CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 20/16 and CCT 24/16

In the matter between:

AREVA NP INCORPORATED IN FRANCE Applicant

and

ESKOM HOLDINGS SOC LIMITED First Respondent

WESTINGHOUSE ELECTRIC BELGIUM SOCIÉTÉ ANONYME Second Respondent

Neutral citation:	*Areva NP v Eskom Holdings SOC Limited and Another* [2016] ZACC 51
Coram:	Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J
Judgments:	Zondo J (majority): [1] to [48] Moseneke DCJ (dissenting): [49] to [86]
Heard on:	18 May 2016
Decided on:	21 December 2016
Summary:	*Locus standi* — party that did not submit a bid in its own right instituting review to challenge award of tender — not the right party to challenge — no *locus standi*

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg):

1. Condonation is granted to all parties who applied for condonation in respect of their non-compliance with the Rules of this Court.
2. Leave to appeal is granted to both Eskom Holdings SOC Limited and Areva NP.
3. Westinghouse Electric Belgium Société Anonyme is refused leave to cross-appeal.
4. Westinghouse Electric Belgium Société Anonyme's two applications for the admission of further evidence are dismissed with costs including the costs of two counsel.
5. Areva NP's appeal is upheld.
6. The order of the Supreme Court of Appeal and that of the High Court are set aside and the order of the High Court is replaced with the following:
    "(a) The application is dismissed.
    (b) Westinghouse Electric Belgium Société Anonyme is ordered to pay Areva NP's costs including the costs of two counsel."
7. Westinghouse Electric Belgium Société Anonyme must pay Areva NP's costs in this Court and in the Supreme Court of Appeal including the costs of two counsel.

JUDGMENT

ZONDO J (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring):

Introduction

[1] Before us are four applications. Two of them are applications for leave to appeal against a certain decision of the Supreme Court of Appeal. Another one is an application for leave to cross-appeal against part of that decision. The last one is an application for the admission of new evidence. The first application for leave to appeal has been brought by Areva NP Incorporated in France (Areva), a company that is registered in France. The other has been brought by Eskom Holdings SOC Limited (Eskom). The decision in respect of which Eskom and Areva seek leave to appeal is a decision of the Supreme Court of Appeal overturning a decision of Carelse J of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) in favour of Eskom and Areva and setting aside Eskom's award of a certain tender to Areva. The application for leave to cross-appeal has been brought by Westinghouse Electric Belgium Société Anonyme (WEBSA). WEBSA seeks leave to cross-appeal against a part of the decision of the Supreme Court of Appeal in terms of which the Supreme Court of Appeal did not award the tender to WEBSA and, instead, remitted the tender to Eskom to adjudicate it afresh. The application for the admission of new evidence has been brought by WEBSA.

[2] The decision of the High Court was given in a review application brought by WEBSA against Eskom and Areva to have Eskom's decision to award the tender of the replacement and installation of six steam generators in the Koeberg Nuclear Power Station (Koeberg), Western Cape to Areva reviewed, set aside and awarded to it. Carelse J dismissed WEBSA's application with costs. WEBSA then appealed to the Supreme Court of Appeal.

[3] WEBSA had also sought that the Supreme Court of Appeal should award the tender to it after setting it aside and not remit the matter to Eskom to adjudicate the tender afresh. WEBSA's application for leave to cross-appeal is directed at the setting

aside of the Supreme Court of Appeal's decision to remit the tender to Eskom to award afresh. WEBSA seeks an order from this Court awarding the tender to itself. If they are granted leave to appeal, Areva and Eskom seek to have the decision of the Supreme Court of Appeal set aside and the High Court's order restored. Before considering the application for leave to appeal, it is necessary to first set out the background to the matter.

Brief background

[4] Koeberg is the only nuclear power station in Africa. It comprises two units. Each unit has three steam generators. Since 2010 Eskom has been aware of the need to replace the steam generators. They are said to be prone to "Inter Granular Stress Corrosion Cracking". By the end of 2016 one of the units will have been in operation for about 32 years. Eskom considered that by 2018 all the six steam generators would need to be replaced as a nuclear safety priority. The replacement of the generators would cost about R5 billion. The generators can only be replaced during a scheduled shut down in the course of routine maintenance that takes place every 18 months. Eskom intended that the installation and replacement of the steam generators should occur during such a shut down in 2018. For this project, Eskom had to call for tenders.

[5] In or around June 2012 Eskom called for expressions of interest for the replacement of the six steam generators for Koeberg. This was directed to suppliers on its supplier database which would be capable of supplying these services to various consulates, including Brazil, China, India, Korea, Japan and Russia. In the relevant Eskom tender document, an "expression of interest" is defined as a non-competitive enquiry issued/advertised to the external market to establish market interest in offering the required goods, assets or services to Eskom. There was a checklist of mandatory criteria to be completed by each supplier who expressed an interest. Those criteria were to be used to assess each supplier as to whether it qualified to be issued with an invitation to tender. If a supplier answered "No" against any criterion in the checklist, it could be disqualified.

[6] Several interested parties responded to the call for expression of interest. They included Areva and WEBSA. Suppliers who met the requisite mandatory criteria were to be invited to submit bids for the project. Areva and WEBSA were the only companies that met the mandatory criteria.

[7] Eskom then issued the two companies with an Invitation to Tender. Both submitted tenders. There is no indication on the record whether WEBSA was responding in its own right or on behalf of another entity. Their bids were considered by various committees within Eskom. At this stage it was contemplated that the tender could be split between two or more companies. If the tender was split, Lots 1 and 3 could be given to one company and Lot 2 could be given to the other company or vice versa. However, a decision was taken by the Board Tender Committee (BTC) to request the two bidders to submit bids for a composite project covering all the three Lots. They did.

[8] In June 2014 the BTC decided to invite the two bidders to parallel negotiations in regard to the tender. The negotiations took place between 24 June 2014 and 4 July 2014. On that last day the bidders were asked to make their final offers to Eskom by 11 July 2014.

[9] On 11 July 2014 WEBSA submitted a bid under cover of a letter dated 11 July 2014. The letter was written by Mr Luc Van Hulle and co-signed by Mr Frederic Poncelet and Mr Frederik Wolvaardt. Mr Van Hulle is the same official who deposed to WEBSA's affidavits. That letter bore the letterhead of WEBSA. It was addressed to Eskom. The subject of the letter was given as "Westinghouse Offer In response to Eskom Request for Offer Post Negotiations for The Replacement of the Steam Generators at the Koeberg Nuclear Power Station for Units 1 and 2 (Tender no: PSE020; 021 and 022)".

[10] The opening paragraph of the letter reveals that WEBSA was submitting the "Westinghouse Offer" on behalf of Westinghouse Electric Company. The paragraph reads:

> "In response to Eskom Request for Offer Post Negotiations for the Replacement of the Steam Generators at the Koeberg Nuclear Power Station for Units 1 and 2 (Tender no. PSE020; 021 and 022), *Westinghouse Electric Belgium on behalf of Westinghouse Electric Company is pleased to submit the present offer to Eskom*."

The reference to Westinghouse Electric Belgium is a reference to WEBSA. The reference to Westinghouse Electric Company is a reference to Westinghouse Electric Company LLC which is Westinghouse USA. Thereafter, the authors of the letter set out how the offer was structured. It is not necessary to reproduce that part of the letter.

[11] Under the heading "Quality Assurance", the authors of the letter wrote:

> "Westinghouse provides services in accordance with the Westinghouse Electric Company Quality Management System (QMS, Rev. 7). This system meets the requirements of the United States Nuclear Regulatory Commission related to quality control and quality assurance including the requirements set forth in 10CFR50 Appendix B, NQA-1 and also the standards set forth In ISO 9001."

Under the heading "Proprietary Information", the authors wrote:

> "This offer, any financial or other supporting information submitted in connection therewith, and any subsequent communications relating to this offer are property of and contain information which is proprietary and confidential to, Westinghouse Electric Company LLC, and may be used only for purposes of offer evaluation. Accordingly, do not publish, reproduce, transmit, or disclose to others outside your organization any information contained in or submitted in support of this offer without the prior written consent of Westinghouse."

[12] Areva also submitted its final offer on 11 July 2014. On 12 August 2014 the BTC decided to award the tender to Areva.

Review Proceedings

[13] WEBSA was aggrieved by the award of the tender to Areva and instituted a review application in the High Court to have that decision set aside and the tender awarded to it. Eskom and Areva opposed the review application. Mr Van Hulle deposed to WEBSA's founding affidavit in the review application. In the founding affidavit Mr Van Hulle describes himself as Vice President: Marketing employed by WEBSA. For convenience he refers to that entity as Westinghouse or applicant. Mr Van Hulle says in WEBSA's founding affidavit in the High Court:

> "I am duly authorised to depose to this affidavit on behalf of the applicant, and to represent it in the proceedings for the relief sought in the Notice of Motion to which this affidavit is attached. In this regard I attach a resolution marked 'LVH1'.
>
> This application concerns a tender process in which first respondent ('Eskom') invited bids for the provision of new steam generators to be installed in the nuclear reactors at the Koeberg nuclear power plant ('Koeberg'), situated near Cape Town."

[14] Mr Van Hulle explains in the founding affidavit that he was "integrally involved in the formulation and submission of [WEBSA's] bid in response to" the invitation for bids extended by Eskom in 2010. He says that that process was eventually cancelled by Eskom and then the tender in issue in these proceedings was initiated in 2012. Mr Van Hulle states that he was "again integrally involved in the formulation and submission of [WEBSA's] bid in 2012". He says: ". . . I led the [WEBSA] team during the tender process, including the negotiations that took place in June-July 2014".

[15] Mr Van Hulle described the applicant as being Westinghouse Electric Belgium Société Anonyme which he said "is a company registered in accordance with the laws of the Kingdom of Belgium, with its principal place of business at

Rue de L' Industrie 43, Nivelles, Belgium". He says: "It is a subsidiary of Westinghouse Electric UK Holdings Limited, a multi-national corporation. Westinghouse, in South Africa, has its local head office at Eden on Bay, Big Bay, Cape Town". Mr Van Hulle describes WEBSA as the entity that lost the tender to Areva. Eskom seems to have accepted this without any question.

[16] In its answering affidavit in the High Court, Areva said:

> "I emphasise that in the [WEBSA] response, 'LVH26', under the heading 'PROPRIETARY INFORMATION', Van Hulle, Wolvaardt and one Poncelet state:
> 'Our offer, these clarifications and any subsequent communications relating to this offer are the property of and contain information which is proprietary and confidential to, Westinghouse Electric Company LLC…'. viz, Westinghouse USA. From this, it must be deduced, I contend, that the true tenderer was not [WEBSA], but rather Westinghouse USA. This would mean that the applicant has no locus standi in these proceedings."

[17] WEBSA denies Areva's averment that WEBSA was not the true tenderer and that the true tenderer was Westinghouse Electric Company LLC. Mr Van Hulle says that WEBSA was the tenderer. He goes on to say that WEBSA and Westinghouse USA are members of "the Westinghouse group". He adds that WEBSA received the support of other entities in the Westinghouse group. This is WEBSA's defence to Areva's challenge of its *locus standi*.

[18] Later on in its answering affidavit, Areva said:

> "In the first instance it needs to be pointed out that, as stated in paragraph 1.0 of Annexure 'LVH 36': 'The current proposal is a joint effort of Westinghouse Electric Company and Bechtel Power Corporation'. That means the true tenderer is Westinghouse USA, and not [WEBSA], as adverted to above. As also mentioned above, the memorandum of understanding produced by [WEBSA] in the interdict application pursuant to a rule 35(12) notice, shows that Westinghouse USA intended to engage Bechtel as a sub-contractor on the project."

Mr Van Hulle's reply on behalf of WEBSA to this paragraph was to refer to the defence to which reference has been made above.

[19] Annexure "YMP7" to Areva's answering affidavit is a letter of intent addressed to Doosan Heavy Industries & Construction Co Ltd on the letterhead of WEBSA. The author of the letter is Mr Brian G Roberts who describes himself as:

> "Senior Sourcing Specialist Primary Equipment – Steam Generators
> Westinghouse Electric Company LCC."

At this stage it must be remembered, once again, that the reference to "Westinghouse Electric Company LCC" is a reference to Westinghouse USA and not WEBSA. The letter is dated 1 August 2014. That was about 11 days before the BTC was to take a decision as to whom it would award the tender.

[20] In the first paragraph of the letter the author wrote:

> "This letter of intent is to confirm the commitment of Westinghouse Electric Company LLC ('Westinghouse') to purchase Replacement Steam Generators ('RSGs') for Koeberg Nuclear Power station Units 1 & 2 in accordance with reference (a) and to be finalized contract Terms and Conditions. The Purchase Agreement will be issued pending contract award from the customer, Eskom, and finalization of contract Terms and Conditions."

Special attention needs to be drawn to the fact that, although this letter was on WEBSA's letterhead, it makes it clear that it confirms the commitment of Westinghouse Electric Company LLC to purchase Replacement Steam Generators (RSGs) for Koeberg. The terms of the letter do not reflect confirmation of WEBSA's commitment to purchase Replacement Steam Generators for Koeberg. Instead, they reflect Westinghouse USA's commitment to do so.

[21] In regard to the second paragraph of that letter, it is necessary to bear in mind that the reference therein to Westinghouse is a reference to Westinghouse Electric

Company LLC as defined in the first paragraph and not to WEBSA. In the second paragraph the author writes:

> "This letter of Intent is issued as an interim measure to document Westinghouse's intention to award a Purchase Agreement for RSGs to Doosen Heavy Industries & Construction Co, Ltd ('Doosen'). Pending Westinghouse contract award from Eskom, Westinghouse and Doosen shall negotiate in good faith to finalise the Purchase Agreement."

The last sentence of the fourth paragraph makes it clear that Westinghouse Electric Company LLC and not WEBSA was the one expecting to be awarded the tender. It reads:

> "Westinghouse [i.e. Westinghouse Electric Company LLC] and Doosen agree that if Westinghouse is not awarded the tender by August 31, 2014, the subject Letter of Intent shall be void."

[22] Counsel for Areva drew our attention to the letters referred to above in support of his contention that WEBSA has no *locus standi* in these proceedings. He emphasised that what was submitted to Eskom as Westinghouse's final offer on 11 July 2014 was Westinghouse USA's final offer submitted by WEBSA on behalf of Westinghouse USA. He referred to the fact that the terms of the letter said so expressly. He submitted that the Supreme Court of Appeal did not provide any convincing reasons for its decision that WEBSA has *locus standi* in these proceedings.

High Court Decision

[23] The High Court dismissed Areva's challenge to WEBSA's *locus standi*.[1] In arriving at its decision, the High Court made no reference to the fact that in the final offer given to Eskom by WEBSA it was written that that final offer was made on behalf of Westinghouse USA and that that offer and the clarifications that had preceded it belonged to Westinghouse USA. The High Court recorded that Areva's

[1] *Westinghouse Electric Belgium v Eskom Holdings* [2015] ZAGPJHC 315 (High Court judgment).

counsel had referred it to certain passages in the record that suggested that Westinghouse might not have *locus standi.* However, quite strangely, the High Court said that it did not intend to deal with those passages as they did not affect the conclusion to which it had come. One would have thought that the fact that those passages seemed to support Areva's contention on *locus standi* would have been a reason for the Court to deal with those passages rather than a reason for the Court not to deal with them. Assuming that, for example, the High Court was referred to the passages in the final offer which are quoted earlier in this judgment, the High Court was bound to deal with those passages before it could reach a conclusion that was adverse to Areva.

[24] The High Court largely based its decision that WEBSA had *locus standi* on the fact that Eskom treated WEBSA as if it was one of the two bidders. It seems not to have occurred to the High Court that Eskom may have wrongly but *bona fide* treated WEBSA as one of the bidders or that Eskom might have dealt with WEBSA in the manner in which it did because it took WEBSA to be the agent of Westinghouse USA. In any event, how Eskom treated WEBSA is neither here nor there. The question is whether or not WEBSA was a bidder in its own right to the tender. If it was, it had *locus standi*. If it was not, it did not have *locus standi* to institute the proceedings in its own right and not as an agent of the true tenderer.

Supreme Court of Appeal Decision

[25] The judgment of the Supreme Court of Appeal was written by Lewis JA and concurred in by Ponnan, Theron, Petse and Mathopo JJA.[2] On the issue of whether WEBSA had *locus standi*, the Supreme Court of Appeal recorded the parties' contentions. At the end thereof, it referred to a passage in Cameron JA's judgment in *Sandton Civic Precinct (Pty) Ltd*[3] and simply said:

[2] *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd* [2015] ZASCA 208; 2016 (3) SA 1 (SCA) (SCA judgment).

[3] *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg* [2008] ZASCA 104; 2009 (1) SA 317 (SCA); [2009] 1 All SA 291 (SCA).

> "I consider that Westinghouse has established its legal lineage."

For this conclusion it did not offer any reasons. Thereafter, the Court said:

> "Moreover, Areva did not deny that Westinghouse had submitted its first bid in October 2012 and a revised offer in 2014. The references to acting on behalf of Westinghouse USA are mere surplusage and must be disregarded. Areva's argument on Westinghouse's standing must thus fail as it did in the *court a quo*."

I do not think that the Supreme Court of Appeal did justice to Areva's challenge to Westinghouse's *locus standi*. The relevant passages in the final offer submitted to Eskom on behalf of Westinghouse USA were not mere surplusage that had to be disregarded. They were very important parts of the record on which Areva relied to support its contention that WEBSA was not a tenderer in its own name and thus had no *locus standi* to institute the review proceedings.

In this Court

Jurisdiction

[26] This case is about whether Eskom acted lawfully in awarding the tender for the replacement of the six steam generators in Koeberg to Areva. That matter raises constitutional issues and this Court has jurisdiction. Furthermore, whether a litigant has *locus standi* is also a constitutional issue.[4]

Leave to appeal

[27] The tender in issue relates to an important national project. That is the replacement of the six steam generators in Koeberg. Koeberg is the only nuclear power station in the continent. The monetary value of the tender is estimated at about R5 billion. The issue of whether Eskom acted lawfully in awarding the tender to Areva is an important constitutional issue.

[4] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (*Giant Concerts*) at para 27.

[28] There are reasonable prospects of success for the appeal. This can be inferred from the fact that the High Court and the Supreme Court of Appeal reached opposite conclusions on whether Eskom had acted lawfully in awarding the tender to Areva. The High Court answered this question in the affirmative whereas the Supreme Court of Appeal answered it in the negative. On the issue of *locus standi*, too, I think that there are reasonable prospects of success for Areva. Both the High Court and the Supreme Court of Appeal did not adequately address Areva's contention. It is in the interests of justice that leave to appeal be granted.

The appeal

Does WEBSA have locus standi?

[29] Before us counsel for Areva pursued Areva's challenge to WEBSA's *locus standi*. In support of Areva's challenge he referred to the passages in the affidavits and correspondence to which reference has been made above. He submitted that both the High Court and the Supreme Court of Appeal had given unpersuasive reasons for holding that WEBSA had *locus standi*. He referred to *Sandton Civic Precinct (Pty) Ltd* and *Giant Concerts*.

[30] There is some similarity between *Sandton Civic Precinct (Pty) Ltd* and the present case. Sandton Civic Precinct (Pty) Ltd's name is almost identical to that of the entity that had *locus standi* to institute the proceedings in that case, namely, Sandton Civic Precinct Consortium. In the present case WEBSA's name, namely, Westinghouse Electric Belgiuim Société Anonyme, is almost identical to that of Westinghouse Electric Company LLC which Areva contends is the entity that was a tenderer competing with Areva. *Sandton Civic Precinct (Pty) Ltd* falsely claimed that a resolution of the predecessor to the City of Johannesburg that had been passed in November 2000 had sought to alienate a certain property to it.[5] The City of Johannesburg accepted that in law its predecessor's decisions or resolutions were its

[5] *Sandton Civic Precinct (Pty) Ltd* above n 3 at para 11.

own decisions and resolutions. The resolution of November 2000 had been made in favour of Sandton Civic Precinct Consortium.

[31] After a period of five years had lapsed without the implementation of the resolution, the City passed a resolution effectively withdrawing the resolution of November 2000. At that stage Sandton Civic Precinct (Pty) Ltd – and not Sandton Civic Precinct Consortium or its constituents – instituted an application in the High Court to set aside the later resolution and enforce the November 2000 resolution. In the present case WEBSA averred that it was a bidder and lost the tender to Areva. However, it has been shown that Westinghouse Electric Company LLC was one of the two bidders and the bid had been submitted by WEBSA on behalf of Westinghouse Electric Company LLC and WEBSA had not submitted the final offer in its own right. That being the case, it seems to me that WEBSA's statement that it had submitted a bid in respect of the tender and had lost to Areva must be rejected in the same terms in which Cameron JA rejected *Sandton Civic Precinct (Pty) Ltd*'s claim that the November 2000 resolution had sought to alienate property to itself. In that case, Cameron JA rejected that averment as "plainly wrong".[6] In my view, WEBSA should be told the same answer. That is that its statement that it made the bid in its own right is "plainly wrong".

[32] This Court held in *Giant Concerts* that, "where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities".[7] We said: "The own interest litigant must therefore demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned".[8]

[33] Has WEBSA demonstrated the interests that confer standing on it to bring the challenge and the impact the decision to award the tender to Areva had or has on those

[6] Id.

[7] See *Giant Concerts* above n 4 at para 35.

[8] Id at para 43.

interests? I think not. In the present case the only thing that WEBSA said in its founding affidavit in the High Court in support of its contention that it has *locus standi* was that it was one of the two bidders and it lost the bid to Areva. This has been shown not to be true. It also said that it and Westinghouse USA are part of the same group of companies. I deal with this later.

[34] It is abundantly clear from the language of the final offer upon which WEBSA relies as the offer that it made to Eskom in its own right that that offer was submitted by WEBSA on behalf of Westinghouse USA and not in its own right. In the final offer submitted by WEBSA, Mr Van Hulle, who has now deposed to an affidavit in support of the contention that WEBSA submitted the final offer in its own name, wrote:

> " . . .Westinghouse Electric Belgium on behalf of Westinghouse Electric Company LLC is pleased to submit the present offer to Eskom."

This is the offer that was rejected by Eskom in favour of Areva's one. If this does not show that WEBSA submitted the final offer as an agent for Westinghouse USA and not in its own right, then nothing will. There is, of course, also the passage quoted earlier[9] which made it clear that the offer and the other communications were those of Westinghouse USA.

[35] As I indicated earlier, in WEBSA's founding affidavit in the High Court, Mr Van Hulle described WEBSA as a company that is registered in accordance with the laws of the Kingdom of Belgium. He also said that WEBSA is a subsidiary of Westinghouse Electric UK Holdings Limited, a national corporation. In the light of this statement in the founding affidavit, one would have expected that in the replying affidavit Mr Van Hulle would at least explain how it comes about that he signed an affidavit in which he said that WEBSA tendered for the tender in question and lost and yet he was also party to a statement that the offer, clarifications and all

[9] See [20] and [21] above.

communications belonged to Westinghouse Electric Company LLC which is a different legal entity to WEBSA. Mr Van Hulle failed to reconcile these contradictory statements by himself.

[36] While Areva referred to the documentation before the Court to support its assertion that the applicant was not one of the tenderers, WEBSA simply baldly asserted in its replying affidavit that it was a tenderer but did not refer to any documents before the Court to support its assertion. In my view, the reason why WEBSA did not refer to any supporting documentation is that there is no documentation supporting the proposition that it submitted the bid in its own right and not as an agent of Westinghouse USA. Mr Van Hulle says in his affidavit that WEBSA tendered in its own right and yet he wrote and signed the letter of the final offer in which he said that WEBSA was submitting the final offer on behalf of Westinghouse USA. He was obliged to explain these contradictory statements he made but he failed to do so. I, therefore, find that WEBSA did not submit the bid in its own right. This also means that WEBSA did not lose the tender to Areva. For that reason, it cannot be said that the decision to award the tender to Areva "adversely affects the rights" of WEBSA.

[37] WEBSA's other defence is that it and Westinghouse USA are part of "the Westinghouse group". It adds that it received the support of other entities in the Westinghouse group. The answer to this is that, if WEBSA was not one of the two bidders for the tender in its own right and it instituted the review application in its own right and not as an agent of Westinghouse USA, the fact that it and Westinghouse USA are part of the same group of companies cannot help it. This is because WEBSA and Westinghouse USA are two separate legal entities and each one of them bears its own separate rights and incurs its own separate obligations.

[38] When each one of the two separate legal entities acts in its own right, no obligations or rights attach to the other simply by virtue of the fact that they both belong to the same group of companies. This purported defence is no defence at all in

law. Just because company A belongs to the same group of companies as company B does not give any one of the two companies *locus standi* to institute court proceedings in its own right in a matter that only directly affects the other company. So, if company A submitted a bid for a certain tender and lost that tender to company C, company B cannot then institute review proceedings in its own right to set aside the award and to seek an order that the tender be awarded to it just because it and company A belong to the same group of companies.

[39] The proposition implied in WEBSA's second defence is as bad as would be the proposition that, if one brother submitted a bid for a tender in his own right and lost it to a competitor, any of his brothers or sisters may institute legal proceedings in his or her own right to have the award of the tender reviewed and set aside just because the two siblings belong to the same family. The issue here is about separate legal entities. In my view, Eskom's decision to award the tender to Areva did not affect any of WEBSA's rights or interests because WEBSA did not bid for the tender in its own right.

[40] It was said in *Giant Concerts* that the issue of *locus standi* is separate from the merits and will usually be dispositive of an own interest litigant's claim. This Court went on to say that—

> "an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if 'the right remedy is sought by the right person in the right proceedings'."[10]

However, this Court immediately qualified the general principle that an own-interest litigant's challenge of a public decision may be dismissed solely on the basis that the litigant lacks *locus standi*. It said:

[10] See *Giant Concerts* above n 4 at para 34.

> "To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."[11]

[41] It seems to me that, part of what this Court held in *Giant Concerts* was that, where a litigant has failed to show that it has standing, the Court should, as a general rule, dispose of the matter without entering the merits and that it should only enter the merits in exceptional cases or where the public interest really cries out for that. It does not appear to me that this is a case which cries out for that. In saying this, I am not suggesting that on the merits the challenge is necessarily without merit but I do so because: (a) the two bidders appear to have been neck and neck in the competition for the tender; (b) both bidders were accepted as technically capable of doing the job properly; and (c) time is of the essence in regard to the installation and replacement of the steam generators and, if the steam generators are not installed and replaced on time, there may be severe consequences for the country in regard to nuclear energy. Furthermore, Areva has been working on the project for the past two years and there is not much left before the time by when the installation and replacement of the generators is required to have been completed.

[42] In the circumstances I conclude that WEBSA had no *locus standi* to institute the review proceedings in its own right to have the award of the tender to Areva set aside. It would have been entitled to do so as an agent of Westinghouse USA but it did not do so. Indeed, it insisted that it instituted those proceedings in its own name because it had submitted the tender in its own right which I have found not to have been the case. The result, therefore, is that Areva's appeal succeeds and the decisions of both the Supreme Court of Appeal and the High Court must be set aside. The High Court dismissed WEBSA's application on the merits and awarded both Areva and

[11] Id.

Eskom costs. We say that it should have dismissed it for WEBSA's lack of *locus standi* and awarded costs only to Areva and not to Eskom. Therefore, the High Court's order must be replaced with an order dismissing WEBSA's application and awarding costs only to Areva.

[43] Areva's application for leave to appeal included an application for leave to appeal against a decision of the Supreme Court of Appeal dismissing its cross-appeal against the High Court's refusal to award it the costs of three counsel and to limit it to the costs of two counsel. Areva submitted that this is a complex matter of great importance involving a tender with a monetary value of R5 billion. It submitted that, therefore, the employment of three counsel was justified. Access to justice is very important. Courts must constantly guard against making decisions that contribute to making access to justice more difficult than it already is. In my view, although the monetary value of the tender involved is about R5 billion, this matter is not one that justifies the employment of three counsel. One only has to read the judgments of the High Court and the Supreme Court of Appeal to reach this conclusion.

[44] In the light of the issues in the matter, what may be complex are not matters that a lawyer dealing with this matter would have to go into. I am here referring to technical matters relating to nuclear energy. In my view, the legal and factual issues which counsel had to understand in order to argue this case are not so complex as to justify the employment of three counsel. In this Court we are disposing of the matter on the basis of the challenge to WEBSA's *locus standi* by Areva. The *locus standi* point, too, was not complex at all. Having regard to all of the circumstances of the matter, I am not satisfied that the employment of three counsel was justified. Costs for two counsel would have been enough. For these reasons, Areva's appeal in regard to the issue of costs falls to be dismissed.

[45] Just so that there can be no misconception about what the effects or implications are of our conclusion that WEBSA has no *locus standi* and that, consequently, Areva's appeal must be upheld, I wish to make it clear that this

judgment holds that WEBSA was a wrong litigant to challenge Eskom's decision in its own right. This judgment says nothing about whether Eskom's decision to award the tender to Areva was lawful or reasonable or justifiable.

[46] After the hearing in this Court, WEBSA brought an application to lead further evidence in support of its cross-appeal. The result of the conclusion that WEBSA has no *locus standi* is that that application falls to be dismissed with costs including the costs of two counsel.

[47] Only Areva is entitled to costs. Eskom is not entitled to any costs because it did not challenge WEBSA's *locus standi* which is the basis on which the appeal is upheld. Eskom's stance was that it abided by the Court's decision on whether WEBSA had *locus standi*. It only sought to have the Supreme Court of Appeal's decision reversed on the merits. Lastly, all the parties failed to comply with one or other rule of this Court and they all sought condonation for their failure to so comply. No party opposed any other party's application for condonation. We are satisfied that all the applications for condonation should be granted.

Order

[48] In the result the following order is made:

1. Condonation is granted to all parties who applied for condonation in respect of their non-compliance with the Rules of this Court.
2. Leave to appeal is granted to both Eskom Holdings SOC Limited and Areva NP.
3. Westinghouse Electric Belgium Société Anonyme is refused leave to cross-appeal.
4. Westinghouse Electric Belgium Société Anonyme's two applications for the admission of further evidence are dismissed with costs including the costs of two counsel.
5. Areva NP's appeal is upheld.

6. The order of the Supreme Court of Appeal and that of the High Court are set aside and the order of the High Court is replaced with the following:

    "(a) The application is dismissed.

    (b) Westinghouse Electric Belgium Société Anonyme is ordered to pay Areva NP's costs including the costs of two counsel."

7. Westinghouse Electric Belgium Société Anonyme must pay Areva NP's costs in this Court and in the Supreme Court of Appeal including the costs of two counsel.

MOSENEKE DCJ (Bosielo AJ concurring):

Introduction

[49] The judgment of my esteemed colleague Zondo J (main judgment), makes for a crisp and compelling read. It disposes of the dispute between the parties on the only ground that Westinghouse Electric Belgium Société Anonyme (Westinghouse), the second respondent, did not have the requisite standing to initiate the review proceedings in the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court). By this fiat, the main judgment steers clear of deciding the merits of the dispute. I disagree.

[50] Westinghouse had the requisite standing in the judicial review it sought. It had a direct and substantial interest under the common law[12] and an own standing conferred by section 38 of the Constitution brought about by the section 33 right to

[12] Under the common law doctrine of *locus standi*, an applicant must have a sufficient, personal and direct interest in the matter. See, for example, *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 473B-C; *Mgedle v Administrator, Cape* 1989 (1) SA 752 (C) at 758F-G; *Ahmadiyya Anjuman Ishaati-Islamlahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C) at 863G-864B; *PE Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 801 (T) at 804B; *United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415H. Westinghouse has established sufficient interest on the facts, as discussed in the judgment.

just administrative action by Eskom, a public body.[13] In any event, it is not in the interests of justice for a court of final instance to dispose of a matter, of this constitutional magnitude, commercial import and of high public interest, by way of only a technical and dilatory bar as *locus standi*.

Standing

[51] The High Court dismissed out of hand Areva's contention that Westinghouse had no right to institute review proceedings to set aside the adverse tender decision made by Eskom.[14] In the Supreme Court of Appeal, again Areva argued that Westinghouse did not have the necessary standing.[15] Areva submitted that various letters sent by Westinghouse to Eskom revealed that it was acting not for itself but for its associate – Westinghouse USA. Westinghouse answered that it was always the bidder and that all concerned, including Areva, so accepted. The Supreme Court of Appeal found that the arguments by Areva were "surplusage and must be disregarded".[16] It dismissed the claim of standing together with Areva's cross-appeal.

[52] The main judgment holds that the Supreme Court of Appeal was wrong, but I think not.

[13] Section 38 of the Constitution provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

See *Giant Concerts* above n 4 at paras 28-9, which found that the right to just administrative action as set out in section 33 of the Constitution confers standing in terms of section 38 under the Bill of Rights.

[14] High Court judgment above n 1 at paras 22 and 63.

[15] SCA judgment above n 2 at para 67.

[16] Id at para 70.

[53] It is prudent to recall the own standing standard we have laid down as a unanimous Court in *Giant Concerts*. Do pardon the long quotations – they are necessary to disclose the scope of the standard:

> "The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.
>
> Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether this particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if 'the right remedy is sought by the right person in the right proceedings'. *To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.*
>
> Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown."[17]

[54] After meticulously collecting the cases, Cameron J for a unanimous Court summarised:

[17] *Giant Concerts* above 4 at paras 33-5. (Own emphasis).

"These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

(a) To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.
(b) This requirement must be generously and broadly interpreted to accord with constitutional goals.
(c) The interest must, however, be real and not hypothetical or academic.
(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – *the interests of justice must also favour affording standing*.
(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.
(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed."[18]

[55] Later the judgment reverted to the broad ambit of constitutional standing:

"Thus, while I endorse the overall conclusion of the Supreme Court of Appeal, it is important to emphasise that the broad ambit of constitutional standing must be preserved even for own-interest challenges."[19]

[56] Finally, the judgment warned:

[18] Id at para 41. (Own emphasis).

[19] Id at para 47.

> "While constitutional own-interest standing is broad, it is not limitless. *Ferreira* draws the line at hypothetical and academic interests."[20]

[57] Now that the standard for joinder is clear, the High Court and the Supreme Court of Appeal were rightly not impressed by the standing point. They preferred the substantive justice approach which eschews a "technical or strictly-defined" notion of standing in favour of the enquiry whether it would be in the interests of justice to decide the merits of a dispute even if the claimant's standing may be questionable.

[58] The two Courts were correct because Westinghouse and Westinghouse USA acted in concert and Eskom negotiated with them throughout the long and complex tender process without quibbling about their identity and standing. In all that time, Areva too never raised concerns about the identity of Westinghouse. It may be rightly added that even if Westinghouse acted for a disclosed or undisclosed principal, that would confer on it sufficient own interest to review a decision that adversely affects its interest or that of its principal.[21]

[59] Westinghouse's interest here is real, direct and substantial and not merely hypothetical or academic. And unlike in *Giant Concerts*, Westinghouse was not—

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[20] Id at para 50 citing *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 164-5.

[21] In the situation of a disclosed principal, it is generally accepted that the agent cannot institute proceedings against a third party in their own name where there is a contract between the principal and the third party. See for example, *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd* 1978 (1) SA 671 (A) at 680D-F. The Court held in *Sentrakoop Handelaars Bpk v Lourens* 1991 (3) SA 540 (W) at 545D-E that it is not proper for an agent to institute proceedings in his name as a representative or agent of his principal where the claim is against the principal. However, it went on to state that this does not apply where the agent "has the right to sue in his own name". Where an agent has expressly or impliedly agreed to be bound by an agreement, the agent will be liable under the agreement. In *Scholtz v Sieff* 1928 OPD 131 at 133, the Court held:

> "[A]n agent, though contracting as agent for a disclosed or undisclosed principal, may validly acquire for himself the right of bringing action on such contract in his own name. At the same time that right of action, though exercisable by the agent in his own name, is really acquired by him for the purposes of the agency and must therefore necessarily be at the disposal of the principal, and may therefore be revoked by the principal."

Courts have also held that, in some instances, where the agent is held liable against the third party, the agent also has corresponding rights against the third party. See *Natal Trading and Milling Co Ltd v Inglis* 1925 TPD 724 at 726-7; and *Langham Court (Pty) Ltd v Mavromaty* 1954 (3) SA 742 (T) at 745D-G.

> "merely toying with process, or seeking to thwart a propitious public development because it had been made available to someone else . . . . The consequence is that Giant [Concerts] lacks standing, since its interest remains incipient and has never become direct or substantial."[22]

[60] In assessing where the interests of justice lie on standing here, it is relevant that in the earlier Courts and in this Court, Eskom did not claim that Westinghouse lacked own standing. If it did, it would have been surprising. Equally so, it is surprising that Areva now disavows the direct and substantial interest of Westinghouse, its competitor throughout the tender process, that stood ready to assume tender obligations that were to run into several billions of rand. Whatever the correct description of Westinghouse or its relationship with Westinghouse USA is, it was never a thing of substance in the tender process. That little matter changed nothing in the tender or subsequent litigation process and no entity may correctly claim that it had been thereby prejudiced.

[61] Another interests of justice consideration is that the litigants poured their effort into resolving the dispute on the merits. All parties invested so much in presenting their cases on the merits and we heard them on the merits. It is indeed in the public interest for us to pronounce on whether Eskom, a state-owned entity, acted within the prescripts of the Constitution and of the Promotion of Administration of Justice Act[23] (PAJA) or not in awarding a massive tender of great economic and monetary value. In my view, the judgment would have been the stronger if, after disposing of the standing point, it went further to say: "In any event, the appeal on the merits is without substance." This approach speaks to an apex court that will not lightly look away at a potential injustice only because a party may have mixed up its corporate identity within the litigating multinational group of companies.

[22] *Giant Concerts* above n 4 at para 55.

[23] 3 of 2000.

[62] Here in the words of *Giant Concerts*, "broader concerns of accountability and responsiveness may require investigation and determination of the merits".[24] More so, on the facts, the work to be performed under the tender is plainly urgent. A decision on standing only will almost inevitably attract fresh litigation and may render the tender useless. That could hardly be in the interests of justice.

[63] For all these reasons, the main judgment should have found that Westinghouse has the requisite own standing and should have reached and decided the merits of the appeal by Areva and counter-appeal by Westinghouse.

Merits

[64] The view I take on standing compels me to look at the merits of the appeal and the counter-appeal. This being a minority judgment, I do so only in pithy terms. But first a brief background.

Background

[65] The process under review began in 2012 when Eskom called for expressions of interest in a tender process to replace and install six steam generators at Koeberg. The generators in issue are prone to Inter Granular Stress Corrosion Cracking and this necessitates their replacement. Koeberg comprises of two units; by the end of 2015, both units would have been in operation for 30 years. Eskom considered that they would need to be replaced by 2018 as a nuclear safety priority.

[66] An independent consultant audited the tender invitations in June 2012, and shortlisted prospective suppliers. Only Areva and Westinghouse qualified to make bids. A non-negotiable requirement of the tender was that Areva and Westinghouse be able to meet the 2018 shutdowns (referred to as the X23 outage). At the start of the process, when Eskom invited expressions of interest in the tender, the tender was divided into three lots. It was envisaged that different lots would be awarded to different bidders. The Invitations to Tender stated:

[24] *Giant Concerts* above n 4 at para 34.

> "The tender evaluation process will be based on evaluating the overall value to Eskom rather than the tendered prices only. Eskom reserves the right not to award this tender to the highest ranked or highest scoring tender, as it needs to leverage or align its procurement practices to driving socio-economic development objectives that are enshrined in various government policies such as Broad Based Black Economic Empowerment (BBBEE), Plan Industrial Policy Action, and the New Growth Path. Preference will be given to responses that score high in these areas."

[67] The invitation to tender also provided that Eskom reserved the right to conduct a further procurement process through negotiating with bidders, even after the evaluation process, provided that it had the permission of the Eskom Board of Directors or the relevant delegated authority.[25]

[68] Eskom's Board Tender Committee (BTC) was delegated with the authority to make the final determination on the tender award. The initial evaluation of the tenders was referred to an in-house technical committee. Its role was to assess the bids with reference to the bid criteria. The technical committee recommended that Westinghouse be awarded the contract for two lots (Lot 1 and 3), as it obtained the highest scores for these lots. And Lot 2 was recommended to be awarded to Areva. These recommendations were communicated to the BTC. In February 2013, the BTC, after considering these recommendations, concluded that it did not have the expertise to make a final determination in respect of the bids. The BTC resolved to appoint a Swiss firm, AF-Consult Switzerland Limited (AF-Consult) to advise on technical matters.

[69] On 12 August 2013, the BTC considered AF-Consult's report. The report recommended that Eskom should take into account strategic considerations which included previous experience of Koeberg and Eskom with suppliers. The report also recommended awarding the tender to one supplier. Pursuant to AF-Consult's recommendations, the BTC decided that the technical bids should be reopened. On

[25] SCA judgment above n 2 at para 14.

13 December 2013, Eskom invited Westinghouse and Areva to submit composite bids for the three lots. The BTC decided to appoint a team that would hold parallel negotiations with the bidders.

[70] On 13 June 2014, Areva and Westinghouse were invited to participate in negotiations with Eskom's team. An external negotiator, Mr Koenig, was appointed by Eskom to facilitate the process, along with independent auditors and consultants. Negotiations commenced between 24 June and 4 July 2014. On 11 July 2014, Areva and Westinghouse submitted their final offers. Eskom then required an unconditional acceptance of its key commercial terms by 22 July 2014. On 22 July 2014, Areva submitted a schedule indicating that it would meet the scheduled deadline, three months ahead of time.

[71] From 19 July to 7 August 2014, the merits of the two offers were considered by various bodies within Eskom. On 12 August 2014, the BTC in its meeting decided by way of a secret ballot that the contract would be awarded to Areva. The BTC then sent a letter to the Minister of Public Enterprises explaining the processes that had led to the decision and the reasons for the decision. On 15 August 2014, Areva was told that its bid had been accepted.

High Court

[72] Dissatisfied with the decision, Westinghouse sought a review in the Gauteng Local Division High Court by way of urgent application. It attacked the tender process and sought an order setting aside the tender award and in the event that such order is granted, the tender be awarded to it. Both Eskom and Areva opposed the application. Carelse J dismissed the application with costs including the costs of two counsel.[26]

[26] High Court judgment above n 1 at para 65.

[73] The High Court dealt with the alleged irregularities. Westinghouse contended that there were six additional criteria introduced during the negotiations that were procedurally unauthorised and extraneous. Westinghouse further complained that it had not been informed how these considerations would be included in the matrix of factors that would be taken into account. The Court found that it is not in issue that these considerations were taken into account and there is no suggestion that these strategic considerations were not also applied to the evaluation of Areva's bid. The Court found that there was no suggestion by Westinghouse prior to the parallel negotiations or even during the negotiations that the strategic considerations were extraneous or that it did not understand them. Neither did Westinghouse seek clarity on what these considerations were. Instead, Westinghouse took part in the negotiations without even whispering a complaint. The Court held the tender process to be procedurally fair. It also held that there was nothing to support the submission that the BTC's final decision was arbitrary or capricious.

Supreme Court of Appeal

[74] Westinghouse appealed against the High Court's substantive order. Areva cross-appealed against the High Court's costs order. It wanted a costs order that included all three of its counsel. The Supreme Court of Appeal had to determine whether the award followed an unlawful tender process and whether Westinghouse had standing to institute the application or pursue the appeal.

[75] The Court looked at whether the BTC was entitled to take into account what it termed strategic considerations. It found that the answer to this question lay with the bid evaluation criteria. If the strategic considerations fell outside the criteria, and if any one of the considerations was taken into account when it should not have been, then that would be sufficient to vitiate the decision. The Court found that the BTC resorted to strategic considerations without making these known to either Westinghouse or Areva, and without making them part of the bid evaluation criteria. It held that the process appeared to be fundamentally unfair. The Court further found that the strategic considerations by the BTC in awarding the tender to Areva made the

decision unlawful in terms of section 6(2)(e)(iii) of PAJA. Section 6 provides that a court or tribunal may review an administrative action if it was taken because of irrelevant considerations were taken into account or relevant considerations were not considered.[27]

In this Court

Areva's submissions

[76] Areva was adamant that, if leave were granted, the appeal has reasonable prospects of success as intimated by the conflicting judgments between the High Court and the Supreme Court of Appeal. It added that the correct determination of this dispute is of national significance. Should the tender process and decision be set aside, it will be impossible for the X23 deadline to be met. Then Eskom, and South Africa, would have to make a difficult choice between shutting down Koeberg and undermining the integrity of the national power grid, or continuing to operate the steam generator units with the risk, however remote, of a nuclear incident.

[77] Areva also said that the Supreme Court of Appeal erred and misdirected itself by finding that the strategic considerations fell outside the bid evaluation criteria. It submitted that the Supreme Court of Appeal failed to give full and proper consideration to the actual bid evaluation criteria.

[78] Areva contended that the strategic considerations, as well as the schedule float, were considerations either explicit or reasonably to be read as implicit in the bid

[27] Section 6(2)(e)(iii) of PAJA provides:

> "A court or tribunal has the power to judicially review an administrative action if—
>
> . . .
>
> (e) the action was taken—
>
> . . .
>
> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered."

evaluation criteria,[28] and were therefore matters which could be considered properly by the BTC. Areva added that it is the invitations to tender that contain the substance of the tender requirements. Areva submitted that the parallel negotiations were based on the invitations of interest and the criteria contained therein.

Eskom's submissions

[79] Eskom argued that the Supreme Court of Appeal's finding that it made a concession that the strategic considerations did not form part of the evaluation is not borne out by Eskom's version expressly set out in its opposing affidavit, and the argument advanced on behalf of Eskom in the Supreme Court of Appeal.

[80] It submitted that the strategic considerations that were taken into account by the BTC fell within the evaluation criteria. In the event that the strategic considerations did not form part of the evaluation criteria, their consideration nevertheless did not constitute a material departure from the evaluation criteria. Those considerations were directed at achieving Eskom's purpose of procurement. Eskom therefore submitted that Westinghouse failed to show that taking the strategic considerations into account constituted a material departure from the evaluation criteria. Eskom argued that to the extent that the considerations constituted a deviation from the bid criteria, the deviation by the BTC was justifiable in the circumstances of the present case.

Westinghouse's submissions

[81] Westinghouse observed that it was the frontrunner throughout the tender process. It noted that it was only when Eskom included additional strategic considerations at the final stage of adjudication that Areva was awarded the tender. This, despite the fact that Westinghouse was the lowest priced bidder. Although Eskom had reserved the right not to award the tender to the highest-ranked bidder

[28] It relies on jurisprudence on the interpretation of documents in *Novartis SA v Maphil Trading* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) at paras 24-34; *Bothma-Batho Transport v S Bothma & Seun Transport* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) at paras 10-2; and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

based on its development and empowerment objectives, it does not mean that Eskom was authorised to employ other considerations in awarding the tender. Westinghouse repeated that the Supreme Court of Appeal was correct in finding that the BTC's inclusion of strategic considerations in awarding the tender was unlawful, and vitiated the tender award. It submitted that strict compliance with the procurement process was necessary for the process to be lawful.

Conclusion

[82] On the merits, I think Eskom was truly meticulous and proper in its assessment of the bids. It resorted to independent interlocutors to help it assess the technical strength of the respective bids. Here there was no suggestion in evidence or argument that the BTC was actuated by malice, irrationality, corruption or other improper motive.

[83] I am unable to agree that the strategic considerations by the BTC in awarding the tender to Areva made the decision unlawful because irrelevant considerations were taken into account or relevant considerations were not considered. The evidence suggests that the process was a hallmark of careful consideration of all relevant factors.

[84] Westinghouse's claim that certain vital strategic tender requirements were irregularly considered mid-stream is not supported by a careful evaluation of the tender process. In my respectful view the Supreme Court of Appeal erred by finding that the strategic considerations fell outside the bid evaluation criteria. Had the Supreme Court of Appeal given full and proper consideration to the actual bid evaluation criteria, it should have found that the strategic considerations were integral to the bid evaluation criteria or at the very least, could be properly inferred from the bid evaluation criteria.

[85] That must have been the understanding of Westinghouse too. As the High Court rightly observed, there was no suggestion by Westinghouse prior to the parallel negotiations or even during the negotiations that the strategic considerations were extraneous or that it did not understand them. Neither did Westinghouse seek clarity on what these considerations were. Instead, Westinghouse took part in the negotiations without even whispering a complaint.

[86] In the view I take, the tender process was procedurally fair. I would have upheld the appeal of Areva with costs and dismissed all counter-appeals with costs.

For Areva:	P Hodes SC with D Goldberg and D Simonsz instructed by Dentons Incorporated as Kapditwala Inc
For Eskom:	V Maleka SC with N Mayet and H Rajah instructed by Mchunu Attorneys
For Westinghouse:	J Gauntlett SC with D Borgström and L Kelly instructed by Webber Wentzel