to expire on 31 July 2010. At the end of the contract period (that is, 31 July 2010) the stevedoring service providers, including the applicant, were allowed to continue with the work for a further two months whilst the first respondent was processing the applications in respect of the second tender. It was common cause that during the two months periods aforesaid the applicant was being remunerated on the basis of its tender price rate during the previous three-year first tender period plus a 5% increase which the applicant had asked for and which the first respondent had granted.

[11] Provision of stevedoring services on the basis of the RFP was to commence on 1 September 2010. The invitation in respect thereof was issued on 1 March 2010, the closing date to submit tenders being 23 March 2010. There was to be a compulsory briefing session scheduled for 8 March 2010. The applicant submitted its tender and attended the compulsory briefing session.

[12] The applicant alleged that prior to the first tender being issued out

the applicant was the main container stevedoring company in the various ports with approximately 60% of the market share in Durban, 55% in Port Elizabeth and about 50% in Cape Town.

[13] Consequent to the first tender the applicant was awarded a total volume of approximately 80 000 containers per month in respect of the Durban port (Piers 1 and 2), spread across all the shipping lines which, according to the applicant, was a significant allotment as it represented approximately 55% of the container stevedoring market share at the Durban port. The remaining 45% of the container stevedoring market share in Durban was then distributed amongst the other five stevedoring companies that had also successfully tendered for the business. The applicant further alleged that in Port Elizabeth (which included the recently opened port of Ngqura) the combined volumes were an average 18 000 containers per month. In Cape Town the volumes were in the region of 8 000 per month. The price rate charged by the applicant was in the region of R34 per container at all the ports.

[14] The outcome of the applicant's tender, pursuant to the RFP, was then received by the applicant. In terms of the first respondent's letter dated 5 August 2010 the applicant was advised that its tender was successful. The following was contained in the letter:

> "We refer to the tender submitted in response to the above mentioned tender.
>
> We have pleasure in advising you that after consideration of the tenders submitted to us and evaluation thereof, your tender has been successful and that you have been nominated as the preferred supplier for the supply of the stevedoring services at the ports of Durban, Port Elizabeth, Ngqura and Cape Town.
>
> All business transactions emanating from this tender shall be subject to the

terms and conditions of the tender and draft Memorandum of Agreement, your response thereto and any other contractual conditions negotiated thereafter.

Please be advised that the award for the stevedoring services is conditional upon the following:

1. The acceptance of this letter; and
2. The negotiation and signature of an agreement within 1 (one) month from date hereof.

Your participation in the tender process is sincerely appreciated and we would like to extend our thanks to your staff for the comprehensive manner in which the information was presented…."[3]

[15] The RFP was the source document on which the legal and contractual relationship between the first respondent and the preferred tenderers, including the applicant, was to be founded. It is also on this document that the applicant and the first respondent primarily sought to rely for their claim and defence, respectively. What follows are some of the important and relevant provisions of the RFP:

15.1 "BROAD-BASED BLACK EMPOWERMENT ('BBBEE')
TPT fully endorses and supports the Governments Broad Based Black Economic Empowerment Programme and it is strongly of the opinion that all South African business enterprises have an equal obligation to redress the imbalances of the past.
TPT will therefore prefer to do business with local business enterprises who share these same values and who are prepared to contribute to meaningful BBBEE initiatives (including, but not limited to subcontracting and Joint Ventures) as part of their RFP responses. TPT will accordingly allow a "preference" in accordance with the 10% preference system, as per the Preferential Procurement Policy Framework Act No 5 of 2000 (as amended), to companies who provide a BBBEE Accreditation Certificates. All procurement and disposal transactions in excess of R30 000 (thirty thousand SA Rand) will be evaluated accordingly. All transactions below this threshold will, as far as possible, be set aside for Exempted Micro Enterprises (EMEs)."[4] …

"In view of the high emphasis which TPT places on Broad-Based Black Economic Empowerment, TPT will utilise the 50/40/10 point preference system, i.e. the Tenderer's BBBEE rating will be scored out of a maximum of ten points respectively in the evaluation process."[5]

3 Annexure "WM9" to the applicant's founding affidavit
4 Section 1 clause 9 of the RFP
5 Section 1, clause 9.4 of the RFP

15.2 "IMPORTANT CONSIDERATIONS TO NOTE :

Changes or purported changes by the Tenderer to the Tender prices will not be permitted after the closing date. …

TPT reserves the right to undertake post-tender negotiations with those persons appearing on the list of preferred Tenderers, once such list is approved by the Division Acquisitional Council.[6]

TPT shall award the business to more than one (1) Stevedore. …

Each Tender is subject to the negotiation and conclusion of a Stevedoring Agreement. A copy of the proposed Stevedoring Services Agreement is attached to the Tender (in Section 11)."[7]

15.3 SCOPE OF REQUIREMENTS

"TPT intends to sub-contract the Stevedoring Services to more than one (1) Stevedore per port to perform the Stevedore Services for a period of two (2) years, with an option to extend for a further one (1) year (in favour of TPT which may be exercised by TPT within its sole and unfettered discretion)."[8]

15.4 EVALUATION CRITERIA

15.4.1 Critical Success Factors

"Tenderers must submit their schedule of prices in accordance with the pricing schedule contained in Section 6 of the Tender.
Please note that pricing is not the sole determining factor for consideration. However, competitive pricing is critical."[9]

15.4.2 General conditions relating to Evaluation Criteria

"In addition to the other "DISCLAIMERS" contained in Section, clause 15, TPT reserves the right at all times to:

- Split the Tender and make an award of business to more than one Tenderer for different sections of the scope of work; and/or
- Withdraw this Tender in whole or in part, or not make any award of any business to any Tenderer; and/or
- Increase or decrease or in any other way vary the quantum of the award; and/or
- Shortlist the preferred Tenderer(s) based solely upon

6 Section 1 clause 14 of the RFP
7 Section 1, clause 14.10 of the RFP
8 Section 2, clause 1.2 of the RFP
9 Section 2, clause 6.1.1 of the RFP

TPT's evaluation methodology …"[10]

15.4.3 Evaluation of Methodology

"The objective of the evaluation is to assess all Tenderers in accordance with the criteria set out hereunder to ensure compliance with TPT's aims and requirements.

Phase 1: All Tenderers will be evaluated by TPT in terms of the Evaluation Criteria stipulated in clauses 6; 6.1.2; 6.1.2; 6.1.3 and 6.1.4 above. Incomplete Tenders may result in disqualification and it is therefore critical that all documents requested in the Tender is submitted (known as the '1st technical phase').

Phase 2: Physical evaluations at the Tenderers' sites (known as the 'second technical phase).

Phase 3: Price will count for 50 points, Technical 40 points and BBBEE 10 points.

Phase 4: The Tenderers with the highest scores attained (per port) will be recommended to the DAC for approval.

Phase 5: After approval of the preferred Tenderers by the DAC, post-tender negotiations will then be conducted with the preferred Tenderers, with a view to negotiating and finalising the terms and conditions of the proposed Stevedoring Agreement, a copy is included in Section 9 of this Tender."[11]

15.4.4 Pricing Schedule

"TPT reserves the right to negotiate final prices with the preferred Tenderers."

"Prices should not be subject to variation, amendment or adjustment."

"TPT does not guarantee volumes of containers to be moved." [12]

[16] As previously scheduled, on 8 March 2010 the applicant and the other preferred tenderers, through their representatives, attended the compulsory briefing session at which each tenderer (candidate) was given a copy of a document entitled "Notes for Compulsory Briefing Session" ("the Notes"). In terms of the Notes "[t]he purpose of the briefing session (was) to ensure that all Tenderers understand what is expected from them in regard to the tender processes and TPT's operational requirements and

10 Section 2, clause 6.3.5 of the RFP
11 Section 2, clause 6.4 of the RFP
12 Section 6, clauses 2, 5 and 8 of the RFP

to clarify queries raised by any Tenderer."[13]

[17] The first respondent made certain undertakings, in terms of the Notes, which included the following:

> "The adjudication will be based on the following criteria with the weighted averages of Price 50, Technical 40 and BBBEE 10."[14]
>
> "In order to ensure that all Tenderers are afforded an equal opportunity of competing, and also to enable TPT to evaluate the different proposals on an identical basis, a process of evaluation will be followed. In order to assist all Tenderers, a list of criteria for such evaluation is made available under Evaluation Criteria, Section 2, item no. 6 on page 14 of the Tender Document."[15]
>
> "TPT will not engage in 'horse trading' and will not disclose the prices of any Tenderer. All financial and related information will be regarded as strictly confidential."[16]

[18] The Notes also contained aspects on evaluation criteria, post-tender negotiations and BBBEE programmes in a manner virtually identical as contained in the RFP.[17]

[19] During the briefing session the candidates were addressed by the first respondent's representatives, after which the candidates were allowed to ask any RFP-related questions which they were requested to prepare in a written form on the sheets provided together with the Notes. It was indicated in the Notes that "No answers will be given by TPT at the briefing sessions. All the questions raised at the briefing session together with TPT's answers will be distributed to all the tenderers who

13 Para 2 of the Notes
14 Para 8.5 of the Notes (at p574 of the Record)
15 Para 10.1 of the Notes (at p575 of the Record)
16 Para 11.7 of the Notes (at p576) of the Record
17 Paras 10,11 and 12 of the Notes (at p575-6 of the Record)

attended the compulsory briefing session."[18] According to the Notes, the question was raised as to whether the "price" would be the only subject of discussion at the post-tender negotiations, to which the first respondent furnished the following answer:

> "TPT will negotiate on various issues and once the negotiations have been completed, TPT will allocate the volumes and lines. It is not possible to allocate volumes and lines before negotiations with the shortlisted tenderers have been completed. The proposed Stevedoring Agreement is a standard TPT agreement for Stevedoring which will be uniform in its operations and the terms and conditions will not be changed for individual Stevedores."[19]

[20] As stipulated in the RFP, there was still to be post-tender negotiations held between the first respondent and the preferred tenderers with a view to negotiate and finalise the terms and conditions of the Stevedoring Agreement. The meeting for this purpose was scheduled to take place on 19 August 2010 at the first respondent's Durban headquarters. The representatives of both the applicant and first respondent attended the meeting. According to the applicant it was only at that stage that the applicant realised that it was not the only preferred tenderer but that there were other tenderers who were also involved in the post-tender negotiations with the first respondent.

[21] During the applicant's turn at the post-tender negotiation table, the applicant's representatives were told that its prices were high and that the applicant had to consider revising the same. Consequently, albeit reluctantly, the applicant revised its price rates for the port of Durban (in the 300 000 to 700 000 band) down from R37,31 to R36,37 per container in respect of vessels working with container gantries and from R100.01 to

18 Para 14 of the Notes (at p576 of the Record)
19 Para 1(a) of the Record (at 584 of the Record)

R97.52 per container where vessels worked with ship cranes. The same revision was done in respect of the ports of Cape Town and Port Elizabeth in the same category. The applicant advised the first respondent of these revisions accordingly.

[22] It was submitted on behalf of the applicant that the revised price rates aforesaid were offered by the applicant based on the following factors:

22.1 That the correspondence of 5 August 2010 from the first respondent indicated that the applicant was the preferred supplier of the stevedoring services in accordance with the applicant's tender.

22.2 That by revising its rates (at the instance of the first respondent) the applicant thereby assumed or expected that its container handling volumes would be improved or, at the very least, not be reduced in relation to the volumes which the applicant had been allotted in the past (that is, in terms of the first contract). In other words, the applicant expected that, having reduced its rates as requested, its volumes would not be at risk.

[23] However, the applicant's assumption or expectation aforesaid was dashed by the first respondent's email dated 30 August 2010 addressed to the applicant conveying the first respondent's decision on the allocation of container handling volumes during the contract period of the second tender. I refer to the email, in part:

> "Attached please find the SACS (the applicant's) volumes allocated.
> Kindly note that your volumes in Durban was *(sic)* halved due to your tendered prices. The volumes will still however remain within 300 000 – 700 000 range for Durban.
> The volumes in PE and CT remain more or less the same as they have been previously – some small changes but nothing too drastic."

[24] This is the impugned decision of the first respondent which the applicant now seeks to be reviewed and set aside on the basis that it is both unlawful and unconstitutional as set out more fully hereunder. According to the applicant, the impugned decision would have a very drastic negative impact on the applicant's business, which impact the applicant summarised as follows:

24.1 The container handling rate in the port of Durban was effectively reduced from an average of approximately 80 000 containers per month to about 40 000 containers per month (in peak time). In financial terms this accounted for a reduction to the applicant's gross monthly turnover from R3,3 million to R1.45 million.

24.2 In Port Elizabeth (across the ports of Port Elizabeth and Ngqura) the applicant apprehended that the handling volumes would be reduced from 18 000 to about 12 000 containers per month.

24.3 The applicant submitted that its current handling volumes of 8 000 containers per month in Cape Town ought to have been increased given the fact that fewer companies (that is, the applicant, the fifth and sixth respondents) remained to perform the job after the previous service provider, *Port Stevedores*, had not availed itself to provide the stevedoring services in

respect of the tender under consideration.

[25] It was further pointed out that stevedoring services was a very labour intensive operation. For instance, in Durban the applicant currently employed 117 people (plus an additional 30 employees per shift sourced from a fixed labour pool); 115 in Cape Town (inclusive of personnel sourced from a labour pool) and 38 in Port Elizabeth (with some variable numbers of personnel being procured from a labour pool). The effect of the impugned decision was that the applicant would be left with no choice but to retrench a substantial proportionate percentage of its workforce.

[26] Notwithstanding the impugned decision, on 31 August 2010 the applicant finalised and concluded the Stevedoring Agreement with the first respondent, a copy whereof was annexed to the applicant's founding papers.[20] In terms of the Stevedoring Agreement the applicant's price per container was set at the reduced rate as revised by the applicant in response to what the applicant described as the first respondent's threats that if the rates remained too high the applicant's volumes would be reduced, particularly in the 300 000–700 000 range for the port of Durban.

[27] It was submitted on behalf of the applicant that the first respondent was an organ of state as envisaged in section 217(1) of the Constitution[21], read with section 1 of the Preferential Procurement Policy Framework Act[22] ("the PPPFA"). Originally the averment of the first respondent being an organ of state was disputed by the first respondent. However, at

20 Annexure WN12
21 The Republic of South Africa Constitution Act, 1996 ("the Constitution")
22 Act No. 5 of 2000

the time of argument it was no longer in issue. On this basis, Mr *Stewart* submitted that for the purpose of procuring stevedoring services at all South Africa's container terminals the first respondent was therefore obliged to comply with the relevant provisions of the PPPFA, which provided, amongst others, that "an organ of state must determine its preferential procurement policy and implement it"[23].

[28] Mr *Stewart* contended that the first respondent was therefore obliged to follow a procurement system which met the requirements of the PPPFA. He submitted that the final allocation of work, which was tabled in annexure "H" to the affidavit of one Ms Van Vuuren (the first respondent's employee) did not comply with section 2(1) of the PPPFA and, as an organ of state, it was therefore in violation of section 217(1) of the Constitution which required that the tender process must to be "fair, equitable, transparent, competitive and cost-effective." He argued that the applicant was promised by the first respondent that the PPPFA system would be applied which stipulated that the work must be allocated to the highest points earner, yet the ranking of preferred tenderers in relation to the points was not the basis upon which the work was allocated. He submitted that the work was allotted on a different basis.

[29] Counsel submitted that, in terms of the RFP itself, the first respondent expressly enlisted the procurement system as being subject to the PPPFA. He also pointed out that the first respondent compiled normative rules in a document known as the Procurement Procedures Manual ("the PPM"), a copy whereof was included in the first

23 Section 2(1) of the PPPFA

respondent's answering papers,[24] a step which was in accordance with the requirements of the PPPFA. In that regard, the first respondent opted for a 50/40/10 formula[25] as the basis of its procurement policy, which policy the first respondent overlooked when the final allocation of work was done. On this basis, Counsel argued, the first respondent was bound to comply with the requirements set out in section 2(1) of the PPPFA in relation to the tender process, including the allocation of volumes.

[30] Mr *Stewart* reiterated that the RFP clearly stipulated that the contract (and therefore the work) was to be given to the tenderer which scored the highest points per port, unless there was a special reason not to do so.[26] Indeed, the applicant submitted its tender in respect of bands per port, in accordance with the apparent requirements of the RFP. He opined that the RFP stipulation aforesaid did not contemplate that the allocation of work would be processed on a national basis, which the first respondent conceded it had subsequently done, per annexure H.

24 Annexure "A"
25 Section 2 clause 6.4 (Phase 3) of the RFP
26 Section 2 clause 6.4 (Phase 4) of the RFP

[31] Counsel noted that the volume of work was different at the different mentioned ports – some being busier than the others. He stated that had the applicant known that the allocation of work would not be determined on a per port basis, but nationally, the applicant would probably or possibly have quoted its prices differently than it did. He submitted that on a national allocation basis it was conceivable that there could be a substantial amount of work in some ports and very little in others. He pointed out that in any particular port their economies were scaled. Hence, it would be for instance, very costly for the applicant to move fewer containers in a less busy port than to move far more containers in a much busier port. Bearing in mind this differentiation the applicant had quoted prices per port within a particular band. Yet it was then possible, on the basis of the allocation of volumes on a national basis, that the applicant would not actually get the expected number of containers within a particular band in a particular port.

[32] Mr *Stewart* recalled that it was only after the "preferred tenderers" (per port) were approved by the Divisional Acquisition Council ("the DAC") that the "post-tender negotiations" would be undertaken "with a view to negotiating and finalising the terms and conditions of the proposed Stevedoring Agreement"[27]. According to the applicant, it was clearly envisaged in the RFP, and accepted by the applicant, that by virtue of the points it was awarded under the preference points system the applicant was chosen, in terms of the first respondent's letter of 5 August 2010, as the "preferred supplier" in respect of the ports of Durban, Cape Town, Port Elizabeth and Ngqura. Hence, to the applicant it made a mockery of the PPPFA's points system when it transpired that there were other several preferred tenderers per port who were invited for the post-tender negotiations.

27 Section 2 clause 6.4 (Phase 5)

[33] According to the applicant the adjudication of the tender process was "neither fair, nor equitable, nor transparent, nor competitive"[28]. The impugned decision was therefore unlawful for violation of section 217(1) of the Constitution and section 2(1) of the PPPFA. Mr *du Plessis* (after he took over from Mr *Stewart*, as explained earlier) pointed out that the issue here was not just about whether or not the applicant suffered any prejudice as a consequence of the volume allocation process having been determined on a national, instead of per port, basis but that the issue was one of legality. He argued that the impugned decision was reviewable in terms of section 6(2) of the Promotion of Administrative Justice Act,[29] ("PAJA") on the ground that the decision was an "administrative action" which was procedurally unfair and also both unlawful and unconstitutional, as alluded to above. On this basis, Counsel submitted that the impugned decision ought to be set aside and that the court did not have any discretion to exercise in this regard.

[34] Mr *du Plessis* further pointed out that the first respondent had undertaken that there would be no "horse-trading" with any tenderers and further outlawed "changes or purported changes by the Tenderer to the Tender prices"[30]. However, Counsel submitted, it appeared that such horse-trading had in fact occurred during the post-tender negotiations when the first respondent impressed on the preferred tenderers, including the applicant, to reduce their prices. It was after this "horse-trading" that the first respondent finally decided on the allocation of the volumes.

[35] Mr *du Plessis* sought to explain that the reason for the applicant

28 Paragraph 94 of the applicant's founding affidavit
29 Act No. 3 of 2000
30 Section 1 clause 14.2 of the RFP

having received the most volumes (despite its apparent mediocre performance in terms of the score sheets) was because the other preferred tenderers, who would otherwise have got more work than the applicant within certain bands, were lacking in capacity. Hence, the volume of work allocated to those tenderers was the maximum load that they could handle. On this basis, counsel submitted, it could not be said that the higher allocation of volumes for the applicant was as a result of any favouritism towards the applicant.

[36] It was alleged in the first respondent's answering papers that after the preferred tenderers were advised that they were successful with their respective tenders the first respondent set upon scheduling a meeting for the holding of post-tender negotiations with the said tenderers in accordance with prescriptions of the PPM and the RFP. However, the first respondent conceded that the allocation of work was not determined in accordance with the model used previously in awarding the first contract ("the old model"). What happened was that after the conclusion of the post-tender negotiations but before the Stevedoring Agreement was signed, an official of the first respondent, one Mr John Frederick Hyde, who was then the first respondent's National Operations Planning Manager: Container Terminals, set about designing a new model for the allocation of work.

[37] The old model included the stevedoring company called Port Services (Pty) Ltd ("Port Services") which originally participated in the second tender (the RFP) but withdrew before its conclusion. Mr Hyde used the old model as a first draft and then allocated Port Services's

volumes to the only new entrant amongst the preferred tenderers, namely, the eighth respondent.

[38] The first draft was depicted in Annexure "G" to the affidavit of Ms Amanda Van Vuuren, (referred to earlier), the first respondent's Commodity Manager : Procurement.[31] According to Mr Hyde, the first draft did not take into account the ranking of the respective preferred tenderers, their capacity and, most importantly, their prices, as the first respondent was required to do in terms of the RFP, which stipulated that:

> "The recommendation for award (of business) will be based on:
> - completeness of the tender submission;
> - results of the physical site evaluation;
> - financial status of Tenderer;
> - previous experience/history it may have had with Transnet and/or TPT;
> - minimizing risk to the TPT operations; and
> - competitive pricing"[32]

[39] As a result, Mr Hyde reworked the first draft to take such factors into account and formulated the new model. It was this new model which was embodied in annexure H. The schedules hereunder (part of annexure H) show how the allocation of volumes amongst the various stevedores (the preferred tenderers) was done in respect of the port of Durban in terms of the new model which the first respondent applied. In the schedules the applicant is reflected as "SACS". It is also noted in the schedules that the applicant's quoted price rate of R37,31 (see page 514

31 At p600 of the Record
32 Section 2 clause 7.3 of the RFP

of the Record) is reduced to R36,37 - an adjustment that was made by the applicant after attending the post-tender negotiations held on 19 August 2010, as discussed earlier.

Durban			
Stevedore	**Price**	**Allocation**	**Total Cost**
Thekwini	R 34.50	95,364	R 3,290,058.00
Rainbow	R 32.50	93,372	R 3,034,590.00
DP World	R 30.00	452,396	R 13,571,880.00
Pace	R 34.95	330,780	R 11,560,761.00
Greystone	R 30.70	407,586	R 12,512,890.20
SACS	R 36.37	489,113	R 17,789,039.81
Total		**1,868,611**	**R 61,759,219.01**

(The next schedule applied to the stevedores in the same order as above)

	Durban		Est Ship Gear Volume	Ship Gear Cost
	Price Gantry	**Price Ship Gear**	**Volume (0,1%)**	**Cost**
	R 34.50	R 91.50	477	R 43,645.50
	R 32.50	R 105.00	466	R 48,930.00
	R 30.00	R 60.00	2,261	R 135,660.00
	R 34.95	R 110.00	1,654	R 181,940.00
	R 30.70	R 87.40	2,038	R 178,121.20
	R 36.37	R 97.52	2,446	R 238,533.92
Ave	**R 33.17**	**R 91.90**	**9,342**	**826,831**

[40] In his affidavit, Mr Hyde alleged that the new model constituted a fair and rational basis to allocate the volumes of work amongst the preferred tenderers. He pointed out that in devising the new model, which was done after the post-tender negotiations, he had borne in mind the following:

40.1 That as a general rule, only one stevedoring company should attend a line service. This was for reasons of efficiency and it also facilitated the stevedores concerned getting to know the

characteristics of the vessels used in a particular line service;

40.2 That one also had to consider whether a particular stevedoring company had the necessary resources (mainly skilled and semi-skilled manpower) to service a complete line service. In other words, it was on an "all or nothing" basis.

40.3 That, more importantly, however, the system had to be cost-effective, taking into account what the first respondent received from the shipping line companies for the stevedoring services rendered. To this end, therefore, the first respondent did its best to ensure that it allocated the largest amount of work to the lowest tenderer, subject to (40.1) and (40.2) above.

[41] Mr Hyde said that he believed that the new model (annexure H) was the most effective method of ensuring a satisfactory and cost-efficient system of stevedoring services in the various South African ports. He further pointed out that whilst the applicant might have lost a number of shipping line services in Durban, it had gained more than half of the business in the Port of Ngqura, which port was projected to experience the most significant growth during the Stevedore Agreement. Further, that the applicant was not the only service provider which had been allocated reduced volumes based on the price it tendered. For

example, the seventh respondent, under the previous contract, handled approximately 441 000 containers per annum. However, based on the price which the seventh respondent had tendered, it was estimated that under the new contract it would handle only 330 000 containers per annum.

[42] In her affidavit Ms Van Vuuren sought to explain that the purpose of post-tender negotiations was not to identify which of the preferred tenderers would receive orders from the first respondent for the carrying out of stevedoring services. On the contrary, they were all successful tenderers and were all going to receive work. The purpose of the post-tender negotiations was to try and render the procurement of these services more cost-effective for the first respondent.

[43] Ms Van Vuuren stressed that the actual allocation of work was only determined after the post-tender negotiations. The allocations were dependent upon a number of factors, the two main ones being (1) the price tendered by each preferred tenderer and (2) the resources available to the tenderer concerned to carry out the stevedoring services. In other words, all other things being equal, the lower the price tendered by a preferred tenderer, the more work such tenderer would be allocated, up to the limit of the resources available to it, to enable it to render such services.

[44] She further pointed out that if the first respondent gave favourable allocation of volumes to the applicant, as the applicant demanded, that

would adversely affect the volumes allocated the fourth, sixth, seventh and the eighth respondents (the third respondent having been unsuccessful in the tender). This in turn would result in the first respondent acting unfairly towards to the other preferred tenderers, especially those who had ranked higher than the applicant in the score sheets. She recalled that the applicant was ranked fifth amongst the preferred tenderers.

[45] It was submitted on behalf of the first respondent that the first respondent complied with the provisions of section 217(1) of the Constitution, section 51(1)(a)(iii) of the Public Finance Management Act,[33] ("the PFMA") and section 2(1) of the PPPFA. Counsel further submitted that the fact of the tender process having been dealt with nationally did not cause any prejudice to the applicant because, after all, it was the applicant which received the largest allocation of volumes despite having scored less points than some other preferred tenderers.

[46] In *Shidiack v Union Government (Minister of the Interior)*[34] the court emphasised that it would not interfere with the discretion of a public official which had been *bona fide* expressed, and duly and honestly applied to the issue within the public official's discretion, even if the court considered the decision to be wrong. It also added that in such an instance no appeal or review will lie against the decision.

33 Act 1 of 1999
34 1912 AD 642

[47] Recently in *Pharmaceutical Manufacturers* case[35] the court stated as follows:

> "What the Constitution requires is that public power vested in the Executive and other functionaries be exercised in an objectively rational manner … Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."[36]

[48] Therefore, the court recognises that, as an organ of state,[37] the first respondent served as a public functionary vested with public power to exercise in the fulfilment of a public duty assigned to it by statute through its mother company, the state-owned Transnet Limited[38], and that, amongst others, contracting for goods and services as envisaged in the RFP in the present instance, was a statutory obligation.

[49] The purpose of a tender process was described in *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province & Others*[39] as follows:

> "Tender procedures, as we have come to know them over many years, have been the result of vast experience gained in the procuring of services and goods by government. They have evolved over a long period of time through trial and error and have crystallised into a procedure that has become vital to the very essence of effective government procurement. Strict rules have developed over the years in order to ensure that the system works effectively.

35 *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa &Others* 2000 (2) SA 674 (CC)
36 Para 89-90
37 The issue of the first respondent being an organ of State is dealt with in the succeeding paragraphs
38 Legal Succession to the South African Transport Services Act 9 of 1989
39 1999 (1) SA 329 (CkH) at 350 F-I

> The very essence of tender procedures may well be described as a procedure intended to ensure that government, before it procures goods or services, or enters into contracts for the procurement thereof, is assured that a proper evaluation is done of what is available, at what price and whether or not that which is procured serves the purposes for which it is intended."

[50] Originally the first respondent sought to contest the applicant's averment that the first respondent was an organ of state, as envisaged in the PPPFA.[40] However, this point was subsequently conceded by the first respondent. Indeed, it is clear that the definition of "organ of state" in the Constitution includes an entity such as the first respondent. An organ of state is defined as:

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
> (b) any other functionary or institution –
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a power or performing a function in terms of any legislation."[41]

[51] Notwithstanding the concession that the first respondent was indeed an organ of state, Mr *Pammenter* strenuously argued that the provisions of the PPPFA did not necessarily apply to the RFP, despite there being some reference to the PPPFA in the RFP.[42] He contended that reference to the PPPFA was for the limited purpose of allowing a "preference" as defined in the PPPFA for the purposes of BBBEE and that such reference did not entail the incorporation of the entire provisions of the PPPFA (and the Regulations made thereunder) into the

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40 The first respondent initially contended:
> "I point out that the tender was not adjudicated in terms of the Preferential Procurement Policy Framework Act 5 of 2000 ("the PPPFA"), for the reason that the First Respondent is not an organ of state as defined in terms of Section 1(iii) of that Act." (Para 9 of the answering affidavit)

41 Section 239 of the Constitution

42 Section 1 clause 9 of the RFP

tender process.

[52] Section 217 of the Constitution provides:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for -
> (a) categories of preference in the allocation of contracts; and
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[53] Pursuant to section 217(3) of the Constitution, Parliament promulgated the PPPFA, which defines an organ of state as being -

> "(a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999):
> (b) a municipality as contemplated in the Constitution;
> (c) a constitutional institution defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999);
> (d) Parliament;
> (e) a provincial legislature;
> (f) any other institution or category of institutions included in the definition of "organ of state" in section 239 of the Constitution and recognised by the Minister by notice in the *Government Gazette* as an institution or category of institutions to which this Act applies."[43]

[54] Section 2(1) of the PPPFA provides, in part, 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;

43 Section 1(iii)

…

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* No. 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; …"

[55] In line with the dictates of section 217(1) of the Constitution, the PFMA provides, in part, as follows:

"(1) An accounting authority for a public entity -
   (a) must ensure that that public entity has and maintains –
      (i) effective, efficient and transparent systems of financial and risk management and internal control;
      (ii) …
      (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
      (iv) a system for properly evaluating all major capital projects prior to a final decision on the project; [44]

[56] I do not agree with Mr *Pammenter's* submission that the provisions of the PPPFA were not applicable in the present case. In terms of the RFP, after the first respondent had committed itself to endorsing and supporting the Government's BBBEE's programme and to doing business with local business enterprises who shared the same values, the first respondent proceeded and made this firm undertaking: "TPT will accordingly allow a 'preference' in accordance with the 10% preference system, as per the Preferential Procurement Policy Framework Act (as

44 Section 51(1)(a)

amended) …"[45] This was a direct reference to the PPPFA contained in the RFP, as well as in the PPM[46]. However, it was not the only reference. For instance, one of the undertakings which the first respondent appeared to have made, in terms of the Notes, was the following: "The adjudication will be based on the following criteria with the weighted averages of Price 50, Technical 40 and BBBEE 10"[47], and the RFP, yet again stressed: "Price will count for 50 points, Technical 40 points and BBBEE 10 points."[48] To my mind, there was no clearer indication on the part of the first respondent of its intention to have the provisions of the PPPFA applicable in this tender process.

[57] In any event, it does not appear to me to be a prerequisite that a special clause should be included in a tender document whereby an organ of state is subjected to the provisions of the PPPFA when contracting for goods or services. It seems to me this is a constitutional imperative in terms of the provisions of section 217 of the Constitution, read with section 2(1) of the PPPFA. There appears to be no indication either in the Constitution or the PPPFA that the application of the PPPFA in a public tender would always have to be subject to an empowering clause located in the tender document or elsewhere. Therefore, the position should, in my opinion, be that the provisions of the PPPFA are attracted in a tender process immediately once it is established that an institution or entity which is an organ of state is inviting for tender to contract for goods or services. To my mind, this is what both the Constitution and the Legislature seem to have intended in this regard. I am therefore satisfied

45 Section 1, clause 9 of the RFP

46 See clause 1.3.1, at p272 of the Record , where it is stated that :

> "Transnet will accordingly allow a preference in accordance with the 90/10 preference system, as per the PPPFA, to companies who provide a BBBEE Accreditation Certificate."

See also clause 9.2.3.3 of the PPM, at p335 of the Record.

47 Para 8.5 of the Notes

48 Section 2, clause 6.4 (Phase 3) of the RFP

that the provisions of the PPPFA were applicable in the present tender dispute. The issue to determine now is whether or not the impugned decision is inconsistent with those provisions.

[58] Counsel further submitted that the applicant, on its own case, was advised in writing of the impugned decision on 30 August 2010. By concluding the Stevedoring Agreement with the first respondent on 1 September 2010 (when it was already aware of the impugned decision) the applicant thereby made its election and its action was consistent with an intention on its part to render the stevedoring services in accordance with the impugned decision. He pointed out that the applicant only lodged the complaint some two weeks later when it addressed a letter to the first respondent on 14 September 2010. In the circumstances, Counsel submitted that the applicant had perempted its right to seek a review and setting aside of the impugned decision.

[59] The applicant denied that it had perempted its right to the review. Mr *du Plessis* argued that peremption applied only where, by its action, a party unequivocally indicated that it was not going to take any step in a matter in question. He pointed out that the Stevedoring Agreement was only forwarded to the applicant the day before the Agreement was due to be in force. In the circumstances, the applicant simply signed the Stevedoring Agreement because it was financially prudent to so. This was not, counsel submitted, an unequivocal abandonment of its rights on the part of the applicant. Referring to the decision in *Clarke v Bethal Co-operative Society,*[49] he further submitted that the courts should not lightly

49 1911 TPD 1152 at 1159

take away litigants' right to litigate.

[60] There seems not to be a clear position on the issue of whether the doctrine of peremption (or acquiescence, as it is sometimes called) may apply to a situation, such as the present, where the decision allegedly acquiesced in is not a judgment or order of a court of law but an administrative decision. The first respondent alleges that the applicant perempted its right to have the impugned decision (which is an administrative decision) reviewed and set aside. The following decisions illustrate how the courts have remarked about the doctrine:

[61] In *Hlastwayo v Mare and Deas*[50] the court described the doctrine as follows:[51]

> ". . . [I]t would seem that to constitute acquiescence there must be consent either in act or word. A person has the right to re-open the case or to appeal; he voluntarily chooses to do an act which is clearly inconsistent with this right, and he is therefore presumed to have consented to the judgment. . . At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate."

[62] The doctrine was again dealt with in *Dabner v SAR&H*[52] where the court stated the following:[53]

> "If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful

50 1912 AD 242
51 *Hlatswqyo* at p259
52 1920 AD 583
53 *Dabner* at 594

cases acquiescence, like waiver, must be held non-proven."

[63] In *Gentiruco AG v Firestone SA (Pty) Ltd*[54] the court put it thus:[55]

> 'The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order. . . Conceivably such acquiescence may occur, albeit rarely, before the judgment or order is actually given against him, as, for example, where he expressly or impliedly agrees in advance to be bound by it.

[64] In *Blou v Lampert & Chipkin NNO and others*[56] the court stated the following:[57]

> "[A]s I understand the position the principle of peremption does not apply to the grounds of appeal but to the judgment itself. It is in the authorities dealt with on the basis of an acquiescence in the judgment and the rule with regard thereto is well settled. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. The conduct relied upon must be unequivocal and must be inconsistent with an intention to appeal and the onus of establishing that position is upon the party alleging it. . . It seems to follow that all this relates to the conduct of the unsuccessful litigant after judgment was entered against him and not to his conduct before judgment."

[65] It is clear from the Appellate Division's decision in *Gentiruco, supra,* that, albeit rarely, the doctrine may apply even before judgment or order is given in certain circumstances. However, it does not appear to me that the doctrine can apply in respect of an administrative decision made

54 1972 (1) SA 589 (A)
55 *Gentiruco* at 600A-C
56 1970 (2) SA 185 (T) at 199D
57 *Blou v Lampert* at 199D

by any institution or entity (including an organ of state), other than a court of law. On this basis alone, I would have been inclined to dismiss the first respondent's submission. In any event, I am satisfied that this was a situation that when the applicant concluded the Stevedoring Agreement with the first respondent on or about 1 September 2010 the applicant did so under protest. The impugned decision had been brought to the attention of the applicant virtually on the eve of the commencement date of the Stevedoring Agreement. Clearly, if the applicant had decided not to sign the Stevedoring Agreement it would have lost even the reduced volumes that were allocated to it and that could possibly have led to much bigger problems for the applicant. The applicant's right of access to the court should be respected[58]. The defence of peremption raised by the first respondent can therefore not succeed.

[66] The applicant's concern about the potential enforced retrenchment of a substantial proportionate percentage of its workforce, which allegedly would mostly affect its long-serving staff was, with respect, of no substance because, as Mr *Pammenter* correctly contended, the RFP envisaged that the workers' positions would be protected under the provisions of section 197 of the Labour Relations Act.[59] In this regard I recall the relevant provisions in the RFP:

> "14.11 Tenderers acknowledge and agree that if they are awarded the Tender and, subsequently, the business then that will constitute a transfer of business to the successful Tenderer(s) in terms of section 197 of the Labour Relations Act No.66 of 1995 ("LRA"), as a consequence of which the successful Tenderer(s) may acquire the incumbent employees who were engaged in providing the Stevedoring Services to TPT.
> 14.12 To the extent necessary, the successful Tenderer(s) will:
> 14.12.1 assume liability for the payments referred to in section 197(7) of the LRA (refer to relevant clauses in the attached draft Agreement);

58 Section 34 of the Constitution
59 Act 66 of 1995

14.12.2 indemnify TPT and hold it harmless in respect of all claims of whatever nature and howsoever arising, which may be made against TPT by one or more of the predecessor's employees."[60]

[67] It would appear to me, therefore, that the applicant's concern on this aspect was merely a self-serving submission and not something of a real threat to its current workforce, as the applicant claimed.

[68] It is common cause that the applicant did not tender on the lowest band (namely, the 0–39 999 container moves category), but quoted only from 40 000–99 999 (except in respect of Durban), 100 000–299 999 and 300 000–700 000 container moves per annum. According to the score sheets the applicant fared as follows in respect of the mentioned ports and bands[61]:

68.1 DURBAN

(1) 100 000-299 999 CONTAINER MOVES

Out of seven eligible competitors, the applicant was ranked fifth behind Rainbow Marine (fourth respondent), Thekweni Marine (eighth respondent), DP World (sixth respondent) and Greystones (fifth respondent). The applicant's tendered price was the third highest, only behind Port Services (third respondent) and Pace (seventh respondent), respectively in their ranking order.

(2) 300 000-700 000 CONTAINER MOVES

The same seven tenderers, as above, competed under this category. The applicant was again placed in the fifth position behind the fourth, sixth,

60 Section 1 clause 14.11 and 14.12 of the RFP
61 The score sheets appear at pp511-519 of the Record

eighth and fifth respondents, respectively in their ranking order. Again the applicant's price was the third highest behind the third and seventh respondents.

68.2 CAPE TOWN

(1) 40 000-99 999 CONTAINER MOVES

The applicant competed with three other tenderers – that is, they were four in all. Under this category the applicant was ranked first, having scored the highest points, but quoted the second lowest price behind the fifth respondent.

(2) 100 000-299 999 CONTAINER MOVES

The same four tenderers, including the applicant, contested in this category. The applicant was ranked second behind the sixth respondent. The applicant quoted the second highest price behind the third respondent.

(3) 300 000-700 000 CONTAINER MOVES

Precisely the same position as in (2) above, obtained in relation to the applicant under this category.

68.3 PORT ELIZABETH AND NGQURA

(1) 40 000-99 999 CONTAINER MOVES

There were three eligible competitors, including the applicant, in this band. The applicant was ranked last, with the highest price quoted.

(2) 100 000-299 999 CONTAINER MOVES

From the same three competitors, as above, the applicant was ranked second - albeit with the highest price.

68.4 It is also noted that in respect of the DURBAN port the applicant scored the second highest points (9.5 out of 10) behind the fourth

and eighth respondents who each obtained 10 out of 10, for BBBEE. The applicant was tied with the seventh respondent.

[69] In the present instance the point scoring was conducted on the basis of the aggregate consideration of various factors which, in my view, were not inconsistent with the spirit and tenor of the PPPFA. These factors were compartmentalised under the following headings or columns: Financial Offer (i.e. Price); Comparative Offer; Technical (maximum score 40); Points for Financial Offer (maximum 50); BBBEE Level of Contribution (Level 1 to 9); BBBEE (Points out of 10) and Total Points out of 100. The last column was the ultimate Ranking of the candidate (tenderer) *vis-à-vis* its competitors. Clearly, these factors were what section 2(1) of the PPPFA envisaged

[70] The applicant sought to rely on the provisions of section 2(1)(f) of the PPPFA which stipulate that "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". However, the above score sheets do not completely favour the applicant. In particular, the score sheets clearly illustrated that the applicant was not the best performer in respect of the Durban port in the 300 000–700 000 band, even under the BBBEE consideration.[62]

[71] Indeed, in many instances, the other preferred tenderers performed better than the applicant particularly on price rates. On this particular point it is important to refer to the RFP under "Evaluation Criteria –

62 See p514 of the Record

Critical Success Factors" where it is stated: "Please note that pricing is not the sole determining factor for consideration. However, competitive pricing is critical."[63] (Emphasis added). As stated earlier, the first respondent conceded that the allocation of work was determined upon a number of factors, mainly (1) the price tendered by each preferred tenderer and (2) the capacity of the tenderer concerned to carry out the stevedoring services.[64]

[72] The concept of post-tender negotiations is not uncommon in public tender dealings and has been found to be a legally acceptable practice as long as, it seems to me, it is included in the tender document as a requirement in the tender process. In *Mhonko's Waste and Security Services CC & Others CC v Transnet Ltd*[65] the court stated:

> 'once the decision was made with respect to who the successful candidates were Transnet was entitled to negotiate the prices with them as this was part of the agreement between the parties, as contained . . . in the tender document.'[66]

[73] If an organ of state wishes to engage in negotiations in a tender process it does not appear that it is required to do so before short-listing, or even before the tender is finally awarded. In *Roy Ramdaw Incorporated v Amajuba District Municipality & Others*[67] the tender process involved three stages. At the first stage tenders were invited; at the second, tenderers were short-listed, and then at the third stage, a successful tenderer was chosen and only then that the negotiations were entered into. In that case the court described this last stage during which

63 Section 2 clause 6.1.1 of the RFP
64 See para 20(i) of Amanda van Vuuren's affidavit, at pp227-8 of the Record
65 Unreported decision of CPD – Case No 9137/2006 undated
66 Mhonko's Waste, *supra*, at para 28
67 Unreported decision of the NPD – Case no AR1028/03: dated 27 February 2004

the negotiations took place as purely commercial in nature and not an administrative process that engaged the interests of the appellant, who was a short-listed, but unsuccessful, tenderer.[68] The third stage would then represent the stage of the post-tender negotiations in the present case.

[74] It is unclear to me why the proposed distribution of volumes among several stevedoring companies, in terms of the Notes, should have come as a surprise to the applicant at the post-tender negotiations. It was not unlawful or improper for the first respondent to divide the volumes amongst the several tenderers. The PPM, which was the first respondent's procurement policy framework document, compiled in compliance with the PPPFA, stipulated as follows:

> "When it is considered in Transnet's best interest to divide the total requirement of a tender between two or more tenderers (e.g. in order to draw from the most convenient or nearest source, or to ensure continued competition or to optimise available resources or to support a BEE Company) a supply or service may be divided amongst several tenderers, and contracts can be placed accordingly, provided that this was a tender condition. The total value of the business to be awarded, and not the individual contracts, will however determine whether such tender falls within the (Acquisition Council's) AC's jurisdiction or not. Once approval for the award of the business has been obtained from the AC, the individual contracts may be signed by the person with necessary contractual powers for the individual contracts."[69]

[75] Therefore, clause 6.12 of the PPM was the empowering provision in terms of which the first respondent announced more than once in the RFP about its intention to allocate the volumes to more than one preferred stevedore at each port. I can refer to a few further examples in this regard:

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68 Roy Raymond, Supra, at para 5
69 Clause 6.12 of the PPM

> "TPT intends to sub-contract the stevedoring services to more than one (1) stevedore per port to perform the stevedore services for a period of two (2) years, with an option to extend for a further one (1) year (in favour of TPT which may be exercised by TPT within its sole and unfettered discretion)."[70]

And,

> "Without limitation to TPT's rights elsewhere contained herein, and in addition thereto, TPT may accordingly in its sole and unfettered discretion, split the award of the business to more than one stevedore in the proportions that TPT deems fit, in its sole and unfettered discretion"[71]

[76] Indeed, the applicant's ostensible belief that it was the only preferred tenderer (or supplier) and was surprised at the post-tender negotiations to discover that it was not, appeared in its founding papers, where the applicant alleged as follows:

> "The fundamental difficulty with TPT's process was that it included the mandatory and objective PPPFA points system which is designed to identify the single tenderer with the most points and to whom the tender "***must***" then be awarded "unless objective criteria [other than price, technical and BBBEE] justify the award to another tenderer" (s 2(1)(f) of the PPPFA), yet it also envisaged several tenderers qualifying for post-tender negotiations "on various issues and once the negotiations have been completed, TPT will allocate the volumes and lines"[72]

[77] To my mind, the fact that section 2(1)(f) of the PPPFA refers to "the tenderer" (in singular) does not in any way imply a legislative intention that at all times the award of contract, under the PPPFA, should be restricted only to a single tenderer even where the tender document clearly reflected the contrary intention. The Interpretation Act, 1957 provides, amongst others:

> "In every law, unless the contrary intention appears –
> (a) …
> (b) words in the singular number include the plural, and words in the plural

70 Section 2 clause 1.2 of the RFP
71 Section 1 clause 15.8 of the RFP. See also clause 14.7; Section 2 clauses 6.3.3 and 6.3.5
72 Para 77 of the applicant's founding affidavit

number include the singular."[73]

[78] Therefore, it ought not to have taken the applicant by any surprise to realise, during the post-tender negotiations, that it was not the only preferred tenderer for the provision of stevedoring services at the ports in question.

[79] Further, the provision (in the Notes) that "[t]here is no guarantee on volumes" was also consistent with the terms of the RFP which clearly stipulated: "TPT does not guarantee volumes of containers to be moved."[74]

[80] Therefore, the matters dealt with in paragraph 4 of the Notes are, in my view, not entirely inconsistent with, but somewhat complementary to, the "Principles for Awarding Business" in terms of the RFP.

[81] It is clear that the advertisement in the RFP gave the indication that the consideration of the tenders and allocation of volumes would be done on a per port basis. The first respondent did not, however, follow its undertaking in this regard, but instead the first respondent conducted the process on a national basis. For this, the tender process was procedurally flawed to the extent of that irregularity. However, the court has to determine whether, on the consideration of all relevant factors, the irregularity was such as to warrant that the impugned decision be reviewed and set aside.

73 Section 6 of Act 33 of 1957
74 Section 6 clause 8 of the RFP

[82] In its argument counsel for the applicant also relied on the decision in *Premier, Free State & Others v Firechem Free State (Pty) Ltd*[75] and in particular where the court, in that case, stated that one of the requirements of a tender procedure was "that a tender should speak for itself. Its real import may not be tucked away, apart from its terms".[76] On this point, counsel submitted that the "Principles for Awarding Business" in terms of the RFP[77] were materially different from what was contained in the Notes under the heading "Allocation of Work"[78]. He further contended that, indeed, the terms of the contract which was eventually concluded between the applicant and the first respondent materially differed from what the RFP envisaged on the issue of allocation of volumes. On this basis, counsel submitted that the principle in *Firechem* should, therefore, be applied.

[83] Section 2 clause 7 of the RFP under the heading "Principles for Awarding Business" ("the Principles") provided the following:

> "7.1 As indicated in clause 6.4 Phase 5 above, TPT shall enter into post-tender negotiations with the preferred Tenderers.
>
> 7.2 As is elsewhere also provided in the Tender, Tenderers are advised and should note that any final award of business is entirely conditional upon and subject to the successful conclusion of a written contract between the preferred Tenderer(s) and TPT, which contract will include such terms and conditions as TPT Management and the DAC may require or prescribe, but which shall have its foundation in the attached Proposed Stevedoring Services Agreement (see Section 11 of the Tender)
>
> 7.3 The recommendation for award will be based on:
>
> - completeness of the Tender submission;
> - results of physical site evaluation;
> - financial status of Tenderer;
> - previous experience/history it may have had with Transnet and/or TPT;

752000 (4) SA 413 (SCA)
76 *Firechem, supra,* at 429H-I
77 Section 2 clause 7 of the RFP
78 Para 4 of the Notes

- minimising risk to the TPT operations; and
- competitive pricing.

7.4 The Tenderer must be in a position to commence providing the Stevedoring Services within one month after receipt of written notification to this effect from TPT."

[84] On the other hand, paragraph 4 of the Notes under the heading "Allocation of Work" contained, amongst others, the following:

> "Given the nature and volume of business through the Container Terminals, TPT has estimated in terms of its operational requirements the most appropriate number of stevedores to be appointed per region.
> The regions have been determined as follows:
> **Region 1** – Durban Container Terminal and Pier 1 Container Terminal = 63 Line Services with an estimated annual container volume of 1,700,000. Propose 6 or 7 stevedores.
> **Region 2** – Port Elizabeth and Ngqura Container Terminals = 16 Line Services with an estimated annual container volume of 214,000. Propose 3 stevedores,
> **Region 3** – Cape Town Container Terminal and Diversions from CTCT to Cape Town MPT due to construction at CTCT = 26 Line Services and an estimated annual container volume of 586,000. Propose 4 stevedores.
> The award to the proposed number of Stevedores in this model is obviously only possible if there are sufficient suitably qualified companies that submit tenders.
> The grouping of Line Services to make up the allocated volume will be determined by TPT.
> The Stevedoring Company will carry the risk of changes in estimated volumes due to growth, mergers, disinvestments etc. i.e. There is no guarantee on volumes.
> process, the Line Services will be allocated to each successful tenderer based on the band of containers that they have been successful for in their tender. Factors that will be taken into account when this allocation is done are:
> - The number of gantries that the company can man at any given time in the region.
> - The schedule of the vessels of the Line Services allocated.
> - The expected volumes from each Line Service to make up sufficient volume for the band allocated."

[85] In *Firechem, supra,* the court had to deal with a tender procedure in relation to the supply of cleaning material to a provincial government. The tender document contained a term that was materially different to that of the contract which was ultimately concluded, in that the former

provided that the provincial government would determine from time to time the quantity of supplies that it would need, whereas the latter provided for a fixed quantity of supplies which would be delivered to the provincial government which, in turn, was then obliged to take delivery of. It would appear that in *Firechem* the court intended, among other things, to emphasise the importance of competitiveness in a tender procedure,[79] when the court stated "that a tender should speak for itself and its real import may not be tucked away, apart from its terms". In other words, the tender process must be devoid of deception or underhandedness.

79 See also: *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board & Others* 2001 (2) SA 675 (C)

[86] Further, it is noted that in *Firechem* the two documents (namely, the written tender and the contract) were clearly at variance in a material respect and, therefore, spoke directly to a material term of the contract, namely, the volume of supplies to be provided and how that volume was to be determined. In the present instance counsel for the applicant pointed out the factual situation that different ports had different volumes of work in that some ports were busier than others. I do not doubt the veracity of this assertion.

[87] Counsel further submitted that had the applicant known that the allocation of work would not be determined on a per port basis, but on a combined basis, the applicant would probably or possibly have quoted its prices differently than it did. He opined that on a national allocation basis it was conceivable that there could be a substantial amount of work in some ports and very little in others. He pointed out that in any particular port their economies were scaled. Hence, he submitted, it would be very costly for the applicant to move fewer containers in a less busy port than to move far more containers in a much busier port. Bearing in mind this differentiation the applicant had quoted prices per port within a particular band. Yet as the position stood, it was possible that the applicant would not actually get the number of containers which it hoped to get within a particular band in a particular port.

[88] Indeed, the applicant submitted its tender per port which, admittedly, was in apparent compliance with the advertisement in the RFP. It is common cause that the applicant generally quoted different prices in respect of different ports and within different bands. It is also common cause that the first respondent, when allocating the volumes, did not apply the method that accorded with the RFP advertisement, in that it determined the allocation of work not on a per port basis, but on a combined or national basis. On this basis, it cannot be denied that had the applicant known that the allocation of work would be determined on a national basis the applicant would have quoted in a different way. As I have already found, the first respondent, by designing the "new model" (annexure H) for the allocation of work after the process of submitting tenders was closed and without notifying the tenderers about it, thereby committed an irregularity which rendered the tender process procedurally flawed to the extent of that irregularity.

[89] Can it then be said that this procedural irregularity is of similar status as in *Firechem's* case? In my view, the situation in *Firechem* was such that the discrepancy between the tender document and the contract on the item complained of, namely, the quantity of the cleaning material to be supplied, had a clear direct bearing on the material term of the contract. There was simply no conjecture or speculative thinking about the issue.

[90] However, in the present instance the position is not necessarily the same. There was no evidence or suggestion that if the allocation of work was done on a per port basis the applicant would have received more volumes than it actually received, which would have satisfied the applicant. Indeed, this was not the applicant's case. The basis of the applicant's complaint was simply that had it known that the allocation of work would be determined on a national basis it would probably or possibly have quoted its prices in a different way. It was, therefore, also possible that the applicant would not necessarily have done so.

[91] The applicant's observation that had it known about what would happen (namely, that the allocation of work would be done on a national basis) it would have quoted prices differently may, it seems to me, tend to suggest that in those ports where the applicant knew that there were fewer containers to move it would have quoted higher prices because, according to the applicant, it was more costly to undertake stevedoring operations in that environment. It would have been commercially imperative for the applicant to compensate for the extra operating expense. However, this is all speculation, which is induced by the applicant's speculative submission on this aspect. The bottom line, in my view, is that the facts in *Firechem* were not on all fours with the facts in this case. The two cases are, therefore, distinguishable.

[92] In any event, even if I am wrong with my finding in the preceding paragraph, I would still find that the procedural irregularity committed by the first respondent was not of the nature and extent as to warrant the review and setting aside of the impugned decision. Notwithstanding the first respondent irregularly using the new model (annexure H) in the circumstances discussed above, the end result saw the applicant getting more volumes than it actually deserved in terms of that model, as well as in terms of the RFP, the PPM and the PPPFA, all of which referred to the highest points scorer getting the upper hand in terms of work allocation, which was not the case with the applicant.

[93] As pointed out, in the port of Durban (in the 300 000–700 000 band) the applicant ranked fifth behind most other preferred tenderers. Even under the BBBEE consideration the applicant was outshone by the fourth and eighth respondents. The fact that the other preferred tenders were allocated volumes up to their respective capacities was a factor which obviously played out to the applicant's favour and advantage. This appeared to be common cause. In my view, it is a factor which ought to be taken regard of in favour of the first respondent.

[94] It is also important noting or remembering that the element of procedural fairness in any bilateral or multi-lateral transaction is something to be ensured to apply to both or all parties, as the case may be, to the transaction, including (in a similar matter as the present) the party who issues the invitation to tender. It cannot be disputed that the fourth to eighth respondents are innocent parties in this controversy. They stand to lose hugely, financially or otherwise, if the impugned decision

were to be set aside, because an increase in the applicant's volumes at this stage would mean a decrease in their respective volumes.

[95] Therefore, any interference with the current container handling operations at the South Africa's harbours, in the manner envisaged in the relief sought, would, besides any further adverse considerations (some of which are discussed below) be doubtlessly unduly unfair to the other respondents concerned. The apparent adverse financial effect which the new contract had on the applicant and its business did not necessarily constitute proof of any impropriety or procedural unfairness in relation to the tender process, nor was it a sufficient ground for review of the impugned decision.

[96] I further consider that, although the first respondent allocated work through a model other than the one apparent in the RFP advertisement, the model so applied, it would appear, was reasonable and fair to all parties. More importantly, after all, that method of allocation does not seem to me to be inconsistent or at variance in context with the "Principles For Awarding Business" referred to in section 2 clause 7.3 of the RFP. Instead, the method appears to me to comply with the requirements set out in section 217(1) of the Constitution, read with section 2(1) of the PPPFA. I further took into account the following observations.

[97] In evaluating tenders, an organ of state is entitled to set up a

benchmark. As was stated in *Mhonko's Waste*, *supra:*

> 'It is [Transnet's] right to determine the benchmark and it is for them to decide when this would be done. It could be done before the close of tender and prospective candidates advised thereof or after the tender is closed or towards the very end of the process: when it is done is not for this court to prescribe, the decision is that of Transnet.' [80]

[98] The court went on to explain that what it would be concerned with is whether the benchmark itself is arbitrary or based on reasonable and rational considerations as to its determination and whether its application of the benchmark is uniform.

[99] There can be no doubt that the issue of price is an important factor when considering a tender, not only for the purposes of determining money actually spent, but also in determining whether a tenderer is suitably aware of the market forces involved in the work being tendered for. [81] I would think that this factor was even more important in a transaction involving a public tender, where the project tendered for was likely to cost the taxpayer enormous amounts of money. Indeed the fact that in terms of the procurement policy framework "price" alone counted for 50 points (out of 100), in comparison to 10 points for "BBBEE" was, in my view, substantive proof of this conclusion.

[100] Therefore, the first respondent, as a commercial entity and an organ of state, was, in my view, both entitled and obliged (from both the legal and constitutional perspective) to obtain the fairest possible price it

80 *Mhonko's Waste and Security Services CC & Others v Transnet Ltd* (unreported) Case No. 9137/2006 (CPD) undated at para 25
81 *Mhonko's Waste, ibid*

could when procuring goods and services through a tender process. In doing so, the first respondent was entitled to set a benchmark against which the prospective tenderers would be compared.

[101] The use of the 50/40/10 formula was clearly such a benchmark, used to determine whether the tenderers met the requirements of the first respondent's needs, and in relation to the prices that the tenderers charged. This benchmark was, in my view, in compliance with the RFP and the PPPFA, but never intended to be the final determination of which tenderer would ultimately be awarded the tender. It was rather a standard against which prospective tenderers could be measured and short-listed.

[102] At the end of the day it was about how much the first respondent would pay for the project (the tender) which amount was how much the successful tenderer(s) would be paid or receive. In my opinion, therefore, the first respondent's decision to focus mainly on price and capacity to deliver at the stage of allocation of volumes was not inconsistent with the aims and objects of the RFP, including the "Principles For Awarding Business".[82]

[103] Once the benchmark had been set, and a shortlist of tenderers compiled, the first respondent was thereafter entitled to enter into commercial negotiations with each shortlisted preferred tenderer, provided that the first respondent conducted itself fairly and treated all tenderers equally at all times.

82 Section 2, clause 7.3 of the RFP

[104] I do not agree with the suggestion that the first respondent abused the post-negotiation process to conduct "horse-trading" which the first respondent had undertaken it would not do. Post-tender negotiations are an accepted feature of a tender process, and, in the present case, it was also a procedure that was clearly envisaged in the RFP. There is nothing to suggest that any one tenderer was treated at an advantage over another during these negotiations, or that any one tenderer had any kind of 'inside information' that would put the tenderer concerned at an unfair advantage over the others. At all times, the first respondent was open about the fact that it was negotiating with all the preferred tenderers. In any event I agree with Mr *Pammenter* that there is no reason why "commercial arm twisting" should not be allowed in the procurement process and that it must be borne in mind that the purpose of section 217 is, subject to the affirmative action issue, to ensure that the government gets the best price and value for which it pays.

[105] It has also been said it is not unfair for an organ of state to set criteria in a tender, and not disclose the weight to be attached to each of these criteria, as this then influenced tenderers to tender competitively.[83] However, where a tenderer were to receive information which gave the tenderer concerned an advantage over other tenderers, this would render the process unfair.[84] It would also be unfair if there was any deception present in the acceptance of a particular tenderer, as this strips the process of the fundamental aspect of fairness, namely, the requirement that all

83 *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board and others* 2001 (2) SA 675 (C) para 16
84 *S. A. Post Office, Supra*

tenderers should be treated and considered on an equal basis.[85] As was stated in *Metro Projects CC:*

> "Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning or not." [86]

[106] The RFP envisaged, in my view, that the post-tender negotiations would be conducted on a one-on-one basis as between the first respondent and each preferred tenderer at a time, particularly on the issue of price: "TPT reserves the right to negotiate final prices with the preferred Tenderers."[87] Indeed, this clause, on its face, could appear to be somewhat inconsistent with the further provision under the same section which stipulated: "Prices should not be subject to variation, amendment or adjustment."[88] It seems to me, however, that the latter clause related to a unilateral action on the part of the tenderer at an earlier stage of the process before the negotiations, which was prohibited. The former clause related to the negotiation stage, which was then permissible. In my opinion, there is therefore no conflict between the two clauses.

[107] It is apparent that the primary issue that dominated the post-tender negotiations was the issue of price rates. There was no suggestion that what the first respondent discussed with one preferred tenderer during the negotiations was imparted to any one of the other preferred tenderers. The discussions remained confidential between the parties. Indeed, the first

85 *Metro Projects CC & Another v Klerksdorp Local Municipality and others* 2004(1) SA16 (SCA) para 14
86 *Metro Projects, Supra*
87 Section 6 clause 2 of the RFP
88 Ibid, Section 6 clause 5

respondent undertook*:* "TPT will not engage in "horse-trading" and will not disclose the prices to any Tenderer. All financial and related information will be regarded as strictly confidential."[89] There was no evidence or suggestion that the first respondent breached this undertaking of confidentiality.

[108] According to the dictionary meaning "horse-trading" means "hard and shrewd bargaining" [90] which, on its face, does not necessarily suggest or imply any impropriety or *mala fides*. However, it is evident that the concept of "horse-trading" (as alleged in the present context) implied an ingenious and cunning ulterior motive on the part of the first respondent during the negotiations. In my view, there was no evidence or even suggestion that the post-tender negotiations in the present instance amounted to "horse-trading" in the context alleged, on the part of the first respondent. Nor was there any evidence, allegation or suggestion that the negotiation process in particular or the entire tender process generally, was tainted with fraud, corruption or any other reprehensible conduct.

[109] Significantly, like every other preferred tenderer, the applicant was well aware as at the time it submitted its tender that there was a mandatory provision about the post-tender negotiation process. To my mind, therefore, the negotiation process did not take away any one of the elements of fairness, equitability, transparency, competitiveness and cost-effectiveness envisaged in section 217(1) of the Constitution.

89 Para 9.3 of the Notes
90 Compact Oxford English Dictionary for Students, 3 ed (2005) at 488; The New Shorter Oxford English Dictionary, Vol I (1993)at p1264

[110] An organ of state has discretion to accept or reject a particular tender, but in exercising this discretion it must act fairly, responsibly, and honestly,[91] and in a manner that is procedurally fair.[92] Indeed, in terms of the RFP the first respondent possessed this discretion: "Without limitation to TPT's rights elsewhere contained herein, and in addition thereto, TPT may accordingly in its sole and unfettered discretion … reject all Tenders, without assigning any reason therefor, or resolve not to accept any Tender; …".[93]

[111] The court is also conferred with discretionary power to grant a review application and set aside an impugned decision. Indeed, it has been held that tender processes do not necessarily have to be perfect, and that not every slip in the administration of tenders has necessarily to be visited by judicial sanction.[94] Hence, when it deems appropriate the court may decide, in the exercise of its discretion, not to set aside an impugned decision even if it amounted to an invalid administrative act.[95] In *Oudekraal Estates (Pty) Ltd v City of Cape Town*[96] the court stated:

> '. . . a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'

91 *Goodman Bros v Transnet* 1998 (4) SA 989 (W) at 997B
92 *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) para 8
93 Section 1, clause 15.5 of the RFP. See also section 2, clause 6.3.5
94 *Moseme Road Construction CC and others v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA), at para 21
95 *Chairperson, Standing Committee & Others v JFE Sapela Electronics (Pty) Ltd & Others* 2008 (2) SA 638 (SCA) para 28
96 2004 (6) SA 222 (SCA) at 246C-D

[112] The court's discretion can also, in an appropriate case, be influenced by considerations of pragmatism and practicality.[97] More recently, this court declined to set aside a decision despite the court having found that "there exists cogent reasons to review and set aside the decision of the Bid Adjudication Committee (an organ of the first respondent, being eThekwini Municipality) on 20 January 2010 to award the contract in question to the second and third respondents."[98] In refusing to set aside the decision the court (per Swain J) stated as follows:

> "Considering all of the above, I reluctantly conclude in the exercise of my discretion, that although the award of the contract to the second and third respondents was invalid when made, I should decline to set aside the award. To do so at this stage, would be highly prejudicial to the second and third respondents, as well as the ratepayers of the first respondent. The second and third respondents are not guilty of any wrongdoing, and the applicant does not allege that the award was tainted by fraud or corruption. I am enjoined by the Supreme Court of Appeal to exercise my discretion in a case such as the present, pragmatically and practically. To set aside the award at this stage of events would satisfy neither of these criteria."[99]

[113] As stated in *Millenium Waste Management*[100], it is always difficult to deal with the matter where the challenged decision has been acted upon by the parties by accepting the tender and concluding a contract with the tenderer which is -

> "… often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the offer, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable."[101]

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97 *Moseme Road Construction CC & Others, supra*, at para 15
98 *Vukukhanye Personnel Services CC v EThekwini Municipality & Others* (unreported) Case No. 8110/2010 (KZD) handed down on 1 December 2010.
99 *Vukukhanye Personnel Services, supra*, para 33. See also *Chairperson, STC & Others v JFE Sapela Electronics (Pty) Ltd & Others* 2008 (2) SA 638 (SCA) at 649J
100 *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board:Limpopo* 2008 (2) SA 481 at 490C
101 *Millenium Waste, supra,* at 490C-E

[114] In the present instance the applicant and the fourth to eighth respondents are currently operating at the respective ports on the basis of the volumes allocated to them in terms of the tender process arising from the impugned decision, which is now sought to be reviewed and set aside. The operations are founded on valid contracts which the first respondent concluded with each of the parties concerned, including the applicant. As pointed out elsewhere in this judgment, the fourth to eighth respondents are innocent parties in this dispute. Therefore, the practical effect of an order setting aside the impugned decision would certainly be unfair and prejudicial to these respondents and of course, eventually, the tax payer.

[115] The current stevedoring operations in terms of the Stevedoring Agreement had, as at the time when this application was argued (which was January 2011) carried on for approximately five months, presumably on an undisturbed and harmonious footing from the general public interest perspective, I venture to imagine. The period of the Stevedoring Agreement is only two years with an option of a further year extension, at the pleasure and unfettered discretion of the first respondent. The remaining period of the contract was therefore only 19 months.

[116] It seems to me, therefore, that any enforced drastic change at this stage (as envisaged in the applicant's relief sought) to the current order of operation apparently prevailing would not be without devastating practical implications. Indeed, such change would most likely create uncertainty and confusion at all the South Africa's harbours, particularly the port of Durban, understandably the largest in Africa and the southern hemisphere. No evidence is needed to show that the impact of such

disruption would be extremely dire and catastrophic not only for the port operations but, consequentially, also for the economy of the country.

[117] In my view, therefore, upsetting the status *quo* (in the context of the stevedoring operations under the current agreements) in this case was vastly out of proportion to the benefit that such an order would render to the applicant. For this reason alone, the court would have been entitled to exercise its discretion and decline to grant the application. Besides, the other considerations alluded to above further influence my decision in that direction. Indeed, I am of the view that it would not be in the interests of justice to grant the relief sought.

[118] Therefore, considering the matter in its entirety, I am satisfied that the first respondent gave effect to its constitutional obligation to procure the stevedoring services in a cost-effective manner pursuant to a system that was fair, equitable, transparent, competitive and cost-effective, as required of it by section 217(1) of the Constitution, read with section 2(1) of the PPPFA and section 51(1)(a)(iii) of the PFMA. Accordingly, I hold that the impugned decision was reasonable and procedurally fair and, therefore, not reviewable under section 6(2) of PAJA.

[119] Concerning the issue of costs I find, however, that in the circumstances of this case, the costs should not necessarily follow the result. The first respondent committed a procedural blunder (which is elaborated upon in this judgment) on the basis of which the applicant was legally and constitutionally entitled to challenge the impugned decision

made pursuant to that procedure. The application was therefore not a vexatious exercise or abuse of the court process. For that reason, I think it would be unfair to award costs against the applicant as the unsuccessful party. It seems to me that granting no costs order would be a fair and appropriate thing to do in this contest.

[120] In the event, the following order is made:

1. The application for the review and setting aside of the first respondent's decision (more fully described in Part B of the notice of motion) is dismissed.
2. There is no order as to costs.

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SK NDLOVU
JUDGE OF THE HIGH COURT

Appearances:

For the applicant : Mr *A Stewart SC,* with him Mr *M du Plessis*
Instructed by : Edward Nathan Sonnenbergs, Durban

For the first respondent : Mr *CJ Pammenter SC,* with him Mr *DJ Saks*.
Instructed by : Livingston Leandy Inc., Durban

Dates of argument : 9 November 2010; 7 January 2011

Date of Judgment : 30 March 2011