



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT**

CASE NO: EL789/2020

In the matter between:

SKG AFRICA (PTY) LIMITED

Applicant

and

ESKOM HOLDINGS SOC LTD

First Respondent

ROKEWOOD INVESTMENT HOLDINGS (PTY) LIMITED

Second Respondent

SECRIVEST TWENTY (PTY) LTD

Third Respondent

NVEST PROPERTIES LTD

Fourth Respondent

JUDGMENT

LOWE J

INTRODUCTION

1. In this matter applicant ("SKG" or "applicant" wherever convenient) seeks to review three tender processes taken by first respondent ("Eskom") for office accommodation in East London.
2. The first tender was an invitation for 1200m² office space in East London (tender no ELS-5796), which was issued by Eskom on 17 May 2019 ("5796") and cancelled on or before 10 September 2019.

3. The second tender was an invitation for 1200m² office space in East London (tender no ELS-5818), which was issued by Eskom on 19 September 2019 (“5818”), this for the same office space required in terms of 5796 and was purportedly issued as a result of the cancellation of 5796 aimed at replacing same. 5818 was awarded to second respondent (“Rokewood”).
4. The third tender was an invitation for 980m² office space in East London (tender no ELS-5817), which was issued by Eskom on 19 September 2019 (“5817”) and cancelled on or before 9 January 2020.
5. In respect of 5796, applicant seeks an order that Eskom’s decision, which resulted in the cancellation of 5796 as well as the administrative action in pursuance of that cancellation, be reviewed and set aside.
6. In respect of 5818, applicant seeks an order that Eskom’s decision, to award the tender for the supply and letting of the accommodation to Rokewood and all the administrative action which resulted in the award and in pursuance thereof be reviewed and set aside.
7. In respect of 5817, applicant seeks an order that Eskom’s decision to cancel the tender for the said office accommodation and all the administrative action, which resulted in the cancellation, be reviewed and set aside.
8. An order is also sought that the lease agreement concluded between Eskom and Rokewood, pursuant to the award in 5818, be set aside. In respect of 5818 (the only office space in fact awarded and in respect of which a contract

was concluded between Eskom and Rokewood), applicant seeks further, upon the setting aside of that award, relief that the award be substituted with an award of the tender to SKG; alternatively, that it be remitted for reconsideration; alternatively, that Eskom be directed to commence a new tender process under 5818 together with an award within six months from the date of order.

9. Tender 5818 was awarded and a contract concluded between Eskom and Rokewood, nearly three years ago which lease expires shortly, something about which much more will be said in due course.
10. The application in this matter was originally launched in 17 August 2020, more than two years ago. Applicant did not seek interim relief, and with some preliminary skirmishes, one particularly relevant to the production of the record, the merits of the matter, after an opposed amendment application, came before me on the 17th and 18th November 2022, I reserving judgment.
11. In respect of the three tenders referred to it is useful for a proper understanding of the argument in this judgment to set out the time line relevant.

5796

12. On 17 May 2019 first respondent issued tender 5796 for the said 1200m² grade A or higher rated office space in Beacon Bay, East London.

13. The closing date for the submission of bids was 28 May 2019 at 10h00. A tender validity period of twelve weeks from closing date applied within which the tender had to be finalised.
14. It was provided that a submission of a tender was deemed to be inclusive of acceptance of the first respondent's standard conditions of tender.
15. On 9 September 2019, and by way of letter from first respondent, applicant was advised that 5796 would be cancelled and re-issued in that:

“... the adjudication process of this bid has not been concluded as such and as a result of the tender validity of the submissions have expired” (sic)
16. The notice of expiry of 5796 was formally published on 10 September 2019, applicant being advised of the formal expiration and that a new tender would be tendered on 18 September 2019.¹

5818

17. A new tender was issued on 19 September 2019 as ELS-5818. This was for approximately 1200m² grade A or higher rate building or office space in Beacon Bay, East London. The closing date for the submission of bids was 15 October 2019 at 10h00 and similar to the last the submission of the tender was deemed to be such as to include and accept the application of first respondent's standard conditions of tender.

¹ This communication was by letter from first respondent to applicant signed by the procurement manager.

18. At this stage first respondent emphasises that the standard conditions provided amongst other things, that alternative tenders could be submitted only if a main tender was also submitted and only if this was permitted in the invitation to tender.
19. The invitation to tender stated amongst other things at 1.13 under the rubric "*alternative tenders*" that "*alternative tenders are not allowed*".
20. The tender was subject to functionality (technical) evaluation and price evaluation as set out in the invitation to tender whilst "*tenant installation cost*" was payable by first respondent to the successful bidder, it being stated "*tenant installation costs where applicable will be contracted to the successful bidder*". This was also clarified in a letter from first respondent which stated "*tenant installation costs will be paid by Eskom as a once off payment to the successful bidder. Evaluation will be based on the price for accommodation, parking bays and Operational costs only.*"
21. 5818 was evaluated and adjudicated and factually was awarded to Rokewood on 30 December 2019. This was contained in a letter of acceptance by Eskom to Rokewood.
22. It is this tender, 5818, which is the central dispute in this matter and in respect of which applicant contends it should have been the successful tenderer.

5817

23. This tender was issued on the same date as 5818 for approximately 980m² of grade A or higher rated office space in Beacon Bay, East London, the relevant and material terms being similar to 5796 with the closing date of 8 October 2019 a validity period of ninety days from closing date and submission being acceptance of the standard conditions of tender which included the provision that:

“Eskom may cancel the tender process at any time prior to the formation of a contract and will give written reasons for the cancellation of the tender upon written requests to do so.”²

24. On 9 January 2020 first respondent issued a notice of “*cancellation*” in respect of 5817 on the grounds that after careful deliberation and re-evaluation of the office space required, the said 980m² of office space, subject matter of the tender, was no longer required. This was contained in a letter from Eskom to applicant informing applicant that first respondent withdrew the invitation to tender in respect of 5817. The letter is from the procurement officer and dated 9 January 2020.
25. It will be noted that the offer had in fact expired from a time point of view ninety days from closing date on 8 January 2020.

² Clause 1.6.1 of the Standard Conditions.

THE APPLICATION

26. As mentioned above the application was issued on 17 August 2020 served by applicant on first respondent on 8 September 2020. Applicant sought delivery of the record of the proceedings sought to be set aside within fifteen days of service, being effectively 30 September 2020.
27. First respondent did not comply with this fifteen day period resulting in applicant launching an interlocutory application to compel seeking an order directing first respondent to deliver "*the complete record of proceedings*" in respect of the open tenders including specifically specified documents.
28. This was, put shortly, opposed apparently on the ground that applicant, said first respondent, was only entitled to the relevant portions of the record. On 11 February 2021 the court made an order by agreement between the parties, the exact contents of this which will be set out in due course hereafter, as I am obliged to decide the costs issue relevant to that application which were reserved.
29. It suffices to say that the relevant portion of the record was delivered and then supplemented on 12 March 2021. Subsequently the matter was set down for adjudication in respect of the record itself.
30. The review application was initially set down for hearing on 21 October 2021 but on 13 October 2021 was removed from the roll by a directive of the Judge President, the court to first consider an amendment to the notice of motion in

respect of an additional prayer for relief in terms of section 9 of PAJA. This was pursuant to SKG having launched an application to amend its notice of motion which was opposed. This was set down for hearing on 24 March 2022 and the amendment was granted, and finds its way into the notice of motion as paragraph 9 thereof.

31. Whilst this will be referred to more fully hereafter, if necessary, SKG raised the possibility of needing an extension of time in its founding affidavit.³ In short, SKG alleges having become aware that its bid for 5818 was unsuccessful on 14 January 2020, but not the reasons therefor. In summary, it is argued that the 180 time period in terms of section 7(1)(b) of PAJA only commenced to run once it became aware of the reasons for the impugned decision. It is alleged that on 16 March 2020 Eskom made available some documentation relevant to the issue, and that the earliest possible date relevant to the running of the 180 day period was 16 March 2020, the application launched on 17 August 2020, it being argued that this was then within the 180 days prescribed by PAJA.

THE GROUNDS OF ATTACK IN RESPECT OF 5818

32. The grounds for challenge in respect of 5818 are limited in respect of applicant's argument to the issue of "*price*".
33. It is alleged that there are two aspects to this challenge, firstly it being contended by SKG that when a tender invitation does not specify a specific or

³ Review papers 47 and 91.

fixed lease area but instead requires an “*approximate*” area, then the bids should be evaluated on price per square meter as opposed to the total price.

It is said that this is necessary in order to comply with the provisions of section 217 of the Constitution.

34. The second challenge is that it is alleged that when Eskom deducted the tenant installation costs (“TIC”) from Rokewood’s bid price it “*should have done the same in respect of SKG’s bid price*”.
35. The second basis of the challenge in the papers relevant to the acceptance of the award after expiry of the validity period was not pursued in argument.
36. In respect of the approximate lease area issue, in the tender invitation, it was common cause, that the invitation to tender read as follows:

“A lease agreement for ± 1200m² office space of Grade A or higher rated building in the Beacon Bay, East London area.”

37. The lease was to run until 31 January 2023.
38. The tender invitation provided for the manner in which points would be allocated for the said office space which, argued applicant, in its terms did not make sense. This was based on the submission that where bidders offer related to space of between 1000m² and 1250m² they would score ten points, the difference between the upper and lower acceptable floor space being 250m². This it was said was significant having a substantial effect on the total price. It was alleged that the bidder with the smallest space would in most

circumstances have a less expensive total price despite the fact that the rate per square meter may in fact be higher. This it is alleged is what happened in the present matter.

39. It is argued that it is also common cause that Rokewood's bid provided for 1045m² of office space at a rate of R115,00 (vat exclusive) per square meter and that SKG's bid provided for 1200m² office space at a rate of R100 (vat exclusive) per square meter.
40. Comparing the two tenders overall pricing, on the face of it, the Rokewood bid was more cost effective overall than was that of SKG.
41. It is thus that SKG suggests that the overall comparison is inappropriate and that the only fair constitutional approach is to, as it puts it, compare apples with apples and not overall pricing relevant to different square meter areas.
42. Put otherwise, SKG submits that where the space required is not fixed (approximate) it is incumbent upon the evaluators to evaluate and compare prices per square meter instead of total price. It is alleged that this is entrenched in the values of section 217 of the Constitution being fairness, equality and cost effectiveness.
43. Reference is made in this regard to **Premier Free State and Others v Firechem Free State (Pty) Ltd⁴; All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African**

⁴ 2000 (4) SA 413 (SCA) at [30].

Social Security Agency and Others⁵, emphasising that in adjudicating tenders this must relate to comparable offers, the tender to speak for itself, thus competitors to be treated equally, tendering for the same thing.

44. The argument, put differently, is that Eskom was not required to alter the office space but consider the price per square meter, not the bottom line, and that if the smaller space offered by Rokewood was more attractive than the price Eskom could and should have approached SKG to take up the space offered by Rokewood. It was argued that SKG's bid was "*more cost effective*" than Rokewood's and thus had to be awarded to it this being reviewable.⁶
45. The second argument related to the TIC issue.
46. SKG argues that the second reason why SKG's bid was more cost effective than that of Rokewood was that when Eskom deducted the TIC from Rokewood's bid price it should have treated SKG's bid equally.
47. Both SKG's and Rokewood's bids provided for tenant installation. In respect of SKG's bid, tenant installation was offered at R1400 per square meter, this being amortised into the rental amount or so SKG argues. Whilst this is denied the dispute turns on the wording of the SKG bid paragraph (k) to which I will revert hereafter.

⁵ 2014 (1) SA 604 (CC) at [39].

⁶ **All Pay** (*supra*) at [25].

48. In respect of Rokewood's bid, tenant installation was offered at a rate of R6,24 per square meter. In point of fact this is irrelevant as this was deducted from the prices tendered by Eskom and added to its own costs for TIC.
49. It is thus argued that the total Rokewood bid tender was R6 350 709,77. The total excluding vat is R5 522 356,32. It is argued that the "*tender price*" of Rokewood's bid is reflected as R6 080 748,65 in the evaluation report whilst the "*contract price*" is reflected as R5 287 607,52. The difference between the two amounts referred to above is R234 748,80 (R5 522 356,32 minus R5 287 607,52).
50. It is argued that the difference is explained by accepting that the R234 748,80 referred to above reflects that this is the amount of the TIC included in the bid. It is argued that this does not relate to the R6 520,80 allowed for tenant installation in the Rokewood price.
51. That is not so much the point, it being argued that Eskom should, then having deducted TIC from the Rokewood bid, also have deducted SKG's TIC from the total contract price. Had it done so and because SKG's tender for TIC was substantially higher than that offered by Rokewood this would have resulted in SKG's bid being substantially less expensive.
52. It is argued that it is common cause that because Rokewood included tenant installation in its bid, Eskom deducted this evaluating it at an amount of R5 287 607,52. About this there is no dispute. SKG's bid also, argues SKG, included TIC and it is argued that if that TIC is deducted the result is

R3 550 300,80 substantially less than Rokewood. For this to be correct one has to accept that the tenant installation was amortised in the SKG bid.

53. SKG's submissions in respect of 5818 itself stand or fall on these two points.

LEGAL FRAMEWORK

54. In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, SASSA and Others*⁷ (the Court referring to *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁸) stated as follows:

“Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1).”

55. Section 217(1) of the Constitution provides that where an organ of state in the National, Provincial or Local sphere of Government contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. Section 217(3) provides for

⁷ 2014 (1) SA 604.

⁸ 2007 (3) SA 121 (CC) at para 3.

legislation with a framework to implement a preferential procurement policy that advances persons previously disadvantaged by unfair discrimination.

56. This is echoed in section 38(1)(a)(iii) of the Public Finance Management Act, 1 of 1999 (**the PFMA**) which provides that an accounting officer of a department should ensure the department maintains a procurement system that is fair, equitable, transparent, competitive and cost effective. Regulations 16A(6)(2) of the Treasury Regulations issued in terms of section 76 of the PFMA, sets out that procurement through a bidding process should provide for (inter alia) the adjudication of bids through a bid adjudication committee; the establishment, composition and functioning of bid specification, evaluation and adjudication committee; and the approval of bid evaluation and adjudication committee recommendations.
57. The Preferential Procurement Policy Framework Act 5 of 2000 (**the PPPFA**) is the national legislation prescribing the framework within which public procurement policy must be implemented in terms of Section 2(1)(b)(ii) of the PPPFA read with regulation 6 of the Preferential Procurement Regulations, 2017 issued by the Minister of Finance in terms of Section 5 of the PPPFA. Tenders for goods and services with a rand value of above R30,000.00 and up to R50 million must be adjudicated according to an 80/20 preference points system. In practice this means that 80 out of 100 of the points are allocated for price and the lowest acceptable tender will score full marks, i.e. 80 points.
58. Only "*acceptable bids*" are scored during the scoring phase of the bid evaluation process. An acceptable bid is defined in the PPPFA as a bid that

conforms in all respects with the conditions of tender. Bid offers that do not comply with the tender requirements are usually disqualified during the initial phase of the tender process (as being “non-responsive”).

59. Once all the acceptable tenders are scored, tenderers are ranked according to the points scored for price and preference. Section 2(1)(f) of the PPPFA provides that a tender must be awarded to the highest scoring bidder, unless there are lawful grounds to award the tender to another bidder.
60. The evaluation and award of a tender, in this context, is administrative action implicating constitutional issues and is reviewable under PAJA⁹.
61. In ***WDR Earthmoving Enterprises & Another v The Joe Gqabi District Municipality & Others*** the following was stated¹⁰:

“[29] The third respondent therefore correctly determined that the appellants had not complied with the obligation to submit returnable documents, being audited annual financial statements for three years. However, whether the tender offer of the appellants was correctly declared as non-responsive has to be considered in the context of the decision in *Dr JS Moroka Municipality & others v Betram (Pty) Ltd & another* [2013] ZASCA 186; [2014] 1 All SA 545 (SCA).

[30] In *Moroka* para 10, it was held that it was for the municipality and not the court to decide the prerequisites for a valid tender. A failure to comply with prescribed conditions would result in a tender being disqualified as an acceptable tender under the Act, unless those conditions were immaterial, unreasonable or unconstitutional. With reference to the decision in *Minister of Environmental Affairs and*

⁹ ***Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board, Limpopo Province & Others*** 2008 (2) SA 481 (SCA) [4]; ***Steenkamp NO v Provincial Tender Board, Eastern Cape*** 2007 (3) SA 121 (CC) [21].

¹⁰ (392/2017) [2018] ZASCA 72 (30 May 2018)

Tourism & others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism & others v Smith 2004 (1) SA 308 (SCA) para 31, the court noted that as a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power, if it has been afforded the discretion to do so.

[31] It was held at para 14, that in the absence of any discretion in the relevant legislation or regulations, a discretion to condone a failure to comply with a peremptory requirement was entirely dependent upon a proper construction of the documents forming part of the tender invitation. In the absence of any specific provision in the tender invitation, or the various documents included therewith, providing for a discretion to be afforded to a municipal official or committee to condone a failure to comply with any prescribed condition of tender, the failure could not be condoned.

[32] The dictum in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) para 17 that:

'[O]ur law permits condonation of non-compliance with peremptory requirements in cases where condonation is not incompatible with public interest and if such condonation is granted by the body in whose benefit the provision was enacted.'

was disapproved of at para 18, on the basis that it was inconsistent with the decision in *Pepper Bay*, but also offended the principle of legality.

[33] In *Overstrand Municipality v Water and Sanitation Services South Africa (Pty) Ltd* [2018] ZASCA 50 para 50, this Court held that it was not necessary on the facts of the case to resolve the apparent differences in the decisions in *Millennium* and *Moroka* and stated the following:

'I am alert to the debate concerning the possible sufficiency of substantial or adequate compliance with what, in conventional terms, is described as mandatory requirements. One should also guard against invalidating a tender that contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in tender documents. In the present case the non-compliance is not of a trivial or minor nature.'"

62. In addition clearly the question of **standing** in respect of Applicants seeking in any event the setting aside of the tender to Rokewood, even if unsuccessful in its main relief, is to be determined in its favour as set out in *WDR supra*¹¹ :

“[13] However, in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* [2012] ZACC 28; 2013 (3) BCLR 251 para 29, the Constitutional Court held that:

'PAJA, which was enacted to realise s 33, confers a right to challenge a decision in the exercise of a public power or the performance of a public function that “adversely affects the rights of any person and which has a direct, external legal effect”. PAJA provides that “any person” may institute proceedings for the judicial review of an administrative action. The wide standing provisions of section 38 were not expressly enacted as part of PAJA. Hoexter suggests that nothing much turns on this because “it seems clear that the provisions of section 38 ought to be read into the statute”. This is correct.'

It then added at para 30 that 'adversely affects' in the definition of administrative action:

'. . . was probably intended to convey that administrative action is action that has the capacity to affect legal rights, and that impacts directly and immediately on individuals. The effect of this is that . . . an own-interest litigant, had to show that the decisions it seeks to attack had the capacity to affect its own legal rights or its interests.'

[14] The Constitutional Court added, at para 32, that in determining a litigant's standing:

'. . . we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified.'

It summarised the position at para 43, in the following terms:

'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.'

[15] The standing of the appellants has to be determined by considering whether the award of the tender to the fourth respondent would have a

¹¹ Paragraphs [13] to [18]

direct effect upon the interests, or potential interests of the appellants, without regard to whether the decision was valid or not. It has to be assumed that the challenge the appellants wish to bring is justified.

[16] I agree with the submission by the appellants that a declaration that a decision on whether the fourth respondent's tender offer was non-responsive, would directly affect their rights. In the event of a decision against the fourth respondent, the tender process would have to be recommenced as the only responsive tender offers were those of the appellants and the fourth respondent. The appellants and the fourth respondent together with any other interested parties, would then be entitled to compete for the tender. The appellants therefore have standing to seek the review and setting aside of the declaration of the fourth respondent's tender offer as responsive, as also the award of the tender to the fourth respondent.

[17] The full court accordingly erred in concluding that the standing of the appellants to challenge the award of the tender to the fourth respondent, was determined by the finding that the appellants' bid was non-responsive. Its reliance upon *Rodpaul Construction CC v Ethekweni Municipality* 2014 JDR 1122 (KZD) was misplaced. The statement in *Rodpaul*, at para 52, that:

' . . . only a compliant tenderer acquires the right to challenge an award. At best a non-compliant tenderer may appeal to the authority before expiry of the tender notice to waive strict compliance.'

is too broadly cast and does not correctly reflect Canadian law, from which it was said to be derived.

[18] In *M.J.B. Enterprises Ltd v Defence Construction* (1951) [1999] 1 SCR 619 paras 58 and 60, the Supreme Court of Canada held that the submission of a tender in response to an invitation to tender may give rise to contractual obligations (contract A), distinct from the obligations associated with the contract to be entered into upon the acceptance of a tender (contract B), depending upon the intention of the parties. Where the party calling for tenders, awards contract B to a non-compliant tenderer, then a tenderer who submitted a compliant bid, would suffer the loss of contract B and would be entitled to damages in the amount of the profits it would have realised, had it been awarded contract B. It is in this context that only a compliant tenderer would have locus standi to institute an action for damages. The decision has no application to the present dispute."

THE APPROACH TO APPLICATIONS

63. In general terms a Court can entertain motion proceedings when there are no genuine disputes of fact.
64. Disputes of fact which are discerned in any application are dealt with in terms of Rule 6(5)(g) which permits the hearing of oral evidence in appropriate circumstances.
65. Reviews of this nature are subject to Rule 53 and must be brought by application. In the event of a conflict of fact arising, which can only be resolved by oral evidence, Applicants cannot be penalized along the lines that this should have been anticipated and should have proceeded by a different route.
66. It has been held that a party in a review (discharging an onus of proof) who seeks to adduce oral evidence or cross-examination of deponents to answering affidavits should not lightly be deprived of this opportunity, having been obliged to go by way of Motion¹².
67. The Court was careful to point out however that this does not mean that any such application will be granted as a matter of course. The consideration of the facts and alleged disputes, in ***AECI (supra)***, demonstrate the care with

¹² ***AECI Ltd and Another v Strand Municipality and Others*** 1991 (4) SA 688 (C) 698J – 699A and ***Freedom Under Law v Acting Chairperson: JSC*** 2011 (3) SA 549 (SCA) 564 F-H.

which these were considered to determine whether such disputes were relevant and such as to warrant such referral.

68. It is clear from the authorities that whilst undesirable to settle disputed facts on affidavit, the first step in considering this issue is to carefully examine such alleged disputes to determine if these are real, *bona fide* and material.
69. Whether there is a real, material, genuine dispute (of fact) is a question of fact for the Court to decide¹³.
70. There must also be an enquiry as to whether such dispute, if established, is relevant and material to the issue to be decided.
71. A real dispute usually arises where Respondent denies material allegations by Applicant and produces positive contrary evidence. This can only arise where the party raising the dispute has seriously and unambiguously addressed the disputed fact in the answering affidavit¹⁴. For a genuine dispute to arise Respondent must satisfy the Court that there are reasonable grounds set out that would establish a defence in action proceedings¹⁵.
72. It must be remembered that, in respect of final relief, even where facts are in dispute on the papers, but the Court is satisfied nevertheless that on Respondents' facts, with those of Applicants which are admitted by

¹³ *Dorbyl Vehicle Trading and Finance (Pty) Ltd v Northern Cape Town and Charter Service CC* [2001] 1 All SA 11 (NC) 123-4.

¹⁴ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) [13].

¹⁵ *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (1) SA 184 (SCA) [56].

Respondents (or at least not denied), that Applicants are entitled to relief, it will make such an order¹⁶.

73. It is Applicants, not Respondents, who run a risk by bringing a claim on motion. That is because, as with any motion proceedings, to the extent that any facts are genuinely in dispute, they must be resolved in favour of Respondents¹⁷, unless a referral is justified and sought.

74. The SCA has accordingly held that:

“It may be assumed... that an applicant who presses for a decision on the papers in the face of a factual dispute, by necessary implication consents to the matter being decided on the basis that the applicant is prepared to have the matter decided on the basis set out in *Plascon Evans*...”.¹⁸

75. The Court went on to say, in ***Ngquma (supra)***, that “*although there are evidently disputes of facts there are no ‘real’ disputes of fact if either party can succeed on the version of the other party*”.¹⁹

76. The ***Plascon Evans*** rule is well known:

“It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s ... affidavits, which have been admitted by the respondent..., together with the facts alleged by the latter, justify such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of facts, is

¹⁶ ***Transman (Pty) Ltd v South African Post Office and Another*** [2013] 1 All SA 78 (SCA) at [16].

¹⁷ ***Reddy v Siemans Telecommunications (Pty) Ltd*** 2007 (2) SA 486 (SCA).

¹⁸ ***Ngquma v Staatspresident; Damons NO v Staatspresident; Jooste v Staatpresident*** 1988 (4) SA 224 (A0 at p 243 F-H).

¹⁹ *Ngquma* at p243 D-E.

palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers”.²⁰

APPLICANT’S SUBMISSIONS RELEVANT TO THE CANCELLATION OF 5796

77. It is argued that this bid should have been valid until 20 August 2019, that is closing date 28 May 2019 together with a validity period of twelve weeks. SKG alleges that it made an enquiry in this regard with Eskom on 28 August 2019 (after the validity date) and was advised that the tender would be awarded to a competitor on 29 August 2019, this not being denied in answer by Eskom. As set out above, however, this was not in fact awarded and was purportedly cancelled on 10 September 2019.
78. Eskom contends that the bid validity period having expired, there was no cancellation, which contention SKG challenges. Eskom’s deponent alleges that 5796 simply lapsed as he was unable to keep abreast of all the tender processes and having realised that the validity period had lapsed, he issued a notice of cancellation on 10 September 2019. This was followed by the 5818 issue on 19 September 2019 for the same subject matter.
79. SKG’s challenge depends on the argument that the version given by Eskom stands in contrast to its correspondence from which it appears that Eskom took a decision to cancel 5796, which decision it gave effect to on 10 September 2019. SKG argues that 5796 was not cancelled in terms of regulation 13 of the Procurement Regulations 2017, was unlawful and should be set aside.

²⁰ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26.

APPLICANT'S SUBMISSIONS IN RESPECT OF THE CANCELLATION OF 5817

80. Applicant contends that the bid would have been valid until 6 January 2020 (closing date 6 October 2019 together with ninety days).
81. It seems to be common cause that SKG contacted Eskom on 12 December 2019 enquiring about 5817 and was advised by Mr. Subramony that 5817 would be cancelled. It was in fact purportedly cancelled on 9 January 2020. SKG challenges this decision on the basis that it did not accord with regulation 13 of the Procurement Regulations 2017.
82. Eskom contends, however, that the decision to cancel was made in accordance with regulation 13(1)(a) whilst SKG questions the "*sudden change in circumstances*".
83. Eskom counters with the argument that the validity period in any event expired before 5817 was cancelled.
84. At the end of the day applicant argues that the purported cancellation was unlawful and was not in accordance with regulation 13 and should be set aside.

THE TWO BID ISSUES ON 5818

85. Finally, applicant joins issue with Eskom's contention, put up in the application for the first time, that the SKG bids were ineligible because SKG's submitted two bids in contravention of clause 1.2 of the Tender Data in the tender invitation and clause 2.23 of the standard conditions of tender.
86. Applicant contends that the factual background to this is that the two bids which were indeed submitted, were in respect of two different buildings. It is argued that the requirement relied upon by Eskom does not prohibit two tenders for two separate buildings but is aimed at prohibiting two different tenders for one building by the same bidder or two separate tenders in respect of the same building by two different tenderers, one of them being a joint venture with the other. In short it is argued that the prohibition does not apply to the SKG bid and that it is borne out by the fact that Eskom did not disqualify SKG during the bid evaluation on this basis. Regard is also had to the fact that this is not supported by clause 2.23 of Eskom's conditions of tender.

THE EXTENSION OF TIME ISSUE

87. Finally, applicant addresses the extension of time (condonation) argument.
88. In short, SKG argues that it dealt with the potential need for an extension of time in its founding affidavit out of an "*abundance of caution*".
89. I have already set out above that if the argument is accepted that reasons were required to be provided before the 180 day period commenced to run,

the application was well within time having been launched on 17 August 2020, the reasons, applicant contends having been given on 16 March 2020.

90. If, however, this argument falls to be rejected SKG argues that an extension of time is justified within which to launch the application in terms of section 9(1)(b) of PAJA for the reasons that it was only after SKG was afforded some of the documentation on 16 March 2020 that it became aware of the irregularities and that the launching of the application was delayed as a result of the Covid lockdown from 26 March 2020. It is argued that Eskom's persistent failure to make a complete record of the decision available in the three tender procedures exacerbated the delay in launching the application which delay, in any event, it is argued, is not significant.

FIRST RESPONDENT'S SUBMISSIONS

91. I have already dealt partly with first respondent's approach and submissions relevant to the issues raised.
92. In summary first respondent opposed the relief sought on the grounds that:
- 69.1 The review application is out of time and that there is no basis for condonation;
- 69.2 5796 lapsed by effluxion of time upon expiry of the validity period and that having so expired, without consequence, the evaluation or award of the bid would be incompetent;

- 69.3 5817 was cancelled in accordance with regulation 13(1)(a) of the Regulations in that due to change in circumstances there was no longer a need for the procurement of the goods, the cancellation in any event being effected after the tender had expired by effluxion of time;
- 69.4 5818 was awarded to second respondent in a fair, equitable, transparent, competitive and cost effective process;
- 69.5 In respect of 5818 in any event applicant's award did not qualify they having delivered more than one bid in contravention of clause 1.2 of the tender data read with clause 2.23 of the standard conditions of tender.

SECOND RESPONDENT'S APPROACH

93. Second respondent argues that in respect of 5796 and 5817 no consequential relief or remedy is sought should these be reviewed and that the remedy relates primarily to 5818.
94. In respect of 5818 it is pointed out that applicant did not seek or obtain interdictory relief and that the tender being for a period of thirty six months does not extend beyond 31 January 2023, less than two months being left.
95. It is argued, as does first respondent, that applicant failed to launch the review timeously.
96. In respect of 5796 it is argued that the validity period for the tender expired without it being adjudicated, awarded or validly extended and that the tender

process was completed albeit unsuccessfully, the purported cancellation being irrelevant, there being nothing to cancel. It is submitted then that the view of 5796 must fail.

97. In respect of 5817 it is argued that the decision to cancel the tender must be dealt with on the same lines as the matter **Tshwane City and Others v Nambiti Technologies (Pty) Ltd**²¹ in summary that the court will not attempt to compel an organ of state to enter to contracts and require goods and services that it has determined not to acquire which would only be done in extreme circumstances, and in this matter the review must fail.
98. In respect of 5818 it is argued that applicant's bid should have been disqualified, SKG having submitted more than one tender, that being the end of the matter according to second respondent.
99. Further, in respect of 5818, it is argued that the bid was properly adjudicated and that applicant's argument is incorrect that its tender was "*cheaper*" than second respondent's on the rate per square meter argument. It is argued that Eskom correctly evaluated the two bids using the price of accommodation, parking bays and operational costs, without tenant installation and applying the escalation clauses over the three year lease period, Rokewood's bid being the "*cheapest*" bid. It is argued that the applicant's contention that the bids should have been evaluated on a costs per square meter basis is not sustainable as the size of the property was only utilised for purposes of the technical evaluation; the tender specifically provided for the gross cost of the

²¹ 2016 (2) SA 494 (SCA).

lease per month; the tender did not provide for the adjudication of bids on a cost per square meter basis; and the tender also provided for the costs per parking bay which was not calculated at a cost per square meter.

100. It is argued that tender 5818 with the closing date of 15 October 2019 and a tender validity period of ninety days in closing date was awarded within that time period to Rokewood on 20 December 2019, the letter of acceptance signed by Eskom on 30 December 2019 (a ground in any event abandoned by applicant).

101. It is argued in the alternative that should the court find that any of the decisions were reviewable, particularly 5818, it would not be just and equitable to set the decision aside, having a very short period left to run, the court either declining to set aside an invalid administrative action for reasons of pragmatism and practicality and in any event there is no other equitable remedy available.²² No interim interdict was sought and relief now will have no practical effect.²³ This argument has considerable rebut.

THE DELAY IN LAUNCHING THE REVIEW

102. As this would potentially be dispositive of the review, it would be appropriate to deal with this issue first.

²² **Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd** 2011 (4) SA 113 (CC) [85].

²³ **Millenium Waste Management (Pty) Ltd v The Chairperson Tender Board Limpopo Board and others** 2008 (2) SA 481 (SCA) [18 - 19], [23 - 25]; **Chairperson Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd** 2008 (2) SA 638 (SCA) [22 - 27]; **Moseme Road Construction CC v King Civil Engineering Construction (Pty) Ltd and another** 2010 (4) SA359 [6 - 9].

103. I have already set out above the time line relevant and the argument advanced in outline in this regard.
104. It is common cause that applicant had knowledge that 5796 was not to proceed on 9 September 2019; that 5817 was cancelled at the latest on 9 January 2020; and in respect of 5818 on 14 January 2020, at least that the tender had been awarded to Rokewood.
105. Section 7(1) of PAJA provides that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date “...*on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.*”
106. Of course, in terms of section 9 of PAJA the period of 180 days may be extended for a fixed period by the court “... *where the interest of justice so requires.*”
107. Having regard to what follows, the principle issue relates to 5818, it being common cause that applicant was informed and became aware of the award of the tender, the administrative action, on 14 January 2020. It is argued, at least for second respondent, that the 180 day period commenced to run from that date and therefor lapsed on 13 July 2020, long before the review proceedings were launched on 17 August 2020, and that accordingly applicant requires condonation and that this condonation will not be granted. In respect of Eskom and 5818 it is argued in summary that applicant was

advised hereof on 14 January 2020, acquiesced with first respondent's response to the PAIA request except that the respondent did not challenge the response in terms of the mechanism created by PAIA and unreasonably delayed the institution of its review application from 14 January 2020 to 8 September 2020 (in fact this being the date of service).

108. Neither Eskom nor Rokewood seemed to address, at least in their heads, the argument advanced for SKG that the period did not commence to run until reasons had been furnished.
109. Hoexter Penfold Administrative Law in South Africa 3rd ed at 724 state that "*curiously*" the reference to "*and the reasons*" that the better reading of section 7(1)(b) of PAJA is that where a person is informed of the decision but not the reasons, the period starts to run only when that person becomes aware of the reasons or might reasonably have been expected to become aware of them.
110. In **City of Cape Town v Aurecon**²⁴ the Constitutional Court held that the period in section 7(1)(b) starts to run from the date on which the reasons became known, or reasonably ought to have become known to the applicant, rather than from the date on which the applicant became aware that the administrative action was tainted by irregularity.

²⁴ 2017 (4) SA 223 (CC) at [41].

111. The conclusion as to when an applicant might reasonably have been expected to have become aware of the action and the reasons as contemplated, depends as Hoexter points out, on the circumstances.²⁵
112. This must be so, and in this matter is clearly applicable, the question being when applicant was or could reasonably have been aware of the reasons for the award of the tender to Rokewood and not itself. I stress that this is different from an enquiry as to when an applicant might become aware that the administrative action was tainted by irregularity.
113. The award of 5818 was made on 30 December 2019 to Rokewood.
114. The notification by letter from Eskom on 14 January 2020 simply informed that SKG had not been successful and that Rokewood had giving no reasons whatsoever therefor. It is common cause that SKG was not aware at that time, of the reasons therefor.
115. Being unaware of the reasons, SKG requested the record of the decision on 21 January 2020, and alleges that Eskom delayed making available the record by seeking extensions and dishonouring its own undertakings to make this available. It is thus that it is argued that eventually on 16 March 2020 Eskom made available some documents, but not, argues SKG, a complete record with sufficient reasons.

²⁵ See also **Transnet Ltd v Goodman Brothers (Pty) Ltd** 2001 (1) SA 853 (SCA) [10].

116. In the answering affidavit by Eskom the allegations relevant to knowledge are simply denied, setting out no basis for arguing that in respect of 5818 applicant was furnished with reasons on any earlier date than March 2020. In respect of 5796 and 5817 it is set out that reasons were given on 10 September 2019 and 9 January 2020 respectively.
117. In my view, there is no sustainable argument that applicant, SKG, was sufficiently aware of the reasons for the decision (as opposed to impropriety alleged) at any time prior to the furnishing of the first documents on 16 March 2020.
118. It follows, more that the review application in respect of 5818 was more than timeous and certainly within the 180 day period.
119. In respect of 5817 a request for reasons was also made on 21 January 2020. No request was made for 5796 as applicant says according to Eskom 5818 had replaced 5796. It is argued that virtually no documents were made available in respect of 5817 and therefor again it was only on 16 March 2020 that reasons could have been established. Applicant was aware of the purported cancellation on 9 January 2020, and if there is any merit in the review at all, it seems reasonable to require documentation to have been supplied before the alleged reasons were established and thus to the extent necessary I find to be timeous, although dismissing the relief on a different basis in any event. In respect of 5796 the tender period had lapsed, and again, in due course I dismiss this review on a different basis. It is unnecessary to consider whether the review was timeous in any event.

120. In the result, in my view, the review is properly before this court in all relevant respects having regard to the 180 day period, it being unnecessary thus to consider the condonation issue at all.

THE MERITS 5818

121. I will consider the relevant issues as to the merits of the review application in this regard sequentially insofar as is necessary.
122. In respect of 5818 the first issue is one raised by Eskom in its papers though not applied to disqualify the SKG bid on 5818, by Eskom initially.
123. I have already summarised the issues relevant hereto and state shortly, that Eskom argues that the SKG bid was disqualified as it submitted two bids for the relevant office space.
124. The submission of a tender accepted the incorporation of the standard conditions of tender.
125. In the invitation to tender paragraph 1.2, tenderers were deemed ineligible to submit a tender if:

“Tenderers submit more than one tender either individually or as a partner in a joint venture (JV) or consortium.”

126. At paragraph 1.13 under the description “*alternative tenders*” it simply is stated that “*alternative tenders are not allowed*”.
127. The standard conditions of tender deal with this at clause 2.23.
128. It must be emphasised, and always remembered, that in the current day, interpretation of a document, including a statute, must always have careful regard to context. When a court determines the nature of the party’s rights and obligations in a contract it is involved in an exercise of contractual interpretation. There is now a settled approach to the interpretation of contracts, documents and indeed statutes.²⁶ In that matter the following was said:

“[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A

²⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’,¹⁶ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

129. As was emphasised this approach to interpretation requires that from the outset one considers the context and language together, with neither predominating over the other.
130. In **Chisuse v Director - General Director of Home Affairs**²⁷ (at paragraph 52) the Constitutional Court speaking in the context of statutory interpretation held that this “*now settled*” approach to interpretation, is a “*unitary*” exercise. This means said the court in **University of Johannesburg v Auckland Park Theological Seminary and another**²⁸ that interpretation is to be approached holistically: simultaneously considering the text, context and purpose. To make it clear, it has been explicitly pointed out in cases subsequent to **Endumeni** that context and purpose must be taken into account as a matter of course whether or not the words used in the contract (or statute) are ambiguous.²⁹

²⁷ 2020 (6) SA 14 (CC).

²⁸ 2021 ZACC 13 at [65].

²⁹ **Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd** 2016 (1) SA 518 (SCA).

131. In **Cool Ideas 1186 CC v Hubbard**³⁰ the court in dealing with the interpretation of statutes said the following:

“[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised;
- and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”

132. Viewed in the manner set out above, it is clear from the tenders that were submitted that these were completely different tenders for different buildings and different accommodation, both said to be compliant with the invitation to tender relevant to 5818.

133. These were separate tenders and cannot, in any way be described as “*alternative tenders*” in the sense required.

134. In my view, on a proper interpretation of the tender conditions read with all other relevant circumstances, documents the background and purpose, indicate that what was sought to be prevented was alternative tenders in respect of the same space in the same building – this for obvious reasons. There can be no rational reason to extend this to two entirely separate

³⁰ 2014 (4) SA 474 (CC).

tenders for entirely different buildings, as same would make no business sense whatsoever.

135. It is not insignificant, that adjudicating the tenders, this was not something that played any role whatsoever in Rokewood being preferred to the SKG tender, nor was it suggested at any time that SKG was deemed to be ineligible to submit a tender having on this argument, submitted more than one tender viewed as an alternative tender.

136. To hold otherwise would make no sense whatsoever in the context of interpretation as set out above.

137. In my view, accordingly, this argument can simply not be substantiated.

THE PRICE ISSUE

138. This leaves two issues for determination, both relating to price, the first as to whether the bids should have been evaluated (fairly) on a price per square meter basis as opposed to total price and the second, the TIC issue.

139. As to the price per square meter issue I have essentially already summarised applicant's and first respondent's submissions in this regard and now turn to second respondent's answer to the claim that in order to compare apples with apples it made no sense to treat the bidder with the smaller space and the bidder for a larger space still within the approximate requirement on a total price basis as in most circumstances the smaller space would have a less

expensive total price perhaps even though the rate per square meter was higher.

140. To illustrate this, applicant argues that as to bid 5818 Rokewood's bid at the lower square meterage came in at a rate of R115 per square meter, vat exclusive whilst SKG's was at R100 vat exclusive.
141. Applicant argues that Eskom's submissions that it was not entitled to alter the floor space offered by SKG is a misdirected answer and that notwithstanding the approximate square meterage required it was incumbent upon Eskom to evaluate and compare prices per square meter, not total pricing, within the principles entrenched in section 217 of the Constitution already referred to above. To do otherwise, argued applicant, was such as to fail to evaluate on an equal footing.
142. Rokewood argues that this contention is not sustainable as the size of the property was only utilised for the purposes of "*technical evaluation*"; the tender specifically provided for the "*gross*" costs of the lease per month; the tender did not provide for the adjudication of bids on a costs per square meter basis; and the tender also provided for the costs per parking bay which was not calculated at a cost per square meter.
143. As already pointed the invitation to tender required a lease agreement for ± 1200m² office space of a grade A or higher rated building in the Beacon Bay, East London area. Paragraph 2 of the invitation to tender reflected that the evaluation process and criteria would include basic compliance; mandatory

tender returnable; functionality; financial evaluation; price and preference scoring; objective criteria.

144. It was provided that the property must have at least sixty reserved parking bays and that water, electricity, sewerage and refuse cost would be paid separately and should not be included in the total price tendered. Whilst there were other requirements, these are not relevant referring to for example, that the space must be relevant to offices, restroom facilities and have sufficient toilets to cater for male and female and people with disability with after hour access.
145. It was provided as to functionality (technical) evaluation that a weighted score card approach would be used, the floor space requirement providing a score of ten if greater than 1000m² or less than 1250m², they would score a score of five if greater than 1250m² and zero if less than 1000m². This included a minimum number of parking bays of sixty giving a score of ten if met. The price list required included five items:

Nett rent for office space;

Nett rent for covered parking bays;

Nett rent for open air parking bays; and

Items 4 and 5 being operational cost and TIC included in the list with a total cost of the lease per month to be stipulated, there was an escalation table for completion relevant to all elements of the leased premises.

146. Under the heading Evaluation of Price was detailed and included that TIC would be contracted to the successful bidder, provided that prices would be evaluated, *inter alia*, as follows:

“Making a comparison of the Nett Present Value of each adjusted tender based on the tendered programme and prices...”

147. The mandatory requirements for “*technical*” repeated that the space was for approximately 1200m² office space with sixty reserved parking bays, that water, electricity, sewerage and refuse costs would be paid separately amongst other things.

148. A study of the form indicates that there is no hint or suggestion that the pricing would be reduced to a square meterage basis or, put otherwise, that the total price of each tender would be reduced to a square meterage basis. Indeed, the pricing as indicated above, included the nett rent for office space and that for parking bays.

149. Applicant’s argument in this regard relies on the suggestion that if one takes into account the purpose of section 217 of the Constitution, fairness and equality and cost effectiveness required the assessment to rely on cost per square meter, not overall cost or total costs.

150. Whilst I will revert to TIC, this was to be “*contracted to the successful bidder*” and when asked in clarification whether Eskom required a quote per square meter in this regard Eskom replied “*tenant installation costs will be paid by*

Eskom as once payment to the successful bidder. Evaluation will be based on the price for accommodation, parking bays and operational costs only.”

151. There is no indication whatsoever on a proper interpretation, that the bid and invitation to tender in any way stipulated a per square meter assessment overall, or that this would be the assessment approach.
152. It should also be said that only the office space could be rated on a square meterage basis as the sixty parking bays were quoted per bay and not per square meter for obvious reasons. An assessment on a square meter basis would then effectively have been impossible overall due to office space as opposed to parking bays space.
153. Second respondent's bid for 1 045 square meters certainly included TIC at R6,25 per square meter having a total cost per month for the first year without the tenant installation of a R138 200,00. This had an escalation of 6% per annum.
154. As to applicant's bid it argues that this was a property of 1200m² in size, the tender not including tenant installation cost at R1700 per square meter as a standard rate gave a figure of R143 500 per month. Rental would escalate at 8% per annum.
155. Adding the nett rent for office space and covered parking and excluding tenant installation cost this gave a total cost of the lease per month at a R143

500,00 (for year one) with a 2% greater escalation per annum than Rokewood.

156. As I understand it Eskom evaluated the bids using the price of accommodation, parking bays and operational costs, without tenant installation, applying the escalation clause over three years calculating applicant's bid at an overall sum of R5 590 300,80 and second respondent's bid excluding TIC which it took out of R5 287 607,52.
157. Obviously on that basis Rokewood was the lower bid on the face of it.
158. In short applicant's submission in this regard is entirely dependent upon the acceptance of a principle that in assessing tenders of this nature, to be fair every aspect of the bid must be teased out including the square meterage for the office space itself as opposed to for example parking bays.
159. Of course, a bigger space, although perhaps on a lower square meterage price, might well end up in a larger total sum, it seeming to be the suggestion as in this matter, that this is by the way, as the square meter price is less.
160. This clearly has various logical issues and problems quite apart from the fact that the tender bid and evaluation report did not in any way require this analysis to be performed. Whilst the square meterage price was perfectly clear in each bid, so was the overall price.

161. This is illustrated in this matter where the square meterage price of SKG (argues SKG) was lower than Rokewood's but the overall price, because of the difference in area, was greater. Had the SKG bid been accepted this would have, on the face of it, been for a greater sum overall, a bigger total price.
162. It is also true as argued by SKG, that if they had been assessed for the same office space as Rokewood but at the lower square meter price, this would have rendered a lower price for that space, and the suggestion that this should have been negotiated.
163. Again, I can find no tender obligation to negotiate for a smaller area, and in my view it is going way too far to suggest that this was required on an equality, fairness, cost effectiveness basis.
164. In my view, accordingly, the argument cannot succeed.
165. I am fully aware, and am taking into account the principles entrenched in the values of section 217 of the Constitution particularly fairness, equality and cost effectiveness. I have had regard to the authorities referred to in argument by SKG and particularly the **Premier Free State and others v Firechem Free State** (*supra*) paragraph [30] and **All Pay** (*supra*) at para [39]. Whilst I accept that the procedure in adjudging tenders must relate to comparable offers and that competitors should be treated equally, being entitled to tender for the same thing, that principles are not abrogated in this matter in the way that the tenders were in fact assessed.

166. At the end of the day the cheaper tender, although for lesser area, was adopted, and it stands to reason that in all or most tenders for office space, it make sense to ask for tenders in an approximate square meterage having regard to the existing square meterage of building available, and to assess this on an overall price in the manner set out in the invitation to tender being scored as I have already set out above in this case between 1000m² but less than 1250m², the overall area being \pm 1200m² office space.
167. Turning to the second issue relating to TIC.
168. I have again already set out above the factual situation relevant to and the prices applicable to tenant installation cost, this must be seen against the clear indication that TIC was not to be included and would subsequently be awarded to the successful tenderer. This was made further clear in the clarification enquiry referred to above, and that evaluation would be based on prices excluding tenant installation.
169. This is met by applicant or attempted to be met, by contending that its bid included tenant installation which was "*amortised*" into its tender price. The logic in the founding affidavit is not simple to follow to say the least and it is said that although the SKG bid provided for tenant installation costs these were amortised into the tender price having regard to what was already offered in the property there being no need for a full three month beneficial occupation period to attend to tenants installation if the property was already ready for occupation. It is said "*it is for this reason that SKG Africa's bid did*

*not include the TI costs under 'pricelist' ... - it merely reflected the rate as Eskom required the rate to be reflected." That rate will be recalled was R1 700,00 per square meter. It is said "the result is that, in addition to the rate per square meter for the office space, SKG Africa's bids are also far less in price than Rokewood's bid due to the latter's 2.3 million for TI."*³¹

170. This is even more difficult to follow as it appears from Rokewood's answering affidavit (paragraph 9³²) that the SKG proposal provided at paragraph (k) that:

"Our rate of R1700,00 per square meter for tenant installation costs as quoted in this tender document is our standard rate for tenant installation costs. If you require any specialist specific tenant installation items, then the price will be adjusted accordingly."

171. It seems to me, that the valuation applied related to the price of accommodation, parking bays and absent operational costs without tenant installation which was removed in the Rokewood bid by Eskom.
172. The comparative costing being Rokewood of R5 287 607,52, being compared to SKG's of R5 590 300,80. Both, in my view, this on the papers clearly excluded TIC, and at the end of the day the Rokewood bid on the face of it was less expensive. This obviously viewed as total price.
173. It seems to me then, that on a proper understanding of the papers and the annexures, this argument similarly must fail.

³¹ Papers page 41.

³² Page 335.

174. There seems to me to be merit in Rokewood's submission that applicant misinterpreted the approval of the tender in the sum of R7 925 929,38 as referred to in paragraph 49.2 of the founding papers. This is in fact incorrect, the sum of the tender awarded to second respondent being in the amount of R5 287 607,52.
175. The make-up of the larger sum starts with the original office, accommodation, parking bays and operational costs, to which is then added the excluded utilities services, electricity water and sewerage, the rates and taxes and then tenant installation in the sum of R2 680 000,00 giving the larger total.
176. In the result, on the price challenge advanced by applicant in respect of 5818 it must fail.

5796

177. I have set out the factual matrix relevant to this fully above. In summary applicant challenges the decision of Eskom to cancel 5796 (or its failure to make an award before the expiry of the bid validity period).
178. It is difficult to appreciate where this argument goes, as it is perfectly clear that 5818 was then issued directly to deal with the fact that the original bid had fallen away and in respect of the identical issues.
179. Eskom's response is that the bid validity period had expired but was not in fact cancelled. In this regard the bid validity period expired on 20 August

2019, by which date there had been no award. Whilst Eskom advised the tender would be awarded to a competitor of SKG on 29 August 2019 (which is not denied), and whilst the bid was purportedly cancelled on 10 September 2019, this seems to me to take the matter no further.

180. Applicant contends that in fact Eskom took a decision to cancel 5796 giving effect thereto on 10 September 2019.

181. In fact, the letter from Eskom on the 9 September 2019 stated:

“Please be informed that the adjudication process of this bid has not been concluded as such and as a result the tender validity of the submissions have expired. This enquiry will be cancelled and re-issued.”

182. On 13 September 2019 Eskom wrote *“the tender process was officially cancelled on 10 September 2019. The cancellation was published on the Eskom e-tendering portal ...”*.

183. It seems to me to make no difference what the letter said, as a matter of fact the tender having expired after which it could not be awarded. To argue that the cancellation was unlawful then and should be set aside, is flawed for obvious reasons.

184. In **Joubert Galpin Searle Inc and others v Road Accident Fund and others**³³ it was made clear that by the time a tender validity period has expired there is nothing to extend, the process having been concluded albeit

³³ 2014 (4) SA 148 (ECP).

unsuccessfully. It is thus that the tender authority had no power to award the tender once the validity period had expired and in fact had no power to extend the period relevant to that matter.³⁴

185. In my view the attempt to review this tender must fail.

5817

186. Again, I have set out the time line and relevant issues above.

187. In short, the bid validity period in this matter would have been 6 January 2020, Eskom advising SKG that the bid would be cancelled. In fact, Eskom addressed a letter to SKG on 9 January 2020 stating that “*After careful deliberation, and due to a re-evaluation of the office space required to accommodate staff that are currently located at Palm Square, has been undertaken by the ERE Portfolio and Operations Team.*” It was then said that the subject matter of the tender was no longer required and that the invitation to tender was withdrawn. Applicant challenges this on the basis that the decision was not made in accordance with regulation 13 of the procurement regulations 2017.

188. Eskom contends that the decision to cancel was indeed made in accordance with the regulation, SKG questioning the sudden change in circumstances. Eskom also contends that the validity period in any event had expired before it was cancelled. To meet this argument applicant contends that the

³⁴ Joubert Galpin Searle (*supra*) at paragraphs [72], [73] and [74].

conversation with Eskom on 12 December 2019 contained and advised that the bid would be cancelled and that this decision had then already been taken.

189. This review must be dismissed for one or more of the following reasons.
190. On the same reasoning as applies to 5796, and having regard to the fact that all clarification questions and additional information sought during the tendering process had to be in writing, it seems to me, that the oral conversation relied upon on 12 December 2019 is irrelevant.
191. On the correspondence, the tender expired prior to notice of cancellation.
192. In any event, if I am incorrect in this, and in fact the tender decision to cancel was taken prior to the expiry date or even on 9 January 2020, the decision to cancel a tender, and whether it constitutes administrative action and is reviewable in terms of PAJA, was considered by the Supreme Court of Appeal in **Tshwane City and others v Nambiti Technologies (Pty) Ltd.**³⁵ That judgment in short at paragraphs referred to indicated that it would be an extremely serious matter for a court to intervene in decisions of the carefully chosen programme of government. To do so by compelling an organ of state to enter contracts and acquire goods and services that it has determined not to acquire, or at least not to acquire on the terms of the specific tender, is something that, if open to a court to do at all, should only be done in extreme circumstances.

³⁵ 2016 (2) SA 494 (SCA) at para [24] and [43].

193. In this matter it seems that there are no such extreme circumstances, nor am I persuaded that this court should intervene. The review on this basis must similarly fail.

COSTS

194. It seems to me that there is no reason in this matter why the costs of the review itself should not follow the result, and in respect of first respondent those costs should include the costs of two counsel. The matter was complicated and it was a wise and reasonable precaution for two counsel to be employed and fully justified.

RESERVED COSTS IN RESPECT OF THE APPLICATION TO COMPEL THE RECORD AND REASONS

195. In December 2020 applicant bought a notice of motion entitled an (application to compel).

196. In summary it sought that first respondent be ordered to comply with the provisions of Rule 53(1)(b) of the Rules of Court and the applicant's notice of motion dated 17 August 2020 in the review application launched by applicant in this matter by *inter alia* dispatching the "*complete record*" of proceedings together with reasons relevant to ELS-5917; ELS-5818; and ELS-5796.

197. In addition, in paragraph 2 it was sought that the record be made available by first respondent such as to include but not limited to a list of six specific categories of documents duly identified and this had been referred to in an application in terms of PAIA bought by applicant.
198. In due course, an order was given by Mafunda AJ on 11 February 2021 by agreement in terms of annexure "A".
199. It is to be noted however, that the relief was somewhat less than was originally sought omitting reference to the "*complete record*" and also this relief originally sought in respect of the specified categories of documents. Further first respondent was given seventeen days to comply.
200. Costs were reserved.
201. I must deal with these reserved costs in respect of which the parties at my request submitted supplementary heads as I had not been involved in that application.
202. SKG seeks an order that Eskom pays the costs of the application to compel on the basis that it was substantially successful, as it is argued is apparent from the order, whilst Eskom argues that SKG was not substantially successful having regard to the nature and content of the relief sought.
203. This turns partially on the argument that the word "*complete*" when used in respect of the record which was sought in each instance and prayers 1.1 to 1.3 were omitted from paragraphs 1.1 to 1.3 in the order granted; and that

prayer 2 of the notice of motion, which sought specific documents as part of the record, did not form part of the order.

204. It is argued then that SKG abandoned substantive relief effectively conceding that it was not entitled to same and therefore should not have the costs of the application.
205. As part of the argument it was included in Eskom's opposition to the application that it was recognised that Eskom was required to make available at least part of the record but that it contended that the record had to be retrieved, collated and considered by counsel and that SKG had unreasonably refused the request for an extension to make this possible and the record available. Secondly, Eskom contended that the relief sought by SKG was beyond the scope of rule 30A and 53 and that SKG incorrectly and unlawfully sought recourse to PAIA.
206. In point of fact in Eskom's answering affidavit, applicant argues, it made no opposition to the word "*complete*" record, its opposition being limited to the relief sought relevant to the specific documents in prayer 2.
207. The background is that the main application was launched on 17 August 2020 and served on Eskom on 8 September 2020. In terms of Rule 53(1)(b) Eskom was to dispatch to the Registrar the record within fifteen days after 8 September 2020 together with such reasons Eskom was by law required to give or desire to give. It is common cause that Eskom failed to do so which

caused the delay in the main application, alleges applicant, Eskom conceding in the end that it was required to make available "*the record*".

208. It is set out in applicant's heads that various extensions were in fact granted to Eskom to provide the record up to 5 October 2020, Eskom on 7 October 2020 seeking a further extension to 6 November 2020 for reasons which applicant did not consider valid. Eskom brought no application to extend the time limits applicable.
209. Applicant argues that SKG did not act unreasonably as is alleged and in fact, the record was not made available on 6 November 2020 despite Eskom alleging that it would have been "*able to meet the 6 November 2020 extension.*" The reason for the delay was due, says Eskom, to "circumstances beyond its control".
210. As to the first ground, referred to above, for the failure to produce the record applicant argues that a record is a formal record of what has happened and includes all paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. It is argued thus that the documents should have been provided in their completeness, including every scrap of paper throwing light, however indirectly, on what the proceedings were.³⁶
211. In respect of the second ground of opposition relating to PAIA, Rule 30A and Rule 53, this relates, argues applicant, to the relief sought in prayer 2 of the notice of motion.

³⁶ **Transnet Ltd and another v SA Metal Machinery Company (Pty) Ltd** 2006 (6) SA 2854 (SCA) para [55], **SA Airlink (Pty) Ltd v Mpumalang Toursima dn Park Agency and others** 2013 (3) SA 112 (GSJ) para [11] and [22]; **Cape Town City v South African National Roads Authority and others** 2015 (3) SA 386 (SCA) paras [37] and [38].

212. Applicant argues that prayer 2 was supplementary to prayer 1 and accordingly the opposition then superfluous. SKG did not seek to compel Eskom to comply with the PAIA request nor in fact could it have done so once the application had been launched. It is argued that by conceding that Eskom was required to make available the “*record and reasons*” this was the relief effectively in prayer 1 and by implication also prayer 2.
213. Effectively then, the question is, says applicant, whether the dropping of the word “*complete*” and the failure to obtain the relief in prayer 2 disentitled SKG to its costs.
214. Applicant argues that there is no difference between a complete record of proceedings and a record of the proceedings in the context of Rule 53, and that the distinction is artificial.
215. First respondent, at my request, also filed supplementary heads of argument relevant to these costs. In short, first respondent argues that:
- 214.1 The relief sought by applicant was incompetent insofar as it extended beyond the scope of Rule 30A or Rule 53;
- 214.2 The relief sought was unreasonable or “*frivolous in the circumstances*” and
- 214.3 The relief sought was not proper or competent in relation to the issue between the parties.

216. Having set out the background facts first respondent points out that the matter, having been set down for hearing on 11 February 2021, was resolved when the applicant “*abandoned its reliance on the provisions of PAIA as the basis of the application to compel and its insistence on the ‘complete record.’*” First respondent argues that the order was essentially in the terms proposed by first respondent prior to the institution of the application to compel.
217. First respondent argues that it is trite that the whole record of proceedings sought to be corrected or set aside need not be furnished and only those portions thereof which were relevant and those portions not excluded by privilege are required to be delivered.³⁷
218. First respondent argues that the questions arising in Rule 30A(1) are objective questions of fact or law inter alia whether there has been non-compliance. It is pointed out that the majority judgment in **Helen Suzman** (supra) distinguishes the requirements of Rule 30A(1) from those of Rule 30A(2).
219. It is clear from that decision that the rule confers a wide discretion on the court to which a Rule 30A applications made. In the event of non-compliance the court is free to make any order it deems fit. Clearly as pointed out by the court a flexible approach is required in construing and applying the rules and not a mechanical application thereof.

³⁷ Erasmus, Superior Court Practice vol 2 D1 – 710A service 11; **Ekuphumleni Resort (Pty) Ltd v Gambling and Betting Board Eastern Cape** 2010 (1) SA 228 (E) at 233; **Helen Suzman Foundation v Judicial Service Commission** 2018 (4) SA 1 (CC) at 11 A – D.

220. First respondent concedes that the record was not delivered but points to the difficulties experienced by first respondent, and argues that the crucial issues are:

219.1 Whether the applicant had made out a case for an order in terms of Rule 30A;

219.2 Whether the applicant was permitted to seek reliance on its abandoned PAIA application to compel the record;

219.3 Whether applicant was permitted to demand a “*complete record*”; and

219.4 Whether applicant acted reasonably in refusing the extension to deliver the record as was, so it is argued, reasonably sought.

221. First respondent argues that applicant’s case extends beyond Rule 30A implicating non-compliance with request or notices issued outside the ambit of the Rules.

222. First respondent argues that it fully set out in the correspondence its difficulties in complying with the provision of the record which included the Covid-19 pandemic and the legal officer’s leave of absence relevant, applicant applying so it is argued an unreasonable approach inconsistent with the constitutional court’s decision in **Helen Suzman Foundation**. It argues credible evidence was provided that steps had been taken to comply but was effectively impossible at that time.

223. Applicant argues that the reference to the “*complete record*” was undue, and went beyond that which could be legitimately granted by a court. It is argued that the order granted by agreement demonstrated that applicant conceded that it was not entitled to the complete record or to persist with the PAIA request.
224. It is argued that first respondent was therefor the successful party however conceded the duty to deliver the record, though not the complete record, the order in fact being a formalisation of the cause that first respondent contended for prior to the application to compel being launched.
225. In the alternative first respondent argues that if it is found that the applicant was successful in the application to compel the applicant is to be deprived of its costs due to the “*unreasonable, inexplicable and frivolous stances it took in launching the application to compel.*”
226. In respect of a decision as to reserved costs, it is not required of a court to tease out the intricacies of an application settled and disposed of by way of an agreed order. The court must simply do the best it can with the material at its disposal to make a fair allocation of costs.³⁸
227. The fact of the matter is, however, it is trite that whilst the notice of motion in a review must call for the record of the proceedings, in content the extent of the record will depend upon the facts or circumstances of the particular case.³⁹
- Only the relevant part of the record has to be produced.⁴⁰

³⁸ **Gamlan Investments (Pty) Ltd vs Trilion Cape (Pty) Ltd** 1996 (3) SA 692 at 700 G – 701 D; **Nxumalo and another v Mavundla and another** 2000 (4) SA 349 at 355E – G.

³⁹ **Lawyers for Human Rights v Rules Board, Courts of Law and another** [2012] 3 All SA 193 (TMP).

⁴⁰ **Muller v The Master** 1991 (2) SA 217 (N)

228. Of course, if the record on demand is not produced applicant is entitled, as an aggrieved party, to apply to court to compel compliance with the request.⁴¹
229. In my view, in this matter, first respondent was on the face of it, and as it concedes, obliged to deliver the record but was experiencing administrative difficulties described in the papers from doing so. In my view, whilst applicant could certainly have provided a greater opportunity to do so, it was in the context of the matter not further obliged to delay, this impacting on its application in the matter requiring, as is seen from the main judgment, some expedition.
230. Nevertheless, there is considerable merit in first respondent's argument that applicant too widely stated its entitlement insisting on a "*complete record*". This was, as appears above, not an entitlement which applicant enjoyed, this at least and after an order had been given would have compelled first respondent to provide a record that may well have gone beyond the content and extent to which applicant was entitled.
231. In my view, on what is before me, and having considered carefully the arguments and counter arguments presented in the supplementary heads, it seems to me that it would be just and equitable were each party to pay their costs in the application to compel. Both were successful to an extent and in the context of that I have set out above.

⁴¹ Drahtseilwerk Saar Gmbh v International Trade Administration Commissioner and others 2011 (2) SA 261 (GP) at para [20].

232. In the result the costs incurred in respect of the application to compel the record, each party is to pay their own costs.

233. **ORDER**

234. In the result the following order is given:

1. The review in respect of tender number ELS-5796 is dismissed.
2. The review in respect of tender number ELS-5817 is dismissed.
3. The review in respect of tender number ELS-5818 is dismissed.
4. The applicant is to pay first and second respondents' costs, in respect of first respondent those costs to include the costs of two counsel.
5. The order granted in the application to compel in terms of which costs were reserved are hereby determined as follows: Each party is to bare their own costs in this regard.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicant: Adv. J.F. Pretorius, instructed by Fourie van Pletzen Attorneys Incorporated c/o Gravett Schoeman Inc, Beacon Bay, East London

Appearing on behalf of the First Respondent: Adv. S.L. Shangisa SC with Adv. N.L. Ntsepe, instructed by Smith Tabata Attorneys, East London

Appearing on behalf of the Second Respondent: Adv. K.L. Watt, instructed by Drake Flemmer & orsmond (EL) Inc, East London

Date heard: 17 – 18 November 2022

Date delivered:

15 December 2022.