



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D3052/2024**

In the matter between:

APM TERMINALS BV

APPLICANT

and

TRANSNET SOC LIMITED

FIRST RESPONDENT

**INTERNATIONAL CONTAINER TERMINAL
SERVICES INC**

SECOND RESPONDENT

COSCO SHIPPING PORTS LIMITED

THIRD RESPONDENT

DP WORLD LIMITED

FOURTH RESPONDENT

GLOBAL PORTS SERVICES PTE LIMITED

FIFTH RESPONDENT

RED SEA GATEWAY TERMINAL

SIXTH RESPONDENT

MMC PORT HOLDINGS SDN BHD

SEVENTH RESPONDENT

TERMINAL INVESTMENT LIMITED

EIGHT RESPONDENT

REMGRO LIMITED

NINTH RESPONDENT

Coram: Mossop J

Heard: 16 and 17 September 2024

Delivered: 9 October 2024

ORDER

The following order is granted:

1. The application is regarded as urgent and the applicant's failure to comply with the Uniform Rules of Court and the Practice Directives of this division is condoned.
2. The question of law raised by the eighth respondent in accordance with the provisions of Uniform rule 6(5)(d)(iii) is dismissed with costs, such to include the costs of two counsel and to be taxed on scale B.
3. Pending the final determination of Part B of this application, the first respondent is interdicted from:
 - 3.1 taking any steps, alternatively any further steps, to implement the decision taken by it on 1 March 2024 to award the tender Request for Proposal: Durban Container Terminal Pier 2 (DCT2) (RF Number TCC/PSP/2022/0003/RF) (the tender) to the second respondent;
 - 3.2 negotiating or concluding any contract with the second respondent or any third party; or
 - 3.3 implementing, or further implementing, as the case may be, any such contracts, in relation to the tender.
4. The first and second respondents are directed to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, including the costs of two counsel where so employed, to be taxed on Scale C.
5. To the extent necessary, the parties are granted leave to approach the Judge President, alternatively the senior civil judge, in order to make representations concerning a preferent date being allocated for the hearing of Part B of this application.

JUDGMENT

MOSSOP J:

Introduction

[1] The presence of an ever changing pattern of ships anchored off the coast of Durban is a daily sight to the inhabitants of that city. Vessels arriving at the port of

Durban (the port) are required to assume an involuntary holding position in the Indian Ocean to the north of the port's entrance as they wait to enter the port. The reason that they are unable to enter is because the port has been in a state of decline for several decades. Its inability to function efficiently is a locally, nationally and internationally known fact,¹ with excessive delays being experienced by vessels seeking to enter the port to discharge their largely containerised cargo.

[2] As part of its national development plan, the government of this country has apparently approved a development initiative called the 'Roadmap for the Freight Logistics System' (the roadmap). One of the purposes behind the roadmap is to revitalise, inter alia, South Africa's ports. That revitalisation would include that portion of the port known as the Durban Container Terminal Pier 2 (DCT2). The first respondent in this application, Transnet SOC Limited (Transnet), has been tasked with implementing the DCT2 project and it consequently formulated a plan to do so.

The plan

[3] The plan envisaged the selection of a private sector partner that would join forces with Transnet, which, as its full name suggests, is a state-owned company, to take over the management of DCT2 with the goal of improving and enhancing its operations.

[4] DCT2 is an existing specialised maritime facility with dedicated infrastructure that includes the specialist equipment required for the handling of containerised cargo. It is comprised of three clusters of berths, has a capacity of approximately 2.4 million TEU² and has a quay length of 2 128 metres. The introduction of a private sector partner is intended to bring new ways of working to DCT2 in order to drive capacity through improved efficiencies and volumes.

[5] The private sector partner sought by Transnet was to be identified through a bidding process designed by it. The process would have several stages, each of

¹ The document entitled 'Roadmap for the Freight Logistics System in South Africa', referred to in paragraph 2, states the following: 'While the performance of South Africa's ports has improved in recent years, the container terminals at the Ports of Durban and Ngqura were ranked 365th and 361st respectively out of 370 ports worldwide by the World Bank in 2022.'

² Twenty-foot equivalent unit containers.

which would have to be negotiated before, ultimately, the successful private sector partner would be identified. Having been so identified, that entity would have the opportunity to enter into negotiations with Transnet with a view to concluding a contract with it (the contract). If this was achieved, the private sector partner would be obliged to purchase 49 percent of the shareholding in a new special purpose vehicle to be registered, referred to as 'Newco', with Transnet to hold the balance of the shares in Newco. While Transnet would hold the majority shareholding, Newco would, in fact, be managed by the successful private sector partner. The shareholding in Newco did not come for free: as part of the bidding process, a bidder was required to indicate how much it would pay Transnet to acquire that minority shareholding.

[6] Newco would operate and maintain the DCT2 terminal, and attend to the supply, financing, and commissioning of all terminal equipment and the ongoing operation, maintenance, repair, and improvement of DCT2 for the duration of the term of the contract to be negotiated, which was to be for a period of 25 years.

[7] It is common cause that to achieve the goals just mentioned, substantial amounts of capital, running into billions of Rands, will be needed. The successful bidder would accordingly be required to establish from the outset that it had sufficient financial capability to commence and undertake the project and that it had the ability to attract loan funding to allow the project to achieve its anticipated potential.

The bidding process

[8] The process for selecting a private sector partner would commence with a stage referred to by Transnet as the 'Request for Qualifications' (the RFQ). The RFQ stage required certain preliminary information from bidders in order to qualify them for the next stage of the project. That information would be supplied in two internal phases.

[9] Given the scale of the project and its financial demands, of particular importance, even at the RFQ stage, was evidence of financial capacity. The bid documents accordingly specified the minimum financial criteria that had to be met.

Bidders would have to establish the criteria through their financial statements and from certain financial declarations that they were required to make.

[10] Significantly, the RFQ stage required that:

‘Statements of Qualifications must respond to the requirements of this RFQ, demonstrate an understanding of the desired outcomes and address the key objectives set out in Section 1.4. All Statements of Qualifications (unless rejected in accordance with the provisions of this RFQ) will be evaluated in accordance with the criteria set out in Part 5.’

[11] As to how bidders would progress, the RFQ explained as follows:

‘Respondents who submit compliant Qualification Declarations and Statements of Qualifications that satisfy the minimum qualification criteria and best meet the objectives set out in this RFQ may be selected as Shortlisted Respondents at the sole and absolute discretion of Transnet. Shortlisted Respondents will then be invited to submit detailed proposals in response to the RFP.’

[12] The reference to ‘minimum qualification criteria’ in the extract above included a reference to minimum financial criteria. The reference to ‘RFP’ is a reference to the next stage of the process, designated by Transnet as the ‘Request for Proposals’ stage (the RFP). The formal designation that Transnet assigned to this stage was: ‘Request for Proposal: Durban Container Terminal Pier 2 (“DCT2”) (RF Number: TCC/PSP/2022/0003/RFP)’

[13] As with the RFQ stage, the RFP stage also had internal phases through which bidders had to progress, of which there were seven. The RFP stage imposed additional requirements on the bidders for participation in the further stages of the project and invited the bidders to submit substantive and detailed proposals to Transnet. Such further obligations also related to a bidder’s financial muscle.

[14] Importantly, having made representations about its financial resources and capabilities during the RFQ stage, in the RFP stage those same representations had to be considered and reviewed by an independent third party which had to verify the correctness of what a bidder had represented about its financial capabilities.

[15] From those bidders that successfully negotiated the RFP stage and progressed, a preferred bidder was to be identified. For the preferred bidder, the next stage of the tender was the period of negotiations between itself and Transnet in which both parties would attempt to agree on the terms of the contract that would be awarded to the preferred bidder. If, for whatever reason, the contract could not be concluded with the preferred bidder on terms acceptable to both parties, Transnet would shift its focus to the second ranked bidder and commence similar negotiations with it, with a view to concluding the contract with it.

Implementation of the bidding process

[16] The bidding process was implemented and commenced with Transnet issuing the RFQ on 11 February 2022. The initial closing date of 29 March 2022 was extended to 12 April 2022.

[17] Responses from 21 bidders were received by Transnet during the RFQ stage. Ultimately, ten bidders were permitted to proceed to the RFP stage. The announcement of the names of those bidders who had progressed was made on 12 August 2022. Both the applicant, a Dutch company which forms part of the Danish A. P. Moller-Maersk Group of Companies, and the second respondent, a Philippines-based company listed on the Philippine Stock Exchange, were among the ten bidders that progressed to the RFP stage.

[18] Of the ten bidders that progressed to the RFP stage, only six submitted proposals to Transnet. On 6 July 2023, the second respondent was identified by Transnet as being the preferred bidder.

[19] It is relevant to mention, given what will later be discussed, that the applicant requested reasons, by way of a letter, for this outcome from Transnet on an unspecified date in July 2023 (said to be the 23rd by counsel during argument) and in such letter, requested Transnet to respond in writing regarding:

‘... how the process of bid evaluation was conducted in accordance with Section 10 of the RFP:

- Step 1 – Third party verification: confirmation that those bidders who submitted a bid, including ICTSI [the second respondent], submitted a satisfactory third-party

verification report, confirming that the following criteria satisfy the RFP requirements: (i) the operating performance levels of the marine container terminals, and (ii) the minimum financial criteria (specifically, the solvency requirement of 0.4 which according to ICTSI's 2022 annual accounts (page 53) does not seem to exceed 0.24).'

[20] On 1 March 2024, the second respondent was identified as being the entity with whom Transnet would conclude the contract.

[21] As part of its successful bid, the second respondent committed itself to paying the amount of US\$618 million (approximately R11.1 billion) to Transnet for its minority shareholding in Newco. The applicant was ranked second behind the second respondent, having offered approximately R2 billion less than the amount that the second respondent had offered for the shareholding in Newco, namely the amount of US\$515 million.

[22] The applicant believes that it ought to have been ranked first and that it ought to have been awarded the right to negotiate the contract with Transnet. It holds the view that the second respondent ought to have been disqualified at the RFQ stage, should not have been permitted to proceed to the RFP stage, was thereafter irregularly awarded the right to negotiate the contract, and was finally awarded the contract itself. It has accordingly turned to this court for relief.

The relief claimed

[23] The applicant claims relief in two parts. Part A of its notice of motion (Part A) claims an interdict pending a review of the decision to award the contract to the second respondent and Part B (Part B) is the judicial review foreshadowed in Part A.

[24] Part A reads as follows:

'1. The applicant's non-compliance with the Uniform Rules of Court relating to forms, service and time periods is condoned and the matter is heard on an urgent basis in terms of Rule 6(12)(a).

2 Pending the final determination of Part B of this application, the first respondent is interdicted from:

- 2.1 taking any steps, alternatively any further steps, to implement the impugned Tender decision;
- 2.2 negotiating or concluding any contract with the second respondent or any third party; or
- 2.3 implementing or further implementing as the case may be, any such contracts, in relation to the first respondent's Request for Proposal: Durban Container Terminal Pier 2 ("DCT2") (RF Number: TCC/PSP/2022/0003/RFP) ('Tender' or 'RFP').'

[25] For the sake of completeness, Part B reads as follows:

- '1 The decision of the first respondent made on or about 1 March 2024 to award the Tender to the second respondent and to proceed to finalise the contract award is reviewed, set aside, and declared invalid ("Impugned Decision").
- 2 It is declared that the applicant is the preferred bidder as contemplated in the Tender.
- 3 The first respondent is directed to forthwith implement the declaration in paragraph 2 as contemplated in the Tender.
- 4 *Alternatively to 2 and 3 above*, the matter is remitted back to Transnet for reconsideration.
- 5 The costs of Part B of this application shall be paid by any respondent opposing any part of the relief sought, including the costs of two counsel.'

The issue to be determined

[26] I am not required to consider Part B. What is before me is only Part A.

[27] In considering the matter, I have been assisted by helpful and erudite submissions from Mr Maenetje SC, who appeared with Mr Gwala for the applicant, from Mr du Plessis SC and from Mr Ferreira who appeared together with Mr Salukazana for Transnet, from Mr Stein SC, who appeared with Ms Palmer for the second respondent, and from Mr Daniels SC, who appeared for the eighth respondent. I thank all counsel for their respective assistance.

[28] Before considering Part A, it is necessary to consider two preliminary issues, namely the issue of urgency and a notice delivered by the eighth respondent, Terminal Investment Limited, a Swiss-based bidder, in terms of the provisions of Uniform rule 6(5)(d)(iii).

Urgency

[29] The applicant brought the relief claimed in Part A on an urgent basis, asserting that it could not afford to wait for a hearing in the ordinary course.

[30] Only three of the nine named respondents have participated in the application, namely Transnet, the second respondent, and the eighth respondent. They all, to some degree, deny the presence of the urgency contended for by the applicant.

[31] The fact that this is a commercial matter and not a matter where life and limb are threatened does not, in my view, mean it foregoes any claim to urgency. In *Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd*,³ Goldstone J stated that in his opinion:

‘...the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6 (12) no less than any other interests. Each case must depend upon its own circumstances.’⁴ I share that opinion.

[32] In *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC*,⁵ the court remarked that:

‘Cases involving ... crippling commercial loss, are also likely to be urgent.’⁶

As a general proposition, that may be correct. It is common cause that the stakes in this matter are extremely high and the failure to be able to conclude the contract with Transnet will amount to a significant lost opportunity to the unsuccessful party. On a general conspectus, it is not difficult, therefore, to sense the potential for urgency.

[33] General propositions are all well and good but whether a matter, including a commercial matter, justifies an expedited and urgent hearing will always depend on the facts of each case, the imminence and scale of the likely harm anticipated, and whether substantial redress can be secured by the applicant at a hearing in due

³ *Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W).

⁴ *Ibid* at 586F-G.

⁵ *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC* [2023] ZAGPJHC 846 (‘*Volvo*’).

⁶ *Ibid* para 6.

course.⁷ Each matter is thus to be considered on its own unique facts, from which the urgency must be discerned.

[34] The applicant asserts that the matter is urgent because Transnet has taken a final decision to conclude the contract with the second respondent and that will inexorably lead to the implementation of the tender, for Transnet appears to be resolute on proceeding with it. It contends that the second respondent ought not to have succeeded and, because of the decision taken by Transnet, the applicant will be denied the opportunity to negotiate the contract with Transnet and will accordingly suffer considerable losses. The crippling commercial loss contemplated in *Volvo* will occur.

[35] Transnet's decision to conclude the contract with the second respondent was conveyed to the applicant's attorneys by its attorneys, Edward Nathan Sonnenbergs (ENS) on 1 March 2024 (the 1 March letter). The relevant part of the 1 March letter reads as follows:

'Transnet's Board has confirmed that Transnet will proceed to finalise the contract award to ICTSI [the second respondent], subject to the successful completion of the following mandatory outstanding matters.'⁸

[36] The effect of the 1 March letter was that the second respondent was no longer simply the preferred bidder but was now the successful bidder. While there was the prospect earlier in the bidding process that the second respondent might notionally not progress from being the preferred bidder to being the successful bidder if acceptable terms applicable to the contract could not be negotiated, that possibility had now been eliminated. The applicant consequently had two options: it could either accept the conclusion of the contract, and do nothing more about it and watch the tender be implemented, as some bidders have done, or it could challenge that decision if it had grounds upon which to do so. It chose the latter option.

⁷ *East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others* [2011] ZAGPJHC 196 para 7.

⁸ The reference to the 'mandatory outstanding matters' was a reference to the standard approvals and clearances that must be sought and obtained when the State is a contracting party.

[37] In my view, the applicant did not delay unnecessarily in making its election to challenge Transnet's decision, and within a period of five days of its last communication with Transnet, it had its voluminous application papers prepared,⁹ issued by the registrar of this court and delivered to the respondents. It is so that the respondents were given shortened periods within which to deliver their answering affidavits but I do not regard those shortened periods as being unfair to them. Those respondents that desired to oppose the application were able to, and did, prepare substantial answering affidavits in the time prescribed by the applicant, although not without some grumbling and complaint about the time afforded to them to do so.¹⁰

[38] Transnet and the second respondent resist the alleged urgency of the matter and advance a different hypothesis. It is that the applicant ought to have approached the court for relief after the appointment of the second respondent as the preferred bidder. That is not a proposition that I need to resolve in considering Part A. The applicant has specifically sought relief in relation to the decision of 1 March 2024 and not the decision of 6 July 2023. The issue is best considered and resolved by the court hearing Part B. It is not disputed by Transnet that its decision of 1 March 2024 amounts to an administrative action on its part. In other words, it was a final determination.

[39] Should I be incorrect in this view, it appears to me that the argument that Transnet now advances about the application being made earlier is not one to which it has consistently adhered. On 2 November 2023, ENS addressed a letter to the applicant's attorneys in which the following was stated:

'Any approach to a court for interim interdictory relief is similarly inapposite as there is simply no prejudice to your client nor is there any protectable interest at this stage in the process that would justify judicial intervention.'

[40] This point of view was repeated six days later, on 8 November 2023, when ENS informed the applicant that the RFP process was not complete, and no final

⁹ The founding affidavit was some 49 pages long and together with annexures, the founding papers came to some 320 pages.

¹⁰ Transnet delivered an answering affidavit of some 99 pages, which, together with annexures, swelled the answering affidavit to some 783 pages.

award had been made in respect of the tender. All that had occurred was the selection of a 'Preferred Proponent'.

[41] Finally, on 4 March 2024, ENS wrote to the applicant and said:

'in our view an application for interim relief at this intermediate juncture is premature given the processes and outcomes required before Transnet is able to make a final award.'

ENS also described the process as being 'inchoate'.

[42] It was argued by Mr du Plessis that these statements were just the opinion of Transnet's attorneys, the inference being that Transnet itself could not be held to what its attorneys had said. I do not accept that argument. I can conceive of no reason why I should not regard the representations made by ENS as not reflecting Transnet's instructions to it. Transnet accordingly appears to have blown both hot and cold over the issue of urgency.

[43] Before this application was prepared and launched, Transnet was requested by the applicant's attorneys to provide certain undertakings pending the review contemplated by the applicant.¹¹ The undertakings sought may have rendered Part A unnecessary. Transnet, however, declined to provide those undertakings and seems intent on progressing with the tender, notwithstanding its knowledge that the applicant is intending to review its decision. If the project is progressed, then there is a real risk that the review court will not be prepared, in the public interest, to set aside that which has already been done while the date for the review was awaited. In other words, as the applicant puts it, the review court may be unwilling to later attempt to unscramble the egg. There is thus a distinct possibility that the applicant will not be afforded substantial redress at a hearing in due course.

[44] Transnet, in urging the court not to grant relief to the applicant, asserts that the awarding of the tender is of critical significance to the economic prospects of this country. In its heads of argument, it is submitted that:

'Every day the status quo endures, the South African economy succumbs to losses of approximately R1 billion.'

¹¹ The request was made on 1 March 2024 and the undertaking was required to be given by 12h00 on 4 March 2024.

While the basis of this allegation has not been established, I am prepared to accept that it may be correct. If it is, then this has been the situation for a considerable period of time because Transnet itself has asserted that the upgrade of the port has been talked about for the past 22 years by government. But the significance and importance of the tender to the applicant is also established by that statement and strengthens the suggestion that the matter is, therefore, urgent.

[45] In my view, the agglomeration of all these factors points to the matter being urgent. On a balanced consideration of the competing submissions, I accordingly consider that an appropriate case for urgency was made out by the applicant.

The eighth respondent's notice

[46] While it is correct to say that the eighth respondent has participated in the application, its participation has been limited to the delivery of a notice (the notice) in terms of Uniform rule 6(5)(d)(iii), indicating that it raises only a question of law. It did not deliver an answering affidavit.

[47] Uniform rule 6(5)(d)(iii) reads as follows:

‘(d) Any person opposing the grant of an order sought in the notice of motion shall -

...

(iii) if such person intends to raise any question of law only such person shall deliver notice of intention to do so, within the time stated in the preceding subparagraph, setting forth such question.’

[48] The question of law taken by the eighth respondent is not crisply expressed in the notice. It is stated over a page and a half, encompassing three lengthy paragraphs. In summary, it states that the decision that the applicant ultimately seeks to set aside was taken on 3 July 2023 and that the applicant was provided with reasons for that decision on 15 August 2023; the application has consequently been brought outside the 180-day period contemplated by the Promotion of Administrative Justice Act 3 of 2000; and the application itself lacks factual averments necessary to entitle the applicant to claim an interim interdict.

[49] There are several shortcomings with the notice in my view. Firstly, it is desirable for a party taking a legal point to also deliver an affidavit. In *Bader and another v Weston and another*,¹² Corbett J stated the following:

‘It seems to me that, generally speaking, our application procedure requires a respondent, who wishes to oppose an application on the merits, to place his case on the merits before the Court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the Rules of Court. Having done so, it is also open to him to take the preliminary point that (in this case) the petition fails to disclose a cause of action and this will often be a convenient procedure where material disputes of fact have arisen which cannot be resolved without recourse to the hearing of oral evidence. On the other hand, I do not think that normally it is proper for such a respondent not to file opposing affidavits but merely to take the preliminary point.’¹³

[50] Secondly, there is a factual disconnect between the content of the notice and what the applicant actually claims in its notice of motion. The decision that the applicant seeks initially to interdict, and later to overturn, was not taken on 3 July 2023, as asserted by the eighth respondent, but was taken on 1 March 2024. The eighth respondent may believe that the decision taken on 3 July 2023 is the decision that the applicant should have challenged, but the notice of motion reveals that it is not. Why the eighth respondent believes that the applicant ought to have impugned the decision of 3 July 2023 would have to be explained by it in an affidavit, which it has not done.

[51] Thirdly, the eighth respondent has populated its notice with facts that by rights should not have appeared in the notice at all and which cannot be classified as questions of law. In *Minister of Finance v Public Protector and others*,¹⁴ the court held that such a notice:

‘... is not a pleading as contemplated in rule 23(1). It is merely a notice in which the respondent sets forth its intention to rely on point/s of law that are dispositive of the dispute between the parties. The respondent is merely required to set out, in the rule 6(5)(d)(iii) notice, the points of law that it seeks to rely on that will be dispositive of the issues for

¹² *Bader and another v Weston and another* 1967 (1) SA 134 (C).

¹³ *Ibid* at 136E-G.

¹⁴ *Minister of Finance v Public Protector and others* 2022 (1) SA 244 (GP).

determination in the matter. Since a rule 6(5)(d)(iii) notice is neither a pleading nor an affidavit, it is impermissible for the respondent to plead facts or produce evidence in support of the law points raised, which should have been placed before the court in an answering affidavit. In the absence of an answering affidavit dealing with the merits of the dispute, the court has a discretion to simply deal with the matter on the points of law raised and the evidence in the founding affidavit.¹⁵ (Footnote omitted.)

That being the case, the notice must be considered against the factual matrix proposed by the applicant. In my view, those facts do not support the submissions of the eighth respondent.

[52] Fourthly, it appears that the eighth respondent intends through its notice to attack the relief that is actually claimed in Part B. As already noted, I am not dealing with Part B.

[53] Fifthly, and finally, while the eighth respondent has alleged that the applicant's founding affidavit lacks factual averments necessary to entitle the applicant to claim an interim interdict, it does not indicate what those facts are. It is, in my view, impermissibly vague in this regard.

[54] I am consequently not satisfied that this is an instance where a valid question of law has been raised in a compliant manner and it must consequently fail. The eighth respondent shall therefore pay the applicant's costs, such to include the costs of two counsel to be taxed on scale B. For later certainty, I make it plain that the costs relating to the adjudication and dismissal of its notice is the only liability for costs that the eighth respondent shall bear.

[55] The preliminary points having been disposed of, I now turn to consider the merits of Part A.

The relevant terms of the RFQ

[56] The RFQ's terms, being the first stage that bidders had to negotiate, were formulated in a written document.

¹⁵ Ibid para 15.

[57] Part 5 of the RFQ is titled 'Assessment of Statements of Qualification'. Section 5.1 thereof deals with the manner in which bids were to be considered and evaluated. It stated that:

'Statements of Qualifications and Qualification Declarations submitted in response to this RFQ will be evaluated by Transnet to determine which Respondents are qualified to meet Transnet's objectives and to efficiently undertake and complete the Project.

The process of evaluation of submitted Statements of Qualifications and Qualification Declarations will be conducted in three stages, as follows (each described in more detail below):

- (a) Compliance with Process Criteria;
- (b) Compliance with Exclusion Criteria;
- (c) Compliance with Minimum Operating Criteria and Minimum Financial Criteria.'

[58] Section 5.2(d) of the RFQ dealt with 'Minimum Financial Criteria' referred to in paragraph (c) above. It is lengthy, but is a pivotal part of this application around which much turns. It is accordingly necessary to quote it in full:

'Respondents must show that they have sufficient financial capacity to attract the required funding for the envisaged investments in DCT2.

Each Respondent must submit its most recent five (5) years audited, consolidated financial statements (including auditor's report and notes).

A Respondent is deemed to have sufficient financial capacity, when the following criteria are met (at latest financial year end):

1. Solvency is equal to or exceeds 0.4, as calculated by the following formula:

Financial Minimum Criteria 1: Solvency:
$$\frac{\text{Total Equity}}{\text{(Total Assets)}} \text{ equal to or exceeds } 0.4$$

2. Liquidity Ratio is equal to or exceeds 1.2, as calculated by the following formula:

Financial Minimum Criteria 2: Liquidity:
$$\frac{\text{Sources of Funds}}{\text{Uses of Funds}} \text{ equal to or exceeds } 1.2$$

For which the Sources of Funds include:

- Closing Bank Balances
- Closing Balance of Short Term Liquid Investments
- Closing balance of Short Term Liquid Investments
- Closing Balance of Short Term Committed Unutilised Facilities

For which the Uses of Funds include:

- Loan and Bond Redemptions for 12 months after latest financial year end

3. The profit, earnings before interest, taxes, depreciation and amortisation (EBITDA) and operational free cashflow of each of the last five years were positive. Where the impact of COVID has resulted in a negative result, Transnet will concede the requirement for positive results in the affected financial years provided sufficient explanation of the COVID impact is provided. Transnet reserves the right to admit Respondents that can provide a convincing explanation for a negative profit, EBITDA or operation free cashflow.

Further, the Respondents must declare that since the publication of the latest financial statements, the Respondent's situation has not materially changed, such that the criteria will not be met in the financial statements of the current and subsequent financial years.

Finally, the Respondent must declare that the Respondent has, to date, not engaged in commitments to the extent that such commitments might affect the Respondent's ability to finance or complete the Project.

Transnet will require that declarations made by Respondents in respect of satisfaction of the minimum financial criteria be verified/certified by an independent third party prior to submission of a Proposal in response to the RFP, for Shortlisted Respondent (and at the Shortlisted Respondent's cost). Further detail about this third party verification/certification will be provided to Shortlisted Respondents.' (Footnotes omitted.)

[59] I shall refer to the equation in numbered paragraph 1 of the extract above as 'the solvency ratio calculation' and the equation in numbered paragraph 2 of the same extract as 'the liquidity calculation'.

[60] Several schedules were attached to the RFQ and were required to be completed by bidders. Schedule 'C' was entitled 'Qualification Declaration'. The introductory paragraph to that schedule reads as follows:

'1. All information and material contained in, or provided together with, the Respondent's Statement of Qualifications and submitted to Transnet concurrently herewith is true, accurate and complete.'

[61] Sections 3 and 4 of Schedule 'C' read as follows:

'3. The Respondent, or if the Respondent is a Consortium, at least the Lead Member of the Consortium, satisfies the following three minimum financial criteria:

- (a) Solvency after investment exceeds or is equal to 0.4 (at latest financial year end);
- (b) Liquidity after investment exceeds or is equal to 1.2 (at latest financial year end); and

(c) The profit, EBITDA and operational free cashflow of each of the last five (5) years were positive. Where the profit, EBITDA and operational cashflow are negatively impacted by COVID, sufficient details are provided to explain the negative returns.’

4. Since the publication of the latest financial statements, the Respondent’s situation has not materially changed, such that the minimum financial criteria described above will not be met in the financial statements of the current and subsequent financial years.’

The relevant terms of the RFP

[62] The applicable terms of the RFP were, as with the RFQ, recorded in writing. Dovetailing with what had been stated in the RFQ, the RFP required independent verification by a third party of a bidder’s satisfaction of the minimum financial criteria. It stated that:

‘... Proponents must meet the following third-party verification requirement in order to proceed to Step 2 of the Evaluation:

The Proponent has submitted one or more written reports completed by the Lead Members (or other relevant Consortium member’s) auditors. The reports must verify the accuracy of the claims made by such Proponent Team Member in the RFQ at latest financial year end, regarding the following operational and financial credentials of the Proponent...’¹⁶

[63] There then followed the solvency ratio calculation and the liquidity calculation, which, having already been fully stated earlier, are not repeated again. The RFP went on to state the following:

‘The third-party verification report submitted by the Proponent must indicate the basis on which the authors of the reports have verified the Respondent’s declarations, and such authors must substantiate their confirmation of such declarations with adequate information regarding the methodology followed for purposes of verification; the nature of their investigations and the outcomes or findings thereof. The reports must list each declaration made by the Shortlisted Responded and confirm each such declaration.’

[64] As regards the negotiations with the preferred bidder, the RFP provided, inter alia, as follows:

¹⁶ In the RFQ, Transnet used the word ‘Respondent’ to refer to a bidder. In the RFP, the use of the word ‘Respondent’ was discontinued and the word ‘Proponent’ was preferred. In terms of the definition of ‘Proponent’ provided in the definition section at the beginning of the RFP, a proponent was defined to mean ‘a Shortlisted Respondent (which could be a single Person or a Consortium) which, having received the RFP is eligible to respond thereto by submitting a Proposal’.

'The Proponent with whom the negotiation of the project agreements has been successfully concluded, will be invited to sign the project agreements with Transnet and/or the SPV as applicable. If the Project Agreements are not signed within a period of one (1) month of such invitation, Transnet has the right, but not the obligation, to stop the execution process with the Preferred Proponent and enter into negotiations with the second ranked Proponent.'

[65] Finally, on the ability of Transnet to reject proposals, terminate bids, terminate the procurement process itself, and disqualify bidders, section 47 of the RFP provided, in part, as follows:

'Transnet reserves the right to reject any Proposal, including without limitation, where the Proponent:

- 47.1.1 submits false, inaccurate or incomplete information in its Proposal; or
- 47.1.2 at any time, makes or is discovered to have made, a material misrepresentation to Transnet in relation to its Proposal; or
- 47.1.3 ...
- 47.1.4 fails to provide clarification information requested in writing by Transnet; or
- 47.1.5 submits a Proposal which is found to be materially incomplete at the time of the opening thereof...'

The applicant's grounds of review

[66] Essentially, two grounds of review have been advanced by the applicant. It, firstly, alleges that the second respondent did not meet the solvency test required by the RFQ and it thereafter alleges that no independent third party verification of the second respondent's solvency, as required by both the RFQ and the RFP, occurred. Thus, so the applicant contends, the second respondent should have been excluded at the RFQ stage of the tender. It, however, was not.

[67] As regards the first ground, the applicant draws attention to the requirements of section 5 of the RFQ and, more specifically, to section 5(2)(d) thereof which deals with the applicable minimum financial criteria. The applicant submits that it is clear that financial capacity was vitally important and had to be established at the commencement of the bid process.

[1] None of the bidders apparently had any difficulty in understanding the requirements of, or the manner in which, the solvency ratio calculation was to be

applied and executed, for it is common cause that none of them sought clarification on this specific issue from Transnet and none of them, including the second respondent, objected to the values that were to be used in calculating the solvency ratio calculation. As ENS, writing on behalf of Transnet, stated in a letter to the second respondent dated 20 November 2023:

‘The RFQ and RFP requirements were clear and were accepted by ICTSI [the second respondent]’.

[68] All bar one of the bidding parties accordingly applied the solvency ratio calculation as it was intended to be applied. The component of the calculation identified as being ‘total equity’ was extracted by the bidders from their audited annual financial statements, which they were required to put up, and then inserted into the solvency ratio calculation and the solution calculated.

[69] The one bidder that did not do so was the second respondent. As we know, the solvency ratio calculation was stated in the RFQ to be:

$$\frac{\text{Total Equity}}{\text{Total Assets}}$$

The solution had to be equal to, or exceed, 0.4. Instead of using this equation, the second respondent changed it to the following:

$$\frac{\text{Market capitalisation}}{\text{Total assets}}$$

[70] Having done so, the second respondent calculated its solvency ratio to be a spectacular 1.28, far exceeding the prescribed 0.4. It submitted that figure with its response to the RFQ to Transnet.

[71] It is, however, common cause that if the second respondent had used its total equity in the solvency ratio calculation and had calculated that figure with reference to its annual financial statements, as all the other bidders did, it would not have met the prescribed ratio of 0.4. Indeed, it would have fallen dismally short of it because

the solvency ratio calculation, when applied as it was published by Transnet, would have yielded the second respondent a ratio of 0.24.¹⁷

[72] The applicant submits that the second respondent's conduct was non-responsive, did not establish that it had the required financial solvency or capacity, and ought to have led to its disqualification from the bidding process.

[73] As regards the second ground of review, it submits that by virtue of the fact that the second respondent did not properly calculate its solvency ratio, no independent third party could verify that it, indeed, had correctly calculated it. If the calculation performed by the second respondent using market capitalisation was indeed unacceptable, then logically the applicant's assertion becomes self-evident.

[74] There was, therefore, according to the applicant, a further material non-compliance with an important requirement of the RFQ and the RFP and such non-compliance was sufficient, on its own, to also disqualify the second respondent from further participation in the tender.

[75] The applicant submits that in claiming an interim interdict as it does, its conduct is directed at enforcing Transnet's compliance with section 217 of the Constitution. That section reads as follows:

'(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, or categories of persons, disadvantaged by unfair discrimination.

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

¹⁷ Transnet later itself calculated that the second respondent had a solvency ratio of 0.24 for both the year ended on 31 December 2021 and the year ended on 31 December 2022.

The section regulates Transnet's process of acquiring services, as it is an organ of state or public entity listed in the Public Finance Management Act 1 of 1999.

Transnet and the second respondent's refutation of the applicant's grounds

[76] A number of defences are raised by these two respondents:

- (a) Transnet asserts that the applicant has not established a prima facie right to the relief that it claims in Part A, stating that the solvency requirement was not a mandatory part of the RFQ: it was part of a deeming provision that was intended to simplify the proof by a bidding party of its financial capacity;
- (b) Satisfaction of the minimum financial criteria specified by the RFQ was not intended to be a 'box ticking' exercise. A failure to complete, or properly complete, that section of the RFQ devoted to the minimum financial criteria was therefore not material;
- (c) Even if it is found that the completion of the minimum financial criteria was mandatory, Transnet submits that the applicant has not established irreparable harm, it being contended in Transnet's heads of argument that:
'At best for Transnet, the award will be at the early stages of implementation when the review application is decided in the ordinary course. APMT [the applicant] will thus be able to secure a proper vindication of its rights through the review proceedings if it is successful in those proceedings'; and
- (d) As regards the verification exercise required to be performed by an independent third party of the second respondent's financial representations, Transnet appears to contend that this occurred satisfactorily.

[77] As regards the second respondent, the applicant asserts that it did not make any of the decisions sought to be reviewed and therefore is not in a position to explain or defend those decisions that it did not make. The second respondent, nonetheless, asserts, as the eighth respondent had done in its notice, that the applicant ought to have reviewed the decision by Transnet to recognise the second respondent as the preferred bidder. That decision was taken, according to the second respondent, on 3 July 2023 and the applicant's review application is accordingly outside the outer limit for the judicial review of that decision. The second respondent further states that the applicant has not established that there was any

administrative decision taken by Transnet on 1 March 2024. It also contends that the applicant has failed to establish the requisites required for an interim interdict. Finally, it is asserted by the second respondent that the DCT2 project is an issue of national importance and it cannot wait for the applicant to ‘ventilate its ill-conceived complaint’.

Analysis of the claims and the defences

[78] In considering the matter, I am aware that it would not be appropriate for me to make findings that may serve to bind the court hearing the applicant’s review. It is not my intention to do so in analysing the competing arguments. But it appears inevitable to me that it may be necessary for me to express views on what appears to be likely or probable in determining, for example, the applicant’s prospects of ultimate success in the review proceedings. This is because I am required to take a ‘peek’ at the grounds of review and to assess their strength.¹⁸ In doing so, any observations that I may make are based against the backdrop of the issues that I have been requested to determine, which may not be the same issues that must later be established in Part B.

[79] The applicant’s case is simply put and is largely demonstrable by reference to documentation. And the facts underpinning that documentation are, for all intents and purposes, common cause. It is, therefore, not in dispute that the second respondent, indeed, varied the solvency ratio calculation, as alleged by the applicant. This is acknowledged by Transnet when it stated in its answering affidavit that: ‘Transnet was, in fact, satisfied despite ICTSI [the second respondent] using its market capitalisation to calculate its solvency ratio.’

The applicant’s complaint about the solvency ratio calculation is accordingly not simply an opinion or speculation on its part, but a fact that may be observed and which has been conceded.

[80] I must therefore commence this analysis from the basis that the second respondent did not use the solvency ratio calculation, as required by the RFQ. With

¹⁸ *Economic Freedom Fighters v Gordhan and others* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020(8) BCLR 916 (CC) para 42.

that as a starting point, I consider now the various defences raised by Transnet and the second respondent.

[81] Transnet asserts that the minimum financial criteria did not comprise a mandatory part of the RFQ, it being merely a deeming provision that was intended to simplify the proof by a bidding party of its financial capacity.

[82] The ordinary meaning of 'minimum' is:

'the smallest amount or number allowed or possible'.¹⁹

To describe information required as being the smallest amount required, as Transnet does, and then to assert that it was not mandatory for it to be provided in the form defined by Transnet, seems to me to be incongruous and unlikely. On this view, it was thus not mandatory to supply even the minimum of financial information.

[83] The proposition that it was not mandatory for the second respondent to deal with the minimum financial criteria appears to be an attitude recently adopted by Transnet. At paragraph 103 of Transnet's answering affidavit, the following is stated by the deponent, Mr Kapei Calvin Phahlamohlaka:

'Two of the bidders who submitted a joint proposal, Terminal Investment Ltd (TIL) [the eighth respondent] and REMGRO Limited [the ninth respondent], were requested to resubmit their liquidity calculation using the formula provided in the RFP [.] The bidders failed in two respects. First they failed to provide the calculation for liquidity in accordance with the formula provided in the RFP, and second, they were required to submit calculations for both bidders. Remgro and TIL were provided with an opportunity to correct their submission which they duly complied with.'

[84] It will be recalled that the liquidity calculation (identified as paragraph 2 in the extract mentioned in paragraph 58 of this judgment) formed part of section 5.2(d) and appeared immediately below the solvency ratio calculation (identified as paragraph 1 in paragraph 58). If it really was not mandatory for a bidder to deal with the calculations formulated by Transnet, why were the eighth and ninth respondents directed to answer the liquidity calculation? The answer is obvious: it was mandatory. If completion of the liquidity calculation was mandatory, then completion

¹⁹ See Cambridge online dictionary: <https://dictionary.cambridge.org/dictionary/english/minimum>.

of the solvency ratio calculation must also have been mandatory. Had the two calculations not been material to a bidding party's prospects, and had it been a matter of choice as to whether the calculations had to be calculated, then there would have been no point in Transnet insisting on compliance by the eighth and ninth respondents.

[85] Associated with the first point taken by Transnet is the second point that each bidder was not required to tick every box under section 5.2(d) and that a failure to do so would not be material nor would it lead to disqualification from the bidding process. From an ordinary reading of that section, there is nothing to indicate that the requirements of the RFQ specified that section 5.2(d) need not be answered. The fact that the reference was to 'minimum financial criteria' would tend to indicate that it had to be answered. Mr Ferreira, who dealt with this aspect on behalf of Transnet in argument, was asked where this would have been apparent to the bidders. He, very correctly, conceded that it was not recorded in the RFQ documentation. It was a concession that needed to be made.

[86] In a similar vein, Mr Ferreira submitted that bidders could still progress if they could demonstrate that they had the financial capacity necessary to satisfy the demands of the contract. He was again asked how any bidder would know that financial capacity could be established in a different manner, for example, by producing other, unspecified, documentation. Again, Mr Ferreira correctly conceded that this would not have been apparent to any bidder. Yet, that was permitted of the second respondent.

[87] It appears that this argument has been adopted by Transnet in order to paper over the problem of the non-responsiveness of the second respondent's approach to the solvency ratio calculation. Transnet had consistently stressed the necessity of the successful bidder having financial strength.

[88] It consequently appears to me to be entirely probable that the minimum financial criteria were both mandatory and had to be addressed by a bidder who desired to progress.

[89] Transnet further submits that the failure by the second respondent to complete, or properly complete, that section of the RFQ devoted to the minimum financial criteria was not material. In other words, it did not matter that the very least information relating to financial capacity was not disclosed through the prescribed calculations but could be disclosed in other ways not permitted for in the RFQ. That is what Transnet essentially now asserts.

[90] In this regard, the provisions of Schedule C are important. This schedule required a bidder to establish that it had 'satisfied' the three minimum financial criteria, one of which was the solvency ratio calculation. The second respondent did not. A bidder also had to certify that the information in its bid was true, accurate, and complete. The second respondent, in good conscience, surely could not say that its response to the solvency ratio calculation was either true or accurate.

[91] Transnet has the advantage of being the entity that designed the process now being scrutinised. It knew what information it required from bidders and why it required that information. It determined that a solvency ratio of 0.4 was required. It must have had a reason for so deciding. One possible reason is that Transnet candidly disclosed in its answering affidavit that its creditors required it to maintain a solvency ratio of 0.4.

[92] In a letter from ENS to the second respondent, dated 20 November 2023, the following was stated:

'Satisfying the solvency ratio was one of several measures selected by Transnet as evidencing a Respondent's financial capacity.'

The other measures were set out in section 5(2)(d) of the RFQ.

[93] A consideration of the terms of the RFQ reveals that it did not ask for the market value of the bidder or for the value of its shares on a stock exchange. It also did not offer the option of market capitalisation as an alternative to the value of total equity in the solvency ratio calculation. Had market capitalisation been relevant to the issue of solvency, it could have been sought by Transnet or it could have been a

permissible alternative that could be employed in the solvency ratio calculation. But it was not. Notwithstanding this fact, Transnet permitted the second respondent to pervert the solvency ratio calculation. It is difficult to conclude that this is anything but fair.

[94] Not only did Transnet permit this to occur, but it later took the position that what the second respondent had done was entirely acceptable. This it did by putting up an affidavit from Professor Warren Maroun (Professor Maroun), a professor at the University of the Witwatersrand in the School of Accounting. The essence of his affidavit is that there is apparently no single way of calculating a solvency ratio, the inference being that what the second respondent did was as good as any other method.

[95] As interesting as it was to read his affidavit, I am not entirely sure what was sought to be achieved by it. The issue is not whether there are different ways to calculate solvency. There probably are different ways. The issue is that Transnet required the solvency ratio to be calculated in a specified way.

[96] However, in my view, Professor Maroun made two significant concessions in his affidavit. Firstly, he stated that:

‘It is common for financial ratios to be calculated using book values.’

That is precisely what Transnet required and that is how all the other bidders understood the RFQ.

[97] Secondly, Professor Maroun stated that:

‘Market capitalisations are not referred to explicitly in mainstream sources dealing with the solvency ratios.’

That is a telling statement. It indicates that what the second respondent had done was not in accordance with general practice. This was, however, already known by Transnet from a further reports that it had commissioned, to which I shall refer shortly.

[98] Professor Maroun explained in his affidavit that market capitalisation represents the theoretical value of an organisation as a whole. That may be so. But, again, that is not what was required by Transnet. What was required, inter alia, was information that demonstrated the solvency of the bidder. What was being sought by Transnet was a mainstream response to a standard equation that is regularly employed in calculating and assessing solvency. There may be more than one way of showing this, as Professor Maroun has suggested, but that, again with respect, is not the issue. Transnet required the solvency ratio calculation to be used. That being the case, the ratio calculated by the second respondent was clearly non-responsive and can only be defended with considerable difficulty.

[99] Transnet, however, knew this to be the case. Notwithstanding its own knowledge of what it wanted, Transnet twice sought expert opinions on whether what the second respondent had done with the solvency ratio calculation was valid and acceptable. From this fact alone, it can be deduced that Transnet had not itself contemplated market capitalisation being an element of the solvency ratio calculation: if it had, it would not require third party opinions on whether its use amounted to a valid representation of the bidder's solvency.

[100] The first expert approached by Transnet was an entity called Mettle Corporate Finance (Pty) Limited (Mettle). The proposition that Mettle was called upon to consider for Transnet was whether:

‘...it is generally acceptable for the market capitalisation of a company to be used as total equity for purposes of the calculation of the company's solvency ratio on the basis set out above.’²⁰

[101] On 15 September 2023, Mettle delivered a written report to Transnet in which it stated:

‘... in conclusion, there is no direct connection between the amount of money that shareholders have invested in a company as equity and the value of the company's market

²⁰ What was being referred to as being ‘set out above’ was a situation where bidders were required to demonstrate their solvency by way of a formula where ‘total equity’ was the numerator and ‘total assets’ was the denominator. One of the bidders, however, used its market capitalisation as its ‘total equity’. Basically, it was a restatement of the particular facts of this matter.

capitalisation. Consequently, it is not acceptable for the market capitalisation of the company to be used or substituted as total equity for purposes of the calculation of its solvency.'

The issue arising out of the second respondent's conduct was thereby clarified in no uncertain terms.

[102] The second opinion harvested by Transnet was from its own internal audit team. Why a second opinion was sought in the light of Mettle's report is not clear. The report received is dated 17 November 2023. The answer that Transnet received was largely in the same terms as the answer it received from Mettle, and, indeed, the second report referenced Mettle's opinion when it stated the following:

'The key question is whether market capitalisation ("market cap") can be used as a substitute for total equity in the solvency ratio calculation. The answer is a definitive no, we concur with the accounting opinion prepared by Mettle for ENS Africa.'

[103] Transnet's internal audit team went on to state that:

'ICTSI [the second respondent] failed to meet the solvency qualification at the RFQ stage and could have been disqualified at RFQ evaluation in terms of clause 5.2(d).'

That is precisely what the applicant contends should have happened. It is not clear why it did not happen.

[104] Perhaps on the strength of these two reports, ENS wrote to the second respondent on 20 November 2023, and raised notice of the possible disqualification of the second respondent. It stated in that letter that:

'ICTSI relies on market capitalisation to represent its 'total equity', in the calculation of its solvency ratio ... Transnet is of the view that this metric is inaccurate, inappropriate for the purpose for which it was used, misleading and an inadequate reflection of ICTSI's ability to meet its financial obligations.'

[105] Remarkably, and perhaps calamitously for it, Transnet had itself not recognised that the second respondent had used the incorrect value for market capitalisation in performing the solvency ratio calculation. It only came to this realisation when the applicant informed it of that fact in writing on 23 July 2023, referred to earlier in this judgment. The applicant had done the sums. Transnet had not.

[106] It is difficult to understand how Transnet itself did not come to this realisation on its own because, as Transnet's own internal audit team significantly noted, the second respondent's:

'... claim of total equity to USD7,990.80 million and total assets equal to 6,266.46 million is irrational as it implies that ICTSI has negative total debt of US\$1,724.34 million – meaning that ICTSI lenders and creditors owe the company over USD 1 billion. An equity-to-assets ratio above one (1) should have been a red flag for the CFAT,²¹ as it is impossible.' (footnote inserted)

[107] What this all means is that Transnet was twice informed by entities from whom it had sought an opinion that what the second respondent had done was not acceptable. It, too, had instructed its attorneys to inform the second respondent that it had not demonstrated its abilities to meet its financial obligations. Yet, the second respondent had been progressed from the RFQ stage to the RFP stage and was ultimately awarded the contract. The obvious question that arises therefrom is how had the second respondent established at the time that it exited the RFQ stage and entered the RFP stage, that it had the financial credentials that Transnet required? This question is posed because the second respondent had not correctly calculated the solvency ratio calculation nor does it appear that it had submitted any other documentation to Transnet that could have established its financial strength.

[108] Transnet dealt with this issue in two ways. The first was by referring to documents that the second respondent put up from three international banks. The letters, all of which are dated 29 September 2023, were written by representatives of Citibank, NA Philippines branch, HSBC Bank, Manila, and Standard Chartered Bank, Philippines. With regard to the contents of these letters:

- (a) The representative of Citibank stated that the second respondent had 'credit facilities' with it amounting to US\$190 million and considered the second respondent to be a 'satisfactory' customer;
- (b) The representative of HSBC stated that the second respondent had an approved credit facility amounting to US\$96 million; and

²¹ Cross-functional assessment team.

(c) The representative of Standard Chartered indicated that the second respondent had a credit facility with it of US\$109 million.

[109] All of what was stated in these three letters may be correct. But the true point of significance arising from them is their date, 29 September 2023. On the basis that the second respondent had demonstrated its financial capacity at both the RFQ and RFP stages, it had been advanced from both stages and had been selected as the preferred bidder on 6 July 2023. At that time, the second respondent had not calculated the solvency ratio calculation as required and the three letters had not been written. It is, therefore, difficult to understand how it had demonstrated its financial capacity.

[110] The second way in which Transnet dealt with the financial capacity of the second respondent was to refer to a due diligence exercise performed by an entity that it instructed. The entity was called Growthstone Assurance Incorporated (Growthstone). Growthstone, a Johannesburg-based consultancy firm, delivered its report to Transnet on 29 December 2023. It concluded, inter alia, that the second respondent had 'considerable capital-raising capacity in both debt and equity markets'. Again, that may be true. But the second respondent had been required to establish this fact in the RFQ stage and Transnet had to have been satisfied that such capacity had been present then, not in December 2023.

[111] As regards the independent verification of the second respondent's representations concerning its minimum financial criteria, a report was referenced from an entity called SyCip Gomes Velayo and Company (SGV) of Makati City, Philippines, which is apparently a member firm of EY, one of the four big accounting firms. They presented their verification report to the second respondent on 3 October 2023. SGV noted the prescribed solvency ratio calculation and the different way that the second respondent had populated it, using market capitalisation instead of total equity in the calculation. SGV confirmed that they had recalculated the solvency ratio calculation as the second respondent had for the years ending on 31 December 2021, 2022, and 2023.

[112] That seems to me to be no verification at all. The terms of the RFP provided that such verification had to indicate the basis upon which the authors of the reports had verified the second respondent's declarations. The authors of the verification reports had to substantiate their confirmation of the declarations made by the second respondent with 'adequate information' regarding the methodology followed for purposes of verification. They also had to disclose the nature of their investigations and the outcomes or findings and were required to list each declaration made by the 'Shortlisted Respondent' and confirm each such declaration. None of this appears to have been done. SGV did, however, state that:

'We make no representations regarding the appropriateness or the sufficiency of the agreed-upon procedures described below either for the purpose for which this AUP Report has been requested or for any other purpose.'²²

[113] It is, again, difficult to understand how Transnet could have regarded this verification as being compliant or satisfactory. It told it nothing about the second respondent's solvency, only that it could perform a calculation that the second respondent, essentially, had created itself and which did not conform to what was demanded in the RFQ.

[114] After consideration of these facts, it appears to me that the approach of Transnet in identifying the second respondent as the preferred bidder was potentially flawed and prima facie unfair to the other bidders. Different allowances were made for the second respondent that were not offered to other bidders. It appears that Transnet did not, as it said it would do in the RFQ, evaluate the second respondent's bid in accordance with the criteria set out in Part 5 of the RFQ, nor did it require the second respondent to meet the minimum financial criteria. Transnet permitted a bidder that had not established its financial credentials to proceed to the further stages of the tender in which financial capacity was a central requirement. To regularise what it had done, for it did not realise that the second respondent had not used the correct information in calculating the solvency ratio calculation, it then had to permit the ex post facto establishment of facts that ought to have been established at the commencement of the process. In other words, its position is now that the end

²² AUP Report: Agreed-Upon Procedures Report.

justifies the means. In so doing, the second respondent was treated differently to the other bidders.

[115] Transnet submits in its answering affidavit that:

‘The purpose of procurement ... cannot be subverted by undue formalism and disqualification of tenders on the basis of immaterial non-compliance.’

It is astonishing to read and hear such an argument. Transnet itself created the formalities. It prescribed what information was required and how it was to be adduced. It had the ability to specify whatever it wanted in creating the framework of the tender and how it was to be approached and considered. It is now contended by Transnet that it is being subjected to petty formalism when participants in its tender require it to account for its conduct and to explain itself for failing to conduct itself in terms of the procedure that it itself devised. I do not accept that argument.

[116] Considering the second respondent’s defences, its contention that the applicant ought to have reviewed the decision by Transnet to recognise the second respondent as the preferred bidder is, as already stated, an issue for the court hearing the review to consider.

[117] The second respondent further states that the applicant has not established that there was any administrative decision taken by Transnet on 1 March 2024. Transnet, who took the decision, has, however, conceded that its decision taken on that date did amount to administrative action. Whether sufficient evidence exists for the granting of an interim interdict will be considered when the requirements for such an order are dealt with, as will the issue of the tender being a national priority that cannot afford to be delayed.

The requirements for an interim interdict

[118] These requirements are not a matter of controversy and have been settled law in this country for over a century. An applicant must establish:

‘(a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of

convenience must favour the grant of the interdict and (d) the applicant must have no other remedy.²³

Prima facie right

[119] Applicants for interdicts such as the one claimed in this matter are required to establish legal rights²⁴ sufficient to sustain a cause of action.²⁵ A party claiming an interim interdict should establish facts, which, if uncontradicted and believed at the main hearing, would establish the right claimed.²⁶ The right upon which reliance is placed is not merely the right to approach a court for the review of an administrative decision, but must be a right:

‘... to which, if not protected by an interdict, irreparable harm would ensue.’²⁷

[120] The right identified by the applicant is its entitlement to have its bid adjudicated upon within a bidding system that is constitutionally compliant, lawful, reasonable, and procedurally fair.

[121] The applicant undoubtedly has the right to be fairly and equally treated by Transnet in the assessment of its bid.²⁸ It does not appear to have been for the reasons just discussed. The applicant has at least established on a prima facie basis that it enjoys the right to participate in a free and fair bidding process, and to have its bid fairly evaluated against the tender criteria.²⁹ Fairness is inherent in any tender process and compliance with the requirements for a valid tender process, which has been issued in terms of the constitutional and legislative procurement framework, is, as was stated in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v*

²³ *National Treasury and others v Opposition to Urban Tolling Alliance and others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) para 41 (‘OUTA’); see also *Democratic Alliance v Hlophe and others* [2024] ZAWCHC 282 para 36.

²⁴ *Pretoria Estate and Market Co Ltd and another v Rood’s Trustees* 1910 TS 1080 at 1084.

²⁵ *Albert v Windsor Hotel (East London) (Pty) Ltd (in liquidation)* 1963 (2) SA 237 (E) at 240E-241G.

²⁶ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

²⁷ OUTA para 50.

²⁸ *Premier, Free State, and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); [2000] 3 All SA 247 (A) para 30.

²⁹ See generally *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and another* [2015] ZASCA 208; 2016 (3) SA 1 (SCA); [2016] 1 All SA 483 (SCA) for a discussion on unfairness in tender processes.

Chief Executive Officer, South African Social Security Agency, and others,³⁰ legally required.

[122] The applicant submits that it has established a prima facie prospect of success in the review of Transnet's decision. I agree. In my view, the applicant has strong prospects of ultimate success. I am therefore satisfied that the applicant has established the right that it claims, at least on a prima facie level. Indeed, it may even be argued that the right relied upon by the applicant has been shown to be a clear right.

Irreparable harm

[123] The harm identified by the applicant is the loss of the opportunity to be appointed as the successful bidder where it was identified as being the second ranked bidder and where there is a strong case made out that the first ranked bidder should not have been so ranked. In my view, the harm identified is manifest and is ongoing.

[124] In *Tshwane City v Afriforum and another*,³¹ the Constitutional Court expressed itself as follows on the issue of irreparable harm:

'Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily the harm sought to be prevented through interim relief must be connected to the grounds in the main application.'

Those words apply with some force to the facts of this matter.

[125] It was argued by Mr du Plessis that the applicant, a large multinational corporation, cannot possibly suffer irreparable harm should it not be granted an

³⁰ *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency, and others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 40.

³¹ *Tshwane City v Afriforum and another* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) para 56.

interim interdict. It is a wealthy, successful corporation, so the argument went. The argument holds no appeal for me. Even wealthy entities can suffer losses. Loss does not have to mean a destruction of wealth - a diminution in it will suffice. If the contract is implemented and the tender proceeds, there will be substantial losses for the applicant.

The balance of convenience

[126] Transnet and the second respondent submit that any relief granted to the applicant would severely prejudice both them and the country and the balance of convenience is accordingly tilted strongly in its favour. They stress that the underperformance of the port has occasioned catastrophic consequences for this country, generally speaking, and this needs to be put right as a matter of extreme urgency. Any delay in achieving this makes us all poorer. The government has endorsed the roadmap and the granting of relief to the applicant in terms of Part A would undermine all that has already been approved and done. I do not see that to be the case.

[127] The problems with the port have been known since the early 1960s, according to Transnet. It submitted in its answering affidavit that the government also apparently resolved to do something about these inefficiencies some 22 years ago. Those 22 years were permitted to float away without any significant resolution of the difficulties experienced at the port. Given these facts, it seems to me that catastrophic consequences would not flow if an interim interdict is granted until the review is ripe for hearing.

[128] I readily acknowledge that the granting of the relief sought by the applicant would occasion a delay in Transnet's plans for DCT2. But Transnet cannot really claim to be prejudiced by such a delay. If time was so critical to the commencement of the project, then Transnet has not acted as though that is the case. When the applicant pointed out the problems with the second respondent's bid, Transnet was quite happy to take six months to conduct private negotiations with the second respondent. This was apparently an attempt to regularise the second respondent's position and appointment. Transnet also submits that none of the bidders was

prejudiced as a consequence of this prolonged engagement with the second respondent. That cannot be accepted. Such an engagement was not contemplated by the RFP. Transnet was quite content to take its time then. It must consequently show patience while the law, which protects each of us, is permitted to run its course.

[129] When considering the balance of convenience, the prospects of the applicant being successful as weighed against the potential of each party suffering harm if the relief sought is granted or refused, as the case may be, must be considered, as must the seriousness of the harm.³² As already stated, it seems to me that the applicant has good prospects of success. The better the prospects of success, the less the need for the balance of convenience to favour the applicant.³³ As to harm, it is difficult to discern Transnet suffering any harm, other than delay. If the validity of tenders needs to be extended to cover the time between the date of this judgment and the hearing of the review application that can be easily accomplished. The current tender has not yet been implemented and the tender process has been allowed to drag on for over two and a half years since first being published on 11 February 2022.

[130] Transnet submits further that any challenge to the decisions that it has taken would constitute:

‘... an unjustified interference with the national government’s economic recovery plans ...’.

The second respondent shares this sentiment. I am not able to discern why this should be the case. This country is a country of laws, not of men. The government endorses and promotes the rule of law. I do not see how the work of the executive is prejudiced when the law is applied. The following was stated in *Marcé Projects (Pty) Ltd and another v City of Johannesburg Metropolitan Municipality and another*:³⁴

‘An Organ of State is only entitled to act to the extent it is empowered by the Constitution, the law and government policy. The constitutional principle of legality requires Organs of State to act lawfully and within the boundaries of the Constitution. Where an Organ of State acts beyond its constitutional and statutory authority, it is precisely the function of the court

³² *Harnischfeger Corporation and another v Appleton and another* 1993 (4) SA 479 (W) at 491D-E.

³³ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E-F.

³⁴ *Marcé Projects (Pty) Ltd and another v City of Johannesburg Metropolitan Municipality and another* [2020] 2 All SA 157 (GJ) para 88

to prevent such action. Under such circumstances, judicial intervention is consistent with the doctrine of separation of powers.'

[131] If I am wrong and there is some intrusion, then it can only be limited in its extent. The applicant's fundamental right to just administrative action is being infringed. Transnet is not the government nor is it a member of the executive. It is simply a State-owned company. I do not see that the granting of an interim interdict pending a review constitutes an intrusion into the exclusive terrain of another branch of government.

No other remedy

[132] The applicant obviously has the remedy of the review proceedings contemplated in Part B of the notice of motion but no other way of protecting its position pending that review. The review lies in the future and it will be of cold comfort to the applicant if Transnet continues to implement the contract and the tender and that fact is then used to justify the review being refused.

Conclusion

[133] The approach to determining whether an interim interdict should be granted was stated by the Constitutional Court in *Economic Freedom Fighters v Gordhan and others*,³⁵ to be the following:

'Before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict.'

[134] In my view, having considered the grounds of review, the applicant has good prospects of ultimate success in the review. It therefore seems to me that I should exercise my discretion and grant the interim relief sought by the applicant. In so

³⁵ *Economic Freedom Fighters v Gordhan and others* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) para 42.

doing, the public interest in ensuring that tenders are conducted fairly and scrupulously will be preserved.

[135] It also appears to be in the interest of all the parties that the matter proceeds with all possible expedition, including the determination of Part B. I cannot predict what the parties will do after this judgment is delivered, but, to the extent necessary, they will be granted permission to approach the Judge President, or failing her, the senior civil judge, to make representations for Part B to be afforded a preferent date of hearing.

Costs

[136] All of the parties have been represented by multiple counsel, led by senior counsel, except the eighth respondent which has been represented only by senior counsel. The employment of multiple counsel was sensible, for it was a matter of some intricacy and substantial importance. While the notice of motion does not seek costs for Part A, all the parties have, nonetheless, claimed a costs order in their respective heads of argument in pressing their claims for either the granting or dismissal of the application. In my view, costs should follow the result, such to include the costs of two counsel on scale C.

Order

[137] I accordingly grant the following order:

1. The application is regarded as urgent and the applicant's failure to comply with the Uniform Rules of Court and the Practice Directives of this division is condoned.
2. The question of law raised by the eighth respondent in accordance with the provisions of Uniform rule 6(5)(d)(iii) is dismissed with costs, such to include the costs of two counsel and to be taxed on scale B.
3. Pending the final determination of Part B of this application, the first respondent is interdicted from:
 - 3.1 taking any steps, alternatively any further steps, to implement the decision taken by it on 1 March 2024 to award the tender Request for Proposal:

Durban Container Terminal Pier 2 (DCT2) (RF Number TCC/PSP/2022/0003/RF) (the tender) to the second respondent;

- 3.2 negotiating or concluding any contract with the second respondent or any third party; or
- 3.3 implementing, or further implementing, as the case may be, any such contracts, in relation to the tender.
4. The first and second respondents are directed to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, including the costs of two counsel where so employed, to be taxed on Scale C.
5. To the extent necessary, the parties are granted leave to approach the Judge President, alternatively the senior civil judge, in order to make representations concerning a preferent date being allocated for the hearing of Part B of this application.

MOSSOP J

APPEARANCES

Counsel for the applicant:

Mr N H Maenetje SC and Mr M Z
Gwala

Instructed by:

Webber Wentzel
90 Rivonia Road
Sandton
Johannesburg

Locally represented by:
Johnston and Partners
2nd Floor, 81 Richefond Circle
Ridgeside Office Park
Umhlanga Rocks

Counsel for the first respondent:
and

Mr M du Plessis SC, Mr N Ferreira

Mr M Salukazana

Instructed by:

ENS Africa
The MARC Tower 1
129 Rivonia Road
Sandton
Johannesburg

Locally represented by:

ENS Africa
1 Richefond Circle
Ridgeside Office Park
Umhlanga Rocks

Counsel for the second respondent:

Mr A Stein SC and Ms T Palmer

Instructed by:

Bowman Gilfillan Incorporated
11 Alice Lane
Sandton
Johannesburg

Locally represented by:

Bowman Gilfillan
Ground Floor
Compendium House
5 The Crescent
Westway Office Park
Harry Gwala Road
Westville
Durban

Counsel for the eighth respondent:

Mr J Daniels SC

Instructed by:

Allen and Overy

6th Floor
90 Grayston Drive
Sandown
Sandton

Locally represented by:
Shepstone and Wylie
24 Richefond Circle
Ridgeside Office Park
Umhlanga Rocks