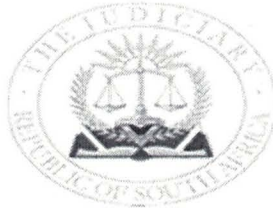


REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO 2017/33335

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED.
	 DATE
	 SIGNATURE

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD

Applicant

and

TRANSNET SOC LTD

First Respondent

VODACOM (PTY) LTD

Second Respondent

JUDGMENT

SUTHERLAND J:

Introduction

[1] This case is about a challenge to the award of a tender. The controversy arises from the disqualification of MTN and from the non-disqualification of Vodacom from that tender process. More specifically:

1.1. Did MTN fail to comply with mandatory requirements of a Request for Proposal (RFP) in that it wrote into a prescribed block of the pricing schedule "N/A" instead of "R0", and was MTN, on that ground, correctly disqualified from the tender process? If not, should not the award of the tender be set aside?

1.2. Independently of the first question, in respect of Vodacom:

1.2.1. Should it not have been disqualified for failing to submit unequivocally to the Service Level Agreement (SLA) stipulated by Transnet?

1.2.2. Should it not have been regarded as having failed the stipulated threshold for technical compliance?

1.2.3. Was it illegitimately allowed to augment its bid?

If so, ought not the tender awarded to it, be set aside, along with the contract concluded with Transnet, pursuant thereto?

[2] The RFP set out its evaluation methodology. As it is pertinent to the various controversies, stages 1 to 3 are cited in full:

"6 EVALUATION METHODOLOGY

Transnet will utilise the following methodology and criteria in selecting a preferred Service Provider, if so required:

NB: Evaluation of the various stages will normally take place in a sequential manner. However, in order to expedite the process, Transnet reserves the right to conduct the different stages of the evaluation process in parallel.¹ In such instances the evaluation of bidders at any given stage must therefore not be interpreted to mean that bidders have necessarily passed any previous stage(s).

¹ It is likely that stages 1 and 2 were performed in parallel. The papers are ambivalent about the stage at which MTN was disqualified. It was unclear if MTN was disqualified at stage 1 for a failure to be administratively responsive because it failed to 'duly complete' a returnable document, or at stage 2 for breaching bullet no 4, which required, for substantive responsiveness, a bidder to have submitted a bid which: '...contains a priced offer (completed pricing schedule with the settlement and without the settlement) populated in alignment to the notes to pricing'. There is no practical difference to the plight in which MTN placed itself and it is unnecessary to resolve that anomaly, as the letter notifying MTN made clear what the reason was for disqualification.

6.1 STAGE ONE: Test for Administrative Responsiveness

The test for administrative responsiveness will include the following:

Administrative responsiveness check	RFP Reference
• Validate whether bid has been lodged on time	<i>Section 1 paragraph 3</i>
• Validate whether all returnable documents and/or schedules were duly completed and returned by the closing date and time	<i>Section 4</i>
• Validate whether the bid documentation has been duly signed by the respondent	<i>All Sections</i>
• Verify the validity of all returnable documents	<i>Section 4, page 46 and 47</i>
• Certificate of attendance of compulsory RFP briefing or signing of the attendance register	<i>Section 9</i>

The test for administrative responsiveness [stage One] must be passed for a Respondent's Proposal to progress to stage Two for further pre-qualification

6.2 STAGE TWO: Test for Substantive Responsiveness to RFP

The test for substantive responsiveness to this RFP will include the following:

Check for substantive responsiveness	RFP Reference
• Whether any general pre-qualification criteria set by Transnet, have been met	<i>Section 1 paragraph 8, Section 4-validity period Section 4- Returnable documents</i>
• Determine whether the Bidder provided an indication (%) of their National Network Coverage across all nine (9) Provinces	<i>Annexure F</i>

Determine whether the Bidder provided a valid ICASA Licence [individual Electronic Communications Network Services (IECNS)]	<i>Section 4 – Returnable documents</i>
Whether the Bid contains a priced offer (completed pricing schedule with the settlement and without the settlement); populated in alignment to the Notes to Pricing	<i>Section 3, page 23 to 40</i>
Whether the Bid materially complies with the scope and/or specification given	<i>Section 2 – Scope of Requirements</i>
- Whether any AD pre-qualification set by Transnet has been met as follows: - A commitment that the monetary value of all SD initiatives to be undertaken by the Respondent will not be less than 30% of the contract value	<i>Section 11</i>

The test for substantive responsiveness [Stage Two] must be passed for a Respondent's Proposal to progress to Stage Three for further evaluation

6.3 STAGE THREE: Minimum Threshold 70% for Technical Criteria

The test for the Technical and Functional threshold will include the following:

Technical Criteria	% Weightings	RFP Reference
Technical Questionnaires Responses	50%	<i>Annexure A</i>
Acceptance of SLA targets	50%	<i>Section 3, page 43 and Annexure E</i>
Total Weighting:	100%	
Minimum qualifying score required:	70%	

The minimum threshold for technical/functionality [stage Three] must be met or exceeded for a Respondent's Proposal to progress to Stage Four for final evaluation

Transnet reserves the right to lower the threshold for Technical from 70% to 60% if no Bidders pass the predetermined minimum threshold in respect of Technical."

[3] The various issues are addressed in turn.

THE DISQUALIFICATION OF MTN

[4] The controversy is crisp.

The Facts

[5] The RFP contained several stipulations which had to be strictly complied with. Among such stipulations was a set of instructions relevant to a document entitled "Notes to Pricing". This concerned a list of 33 devices in a pricing schedule in respect of which separate bids were solicited. Section 3A sets out the instructions. The rigidity of the instructions, especially (e) and (g) bears noting:

"Section 3A: PRICING SCHEDULE (3 YEAR PROPOSITION)

Exclusive of the Settlement/Buy-out

Notes to pricing:

- a) Prices must be quoted in **South African Rand** (exclusive of VAT).

- b) Prices to be submitted using the two (2) options i.e exclusive of the settlement/buy-out and inclusive of the settlement/ buy-out. Failure to provide both options **will result in disqualification. The settlement/ buy-out value will be provided to the Respondents at the briefing session.**
- c) Should the current service provider bid for this tender, the pricing option exclusive of the settlement/ buy-out option will be utilised for evaluation purposes to facilitate a like-for-like comparison of the offers. The pricing option inclusive of the settlement amount will be utilised for Transnet to gain an understanding of the Total Cost of Ownership (TCO) over the contract term should a new service provider be appointed.
- d) Should the current service provider not bid, the pricing options inclusive of the settlement buy-out will be utilised for evaluation purposes.
- e) To facilitate a like-for-like comparison bidders must submit pricing **strictly in accordance with this pricing schedule and not utilise a different format.** Deviation from this schedule **will** result in a bid being declared non- responsive.
- f) Please note that should you have offered a discounted price(s), Transnet will only consider such price discount(s) in the final evaluation stage if offered on an unconditional basis.
- g) Respondents are required to complete all the **green blocks with numeric South African Rand values (exclusive of VAT), no other wording or blank spaces will be accepted** in the pricing schedule below. Failure to do so **will result in disqualification."**

(The emphasis is in the original text)

[6] In addition to these instructions, the pricing schedule, itself, immediately before the list of devices, reminded the persons filling in the prescribed document thus:

“Note:

Respondents are required to provide (South Africa rand, at cost) for each of the handsets listed below.

Devices (brand and models) listed below are not conclusive, however to facilitate a like for like comparison, Bidders are prohibited from providing any alternative mobile device makes or models other than the ones listed in the table below: failure to comply will result in disqualification’

[7] A briefing session was held with potential bidders about what was required to be done in filling out the prescribed forms of the RFP. (It is noteworthy that this bid process was a resumed process after the earlier bid process (The 2015 RFP) had been aborted because the bidders had been held to unresponsive. More it said about that episode hereafter).

[8] The Minute² of the briefing session records, among others, the following exchange:

“Q: What happens if models listed on the RFP are outdated?

A: Please try to complete the pricing to ensure that we can evaluate like -for -like. The models listed have been checked and are currently available in the market.”

[9] A transparency used at the presentation at the briefing session, again shouted out the instructions.³ Moreover, an example was put up too; it illustrated, graphically, the

² Pleadings Bundle, P126, annex FA4 to FA.

pricing schedule with devices listed with rand prices adjacent thereto and including a "R0" entry. If that was not enough, a balloon alert on the example proclaimed once again the very same instructions.⁴

[10] How did MTN react to all of these injunctions and warnings? MTN filled in the blocks for 4 devices in the pricing schedule: "N/A" rather than "R0".⁵

[11] A letter was sent by Transnet informing Vodacom of its disqualification. In that letter the reason given was:

".... your company was unsuccessful... based primarily onfailure to comply with the RFP specification, ie the notes to pricing under section 3, note (g) of the RFP document, which stated the following:

"Respondents are required to complete all the green blocks with numeric SA rand values (exclusive of VAT), no other wording or blank spaces will be accepted in the pricing schedule below. Failure will result in disqualification"

[12] The first question to pose is whether the MTN's response was in compliance with the strict instructions. The answer is plain; it was not. The instructions were clear. They were not followed. MTN was disqualified. Is this decision irregular?

³ Pleadings bundle, page 106.

⁴ Pleadings bundle, page 108.

⁵ Pleadings Bundle, Page 135-136, annex FA4 to FA.

The evaluation

[13] The approach is a two-stage test, determining, first, if an irregularity or deviance by the Organ of State occurred, and at the second stage assessing its materiality in relation to the purpose for which it was prescribed. In *Allpay Consolidated Investment Holdings (Pty) and Others v Chief Executive Officer South African social Security Agency and Others* 2014 (1) SA 604 (CC) it was held:

"[27]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.

[28] Under the Constitution there is no need 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 ant 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.

[40] Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of

procedural fairness. That does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.

[14] The RFP prescribed plainly what had to be done by bidders. MTN did not follow the instructions. Could Transnet excuse MTN? There is no implied or tacit discretion to condone non-compliance with a stipulation in the RFP. The absence of such a power was addressed in *Minister of Environmental affairs and Tourism v Pepper Bay Fishing (Pty) Ltd 2004 (1) SA 308 (SCA)* which dealt with a failure to pay a fee on time and the failure to supply a copy of the bid submission:

“[31] As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so (see, for example, *Le Roux and Another v Grigg-Spall* 1946 AD 244 at 252; *South African Co-operative Citrus Exchange Ltd v Director-General: Trade and Industry and Another* 1997 (3) SA 236 (SCA) ([1997] 2 B All SA 321) at 241 (SA)). The Chief Director derives all his (delegated) powers and authority from the enactment constituted by the general notice. If the general notice therefore affords him no discretion, he has none. The question whether he had a discretion is therefore entirely dependent on a proper construction of the general notice.

[32] Once it is appreciated that the key to the question lies in the general notice as a whole, the obvious starting point is to construe the special provisions of the invitation and the instructions that Pepper Bay and Smith had failed to comply with.[T]he provisions of the invitation pertinent to the Pepper Bay case, on their plain wording, clearly state that the application fee *must* be paid at the time that the application is lodged. Paragraphs 15 and 16 of the instructions are similarly couched in peremptory terms. An applicant '*must* pay' the application fee and '*must* pay the application fee promptly and timeously'. The general principle is, of course, that language of a predominantly

imperative nature such as 'must' is to be construed as peremptory rather than directory unless there are other circumstances which negate this construction (see eg *Sutter v Scheepers* 1932 AD 165 at 173 - 4).... An even more significant indication that timeous payment of the application fee is peremptory is that the invitation contains an explicit sanction for non-compliance with the provision - an application submitted without proof of proper and timeous payment will not be considered (cf *Sutter v Scheepers* (*supra* at 174)). There is also the more general consideration that where, as in the present case, a statute provides for the *acquisition* of a right or privilege - as opposed to the *infringement* of an *existing* right or privilege - compliance with formalities that are prescribed for such acquisition, should be regarded as imperative. (See eg *R v Noorbhai* 1945 AD 58 at 64; *South African Citrus Exchange Ltd v Director-General: Trade and Industry and Another* (*supra* at 241E - I).) In the end, these considerations leave no room for any construction of the specific provisions that Pepper Bay had failed to comply with, which allows for a discretion on the part of the Chief Director to condone such non-compliance.

[33] The same holds true of the provisions which are relevant in the case of Smith. Again, the instructions inform the prospective applicant (in para 1) that 'you *must* fill in the application form and attach the necessary documents in the manner described below' and (in para 10) that 'you *must* submit one (1) original and two (2) copies of the application'. It is true that the instructions do not contain an express sanction for non-compliance with these provisions. Such a sanction is, however, provided for in the invitation which warns the prospective applicant that no application (consisting of, *inter alia*, an original application form together with two copies) received after the stated deadline of midday on 13 September 2001 'will be accepted or considered'.

[15] As to the question whether MTN's deviation was material and thus objectively inexcusable, in *Dr JS Moroka Municipality and others v Betram (Pty) Ltd* [2014] 1 All SA 545 (SCA), dealing with the failure to submit an original tax certificate rather than a copy, it was held:

[10]..... Essentially it was for the municipality, and not the court, to decide what should be a prerequisite for a valid tender, and a failure to comply with prescribed conditions will

result in a tender being disqualified as an “acceptable tender” under by the Procurement Act unless those conditions are immaterial, unreasonable or unconstitutional.

[11][It was submitted], however, that the appellants should have been satisfied with the copy provided and that the failure to provide an original was something which the appellant could and should have condoned.

[12] The immediate difficulty I have with this argument relates to its underlying premise that there existed a discretion to condone a failure to comply with any of the minimum qualifying requirements set out in the tender invitation. The respondent was unable to point to such a discretion being afforded in any of the relevant legislation or regulation and, as Brand JA said in *Pepper Bay*:

“As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so.”

[15] A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid “validly submitted”.

[16] In these circumstances, it is clear that there was no discretion to condone a failure to comply with the prescribed minimum prerequisite of a valid and original tax clearance certificate. That being so, the tender submitted by the first respondent was not an “acceptable tender” as envisaged by the Procurement Act and did not pass the so-called “threshold requirement” to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside – as was held by this Court in *Sapela Electronics*. On this basis, the appellants were perfectly entitled to disqualify the first respondent’s tender as they did.”

[16] MTN contends that there is no material difference between writing “N/A” and “R0”. Moreover, it contends that what “NA” meant was clear from a portion of its bid documents. The document in question is a page which appears to be typed up version of the pricing schedule.⁶ At the very bottom of the page of this document is a paragraph

⁶ Pleadings Bundle, Page 178.

headed 'Assumptions'. A similar paragraph does not appear on the principal pricing Schedule. It includes several remarks, the last of which states:

" N/A indicates devices that are either not type approved or sourced by MTN. However, MTN will assist transnet (sic) in procuring these or alternative devices.'

How it fits into the documents submitted by MTN is not apparent from the papers nor was counsel able to account for its geography. It was submitted that it was part of the pricing schedule, but this is not apparent, not least of all because the pricing schedule runs to 71 numbered pages and this document is not part of that series. The list of devices is on pages 25-26 of the 71.

[17] The contention was advanced that the scrutineer of the bid submission had available this additional information and therefore the meaning of "N/A" was readily apparent. This is not a cogent argument. Self-evidently, how would the scrutineer know where to look, and moreover, why would it be thought that an explanation of "N/A" was tucked away which could be consulted.

[18] However, even if, by some means, merit could be distilled from this argument, it is wholly beside the point. MTN had been instructed with wearisome repetition how to fill in the schedule. It simply ignored the instruction. Whether the meaning of the aberrant inscription was divined or not, the scheme of data presentation demanded by Transnet was thwarted.

[19] The disclaimers expressed by Transnet were alluded to as support for an injunction in the RFP to seek clarification from a bidder at all stages. This is not a cogent contention. The thrust of the disclaimers is the right of Transnet not to award any tender and to be entitled to interrogate the information presented by demanding proofs. For example, they provide:

“10.13: validate any information submitted by respondents in response to this bid. This would include but is not limited to requesting the respondents to provide supporting evidence”⁷

These disclaimers do not qualify nor override the rigid stipulations of paragraph 3A and the pricing list requirements.

[20] A further argument on behalf of MTN was based on an allusion to this sentence, apparently a guide to the scrutineers, applicable to stage 1:

“Procurement conducts to highlight non-responsive (complaint) bids and attempts to obtain outstanding documentation from respondents prior to declaring them non-responsive and eliminating bids” (sic)

The grammar may be a trifle suspect, but its meaning is plain – make sure the bidders have not inadvertently left out any prescribed documents. This courtesy does not address a failure to fill in the documents as expressly directed.

⁷ Pleadings bundle page 62.

[21] In my view, on the facts, the numeric value instruction in section 3A prescribed by Transnet was material because:

2.1. The requirement of a strict uniform format was to facilitate a like with like comparison. The information in the bid submission was requested in both digital and hardcopy format. It must be inferred that the data was probably destined for capture into a matrix, whether computerised or manual. A failure to comply as strictly instructed inhibited a clean process of comparison and would have required the officials of Transnet to make assumptions, attribute interpretations and in general intrude into the process judgments on the meaning of answers were they not to conform to the format prescribed. "N/A" does not have an obvious uniform meaning. In my view most readers might have thought it meant "not applicable" but MTN's special meaning was the least likely to be guessed.

21.2. MTN's decision not to comply inhibited the achievement of the objective of a perfect qualitatively- neutral comparison. Transnet was entitled to demand compliance to facilitate its purposes, which were demonstrably rational in relation to its purpose and eminently reasonable.

[22] Some reference was made to an earlier aborted RFP in which both MTN and Vodacom were disqualified. Strictly speaking, that episode is irrelevant. However, MTN was disqualified in that exercise for the same reason as it was disqualified in the current

process. MTN alleges it was ignorant of the reason. However, the letter informing it made the reason plain.⁸ Moreover, it is sufficient to compare the specifications in respect of the pricing list in the two RFPs to be alerted to the material amplification in the latter RFP as to the need for strict compliance with the format of the replies, amplifications plainly designed to make absolutely and unequivocally clear what was required.⁹ Part of MTN's articulated grievance was that in the aborted bid process it had filled in the pricing schedule in identical terms and been promoted up to the next stage. This is correct, but MTN allows no weight to the fact that it was disqualified *ex post facto* when the RFP was withdrawn.

[23] It is plain that MTN was not compliant. Had Transnet overlooked it, it would have committed a material irregularity. Accordingly, the disqualification of MTN was proper as it was indeed unresponsive in a material respect.

SHOULD VODACOM HAVE BEEN DISQUALIFIED?

[24] The complaints advanced are, to some extent, facets of a single broader complaint. For analysis purposes, they are distinguished and are addressed in turn.

⁸ Letter of 10 March 2017; Pleadings bundle, page 288 reads thus:

"...The cancellation of the tender is consistent with Section 3A, clause E of the [RFP]'s document which states....respondents are required to complete all the green blocks in the pricing schedule below. Failure to do so will result in disqualification" in this regard your bid failed to complete all the required information in the pricing schedule as contained in the aforementioned section of the RFP document. This was a mandatory document which if not fully and duly completed **will** result in a disqualification of the bid."

⁹ The earlier RFP; Pleadings Bundle, page 204, reads thus:

(c) To facilitate like for like comparison bidders must submit pricing strictly in accordance with this pricing schedule and not utilise a different format. Deviation from this pricing schedule **could** result in a bid being declared nonresponsive;

(e) respondents are required to complete all the green blocks in the pricing schedule below. Failure to do so **will** result in disqualification.

The 70% threshold for technical capacity

[25] The RFP provided that Bidders who complied with the formalities stipulated in stage 1 and who therefore were 'responsive' would be promoted to stage 2, and if responsive in stage 2 they would be promoted to stage 3 and so on. Vodacom, alone, was found by Transnet, to have satisfied stage 1 requirements of responsiveness and was promoted to stage 2 and thereafter to stage 3.

[26] At stage 3, as indicated above, technical competence and capacity were assessed along with what described as 'acceptance of service levels'. As regards technical competence the RFP stipulated that a bidder had to exceed a 70% evaluation threshold to pass on to the next stage. The assessment was structured in two equal parts each carrying a 50% weighting; ie the responses to the technical questionnaire, and acceptance of the SLA targets. However, the RFP contained a caveat: "Transnet reserves the right to lower the threshold for technical from 70% to 60 % if no bidders pass the predetermined minimum threshold in respect of technical"¹⁰

[27] The logical consequence of this was that in a case where only one bidder was being evaluated, the *de facto* threshold was 60 %. Vodacom had an initial score of 51.1% Prima facie, it failed and on MTN's perspective should have fallen out in consequence thereof. Moreover, Stage three, by its very nature of being an evaluative

¹⁰ RULE 53 record: para 6.3 Page 883, in Vol 8 of 16

exercise, intrinsically contemplated interrogation by Transnet of the technical aspects of the bidder's offering.

[28] This is what indeed happened. The "Cross Functional Sourcing Team" decided to obtain clarification from Vodacom. The result of the clarification exercise was a re-scoring to increase the score to 63.5%. This exceeded the 60% threshold and permitted Vodacom to be promoted to stage 4.

The illegitimate 'clarification' complaint

[29] It was argued on behalf of MTN that anything other than a blind totting up in relation to what was stated in the initial bid submission was illegitimate. On what basis was the clarification exercise that elevated Vodacom's score from below 50% to 63% justified? (Moreover, the underlying grievance articulated is that if Vodacom had a chance to clarify its input on the technical aspects, why could not MTN get a chance to clarify "N/A"?)

[30] The answer offered is that at stage three of the process clarifications are appropriate to the purpose of that stage. First there is no stipulation in the RFP which prohibits interrogation at this stage and, in my view, it would have been anomalous had there been such an injunction, given the purpose of stage three in awarding a score. Scoring inherently involves an allocation of points as a result of an evaluation. The bona fides of re-scoring has not been attacked.

[31] The clarification opportunity is not available nor appropriate at earlier stages which deal with formalities and responses to standardised questions constructed to afford comparisons. Those stage do not seek to plumb the intricacies of the bidder's specific offering. No discrimination therefore occurred. The caveat is that what took place was indeed a clarification not an augmentation.

[32] Can 'clarification,' of itself, be augmentation? True enough, 'clarification' cannot add any *fresh substantive representation* as to technical capacity. It is however legitimate to submit to the employers' request for verification and explication of that which has already been represented. Its function is to explain, eliminate obscurity of meaning, or settle which of contending possible interpretations about the capacity of the bidder should prevail. Permitting a clarification opportunity recognises that the use of language to express complexities is riven with potential confusions, and no less, describing technology is, similarly, inherently susceptible to innocent misunderstandings. Not to seek clarification would be inherently imprudent.

[33] The complained of alleged augmentation is that contained in an attachment to an email from Vodacom.¹¹ It is said the document contains 'new information'. Obviously, it does – a 'clarification' bereft of additional information is possible to conceptualise, but in real life, is too crimped a concept to be useful. The point to be made is that it serves to explain, not make out a fresh substantive claim. The document sets out questions put to Vodacom, and once asked, Transnet was entitled to full answers and Vodacom was

¹¹ Rule 53 Record: Page 1090 ff, in vol 11 of 16, "M" ie, the 'technical clarifications received from bidder'

duty bound to answer fully. It is the ambit of the question that determines the legitimacy of the exchange of information. In short, a discussion about how the procedure or the apparatus works is not augmentation of the pitch initially put forward and is properly to be described as a clarification. This exercise was not conducted *per se* for comparative purposes, but rather to facilitate the officials of the employer applying their minds to the proposition put forward by the bidder in question.

[34] Notably, the complaint by MTN is short on detail about the effect of the alleged novelties in the clarification in trespassing into the zone of a new substantive pitch. Rather the objective of the complaint seems more of an effort to try to show an equivalence between stage one rigidity for compliance, and a stage 3 flexibility to achieve clarity. In my view, the juxta-positioning of the two stages for this purpose is inapposite.

A guarantee of adherence to the SLA

[35] The complaint about the need for unqualified adherence to the SLA levels derives from the requirement that a bidder was required to 'guarantee' that it would achieve service level targets as set out in annexure "E" to the RFP. Because, as it is alleged, "E" was a document which it was mandatory to return in terms of para 8.6 of the RFP, a failure to comply should mean the bidder was disqualified at stage 1.¹²

¹² See: Para 8.6 of the RFP, Pleadings bundle p61, Annex FA.1.1 to FA

[36] The critical declaration by Vodacom is to be found in response to the question posed in section 3, 'service Levels,' of the RFP.¹³ The relevant portion reads thus:

"3.13.4

3.4 The service provider guarantees that it will achieve the minimum service

levels and the SLA targets provided in 'E'.

3.5 Failure of the service provider to comply with stated service level requirements will give Transnet the right to cancel the contract in whole, without penalty to Transnet...."

[37] Immediately below these statements were two blocks, a YES and a NO, to be ticked. Vodacom ticked "No" and wrote in underneath the blocks:

"Vodacom will work with Transnet to identify the material service levels to which 3.5 can apply."

[38] Two arguments are advanced by MTN:

38.1. First, the annotation is not strictly in compliance with the requirements to state "yes" or "no". (By implication, the argument is why disqualify MTN for a "N/A" instead of a "R0" and not disqualify Vodacom for not answering the question by exclusively ticking one or other box?)

38.2. Second, In the absence of an unequivocal acceptance, how could Vodacom get any of the 50% score itemised in the technical evaluation? It

¹³ Section 3 is found in Bundle C, Vol 3 of 10, at page 216

should get 0%, for its “No”. Logically then, on this thesis, the scoring is restricted to one of two outcomes, a 0 for “No” and 50% for “Yes”.

[39] Transnet and Vodacom answer by contending that the provisions of paras 6.1 and 6.2 of the RFP¹⁴ do not address themselves to service level targets, an item relevant only in Stage 3, but address themselves rather, exclusively, to stage 1 and 2. A plain reading of the text supports this view. It is argued by Vodacom that its answer was not to be construed as outright negative, but merely qualified its acceptance by the additional written words. Transnet argues, further, that even if a bald “No” had been entered that would not be a ground to disqualify for non-responsiveness; it was a scoring issue, as illustrated in the stage 3 technical assessment, referred to elsewhere in this judgment as a qualitative assessment.

[40] Moreover, the argument on behalf of MTN overlooks the instruction given about the “YES” or “NO” exercise in this regard:

“13 INSTRUCTIONS TO BIDDERS FOR COMPLETING THEIR SLA RESPONSES

13.1 The Service Provider or Bidder must complete the Services Levels or Targets detailed in point 14 (table 5) below as follows:

13.1.1 Bidders must indicate their acceptance of each Service Level set by Transnet by ticking the ‘YES’ box below.

13.1.2 If the Bidder is unable to meet the minimum Service Level set by Transnet, or wishes to propose a modified minimum Service Level target, the Bidder must indicate this by ticking the ‘NO’ box and **indicate**

¹⁴ Cited above in paragraph 2 of the judgment.

next to the 'NO' box column their proposed minimum Service Level target. Should the space provided be small, the Bidder must provide the additional information as an Appendix and clearly reference such Appendix for ease of evaluation" (emphasis added)

[41] The reference to TABLE 5 is relevant because Vodacom, in that table, provided the details of the alternatives it proposed, several being more onerous than those put forward by Transnet.¹⁵ The Instructions cannot be understood to expect the details of alternative service levels to be squeezed on the page where "No" and "Yes" appear. In Table 5 Vodacom set out its suggestions made in respect of billing queries turnaround, sim card swaps, bulk requests and repairs of handsets. In MTN's Table 5, it too set out one qualification to the SLA, in the identical format, despite ticking "Yes".

[42] Thus, the complaints advanced by MTN about Vodacom's bid are meritless.

CONCLUSIONS

[43] Accordingly, to sum up:

43.1. MTN was properly disqualified, as it was non-compliant in a material respect.

43.2. It is demonstrable that Transnet did not commit any irregularities in its treatment of Vodacom.

¹⁵ Bundle C, Vol 4 of 10, pages 323ff.

43.3. No reason exists to set aside the award of the tender to Vodacom, nor the contract subsequently concluded between Transnet and Vodacom.

Costs

[44] The costs should follow the result, including the costs of two counsel

The Order

1. The application is dismissed.
2. The award of the tender to Vodacom is declared to free of any irregularities.
3. The contract concluded between Transnet and Vodacom pursuant to the award of the tender was validly concluded.
4. The Applicant shall bear the costs of both Respondents, including the costs of two counsel.



Roland Sutherland
Judge of the High Court
Gauteng Local division, Johannesburg

Hearing: 14 June 2018

Judgment: 18 June 2018

For Applicant:

Adv T. Motau SC,

with him, Adv L. Kutumela and Adv H. Rajah,

instructed by Werksmans.

For First Respondent:

Adv P. Kennedy SC,

with him Adv T. Manchu,

instructed by Motsoeneng Bill.

For Second Respondent:

Adv M. Chaskalson SC,

with him Adv R. Tshetlo,

instructed by Edward Nathan Sonnenbergs Inc.