THE HIGH COURT OF SOUTH AFRICA

KWAZULU–NATAL LOCAL DIVISION, DURBAN

CASE NO: D6346/2019

In the matter between:

WATTPOWER SOLUTIONS CC **FIRST APPLICANT**

PRENTEC (PTY) LTD **SECOND APPLICANT**

and

TRANSENT SOC LIMITED **FIRST RESPONDENT**

MURRAY & DICKSON (PTY) LTD **SECOND RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 20 December 2021.

JUDGMENT

Chetty J:

[1] This is an application by the first and second applicants ('the applicants'), who formed a Joint Venture in order to bid for a tender for the upgrading of the first respondent's ('Transnet') fire protection system at its Alrode Depot, which is a high-risk facility and national Key Point. It is one of the largest bulk storage depots for fuel in the country, supplying fuel primarily to Gauteng. The value of the tender was approximately R130 million. As part of the five stage procurement process, the

applicants and the second respondent, Murray & Dickson (Pty) Ltd ('M&D'), were the only bidders who successfully passed the functional evaluation stage. The applicants obtained the highest score in the fourth stage, based on functionality. This part of the process is referred to by 'Transnet as a 'desktop exercise', as it assumes at face value the correctness of the information submitted by the bidders. The next stage of the process was based primarily on the assessment of price and whether the bidder met the necessary BBBEE credentials. It is not in dispute that the evaluation would be on the basis that price would be accorded 90 points, with the remaining 10 points accorded to preference. The applicants contend that ordinarily, they would have been the successful bidder having scored the highest points in the fourth stage, with the last stage merely entailing post-tender negotiations and the final awarding of the contract.

[2] Notwithstanding the applicants securing the highest points at the fourth stage, they were not awarded the contract. Instead, Transnet, relying on, inter alia, the provisions of the Preferential Procurement Policy Framework Act 5 of 2000 ('PPPFA'), sought to subject both the applicants and M&D to a due diligence investigation, supposedly in terms of s 2(1)(*f*) of the PPPFA, which provides that 'the contract must be awarded to the tenderer who scores the highest points, *unless objective criteria* in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer'.[1] This, as will appear from what is set out below, is one of the main areas of dispute in this application.

[3] Transnet further sought to justify the due diligence investigation on the basis that clause F3.13 of the invitation to tender (clause F3.13') provides that the employer must accept the highest scoring tender provided that it does:

'. . . not present any unacceptable commercial risk and only if the tenderer:

(a) . . .

(b) can . . . . demonstrate that he or she possesses the professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, expertise and the personnel, to perform the contract'.

[1] Emphasis added.

Transnet further relied on the provisions of regulation 25(9) of the Construction Industry Development Board Regulations GN 692, *GG* 26427 (9 June 2004) ('the CIDB Regulations'), in terms of which it had to be satisfied that the successful tenderer has demonstrated that it has the 'resource capacity and capability specific to the contract concerned' and that its '*capacity* to perform the construction works will not be unduly compromised on the award of the contract concerned'.[2]

[4] Despite the applicants being the highest scoring tenderer, the contract was awarded by Transnet to M&D on the basis that the applicants did not demonstrate their 'capacity and capability' to execute the tender. The due diligence investigation was challenged by the applicants as an unlawful intrusion on their rights and inconsistent with the provisions of the legislative framework governing procurement.

[5] Prior to the hearing I convened a video conference with counsel[3] and requested that the parties submit a joint statement in which the issues they required the court to determine were agreed to in writing. I am indebted to counsel for their resolve in doing so, particularly as it enabled the court to focus more directly on the issues in dispute between the parties. At the outset of the hearing, Mr *Tsatsawane SC*, who appeared together with Mr *Chavalala* for the applicants, indicated that the applicants' case rested on two fundamental points. The first point was based on the due diligence investigation which was undertaken by Transnet *after* the applicants had already passed a desktop assessment and were found by Transnet to have scored the highest of all the tenderers. The investigation concluded that the applicants did not possess the necessary 'capacity and capability' to execute the tender. The second point was that prior to the expiry of the closing date for the period within which Transnet was obliged to award the contract, it applied for an extension of the validity period. By that stage, the only parties 'alive' in the race for the contract having passed the functionality stage, were the applicants and M&D. Despite the applicants and M&D granting their consent for the extension of the period within which the contract had to be awarded, the applicants now contend that as this invitation was only extended to the above two

[2] Emphasis added.
[3] By agreement of the parties and in light of the COVID-19 restrictions in place at the time, the hearing was conducted by audio visual means.

parties and *not all the bidders* who submitted bids, this omission by Transnet invalidated the procurement process. It was contended that this violated the requirement for Transnet to act in a 'transparent and fair manner' as envisaged in s 217 of the Constitution. Each of these grounds will be considered in detail below.

[6] M&D, to whom the contract was awarded, has been drawn into the proceedings on the basis that the applicants contend that in the notice of motion that if the review is successful, then not only should the agreement between Transnet and M&D be set aside, but that M&D be directed to open its audited financial statements 'and provide full access of its records' to a firm of auditors for the purpose of conducting a verification of the 'full amount of the profits' earned by M&D in terms of the contract. Once those amounts have been verified, M&D are required to 'repay' to Transnet the profits which it made on the contract. Mr *van Eetveldt,* who appeared for M&D, described this order for the disgorgement of profits, in the absence of a shred of evidence of collusion, as an extraordinary remedy. This aspect is considered at the conclusion of this judgment.

[7] A brief chronology of the events leading up to the awarding of the contract to M&D and the rejection of the applicants' bid are that in October 2017 Transnet invited interested parties to submit bids for the construction of a fire protection system for its Alrode Depot. The first and second applicants constituted themselves as a joint venture, with the second applicant being the lead partner. The applicants submitted their bid in December 2017. In terms of the invitation, the validity period for the tender was for a period of 12 weeks from the closing date of 12 December 2017. The validity period would lapse if no tender was made by 13 March 2018. As part of their submission, the applicants included evidence of them having executed similar projects to that envisaged in the tender, thereby demonstrating their capability and capacity to execute the scope of work required.

[8] The applicants and M&D proceeded through to the third stage dealing with the technical and functionality evaluation of their bids. During this phase the bidder's ability to execute the scope of work was assessed. Any bidder failing to achieve the threshold of a 70 per cent score at this stage of the evaluation was excluded from

further consideration. The fourth stage, to which both the applicants and M&D proceeded, considered price and their BBBEE credentials on the basis of a 90/10 point allocation, where price is allocated 90 points and preference 10. It is common cause that the applicants scored the highest points at the fourth stage of the evaluation, in which event the awarding of the tender to the applicants would have been a formality at the fifth stage.

[9] However, on 8 May 2018 Transnet informed the applicants that it would be subjecting them to a due diligence investigation in which *inter alia* it would carry out interviews with key personnel associated with the bid, conduct site visits and look into health and safety matters. The applicants contend that the invitation to tender constituted a binding contract between Transnet and the applicants (and other bidders),[4] and on its interpretation, the contract makes no provision for a second opportunity to verify a bidder's ability to meet the requirements of the bid. Once this stage has been passed and the applicants were found to have out-scored the remaining competitive bidders (M&D), they contend the contract had to be awarded to them. They submit that the requirement for a second evaluation of competence and capability was introduced by Transnet in order to avoid awarding the contract to them. To that end, the primary enquiry in review applications such as this is whether there has been unfairness in the adjudication process. In *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* 2008 (2) SA 481, para 4, Jafta JA stated:

'The final 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

---

[4] In *Chairperson: Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* [2005] 4 All SA 487 (SCA), para 14 Scott JA said para 14:
'The definition of "acceptable tender" in the Preferential Act must be construed against the background of the system envisaged by section 217(1) of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective". In other words, whether "the tender in all respects complies with the specifications and conditions of tender as set out in the contract documents" must be judged against these values.'

provisions of the Promotion of Administrative Justice Act (PAJA) apply to the process. This is the legislative background against which the present matter must be considered.'

[10] In response, Transnet contends that it applied objective criteria in assessing the ability of the applicants to perform the works as required in terms of the contract and to this extent rely on the provisions of the PPPFA which was enacted to give effect to the provisions of s 217 of the Constitution, in particular s 2(1)(*f*) of the PPPFA, which provides that 'the contract must be awarded to the tenderer who scores the highest points, unless objective criteria . . . justify the award to another tenderer'.

[11] Transnet contends that there was no unfairness in the due diligence investigation and in particular with this assessment being conducted after the functionality stage had been completed. Ms *Annadale SC*, who appeared for Transnet, contends that the reason for this is that the functionality assessment is a desktop evaluation based on the accuracy of what is contained in the documents provided by the individual tenderer. That being the case, Transnet would accept, at face value and without interrogation, the correctness of the contents of the documents submitted. Until the functionality stage has been passed, it would be impractical to conduct due diligence investigations in respect of all the tenderers. In this regard, counsel underscored that there is a fundamental difference between functionality (where no interrogation of a bidder's documents is undertaken) and due diligence where there is an actual assessment of whether a bidder is able to deliver in terms of the contract. The applicants contend that having passed functionality (in the third stage) they should be immune from further scrutiny of their capacity and competency to perform. In other words, the applicants argue that they should not have to undergo a second round of assessing 'functionality'. However, as Ms *Annandale* submitted, this argument by the applicants presupposes that functionality and due diligence are one and the same. It would appear that one exercise involves a cursory glance at compliance, while the other is an in-depth assessment of capability.

[12] A further issue which arises is whether an organ of state can be penalised, before the final awarding of the contract, for wanting to conduct a more thorough investigation to satisfy itself of the competence of the bidder to carry out the works. In

the present case there is no suggestion that the applicants were taken by surprise or that there was any unfairness in the manner in which the due diligence exercise was carried out. The applicants were given notice, in advance, of the reason for the investigation and the matters of focus. They were submitted to the same examination as M&D and therefore they can point to no prejudice resulting from the exercise, other than that they were eventually rejected as the preferred candidate.

[13] Transnet contends that the applicants, although scoring the lowest on price, omitted key aspects from their method statement.[5] To this end, Transnet places reliance on clause F3.13 which is set out below:

'F3.13 Acceptance of tender offer

Accept the tender offer, if in the opinion of the employer, it does not present any unacceptable commercial risk and only if the tenderer:

a. is not under the restrictions, or has principals who are under the restrictions, preventing participating in the employer's procurement,

b. can, as necessary and in relation to the proposed contract, demonstrate that he or she possesses the professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, expertise and the personnel, to perform the contract,

c. has the legal capacity to enter into the contract,

d. is not insolvent, in receivership, under Business Rescue as provided for in chapter 6 of the Companies Act, 2008, bankrupt or being wound up, has his affairs administered by a court or a judicial officer, has suspended his business activities, or is subject to legal proceedings in respect of any of the foregoing;

e. complies the legal requirements, if any, stated in the tender data, and

f. is able, in the opinion of the employer, to perform the contract free of conflicts of interest.'

[14] Transnet contends that clause F3.13 of the invitation to tender is the same as the standard condition of tender included in Annex 'F' of the CIDB Standard for Uniformity in Construction Procurement, July 2015 ('the Uniformity Standard'). This is not disputed by the applicants. In addition, clause 4.3.4 of the Uniformity Standard

---

[5] The purpose of the method statement, according to Transnet, is to describe the process pursuant to which the bidder proposes to execute and manage the works.

provides that 'functionality criteria shall not include. . . matters relating to the basic capability or capacity of the tendering entity to execute the contract', meaning that functionality and a due diligence investigation are not the same. It is in this context that Transnet contends that the due diligence and risk assessment was different from the functionality assessment, which was carried out as a 'desk top' assessment. The Uniformity Standard was issued in terms of the Construction Industry Development Board Act 38 of 2000 Act ('CIDB Act') and the CIDB Regulations. It is contended that Transnet, as an organ of state, is obliged to comply with the CIDB Act which requires organs of state to have an appropriate procurement and provisioning system which is fair, equitable, transparent and cost-effective.[6] It is also obliged to comply with the provisions of the CIDB Regulations that are applicable to 'construction procurement' defined in s 1 as 'procurement in the construction industry, including the invitation, award and management of contracts'. Transnet contends that, since clause F3.13 of the invitation to tender averts to the due diligence assessment, there is no basis for the applicants to contend that Transnet belatedly introduced a standard for assessment that was not disclosed in the invitation to tender.[7]

[15] Transnet argued that the legislative framework pertaining to procurement and in particular s 2(1)(*f*) of the PPPFA, read together with the CIDB Regulations and the provisions of the Uniformity Standard, clearly contemplates that apart from the evaluation based on points and preference, an objective assessment is provided to determine whether the preferred (or highest scoring) bidder is capable of performing in terms of the contract. In other words, it contemplates that the bidder scoring the highest points ought to be awarded the contract, but subject to objective criteria which warrant otherwise. Accordingly, it follows that the application of the objective criteria cannot take place *before* scoring. If that were not the case, every bidder (even before passing functionality) would have to be subjected to a due diligence assessment. This

[6] See CIDB Best Practice Guideline A2: Applying the procurement prescripts of the CIDB in the Public Sector (1002), 5 ed (December 2007).
[7] See Clause F.1.6.1 of the Standard Conditions of Tender in Annex 'F' of the CIDB Standard for Uniformity in Construction Procurement July 2015 which reads:
'Unless otherwise stated in the tender data, a contract will, *subject to F3.13* be concluded with the tenderer who in terms of F3.11 is the highest ranked or the tenderer scoring the highest number of tender evaluation points, as relevant, based on the tender submissions that are received at the closing time for tenders.' (emphasis added).

would be illogical and devoid of any business sense from a cost perspective. Thus, Transnet state that there can be no complaint from the applicants that the reference to objective criteria or an assessment after passing the functionality stage, were not disclosed or alluded to in the invitation. The applicants were not, as it where, 'operating in the dark'.

[16] Transnet submits that the objective criteria it applied in not awarding the contract to the applicant was essentially the applicants' inability to 'get the job done'. In this regard, see *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and Others* (21158/2012) [2013] ZAWCHC 3 (6 February 2013), para 109 where the court stated:

'Functionality as it is variously defined in the Tender Document concerns the ability of the tenderer to deliver what is required, to meet the needs of the tender, to deliver a service or commodity which is fit for purpose. It is based on the objectively measurable criteria of experience and standing, capability and resources. As such it has direct bearing on the question of whether a tender is cost-effective, i.e. whether it yields the best possible value for money.[8] To my mind it is self-evident that it is not cost effective to award a tender to a party who ticks the right boxes as regards price and preference, but is unable to get the job done properly– whether through lack of experience, adequate personnel or financial resources.'

In the context where the PPPFA prescribes that functionality is a minimum threshold for evaluation in tender process, *Rainbow Civils* suggests that that functionality can serve more than a 'gate-keeping' function and can be taken into account a second time around after a tenderer has been evaluated on price and preference where it may not have achieved the highest scores, but has demonstrated a superior ability to provide the relevant goods or services.

[17] Where functionality is used as an assessment tool in the adjudication of a tender has generated controversy that has not yet been resolved by the courts. *Nexus Forensic Services v SASSA* [2016] ZAGPPHC 579 (21 June 2016) expressly disagreed with the reasoning in *Rainbow Civils*. Neither judgment however is binding

---

[8] Referring to P Bolton *The Law of Government Procurement in South Africa* at p.103 where capability is treated as a factor relevant to cost-effectiveness.

on this court. In *Nexus,* Van Niekerk AJ made reference to the article by Quinot[9] which sets out the history of this controversial issue, and also refers to the decision in this division of *Sizabonke Civils CC t/a Pilcon Projects v Zululand District Municipality* 2011 4 SA 406 (KZP) which effectively rejected the use of functionality as an award criterion. In *Nexus*, the court at para [18] stated

"[18] The issue whether or not functionality has a dual application in the procurement process of state organs, is a contentious issue and the law in this respect is not settled. In this regard, see the informative article of Professor Q. Quinot "The Role of Quality In the Adjudication of Public Tenders" PELJ 2014 (17) 3. In *RH/ Joint Venture v Minister of Roads and Public Works, Eastern Cape and Others* (769/02) [2003] ZAECHC 23 (18 March 2003) in para [32] the learned Judge held that the provisions of section 2(1)(f) of PPPFA are clear namely that the objective criteria referred to therein must be additional criteria, in other words these must be criteria over and above those which have already received consideration as specific goals in terms of section 2(1)(d) and (e) of PPPFA. However, the reasoning for that interpretation does not appear from the judgment.
[19] I disagree with the submission that the *TSP Building & Civils (Ply) Ltd* decision relied upon by Counsel for First and Second Respondents supports the argument in favour of the dual application of functionality ……".

[18] Van Niekerk AJ in *Nexus* therefor expressly rejected the "elevation of the dual application of functionality as part of our law". As pointed out by Quinot at 1123 :

"The role of functionality as a qualification criterion was formalised in the new Preferential Procurement Regulations, 2011, which became fully effective in December 2012. Regulation 4 of the 2011 regulations provides that functionality should be assessed as a qualification criterion in a first stage of adjudication with only bidders obtaining the minimum threshold score for functionality proceeding to the second round of adjudication, where only price and preference points will be taken into account in ranking bidders. This regulation thus effectively put in place the approach of National Treasury's instruction note of 2010. Regulation 4 also removes any doubt as to the legal basis for the two-stage adjudication approach and the use of functionality as a qualification criterion."

---

[9] G Quinot 'The Role of Quality in the Adjudication of Public Tenders' *Potchefstroom Electronic Law Journal* 2014 (17) 3 at 1110.

[19] As I have stated earlier, Transnet contend that the due diligence investigation was not a repeat of the functionality assessment carried out earlier in the process. The difference between the two processes is not disputed by the applicants, with the point is underscored by clause 4.3.4 of the Uniformity Standards, which were incorporated as part of the terms of the tender invitation, that functionality shall not include matters relating to assessment of capacity and capability. There is no denial from the applicants that the due diligence investigation was carried out by an independent engineering consultant, which exposed several shortcomings in the method statement of the applicants. In the context of the construction to which the tender pertained, and the safety aspects of the bulk fuel depot, it was found that the applicants had failed to make provision for a large concrete structure referred to as a 'valve bank". When interrogated on this omission, the consultants found the applicants response was unsatisfactory. In addition, it was found that no provision was made for 'gas freezing' of the storage tanks for the required period of eight days during which the tanks are to be cleaned. As with the aspect of the valve bank, Transnet submits that these omissions displayed a lack of capability on the part of the applicants to appreciate the nature and scope of work required. On this basis, it contended that the applicants had failed the threshold set in Clause F3.13 as well CIDB Regulation 25(9).

[20] In a letter dated 11 October 2018 Transnet wrote to the applicants setting out its reasons for not awarding contract to it. The letter, in part, reads:

'The standard conditions of tender under clause F3.13 (Acceptance of tender offer) as issued in the RFP state[s] "accept the tender offer, *if in the opinion* of the *Employer*, it does not present any unacceptable commercial risk and only if the tenderer can as necessary and in relation to the proposed contract, demonstrate that he or she possesses the professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, expertise and personnel to perform the contract.

The Wattpower Prentec Joint Venture *did not demonstrate sufficient capacity and capability* to successfully execute the contract, therefore, tender offer could not be accepted.' (emphasis added)

[21] The reliance by Transnet on clause F3.13 as a ground of rejection is challenged by the applicants on the basis that s 2(1)(*f*) of the PPPFA only permits the

consideration of *objective* criteria in the determination of a tender. According to the applicants, what is contemplated in clause F3.13 is the expression of an opinion by various officials from Transnet. In this regard, counsel for the applicants submit that any opinion expressed is subjective and therefore inconsistent with the requirement in s 2(1)(*f*). Reliance was placed on *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) where the court held that the prerequisite of an opinion (in that case dealing with an arrest and detention) was a subjective jurisdictional fact. As it is pointed out in Hoexter *Administrative Law in South Africa* 2 ed (2012) at 301, our courts have moved on to viewing opinions and similar clauses in legislation, such as where an official has '*reason to believe'*, to be based and assessed on objective facts. This is aptly captured in *Walele v City of Cape Town* 2008 (6) 129 (CC) where the following was stated in the majority judgment:

'. . . . If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds. The documents fall far short as a basis for forming a rational opinion. Nor does the mere statement by the City to the effect that the decision-maker was satisfied suffice. In the past, when reasonableness was not taken as a self-standing ground for review, the City's *ipse dixit* could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker's opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds. In this case, it cannot be said that the information, which the City admitted had been placed before the decision-maker, constituted reasonable grounds for the latter to be satisfied.'

[22] Although *Walele* deals with the statement of an official or the decision-maker as compared to the present matter where Transnet acted on the basis of a decision made by officials with particular experience in construction and engineering, I accept that *Walele* is instructive in the present context. However s 2(1) of the PPPFA must be read together regulation 11 of the Preferential Procurement Regulations 2017, GN R.32, *GG* 40553 (20 January 2017) ('the Procurement Regulations'), which provides that where a contract is to be awarded to an entity other than that which scored the highest points in terms of s 2(1)(*f*), not only must this decision be based on objective criteria, but the objective criteria must also be fleshed out in the tender documents or in the invitation to tender. The contention of the applicants' counsel is that even if

Transnet did apply objective criteria in selecting M&D as the preferred candidate, its failure to stipulate this much in the invitation constituted an irregularity.

[23] While the reason given for not awarding the contract to the applicants was their failure to 'demonstrate sufficient capacity and capability', they contend that their rejection was based on the subjective opinion of Transnet's officials. The reliance on subjective criteria, which is at odds with s 2(1)(*f*) of the PPPFA read with regulation 11 of the Procurement Regulations, has received the attention of our courts in various cases. In *Q Civils (Pty) Ltd v Mangaung Metropolitan Municipality and Others* (A48/2016) [2016] ZAFSHC 159 (8 September 2016) para 40 the court stated:

'Objective criteria with reference to section 2(1)(f) of the PPPFA referred to *supra* can be defined as those: (a) not listed in paragraphs (d) and (e) of section 2(1) of the PPPFA; (b) which are objective in the sense that these can be ascertained objectively and their existence or worth does not depend on someone's opinion; and (c) bear some degree of rationality and relevance to the tender or project.'

[24] In *Q Civils* the court, in paragraph 40, referred to *Pelatona Projects* (*Pty*) *Limited v Phokwane Municipality and 14 others* unreported NCD judgment under Case No. 691/04, para 31, where it was stated :

'. . . objective criteria must, in my view, be discernable from the information made available to the decision maker . . . . If this is not the case it would mean that the decision maker may look at criteria or information which was never asked from the tenderers. The decision maker will therefore look at information other than that put before it. Such a decision would detract from the fairness of the process. It may well lead to subjective factors being taken into consideration. It is well known that when subjective factors walk in the door rationality flies out of the window. The objective criteria justifying the awarding of the tender to a tenderer other than the one with the lowest tender should not cause the process to lose the attributes of fairness, transparency, competitiveness and cost effectiveness.'

[25] The consideration of objective criteria in tender adjudication processes was clarified in by Wallis JA in *South African National Roads Agency Limited v Toll Collect Consortium ('Tolcon')* 2013 (6) SA 356 (SCA) paras 20-21:

'[20] As to objectivity, which is an aspect of the constitutional requirement that the public procurement process be fair, it requires that the evaluation of the tender be undertaken by

means that are explicable and clear and by standards that do not permit individual bias and preference to intrude. It does not, and cannot, mean that in every case the process is purely mechanical. There will be tenders where the process is relatively mechanical, for example, where the price tendered is the only relevant factor and the competing prices are capable of ready comparison. The application of the formula for adjudicating preferences under the PPPFA may provide another example. However, the evaluation of many tenders is a complex process involving the consideration and weighing of a number of diverse factors. The assessment of the relative importance of these requires skill, expertise *and the exercise of judgment on the part of the person or body undertaking the evaluation*. That cannot be a mechanical process. The *evaluator must decide* how to weigh each factor and determine its significance in arriving at an appropriate decision. Where that occurs it does not mean that the evaluation is not objective. *Provided the evaluator can identify the relevant criteria by which the evaluation was undertaken and the judgment that was made on the relative importance and weight attached to each, the process is objective and the procurement process is fair.*
[21] Where the evaluation of a tender requires the weighing of disparate factors it will frequently be convenient for the evaluator to allocate scores or points to the different factors in accordance with the weight that the evaluator attaches to these factors. *But the adoption of such a system, without it being disclosed to tenderers in advance, does not mean that the tender process is not objective. If anything, the adoption of the scoring system enhances the objectivity of the process*, because, in the event of a challenge to the award of the tender, the basis upon which the evaluation was undertaken emerges clearly.' (my emphasis)

[23] It would appear that *Tolcon*, in my respectful view, is a discreet 'claw-back' from an earlier position which was rooted firmly to the requirement of objective criteria, as set out on *Q Civils* and *Pelatona*. *Tolcon* adopts a balanced assessment of the complex nature of procurement and an acknowledgment that it is not always practical to scrutinise every minute detail of the process, with the faintest deviation being alleged as a reviewable irregularity. *Tolcon* is authority for the view that even if the employer sets the criteria for evaluation, that does not necessarily make the criteria less objective. At the same time, it begs the question who else but the employer or the procuring entity would be best suited to establish the criteria it wants bidders to meet, and who better than the employer to assess whether this threshold has been met? The litmus test in procurement cases is to determine whether the employer, or organ of state as the procuring entity, acted fairly in the awarding of the contract and whether there was equal evaluation of tenders. In *Metro Projects CC and Another v Klerksdorp*

Local Municipality and Others 2004 (1) SA 16 (SCA) the court set aside the award by the municipality to the successful bidder, with Conradie JA stating the following in paragraph 13:

'In the *Logbro Properties* case *supra*, paragraphs [8] and [9] at 466H–467C, Cameron JA referred to the "ever-flexible duty to act fairly" that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It *may* in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it *may* be fair to allow a tenderer to correct an obvious mistake; it *may*, *particularly in a complex tender*, *be fair to ask for clarification or details required for its proper evaluation*. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness' (emphasis added).

[24] It was submitted by Transnet that the applicants do not take issue with the conclusions reached in the due diligence investigations nor have they shown that any of those conclusions are factually incorrect. It is a challenge therefore of form over substance. The focus of the applicants' challenge is that the assessment was performed *after* the scoring in respect of functionality. One must therefore infer that the applicants would have had no compliant if the due diligence was done as *part of* the functionality assessment. This however is not feasible for reasons as stated earlier. In any event, taken to its conclusion, what this entails is that the applicants would have been disqualified at the functionality stage, earlier than they eventually proceeded to. This gives rise to the question that if it is found that Transnet ought to have conducted the due diligence exercise earlier than it did, and that it had to be part of the functionality assessment, what is the materiality of that deviation (flowing from *Tolcon*) and what prejudice, if any, did the applicants suffer? On the other hand, the applicants fail to engage in any manner with the shortcomings exposed during the due diligence investigation, simply contending that the exercise was irregular. However, as pointed out by counsel for Transnet, in dealing with a high-risk facility such as the Alrode bulk fuel depot, the procuring entity has every right to satisfy itself that not only does the preferred bidder meet the evaluation in terms of the procurement process ('ticking the boxes'), but it must be able to demonstrate its competency to deliver on performance. On the basis of this argument, and following the reasoning in *Rainbow Civils* I am satisfied, having regard to the invitation to tender, that the due diligence investigation carried out by Transnet was not tainted by any unfairness to the applicant, nor irregular

in the context of the application of the procurement process, that it did not constitute a repeat of the functionality assessment, and accordingly this ground of the applicants' challenge must fail.[10]

[25] I now turn to deal with the aspect of the 'record' provided to the applicants by Transnet, although this was a subsidiary ground, belatedly relied on by the applicants. Mr *Tsatsawane* submitted that when Transnet was asked to furnish the minutes of the meeting of the Divisional Acquisition Council ('DAC') it was presumed that they would contain the details of the investigation carried out by Transnet and the factors that were taken into account in arriving at the opinion not to award the contract to the applicants. What was furnished was a significantly redacted document. The second page of the minutes dated 15 August 2018 is redacted to the extent that only one-eighth of the contents of the page are disclosed. It begs the question, irrespective that the applicants did not frame their notice of motion in terms of Uniform rule 53, whether Transnet as an organ of state has acted in a manner that is fair and transparent when it filed a redacted 'record' of the type that was given to the applicants. When a losing party requests details as to why it failed to secure a bid, a responsive organ of state should disclose as much information as it possibly can, having due regard to issues of confidentiality. It must inform the requester why he or she was found to be deficient or second-best. The actions of Transnet fell woefully below that standard. Ms *Annandale* contended that the redacted portions of the minutes refer to pricing and other confidential aspects, which are of no moment in the dispute. Moreover, no challenge was raised by the applicants to the redacted documents with Transnet, which was raised for the first time at the hearing.

[26] The point emphasised by counsel for the applicants was that the 'record' sought from Transnet was not only vital to the applicants, but also to the court in assessing from the available information, whether the actions of Transnet were fair in the circumstances of the case. No justification has been advanced by Transnet for so heavily redacting the minutes, nor has confidentiality been claimed by any of the other

---

[10] Compare *Nexus Forensic Services (Pty) Ltd v Minister of Employment and Labour* 2020 JDR 2694 (GP). See further G Quinot 'The Role of Quality in the Adjudication of Public Tenders' *Potchefstroom Electronic Law Journal* 2014 (17) 3 at 1110.

bidders. At the same time Mr *Tsatsawane* submitted that without access to the full record or minutes of the DAC meetings, this court is unable to assess whether Transnet applied objective criteria in preferring M&D over the applicants as the successful candidate for the tender. Ms *Annandale* contended that the applicants elected not to proceed via Uniform rule 53 and have raised the issue of a 'defective record' only in their heads of argument. There was no request for the record in terms of Uniform rule 53, but instead a request in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA') in which certain specific documents (including minutes of meetings) were requested, including reasons why the tender was not awarded to the applicants.

[27] The minutes of June and August 2018, which are attached in their redacted form to the founding affidavit, are relevant as they provide a record of the findings of the due diligence investigation conducted in terms of the Uniformity Standard. The minutes (recording a meeting on 29 August 2018 and signed on 4 October 2018) state, in paragraph 4, that:

'The reason for not recommending the first rank bidder [the applicants] was not that it failed the risk analysis, rather the JV could not demonstrate that it possesses the skills, competence, resources and capability to perform on the scope of work as evident by the due diligence reports presented.'

The earlier minutes from June 2018 confirm that reservations were expressed by those carrying out the due diligence investigation as to the capacity and capability of the applicants to carry out the work forming the scope of works.

[28] The investigators carrying out the due diligence further found that the applicants had a CIDB grading below that required for an entity undertaking work for the value of a contract as in the present matter. The panel 'unanimously agreed that the joint-venture did not demonstrate that it possesses the professional qualifications, professional technical competence as well as managerial capability'. Accordingly, it was found that there were compelling and justifiable reasons not to recommend the applicants for the contract despite them having secured the highest evaluation points. The minutes further reflect that the applicants expressed their disquiet at the procedure being followed by Transnet and enquired whether this process was also applied to other bidders, including M&D. Eventually the DAC conducted a due diligence

assessment of M&D. Turning to the minutes of the DAC meeting on 15 August 2018, it is recorded that a due diligence investigation would be undertaken in respect of M&D to ensure that the evaluation process was fair and transparent.

[29] Mr *Tsatsawane* submitted that this is indicative of a different set of rules for M&D compared to the applicants who were being assessed in terms of their competency and capability to perform in terms of the contract. Moreover, the minutes themselves record that the reports following the due diligence investigation were 'not conclusive regarding which contractor is preferable'. It was therefore submitted that it is impossible to ascertain what objective criteria were applied in selecting M&D ahead of the applicants. Instead, the minutes of 29 August 2018 note that the applicants were not recommended as the successful candidate based on capacity and capability risks identified. Rather, it is noted that the applicants 'could not demonstrate' that they possessed 'the skills, competence, resources and capability to perform on the scope of works'. Again, this lends credence to the submission that the applicants were evaluated on different standards. It bears noting that Transnet's letter of rejection dated 11 October 2018 records that the '*Wattpower Prentec Joint Venture did not demonstrate sufficient capacity and capability to successfully execute the contract, therefore, its tender offer could not be accepted*.' In addition, it would appear from the minutes that the due diligence was conducted on the applicants, and only after the matter was brought to the DAC did the latter direct that a similar exercise be performed on M&D. This again raises the spectre of different processes applicable to the applicants compared to M&D.

[30] In my view the redacted minutes provided to the applicants was in response to a request in terms of PAIA, and not a request directed in terms of Uniform rule 53. At no stage prior to the hearing of the matter was the issue of the redacted minutes raised with Transnet or contended as a ground of invalidity in terms of the procurement process. However, as I have stated above, as an organ of state, Transnet has a duty to act in a transparent manner in all matters relating to procurement. This duty does not end once the contract has been awarded. However, despite the shortcomings in their conduct, I am unable to conclude that the failure to furnish a fuller or un-redacted version of the minutes invalidates the procurement process.

[31] Turning to the second ground that Transnet acted irregularly and unfairly when it extended the tender validity period, the argument is that even though the extension was done with the consent of both the applicants and M&D, and before the expiry of the period, since the disqualified bidders[11] at that stage had not been asked for their consent, this was unfair and constitutes a ground on which the awarding of the tender must be set aside. It is clear from the case authorities that a tender period can be extended, if firstly, the tender data or invitation made provision for an extension, and secondly, it is extended *prior* to the date on which it was due to lapse. Mr *Tsatsawane* placed much emphasis on the judgment by Southwood J in *Telkom SA Limited v Merid Training (Pty) Ltd and Others; Bihati Solutions (Pty) Ltd v Telkom SA Limited and Others* (27974/2010, 25945/2010) [2011] ZAGPPHC 1 (7 January 2011), where in paragraph 14 he held:

'As soon as the validity period of the proposals had expired without the applicant awarding a tender, the tender process was complete - albeit unsuccessfully - and the applicant was no longer free to negotiate with the respondents as if they were simply attempting to enter into a contract. The process was no longer transparent, equitable or competitive. All the tenderers were entitled to expect the applicant to apply its own procedure and either award or not award a tender within the validity period of the proposals. If it failed to award a tender within the validity period of the proposals it received it had to offer all interested parties a further opportunity to tender. Negotiations with some tenderers to extend the period of validity lacked transparency and was not equitable or competitive.'

[32] Southwood J's approach in *Telkom* has been followed in a number of decisions since. In *Joubert Galpin Searle Inc And Others v Road Accident Fund And Others* 2014 (4) SA 148 (ECP) para 66, Plasket J stated that the matter before him was on 'all fours' with that in *Telkom* and found that an attempt to extend a tender validity period, *after* it had already expired, was reviewable. This reasoning was followed in this division in *Ethekwini Municipality v Mantengu Investments* CC 2020 JDR 0734 (KZD), and *Tactical Security Services CC v Ethekwini Municipality* 2017 JDR 1558 (KZD).[12] I agree with the reasoning in the above cases. It seems to me, however,

---

[11] Those bidders who did not pass functionality.

[12] See also *Secureco (Pty) Ltd v Ethekwini Municipality* 2016 JDR 0608 (KZD), and, inter alia, *Citiconnect Business Solutions v City Manager of the City of Tshwane Metropolitan Municipality NO*. 2015 JDR 0443 (GP); *Nexus Forensic Services (Pty) Ltd v Minister of Employment and Labour* 2020 JDR 2694 (GP), and *Ilex South Africa (Pty) Limited v National Health Laboratory Service* 2021 JDR 0321 (GJ).

that it is not in dispute that in the present matter the purported extension of the tender validity date occurred *prior* to the expiry date, and the point of contention is whether the purported extension was valid despite Transnet failing to request an extension from *all* bidders, and not just those bidders who had been found to be responsive.

[33] The issue is whether it was necessary for Transnet to advise *all* bidders of the extension, or whether it was obliged to canvass the views of disqualified bidders in a 'race' where only two responsive candidates remained, and in respect of whom such consent was asked and received. Put differently, did Transnet have any obligation in respect of non-responsive bidders? Mr *Tsatsawane* submits Transnet was obliged to, and its failure to notify *all* bidders of the extension, lacks transparency. This argument appears, at first glance, to be buttressed by Southwood J in *Telkom*, at paragraph 14, that '[n]egotiations with *some* tenderers to extend the period of validity lacked transparency and was not equitable or competitive'.[13]

[34] However, the context in which the above statement was made must be carefully considered. The relevant context was that the period of the tender validity had lapsed, *prior* to the purported extension of the period of validity (which is not the case in the present matter). Thus, Southwood J's statement does not necessarily apply to the situation where a tender validity date has been extended prior to it lapsing. This is a critical distinction between *Telkom* and *Joubert Galpin Searle* and the facts in the present case. In *Joubert Galpin Searle* almost a year after the tender validity period had expired, the Road Accident Fund (the respondent in that matter) wrote to bidders to 'amend and renew' their bids. (see paragraph 32 of that judgment). In the present case, Transnet approached the applicants and M&D to extend the validity period *prior* to expiry.[14]

---

[13] Emphasis added. This contention finds support in *Nexus Forensic Services (Pty) Ltd v Minister of Employment and Labour* 2020 JDR 2694 (GP) para 3.3 in which the court held:
'If it is anticipated that the award of the tender or the signing of the contract will not take place prior to the expiry of the bid [validity] period, the period can be extended. In such a case a request must be directed prior to the expiry date to *all bidders who have not yet been disqualified* for their consent to the extension' (emphasis added). See also *Pro Khaya JV v The Nelson Mandela University* 2019 JDR 1944 (ECP) which adopted a similar view.

[14] See *Joubert Galpin Searle Inc And Others v Road Accident Fund And Others* 2014 (4) SA 148 (ECP) paras 66-68 which illustrates that the tender validity period was extended after expiry..

[35] In *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) para 23, in circumstances where tenderers who were found to be ineligible were not asked to extend their tenders, the court stated that 'the complaint relating to the *other* tenderers has no merit whatsoever for the simple reason that they had *already been found ineligible* at that stage and were out of the picture.'[15]

[36] The above comments by the Supreme Court of Appeal in *Aurecon* finds favour with the argument advanced by Ms *Annandale* who contended that Transnet had no obligation to consult with the disqualified bidders as they had no further interest in the awarding of the tender. Indeed, I put it to counsel for the applicants that this fact is underscored by the absence of any challenge to M&D being awarded the contract. It would appear that the applicants are raising an argument, essentially on behalf of unsuccessful bidders, who have no interest in this matter. There is no prejudice to the disqualified bidders whatsoever. Mr *Tsatsawane* submits that this is immaterial. I beg to differ. Even if there is an irregularity (assuming for one moment that it is found that Transnet was under an obligation to engage with disqualified bidders to extend the validity period) the approach on review is to enquire into the materiality of the deviation. Asking the disqualified bidders to extend would have made no difference to the outcome, or as Ms *Annandale* submits, it would have been a pointless exercise. This approach where an irregularity has been found to exist was set out by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) para 28 where it was stated:

'Under the Constitution there is no reason to conflate procedure and merit. The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.'

[37] Another factor that favours Transnet's position is that, as a matter of logic, it appears to be a waste of time and resources to request a non-responsive bidder to

---

[15] Emphasis added. See also *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) para 20.

agree to an extension. As noted in P Bolton *The Law of Government Procurement in South Africa* (2007) at 182:

'In the interests of fairness and transparency (and also competitiveness), an organ of state should, as a general rule, not consider tenders that are "non-responsive". It should consider only tenders that comply with the tender specifications.'

[38] It was submitted that Transnet's exclusion from engaging with the disqualified bidders is justified as regulation 5(6) of the Procurement Regulations makes it clear that a tender that fails to meet the minimum requirements for functionality, is disqualified from further participation.[16] It is not considered an 'acceptable tender'. If that is the case, what purpose is served by engaging with an entity which has no further interest in the proceedings and its outcome. On this ground it was submitted that the present case can be distinguished from the facts in *Telkom* and *Joubert Galpin Searle.* Moreover, as a matter of law, in terms of regulation 5(6) of the Procurement Regulations once the bidders were disqualified, it was not competent for them to consent to the extension of the validity period. Their bids cannot be resuscitated for any purpose. For this reason, only the qualified bidders were engaged on the extension of the validity period. I can find no reason why this reasoning can be regarded as unsound.

[39] Weighing up the circumstances of the matter, I am unable to conclude that either of the legs relied upon by the applicants are meritorious – that is, the extension of the validity period without engaging disqualified bidders and the contention that the due diligence investigation was not provided for in the tender invitation. Even if there were merit in these arguments, it does not automatically follow that the tender must be set aside. Mr *Tsatsawane* submitted that in accordance with *Allpay Consolidated Investment Holdings (Pty) Ltd And Others v Chief Executive Officer, South African Social Security Agency And Others* 2014 (4) SA 179 (CC), in the event of this court finding that the awarding of the contract to M&D was invalid and irregular, a just and

[16] See regulations 5(6) and 5(7) of the Preferential Procurement Regulations, 2017, GN R32, GG 40553, January 2017, which are set out below:
'(6) A tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents is *not an acceptable tender*.
(7) Each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point system and any objective criteria envisaged in regulation 11.'

equitable remedy should see the tender being awarded to the applicants and order a disgorgement of profits made by M&D in terms of the contract and that these be repaid to Transnet. In the event of the scope of work under the tender being fully completed, the applicants contend that the matter should be adjourned to enable the parties to file affidavits as to what a just and equitable remedy should be.

[40] Transnet however argued that the remedy of setting aside is a discretionary remedy. In *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd and Others* 2020 (1) SA 450 (CC) para 89 the court said the following:

'The default remedy for declarations of invalidity of administrative action is to set aside the invalid action and remit it to the decision maker for reconsideration. Once a decision has been set aside, it ceases to have an effect and is treated as if it never existed. Although this is the default remedy, it remains a discretionary remedy. As a result, there are certain instances where setting-aside and non-remittal would be appropriate. The case of *JFE Sapela Electronics* is a prime example here. In that case, Scott J reasoned that a remittal would be impractical and disruptive and accordingly held that it would be in the interests of finality, pragmatism and practicality for the invalid action in that case not to be remitted. This view was further adopted in *Millennium Waste Management*. *Oudekraal* has also set out that legality on occasion may be overridden by these competing considerations.'

[41] As will appear from what follows, at the time of the hearing the work in terms of the contract had all been but completed, with M&D having already paid out third parties for their work on the site. Even if the administrative action is declared invalid, where there has been a significant lapse of time before the matter is heard or where there has been a delay in the institution of the review application (as there has been in this case) it does not necessarily follow that a court will set aside the invalid action. Scott JA held in *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) paras 28-29 that:

'In appropriate circumstances a court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 SCA para 36 at 246D:

"It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide."

A typical example would be the case where an aggrieved party fails to institute review proceedings within a reasonable time. . . . In a sense, therefore, the effect of the delay is to "validate" what would otherwise be a nullity. See *Oudekraal Estates (Pty) Ltd,* (supra) para 27 at 242E-F. In the present case, as I have found, there was no culpable delay on the part of the respondents. But the object of the rule is not to punish the party seeking the review. Its *raison d'être* was said by Brand JA in *Associated Institutions Pension Fund v Van Zyl and Others* 2005 (2) SA 302 (SCA) [(2004 4 All SA 133) in para 46 to be twofold:
"First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions."
Under the rubric of the second I would add considerations of pragmatism and practicality.
[29] In my view the circumstances of the present case as outlined above, are such that it falls within the category of those cases where by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand. While the court a quo correctly found that the award of each of the three tenders was invalid when made, it appears not to have appreciated that it had a discretion to decline to set aside those awards. It follows that in my view the court a quo erred in making the order it did and this court is free to set aside that order.'

[42] Regarding the applicants' submission that, in the event that the court finds that the contract awarded to M&D was invalid the proceedings should be adjourned to file written submissions, Ms *Annandale* submitted that this would be a waste of time as a substantial amount of time has already elapsed since the contract was awarded. Even at the stage when the applicants launched their urgent application (which failed), six months had passed into the contract. I am in agreement that a bifurcated hearing is not appropriate in these circumstances, and in any event, for the reasons that follow, it finds no application in this matter. In any event, it has been stressed that the remedy in such matters must involve a balancing of competing interests *of all parties* – in the case that of Transnet (not to have its activities disrupted by any late third party intervention, particularly in respect of a high-risk activity); that of M&D which has already completed the works and for all intents and purposes has 'moved on'. It is not certain what purpose (including monetary) would be served by the awarding of the contract to the applicants as this would be entirely moot in circumstances where all the work has already been completed. Even if I were to grant a disgorgement of

profits, which is a most drastic remedy, in whose interest would such an order be made? In *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 SCA para 23 it was held that:

'The difficulty that is presented by invalid administrative acts, as pointed out by this court in *Oudekraal Estates*, is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contracts concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable.'

Similarly in *Serengeti Rise Industries (Pty) Ltd and Another v Aboobaker NO and Others* 2017 (6) SA 581 (SCA) para 19 the court stressed that '[r]emedies provided for under s 8 of PAJA and under common law must be construed as giving effect to and promoting constitutional rights', and cited the comments in JR de Ville J*udicial Review of Administrative Action in South Africa* (2003) at 331 that '[a] finding that the action in question is invalid (because a ground of review is present) will not necessarily mean that the action is to be set aside or declared invalid with retrospective effect or even at all.'

[43] Mr *van Eetveldt*, for M&D, explained that M&D had been 'dragged' into this matter following an urgent application launched by the applicants by virtue of relief in the notice of motion that M&D be subjected to an audit of its financial affairs, lay open its financial affairs to investigation where the applicants seek a disgorgement of profits which it made under the contract, as well as an order that it be liable for costs. M&D was, in light of the above and as the successful bidder of the contract, left with no choice but to become embroiled in the litigation. The bald averment in the founding papers that M&D should not be allowed to keep the profits which it has made from the contract is advanced without a shred of evidence suggesting that it has in some manner colluded with Transnet to secure the contract. Nor for that matter have the

applicants been able to point out any deficiency in the bid submitted by M&D which may have warranted the contract being awarded to the applicants. For all intents and purposes, no further evidence has been produced by the applicants to dislodge this view, that M&D benefitted from ill-gotten gains, even two years after they launched the urgent application in August 2019.

[44] Mr *van Eetveldt* firmly associated himself with the argument of Ms *Annandale* on the merits of the matter. With regard to the issue of remedy, Mr *van Eetveldt* emphasised that the court in *Millennium Waste* decided to keep an unlawful tender in place in circumstances where the successful bidder was an innocent party and there was no suggestion that it was complicit in the unlawful activities of the respondent and that it had already expended vast sums to pay third parties for work done on the project. This is on all-fours with the present case. Relying on *Millennium Waste* and a host of similar decisions,[17] it was submitted that the principle that has emerged is whether it is just and equitable, in circumstances such as those in the present matter, that the tender awarded to the successful bidder be allowed to remain in place.

[45] Apart from the issue of disgorgement of profits, at a practical level in respect of a high-risk facility such as the Alrode Depot where safety and construction parameters are critical, if the applicants were to be instated as the lawful candidate, which entity would carry the indemnity in respect of construction work undertaken on the site? The construction is all but complete. It is not clear from the papers what role if any the applicants would assume in respect of the construction if the contract were to be set aside. This difficulty is borne out by the averment in the founding papers where the deponent states:

'Whilst I accept that a Court hearing a review application is required to formulate a remedy which addresses the violation of rights complained of, it would be difficult, if not impossible, to formulate such a remedy if the tender has been executed – and this is even if the relief which the applicants seek is granted in its entirety'.

---

[17] *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA)*; Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA); *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA) and *Joubert Galpin Searle Inc And Others v Road Accident Fund And Others* 2014 (4) SA 148 (ECP).

In his replying affidavit to the contention from M&D that this matter was moot, the deponent contends that M&D have been drawn into the dispute to prevent them from benefitting from an unlawful tender process. Even then, no basis is laid for this far-reaching contention.

[46] Based on the applicants' own submission, it recognises the difficulty in the relief it seeks on the basis that the work in terms of the contract has been substantially completed, and considerable work had already been done even at the stage when the urgent application was launched in August 2019. The delay in bringing the application, where the contract was awarded in October 2018, militates against the relief sought against M&D. No interdict was sought or obtained to halt construction at the time of the urgent application. It ought to have dawned on the applicants at that stage, when the urgent application was withdrawn, of the difficulties it would face going forward. Lastly, as to the reliance by the applicants on *Allpay Consolidated Investment Holdings (Pty) Ltd And Others v Chief Executive Officer, South African Social Security Agency And Others* 2014 (4) SA 179 (CC) ('*Allpay II*') as authority for the case of disgorgement of profits, this is misplaced as if fails to take into account that M&D was acting as a private entity undertaking construction works on behalf of an organ of state. In *Allpay II*, Cash Paymaster Services was essentially performing a function of paying pensions, a function falling squarely within the obligations of the Department of Social Security. Moreover, as counsel for M&D submitted, and with which contention I agree, it would send a chilling message to any private entity contemplating a tender for work with an organ of state if an order for disgorgement or for the financial affairs of a company were to lay open for 'investigation', were to be granted. Innocent successful bidders could, by virtue of such an order, become entangled in litigation in circumstances where they are without blame.[18]

---

[18] *Moseme Road Construction CC and Others v King Civil Engineering Contractors (Pty) Ltd and Another* 2010 (4) SA 359 (SCA), para 1:
'This appeal concerns the award of a government tender. These awards often give rise to public concern – and they are a fruitful source of litigation. Courts (including this court) are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them. The grounds on which these applications are based are many. Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders. Sometimes the successful tenderer is to be blamed for the problem, but then there are cases where he is innocent.

[47] Counsel for Transnet submitted that the applicants have failed to make out a case for the declaration of the tender awarded to M&D as invalid. For the reasons set out earlier in this judgment I have concluded that there is no merit in either of the legs advanced in support of the argument on the merits – either pertaining to the extension of the validity period of the tender or the 'subsequent' due diligence exercise carried out by Transnet after the applicants had passed the functionality stage of the procurement process. That being the case, Ms *Annandale* submits that costs must follow the result. This is not a matter where the application has been brought in the public interest, therefore the principles in *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) find no application.

[48] As regards the costs in association with M&D, Mr *van Eetveldt* submitted that costs should be awarded against the applicants on an attorney-client scale as they dragged M&D into the matter without any justification whatsoever, seeking far-reaching and drastic relief against it, where no foundation was laid for such relief. One is left to speculate as to what may have motivated this approach. Even on their own papers, as I alluded to earlier, the applicants recognised the difficulty in the relief they were seeking in light of the time which had elapsed when they first embarked on the litigation. That ought to have become apparent when the urgent application was adjourned, where the applicants conceded that the matter was not urgent. If the applicants launched their application in which it was made clear that their dispute was with the process followed by Transnet in awarding the contract to M&D, the latter could simply have avoided the litigation by filing a notice to abide. By virtue of the relief sought in the notice of motion, including an adverse order for costs, M&D were compelled to join the fray. Support for the claim for costs can be found in *Normandien*

Many cases are bedevilled by delay, whether in launching the application (and also because the facts were not readily available or easily ascertainable) or because of delays and suspensions inherent in the appeal procedure. If the applicant succeeds the contract may have to be stopped in its tracks with possibly devastating consequences for government or the successful tenderer or both. Conversely, if the works are allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. There are also cases where the final judgment issues only after completion of the contract. It is not necessary to adumbrate further. Tendering has become a risky business and courts are often placed in an invidious position in exercising their administrative law discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy.'

Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Ltd and Another 2020 (4) SA 409 (CC) where the court awarded attorney-client costs where it ought to have been clear to the applicant that their case had become moot. I am of the view that this is such a case where the court should show its disapproval for the manner in which M&D was unnecessarily burdened with having to defend itself in circumstances where it had no role to play.

[49] In the result I make the following order:

a. The application is dismissed with costs, on a party and party scale including that of senior counsel in respect of the first respondent, and costs on an attorney-client scale in respect of the second respondent, such costs to include all costs reserved.

____

M R CHETTY

Appearances

For the Applicants:	Mr *Tsatsawane SC*, with Mr *Chavalala* Mr S Morgan
Instructed by:	HM Chaane Attorneys Inc
Address:	24 Ridgeside Office Park
	Umhlanga Rocks
Tel:	031 575 7000
Email:	hope@hmchaane.co.za and too fchristian@wylie.c.za
C/O	Shepstone & Wylie
Ref:	HM Channe/R Seepane/M 00075

For the First Respondent:	Ms *Annadale SC*
Instructed by:	Hughes- Madondo Inc
Address:	Unit 7, Level 2
	The centenary Quadrant 1
	Umhlanga Rocks
Tel:	031 584 6969
Email:	chanelle@h-m.co.za

For the Second Respondent:	Mr van Eetveldt
Instructed by:	Bennet Attorneys
Address:	48 Marula Street
Tel:	084 510 2031
Email:	chris.bennett1900@gmail.com
Ref:	C Bennett/M&D/Wattpower
c/o	Livingston Leandy Inc
	309 Umhlanga Rocks Drive
Ref:	K Naidoo/ M Mota
Date of Judgment reserved:	27 August 2021
Date of delivery:	20 December 2021