**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **7572/2022P**

In the matter between:

**SMEC SOUTH AFRICA (PTY) LTD** **Applicant**

and

**THE PREMIER OF KWAZULU-NATAL PROVINCE** **First Respondent**

**THE MEC FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS KWAZULU-NATAL PROVINCE** **Second Respondent**

**THE DEPARTMENT OF ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS, KWAZULU-NATAL PROVINCE** **Third Respondent**

**THE CHAIRPERSON OF THE KWAZULU-NATAL PROVINCIAL BID APPEALS TRIBUNAL** **Fourth Respondent**

**THE MEC FOR FINANCE, KWAZULU-NATAL PROVINCE** **Fifth Respondent**

**HATCH AFRICA (PTY) LTD** **Sixth Respondent**

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**ORDER**

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The following order is made:

(a) The applicant has the requisite *locus standi* to challenge its exclusion from the tender process in respect of Tender Number Z[...].

(b) The application to review and set aside the applicant's exclusion from the tender process is dismissed.

(c) The application to declare that the tender process has lapsed, is invalid and null and void is dismissed.

(d) The application to review and set aside the decision by the fourth respondent to dismiss the applicant's internal appeal and to recommend the appointment of the sixth respondent is dismissed.

(e) The application to review and set aside the decision by the fifth respondent to accept the recommendation by the fourth respondent is dismissed.

(f) The applicant is ordered to pay the costs of:

(i) The second, third, fourth and fifth respondents in respect of the review application.

(ii) The costs of the urgent application dated 3 July 2020, limited to those costs incurred by the opposing party in the urgent application.

(iii) The partial costs of the first and second respondents in the interlocutory application, which shall exclude the costs associated with the applicant successfully obtaining the order of the items listed in paragraph 36.1 of the court order dated 4 October 2023.

(g) The costs in paragraph (f) above shall be on scale C and shall include the costs consequent upon the employment of senior counsel, where so employed.

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**JUDGMENT**

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**SIWENDU J:**

**Introduction**

[1] This application is one of many public procurement disputes increasingly occupying the courts in recent years. The applicant, SMEC South Africa (Pty) Ltd (SMEC), applied to review and set aside the award of Tender Number Z[...] (the Tender) to the sixth respondent, Hatch Africa (Pty) Ltd (Hatch), as the transaction advisor for the King Shaka International Airport Transport Link Solution Project (KSIA project).

[2] The Tender was issued under the following circumstances: The provincial government of KwaZulu-Natal, represented by the first respondent, the Premier of KwaZulu-Natal Province (the Premier), identified a need for an integrated aerotropolis strategy to enhance regional connectivity. The strategy aims to develop a transport network that connects King Shaka International Airport to the cities of Durban, Pietermaritzburg, Richards Bay, and Port Shepstone. The second respondent, the Member of the Executive Council for Economic Development, Tourism, and Environmental Affairs, KwaZulu-Natal Province (the MEC), was tasked with the procurement of the project, while oversight and implementation were delegated to the third respondent, the Department of Economic Development, Tourism, and Environmental Affairs, KwaZulu-Natal Province (the Department).

[3] Given the scale of the KSIA project, it was decided to procure it through a Public-Private Partnership (PPP). This procurement model is governed by Treasury regulation 16, issued under the Public Finance Management Act 1 of 1999 (PFMA),[1] read with the National Treasury PPP Manual, which stipulate the framework for managing PPPs. Additionally, KwaZulu-Natal adheres to its own Supply Chain Management Provincial Policy (SCM Policy and a Policy Framework),[2] which guides procurement and the implementation of PPPs at provincial level. The standardised procurement cycle is segmented into a feasibility study, which requires Treasury Approval (TA) I, the procurement phases segmented into TA IIA and IIB and the contracting agreement, requiring TA III.[3]

[4] The Department decided that it lacked the internal expertise to procure a complex PPP on the scale envisioned and sought permission from the KwaZulu-Natal Treasury (KZN Treasury) to appoint specialist consultants for this purpose.[4] On 6 April 2018, it advertised the Tender for the appointment of a transaction advisor to assist it throughout the PPP project procurement cycle. It is common cause that the closing date for the tender was 3 July 2018. However, the Department amended the terms of reference and extended the closing date to 27 July 2018, after holding a briefing meeting with interested parties on 3 May 2018. Nothing turns on this for the purpose of the review application.

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[1] Treasury Regulations, GN R225, *GG* 27388, 15 March 2005.

[2] The KwaZulu- Natal Supply Chain Management Policy Framework dated 3 February 2006 and the Supply Chain Management Policy dated February 2019, read together with Practice Note Number: SCM -07 of 2006 devolves procurement requirements in National Treasury regulations 16A and Practice Notes into provincial procurement.

[3] See Treasury Regulation 16.

[4] Treasury regulation 16.3.4 states that: 'If an institution lacks the expertise to proceed with the procurement of a PPP agreement, the accounting officer of the institution –

*(a)* must inform the relevant treasury accordingly; and

*(b)* if the relevant treasury so requests, must appoint a specialist consultant for this purpose.'

[5] SMEC, Hatch, Gibb (Pty) Ltd (Gibb), UWP Abelusi Ziphelele Allen & Overy JV (UWP), RM Joint Venture (RM JV), Delta Built Environmental Consultants (Delta), Ramgoolam (Pty) Ltd (Ramgoolam) and LDM Consulting (Pty) Ltd (LDM) were amongst the eight bidders who responded to the invitation to bid for the appointment as transaction advisor. The Tender was evaluated in a two-stage envelope system: the first stage involved a technical evaluation of the bids, referred to as the functionality assessment, and the second stage entailed the price evaluation.

[6] The bid evaluation process was conducted by the Bid Evaluation Committee (BEC), comprising of representatives from Dube Trade Port, the Department of Transport, National Treasury, KZN Treasury, Prasa, Richards Bay Industrial Development Zone, eThekwini Municipality and the Department, amongst others. After compiling a shortlist of preferred bidders, it made recommendations to appoint the preferred transaction advisor to the Bid Adjudication Committee (BAC)[5] for a decision.

[7] Hatch was selected as the preferred transaction advisor and the recommendation was confirmed by the BAC. On 15 May 2020, the Department published a notice awarding the Tender to Hatch. Dissatisfied with the award to Hatch, SMEC sought to avail itself to the internal remedies in clause 19(2) of the SCM Policy Framework[6] to appeal the award to the KwaZulu-Natal Provincial Bid Appeals Tribunal (BAT). The BAT is an independent and impartial body established under clause 18(1) of the SCM Policy Framework and operates under the auspices of the fifth respondent, the Member of the

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[5] In terms of clause 9.2.3 of the SCM Policy dated February 2019, the composition of the BAC is 'cross-functional', with at least four members at senior level.

[6] Clause 19(2) of the SCM Policy Framework dated 3 February 2006 states that '[t]he department or bidder must, within five working days of receipt of the notification of an award, deliver written notification of an intention to appeal'.

Executive Council for Finance, KwaZulu-Natal Province (MEC for Finance). In this instance, the BAT was constituted by four independent professionals, chaired by the late Judge Levinsohn. The Chairman of the BAT is cited herein as the fourth respondent.

[8] A dispute ensued about whether SMEC lodged the appeal within the prescribed period. The key issue was the exact date on which SMEC was notified of the award of the Tender to Hatch. On 9 February 2022, SMEC successfully obtained an order from Gani AJ to set aside the notification of the award. The court ruled that the correct date of the notification was 3 June 2020. It confirmed that SMEC’s notice of appeal was lodged within the prescribed period. This ruling paved the way for SMEC to proceed with an internal appeal to the BAT.

[9] SMEC's grievance on appeal to the BAT was that the BAC incorrectly rejected its bid. It claimed that it had met the technical evaluation threshold. It should have been awarded the Tender, as its bid offer was the lowest price.

[10] Before the appeal to the BAT could be finalised, SMEC approached the high court on 3 July 2020 for urgent relief to prevent the implementation of the award or the implementation of the Tender, pending its internal appeal. The project has been in a hiatus since. The terms of the court order by Chili J are crucial to the relief SMEC now seeks in this review, and warrant a restating of the relevant parts, namely that:

‘The First Respondent and/or the Second Respondent be interdicted and restrained from proceeding with and/or implementing and/or giving effect to the outcome of the tender adjudication process relation to Tender Number Z[...], pending the final determination of –

2.1 the application procedures that will be commenced by the Applicant relating to the internal appeal procedures to be conducted in terms of the KwaZulu- Natal Supply

Chain Management Policy Framework and/or the KwaZulu Supply Chain Management Policy, such application procedures to be commenced within 30 days of [the sic] of this order; and

2.2 any review application relating to the award of Tender Number Z[...], to be commenced by the Applicant after the conclusion of the abovementioned application procedure and/ or outcome of any internal appeal procedures to be conducted in terms of the KwaZulu- Natal Supply Chain Management Policy Framework and/or the KwaZulu Supply Chain Management Policy, such review procedures to be commenced within 30 days of date of such conclusion alternatively such outcome.

3. …

4. The costs of this application are reserved for decision by the court hearing the application alternatively review proceedings.'

[11] On 14 April 2022, approximately two years after the award of the tender, the BAT delivered its decision, rejecting SMEC's appeal. The BAT reasoned that the BAC had thoroughly reviewed SMEC's price proposal and correctly concluded that SMEC's 'fixed price for the procurement phase' did not account for negotiation fees with the preferred bidder. SMEC had 'deliberately' excluded these fees, as shown by the qualifications incorporated in its tender document. Supporting the BAC's evaluation, the BAT found that by omitting a significant portion of the price requirements and placing a three-month ceiling on negotiations, SMEC's bid was not, in fact, the lowest price.

[12] The MEC for Finance accepted the decision of the BAT and appointed Hatch as the transaction advisor. SMEC, having failed in its bid to appeal, launched this review on 14 June 2022.

**Review grounds**

[13] In its original notice of motion of 14 June 2022, SMEC sought the following relief:

‘1. That the decision of the Third Respondent to declare the Applicant’s bid as partially non-responsive and to exclude the applicant from consideration for award of Tender Number Z[...] issued by the Third Respondent be reviewed and set aside
2. That the decision of the Third Respondent to award Tender Number Z[...] to the Sixth Respondent be reviewed and set aside.
3. That the decision of the Fifth Respondent to dismiss the Applicant’s appeal against its exclusion from consideration and the award of the Tender Number Z[...] to the Sixth Respondent be reviewed and set aside.
4. That the Third Respondent be directed to include the Applicant in the bidding process as a responsive bidder and to evaluate and score [sic] Applicant’s bid in accordance with the provisions of the relevant bid documents in considering the award of Tender Number Z[...].
5. That the First, Second and Third Respondents and Fifth Respondent be directed to pay the costs of the urgent application and the costs of this review application, jointly and severally with any other Respondent who may oppose the application.’

[14] SMEC raised several grounds challenging the decision made by the BEC. It alleged that Hatch and Gibb successfully passed the functionality test, despite both companies including exclusions in their offers. It is alleged that there was irregular and unlawful conduct by the BEC, in that it:

‘6.3.1 unilaterally and subjectively adjusted the offers submitted by the applicant as well as the Sixth Respondent to compensate for the failure of the Sixth Respondent to submit its offer excluding VAT and disbursements (such adjustment was done subjectively by the BEC and without being authorized to do so);
6.3.2 (again) resolved that an alternative percentage in respect of the prefeasibility cap of 15% as advertised, can be agreed during the negotiation process to follow, which is unlawful and irregular as the BEC does not have the authority to vary and /or amend any of the tender specifications as any variation of the tender specifications as advertised by the BEC shall render the evaluation process *inter alia* unfair and anti-competitive.’

[15] SMEC additionally alleged that the BEC’s recommendation to the BAC showed that Hatch and Gibb scored the lowest points on price and preference. It averred that:

'…the exclusion by the Sixth Respondent of parallel negotiations during the procurement stage as highlighted by the BEC during its meeting of 20 March 2019, simply disappeared as the evaluation process progressed and was no longer considered by the BEC…'

[16] In sum, as of 14 June 2022, SMEC's review was directed at:

(a) The decision to exclude it from the Tender;

(b) The 'double standards' allegedly applied by the BEC during the evaluation process;

(c) The award of the tender to Hatch;

(d) The recommendation by the BAT to dismiss SMEC's appeal;

(e) The acceptance of the recommendation of the BAT to dismiss the appeal by the MEC for Finance; and

(f) The order directing SMEC's bid to be included in the bidding process as a responsive bid and to evaluate and score its bid based on the relevant bid documents.

[17] On 12 December 2022, the MEC and the Department opposed the review and raised two preliminary objections, namely:

(a) The non-joinder of other bidders (non-joinder point). The point made was that the non-joinder of the other bidders, who have a material and substantial interest in the outcome, is fatal to the review.

(b) SMEC's lack of *locus standi*. On the score, the point made was that SMEC's interest is limited to the decision to exclude it from the Tender, and it lacked *locus standi* to impugn the award of the Tender to Hatch, without first having its disqualification set aside. It also lacked the *locus standi* to review hypothetical irregularities and illegalities, unless it could show that those had a direct and external effect on its rights.

[18] In November 2023, SMEC amended its notice of motion, and now seeks the following relief:

'1. An order declaring that the tender process regarding Tender Number Z[...] issued by the Third Respondent was unsuccessfully completed on 25 October 2018, and that all further conduct in the evaluation of the bids and the award of the tender is invalid and null and void.

2. In the alternative to the foregoing –

2.1 an order declaring that the conduct of the Third Respondent in dealing with the tender process regarding Tender Number Z[...] was unconstitutional and invalid.

2.2 an order reviewing and setting aside the decision of the Third Respondent to declare the Applicant's bid as partially non-responsive and to so exclude the Applicant from consideration for the award of Tender Number Z[...].'

[19] At the hearing, Mr *Wagener* (for SMEC), confirmed that SMEC's review must be adjudicated based on the amended notice of motion. He submitted that the amendment took effect retroactively and there has been no objection to it. Notwithstanding the primary relief to declare the tender process null and void, SMEC confirmed that it did not abandon the other orders concerning its exclusion, or the challenge of the award to Hatch. It persisted with the mandamus to be included in the bidding process and to have its bid evaluated according to the relevant bid documents.

[20] Until the amended relief, neither the MEC for Finance nor the BAT were parties to the review proceedings. They opposed the review in February 2024.

**The review hearing**

[21] Both Ms *Gabriel* (for the MEC and the Department) and Mr *Dickson* (for the MEC for Finance and the BAT) join issue that as an 'own interest litigant', SMEC interest is limited to the decision to exclude it from the tender process. It was contended that SMEC lacks the broad *locus standi* to vindicate public interest law rights based on other irregularities or on the ground of

constitutional invalidity of the Tender. Ms *Gabriel* submitted that since SMEC was lawfully excluded from the Tender, it cannot upset the award of the Tender to Hatch.

[22] Added to the above, Mr *Dickson* contended that SMEC's founding affidavit is devoid of any averments of irregularities by the BAT. SMEC's complaint is directed at the decision by the BEC, which was finally adjudicated on by the BAT. SMEC wholly failed to engage with that decision or pinpoint any irregularities by the BAT's conclusion to recommend the award of the Tender to Hatch.

[23] Mr *Wagener*, in response, clarified that SMEC did not seek to vindicate any public interest or right. It was before the court as an 'own interest' litigant. Given this, the parties agreed that as an anterior question, SMEC's *locus standi* is to be decided first.

**Locus standi**

[24] The difference in approach between Mr *Wagener* and Ms *Gabriel* centres on two issues: The first issue is whether SMEC has *locus standi,* and if it is so found, the ambit of what it may lawfully challenge. The divergent views are influenced by the variety of orders SMEC seeks to review. The second issue is whether the court can decide the merits of SMEC's review at all. This dispute arises from a disjuncture in the interpretation of the decisions by the Constitutional Court and the Supreme Court of Appeal (SCA) employed by the parties.

[25] The milieu of the present review involves public procurement and a public tender process. As Mr *Wagener* contended, what was at stake (by this I

understood to mean SMEC's interest) is the right to take part in a tender process that is fair, transparent, cost effective, and competitive, as entrenched in s 217 of the Constitution. This underscores SMEC's right to take part in the tender process and not to be unlawfully excluded.

[26] Ms *Gabriel* argued that SMEC's *locus standi* is limited in scope, consequently, the merits of the review are confined to SMEC's exclusion from the Tender. The first decision relied upon is *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others,*[7] where the Constitutional Court held that:

'[33] … An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must <u>be demonstrated</u>.

[34] … an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands…

[35] … where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.' (Own emphasis.)

[27] The second decision addressing *locus standi* and when the court may enter the merits of the review, is *Areva NP Incorporated in France v Eskom Holdings SOC Ltd and Another*.[8] The Constitutional Court delivered a split decision. The majority held that where a litigant fails to show it has standing, a court should only enter the merits 'in exceptional cases or where the public interest really cries out for that'.[9] The minority judgment supported a substantive justice approach to standing, as opposed to a 'technical or strictly-

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[7] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (*Giant Concerts*).

[8] *Areva NP Incorporated in France v Eskom Holdings SOC Ltd and Another* [2016] ZACC 51; 2017 (6) SA 621 (CC) (*Areva*).

[9] Ibid para 41.

defined' approach, in favour of an inquiry whether it would be in the interests of justice to decide the merits.[10]

[28] The dicta in *Giant Concerts* and *Areva*, and clarity on the pathway for determining the merits of the review, were considered by the SCA in *Goldrush Group (Pty) Ltd v North West Gambling Board and Others.*[11] The SCA in *Goldrush* confirmed that something more is required, stating that 'if own-interest standing is lacking, that will determine the present matter without entering the merits. This is because there is no averment, let alone any indication, that fraud or gross irregularity attends on the conduct of the Board'.

[29] As Ms *Gabirel* submitted, the above decisions are not only binding on this court, but they were followed by this division in *Tupac Business Enterprises CC v Chairperson: KwaZulu-Natal Gaming and Betting Board and Others*.[12] It is material to note, however, that in *Tupac*, the applicant submitted a tender which did not meet the bid requirements. At the hearing, it abandoned the challenge of its disqualification but sought to pursue other grounds for review. The court rejected the invitation to adjudicate those matters on the ground of a lack of standing.

[30] In the present case, Mr *Wagener* argued that SMEC's *locus standi* and the scope for the review were wider than its exclusion. Its standing includes the right to challenge the award of the Tender to Hatch. He submitted that the source of SMEC's *locus standi* derives from two events and the starting point was:

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[10] Ibid para 57.
[11] *Goldrush Group (Pty) Ltd v North West Gambling Board and Others* [2022] ZASCA 164; 2023 (3) SA 487 (SCA) (*Goldrush*) para 15.
[12] *Tupac Business Enterprises CC v Chairperson: KwaZulu-Natal Gaming and Betting Board and Others* [2018] ZAKZPHC 63 (*Tupac*) paras 15-21.

(a) The alternative relief in paragraph 2.2 of the amended notice of motion pertaining to SMEC's exclusion from consideration of its bid on the ground that it was partially non-responsive (the exclusion point); and

(b) The second event was from the revised primary relief in paragraph 1 of the amended notice of motion, that the tender process was unsuccessfully completed on 25 October 2018. It was contended that both events had an adverse effect on SMEC's rights and conferred on it *locus standi* to challenge the tender process and the award to Hatch.

[31] The argument was that SMEC's exclusion and the award of the Tender to Hatch are connected because the exclusion took place with a view to awarding the Tender to the only remaining successful bidder, Hatch. It was contended that the foundation of SMEC's complaint about the lawfulness of the tender process involves an interaction between the way purported errors in SMEC's bidding documents were dealt with when contrasted with the way the difficulties in Hatch documents were dealt with.

[32] Mr *Wagener* ascribed a different interpretation to the dictum in *Giant Concerts*. He submitted that the point enunciated in the case is that:

'…in determining Giant's standing, we- must assume that its complaints about the lawfulness of the transaction are correct. That is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified.'

[33] Mr *Wagener's* counter argument was that, on a correct interpretation of *Giant Concerts*, the court must assume that there is merit in all of SMEC's grounds for review. He submitted that the consequence of *Giant Concerts* means that it would be incorrect for the court to investigate the merits and/or the probabilities of the merits at this stage. Based on the authorities, the merits are not what is at hand.

[34] He also called in the aid of the SCA's decision in *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others*,[13] to buttress SMEC's assertion of locus standi and the order nullifying the tender process. In *WDR Earthmoving,* the court found that a decision that a tender was non-responsive conferred the appellants with legal standing to challenge it. In addition, the court approved the right to review and to have a determination that a bid offer by a competitor was responsive set aside. The award of a tender was ultimately set aside

[35] Ms *Gabriel* persisted with the view that SMEC's exclusion was lawful, and that the review can be disposed of on the merits of the exclusion alone. That issue is dispositive of SMEC's case.

[36] It seems to me that based on both arguments, even on the strength of *WDR Earthmoving*, there is common cause that as a starting point, SMEC's exclusion from the tender process confers it with the requisite *locus standi* to review its exclusion, although the parties disagreed on the consequences that follow from that common cause fact. It is to those issues that I now turn.

**Analysis**

[37] Before addressing the respective submissions, a valuable indicator to the meaning and approach to *locus standi* was recently rearticulated by the SCA in *Firm-O-Seal CC v Wynand Prinsloo & Van Eeden Inc and Another.*[14] It explained that:

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[13] *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others* [2018] ZASCA 72 (*WDR Earthmoving*).

[14] *Firm-O-Seal CC v Wynand Prinsloo & Van Eeden Inc and Another* [2023] ZASCA 107; 2024 (6) SA 52 (SCA) (*Firm-O-Seal*) para 6.

'*Locus standi in iudicio* is an access mechanism controlled by the court itself. Generally, the requirements for *locus standi* are these: the plaintiff must have an adequate interest in the subject-matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. Standing is thus <u>not just a procedural question, it is also a question of substance</u>, concerning, as it does, the sufficiency of a litigant's interest in the proceedings. The sufficiency of the interest depends on the particular facts in any given situation. The real enquiry being whether the events constitute a wrong as against the litigant.' (Emphasis added and footnotes omitted.)

[38] The consequence of the approach advanced on SMEC's behalf is that even though it is common cause that SMEC's exclusion confers it with *locus standi* to review its exclusion, the review of the merits of the exclusion should be deferred for adjudication at a later stage.

[39] In my view, the argument misconstrues and conflates the substantive inquiry into SMEC's legal standing with the ultimate determination of the merits of the review. The misconstruction is based on a partial reading of *Giant Concerts*,[15] because the court makes it clear that:

'The own-interest litigant must, therefore, demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned.'

[40] Accordingly, the separation of the determination of the merits does not absolve SMEC from the obligation to demonstrate an interest affected by unlawfulness. As the SCA in *Firm-O-Seal* clarified, the demonstration of the interest, referred to in *Giant Concerts,* forms part of the 'substantive' element of the inquiry into *locus standi.*

[15] *Giant Concerts* para 43.

[41] Since the review is premised on the Promotion of Administrative Justice Act 3 of 2000 (PAJA), what is justiciable, using the parlance in s 1 of PAJA, is a decision which 'adversely affects the rights' and 'which has a direct, external legal effect'. Put differently, the framework in which the substantive scrutiny into SMEC's *locus standi* occurs, serves the purpose of establishing a jurisdictional requirement or fact to ascertain whether a decision has been taken which has an adverse effect on its rights – a prerequisite to asserting the right to a review.

[42] On the arguments advanced, there is common cause that SMEC has the requisite *locus standi* to challenge its exclusion from the Tender. Two questions arise from this, namely whether the court should decide the merits of the exclusion and the effects of the newly raised order nullifying the Tender, a further point on which SMEG relies to support its *locus standi*. I have already demonstrated above why the premise on which SMEC resists the adjudication of the merits of its exclusion is misconceived.

[43] To the extent that Mr *Wagener* submitted that there are disputed facts and denied that SMEC excluded the negotiation component in the third phase of its bid offer, that dispute can hardly be the basis to defer a decision on the merits once *locus standi* is conferred. SMEC was required to set out the disputed facts in its affidavits.[16] The affidavits about the exclusion are before the court and the grounds on which SMEC disputes the lawfulness of its exclusion were ventilated during the hearing, so was the basis for seeking the nullification of the Tender. Furthermore, the principles in *Plascon-Evans*[17] apply.

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[16] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.
[17] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[44] Accordingly, it would be untenable and incongruent to find that SMEC has the requisite *locus standi* to challenge its exclusion, only to reserve the determination of the merits of that exclusion for a later stage. As will be seen later in the judgment, the reliance on *WDR Earthmoving* does not alter my finding nor support the approach advanced by SMEC. A piecemeal adjudication of disputes is eschewed by the courts, and there is no legal basis to do so in this case. It is to the merits of the exclusion that I now turn.

***Was SMEC unlawfully excluded from the tender process?***

[45] The facts leading to SMEC's exclusion emerge from the affidavits and the argument advanced before the court. These facts were the subject of the internal appeal before the BAT. SMEC was amongst the five bidders (namely, SMEC, Hatch, Gibb, UWP and RM JV) who scored above the 70% functionality threshold, triggering the price evaluation.

[46] The BEC had queries regarding the bids submitted by all five bidders who passed the functionality threshold. On 11 March 2019, it invited all five bidders, including SMEC, to address and clarify the concerns that the BEC had regarding their technical and financial proposals, on condition that they do not supplement their bids.

[47] While preparing for the presentation, the BEC found errors in the formula it used to calculate points accruing to the bidders. It also omitted the weighting of the scores. It enlisted the Department's SCM Team and sought technical support from the KZN Treasury to recalculate the scores to correct the minimum score of 350, representing the 70% functionality threshold, and the maximum score of 500 articulated in the terms of reference. The above facts were recorded in the BEC minutes dated 7 March 2019.

[48] Based on the recalculation, only three bidders passed the functionality test. SMEC scored 358 points, while Hatch scored 417 points and Gibb 351. Since SMEC passed the functionality test, it takes no issue with the recalculation of the scores. It was not prejudiced. Consequently, only three bidders, including SMEC, were invited to make presentations at the BEC.

[49] The affidavit by the Department and the minutes show that SMEC's price proposal was R45 363 709.48, Hatch's was R47 647 149.99 and Gibb's was R84 729 381.77. The Department disclosed that Hatch's price included disbursements. The BEC adjusted the price to exclude these disbursements, yielding a price offer of R 46 943 004.91.

[50] The adjustment made by the BEC was amongst the complaints placed on appeal before the BAT. SMEC's complaint was that its bid price was the lowest at R45 363 709.48 including VAT and it should have thus been awarded the Tender. As will be seen, this was considered by the BAT.

[51] A critical issue influencing the decision not to award the Tender to SMEC is that after the BEC assessed the price evaluation, it found that SMEC's price offer deviated from the Tender requirements in the following respects:

(a) Its fee proposal for the PPP procurement phase stated that it was 'subject to the scope of work set out in the technical proposal. Any work required which is out of scope will be treated as a change in scope and will be billed for separately at a rate to be agreed'.

(b) Its bid price proposal in respect of the PPP procurement phase was subject to the condition that: (i) there were no more than ten bidders during the evaluation of the RFQ phase and (ii) no more than three prequalified bidders who submit compliant bid responses to the RFP.

(c) It excluded any negotiation support that might be required with the private partner during the procurement phase.

[52] SMEC does not dispute that on 29 March 2019, the BEC invited it to clarify the qualification and exclusion of negotiation support in the procurement phase of the project, and its impact on its bid offer and price. On 2 April 2019, SMEC wrote that:

'Based on previous experience we have reservations over the potential duration of the negotiation process. Our concern has been and remains that the allocation of financial risks and related obligations may be outside of our control and could result in protracted negotiations. At the time of bidding, we elected to address the concern by not pricing for the negotiations process on account of the fact that the negotiations time frame could be at large.

…

However, we will, if appointed, provide negotiation services and support within our price for a duration of three months, on the basis that the procurement process will be designed and implemented to curtail the risk of protracted negotiation.'

[53] SMEC asserted that this did not alter its bid offer price but merely clarified that the three months of negotiation support required during the procurement phase with the selected bidder formed part of its bid offer. It clarified that its offer 'includes three (3) months of negotiation support at the procurement stage'. It confirmed this stance in its founding affidavit.

[54] SMEC contended further that once it met the functionality threshold, its bid should have been found responsive. There is no merit to this claim. By submitting the bid, SMEC agreed to participate in the two envelope tender evaluation process, which separated the bid evaluation into two stages, namely

functionality and price evaluation. This approach is also sanctioned by the SCM Policy. It entailed that SMEC's bid offer price would be evaluated separately.

[55] The MEC and the Department contended that although SMEC's offer price appeared to have been the lowest, SMEC's offer excluded a material and complex part of the scope of work of a transaction advisor. This rendered SMEC's bid conditional, incomparable, partially 'non-responsive' and not an 'acceptable tender'. The BEC concluded that SMEC's offer was incomparable due to the exclusion of the price for negotiation support at the procurement stage.

[56] SMEC sought to suggest in the founding affidavit and during argument that 'all the selected bidders included certain exclusions in their respective offers'. This pertained to fact that Hatch's bid offer price included VAT and disbursements. It also claimed that the BEC evaluated the Tender with the view to favour Hatch. It also relied on the way the Department dealt with Hatch's pre-feasibility cap, which exceeded 15%, as stipulated in the bid specification.

[57] SMEC's complaint is that Hatch was not disqualified. The BEC resolved that an alternative percentage must be agreed to during the negotiation process. The matter simply disappeared and was referred to negotiation. It suggested that the BEC allowed impermissible, parallel negotiations with Hatch.

[58] In answer, the Department explained that Hatch's cost for the prefeasibility phase was 18% plus 5% of the mobilisation fee, which was higher than the 15% cap. SMEC's cost for the prefeasibility phase was 22% plus 5 %, thus higher than Hatch. All three qualifying bidders, including SMEC, exceeded the prefeasibility cap. All the bidders clarified that the amount of work required

was higher than 15%. The issue was not unique to Hatch. Consequently, Hatch was not singled out for a special parallel consideration. The BEC recommended to the BAC that the prefeasibility cap be dealt with during negotiations *after* a successful bidder was selected on the merits of their bids (own emphasis). In essence, had SMEC been the preferred transaction advisor, it would have been similarly treated.

[59] Importantly, this complaint was ventilated during the appeal before the BAT. It found that since all the bidders exceeded the 15% cap and expressed the same concern, the recommendation to resolve the fee cap through negotiation after selecting a successful bidder did not prejudice any of the bidders. The BAT concluded it was a sensible, rational approach, given that the issue affected all the shortlisted bidders. It reasoned that a rejection of all three bids after the clarification process would have been irrational. The bidders were similarly placed in so far as the prefeasibility issue, treated equally and were not prejudiced by the approach. The BAT found the alleged irregularity inconsequential, given their common placement on the issue and that their binding offers were all before the BEC for adjudication. There are other reasons, with respect, why the view by the BAT is correct when one considers the scope of what is subject to TA in the PPP regulations, but it is not necessary to enter that debate as it was not raised during argument.

[60] The point advanced by the Department on the strength of the Constitutional Court decision in *Steenkamp NO v Provincial Tender Board, Eastern Cape,*[18] is that the tender required 'strict and equal compliance by all competing tenderers on the closing day for submission of tenders.' As Ms *Gabriel* contended, the conclusion by the BEC that SMEC's tender was not

[18] *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) para 60.

comparable is supported by decision of the SCA in *Premier, Free State, and Others v Firechem Free State (Pty) Ltd*,[19] which held that:

‘One of the requirements of such a procedure is that the body adjudging tenders be presented with comparable offers in order that its members should be able to compare. Another is that a tender should speak for itself. Its real import may not be tucked away, apart from its terms. Yet another requirement is that competitors should be treated equally, in the sense that they should all be entitled to tender for the same thing.’

[61] The logic of this position cannot be gainsaid, since tenders are evaluated relative to one another. Although not pressed during argument, there is a second important contractual principle arising from the dictum in *Firechem.*[20] The SCA, citing with approval *The Law of Contract in South Africa*,[21] as well as *Scheepers v Vermeulen*[22] and *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases*[23] held that ‘an agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree’. To the extent that SMEC’s bid offer had a material exclusion and was conditional in respect of the mandatory contractual support during the PPP procurement phase, it can be concluded on the strength of *Firechem* that SMEC’s bid offer was opaque for want of a material term and was not a binding offer open to acceptance or rejection on its written terms.[24]

[62] I agree that SMEC must stand or fall by its bid offer, which excluded a material component of the tender specification relating to the negotiation phase of the project. SMEC was lawfully and justifiably excluded from the tender

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[19] *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) (*Firechem*) para 30.
[20] Ibid para 35.
[21] R H Christie *The Law of Contract in South Africa* 3 ed (1996) at 152.
[22] *Scheepers v Vermeulen* 1948 (4) SA 884 (O) at 892.
[23] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A) at 828I.
[24] See *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others* [2015] ZASCA 69; 2015 (5) SA 192 (SCA) para 18.

process. The finding should be dispositive of SMEC's case. Since SMEC fails on the challenge of its exclusion, on the principles in *Giant Concerts*,[25] the balance of any other interest it seeks to enforce would be hypothetical and academic, so too would the other orders it seeks in terms of s 6(1) of PAJA.

[63] For completion, however, something must be said about the scope of SMEC's premise for *locus standi* and the review challenge, which, as shown, were broader than the dispute about its exclusion from the tender process. This concerns the orders:

(a) Challenging the BAT's decision confirming SMEC's exclusion, leading to the acceptance of the recommendation to appoint Hatch; and

(b) Nullifying the tender process and the award on the grounds that the Tender was unsuccessfully completed on 25 October 2018.

***The BAT's decision confirming SMEC's exclusion***

[64] With regard to the review of the BAT's decision, SMEC contended the BAT 'reflected on two decisions which impact its rights', namely, the confirmation of the exclusion and appointment of Hatch. The gist of the complaint was that the BAT failed to properly consider the internal appeal by recommending the dismissal of its appeal to the MEC for Finance. It submitted that the BAT did not adhere to a fair administrative procedure. SMEC complained that the issues raised in the internal appeal were neither fully nor meaningfully addressed, and the BAT's actions did not meet the standards of fairness mandated by law.

[65] When questioned about the grounds on which SMEC impugned the decision of the BAT, SMEC relied on paras 40-99 of its founding affidavit, and

[25] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC).

complained that the procedure was not fair and the grounds relied upon demonstrate why the decision of the BAT to confirm the decision of the Department was an error.

[66] However, the grounds SMEC relied on, merely reiterate the terms of the tender specifications[26] and thereafter dealt with (a) the BEC's approach to the adjudication of the Tender and the basis for concluding that SMEC's bid was non-responsive;[27] (b) SMEC's interpretation of the tender specification relative to price; and (c) the grievances about the terms of the tender specifications and the irregularity complaints by the BEC and the selection of Hatch.[28]

[67] Other than the complaints in para 98 that the BAT failed to uphold SMEC's internal appeal and that its decision is tainted by the irregularities alleged against the BEC, there are no allegations or grounds of irregularities levelled against the BAT or the BAC's decision-making process. SMEC contended it engaged with the decision of the BAT in para 99, by simply stating:

'In the premises, the decision of the fifth respondent is similarly tainted by the irregularities referred to above.'

[68] The point by Mr *Dickson* (for the BAT and the MEC for Finance) is that SMEC failed to deal with the written decision of the BAT. SMEC merely made broad, unsubstantiated allegations of irregularities, without engaging fully with the decision or pinpointing a clear, procedural basis for challenging it.

[69] It bears mentioning at this stage that the Province of KwaZulu-Natal has not enacted provincial legislation governing procurement since the repeal of the

[26] The founding affidavit paras 40-56.
[27] The founding affidavit paras 57-70.
[28] The founding affidavit paras 71-97.

KwaZulu-Natal Procurement Act 3 of 2001 (the repealed KZN Procurement Act). Clause 20 of the SCM Policy stipulates the grounds on which the BAT may interfere with the decision of the BAC on appeal. It was contended that the grounds on which it may do so were, in essence, a review.[29] That submission is supported by the SCA decision in *Tetra Mobile Radio (Pty) Ltd v MEC Department of Works and Others,*[30] where the court, dealing with ss 20 and 21 of the repealed KZN Procurement Act stated that: '…. the appeal provided for in s 20 is in substance a review'. Clause 20 of the SCM Policy mirrors the provisions of the repealed KZN Procurement Act.

[70] As already alluded to, SMEC relied on the challenge to the BAT's decision as the foundation for its *locus standi.* Notwithstanding its contention that the merits of its review must be dealt with at a later stage (a position I have found to be incorrect), SMEC, consistent with *Giant Concerts,* was required to demonstrate the unlawfulness of the BAT's decision and articulate precisely what part of that decision adversely affected its rights. It advanced nothing on this score. It is wholly insufficient to rely on the unfavourable outcome.

[71] The review would not have been adjudicated on a piecemeal basis, as suggested. SMEC was, in addition to the above, required to articulate the grounds upon which the decision by the BAT is susceptible to a review in its founding and supplementary affidavits. SMEC failed to advance any of the above, let alone the grounds for a review of the decision taken by the BAT.

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[29] The grounds are that the BAT:
'*(a)* committed misconduct in relation to their duties as members;
*(b)* committed a gross irregularity;
*(c)* exceeded its or their power;
*(d)* awarded a tender in an improper manner; or
*(e)* awarded a tender inconsistent with the objectives of this Act.'

[30] *Tetra Mobile Radio (Pty) Ltd v MEC Department of Works and Others* [2007] ZASCA 128; 2008 (1) SA 438 (SCA) (*Tetra*) para 11.

Accordingly, its claim for *locus standi* on this basis and its effort to impugn the decision of the BAT fails.

[72] The above finding brings me to the refashioned order for the nullification of the tender process. This issue is not only relevant to the orders sought but influences the approach I take to the ultimate costs order.

***The order nullifying the tender process***

[73] SMEC submitted, based on the amended notice of motion, that the tender process and the award of the Tender should be set aside because it was awarded after the tender validity period expired. The Tender validity period expired on 25 October 2018. The effect of the submission is that the Tender lapsed approximately more than six years ago, and the respondents would have to re-run the tender process.

[74] SMEC found support for this contention from the SCA's decision in *Ekurhuleni Metro Municipality v Takubiza Trading & Projects CC and Others.*[31] Its argument went as follows: if it is found that SMEC has *locus standi* to challenge its exclusion and the lapsing of the tender based on *Takubiza*, then the question of the award to Hatch comes into play. That question must be answered without reference to the merits of the case, because I must assume that the lawfulness of the complaints about the procedure are correct.

[75] The facts in *Takubiz*a find no application in this case. In *Takubiza,* the request for the confirmation of an extension of the tender validity period was dispatched on the day of the expiry of the tender. The court found the late request stood on the same footing as where a confirmation for an extension is

[31] *Ekurhuleni Metro Municipality v Takubiza Trading & Projects CC and Others* [2022] ZASCA 82; 2023 (1) SA 44 (SCA) (*Takubiza*).

not received, as it did not achieve the intended purpose. In the present case, an extension of the bid validity period was sought from all bidders, including SMEC, who acquiesced on 30 October 2018, and proceeded to participate in Tender evaluation meetings without ado

[76] The contention that the Tender is null and void is confounding for the following reasons:

(a) SMEC would have known or ought to have reasonably known about the expiry of the Tender, before exercising its right to appeal to the BAT. The knowledge about the nullity of the Tender was not dependent on obtaining information in the rule 53 record.

(b) SMEC pursued the appeal before the BAT, which on the strength of *Caine Bros (Pty) Limited t/a Triple A Beef v Development Tribunal for KwaZulu-Natal and Others,*[32] which it did not dispute, constituted a rehearing of SMEC's complaints on the merits.

(c) The new ground nullifying the tender process was not raised anywhere and was not foreshadowed in the proceedings before the BAT as the subject of the internal appeal and the internal remedy in the SCM Policy, designed for that purpose.

(d) Although it was contended the ground is raised in the alternative, it was equally argued that SMEC does not abandon any other grounds it relied upon for locus standi and the review. An order nullifying the Tender is mutually exclusive with SMEC's complaint about its exclusion, specifically the

[32] *Caine Bros (Pty) Limited t/a Triple A Beef v Development Tribunal for KwaZulu-Natal and Others* [2016] ZASCA 81 para 9. The court observed that: 'It should be noted at this point that the appeal was a full rehearing, taking into account further evidence and submissions. Cora Hoexter *Administrative Law in South Africa* 2 ed (2012), the leading authority on South African administrative law, points out that, in general, administrative appeals are established to deal with the merits of a decision, and the appellate tribunal will step into the shoes of the decision-maker (p 65). She refers to the classic decision in *Tikly & others v Johannes NO & others* 1963 (2) SA 588 (T) at 590F-591A, in which Trollip J distinguished between a wide appeal, which amounts to a complete re-hearing and redetermination on the merits of a matter, and a narrow appeal where the appellate body is confined to the record. This was a wide appeal.'

mandamus to be included and considered in a tender, which by its own account, is null and void. It renders the order to evaluate its bid superfluous.

[77] As contended on behalf of the Department, with reference to *IN2IT Tech (Pty) Limited v Gijima Holdings (Pty) Limited and Others*,[33] which cited with approval another case involving SMEC, namely, *SMEC South Africa (Pty) Ltd v City of Cape Town and Others; SMEC South Africa (Pty) Ltd v City of Cape Town and Others*,[34] and dealing with a failure to raise grounds of attack:[35]

'… it is undesirable for a bidder to take a chance in the hope that it will be awarded the tender and "keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid".'

[78] In addition to the above, the order seeking to nullify the tender is wholly inconsistent and incompatible with the terms of the interdict,[36] hastily obtained before Chili J to halt the implementation of the project. Until the amendment, the primary grounds for complaint were about irregularities in the bid evaluation process resulting in SMEC's exclusion. To my mind, a declaration that the Tender is a nullity is a question of fact and law. It materially alters the basis for the review and triggers the extension of the period in s9 of PAJA.[37]Although the respondent did not formally and separately opposed this as irregular, but did so in argument, it was impermissible for SMEC to unilaterally introduce it, out of time, without a full explanation, and without an application for the extension the period required.

[33] *IN2IT Tech (Pty) Limited v Gijima Holdings (Pty) Limited and Others* [2023] ZAGPJHC 478 (*IN2IT Tech*).
[34] *SMEC South Africa (Pty) Ltd v City of Cape Town and Others; SMEC South Africa (Pty) Ltd v City of Cape Town and Others* [2022] ZAWCHC 131.
[35] *IN2IT Tech* para 40.
[36] See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) on the interpretation of courts orders and judgments.
[37] Section 9(2) states that 'The court or tribunal may grant an application [ for an extensions of the period] in terms of subsection (1) where the interests of justice so require.'

[79] The order for the nullification of the Tender lends credence to the argument by the Department that SMEC brought this application in bad faith resulting in 'a loss to the economy of the Province and the City'. The respondents had to set the application down for final determination. To illustrate the point, on SMEC's refashioned case, the nullity of the tender means:

(a) There was, from the outset, lawfully nothing to participate in, nothing to evaluate, nothing to award, nothing to adjudicate on appeal and nothing to take on review.

(b) The knowledge and/or presumptive knowledge of the lapsing of the Tender means SMEC put the respondents through unnecessary legal costs of interdicts, a defunct appeal process, an interlocutory dispute about a superfluous production of the lengthy record running into 40 Volumes (excluding other material) and this review to enforce a decision that is a nullity.

[80] For the reasons stated above, the application for review must fail. It is not necessary to determine the non-joinder point. What remains is the question of costs.

**Costs**

[81] It is trite that costs follow the result and are at the discretion of the court. However, the present review, and SMEC's approach to the litigation, leave the impression that it placed its own narrow commercial interests above all else. It disregarded the mechanisms created to resolve genuine disputes involving irregularities or malfeasance in public procurement. The allegations that SMEC's application is *mala fide* and was a stratagem to induce Hatch to 'walk away' loom large. It was met with silence by SMEC. It is appropriate that it is ordered to pay the costs on scale C.

**Order**

[82] Accordingly, the following order is made:

(a) The applicant has the requisite *locus standi* to challenge its exclusion from the tender process in respect of Tender Number Z[...].

(b) The application to review and set aside the applicant's exclusion from the tender process is dismissed.

(c) The application to declare that the tender process has lapsed, is invalid and null and void is dismissed.

(d) The application to review and set aside the decision by the fourth respondent to dismiss the applicant's internal appeal and to recommend the appointment of the sixth respondent is dismissed.

(e) The application to review and set aside the decision by the fifth respondent to accept the recommendation by the fourth respondent is dismissed.

(f) The applicant is ordered to pay the costs of:

(i) The second, third, fourth and fifth respondents in respect of the review application.

(ii) The costs of the urgent application dated 3 July 2020, limited to those costs incurred by the opposing party in the urgent application.

(iii) The partial costs of the first and second respondents in the interlocutory application, which shall exclude the costs associated with the applicant successfully obtaining the order of the items listed in paragraph 36.1 of the court order dated 4 October 2023.

(g) The costs in paragraph (f) above shall be on scale C and shall include the costs consequent upon the employment of senior counsel, where so employed.

**SIWENDU J**

This Judgment is handed down electronically by circulation to the Applicant and Respondent’s Legal Representative and the Defendants by email, publication on Case Lines. The date for the handing down is deemed 23 September 2025

**Appearances**

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|---|---|
| Matter heard : | 29 July 2025 |
| Judgement handed down : | 23 September 2025 |
| | |
| Counsel for the applicant: | S. D Wagener SC |
| Instructed by: | Kally & Co |
| Locally represented by: | C/O Stowell & Co |
| | |
| Counsel for the second and third respondents: | AA Gabriel SC |
| Instructed by: | PKX Attorneys |
| | |
| Counsel for the fourth and fifth respondents: | AJ Dickson SC |
| Instructed by: | Xaba Attorneys |