



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

Case No: 24377/2020

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/ NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/ NO	
(3) REVISED	
 SIGNATURE	17/6/2021 DATE

In the matter between: -

RAIL REFURB CC

APPLICANT

and

**SOUTH AFRICAN NATIONAL ROADS
AGENCY SOC LIMITED**

FIRST RESPONDENT

**VEA ROAD MAINTENANCE &
CIVILS (PTY) LIMITED**

SECOND RESPONDENT

JUDGMENT

TOLMAY J**INTRODUCTION**

[1] This is a review application in which the applicant (Rail Refurb) seeks an order reviewing and setting aside the award of two contracts awarded by the first respondent (SANRAL) being X003-030-2019/1 and X003-032-2019/1 (the contracts) to the second (VEA) and third (Rainbow) respondents respectively. SANRAL and VEA oppose the application.

[2] On 24 June 2020 urgent interim relief was granted pending the finalization of the review application, which interdicted the implementation of the contract, save for certain emergency road maintenance activities. This interim order was subsequently varied on 6 November 2020 to allow for additional emergency road maintenance after SANRAL brought an urgent application.

[3] This Court had to determine Part B of the application and the parties were in agreement that the three-year period of the contract will commence after finalization of this matter.

[4] Rail Refurb complained that SANRAL unlawfully awarded the contracts to VEA and Rainbow, in circumstances where Rail Refurb offered a significantly superior offer. It was also pointed out that the contracts were awarded in circumstances where SANRAL had proposed a round table meeting, but failed to do so. It was common cause that the round table meeting did not take place.

[5] The first issue to be determined was whether Rail Refurb was denied a hearing on the rebalancing of pricing rates and whether the award of the contracts was procedurally unfair for that reason. The second issue to be determined was whether

the refusal by SANRAL to evaluate the bids submitted by Rail Refurb for pricing and preference was irrational. The third question that must be determined was whether, if the award was set aside, whether the Court should proceed to award the contracts to Rail Refurb, or whether it should be referred back to SANRAL for reconsideration. This Court also had to determine who should pay the costs of this application and the two urgent applications, as those costs were reserved.

[6] It was common cause that during the course of the evaluation of tenders, Rail Refurb was promised a meeting by the Procurement Manager for SANRAL's Southern Region, Andile Ngxoza (Mr. Ngxoza), who recommended it in an email dated 11 February 2020. SANRAL however contended that Mr. Ngxoza was not on the Bid Evaluation Committee (BEC) and accordingly was not authorized to give the undertaking for a round table meeting. SANRAL unilaterally abandoned the meeting and while Rail Refurb was waiting for the proposed meeting to take place, SANRAL rejected Rail Refurb's bids as "non-responsive" and disqualified it from the evaluation. It was submitted on Rail Refurb's behalf that this in itself was fatal to SANRAL's decision (the impugned decision) and constituted a reviewable irregularity.

[7] It was further pointed out that another ground for reviewing and setting aside the impugned decision was that Rail Refurb's pricing model, which SANRAL claimed was irrational, had been accepted as both rational and the best tender and the best bid by SANRAL in a similar road maintenance tender based on the same pricing model. It was argued that the pricing model was either objectively irrational and justified disqualification, or it was not. It was argued that the aforesaid rendered the decision by SANRAL irrational and constituted a reviewable irregularity.

[8] Rail Refurb obtained the opinion of an expert in quantity surveying, engineering and construction who found the pricing model to be rational. SANRAL did not provide an expert opinion to counter the opinion of Rail Refurb's expert.

[9] It was furthermore argued on behalf of Rail Refurb that SANRAL's reliance on hidden benchmarks or market related prices was impermissible and in contravention of the Tender Conditions, Preferential Procurement Regulations 2017 to the

Preferential Procurement Policy Framework Act¹ (PPPFA) and National Treasury Guidelines.

[10] SANRAL was made aware of the alleged irregularity and illegality of its process on 10 May 2020 and Rail Refurb sought to engage with SANRAL to ensure that the impugned decision and tender projects were not implemented. It sought SANRAL's engagement on an expedited timeline of the review proceedings. SANRAL however dismissed the aforesaid request and commenced with site handovers and implementation of the contracts on 1 June 2020. This then led to the first urgent application. Rail Refurb furthermore contended that despite SANRAL's undertaking to supply the Rule 53 record by 19 June 2020, it took seven weeks for SANRAL to provide the full record, which resulted in a delay and a hearing of the review only during 2021.

THE MERITS

[11] Rail Refurb submitted tenders in accordance with SANRAL's invitations during November 2019. Included in its tender submission, in compliance with Pricing Data of the Tender Data, Rail Refurb submitted rates for the stipulated Bill of Quantities (BOQ) for each project. This included certain R1 rates that were subsidised by rates elsewhere in the BOQ.

[12] It was common cause that Rail Refurb's bid was the lowest for each tender. It was R14 065 325.70 lower than VEA's successful bid for Tender 030, and it was R4 202 676.50 lower than Rainbow's successful bid for Tender 031.

[13] During January and early February 2020, following Rail Refurb's bid submission, SANRAL's agent, Q&A Consulting, corresponded with Rail Refurb requesting it to rebalance and/or explain certain rates in the BOQ which were considered either "*unduly high*" or "*unduly low*". SANRAL did not inform Rail Refurb of what it considered to be the "*market related*" prices against which these were measured. Rail Refurb did rebalance certain rates and provided these to SANRAL on 3 February 2020. During the course of its correspondence, Rail Refurb made the

¹ 5 of 2000.

remark that the rates were balanced through cross-subsidisation and so were not unrealistic when considered holistically and that Clause C22.8 of the Tender document permitted cross-subsidisation of rates.

[14] Rail Refurb stated that it carefully considered the Conditions of Tender and both it and any subcontractors would be able to work profitability from the BOQ. It was remarked that SANRAL appeared to require alignment of prices to a predetermined benchmark of "*market related*" prices rather than with achieving the lowest profitable tender price.

[15] It was furthermore stated by Rail Refurb that the purported imbalance in rates was a result of an imbalance of items within SANRAL's own BOQ. Rail Refurb advised that it would be happy to explain the interaction between the rates and allay any concerns SANRAL might have had.

[16] On 6 and 7 February 2020, SANRAL's Regional Bid Evaluation Committee for the Southern Region (the RBEC) met to consider its recommendation of preferred tenders for Tender 030 and Tender 031. In respect of Tender 030, the RBEC determined Rail Refurb's total price was unrealistically low, in addition to containing rates that were "*unduly high*" and "*unduly low*". Rail Refurb argued that the Tender Data provided no stipulation as to what SANRAL would consider to be a "*realistic*" total price.

[17] After this Rail Refurb was not given a further opportunity to rebalance or explain its rates. VEA's rates were also determined to be "*unduly high*" and "*unduly low*", while its overall price was considered to be "*realistic*". The RBEC decided to provide VEA with a further opportunity to rebalance its rates.

[18] In respect of Tender 031, the RBEC determined that Rail Refurb presented "*unduly high*" and "*unduly low*" rates. Its overall tender price was, however, considered to be realistic. The RBEC decided to provide Rail Refurb with a further opportunity to rebalance its rates.

[19] It transpired that a key concern in the RBEC meeting was the belief that the Conditions of Tender prevented sub-contractors from increasing an individual rate by more than 25%. This, Rail Refurb argued, was an important feature of the decision-making process because the record demonstrated that it was on the basis of this belief that the members concluded that sub-contractors would be prejudiced by what it considered to be Rail Refurb's unduly low rates. Rail Refurb argued that the belief was factually mistaken.

[20] During the course of the meeting the RBEC attempted to contact both VEA and Rail Refurb telephonically. They were not successful in contacting Rail Refurb, but were able to have a phone-call with VEA to discuss the rates in its BOQ and the need to rebalance. While SANRAL provided both VEA and Rail Refurb an opportunity to further rebalance their rates to "*market related*" rates, SANRAL did not provide guidelines as to what it considered to be "*market related*". This failing was raised by a RBEC member in the meetings. Rail Refurb responded to SANRAL's request to rebalance by seeking an opportunity to further explain how its pricing model worked to the advantage of both it and SANRAL.

[21] Following the last communication, on 11 February 2020, Mr. Ngxozza wrote to Rail Refurb, copying in the RBEC Chairperson, and proposed a roundtable discussion between the parties. Rail Refurb accepted this invitation and awaited the meeting. However, no meeting took place. The following day, 12 February 2020, the RBEC Chairperson recommended that Rail Refurb's bids be rejected for both tenders on the basis that they presented "*unrealistic financial offers*". The recommendation made no mention of the proposed round table discussion and Rail Refurb's acceptance of this proposal.

[22] The RBEC's recommendation to reject Rail Refurb's bids as non-responsive due to being "*unacceptable financial offers*" was opposed by Mr. Ngxozza in the Regional Bid Adjudication Committee (RBAC) meeting. His objection was based on the point that reliance on "*market related*" benchmarks, which were hidden from the tenders, was in contravention of Regulation 11(2) of the Preferential Procurement Regulations. Mr. Ngxozza's reservation was recorded in the RBAC memorandum.

Despite this, the recommendations to award Tender 030 to VEA and Tender 031 to Rainbow were approved on 19 March 2020.

[23] In preparing its review application Rail Refurb sought the expert opinion of Mr. Dave Mark Buchanan Stuart (Mr. Stuart). Mr. Stuart is a qualified Quantity Surveyor and a corporate member of the Association of South African Quantity Surveyors. According to his affidavit he has over 35 years' experience in the measurement and valuation of work for engineering, mining and construction contracts. The expert's opinion was that Rail Refurb's pricing model was economically and rationally based on accepted industry standards and overall, Rail Refurb's pricing model was realistic. Neither SANRAL nor VEA submitted expert reports to counter the conclusions contained in Mr. Stuart's report. It therefore stood as the only expert analysis before this Court regarding whether or not Rail Refurb's pricing mode was indeed irrational, as SANRAL concluded.

[24] SANRAL expressed the opinion that the expert misconceived the re-measurable road maintenance contracts as being fixed term construction contracts. On this basis, SANRAL contended that the expert's entire analysis should be ignored, as his opinion was inapposite. It must however be noted that SANRAL's view was not based on a contradictory expert opinion and could as a result carry little weight in assisting the Court. SANRAL's assertion therefore was not based on evidence, but was merely an opinion of the decision makers. It followed that SANRAL's objection to the expert opinion could not be accepted. The fact is that SANRAL's objection should be rejected because SANRAL provided no support for its assumption beyond pointing to the report's reference to a dictionary meaning of "*a tender*". The expert had access to all the tender documents and was thus aware of the nature of the contracts when formulating his opinion. Mr. Stuart confirmed this in his affidavit. The expert's opinion could therefore not cogently be disputed unless the considered opinion of another independent expert was provided.

[25] The proper approach to disputes of fact in motion proceedings is trite:

"... an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute

of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers".²

[26] In the circumstances the opinion of the independent expert must be accepted by the Court, as no allegations have been advanced to gainsay it. Therefore, SANRAL's defence, namely that Rail Refurb's pricing model was objectively irrational, cannot be upheld.

GROUNDINGS FOR REVIEW

[27] Rail Refurb raised three grounds for review. The first was SANRAL's unilateral decision not to attend to the round table discussion. The second was SANRAL's alleged incorrect assessment of the pricing model as an unacceptable financial offer, including SANRAL's rejection of the pricing model, which had already been found in another instance to be objectively realistic. The third was SANRAL's decision to disqualify Rail Refurb according to a benchmark that allegedly violated the Conditions of Tender.

[28] It is trite that SANRAL's decision was required to be objectively rational, reasonable and fair.³ As far as the failure to follow through on the promise of a round table conference, it transpired that SANRAL decided not to proceed with this undertaking unilaterally and without informing Rail Refurb of it and awarded the contracts to the successful tenders. SANRAL argued that the proposed round table was unnecessary as Rail Refurb had refused to rebalance its rates to meet SANRAL's approval. Rail Refurb denied this allegation and pointed out that it was also legally irrelevant because procedural irregularity is always fatal, even if it would have made no difference to the outcome.⁴

² See *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paras 12–13 and *Plascon-Evans Paints Ltd v Van Rieksbeeck Paints* 1984 (3) SA 623 (A) at 634E–635C.

³ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) at para 59 and *Democratic Alliance v South African Broadcasting Corporation SOC Ltd and Others* [2015] ZAWCHC 182 (WCC) at para 36.

⁴ *Banking Insurance Finance & Allied Workers Unions & Another v Mutual & Federal Insurance Co Ltd* (2006) 27 ILJ 600 (LAC) at para 33.

[29] The Conditions of Tender, it is trite, constitutes components of the binding framework against which the legality of a decision will be evaluated.⁵ According to clause 5.10 of the Conditions of Tender, SANRAL, as the Employer, shall “[o]btain clarification from a tenderer on any matter that could give rise to ambiguity in a contract arising from the tender offer”. However, SANRAL failed to do this.

[30] SANRAL failed to clarify issues that it admitted arose from Rail Refurb’s pricing model. This invalidated the impugned decision on the basis of material non-compliance with a mandatory tender condition.⁶ In acting in this manner, SANRAL failed to comply with what the Conditions of Tender promised and when a public authority fails to do so it fails to discharge its duty fairly.⁷

[31] SANRAL had previously claimed that the clarification was “dealt with” through a series of correspondence. However, this did not happen and it was contradicted by the fact that SANRAL’s proposal for the meeting followed after, and as a result of, the series of correspondence.

[32] SANRAL’s main objection to Rail Refurb’s bids was the use of unrealistically low rates. Rail Refurb argued that it is a reviewable irregularity to declare a bid as unrealistically low without affording the tenderer any audience on the matter.⁸

[33] In addition to SANRAL’s breach of mandatory tender conditions, the impugned decision was procedurally unfair. Our courts have concluded that similar failures to SANRAL’s are fatal to the validity of similar decisions, taking into account that procedural fairness is determined on a case by case basis.⁹

⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (Corruption Watch and another as amici curiae)* 2014 (1) SA 604 (CC) (*Allpay 1*) at para 38.

⁶ *Ibid* at paras 28 – 30.

⁷ See *Chairpersons’ Association v Minister of Arts and Culture and Others* 2007 (5) SA 236 (SCA) at para 45.

⁸ See *Sethakatshipa Business Enterprise and Others v Mangaung Metropolitan Municipality* [2015] ZAFSHC 32 at para 23 and *Road Mac Surfacing Pty Ltd v MEC for the Department of Transport and Roads, North-West Province and Others, Raubex (Pty) Ltd v MEC for the Department of Transport and Roads, North-West Province and Others* [2006] ZANWHC 54 at paras 53 – 59.

⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 45.

[34] In the case of *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*,¹⁰ the Supreme Court of Appeal (SCA) held that:

"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."¹¹

[35] In the case of *Road Mac Surfacing (Pty) Ltd v MEC for the Department of Transport and Roads North West Province and Others, Raubex (Pty) Ltd v MEC for the Department of Transport and Roads, North-West Province and Others*, the following of relevance was stated:¹²

"Although I agree with Landman J that the Department's officials committed a procedural error by not inviting Road Mac Surfacing for an interview before rejecting its tender proposal, I am of the view that such failure on the part of the Department constituted a procedural unfairness in that Road Mac Surfacing have not had the opportunity to explain why its tender price was too low and may even have persuaded the Department to reconsider its tender together with the others."¹³

[36] In this instance SANRAL furthermore unilaterally abandoned discussions and Rail Refurb did not have the opportunity to explain its rates.

[37] SANRAL is legally bound by the reasons given in its letters of 17 April 2020 and 5 May 2020.¹⁴ SANRAL did not raise the objection to Mr. Ngxoza's authority in these letters and that Mr. Ngxoza was not acting or could not act on behalf of SANRAL for a

¹⁰ [2004] 1 All SA 504 (SCA).

¹¹ *Ibid* at para 13.

¹² [2006] ZANWHC 54.

¹³ *Ibid* at para 58.

¹⁴ See *Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others* 2018 (1) SACR 436 (GP) at para 46; *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) (*National Lotteries*) at para 27 and *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC). See also *Mobile Telephone Networks (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others* and *Vodacom (Pty) Ltd v Chairperson of the Independent Communications Authority of South Africa and Others* [2014] 3 All SA 171 (GJ) at paras 94 and 97.

round table meeting. It is trite that the decision maker is bound by the reasons given for its decision and may not deviate from those, as the duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. The failure to give proper reasons should ordinarily render the decision reviewable for reasons given at a later stage are not the true reasons for the decision, but “an ex post facto rationalization for a bad decision.”¹⁵

[38] It must be taken into account that Mr. Ngxoza was included in all requests from, and responses to the technical sub-committee, and SANRAL's belated attempt to distance itself from Mr. Ngxoza's invitation to a round table meeting was without any substance and must be rejected.

[39] Regarding the possible prejudice to sub-contractors as a result of the pricing model followed, Rail Refurb argued that in the Northern region it was asked to submit a contract Participation Goal plan (CPG plan) to show that sub-contractors would be accommodated in its pricing model. Therefore, it was argued, there was no cogent reason why SANRAL could not have done the same here. Unfortunately, SANRAL did not explain this aspect on the papers. It is untenable and irrational and unfair that the same party could accept the same pricing model in another instance, but reject it under similar circumstances.

[40] SANRAL acknowledged that the high and low rates were explained by cross-subsidization. The cross-subsidization occurred across complimentary and corresponding rates. Importantly, cross-subsidization was provided for in clause C 2.1.8 of the Tender Document and its rationality accorded with the expert's opinion.

[41] “*Unduly high*” and “*unduly low*” were defined in the Standard Conditions of Tender. Despite SANRAL's claim, unduly high and unduly low rates were not defined by a specific deviation of ‘20% to 25% from a market average’. It was argued by Counsel on behalf of Rail Refurb that the Conditions of Tender defined the standards to be applied as follows:

- (i) A rate is only unduly low if it compromised the ability of a tenderer to

¹⁵ *National Lotteries supra* at para 27.

- complete the contract; and
- (ii) A rate was only unduly high if it exposed SANRAL to disproportionate increases in construction costs, in certain circumstances.

[42] As a matter of pleading, it was argued, it was insufficient for SANRAL to claim that a mere deviation from market related averages would result in either of the above scenarios, without substantiation. The expert report made it clear that neither one of these two situations would arise.

[43] SANRAL stated that:

- (i) "Generally, a rate which is more than 20% or 25% (depending on the employer and/or evaluator) higher or lower than the average, it is considered to be unbalanced and it is investigated further."
- (ii) "Generally, rates are considered unduly high or low if they differ by more than 25% from the average quoted for an item. If quoted rates are absurdly outside a market related range, it is considered to be non-responsive. When a bidder refuses to rebalance its rates or to resubmit a bid that is market related, it continues to be non-responsive."

[44] If SANRAL applied the standard of '20% to 25%', of what SANRAL itself deemed to be the "market average" without disclosing to Rail Refurb what it considered "the market average" would be, this would result in SANRAL's decision being declared invalid and unlawful because the evaluation process applied by SANRAL had the result that the true import of the tender that Rail Refurb bid for, and the evaluation process, was not disclosed to Rail Refurb. It is trite that a tender is required to 'speak for itself'.¹⁶

[45] Rail Refurbish further argued that SANRAL's definition of an "unbalanced rate" does not appear in the Conditions of Tender.

[46] SANRAL stated that *"the reason for the decision to award the Tender 030 to VEA Road is set out in the minutes of the RBEC meeting of 6 and 7 February 2020. It*

¹⁶ See *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para 30 and *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC) at para 89.

was because VEA Road had indicated its willingness to further balance their rates." And that, "The committee phoned VEA Road during the meeting. It confirmed that it was willing to do so. On 10 February 2020, the response from VEA Road was deliberated on and found to yield rebalanced rates."

[47] SANRAL stated that other bidders, like VEA, were asked to rebalance their rates to present realistic, market related prices for items that were priced very low or very high. According to SANRAL other bidders (like VEA) rebalanced the pricing rates in their bids to address this problem. It was stated by SANRAL that this enabled the RBEC to evaluate their pricing realistically and in a way that is related to "going rates in the market."

[48] However, a perusal of the papers revealed that even after the rebalancing, on 9 February 2020, VEA's rebalanced rates continued to have multiple rates which fell below SANRAL's determination of a 'market related average'. It is this 'market related average', as is admitted by SANRAL, that disqualified Rail Refurb's personal final evaluation process.

[49] An annexure to the Expert Report recorded all the rebalanced rates that VEA provided that varied from the 'market related average'. SANRAL's attention was drawn to this. This allegation was not addressed by SANRAL in the supplementary answering affidavit, beyond a bare denial. In terms of the so-called *Plascon-Evan's* rule, it is trite that the bold denial stood accordingly to be rejected.¹⁷

[50] On SANRAL's own version not only would these rates provided by VEA pose a risk to sub-contractors, but they constituted unduly low rates. SANRAL's rejection of Rail Refurb's bids for Tenders 030 and 031, on exactly this basis, must therefore be irrational and procedurally irregular and unfair. SANRAL could not lawfully apply one rule to Rail Refurb, and apply a different standard to another tenderer.

[51] It would furthermore seem that SANRAL did not have regard to Rail Refurb's rebalanced rates. The figures referred to by SANRAL did not accord with the numbers

¹⁷ *Plascon-Evans Paints Ltd v Van Rieckbeeck Paints* 1984 (3) SA 623 (A) at 634E-635C.

indicated by Q&A Consulting to be at issue following Rail Refurb's submission of its rebalanced rates. It was unclear from where they were derived. It would seem that SANRAL had taken its decision without having regard to Rail Refurb's rebalanced rates. SANRAL relied on Rail Refurb's alleged rate of excavating hard and soft material. These rates were taken from Rail Refurb's original BOQ and not from Rail Refurb's rebalanced BOQ, which it submitted on 3 February 2020. SANRAL ought to have considered the latter BOQ, if its decisions were to be held to be valid for procedural rationality and procedural fairness.

[52] SANRAL claimed that Rail Refurb's rates continued to include abnormally high rates for item M630.01. However, in Rail Refurb's rebalanced BOQ there were no abnormally high rates for M630.01. Rail Refurb addressed SANRAL's concern regarding initial high payments a number of times in correspondence with Mr. de Klerk from Q&A Consulting and explained that all high initial payments had been balanced out. SANRAL's supplementary answer further supported Rail Refurb's claim that SANRAL failed to consider Rail Refurb's rebalanced BOQ. It would then seem that SANRAL based their decision on the incorrect pricing Schedule. This constituted a further reason why the impugned decision should be set aside. The decision was based on an "*error of fact*", on an objectively verifiable and uncontentious basis,¹⁸ and/or for non-compliance with the Conditions of Tender. It is thus reviewable in terms of sections 6(2)(e)(iii) of the Promotion of Administrative Justice Act¹⁹ (PAJA) and the principle of legality.

[53] Rail Refurb argued that SANRAL misapplied N030.04²⁰ of the Tender Data to its prejudice. It argued that the provision did not refer to the individual rates tendered, but to the package of work. This package, it was argued, would incorporate a combination of rates and therefore viability for sub-letting is not determined by the individual rate, but by the package of rates to be sub-contracted. SANRAL conceded

¹⁸ See *Dumani v Nair and Another* 2013 (2) SA 274 (SCA) at paras 31 and 32.

¹⁹ 3 of 2000.

²⁰ M030.04 of the Tender Data reads:

"If the highest point scoring subcontractors tendered package values (excl. P&G) is higher than 25% above that of the main contractors value for the package the Contractor will be allowed to negotiate the subcontractor's tendered amount downwards up to but not less than 25% above that of his own package value [...]
Payment out of the lump sum shall be made on a pro rata basis to cover the difference in the package values between that of the Main Contractor and his subcontractors until the lump sum is depleted [...]"

that its evaluating committee must consider the package value. It seemed however that SANRAL considered only whether an individual rate was realistic and not whether the package of rates which applied to a piece of work was realistic.

[54] Based on the aforesaid the decision was procedurally irrational and unfair and is as a result reviewable in terms of section 6(2)(c) of PAJA. It is trite that the impugned decision will be unlawful in the event that it can be shown to be irrational seeing that rationality is a minimum threshold requirement applicable to the exercise of all public power. It requires a court to examine the means selected by the decision-maker and whether the means are rationally related to the objective sought to be achieved.²¹

[55] It is furthermore trite that the process must be rational in its entirety, that is both the process and the decision must be rational.²² The inconsistency in respect of SANRAL's handling of "*unduly low rates*" is accordingly evidence of irrationality. The decision was therefore procedurally irrational and irregular and is thus reviewable in terms of section 6(2)(f)(ii)(bb),(cc), and (dd) of PAJA and the principle of legality.

[56] The Conditions of Tender constituted "*the legally binding and enforceable framework within which tenders ...[must] be submitted, evaluated and awarded*".²³ This is the yardstick against which SANRAL's reasons for the decision must be measured.

[57] The Conditions of Tender at A.5.11.7 states:

"A professional estimate or the average price tendered can be used as an indicator (benchmark of market prices) of this, but not as an absolute criterion on which a tender offer is overlooked"

[58] This accords with the National Treasury Circular of 10 May 2005, which states inter alia that:

²¹ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 90; *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) (*Democratic Alliance*) at para 32 and *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) at paras 65 – 69.

²² *Democratic Alliance supra* at para 34.

²³ *Allpay 1 supra* at para 38.

“Deviation by more than a predetermined percentage from the cost estimate of the project / commodity cannot be regarded as a justifiable reason for the rejection of a bid...”

[59] In addition, Regulation 11(2) of the Preferential Procurement Regulations 2017 states that “if an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents”. Mr. Ngxozza clearly understood the regulation to apply and he pertinently raised concern over the fact that SANRAL was applying benchmark/market related rates without indicating what rates they required to be met.

[60] Despite the above prescripts, SANRAL required Rail Refurb to align its rates with their predetermined benchmark of market prices as a “critical” and an inflexible criterion. Whether or not SANRAL chose to refer to it as “benchmark”, that was what was sought. And it was ultimately the basis on which Rail Refurb’s bids were rejected.

[61] The use of a benchmark was not limited to the individual rates but also applied to the overall tender value. In respect of Tender 030, SANRAL averred that it required a total price of at least R50 and R60 million to be eligible for consideration. SANRAL pointed to the RBEC recommendation as justification. SANRAL did not point to any requirement of a minimum total price within the Tender Data provided to the tenderers. SANRAL impermissibly applied a benchmark to reject bids and kept this benchmark hidden from tenderers. This alone, as is well-established, vitiates the validity of SANRAL’s decision.²⁴

[62] The decision was therefore taken for a reason not authorised by the empowering provision and is thus reviewable in terms of section 6(2)(e)(i) of PAJA and the principle of legality.

²⁴ See *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 at para 30. Also see *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC) at para 89.

[63] In light of all of the above, SANRAL clearly did not follow a legally sound process when evaluating and rejecting Rail Refurb's bids. Its decision is irregular and invalid for all of the above reasons.

[64] It was submitted that if SANRAL's decision is found to be invalid, it must be declared unlawful.²⁵ The appropriate remedy is for this Court to review and set aside SANRAL's decision. This is the default position in our law.²⁶

[65] The question of what is just and equitable should be informed by the circumstances of each case.²⁷ In this instance VEA will not suffer any significant prejudice as they were timeously informed of the dispute and the work done was done under a court order.²⁸ Furthermore unrecoverable losses caused by tenders being set aside is a reality of the tender environment.²⁹

[66] As a result, the decision should be declared invalid and set aside.

SUBSTITUTION

[67] Rail Refurb wanted the Court not only to review and set aside the award but to grant the contracts to it. This Court has a broad discretion in relation to the remedy to be granted to Rail Refurb. PAJA empowers a court to weigh the factors set out in section 8 and to determine what remedy to afford.³⁰ A court may do the same in respect of established grounds of review under the principle of legality.

[68] Section 8(1)(c)(ii)(aa) of PAJA provides, amongst the number of remedies in proceedings for judicial review, that, 'The court or tribunal, in proceedings for judicial review in terms of s 6(1), may grant any order that is just and equitable, including

²⁵ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at para 84.

²⁶ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC) (*Allpay 2*) at paras 29 – 33.

²⁷ *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) at para 22.

²⁸ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at para 84.

²⁹ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 56.

³⁰ *Aquila Steel (S Africa) (Pty) Limited v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC) at para 108.

orders, setting aside the administrative action and, in exceptional cases, substituting or varying the administrative action or correcting a defect resulting from the administrative action'. Section 172 of the Constitution gives a court an identical discretionary remit for remedial purposes.

[69] The SCA in *Umso Construction (Pty) Ltd v Member of the Executive Council of the Government of the Province of the Eastern Cape Responsible for Roads and Transport and Others*,³¹ described the court's position as follows:

"There are two primary questions that must be answered namely: first, whether a court is in as good a position as the department to enable it to make the order; and secondly, whether or not the decision of an administrator can be said to be a foregone conclusion, for example, that a party, in this case, Umso, would have been the successful tenderer.³² These factors must be considered cumulatively with other relevant factors such as bias or the incompetence of the administrator. Ultimately, it is a question of fairness and equitability."

[70] Due to the complexities of the evaluation of the competing tenders, this Court is in my view not in as good a position as SANRAL to make an appropriate decision. Seeing that Rail Refurb has been doing other work for SANRAL, one cannot infer that SANRAL's decision will be a foregone conclusion. Furthermore, the rights of the other tenderers must also be taken into account and it will not be just and equitable to deny them the opportunity to make new submissions. Hopefully SANRAL will consider the findings in this judgment when making its decision. In my view there exists no special circumstances which would allow this Court to award the contracts to Rail Refurb.

COSTS

[71] The costs of both urgent applications were reserved. In the light of SANRAL's attitude to not delay the award, Rail Refurb had no choice but to bring the urgent application for interim relief. Furthermore, Rail Refurb was substantially successful and should be awarded the costs of the urgent application of June 2020.

³¹ [2016] JOL 36065 (SCA) at para 28 citing *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & Another* 2015 (5) SA 245 (CC) at para 47.

³² *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & Another* 2015 (5) SA 245 (CC) at para 49.

[72] Regarding the November 2020 variation application where SANRAL was successful, Rail Refurb complained that the variation was a result of SANRAL's dilatory approach and complained that SANRAL did not engage with Rail Refurb to prevent the application. However, Rail Refurb opposed the application. In my view the only fair award pertaining to costs relating to this application should be that each party should pay its own costs.

[73] Regarding this application, due to the fact that Rail Refurb was successful, it is entitled to the costs of the application.

ORDER

[74] The following order is made:

1. The decision of the first respondent to award Contract SANRAL X003-030-2019/1 to the second respondent and Contract SANRAL X003-031-2019/1 to the third respondent is reviewed and set aside.
2. The first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the applicant's costs of the urgent application brought during June 2020.
3. Each party is to pay its own costs pertaining to the urgent application brought during November 2020.
4. The first and second respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved.
5. All costs will include the costs of two counsel.
6. The matter is remitted to the first respondent for reconsideration with due consideration to the findings of the Court.



RG TOLMAY**JUDGE OF THE HIGH COURT****GAUTENG DIVISION OF THE HIGH COURT, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 JUNE 2021.

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MERWE INC

Date of hearing:

8 FEBRUARY 2021

Date of judgment:

18 JUNE 2021