

**REPUBLIC OF SOUTH AFRICA**



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

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|-----|----------------------------------------|
| (1) | <b>NOT</b> REPORTABLE                  |
| (2) | <b>NOT</b> OF INTEREST TO OTHER JUDGES |

**CASE NO:** 2024-001253

**DATE:** 14 April 2025

In the matter between:

**THRU RAINBOW (PTY) LIMITED**

Applicant

and

**NATIONAL TREASURY**

First Respondent

**THE MINISTER OF FINANCE N O**

Second Respondent

**ERESA AFRICA (PTY) LTD**

Third Respondent

**ERESA (PTY) LTD**

Fourth Respondent

**JOHANNES FREDERIK**

Fifth Respondent

**JANSE VAN RENSBURG BRUMMER**

Sixth Respondent

**KIMBERLEY DANIELLE ANANTHAN**

Seventh Respondent

**TORINET (PTY) LTD**

**ERNESTIA BRUMMER**

Eighth Respondent

**RENIER OCKERT SMIT**

Ninth Respondent

**REINHARDT BODENSTEIN**

Tenth Respondent

**Neutral Citation:** *Thru Rainbow v National Treasury and Others* (2024-001253) [2025] ZAGPJHC --- (14 April 2025)

**Coram:** Adams J

**Heard:** 6 and 7 March 2025

**Delivered:** 14 April 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 14 April 2025.

**Summary:** Administrative law – review – review application based on the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – public tender – administrative action constituted by *inter alia* the award of a tender by a Public Body – the applicant was an unsuccessful bidder – it contended that the tender process and the award of the tender were invalid and unlawful –

An administrative organ or authority does not have the inherent power to condone non-compliance with a peremptory requirement – a tender which did not comply with a mandatory requirement was not an acceptable tender in terms of the Procurement Act – the administrative authority, not the court, decides what should be prerequisite for a valid tender – an award that contains minor deviations that do not materially alter or depart from the conditions of a tender, should not be invalidated – materiality of a tenderer's non-compliance with the compulsory tender requirements depends on the extent to which the purpose of the requirements is attained – *in casu* non-compliance by tenderer found not to relate to mandatory requirements –

Application dismissed.

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## ORDER

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- (1) The third and sixth respondents' interlocutory application dated 24 June 2024 to strike out certain portions and certain paragraphs of the applicant's founding affidavits, be and is hereby dismissed with costs.
- (2) The third and sixth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of the said interlocutory application, including the costs of two Counsel (where so employed) on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.
- (3) The applicant's judicial review application is dismissed with costs.
- (4) The applicant shall pay the first to tenth respondents' costs of this opposed application, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.

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## JUDGMENT

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### **Adams J:**

[1]. In this opposed application, which came before me as a Special Motion on 6 and 7 March 2025, the applicant ('Thru Rainbow') applies for an order reviewing and setting aside the award by the first respondent ('National Treasury') to the third respondent ('Eresa Africa') and the seventh respondent ('Torinet') of tender number TT4-2023, descriptively titled as a Bid for 'The Supply and Delivery of Emergency and Rescue Equipment to the State for a period of 60 months' ('the Tender'). Thru Rainbow also applies for an order

setting aside any agreement or agreements concluded between Eresa Africa, Torinet and National Treasury pursuant to the aforesaid award of the tender, as well as for an order that the tender be remitted to National Treasury for the recommencement of the tender process *de novo*, subject to the proviso that Eresa Africa and Torinet are precluded from participating in the *de novo* tender process.

[2]. By the time the bid closed on 25 January 2023, there were in total fifty bidders, including Thru Rainbow, Eresa Africa and Torinet. The decision to award the tender to Eresa Africa and Torinet was taken by National Treasury on 8 September 2023. I interpose here to mention that what were in fact awarded to Eresa Africa and Torinet were certain line items of the Tender. The Tender consisted of 251 items that were awarded to a total of 23 suppliers. Of the 251 items, Torinet and Eresa Africa were awarded only the tender relating to the supply of sixteen items – the same sixteen items being supplied by each one of them. These line items, as I understand it, relate specifically to vehicular emergency electric flashing response lighting, such as those fitted to South African Police Service and other official emergency vehicles like ambulances and fire trucks.

[3]. The remaining respondents are individuals and entities alleged to be related to Eresa Africa and Torinet. Thru Rainbow is aggrieved at not being awarded the bid or that portion of the bid awarded to Eresa Africa and Torinet, hence its application for the judicial review of the decision by National Treasury to award the tender to these two companies.

[4]. Thru Rainbow contends that National Treasury's decision to award the Tender to Eresa Africa and Torinet was invalid, should be reviewed and set aside in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') for the following reasons. First, Thru Rainbow contends that Torinet and Eresa Africa failed to comply with the mandatory requirements of the tender relating to essential parts of it, and thus, National Treasury acted irregularly in awarding the tender to those bidders, it having no discretion in the matter.

Second, it is the case of Thru Rainbow that Torinet and Eresa Africa have collaborated and colluded in preparing their applications, which were patent and should have been detected by National Treasury who ought to have ruled out those bidders on that basis.

[5]. Therefore, in issue in this judicial review application is whether valid grounds exist for the review and the setting aside of the decision by National Treasury to award the tender in favour of Eresa Africa and Torinet. And, if so, what just and equitable remedy should be granted.

[6]. The issues in this matter are to be decided with reference to the laws relating to public procurement and the notion that public procurement is not a mere showering of public largesse on commercial enterprises. It is the acquisition of goods and services for the benefit of the public.

[7]. The procurement of goods and services by the state and other public entities is subject to various legal constraints. Section 217(1) of the Constitution requires all organs of state, when they contract for goods or services, to do so 'in accordance with a system which is fair, equitable, transparent, competitive and cost effective'. That is taken up in the Public Finance Management Act 1 of 1999 ('the PFMA'), which provides in s 51(1)(a)(iii) that the accounting authority of a public entity (which includes National Treasury) 'must ensure that the public entity ... has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective'. It has also been held that public procurement constitutes 'administrative action' as contemplated by the PAJA and must comply with the provisions of that Act.

[8]. Section 217 of the Constitution, the Preferential Procurement Policy Framework Act 5 of 2000 ('the Procurement Act' or 'the PPPFA') and the PFMA provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central

focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA.

[9]. Section 217, the PPPFA and National Treasury's procurement policies all constitute the framework for National Treasury's procurement process in issue. A National Government department's procurement policies are not just its internal prescripts. They have legal effect and must be complied with unless set aside in proceedings for judicial review. As was held by 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 (Corruption Watch and another as amici curiae)*<sup>1</sup>, at para 40:

'Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.'

[10]. National Treasury, as a public entity listed in Schedule 2 of the PFMA, is subject to the provisions of the PFMA, the National Treasury Regulations, Guidelines, Circulars and Instruction Notes that regulate the procurement and contracting of goods and services. These instruments are issued under statute. They have legal effect unless and until set aside in proceedings for judicial review. They have not been set aside. These are not proceedings to set them aside. This is the inevitable consequence of the rule of law.

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<sup>1</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (CC);

[11]. In *AllPay* the Constitutional Court emphasised that even treatment of all bidders and complying with procedural formalities ensures fairness to participants in the bid process, enhances efficiency, optimises the outcome and guards against corruption. The court further stated that to evaluate whether a deviance from legal requirements is reviewable under PAJA, its materiality must be assessed against the purpose of the requirement and not whether compliance, or allowing non-compliance with same in case, would lead to a different result. It reasoned that process change must be procedurally fair, reasonable and justifiable and that irregularities in process that affect the outcome have the capacity to affect legal rights.

[12]. The Supreme Court of Appeal has, in several cases emphasised that for fairness tenders must be evaluated equally, tenderers must be treated equally and that a tender which is adjusted during the process resulting in the bid that is accepted being different from one that was tendered initially, is unfair.

[13]. The Supreme Court of Appeal has also stated that '[f]air administrative process depends on the circumstances of each case and in some cases, it is indeed fair to afford a tenderer an opportunity to correct an obvious mistake, to ask for clarification or further details, provided that the process on the whole does not lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness'.

[14]. In *Dr JS Moroka Municipality v Betram (Pty) Limited*<sup>2</sup>, the SCA, relying on *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd*; *Minister of Environmental Affairs v Smith*<sup>3</sup>, re-iterated the general principle that an administrative organ or authority does not have the inherent power to condone non-compliance with a peremptory requirement. It reasoned that a tender which did not comply with a mandatory requirement was not an

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<sup>2</sup> *Dr JS Moroka Municipality v Betram (Pty) Limited* 2013 JDR 2728 (SCA).

<sup>3</sup> *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd*; *Minister of Environmental Affairs v Smith* 2004 (1) SA 308 (SCA) at para 31.

acceptable tender in terms of the Procurement Act and its regulations and therefore did not pass the threshold to qualify for consideration.

[15]. It is for the administrative authority not the court, so held *Betram*, to decide what should be prerequisite for a valid tender and what the consequences of failure to comply therewith should be. Importantly, a Court must guard against invalidating a tender, and by extension an award, that contains minor deviations that do not materially alter or depart from the characteristics, terms and conditions and other requirements set out in tender documents. The materiality of a tenderer's non-compliance with the compulsory tender requirements depends on the extent to which the purpose of the requirements is attained.

[16]. With this legislative framework in mind, I now turn to deal with the grounds of review raised by the applicant. But before I do that, it may be apposite at this point to set out the facts in the matter in very broad strokes.

[17]. On 15 December 2022, National Treasury invited members of the public to submit bids in the tender. The closing date for the submission of the bids was the 25 January 2023. Fifty bidders submitted their bids before the closing date and time. According to the bid document the bids were to be evaluated in five phases namely: Phase 1 – Prequalification; phase 2 – administrative requirements; phase 3 – mandatory and other bid requirements; phase 4 – technical specification; and phase 5 – price and specific goals.

[18]. On 18 January 2023 a compulsory briefing session was held with the bidders. During the compulsory briefing session the bidders raised several questions which were addressed in an annexure to a letter dated 19 January 2023. In the same letter the closing date and time for the bid was extended to 30 January 2023 at 11:00.

[19]. The bid was subject to Special Conditions of Contract for RT4-2023 ('SCC'). Clause 6 of the special conditions of contract deals with evaluation

criteria. Clause 6.2.1 of the special conditions of contract provides that it is a condition of the bid that only bidders having BBBEE status level contributor 1 to 8 may respond to the bid. It further provides that bidders are required to submit proof of BBBEE status level of contributor, that proof includes valid BBBEE status level verification certificates or certified copies thereof or a sworn affidavit signed by the EME/QSE representative and attested by a Commissioner of Oaths, or BBBEE affidavit issued by Companies and Intellectual Property Commission (CIPC). The clause further provides that non-compliance with the requirements for prequalification will invalidate the bid.

[20]. The bid was also subject to the General Conditions of Contract, July 2010 ('GCC'). Clause 34 of the GCC provides for prohibition of restrictive practices. In particular the clause provides that an agreement between or consented practice by firms or a decision by association of firms is prohibited if it is between parties in a horizontal relationship and if the bidders are involved in a collusive bidding or bid rigging. The clause further mandates a purchaser, an organ of state, where there are reasonable grounds or evidence that bidders are involved in restrictive practice to refer the matter for investigation by the Competition Commission in terms of the Competition Act 89 of 1998. The clause further provides that if bidders are found guilty by the Competition Commission of restrictive practice the purchaser, the organ of state in this regard, may in addition to any other remedy invalidate the bids on the items affected and/or may terminate the contract in whole or in part and/or restrict the bidder or contractors concerned from conducting business with the public sector for a period not exceeding ten (10) years and/or claim damages from the bidder or contractor concerned.

[21]. This means that an organ of state, like the National Treasury, must upon obtaining evidence or upon detecting a possible fronting or bid rigging refer the matter to the Competition Commission for investigation and that it is only upon a finding made by the Competition Commission of the existence of such bid rigging or fronting that the organ of state is entitled to act in terms of the General Conditions of Contract, clause 34. Otherwise, absent any finding of

guilt in this regard the organ of state may not disqualify a bidder nor may it restrict a bidder from obtaining business from the government.

[22]. During the period between the 6 and 17 March 2023 the Bid Evaluation Committee ('the BEC') of National Treasury met to evaluate the bids. Thru Rainbow was disqualified for the reason that some of the samples submitted for evaluation were not to specification and there was no submission of samples for categories B and C of the technical specifications. Its bid was found to be non-compliant in this regard.

[23]. The next BEC meeting was on 24 to 25 May 2023 to consider and evaluate the bids that had passed the phase 4 evaluation. On 22 June 2023 the BEC prepared a memorandum for the Bid Adjudication Committee ('the BAC'). The purpose of the memorandum is described as being to obtain approval from the BAC for the appointment of suppliers for the supply and delivery of emergency and rescue equipment to the state for a period 1 August 2023 to 31 July 2028. In the memorandum the BEC recommended the appointment of twenty-three bidders, including Torinet and Eresa Africa, identified as bidders number 20 and number 8, respectively, for various items of the bid. On 20 July 2023 and again on 21 September 2023 the BAC considered the recommendation made by the BEC and approved the awards to the recommended bidders.

[24]. That then brings me to the applicant's review grounds and the merits thereof.

[25]. The applicant firstly contends, based on a number of alleged similarities between the bid documents of Eresa Africa and Torinet and certain assumptions made and inferences drawn, that there has been collusion between these two entities and 'bid-rigging' by their collusion. Accordingly, so the contention on behalf of Thru Rainbow goes, these companies should have been disqualified from the tender process on the basis of the provisions of the SCC, the GCC and the Competition Act.

[26]. The fact of the foregoing alleged collusion and bid-rigging, so Thru Rainbow argues, can and should be inferred from the fact, for example, that the compliance checklist in respect of the particulars of the bid for both Eresa Africa and Torinet are *materially* similar, with verbatim references clearly apparent throughout. Furthermore, both Torinet and Eresa Africa rely on the same supplier, United Conscious (Pty) Limited ('United Conscious'), for the same *ManyWain* products, in order to serve the tender. This is also reflected in the Distributor Certificates, Warranty Certificates, Installation Manuals and Test Reports, which are materially the same in respect of both Torinet and Eresa Africa. Thru Rainbow furthermore contends that the 'third party supplier', being United Conscious, was owned and controlled by the ninth respondent (Mr Renier Smit) and a Mr Charles Bodenstein, who are the directors of Torinet, and who, together with the eighth respondent (Ms Ernestia Brummer) and the fifth respondent (Mr Johannes Brummer), are all closely related family. It is also argued by Thru Rainbow that the collusive conduct and bid-rigging are evidenced by the fact that the trading addresses of Eresa, Eresa Africa and Torinet are all located at the same physical address, being Eland Avenue, Koedoespoort, Pretoria.

[27]. Importantly, Thru Rainbow attaches significant weight to the fact that, according to them, the difference in price in respect of every single product between Torinet and Eresa Africa is equal to 2.7%, with Torinet products being priced at 2.7% more than that of Eresa Africa. Moreover, the local content declaration for both parties were signed on the exact same day, 25 January 2023, plus the fact that the third-party undertaking from United Conscious are identical in their wording and are both dated 23 January 2023.

[28]. Both Eresa Africa and Torinet deny collusion between them or that they had made themselves guilty of bid-rigging. They explain that most of the similarities result from the fact that they both make use of the same supplier to source the products required to service the contract pursuant to the award of the tender. These respondents deny, in the strongest possible terms, that their bid documents were prepared together or in consultation with one another. The

deponent to the answering affidavit of Eresa Africa, who is also the sixth respondent (Ms Kimberley Ananthan), explains that she is the sole director and sole shareholder of Eresa Africa. She states that until she saw the founding papers of Thru Rainbow in this application, she was completely unaware of the fact that Torinet was in fact also sourcing its products from United Conscious.

[29]. The dispute between the parties in relation to alleged collusion and bid-rigging is, in my view, a factual one. On the one hand, Thru Rainbow avers that it is apparent from the tender documents of both Eresa Africa and Torinet that both bids submitted are substantially the same. This amounts to, so Thru Rainbow contends, collusive tendering and to a breach of the declaration by both Eresa Africa and Torinet as contained in the SBD4 Declarations, in which the bidders declared inter alia that: -

- '3.3 The bidder has arrived at the accompanying bid independently from, and without consultation, communication, agreement or arrangement with any competitor. However, communication between partners in a joint venture or consortiums will not be construed as collusive bidding.
- 3.4 In addition, there have been no consultations, communications, agreements or arrangements with any competitor regarding the quality, quantity, specifications, prices, including methods, factors or formulas used to calculate prices, market allocation, the intention or decision to submit or not to submit the bid, bidding with the intention not to win the bid and conditions or delivery particulars of the products or services to which this bids invitation relates.
- 3.5 The terms of the accompanying bid have not been, and will not be, disclosed by the bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening or of the awarding of the contract.  
... ..
- 3.6 I am aware that, in addition and without prejudice to any other remedy provided to combat any restrictive practices related to bids and contracts, bids that are suspicious will be reported to the Competition Commission for investigation and possible imposition of administrative penalties in terms of section 69 of the Competition Act No 89 of 1998 and or may be reported to the National Prosecuting Authority (NPA) for criminal Investigation and or may be restricted from conducting business with the public sector for a period not exceeding ten

(10) years in terms of the Prevention and Combating of Corrupt Activities Act No 12 of 2004 or any other applicable legislation,'

[30]. The answering affidavits filed by Torinet and Eresa Africa do, in my view, adequately explain the perceived similarities. Moreover, in the context of this opposed application, which implies that the principle in *Plascon Evans*<sup>4</sup> finds application, it cannot be said that with any conviction that the versions of the Eresa Africa and that of Torinet are so far-fetched and untenable that this Court can reject it out of hand. Put another way, the version of these respondents on the facts cannot and should not be rejected by this Court out of hand, as being patently implausible and far-fetched.

[31]. If anything, the version of Eresa Africa and that of Torinet should be accepted as being more probable than that of Thru Rainbow. As submitted by Mr Harcourt SC, who appeared with Ms Maharaj on behalf of Eresa Africa and Ms Ananthan, there is no direct evidence to support the assertion that there was collusion between Eresa Africa and Torinet or price-fixing or bid-rigging by these two bidders. Both Torinet and Eresa Africa have the same wholesale supplier, which necessarily means that the wholesale costs would be the same and the markup close. That is especially so in a keen and experienced market where the competitive pricing is not even an open secret and freely available in the marketplace. What is more is that the applicants' allegations of collaboration, collusion and bid-rigging are nothing more than speculation supposedly based on inferential reasoning.

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<sup>4</sup> *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 at pp 634 and 635 held as follows: -

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact ... .. Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ...'.

[32]. Accordingly, I conclude that the ground of review based on collusion, bid-rigging and/or price-fixing is without merit and should fail.

[33]. The second ground of review relates to alleged 'fronting' by Eresa Africa, which, according to Thru Rainbow, is a front for the fourth respondent ('Eresa') based on the close similarity of their names, the fact that they share the same address according to CIPC records and that Mr Johannes Brummer, a former director of Eresa Africa, is now a director of Eresa. This claim, which by all accounts is totally unsubstantiated, is denied by Eresa Africa and on the basis of the same reasoning *supra* relative to collusion and bid-rigging, this factual dispute cannot possibly be decided in favour of the applicant.

[34]. The simple point is that it cannot possibly be suggested that the version of Eresa Africa is to be rejected out of hand as so far-fetched and untenable. Moreover, as with the contentions in relation to collusion and bid-rigging, the allegation of fronting is based on sheer speculation and fatally flawed inferential reasoning.

[35]. Therefore, the second ground of review should also be rejected.

[36]. The third ground of review relates to the Broad Based Black Economic Empowerment (B-BBEE) status of Torinet. Thru Rainbow placed in dispute the B-BBEE Status of Torinet at Level 1, which entitled it to 100 B-BBEE points during the adjudication of its bid.

[37]. The case on behalf of Thru Rainbow is that Torinet, in its bid documents, has failed to comply with the requirements relating to the verification of its B-BBEE status, which required of bidders to either file a sworn affidavit indicating their B-BBEE status level or furnish a B-BBEE Certificate by South African National Accreditation Society ('SANAS') accredited certifier. In that regard, the statement by Eresa, which purported to be a sworn affidavit in compliance with the foregoing requirement, was inadvertently not signed on behalf of Torinet, although it was supposedly commissioned by a Commissioner

of Oaths. As for the B-BBEE Certificate, the document furnished by Torinet in purported compliance with the said requirement, was issued by a non-accredited entity, although the individual who signed the certificate is a member of a SANAS accredited entity.

[38]. The effect of the foregoing, so the argument on behalf of Thru Rainbow goes, *inter alia* per clause 6.2.4 of the SCC, is that Torinet ought to have been excluded from this bid. Clause 6.2 of the SCC provides as follows: -

**‘6.2 Phase 1: Pre-Qualification Evaluation Criteria**

6.2.1 *It is a condition of this bid that only the bidders having a B-BBEE status level contributor 1 to 8 may respond to this bid.*

6.2.2 Bidders are required to submit proof of B-BBEE status level of contributor. Proof includes valid B-BBEE status level verification certificates or certified copies thereof or a sworn affidavit signed by the EME/QSE representative and attested by a Commissioner of Oaths, or BBEE affidavit issued by Companies and Intellectual Property Commission (CIPC).

6.2.3 ... ..

6.2.4 *Non-compliance with the requirement for pre-qualification will invalidate the bid.*  
(Emphasis added).

[39]. Thru Rainbow interprets the foregoing clause as a ‘mandatory tender condition’ requiring as part of the bid documents either a valid B-BBEE status level certificate or an affidavit by the bidder. Non-compliance with this mandatory condition, so the argument on behalf of Thru Rainbow goes, would result in disqualification from the bid. I do not agree with this interpretation. In my view, the mandatory pre-qualification condition provided for in the clause – textually, contextually and purposively interpreted – is the requirement that the bidder must have a B-BBEE status level contributor 1 to 8. The submission of the B-BBEE status level verification certificate and/or the sworn affidavit by the bidder is not, in my view, a mandatory pre-qualification condition. In that regard, the use of the phrase ‘Proof *includes* ...’ is telling.

[40]. The factual position is that, at the relevant time, Torinet was a Level 1 B-BBEE contributor, as evidenced by the Exempted Micro Enterprise (EME)

B-BBEE certificate by an entity by the name of Inspired Mentors, which is, by all accounts, not SANAS accredited. The fact, however, remains that Torinet, on the papers, is a Level 1 B-BBEE contributor. This is also confirmed by the 'sworn statement' by Mr Smit, who, by all accounts, had every intention to sign same under oath before the Commissioner of Oaths, who in fact signed the statement on the understanding that same had been signed by Mr Smit. The reason that he did not sign was clearly, indubitably and undisputably due to an inadvertent oversight on his part. This means that Torinet complied with the mandatory requirement envisaged by clause 6.2 of the SCC. Moreover, National Treasury had accepted the proof provided by Torinet of its B-BBEE status level of contributor.

[41]. I therefore conclude that the applicant's third ground of review lacks merit. It therefore follows that the concession on behalf of National Treasury to the contrary is, in my view, misplaced. It is so, as contended by Torinet, that the failure to provide a proper proof of B-BBEE status is in any event not fatal to the award of the tender.

[42]. There is another reason why Thru Rainbow's review ground based on the alleged failure by Torinet to submit proof of its B-BBEE Contributor 1 level should be rejected. And that reason is to be found in the *ratio decidendi* in *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Limited and Another* 2016 (3) SA 1 (SCA), in which the Supreme Court of Appeal (per Lewis JA) held as follows: -

'[35] Carelse J in the court a quo considered that the strategic considerations –  
 "were relevant considerations for the selection of the successful bidder. None of the six criteria applied can be said to be irrelevant considerations."

She held thus that the BTC's decision was not arbitrary or capricious, and that the tender process was procedurally fair. In this regard she relied on *Lawrence Baxter Administrative Law (Juta 1984)* at 446:

"Administrative action based on formal or procedural defects is not always invalid. Technicality in the law is not an end in itself. Legal validity is concerned not with technical but also with substantial correctness. Substance should not

always be sacrificed to form; in special circumstances greater good might be achieved by overlooking technical defects.”

That is doubtless still good law. In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2013 (4) SA 557 (SCA) ([2013] ZASCA 29) (AllPay SCA) para 21 this court said:

“There will be few cases of any moment in which flaws in the process of public procurement cannot be found, particularly where it is scrutinised intensely with the objective of doing so. But a fair process does not demand perfection and not every flaw is fatal.”

It is, of course, only immaterial flaws (termed “inconsequential” by that court) that may be overlooked. The judgment in AllPay SCA was reversed on appeal to the Constitutional Court (the principles formulated by that court are discussed below) but, as I understand it, that principle was not attacked.’

[43]. The point about this authority is simply that an immaterial technical or formal defect in an administrative action does not invalidate such action. The missing signature on the ‘sworn statement’ by Torinet is, in my view, nothing more than a ‘formal or procedural defect’ in the process leading up to the award of the tender, which can and should be overlooked in the interest of the greater good. I therefore reiterate that this ground of review should be dismissed.

[44]. The foregoing reasoning apply equally to Thru Rainbow’s fourth ground of review, that being that Torinet omitted to comply with the mandatory requirement that it was to submit an organogram. In short, this clearly was not a mandatory requirement and non-compliance could not have disqualified Torinet.

[45]. There are further grounds of review such as that based on an alleged material non-disclosure by Torinet in relation to its shareholding, as well as an alleged misrepresentation with respect to local production of products to be supplied pursuant to the award of the tender and the subsequent conclusion of the supply agreement. There is no merit in any of these grounds of review. The simple point with regard to local production of products is that, in the bid under review, National Treasury did not exercise the power / right to consider and give preference points for locally produced goods. The products were not part of the

designated sector. The goods did not have to be locally produced and there was accordingly no basis to disqualify the bidders based on their statements in the bid.

[46]. Lastly, Thru Rainbow attacks the award of the tender to Torinet on the basis of its alleged non-compliant tax status. Torinet contends that, whilst it is so that at the time of the adjudication of the bid its tax affairs were not in order, it was entitled as per a National Treasury Instruction Note to remedy their status, which they subsequently did. This ground of review therefore falls to be dismissed.

[47]. In all of the circumstances and for the reasons mentioned above, National Treasury's impugned decision to award the tender to Eresa Africa and to Torinet is not invalid and therefore cannot and should not be declared to be constitutionally invalid or set aside. In the final analysis, the procurement process followed by National Treasury and the subsequent award of the tender to Eresa Africa and Torinet were 'in accordance with a system which is fair, equitable, transparent, competitive and cost effective'. It therefore complied with the letter and the spirit of Section 217(1) of the Constitution.

[48]. In light of these findings, it is not necessary to consider the appropriate relief to be granted, based on what is 'just and equitable'.

### **Third and Sixth Respondents' Application to Strike**

[49]. There is one last issue which I need to deal with and that relates to an interlocutory application by Eresa Africa and Ms Ananthan to have struck out – in terms of Uniform Rule of Court 6(15) – certain portions and a number of paragraphs of Thru Rainbow's founding and supplementary founding affidavits.

[50]. The said Rule 6(15) application to strike out certain allegations in Thru Rainbow's founding papers is based on the grounds that such allegations are 'scandalous, vexatious or irrelevant (and in particular being scandalous and irrelevant where they are hearsay)'. So, for example, Eresa Africa and Ms

Ananthan apply to have struck out the statement in paragraph 16 of the applicant's founding affidavit in which it is stated that '... the applicant seeks to set aside the decision of the first respondent to award Tender No: RT4-2023 ... to the *first respondent*' on the grounds that such allegation is meaningless nonsense and therefore both so scandalous and vexatious. This, as argued by the respondents, was clearly a typographical error and Thru Rainbow could and should have regarded it as such. I agree with that contention. More often than not a common-sense approach to these types of issues should trump an overly technical and unnecessarily rigid formalistic approach.

[51]. Other examples of allegations which Eresa Africa and Ms Ananthan apply to have struck out are: (a) The following portion of paragraph 17.1 of the founding affidavit: 'Unlawful conduct on the part of the successful tenderers, ...' on the grounds that such allegation is simply vague and embarrassing; (b) Paragraph 18.2.5 on the grounds that it is irrelevant; (c) Paragraph 18.2.6 on the grounds that it is irrelevant; (d) Paragraph 18.2.7 on the grounds that it is irrelevant to the present application; (e) Paragraph 18.2.8 on the grounds that it is irrelevant to the present application; and (f) Paragraphs 18.2.9, 18.2.10 & 18.2.11 on the grounds that the allegations contained therein are irrelevant to the present application.

[52]. I am of the view that the said application should fail. It is ill-advised and should be dismissed. The simple point is that most, if not all of the allegations which Eresa Africa and Ms Ananthan wish to have struck out, are averments and conclusions disputed by them. The foregoing point is aptly demonstrated by para 25.2 of the founding affidavit, which Eresa Africa and Ms Ananthan apply to have struck out on the grounds that the hearsay allegation that Mr Johannes Brummer, the fifth respondent is married to Ms Ernestia Brummer, the eighth respondent when, as a matter of fact they are brother and sister and not married. Similarly, they want para 26.1, which reads that 'I am personally aware of these relationships given that I operate in the same industry that Eresa operates in', on the basis that it is 'no more than an assertion of hearsay and is

vexatious in particular when it is factually wrong (and discourteous to say the least)'.

[53]. This is the general tenet of the application to strike out – if Eresa Africa and Ms Ananthan dispute or disagree with an averment in the founding affidavits of Thru Rainbow, they seek to have same struck out. As I have already indicated, there is no merit in the said application. The respondents do not make out a case to have those portions of the affidavits struck out.

[54]. Rule 6(15) reads as follows: -

'(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. *The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.*' (Emphasis added).

[55]. In *Helen Suzman Foundation v President of the Republic of South Africa and Others*<sup>5</sup>, the Constitutional Court held as follows at paras 27 and 28: -

'[27] Is the additional evidence scandalous, vexatious or irrelevant? Two requirements must be met before a striking-out application can succeed: (i) the matter sought to be struck out must be scandalous, vexatious or irrelevant; and (ii) *the court must be satisfied that if such a matter is not struck out the party seeking such relief would be prejudiced.*

'[28] "Scandalous" allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a 'vexatious' matter refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy; and "irrelevant" allegations do not apply to the matter at hand and do not contribute one way or the other to a decision of that matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation.' (Emphasis added).

[56]. There is, on the basis of this Constitutional Court authority, another reason why the third and sixth respondents' strike out application should fail,

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<sup>5</sup> *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC).

that being that the applicants have failed to demonstrate prejudice in the event of the offending paragraphs not being struck out.

[57]. Accordingly, the application to strike out certain paragraphs falls to be dismissed with costs,

### **Costs**

[58]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*<sup>6</sup>.

[59]. I can think of no reason why I should deviate from this general rule. The applicant should therefore be ordered to pay the costs of the opposed application of all of the respondents.

### **Order**

[60]. In the result, I make the following order:

- (1) The third and sixth respondents' interlocutory application dated 24 June 2024 to strike out certain portions and certain paragraphs of the applicant's founding affidavits, be and is hereby dismissed with costs.
- (2) The third and sixth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of the said interlocutory application, including the costs of two Counsel (where so employed) on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.
- (3) The applicant's judicial review application is dismissed with costs.
- (4) The applicant shall pay the first to tenth respondents' costs of this opposed application, such costs to include the costs consequent upon the utilisation of two Counsel, one being Senior Counsel (where so employed),

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<sup>6</sup> *Myers v Abrahamson* 1951(3) SA 438 (C) at 455

on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.



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**L R ADAMS**  
*Judge of the High Court*  
*Gauteng Division, Johannesburg*

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|-----------------------------------------------|-----------------------------------------------------|
| HEARD ON:                                     | 6 and 7 March 2025                                  |
| JUDGMENT DATE:                                | 14 April 2025 – Judgment handed down electronically |
| FOR THE APPLICANT:                            | Y Alli, with S Mohammed                             |
| INSTRUCTED BY:                                | Hajibey-Bhyat Mayet & Stein Inc, Illovo, Sandton    |
| FOR THE FIRST AND SECOND RESPONDENTS:         | Z Z Matebese SC, with N Sibeko                      |
| INSTRUCTED BY:                                | The State Attorney, Pretoria                        |
| FOR THE THIRD AND SIXTH RESPONDENTS:          | A W M Harcourt SC, with I Maharajh                  |
| INSTRUCTED BY:                                | Shaun Pillay Attorneys Incorporated, Durban         |
| FOR THE FOURTH, FIFTH AND EIGHTH RESPONDENTS: | H P West                                            |
| INSTRUCTED BY:                                | W Duursema Attorneys, Sunward Park, Boksburg        |
| FOR THE SEVENTH, NINTH AND TENTH RESPONDENTS: | H P West                                            |
| INSTRUCTED BY:                                | Kruger & Okes Attorneys, Nigel                      |