



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case nos. 2501/23 & 2502/23

In the matter between:

PROSEC GUARDS CC

Applicant

and

**THE DEPARTMENT OF PUBLIC WORKS &
INFRASTRUCTURE**

First respondent

**THE DIRECTOR-GENERAL: DEPARTMENT OF
PUBLIC WORKS & INFRASTRUCTURE**

Second respondent

**THE REGIONAL BID ADJUDICATION COMMITTEE:
DEPARTMENT OF PUBLIC WORKS & INFRASTRUCTURE**

Third respondent

KRA SECURITY & PROJECT

Fourth respondent

TRUST ONE GUARD SECURITY SERVICES (PTY) LTD

Fifth respondent

KUZINCA PROTECTION SERVICES (PTY) LTD

Sixth respondent

MMAPULA SECURITY SERVICES & PROJECTS CC

Seventh respondent

SNIPER SECURITY (PTY) LTD

Eighth respondent

KWANDI SECURITY SERVICES (PTY) LTD

Ninth respondent

SENIOR QUALITY PROTECTION & PROJECTS (PTY) LTD

Tenth respondent

And:

In the matter between:

PROSEC GUARDS CC

Applicant

and

THE DEPARTMENT OF PUBLIC WORKS & INFRASTRUCTURE	First respondent
THE DIRECTOR-GENERAL: DEPARTMENT OF PUBLIC WORKS & INFRASTRUCTURE	Second respondent
THE REGIONAL BID ADJUDICATION COMMITTEE: DEPARTMENT OF PUBLIC WORKS & INFRASTRUCTURE	Third respondent
KRA SECURITY & PROJECT	Fourth respondent
TRUST ONE GUARD SECURITY SERVICES (PTY) LTD	Fifth respondent
MVELAMASWAZI TRADING (PTY) LTD	Sixth respondent
MMAPULA SECURITY SERVICES & PROJECTS CC	Seventh respondent
SNIPER SECURITY (PTY) LTD	Eighth respondent
BLUE FALCON (PTY) LTD	Ninth respondent
S ISMAIL t/a ALCATRAZ	Tenth respondent
SIX COMBINED CORPORATIONS CC	Eleventh respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 24 MAY 2024

SHER, J:

1. The applicant is a security services provider. It seeks to review and set aside decisions which were taken by bid evaluation and adjudication committees of the Department of Public Works and Infrastructure, whereby it was disqualified as a bidder from tenders which were advertised for the provision of safeguarding and protection services (tender CPT 9/22) and tactical services (tender CPT 10/22), to State properties in the Western Cape.
2. In tender CPT 9/22, which was advertised on 24 October 2022, the applicant was disqualified on 16 November 2022 on the basis that it had scored less than the requisite 50% minimum required for 'functionality'. In tender CPT 10/22, which was advertised on 11 November 2022, the applicant was disqualified on 12 November 2022 on the basis that its bid was non-

responsive as it had failed to submit a copy of a valid registration certificate issued by the National Bargaining Council for the Private Security Sector ('the NBC'), together with its bid.

The facts

3. The matters before Court are two of six applications which were launched by unsuccessful bidders to challenge the award of the 2 tenders, which were set down to be heard on the same day. Four of these matters were removed shortly before they were to be heard, on the basis that they had either settled or were to be postponed. In the two matters for adjudication the 1st to 3rd respondents are the relevant State functionaries who were responsible for the tenders, and the remaining respondents are the bidders to whom the tenders were awarded. None of these bidders sought to participate in the proceedings. In the circumstances where reference is made to 'the respondents' it is to be understood as a reference to the 1st to 3rd respondents.

(i) The tender documentation

4. The tender documentation in both matters is virtually identical. It consists of a Notice and Invitation to Bid ('Part A') and the terms and conditions which are applicable ('Part B'), including so-called 'terms of reference' and 'special conditions', together with the relevant forms which bidders were required to complete and submit.
5. On the first page of the Notice and Invitation to Bid bidders were informed, at the outset, that only those who were 'responsive' to certain criteria which were stipulated would be eligible for consideration. In this regard amongst the 'responsiveness' criteria listed were requirements pertaining to the lodging and submission of a host of documents, including so-called 'compulsory returnable' documents to be set out on form DPW-09, and copies of several valid registration certificates, *inter alia* from the NBC and the PSIRA (the Private Security Industry Regulatory Authority).
6. In addition, the Notice and Invitation to Bid informed bidders that they were to comply with a range of 'pre-qualification' criteria which pertained to their B-BBEE status and their 'functionality', which would be used to establish 'minimum qualifying' requirements, whereafter the bids they had submitted

would be evaluated on the basis of price and preference in accordance with the 80/20 formula applicable (as the tender value was below R 50 million).

7. 'Functionality' was to be scored out of a total of 100 points, and to qualify on this aspect bidders would have to obtain 50% thereof i.e. 50 points. The points break-down were as follows: 60 points were allocated to A) company experience on security guarding projects; 20 points were allocated to B) 'infrastructure requirements' in relation to having an administrative office in SA; and the remaining 20 points were allocated to C) 'infrastructure requirements' in relation to response vehicles.
8. The bid requirements pertaining to each of these criteria were set out in detail. Thus, as far as company experience was concerned what was required was experience of completed security projects to a minimum value (of R300 000 in respect of tender 9/22 and R500 000 for tender 10/22) which had been undertaken 'accumulatively' (sic) in the preceding 5 years between 2017 and 2022. The 'means of proving' this experience was 'subject to the attachment of appointment letters/contracts/SLA's/purchase orders' from employers 'with reference letters clearly stating the contract value, name of employer, duration of the contract and contract details'.
9. Only projects that had been completed prior to the closing date of each tender qualified for consideration and had to be recorded on the DPW-09 form, and the Department reserved the right to verify them. A failure to provide information on the DPW-09 regarding a bidder's previous experience would lead to 'no scoring' of points for this criterion. To claim the full complement of 60 points for experience bidders would not be able to rely only on a single completed project. They were only eligible for a full score if they had completed 3 projects or more, in which event they would qualify for 5 out of 5 points, whereas if they had only completed 2 projects they would score 3 points, and if they had only completed a single project, they would only get a single point. Thus, to qualify for a full 60 points i.e. a 5 out of 5 score on this aspect of the functionality criterion bidders would have to have completed 3 projects or more.
10. As far as the infrastructure requirements pertaining to an office were concerned, it was stipulated that bidders were required to have an administrative office within the borders of SA. They were to supply proof

thereof by submitting either a copy of a title deed evidencing ownership of such a property, or a signed lease agreement which was valid for the duration of the contract which was to be concluded following upon the award of the tender, which in the case of tender 09/22 was to be for a period of 24 months. This section also made use of a 5-point scoring system: to obtain a full score (i.e. 20 points) 'satisfactory proof' was to be provided of ownership or a lease agreement and 0 points would be awarded if such proof was not supplied. In a note in parentheses at the bottom of this section it was noted that for the purpose of scoring on this part of the functionality assessment the Department would accept an existing administrative office which was outside of the Western Cape, but to be allocated work the successful bidder would be required to open or lease an office in the province within 7 days.

11. In part C of the functionality section, bidders were required to provide proof they had 2 response vehicles available. If they owned the vehicles proof of ownership was to be supplied by means of a copy of an e-NATIS 'report' i.e. a report drawn from the National Administration Traffic System, which showed that the vehicles were registered under the applicant's directors' or company names. If the vehicles were leased, a signed copy of the lease agreement was to be provided. If the vehicles were neither owned nor leased, as yet, a letter of intent to buy or lease would suffice. In such instance, as in the case of the infrastructure requirements pertaining to an administrative office, if awarded the tender a successful bidder who was not yet in possession of the vehicles would have 7 days after the conclusion of a contract pursuant to an award, to buy or lease them.
12. In response to the invitation to bid in tender 09/22, the applicant listed 6 projects on its DPW-09 form as having been completed in the preceding 5 years. Two of these were tenders for the City of Cape Town: 1) tender 207 of 2016/17 which was for a contract sum of R117.9 million odd and had been carried out over the period 1 December 2018-30 April 2022 and 2) tender 80S of 2012-2013 which was for a contract sum of R60 million odd and had been carried out over the period 1 October 2014-30 November 2018.
13. In addition, it listed two tenders it had completed for the Department of Agriculture, Forestry and Fisheries ('DAFF'): one was for a contract sum of R483 383 for a 5-month project between March and August 2019 and the

other was for a contract sum of R272 587 for an 11-day project in August 2018.

14. The remaining 2 projects listed on the DPW-09 were for work done for the National Lotteries Commission for a contract sum of R211 581 over the period March 2016 to December 2017, and for Willjarro (Pty) Ltd for a contract sum of R375 680 over a 30-month period between December 2016 and January 2018.
15. In substantiation of the 6 projects the applicant submitted a letter from a Mr T Jackson the Head of Safety and Security Services: Facilities Management of the City of Cape Town, dated 30 October 2018, a purchase order dated 29 March 2019 in respect of the DAFF tender for the contract sum of R483 363, and a letter of 'commendation' from a project manager at Willjarro (Pty Ltd dated 21 February 2017.
16. Regarding the requirement to submit proof of an administrative office in South Africa the applicant attached a copy of a lease agreement which it had concluded for the lease of premises in Milnerton, in Cape Town, for a period of 3 years between 1 December 2018 and 30 November 2021. The agreement provided that the lessee had an option to renew the lease for a further 3-year period, provided it gave written notice of its intention to do so at least 3 calendar months prior to the expiry of the initial 3-year period. The applicant did not attach any documentation evidencing an extension of the lease.
17. In relation to the requirement to provide proof of ownership or lease rights over 2 response vehicles the applicant attached copies of registration certificates, in the name of the Republic of South Africa, for a 2021 Toyota Agya and a 2021 Toyota Corolla.
18. That then as far as the documents in respect of tender 09/22. As far as tender 10/22 is concerned it is not necessary to traverse the full bid documentation that was submitted, given that the applicant was disqualified on the basis that it failed to submit a copy of a valid certificate of its registration with the NBC. In this regard reference need only to be made to 2 documents which were annexed to the applicant's bid submission. Both were on the letterhead of the NBC. In the first of these, which was dated 5 October 2022, and which had as its subject heading the reference 'Letter of Good Standing', the General Secretary of the NBC confirmed that the applicant 'levied contributions in

accordance with the levy agreement as published and extended to non-parties' (and) 'are up to date' (sic). In the second, which had as its subject heading 'Confirmation of Registration and Paid-up Levies' the General Secretary provided the same confirmation as was previously given in the first letter viz that the applicant was fully paid up as far as its levy contributions were concerned. The letter did not expressly state or confirm that the applicant was registered with the NBC.

(ii) The applicant's papers

19. The founding affidavit which was filed by the applicant in case number 2501/23 (which pertains to tender 09/22) raised a single ground of review viz that the Department had failed to evaluate the applicant's bid, and this was procedurally unfair, contrary to its right to lawful administrative action in terms of the Promotion of Administrative Justice Act ('PAJA').¹
20. After it had occasion to consider the record of the decision which was filed in terms of rule 53 the applicant filed a supplementary founding affidavit. In that affidavit it noted that its bid had been considered by the bid evaluation committee ('the BEC') and had been disqualified on the basis that it had failed to obtain the requisite 50% score for functionality i.e. 50 points. The applicant had in fact received no points at all and was scored 0%. From handwritten notes which were made on its bid documents it appeared this was because, according to the BEC, it had failed to submit the required reference letters. The applicant took issue with this. It contended that, from its reading of the bid specifications, where a bidder listed 3 projects or more on the DPW-09 it qualified to be allocated 5 out of 5 points i.e. the full weighting of 60 points. It contended further that, in any event, it had submitted the requisite 'reference' letters 'where they were available'. In this regard, it claimed that a reference letter for the two City of Cape Town tenders had been supplied by Mr Jackson, the Head of Facilities and Management Services, and for the Willjarro project a reference letter had been provided by a project manager. As for the DAFF projects it had supplied a purchase order for the March-August 2019 project, to the value of R483 383. It averred that consequently, given the

¹ Act 3 of 2000.

submission of these documents it qualified for the full complement of points for this aspect of functionality i.e. 60.

21. As for the requirements in relation to proof of an administrative office it said that due to an 'inadvertent error' it had only attached a copy of the lease agreement it had concluded in 2018, which had expired in 2021, and had failed to submit proof of its subsequent renewal. It conceded that in the circumstances the BEC had correctly found that on the information supplied the lease had lapsed and was not valid, and the applicant should be awarded no points on this aspect. But in its supplementary affidavit it sought to retract the concession it made and pointed out that it was currently in possession of premises in Cape Town, in terms of a lease agreement which had been entered into during March 2023, which agreement was valid for the duration of the contracts which were concluded pursuant to the award of the tenders.
22. As for the proof required in relation to its response vehicles, whilst it conceded that the bid specifications required a copy of a 'report' issued by e-NATIS and that it had instead supplied a copy of 2 registration certificates, it pointed out that these certificates were issued by e-NATIS, and averred that they contained the same information that would have been recorded in a report. Consequently, it contended that it qualified for the full 20 points available in respect of this aspect of the functionality requirements as its bid was substantially in compliance with the tender specifications.
23. Thus it contended, in summary, that it should have been scored as having obtained a total of 80 points for functionality (60 for experience and 20 for its response vehicles) and should accordingly not have been disqualified without its bid being considered. Such a score rendered it more competitive as far as functionality and price was concerned, than many of the bidders to whom the tender had been awarded.
24. As far as tender 10/22 is concerned, in its founding affidavit the applicant similarly relied on a single ground of procedural unfairness. It contended that the 1st respondent had failed to notify it of the award of the tender and the reasons why its bid had been rejected. In its supplementary founding affidavit it indicated it was abandoning this ground and was raising a complaint that its bid had wrongly been rejected as being non-responsive. It contended that, by way of the letters from the NBC dated 5 October and 2 December 2022 it had

supplied the requisite proof of its registration with the NBC. In this regard it submitted that, although the letters did not expressly say that it was registered, it was impossible to be in good standing without being registered. In any event, it was also apparent from the heading of the letter dated 2 December 2022 that it must have been registered at the time it submitted its bid. It contended, in the alternative, that to the extent that the confirmation which had been provided by the NBC was 'ambiguous' (sic) the bid adjudication committee ('the BAC') should not have rejected its bid summarily and should have sought clarification as to its status, either from the NBC or from the applicant itself, and its failure to do so prior to disqualifying the applicant for being non-responsive was procedurally unfair.

(iii) The respondent's papers

25. In their answering affidavits the respondents pointed out that the tender documentation for each tender contained both responsiveness and 'pre-qualification' criteria, which included criteria in relation to functionality, and it was clearly stipulated that a failure to comply with these bid specifications would result in disqualification without the merits of a bid being considered.
26. To be considered responsive and therefore eligible for evaluation, bidders were required to comply with several mandatory requirements, which included having to submit certain prescribed documentation. Amongst these were copies of valid certificates from certain institutions or entities, including the NBC. In addition, bidders were also required to submit a range of additional documents. These included letters of 'good standing' from certain entities (including the NBC). The invitation to bid clearly stated that if bidders failed to submit the prescribed documents required they would be disqualified, and their bids would not be considered.
27. Likewise, the invitation required bidders to comply with certain compulsory 'pre-qualification' criteria, to be considered eligible for preferential procurement. These included having to comply with certain prescribed B-BBEE and minimum functionality requirements.
28. The bid which was submitted by the applicant in tender 9/22 failed to comply with the functionality criteria that were stipulated and in the case of tender 10/22 was non-responsive. In this regard, as far as experience was concerned bidders were required to provide proof of having undertaken and

completed security projects to the minimum value specified, as listed by them on form DPW-09 over the preceding 5 years, by submitting documents which evidenced the awarding of the projects to them, such as appointment letters, agreements or purchase orders, together with reference letters which confirmed the contract values, names of employers, duration of the contracts and the contract details. Thus, reference letters confirming these particulars were mandatory.

29. If one considered the documents that were submitted by the applicant in respect of this requirement in tender 9/22, it was evident that it had failed to do what was necessary in respect of the projects listed by it on the DPW-09. In this regard, as far as documents evidencing the award of the projects was concerned save for a purchase order for one of the DAFF projects not a single primary, source document of the type specified, was provided, and not a single proper reference letter confirming the award and completion of these projects, as required by the pre-qualification criteria, was provided. The letter which the applicant provided from Mr Jackson of the City of Cape Town dated 30 October 2018 simply 'confirmed' that the contract which was concluded in terms of tender 80S of 2012/13 was extended for a period of 5 months from 1 July 2018 and was terminated on 30 November 2018. It did not however confirm the contract value or duration of the contract, or the other particulars listed in respect of this project on the DPW-09 form. The letter also made no mention of the other city of Cape Town tender/project listed and did not confirm it. Likewise, the letter which was provided in respect of the Willjarro project did not confirm its contract value and duration, and no reference letters were provided for either of the DAFF projects listed on the DPW-09.
30. In similar vein the applicant had failed to submit the necessary documentation required in proof of compliance with the infrastructure requirements for functionality pertaining to its office and response vehicles. As far as the office was concerned it had provided a copy of a lease agreement which had already expired the previous year and was no longer valid. As far as the motor vehicles were concerned it had provided copies of vehicle registration certificates instead of an e-NATIS report.
31. The respondents pointed out that in the compulsory briefing session which was held for potential bidders for tender 09/22 on 27 November 2022 it was

made clear by the Deputy-Director: Supply Chain Management, that reference letters were required in addition to documentation that evidenced the award of completed projects listed on the DPW-09, and any lease agreement which was to be relied upon was to be valid for the duration of the proposed contract which was to be concluded pursuant to the award of the tender. Bidders were also expressly warned that no registration documents would be accepted in lieu of proving ownership or lease rights over their response vehicles, and an e-NATIS 'report' was required.

32. In respect of tender 10/22 a compulsory briefing session was likewise held with potential bidders on 23 November 2022 at which similar warnings were given by the Deputy-Director: Supply Chain Management in relation to mandatory pre-qualification and responsiveness requirements. In this regard bidders were warned that they were required to submit a valid certificate of registration issued by the NBC, as well as a letter of good standing. If they did not have a letter of good standing available at the time of submission of their bids, they had 21 days to provide it.

An assessment

(i) The law

33. The bid specifications and evaluation criteria which are set out in an invitation to tender, together with the applicable constitutional and legislative provisions that deal with procurement, constitute the 'legally binding' framework within which public tenders must be submitted, evaluated and awarded.²
34. As far as the constitutional provisions are concerned, s 217(1) of the Constitution states that when an organ of state contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective. These imperatives are reiterated in several legislative instruments, including the Preferential Procurement Policy Framework Act ³ ('the PPFA') the Public Finance Management Act, ⁴ the

² *Chief Executive Officer, SA Social Security Agency & Ors v Cash Paymaster Services (Pty) Ltd* 2012(1) SA 216 (SCA) para 15; *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, SA Social Security Agency* 2014 (1) SA 604 (CC) para 38; *Westinghouse Electric Belgium SA v Eskom Holdings (SOC)* 2016 (3) SA 1 (SCA) para 43.

³ Act 5 of 2008.

⁴ Act 1 of 1999.

Local Government: Municipal Systems Act⁵ and the Local Government: Municipal Finance Management Act⁶ and various regulations which have been promulgated in terms thereof.⁷ In *Tetra Mobile*⁸ the Supreme Court of Appeal noted the importance of fairness and transparency and how these values ‘permeate’ the entire tender process.

35. In assessing whether the award of a tender was fair the focus is on the process and not on the result.⁹ Fairness is a procedural requirement which is aimed at ensuring even-handed treatment of bidders. As competitors, they are required to be treated equally.¹⁰
36. Whether a tender process has been fair is a matter that must be determined on the facts of each matter.¹¹ They will establish whether any ‘shortfall’ in any of the requirements listed in s 217(1) of the Constitution amounts to procedural unfairness, irrationality, unreasonableness, or any of the other review grounds set out in PAJA.¹²
37. The applicant’s counsel emphasized the duty on organs of state in tender matters, to act fairly, and pointed out that in *Metro*¹³ the SCA held this may require BECs to request a bidder whose bid is not strictly compliant with tender specifications to provide clarification or further details in respect thereof, or to explain an ambiguity or correct an obvious mistake. He submitted that the BECs had such an obligation in these matters, which it had failed to discharge.
38. It is important to note that the SCA did not hold that this was a general requirement or principle which finds application in every matter in which a bidder’s submission is deficient. Whether such an obligation exists in a particular matter depends on the circumstances: whilst it may be necessary in

⁵ Act 32 of 2000.

⁶ Act 56 of 2003.

⁷ Including the Preferential Procurement Regulations promulgated in terms of the PPFA, the Treasury regulations promulgated in terms of the PFMA, and the Municipal Supply Chain Management Regulations promulgated in terms of the MFMA.

⁸ *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works & Ors* 2008 (1) SA 438 (SCA) para 10.

⁹ *AllPay* n 2 para 42.

¹⁰ *Premier, Free State & Ors v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 30.

¹¹ *Metro Projects CC & Ano v Klerksdorp Local Municipality & Ors* 2004 (1) SA 16 (SCA) para 13.

¹² *AllPay* n 2 para 43.

¹³ Note 11.

certain instances for a tender authority to query or approach a bidder in other instances it may not be so.

39. Applicant's counsel further submitted that insofar as the respondents sought to contend that, in terms of the PPFA¹⁴ an acceptable bid was one which complied 'in all respects' with the specifications and conditions of an invitation to tender, in *Millennium Waste*¹⁵ the SCA confirmed (with reference to its earlier decision in *JFE Sapela*)¹⁶ that the phrase was not to be applied in a literal sense and was to be construed against the background of the procurement system envisaged by the constitutional imperatives in s 217.¹⁷ Thus, the SCA held this did not mean that a bidder had to comply with every condition or specification of a tender invitation and was not compelled to do so in relation to conditions or specifications which were immaterial, unreasonable, or unconstitutional.¹⁸ In determining whether a bidder's non-compliance made its bid 'unacceptable' regard was to be had to the purpose of the condition or specification with which there had not been exact compliance; and the condition or specification was not to be applied mechanically to disqualify a bidder.¹⁹
40. In *Millennium Waste* the bidder had submitted a declaration of interest (or non-interest as it should probably be called) in respect of relatives, family etc in its bid, which had been initialled but not signed at the end thereof, due to an oversight. Jafta JA held that the non-compliance was condonable as it was not incompatible with the public interest.²⁰
41. Consequently, the applicant's counsel contended that, insofar as the applicant had failed to comply exactly or strictly with the bid specifications and conditions, particularly those pertaining to the submission of a valid NBC certificate and an e-NATIS report, this should be condoned as it had complied substantially with them.

¹⁴ Section 1.

¹⁵ *Millennium Waste Management v Chairperson, Tender Board* 2008 (2) SA 481 (SCA).

¹⁶ *Chairperson; Standing Tender Committee & Ors v JFE Sapela Electronics (Pty) Ltd* [2005] 4 All SA 487 (SCA) para 14.

¹⁷ *Millennium Waste* paras 18 and 19.

¹⁸ *Id* para 19.

¹⁹ *Id*.

²⁰ *Id* para 17.

42. Once again, the applicant's reliance on a decision of the SCA is subject to qualification. In *Millennium Waste* the relevant procurement regulation²¹ which had been promulgated by the MEC for Finance and which was applicable to the evaluation of the tender, allowed the tender Board to accept bids even if they failed to comply strictly with tender specifications. There is no averment that any such regulation was applicable to the tenders in these matters.
43. In several subsequent decisions the SCA has deviated from the views it expressed in *Millennium Waste* and has sought to qualify or distinguish it. Thus, in *Moroka*²² which was decided in 2014, it pointed out²³ that it had previously held in *Pepper Bay*²⁴ (which was decided before *Millennium Waste*) that as a general principle an administrative authority has no inherent power to condone a failure to comply with a peremptory or minimum qualifying requirement in a tender, unless it has been expressly afforded a discretion to do so.
44. In *Moroka* the tender invitation required bidders to submit an original tax clearance certificate and stated that if they failed to do so this would render their bid liable to disqualification. The applicant submitted a copy instead of the original certificate and was duly disqualified. The applicant conceded that there was no express provision in the applicable procurement legislation or in the tender documentation, including the terms and conditions of tender, that conferred a discretionary power of condonation on the organ of state but contended (as the applicant seeks to do in this matter), that such a power could be implied from a clause in the terms and conditions of tender, which provided that the organ of state was under no obligation to accept any bid or the lowest one.
45. The SCA held²⁵ that, on a proper interpretation this clause only applied to bids that had been validly submitted in the prescribed manner and not to bids that did not satisfy the prescribed minimum requirements. It held further that it was the organ of state's prerogative to specify what would constitute a prescribed

²¹ Regulation 5(c) It is not specified in the judgment which body of regulations it was part of, or when it was promulgated.

²² *Dr JS Moroka Municipality & Ors v Betram (Pty) Ltd & Ano* [2014] 1 All SA 545 (SCA).

²³ Para 12.

²⁴ *Minister of Environmental Affairs and Tourism & Ors v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs & Ors v Smith* 2004 (1) SA 308 (SCA) para 31.

²⁵ *Moroka* n 22 para 15.

minimum requirement, not the courts, and in the matter before it one of such requirements was the submission of a valid, original tax clearance certificate. As the conditions and terms of tender did not confer a discretion to condone a failure to comply with this requirement the bid therefore did not pass the threshold requirement and was not an acceptable one in terms of the PPFA.²⁶

46. The approach which was adopted in *Moroka* was endorsed by the SCA in 2018 in *WDR Earthmoving*,²⁷ where a bidder only submitted 2 years of annual financial statements instead of the 3 which had been prescribed. The SCA reiterated that it was for organs of state to determine the prerequisites for a responsive tender submission not the Court, and the failure to comply with such requirements would ordinarily result in disqualification as a non-compliant bid would not be an acceptable one, unless, as was held in *Millennium Waste* the prescribed requirements or conditions of tender which had not been complied with were immaterial, unreasonable or unconstitutional.²⁸ In addition, it reiterated that an administrative tender authority has no inherent power to condone a failure to comply with peremptory requirements set by it, unless it has been afforded a discretion to do so, either in terms of a legislative provision or the terms and conditions of tender.²⁹ Consequently, as it was peremptory in terms of both the invitation to tender and procurement regulations for bidders to submit 3 years of annual financial statements the bidder's non-compliance was not trivial or minor, and the condition which prescribed it to be a minimum qualifying requirement was not immaterial, unreasonable or unconstitutional.³⁰ The SCA further confirmed, as per its decision in *Millennium Waste* and as endorsed in the subsequent decision of the CC in *Allpay*,³¹ that whether there has been material non-compliance with a condition or provision of an invitation to tender is to be determined by considering the issue in the light of the purpose of the provision or condition concerned.

²⁶ Id para 16.

²⁷ *WDR Earthmoving Enterprises & Ano v The Joe Gqabi District Municipality & Ors* [2018] ZASCA 72.

²⁸ Id para 34.

²⁹ Id para 30.

³⁰ Id para 34.

³¹ Note 2 para 28.

47. In *Allpay* the special conditions in the tender invitation had stipulated that if bidders wished to tender to administer social grants on behalf of SASSA (the South African Social Security Agency) in more than one province, they were to submit separate bids for each province. One of the bidders submitted a single, globular bid for all 9 provinces instead of 9 separate ones and was disqualified as a result. On appeal it contended that its failure to comply exactly or strictly with this requirement should be overlooked, as there had been substantial compliance.
48. The CC pointed out ³² that whereas the materiality of non-compliance with legal requirements or conditions in administrative law previously depended on whether they were mandatory or peremptory, as opposed to merely directory, and on the basis of this distinction in the case of the former strict compliance was required whilst in the case of the latter substantial compliance would do, this 'mechanical approach' had since been discarded and the 'central element' in determining whether a bidder's response was sufficient was to link the issue of compliance with the purpose of the provision or condition which had not been strictly or exactly complied with. What was required essentially was to determine whether, viewed in the light of the purpose of the condition or provision, the bidder had done what was required.
49. The purpose of requiring separate bids for each of the provinces was to enable SASSA to assess whether the bidder would be able to provide the necessary services in each of the provinces for which it bid. As this purpose was attained in the single bid submission which had been put forward the CC was of the view that the non-compliance was not material. However, the bidder still ultimately lost on appeal on the basis that SASSA had failed to properly assess and confirm whether its bid complied with empowerment and transformation requirements.
50. In 2018 the SCA similarly endorsed the approach which had been adopted in *Moroka*, in *Overstrand Municipality*,³³ which concerned an appeal against a decision which set aside the award of a tender (for the operation and maintenance of a municipality's bulk water and sewerage infrastructure) to a bidder who, in its bid submission, had failed to comply with certain prescribed

³² Para 30.

³³ *Overstrand Municipality v Water & Sanitation Services SA (Pty) Ltd* [2018] 2 All SA 644 (SCA).

minimum staffing requirements, as prescribed by regulation.³⁴ The requirements were aimed at ensuring a consistent supply of the right quality and quantity of water and the optimisation and preservation of the operations and infrastructure used to provide it. The SCA reaffirmed that, whilst one should guard against invalidating tenders which suffered from minor deviations which did not materially depart from the 'characteristics, terms, conditions and other requirements' set out in a tender invitation, where the non-compliance was not of a trivial or minor nature and was in breach of a peremptory term, the bid would not be an acceptable one.³⁵

51. The most recent decision of the SCA on this aspect of the law is that in *Eskom Holdings*,³⁶ in which judgment was handed down on 29 April 2024. It concerned an appeal by Eskom against the judgment and order of the North Gauteng High Court, which upheld an application to review and set aside the award of certain tenders for the provision of maintenance and outage services at power stations. The dissatisfied bidder, Babcock, was disqualified for failing to submit proof of certification in terms of ISO 3834 i.e. certification of its capacity in terms of standards set by the International Organisation for Standardisation. Babcock had stated in its bid submission that it was certified but had failed to provide a copy of the certificate. It contended that the bid requirement was phrased in ambiguous terms and did not require bidders to necessarily submit a valid certificate but simply to address the 'issue' of certification in satisfactory terms. As a certificate was not a peremptory requirement it could therefore be provided after submission of the bids, as it had done. Eskom's decision to disqualify it for failing to file an ISO certificate was in any event unfair as Eskom knew it was in possession of such a certificate as it had been servicing its power stations for extended periods of time, over many years, and it had previously submitted copies of such a certificate for that purpose.
52. Eskom contended that the purpose of requiring proof of certification was to ensure that bidders had the requisite skills and experience necessary to carry out the highly specialised services required, and to treat bidders fairly and

³⁴ Regulation 2834, promulgated in terms of the Water Act 54 of 1956.

³⁵ *Id* para 50.

³⁶ *Eskom Holdings SOC Ltd v Babcock Ntuthuko Engineering (Pty) Ltd* [2024] ZASCA 63.

equally. Consequently, a mere statement that a bidder had ISO certification could not constitute either actual or substantial compliance with the prescribed requirement and the conditions of tender did not afford to it a power or discretion to condone such non-compliance. It pointed out further that at a 'clarification' meeting bidders were pertinently told that they were required to submit an ISO 3834 certificate, and as it was a mandatory, returnable document, bidders who failed to do so by the deadline would be disqualified.

53. The SCA held that the High Court's finding that the invitation to tender (which was in the form of a Request for Proposals) was ambiguous was not sustainable as the wording was clear, and in any event at the clarification meeting bidders had been expressly told that they were required to submit a certificate and a failure to do so would result in disqualification. It also confirmed, with reference to the principles laid out in *Allpay*, *Millennium Waste*, *WDR Earthmoving* and *Overstrand Municipality* that whereas instances of non-compliance of a trivial or minor nature could pass muster, this was not so in the case of non-compliance with material terms or requirements. ISO certificates were required to show that bidders possessed the necessary resources and skills to supply the required services to the appropriate standard, and it was thus essential that Eskom be supplied with a valid and current certificate. The submission of an ISO certificate was also intended to ensure consistency and fairness in the evaluation and award of the tender. At least 2 other bidders had been disqualified for failing to submit ISO certificates and to allow the appellant to be treated differently simply because it was the incumbent service provider and had previously submitted such a certificate, would result in unfair treatment towards other bidders. The requirement of providing an ISO certificate was a compulsory and material term of the invitation to tender and Eskom did not have a discretion to condone non-compliance therewith. Having regard for the purpose of the requirement the mere statement in its bid submission that Babcock had the necessary certification did not constitute actual or substantial compliance with the requirement.

(ii) The law applied

54. The applicant contends that on a proper i.e. contextual and purposive reading of the stipulated requirements for functionality pertaining to company

experience the documents referred to in this regard in tender 9/22 i.e. the source documents and reference letters, were not mandatory or compulsory and thus a failure to submit them was not intended to result in a zero score. In support of this submission it sought to rely on the maxim *expressio unius est exclusio alterius*, which roughly translated means ‘where one thing is expressed the other is excluded’. The maxim has found application as an interpretative aid where there are two possible meanings for a phrase or word in a legislative instrument or document. In this regard the applicant submitted that because it was expressly stipulated that a failure to provide the required information on the DPW-09 form regarding the bidder’s experience would lead to ‘no scoring of points’ (sic), whilst nothing was said about a failure to submit the source documents and reference letters evidencing and confirming such experience, it should be understood that a failure to submit the source documents and reference letters was excluded from a similar sanction or scoring and that it was not compulsory to submit them. In any event, so it submitted, the terms of reference reflected that the municipality had a discretion to accept substantial as opposed to exact or strict compliance with the documentary requirements.

55. It is trite that the process of interpreting text in a document is a unitary exercise that involves a consideration of the language used in the light of ordinary rules of grammar and syntax, the context in which the text appears in the document as a whole and the apparent purpose to which it is directed. The process is an objective one that attempts to arrive at a sensible and businesslike meaning which seeks to give effect to the purpose.
56. As previously pointed out functionality is defined in the invitation to bid as a ‘pre-qualification’ criterion used to establish a ‘minimum qualifying requirement’ and only those bidders who obtained the requisite 50 points i.e. the threshold score were eligible for consideration on price and preference. A contextual and purposive reading of the detailed specifications and requirements pertaining to functionality must result in the following interpretation: In order to qualify for points for experience bidders were required to *prove* it by submitting 1) source documents (such as letters of appointment, service level agreements or purchase orders) *evidencing* that they had been awarded the projects of the minimum value prescribed, as

listed on their DPW-09 form, and 2) reference letters which *confirmed* this by 'clearly stating' the contract value, duration, employer particulars and contact details for each such project listed. By stipulating that the 'means of proving experience' was 'subject' to the attachment of the requisite source and confirmatory documents i.e. the letters of reference, both of these classes of documents became mandatory, returnable documents that had to be submitted.

57. As far as reliance on the *expressio unius* maxim is concerned, as was pointed out by De Villiers JA almost 100 years ago in *SA Ests* ³⁷ it is one which 'must at all times be applied with great caution'. It is not 'strictly speaking' a rule of interpretation but a 'principle of common sense' by which a court may be guided in arriving at the intention of the author of a document.³⁸ Whether it is applicable depends on the terms of the document read as a whole and 'more especially upon the relation in which the thing expressed stands to the thing which is not expressed' and 'it by no means always follows that the mention of one matter implies the exclusion of what may at first sight appear the converse'.³⁹ At best therefore, if the maxim finds application it is no more than a *prima facie* 'indicator of meaning' and not a hard and fast rule.⁴⁰ In my view, on a proper and contextual reading of the section pertaining to functionality in relation to company experience the maxim does not find application. This is not an instance where there are two possible interpretations of a phrase or word in a text, and the 'express mention of one of the possibilities' therefore implicitly excludes the other.⁴¹ The fact that it was expressly stipulated that a failure to record the necessary information on the DPW-09 form would lead to a nil score and would result in disqualification does not necessarily imply that, because this was not similarly stated, in that same portion of the text, to be the consequence for failing to file source and confirmatory documents proving a bidder's experience, it was not mandatory to file such documents. The rest of the document, particularly the first three pages of the invitation to bid, make

³⁷ *SA Ests & Finance Corporation Ltd v Commissioner for Inland Revenue* 1927 A.D. 236.

³⁸ Per De Villiers CJ in *Poynton v Cran* 1910 A.D. 205 at 222.

³⁹ *Id.*

⁴⁰ Du Plessis *Statute Law & Interpretation* LAWSA Vol 25: Part 1 para 360(b)(ii).

⁴¹ GM Cockram *Interpretation of Statutes* (Juta 1975) p 80.

it clear that the submission of the documents was a mandatory requirement, failure to comply with which would result in disqualification.

58. If one considers the bid documentation which the applicant submitted it is clear that it failed to comply with what was required in regard to both the necessary source, and the confirmatory, documents required for functionality for points for experience. It provided only a single source document, a purchase order for a DAFF project, but details of the project were not confirmed in an accompanying reference letter. In fact, not a single reference letter within the terms required, was provided for any of the projects. The letter from the Head: Facilities Management dated 30 October 2018 was in relation to one of the City of Cape Town tenders (tender 80S) and simply confirmed its extension and termination in November 2018. This does not tally with the statement in the DPW-09 that this tender was one which endured for a period of 4 years between 2014 and 2018, and the letter did not confirm the tender by reference to its contract value and duration. Likewise, the letter of 'commendation' from the project manager of Willjarro (Pty) Ltd did not constitute a reference letter, in the terms required, as it also did not confirm the contract value and duration of this project.
59. Thus, in the absence of the provision of the required source documents and reference letters for the 6 projects listed in the DPW-09 form the applicant was correctly scored zero, as it was not eligible to be awarded any points for experience. It also cannot be suggested that the documents submitted constituted substantial compliance with what was required. Put differently, in terms of the formulation which was adopted in *Allpay* it cannot be said that, given the purpose of the requisites pertaining to company experience, the applicant complied in effect, in substance and form.
60. As for the functionality requirements pertaining to an administrative office, although the applicant conceded in its own founding affidavit that it was correctly scored zero as it failed to submit a copy of a valid lease agreement with its bid submission, during argument the applicant's counsel similarly sought to contend that the submission of such a document as part of the bid was not a mandatory requirement, and the lease could be submitted afterwards. In this regard the applicant sought to rely on clause 10.7 of the terms of reference which read as follows:

“Proof of Administrative Office in the Western Cape. (This requirement will not be used to score for functionality). It is applicable only to bidders who are residing or operating outside the Western Cape) ‘ (my underlining).

61. On a first reading the clause appears to contradict the contents of section B of the functionality criteria in the invitation to bid, which deals with the requirements of having an administrative office. But once again, a proper reading requires one to have regard for the context in which clause 10.7 appears, in the document as a whole. Clause 10.7 is part of clause 10, which from its heading sought to deal with those ‘statutory documents required’ which had to be submitted by ‘successful bidders’ before any work would be allocated to them. This clearly rendered the clause applicable only to those bidders who were compliant with the functionality requirements, by submitting the required documents stipulated in section B of the Invitation to Bid, with their bid, namely proof of ownership or lease rights for an administrative office ‘within the borders of South Africa’, and who had then been awarded the tender after scoring for price and preference.
62. On a holistic reading there is no contradiction between the two texts. Section B stated that the department would accept an existing office ‘even if it (was) not in the Western Cape’, however a ‘successful bidder’ would be required to ‘open or lease’ one in the Western Cape within 7 days. What clause 10.7 sought to do therefore, somewhat clumsily, was to extend the requirement for opening an office in the Western Cape, to *successful* bidders who had submitted valid bids (in accordance *inter alia* with the functionality criteria of having an office in SA), beyond the 7 days. Until they opened an office in the Western Cape, successful bidders would not be allocated any work in terms of the tender. Clause 10.7 therefore cannot be construed to excuse pre-award bidders from complying with the functionality criteria in section B and from submitting a copy of a valid lease agreement for their administrative office.
63. As a fallback position the respondents contended that any non-compliance that may have been present in relation to the functionality criteria should have been condoned by the BEC/BAC, as it had a discretion to do so, in terms of various terms and conditions in the invitation to bid. To this end it sought to rely on clauses 3 and 12 of the terms of reference and certain subclauses therein.

64. Clause 3 deals with the panel of work providers that was to be appointed in order to give effect to the objectives of the tender, as set out in clause 2, and contains a number of sub-provisions. In its opening paragraph it states that the panel will consist of 'all bidders who met all' the requirements and criteria stipulated in the notice of invitation to bid or the terms of reference. It provided that bidders that were appointed to the panel would be ranked from the lowest mark-up percentage and would be allocated work in accordance with this ranking, for rotational periods of 3 months at the time. However, 'no allocation of work would be done' until bidders had fulfilled all requirements stipulated in the tender documentation. Thus, it is evident that the clause sought to reiterate and emphasize that there had to be compliance with mandatory requirements.
65. The respondents sought to rely on a sub-provision that stipulated that in the event that a bidder failed to fulfil all the requirements, or to submit the required documents as stipulated 'on' (sic) administrative criteria and/or terms of reference, within a maximum of 21 calendar days, it would be disqualified from participating on the panel. In the context of the clause as a whole, read with the various other provisions of the bid specifications and functionality criteria previously referred to, this provision can only be construed as being of application to successful bidders, who had submitted valid bids and had been awarded the tender, not to those who failed to qualify as responsive or failed to qualify on functionality, because they had not submitted documents that were mandatory.
66. As far as clause 12 is concerned, which is headed 'compliance', a subclause therein stipulated that a failure to provide 'sufficient' information 'may' disqualify a bidder. Once again, read in the context of the document as a whole, this clause cannot be read to confer a discretionary power on the tender authority to condone non-compliance with conditions or requirements that were compulsory and material to the tender. At best, it could be read to afford a discretionary power to condone trivial or minor deviations from what was required in relation to the submission of information. Similarly, as far as the 'clarification' subclause in clause 12 is concerned, which provided that the Department 'may request clarification' or further information regarding any 'critical aspect' of the bid, this was only a clause that allowed for the tender

authority to approach a bidder to clarify an ambiguity or uncertainty, or an obvious mistake. It did not afford the tender authority a discretionary power to condone a material non-compliance and did not impose a duty on it to approach every bidder, in the case of any and every non-compliance with the bid specifications and functionality requirements.

67. That brings us to the requirements in respect of the response vehicles. The applicant filed an affidavit from a retired traffic inspector, who pointed out that the e-NATIS system has a database that stores comprehensive data pertaining to motor vehicles that are in use in SA, which include their registration details, ownership history and licensing information. From her knowledge and experience a motor vehicle registration certificate issued by e-NATIS is widely accepted as conclusive proof of the registration and ownership of a motor vehicle. She has never come across the document referred to as an e-NATIS 'report' in the functionality criteria, and on the face of it the document generated in this regard from the e-NATIS system is one in response to an 'e-NATIS 163' system query. The information generated in an e-NATIS 'report' in response to such a query is essentially the same information as that which would be recorded in a registration certificate.
68. From a comparison of the two documents it is however apparent that, whilst an e-NATIS report contains substantially the same information in relation to a registered motor vehicle, as one would find on its registration certificate, such as its vehicle register, identification and engine numbers and its make and model, the e-NATIS report goes further: it contains a compilation of such particulars in respect of all vehicles which are owned by, or registered in the name of a person or entity, including a director of a company or member of a close corporation. Unlike a registration certificate it contains information pertaining to more than one vehicle. Thus, the information which the respondents would have obtained had they been provided with a copy of an e-NATIS report for the applicant would have been a confirmation of whether it owned two or more vehicles in its name, or in the name of its members or other persons, and the particulars of such vehicles. However, even if one were to accept that, viewed in the light of the purpose of the requirement i.e. to apprise the City of the particulars of such vehicles and whether they were indeed owned by and registered in the name of the applicant, it complied in

effect with what was required (i.e in pre-*Allpay* language there was substantial compliance), this would not be sufficient to push the applicant over the 50% threshold required for functionality, as it would only have been entitled to be awarded 20 points.

69. That then as far as tender 09/22 is concerned. If one considers the tender documentation in tender 10/22 in the light of the accepted principles the following emerges. In the first place, the submission of a valid certificate of registration issued by the NBC was a mandatory requirement and bidders were clearly informed on the very first page of the invitation to bid that the failure to submit it would render them non-responsive and subject to disqualification, even before their bids would be evaluated for preference and price. That this was a material and compulsory requirement was emphasised at the compulsory briefing session that was held for bidders. In contrast to this, the additional requirement that bidders were to submit a letter of good standing from the NBC was not prescribed as a mandatory one, failure to comply with which would result in non-responsiveness. The terms of the bid and its special conditions stated that bidders who had already obtained such a letter could submit it with their bid documentation, whilst those who had not could submit it later. The distinction between the 2 types of documents and the consequences attendant upon a failure to submit them, is evident from a reading of clause 9 of the terms of reference. Both documents are referred to therein as 'statutory' documents which were required and had to be submitted. The certificate of registration had to be submitted 'with the tender document' i.e. the bid and a failure to do so would result in 'elimination' (sic). The letter of good standing was to be submitted by 'successful bidders' i.e. bidders who qualified as responsive and had been awarded the tender, within 7 days thereof, and they would not be allocated work until they did so.
70. In their answering affidavit the respondents stated that the purpose of requiring a valid NBC registration certificate, as opposed to only a letter of good standing, was that a properly issued certificate served as conclusive proof of a bidder's registration at the time of the submission of their bid. In this regard it is evident (from a copy of a registration certificate which was issued to one of the successful bidders) that it certifies and confirms that the holder thereof is registered as an employer with the NBC as at the date of issue

thereof. Importantly, the holder's particulars are set out in the certificate including, where the holder is a company or close corporation, its registered name and CIPC registration number, the names of its directors or members and its (registered) business address.

71. The applicant conceded that neither of the 2 letters from the NBC which it submitted qualified as a certificate, either within the ordinary, linguistic meaning commonly understood by the term, or the meaning to be ascribed to the term in the context of the particulars that are ordinarily recorded on such a document by the NBC. Neither of the letters expressly certified and confirmed that the applicant was registered with the NBC as at the date thereof. Aside from wrongly referring to the applicant as 'Prosec Guards' (it is in fact a CC), neither of the 2 letters confirmed its registered name, registration number, registered business address and the names of its members. Both letters merely sought to confirm that 'Prosec Guards' had levied contributions to the NBC in accordance with the levy agreement applicable to the sector, but neither of them even set out the 'contributor's' levy number, as would appear in the case of a registration certificate.
72. In the circumstances, the information provided in the letters can hardly be considered to constitute substantial compliance, in terms of the submission of the requisite information which would be provided to the municipality in a registration certificate. As to the applicant's contention that as both letters confirmed that it was in good standing and they therefore implicitly confirmed it was registered at the time as an employer with the NBC, the following. In the first place, as was pointed out in *Moroka* and *WDR Earthmoving* it is the prerogative of the tender authority to prescribe the type and formal requirements of documents that are to be submitted to qualify a bid as responsive, not the courts, which should respect such prerogative in recognition of the separation of powers. Secondly, it seems to me that the argument is analogous to submitting that because a professional is in good standing with their regulatory authority (such as the Legal Practice, Engineering or Health Professions Council) as they have paid their membership and other dues, they must be in possession of a valid certificate of their admission as a legal or medical practitioner, or engineer. Whilst one would expect that this would ordinarily be the case it is not always and

necessarily so. It would depend on when the certificate of registration was issued and whether it is genuine and extant, and when the dues were to be paid. Thus, where dues are paid annually or quarterly a professional may have paid them and would thus be in 'good standing' but may have subsequently terminated their membership of the regulatory body or may have been otherwise removed from the roll of its members for misconduct, or on request. Thus, it does not necessarily and inevitably follow that a person who is stated to be in 'good standing' with a regulatory authority is in fact a registered member of it.

73. It seems to me also that, given the distinction which is made between certificates and letters of good standing in clause 9 of the terms of reference, to accept that a letter of good standing would on its own suffice as proof of registration would be unfair vis-à-vis bidders as a group, as letters of good standing did not have to be submitted with bids, unlike certificates of registration. To adopt the interpretation advanced by the applicant would mean that notwithstanding the peremptory requirement that bidders needed to supply registration certificates in order to qualify as responsive, *before* being awarded the tender, they could ignore this requirement and would qualify as responsive and would be eligible to be awarded the tender, as long as they were able to provide a letter of good standing *after* the tender was awarded to them. This would potentially open the door to unregistered bidders applying for and being awarded tenders for security services and only registering as employers thereafter with the NBC, if at all. The interpretation would be manifestly unfair to the general body of providers in the security service industry. In *Steenkamp*⁴² the CC emphasized that tender processes require 'equal' compliance by bidders on the closing day for submission of bids. In tender 10/22 many bidders were disqualified for not submitting registration certificates. To treat the applicant differently would be improper and unfair.

Conclusion

74. In the circumstances the applications must both fail. As far as costs are concerned, although the applicant contended that on the basis of the principle in *Biowatch* it should not be mulcted in costs as it sought to vindicate its

⁴² *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 60; *Allpay n 2* para 39.

constitutional right to fair administrative action, in my view at heart the matters essentially concern the applicant's commercial interests and there is no good reason to depart from the principle that ordinarily applies in disputes involving such matters viz that costs should follow the event. In terms of the recent amendment that came into effect on 12 April 2024 by way of rule 67A, Courts granting party-party costs orders are required to indicate which of three successively increasing scales of costs (A,B and C) are to apply. In *Mashavha*⁴³ Wilson J recently held⁴⁴ that the rule should not be applied retrospectively to matters that were instituted and heard before 12 April 2024. Fees for work done before that date should be recoverable in terms of the rules that applied before then.

75. In the result I make the following order:

The applications in case nos. 2501/23 and 2502/23 are dismissed with costs, including the costs of two counsel where so employed.

A large black rectangular box redacting the signature of the judge. A small portion of a handwritten signature is visible above the box.

M SHER
Judge of the High Court
(Digital signature)

⁴³ *Mashavha v Enaex Africa (Pty) Ltd* [2024] ZAGPJHC 387 (delivered on 22 April 2024).

⁴⁴ Para 12.

Appearances:

Applicant's counsel: DC Joubert SC and D Lubbe

Applicant's attorneys: D Kotze Attorneys (Bellville)

First -Third Respondents' counsel: T Masuku, T Sarkas and L Matiso

First -Third Respondents' attorneys: State Attorney (Cape Town)