

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
_____	_____
DATE	SIGNATURE

APPEAL COURT CASE NO: A2022-050014
CASE NO.: 57981/2021

In the matter between:

WACO AFRICA (PTY) LIMITED t/a **SGB-CAPE**
Appellant

and

SOC LIMITED First Respondent

KAEFER THERMAL CONTRACTING SERVICES (PTY) LTD Second
Respondent

ELECTROHEAT ENERGY (PTY) LTD Third
Respondent

**RAMGULAM INVESTMENTS CC TRADING AS
ORAM INDUSTRIALS (PTY) LTD** Fourth
Respondent

RSC INDUSTRIAL SERVICES (PTY) LTD Fifth
Respondent

and

**APPEAL COURT CASE NO: A009029/2023
CASE NO:2022/3047**

In the matter between:

SOUTHEY CONTRACTING (PTY) LTD
Appellant

and

ESKOM HOLDINGS SOC LTD First
Respondent

ELECTROHEAT ENERGY (PTY) LTD Second
Respondent

KAEFER THERMAL CONTRACTING SERVICES (PTY) LTD Third
Respondent

RAMGULAM INVESTMENTS CC TRADING AS ORAM INDUSTRIALS (PTY) LTD Fourth
Respondent

RSC INDUSTRIAL SERVICES (PTY) LTD Fifth
Respondent

JUDGMENT

This judgment has been delivered by being uploaded to the CaseLines profile and communicated to the parties by email.

Wepener J et Yacoob J et Dosio J:

[1] This is an appeal by two parties being Southey Contracting (Pty) Limited (“Southey”) and Waco Africa (Pty) Limited trading as SGB (“SGB”) arising from two of three applications, heard together, although not consolidated, by three erstwhile

service providers to the respondent, Eskom SOC Limited (“Eskom”), for the provision, supply erection and dismantling of scaffolding and removal and replacement of insulation material at Eskom’s fifteen coal-fired power stations. The court a quo (Adams J) heard the matters together and issued a single judgment dismissing all three applications. One of the applicants in the court a quo, TMS Group Industrial Services Limited (“TMS”), takes no further part in this matter.

[2] As unsuccessful tenderers, the three applicants (in the court below) applied to review the validity of Eskom's tender process and the awarding of the tender contracts to successful tenderers, being respondents in the matter. The court a quo’s judgment was delivered on 2 September 2022, and the two appellants were granted leave to appeal on 21 October 2022.

[3] It is common cause that the procurement of the goods and services by Eskom is subject to various legal prescripts such as the Public Finance Management Act¹ (“PFMA”); the Constitution;² the Promotion of Administrative Justice Act³ (“PAJA”); the Preferential Procurement Policy Framework Act⁴ (“PPPFA”); Public Finance

¹ Act 1 of 1999.

² Section 217(1) – (3):

“Procurement.- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

(a) categories of preference in the allocation of contracts; and
(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (3) must be implemented.”

³ Act 3 of 2000.

⁴ Act 5 of 2000 – section 2(1):

An organ of state must determine its preferential procurement policy and implement it within the following framework:

(a) A Preference point system must be followed;

(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;

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

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

(d) the specific goals may include—

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

(ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;

Management (“PFMA”)⁵ as well as the Construction Industry Development Board Act⁶ (“CIDB”) and the regulations published thereunder.⁷

[4] Eskom, being a public entity listed in Schedule 2 of the PFMA, is also subject to the provisions of the National Treasury Regulations, guidelines, circulars, and instruction notes that regulate the procurement of services and goods. These instruments have legal effect having been issued under the provisions of the statute. Not all of the provisions feature in this appeal.

[5] In *Steenkamp NO v Provincial Tender Board of the Eastern Cape*,⁸ the Constitutional Court stated that tender processes require “strict equal compliance by all competing tenderers, on the closing day for submission of tenders.”⁹

[6] The proper legal approach was set out in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (Corruption Watch as Amicus Curiae)* (“*Allpay (1)*”)¹⁰

“[22] This judgment holds that:

(a) The suggestion that “inconsequential irregularities” are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.

(b) The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

(d) any specific goal for which a point maybe awarded, must be clearly specified in the invitation to submit a tender;
(e) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and
(f) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, maybe cancel led at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.”

⁵ Act 1 of 1999 – Section 51(1)(a)(iii):

“an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”

⁶ Act 38 of 2000

⁷ Regulations published under Government Notice 692 in Government Gazette 26427 of 9 June 2004as amended thereafter.

⁸ 2007 (3) SA 121 (CC) para 60; confirmed in *Allpay (1)* para 39.

⁹ Paragraph 60.

¹⁰ 2014 (1) SA 604(CC) at para 22.

(c) The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.

(d) The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act (PAJA).

(e) Black economic empowerment generally requires substantive participation in the management and running of any enterprise.

(f) The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside.”

[7] When considering the fairness and lawfulness of the administrative action (independent from the result) the following approach is to be followed:

“Once the ground of review under PAJA has been established there is no room for shying away from it. Section 172(2) (a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under Section 172(1) (b). Section 8 of PAJA gives detailed legislative content to the Constitution’s ‘just and equitable’ remedy.” (footnotes omitted)¹¹

[8] The Constitutional Court further considered¹² that

“. . . deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a threefold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.”

¹¹ *Allpay* (1) et para 34.

¹² At para 27.

[9] The procurement framework legality was set out by Froneman J in *Allpay (1)*¹³ as follows:

“[31] In *Steenkamp Moseneke* DCJ stated:-

‘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 s 33 and the basic values governing public administration in section 195(1).’ (footnotes omitted)

In *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others the Supreme Court of Appeal* (per Jafta JA) elaborated:

“The . . . Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (s 217). The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be ‘fair, equitable, transparent, competitive and cost-effective’. Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of [PAJA] apply to the process.” (footnotes omitted)

[32] The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus s 217 of the Constitution:

‘(1) When an organ of state in the national, provincial, or local sphere of government, or any other institution identified in national legislation, contracts for goods or

¹³ At para 31 and following.

services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for —

- (a) categories of preference in the allocation of contracts; and
- (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

[33] The national legislation prescribing the framework within which procurement policy must be implemented is the Preferential Procurement Policy Framework Act (Procurement Act). The Public Finance Management Act is also relevant.

[34] An “acceptable tender” under the Procurement Act is any “tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document;” The Preferential Procurement Regulations (Procurement Regulations) define a tender as

“a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals;”

[35] An organ of state must indicate in the invitation to submit a tender —

- (a) if that tender will be evaluated on functionality;
- (b) that the evaluation criteria for measuring functionality are objective;
- (c) the evaluation criteria, weight of each criterion, applicable values and minimum qualifying score for functionality;
- (d) that no tender will be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation; and
- (e) that tenders that have achieved the minimum qualification score for functionality must be evaluated further in terms of the applicable prescribed point systems.

[36] The object of the PFMA is to

“secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions” to which it applies, SASSA being one of them. Section 51(1)(a)(iii) provides that an accounting authority for a public entity must ensure and maintain “an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;”

[37] The Treasury Regulations issued pursuant to section 76 of the PFMA require the development and implementation of an effective and efficient supply chain management system for the acquisition of goods and services that must be fair, equitable, transparent, competitive and cost-effective. In the case of procurement through a bidding process, the supply chain management system must provide for the adjudication of bids through a bid adjudication committee; the establishment, composition and functioning of bid specification, evaluation and adjudication committees; the selection of bid adjudication members; bidding procedures; and the approval of bid evaluation and/or adjudication committee recommendations. The accounting officer or accounting authority must ensure that the bid documentation and the general conditions of contract are in accordance with the instructions of the National Treasury, and that the bid documentation includes evaluation and adjudication criteria, including criteria prescribed by the Procurement Act and the Broad-Based Black Economic Empowerment Act (Empowerment Act).”(footnotes omitted)

[10] It is only after applying the proper principles that consideration to a remedy, if applicable, should be given. In this regard Froneman J said in *Allpay (1)*¹⁴ as follows:

“Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the

¹⁴ At para 56.

decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight.”

[11] If the requirements are deviated from

“ . . . the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.”¹⁵

[12] It is common cause that at all material times, both appellants were existing suppliers of the same or similar goods and services to Eskom at some of each of the coal fired power stations. On 26 October 2020, Eskom called for tenders for new contracts for 15 power stations. The process was designated Corp 5171. The closing date for tenders was 3 December 2020 and the tender validity period was 52 weeks. The approved budget value for the tender was approximately R4,5 billion.

[13] For purposes of the tender Eskom divided the 15 power stations into eight clusters, of which all but one cluster contained two power stations. An approved budget per cluster was contained in Eskom’s procurement strategy. The latter strategy also recorded that it aimed at the reduction of costs and the realisation of savings through payment of market related rates. The procurement strategy embodied the following features:¹⁶

“To issue an open competitive tender to the market for a contract period of four years commencing 1 July 2021 to 30 June 2025; the works were to be divided into eight clusters; the awarding of contracts would be to a maximum of eight suppliers in possession of the technical capability and capacity to provide scaffolding and insulation material and those who met Eskom parameters; to negotiate market

¹⁵ *Allpay (1)* at para 40.

¹⁶ See judgment of Adams J para 13.

related rates with the recommended suppliers; to impose the requirement that all tenderers be in possession of a CIDB Grade 8 SL or higher; to mirror the contract terms and conditions present in the historical term service contracts; and highlighting that the works would be repetitive and routine in nature for the purposes of providing access to the plant and equipment to perform maintenance and repair work and to provide access to areas that require the removal and reinstatement of insulation.”

[14] The invitation to tender (ITT) that was issued incorporated Eskom’s standard conditions of tender and included the following provisions: the tender validity period was fifty-two weeks from the date and time of the tender; the evaluation criteria were divided into five different stages, namely (i) basic compliance, (ii) mandatory and pre-qualification criteria including compliance with the CIDB Level 8SL or higher grading, (iii) functionality criteria including site inspection and tender evaluation, (iv) evaluation of price and B-BBEE preference points with prices to be scored out of 90 points and B-BBEE out of 10 points in accordance with the PPPFA, and (v) contractual requirements, which included the Safety and Quality requirements, financial statements and SD&L that were to be assessed after the evaluation and the ranking of the tenderers; the allocation strategy inter alia reflected that (i) the contracts would be divided into eight different clusters, (ii) the allocation of contracts would be based on the 90/10 Price Preference Scoring methodology, (iii) tenderers could submit offers for all the clusters or select the clusters they preferred, even though a supplier would only be awarded a contract for one cluster, (iv) in the event that a tenderer scored the highest in more than one cluster, the said tenderer would be given an option to choose one cluster they preferred and the remaining clusters would be allocated to the next ranked tenderer as per the 90/10 Price Preference Scoring methodology, which methodology would be applied to the remaining clusters, (v) Eskom reserved its right to allocate more than one cluster per supplier

(limited to two clusters) should the tenderers refuse to accept mandated negotiation parameters, (vi) no supplier would be allocated more than two clusters, and (vii) the allocation of the second cluster would be on the 90/10 Price Preference Scoring methodology meaning the highest ranked supplier would be allocated a second cluster. The ITT also provided for Eskom's reservation of its right to negotiate with preferred bidders after the competitive bidding process or price quotations, should the tendered prices not have been deemed to be market related. The conditions of contract would be those of the NEC 3 Term Service Contract. A non-mandatory clarification meeting was to take place on 4 November 2020.

[15] On 4 February 2021, Eskom received the bid submissions of the various bidders, including the applicants, and the evaluations commenced during February 2021 and were concluded during May 2021. The analysis that was conducted took into account the cheapest Eskom rates and the cheapest rates found in the bid submissions from all the suppliers, for the purposes of arriving at a revised Eskom estimate (the new Eskom estimate). Twenty-three tenderers responded to the tender and were evaluated in the four stages recorded in both the Proposed Allocation Strategy in the Procurement Strategy and the ITT. The shortlisted bidders were ranked per cluster according to price as follows: (1) Kaefer scored the highest points on cluster 1 to 7. Kaefer did not tender on cluster 8; (2) RSC scored the third highest points on cluster 8 and the second highest on clusters 1 to 7; (3) Oram scored the third highest points on clusters 1 to 7 and the second highest on cluster 8; (4) Electro-Heat scored the fourth highest points on clusters 1 to 7 and the third highest on cluster 8; (5) SGB-Cape scored the fifth highest points on clusters 1 to 7 and the fourth highest on cluster 8; (6) Southey scored the sixth highest points on clusters 1

to 7 and the fifth highest points on cluster 8; and (7) TMS scored the seventh highest points on clusters 1 to 7 and the sixth highest on cluster 8.

[16] Eskom followed the 90/10 Preference Scoring Methodology by first allocating to the highest ranked tenderer and thereafter to the tender ranked second, third, fourth, fifth, sixth and seventh in that particular cluster. In effect each of the successful tenderers scored the highest points in the clusters allocated, in light of the two-contract limitation per tenderer once tenderers already having contracts are excluded.

[17] Eskom thereafter commenced negotiations, as per the reservation of their rights in terms of the ITT, with all seven shortlisted bidders using the price ranking methodology as per the ITT and the approved Procurement Strategy. The negotiations with the shortlisted tenderers took place in three rounds between 23 to 26 April 2021.

[18] Based on the revised rates offered by the preferred bidders during the negotiation process, the four highest scoring bidders were Kaefer, RSC, Oram and Electro-Heat (who were ranked first to fourth respectively), having offered competitive prices in line with Eskom's cost saving initiative. On the other hand, SGB-Cape, Southey and TMS were ranked fifth, sixth and seventh respectively as their prices were still between 11% and 28% higher than the first ranked tenderer, resulting in no further negotiation rounds with them. The negotiated prices were evaluated and signed off by Eskom's Chief Advisor Quantity Surveyor, who confirmed that the prices offered were financially acceptable offers in relation to the agreed tender price and confirmed the recommendation to award the contracts to the four highest ranked tenderers.

[19] The effect of the above recommendation was that Eskom would be awarding a maximum of two clusters to the four successful bidders, instead of one cluster to seven bidders and one extra cluster to one successful supplier, as initially envisioned in the Procurement Strategy and Invitation to Tender. The total savings achieved on the CORP 5171 contract, so Eskom alleges, is approximately 29% in comparison to what Eskom was then paying for the same scope of work in terms of the expired ENK contracts.

[20] On 30 November 2021, Eskom's Board resolved that the contracts be awarded to Kaefer, RSC, Oram and Electro-Heat for a period of four years and correspondence together with the NEC 3 Contracts were sent to the successful bidders on or about 7 December 2021, notifying them of their award.

[21] On 3 December 2021, Eskom informed the applicants that (a) their ENK Contracts would terminate in terms of its full scope of the works on 31 December 2021, (b) the demobilisation and handover would occur in January 2022, (c) the applicants would be permitted to complete outage works that had not been completed by 31 December 2021, and (d) they should provide Eskom with their demobilisation plans.

[22] Between 13 December and 17 December 2021 Eskom entered into contracts with the successful tenderers in the following terms: (1) The contract was a rates based contract; (2) The starting date of the contract was 1 January 2022 to 31 December 2025; (3) The plan identified in the Contract Data is stated in each Task Order; (4) The use of plant equipment and materials is per Task Order; (5) The Contractor supplies, erects and dismantles scaffolding in accordance with each detailed Task Order; (6) The Employer instructs the Contractor when a scaffold is required and by when it must be dismantled; and (7) The Contractor makes the

provision for the supply of labour for the erection, alteration and dismantling of scaffolding during outages, maintenance and project activities.

[23] On 17 December 2021, Eskom published a Regret Letter to the unsuccessful suppliers on its Tender Bulletin and on the CIDB website, informing all bidders that it had decided to award the CORP 5171 Tender to the respective successful bidders and that they had been unsuccessful in their bids. On 22 December 2021, Eskom wrote letters to the applicants informing them that they were not successful in their bids for the CORP 5171 Tender for the reasons, namely, that they had tendered exorbitant prices when compared to the lowest accepted rates and prices, and their prices were thus not market-related and could not be awarded the Tender in terms of the 90/10 preference point system.

[24] Between December 2021 and January 2022 the three unsuccessful tenderers, including the two appellants, instituted three separate urgent applications seeking interim relief pending the finalisation of review proceedings. In the review proceedings the appellants sought the review and setting aside of the award of the tenders to the four parties mentioned before. By agreement between the parties, the urgent applications were not persisted with, and the Deputy Judge President was approached for an expedited hearing of the review applications. The review applications were heard as indicated aforesaid with the unsuccessful conclusion for all three applicants.

[25] An issue that was raised in the court below was an application by Eskom to strike out certain paragraphs of Southey's replying affidavit. The judgment of the court a quo does not mention the issue and it is mentioned in the appeal papers only in relation to costs and there is no cross appeal regarding that matter. Having requested counsel to address us on the issue, we are the view that that the striking

out application does not warrant any further consideration or that any special costs order is attributable to it. That application was and is, in our view, inconsequential in the greater scheme of things of this matter and no order should be made regarding the striking out application.

[26] Despite setting out a large number of grounds of appeal in its application for leave to appeal, Southey has limited the relief sought on appeal in its heads and argument. SGB's grounds of appeal, in addition to broadly making common cause with Southey, can be broadly placed in two categories: the failure of the court to consider certain grounds and, secondly, the errors and misdirections of the court below in those grounds it did consider.

[27] Some of the grounds of appeal are common to both appellants and those will be dealt with primarily as submitted by counsel for Southey. A number of the grounds that overlapped dealt with the validity and manner of application of the cluster allocation system.

[28] One of the grounds of appeal addressed before us related to the complaint that Eskom had failed to adhere to legal prescripts and that the manner in which the ITT was put together and advertised, was unlawful. Without dealing with the specifics of the alleged illegality, it is important to note that a complaint was never raised at the time when the appellants submitted their bids and the appellants happily participated in the bidding process in the manner in which Eskom had set it out. We find that the complaint, after the fact, that there may not have been some or other strict compliance with any of the prescripts, does not avail the appellants. The complaint by the appellants is, by and large, that the cluster allocation system utilised by Eskom, regarding the clusters, offended the rule of legality. Eskom's answer to this ground of review is that the appellants are precluded from challenging the criteria set

out in the invitation to tender, which it failed to challenge before it submitted itself to the tender, which on its version, it was aware was irregular.

[29] It is so that tender criteria can be challenged prior to the evaluation of a tender, as it was done in *Airports Company South Africa SOC Limited v Imperial Group Limited and Others*¹⁷ where the applicant successfully sought an order reviewing and setting aside ACSA's decision to issue and publish an RFB on the basis that it was unlawful, unreasonable, inconsistent with the Constitution and invalid. In this regard the Supreme Court of Appeal held¹⁸ as follows:

“[16] The correct starting point is to consider whether the issuance and publication of the RFB constitutes an administrative action that can be challenged on review under PAJA. The definition of ‘administrative action’ in s 1 of PAJA has seven components: (a) there must be a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or empowering provision; (e) if that decision adversely affects the rights of any person; (f) or has a direct, external legal effect; and (g) does not fall under any of the exclusions listed in that section. It is evident from the provisions of clause 5.1 and 5.3 of the RFB that a bidder who did not meet the prescribed pre-qualification criteria would be automatically disqualified from the evaluation process at stage I. It is also evident that the RFB did not allow ACSA to exercise any discretion in that regard. It is undisputed that in the light of the pre-qualification criteria set out in those clauses of the RFB, the self-evident outcome of stage I of the evaluation process was that Imperial would be disqualified from further evaluation. Imperial's assertion that it could not wait until after ACSA had made a final award because it would, upon its disqualification from the bid, have to vacate ACSA's premises, was not refuted.

[7] . . .

¹⁷ 2020 (4) SA 17 (SCA).

¹⁸ At para 16 and 18.

[18] Fortified by the authorities mentioned in the preceding paragraph, I agree that the automatic disqualification of Imperial at the first hurdle of the evaluation process would have an external effect and adversely affected Imperial's legal rights. Expecting Imperial to wait until it was formally notified of the outcome before resorting to judicial review in terms of PAJA would indeed be tantamount to putting form above substance. I am thus satisfied that, on the facts of this case, the RFB constituted an administrative action that was ripe for a judicial challenge. Imperial was therefore perfectly entitled to resort to judicial review without having to await the formal notification of the outcome.”

[30] The Supreme Court of Appeal adopted the same approach in the matter of *SwissPort South Africa (Pty) Limited v Airports Companies South Africa SOC Limited and Others*.¹⁹ To the extent that any provision in the invitation to tender can be said to result in Eskom not complying with the requirements of section 217 of the Constitution and section 2(1)(f) of the PPPFA, it did affect legal rights adversely. Those legal rights include the appellant's entitlement to have its bid considered in a manner compliant with section 217 of the Constitution and the other prescripts. However, no party challenged the criteria contained in the ITT before it submitted itself to the tender, which it now contends was irregular.

[31] In *Babcock Ntuthuko Engineering (Pty) Ltd v Eskom Holdings SOC Limited and Others*, Millar J held that:²⁰

“It does not behove a tenderer in the position of Babcock to engage in a tender process well knowing the tender was going to be split, and to then after its disqualification for other reasons, attempt to review the award on this basis. It seems to me to have been raised in consequence of a 'belts and braces' approach to the review, a not unreasonable approach given the importance of the matter to all concerned.”

This approach may result in administrative action indeed being regarded as valid, despite it being tainted.

¹⁹ 25363/2018 [2020] ZAGPHC 70 (2 March 2020).

²⁰ (64288/2021) [2022] ZAGPPHC 865 (17 November 2022) para 37.

[32] It was held in *Oudekraal Estates (Pty) Limited v City of Cape Town and Others*²¹ as follows:

“That has led some writers to suggest that legal validity (or invalidity) in the context of administrative action is never absolute but can only be described in relative terms. In Wade Administrative Law 7th ed (by H W R Wade and Christopher Forsyth) at 342 - 4 that view is expressed as follows:

‘The truth of the matter is that the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff’s lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the ‘void’ order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another; and that it may be void against one person but valid against another.... ‘Void’ is therefore meaningless in any absolute sense. Its meaning is relative, depending upon the Court’s willingness to grant relief in any particular situation.’”

The result is that the ground of review regarding the splitting of the tender into clusters was rightly dismissed by the court a quo.

[33] In any event, we consider whether the allocation strategy foreshadowed in the ITT is unlawful or irrational and whether the award contravened section 2(1)(f) of the PPPFA. A proper consideration of section (2)(1)(f) leaves the impression that it does not prohibit the strategy employed by Eskom. The ITT is clear that the ranking will be per cluster. Although a bidder could bid for all eight clusters, one bidder would only be allocated a maximum of two clusters. In effect, a bidder was limited to contest for a maximum of two clusters which would be awarded on the basis that the bidder scored the highest points for those clusters, in line with section 2(1)(f). The

²¹ 2004 (6) SA 222 (SCA) para 28.

remainder of the clusters could be contested by other bidders, who could likewise be the highest scoring bidders for two clusters, and so forth. Ultimately, the tenders were awarded to the highest scoring bidder per cluster after elimination of those that were already awarded tenders. We are of the view that the allocation strategy meets and achieves the purpose of section 2(1)(f), which is cost-effectiveness or contest on price. In *South African Container Stevedores (Pty) Ltd v Transnet Port Terminals and Others*²² (“*South African Containers Stevedores*”) the court said as follows:

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

‘Tender procedures, as we have come to know them over many years, have been the result of vast experience gained in the procuring of services and goods by government. They have evolved over a long period of time through trial and error and have crystallised into a procedure that has become vital to the very essence of effective government procurement. Strict rules have developed over the years in order to ensure that the system works effectively. The very essence of tender procedures may well be described as a procedure intended to ensure that government, before it procures goods or services, or enters into contracts for the procurement thereof, is assured that a proper evaluation is done of what is available, at what price and whether or not that which is procured serves the purposes for which it is intended.’”

[34] In these circumstances there is no breach in terms of section 2(1)(f) or any breach is not so material²³ as to constitute a ground of review.

[35] The interpretation that section 2(1)(f) allows for multiple tenders and multiple contracts at award stage is, in our view, in line with the interpretation of section 2(1)(f) in *South African Container Stevedores*.²⁴

²² (11445/2010) [2011] ZAKZDHC 22 (30 March 2011) para 49.

²³ Materiality being a requirement – See *Allpay (1)* para 28-30.

²⁴ Paragraph 142.

[36] Both SGB and Southey fail to appreciate that Eskom does not claim that the cluster allocation is an “objective criterion” as envisaged in section 2(1)(f) of the PPPFA. The cluster allocation ensured that at every stage, following the elimination of the highest-scoring bidder, the next highest scoring bidder in a cluster would be allocated. The ITT is clear that objective criteria will not be applicable in this Tender. Thus, applying the two-stage enquiry in *Grinaker LTA Ltd and another v Tender Board (Mpumalanga) and others*,²⁵ Eskom only had to ensure that when it awarded the clusters it awarded to the highest scoring bidders in clusters following the negotiations and after eliminating the bidders that had already been awarded contracts in other clusters. Therefore, the Court a quo correctly found that the cluster allocation did not contravene section 2(1)(f) of the PPPFA and met the cost-effectiveness objective in the SGB grounds where SGB contends the court erred.

[37] Counsel for SGB suggested that the application of *South African Container Stevedores* by the court a quo was incorrect. There is no merit in this contention, and there is nothing in the language, context and purpose of the relevant provisions that justifies the approach contended for by SGB. As set out below, this is based on an incorrect interpretation of the cluster allocation system by SGB.

[38] SGB also raised as a ground of review that Eskom did not comply with its own cluster allocation system. The cluster system set out in the RFP is essentially that a cluster will be allocated to the highest scoring bidder for that cluster, which has not yet been allocated a cluster, and that a second cluster would then be allocated to the highest scoring bidder who has not yet been allocated a second cluster.

[39] SGB’s contention is that Eskom had to do this mechanically and entirely numerically by cluster, and that Eskom’s failure to do so falls foul of the procedure set out in the RFP. Each cluster, then, had to be looked at in a vacuum, without

²⁵ [2002] 3 All SA 336 (T) paras 40 - 41

reference to that bidder's rating or ranking in other clusters, or any other consideration. As an example, it complains that RSC should have been awarded Cluster 2 and then only another Cluster between 5 and 8, because there were two more bidders who had to be allocated clusters before RSC could be considered again. Instead, RSC was allocated Clusters 2 and 4.

[40] There is no reason to conclude that the method of application, in itself, is inconsistent with the various applicable precepts. Nor is there merit in the contention that the system was not applied in accordance with how it is set out. The Procurement Strategy, for example, specifies that a cluster will be allocated to the highest scoring tenderer who has not yet had an allocation. It also specifies that if the tenderer has the highest score in more than one cluster it may choose which cluster it prefers. There is nothing in the Procurement Strategy Document which requires that the clusters would be allocated strictly according to an [arbitrarily allocated] number.

[41] The method of application contended for by SGB is, in any case, in our view, overly mechanical, and may well deprive Eskom of the ability to ensure that it has achieved the cluster allocation that is most equitable, fair, competitive and cost-effective, within the parameters of the ITT and the RFP. It has the potential of resulting in an arbitrary allocation which does not serve the objectives of regulatory framework, because it does not allow Eskom to look at the overall result when making its decision. In fact, it is possibly this interpretation of how the cluster allocation system ought to be applied which led to some of SGB's submissions on why the cluster allocation system was invalid.

[42] We are satisfied that there is no merit in this ground of review.

[43] Both SGB and Southey argued that Eskom allocated the tenders on the basis that it subjectively believed those who were granted the tenders could do the work, without objectively complying with the functionality and capacity test. There were various red flags raised in Eskom's financial assessment of these tenderers, showing that the awards to them should be much lower because of their lack of financial capacity. The award to them was therefore neither rational nor lawful. SGB contends that the court *a quo* erred in finding that Eskom satisfied itself that the two tenderers have the necessary financial capabilities.

[44] Eskom satisfactorily demonstrated that it required mitigating measures of these tenderers as a result of the financial analyses and examined the specific capability of each tenderer to carry out the exact services that were being tendered for, before being satisfied that the tenderers would be able to do the work required and deciding that they qualified for the tenders. SGB's argument ignores the holistic approach taken by Eskom in assuring functional capacity, as well as the mitigating measures required. There is no merit in this ground, and it also fails.

[45] A further ground relied on by SGB is that the contracts exceed the values which the successful tenderers qualify for in terms of their CIDB grading.

[46] We are satisfied that SGB's contention is based on a mischaracterization of the contracts and on a misreading of the relevant CIDB regulations. Eskom has demonstrated that the contracts are for work that is of an "as and when required" [outages] or "routine" [maintenance] nature. Eskom was therefore entitled to rely on regulation 25(1B), which permits the annual values of the contracts to be used as the

determining factor, rather than the full value. The contracts do not exceed the annual values for which the contractors qualify. There is therefore no merit in this ground.

Southey's contention of a simulated contract

[47] Southey's most vociferously argued ground was that the contracts between Eskom and the successful tenderers were simulated transactions. Southey argued that the contracts between Eskom and the successful tenderers were simulated transactions, disguised to evade statutory prohibitions under the CIDB and its regulations. It was argued that Eskom took a price-based contract, didn't change anything, and simply stated that it was a rates-based contract. Reference was made to the fact that the ITT uses the word "Price", while once the tenders were received and evaluated, the word used is "Rates".

[48] If this argument succeeds, not only is the contract unlawful for that reason alone, but it would also mean the awarded contracts were far outside the budgeted value, and the successful tenderers did not have a high enough CIDB grading for the value, which would be additional grounds to set the awards aside. Naturally, if the simulated contract argument fails, the grounds based on a finding of a simulated contract, or of a contract that is price based and has the value reached by the quantities tenderers were asked to tender on, also fail.

[49] In support of this argument, Southey cited the case of *De Faria v Sheriff High Court Witbank*,²⁶ where the court said, "it is virtually impossible to escape the conclusion that the Legislature intended the general rule to apply, ie that non-compliance with the prescriptions thereof results in nullity."

²⁶ 2005 (3) SA 372 (T)

[50] In addition to the above case, Southey cited the case of *Schierhout v Minister of Justice*²⁷ where the Appellate Division, (as it then was), stated “it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect ... so that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act ... And the disregard of pre-emptory provisions in a statute is fatal to the validity of the proceeding affected.”²⁸

[51] Southey submitted that Eskom’s conduct in utilising what Southey characterised as simulated or disguised transactions to evade invalidation of the tender and contracts under the CIDB Act, has the consequence that the entire tender process and all the contracts should be declared invalid and set aside, because it is unlawful and against public policy for anyone, and *a fortiori* a State-Owned Enterprise like Eskom, to conclude simulated contracts to evade legislative non-compliance.

[52] Eskom, on the other hand, submitted that Southey’s simulation argument lacks merit. In support of its argument, Eskom cited the case of *Commissioner for South African Revenue Service v NWK Ltd*²⁹ (“*NWK*”) where the Supreme Court of Appeal said the following:

“In my view the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of

²⁷ 1926 AD 99

²⁸ At page 109

²⁹ 2011 (2) SA 67 (SCA)

the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.”³⁰

[53] Eskom submitted that Southey makes no attempt to meet the stringent test for simulation, i.e., to show that the only purpose of the contracts is to evade the provisions of the CIDB Regulations. Furthermore, the established facts show that from the outset Eskom intended to conclude rates-based contracts. Eskom made it clear in its responses to the clarification questions posted in Eskom’s Tender Bulletin at the time that the quantities as contained in the bill of quantities were provided for estimation purposes and that the contracts to be awarded were rate-based contracts. There was no objection to this clarification; nor any PAJA or legality challenge.

[54] In addition, the contracts had always historically been rates-based contracts, and the appellants, as incumbent service providers, were aware that this was the case, and that nothing had changed.

[55] Therefore, according to Eskom, Southey’s contentions were misplaced.

[56] A “simulated transaction” is defined as a transaction where the parties to the transaction do not intend it to have as between them the legal effect it purports to convey. The purpose thereof is to deceive by concealing the real transaction – substance rather than form determines the nature of a transaction (*plus valet quod agitur quam quod simulate concipitur*).³¹

[57] In light of the matter of *NWK*, if the purpose of the transaction is only to achieve an object that allows the evasion of a peremptory law that transaction is regarded as having been simulated.

³⁰ Para [55]

³¹ *IPH Finance (Pty) v Masilela* (19877/2021) [2023] ZAWCHC 143 (13 June 2023) at para 14.

[58] In *Roshcon (Pty) Limited v Anchor Auto Body Builders CC*³² (“*Roshcon*”) the Supreme Court of Appeal said, “for a court to declare a transaction a simulation it does not have to look at any particular legislation but has to look at the facts of each particular case.”³³ This is in light of the judgment of *Zandberg v van Zyl*³⁴ where the court said “the inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down. Perezius (Ad . Cod, 4.22.2) remarks that these simulations may be detected by considering the facts leading up to the contract, and by taking account of any unusual provision embodied in it.”³⁵

[59] *Roshcon* made it clear that “the position remains that the court examines the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated.”³⁶

[60] Similarly, in *Commissioner For The South African Revenue Service v Bosch*³⁷ the Supreme Court of Appeal said, “simulation is a question of the genuineness of the transaction under consideration. If it is genuine then it is not simulated, and if it is simulated then it is a dishonest transaction, whatever the motives of those who concluded the transaction. The true position is that ‘the court examines the transaction as a whole, including all surrounding circumstances, any unusual features of the transaction and the manner in which the parties intend to implement it, before determining in any particular case whether a transaction is simulated.’”³⁸

[61] In light of these quoted cases, it is clear that the correct test for examining whether a transaction is a simulated one or not is by considering the facts.

³² (49/13) [2014] ZASCA 40; [2014] 2 All SA 654 (SCA); 2014 (4) SA 319 (SCA)

³³ para 10

³⁴ 1910 AD 302

³⁵ *Zandberg v van Zyl* 1910 AD 302 at 309.

³⁶ para 37

³⁷ (394/2013) [2014] ZASCA 171; [2015] 1 All SA 1 (SCA); 2015 (2) SA 174 (SCA)

³⁸ para 40

[62] Southey's argument that the contracts entered into between Eskom and the successful tenderers were simulated transactions, disguised to evade statutory prohibitions under the CIDB Act and its regulations, does not stand. Eskom made it clear in its responses to the clarification questions posted in Eskom's Tender Bulletin at the time that the quantities, as contained in the bill of quantities, were provided for estimation purposes and that the contracts to be awarded were rate-based contracts. There was no objection to this clarification; nor any PAJA or legality challenge. This is in line with what is stated in the "Approval of negotiated outcome" document. This is fully explained by Eskom's expert witness who had personal knowledge of the facts that Eskom's Approval of Negotiated Outcome and feedback Report recorded that the estimated spend for each of the clusters 1 to 7 was R1 811 919 333.9225 and the estimated spend for cluster 8 (one power station) was R905 959 666.96.26 which was higher than the approved budget. The expert confirmed that the envisaged contracts are rates-based rather than volume-based (which would be the same as price-based). This was due to the specified quantities issued with the Tender being inflated, in order to give Eskom more accurate rates based on bulk supply. However, given that this is an enabling contract and a rates-based contract rather than volume based, this would not implicate the approved budget.

[63] Southey's contentions ignore these explanations and with no basis allege an attempt by Eskom to mislead the Court a quo regarding the budget of R4,5 billion.

[64] Having indicated from the beginning that it intended to conclude rates-based contracts, Eskom was entitled to conclude the tender contract on a rates basis.

[65] Southey has not established any simulation. There is no simulation relevant to the merits of the review or to the just and equitable remedy sought.

SGB's remaining grounds of appeal

[66] The grounds on which SGB contends the Court *a quo* erred or misdirected itself have already been dealt with earlier in this judgment. They are primarily based on the cluster allocation policy, its validity, and the manner in which it was applied. It remains to deal with those grounds which SGB contends the court failed to consider.

[67] It was argued by SGB that the grounds not dealt with by the Court *a quo* are good grounds which should result in the tender being set aside. These grounds are: that Eskom applied price matching contrary to its own policy; that SGB did not have the full opportunity to negotiate as set out in the ITT, and, that Eskom incorrectly took into account a pending matter between the parties and therefore excluded SGB.

[68] It was contended by SGB that the rejection of SGB's tender bid on the basis that its pricing is "exorbitantly high and not-market-related when compared to the lowest tendered" is irrational and unlawful. SGB argued its prices are market-related and the pricing of the successful bidders (as well as Eskom's aspirational rates) are below market-related to the extent that no service provider would in fact be able to execute the tendered services at those rates.

[69] The submission that Eskom applied price matching must fail. Eskom explained that it used aspirational rates as a negotiation parameter. The success of a bidder was not based on its ability to match the aspired rate of the highest bidder on price. The affidavit supplied by Eskom's expert explains the methodology used to determine Eskom's aspirant prices. SGB failed to establish that its own prices were market-related or that its exclusion was unfair. Eskom's decision on pricing was both reasonable and rational.

[70] SGB's complaint that the Court *a quo* failed to consider and address the fact that Eskom deliberately failed and/or neglected to provide SGB an opportunity to

engage in a further price negotiation meeting with Eskom, in circumstances where the same opportunity was granted to Electro Heat, Oram, and RSC must fail.

[71] SGB had addressed a plethora of correspondence to Eskom subsequent to its initial and only negotiation meeting requesting an opportunity to meet with Eskom to negotiate its rates further.

[72] SGB was indeed called to a meeting where prices were discussed. It cannot be suggested that SGB can have the right to insist on being included in negotiations when it was clear that it did not offer market related prices. The contractors who were engaged in the second round of negotiations were the ones who gave better pricing and were ranked higher than SGB. Having fallen out due to higher pricing, there is nothing unfair in Eskom not calling SGB back for further negotiations.

[73] SGB's complaint that the Court a quo failed to consider that Eskom took into consideration pending Competition Tribunal proceedings, and that, in fact, Eskom held pending Competition Tribunal proceedings against it resulting in an unfair process, must equally fail.

[74] The submission that Eskom placed SGB at a disadvantage by taking into account litigation between them, is in our view, no more than a fiction and no facts to support the allegation have been pleaded. The tender was considered and awarded for reasons unrelated to the pending Tribunal proceedings. While SGB was afforded an opportunity in the negotiations to address the concern regarding the Tribunal proceedings, it is clear that the decisive issue was the rates that was tendered. The pending Competition Tribunal proceedings played no role in the ultimate decision. There is no basis for this submission, and it finds no factual basis in the papers.

Costs

[75] The Court *a quo* correctly exercised its discretion in making costs orders against the Appellants. The Appellants do not make out a case for interference on appeal with the Court's exercise of discretion on costs on appeal.

[76] We make the following orders:

(1) Appeal by Southey

The appeal is dismissed with costs including the costs of two counsel.

(2) Appeal by SGB

The appeal is dismissed with costs including the costs of two counsel.

Wepener J

Yacoob J

Dosio J

Heard: 8 November 2023

Delivered: 4 March 2024

For SGB:

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