



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

**APPEAL CASE NO: A216/2022
COURT A QUO CASE NO: 5106/2021**

In the application between

**MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, WESTERN CAPE**

**APPELLANT
(FIRST RESPONDENT *a quo*)**

And

TULLIS LAUNDRY SOLUTIONS

**FIRST RESPONDENT
(APPLICANT *a quo*)**

AMLAZI EQUIPMENT SERVICES (PTY) LTD

SECOND RESPONDENT

Date of hearing: 8 November 2024

Date of judgment: Judgment delivered electronically on 21 January 2025

JUDGMENT

Summary -The appeal involves a dispute between the Member of the Executive Council (MEC) for Health, Western Cape, and Tullis Laundry Solutions, with Amlazi Equipment Services (Pty) Ltd as the second respondent regarding the supply, installation, and maintenance of laundry equipment. The Court *a quo* per Nuku, J found that the MEC's evaluation process lacked objective criteria to justify awarding the tender to a bidder other than the highest scoring one.

The appeal was dismissed for the following key reasons:

1. Lack of Objective Criteria:

- The tender evaluation process lacked clear, predefined, and objective criteria for assessing functionality, its initial threshold role and beyond.
- Functionality was improperly used as a subjective factor in the final award decision, contrary to the Preferential Procurement Policy Framework Act (PPPFA) and relevant regulations.

2. **Procedural Irregularities:**

- The evaluation process fused the initial functionality assessment with subsequent award criteria, leading to inconsistencies and subjectivity.
- Tullis' bid was treated as acceptable during the initial evaluation but later penalized for deviations without clear, stipulated criteria.

3. **Non-Compliance with Regulations:**

- Regulation 5 of the Preferential Procurement Regulations (2017) requires functionality criteria, points, and thresholds to be explicitly stated in the tender documents. These were absent, making the process procedurally unfair.

4. **Unfair Advantage to Amlazi:**

- The evaluation process favoured Amlazi, based on subjective opinions formed during site visits and interviews, without tying these assessments to objective, pre-disclosed criteria.

VAN DEN BERG, AJ

- [1] Functionality is the quality of being useful, practical, and suitable for the purpose for which something was made, or the quality of being suited to serve a purpose well. In the sphere of procuring goods or services for the state, functionality may also indicate a bidder's experience or the quality and reliability of the goods tendered. Functionality has a specific role in public procurement as a quality criterion. Functionality sets the bar for a tender to be responsive or acceptable¹. However, the question arises as to whether functionality could also serve as objective award criteria for

¹ Clause 1.12 of the General Contract Conditions (GCC) defines "**functionality**" as meaning '... the ability of a tenderer to provide goods or service in accordance with specification as set out in the tender documents'

awarding a contract to a bidder other than the highest scoring one. If functionality could be applied as such, at what stage of the bidding process may it be used? These are some of the aspects that are relevant to this appeal that deal with the awarding of a bid for the supply, delivery, installation, testing, and commissioning of laundry equipment for the Tygerberg Hospital.

- [2] The Member of the Executive Council for Health, Western Cape (*the MEC*), appeals against the decision of the High Court of South Africa, Western Cape Division, Cape Town, delivered by Justice Nuku, on 5 October 2021. Leave to appeal to this Court was granted by the Supreme Court of Appeal on 14 October 2023. Central to the appeal is the review and setting aside of the appellant's decision to award Bid WCGHCC0232/2020 (*the Bid*) to the second respondent, Amlazi (*"Amlazi"*). The first respondent (*"Tullis"*) challenged the award of the Bid to Amlazi.

- [3] Tullis was successful and the Court reviewed and set aside the decision taken by the appellant (the MEC) to award the tender for the supply, delivery, installation, testing, and commissioning of 3 (three) laundry lines at the Tygerberg Hospital. The Court declared the contract concluded between the MEC and Amlazi invalid and ordered that the matter be remitted to the MEC so that the procurement process could commence afresh without unreasonable delay. The Court also gave directions that the procurement process, if it is to be evaluated based on functionality, must

comply with the provisions of Regulation 5 of the Preferential Procurement Regulations, 2017 (“the *Regulations*”) published in terms of the Preferential Procurement Policy Framework Act, 5 of 2000 (“*PPPFA*”). The declaration of invalidity was suspended pending the remittal of the procurement process to the MEC.

- [4] Tullis challenged the award of the Bid to Amlazi on several procedural and substantive grounds. Ultimately, the dispute, in essence, relates to the specification, use, and application of functionality when awarding the bid. On appeal, the following issues had to be decided:

- [4.1] What was Tullis’ pleaded case in its founding papers in the review application, and did the court order go beyond what was pleaded?
- [4.2] Did Tullis impugn the tender conditions based on the vagueness of the tender conditions?
- [4.3] The difference between responsive Bids, deviations, and the stage at which the functionality enquiry was conducted.
- [4.4] The just and equitable remedy granted by the Court.
- [4.5] Did the MEC pre-empt the appeal?

THE TENDER PROCESS

- [5] The Bid concerns the supply, delivery, installation, testing, and commissioning of laundry equipment for the Tygerberg Hospital. The need for the Bid arose because the Tygerberg Central Laundry was experiencing challenges with ageing equipment, which impacted the provision of an efficient and quality laundry and linen service. The Bid envisaged the modernisation of the Tygerberg Central Laundry over 3 (three) years at a total contract value of R122,185,060 (including VAT). The Tygerberg Central Laundry processes the laundry of 38 institutions, including Tygerberg Hospital, Karl Bremer Hospital, and Somerset Hospital. The laundry has three washing lines, each consisting of a tunnel washing machine, ironer, garment finisher, blanket and towel folder. The average life span of some of the equipment is more than twenty-five years with the highest cost driver being maintenance on outdated machinery. The needs and demands in respect of laundry service are substantial and integral to health service in the province.
- [6] The MEC issued the tender on 16 July 2020, with the closing date being 21 August 2020. The closing date was extended to 14 September 2020. Tullis and Amlazi and two other tenders submitted Bids. Tullis submitted a Bid for a total amount of R95,429,200.44, whereas Amlazi's Bid was for an amount of R122,185,060.00. Mzwalo Investments (Pty) Ltd trading as Lumacon Airconditioning ("**Mzwalo**") tendered a price of R171,958,008.79 and Zamil Engineers and Contractors CC ("**Zamil**") offered a price of R198,526,950.13.

- [7] The invitation to bid was subject to the General Conditions of Contract ("GCC"). Paragraph 5 of the pre-amble to the invitation to bid advised the prospective bidders that:

"This bid will be evaluated on the Bidder's proven ability to provide the service i.e. infrastructure, technical and operational capacity as well as the 90/10 Preference Procurement Points System as provided for in the bid document."

- [8] The MEC further indicated that all equipment covered by the specification would be purchased from one successful bidder. In Section 3 of the GCC, paragraph 3.11.4 the MEC reserved the right not '...to accept the lowest or any bids and reserves the right to accept the proposal which it deems to be in the best interest of the WCGH even if it implies a waiver by the Department of certain bid requirements which the Department considers to be of minor importance and not complied to within the proposal'. However, no specification was made in the tender documents as to the evaluation criteria for measuring functionality, the points for each criteria or the minimum qualifying score for functionality. The bid document does not specify these issues or that the Bids would be evaluated on functionality. The invitation to bid further invited the bidders to state if their offer complied with the specifications. If a bidder indicated that its bid did not comply, they were invited to provide an explanation. Tullis noted that it did not comply with all of the specifications since they offered different machinery performing the same functions. The MEC further explained that not all deviation would automatically render a bid non-compliant or non-responsive.

- [9] On 14 August 2020, a compulsory site meeting was held at the Tygerberg Central Laundry to grant potential service providers the opportunity to raise questions concerning the requirements and any other related matters. This compulsory site meeting must be distinguished from the inspection visits, or reference site investigations subsequently conducted by three members of the BEC at two of the bidders' local offices and installation reference sites in Johannesburg and Pretoria during which the equipment supplied by Tullis and Amlazi was compared and evaluated in terms of a questionnaire and discussions with laundry managers and officials.².
- [10] The Bid Evaluation Committee ("**BEC**") evaluated the 4 (four) Bids and prepared a memorandum dated 19 November 2020. The BEC decided regarding the Bids submitted by Mzwalo and Zamil that:
- "The offers of two highest bidders were found non-compliant for the reasons indicated in the attached evaluation sheet and their pricing is exorbitant. It appears from the evaluation schedule that Mzwalo is listed on the National database of companies or persons prohibited from doing business with the public sector and that it had no experience. Zamil's bid was unsigned and had no experience and provided no references regarding the provision of laundry services and machinery."
- [11] It stands to reason that the BEC deemed Amlazi and Tullis' bids to be 'compliant' and thus acceptable. The BEC did not reject Amlazi and Tullis' bids as being 'non-compliant'. This is important since it is common cause that Tullis' bid deviated in 12 respects from the bid specifications and that the BEC would subsequently find that 11 of the deviations were material.

² BAC approval of recommendation para 1.3 to 1.6, dated 19 November 2020

- [12] It further appears from the BEC's memorandum, as mentioned earlier, that 3 of its members were nominated to conduct site inspection visits to the recommended bidders' local offices and installation reference sites in Johannesburg and Pretoria, as indicated in their bids.
- [13] The BEC memorandum reports in paragraph 1.5 that:
- “The purpose of these reference site visits was to see the equipment offered in production and speak to the Laundry Managers regarding their experience with the companies Amlazi and Tullis with regard to their maintenance and spares lead times, technicians' availability, frequencies of downtimes and breakages on different models of equipment.”
- [14] Meetings were arranged where the representatives of Amlazi and Tullis were required to make presentations regarding the history of the companies, all aspects of their businesses, and the equipment they had offered in their bids. The institutions that Amlazi and Tullis referenced were also visited to observe the equipment at work and speak to the Laundry Managers. For purposes hereof, a questionnaire was developed, which was used during the site inspections to compare and/or evaluate the two companies.
- [15] Paragraphs 1.6 to 1.15 of the BEC memorandum regarding the evaluation of the equipment offered by the two companies (Amlazi and Tullis) recorded the following:

- “1.6. The equipment supplied by the two companies Tullis and Amlazi was compared/evaluated in terms of the above and based on discussions with the Laundry Managers and officials of the Infrastructure Development (Department of Public Works Gauteng) regarding complaints on the Jensen equipment offered by Tullis. Laundries must wait sometimes up to 4-6 weeks for Jensen spares to arrive from Germany and 7 days or more for the technician to attend to breakdowns.
- 1.7. The Department of Infrastructure Development advised that Tullis have (sic) four technicians but only one experienced trained technician on this specific equipment and sometimes rely on assistance from Amlazi to do the maintenance on some of their Jensen machines if their technician is not available or do not have the knowledge to repair or install the specific model of Jensen/Senking equipment.
- 1.8. This would influence service delivery if the laundry equipment is not kept in optimal production status and therefore would be an operational risk for the Department to appoint Tullis.
- 1.9. The Kannegiesser equipment supplied by Amlazi is more reliable and spares are always available. Amlazi provides excellent service with 30 (thirty) years' experience on Kannegiesser and Jensen equipment. Amlazi installed 20 (twenty) Jensen/Senking and 11 (eleven) Kannegiesser tunnel washers so far and have 4 (four) trained technicians in Cape Town and 6 (six) in Gauteng. A technician is always available on short notice and after hours, with the result that equipment does not have long downtimes. Tullis does not have enough knowledge about the Jensen/Senking equipment they offered, does not work after hours and mainly concentrates on sales rather than on service of equipment. Tullis is a division of Lead Laundry & Catering and concentrates mainly on the sale of catering equipment and on-premise stand-alone washing machines to hotels, state, and private hospitals. Amlazi also have a service contract with Pretoria Private Laundry and the manager reported excellent services from Amlazi and all equipment was in good working condition.

- 1.10. At the Chris Hani Baragwanath hospital, the laundry manager indicated that they experience a problem with the sensors on the Jensen/Senking equipment as well as with water pressure that is a common problem with Jensen/Senking equipment. The Kannegiesser equipment have a longer service life than Jensen and therefore less breakdowns. The Jensen equipment provides more problems [than] the (sic) Kannegiesser equipment and, therefore, the Kannegiesser equipment is preferred by all the laundries that the BEC members visited.
- 1.11. At Masakhane Laundry, officials from the Department of Infrastructure Development indicated that they are in the planning phase to change the PLC panels of the Jensen machines to Siemens control panels with the assistance of Amlazi. The Department of Infrastructure Development are responsible for the co-ordination of all maintenance relating to all the Gauteng Department of Health's equipment, including laundry equipment.
- 1.12. In terms of pricing of spares, Amlazi is flexible, prices can be negotiated. Amlazi and does not charge for certain parts, while Tullis/Lead is not prepared to negotiate on any spares pricing. Furthermore, the Jensen/Senking spares are more expensive than Kannegiesser and not always available.
- 1.13. It was identified by the BEC members that most of the equipment installed by Tullis are maintained by Amlazi technicians.
- 1.14. Furthermore, **Tullis indicated several deviations from the equipment specifications. This is not acceptable. The BEC have discovered with our site visits that all the deviations have not a positive impact on productions. The tumble dryers will have more moving parts, and will need more maintenance, and will be a high-cost factor. The hangers are not suitable because its (sic) plastic and replacement will be more frequently. Mostly we have discovered no robo folders because of high breakage of hangers. The deviations have a higher cost implication and**

that is why we cannot accept the deviations because our specifications are based on previous experience and it proofs (sic) successful.³

1.15. In conclusion, in terms of the discussions and observations at these reference sites, we are satisfied that Amlazi has the capacity, technical expertise available, and turnaround times to render the equipment, maintenance, and servicing as per the specified requirements. Amlazi has already proven its capacity with the current maintenance contracts at Pretoria Private Laundry, Tygerberg and Lentegour Laundries and it provides excellent service. Amlazi has more than enough capacity to provide the maintenance and servicing of the equipment, with 10 trained technicians available countrywide and 4 permanently based in Cape Town. We could not identify any reference to service contracts with Tullis Solutions ...”

[16] Despite recording the aforesaid information in detail, the BEC recommended in paragraph 5 of the 'BID EVALUATION COMMITTEE APPROVAL OF RECOMMENDATION' as follows:

‘5 SITE VISIT FEEDBACK

The BEC noted DBAC members concerns on the feedback from site visits in particular the lack of formal written feedback from official engaged by BEC representatives on the site visits.

The BEC noted the feedback from BEC representatives on the poor maintenance track record of Tullis installation sites.

The BEC also noted feedback from BEC representatives that officials engaged on the site visits were hesitant to provide formal written feedback on the poor maintenance track record of Tulls installation sites.

³ Emphasis added with reference to para [17] hereunder

The BEC resolved that in the absence of formal written feedback from officials engaged by BFC representatives on the site visits that the site visit feedback will be noted as a concern and will not be used in the BEC decision making process to recommend a bidder as the site visit feedback may be regarded as hearsay in a legal challenge.’

- [17] The BEC’s memorandum was submitted to the Bid Adjudication Committee (“BAC”), which requested, *inter alia*, a list of deviations by Tullis from the Bid equipment specifications. The BEC prepared a further memorandum (“the second BEC memorandum”), which sets out each of the deviations and what the BEC considered to be the impact of the said deviations⁴. In

⁴ The second BEC memorandum recorded the following regarding deviations of the bid specification:

Paragraph 3.3.4 of the bid specification, the second BEC memorandum recorded that:

“A drive chain that requires tension will need (sic) special maintenance in the long term. There have been challenges at Tygerberg Central Laundry with the Tunnel Washer with a drive chain that requires tension which has resulted in significant downtime and linen service backlogs.”

Paragraph 3.5.4.b of the bid specification, the second BEC memorandum recorded that:

“This can result in an increase in the colour run from one compartment to another and can discolour and permanently damage linen which is costly to replace.”

Paragraph 9.2.7 of the bid specification, the second BEC memorandum recorded that:

“There will be an increase in long-term maintenance cost, as too many mechanical systems in place. Engineering had to replace similar tumble dryers previously due to ongoing difficulties which impacted on washing and drying ratios and tonnage throughput per day at both Lentegour and Tygerberg laundries. The tunnel dryers in question have (sic) been replaced with tumble dryers which are air flow operated.”

Paragraph 13.2 of the bid specification, the second BEC memorandum recorded that:

“Cannot accept less than 3000 mm due to different sheet sizes which will result in tearing of sheets and increased condemning of good linen.”

Paragraph 13.7 of the bid specification, the second BEC memorandum recorded that:

“The vacuum suction bar and upper spreading bar is required to enhance the equal movement of items such as sheets on the ironers. This is important to positively impact on linen ironing throughput per laundry service shift.”

Paragraph 14.2.4 of the bid specification, the second BEC memorandum recorded that:

“It is important to lift rolls 400 mm out of beds for cleaning to prevent staining of linen and to promote efficient servicing of ironing equipment.”

Paragraph 14.2.8 of the bid specification, the second BEC memorandum recorded that:

“Stainless steel is resistant to erosion and subsequently (sic) corrosion as a result of the high steam velocity. It also has high strength in welding points by mating same materials. Carbon is not resistant to erosion and subsequently (sic) corrosion as a result of high steam velocity. It also has low strength in welding points by mating different materials.”

Paragraph 15.2.7 of the bid specification, the second BEC memorandum recorded that:

“Non provision of coupling of the facility for automatic coupling of lanes 1.2 and 4 will result in clogging and negatively impact on tonnage.”

Paragraph 16.2 of the bid specification, the second BEC memorandum recorded that:

weighing up the deviations, the BEC relied upon the investigation and conclusions reached by the reference site inspection delegation, as is recorded in paragraph 1.14 of the BEC Memorandum quoted above. This, in turn, led to the decision recorded in the second BEC memorandum that:

“The laundry equipment technical experts in the BEC reviewed the Tullis deviations and have confirmed that these would result in operational and maintenance challenges which will negatively impact service delivery. ... The Tullis deviations are therefore not acceptable.”

- [18] On 18 January 2021, the BEC adopted a resolution in terms of which Amlazi was recommended for the award of the Bid subject to negotiation being completed by 22 January 2021. Amlazi was informed on 4 February 2021 that its Bid had been accepted and Tullis was informed on 9 February 2021 that its Bid had been unsuccessful. Tullis’ attorneys exchanged correspondence with the appellant and the review application followed. In Tullis’ founding affidavit, the awarding of the tender is attacked on the following basis:

28. ... Despite Tullis’ tendered equipment and BBBEE status being equivalent, and notwithstanding Tullis’ price being markedly superior, the Department awarded the tender to Amlazi.

“Plastic hooks are not heat resistant and corrode easily. It also changes in form due to the heat and damages the automatic sensors over a long-term. This will increase the maintenance cost and down time of the robo folder.”

Paragraph 16.3 of the bid specification, the second BEC memorandum recorded that:

“Tunnel finisher with 4 zones promotes Health and Safety for staff by positively impacting on the heating mechanisms and reduces the risk of staff sustaining burn injuries. It also reduces creasing and improves the finishing of linen.”

Paragraph 18 of the bid specification, the second BEC memorandum recorded that:

“A drop type stacker has many mechanical systems which will increase maintenance cost (sic) resulted in extended down time in the event of a breakdown. With the drop type stacker one linen item is dropped onto the robo folder system whilst 5 linen items are dropped onto the folder system with a single lifting stacker. Efficiency and throughput are improved with a single lifting stacker.”

29. This is, firstly, inconsistent with section 2(1)(f) of the Preferential Procurement Policy Framework Act 5 of 2000. It provides in peremptory terms that a “contract must be awarded to the tenderer who scores the highest points, unless objective criteria ... justify the award to another tenderer.” In turn, Regulation 11(2) of the Preferential Procurement Regulations (prescribed pursuant to Act 5 of 2000) requires that “[i]f an organ of state intends to apply objective criteria in terms of section 2(1)(f) of the Act, the organ of state must stipulate the objective criteria in the tender documents.” No objective criteria had been identified in the bid. Instead, the bid itself specifically refers to regulation 11 of the preferential procurement regulations, reiterating that “the bidder obtaining the highest number of total points will be awarded the contract.” I refer in this respect to clause 3.1 of WCBD 6.1, which forms an integral part of Bid WCGHGC0232/2020. To the extent that paragraph 3.11.4 of section 3 (containing the general conditions on p. 74 of 120 of the tender documentation) might be construed as purporting to reserve a right to award the tender to a different bidder, the department has no such right to reserve (as the Constitutional Court observed in a related situation), I am advised. This applies particularly in circumstances where the subsequent provision (paragraph 3.12 of the same section and on the same page) sets out the only evaluation criteria. It reads: “The bids will be evaluated according to the 90/10 Procurement Preference Points System. See the attached WCBD 6.1.” Thus the only evaluation criteria governing the tender were preferential procurement points and price.

[17] *The MEC answered as follows to paragraph 29 of Tullis’ founding affidavit:*

“193. Save for admitting (to the extent that they are correctly quoted), the statutory and regulatory provisions referred to herein, I deny the remaining allegations in this paragraph.

194. As regards the application of the statutory provisions and the Regulations to the facts of this matter, I say the following:

194.1. First, before the issue of scoring the highest points arises, the Bidder must be compliant with the bid specifications. It is common cause that Tullis was not and that it sought no less than twelve deviations.

194.2. Second, the exception in respect of the objective criteria to justify the award to another tenderer does not arise. The facts are these: While Tullis' tender was some R23 million lower than that of Amlazi, Tullis did not meet the bid specifications.

194.3. Third, Tullis is mistaken, it is not correct that "the only evaluation criteria governing the tender were preferential procurement points and price." I point out in this regard that clause 4 of the General Conditions of Contract (FA, Annexure B4, p 114) states in terms: "The goods supplied shall conform to the standards mentioned in the bidding documents and specifications".

194.4. Fourth, what Tullis seeks to do, is to use a review mechanism to unseat a reasonable, objective, impartial and carefully considered decision to appoint a compliant bidder (Amlazi). To achieve its ends, Tullis unjustifiably and impermissibly incorporates and imposes its own specifications in the place of the bid specifications as imposed."

[18] In opposing the review application, the MEC dispelled the notion that only price and preference procurement points were considered in evaluating the Bids in stating as follows:

"I also point out that the bid price is not the only major consideration. Functionality and meeting the requirements of the bid specification must be met before the issue of price arise."

LEGAL POSITION

- [19] Section 217 of the Constitution serves as the foundation upon which this appeal must be decided in light of the relevant legislative provisions. In **Millenium Waste Management (Pty) Ltd v Chairperson of the Tender Board Limpopo Province and others**,⁵ Jafta JA stated:

“The final Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (s217). The section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services, must be ‘fair, equitable, transparent, competitive and cost-effective’. Finally, as the decision to award a tender constitutes administrative action, it follows that the provisions of the Promotion of Administrative Justice Act (PAJA) apply to the process. This is the legislative background against which the present matter must be considered.”

- [20] The PPPFA contains the following relevant provisions in furtherance of the aforesaid constitutional objectives and requirements:

[20.1] The term “*acceptable tender*” is defined as “*any tender which, in all respects complies with the specifications and conditions of tender as set out in the tender document.*”⁶

[20.2] The term “*functionality*” is defined in Regulation 1 of the Preferential Procurement Regulations, 2017 published in Government Gazette 32 of 2017 which applied at the time of the award of the tender that functionality is “*... an ability of a tenderer*

⁵ 2008 (2) SA 481 para 4

⁶ Section 1

to provide goods or services in accordance with specifications as set out in the tender documents.”

- [21] There is, therefore, a clear overlap between the term “*acceptable tender*” and “*functionality*”.
- [22] In terms of Regulation 4 (as it applied at the relevant time), an organ of State must indicate in the invitation to submit a tender:
 - [22.1] If that tender will be evaluated on functionality.
 - [22.2] That the evaluation criteria for measuring functionality are objective.
 - [22.3] The evaluation criteria, weight of each criterion, applicable values and minimum qualifying score for functionality.
 - [22.4] That no tender will be regarded as an acceptable tender if it fails to achieve the minimum qualifying score for functionality as indicated in the tender invitation, and
 - [22.5] That tenders that have achieved the minimum qualifying score for functionality must be evaluated further in terms of the applicable prescribed point system.

[23] Regulation 5 of the Procurement Regulations reads as follows:

“(1) An organ of state must state in the tender document if the tender will be evaluated on functionality.

(2) The evaluation criteria for measuring functionality must be objective.

(3) The tender document must specify-

(a) The evaluation criteria for measuring functionality.

(b) The points for each criteria and, if any, each sub-criterion; and

(c) The minimum qualifying score for functionality.

(4) The minimum qualifying score for functionality for a tender to be considered further-

(a) Must be determined separately for each tender; and

(b) May not be so low that it may jeopardise the quality of the required goods or service or high that it is unreasonably restrictive.

(5) Points scored for functionality must be rounded off to the nearest two decimal places.

(6) A tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender document is not an acceptable tender.

(7) Each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the

preference points system and any objective criteria envisaged in regulation 11.”

[24] Section 2(1)(f) of the PFA provides that the contract must be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer. In line herewith, Clause 3.1 of the GCC provides regarding adjudication using a point system: ‘...Subject to Regulation 11 of the Regulations, the bidder obtaining the highest number of total points will be awarded the contract.’

[25] In *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape and others*,⁷ the Court stated:

“Functionality as it is variously defined in the Tender Document, concerns the ability of the tenderer to deliver what is required, to meet the needs of the tender, to deliver a service or commodity which is fit for purpose. It is based on the objectively measurable criteria of experience and standing, capability and resources. As such it has direct bearing on the question of whether a tender is cost-effective, i.e. whether it yields the best possible value for money. To my mind it is self-evident that it is not cost effective to award a tender to a party who ticks the right boxes as regards price and preference, but is unable to get the job done properly— whether through lack of experience, adequate personnel or financial resources.”

[26] Rainbow Civils suggests that functionality can serve more than a “gate-keeping” function and can be taken into account a second time around after a tenderer has been evaluated on price and preference where it may not have achieved the highest scores, but demonstrated a superior ability to

⁷ (21158/2012) [2013] ZAWCHC 3 (3 February 2013) para 109

provide the relevant goods and service. This dual role of functionality as an assessment tool in deciding upon the responsiveness or acceptability of a tender opposed to its broader general application has not yet been resolved by the Courts. In ***Nexus Forensic Services v SASSA***⁸ the Court disagreed with the reasoning in *Rainbow Civils*. In *Nexus*, Van Niekerk AJ sets out the history of this controversial issue and refers to the decision in ***Sizabonke Civils CC trading as Pilcon Projects v Zululand District Municipality***,⁹ which effectively rejected the use of functionality as an award criteria. In *Nexus*, it was held that the provisions of section 2(1)(f) of the PPPFA are clear, namely that the objective criteria referred to therein must be additional criteria, in other words these must be criteria over and above those which have already received consideration as specific goals in terms of section 2(1)(d) and (e) of the PPPFA.

[27] The Court, therefore, rejected in *Nexus* the dual application of functionality as part of our law. Functionality should be assessed as a qualification criterion in the first stage of adjudication, with only bidders obtaining the minimum threshold score for functionality proceeding to the second round of adjudication, where only price and preference points will be taken into account in ranking bidders.

[28] Section 2(1)(f) of PPPFA only permits the consideration of objective criteria in determining a tender. This raises the question as to whether the site visits

⁸ [2016] ZAGPPHC 579 (21 June 2016)

⁹ 2011 (4) SA 406 (KZP)

conducted by the BAC, the representations, and the subsequent adjudication by the BEC and BAC were objective. Again, a distinction needs to be drawn between an opinion formed by the members of the BAC and objective criteria.

[29] In Walele v City of Cape Town,¹⁰ the following is stated in the majority judgment:

“If indeed the decision-maker was so satisfied on the basis of these three documents, his satisfaction was not based on reasonable grounds. The documents fall far short as a basis for forming a rational opinion. Nor does the mere statement by the City to the effect that the decision-maker was satisfied suffice. In the past, when reasonableness was not taken as a self-standing ground for review, the City’s *ipse dixit* could have been adequate. But that is no longer the position in our law. More is now required if the decision-maker’s opinion is challenged on the basis that the subjective precondition did not exist. The decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds. In this case, it cannot be said that the information, which the City admitted had been placed before the decision-maker, constituted reasonable grounds for the latter to be satisfied.”

[30] The MEC acted on the basis of the findings and recommendations by the BAC’s officials who attended the site inspections and listened to the representations by the two tenderers and other officials. If the MEC wished to award the tender to an entity other than which scored the highest points in terms of section 2(1)(f), not only must this decision be based on objective criteria, but the objective criteria must also be fleshed out in the tender documents or the invitation of tender. Allowing subjective criteria to be used

¹⁰ 2008 (6) 129 (CC)

as an overall spanning functionality test will be at odds with section 2(1)(f) of the PPPFA read together with the regulations.

[31] In **Q Civils (Pty) Ltd v Mangaung Metropolitan Municipality and others**,¹¹ the Court stated:

“Objective criteria with reference to s 2(1)(f) of the PPPFA referred to *supra* can be defined as those (a) not listed in paragraphs (d) and (e) of section 2(1) of the PPPFA, (b) which are objective in the sense that these can be ascertained objectively and their existence or worth does not depend on someone’s opinion and (c) bear some degree of rationality and relevance to the tender or project.”

[32] The decision-maker may not view or consider information which was never asked from the tenderers. The decision-maker can, therefore, only view the information put before it. Otherwise, it may lead to subjective factors being taken into consideration. This may lead to what the Court described in **Q Civils** as “it is well known that when subjective factors walk in the door, rationality flies out of the window”. The objective criteria justifying the awarding of a tender to a tenderer other than the one with the lowest tender should not cause the process to lose the attributes of fairness, transparency, competitiveness, and cost-effectiveness. In **South African National Roads Agency Limited v Tol Collect Consortium**,¹² Wallis JA (as he was then) held:

“[20] As to objectivity, which is an aspect of the constitutional requirement that the public procurement process be fair, it requires that the evaluation of the tender be undertaken by means that are explicable and clear and by standards that do not

¹¹ (A48/2016) [2016] ZAFSHC 159 (8 September 2016) para 40

¹² 2013 (6) SA 356 (SCA)

permit individual bias and preference to intrude. It does not, and cannot, mean that in every case the process is purely mechanical. There will be tenders where the process is relatively mechanical, for example, where the price tendered is the only relevant factor and the competing prices are capable of ready comparison. The application of the formula for adjudicating preferences under the PPPFA may provide another example. However, the evaluation of many tenders is a complex process involving the consideration and weighing of a number of diverse factors. The assessment of the relative importance of these requires skill, expertise, and the exercise of judgment on the part of the person or body undertaking the evaluation. That cannot be a mechanical process. The evaluator must decide how to weigh each factor and determine its significance in arriving at an appropriate decision. Where that occurs it does not mean that the evaluation is not objective. Provided the evaluator can identify the relevant criteria by which the evaluation was undertaken and the judgment that was made on the relative importance and weight attached to each, the process is objective and the procurement process is fair.

[21] Where the evaluation of a tender requires the weighing of disparate factors it will frequently be convenient for the evaluator to allocate scores or points to the different factors in accordance with the weight that the evaluator attaches to those factors. But the adoption of such a system, without its being disclosed to tenderers in advance, does not mean that the tender process is not objective. If anything, the adoption of the scoring system enhances the objectivity of the process, because, in the event of a challenge to the award of the tender, the basis upon which the evaluation was undertaken emerges clearly.”

- [33] The KwaZulu-Natal Local Division, Durban considered the role that functionality plays in evaluating and awarding bids in **Wattpower Solution CC and another v Transnet SOC Limited and another**.¹³ Transnet argued in the Wattpower judgment that functionality and due diligence are the same. The test for functionality as a test for responsiveness of bids

¹³

[2021] JOL 52070 (KZD)

involves a cursory glance at compliance, while the due diligence exercise process followed in Wattpower provides for an in-depth assessment of capability. Could an organ of the state be penalised before the final awarding of points is made to conduct a more thorough investigation, in order to satisfy itself with the competence of the bidder to carry out the works? As is the case in this appeal, the bidders in Wattpower were given notice, in advance, of the investigation or due diligence that would be conducted in the form of the inspection *in loco* and oral submissions. Transnet argued that s2(1)(f) of the PPPFA, read together with the relevant regulations, clearly contemplates that, apart from the evaluation based on points and preference, an objective assessment is provided to determine whether the preferred (or highest scoring) bidders are capable of performing in terms of the contract.¹⁴ Transnet argued that the objective criteria are not only applied in awarding the contract but to determine the bidder's ability to 'get the job done'. Chetty, J, in Watt Power, stated at para [16] as follows:

'...Transnet submits that the objective criteria it applied in not awarding the contract to the applicant was essentially the applicant's inability to "get the job done". In this regard, see Rainbow Civils CC v Minister of Transport and Public Works Western Cape and Others (21158/2012) [2013] ZAWCHC 3 (6 February 2013), para 109 where the court stated:

"Functionality as it is variously defined in the Tender Document concerns the ability of the tenderer to deliver what is required, to meet the needs of the tender, to deliver a service or commodity which is fit for purpose. It is based on the objectively measurable criteria of experience and standing, capability and resources. As such, it has a direct bearing on the question of whether a tender is cost-effective, i.e. whether it yields the best possible value for money. To my mind it is self-evident that it is not cost effective to award a tender to a party who ticks

¹⁴

Wattpower, *ibid* at [14] and [15]

*the right boxes as regards price and preference, but is unable to get the job done properly – whether through lack of experience, adequate personnel or financial resources”.*¹⁵

- [34] In **Urban Icon (Pty) Ltd South Africa National Roads Agency Soc Ltd and others**,¹⁵ the Court had to decide on the question whether a state entity may take into consideration the ability of a tenderer to deliver on several tenders simultaneously, despite having qualified and scored the highest. Tolmay, J held that:

‘[25] The PPPFA Regulations define “functionality” as “the ability of a tenderer to volume goods or services in accordance with specifications as set out in the tender documents”. In terms of regulation 5(5), a tender that fails to obtain the minimum qualifying score for functionality as indicated in the tender documents would not be regarded as an acceptable tender. Regulation 5(7) provides that each bid that obtained the minimum qualification score for functionality must be evaluated further in terms of price and the preference point system and any objective criteria envisaged in regulation 11. The objective criteria referred to in regulation 11 are the objective criteria contemplated in section 2(1)(f) of the PPPFA. SANRAL argued that it is clear from the language and scheme of the PPPFA and the applicable regulations that functionality is simply a threshold assessment to determine if a bidder has the minimum attributes necessary to provide the services as specified in the tender document. It was argued correctly that an assessment into functionality and an objective criteria assessment may consider similar general topics, but the assessment is not the same for three reasons:

[25.1] The functionality assessment occurs before the preference points assessment and the objective criteria assessment occurs after the preference point assessment.

[25.2] The functionality assessment is ordinarily a binary assessment of all timeously submitted bids. The due diligence assessment is an assessment of the highest scoring bid vis-à-vis one or more other acceptable bids.

[25.3] The purpose of a functionality assessment is to determine whether bids are acceptable or not. The purpose of a due diligence assessment is to determine whether the tender should be awarded to a better other than the highest scoring bidder.

[26] Urban Icon's argument, on the other hand, is that, once it passed the binary functionality assessment, SANRAL was obliged to assess it in terms of the 90/10 principle. Thereafter, it was not permissible to take into consideration any other factor including the factor that the tenderer was to be appointed to deliver all 7 projects. Urban Icon's argument basically is that, if such considerations were relevant, they ought to have been included in the tender documents. However, this position loses sight of effect as it was correctly argued by SANRAL that the ability to deliver on a number of tenders cumulatively would not be included in the subject matter of each individual tender. I agree that the consideration of the capacity and ability of a tenderer to deliver on more than one tender is a relevant and rational consideration. The holistic approach argued for by SANRAL is both rational and in accordance with the applicable legislation. To ignore the background and facts would be particularly shortsighted and could have devastating consequences for SANRAL and for the country. A contextual approach is therefore called for, considering the ability of a tender to perform in seven tenders is, simultaneously, both lawful and rational, even if the individual tenders did not make provision for such an eventuality.'

- [35] The facts in this appeal differ from those that served before the court in the Urban Icon's matter. The MEC employed functionality both as a minimum requirement test to determine if bids were acceptable and also objectively after the bids that were deemed acceptable were scored for price and BBEE. It would have been different if the bid was awarded to Tullis, but after that, due to a due diligence exercise as employed in Urban Icon's, it was found that the tender should not be awarded to Tullis. The BEC conflated the functionality assessment before the preference points assessment and

the objective criteria assessment (if specified) that may occur after the preference point assessment.

- [36] Therefore, the question to be answered in this appeal is how objective the opinions are of the members of the BAC who conducted the site visits and participated in the submissions and discussions with Amlazi and Tullis. How did the reference site inspections influence the decision-making rationale of the BAC? Did the BEC divorce itself from the findings of the three delegated BAC reference site inspection delegations, as it proclaims it did? The answer to these questions is found in paragraph 1.14 of the BEC memorandum that records the Tullis' deviation was evaluated based upon the information gathered during the reference site inspections¹⁶. In the Watt Power matter, the unsuccessful tenderer argued that any opinion expressed in such a process is subjective and inconsistent with the requirements in s 2(1)(f). In *Minister of Law and Order v Dempsey*,¹⁷ the court held that the prerequisite of an opinion (in that case dealing with an arrest and detention) was a subjective jurisdictional fact. The tender lacks objective criteria for measuring fairly and in a transparent manner bid specification deviations. The specification fails to establish clear, objective criteria that distinguish between major and minor deviations, which could lead to inconsistent assessments.

¹⁶ See paragraphs [15] and [17] above

¹⁷ 1988 (3) SA 19 (A)

[37] Section 2(1)(f) of the PPPFA provides that, where a contract is to be awarded to an entity other than that which scored the highest points in terms of s2(1)(f), such a decision must be based on objective criteria. The objective criteria must also be fleshed out in the tender documents or in the invitation to tender. The failure to stipulate such objective criteria constitutes in itself an irregularity.

[38] In **Pelatona Projects (Pty) Limited v Phokwane Municipality and 14 others**,¹⁸ the court held that:

‘...Objective criteria must, in my view, be discernible from the information made available to the decision-maker. If this is not the case, it would mean that the decision-maker may look at criteria or information other than that put before it. Such a decision would detract from the fairness of the process. It may well lead to subjective factors being taken into consideration. It is well known that, when subjective factors walk in the door, rationality flies out the window. The objective criteria justifying the awarding of the tender to a tenderer other than the one with the lowest tender should not cause the process to lose the attributes of fairness, transparency, competitiveness, and cost effectiveness.’¹⁹

[39] The importance of objective criteria was also recognised by Wallis, JA in **South African National Roads Agency Limited v Toll Collect Consortium**.²⁰ There may be tenders where the process is relatively mechanical. However, the evaluation of many tenders, such as the one in this appeal, is a complex process involving the consideration and weighing of a number of diverse factors. The evaluator must decide how to weigh the

¹⁸ Unreported NCD judgment under Case No. 691/04, para 31 as referred to in Q Civils Pty Ltd v Mangaung Metropolitan Municipality and Others (A48/2016)[2016] ZAFXHC 159 (8 September 2016) para 40

¹⁹ Watt Power at [24]

²⁰ 2013 (6) SA 356 (SCA) paras [20] – [21]

different factors and determine their significance in arriving at an appropriate weighted decision. The relevant criteria must be identifiable from the bid invitation or specification. The evaluation process will be objective and fair if the relevant criteria can be identified.

- [40] The overriding principle that a decision-maker must act in accordance with an *“ever-flexible duty to act fairly”* fairness must be decided on the circumstances of each case. In particular complex tenders, it may, therefore, be fair to ask for clarification or details required for evaluation; however, whatever is done may not cause the process to lose the attributes of fairness, objectivity, transparency, competitiveness, and cost effectiveness.

WHAT WAS TULLIS’ PLEADED CASE IN ITS FOUNDING PAPERS IN THE REVIEW APPLICATION?

- [41] It was argued on behalf of the MEC by Ms Pillay SC that Tullis failed to plead in its founding affidavit the ultimate true ground of appeal relied upon by the Court *a quo* regarding functionality. The judgment held, so the argument went, that Tullis’ ground of review was that, in the process of evaluation of the bids, the MEC conflated the acceptability of the bid with functionality.

- [42] It is trite that, in motion proceedings, the affidavits constitute not only the evidence, but also the pleadings. A party is accordingly expected to allege

the required facts and present evidence in support thereof. The necessary facts to prove the claim appear from the founding affidavit and its supporting documents. Holding parties to pleadings is not pedantry in the words of Justice Jafta in the minority judgment in SATAWU and another v Garvas and another²¹ but an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our constitution is founded. However, this contention by the MEC does not account for the following factors.

[43] In paragraphs 28 and 29 of the founding affidavit, Tullis alleges that the Bid was awarded despite Tullis' tendered equipment and BBBEE status being equivalent, and notwithstanding Tullis' price being markedly superior to Amlazi. Tullis further contended that no objective criteria had been identified in the bid. Instead, the bid itself specifically refers to regulation 11 of the preferential procurement regulations, reiterating that "the bidder obtaining the highest number of total points will be awarded the contract. The only evaluation criteria governing the tender were preferential procurement points and price.

[44] In the course of submissions in response to the point raised by the MEC, Mr Maleka SC, who appeared with Mr Scott on behalf of Tullis, submitted that the issue of functionality was raised before the Court of first instance and was fully argued. Tullis' argument postulated that the MEC's decision

²¹ 2013 (1) SA 83 (CC)

to evaluate the tender based on functionality in the absence of objective criteria was unlawful. The argument before us, as did the judgment below, proceeded on the footing that the issue of functionality is directly related to the constitutional principle of a fair and open procurement process. That being so, it is trite, so the argument went, that the Court may raise such an issue *mero moto*.

- [45] It should be further observed that the narrow approach favouring the strict application of the aforementioned principles is further qualified on the basis that the Court has a wide discretion in applications in which disputes of fact arise to ensure that a just and expeditious decision is reached in matters where an application is brought before Court in terms of Uniform Rule 53. Uniform Rule 53(4) expressly provides an applicant in review proceedings to amplify its founding affidavit upon receipt of the record. It would be an oversimplification to find that the issue of functionality is not fundamental to the award of the tender in casu or was the pleaded and argued case before the Court *a quo* and before us. It follows from all these considerations that the judgment did not go beyond the pleaded case and the Court was entitled to review the administrative decision of the MEC regarding the role of functionality in awarding the bid.

**DID TULLIS IMPUGN THE TENDER CONDITIONS BASED ON THE
VAGUENESS OF THE TENDER CONDITION?**

- [46] The Constitutional Court, in **Allpay Consolidated v Chief Executive Officer, SASSA**,²² held that vagueness and uncertainty are grounds for review under section 6(2)(i) of PAJA. Clarity and certainty are directly related to the rule of law and just and fair administrative action. If tender specifications are unclear or vague, it may render a procurement process procedurally unfair under s 6(2)(c) of PAJA. Every person is entitled to know the case s/he must meet. This, in turn, requires adequate and sufficient information to enable a prospective tenderer to make bids that cover all the requirements expected for the successful award of the tender.
- [47] In this regard, the MEC argued with reason that Tullis did not raise vagueness of the tender specification as basis for the Court's finding that the award should be reviewed and set aside.
- [48] The MEC relied heavily on the judgment by Rogers J (as he was then) in **SMEC South Africa (Pty) Ltd v City of Cape Town and others; SMC South Africa (Pty) Ltd v City of Cape Town and others**,²³ in which it was correctly held that vagueness as a review ground concerning the decision to issue tender invitations and their terms rather than with the decision made. It is the BEC and BAC's function to evaluate the tenders in accordance with the tender documents. Tullis never mounted an attack against the tender specifications. It is not alleged that the tender specifications by late procurement legislation are susceptible to judicial

²² 2014 (1) SA 604 at 635 [87]

²³ (8277/2021); 14097/2021 [2023] ZAWCHC 13 (23 Junie 2022)

review. To the contrary, Tullis' attack is against the fairness of the procurement process preceding the decision.²⁴

- [49] The aforementioned distinction between the vagueness of tender specifications opposed to the fairness of the administrative process goes to the heart of the matter. Tullis argues that the tender specifications are clear that bids will be evaluated according to the 90/10 Procurement Preference Points System. The tender specifications do not state, in accordance with Regulation 5 of the Preferential Procurement Regulations, 2017, that the tender will be evaluated on functionality and do not specify the evaluation criteria of measuring functionality, the points for each criteria, or any sub-criteria and the minimum qualifying score for functionality. The process followed by the BEC and, in particular, conducting reference site visits and obtaining further information are undeniably related to functionality. In the absence of clearly stated criteria with which tenderers must comply and which the BEC members use in evaluating the offers, the process could be rendered unjust. At issue is not the bid specifications, but rather the manner in which the BEC and BAC evaluated the bids without clear objective criteria and specifications. This has a further consequence that, in the absence of expressly stated criteria, uncertainty arises regarding the value to be attributed, if any, to deviations. This, in turn, further gives rise to the next dispute to be decided.

THE DIFFERENCE BETWEEN RESPONSIVE BIDS, DEVIATIONS, AND THE STAGE AT WHICH THE FUNCTIONALITY INQUIRY WAS CONDUCTED

[50] In SMEC, the BEC found that SMEC's bid was non-responsive, because SMEC had proposed material deviations from the advertised items. It was thus not further evaluated on price and performance points. The evaluation, therefore, did not involve scoring for functionality but prescribed minimum requirements relating to key personnel, support staff, and the like with which bidders had to comply in order to be found responsive.²⁵

[51] Tullis' bid was not *in casu* deemed to be non-responsive. It was not disqualified along with the other two unsuccessful tenderers in the initial evaluation stage. In the SMEC matter, the tender document stated expressly a "*test for responsiveness*" listing what Rogers J described as the employers' undertakings in the form of a series of injunctions.

[52] In the comparison thereto, the bid specifications in this matter provided in the pre-amble that the bid would be evaluated on the bidders' proven ability to provide the services, i.e. infrastructure, technical and operational capacity as well as the 90/10 Preferential Procurement Points System, as specified in the bid document.

²⁵

ibid at [5]

- [53] Paragraph 5 of the preamble expressly refers in this regard to the attached form marked “WCBD6.1” that is incorporated in the tender specifications. Form WCBD6.1 bears the heading “*PREFERENCE POINTS CLAIM FORM IN TERMS OF THE PREFERENTIAL PROCUREMENT REGULATIONS 2017 CODES OF GOOD PRACTICE*”. The form serves as a claim form for preference points for Broad-Based Black Economic Empowerment (B-BBEE) Status Level of contribution. It does not contain objective criteria regarding functionality.²⁶
- [54] The preamble further states in paragraph 6 that the *‘bid will be awarded subject to the inspection of the premises by duly authorised representatives of the Department. Subject to a visit to the manufacturers’ premises (local or overseas) by three (3) representatives of the Department ...’*
- [55] The procurement process is usually divided into two stages. The first is a mandatory stage in which bids are adjudicated for responsiveness. The MEC argues in this regard that Tullis’ bid was unresponsive due to the 12 deviations, 11 of which were found to be material. However, Tullis was not disqualified in the preliminary mandatory evaluation of the bids, as was the case with the other two unsuccessful tenderers. There is no dispute that both Tullis and Amlazi were evaluated in accordance with paragraph 6 of the preamble to the invitation to bid. This was despite the fact that the tender specifications stated that a bid will be awarded subject to the inspection to

²⁶ Record, volume 10 of 19, pp 971 and further

be conducted as described aforesaid. The tender specifications did not envisage a 3-stage evaluation process consisting of a mandatory evaluation, the awarding of points for price and B-BBEE and thirdly, functionality.

- [56] In SMEC, the Court draws a distinction between cases where the tenders required functionality to be evaluated. Not all tenders need to invariably require functionality to be scored. The Court held:

‘The fact that functionality was not to be evaluated does not mean that functionality in a more general sense was irrelevant. In order to ensure that competent services would be supplied, the Tender Terms incorporated detailed eligibility requirements for key personnel, support resources, and track record. If a particular bidder met these requirements and scored the most points for price and preferential procurement, residual functionality concerns could be addressed in the risk analysis contemplated by clause C.3.11.4, a component of which was the tenderer’s ability to fulfil its obligations.’²⁷

- [57] The relevant clause of the Tender Terms and SMEC differed vastly from the bid’s specifications in this matter. In SMEC, the relevant clause of the Tender Terms provided that *‘The conclusions drawn from this risk analysis will be used by the Employer in determining the acceptability of the tender offer ...’*. In SMEC, the Tender Terms expressly reserved the right that the employer only had to accept the tendered offer if it does not present material risk and that the employer reserves the right to consider the mixed ranked tenderer.

²⁷

SMEC ebid at para [89]

- [58] SMEC held correctly that function remains an overriding requirement of our procurement law founded upon the requirements of the Constitution. This does, however, not detract from competing constitutional obligations regarding certainty, clarity, the rule of law and fair and open administrative processes and procurement.
- [59] The process used by the BEC and BAC fused the functionality assessment regarding the acceptability of Tullis' tender with functionality as an overriding requirement. The manner in which they dealt with Tullis' deviation resulted in a subjective evaluation of the information gathered by the BEC during the inspection *in loco* and other investigations. It is impossible to determine the objection criteria used in this process, irrespective of whether the conclusion reached was accurate. The process was not objective, open, and fair.
- [60] Even if the MEC and BAC's finding that Tullis' bid should have been held nonresponsive or unacceptable at the first functionality enquiry is correct, it does not enshrine the process with the constitutionally mandated requirements of fairness and openness. In *AllPay*, the Constitutional Court held that a declaration of invalidity should follow once a reliable ground has been established. The equitable remedy to be granted following such a finding requires its own consideration.

THE JUST AND EQUITABLE REMEDY GRANTED BY THE COURT

[61] Once a finding of invalidity is made the effected decision or conduct must be declared unlawful and a just and equitable order must be granted. At this stage the inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Contracts concluded within the constitutional and statutory procurement framework are concluded not on behalf of the state but in the public's interest. Accordingly, those most closely associated with the benefits of a contract must be given due weight. The Constitutional Court held in **All Pay** that the interest of grant beneficiaries and, in particular, child grant recipients in an uninterrupted grant system will play a more major role than the rights or expectations of an unsuccessful bidder.²⁸

[62] In the exercise of the Court's remedial discretion, the nature of the irregularity and the extent to which circumstances have changed during the intervening period are determining factors. If the irregularity taints the entire tender process, due to, for example, the tender criteria being vague, a fresh tender process should be run. Should the irregularity relate to the manner in which the decision was taken, there would normally be no reason why the existing tenders cannot simply be reconsidered, unless circumstances have changed, and it is no longer appropriate to award the contract based on the original tender process.²⁹

²⁸ **All Pay Consolidated v Chief Executive Officer, SASSA** 2014 (1) SA 604 (CC) at [56]

²⁹ **Norland Construction (Pty) Ltd v Chris Hani Development Agency (SOC) Limited and another** 2024 JDR 0298 (ECMA) at [25] to [28]

[63] It does not follow in all cases that, in deciding on a just and equitable remedy despite the declaration of invalidity, the Court should set aside the contracts concluded pursuant thereto. This is, however, a case-to-case-based inquiry.³⁰ In deciding if the order is just and equitable, it should be considered if it resulted in fairness to all implicated parties and must account for all the relevant facts and circumstances. In most instances, the Court will not be in as good a position as the administrator to substitute its own decision for that which forms the subject of the review. A further factor to be considered in this regard is delay. The Constitutional Court, in Trencon Construction,³¹ held that “*delay can cut both ways*”. The inappropriateness of especially a substitution order may become evident with the passing of time. However, delay occasioned by the litigation process should not easily cloud a Court’s decision in reaching a just and equitable remedy. The Appeal Court should further ordinarily base its decision on the facts that existed when the original decision was made.

[64] Nuku J held that the MEC did not disclose to the Court to what extent the tender had been implemented. The omission to provide this information was explained in argument by Ms Pillay SC on behalf of the MEC on the basis that the relevant contracts and purchase orders were not yet in existence at the time when the MEC’s answering affidavit was prepared. Mr Maleka SC,

³⁰ Loliwe CC trading as Vusumzi Environmental Services v City of Cape Town and others, case number 3791/2012

³¹ Trencon Construction v Industrial Development Corporation 2015 (5) SA 245 (CC) at [51]

however, correctly relied upon the principle that officials such as the MEC may not be allowed to avoid their constitutional obligation to provide all the necessary information that may be relevant to a Court in instances such as this.³²

- [65] The Court *a quo*'s order to suspend the declaration of invalidity subject to the re-adjudication of the tenders should, therefore, be judged against the information available at the time. The relief granted can thus not be faulted.
- [66] In light of the further evidence presented to the Court on appeal that was admitted by agreement between the parties, it has become common cause that Amlazi has successfully installed all three laundry lines. The MEC's submission regarding irreparable financial prejudice and, more importantly, the more than likely disruption of the province's public healthcare system carries more weight than Tullis' rights. It would serve no purpose to commence the procurement process afresh. The three washing lines are installed, and there is no need to replace them in approximately the next 15 to 20 years. Tullis invited this Court to engage the issue of compensation, but this does not need to be dealt with since it was not ventilated in the affidavits or claimed as a relief. In appropriate circumstances, a tenderer in Tullis's position is entitled to recover its lost profits in terms of PAJA. Where the state's misconduct is deliberate and dishonest and where substitution or remittal is not a viable form of relief, circumstances may exceptionally require compensatory relief to ensure a just and equitable result. The

³²Trencon ebid at [52]

appropriate avenue for a claim for compensation for loss sustained for a breach of the precepts of administrative justice is PAJA³³.

However, this is not the end of the inquiry into just and equitable relief. It is common cause between the parties that Amlazi was awarded a 3-year maintenance contract as part of the successful tender. Although the three laundry lines have been installed, the maintenance contract is ongoing. The Court had insufficient information before it to rule on the consequences of a declaration of invalidity on the maintenance contract. The Appeal Court is in a similar position. In *Allpay*,³⁴ Justice Froneman held, regarding the appropriate remedy in that matter, that:

...Part of the submissions dealt with the constitutional obligations that Cash Paymaster may have to continue with the current system even if the tender award is set aside, until a new system is in place. These considerations raise difficult factual and legal issues. The information currently before us is outdated and inadequate. It would be inappropriate to make a decision on a just and equitable remedy in the absence of further information and argument on these issues.'

- [67] It is alleged by Tullis that Amlazi is the sole supplier of Kenneglesser machinery in South Africa and that the installation of the three laundry lines entrenched Amlazi's right to the ensuing maintenance contract.³⁵ While this may be true, the new equipment must be supported and maintained under a comprehensive maintenance contract. The average lifespan of some of the equipment may be twenty-five years, and the initial maintenance agreement was for five years. To this end, the Court below suspended its

³³ *Esorfranki Pipelines (Pty) Limited v Mopani District Municipality* 2023 (2) SA 31 (CC) at [54] to [55]

³⁴ *Allpay Consolidated v Chief Executive Officer SASSA* 2014 (1) SA 604 (CC)[96]

³⁵ Par 38 of the MEC's supplementary affidavit on pp 152 in the application to produce further evidence on appeal.

declaration of invalidity of the contract until the final conclusion of the procurement process that was remitted to the MEC "... in order to ensure the continuous provision of service...". A case is not made out to interfere with the remedy granted by the Court below. Litigation is a time-consuming process, especially when a matter is appealed, and the appeal stands to be decided upon the facts known to the court below at the time.³⁶ This court cannot decide on the issue of compensation or order an enquiry into Tullis' proclaimed losses under the current circumstances. This is a matter best left undecided for another court.

DID THE MEC PRE-EMPT THE APPEAL?

[68] Tullis' argument that the MEC pre-empted the appeal by readvertising the third line should be judged against the contextual background to the application. At the time of the award, the provincial health system was in dire need of acquiring a modernised laundry system. This need was of even greater importance, given the ongoing COVID pandemic at the time. The MEC was, therefore, faced with the proverbial Hobson's choice. She had no real alternative but to readvertise the third laundry line. This in itself is not definitive or a clear indication that the MEC does not take issue with the judgment.

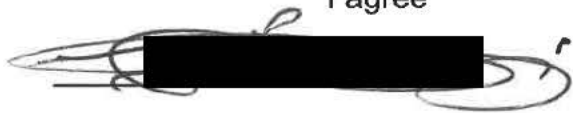
CONCLUSION

³⁶ *Trencon Construction v Industrial Development Corporation* 2015 (5) SA 245 (CC) [51] and [52]

[69] The appeal lies against the order of the Court and not its reasons. For the reasons as set out aforesaid and, in particular, given the absence of objective criteria against which functionality could be measured, the Court's judgment cannot be faulted. The appeal stands to be dismissed and costs on Scale C should follow the result. In the premises I propose the following order:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the appeal on Scale C.


ff **VAN DEN BERG AJ**

I agree

NZIWENI J

I agree
and it is so ordered

ERASMUS J

On behalf of appellant

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