

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

**CASE NO.: B3733/23**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 27 February 2025

E van der Schyff

In the matter between:

NDODANA CONSULTING ENGINEERS (PTY) LTD                      FIRST APPLICANT

OARONA CONSULTING AND ENGINEERING (PTY) LTD      SECOND APPLICANT

NDODANA-OARONA JOINT VENTURE                              THIRD APPLICANT

and

SOUTH AFRICAN NATIONAL ROADS AGENCY  
SOC LIMITED                                                              FIRST RESPONDENT

INGEROP SOUTH AFRICA (PTY) LTD                              SECOND RESPONDENT

HORIZON CONSULTING ENGINEERS (PTY) LTD                      THIRD RESPONDENT

THE INGEROP-HORIZON JOINT VENTURE                              FOURTH RESPONDENT

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JUDGMENT

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Van der Schyff J

**Introduction**

- [1] The first respondent, the South African National Roads Agency SOC Limited (“SANRAL”), is an independent statutory company. It operates in terms of its founding legislation, the South African National Roads Agency Limited and National Roads Act 7 of 1998. SANRAL’s statutory mandate includes the financing, improvement, management, and maintenance of the national road network in South Africa.
- [2] In September 2022, SANRAL issued three tenders in which it sought consulting engineering services for the routine road maintenance (RRM) of freeways in and around Tshwane, Johannesburg, and Ekurhuleni, (the “Gauteng Freeways”) respectively. The applicants, collectively referred to as Ndodana, and the second to fourth respondents, collectively referred to as Ingerop, were among the parties that submitted tenders in respect of the Gauteng Freeways.
- [3] Ndodana, the incumbent service provider, has been the successful bidder since February 1997 when the three RRM contracts were first awarded to it. Ndodana has been doing the same work that went out on tender in relation to the same three sections of the Gauteng Freeways for the past 25 years. This round, Ndodana’s bids were, however, found to be non-responsive. Ingerop was ultimately held to be the successful bidder and was awarded the three tenders despite its tenders being significantly higher than Ndodana’s, and in two of the tenders were the highest tenders submitted.
- [4] Ndodana subsequently approached the urgent court for interim relief, pending the review. Interim relief was granted. I am herein seized with the review proceedings.
- [5] Ndodana essentially seeks this court to review and set aside SANRAL’s decisions to declare its bid submissions to be non-responsive, to declare its bid submissions responsive, to review and set aside the decisions to award the tenders to Ingerop, and to remit the decisions back to SANRAL. The bids were respectively submitted for the following contracts:

- i. SANRAL X.002-160-2023/IF (Toll) and X.002-161-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route N4 Section 1, N4 Section 11 & 12, N4 Section 21, R21 Section 2, R104 Sections 1 & 2 and R 573 (Tshwane Freeway RRM);
- ii. SANRAL X.002-162-2023/1F (Toll) and X.017-010-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route N1 Section 19, N1 section 20, N1 Section 21, N3 Section 2, N12 Section 18 and N17 Section 1(Johannesburg Freeway RRM);
- iii. SANRAL X.002-163-2023/IF (Toll) and X.003-161-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route R 21 section 1& 2, N 12 Sections 18 & 19, N3 Sections 11 & 12 and N17 Section 2 (Ekurhuleni Freeway RRM);

[6] Ndodana initially raised several grounds of review. It took issue with the procedure followed in declaring its tenders non-responsive and the reasons provided for the decisions. After having had the benefit of scrutinising the record provided by SANRAL, Ndodana raised two further grounds of review, to wit, a reasonable perception of bias and that the decision-maker was not properly constituted and subsequently lacked authority. In this judgment, I commence by considering the averment that the decision-maker was not properly constituted and the ensuing consequences.

### **Was the decision-maker properly constituted?**

[7] After having had the opportunity to scrutinise the record provided by SANRAL, Ndodana concluded that the record does not demonstrate compliance with the tender requirements governing the constituency of the Bid Evaluation Committee (the “BEC”).

[8] The record reflects that the BEC held a meeting on 2 March 2023. Seven voting members were in attendance. These were Mr. Moloto, Mr. Rughodo, Mr. Nogwaza,

Mr. Gogotya, Ms. Faku, Ms. Ndugane and Ms. Dladla. A second meeting was held on 23 March 2023. The minutes reflect the attendance of five voting members, Mr. Moloto, Mr. Rughodo, Mr. Nogwaza, Ms. Ndugane and Mr. Gogotya. Ndodana's disqualification and Ingerop JV's appointment were apparently approved at the BEC meeting on 23 March 2023.

- [9] Mr. Gogotya is identified as a voting member who attended both the meetings. He, however, did not qualify to be a voting member on 2 March 2023 or 23 March 2023 as his letter of appointment to the BEC reflects that his term of office expired on 1 March 2023.
- [10] Ndodana averred in the confidential supplementary affidavit filed that it appears that the BEC might not have been quorate or legitimately constituted. Since the record does not reflect anything to gainsay this averment, Ndodana invited SANRAL to respond to this averment.
- [11] SANRAL, however, did not file a further supplementary answering affidavit after having received the confidential supplementary affidavit filed by Ndodana. Ingerop, in its confidential answering affidavit explained that the BEC is only responsible for the evaluation of the bids submitted in response to a public invitation for bids. The BEC then submits a report and recommendation to the Bid Adjudication Committee (the "BAC"). The BEC is an evaluation committee. The final decision of the appointment lies with the BAC. Ingerop conceded that Mr. Gogotya's appointment to the BEC expired. Ingerop claims, however, that five members were appointed to the BEC, that all five members attended both meetings and states that even if it is argued that Mr. Gogotya was not a member of the BEC then four members attended and a quorum was met.
- [12] The court is left in the dark as far as the compilation of the BEC is concerned since the minutes of the BEC reflect that seven voting members attended the first and five voting members attended the second BEC meeting. The court has not been provided with any information as to the minimum required members or whether a quorum was prescribed in the enabling policies or regulations. In the absence of

any other facts brought to the fore by SANRAL, it is common cause that the BEC was not properly constituted in that Mr. Gogotya attended and participated as if he was a member of the BEC, whilst his appointment has in actual fact expired.

- [13] In *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality and Another*<sup>1</sup> the court held that decisions based on recommendations of a bid evaluation committee that was not properly constituted do not pass muster. In *Mjayeli Security (Pty) Ltd and Another v South African Broadcasting Corporation SOC Limited and Others*<sup>2</sup> the court held that the decisions and recommendations of an improperly constituted BEC are invalid and that this alone is sufficient reason to set aside any decision based on such recommendations.
- [14] The conundrum caused by Mr. Gogotya's participation in the BEC's meetings transcends the question of whether the BEC is a voting committee and whether the meeting was quorate. The fact is that a person who was not authorised or appointed to participate in the evaluation of the bids, participated as a 'voting member'. Irrespective of whether any actual voting occurred, the only inference that can be drawn from Mr. Gogotya being reflected as a voting member is that he actively participated in the evaluation process and engaged with the committee members on the topic as being a member of the BEC. The court is in the dark about the extent of his participation and the manner in which he could or did influence the other members' views on the tenders.
- [15] It is trite that bid evaluation committees are responsible for the evaluation of bids submitted in response to a public invitation for bids.<sup>3</sup> The evaluation of the bids must be done in accordance with the specifications for the particular procurement. The BEC must evaluate the responsiveness of bids and the 'ability' of each responsive bidder to execute the contract.

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<sup>1</sup> (1357/2007) [2008] ZANCHC 73 (12 December 2008) at paras [70] and [71].

<sup>2</sup> (47916/2017) [2023] ZAGPJHC 1132 (10 October 2023) at para [90].

<sup>3</sup> See, *inter alia*, Bolton, P. 'The Committee System for Competitive Bids in Local Government' 2009 (12) 2 PELJ 57-96 for a comparable discussion.

[16] Having regard to the important function of a BEC, and the reliance placed by a BAC on the recommendations of a BEC, I must find that Mr. Gogotya's presence and participation caused the BEC not to be properly constituted and tainted the sitting of the BEC and any decision made by it. This case is to be distinguished from the position in *Aurecon South Africa (Pty) Ltd v City of Cape Town*,<sup>4</sup> where a case was made out that the regulatory framework allows participation by non-members of the BEC in the evaluation of tenders. In *Aurecon* the non-member in question was not considered to be a member of the BEC. All the participants understood that he was there only in an advisory capacity. In *casu*, SANRAL did not rely on any provision in any relevant document or regulation allowing a non-member of the BEC to participate in or advise the BEC in connection with the scoring process or attending committee meetings in an advisory capacity. Mr. Gogotya, in any event, did not participate in an advisory capacity but as a committee member. On this ground alone, the applicant stands to succeed in seeking the review and setting aside of the decisions to find Ndodana's bids non-responsive and to award the respective tenders to Ingerop.

### **Substantive grounds for reviewing and setting aside the impugned decisions**

[17] Ndodana raised several substantive grounds for review. Despite finding that the impugned decisions stand to be reviewed and set aside because the BEC was not properly constituted, it is necessary to have regard to the other grounds of review raised by Ndodana. These issues need to be clarified to prevent them from occurring again in the future. To contextualise the discussion and the findings to be made, it is necessary to set out the factual context in more detail.

#### *Factual matrix*

[18] SANRAL utilised the 'two-envelope' bidding system when it called for the respective Gauteng Freeways' tenders. It is trite that the 'two-envelope' system allows for the evaluation of technical merit without initially considering the price.

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<sup>4</sup> 2016 (2) SA 199 (SCA) (9 December 2015) at para [33].

The second envelope is only opened in relation to those bidders who met the technical and functionality requirements.

- [19] In all three tenders, Ndodana, who was the consultant on the Gauteng Freeways for the past 25 years, passed the technical and functionality evaluation. All bidders who passed the functionality evaluation were then evaluated on 'price and preference'. After the second envelopes were opened, Ndodana scored the highest number of points in each of the three tenders. Since the second envelopes were publicly opened, it is apt to provide the respective tender amounts and total points obtained by each consultant who submitted a tender.

|            |                 |              |
|------------|-----------------|--------------|
| Tshwane    |                 |              |
| Consultant | Price           | Total points |
| 1          | R 25 915 255.18 | 98           |
| Ndodana    | R 26 218 571.13 | 99.06        |
| 3          | R 26 389 860.75 | 98.53        |
| 4          | R 26 622 183.75 | 97.82        |
| 5          | R 26 970 628.00 | 96.74        |
| 6          | R 27 562 050.00 | 94.92        |
| 7          | R 29 163 310.00 | 89.97        |
| Ingerop    | R 32 763 097.50 | 78.86        |

|            |                 |              |
|------------|-----------------|--------------|
| JHB        |                 |              |
| Consultant | Price           | Total points |
| Ndodana    | R 31 453 687.38 | 100          |
| 2          | R 31 620 796.87 | 99.57        |
| 3          | R 32 203 128.00 | 98.09        |
| 4          | R 32 794 550.00 | 96.59        |
| 5          | R 34 395 810.00 | 92.52        |
| 6          | R 34 867 545.75 | 91.32        |
| Ingerop    | R 38 047 922.50 | 83.23        |

|            |                 |              |
|------------|-----------------|--------------|
| Ekurhuleni |                 |              |
| Consultant | Price           | Total points |
| Ndodana    | R 26 966 444.88 | 100          |
| 2          | R 27 098 226.25 | 99.61        |
| 3          | R 27 718 128.00 | 97.77        |
| 4          | R 28 309 550.00 | 96.02        |
| 5          | R 29 324 810.25 | 93.00        |
| 6          | R 29 900 460.00 | 91.30        |
| Ingerop    | R 33 518 072.50 | 80.56        |
| 8          | R 36 255 762.50 | 72.44        |

[20] Despite the fact that Ndodana had the lowest price and scored the highest points at the pricing stage on two of the tenders and on the remaining tender, through a combination of its BEE ranking and price still scored the highest points although it did not tender the lowest amount, the tenders were awarded to Ingerop. The rule 53 record revealed that all the bids, save for that of Ingerop and one other bidder on the Ekurhuleni tender, were found to be non-responsive. It is the decision to find Ndodana's bids non-responsive, that essentially lies at the heart of this review application. I pause to note that I find it curious that tenders were declared non-responsive after being ranked according to the points' system. Generally, only responsive tenders are ranked. This contributes to the court's discomfort with the process followed by SANRAL.

[21] The BEC met twice after the second envelopes were opened. The first meeting took place on 2 March 2023, and the second on 23 March 2023. No transcribed record of the BEC meetings that were conducted virtually was attached to the documents presented to the court. What is clear, however, is that SANRAL requested Ndodana and all the other bidders, except Ingerop and one other bidder in the Ekurhuleni tender, to justify their prices after the first meeting, and in letters dated 9 March 2023.

[22] I pause to note that every consultant who submitted a lower bid than Ingerop received a request to justify its prices. It also needs to be mentioned that when

Ndodana submitted its tenders in October 2022, the second envelopes each contained a cover letter wherein Ndodana explained its pricing strategy. Ndodana informed the procurement officer, and essentially the BEC, of the following:

- i. *'Ndodana Consulting Engineers (Pty) Ltd has been involved with the routine road maintenance of the Johannesburg, Tshwane and Ekurhuleni freeways for over 2 decades. Currently Ndodana Oarona JV is appointed in the three existing routine road maintenance contracts: ...*

*This continuous involvement has allowed Ndodana to garner a substantial amount of knowledge and records on the existing RRM infrastructure and issues on the road and built up an experienced RRM team with extensive experience on the Gauteng freeways.*

*These past appointments have given Ndodana Oarona JV the critical knowledge and access to information that has influenced our pricing strategy and allows for certain pay-items to be priced more economically than other tenderers who may not have the same amount of experience.'*

[23] Ndodana then referred to 8 specific pay-items to illustrate their strategy e.g.:

- i. 34:02 Tender Evaluation Report  
*Ndodana Oarona JV has evaluated these RRM tenders multiple times and has templates available.*
- ii. 35.02(c) Establishment of office equipment  
*All equipment is currently available on our existing sites and establishment will be a minimal cost.*
- iii. 35:07 Routine Maintenance and Slope Management System  
*Based on current experience, procedures and company standard operating procedures these items are achievable at minimal additional costs as there is always a Route Manager or Assistant Route Manager on standby at all hours.*

- [24] In regards to some of the pay-items, Ndodana quoted nominal amounts, e.g. in 32.01(a), 32.01(c), 32.02, 34.01(a), 34.01(c), 34.02, 34.03, 35.01(c)(iii), 35.01(b), 35.05, 35.06. Ndodana's justification for this boils down to it stating that as the incumbent contractor, it already has the necessary skills, knowledge, infrastructure or personnel to fulfill the functions at minimal cost.
- [25] The record provided to the court does not reflect that the BEC gave any consideration to Ndodana's pricing strategy explanation before the price justification letters were sent.
- [26] In the price justification letters of 9 March 2023, SANRAL informed all the bidding consultants who submitted lower tenders than Ingerop, including Ndodana, of the following:
- i. SANRAL is currently conducting tender evaluation;
  - ii. During the evaluation process, it was found that the tender submission contains 'numerous unacceptable rates';
  - iii. In most instances, there are numerous zero rates, very high rates, and very low rates;
  - iv. The tender offer can be said to be unbalanced;
  - v. SANRAL has many examples where the acceptance of unbalanced tenders poses a problem for SANRAL in the execution of the contracts;
  - vi. Very high-rate items and very low-rate items are a cause of concern as it may constitute a considerable financial risk in the event of possible variations in quantities, claims etc.;
  - vii. Where items have been priced very low, it would cause similar risk to the bidder in the event of 'scope execution at economically unviable rates, scope creep and increased quantities etc.';
  - viii. An indication of the items with rates considered as unbalanced are marked up in the Bill of Quantities attached. Rates identified as 'low rates' *'that may be of concern to the tenderer'* are indicated in blue, rates identified as high rates *'and being a risk to SANRAL'* are indicated in red; zero rates are indicated in yellow.

- ix. The highlighted tendered rates are of concern as these constitute unhealthy competition;
- x. SANRAL drew the bidders' attention to clause 2.1.10 of the Pricing Schedule, that in SANRAL's view meant that 'tenderers are expected to submit rates that can stand by themselves for payment of work done'.
- xi. Bidders were called to adjust rates by reducing very high items and submitting economically viable or market rates for items marked as low or zero rates, whilst keeping the overall tender price the same as the tendered sum.
- xii. Where R0 rates are provided, bidders are requested to provide justification on how they would execute the contract without having priced the item in question.

[27] All the items marked in Ndodana's Bill of Quantities were marked blue, hence identifying the rates as 'low rates'.

[28] Ndodana's responses to the price justification letters are dated 16 March 2023. Ndodana's response to the price justification request in all their tenders was as follows:

- i. Ndodana noted SANRAL's concerns related to the very low rates compared to generally accepted market-related rates;
- ii. Ndodana has 'intentionally tendered in this way to ensure that they remain in touch in this competitive environment';
- iii. Ndodana reiterated its prior involvement in routine road maintenance on these specific freeways for over 2 decades;
- iv. This continuous involvement allowed Ndodana to garner a substantial amount of knowledge, records and develop standard operating procedures for most instances on the existing RRM infrastructure and issues on the road;
- v. Ndodana built up an experienced RRM team with extensive experience on the Gauteng Freeways

- vi. Ndodana has gained critical knowledge and access to information that influenced its pricing strategy;
- vii. This allows for certain pay-items to be priced more economically than other tenderers who may not have the same amount of experience;
- viii. Pricing some of these items higher would be charging SANRAL twice for work that has already been completed, and this could be construed as unethical;
- ix. Ndodana again referred to practical instances and specific price-items and provided reasons for each low tender;
- x. Ndodana commented on each line item in the Bill of Quantities justifying the particular rate and confirmed that 'each stage/phase of a project is priced separately and no cross-subsidisation between phases/stages occurs.'
- xi. Ndodana concluded its justification letter with the undertaking that 'any increase in the quantities<sup>5</sup> will not result in any claim for amendment rates or additional costs'.

[29] Due to the pricing strategy it followed, it was difficult for Ndodana to balance rates without affecting the total price of the tender. Ndodana kept the rates of each price item in the Bill of Quantities unchanged.

[30] Presumably after the BEC received the respective consultants' justification or adjustments, memoranda were prepared that were eventually submitted to the BAC. These were presumably discussed at the second BEC meeting on 23 March 2023. In these memoranda, the following is, amongst other recorded:

'During the tender evaluation process, it was found that several service provider's (*sic*) tender submissions contained numerous unacceptable rates. In most instances, service providers have tendered numerous zero cost rates, very high rates, and very low rates, and therefore deeming the received tender offers unbalanced.

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<sup>5</sup> It is relevant to note that the quantities were fixed quantities provided by SANRAL in the excel pricing schedule that had to be completed by the respective bidding consultants.

SANRAL has many examples where the acceptance of underpriced and unbalanced tenders poses a problem for SANRAL in the execution of contracts.'

[31] The BEC then identified Ndodana as one of the bidders who submitted 'unreasonable and out of proportion' tenders due to the majority of their tendered rates being 'unrealistic'.

[32] The BEC, relying on Tender Clause 2.1.10, and Tender Clause 3.8.2 declared these bids non-responsive. Tender Clause 2.1.10 provides as follows:

'A tender may be deemed non-responsive if the unit rates or lump sums for some of the items in the Pricing Schedule are, in the opinion of the Employer, unreasonable or out of proportion, and if the tenderer fails, within a period of seven (7) days of having been notified in writing by the Employer to adjust the unit rates or lump sums for such items, to make such adjustments.'

Tender Clause 3.8.2 provides that a responsive tender is one that conforms to all the terms, conditions and scope of work of the tender documents, without material deviation or qualification. A material deviation or qualification is one which, in the employer's opinion, would

- Detrimentially affect the scope, quality, or performance of the works, services or supply identified in the scope of works,
- Significantly change the employer's or the tenderers risk and responsibilities under the contract, or
- Affect the position of other tenderers presenting responsive tenders, if it were rectified.

[33] The rule 53 record indicates that none of the bidders' responses to SANRAL were acceptable to SANRAL as SANRAL declared the bids non-responsive. This effectively disqualified all but Ingerop and one bidder in the Ekurhuleni tender

from competing for the Gauteng Freeway tenders. Coincidentally, all bidders who submitted prices cheaper than Ingerop were disqualified.

[34] The record also reflects that the BEC prepared two standardised responses that were respectively used in the respective memoranda in cases where the consultant's bid was regarded to be too high or too low. The record provided does not indicate that each individual consultant's price justification was carefully scrutinised and analysed. It seems as if the respective consultants' justification was grouped together based on the nature of the justification and then generically dealt with.

[35] The detailed information contained in the rule 53 record reflected above was, however, not available to Nododana before the record was filed. After Nododana responded to SANRAL's price justification letter in March 2023, it did not receive any further communication from SANRAL. Nododana's legal representative sent a letter dated 2 May 2023 to SANRAL. Nododana, among others, requested to be informed whether it was indeed eliminated, for example, by its bids being declared unresponsive, and if so, on what grounds. It is only after this letter was sent that Nododana was informed that SANRAL, already on 29 and 30 March 2023, had awarded all three tenders to Ingerop

[36] SANRAL provided its reasons in a letter dated 10 May 2023. The reason for SANRAL's decision to declare Nododana's bid unresponsive, is contained in one paragraph of a letter containing 18 paragraphs. Paragraph 13 of the letter reads as follows:

'In this instance, SANRAL duly complied with the above and having assessed your client's bid and responses as provided on 16 March 2023 determined that your client's bid was nonresponsive *for it did not comply with the conditions and scope requirements for this tender, as the rates provided could not economically stand by themselves for the contract specification and scope deliverables in question without seeking additional*

*funding from other income sources or from other rate items in the Bill of Quantities.'* (My emphasis.)

This, SANRAL contended, constitutes a material deviation from the tender documents, which rendered the bids non-responsive.

### *The parties' submissions*

- [37] Ndodana asserts that SANRAL (i) afforded a wrong interpretation to Tender Clause 2.1.10 and paid mere lip service to the *audi et alteram partem* principle engrained in the clause; (ii) SANRAL did not follow the prescribed mandatory procedure outlined in its own tender documents; (iii) SANRAL's reasons are irrational in the sense that its decision to eliminate Ndodana was insufficiently connected to the purpose of the tender and the information that served before the decision-makers; (iv) SANRAL failed to take certain relevant considerations into account; (v) SANRAL's procedure was unfair in that it failed to adequately give the applicants prior *audi alteram partem*; and (vi) in taking the impugned decisions SANRAL was biased or can reasonably be suspected of bias.
- [38] SANRAL contends that after considering Ndodana's bids and the low rates contained therein, SANRAL regarded the rates as 'constituting unhealthy competition' and a risk during the execution of the contract. It provided Ndodana with the opportunity to adjust its rates whilst keeping the submitted tender price. Ndodana failed to adjust unit prices and attempted to provide justification as to why it quoted the prices it quoted.
- [39] SANRAL claims that after considering Ndodana's response, it still held the view that Ndodana's price posed a risk and that it may be difficult for the tenderer to sustain a thirty-six (36) months contract. The justification provided did not, in SANRAL's view, mitigate this risk.
- [40] SANRAL asserts that it adhered to the *audi et alteram* principle in that it gave Ndodana the opportunity to make representations and considered their representations. The principle does not require that the decision-maker must agree

with what the bidder says or that the decision-maker must henceforth continuously engage 'back and forth' with the bidder on its bids and representations. SANRAL claims that its minutes of the BEC reflect that Ndodana's representations were considered.

[41] SANRAL states that Ndodana's view that it should have been declared the preferred bidder and that SANRAL should thereafter have proceeded to negotiate market-related prices with them is untenable. The conditions set out in the bid documents clearly stated that only bids which are found to be responsive would be evaluated on functionality and pricing. Ndodana's bid was found not to be responsive on pricing. SANRAL's obligation to enter into negotiations relating to market price rates only applied if the bidder's bid was found to be responsive on all issues. The negotiations to market-related prices contemplated in the tender documents entailed a downward adjustment, and not the converse.

[42] SANRAL denies that its decision was irrational. It claims that in the context of these tenders, and in order to ensure that the services would be cost effective, it considered among others the prices quoted by the bidders for the services and whether the service providers would, taking into account a change in circumstances, still be able to deliver on the services. It did so by considering 'each and every price quoted by the bidders including Ndodana [in] each item in the Bill of [Q]uantities.'

[43] In Ndodana's case, SANRAL contended, it was found that there is a real risk that Ndodana would not, in due course, be able to deliver the services at that price without compromising the quality and standard of the services. The deponent to the answering affidavit then refers to specific items in the Bill of Quantities and Ndodana's response.

[44] SANRAL took issue with Ndodana's explanation that its low rates are justified because it either had the information required already at its disposal and need not expend costs in compiling certain reports, that it already has the necessary templates available, that certain items are 'included costs' or will be achieved at

‘minimal cost’. SANRAL opined that it still had to pay for these services but that Ndodana had ‘nonetheless’ opted not to price them. SANRAL claims that Ndodana has not provided reasons for charging extremely low rates and that it is, therefore, clear that Ndodana would not be able to deliver these services without compromising the standard due to under-quoting.

[45] SANRAL denies that it failed to take into account relevant considerations. SANRAL claims that it ‘considered each of the line items,’ and ‘took into account the nature of the services in respect of each line item, and the impact on the quality of services of the quoted prices.’ It further took into account market rates in respect of these services and concluded that, given these materially low rates, Ndodana would not be able to deliver on the services without compromising the quality.

[46] SANRAL denies being biased in favour of the Ingerop. SANRAL claims that although it is correct that Ingerop was not called upon to readjust its prices, albeit higher than other bidders’ prices, is not evidence of bias in favour of Ingerop. Even if some line items may have been higher, all other items Ingerop quoted were market-related and did not pose a risk to SANRAL.

[47] SANRAL admits that Ndodana has been the incumbent service provider in respect of the contracts for the past 25 years, but denies that Ndodana was, by virtue thereof, best suited for appointment. SANRAL opines that Ndodana’s experience for the duration which they held the contract would only have been of relevance after the award of the contract. SANRAL submits that if Ndodana was able to ‘underquote’ on their bid it would give them an unfair advantage over bidders ‘in that their bid will always be low in price compared to other bidders.’ This, SANRAL contends, would seem like the tender is tailor-made for Ndodana.

[48] SANRAL curiously denies that the respective bidders either received response 1 or 2, in the respective memoranda drawn up for the BAC’s benefit. This is an objective fact determinable on a reading of the respective memoranda. SANRAL’s explanation that - ‘This is how SANRAL classified the responses, after analysing various responses by each bidder. They did not mean that those were responses

to individual bidder[s].', fails to convince, particularly in the absence of any evidence relating to the discussion and individual analyses of the bids.

- [49] Ingerop also filed an answering affidavit to Ndodana's supplementary affidavit. I agree with Ndodana that Ingerop's contribution to the issues at hand is of little value, as it is not Ingerop, but SANRAL's decisions and the reasons for taking the decision and the administrative decision-making processes that lie at the heart of this review. Ingerop's views cannot justify decisions taken by SANRAL if SANRAL cannot sufficiently justify the decisions.

## Discussion

- [50] An acceptable tender is defined in section 1 of the Preferential Procurement Policy Framework Act 5 of 2000, as:

'any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document.'

- [51] It is a well-established principle that organs of state are only allowed to evaluate bids that are regarded as 'acceptable' or responsive. Responsiveness is thus the first hurdle that bidders need to overcome.<sup>6</sup> A bid only qualifies as responsive if it meets all the requirements as set out in the bid document. A tenderer who disregards mandatory bid requirements cannot complain if its bid is declared non-responsive. Mandatory requirements are those requirements that are a *sine qua non* for further consideration in the evaluation process. Non-compliance with mandatory requirements can be glaring, but the determination of acceptability involves not only a consideration of responsiveness to bid formalities but compliance with the substantive requirements outlined in section 217(1) of the Constitution.

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<sup>6</sup> See Volmink, P. *Legal consequences of non-compliance with bid requirements* (2014) 1 APPLJ 41-60.

[52] In determining whether a bid is responsive, an organ of state is bound to ensure that the decision-making process is lawful, reasonable, and procedurally fair. Administrative action is considered lawful, reasonable and procedurally fair when it is taken within the bounds of the law, is based on rational decision-making considering all relevant factors and follows procedures that include proper consultation and an absence of bias. Essentially the decision-making process must be transparent, impartial and justified by the facts and the applicable law. A tenderer is entitled to constitutionally compliant administrative action in every phase of its tender being considered, whether it is considered for responsiveness or being evaluated after having been found to be responsive.

[53] It is trite that fair administrative process 'depends on the circumstances of each case.' In *Metro Projects CC and Another v Klerksdorp Local Municipality and Others*<sup>7</sup> Conradie JA said:

'It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.'

[54] From the facts of this case we know that SANRAL declared Ndodana's tenders non-responsive because of what SANRAL considered to be the too low prices contained in the pricing schedule. Ndodana complains that SANRAL never informed it of the nature of the risk posed by its tender. I do not agree that Ndodana was left in the dark regarding the risk SANRAL identified. Already in the letter dated 9 March 2023, SANRAL informed Ndodana that very high-rate items,

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<sup>7</sup> 2004 (1) SA 16 (SCA) at para 13.

and very low-rate items are a cause of concern as this may constitute ‘a considerable financial risk’.

[55] SANRAL, however, never explained, by providing a factual basis, its conclusion that the rates quoted by Ndodana could not economically stand by themselves for the contract specification and scope deliverables. An organ of state must justify and provide reasons for taking a particular decision. This comprises of the conclusion reached as being the ‘reason’ for the decision, but also the facts and other relevant considerations that formed the basis for the conclusion to be reached. It is trite that a distinction is drawn between the reasons for a decision and *ex post facto* justifications for a decision. In review applications, organs of state are bound to the reasons provided to parties for the impugned decisions, they cannot rely on *ex post facto* justifications for the decisions. It is the actual reasons that underpinned a decision that has to withstand judicial scrutiny.

[56] In its letter of 10 May 2023, SANRAL provided very specific reasons for its decision. The reasons did not include that Ndodana omitted to tender for whole portions of the work, or that Ndodana’s past involvement in the maintenance of the Gauteng Freeways indicated that the quality of its work has decreased, or that SANRAL faced any financial risks due to low prices quoted and accepted in the past, or that the prices quoted in the past by Ndodana were substantially higher than the prices quoted now. In this review application, I am only concerned with the reason(s) SANRAL actually proffered for its decision to declare Ndodana’s tenders unresponsive.

[57] The first question that came to mind was, on what basis did SANRAL conclude that Ndodana’s prices were not market-related and in fact, too low. If all the bids are considered it is evident that while Ndodana’s bids were amongst the lowest, it was not disproportionately low if measured against the majority of the tenders. Given the factual circumstances, SANRAL could not reasonably have concluded that Ndodana’s tenders are not economically viable and posed a risk in that it may be difficult for the tenderer to sustain a thirty-six (36) month contract without doing a proper risk analysis. Although SANRAL’s counsel submitted that such risk

analysis was done, the rule 53 record and the evidence before the court do not substantiate such submission.

[58] SANRAL 's decision to declare the tenders non-responsive was clearly influenced by its interpretation that Tender Clause 2.1.10 requires that for a tender to be responsive the rates provided in each line item should economically stand by themselves. The Supreme Court of Appeal held in *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* ("JFE Sapela")<sup>8</sup> that 'the failure to price each and every item in the schedule of quantities would not necessarily be fatal to a tender.'<sup>9</sup>

[59] The qualification of 'not necessarily' is a clear indication that something more is required for a bid not to be acceptable than the mere fact that individual line items do not economically stand by themselves. The nature of the works tendered, for example, would be one of the factors that need to be considered. SANRAL never explained to Ndodana why it was of the view that the rates provided could not economically stand by themselves for the contract specification and scope deliverables. My attention was also not drawn to any portion in the rule 53 record where the BEC engaged in a discussion, or were afforded the benefit of an expert's views, regarding this aspect.

[60] I agree with Ndodana that a reading of the tender document as a whole, in its entirety, does not support a finding that Tender Clause C2.1.10 required that the rates provided in each line item should economically stand by themselves. Imposing this requirement *ex post facto* in itself is a reason to review and set aside the impugned decisions.<sup>10</sup>

[61] SANRAL placed heavy reliance on Clause 2.1.10 of the CIDB that provides that:

'a tender may be deemed non-responsive if the unit rates or lump sums for some of the items in the pricing schedule are, in the

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<sup>8</sup> 2008 (2) SA 638 (SCA).

<sup>9</sup> *JFE Sapela, supra*, at 645C.

<sup>10</sup> *Rail Refurb, supra*, at para [29].

opinion of the employer unreasonable or out of proportion and if the tenderer fails, within a period of seven days of having been notified in writing by the employer to adjust the unit rates or lump sums of such items, to make such adjustments'

[62] The employer concerned is, however, obliged to define the parameters of what it deems 'unreasonable' or 'out of proportion' and provide well-grounded reasons for its view and why 'it was in the employer's opinion' unreasonable or out of proportion. Reasonable grounds must exist for the employer to have formed this opinion, and these grounds should have been communicated to the affected bidders. The Constitutional Court has ruled in relation to an 'is satisfied' clause, in the light of the right to reasonableness, '[m]ore is required if the decision-maker's opinion is challenged on the basis that the precondition did not exist. The decision-maker must now show that the subjective opinion ... was based on reasonable grounds.'<sup>11</sup> In a constitutional dispensation guided by constitutional imperatives of openness and accountability, an administrator should demonstrate that it took all the relevant considerations into account.<sup>12</sup> Neither the letter dated 10 May 2023 that contains SANRAL's reasons, nor any portion of the rule 53 record provided to me reflects the reasonable grounds, or any grounds for that matter, on which SANRAL could base its subjective opinion, that the unit rates tendered were unreasonable or out of proportion.

[63] It is ironic that Inform Practice Note #5 sets out the manner in which tender offers are to be evaluated in terms of the Standard Conditions of Tender when using the competitive selection procedure. It specifically deals with instances where the tendered sum is regarded as being unduly low and considered to compromise the ability of the contractor to complete the project 'i.e. [when] it presents an unacceptable commercial risk to the employer or the tenderer has insufficient capital to perform the contract'.

[64] Informed Practice Note #5 provides that in such circumstances –

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<sup>11</sup> *Wadele v City of Cape Town* 2008 (6) SA 129 (CC) at para [60].

<sup>12</sup> See Penfold, G. and Hoexter, C. *The treatment of facts in administrative-law review* (2024) SALJ 14(3), 496-525. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para [103].

‘A professional estimate or the average price tendered may be used as an indicator (benchmark or market price) of this, but not as an absolute criterion by which a tender may be overlooked. Any decision reached in this regard should be established on a case-by-case basis. ... Alternatively, the tenderer may have to be called upon to demonstrate his or her ability to complete the contract for the sum tendered in terms of clause C2.18.

Before rejecting a tender on the grounds that it is abnormally low, the employer should request in writing details of the constituent elements of the tender which it considers relevant, ...’

- [65] Fairness would have prevailed if Ndodana was called up to demonstrate its ability to complete the contract for the sum tendered before its tender was declared non-responsive, as this was effectively the reason proffered by SANRAL for declaring Ndodana’s bid non-responsive.
- [66] SANRAL, in addition, failed to indicate where in the tender documents it was set as a material requirement that rates quoted in each line item, had to stand by itself for payment of work done.
- [67] To summarise, Ndodana stated upfront that its prices were low, and justified the prices when the tender was submitted. There is no indication that SANRAL gave such justification any consideration. The same applies to the justification provided subsequent to SANRAL’s price justification letters. Although it is true that a tenderer cannot expect that discussion or consultations between itself and the employer continue indefinitely, and although it is equally correct that the employer is still entitled to its own opinion, which may differ from the tenderers after such engagements occur, adherence to the *audi et alteram* principle dictates that the record in review proceedings reflect that submissions by a tenderer were sufficiently considered.

- [68] The factual matrix of the tender, and in particular in light of Ndodana being the incumbent consultant and having been so for the past 25 years, fairness requires that the administrator or employer provides a factual basis for its conclusion that a tender does not comply with the conditions and scope requirements of the tender and for its view that the rates provided 'could not economically stand by themselves for the contract specification and scope deliverables in question.' SANRAL had to do a risk assessment before it could conclude that the amounts tendered by Ndodana were too low to sustain the contract for thirty-six months. This risk assessment had to be properly recorded and SANRAL's mere *ipse dixit* that a risk assessment was done, is insufficient.
- [69] On a reading of the papers the impression is formed that both SANRAL and Ingerop is of the view that Ndodana's past involvement and experience relating to the maintenance of the Gauteng Freeways should not be considered at all.
- [70] There is no rational basis for such a perception. Tenders should, among others, be cost-effective, and if a party who is doing good work adheres to ethical norms and indicates that it will not charge for executing functions it need not execute because of the scope of its current knowledge of the project, it cannot be regarded as predatory pricing or unhealthy competition. Public funds are utilised for funding SANRAL's projects. A cost-effective tender cannot be disregarded just because of a competitive edge obtained by an incumbent contractor whose tender meets the tender requirements.
- [71] Quinot explained that past experience and the profile of the supplier including factors such as the qualifications and experience of the personnel, management structures, capacity, and resources, might be equally relevant to a particular bidder's ability to perform under the contract (as qualification criteria) and the merit of that bidder's bid compared to other bids (as award criteria). He continues to state that the notion of responsiveness can be viewed as both distinct from and overlapping with that of qualification.<sup>13</sup>

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<sup>13</sup> Quinot, G. *The Role of Quality in the Adjudication of Public Tenders* (2014) 17(3) *PELJ* 1109-1136.

[72] To answer to a submission made by Ingerop, if an incumbent contractor meets the functionality and preference criteria and has a reputation of providing good services at low-cost effective prices, and is able to tender lower rates because it knows the business inside out, can save on certain aspects because it is already in the game and doing the work, and is ethical not to double-dip by claiming for expenses it need not incur because it is the incumbent contractor who incurred the costs concerned in the past, such a contractor's bid cannot without more be declared non-responsive. The facts in *JFE Sapela*, is in my view, distinguishable from the facts in this matter, and as stated above, SANRAL did not proffer as a reason for its decision to declare Ndodana's tenders non-responsive, that Ndodana failed to quote for entire sections of the work, or that it failed to submit comparable offers.

#### *Miscellaneous*

[73] Mr. Hlahla, the Regional Manager of the Northern region, deposed to SANRAL's answering affidavit. Although Mr. Hlahla explains that the averments which he deposed to fall in his personal knowledge and where matters on which he relies do not fall within his personal knowledge have been made available from the records in his control and were verified by officials within SANRAL. I find it problematic, however, that Mr. Hlahla does not explain his involvement in the affairs of the BEC. If one has regard to the two minutes of the BEC that were attached to the papers, Mr. Hlahla was not present at either of the meetings. His evidence relating to aspects not covered in the documentation that forms part of the rule 53 record thus constitutes hearsay.

[74] The only confirmatory affidavit that accompanied SANRAL's answering affidavit was the affidavit of Ms. N. Faku. The affidavit was primarily filed to answer Ndodana's allegations that SANRAL failed to inform them that the bids were awarded to Ingerop despite them specifically raising a query in this regard. Ms. Faku stated that she confirmed the process that was followed in the procurement process as set out by Mr. Hlahla.

[75] The court is uncertain of Ms. Faku's role in the whole process. She claims to be employed by SANRAL with the supply chain unit. From the minutes of the first BEC meeting it seems as if Ms. Faku was a voting member of the BEC. She did not state her position as being a member of the BEC, however. In any event, she did not attend the second BEC meeting where the impugned decision to declare Ntodana's bid non-responsive, was made. She also does not shed any light on any risk assessment that was undertaken, what the market-price yardstick was against which the tenders were measured, or how this yardstick was determined. One would expect Ms. Faku to explain how the BEC dealt with Ntodana's cover letter. She remained silent on those aspects. The one line in her affidavit confirming the contents of Mr. Hlahla's affidavit in so far as it deals with the process that was followed in the procurement process, is wholly insufficient to substantiate Mr. Hlahla's remarks. His answering affidavit contains for the biggest part hearsay that is wholly unsubstantiated and inadmissible. This is highly relevant and detrimental to SANRAL's case, as the hearsay, amongst others, encompass SANRAL's claim that Ntodana's justification letter was adequately considered and a proper risk assessment was done, while there is not a shred of evidence relating to such analyses or consideration on the record provided. This court regards with disapproval the evidence presented by SANRAL, as the best evidence would have been evidence from the mouths (or pens) of the members of the BEC, and preferably the chairperson of the BEC, which evidence should, at least, had to be supported by transcribed records of the virtual proceedings that took place.

[76] SANRAL is reminded that the Constitutional Court has clarified that the record includes deliberations of the decision-making body.<sup>14</sup> It consists of 'the documents, evidence, arguments and other information' before the administrator at the time and includes 'every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially.'<sup>15</sup> Reliance on *R v Dlumayo*<sup>16</sup> in justifying the absence of reasons is misplaced.

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<sup>14</sup> *Helen Suzman Foundation v Judicial Services Commission* 2018 (4) SA 1 (CC) at paras [22]-[27].

<sup>15</sup> *Johannesburg City Council v The Administrator, Transvaal (1)* 1970 (2) SA 89 (T) at 91G-H.

<sup>16</sup> 1948 (2) SA 677 (A) at 702.

[77] Ingerop gallantly attempted to shoulder SANRAL's responsibility to substantiate the impugned decisions, although Ingerop has a direct interest in these proceedings, Ingerop cannot testify to the BEC's frame of mind when the impugned decisions were taken.

### **Appropriate relief**

[78] In addition to having the impugned decisions set aside and reviewed, Ndodana seeks this court to declare its bids responsive, and to remit the decision on who should be awarded the tenders to SANRAL. Ndodana wants the BEC to reconsider its bids on the one hand and Ingerop's bids on the other.

[79] SANRAL wants all three tenders to be scrapped, and for the whole process to start afresh.

[80] The tender was advertised for the work to commence on 1 December 2023 for a period of 36 months. Due to the protracted review proceedings, Ndonana's existing contracts were sporadically extended to ensure that the Gauteng Freeways were maintained. The contracts were not awarded, and the three-year period has thus not yet commenced. Due to the effluxion of time and the variables that affect the real value of money, it is just for the whole tender process to commence afresh. It might also be that SANRAL wants to extend its tender requirements to inform all potential bidders of the benchmark against which tender pricing will be evaluated to ensure that a competitive process ensues. The mere fact that Ingerop was the only tenderer whose tender was not found non-responsive in two of the tenders and one of two in the third tender, is indicative thereof that the system as a whole was not competitive.

[81] The three tenders thus stand to be set aside and remitted to SANRAL to start the tender process afresh.

[82] As for the interim, the principle of the separation of powers prevents this court from stepping into SANRAL's shoes to decide the way forward and to conclude

contracts for SANRAL for the interim. SANRAL is to engage in fair administrative decision-making in dealing with the practical effect of the tenders being remitted.

### **Costs**

[83] This review could have been concluded a long time ago if SANRAL diligently provided the record of the proceedings. SANRAL, however, throughout the review proceedings, failed to adhere to timelines prescribed in the Uniform Rules of Court, court orders, directives issued by the court, or agreed among the parties.

[84] SANRAL's lackadaisical approach to the litigation extended the duration of the review proceedings and was a hurdle in the way of an expeditious review. It put its opponents under immense pressure. As a token of the court's dissatisfaction with the manner in which SANRAL conducted itself, a punitive costs order stands to be granted.

### **ORDER**

#### **In the result, the following order is granted:**

1. The first respondent's decisions to declare first to third applicants' tenders for the following contracts:
  - a. SANRAL X.002-160-2023/IF (Toll) and X.002-161-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route N4 Section 1, N4 Section 11 & 12, N4 Section 21, R21 Section 2, R104 Sections 1 & 2 and R 573 (Tshwane Freeway RRM);
  - b. SANRAL X.002-162-2023/1F (Toll) and X.017-010-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route N1 Section 19, N1 section 20, N1 Section 21, N3 Section 2, N12 Section 18 and N17 Section 1(Johannesburg Freeway RRM);
  - c. SANRAL X.002-163-2023/IF (Toll) and X.003-161-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of

National Route R 21 section 1& 2, N 12 Sections 18 & 19, N3 Sections 11 & 12 and N17 Section 2 (Ekurhuleni Freeway RRM);

non-responsive are reviewed and set aside;

**2. The first respondent's decisions to award the tenders for the following contracts:**

- a. SANRAL X.002-160-2023/IF (Toll) and X.002-161-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route N4 Section 1, N4 Section 11 & 12, N4 Section 21, R21 Section 2, R104 Sections 1 & 2 and R 573 (Tshwane Freeway RRM);
- b. SANRAL X.002-162-2023/1F (Toll) and X.017-010-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route N1 Section 19, N1 section 20, N1 Section 21, N3 Section 2, N12 Section 18 and N17 Section 1(Johannesburg Freeway RRM);
- c. SANRAL X.002-163-2023/IF (Toll) and X.003-161-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route R 21 section 1& 2, N 12 Sections 18 & 19, N3 Sections 11 & 12 and N17 Section 2 (Ekurhuleni Freeway RRM);

to the second to fourth respondents are reviewed and set aside.

**3. The tenders for the contracts:**

- i. SANRAL X.002-160-2023/IF (Toll) and X.002-161-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route N4 Section 1, N4 Section 11 & 12, N4 Section 21, R21 Section 2, R104 Sections 1 & 2 and R 573 (Tshwane Freeway RRM);
- ii. SANRAL X.002-162-2023/1F (Toll) and X.017-010-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of

National Route N1 Section 19, N1 section 20, N1 Section 21, N3 Section 2, N12 Section 18 and N17 Section 1(Johannesburg Freeway RRM);

- iii. SANRAL X.002-163-2023/IF (Toll) and X.003-161-2023/1F (Non-Toll) for Consulting Engineering Services for the Routine Road Maintenance of National Route R 21 section 1& 2, N 12 Sections 18 & 19, N3 Sections 11 & 12 and N17 Section 2 (Ekurhuleni Freeway RRM);

are remitted back to the first respondent to start the tender process afresh.

4. The costs of the first to third applicants and the second to fourth respondents are to be paid by the first respondent on attorney and client scale, such costs to include the costs of two counsel where so employed.

E van der Schyff  
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

|                                       |                             |
|---------------------------------------|-----------------------------|
| For the first to third applicants:    | Adv. K. Hopkins SC          |
| Instructed by:                        | Fairbridges Wertheim Becker |
| For the first respondent:             | Adv. D. Mtsweni             |
| Instructed by:                        | MB Tshabangu Incorporated   |
| For the second to fourth respondents: | Adv. N. Schnellenburg SC    |
| With:                                 | Adv. J.J. Buys              |
| Instructed by:                        | York Attorneys Incorporated |
| Date of the hearing:                  | 18 February 2025            |
| Date of judgment:                     | 27 February 2025            |