



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 679/2024

In the matter between:

URBAN ICON (PTY) LTD

APPELLANT

and

SOUTH AFRICAN NATIONAL ROADS AGENCY

SOC LTD

FIRST RESPONDENT

NYELETI CONSULTING (PTY) LTD

SECOND RESPONDENT

ILIFA AFRICA ENGINEERS

THIRD RESPONDENT

BVI CONSULTING ENGINEERS

FOURTH RESPONDENT

MINISTER OF FINANCE

FIFTH RESPONDENT

MINISTER OF TRANSPORT

SIXTH RESPONDENT

Neutral citation: *Urban Icon (Pty) Ltd v South African National Roads Agency SOC Ltd and Others* (679/2024) [2025] ZASCA 141 (1 October 2025)

Coram: MAKGOKA, UNTERHALTER, BAARTMAN and COPPIN JJA and STEYN AJA

Heard: 1 September 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 1 October 2025.

Summary: Preferential Procurement Policy Framework Act 5 of 2000 – s 2(1)(f) and regulations under the Act – s 217 of the Constitution – review-tender – standard conditions of tender – capacity of a tenderer and consequent commercial risk – displacement of highest-scoring tenderer in favour of second-placed tenderers in each instance.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tolmay J, sitting as the court of first instance):

The appeal is dismissed with costs, including the costs of two counsel where so employed.

JUDGMENT

Unterhalter JA (Makgoka, Baartman and Coppin JJA and Steyn AJA concurring):

Introduction

[1] Between March and July 2017, the first respondent, the South African National Roads Agency Soc Ltd (SANRAL), issued seven requests for bids in respect of seven tenders. The tenders concerned the rendering of civil engineering services in respect of infrastructure projects for the improvement of roads. The appellant, Urban Icon (Pty) Ltd (Urban Icon), submitted bids in response to all seven requests. SANRAL ultimately awarded three tenders to Urban Icon. The remaining tenders (four in

number) were awarded to other bidders, including the third respondent, Ilifa Africa Engineers (Ilifa). Ilifa is the only bidder which opposes Urban Icon's appeal.¹

[2] During the evaluation of the bids, Urban Icon's bids met the requirements for technical functionality. Its bid prices were the lowest, and judged as to price and preference, they were the highest scoring. Of the four awards that SANRAL made to bidders other than Urban Icon, they were made to the second-highest scoring bidders. Urban Icon was dissatisfied with this outcome. It challenged the decision of SANRAL to award the four tenders to bidders, instead of awarding all seven tenders to it. Urban Icon brought a review application in the Gauteng Division of the High Court, Pretoria (the high court). The application was opposed by SANRAL and Ilifa. The high court dismissed the review, with costs, including the costs of two counsel, but subsequently granted Urban Icon leave to appeal.

[3] The process by which SANRAL came to make the awards was the following. Initially, SANRAL's recommendation was to award two tenders to Urban Icon. However, SANRAL's Contracts Committee attached a condition to Urban Icon's appointment: '[it] would be subject to [Urban Icon] being called in to indicate officially if they had the requisite capacity to deliver/perform in terms of the two tenders'. This concern arose because Urban Icon had been recently incorporated and the contracts it had performed were modest in comparison to the scale of work required by the tenders for which it had bid. On 7 September 2018, a meeting was held between representatives of Urban Icon and officials of SANRAL, during which Urban Icon's capacity was probed. The upshot was a decision by SANRAL's Management Bid Adjudication Committee (MBAC) to appoint one of its members, Mr Essa, to investigate Urban Icon's capacity and make recommendations.

¹ The second, fourth, fifth and sixth respondents did not take part in this appeal.

[4] This Mr Essa did. He sought information from Urban Icon reflected in correspondence that passed between them. He subsequently submitted his written recommendations to SANRAL's Contracts Committee. Mr Essa found that Urban Icon was 'relatively new', 'with a limited track record', its staff compliment was modest, and it would have to rely on 'external specialists' who were also committed to other entities who also did work for SANRAL. One of those external specialists, Mr Piet Luus, was overcommitted. This, Mr Essa concluded, posed a high risk to SANRAL should it award 'too much work to a relatively new entity, with no track record'. He considered that to award all seven tenders to Urban Icon 'could set up the entity for failure' and was 'an unacceptable commercial risk'. Mr Essa recommended awarding three projects to Urban Icon.

[5] These three projects concerned roads that did not carry large volumes of traffic. He considered them less risky, being projects that 'lend themselves to new entrants into the industry'. Mr Essa also observed that 'once the entity has settled and stabilised its employees, structure and systems, it can bid on new contracts that are to come out to tender' (of which many were anticipated in the near future). Mr Essa further recommended that the remaining four projects (including the two originally awarded to Urban Icon) should be awarded to the second highest ranked bidders, respectively.

[6] The Contracts Committee approved Mr Essa's recommendations, and, accordingly, awarded three tenders to Urban Icon, and four tenders to the second highest ranked bidders. It also resolved that no further awards were to be made to Urban Icon for a period (estimated to be twelve months) that was required to monitor its capacity, competence and ability to execute the three projects to be awarded to it. I shall refer to this as the stay condition. Mr Essa also noted the risk that Urban Icon may be engaged in fronting, and the Contracts Committee recommended that an independent consultant be procured to investigate 'possible fronting'.

[7] Urban Icon's notice of motion was framed in a somewhat convoluted way. In essence, it seeks to review and set aside the award of the four tenders by SANRAL (and any ensuing contracts) in which Urban Icon did not prevail; to remit these bids to SANRAL for re-adjudication, alternatively, for the court to award the four tenders to Urban Icon. In addition, Urban Icon sought to review and set aside the stay condition.

[8] Two issues lie at the heart of this appeal. First, whether SANRAL, in its adjudication of the bids, was competent to consider whether Urban Icon had the capacity to execute all the projects for which it had bid. If so, whether SANRAL could then decide to make awards to the second highest ranked bidders, displacing Urban Icon as the highest ranked bidder. I shall refer to this as the competence issue. Second, if the competence issue is answered in the affirmative, whether SANRAL exercise its competence without reviewable irregularity. I shall refer to this as the irregularity issue.

The competence issue

[9] Section 217 of the Constitution stipulates the attributes of the procurement system pursuant to which an organ of State such as SANRAL must contract for goods or services. The Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and its Preferential Procurement Regulations, 2017 (the Regulations) give effect to s 217 of the Constitution. Section 2(1)(f) of the PPPFA provides, in relevant part, that the contract must be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer. The Regulations were promulgated in terms of s 5 of the PPPFA, '[t]he period of suspension expired on 2 November 2021'.² The Regulations were in force at the time that SANRAL issued the requests for tenders and adjudicated the bids. Regulation 11(1) provides, perhaps

² The Regulations have since been declared unconstitutional: *Afribusiness NPC v The Minister of Finance* [2020] ZASCA 140; *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) but their invalidity was suspended for 12 months.

redundantly, that ‘a contract may only be awarded to a tenderer that did not score the highest points only in accordance with s 2(1)(f) of the Act’. It follows that SANRAL was competent to make an award to a bidder that did not score the highest points, if objective criteria justify such an award.

[10] The terms upon which bids were adjudicated by SANRAL were provided for in the conditions of tender. It is common ground that responsive tenders were first adjudicated for conformity with quality criteria. The minimum number of points required for quality was 85 out of 100. The financial offers were then assessed for those bids that met the minimum threshold for quality. A formula was set out as to the method by which financial offers and preferences were to be scored. Clause 5.11.4 (d) stipulates that the tenderer with the highest number of tender evaluation points for the award of the contract should be recommended, ‘unless there are compelling and justifiable reasons not to do so’. This standard is somewhat more rigorous than the standard for deviation set out in s 2(1)(f) of the Act, since it requires compelling reasons, and not simply objective criteria that justify an award that is not made to the highest scoring bidder. Clause 5.13 of the standard conditions further specifies the following:

‘Acceptance of a tender offer

Accept a tender offer should it be considered not to present any unacceptable commercial risk, only if the tenderer;

...

- (b) can, as necessary and in relation to the proposed contract, demonstrate the possession of the professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, expertise and personnel, to perform the contract.’

[11] The statutory framework that I have outlined, and also the specific terms of the standard conditions of tender, permitted SANRAL to make an award to a bidder that was not the highest scoring bidder, provided that such an award was justified in compliance with the stipulated standard.

[12] However, to answer the competence issue, it is necessary to go further and consider whether SANRAL could consider whether, if awarded all seven contracts, Urban Icon had the capacity to carry them out without occasioning unacceptable commercial risk to SANRAL. I shall refer to this as the collective risk issue.

[13] The statutory provisions and the conditions of tender I have referenced, are formulated in language that is cast in the singular. That notwithstanding, they stipulate rules that are of application when an entity, such as SANRAL, is required to adjudicate upon several tenders for a series of projects. This is so upon an application of the well-established principles of interpretation (the unitary consideration of text, context and purpose).

[14] It may be efficient or required for operational reasons that an authority publishes invitations, solicits bids and adjudicates tenders for various projects at the same time. It would be an unworkable restriction that the rules of application can only be applied to each bid, without regard to whether a bidder has also bid on other tenders.

[15] The capacity of a bidder to perform is a function, amongst other matters, of how many tenders it is awarded, and indeed what other contractual commitments a bidder may have undertaken. Otherwise, it would mean that because a bidder had the capacity to perform each of the bids that it had made, SANRAL cannot consider whether the bidder has the capacity to perform *all* the bids that it has submitted. Such a restrictive reading would be deeply subversive of the purpose of the rules, which is: to determine whether the highest scoring bidder has the capacity to perform the proposed contracts, without unacceptable commercial risk to SANRAL.

[16] There is no reason to read s 2(1)(f) of the PPPFA, Regulation 11(1), or the provisions of Clause 5.11.4(d) and Clause 5.13 in a restrictive way. Taken together,

they permit SANRAL to consider the capacity of a bidder to undertake all the work for which it has bid, and the commercial risk to SANRAL that might arise from such a bidder's capacity constraints. The collective risk issue must thus be answered on the basis that SANRAL was permitted to consider Urban Icon's capacity to perform all the works that would be required of it, should awards be made to it in respect of some or all of the tenders for which it had bid and been ranked the highest bidder.

[17] Urban Icon contends that SANRAL did not have the power to subject it to a risk assessment, and by doing so, SANRAL acted beyond its powers. The generality of that contention cannot be sustained. Urban Icon does not dispute the statutory provisions and conditions of tender that stipulate the basis upon which SANRAL may deviate from an award to a highest-ranked bidder. Its contention is that once Urban Icon had qualified on the basis of quality conformity a risk assessment based upon capacity was precluded. That the conditions of tender provide for a qualification stage of adjudication, concerned with quality conformity, does not mean that issues of commercial risk, that engage a bidder's capacity to perform the works for which it has bid, can no longer be considered. The provisions of the PPPA, its Regulations, and the conditions of tender are formulated on a quite different premise, that is: even though a bidder may have been ranked first, and thus met the qualifications for quality, there may nevertheless be an objective basis to deviate from an award to such a bidder.

[18] Urban Icon argues that the objective criteria referenced in s 2(1)(f) of the PPPFA do not include a risk assessment of a bidder's capacity to perform the tenders for which it has bid. This argument also falls to be rejected. As the high court correctly observed, citing *Simunye v Lovedale*,³ a bidder's track record, its experience, its resources, both by way of personnel and finance, and the extent of its existing and proposed commitments may all constitute objective criteria within the

³ *Simunye Developers CC v Lovedale Public FET College* 2010 JDR 1568 (ECG).

meaning of what s 2(1)(f) contemplates. Public procurement makes use of public resources. That places a high premium on how such scarce resources are spent. Awarding a tender to a first-placed bidder who cannot do the work or some material part of it, constitutes a risk to the efficient and effective use of public resources. Such a risk must be assessed on an objective basis, and it is relevant to the calculus of whether the tenders should be awarded to such a bidder.

[19] To conclude otherwise would suggest that the PPPFA was indifferent to the substantial harm that can result to the public good from an award to a bidder that may have qualified on a desk top assessment of the quality of its bid, and offered the lowest prices, but upon the application of objective criteria, the bidder is found to suffer incapacity in relation to some or all of the bids that it has made. The PPPFA entails no such indifference. Incapacity is an objective criterion falling squarely within the remit of s 2(1)(f) of the PPPFA. Incapacity may also constitute a compelling and justifiable reason in terms of Clause 5.11.4 (d) of the conditions of tender, provided the facts meet this standard. I therefore conclude that SANRAL was competent to engage the collective risk issue.

[20] A further contention emphasised by Urban Icon was this; Even if SANRAL enjoyed the competence, upon an application of s 2(1)(f), to avoid the obligation to award all seven contracts to Urban Icon, SANRAL could not simply make the four awards to the second-highest-scoring bidders. Urban Icon points to the wording of s 2(1)(f) that references objective criteria justifying ‘the award to *another tenderer*’ (my emphasis). Another tenderer does not mean the second-highest-scoring bidder, so the argument went. This interpretation, it argued, is supported by a number of provisions of the conditions of tender⁴, and in particular clause 5.11.5 (d) which directs SANRAL to, ‘[R]escore and re-rank all tenderers should there be compelling and justifiable reasons not to recommend the tenderer with the highest number of

⁴ Urban Icon relies upon clauses 5.11.2 (b), 5.11.3 (d), 5.11.4 (d) and 5.11.5 (d) of the tender conditions.

tender evaluation points, . . . unless there are compelling and justifiable reasons not to do so, in which case the process set out in this subclause shall be repeated’.

[21] The use of the phrase ‘another tenderer’ in s 2(1)(f) includes the second-highest bidder, but does not require that the second-highest scoring bidder must be selected. This means that the second-highest scoring bidder can be selected, but does not have to be. It is not clear, then, how the reference to another tenderer advances the case of Urban Icon. First, we are here concerned with whether it was competent for SANRAL to make the awards it did to the second-highest scoring bidders in place of Urban Icon. Section 2(1)(f) does not exclude SANRAL from doing so. Whether SANRAL’s application of this competence was irregular is a separate question, upon which I am not presently engaged. Second, s 2(1)(f) is predicated upon the circumstances in which an obligation to make an award to the highest scoring tenderer may be avoided. It is difficult to imagine that the obligation may be avoided, but the highest-scoring bidder nevertheless remains in the running. What is clear, however, is that if the highest-scoring bidder may be justifiably displaced, and s 2(1)(f) permits, but does not require, that the second-highest bidder be chosen, provided this choice is justified by objective criteria.

[22] Nor do the provisions of the tender conditions in clauses 5.11.2 (b), 5.11.3 (d), 5.11.4 (d) and 5.11.5 (d) advance Urban Icon’s case. These clauses all reference the different methods by which permutations of the financial offer, quality, and preferences are scored. Clause 5.11.5 (d) sets out method 4. That was not the method of application in this matter. Method 3 was. Clause 5.11.4 regulates the scoring of a financial offer and preferences under method 3. Clause 5.11.4 (d) requires, as I have observed, that the tenderer with the highest number of evaluation points be recommended for the award of the contract, ‘unless there are compelling and justifiable reasons not to do so.’ Here too, provided there are compelling and justifiable reasons to do so, the second-highest bidder may be chosen.

[23] I conclude that the review of Urban Icon, predicated upon SANRAL's alleged lack of competence to conduct a risk assessment of Urban Icon's capacity and appoint the second-highest scoring bidders, must fail. I find, for the reasons given, that SANRAL enjoyed the competence to do so.

The irregularity issue

[24] I proceed next to consider whether SANRAL exercised its competence lawfully. Urban Icon's principal ground of review on this score is that SANRAL unreasonably and irrationally found that Urban Icon posed an unacceptable commercial risk, and conducted the risk assessment exercise in an unfair and discriminatory manner.

[25] Whether Urban Icon had the capacity to carry out all the tenders it had submitted bids for, and whether, in consequence, it posed a commercial risk to SANRAL, were matters that SANRAL enjoyed the power to investigate and consider. As I have recounted, Urban Icon was, at the time, a recent entrant. It had bid for all seven tenders. The experience and resources it possessed to carry out the scale and complexity of work required by the seven tenders, and to do so simultaneously, were matters falling squarely within the objective criteria that s 2(1)(f) of the PPPFA contemplates. Objective questions of capacity inevitably arise when a new entrant bids for and is first ranked to be awarded seven tenders of considerable value, size and importance. The potential commercial risk to SANRAL of awarding all seven tenders to Urban Icon, a new entrant with a modest track record of previous works, was apparent and warranted objective investigation.

[26] Urban Icon raised various complaints as to how SANRAL conducted its investigation of Urban Icon's capacity. First, it complained that since Urban Icon had already secured the minimum number of points to qualify for the quality of its bids, there was no basis upon which SANRAL could or should have undertaken the risk assessment of Urban Icon's capacity. As to whether SANRAL could have undertaken

such an assessment, I have already determined this issue under my analysis of SANRAL's competence. As to whether SANRAL should have proceeded with the assessment that it did, here too, SANRAL cannot be faulted. There was plainly a collective risk issue posed by the possibility of awarding all seven tenders to Urban Icon as a new entrant. An assessment of its capacity to perform these tenders was, in the circumstances, clearly warranted. Urban Icon's qualification under SANRAL's assessment of the quality of its bids was no answer to the issue of collective risk.

[27] Second, Urban Icon claimed that it was not informed by Mr Essa that he was undertaking a risk assessment of Urban Icon's capacity to perform the tenders, which it contended, was unfair. Furthermore, it is said that Mr Essa sought to extract documents from it in a discretionary and undefined way. There is no basis for either of these complaints. In the correspondence between Mr Essa and Urban Icon, Mr Essa said this: '... your organisation may be in the running for more than one project/tender, therefore the reason for requesting this further information is to assess the experience, capacity, capability and sustainability of your organisation as a whole'. This explanation left little room for uncertainty as to why Mr Essa was seeking the information that he did from Urban Icon. Urban Icon's objection, at the time, was not that it was ignorant as to why the information was being sought, but rather, as in its review, that there was no lawful basis to seek it. That Mr Essa was thorough in his investigation cannot be faulted. He sought to carry out his mandate to make an informed recommendation as to the risk that might be occasioned to SANRAL, and to place Urban Icon in the best possible position to demonstrate its capabilities. That was an entirely rational, reasonable and fair way to discharge his mandate.

[28] Third, Urban Icon asserts that the risk assessment undertaken by Mr Essa was a 'ruse' to pursue an impermissible purpose, that is, not to award certain tenders to Urban Icon. There is no basis for this assertion. Mr Essa's memorandum sets out his findings as to Urban Icon's capacity to carry out the tenders for which it had bid.

These findings are based on an objective consideration of Urban Icon's position. Urban Icon had secured three previous appointments on projects of modest size, and in two cases, as a sub-contractor. Further, Urban Icon proposed to make extensive use of external specialists to execute the work. Its own internal capacity was limited. Urban Icon objects that the terms of the tender permitted the engagement of external specialists, and that other bidders similarly engaged the same external specialists. But this misses the point. The issue for SANRAL was whether the extent to which Urban Icon relied upon external specialists posed a commercial risk. Mr Essa found that it did. Any withdrawal of external experts or constraint on their unavailability due to other commitments posed a significant risk, given the extent to which Urban Icon depended upon these external specialists. While the conditions of tender did not preclude Urban Icon from making use of external specialists, it could not immunise itself from the consequences of its election to rely heavily upon such specialists.

[29] In sum, Mr Essa's memorandum concluded that awarding all seven tenders to a relatively new entrant, with a modest track record relying extensively on external expertise, posed a significant risk to SANRAL, given the scale, complexity and value of the seven tenders. However, Mr Essa did not use this conclusion to exclude Urban Icon. Rather, he recommended that Urban Icon should be awarded three tenders of less complexity to prove their mettle. That was both a balanced and fair outcome that found a *via media* so as to give Urban Icon, as a new entrant, a chance to do work of value, without exposing SANRAL to undue risk. The adoption of these recommendations by SANRAL was in no measure the implementation of an improper purpose to deprive Urban Icon of the fruits of their efforts. It was a rational and reasonable exercise of SANRAL's competence to consider Urban Icon's capacity and the commercial risks that might accrue if all or some of the seven tenders were awarded to Urban Icon. The decision taken by SANRAL to award three, but not all seven of the tenders, to Urban Icon satisfies the objective criteria of s 2(1)(f) of the PPPFMA, as also the more stringent test set out in clause 5.11.4 (d) read with clause 5.13 of the standard conditions that there must exist compelling and justifiable

reasons to derogate from an award to the highest scoring tenderer. That is so because the factors that Mr Essa found to be limitations upon Urban Icon's capacity and the consequential risk to SANRAL are based on objective criteria of sufficient weight to be compelling and justify the award that SANRAL made to Urban Icon, which was aligned to its actual capacity.

[30] Urban Icon raised a number of additional challenges. It complained that SANRAL had treated Urban Icon unfairly and inconsistently. The gravamen of this complaint is that the risk assessment which it was subjected to by SANRAL, was not meted out to other bidders, including the second-placed bidders who secured awards at Urban Icon's expense. More particularly, Urban Icon referred to the passage of Mr Essa's memorandum, in which he referenced a bidder, Cinfratec (Pty) Ltd, that had been 'similarly founded' to Urban Icon and shared key personnel with another bidder, Wamil. Yet, Urban Icon complained, Cinfratec and Wamil were awarded tenders without any investigation of their capacity to execute the required works.

[31] The challenge based on inconsistent treatment is unavailing. For inconsistent treatment to constitute any kind of unfairness, it must, at the very least, be shown that SANRAL treated bidders in like positions differently. This Urban Icon has failed to prove. There is no evidence on record that Cinfratec and Wamil secured the award of tenders for which Urban Icon was competing. The projects that were made subject to competitive bidding involving Cinfratec and Wamil do not appear from the record. Nor is there evidence as to how awards were made to these companies, and against which competing bidders. Once this is so, there is simply no evidence that permits of any conclusion as to whether Cinfratec and Wamil were in any respect similarly situated to Urban Icon.

[32] Nor is there any basis to contend that Urban Icon was treated unfairly because the second-placed bidders that won awards, where Urban Icon did not, were not subjected to the same scrutiny that Urban Icon suffered. Here, too, Urban Icon has

not shown that these second-placed bidders were similarly situated to it. That is to say, there was no evidence that the second-placed bidders were similarly situated to Urban Icon, as relative neophytes, with a modest track record, and few permanent employees with significant experience. On the contrary, it was precisely because Urban Icon and its bids raised distinctive issues of risk that additional scrutiny was warranted. And hence the complaint of inconsistent treatment is not made out.

[33] Urban Icon challenges the award of tenders to the second-placed tenderers. This challenge has two dimensions. First, Urban Icon contends that the reference in s 2(1)(f) to ‘another tenderer’ cannot mean a second-placed tenderer. For the reasons I have set out above, this interpretation cannot be accepted. Second, Urban Icon argues that if it was lawful for SANRAL not to award the four tenders to the first-placed tenderer, SANRAL was required to re-score the tenders. SANRAL did not do so but simply chose to make the awards to the second-placed bidders. This, it is said, is a requirement of s 217 of the Constitution to ensure that the tender process is competitive and transparent, as also of the relevant provisions of clauses 5.11.2, 5.11.5 of the conditions of tender, which require a rescoring and re-ranking of all tenders if there are compelling and justifiable reasons not to recommend the tenderer with the highest number of points.

[34] As to the constitutional requirements of competition and transparency, it is not apparent what more was required of SANRAL. As I have found, it lawfully decided not to award Urban Icon four tenders, even though it was the highest scoring bidder. It did so for reasons, now well traversed. On SANRAL’s assessment, Urban Icon lacked the capacity to carry out the works required in all seven tenders without undue risk to SANRAL. That meant that Urban Icon, logically, could no longer be in contention for the award of these tenders. SANRAL had already undertaken a transparent and competitive process from which it was determined which bidders were second-placed in each of the tenders from which Urban Icon was displaced. A rescoring would have yielded no different ranking; nor would it have secured any

incremental gain by way of transparency or competition. It would have been a redundant exercise. There is no constitutional requirement to perpetuate redundancy.

[35] I have already observed that clause 5.11.4 (d) provides for the application of method 3. It does not require a rescoring. And clause 5.11.5 (d), upon which Urban Icon placed reliance, was not of application to the adjudication of these tenders. However, the language of this clause is, in any event, unclear. But it appears to permit SANRAL not to rescore if there are compelling and justifiable reasons not to do so. A rescoring that is merely performative and cannot give rise to a different outcome is a justifiable and compelling reason not to rescore. Hence, this ground of challenge, on any basis, must also fail.

[36] Finally, Urban Icon drew attention to the correspondence that passed between SANRAL and the National Treasury in which the latter questioned the basis upon which SANRAL had made awards to the second-highest bidders in the four tenders. The reports made to the National Treasury and its views as to the legality of SANRAL's awards are not of consequence for the determination of this review. It is for the courts to decide whether SANRAL's actions comport with the requirements of legality. The discharge by SANRAL of its duties to National Treasury is not a matter that vitiates the decisions here taken by SANRAL.

[37] I conclude, therefore, that the award of the four tenders to the second-placed bidders suffered from no reviewable irregularity. The high court correctly came to the same conclusion.

The stay condition

[38] SANRAL, as I have sketched above, imposed the stay condition upon Urban Icon. Urban Icon contends that SANRAL had no power to impose the stay condition. The high court found that the stay condition was not administrative action because it

had no external legal effect, and since the period of the condition had expired, there was no issue that required determination.

[39] We need not decide whether the stay condition was operative in any decision taken by SANRAL not to award the four tenders to Urban Icon. It suffices to observe that, whether or not the stay condition constituted administrative action, the legality of the stay had become moot by the time that matter fell to be decided in the high court because the presumptive duration of the stay had come to an end. It was not suggested by any of the parties before us that the stay endured beyond this point. Nor was there any issue of principle that required determination, notwithstanding the high court's finding of mootness. The high court was thus correct to decline to determine Urban Icon's challenge on this score.

Conclusion

[40] It follows that Urban Icon's appeal must fail, and it was common ground before us that the costs should follow the result, including the costs of two counsel, where so employed. I mention finally that Urban Icon brought an application to adduce new evidence on appeal in this Court, and there were efforts by SANRAL and Ilifa to do so in response. Properly considered, the evidence was relevant to the question of remedy should the appeal succeed on the merits. Given the conclusion I have reached on the merits of the appeal, there is no need to decide these applications.

[41] In the result, the appeal is dismissed with costs, including the costs of two counsel, where so employed.

D N UNTERHALTER
JUDGE OF APPEAL

Appearances:

For appellant: L Maunatlala (with him S Mhlongo and P Buckland)

Instructed by: Malose Matsaung Attorneys, Pretoria
Peyper & Botha Attorneys Inc., Bloemfontein

For first respondent: A Milovanovic-Bitter (with her P J Daniell)

Instructed by: Edward Nathan Sonnenbergs Inc., Johannesburg
Webbers Attorneys, Bloemfontein

For third respondent: S D Wagener SC

Instructed by: Kally & Co Inc., Pretoria
Honey Attorneys, Bloemfontein.