



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

CASE NO: 66806/20

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

DATE	SIGNATURE
20/09/2024	N V KHUMALO J

In the matter between:

PROXA SOUTH AFRICA (PTY) LTD

APPLICANT

and

TRANS-CALEDON TUNNEL AUTHORITY

1ST RESPONDENT

NAFASI WATER TECHNOLOGIES (PTY) LTD

2ND RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 20 September 2024

JUDGMENT

Introduction

[1] This is a review application in terms of s 6 read with the provisions of s 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in which the Applicant seeks an order in the following terms:

[1.1] The following two decisions taken by the 1st Respondent ,as conveyed to the 2nd Respondent on 15 December 2020, are hereby reviewed and set aside:

[1.1.1] The decision to appoint the 2nd Respondent as its operator in relation to the Acid Mine Water Drainage Facility at the Central Basin under contract No: TCTA- 08-030 (“Central Basin decision”); and

[1.1.2] The decision to appoint the 2nd Respondent as its operator in relation to the Acid Mine Water Drainage Facility at the Eastern Basin under contract No: TCTA - 08-032 (“Eastern Basin decision”);

[1.2] The two contracts concluded between the 1st and 2nd Respondent pursuant to the Central Basin decision and the Eastern Basin decision are cancelled and set aside;

[1.3] The 1st Respondent is directed to commence a fresh tender process in relation to both the Central and Eastern Basin decisions on substantially the same terms as the tender processes that commenced on 1 July 2020 under the same contract numbers according to the following timetable:

[1.3.1] in 30 days to this order the 1st respondent must publish a new invitation to bidders calling for fresh bid submissions to be lodged with its procurement officer;

[1.3.2] The invitation to bidders shall remain open for bid submissions to be lodged by prospective bidders for a period of 30 days after the date referred to in paragraph 3.1 where after no further bid submissions shall be received;

[1.3.3] The fresh bids submitted shall be evaluated and adjudicated within 30 days of the date referred to in paragraph 1.3.2 and a new operator shall be appointed at both Eastern and Central Basin facilities;

[1.3.4] The new operator shall commence operations at both Eastern and Central Basin facilities within 30 days of the date referred to in paragraph 3.3;

[1.4] The 1st Respondent to pay the costs.

[2] The matter was enrolled on the 3rd Court motion roll and heard over a period of a day.

Parties

3The Applicant, Proxa South Africa (Pty) Ltd (“Proxa”), is a private limited company incorporated and registered in accordance with the Company Laws of South Africa. Its principal business activities include industrial water treatment. It is hereinafter referred to as “Proxa.”

[4] The 1st Respondent, Trans-Caledon Tunnel Authority (“TCTA”), is a state owned entity charged with financing and implementing bulk raw water infra structure projects that operates under the agency of the Department of Water and Sanitation (“the

Department”), a National Department responsible for the country’s water resources in respect of usage, equitable allocation and distribution.

Background facts

[5] TCTA, as the Department’s agent is mandated to assist the government in its pursuit of water security and realisation of its Constitutional obligation of ensuring universal access to this essential resource for all citizens. The fulfilment of its mandate is regulated in terms of s 217¹ of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), the Public Finance Management Act 1 of 1999 (PFMA), Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and falls subject to PAJA, which TCTA actions are expected to abide by.

[6] In keeping with its mandate TCTA established water treatment plants which became known as the “Eastern Basin and Central Basin” (also referred to as “the facilities”). Due to a decrease in gold mining operations on the Witwatersrand and the rising water table, there has been contamination of the groundwater with mining waste and heavy metals in both the Central and Eastern Basins of the Witwatersrand. This is commonly referred to as “acid mine drainage” (AMD). TCTA’s mandate was to appoint a suitable operator for the operations and maintenance of the two facilities. Every five (5) years TCTA will make the appointment after following a public procurement process as contemplated in s 217 (2) of the Constitution and in compliance with s 2 of the PPPFA².

¹ S217 Procurement. –

(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

- (a) categories of preference in the allocation of contracts; and
- (b) the protection or advancement of persons, categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a frame work within which the policy referred to in subsection (2) must be implemented.

² Framework for implementation of preferential procurement policy

[7] On 1 July 2020, TCTA issued a Request for Tender (RfT) for provision of the operational and maintenance services for the AMD treatment plants at both of its facilities, for the prescribed 5-years period. The incumbent holder's 30-month operational and maintenance services contract on the two facilities, which was Water Solutions South Africa and Proxa South Africa Joint Venture referred to as WSPJV was to expire on 31 January 2021.

[8] The tender proposal was to be evaluated in terms of, inter alia, s 2 (1) (a)³ of the Preferential Procurement Policy Framework Act, 2000 (No. 5 of 2000), with a three phase approach adopted which was to follow a two envelope criteria, that is Envelope "A" and "B." A tenderer would have to qualify in terms of the first phase which was a pre-qualification of the tenderers on the opening of the first envelope. On qualification on first phase the tenderer will then proceed to be considered in terms of the second phase and if they qualify in terms of the 2nd phase, they will then advance to the third phase. In terms of the first phase the prequalification requirement was for a tenderer to be a level B-BBEE 4 contributor or higher. In the second phase the tenderers were to be evaluated in terms of the functional evaluation (measured from the company experience and key personnel qualifications and experience) for which they will have to qualify to proceed to the third phase for further evaluation on price and must be B-BBEE compliant at the time of the award/decision.

[9] Proxa and Nafasi Water Technologies (Pty) Ltd ("Nafasi"), herein cited as the 2nd Respondent were two of the seven bidders that tendered their bids for the two contracts and identified as T2 (Proxa) and T5 (Nafasi), in the tender documents. They had all, except for one bidder, proceeded through to the second phase, having satisfied the prequalification requirement by tendering their B-BBEE qualifying certificates.

³ Section 2 (1) *An organ of state must determine its preferential procurement policy and implement it within the following framework:*

(a) *A Preference point system must be followed;*

[10] On 22 September 2020 TCTA disqualified Proxa from the tender process due to its failure in the functional evaluation to score the 60 out of a 100 points required for it to qualify to proceed to the third phase for price evaluation. Proxa had apparently scored 53 and 47 points for the Eastern and Central Basin respectively. As a result, it was amongst the three bidders in terms of the Central Basin and four other bidders in terms of the Eastern Basin that were eliminated from the process. With only three bidders qualifying for the third phase for the Central Basin and two bidders for the Eastern Basin.

[11] Nafasi being one of the bidders that qualified to proceed to the third phase for both facilities, was ultimately the successful bidder and on 15 December 2020 awarded the contracts no -080-30 and -080-32 for the operation and the maintenance of both the Eastern Basin and the Central Basin to assume operations on 1 February 2021. Proxa on the other hand, and all other unsuccessful tenderers were officially notified of their unsuccessful bids on 21 December 2021.

[12] Notwithstanding its elimination earlier in the bid, Proxa contests the appointment of Nafasi as the successful bidder. It initially contended that Nafasi was not supposed to have succeeded in its bid as it failed to comply with the requirement of being B-BBEE compliant at the time of the third phase evaluation process. Furthermore, Proxa disputed that Nafasi was properly evaluated in the second phase, that is on the Functional criteria, arguing that the experience and qualifications of Nafasi's key personnel was not properly vetted as Nafasi failed to submit CVs for the personnel, which it had alleged was a requirement in terms of the RfT process but later conceded that it was actually not a requirement.

[13] Notwithstanding the concession made on the CVs not being a RfT requirement, Proxa later persisted to argue that Nafasi's evaluation nevertheless could not have been possible without the CVs, from which its personnel's experience should have been vetted in terms of skills required. Hence Proxa sought the relief in terms of PAJA to set aside TACT's decision to award Nafasi the tender and for an order to reissue and restart the tender process as per the prayers in the amended Notice of Motion. It then limited its challenge to s 6 (2) (f) (ii) (cc) of PAJA.

[14] Proxa however belatedly in its Further Supplementary Affidavit abandoned its contention on the B-BBEE certificate, putting the blame for having pursued that avenue on TCTA's failure to timeously provide the relevant information. It also no longer based its contention on the failure by Nafasi to furnish CVs for its key personnel but challenged the basis upon which Nafasi's key personnel's experience was assessed without the CVs. It disputed that it was possible.

[15] Consequently, the only issue which was still pending at the hearing of the Application was whether or not Nafasi was properly or rationally scored in the functional evaluation phase, there being sufficient information for TCTA to do a proper valuation, or was Nafasi supposed to be disqualified for lack of relevant information. In essence the issues that arises are therefore whether or not the decision of TCT reviewable in terms of s 6 of PAJA upon which the decision to award Nafasi the tender is to be set aside.

[16] Another issue raised by Proxa was with regard to the costs in part A of the Application that Proxa launched on 23 December 2020 by way of urgency, seeking an interim order interdicting the resumption of the contracts by Nafasi and challenging its disqualification alleging that it was improperly disqualified. Proxa had prior the Urgent Application and before the finalisation of the bid process requested reasons for its disqualification. An interim order was granted to preserve the contract that had expired. Subsequent the order Proxa was not so keen to proceed with the contention of its disqualification on the Eastern Basin tender. It continued with its argument that its bid for the Central Basin where it had scored 53 points was unlawfully disqualified as its key personnel's qualifications and experience was supposed to put it in good stead to obtain more points than what was allocated. Further that the unlawful disqualification of its bid tainted the whole process, hence it sought in this Application (which is part B) the review and the setting aside of the TCTA decision.

[17] Finally, Proxa totally abandoned the contention on its disqualification and the interim order for preservation of the expired contract until the decision on the review. On receipt of the Rule 53 record, Proxa had in its Further Supplementary Affidavit pointed out that the record show that according to the Tender Evaluation Committees ("TEC") only Nafasi and Murray and Roberts Water Technoveer were still in the running

on the last phase. The TECs on both facilities recommended that Nafasi be appointed as the preferred bidder. However, the TCTA's Bid Adjudication Committee ("BAC") instructed both TECs to revise their reports to indicate that Murray Roberts was disqualified as its Envelope B did not contain a completed price schedule. No Bill of Quantities was submitted for the main offer. BAC then designated Nafasi, being the only bidder that remained standing in the last phase, the preferred bidder. TCTA then concluded with Nafasi the contracts for both the Eastern and the Central Basin.

[18] Proxa ultimately abandoned the contention on its disqualification, inversely proceeded to challenge the qualification of Nafasi as a preferred bidder alleging that none of the tenderers that submitted a bid for the July RfT qualified for either the Eastern or Central Basin contract, including Nafasi. Further that, the decision to appoint Nafasi was accordingly unlawful as there was no rational basis upon which the TEC and the BAC could have concluded that Nafasi receive 60 points or more on functionality. Nafasi was therefore supposed to have been also disqualified at Envelope A phase.

[19] Proxa contention was based on the following allegations:

[19.1] That on the functionality evaluation, tenderers were scored out of a 100 points of which 40 points referred to the tenderer and 60 to the tenderer's key personnel. Provided the tenderer's key personnel have the requisite qualifications; they were to be scored only on the relevant experience that they had. The only rational way to evaluate the relevant experience, which is how TACT alleges to have done it, was through the CVs of key personnel. Whilst Nafasi is the only tenderer at both the Eastern and the Central Basin that did not submit any CVs.

[19.2] In the RfT the first relevant document in Section 1 reads "Information to tenderers" and has a template that the tenderers were required to complete when providing the information required in Form 2. In Table 3 there is a document titled Functional Evaluation Criteria. The second relevant document in the RfT is the Template that the tenderers were required to complete when providing information in Form 2 titled 'Evaluation Table Form 2 Personal

Experience.’ In the document there is a description of the 6 key personnel roles that the tenderers must provide information on. There is also a requirement for the stipulation of the minimum qualification each one of these key individuals must have.

[19.3] The remainder of the columns required information relevant to experience. What then follows is a note instructing the tenderers to submit a CV for each staff member nominated for a key personnel role. A template then follows describing precisely what must go into the CV in order to demonstrate the number of years of relevant experience. The template was contained in the original RfT and included by TCTA in the Rule 53 record that it filed. Proxa argues that even though the final edition of the Form 2 Template in the RfT that was made available to tenderers did not have the CV Template on it, the objective importance of a CV in order to evaluate relevant experience cannot be seriously disputed. It further pointed out that TCTA, TAC and BAC all alleged to recognise the importance of a CV as they have all stated in their reports that CVs were considered when scoring key personnel on their experience (which could not be true for Nafasi)

[20] Proxa submitted that the relevant experience of key personnel of each tenderer was absolutely material to the way in which the tenderers bids were evaluated and ultimately adjudicated, which emphasised the importance of a CV when evaluating relevant work experience. It argued that without a CV there is no meaningful way of distinguishing between work experience and relevant work experience which is required for the role that the person has been nominated for. For that reason one must be able to see from the CV not only the experience the personnel has but “what part of that experience is relevant to the specific key personnel role to which they have been nominated.”

[21] Proxa points out that, with the disqualification of Nafasi, as a result without any qualifying tender, TCTA must then run a fresh tender process with a view to find an appropriate tenderer who properly qualifies for the tender. That was accordingly the motivation for the relief sought.

[22] Proxa confirms that Nafasi completed the Form 2 template but attached only certificates and qualifications of all the personnel nominated for the key roles but no CVs. It alleges that the relevance or importance of Nafasi not attaching a CV to be the following:

[22.1] The statement by TECs that “evaluation was done on the basis of information provided in Form 2, submitted CVs and copies of minimum qualifications required” of all key personnel when scoring functional points for experience is not true, especially that they considered the CVs, it may be true to all other tenderers but not true as far as it relates to Nafasi.

[22.2] The same goes with TATC’s Senior Manager in procurement who identified the importance of CVs when he confirmed under oath in his affidavit that “CVs of all key personnel were considered when bids were evaluated and scored. This was not true in relation to Nafasi as there were no CVs on its bid.

[23] Proxa argued that from the consolidated score cards of all the tenderers it is clear that both TECs interrogated the CV of all the key personnel. In some instances scored them down because although they had the experience their CVs did not demonstrate their experience to be relevant to the role that they have been nominated. TCTA therefore in its various committees regarded the CVs of all the tenderers, except Nafasi, to be material in the scoring in the second phase.

[24] It further argued that there is no rational basis for the TCTA nor its TEC and BAC nor its Senior Manager in procurement to conclude that the people put forward by Nafasi had the relevant experience that Nafasi claimed they had without the CV. It alleged that it was therefore entirely irrational for the TECs to allocate any points to Nafasi for relevant experience without seeing the CVs of Nafasi’s key staff members.

Grounds of Review

[25] On that basis Proxa as a result raised the following grounds of review:

25.1 TEC's scoring of Nafasi on key personnel in the functional evaluation without the CVs was irrational, which irrationality raises the ground of review under s 6 (2) (f) (ii) of PAJA.⁴

[25.1.1] Due to TEC's irrational scoring of Nafasi, it was equally irrational for the BAC to recommend Nafasi as a preferred tenderer for both the Eastern and the Central Basin. The ultimate decision taken to appoint Nafasi tainted by the same underlying problem of irrationality. The inclusion of the CV was necessary for a rational evaluation of their relevant experience.

[25.2] Furthermore in the case of Nafasi where the CV was not attached a relevant consideration was simply not taken into account by either the TEC or the BAC. Ultimately the decision to appoint Nafasi and then to conclude a contract with it is tainted by the fact that it was recommended in circumstances where a relevant consideration was not taken into account (which is the failure to submit a CV or a document of similar effect), which grounds a review articulated in s 6 (2) (e) (iii) of PAJA.⁵

[25.3] Thirdly the fact that TCTA through its various committees interrogated the relevant experience of the staff members in the other bidders and failed to do so with Nafasi staff. Nafasi did not attach the CVs and not a single committee raised this as a problem goes further than them merely giving Nafasi a preferential treatment. Objectively this preferential treatment raises a suspicion

⁴ which provides that:

'A court has the power to judicially review an administrative action if the action is not rationally connected to:

- (aa) the purpose for which it was taken
- (bb) the purpose of an empowering provision
- (cc) the information before the administrator or
- (dd) the reasons given for it by the administrator"

⁵ which provides that:

"A court has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant consideration were not considered "

that TCTA exercised a bias in favour of Nafasi which it alleges triggers the ground for review that is under s 6 (2) (a) (iii) of PAJA.⁶

[26] The basis upon which the review was raised was basically on the failure by Nafasi to attach CVs.

TCTA Response

[27] TCTA's response with regard to the B-BBEE certificate, is no longer relevant as a result the submission in relation thereto is not considered further except later for the purposes of determining the costs issue.

On the CV issue

[28] Proxa's main contention on the CVs being a tender requirement had however also become moot as Proxa accepted that the RfT sent to the tenderers did not include a requirement to furnish CVs, and also the explanation by TCTA that the RfT that was included in the Rule 53 record with Annexure 18 that referred to CVs being a requirement was included in error by a new employee.

[29] On Proxa's contention that a CV was nevertheless still necessary for the Functional evaluation or the scoring of the key personnel on their experience in relation to their assigned role, which it alleges was not possible without it or information related to what would normally be put in a CV being made available to TEC, TCTA argued that the relevant qualifications and experience of Nafasi's qualified personnel was evident from the documents that were furnished by Nafasi in respect of its bid for both facilities. It refutes the allegation by Proxa that the RfT published in respect of the Eastern and Central Basin necessitated bidders to attach CVs of their qualified personnel to the bids and none of the bidders submitted a clarification in that regard.

⁶ which provides that:

"A court has the power to judicially review an administrative action if the administrator who took it was bias or reasonably suspected of bias."

[30] TCTA pointed out that the note that appears under the published Form 2 Table of the RfT that was published reads:

Notes:

1. *The individual's qualification certificates shall be submitted showing that they meet the minimum requirements;*
2. *The GMR appointment can be any of the nominated individuals;*
3. *No roles will be shared and points will be allocated for each individual.*

[31] TCTA argues that there is no basis to contend that TCTA should or could have disqualified any of the bidders on the failure to include CVs in support of key personnel's experiences submissions. Such action could have rendered the decision subject to a judicial review. Also, details that could be included as part of a discrete CV could be included as part of the tender documents. Similarly, with some members providing copies of reference letters of their track records.

[32] Finally TCTA also referred to the grounds of disqualification that were published in the RfT, the one relevant reads:

[32.1] TCTA will disqualify any tenderer that fails:

[32.1.1] To meet minimum B –BBEE required;

[32.1.2] to meet the minimum functional valuation score;

[33] TCTA went into detail explaining the assessment of the key personnel using the criteria as indicated in the RfT and showing how the points were achieved whilst disputing the allegation by Proxa that the only rational way this could have been done was on the basis of a CV. It argued that no substantiation shown for allegation that there might have been a miscalculation or incorrect scoring due to absence of CV in relation to any specific personnel.

Dishonesty Imputed on the part of TCTA

[34] Regarding the allegation that TEC's statement that they considered the CVs of all key personnel when scoring functional points for experience to be false as no CVs were filed by Nafasi, which accusation was levelled at TCTA's procurement Manager, TCTA's deponent to the Supplementary Affidavit points out that he stated under oath that key personnel experience was evaluated based on the information provided in form 2, the CVs of the individuals and copies of the minimum qualifications required. If the scores awarded to tenderers based on information included in Form 2 documents submitted by bidders, read with the supporting qualifications of personnel were sufficient to meet the minimum qualifying score threshold in respect of personnel experience, then nothing more was required in respect of personnel key experience, which is what happened with Nafasi.

[35] TCTA denies that the inclusion of CVs for staff members nominated in key personnel roles was necessary for a rational evaluation of their relevant experience and therefore denies that:

[35.1] it was irrational of TEC to score Nafasi on key personnel in the functional phase. Proxa failed in its view to explain why the alleged irrationality raises the ground of review in s 6 (2) (f) (ii) and deny that it is apposite.

[35.2] It was irrational of BAC to recommend Nafasi as the preferred tenderer for both facilities. There is no underlying problem that taints the ultimate decision taken to appoint Nafasi or any decision taken in the selection and appointment process.

[36] TCTA further denies that a relevant consideration was not taken into account by TEC or BAC and disputes that s 6 (2) (f) (iii) is relevant. The BAC condition was met.

[37] It denies that any ground of review is as a result triggered.

Nafasi's response

On the CV

[38] Nafasi's response was basically an assertion that it had supplied substantively the information required as every other tenderer, and the information allowed by the RfT for a proper consideration and scoring of its key personnel. The information that TCTA required having been expressly requested in Form 2 and not required to be produced in a CV format. Also that there is nowhere where it says CV should be provided some special weight. It denies Proxa's imputation that the only way TCTA could have evaluated its personnel's relevant experience and which is the way that TCTA alleged to have done it, was through the CVs of the key personnel. There is also no evidence where TCTA has stated that it had considered the CVs of all tendering parties.

[39] It denies any special preference or treatment afforded to it, that being proven by the fact that two of its key personnel were scored 0 and one other person scored down. Reference was had to CVs only where a tenderer has failed to provide the requisite information in the format required by TCTA and instead submitted a CV. Also there is no challenge that it was wrongly scored.

[40] It points out that Section 1 of the RfT is according to the information to tenderers, the most relevant portion of the document to which this court should be directed. In the copy of Section 1 of the published RfT in respect of the Central Basin and the Eastern basin, the note that appears under Form 2 of the published RfT, that instructs tenderers to submit CVs for each staff member that has been appointed in key personnel roles does not appear.

[41] Furthermore that in terms of the key personnel requirements the RfT provides on Table 3, the Functional Evaluation ("FE") criteria which sets out the parameters within which the experience of the key personnel roles will be scored and also provides a score sheet. The FE Criteria requires tenderers to submit a completed Form 2 including relevant qualifications for each of the personnel, failing which the staff member will not be scored. The relevant qualifications referred to are specified in Form 2, which was to be used to evaluate the tenderer's submission. Form 2 in its template

form specifies the relevant positions that must be filled and sets out the minimum academic qualifications which must be possessed and read with the specified experience set out in FE criteria. It requires the tenderers to particularise the years of experience under the years of experience column, that is:

[41.1] The name and type of plant in which the key personnel held the position;

[41.2] The date the key personnel commenced and ended employment in the position in the specified plant; and

[41.3] The total years of experience that key person has at a particular plant;

This collectively forms the experience criteria.

[42] The relevant parameters in the key personnel evaluation are that the key personnel has:

- (i) the correct academic qualification;
- (ii) held the relevant position at another plant;
- (iii) specifies the particulars of experience in the relevant position, by completing the experience criteria.

(Collectively referred to as the “evaluation requirements”)

[43] Nafasi argued that there is no basis for Proxa to impute that the CV was also a requirement and it was to be submitted for purposes of key personnel evaluation. Proxa’s contention arises from documents which were not part of the final RfT and was never relevant to the tender. The information required by TCTA was to allow it to be able to easily identify relevant experience and assess and score the parties on those asis.

[44] Nafasi also disputes Proxa’s allegation that without a CV no meaningful key personnel evaluation or assessment between work experience and relevant experience could take place. The only rational way would be through a CV. It argued that If relevant work experience can be listed in a CV, it can also be listed (The question

is whether the relevant experience or qualifications has been listed, albeit) in a different document).

B-BBEE Certificate

[45] This was no longer part of the dispute between the parties, as Proxa abandoned its reliance on s 6 (2) (b) and s 6 (2) (e) (ii) of PAJA.

Proxa's standing

[46] In addition Nafasi raised the issue of Proxa's standing contending that since Proxa admitted or conceded that it was validly disqualified from the bid process at the functional phase stage and since it alleged to be litigating on its own interest standing, having a commercial interest, it therefore does not have an interest in what happened at Envelope B stage, that is on the 2nd phase. Only those who participated in that phase have an own interest standing to challenge the decision taken or outcome. Proxa therefore lacks any standing.

Grounds of review

[47] On Proxa's first ground of review based on the allegation that Nafasi's tender bid and decision made was irrational grounding a review on s 6 (2) (f) (ii), since Nafasi had not attached its key personnel's CV to its Functional Evaluation Form, making it irrational of TEC to score Nafasi and BAC to recommend Nafasi as the preferred bidder. Nafasi disputes that the allegation has merit, since it submitted the required information in the required format, adequate to enable both the TEC and BAC to make a decision.

[48] On Proxa's second ground of review based on s 6 (2) (e) (ii) that TEC valued and BAC scored Nafasi without having considered the CVs of Nafasi's key personnel, therefore the decision made without taking a relevant consideration into account, Nafasi argued that there is no merit to that conclusion as a CV was not a requirement or the only relevant consideration or document from which the information required was sourced.

[49] On the third ground of review based on an alleged reasonable suspicion of TCTA having exercised biased in favour of Nafasi invoking s 6 (2) (e) (iii) of PAJA. Nafasi disputes the merit of that ground pointing out that it is premised on a wrong assumption that TCTA was required to interrogate CVs when they were actually not required. Nafasi submitted fully all the information requested in Form 2 which was the compliant form. The CVs submitted by the other tenderers were considered where the information required was not fully furnished in that Form 2 or not completed properly. It therefore denied that there was any question of material biased or for any reasonable apprehension of bias nor of preferential treatment, as its tender was critically assessed and scored accordingly.

Proxa's Reply

[50] Proxa conceded that due to similar reasons mentioned in the Respondent's Answering Affidavits the scope of its application had narrowed. It confirmed that it was no longer challenging its disqualification or that of the other tenderers. However, since it seems Nafasi became the last man standing and by default became the preferred bidder, its case, finally is on the ground that Nafasi was also supposed to be disqualified.

[51] Proxa confirmed that Nafasi was supposed to be disqualified not because it was required and did not furnish CVs of its key personnel (which was previously its main contention) but because there was no rational basis upon which TCTA could have scored Nafasi's bid in relation to its key personnel's relevant experience at least without the CVs or any supplementary information in respect thereto. It therefore was not ignoring that the RfT did not contain a requirement that CVs be attached to bid submissions. It submitted that nonetheless, the scant information Nafasi provided in its Form 2 was simply not enough. The relevant experience of its key personnel' was not adequately described. Therefore, without a CV to amplify the scant information provided in Form 2 there was no rational basis upon which Nafasi's bid could have been scored. In other words there was no rational connection between the information provided and the scores given.

[52] It argued that the details that were required in Form 2 could not have been sufficient to provide TCTA with enough information upon which to score a tenderer in the manner contemplated by table 3. It alleges every tenderer to have recognised that and submitted a CV, except Nafasi. However, if a tenderer was astute enough to provide full details of its key personnel's relevant experience in the space provided for in Form 2 then CVs would not need to be attached. Its challenge is therefore that without CVs Nafasi could not and should not have received the points for the relevant experience of its key personnel.

[53] It also indicated to no longer rely on the CV being a requirement but place requirement on the basis of the instruction that the tender bid shall be made by the tenderer completing and returning the schedule of returnable documents including any other documents prepared by the tenderer to supplement the required returnable documents and schedules. It however argues that on that basis the CVs remained important, albeit not compulsory.

[54] It persisted in its argument that the limited information required by Form 2 on the key personnel experience could not have been sufficient to Nafasi's tender to enable TCTA to assess those candidates' relevant experience. The relevance of the experience held by a nominated responsible employee is to be determined by the scoring criteria in Table 3. Each tenderer if it was to be allocated a score in relation to any key personnel had to provide enough details about their candidate's previous experience so as to enable TCTA to determine if they have met the functional evaluation criteria in Table A. Whether they chose to do so in a document they called a CV or whether they chose to do so by attaching some documents possibly letters of appointment or contracts of employment detailing the core functions that their nominated key personnel performed at the applicable plants matters not.

[55] It further argued that the relevant information had to be placed before the TCTA in a document to supplement Form 2. Which all tenderers did, except for Nafasi. Had TCTA scored Nafasi according to Table 3 of section 1 of the RfT, Nafasi would not have received points for its key personnel. This should have led to the disqualification of Nafasi from further adjudication, eliminated for not receiving 40 points out of a possible 60.

[56] On the personnel that had been assessed Proxa criticises the scoring made in the instant of Mr Hutton whom Nafasi purported to demonstrate that he had experience in the operations and management of Activated Sludge, HDS Plant or Water Treatment plant whereupon scoring depended on two separate criteria:

1. Experience on an Activated Sludge, HDS or Water Treatment Plants;
2. The experience should be on operating and managing the Plant;

[57] It is argued by Proxa that in the Form 2 in relation to both facilities Nafasi told TCTA that Hutton who is an engineer worked at 4 different Water Treatment Plants and HDS Plants. However, nowhere in the Form is it indicated what he did at those plants, whether he operated or managed the Plants or did anything related to that. From Form 2 he could only be allocated points if it is known what he did at the plants. He should therefore not have been allocated any score. The score that was granted for his experience bears no rational basis to the information that was furnished when measured against the Functional Evaluation criteria used for scoring in Table 3. Proxa accepts that there was no space and argues that Nafasi should then have furnished the information in a CV or similar document as a supplement to Form 2.

[58] In respect of Mr Baillie, it is indicated that he worked at two HDS and Water Treatment Plants. It is also not mentioned anywhere as to what he did at those plants in terms of operations as the terms of requirement included an indication of his experience in operating the plants. The score that he was allocated bear no relevance to the information provided when measured against the Functional Evaluation criteria used for scoring in Table 3. Also even if accepted that there was no space in Form 2 to provide for the type of information, it should have been provided in a CV or similar document to supplement the information on Form 2.

[59] TCTA's statement that Baillie also has experience in Kayalekera Uranium Sulphuric Acidic Mine Drainage Plant which it corrects to be Kayalekera Uranium Sulphuric Acid Plant (not AMD), a chemical production Plant. It states that in the absence of supplementary information about the nature of the Plant and Baillie's role

at the plant there was no rational basis for TCTA to conclude that the experience was relevant.

[60] Reference is also made to Ms Mushonga who is a Chemical Engineer. In the Form 2 submission TCTA is told that she worked at the Water Treatment Plant and HDS but with no explanation or description of what she did there or her position in the Form 2. She is required to be in operations. TCTA was without this information and therefore should not have allocated her any points. Proxa alleges that the score that TCTA allocated to her bore no rational connection to the information provided when measured against the functional evaluation criteria used for scoring in Table 3. It could have been provided on a CV or similar document.

[61] Reference is also made to Mr Botes who is a Chemical Engineer was supposed to have experience in managing the HDS and WTP plants. It is alleged that nothing on Form 2 is said to indicate if he was managing the plants although it is said he had worked at 5 of those two plants. No information is given on the role he played at the plants.

[62] In relation to Ndobe's information with regard to his experience on maintaining the process at Activated Sledge HDS and Water Treatment Plant was also required to be able to score him. The Form 2 only shows that he worked at one Water Treatment Plant with no explanation as to what he did there. He should not have been scored without the information. The score therefore that TCTA gave Nafasi for Ndobe bore no rational connection to the information provided when measured against the functional evaluation criteria used for scoring in Table 3. Ndobe was scored differently to Bailie who also had experience of working at a chemical production plant. This was regarded as irrelevant but he was awarded points for the 12 years instead of 15 when Bailie was scored for the 11 years. No information indicate why one was awarded points instead of the other.

[63] Overall Proxa disputed the sufficiency of the information submitted by Nafasi as it failed to indicate the role each key personnel played at the relevant places where they worked. It argued that more was needed from Nafasi to supplement the information before TCTA could allocate the points it ultimately did. Proxa therefore

disputes Nafasi's allegation that information provided was sufficient for Nafasi to score 40 points out of the possible 60 allowing it to advance to the next stage. It was insufficient to do so. The lack of information rendered TCTA's decision to allocate Nafasi any points irrational. It alleged that TCTA had allocated points to Nafasi in circumstances where its decision to do so cannot be rationally connected to any document that served before it.

Proxa's locus standi

[64] On Nafasi argument that since Proxa was litigating on the basis of its own, personal commercial interest and has been disqualified, it lacks standing. It had no interest to what happens in the second envelope. Proxa's response is that the mere fact that it was disqualified at an early stage is not an impediment to its own interest standing. Especially because it is challenging the qualification of Nafasi on the same phase, the envelope A process saying that everybody was supposed to be disqualified including Nafasi.

[65] It further submits on the own interest standing that, in terms of s 38 of the Constitution the court's approach on the issue of standing on PAJA reviews, take into consideration that the purpose of such reviews is to protect the constitutional right to just administrative action in s 33 of the Bill of rights. TCTA as an organ of state is to act in an open, transparent and accountable manner. It also entitles the member of the public to act in a responsible manner. The fact that as a member of the public it has scrutinized the conduct of TCTA were it was forced to explain cannot be wrong. It denied Nefasi's accusation that the review was vexatious.

Issues to be determined.

- (a) Whether the Applicant has any *standing* to bring this Application on an own interest capacity, notwithstanding being validly disqualified during the 2nd phase.
- (b) Failing an own interest, if he has *standing* on a public interest capacity this being a public interest issue; if found that he has, then

- (c) Whether the decision that was made is reviewable on the basis of:
- (i) being irrational in that there was no information before the TCTA that justified the decision made; s 6 (2) (f) (ii); which means the decision could not have been taken with the information that was before the TCTA (in that Nafasi was supposed to supplement its information; compliance with RfT on Form 2 not being sufficient).
- (d) If reviewable, the correct remedy.

Legal framework

On Proxa's standing (own interest).

[66] In enunciating on the point of own interest *standing* Chaskalson P in *Ferreira vs. Levin N.O.*⁷ at para 165 stated the following:

"I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broader approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled."

[67] It was further in *Ferreira v Levin NO and Others*⁸ stated that "It is sufficient for the accused to show that he or she is directly affected by the unconstitutional legislation. If this is shown "...it matters not whether he is the victim." The impact of *Ferreira* to own interest standing is said to have been emphasised in *Giant Concerts CC vs. Rinaldo Investments (Pty) Ltd*⁹ where, in para 41, the Constitutional Court summarised the following general principles concerning own-interest standing:

⁷ 1996 (1) SA 984 (CC)

⁸ 1995(2) SA 813 (W) at 843

⁹ 2013 (3) BCLR 251 (CC)

“33.1. To establish own-interest standing under the Constitution, the applicant need not show the same “sufficient, personal and direct interest” that the common law requires. The applicant must, however, show that the contested law or decision affects its rights or interests, or potentially affects them.

33.2. This requirement must be generously and broadly interpreted to accord with constitutional goals.

33.3. The interest must, however, be real and not merely hypothetical or academic.

33.4. Standing is not a technical or strictly defined concept, and there is no magical formula for conferring it. It is a tool that a court must employ to determine whether a litigant is entitled to claim the court’s time, and to put the opposing litigants to trouble.

33.5. Each case depends on its own facts and there is no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. Here a measure of pragmatism is needed.” (My emphasis)

[68] In *WDR Earthmoving Enterprises vs. Joe Gqabi District Municipality* 2018¹⁰ a distinction is drawn between namely disqualified tenderers who may lack standing to challenge a final award unless their challenge, if successful, results in the need for a brand-new process to be commenced afresh. In that instance standing is confirmed.

[69] These being the authorities that have been referred to by Proxa in its heads of argument. The crux of the matter is that Proxa and other tenderers that were disqualified in the functional evaluation are not challenging their disqualification and the other disqualified tenderers are not involved in the litigation. Nafasi had argued that Proxa’s disqualification will not change Proxa’s situation. Proxa had correctly argued that its circumstances will change if the relief it is seeking, which is the rerun

¹⁰ (392/2017) [2018] ZASCA 72 (30 May 2018)

of the tender is granted, as it will get another chance to bid for the tender as enunciated in WDR.

[70] In *WDR Earthmoving Enterprises supra*¹¹ the esteemed court stated in respect of the own interest standing the following:

“As regards the issue of standing, the full court held that the appellants had no standing to challenge the award of the tender to the fourth respondent because: ‘. . . once its bid was found to be non-responsive, it fell out of the race and it no longer had a legally protected interest in the outcome of the process. As Pillay J stated in Rodpaul Construction CC t/a Rods Construction v Ethekeweni Municipality & others [2014 JDR 1122 (KZD)] “only a compliant tenderer acquires the right to challenge an award.”

[71] The full court in WDR had then rejected the argument that the appellants’ standing to challenge the award to the fourth respondent arose from s 6(1) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) which provides that ‘any person may institute proceedings in a court . . . for the judicial review of an administrative action.’

[72] The Constitutional Court found the full court to have erred in concluding that the standing of the appellants to challenge the award of the tender, was determined by the finding that the appellants’ bid was non-responsive. Further that its reliance on *Rodpaul Construction CC v Ethekeweni Municipality* 2014 JDR 1122 (KZD) was misplaced. The statement in *Rodpaul*, at para 52, that the full court followed, was that:

‘. . . only a compliant tenderer acquires the right to challenge an award. At best a non-compliant tenderer may appeal to the authority before expiry of the tender notice to waive strict compliance.’

It is too broadly cast and does not correctly reflect Canadian law, from which it was said to be derived.”

¹¹ *Supra* at 67 par 52

[73] In any case both Respondents TCTA and Nafasi did not address the issue of own interest standing in their heads of argument nor in their oral submissions. I would therefore assume that reference to the abovementioned authorities had persuaded them otherwise. The own interest standing of Proxa no longer regarded to be in issue.

Whether the decision that was made qualifying Nafasi in the functional criteria is reviewable on the basis of s 6 (2) (f) (ii), it being irrational in that there was no information before the TCTA that justified the decision, which means the decision could not have been taken with the information that was before the TCTA.

Legal framework

[74] In *Potgieter v Howie NO and Others* [2013] ZAGPPHC 313; 2014 (3) SA 336 (GP), para 20 the following was stated:

“A rationality review is based on an absence of rationality between the information before decision maker and which he relied on to form the basis of its decision. It does not refer to the rational connection between reasons given and the decisions but rather the information upon which the decision is based.”

[75] In *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman of the State Tender Board v Sneller Digital (Pty) Ltd & Others*,¹² the court also emphasised that in order to be rational, a decision must be based on accurate findings of fact and a correct application of the law. Whilst in *Pharmaceutical Manufacturers*¹³ this Court stated that:

“Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful.” The setting of this

¹² [2011] ZASCA 202; 2012 (2) SA 16 (SCA) para 40.

¹³ *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000] ZACC 1 (25 February 2000) above n 61 at para 90

standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately"

[76] What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. It was held in a different context in *Prinsloo v Van der Linde & Another*¹⁴ at para 36 that "[a]s long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way." It is further expounded in the Judgment that:

"The question of whether the legislation could have been tailored in a different and more acceptable way is relevant to the issue of justification, but irrelevant to the question of whether there is a sufficient relationship between the means chosen and the end sought, for purposes of the present enquiry¹⁵.

In regard to the first misconception, a person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the state objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way."

[77] Our courts have confirmed that the exercise of public power entails rational decisions related to the purpose for which the power was given. In *Pharmaceutical*¹⁶ the court held that:

"It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they

¹⁴ *Prinsloo v Van der Linde and Another* (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (18 April 1997)

¹⁵ *Prinsloo* above in para 35

¹⁶ At par 85 & 86

are arbitrary and inconsistent in effect with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least comply with this requirement.¹⁰⁷ If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it and mistakenly in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.

[78] Section 217 (1) of the Constitution states that when an organ of state in the national, provincial, or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective.¹⁷

[79] Section 51(1)(a)(iii) of the PFMA sets out the principles that must be adhered to, to achieve a legitimate procurement process:

“an accounting authority for a public entity must ensure and maintain “an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”

[80] In terms of Section 217(3) of the Constitution the national legislation is to provide a framework for preferential procurement. That national legislation is the PPPFA; it is only within this framework that organs of State may undertake preferential procurement¹⁸. The PPPFA requires an establishment of a procurement policy and a tender procedure to be followed for the procurement of goods and services.¹⁹

¹⁷ Section 217 (1) of the Constitution of the Republic of South Africa, 1996.

¹⁸ *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* [2020] ZASCA 2; 2020 (4) SA 17 (SCA), para 64.

¹⁹ Section 2(1) of the PPPFA.

[81] A points-based system is prescribed by the PPPFA, with some exception,²⁰. Section 2(1)(f) of the PPPFA provides that a contract must be awarded to the tenderer who scores the highest points. That tenderer must, in accordance with section 2(1)(b) and (c) have submitted an “acceptable tender” which is defined, by section 1, as “one that ‘in all respects complies with the specifications and conditions of tender as set out in the tender document.

Analysis

[82] The contested information required on the relevant experience of key personnel was apparently according to Proxa supposed to be furnished in the form of a CV to supplement the information requested in RfT’s Form 2, as it allegedly did not adequately address the purpose for which the information was required. The practical example given by Proxa although belatedly in the Replying Affidavit was the fact that the information does not say anything on the type of experience the key personnel had in relation to the position they will be occupying in terms of the new contracts. All the other tenderers furnished that information in a form of a CV although not a specified RfT requirement. Proxa insists that the ‘relevant’ experience could not be outlined sufficiently in Form 2, and for the purpose of scoring Nafasi in the manner contemplated by Table 3 in section 1 of the RfTs. It therefore argued that there was no rational connection between the information furnished by Nafasi and the scores given by TCTA.

[83] The contention that arises from these facts is whether it was indeed not possible for TCTA to establish the required facts from the information submitted by Nafasi, so as to be scored properly and assess the extent to which Nafasi met the functionality criteria, without a CV, notwithstanding the Nafasi’s acceptable or compliant tender.

[84] Section 1 of RfT Information to Tenderers is the most relevant document which clearly stipulates the conditions of tender. Under Point 4 on Submitting a tender offer its stated that: The tenderer is required to complete in full the Returnable Schedule and the Bill of Quantities and attach all relevant documents in order for his tender to

²⁰ Section 2(1)(a) read with section 3 of the PPPFA.

be responsive. The Original and a copy of the tender documents shall be duly completed and signed.

[85] The tender offer shall be made by the tenderer completing and submitting a schedule of returnable documents and schedules including:

- (a) Any other documents prepared by the tenderer to supplement the required returnable documents; and
- (b) copies of receipt slips for addenda.

[86] On 5 Submissions –the following documents must be filled in and submitted as part of compliance documents. Under Table 1, that is Envelope A, Functional proposal. On Section 4 Appendix 5: Complete Forms and supply relevant certificates in respect of qualifications of the Personnel to operate the plant, the documents compulsory. Appendix 6 - on Functional evaluation forms- Completion of Form, a compulsory document.

[87] Item 6. Grounds for disqualification: - TCTA will disqualify tenderer that fails to meet:

1. the minimum criteria;
2. functional evaluation score;
3. Fails to submit form of offer, schedule of rates and prices;
4. Failure to submit the returnable documents within seven days;

7.1 on Functionality evaluation it states that:

“Tenders will be evaluated in terms of the functional evaluation criteria table below. The tenderer must score a minimum of 60 points (out of a 100 points) for functional criteria to qualify for further evaluation on price and B- BBEE status level contribution”

[88] **Table 3:** on Functional evaluation criteria under Form 2, Section 2 on Personnel key experience reads:

“Tenderer shall include completed form (Form 2) including relevant qualification for each of the personnel, failing which the staff member will not be scored.”

1. **Responsible Manager:** Experience in the management and operation of Activated sludge, HDH Plants or Water Treatment plants (WTP).
4 points for the first five years and thereafter 1 point for each year up to maximum of 15 points.
(GMR 1.2 Refer to note below)
2. **Operational Manager:** Experience in operating HDS or WT plants, 5 points for the first 5 years thereafter 1 point for each year up to a maximum of 13 years.
(GMR 1.2 Refer to note below)
3. **Class 5 Operator:** Experience of operating activated sludge, HDS OR WT plants,
3 points for the first 5 years and thereafter 1 point for each year to a maximum of 14 points.
4. **Maintenance Manager:** Experience of maintaining activated sludge, HDS and WT plants
5 years from the first 5 years thereafter 1 point for each year for the maximum of 14 points. (GMR 1.2 refer to note below)
5. **Process Engineer:** Experience of managing process of HDS or WT plants.
3 points for the first 5 years thereafter 1 point for each year up to maximum of 6 points. (GMR 1.2 refer to note below)
6. **Process Technician:** Experience of maintaining the process at activated sludge, HD or WT plants

3 points for the first five years thereafter 1 point for each year to a maximum of 6 points. (GMR 1.2 refer to note below)

GMR 2.1 is a requirement and any of the site based management personnel (i.e Responsible Manager, Operational or Maintenance Manager) shall show proof of accreditation. A maximum of 60 points.

[89] Notes thereafter read:

1. The individual qualifications certificate shall be submitted showing that they meet the minimum requirements.
2. The GMR appointment can be any of the nominated individuals.
3. No roles will be shared and points will be allocated for each individual.

[90] Where after the tenderer had to score a minimum of 60 out of 100 points (40 of which were available to be scored in relation to the company experience and the remainder in relation to the key personnel experience)

[91] It is clear that Form 2 stipulates the minimum information that was required from the tenderers, and the returnable compulsory documents as far as the information on the relevant experience and qualifications of the key personnel was concerned. The document required the tenderers in relation to experience to indicate the name and nature of the plant, that is Water Treatment, High Density or Activated Sludge plant, the number of years of experience operating at the relevant plants, that is the start and end date or if involvement ongoing. Furthermore, on the qualifications to attach the relevant certificates, as proof of meeting the minimum requirement. Accreditations also if applicable. That is exactly the information supplied by Nafasi and the basis upon which Nafasi, Proxa and all other tenderers were scored. Nafasi obtained the required points, ascertainable and justifiable from the information and documentation it supplied.

[92] The tenderers were allocated points for the minimum qualifications required for their roles, established from the relevant information supplied in form 2 and equally relevant qualification certificates submitted. In the Form, it is clearly stated that for the

personnel functional evaluation the submission of relevant certificates is compulsory and without the certificates the personnel were not to be scored. The tenderers were then allocated points for the key personnel's years of experience at the related plants calculated in terms of the formula indicated on Table 3 Section 2 on key personnel experience. The addition of the CV is not mentioned but was nevertheless, to the advantage of those who did submit it also considered to determine if the personnel met the minimum requirements and had the relevant experience to be scored accordingly. It however did not mean that without the CV the tenderers could not be scored.

[93] The fact is that in accordance to what was required in terms of the RfT template and the Form 2 specifications also as per conditions of RfT, Nafasi had complied by submitting an acceptable tender as in terms of s 1 of the PPPFA. It therefore could not be disqualified on the basis that it had failed to furnish or supplement the requisite information in terms of the template, unless if it was indicated therein to be a tender specification. It is also not Proxa's complaint that Nafasi did not comply. As a result, it would then be absurd to conclude that due to Nafasi not submitting CVs, there was no sufficient information from which points could have been accordingly allocated and a decision made in relation to Nafasi's qualification.

[94] Proxa was therefore wrong to still impute that Nafasi should have been disqualified for insufficient information since it did not furnish any CVs, further that it had resulted in an irrational decision by TCTA qualifying Nafasi in the functionality evaluation. It was not part of the RfT specification or the listed reason for which a tenderer could be disqualified. Proxa also disputed that Nafasi's key personnel functionality assessment could take place without the CVs based on the fact that all tenderers submitted CVs which were in all the tenderers instance considered by TCTA in their scoring, except for Nafasi. However Nafasi's tender was compliant in that it was an acceptable tender as per specifications of the RfT. The contention that without the CVs a proper assessment could not take place has no substance. It does not matter in whatever angle the argument is presented. The information submitted as per Nafasi's acceptable tender was relevant for the purpose for which it was required, that is to assess the extent to which Nafasi met the functionality minimum requirement.

TCTA factually assessed and accordingly scored Nafasi. The decision to qualify Nafasi was borne by the facts and therefore not irrational.

[95] Furthermore, considering what goes on to the CV, the mentioning therein of a position held or experience and qualifications obtained is of minimal value without attaching the collateral documentary proof of certificates, accreditation, reference letter, which carries more weight. The further contention that the decision to award the tender to Nafasi was not rationally connected to the information that was before TCTA is baseless.

[96] The other contention raised by Proxa albeit belatedly in its Replying Affidavit to the Respondent's Further Supplementary Answering Affidavit was in relation to the basis upon which the key personnel were scored and points allocated, which is also without merit. As pointed out by TCTA there was no clarity sought about the process to be followed, information to be submitted or on point scoring or allocation during the briefings. TCTA followed the processes and the legislation in place to assess compliance and functionality in order to accordingly score the tenderers. None of the tenderers who had advanced to that category, most of whom were then disqualified, complained about the process followed or their or Nafasi's qualification. It was only Proxa who complained, initially about its own disqualification, then Nafasi's alleged non-compliance due to failure to submit CVs, then challenging the adequacy of the information that was before TCTA's TEC for a proper assessment of Nafasi without CVs and finally disputing Nafasi's scoring.

[97] It is a fact that according to the Form 2 Template they were going to be scored according to the years of experience that they would have been working at the named or similar plants. There were no points granted for the capacity in which the key personnel were employed at that time unless if it was at the relevant plants. The focus was more on the qualifications if they are consistent with the requirements for the appointed role and on the years working at the relevant plants. Points were added for the capacity in which personnel was employed at the relevant plant if mentioned. TCTA consequently made a decision on Nafasi based on what was before it at the time and could be justified. Such a process follows or conforms to the purpose of the tender. The fact that the surplus information provided by some of the tenderers or information

submitted in a different format was also considered does not mean the minimum requirements as per the RfT were inadequate, such that they would not have been able to make the required decision. The criteria remained the same, hence it was possible to balance the scoring and decide on the qualification even of those who supplemented or deviated.

[98] Proxa also alleges that what Nafasi was scored could not be justified. In other words, even though Nafasi's was an acceptable tender legally, there is no way it could have scored the points allocated based on the information submitted in that tender, as it was insufficient. It therefore disputes that Nafasi obtained the points allocated to reach the minimum requirement on functionality, raising the point unfairly in the Replying Affidavit.

[99] It is important to point out that, it is not for this court at the time of review to re-determine the policy applied and or processes followed by the decision maker as it was confirmed in *South African National Road Agency Ltd v The Toll Collect Consortium and Another*²¹ with the court stating that, in such instances:

“[27] The invitation to re-score the Consortium’s tender for quality must be declined. Once again it must be stressed that this is not the function of a court. The task of evaluating and awarding these tenders rested in the hands of SANRAL, not the court, and its decision must be respected, provided it was arrived at in accordance with the constitutional requirements applicable to public procurement as set out in s 217 of the Constitution, any applicable legislation and the terms of the tender. The court could only interfere if the process was infected with illegality. The court will not hesitate to interfere with the award of a tender where there is impropriety or corruption. However, where the complaints merely go to the result of the evaluation of the tender a court will be reluctant to intervene and substitute its judgment for that of the evaluator. It may not interfere merely because the tender could have

²¹ *South African National Road Agency Ltd v The Toll Collect Consortium and Another* (796/2012) [2013] ZASCA 102; [2013] 4 All SA 393 (SCA); 2013 (6) SA 356 (SCA) (12 September 2013)

been clearer or more explicit. Nor will it interfere because it disagrees with the assessment of the evaluator as to the relative importance of different factors and the weight to be attached to them. The court is only concerned with the legality of the tender process and not with its outcome”.

[100] In *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works*,²² it was correctly pronounced by this court that the circumstances upon which a statute or conduct will be correctly characterised as irrational are extremely narrow. This was said with reference to what the Constitutional Court recently stated that:

“As this court observed in Pharmaceutical Manufacturers, a court cannot interfere with legislation simply because it disagrees with its purpose or believes that it should be achieved in a different way. Unless it can be shown that the objective is arbitrary, capricious or manifests naked preferences, ‘it is irrelevant to this inquiry whether the scheme chosen by the legislature could be improved in one respect or another’.”

²³ *Because of the difficulty of establishing irrationality, the vast majority of attempts to impugn statutes for irrationality have failed.*²⁴

[101] In turn, the court considered that it cannot investigate the policy frameworks or motives of the legislative bodies, but should rather stick to the examination of the rationality of the legislation itself.

[102] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, the court also cautioned on imposing on the terrain of administrative agencies stating the following:

“In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the

²²(796/2012) [2013] ZASCA 102; [2013] 4 All SA 393 (SCA); 2013 (6) SA 356 (SCA) (12 September 2013)²² *ERF 16 Bryntirion (Pty) Ltd v Minister of Public Works* (11375/08) [2010] ZAGPPHC 154 (12 October 2010)

²³ *Pharmaceutical Manufacturers Association of SA and Others ;In Re: Ex Parte Application of President of the RSA and Others* ²³; *New National Party of South Africa v Government of the RSA and Others* [1999] ZACC 5; 1999 (5) BCLR 489 (CC); 1999 (3) SA 191 (CC) at paras 19 and 24

²⁴ *Poverty Alleviation Network and others v President of the RSA and others* [2010] ZACC 5, 24 February 2010 at para 71

executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.²⁵

[103] Finally in the *Pharmaceuticals Manufacturers* case²⁶ supra, it was pointed out that rationality as a minimum requirement for the exercise of public power,

“does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary’s decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.”

²⁵ (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)

²⁶ at paras 84-5

[104] In my view Proxa has failed to make a case for the court's interference with the decision made relief sought.

Costs

[105] Part of the costs that were incurred in Part A, in the Urgent Application were still to be determined. On withdrawal of the Application Proxa tendered costs only from the date of Basson J order, that is 21 January 2021 to the date of withdrawal of the Application on 3 February 2021. Basson J had deferred the decision on the costs occasioned by the postponement to when the Application is heard.

[106] Proxa contends that It approached the court on an urgent basis to compel TCTA to furnish it with certain information, and had it not been TCTA's refusal to accede to the requests for the information, there would not have been any need to approach the court on an urgent basis. As and when it ultimately received the information from TCTA it made a decision based solely on the information provided, not to pursue the dispute for the interim relief, only in respect of the Eastern Basin and instead proceeded with a review. It is therefore Proxa's submission that TCTA is liable for the costs incurred until the point when it was furnished with the information it requested.

[107] TCTA is seeking costs including those occasioned by the employment of two counsels on a punitive scale (that is on an attorney and client scale). TCTA's demand is based on the fact that Proxa has changed the course of its litigation significantly, beyond the acceptable or reasonable bounds of a Rule 53 review Application. It had persisted on the review notwithstanding acknowledging that it and other bidders had been properly disqualified. Its accusation of bias against TCTA unfounded.

[108] In reply Proxa denies that it ever contended that it was improperly disqualified but instead allege that it was aware that it was disqualified and had kept on asking TCTA for reasons why it was disqualified which were not forthcoming, but consistently refused. This is however not borne by the documents filed that indicate on Part A that Proxa did contend that it was improperly disqualified.

[109] In relation to the Central Basin Proxa pointed out that its interim relief was not forgone until there was an answer from TCTA, which was provided in the Answering Affidavit, a perfectly reasonable position to take. It had also foregone its interim relief after receiving the answers from TCTA and Nafasi. It however notified both that it intended to proceed with the review in respect of both facilities. In so doing it took a decision which it is entitled to do, to ask for the Rule 53 record in order to evaluate whether the tender process was lawfully conducted, which is a safeguard against state departments acting unlawfully and to make sure that government officials are kept accountable.

[110] This however is proof that there was no position or valid ground when Proxa launched the urgent Application, that is Part A, but only suspicion that the delayed response on the outcome might be because something was not right. It was indeed confirmed by the withdrawal of the reliefs sought in that Application which included foregoing or abandonment of the interim order that was granted. Proxa should have tendered the costs with its application for postponement, its liability being apparent, or on withdrawal of the Application. The postponement was an indulgence it was afforded after setting the matter down for hearing. The fact that it still argued for the Respondent to pay the costs occasioned by the postponement must be frowned upon.

[111] Subsequent to the withdrawal of the Urgent Application, Proxa was bent on challenging the award of the tender to Nafasi on whatever basis it regarded suspect. Whereas it acknowledged that it and the other tenderers were properly disqualified, it then alleged that Nafasi should also have been disqualified since it failed to submit CVs on behalf of its key personnel. Only to later concede that the CVs were not part of the requirements of the RfT. It nevertheless continued to demand Nafasi's disqualification on the basis that the information on Nafasi's Form 2 as per RfT was insufficient without the CVs, notwithstanding it being compliant and its tender being acceptable. Moreover, that Nafasi's key personnel could not be properly evaluated for functionality without the CVs.

[112] It is further noted that the B-BBEE certificate issue remained pending until after the receipt of the Rule 53 record. Proxa allege that the basis for that was because TCTA failed to furnish information to it that the certificate was filed prior to the granting

of the award for both facilities. Whilst TCTA points out that a valid certificate was available as at the time of the closing of the bid and before the award was made. Nafasi provided a new certificate on 22 November 2020 before the date when Nafasi was contractually required to commence with the work.

[113] It was certainly an expensive probationary mission that does not justify that the other side incur any costs. Had it not been for the reason that the issues raised were allegedly founded on rights that arise from the Constitution, a punitive costs order would have been the appropriate sanction. I also have to consider that Proxa did confirm that it has a commercial interest. The basic principle in that regard being that the award of costs, unless otherwise enacted, is in the discretion of the presiding judicial officer, and that the successful party should, as a general principle, have his or her costs.²⁷

[114] Under the circumstances the following order is made:

1. The Application is dismissed with costs, such costs to include the costs occasioned by the postponement of the Urgent Application in Part A and those attendant upon the employment of two Counsels by the 1st Respondent.

N V Khumalo
Judge of the High Court
Gauteng Division, Pretoria

²⁷ *Ferreira v Levin NO Others; Vryenhoek & Others v Powell NO & Others* [1995] ZACC 2; 1996 (4) BCLR 441 (CC); 1996 (2) SA 621 (CC).

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