

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: A277/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO ✓
(2) OF INTEREST TO OTHER JUDGES: YES/NO ✓
(3) REVISED:

5/9/2023

DATE



SIGNATURE

In the appeal between:

Telegenix trading 799 (Pty) limited

Appellant

Zimele Investment Enterprise Company (Pty) Ltd

Cross-Appellant/First Respondent

The South African National Roads Agency Limited

Second Respondent

Servest Facilities (Pty) limited

Third Respondent

DNA consulting engineers and projects

Fourth Respondent

JUDGMENT

Tolmay J (Francis-Subbiah J and Barit AJ concurring)

1. This is an appeal and cross appeal relating to the decisions made by the second respondent (SANRAL) to award two tenders for the operation, management, and maintenance of two different traffic control centers to the appellant (Telegenix). The respondent/ cross appellant (Zimele) was the applicant in the court below and is an unsuccessful bidder. Zimele instituted two review applications under two separate case numbers, the applications were separated in Part A, which sought an interim interdict pending the finalization of Part B, the review application. Part A was not proceeded with. Zimele asked that both tenders be reviewed and set aside. These applications were heard together.
2. Zimele also sought in both review applications additional relief, namely orders declaring clause 4.1.1(a) and 4.1.1(b) of the Tender Data to be inconsistent with the Preferential Procurement Regulations, 2017 ¹(the 2017 Regulations) and that the tenders were therefore invalid and an order declaring clause 4.1.1(d) and clause 5.11.8 of the Tender Data and Form C1.1 TENDERE'S B-BBEE VERIFICATION CERTIFICATE to be inconsistent with the 2017 Regulations and the Generic Codes of Good Practice(Generic Codes of Good Practise) issued in terms of section 9 (1) of the Broad -Based Economic Empowerment Act 53 of 2003 (B-BBEE Act). The court a quo refused to grant the declaratory orders but set aside both tender decisions and the contracts that were concluded between SANRAL and Telegenix, which declarations of invalidity were suspended pending the

¹ Preferential Procurement Policy Framework Act, 2000: Preferential Procurement Regulations, 2017. These regulations were replaced by the 2022 Regulations published in GN2721 of 4 November 2022 but were still applicable for purposes of these matters.

outcome of fresh tender proceedings. Zimele was ordered to pay the respondents' costs in relation to part A of the application. SANRAL was ordered to pay the costs of one half of Zimele's costs in relation to part B of the application. Telegenix was ordered to pay the costs of Zimele in relation to the relief sought against it in the interlocutory application.

3. In a joint practice note the parties agreed that in the appeal two issues arise, firstly whether the court a quo was correct in finding that the procurement processes were not fair and equitable and should be set aside, having found that "non-compliance with the criteria in respect of the B-BBEE Certificate and stipulated by SANRAL would result in a bid being excluded from consideration without discretion"² and having found that even if the applicant had survived the compliance issues raised in clause 4.1.1(a) and 4.1.1(b), it still would have been excluded due to the B-BBEE certificate issue....". It was furthermore noted in the joint practice note that the compliance issues referred to in paragraph 5.10 of the judgment did not apply to the Senekal tender, since Zimele's bid was not disqualified for those compliance issues. SANRAL's reasons for not considering Zimele's bid in that tender related solely to its failure to submit a B-BBEE Certificate. In the cross appeal the issue that arises is whether the court a quo was correct in refusing to grant the declaratory orders previously referred to.

4. The court a quo concluded that:

- 4.1 The tender data that required black-owned Qualifying Small Enterprises (QSE) to produce a valid B-BBEE Certificate as proof of their B-BBEE contribution status to the exclusion of an affidavit did not alter the B-BBEE qualification criteria itself.³

² *Zimele Investment Enterprise Company (Pty) Ltd v South African National Roads Agency and 3 Others* 36023/2021 & 36024/2021 [14 APRIL 2023] unreported at para 4.12 (court a quo judgment).

³ Ibid at para 4.17.

4.2 The Codes of Good Practice on B-BBEE, 2013 did not prevent SANRAL from requiring QSE's to submit a valid B-BBEE Certificate as proof of its B-BBEE contributor status.⁴

4.3 SANRAL, by imposing the mandatory requirement that all bidders provide a valid B-BBEE Certificate as proof of their B-BBEE contributor status (except an EME with an annual revenue turnover of less than R3 million) did not alter or amend the B-BBEE qualification criteria for black-owned QSE's.⁵

4.4 It was not necessary to determine whether SANRAL- had the power, after the closing of tenders, to condone any non-compliance with mandatory provisions relating to the submission of a B-BBEE Certificate in support of a bidder's B - BBEE status.⁶

4.5 The mandatory requirement in clauses 4.1.1(d) and 5.11.8 and Form C 1.1 / SBD 6.1 TENDERERS B-BBEE VERIFICATION CERTIFICATE were not contrary to the Preferential Procurement Regulations, 2017.⁷

5. Despite the following conclusions the court a quo found that the procurement processes were not fair and equitable and should be set aside. The court a quo relied on the judgment in *Trencon Construction (Pty.)Ltd v Industrial Development Corporation and others*⁸ where the following was said:

"In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and government wields massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of state to ensure that the procurement process is fair, equitable, transparent, competitive and cost effective. Where the procurement process is shown not to be so, courts have the power to intervene."

⁴ Ibid at para 4.9.

⁵ Ibid at para 4.11.

⁶ Ibid at para 4.1.

⁷ Ibid at para 4.15.

⁸ 2015 (5) SA 24 (CC).

6. On 19 July 2022 leave was granted to appeal against the whole of the judgment and orders, excluding paragraph 6.1 thereof, which directed Zimele to pay the respondents' costs in relation to Part A of the application and leave to cross appeal was granted against the refusal of two declaratory orders and the costs orders made in the review applications. SANRAL abides by the court's decision, but filed affidavits and addressed the court as far as the cost orders affected it. SANRAL indicated in brief submissions at the hearing that it has not been an active participant in the appeal or the cross appeal and abides the decision of the court in respect of both. SANRAL's primary interest in the matter throughout was to ensure that the traffic control centers continue to operate, and it explained that, that was why SANRAL opposed the interim interdict sought in part A and why it made extensive submissions on the just and equitable remedy in Part B.

7. The following issues arise in this appeal:

7.1 Whether SANRAL correctly disqualified Zimele's bids.

7.2 Whether Zimele submitted acceptable bids.

7.3 Whether SANRAL had the power to condone non-compliance with a mandatory requirement.

7.4 Whether on the assumption that Zimele was correctly disqualified from the two tenders for failure to submit a valid B-BBEE Certificate, it mattered that SANRAL committed other irregularities during the tender evaluations.

7.5 Whether Telegenix should have been disqualified from the two tenders for delivering a fraudulent B-BBEE certificate in the two unrelated tenders that resulted in a decision by SANRAL to blacklist Telegenix for three months which decision was not supported by National Treasury.

The parties agreed that if this court upholds the cross appeal it will dispose of the appeal.

8. On 9 June 2021 SANRAL's management Bid Adjudication Committee (BAC) resolved to award two tenders to Telegenix. The first was for the appointment of a private operator to manage, operate and maintain the Senekal Traffic Control Centre (the Senekal tender) and the second one was for the appointment of a private operator to manage, operate and maintain the Kroonstad Traffic Control Centre (the Kroonstad tender). Both tenders were for a period of 60 months with a three-month mobilization period. Telegenix commenced operating the Kroonstad Traffic Control Center on 25 August 2021 and the Senekal Traffic Control Center on 26 August 2021.
9. Zimele was a QSE that was more than 51% black owned. It submitted an affidavit with both bids as proof of its level 2 B-BBEE contributor status, despite the fact that a B-BBEE Certificate was required in terms of the Tender Data. It was submitted that an affidavit was sufficient in terms of paragraph 5.3 of the Codes of Good Practice's mandatory requirement. Zimele was however disqualified in both tenders as SANRAL insisted that in terms of the tender conditions a valid B-BBEE Certificate was required. In the Kroonstad tender, Zimele was disqualified for an additional reason namely that its key personnel failed to satisfy the mandatory pre-qualification criteria in Tender Data 4.1.1(b). In the Senekal tender Zimele was not disqualified for any reason other than its failure to submit a valid B-BBEE Certificate.
10. Telegenix was a 100% black-owned QSE. Telegenix procured a B-BBEE Certificate which was purportedly issued by EmpowerLogic (Pty) Ltd (EmpowerLogic), as an EME with a Level 1 B-BBEE contributor status in terms of a fictitious sector code in two unrelated tenders. It is common cause that the B-BBEE Certificates that were provided during the bidding process in the Senekal and Kroonstad tenders complied with the necessary requirements and were valid certificates. Telegenix said that it was unaware of the defective certificates in the other tenders, as it made use of an agent, and it would seem that the agent might have obtained fraudulent certificates. This matter is presently still under

investigation, and it is common cause that this court need not decide the issue of guilt.

11. Zimele's main contention to sustain the cross appeal is that the court a quo erred in not declaring the pre-qualification criteria in Tender Data 4.1.1(a) and(b) or the mandatory requirement in Tender Data 4.1.1 (d) relating to a valid B-BBEE Certificate, invalid. Tender Data 4. 1.1(a) deals with the tenderer's minimum experience and 4.1.1 (b) deals with requirements for key personnel. Tender Data 4.1.1(d) states that only tenderers with a B-BBEE contributor status level of 1,2,3 or 4, are eligible to tender. It also states that the tenderer shall submit a valid B-BBEE Certificate. It continues to state that "Failure to satisfy all the eligibility criteria will result in a non-eligible tender".
12. Telegenix submits that it was within SANRAL's right to determine what prerequisites it required for bids to be considered as acceptable bids. As a result, it also had the right to insist on a certain level of proof and could insist on a valid B-BBEE Certificate as such proof. The bids by Zimele were accordingly properly excluded as it did not constitute acceptable bids. Telegenix also argued that the pre-qualification criteria specified by SANRAL in relation to key personnel in the Senekal tender played no role in the decision not to consider Zimele's bid. It was pointed out that SANRAL's decision to require a certain level of proof of B-BBEE status did not result in a more onerous obligation on Zimele, as it had to meet the same requirements to qualify as a QSE, as it required to obtain certification. Clause 4.1.1 of the Tender Data of both tenders set out specific requirements which tenderers had to meet to be eligible. Neither of the tenders alluded to a discretion to condone noncompliance and as a result SANRAL had no discretion to condone a failure to provide a valid B-BBEE Certificate. Telegenix concluded that the court below ought to have dismissed both applications with costs.
13. Zimele submitted with both tenders an affidavit confirming that its annual total revenue for the year ending December 2019 was between R10 million and R50

million and that it was a level 2 B-BBEE contributor and more than 51% black-owned. As a more than 51% black-owned QSE it qualified for enhanced level 2 B-BBEE contributor status in terms of paragraph 5.3 of the Generic Codes of Good Practice. Zimele argued that clauses 4.1.1(a) and (b) of the Tender Data were inconsistent with the 2017 Regulations, and therefore the tenders were invalid. It was argued that these clauses elevated the functionality criteria in the tenders to threshold requirements contrary to Regulation 5 of the 2017 Regulations. Despite this complaint SANRAL made it clear in the answering affidavit to the founding affidavit in Part A of the application that the primary reason for Zimele's disqualification from both tenders was because it failed to submit a valid B-BBEE certificate with its tenders. It is therefore appropriate to deal with this issue first.

14. It was argued that the mandatory requirement that all bidders submit a valid B-BBEE Certificate with their tenders was contrary to the provisions of paragraph 5.3 of the Codes of Good Practice that exempted more than 51% black-owned QSE's from providing a B-BBEE Certificate as proof of its B-BBEE contributor status. More than 51% black-owned QSE's qualify for enhanced recognition under the Generic Codes of Good Practice and are only required to produce an affidavit as proof of their B-BBEE status. It was argued that even if SANRAL could impose the mandatory requirement that all bidders submit a valid B-BBEE Certificate, then Zimele contends that SANRAL had a discretion to condone noncompliance with the requirement. It was argued that SANRAL labored under a material error of law when it failed to appreciate that it had a discretion to condone noncompliance with mandatory requirements.
15. It was also argued on behalf of Zimele that the court a quo correctly found that SANRAL evaluated the pre-qualification criteria relating to key personnel and SANRAL ought not to have disqualified Zimele on this basis in the Kroonstad tender. Section 217 (3) of the Constitution refers to the national framework within

which organs of state must implement their procurement policy.⁹ The PPFA Act and the 2017 Regulations, (for purposes of this matter) as well as the B-BBEE Act and the Codes of Good Practice published in terms of the B-BBEE Act constitute the legislative scheme envisaged in section 217(3) of the Constitution within which procurement policies must be implemented.¹⁰

16. The Preferential Procurement Policy Framework Act, 5 of 2000 (the PPPFA) defines an “acceptable tender” as “any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.” An acceptable tender is a threshold requirement.¹¹ Regulation 3(b) of the 2017 Regulations provides that an organ of state must “determine whether pre-qualification criteria are applicable to a tender as envisaged in regulation 4”. Regulation 4 provides as follows:

“(1) If an organ of state decides to apply pre-qualifying criteria to advance certain designated groups, that organ of state must advertise the tender with a specific tendering condition that one or more of the following tenderers may respond-

- (a) a tenderer having a stipulated minimum B-BBEE status level of contributor;
- (b) an EME or QSE;
- (c)

(2) A tender that fails to meet any pre-qualifying criteria stipulated in the tender document is an unacceptable tender.”

17. Tender Data 4.1 (d) in both tenders had the following pre-qualification criteria:

- (a) “The tenderer shall submit a valid B-BBEE certificate”.

⁹ Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer; South African Social Security Agency, and Others 2014 (1) SA 604 (CC) at para 33 (Allpay).

¹⁰ Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others 2020 SA 17 (SCA) at para 20.

¹¹ Chairperson Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and Others 2008 (2) SA 638 (SCA) at para 11.

(b) "Failure to satisfy all the eligibility criteria will result in a non-eligible tender."

Clause 5.11.8 of the Tender Data stated that "a score card shall be a B-BBEE Certificate issued in accordance with the Codes listed in clause 5.11.8 (1). This requirement is repeated in Form C1.1 TENDERER'S B-BBEE VERIFICATION CERTIFICATE. Both regulations 6(3) and 7(3) state that "a tenderer must submit proof of its B-BBEE status level of contributor". When the provisions of Regulation 6 and 7 are considered, it was argued and correctly so, on behalf of Telegenix that it seems evident that the provisions apply to tenders "under consideration" which must imply acceptable tenders.

18. It was argued on behalf of Telegenix that neither the 2017 Regulations, nor the PPPFA, or the Codes of Good Practice prescribes in any manner to an organ of state calling for tenders what manner of proof it must, or may call for. It was argued that it was left to the relevant organ of state to determine what manner of proof it requires of a B-BBEE status level of contributor, as long as the manner of proof falls within the definition of proof of B-BBEE status as set out in section 1 of the 2017 Regulations. The 2017 Regulations were considered by the *Constitutional Court in Minister of Finance v Afribusiness NPC*.¹² It was held that in terms of section 2 (1) a preferential procurement policy must be determined by an organ of state and it must be implemented within the framework set out in the same section.¹³ It was also held that the power to create a system of preference vests in the organ of state alone and it is not for the Minister to prescribe the policy.¹⁴ It was argued on behalf of Telegenix that it was always open to SANRAL to determine its own procurement policy and to set up pre-qualification criteria and in addition it was therefore always open to SANRAL to call for a certain level of proof in respect of the pre-qualification criteria. This argument then concluded that where a

¹² [2022] ZACC 4.

¹³ Ibid at para 113.

¹⁴ Ibid at para 123.

tenderer ignored the clear specifications and conditions of a tender it cannot complain when its tender is not considered as an acceptable tender.

19. The approach argued for, was adopted in *DR. JS Maroka Municipality v Bertram (Pty) Ltd*¹⁵ where it was held that it was for the municipality to decide what should be a prerequisite for a valid tender, and not for the court. It was also held that a failure to comply with the prescribed conditions will result in a tender being disqualified as an acceptable tender", unless those conditions are immaterial, unreasonable or unconstitutional".¹⁶ It was furthermore stated that "A bid that does not satisfy the necessary prescribed minimum qualifying requirements simply cannot be viewed as a bid 'validly' submitted."¹⁷ Reliance was also placed on *Gijima Holdings (Pty) Ltd and others v SANRAL and others*¹⁸ (Gijima) for the contention that SANRAL could require a valid B-BBEE Certificate as proof of its B-BBEE status. It was argued on behalf of Zimele that Telegenix's reliance on the Gijima in support of this contention is misplaced as the main issue in Gijima was whether SANRAL was justified in disqualifying Gijima, who submitted a flawed affidavit as proof of its B-BBEE status.¹⁹ It is important to note that in Gijima the bidders could submit a sworn affidavit accompanied by audited financial statements, or management accounts as proof of the bidders' B-BBEE status. As such it was accordingly not the affidavit as such that was contentious, but the fact that it was flawed. What is however important when one considers Gijima is that the court held, after interpreting the conditions of tender, that SANRAL did not have the power to condone noncompliance with the mandatory requirements relating to proof of the bidder's B-BBEE status.²⁰

¹⁵ 2013 JDR 2728 (SCA) (Dr JS Maroka).

¹⁶ Ibid at para 10.

¹⁷ Ibid at para 15.

¹⁸ *Gijima Holdings (Pty) Ltd and Others v South African National Roads Agency SOC Limited and Others* (57952/2020) [2021] ZAGPPHC 391 (17 June 2021) (Gijima).

¹⁹ Ibid at para 9.

²⁰ Ibid at para 21 – 22.

20. Based on what was held in JS Maroko, I conclude that SANRAL was within its rights to require a B-BBEE Certificate as proof of a bidder's B-BBEE status. The requirement of a valid B-BBEE Certificate did not in itself alter the B-BBEE criteria. I agree with the argument raised on behalf of Telegenix that the 2017 Regulations refer to three different methods of establishing proof of B-BBEE status level, but they do not determine that an organ of state may only require an affidavit from a QSE. Paragraph 3.1 of the Codes of Good Practice lists the entities which are measurable under the Codes. Paragraph 3.2 thereof determines the basis for measuring B-BBEE compliance. The basis for measuring a black owned QSE is paragraph 5.3. In terms of paragraph 5.3.3 of the Codes of Good Practice a black-owned QSE is only required to obtain an affidavit on an annual basis confirming an annual turnover between R10 million and R50 million and its level of black ownership. Paragraph 5.3.3 of the Codes provides for a method of eligibility/qualification as a QSE in other words without an affidavit an entity cannot achieve an enhanced B-BBEE recognition level. Methods for establishing proof is however to be distinguished from proof required during the tender process.
21. It was argued on behalf Telegenix that according to paragraph 2.6 of the Code of Good Practice proof of compliance only requires suitable evidence or documentation. The argument went further that since neither the Regulations nor the Codes prescribe to an entity such as SANRAL what it must accept as suitable proof, such an entity can elect from the definition of the regulations what it requires in any given circumstance.
22. I conclude that the court a quo was correct in deciding that SANRAL did not change the B-BBEE criteria for 100% and more than 51% black-owned QSE'S through its insistence on a B-BBEE Certificate.
23. Zimele contends furthermore that SANRAL placed more onerous obligations on black-owned QSE's to meet the requirements of the QSE scorecard and the priority elements to qualify as a level 1 or 2 B-BBEE contributor. A perusal of the

Codes of Good Practice²¹ reveals that a QSE that qualifies for enhanced B-BBEE recognition did not need to meet any additional elements and there were no more onerous obligations on it. It is however true that Zimele under these circumstances was required to apply for a B-BBEE Certificate. It is however important to take note of the fact that Zimele elected to submit a bid in respect of the tender, where the requirement was that B-BBEE Certificate was required and if they had any misgivings about this requirement, they could have challenged it from the onset. I agree with Telegenix's argument that in submitting the tender which included this specific requirement Zimele acquiesced to the tender conditions.

24. It was further argued on behalf of Zimele that SANRAL had a discretion to condone non-compliance with this requirement and should have done so. In *Minister of Environmental Affairs and Tourism and others v Pepperbay Fishing(Pty) Ltd; Minister of Environmental Affairs and Tourism and others v Smith*²² , which was later confirmed in JS Maroka it was held that an administrator has no inherent power to condone a failure to comply with a peremptory requirement except if it has been afforded such a discretion. It was argued on behalf of the Zimele that clause 1.6 of Form C 1.2 afforded SANRAL the right to require a bidder "either before a bid is adjudicated or at any time subsequent to substantiate any claim in regard to preferences in any manner required". In addition, it was argued that SANRAL had the power by virtue of clause 5.8 of the Tender Data read with clause 4.14 to condone nonmaterial deviations or omissions from a tender.
25. This argument, however, does not hold water because clause 1.6 of Form C .1.2 provides for the right to call for substantiation of a claim in regard to preference. It does not deal with the pre-qualification criteria as set out in clause 4.1.1. As far as the reliance on clause 5.8 of the Tender Data, read with clause 4.14 is concerned, it can hardly be argued that noncompliance with what is ultimately an

²¹ At para 3.3 & para 5.3.

²² 2004 (1) SA 308 (SCA).

empowerment credential could be regarded as non-material.²³ The conclusion therefore is that Zimele failed to establish that SANRAL in casu had a discretion to condone noncompliance with the pre-qualification criteria. Zimele had to submit an acceptable tender before SANRAL became bound to adjudicate on the tender, consequently it could not rely on a ground for review under PAJA, as a validly submitted tender was required. The result is that Zimele was correctly disqualified in both the Kroonstad and Senekal tenders on this basis alone.

26. In the Kroonstad tender, Zimele was disqualified for an additional reason namely that its key personnel failed to satisfy the mandatory pre-qualification criteria in Tender Data 4.1.1. (b). Zimele and Telegenix during the appeal was in agreement that Zimele was wrongfully disqualified from the Kroonstad tender on the basis that it failed to satisfy Tender Data 4.1.1(b), because it was sufficient to satisfy Tender Data I 4.1.1(a). In any event, this issue does not need any further consideration, as it will not have any effect on the outcome of this appeal, as a result of the conclusion reached in relation to the B-BBEE Certificate requirement, Zimele would in any event have been disqualified from both tenders due to its noncompliance with Tender Data 4.1.1(d). The court a quo was accordingly correct in refusing to grant the declaratory orders.
27. SANRAL correctly disqualified Zimele's bids on the basis that it failed to comply with the prerequisite relating to a B-BBEE Certificate. It is not clear on what basis it was found that the tender processes were not fair and equitable and the reliance on the specific paragraph in Trencon ²⁴ does not clarify the conclusion reached. There is no indication in either the papers or the judgment why the court a quo came to this conclusion, especially in the light of the findings of the court a quo as set out above.

²³ Allpay at para 72.

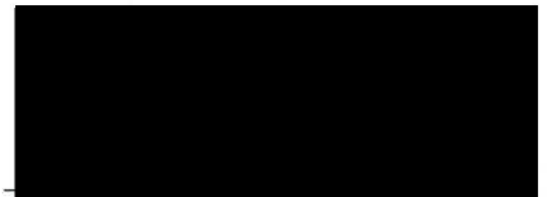
²⁴ Supra note 8.

28. As far as the fraudulent B-BBEE certificate is concerned it was common cause that this issue did not arise in these specific tenders and the matter had been ratified by Telegenix. This issue was not raised as a ground of appeal but was raised in the heads of argument. The fraudulent B-BBEE Certificates relate to the Beitbridge and Polokwane tenders, and Telegenix was correctly disqualified from those tenders. As was set out earlier, Telegenix was unaware that these certificates were fraudulent as it made use of an agent. Valid B-BBEE Certificates were issued on 14 September 2020 in the Kroonstad and Senekal tenders. On 9 June 2021 the tenders were awarded to Telegenix. The papers indicate that there was a difference of opinion between SANRAL's Eastern and Northern Regions regarding the approach and sanction that should be followed due to the fraudulent B-BBEE Certificates. On 29 September 2021 the Management BAC resolved to blacklist Telegenix for three months as a result of the fraudulent B-BBEE Certificates. National Treasury declined SANRAL's request to include Telegenix and its directors on the database of restricted suppliers and disagreed with SANRAL's decision to do so. Zimele complained that SANRAL did not take relevant factors into consideration and dragged its feet, which led to the tenders being awarded to Telegenix. The court a quo correctly concluded that there is no indication that swift action by SANRAL would have led to another outcome. I am also of the view that the fact that the fraudulent certificates related to another tender and the particular circumstances in this case cannot lead to a conclusion that SANRAL's decision offended against section 6(2)(e)(iii) of PAJA.
29. As far as the costs are concerned. SANRAL's participation in the proceedings is of importance. In Part B SANRAL abided the merits and confined its submissions to a just and equitable remedy, as it has a duty to ensure the uninterrupted operation of the effected traffic control centers. SANRAL abides the court's decision in the appeal and cross appeal. In the heads of argument filed by Zimele, Zimele sought costs of the appeal and cross appeal against Telegenix and SANRAL jointly and severally. SANRAL had a substantial interest in the outcome

of these proceedings and clearly did not partake in the disputes between the parties and should not be mulcted with costs in either the proceedings in the court a quo or the appeal proceedings. As far as the costs are concerned the costs should follow the result.

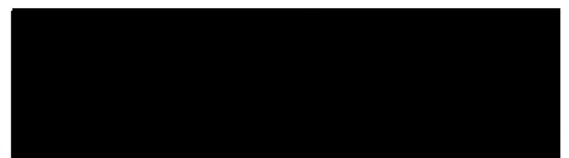
The following order is made:

1. The appeal is upheld.
2. The cross -appeal is dismissed.
3. The court a quo's order, as far as leave to appeal was granted, is set aside and substituted with the following:
 - 3.1 The application is dismissed.
 - 3.2 The First Respondent is ordered to pay the costs of the Appellant, including the costs of the appeal and cross- appeal, which costs will include the costs of two counsel.



R G TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I Agree



R FRANCIS-SUBBIAH
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

L BARIT
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Appellant's Counsel: M W Collins SC & G Campbell.

Appellant's Attorney: Dukhi Attorneys Inc

Cross Appellant/First Respondent's Counsel: S Budlender SC & T Prinsloo.

Cross Appellant/First Respondent's Attorney: Lowndes Dlamini Incorporated

Second respondents Counsel: S Scott.

Second respondents Attorney:

Date of Hearing: 10 May 2023

Date of Judgment: 5 September 2023