



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

CASE NO: 041563/2024

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

2025/04/11 [Signature]

In the matter between:

DATACENTRIX (PTY) LTD

APPLICANT

and

SOUTH AFRICAN NATIONAL PARKS

FIRST RESPONDENT

GIJIMA HOLDINGS (PTY) LTD

SECOND RESPONDENT

REIKEMETSE PROJECTS CC

THIRD RESPONDENT

WIRE SPEED SYSTEMS (PTY) LTD

FOURTH RESPONDENT

NEC XON SYSTEMS (PTY) LTD

FIFTH RESPONDENT

TYR LIL BYTES – THEMOJOLO JV

SIXTH RESPONDENT

JUDGMENT

MOTHA, J:*Introduction*

- (1) Before this court is a titanic battle for the South African National Parks (SANParks) tender, worth just about one billion rand. Blissfully unaware of this existential threat are the lions, leopards, elephants, rhinoceros and cheetahs, to name but a few affected animals. I am convinced that if these animals had a say in the matter, no one would be before this court.
- (2) On 18 September 2024, a judgment ("the first judgment") was handed down dismissing the applicant's application for condonation concerning prayer 2 of the notice of motion, which prayer sought to review and set aside the request for bids relating to the tender GNP 005-23 for the appointment of a service provider for the outsourcing of information and communication technology services, a single services service aggregator including network services construction for 10 years. Amongst a plethora of grounds for review that the applicant raised is the question of the effect of the first judgment on prayer 3 of the notice of motion, which prayer sought to review and set aside the decision to award the second respondent the tender.
- (3) The main *dramatis personae* are the applicant, first and second respondents. Unless stated otherwise, the respondents refer to the first and second respondents.
- The parties are:*
- (4) The applicant is Datacentrix (Pty) Ltd, a company with limited liability incorporated and registered in accordance with the company laws of the Republic of South Africa.

- (5) The first respondent is The South African National Parks, a public entity established in terms of the repealed National Parks Act 57 of 1976 and continues to exist in terms of section 54 of the National Environmental Management Protection Areas Act 57 of 2003.
- (6) The second respondent is Gijima Holdings (Pty) Ltd, a company with limited liability incorporated and registered in accordance with the company laws of the Republic of South Africa.
- (7) The third respondent is Reikemetse Projects CC, a close corporation registered in accordance with the laws of the Republic of South Africa.
- (8) The fourth respondent is Wire Speed Systems (Pty) Ltd, a company with limited liability incorporated and registered in accordance with the laws of the Republic of South Africa.
- (9) The fifth respondent is NEC XON Systems (Pty) Ltd, a company with limited liability incorporated and registered in accordance with the laws of the Republic of South Africa.
- (10) The sixth respondent is Try Lil Bytes- Themolo JV, a joint venture between Try LIL Bytes (Pty) Ltd, a company with limited liability incorporated and registered in accordance with the laws of the Republic of South Africa; and Themolo Telecoms (Pty) Ltd, a company with limited liability incorporated and registered in accordance with the laws of the Republic of South Africa.
- (11) The seventh respondent is Business Connexion (Pty) Ltd, a company with limited liability incorporated and registered in accordance with the laws of the Republic of South Africa.

The factual background

(12) This matter emanates from the tender number GNP-005-23 for the outsourcing of SANParks Information and Communication Technology (ITC) services, including its network services, telephony services, Internet, cloud and cyber security services, and the underlying infrastructure that is integral to its business operations, which involves conservation efforts tourism business and its ability to provide a secure environment for people and animals within the twenty-two (22) national parks under SANParks' management and control.

(13) The tender, which was advertised on 4 September 2023 with a closing date of 31 October 2023, is governed by the Constitution and subsidiary legislations which, in the main, are:

- The Constitution of the Republic of South Africa, in particular s 217, which reads:

“Procurement

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

- The Public Finance Management Act (PFMA) and the Treasury Regulations published in GN R225 in GG 27388 of 15 March 2005, as amended, and Treasury Instruction Notes published by National Treasury in terms of section 76 of the PFMA;
- The Preferential Procurement Policy Framework Act 5 of 2000 and the Preferential Procurement Regulation published in GN 2721 in GG 47452 of 4 November 2022

- SANParks' Supply Chain Management Policy.¹

(14) The terms of the Request for Bids (RFB) relevant to the tender evaluation process were the following:

Part A- Invitation to bid required all bidders to deliver their bid response document in the box at 64 Leyds Street, Muckleneuk, Pretoria by 31 October 2023.

Part- B Terms and Conditions of Bid included the following instructions to bidders: "Bids must be delivered by the stipulated time to the correct address, late bids will not be accepted for consideration..."

(15) The bid evaluation process contained three phases, namely:

- Phase 1 - Mandatory evaluation phase
- Phase 2 -Technical/functionality evaluation phase
- phase 3 - Price and preference evaluation phase.²

(16) It is of paramount importance to note that the RFB uses categorical words when stating the following: "To move to the next phase of evaluation, the previous phase of evaluation must have been fully complied with. No leniency for non-submitted documents/ proof or late submission will be allowed. If your response is incomplete the bid will be disqualified and will not progress to the next phase."

(17) The RFB recorded that the Bid Evaluation Committee (BEC) would make that recommendation to the Bid Adjudication Committee (BAC) for recommendation of the award to the Board of SANParks for the final approval, and the eventual signing of the Service Level Agreement.

¹ Founding affidavit para14

² Supplementary affidavit 51

(18) The were seven bidders, namely: Reikemetse Projects CC, Datacentrix (Pty)Ltd, Wire Speed System (Pty) Ltd, Gijima Holdings (Pty)Ltd, NEC XON Systems (Pty) Ltd, Try Lil Bytes-Themolo JV and Business Connexion (Pty) Ltd. On 13 February 2024, the tender was awarded to Gijima Holdings (Pty) Ltd, the second respondent.³

(19) I pause to mention that the applicant was the incumbent following its successful bid in the previous tender GNP-008-18, in February 2019. In terms of that tender, the applicant was appointed to take over the operation and management of SANParks' ICT for five years. On 7 March 2024, at a meeting with SANParks, the applicant was informed that Gijima was the successful bidder. Following several correspondences with the first respondent and a PAIA request, the applicant instituted a review application, on 17 April 2024.

Issues

(20) In prayers 2 and 3 of the notice of motion, the applicant sought to review and set aside the first respondent's request for bids relating to the tender GNP 005-23 and its decision to award the tender GNP-005-23 to the second respondent.

(21) Pursuant to the Rule 53 application, the applicant and Gijima's legal teams were provided with a confidential record of some 7300 pages, on 11 June 2024⁴. The applicant amended its notice of motion by including prayer 6, which prayed for the tender GNP-005-23 to be awarded to the applicant alternatively that the applicant be directed to continue to render the services at the applicant's usual rates for a period of 24 months, pending the outcome of a new tender process; and prayer 7, which stated that in the event that the first respondent was directed to commence with a new tender process, the second

³ Supra para 85

⁴ Supplementary affidavit para 36

respondent should be disqualified from participating in that process. Accompanying the amended notice of motion was a supplementary affidavit.

(22) On 5 August 2024, the applicant amended its notice of motion for the second time, and this time without any affidavit accompanying it. When the matter appeared before the court on 26 August 2024, the respondents raised, as a point *in limine*, that the applicant had not complied with s 7(1) of the Promotion of Administrative of Justice Act 3 of 2000 (PAJA).

(23) However, this point, as stated in the first judgment under paragraph 35,⁵ was not dispositive of the entire case because the attack on prayer 3 was made well within 180 days. Therefore, it was the attack on the request for bids (RFB) that was outside the 180 days, as contemplated in s 7 of PAJA, i.e. prayer 2.

(24) To me, it would have been cost-efficient, timesaving and avoided the possibility of conflicting judgments had one court dealt with this entire matter. Be that as it may, it is fascinating, and perhaps revealing, that the applicant submitted that: "the question of condonation in relation to the first leg of the review, if necessary, would be addressed during the argument. The reason argued by the Applicant was because the point in *limine* concerning condonation was bound up with the merits. When the court considers the condonation application it would be bound up with the facts and how meritorious or lacking in merit the application was. Therefore, condonation would be addressed as part and parcel of the debate on the merits."⁶

(25) The applicant's submission "prompted an urgent objection from the Respondents who raised a point in *limine* and argued against such presentation

⁵ "Dismissing the review in its entirety in my view will be flawed regard being had to the date when the Applicant received the decision that the Second Respondent was awarded the tender GNP-005-23 which was on the 7th March 2024. Subsequent to that the review was filed around the 17th of April 2024. The review regarding the decision to appoint the Second Respondent was brought well within the 180 days period as prescribed by the PAJA. It would therefore be improbable to dismiss the entire review."

⁶ Judgment para 5.

regard being had to condonation.”⁷ Furthermore, the court in the first judgment said: “This was supported with an SCA decision which clearly delineates that condonation issues need to be decided outright before the court can decide on the merits of the issues that are before it.”⁸

- (26) It is trite that in reviews, whether under s1(c) of the Constitution or PAJA, merits play a role in deciding the issue of condonation, as stated in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited*,⁹ where the constitutional court said:

“It also relied on *Opposition to Urban Tolling Alliance* where it was decided that a court is compelled to deal with the question of condonation before examining the merits of the review application, because, in the absence of an extension, the Court had no authority to entertain the review application. It was on this basis that the Supreme Court of Appeal concluded that “[i]t was thus impermissible for the [High Court] to have entered into and decided the merits of the review application without having first decided the merits of the condonation application”. This conclusion is not in accordance with the jurisprudence of this Court.”¹⁰

- (27) Accordingly, the applicant was correct when it argued that: “In this regard the Applicant’s view was it can argue condonation bound up with the merits as part of good *cause* is to show strong merits which it believed it has.”¹¹

- (28) Before this court the roles have reversed. The applicant submitted that the first judgment did not dispose of the merits of the case, while the respondents submitted that it dealt with the merits of the RFB. When the parties

⁷ Supra para 6.

⁸ *ibid*

⁹ (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (16 April 2019)

¹⁰ Supra para 55

¹¹ Judgment para 7.

outlined the issues for determination before this court, their joint practice notes magnified this reversal of submissions. The joint practice notes read:

"What is the effect of the judgment of Nharmuravate AJ on the main review application? Datacentrix contends that all of its grounds of review survived the judgment of Nharmuravate AJ, that all the grounds of review are relevant to the relief sought in paragraph 3 of the amended notice of motion, and therefore persists with all its grounds of review.

SANParks contends that Datacentrix is only entitled to pursue the limited grounds of review in its supplementary founding affidavit pertaining to alleged flaws in Gijima's bid, and Datacentrix cannot seek to relitigate or revive its remaining grounds of review concerning alleged process irregularities. Gijima contends that Nharmuravate AJ's judgment does not detract from its submission that Datacentrix is precluded from pursuing prayers 3 and 4 of its amended notice of motion to the extent that the relief sought in those prayers is based on Datacentrix's review grounds attacking the process followed by SANParks in assessing the tender submissions.

Whether the bid specifications in the RFB understood within the context of the information communicated at the bid clarification meeting and the steps taken by SANParks after the publication of the RFB to update and/or clarify the bid specifications, resulted in vagueness and uncertainty to an extent which rendered the tender unlawful and unconstitutional? Both SANParks and Gijima contend that Datacentrix is precluded from persisting with its attacks on the bid specifications and the process-related attacks. Datacentrix disputes this."

- (29) Stripped of its fancy legalities, the applicant wants this court to second-guess and render the first judgment inconsequential. The respondents want to elevate the first judgment's reach to cover all the grounds of review against the RFB. It bears mentioning that this is not a court of appeal. Certainly, this is the consequence of dealing with a matter in piecemeal. Before venturing a pronouncement on that question, if at all necessary, first, this court will examine what it is called to deal with, viz: the grounds of review raised under prayer 3.

It is common cause that the first judgment did not deal with prayer 3, which is, in the main, founded on two grounds, which are sketched out in the joint practice note:

“Whether the fact that Gijima did not submit audited annual financial statements for three years was contrary to a mandatory condition of tender as a result of which Gijima ought to have been disqualified from the tender evaluation process. This is a review ground in which SANParks and Gijima dispute Datacentrix's entitlement to raise further and new issues and review grounds in the confidential replying affidavit of Lowndes. Datacentrix contends that it raised this ground of review in the supplementary founding affidavit, as it was entitled to do.

Whether Gijima's failure to submit a certificate from the Linux Professional Institute (“LPI”) was contrary to a mandatory condition of tender as a result of which Gijima ought to have been disqualified from the tender evaluation process.”

- (30) Indeed, the applicant first raised these issues in the supplementary affidavit, as summarized under subparagraphs 15.1 and 15.3. Following the receipt of the record, from the first respondent, in compliance with Rule 53 of the Uniform Rules of Court, the applicant amended its notice of motion. Referring to Rule 53, the court in *Helen Suzman Foundation v Judicial Service Commission*¹² held:

“The purpose of rule 53 is to “facilitate and regulate applications for review”. The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to

¹² *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) (24 April 2018)

assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.

Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:

"Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed."¹³

(31) Therefore, the applicant was well within its rights to raise the issues in its supplementary affidavit. To recap, the two grounds are captured as follows:

- "Gijima failed to submit annual financial statements for the June 2022 financial year and only submitted audited financial statements for the two preceding financial years (June 2021 and June 2020). Gijima ought therefore to have been disqualified from the tender evaluation process for failure to satisfy the minimum mandatory conditions of tender. Four other bidders were disqualified for failing to submit audited or independently reviewed annual financial statements for three financial years."
- "Gijima failed to include in its bid and member of staff that possessed a certificate from Linux Professional Institute. Gijima therefore failed to satisfy a minimum mandatory condition of tender and ought to have been disqualified from the tender evaluation process."

Discussion

¹³ Supra paras 13 and 14.

The financial statements

- (32) The aforementioned phase 1 is mandatory and the RFB reads:

Evaluation phases

Phase 1: Mandatory evaluation criteria

It is essential for all Bidders to note that the process of evaluation will be done in phases. In this phase potential Bidders will be evaluated to ensure that they comply with the mandatory criteria.

Failure to comply with Mandatory Requirements will lead to the bidder being disqualified, and not considered for further evaluation. Only Bidders who can provide acceptable documentary proof that complies with the following mandatory criteria will be considered for the next phase of evaluation.

Please specifically cover these topics in the bid summary of your response including relevant proof or cross references to where the proof has been included and completing the table in **Annexure P**.

The potential Bidder must:

- (1) Be a South African licensed (ECS as well as ECNS) network services provider that includes the build of networks as well as provisioning services on such networks. - Copies of both licences must be provided by the bidder.
- (2) Provide a copy the latest (Independently reviewed (or audited, where possible) Annual Financial Statements/ Annual Report/ for each entity that forms a part of the bid. The Annual report and the independently reviewed (or audited, where possible) Annual Financial Statements must be for the recent three years.- Copy of the Independently reviewed Annual Financial Statements are as per the Companies Act 71 of 2008.
- (3) Have staff that have the following minimum valid certifications in support of the bid:
 - ITIL v3/v4 Practitioner,
 - CoBIT 5@ or later certification
 - TOGAF 9 or later certification,
 - CCIE Routing and Switching- or Equivalent Certification,
 - CCSP in Network Security or Equivalent Certification

- (33) Of particular importance is that the potential bidder had to provide a copy of the latest (independently reviewed or audited, where possible) Annual Financial Statements/ Annual Report/ for each entity that forms a part of the bid, which must be for the recent three years. The point is abundantly made that the bidder will only progress to phase 2 if all the mandatory criteria have been met.

- (34) Under reasons for disqualification, SANParks reserved the right to disqualify any bidders who do not comply with one or more of the following bid requirements, *inter alia*, namely:

"Bidder whose tax matters are not in order (Instruction Note 09 of 2017/ 2018 Tax Compliance Status will apply).

submitted incomplete information and documentation according to the requirements of this RFB document..."

- (35) Another important aspect is that the RFB stated that the copy of the Independently reviewed Annual Financial Statements is as per the Companies Act 71 of 2008. In this regard s 30 (1) of the Companies Act is implicated, and reads:

"Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61 (7)"

- (36) The Annexure P Checklist has four columns, namely: NO, Mandatory Requirement, Proof required and Attached (Yes/No). It is No 3 that should pique our interest, and it reads:

"Latest Audited Annual Financial Statements or Independently reviewed Financial Report for each entity that forms part of the bid response"

- (37) Moving on to phase 2, Under Commercial and Financial soundness, the RFB deals with Technical/ Functional evaluation criteria, and refers to the following:

Commercial and Financial soundness The Financial status and financial trends of the business of the Bidder (Legal Entity bidding) must be provided. Please populate the table on Annexure O supplemented by a copy of the most recent) INDEPENDENTLY REVIEWED OR AUDITED, WHERE POSSIBLE Annual Financial Statements or Annual Report (recent three years)	10	5	5 = All key financial ratios indicate a healthy organization, operating with a positive cash flow, annual turnover is more than R500 million, Assets exceed Liabilities, Letter of good standing from the bank, Letter from SARS indicating that all Tax affairs are in order 4 = As above but annual turnover is less than R500 million but more than R300 million 3 = As above but annual turnover is less than R300 million OR some (max 1) key measures are not satisfactory 2 = As above but annual turnover is less than R300 million OR some (max 2) key measures are not satisfactory
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- (38) Once more the recent three years Independently Reviewed or Audited, where possible Annual Financial Statements or Annual Report is required. Annexure O, which is a Financial Summary, provides that:

“Please duplicate and provide this information not only for the Aggregator, but also for any major partner (value of services included represents more than 30% of the total commercial value of the bid) whose services are included in the Proposal.

Note that first column represents the most recent available reviewed or audited results were possible. The other columns refer to the two years preceding the most recent financial year. The information provided to be supported by the most recent audited financial statements of the entity(ies).”

Submissions by counsel for SANParks

- (39) Counsel for SANParks submitted that when the RFB talked of “Latest” annual financial statements, it referred to the latest one an entity had. Buttressing his point, he submitted that the court’s interpretation of “Latest” to mean the most recent would disqualify any party whose financial statements had not yet been audited for the most recent financial year. He continued that

the whole purpose was to assess the financial viability of the entity. When the court suggested that the latest financial statement would have been for the year 2022 since Gijima's financial year ended in June. He submitted that the fact that an entity's latest AFS was three or five years old went to the argument of rationality, which was not pleaded. Therefore, the submission went, "Latest" in Annexure P meant the last an entity had, and the applicant's case was not based on rationality, but on the checklist.

(40) When he referred to the Commercial and Financial soundness, mentioned *supra*, the court pointed out that the most recent annual financial statements or annual Report was required, and that dovetailed with the meaning of "Latest" in Annexure P. He submitted that Gijima submitted two audited annual financial statements, and for the purpose of assessing the financial soundness and trends that went to rationality, which was not the case before the court.

(41) When he referred to s 30 of the Companies Act, the court pointed out that the Act mentions that an entity must prepare its AFS within six (6) months of the end of its financial year. He submitted that the Companies Act was not for assessing financial evaluation.

(42) To prove that the most recent AFS could be three years old, he pointed to the column in the FRB that deals with Identity and Financial Integrity, which reads:

"

- ✓ Financial information for each entity forming part of the Bid must be provided on Annexure O
- ✓ Audited Annual Financial Statements for the most recent year that has been finalized and audited."

(43) He continued and argued that it does not say for the most recent financial year, and that would have been easy wording to write in there. He stated that if we assume that the most recently finalized and audited AFS dated back five

years, then the problem was with the bid documentation. Then the applicants should have attacked the bid and this was not done. He insisted that it was a phase 1 case. Phase 2 was a rationality case.

- (44) The court drew his attention to the answering affidavit of the second respondent, which reads:

"There is some ambiguity about the need to provide audited AFS for three years. As shown above, in Annexure P there is no such requirement. However, in listing the mandatory requirements, the RFB refers to the need to provide AFS for three years. This must be read with Annexure O, which requires financial information of the most recent three years to be supplied."¹⁴

- (45) Having stated that he stood by his arguments, he submitted that he agreed with the court and added that it was a matter of interpretation. He added that at the end of the day, the court would make the final decision. He submitted that that is what they say, and he was not going to run away from it.

- (46) Following that engagement, the court referred him to the amended Pricing Schedule sent by email on 29 September 2023 by SANParks, which stated:

"Mandatory Requirements - "Annual Financial Statements/Report not older than 6 months for each entity that forms part of the bid response"

Proof Required - Audited Annual Financial Statements / Annual Report".

- (47) He submitted that it was a matter of interpretation. When the court suggested to him that the document took the issue out of the realm of speculation, as it categorically stated not older than six months and it came

¹⁴ Second respondent's Answering affidavit

from his client, he conceded that the document was absolute, and he was stuck with it and could not go behind it.

Submissions of counsel for Gijima

(48) He submitted that the application should be dismissed on the take-a-chance principle. Referring to the fact that the applicant did not ask for a substitution relief in the first notice of motion, he maintained that the applicant made two amendments to its notice of motion. On the take-a-chance principle, he argued its application had to be dismissed. He submitted that the applicant's case was at war with itself. They could not attack the RFB as being bad, and at the same time ask to be awarded the tender, he submitted. However, this was no longer a topical issue, as the applicant abandoned the substitution relief at the last hearing.

(49) He further submitted that they have waived their rights to attack the RFB since they participated in the process. They could have stopped the process, the argument went. Expanding on the take a chance, he *cited the matter of SMEC South Africa (Pty) Ltd v City of Cape Town and Others; SMEC South Africa (Pty) Ltd v City of Cape Town and Others*¹⁵ where the court made the following remarks:

"In principle, it seems undesirable that a bidder should be at liberty to "take a chance" in the hope that it will be awarded the tender, keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid. However, in view of the conclusion I have reached on other aspects, I need not finally decide this point."

(50) The court enquired why the take-a-chance debate was not presented to the first court, he submitted that the court elected not to consider it.

¹⁵ (8277/2021;14097/2021) [2022] ZAWCHC 131 (23 June 2022)

(51) Focusing on the AFS, he submitted that what a party (Gijima) says or thinks the contract means is in law inadmissible because it is an opinion in respect of a legal opinion that the court is required to decide. Qualifying his submission, he stated that in a contractual context where there is a dispute or ambiguity, the court would be entitled to look at how the parties interpreted the contract. There must be some common understanding and conduct by both parties. When the court pointed out that it said exactly that, he argued that before the court was not a contract. At the highest, he said, this was an offer by SANParks to the public to put in a bid. Therefore, in that sense, it might be analogous to two parties' offer and acceptance type of a situation, he continued.

(52) He submitted that SANParks did not disqualify Gijima on the basis that its 2022 AFS was not audited. Therefore, SANParks understood Gijima to have complied with the mandatory requirements. Taking the court through the second respondent's answering affidavit, counsel submitted that when dealing with the mandatory requirements, Annexure P was a decisive list, but not to say it must be cut out and read in isolation. To interpret it, one looked at aids in the column, he submitted. Continuing, he referred to para 100.2 which said:

"Annexure P required bidders to supply their most recent audited AFS. The closing date of the RFP was 31 October 2023. Some entities would already have been in possession of audited AFS for 2023, and in the case of others, such as Datacentrix, the 2022 audited AFS was the most recent. In the case of Gijima the most recent audited AFS was from June 2021. Therefore, in compliance with the checklist in Annexure P, Gijima provided the June 2021 AFS."

(53) In response to the court's quest for clarity regarding subparagraph 100.3, he submitted that he differed with the deponent of his case and stated that what the deponent thought was not admissible. Discussing the issue further with the court, he submitted that this was a legal question, an error in law, and if, to quote him: "I make a wrong legal submission my client is not bound by it."

However, the reality is that the deponent was not giving his thoughts but stating the facts as they stood in the RFB.

(54) Reiterating that phase 1, mentioned *supra*, is mandatory, he referred to s30 of the Companies Act and explained that the AFS is in the plural because it contains a statement of assets and liabilities, income and expenditure statements. In essence, his point was that only one audited AFS was required. Therefore, the RFB must be interpreted to mean that an audited AFS must be drawn from the last three years, and it could not be older than three years, the argument went.

(55) Focusing on functionality, he correctly pointed out that it was not mandatory. He argued that the recent three years were a summarized version of paragraph 2 under mandatory requirements. He insisted that one AFS was needed out of the last three years, and only the table under Annexure O was populated with three years.

(56) Addressing the mail sent by Connie Kgoale, on 29 September 2023, amending the Pricing Schedule which requires Annual Financial Statements/ Report not older than 6 months for each entity that forms part of the bid, he submitted that the second respondent agreed with the applicant that this was not a valid amendment. Furthermore, he argued that SANParks did not adjudicate the bid based on that information.

(57) Pursuant to a discussion with the court, he submitted that the six-month reading would have disqualified everyone since Gijima's, and the applicant's financial years ended on 30 June. Besides, he maintained that the attached document was Annexure O, not Annexure P.

Applicant counsel

- (58) He submitted that the first judgment did not pronounce on the grounds of review in the bid document, nor found that there was something in the bid document that was relevant to the irregularities in the tender processes that followed the ultimate decision to award the second respondent. The grounds of review were neither debated nor decided, and more importantly the merits were not the basis for the first judgment, he argued.
- (59) He submitted that there were two administrative actions: first, prayer 2 was impugning the decision to put out the RFB, and second, the decision to award the tender to the second respondent, which is before this court, prayer 3, the submission went.
- (60) A large amount of time was spent on the grounds attacking the RFB, such as the incorrect information about wide area network (WAN), including the amendment of the tender and the question of ripeness. He submitted that after 31 October 2023, SANParks could not amend or correct any terms of the tender, and by doing so it detracted from the constitutional values of equal treatment and fairness.
- (61) Focusing on their supplementary affidavit, he submitted that Annexure P was clear that “Latest” must be the one required by law. Gijima failed to provide the latest whether audited or independently reviewed AFS, he argued. The RFB was very clear in what it required and the submission that one year of AFS was good enough was not sound.
- (62) Referring to the matter of Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others,¹⁶ he submitted that there are certain minimum requirements for a valid tender process. The decision to award must follow a valid tender process. Pointing out the various

¹⁶ (31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) (29 November 2007) para 4

missteps, such as the mistake in the formula and the purported amendment of Annexure P, he submitted that there was no valid tender process if a holistic view was taken.

- (63) Dealing with the take-a-chance principle and that the applicant should have brought the application sooner, he maintained that it would have been premature for them to act before a decision to award the tender. He cited the matter of *Rhino Oil and Gas Exploration SA (Pty) Limited v Normandien Farms (Pty) Limited and Another*,¹⁷ in which the court said:

“As a general rule, a challenge to the validity of an exercise of public power that is not final in effect is premature. An application to review the action will not be ripe, and cannot succeed on that account. Hoexter explains the concept thus:

‘The idea behind the requirement of ripeness is that a complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the courts’ time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made.’”

- (64) In conclusion, he submitted that Gijima has failed to comply with Annexure P Checklist. Accordingly the court should review the decision to award Gijima the tender.

The law

- (65) Outlining the legal structure of a tender, the constitutional court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*¹⁸ held:

“(c) *Procurement framework legality*

¹⁷ (100/2018) [2019] ZASCA 88; 2019 (6) SA 400 (SCA) (31 May 2019)

¹⁸ (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013)

In *Steenkamp*, Moseneke DCJ stated:

"Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1)."

In *Millennium Waste* the Supreme Court of Appeal (per Jafta JA) elaborated: "The Constitution lays down minimum requirements for a valid tender process and contracts entered into following an award of tender to a successful tenderer (section 217). 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 that the provisions of [PAJA] apply to the process."

The starting point for an evaluation of the proper approach to an assessment of the constitutional validity of outcomes under the state procurement process is thus section 217 of the Constitution:

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

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

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

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

The national legislation prescribing the framework within which procurement policy must be implemented is the Preferential Procurement Policy Framework Act (Procurement Act). The Public Finance Management Act is also relevant.

An “acceptable tender” under the Procurement Act is any “tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document”. The Preferential Procurement Regulations (Procurement Regulations) define a tender as “a written offer in a prescribed or stipulated form in response to an invitation by an organ of state for the provision of services, works or goods, through price quotations, advertised competitive tendering processes or proposals”¹⁹ (Footnotes omitted).

Analysis

(66) When it comes to the AFS, the bone of contention seems to be the interpretation of the word “Latest” found in Annexure P and whether one or three AFS were required in terms of Mandatory evaluation criteria. It is trite that the courts’ tools of trade in interpretation are the triad of text, context and purpose, as mentioned in several cases including the *locus classicus Natal Joint Municipal Pension Fund v Endumeni Municipality*.²⁰ Furthermore, it is trite that interpretation remains “a matter of law and not of fact, and accordingly interpretation is a matter for the court not for witnesses”²¹

(67) In my view, “Latest” is self-explanatory, it means the most recent date, newest, fresh, present-day, or up-to-date AFS. The purpose is beyond question,

¹⁹ Supra 30 to 34

²⁰ (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) para18

²¹ KPMG Chartered Accountants (SA) v Securefin Ltd 2009 (4) SA399 (SCA) at para 39

it is to assess the financial viability of an entity that would deal with twenty-two national parks. The Companies Act is the loadstar as to how one determines the issue of "Latest". It provides that "Each Year a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate..."

(68) The AFS must be for the recent three years, the RFB states that much under paragraph 2. Indeed, Annexure P does not mention three years, therefore, the respondents concluded that only a single audited AFS was required, I disagree. Annexure P, which is a checklist, cannot be viewed in isolation nor divorced from the entire RFB. When viewed *in toto*, including Annexure O, it is patent that three audited or independently reviewed AFS were required, otherwise, how would a trend be established? Both the respondents agreed that 2019 AFS would have been outside the recent three-year requirement yet refused to accept that recent meant the year 2022, at worst, or the year 2023, at best.

(69) To me, Gijima fell short of the checklist and ought not to have proceeded to phase 2. It would be an unnatural reading of the document to conclude that the RFB did not require three years Independently Reviewed or Audited, where possible, Annual Financial Statements or Annual Report. The words speak for themselves without any need for verbal gymnastics. It is insensible and most unbusinesslike to assess the financial soundness of any prospective service provider, bidding to assume the responsibility involving close to a billion rand and 22 national parks, by looking at a single Independently Reviewed or Audited, where possible, Annual Financial Statements or Annual Report, worst still, an old AFS, dating back to 2021. Gijima did not comply with the three years, did not comply with the audited or independently reviewed requirement and certainly did not comply with recent requirements.

(70) In *casu*, the *coup de grace* is that other bidders were disqualified by SANParks for the same infraction. At paragraph 83 of SANParks answering affidavit, the following is recorded:

"The BEC report noted the following:

83.1 Seven bids were received, of which four were disqualified during the mandatory phase for failure to meet mandatory requirements"

- (71) When one examines the mandatory shortcomings of the four other bids which led to their disqualifications at phase 1 (mandatory phase), at paragraphs 68 of the answering affidavit the following is written:

"Reikemetse, Wirespeed, Try Lil Bytes and BCX were thus disqualified at the mandatory evaluation phase for failure to comply with mandatory requirements as follows [RoD 04-7463]:

68.1 Reikemetse failed to show that it was a South African licensed ECNS network provider, failed to provide three years audited all independently reviewed annual financial statements..

68.2 Wirespeed failed to show that it was a South African licensed EC NS network provider and failed to provide three years audited all independently reviewed annual financial statements;

Try Lil Bytes failed to show that it was is South African licensed EC NS network provider fail to provide three years audited or independently reviewed annual financial statements...

BCX failed to provide three years audited or independently reviewed annual financial statement and failed to provide valid certifications of its staff as required by the bid."

- (72) The common denominator in all these disqualifications was the entities' failure to comply with the requirement of three years audited or independently reviewed annual financial statements. What is good for the goose is good for the gander. How is it that Gijima was held to a different standard? This is nothing short of disgraceful conduct. The fact that SANParks came to court and insisted that only one audited AFS was required stinks to high heavens. This conduct is totally at variance with the Constitutional precepts of fairness and equity.

- (73) Gijima's counsel made common cause with the applicant on the email from SANParks, dated 29 September 2023, purporting to amend the RFB and

the Pricing Schedule. Relying on and referring to subparagraph 15.6 of SANParks' supplementary affidavit, counsel for Gijima submitted that:

"The purported amendment of the RFB was done without authority to do so and without publishing an addendum to the RFB no less than ten days before bid closing on the e-Tender portal and in other media. In the circumstances, SANParks purported to amend the RFB without adhering to the mandatory provisions of National Treasury PFMA SCM Instruction 9 of 2022/2023. SANParks therefore failed to comply with the mandatory provisions of the Treasury Instruction Notice."

(74) SANParks amended the Pricing Schedule after the bid closing via an email from Ms Kgoale, on 7 November 2023. It allowed the bidders to amend their total Bid Price because of an error in the formula. The email said: "The formula is supposed to calculate price for ten (10) years, but it only allowed for five (5) years."²² Similarly to the above-mentioned purported amendment, SANParks did not adhere to the provisions of National Treasury PFMA SCM Instruction 9 of 2022/2023. This was worse in that it happened after the closing of the bid. I reject the submission that no one amended their prices, only the formula changed. The reality is that Gijima's original price of R439 100 977.72 (Vat inclusive) was amended to R980 037 813.77 (Vat inclusive).

(75) It would be a waste of judicial time to examine the Linux Professional Institute and other grounds, save for stating that the second respondent's submission on take a chance does not find application in this case.

PAJA

(76) The decision to award the tender to the second respondent was not in keeping with the dictates of the constitution, and it would not be far off the mark to characterize the tender process as being shambolic. Ultimately, this entire tender process was not in accordance with a tender process that is fair,

²² Founding affidavit para 85

equitable, transparent and competitive. Accordingly, the decision to award the tender GNP-005 to the second respondent is open to attack in terms of s 6(2)(b) of PAJA, in that SANParks failed to adhere to the mandatory and material conditions prescribed by the empowering legislation. Consequently, the decision is reviewed and set aside. In terms of s 8(1) of PAJA, I am of the view that it is just and equitable to remit the matter to SANParks for reconsideration with the following direction:

- The applicant is to continue to deliver the current services to SANParks for a period of twelve (12) months from the date of judgment on the same terms and conditions as set out in the agreement concluded in February 2019 pursuant to the award of bid number GNP-008-18 to the applicant *mutatis mutandis* ("submission").

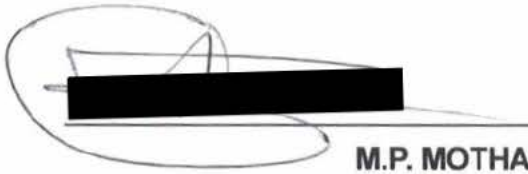
Costs

(77) It is trite that the issue of costs is within the purview of the court, and it is a norm that costs follow the result. I do not intend to veer off this well-trodden path. The first and second respondents are to pay the costs of the applicant, including the costs of two counsel.

Order

1. The first respondent's decision to award the tender GNP-005-23 to the second respondent, for the appointment of a service provider for the Outsourcing of Information and Communication Technology Services, a Single Service Aggregator including network services and infrastructure for a period of 10 years, is reviewed and set aside.
2. The applicant is directed to continue to deliver the current services to SANParks for a period of twelve (12) months from the date of judgment on the same terms and conditions as set out in the agreement concluded in February 2019 pursuant to the award of bid number GNP-008-18 to the applicant *mutatis mutandis*.

3. The first and second respondents are ordered to pay the costs of the applicant jointly and severally, the one paying the other to be absolved, including the cost of two counsel on scale C.



M.P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 3 - 7 February 2025

Date of judgment: 11 April 2025

APPEARANCES:

For the Applicant:

Adv A. Subel SC, Adv. T. Prinsloo, Adv. L. Peter and Adv. B. Mazibuko instructed by Lowndes Dlamini Inc.

For the First Respondent:

Adv A. E. Bham SC and Adv. L. Brighton instructed by Cliff Dekker Hofmeyer Inc.

For the Second Respondent:

Adv. N. D. G. Maritz SC and Adv. A. Friedman instructed by Nicqui Galaktiou Inc.