



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D3052/2024

In the matter between:

APM TERMINALS BV

Applicant

and

TRANSNET SOC LIMITED

First Respondent

INTERNATIONAL CONTAINER TERMINAL

SERVICES INC

Second Respondent

COSCO SHIPPING PORTS LIMITED

Third Respondent

DP WORLD LIMITED

Fourth Respondent

**GLOBAL PORTS SERVICES PTE
LIMITED**

Fifth Respondent

RED SEA GATEWAY TERMINAL

Sixth Respondent

MMC PORT HOLDINGS SDN BHD

Seventh Respondent

TERMINAL INVESTMENT LIMITED

Eighth respondent

REMGRO LIMITED

Ninth Respondent

This judgment was handed down electronically by circulation of the parties' representatives by email and released to SAFLII.
The date for hand down is deemed to be on 10TH October 2025 at 10:00

ORDER

The following order is granted:

1. The application is dismissed.
2. The parties are to bear their own costs, including any costs reserved.

JUDGMENT – REVIEW APPLICATION

Chetty J:

[1] Writing for the Supreme Court of Appeal ('SCA') in *Altech Radio Holdings (Pty) Ltd and Others v Tshwane City*,¹ Ponnan JA said the following regarding challenges in the field of public procurement:

'Search hard enough in public procurement cases such as this, and one will surely find compliance failures along the way. There will seldom be a public procurement process entirely without flaw. But, perfection is not demanded and not every flaw is fatal. Nor does every flaw in a tender process amount to an irregularity, much less a material irregularity. Public contracts do not fall to be invalidated for immaterial or inconsequential irregularities. Indeed, as it has been put, "(n)ot every slip in the administration of tenders is necessarily to be visited with judicial sanction".' (Footnote omitted.)

The question which arises in this matter is whether a 'slip' in the process of the award of a contract of national economic importance, should be reviewed and set aside at the instance of an aggrieved bidder, bearing in mind that judicial review is a discretionary remedy and it does not necessarily follow that an invalid act will, in fact, be set aside.²

[2] The 'slip' in question pertains to the successful bidder not meeting a solvency threshold (under the minimum financial criteria section) contained in the responsiveness phase of the tender.³ Notwithstanding, it is common cause that the bidder has the necessary financial capacity to secure investments for the development of the port of Durban, which both the bidder and the procuring entity submit to be the

¹ *Altech Radio Holdings (Pty) Ltd and Others v Tshwane City* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 54.

² *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 36.

³ Generally, a bid only qualifies as responsive if it meets all the requirements as set out in the tender documents, without material deviation or qualification. These requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical criteria, pricing and empowerment requirements.

overarching purpose of the disputed provision. The successful bidder trumped the second bidder by a significant margin in the price duel.

[3] In light of the unique nature of the tender and the objectives which underlie it, the question which arises is whether the non-compliance should be condoned in light of the materiality test established by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others*.⁴ The first part of this judgment concerns the issue of whether the review application was brought timeously. The second aspect is devoted to a consideration of the materiality argument.

[4] The applicant, APM Terminals BV ('APM'), is part of the AP Moller-Maersk Group, an international logistics company. APM has its principal place of business in the Netherlands and is engaged in 62 locations throughout the world, developing ports and container terminals. It was part of a group with nine other bidders, who competed for a tender issued by the first respondent, Transnet SOC Limited ('Transnet') for the development and operation of the Durban Container Terminal Pier 2 ('DCT2') in the Port of Durban ('the port'), South Africa's main cargo and container hub.

[5] This was no ordinary tender by a state-owned entity for the provision of goods and services, as is generally the case where an award is challenged by an aggrieved bidder. Instead, this tender was aimed at securing a private partner to collaborate with Transnet, a state-owned entity, to develop and operate the port over a period of 25 years. The structure of the transaction is that the business of DCT2 would be transferred to a special purpose vehicle (referred to as 'NewCo'), in which the successful bidder would become a 49% shareholder, with Transnet the remaining shareholder. NewCo will manage and maintain the operations of DCT2 during the contract period. Through this process, Transnet aimed to raise the necessary capital to address the critical infrastructural crisis at the port, to upscale its technical skills and, importantly, generate sufficient capital to reduce its overall debt, and turn its attention to other projects.

⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC) (*Allpay*).

[6] There is no dispute that DCT2 has been plagued for decades by limited operational capacity, resulting in freight backlogs and congestion of vessels entering and leaving the port.⁵ The chronic under-performance at the port has had a significant knock-on effect on the local economy, resulting in an increase in the costs of goods moving into and out of the country. Vessels are berthed for longer than expected, resulting in increased costs to the shipping companies, and negatively impacting supply chains, with the increased costs ultimately borne by the consumer. There can be no equivocation that this is a matter which is overwhelmingly in public interest – DCT2 handles 46% of the country's port traffic and serves as a gateway for the import and export of goods to South Africa and its neighbouring countries. The magnitude of its problems, in global terms, is ominous. The port has lost its regional and global competitiveness.⁶

[7] APM failed to secure the status of the preferred bidder, that privilege and the eventual awarding of the tender being bestowed on the second respondent, International Container Terminal Services Inc ('ICTSI'), a company based in the Philippines and a global competitor to the applicant. ICTSI is the world's largest independent terminal operator, active in six continents and is ranked eighth as a global terminal operator in terms of its capacity.

[8] APM and ICTSI, having been assessed together with the other bidders at a Request for Qualifications stage ('RFQ'), were then progressed through to the second round of the tender, being the Request for Proposals stage ('RFP'). This process involved, what counsel at the hearing euphemistically referred to as a 'straight price shootout'. Simply put, at this stage of the process, the highest bidder would be awarded

⁵ According to Transnet, the concept of the introduction of private sector partners in the operation of the port has long been a priority of national government, stemming back to 2002, when the first plan to fast track private sector inclusion was mooted in the Commercial Ports Policy. For reasons which are not apparent from the papers, the investment in port infrastructure and the provision of a more efficient and higher quality of port services, appear to have slipped the national focus. After a hiatus of almost 19 years, the issue of the ailing infrastructure of the port was resurrected as part of the government's Economic Reconstruction and Recovery Plan, with the intention to expand the capacity of the port, funded by private sector involvement, as Transnet lacked the financial resources to do so.

⁶ In 2022, the World Bank's Container Port Performance Index (CPPI) ranked the port at 341st out of 348 ports globally, reflecting its poor performance. The answering affidavit of Transnet refers to a ranking of 365th out of 370 ports. Nothing turns of the discrepancy,

the tender to develop and operate the port as a shareholder together with Transnet. ICTSI's offer exceeded that of APM by almost R2 billion. APM was ranked second behind ICTSI.

[9] APM's basis for challenging the award is essentially that ICTSI failed to comply with the requirement of the tender specifications, requiring all bidders to establish (at the RFQ stage) a solvency ratio equal to or exceeding 0.4, using the formula of total equity/total assets. Instead of adhering to this formula, in order to demonstrate that it had the necessary financial capacity to attract the required funding for the project over the 25-year term, ICTSI proceeded to assure Transnet of its solvency by using the numerator of market capitalisation (as opposed to total equity) over assets.

[10] As I understood the argument and affidavits, market capitalisation (used by ICTSI) is dependent upon the share price of a company at any given time, with solvency being the ability of a company to meet its financial obligations.

[11] All the other bidders used 'total equity', which are the figures reflected in the company's annual financial statements, and which are verified by its auditors. The purpose of the solvency exercise in the RFQ was to satisfy Transnet of the bidder's ability to meet its financial obligations and to attract investment for the project over a 25-year period. Transnet concedes that it was a mandatory requirement that a bidder had to meet the requirement of establishing that it had the financial capacity to attract investors to the project.

[12] It is common cause that had ICTSI adhered to the formula of using total equity/total assets (as did all the other bidders, including APM), it would have scored 0.24, thereby failing the threshold set out in the bid specification.⁷ In contrast, the metric employed by ICTSI of using market capitalisation as the numerator instead of total equity (and demonstrating its financial capacity), resulted in it achieving a solvency ratio of 1.28. On this basis, ICTSI progressed, along with nine others, including APM, to the RFP stage, with ICTSI ultimately prevailing as the 'Preferred Proponent', a term used in the bid specification to denote the successful bidder. It is on this ground,

⁷ This arose from a recalculation by Transnet of the solvency ratio using the formula of total equity/total assets, applied to the annual financial statements disclosed by ICTSI in the RFQ and RFP stages.

primarily, that APM contends that the decision to award the tender to ICTSI for the development and operation of the port, should be reviewed and set aside. It is noteworthy that none of the other unsuccessful bids who progressed to the RFP stage, contested ICTSI's selection.. No advantage accrued to ICTSI by virtue of the score recorded in the solvency ranking. This was essentially a vetting stage to ascertain the responsiveness of the bidders.

[13] Against the backdrop of the ailing performance of the port, as described earlier, and in light of the government's intent to improve the economy, Transnet's Board approved of the process for the selection of an external partner for the development of DCT2. The procurement of goods and services by Transnet is subject to the constraints of s 217(1) of the Constitution, requiring all organs of state, when contracting for goods or services, to do so 'in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. Section 51(1)(a)(iii) of the Public Finance Management Act 1 of 1999 echoes this standard and requires that a public entity adheres to an 'appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective'.

[14] It is now trite that public procurement constitutes 'administrative action', as contemplated by the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), although Transnet, in opposing the interdictory relief sought by APM, alluded to tenders of this nature, as they are sanctioned by and aligned with the goals of the Executive, as being somehow outside the reach of the courts via judicial review. This amounted to a separation of powers argument. When the matter came before me, neither Mr *du Plessis* nor Mr *Ferreira*, on behalf of Transnet, persisted with that argument, and wisely so. Counsel did, however, argue for a 'deserving deference' to be shown to the decision maker, in this instance, an organ of state. This is an argument which I consider elsewhere in this judgment.

[15] Following the approval of the Board, Transnet issued the RFQ on 11 February 2022 in respect of the search for an equity partner to develop and operate DCT2. A Cross Functional Assessment Team ('CFAT'), comprising professionals across various disciplines, including planning, finance and law, would evaluate the proposals and make recommendations on the bids. The initial phase of the RFQ required bidders to

submit various documents by a set deadline. The next phase required bidders to submit a qualification declaration and a statement of qualifications, including their operational and financial information. This stage was intended to 'pre-qualify' bidders, those who complied with all of the requirements under this phase of the RFQ were passed through or progressed to be selected as shortlisted bidders.

[16] Compliance, or lack of it, with clause 5.2 of the RFQ is the kernel of this dispute. Its terms are set out in full:

'(d) Minimum Financial Criteria

Respondents must show that they have sufficient financial capacity to attract the required funding for the envisaged investment in DCT2.

Each respondent must submit its most recent five (5) years audited, consolidated financial statements (including auditors report and notes).

A respondent is deemed to have sufficient financial capacity, when the following criteria are met (at latest financial year ending):

1. Solvency is equal to or exceeds 0.4, as calculated by the following formula:

Financial Minimum Criteria 1: Solvency: total equity / total assets equal to or exceeds 0.4.

2. Liquidity Ratio is equal to or exceeds 1.2, as calculated by the following formula:

Financial Minimum Criteria 2: Liquidity: Source of funds / Uses of Funds equal to or exceeds 1.2

For which the Sources of Funds include:

- Closing Bank Balances
- Closing Balance of Short Term Liquid Investments
- Closing Balance of Short Term Committed Unutilised Facilities
- Long Term Committed Unutilised Facilities

For which the Uses of Funds include:

- Loan and Bond Redemptions for 12 months after latest financial end

Respondents are required to provide the information required for the Sources of Funds and the Uses of Funds in the Statement of Qualification.

2. The profit, earnings before interest, taxes, depreciation and amortisation (EBITDA) and operational free cashflow of each of the last five years were positive. Where the impact of COVID has resulted in a negative result, Transnet will concede the requirement for positive results in the affected financial years provided sufficient explanation of the COVID impact is provided. Transnet reserves the right to admit Respondents that can provide a convincing explanation for a negative profit, EBITDA or operational free cashflow.'

[17] The RFQ process culminated in the public announcement on 12 August 2022 of the short-listed candidates, who were subsequently invited to the second stage – the RFP, which commenced in September 2022. This stage envisaged a seven-step process in which third party verification was undertaken by Transnet of the shortlisted bidders relating to their declared operational qualification criteria and minimum financial criteria. It is perhaps pertinent to point out that during the RFQ stage, ICTSI provided the verification for satisfying the minimum financial criteria and the solvency ratio, as set out in the bid document.

[18] The verification was undertaken by SyCip Gorres Velayo & Co, based in the Philippines, a subsidiary of the global accounting firm, EY. In particular, the report, dated 17 October 2022, confirms that it was prepared to assist ICTSI in assessing their compliance with the requirements in the RFQ. In respect of the solvency ratio, the report confirms that ‘the total equity used by the Group (‘ICTSI’) in the calculation pertains to the group’s market capitalisation as at December 31, 2021’. The report further stated that it undertook a recalculation of the solvency ratio prepared by ICTSI using the market capitalisation as a numerator and total assets as a denominator and confirmed that the outcome indicated by ICTSI was indeed correct. A further report confirming the correctness of ICTSI’s minimum financial criteria was prepared by Mundy Penfold Limited, a consultancy firm in the United Kingdom. The process also included a due diligence exercise on the shortlisted bidders, a documentary requirement checklist, as well as an evaluation of their business plans.

[19] Step five of the process entailed a financial evaluation, based on the price offered by each shortlisted bidder. In accordance with clause 39.11 of the RFP, a score of 100% was awarded to the bidder with the highest bid, with a resultant 49% stake in the partnership with Transnet.

[20] Four bids were received, with ICTSI scoring 100% for its bid of approximately R11.1 billion. The second ranked bid, with a score of 83%, was APM, with its offer of R9.2 billion. On 6 April 2023, the CFAT, which was responsible for evaluating the bids, requested and received approval from the Group Executive Committee to recommend ICTSI as the ‘preferred proponent’ or highest bidder, with APM recorded as the second ranked bidder.

[21] After further scrutiny by Transnet's internal audit department, which identified no risks, a letter dated 6 July 2023 was sent to APM advising it that ICTSI had been selected as the preferred bidder. The letter further recorded that 'in the event the financial closure fails, Transnet will then seek to finalise the transaction with the second ranked'. On 3 July 2023, a letter was dispatched under the signature of the group chief executive of Transnet, informing ICTSI of its status as the preferred proponent, based on its proposal. The letter further set out certain suspensive conditions and advised that 'the final award of the tender and contract to you as the preferred bidder is subject to the fulfilment of the following suspensive of conditions'.

[22] These conditions included the satisfactory outcome of a due diligence exercise, as well as the payment of the bid price (R11.1 billion) within 10 days of the offer being made to it, to purchase the shares in NewCo. In addition, the final award was subject to the successful negotiation and execution of all project agreements. In the event of ICTSI failing to fulfil the suspensive conditions, the offer would be rendered null and void and Transnet would be entitled to award the tender to, and contract with, the second ranked bidder, APM.

[23] On 23 July 2023, APM wrote to Transnet requesting reasons for the decision to select ICTSI as the preferred bidder, as well as seeking confirmation that it indeed had been ranked as the second placed bidder. APM also requested information pertaining to the third-party verification of ICTSI's bid, as well as confirmation that ICTSI satisfied the minimum financial criteria, specifically the solvency requirement of 0.4. According to APM, ICTSI's 2022 annual financial statements disclosed a solvency ratio of 0.24.

[24] This letter was followed by another letter from APM's attorneys, dated 23 August 2023, in which it was recorded that APM 'harbours serious reservations regarding the lawfulness of the tender process which culminated in the selection of the Preferred Bidder' and specifically sought a response as to how the preferred bidder satisfied the solvency requirement of the tender. The attorneys for APM further sought an undertaking that Transnet would not proceed to conclude an agreement with the preferred bidder.

[25] Of particular significance, in light of Transnet's argument that APM delayed unreasonably in seeking to challenge the decision to award the contract to ICTSI, is the acknowledgment by APM's attorneys on 23 August 2023 of the 90-day time period in terms of PAJA within which to review the decision. In a similar vein, Transnet responded that in the interests of transparency and accountability, it would supply the additional information sought by APM, mindful that the 90-day period in terms of s 5(2) of PAJA would expire on or about 30 September 2023. No extension of the relevant time frames under PAJA were agreed upon.

[26] Transnet then brought to the attention of its attorneys that APM had queried whether ICTSI had complied with the requirements of establishing the minimum financial criteria in the RFQ. An opinion was sought from Mettle Corporate Finance (Proprietary) Limited ('Mettle') whether ICTSI had complied with the tender specifications, having used market capitalisation as the numerator in place of total equity. Mettle concluded that the use of market capitalisation, which is the price per share of the company multiplied by the number of shares issued, is not an acceptable means to ascertain the solvency of a company.

[27] Transnet, in accordance with its obligation under the Constitution to treat all bidders in a fair and equitable manner, brought to the attention of ICTSI the concerns raised by APM, specifically regarding its declared solvency ratio, having used the metric of market capitalisation instead of total equity. It was also recorded that following receipt of the complaints raised by APM, Transnet revisited the provisions of the RFQ and RFP, which required bidders to establish the solvency of not less than 0.4 using 'total equity' as the numerator. Transnet further noted that, based on its recalculation, had ICTSI adopted the use of the same metric as the other bidders (using total equity as the numerator), on the basis of its financial statements as disclosed, it would have generated a solvency ratio of 0.24.

[28] Transnet accordingly gave notice to ICTSI under regulation 14(1)(a) and (b) of the Preferential Procurement Regulations, 2017⁸ of its right to respond to the

⁸ Preferential Procurement Regulations, 2017, GN R32, GG 40553, 20 January 2017. These regulations have since been repealed by the Preferential Procurement Regulations, 2022, GN 2721, GG 47452, 4 November 2022, which came into effect on 16 January 2023.

allegations by APM and provide reasons why it should not be disqualified for failing to meet the requirements contained in the RFQ. In response, within days of receipt of Transnet's letter, ICTSI provided Transnet with letters from three major banks confirming ICTSI's total available credit facilities in excess of US\$400 million, and by inference, its favourable solvency rating.

[29] On 2 October 2023, ICTSI responded that it had indeed complied with the requirements of clause 5.2(d) of the RFQ, which required that it demonstrate the existence of sufficient financial capacity to attract the required funding for investments in DCT2. It disagreed with Transnet's assessment that it failed to meet the threshold of 0.4 and, in any event, it emphasised that the tender document did not provide for disqualification in the event of a bidder failing to achieve the solvency ratio. In its view, as there was no stipulation or guidance in the bid documents as to how total equity was to be determined, it employed market capitalisation, rather than the nominal equity value contained in its audited statements.

[30] ICTSI further pointed out to Transnet that in its response to clause 5.2(d) in the RFQ, it disclosed to those adjudicating the bid of its use of market capitalisation in satisfying the solvency requirement.⁹ Accordingly, there was no attempt to mislead the bid adjudicators. It held the view that market capitalisation was an appropriate means to calculate solvency for the purposes of the RFQ. In its letter to Transnet of 2 October 2023, ICTSI asserted that it has the funding available for the initial share purchase price, and as evidence of its solvency, offered to immediately deposit the amount into an escrow account. Such proposal would, in my view, be inconsistent with a company whose solvency was being doubted. It would therefore not come as a surprise that the Joint Minute, concluded between the parties prior to the hearing, recorded that 'ICTSI has sufficient capacity to attract the funding required for the envisaged investments in DCT2'. That put paid, in my view, to any doubt as to ICTSI's solvency to be a suitable partner to Transnet over 25 years.

⁹ This emerges from a perusal of the completed RFQ by ICTSI and is confirmed in appendix A.1 to the letter from SyCip Gorres Velayo & Co in a footnote, which reflects ICTSI's market capitalisation as at 31 December 2021, 2022 and June 2023. It notes further that 'Total equity is based on market approach following General Standards IVS 105, Valuation and Approaches and Methods of the International Valuation Standards published by the International Valuation Standards Council'.

[31] Further letters on 26 October 2023 and 1 November 2023 were addressed by APM's attorneys to Transnet, requesting the urgent supply of reasons for its decision to appoint ICTSI. As Transnet had not responded by the end of October 2023, as it undertook to do, the stance of APM's attorneys was that they were instructed 'to launch judicial review proceedings imminently to set aside the appointment decision', and to 'approach the court for a special allocation so that the matter could be heard on an expedited basis'.

[32] Transnet undertook that it would make 'no decision' in relation to the 'bidding process' until it had sufficient time to consider the issue raised on behalf of APM. Transnet also adopted the view that any application launched by APM would be premature. The exchange of correspondence between the respective attorneys for Transnet and APM continued without further reasons being furnished and without progression to steps six and seven of the tender process, which would culminate in the final award of the contract to the preferred proponent.

[33] At the same time, Transnet's Internal Audit department ('TIA') reviewed APM's complaint on ICTSI's use of market capitalisation in establishing solvency. The TIA concluded that such procedures were inappropriate and ICTSI failed to meet the minimum criterion in the RFQ, which could result in a disqualification. It, however, cautioned that a legal opinion should first be obtained.

[34] On 20 November 2023, Transnet's attorneys wrote to ICTSI setting out in some detail the respective views as to whether it had complied with the solvency ratio specified in the RFQ. Notice was issued to ICTSI of its potential disqualification as the preferred proponent and it was invited to make submissions as to why Transnet should not proceed with a disqualification.

[35] ICTSI's attorneys responded that the use of market capitalisation was an acceptable method of establishing its solvency, notwithstanding that the other bidders had chosen to use total equity in addressing this requirement. It stressed that its use of the specific metric was disclosed at the time of its completion of the RFQ forms and that it acted reasonably and transparently in the entire tender process. Accordingly, it

gave notice that it would oppose any attempt at disqualification or any review brought by any party.

[36] On 12 December 2023, Transnet took a decision to appoint an external consultant, GrowthStone Assurance Incorporated ('Growthstone') to test ICTSI's 'financial soundness' through the methodology of a financial due diligence exercise. Growthstone released its report in the same month, concluding that from a financial perspective, ICTSI was in a 'good position' to raise additional capital for further investment in DCT2.

[37] On 1 March 2024, Transnet provided a detailed and comprehensive response to APM, as to its processes and reasons followed in verifying ICTSI's compliance with the requirements in the RFQ in establishing its solvency, even though it failed to achieve the ratio of 0.4 when assessed using the numerator of 'total equity'. Transnet's position then and throughout is that the failure to meet the threshold was not material to the achieving of the overall purpose of establishing that the chosen bidder had the necessary financial capacity to finance the project.

[38] On 3 March 2024, Transnet informed ICTSI in a letter that as the preferred proponent, it intended to proceed with the outstanding steps necessary to finalise the award of the contract to it. The letter provided a detailed explanation of all the steps taken by Transnet in the RFQ and RFP stages of the tender culminating in the selection of the preferred proponent.

[39] Of particular relevance to the dispute before me is the explanation provided to APM that at the financial evaluation stage, APM offered US\$515 million – scoring 83% and the preferred proponent, ICTSI, offered US\$618 million - scoring 100%. ICTSI was accordingly recommended by the CFAT as the preferred proponent. As to its engagement with ICTSI on its financial qualifications, Transnet advised that while ICTSI was the only bidder to rely on market capitalisation, it proactively disclosed the use of market capitalisation in its solvency ratio, which was confirmed by its auditors. Transnet indicated that it was satisfied that ICTSI has a 'strong balance sheet and high leverage capacity which will continue as a strong going concern in the foreseeable future, as it has done in the past'. In light of this, Transnet concluded that ICTSI had

the necessary financial capacity to attract the required funding, even though it failed to meet the 0.4 solvency ratio. It adopted the position that the failure to achieve the ratio was not a material factor in light of ICTSI's overall financial capacity.

[40] In light of the response, APM launched an urgent application on 11 March 2024¹⁰ for interdictory relief preventing Transnet from concluding a final contract with ICTSI or any other party, pending a review of the decision of 1 March 2024 to 'award the tender' to ICTSI. It further sought declaratory relief that it (APM) be declared the preferred bidder and that Transnet engage with it in respect of finalising the contract. Apart from attacking ICTSI's failure to satisfy the solvency threshold, APM contended that Transnet accorded ICTSI 'special treatment' to depart from the tender requirements.

[41] In support of its application, it enlisted the expert assistance of Professor Wainer of the University of Witwatersrand's School of Accounting. He reviewed the RFQ and RFP requirements and ICTSI's use of market capitalisation in order to satisfy the minimum financial criteria section of the RFQ.¹¹ He opined that market capitalisation is a 'notional theoretical indicator of the value of all the issued shares' and an assessment from the perspective of an investor, and not an indicator of the actual financial position of the company. In Professor Wainer's view, market capitalisation does not reflect the solvency position of a company.

[42] At the time of his report, Professor Wainer did not have sight of ICTSI's disclosure of the use of market capitalisation in the bid document submitted to Transnet. He was also critical of Transnet's reasons for choosing ICTSI based on its 'strong balance sheet and high leverage capacity' contending that these criteria are different to the objectively determinable criteria in the RFQ. He adopted the position that the RFQ did not require bidders to be assessed for their overall financial capacity.

¹⁰ The application was launched within ten days of being informed of the decision by Transnet and comprised 320 pages. At the time when the matter was argued for the interim order, the papers comprised close to 1 400 pages, and eventually over 14 500 pages when the final review was heard.

¹¹ Transnet conceded that ICTSI did not meet the 0.4 threshold when using book equity as the numerator in the formula set out in clause 5.2(d) of the RFQ.

[43] The urgent application was opposed by Transnet and ICTSI.¹² The matter served before Mossop J who dismissed the arguments raised by both Transnet and ICTSI that the review was out of time. They contended that the decision which had an external effect on the rights of third parties was the selection of the preferred proponent, which was announced on 6 July 2023. The decision of 1 March 2024 in which Transnet provided detailed reasons for having selected ICTSI as the preferred bidder was explanatory in nature and did not have any external effect. Transnet contended that the review, launched on 11 March 2024, was eight months after the date from when the preferred bidder decision was announced.

[44] It was further contended that APM failed to act expeditiously and provided no explanation for the delay. APM's founding papers contain no application for condonation. ICTSI submitted that APM's reliance on the 1 March 2024 decision as being the decision to award the tender, was misconceived. It maintained, like Transnet, that the decision that ought to have been the focus of the review, was the selection of the preferred bidder on 6 July 2023. Both contend that the decision of 1 March 2024 was seized upon by APM as a pretext for urgency, which was self-created in order to stifle the contract awarded to its chief competitor, ICTSI. From APM's perspective, it acted within ten days of the decision of 1 March 2024 being communicated to it. In its view, ICTSI, having failed to comply with a 'mandatory' requirement of the tender, ought not to have progressed beyond the RFQ stage.¹³ This was a 'red flag' according to Transnet's internal audit report. Despite this, ICTSI was progressed to the RFP stage where it prevailed on price.

[45] Mossop J considered that the decision of 1 March 2024 was a 'final' decision, and despite the arguments advanced by Transnet and ICTSI as to the delay, the court found that the matter was inherently urgent. In weighing the prospects of success as part of the equation in determining whether to grant interim relief, Mossop J found that ICTSI failed to comply with the requirements of the RFQ when it resorted to the use of market capitalisation in answering the solvency enquiry in the RFQ. In resisting the

¹² Terminal Investment Limited (the eighth respondent) filed a notice to oppose but no affidavit. Its opposition was confined to a point of law. This opposition was dismissed. The eighth respondent plays no part in the present review proceedings.

¹³ APM relied on the wording in clause 5.2(d) providing for 'minimum financial criteria' which states that bidders '*must show* that they have sufficient financial capacity to attract the required funding...'.

urgent application, ICTSI relied on the affidavit of its expert, Professor Maroun, also from the University of Witwatersrand's School of Accounting, who was of the view that there is no single way to express total equity in determining solvency. He went on to add that care should be taken to avoid creating the impression that solvency can only be expressed through one specific ratio.

[46] The court concluded that the decision in identifying ICTSI as the preferred bidder was potentially flawed and *prima facie* unfair to other bidders. The court expressed no view as to the materiality of ICTSI's non-compliance with the precise formula provided for in clause 5.2(d) or of Transnet's position that such non-compliance did not oblige it to disqualify ICTSI.

[47] Mossop J was persuaded by APM's argument in the urgent application, and interdicted Transnet from taking any further steps pursuant to its decision of 1 March 2024 with ICTSI or any other party in relation to the tender for the development of the port. APM and Transnet were directed to pay the costs of the application and made an allowance for preference to be granted for the urgent hearing of the review application.¹⁴

[48] Following the interdict, Transnet filed the record of its decision in terms of rule 53, to which APM filed a supplementary founding affidavit. Importantly, APM amended its relief from initially only challenging the decision of 1 March 2024 as the 'impugned decision' to now reviewing and setting aside as invalid the decision of 1 March 2024. Importantly, it also sought condonation (to the extent necessary) for the non-compliance with the 180-day time period in PAJA for the reviewing and setting aside of the decision made on 12 August 2022 in which ICTSI was short-listed to participate in the RFP, and of the subsequent decision made or communicated on 6 July 2023 to select ICTSI as the preferred bidder. It sought a declaration that it be appointed as the preferred bidder in line with Transnet's ranking of it as the second ranked bidder, and for Transnet to conduct negotiations with it to finalise the contract. Alternatively, it sought that the matter be remitted to Transnet for reconsideration.

¹⁴ The judgment in the interim application was handed down on 11 October 2024 after two days of hearing argument. An application for leave to appeal was refused.

[49] APM contends that it is entitled to challenge the earlier short-listing and preferred bidder decisions¹⁵ (in addition to the 'final decision' of 1 March 2024), on the basis that ICTSI and Transnet maintain that the earlier decisions constituted administrative actions that would be reviewable, while at the same time informing APM in correspondence as late as November 2023 that no 'decision' had been made and that any institution of action at that time would be premature. In APM's mind, the 'clock started to tick' only once full and adequate reasons were furnished by Transnet. This occurred on 1 March 2024. For this reason, APM adopts the stance that its challenge, through the late amendment, is intended as a 'belts and braces' approach in the event of the court finding that those decisions ought to have been challenged and not the 'decision' of 1 March 2024.

[50] It is worth noting that even after the filing of the record and the amended relief, the crisp issue which remains for determination is whether Transnet was obliged to disqualify ICTSI only for the reason that it failed to comply with a solvency ratio calculated on the basis of total equity over total assets. This could also be termed 'non-responsiveness', in that ICTSI is said not to have passed the initial stage of the RFQ.¹⁶

[51] Transnet and ICTSI maintain that the challenge is premised on a 'narrow, technical ground' intended to disqualify ICTSI in the final leg of what is a fair and lawful tender process, in compliance with s 217 of the Constitution. In so doing, Transnet contends that APM intends to secure for itself the winning position (effectively seeking

¹⁵ The applicant relied on *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC) para 13, which held in relation to rule 53 that:

'The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.'

Transnet and ICTSI opposed the amended relief, contending that APM had known from the outset of the need to challenge the earlier decision but opportunistically latched onto the 1 March 2024 decision as the basis for launching the urgent application.

¹⁶ In terms of s 1 of the Preferential Procurement Policy Framework Act 5 of 2000, an 'acceptable tender' is defined as one 'which, in all respects, complies with the specifications and conditions of tender as set out in the tender document'. *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 (2) SA 638 (SCA) para 11 held that '[t]he acceptance by an organ of State of a tender which is not "acceptable" within the meaning of the Preferential Act is therefore an invalid act and falls to be set aside. In other words, the requirement of acceptability is a threshold requirement'.

substitution as the preferred proponent in place of ICTSI), despite its offer lagging almost R2 billion behind.

[52] While Transnet emphasised the financial benefit accruing from the contract concluded with ICTSI, and the prejudice that would result if the decision was set aside, Mr *Maenetje*, who appeared for APM, submitted that this tender was not a substitute for an auction to the highest bidder in which the irregularity overlooked by Transnet could be sanctioned by this court. In the process, so the argument went, Transnet overlooked the caution expressed by the TIA as well as an external consultant, opting rather to accept a contrary view from another external consultancy, Growthstone, based on criteria different from those to which other bidders were assessed. In doing so, it acted outside the parameters of its own tender document, obliging it in terms of s 217 of the Constitution to act in a fair and equal manner to all bidders. In support of the obligation of Transnet to adhere strictly to the tender provisions, reliance was placed on *Khumalo and Another v MEC for Education, KwaZulu-Natal*.¹⁷

[53] A dispute arose as to which of the decisions constituted administrative action and whether all or any of them were subject to challenge by judicial review. Section 1(1) of PAJA defines 'administrative action' as 'any decision taken, or any failure to take a decision, by ... an organ of state ... which adversely affects the rights of any person...'. In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,¹⁸ the SCA held that the enquiry should be characterised by the effect of such action and whether it has the capacity to affect legal rights. The court said that:¹⁹ 'Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.' (Footnote omitted.)

¹⁷ *Khumalo and Another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC) (*Khumalo*) para 29 held as follows:

'The rule of law is a founding value of our constitutional democracy. It is the duty of the courts to insist that the state, in all its dealings, operate within the confines of the law and, in so doing, remain accountable to those on whose behalf it exercises power. The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights.' (Footnote omitted.)

¹⁸ *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) paras 23-24.

¹⁹ *Ibid* para 24.

[54] ICTSI was shortlisted along with APM and other bidders to progress from the RFQ to the RFP. The RFQ stage, as stated earlier, was essentially a 'box-ticking' exercise to pre-qualify suitable bidders to submit bids for the contract to develop the port. ICTSI contended that the short-listing decision constituted administrative action. Transnet made no such claim. I agree with APM that the short-listing decision has not been shown to adversely affect any party's rights, nor did it have any direct or immediate consequences for any party concerned. All the bidders were cited in this matter, with only APM challenging the eventual decision. At best, the short-listing was the extension of an invitation to various bidders to submit bids. To the extent that APM's amended its notice of motion to conditionally challenge the short-listing decision, I am of the view that this requires no further discussion. In my view, it was clearly not a decision which had any attribute of finality, and was not challenged by any party who may have been excluded at this stage. No order needs to be made regarding the short-listing decision, which in any event was only conditionally sought.

[55] Of critical importance, in my view, is the decision of 6 July 2023 in which Transnet conveyed to the other bidders that it had selected ICTSI as the preferred bidder. APM adopts the position that this decision too did not amount to administrative action, as it did not have the capacity to affect legal rights. Transnet and ICTSI are of the view that this was in fact the critical decision in the award.

[56] APM contends that this decision was provisional in nature and could have been changed by Transnet, without having to invoke the remedy of a self-review. It alluded to a letter dated 27 November 2023 in which Transnet advised that it had not commenced negotiations with ICTSI in respect of the finalisation of the contract. In the mind of APM, no final decision had been reached or taken in the awarding of the contract, and therefore there was nothing to review.²⁰

²⁰ See *Association of Meat Importers and Exporters v International Trade Administration Commission and Others* [2024] 1 All SA 106 (GP) para 21:

'... the decision to continue the imposition of anti-dumping duties on the product was a three tiered/stage process which only became binding on its completion. ITAC's final recommendation, although called "final" in itself, possessed no finality as it was subject to the Trade Minister's approval and if not approved, remittance or rejection. The Trade Minister's approval of ITAC's final recommendation also possessed no finality as such approval did not complete the decision process.'

[57] Argument was advanced before me by the applicant that I should take into account that this decision was communicated differently, by public communiqué, as opposed to the short-listing decision. As I understood this argument, the difference in the mode of communication of the two decisions somehow was indicative or decisive of the finality of the award.²¹ I am not persuaded that anything turns on the manner or mode of publication of the respective decisions, in as much as the tender specifications do not elevate or attach any more weight to one form of publication over the other.

[58] APM maintains that the preferred bidder decision did not constitute administrative action and places all its weight behind the argument that the decision of 1 March 2024 constituted administrative action, and it was against this decision that a review had to be mounted. Its amended notice of motion to bring the preferred bidder decision of 6 July 2023 into the review spectrum, in my view, was done primarily as a precautionary measure. It was submitted that Transnet in its answering affidavit conceded that the decision of 1 March 2024 constituted administrative action and could not seek in argument to retract this concession, which it contended was binding.

[59] The argument went along the lines that it was only in the decision of 1 March 2024 that Transnet advised of its intention to proceed to finalise the contract award to ICTSI, and it was not incumbent of APM to challenge each and every decision along the way of a multi-stage tender process. APM contended that the decision of 1 March 2024 meets the requirements of administrative action in that it had the capacity to affect the legal rights of individuals, and relies on *Allpay*,²² which held:

'First, tenderers have a right to a fair tender process, irrespective of whether they are ultimately awarded the tender. Second, the subject-matter of the review is the decision to award the contract to Cash Paymaster, *not each decision along the way in the process*. Third, the "no effect" argument wrongly seeks to splinter the process in asserting that Allpay's rights were not affected. The decision to exclude AllPay from the second, pricing stage certainly affected its rights and legitimate expectations. Because of its exclusion we are not in a position to know what the outcome of the pricing stage would have been; it is mere speculation. Fourth, in *Grey's Marine* it was stated, with reference to the phrase "adversely affect the rights of any person" in s 1 of PAJA, that what "was probably intended [was] rather to convey that

²¹ See *Independent Regulatory Board for Auditors and Others v East Rand Member District of Chartered Accountants and Others* [2024] ZASCA 114; [2024] 4 All SA 23 (SCA) para 42.

²² *Allpay* para 60.

administrative action is action *that has the capacity to affect legal rights.*" Irregularities in the process, which may also affect the fairness of the outcome, certainly have the capacity to affect legal rights.' (Footnotes omitted and my emphasis.)

[60] In addition to the issue of the finality of the decision of 1 March 2024, APM submits that the clock effectively began ticking only once Transnet provided proper reasons for its decision to appoint ICTSI as the preferred bidder. This argument is bolstered by *Centre for Child Law and Others v South African Council for Educators and Others*,²³ where it was held that:

'The importance of investigating matters before launching review applications to set aside administrative action, in order to avoid unnecessary litigation, was stressed in Joubert Galpin Searle Inc and Others v Road Accident Fund and Others. The appellants cannot be faulted for attempting to obtain reasons before proceeding with litigation. In the absence of reasons, the 180-day period did not even commence before the application was launched. The court of first instance misdirected itself when finding that there was an unreasonable delay in the launching of the application.' (Footnote omitted and my emphasis.)

[61] Apart from both Transnet and ICTSI opposing the relief sought by APM, both contest APM's right to challenge the decision to award the tender to ICTSI on the basis of an undue delay in launching the review proceedings. It will be recalled that when the application was launched, APM cast the decision of 1 March 2024 as the 'impugned decision'. It sought to challenge no other decision.

[62] Transnet and ICTSI contended that the true target of the review is the decision of 6 July 2023 when ICTSI was selected as the preferred bidder. They contend that APM should have timeously approached the court to review and set aside that decision if it wished to challenge the award.²⁴ I consider it proper to dispense with this leg of the enquiry first, in as much as any finding of delay not explained satisfactorily impacts on this court's jurisdiction to consider the matter.

²³ *Centre for Child Law and Others v South African Council for Educators and Others* [2024] ZASCA 45; 2024 (4) SA 473 (SCA) (*Centre for Child Law*) para 11.

²⁴ Transnet and ICTSI place reliance on the rule16A notice issued by APM, which identifies the decision of 6 July 2023 (the preferred bidder decision) as the target of the challenge. Not mention is made of the decision on 1 March 2024.

[63] APM, in the urgent application, persuaded the court that the letter of 1 March 2024 had the effect of changing ICTSI's status from that of 'preferred' bidder to a 'successful' bidder. The court noted that '[t]he applicant has specifically sought relief in relation to the decision of 1 March 2024 and not the decision of 6 July 2023'. In light of Transnet considering the decision of 1 March 2024 to constitute administrative action, Mossop J held this decision was a 'final determination'. The scope of the review application has now been cast much wider as a consequence of the amended relief, conditionally sought, to challenge the decisions of 12 August 2022 and 6 July 2023. I have already concluded that the decision of 12 August 2022 to short-list ICTSI, as a reviewable decision, has no merit. The remaining focus is on the decisions of 6 July 2023 and 1 March 2024.

[64] The starting point is that s 7(1) of PAJA provides:

'Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –

(a) ...

(b) ... on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

Section 9(1)(b) provides that the 180-day period

'(b) ... may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.'

Section 9(2) provides that such an application may be granted 'where the interests of justice so require'.

[65] As will appear from what follows, there is nothing on record to gainsay the assertion of Transnet that from 6 July 2023 to 1 March 2024, despite APM having requested various undertakings, Transnet at no stage agreed to waive the period under PAJA for the bringing of any review application. There is also no dispute that APM knew of the preferred bidder decision as of 6 July 2023. I have already found that the short-listing decision of 12 August 2022, despite the views of ICTSI to the contrary, did not constitute administrative action and there is no need to consider condonation in respect of that decision. If there is any substance to the argument of Transnet and ICTSI of

undue delay, this enquiry must now concentrate on the preferred bidder decision, announced on 6 July 2023.

[66] The letter of 6 July 2023 to APM reads in part:

'[F]ollowing the evaluation of the proposals received in response to the Request for Proposals for DCT2, Transnet has selected International Container Terminal Service, Inc, as the preferred bidder. Transnet will proceed to enter into discussions to finalise the transaction with International Container Terminal Service, Inc. In the event that the financial closure fails, Transnet will then seek to finalise the transaction with the second ranked bidder.'

APM's response to this decision on 13 July 2023²⁵ was to seek specific details as to whether ICTSI satisfied the solvency ratio of 0.4, as according to its published financial statements, ICTSI would only have scored 0.24. Of particular importance is that this letter was written fully cognisant of APM's rights in terms of the Constitution and PAJA. APM recorded in the letter that Transnet's decision to award the contract to ICTSI 'materially and adversely affects APM Terminals as a participant'.

[67] The point emphasised by Transnet is that by this time, APM knew exactly what decision to attack, as the grounds for its challenge were articulated with clarity and referred to the relevant legislative framework. On 15 August 2023, Transnet provided reasons to APM for the selection of the preferred bidder, confirming that it had carried out the third-party verification on the technical and financial criteria set out in the RFQ, as well as the due diligence process, which confirmed no issues arising from the Prevention and Combating of Corrupt Activities Act 12 of 2004 or Politically Influential Persons. The letter further informed APM that the assessment of the bidders to the RFP was performed by the CFAT, which confirmed that ICTSI scored the highest points on pricing.

[68] What then followed were a series of letters exchanged between APM and Transnet, and later between their respective attorneys, over a period of almost eight months from the date of the decision when ICTSI was selected as the preferred bidder. While an applicant intending to pursue a review application is entitled to reasons for

²⁵ It is not clear whether this letter is dated 13 or 14 July 2023. The record simply bears reference to 'July 2023'.

the decision being challenged, there is nothing which emerges from a textual reading of PAJA that permits a party to delay the challenge until it is furnished with what it considers full and proper reasons.

[69] Transnet submits that if APM was not satisfied with the reasons for the decision provided on 15 August 2023, little more than a month after the decision, it could have utilised the provisions of rule 53(4) to obtain further reasons once the review was launched. The point emphasised by Transnet and ICTSI is that APM had everything in its arsenal within weeks of the decision to launch a review of the preferred bidder decision of 6 July 2023. It is worth pointing out that in its letter of 13 July 2023, to which I have already referred, APM articulated very much the same grounds of review it relied upon almost eight months later when it eventually launched its urgent application. Throughout this entire period, APM was cognisant that the conclusion of the tender in question (which admittedly had been on the proverbial backburner for over 20 years) was by its very nature urgent, particularly in light of the continuing inefficiencies at the port and its attendant impact on the broader economy in the country.

[70] The letters from APM's attorneys to Transnet indicate that APM had 'serious reservations' regarding the lawfulness of the selection of the preferred bidder. It was argued that APM was content to bide its time and engage in correspondence with the decision maker in the hope that it would resile from its decision and disqualify ICTSI. This is indeed what almost transpired, resulting in ICTSI's attorneys on 20 November 2023 accusing Transnet of being 'influenced' by an unsuccessful bidder when it issued the notice of the intention to disqualify ICTSI.

[71] Not having received a response from Transnet that was palatable, despite several letters being exchanged from 6 July 2023 onwards, on 1 November 2023, APM's attorneys repeated the averment made on 23 August 2023, alleging that APM still 'harboured serious reservations regarding the lawfulness of the tender process... which culminated in the selection of ICTSI'. The letter went on to add that they had been instructed to launch review proceedings 'imminently' to set aside the appointment decision and demanded certain undertakings that Transnet would not proceed with certain discussions with ICTSI directed at finalising the contract.

[72] Apart from informing the attorneys that such an application would be premature, no undertakings were provided by Transnet. APM was at all times alive to the issues which it wished to challenge but for reasons which are not apparent from the papers, it chose not to act. ICTSI and Transnet accuse APM of engaging in a 'wait and see game', hopeful that Transnet would disqualify ICTSI. Reliance was placed on what Rogers J said in *SMEC South Africa (Pty) Ltd v City of Cape Town and Others*; *SMEC South Africa (Pty) Ltd v City of Cape Town and Others*,²⁶ that if a party to a tender considered the functionality component to have been unlawful, it was bound to launch a timeous judicial review. Rogers J was critical of the applicant in that case (SMEC) which, despite the tender being issued on objectionable terms, elected to participate in the process to the end, and launched its review application only after it failed in its quest to be the successful bidder.

[73] Transnet and ICTSI argue that this epitomises the approach of APM in this matter. It chose to wait and engage in letter writing in the hope of persuading Transnet to disqualify ICTSI. When that failed, APM launched its application within days of the decision of 1 March 2024.²⁷ Moreover, ICTSI further contended that waiting for further or better reasons is not a justifiable basis to delay the launching of a review application, especially in circumstances where APM would later argue for urgent interim relief, despite waiting almost eight months from the date when the decision, against which it had 'serious reservations', was taken.²⁸

²⁶ *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 (SMEC) para 91.

²⁷ See *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd*; *Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others* [2011] ZASCA 202; 2012 (2) SA 16 (SCA) para 20 where the SCA held:

'Generally speaking, whether an administrative action is ripe for challenge depends on its impact and not on whether the decision-maker has formalistically notified the affected party of the decision or even on whether the decision is a preliminary one or the ultimate decision in a layered process . . . Ultimately, whether a decision is ripe for challenge is a question of fact, not one of dogma.'

²⁸ See *Vukani Gaming Free State (Pty) Ltd v Pillay and Others* [2021] ZASCA 137 where the SCA said the following regarding the supply of reasons for decisions:

'[35] As pointed out by Hoexter ". . . reasons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information". The rationale for giving reasons is to enable an aggrieved party to understand the reasoning behind the decision and decide whether or not to challenge it. Reasons should constitute more than mere conclusions. They should refer to the relevant facts, the applicable law and the processes leading to the conclusions. Recently in *Maxrae Estates (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries & Another*, this Court held that the mere mention that a "discretion has been exercised for the given purpose was not sufficient. The court was constrained to intervene where the decision maker had ignored the relevant factors and taken into account irrelevant considerations". What factors the Board took into account in this instance, it is not clear.

[74] Accepting that APM fired the initial salvo on 14 July 2023 when it wrote to Transnet complaining that the selection of ICTSI as the preferred bidder adversely and materially affected its rights under PAJA and requested information as to whether ICTSI had satisfied various aspects of the RFQ, including the solvency ratio, this information was supplied without much delay. When its attorneys wrote to Transnet on 23 August 2023, APM already had misgivings regarding the lawfulness of the process and had already articulated them.

[75] In my view, it was at this time that the matter was ripe for launching. Instead, APM waited until March 2024 – seven months later. As Rogers J in *SMEC* noted:²⁹ 'In principle, it seems undesirable that a bidder should be at liberty to "take a chance" in the hope that it will be awarded the tender, keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid.'

As I had alluded to earlier, when APM launched its review application seeking urgent interim relief, the target decision was that of 1 March 2024. It did not challenge the decision of 6 July 2023 and on that basis did not consider that condonation was at all necessary.

[76] Turning to the decision of 1 March 2024 and whether it constituted administrative action, Transnet initially conceded this point yet appeared to retreat from it in argument. APM hung its case unequivocally on the contention that this was the

[36] The importance of reasons was highlighted in *Koyabe v Minister of Home Affairs* as follows:
 "63. Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal.
 64. In *Maimela*, the factors to be taken into account to determine the adequacy of reasons were succinctly and helpfully summarised as guidelines, which include –
 "[t]he factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be "full written reasons"; the "briefest *pro forma* reasons may suffice". Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified".
 The purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one." (Footnotes omitted.)

²⁹ *SMEC* para 92.

'target decision' to be set aside.³⁰ I have already alluded to the background facts leading to the decision by Transnet to make the final award to ICTSI. It only did so after having tested ICTSI's financial soundness through the appointment of Growthstone, an independent service provider, which conducted a financial due diligence, and concluded that:

'Based on the financial due diligence review, ICTSI is expected to be a robust participant in the Durban Container Terminal Pier 2 private sector participation project. From the financial risk standpoint, the Company is in a very strong position to add value to the project, while being able to withstand volatilities in both global and local scenes by means of its strong balance sheet, well-diversified business portfolio, and extensive access to capital across a broad range of sources. Coupled with effective capital management practices and well-crafted gearing strategy, ICTSI is positioned to be a strong and reliable strategic partner to Transnet at DCT2 operation.'

[77] Transnet was criticised for procuring the services of Growthstone to conduct this exercise, particularly as it obtained two audit reports, including its own internal audit, which were averse to ICTSI and highlighted ICTSI's non-compliance. It will be recalled that after these reports, Transnet wrote to ICTSI giving it notice to show why it should not be disqualified. ICTSI responded, after which Transnet engaged Growthstone.

[78] APM further criticised the use of Growthstone, which it described as a 'small audit firm in Johannesburg' to test the financial soundness of ICTSI.³¹ APM says that the use of this criterion was nowhere to be found in the RFQ or the RFP, and accordingly, ICTSI was evaluated on criteria different to of the other bidders, which flies in the face of the provisions of s 217 of the Constitution and a host of judicial authority.

[79] When Transnet was alerted to a different numerator used by ICTSI in the solvency ratio, it sought opinions internally and externally to determine whether there had been material non-compliance with the solvency ratio requirement. Included

³⁰ APM in its heads contended that the 'shortlisting decision, provisional preferred bidder decision, and award decisionare all being challenged in this application, although APMT's challenge is primarily against the award decision and the other two are challenged only in the alternative and to the extent necessary'.

³¹ Whatever criticism APM may have of Transnet, ICTSI or Growthstone, it must be noted that nowhere in the papers or in argument has there been any suggestion that the process in selecting ICTSI as the successful bidder was attributable to malfeasance or corrupt activity by any party.

amongst these was an opinion from Growthstone, who were tasked with ascertaining whether ICTSI has sufficient financial capacity to attract the required funding for the project. It will be recalled that Growthstone conducted a 'financial due diligence' on ICTSI and found it to be a 'robust participant' with a 'very strong position' from a risk perspective able to 'withstand volatilities' both globally and at home. In arriving at this conclusion, it considered its 'strong balance sheet, diversified business portfolio and access to capital' from various sources. Growthstone found ICTSI to be a 'strong and reliable strategic partner to Transnet'. APM contends that none of the other bidders were submitted to this measure of assessment, both quantitatively and qualitatively.

[80] The letter of 1 March 2024 to APM was a detailed explanation of the rigorous exercise undertaken by Transnet in assessing each bid and thereafter to investigate the 'serious reservations' which APM had expressed regarding the lawfulness of the award. The letter states that it is 'intended to provide an explanation' for its decision to select ICTSI as the preferred proponent, which was taken and communicated in the letter of 6 July 2023. It recorded in the letter of 1 March 2024 that 'ICTSI has a strong balance sheet and high leverage capacity and a sound market position, which will continue as a strong going concern in the foreseeable future, as it has done in the past'. Transnet was therefore satisfied that it had made the correct choice of a long-term partner to operate the port for the next 25 years. The conclusion expressed by Growthstone has not been shown to be contrived, nor was it seriously challenged in any way by APM.

[81] APM submits that the real reason for the progression of ICTSI was that it was found to be financially capable by Transnet only after the findings by Growthstone, which only emerged on 1 March 2024. Therefore, in APM's mind, the clock only then started to tick for the launching of the review application after 'real and adequate reasons' had been furnished.

[82] This conclusion is factually and legally flawed. In the letter of 1 March 2024, Transnet made it clear that 'ICTSI was therefore recommended by the CFAT as the Preferred Bidder'. This decision was made and communicated in the letter of 6 July 2023. APM now contends that the administrative action which is reviewable is that of 1 March 2024 (now conditionally, the earlier decisions being those of 6 July 2023 and

August 2022). If one has regard to the facts of the matter, APM's focus throughout the application was on the decision of 6 July 2023.

[83] When it launched the urgent application, it cast its sights on the letter of 1 March 2024 as being the target decision. This argument resonated with Mossop J, who granted APM interim relief holding that this 'decision' constituted administrative action. If that was the case, it begs the question why APM in its letter to Transnet dated 14 July 2023 (days after being informed of the selection of ICTSI as the preferred bidder) stated in clear terms, with reference to the statutory framework, that the decision taken by Transnet had a material and adverse effect on it as a bidder? The ineluctable conclusion to be drawn is that APM was referring to the decision communicated on 6 July 2023.

[84] If there was any doubt that this was the decision to challenge, one need only have regard to the letters written by APM's attorneys in which they repeatedly threaten the launching of review proceedings, stemming back to 23 August 2023, and again on 1 November 2023, when it threatened that proceedings were 'imminent'. Instead, it sat back in the hope that Transnet would disqualify ICTSI. The letter of 1 March 2024 is detailed and explanatory in nature in respect of a decision taken eight months prior and announced on 6 July 2023. The letter had no capacity, alternatively no greater capacity, to affect legal rights than those already impacted by the letter of 6 July 2023, bearing in mind that APM was the only bidder which sought to challenge the selection of ICTSI. It is that decision which had the direct, external legal effect on APM's rights.

[85] In light of my finding that the true decision to be challenged was that of 6 July 2023, APM has also, through a belated amendment in terms of rule 53(4), sought to set this decision aside. The amendment was challenged as an attempt to 'plug' the gaps exposed by ICTSI and Transnet in the interim application and more particularly, that nothing new emerged from the record that was not already known to APM regarding the short-listing and preferred bidder decisions. ICTSI contends that the amendment is a misuse of rule 53(4) in that APM strategically waited until after it

secured the interim relief to introduce the amendment.³² Had it done so earlier, its contention that the target decision was that of 1 March 2024 would have been undermined, as would its grounds for urgency.

[86] Despite the opposition to the amendment by ICTSI, I am satisfied that the amendment should be allowed and that ultimately, a consideration and assessment of the tender would straddle at the very least the 'preferred bidder' decision and the 'award decision' of 1 March 2024. I am not persuaded that there are good reasons to refuse the amendment.

[87] Turning to the amendment and the decisions sought to be reviewed, in its explanation for seeking condonation APM, states that the short-listing decision was patently not a final decision, and that the preferred bidder decision was equally 'provisional'. It has persistently adopted this view in the papers, contending that these do not constitute administrative action and are incapable of being judicially reviewed.

[88] I have already found that the short-listing decision was not administrative action. However, as regards the critical decision of 6 July 2023, APM provides no clear or compelling reason as to why it waited more than 16 months (until 1 November 2024) before applying to, through the amended notice of motion, review and set aside the decision. Other than placing emphasis on the decision maker being under a duty to supply reasons for the decision and that it acted within days of receiving the letter on 1 March 2024, APM avers that it acted diligently in waiting until adequate reasons were supplied.

[89] As stated earlier, APM was aware of the commercial urgency in respect of any challenge to the decision. Mossop J found that commercial urgency, as in the present tender, justified the intervention of the court. The delay in challenging the preferred bidder decision is significant. In my view, APM fell woefully short of a satisfactory explanation. It is trite that condonation is not there for the asking. The factors that must

³² See *Premier of KwaZulu-Natal and Others v KwaZulu-Natal Gaming and Betting Board and Others and a Related Matter* [2019] 3 All SA 916 (KZP).

be considered in deciding whether it is in the interests of justice to condone a delay depend entirely on the facts and circumstances of each case. These include³³

‘the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice and other litigants; the reasonableness of the explanation for the delay, which must cover the whole period of delay; the importance of the issue to be raised; and the prospects of success.’

[90] APM contends that it did not unreasonably delay in challenging the preferred bidder decision, which it maintains was provisional in nature. Its grounds for condonation are essentially a repetition of the timeline in respect of the letter writing between its attorneys and Transnet, based on its quest for ‘adequate reasons’ for the decision. As pointed out earlier, APM made repeated requests to Transnet for undertakings that no decision would be made in relation to the *implementation* of the preferred bidder decision, and in response, Transnet updated APM that it was still in the process of engaging with ICTSI and that it was still investigating the matter.

[91] APM’s explanation for not launching its application sooner was that it was ‘careful not to abuse the court process and obstruct any lawful award of the Tender’ and that it ‘acted very diligently in trying to get adequate reasons’ and to ‘satisfy itself that its right to a lawful, reasonable, and procedurally fair administrative action has not been infringed’. This explanation does not hold up to the threshold requirement for condonation set out in *Aurecon*. APM relied on *Centre for Child Law*³⁴ where the SCA held that the ‘clock begins to tick from the date on which the reasons for the administrative action became known’. In this case, reasons were given by Transnet in August 2023. Despite that, APM was content to engage in letter writing, asking for more and better reasons. The application was eventually launched in March 2024, following a detailed explanation from Transnet for ICTSI’s election on 1 March 2024.

[92] I know of no authority, nor have I been referred to any, which permits a litigant, aggrieved that a decision has had an adverse effect on its rights, to wait until ‘adequate’ reasons have been furnished before instituting a review application. Nugent JA in

³³ *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; 2016 (2) SA 199 (SCA) (*Aurecon*) para 17.

³⁴ *Centre for Child Law and Others v South African Council for Educators and Others* [2024] ZASCA 45; 2024 (4) SA 473 (SCA) para 10.

*Gqwetha v Transkei Development Corporation Ltd and Others*³⁵ held that 'it is important for the efficient functioning of public bodies . . . that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay'.

[93] The approach adopted by APM is inconsistent with the SCA's views in *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited*³⁶ regarding condonation:

'At common law, application of the undue delay rule required a two-stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) at paragraph 47. Up to a point, I think, section 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the Legislature's determination of a delay exceeding 180 days as *per se* unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is pre-determined by the Legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay (see eg *Associated Institutions Pension Fund (supra)* at paragraph 46). That of course does not mean that, after the 180-day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not....'

On the basis of the above, APM's delay is *per se* unreasonable, if the correct target decision to be reviewed is the decision of 6 July 2023. An applicant would have to show that it would be in the interests of justice to grant condonation.

[94] Despite APM's contention that it would be in the public interest and in the interests of justice that it be granted condonation, there is, on the contrary, a public interest

³⁵ *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) (*Gqwetha*) paras 22.

³⁶ *Opposition to Urban Tolling Alliance v South African National Roads Agency Limited* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (*OUTA*) para 26.

element in the finality of administrative decisions and the exercise of administrative functions.³⁷ Transnet's papers set out the prejudice that is occasioned on a daily basis as a result of the delay in the contract for DCT2 being challenged. This is not challenged. Moreover, it cannot be disputed that the sooner plans for the development of the port are finalised (and the end of all litigation concerning DCT2), the ripple benefits would cascade to all those dependent on the speedy movement of goods through the port.³⁸ Delays in a dispute such as this would also cause potential investors to doubt whether the project would be worth the risk.

[95] As part of the enquiry as to whether condonation should be granted, APM contends that this court must also have regard to the merits in determining the prospects of success. This enquiry focuses primarily on whether the failure by ICTSI to meet the solvency threshold, by strict adherence to the formula of applying total equity over total assets, constitutes a ground for its disqualification. Transnet submits that once the issue of ICTSI's non-compliance was raised, it acted as a diligent public entity is obliged to, guided by the prescripts in *Allpay*.

[96] Turning to the provisions of the tender document, the contention advanced by APM is that the language in clause 5.2(d) 'speaks for itself' and that its real import cannot 'be tucked away, apart from its terms'.³⁹ As I understood this leg of the argument, the wording in the RFQ conveys to the bidders what they are to establish to satisfy Transnet that they have sufficient financial capacity to attract investment to fund the project. The dispute from the perspective of ICTSI is that neither the RFQ nor the RFP provides any elaboration as to how 'total equity' is to be calculated. According to ICTSI, bidders are 'deemed' to have met the requirement of establishing sufficient

³⁷ *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) (*Wolgroeiërs Afslaers*) at 41E-F.

³⁸ In *Gqwetha* para 23, relying on *Wolgroeiërs Afslaers* at 42C, the following is stated: 'proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight'.

³⁹ See *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) (*Firechem*) para 30: 'One of the requirements ... 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. Competitiveness is not served by only one or some of the tenderers knowing what is the true subject of tender ... That would deprive the public of the benefit of an open competitive process.'

financial capacity when they achieve the solvency threshold of 0.4 and above. The point of departure is that ICTSI and Transnet submit that although the RFQ specified the manner in which the solvency ratio was to be met, that in itself was not the only indicator of 'sufficient financial capacity'. It is not disputed that ICTSI would not have met the threshold using the metric of total equity over total assets. ICTSI says that notwithstanding, its proof of satisfying this specific requirement is met in *other* ways, and points to its ability to attract investments and its strong balance sheet as fundamental criteria in meeting the overall purpose of this requirement in the RFQ.

[97] Viewed differently, if both APM, ICTSI and any other bidder all achieved a ratio of 0.4 and above at the RFQ stage, all that this would mean is compliance with a requirement under the responsive stage of the tender, and advancement to the next stage of the process. It would not matter if ICTSI scored 0.4 and APM 0.45. The party with the higher solvency ratio did not garner any advantage. It is also important in understanding the materiality argument of Transnet as to why the ratio of 0.4 was specified, as this is the same threshold which Transnet itself is generally required to satisfy when borrowing money from creditors.

[98] Transnet conceded in its papers that the solvency ratio was a mandatory requirement, although it attempted during the course of argument to retreat from this concession. Both Transnet and ICTSI adopt the position that the requirement of establishing sufficient financial capacity in clause 5.2(d) of the tender was not restricted to solvency alone, but also included proof of liquidity, as well as earnings before interest and taxes (EBITDA). In so far as Transnet and ICTSI's contention that it was permissible to interpret clause 5.2(d) as permitting the use of market capitalisation to calculate the solvency ratio, Mossop J concluded that ICTSI had in fact 'varied' the ratio calculation. As I understood ICTSI's position, while it is not disputed that the tender specifications stipulated the method for calculating the solvency ratio, it used a different metric in establishing this requirement. There is nothing before me to suggest that ICTSI's *modus* of using a different denominator was a stratagem to prevent it from being declared a non-responsive bidder.

[99] Mossop J, in the context of the interim application, found that compliance with the solvency ratio was a mandatory requirement, and that there was nothing in the

tender document that would have drawn to the bidders attention that it was not necessary for them to comply with any one or more of the requirements, as specifically conveyed in the specifications, including compliance with the solvency ratio calculation. On this basis, the court concluded that Transnet permitted ICTSI to 'pervert the solvency ratio calculation', acting unfairly in the process.

[100] Despite arguments to the contrary by counsel for Transnet, I am satisfied that the solvency ratio was indeed a mandatory requirement in the tender. Counsel submitted that the court considering the interim application made no attempt to engage with its argument premised on *Allpay*, namely whether the non-compliance was material, since a review brought on s 6(2)(b) of PAJA requires that both a *mandatory and material procedure* or condition prescribed by an empowering condition was not complied with.

[101] The point of departure between the conclusions in the interim judgment (which do not bind me)⁴⁰ and the submissions on behalf of Transnet, is that *Allpay* directs that whether the provisions in the tender document were mandatory or directory is not the enquiry. Rather, as I see the enquiry in the present matter, the non-compliance must be assessed, not only in light of the purpose of clause 5.2(d), but also the tender document as a whole, including the objectives for the development of DCT2. The Constitutional Court in *Allpay* explained the position as follows:⁴¹

'Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this court O'Regan J succinctly put the question in *ACDP v Electoral Commission* as being "whether what the applicant did constituted compliance with the

⁴⁰ See *Economic Freedom Fighters v Gordhan and Others* [2020] ZACC 10; 2020 (6) SA 325 (CC) para 47: '...the grant of an interim interdict does not, and should not, affect the review court's decision when making its final decision and should not have an effect on the determination of the rights in the main application'.

⁴¹ *Allpay* para 30.

statutory provisions viewed in the light of their purpose". This is not the same as asking whether compliance with the provisions will lead to a different result.' (Footnotes omitted.)

[102] The contention on behalf of APM is that the plain language of clause 5.2(d) requires each bidder to comply with all three components of the section – solvency, liquidity and earnings before interest and taxes. There is no allowance for non-compliance in the bid document, nor any latitude that any of the criteria can be differently met, other than in the terms specified. To the extent that Transnet and ICTSI contend otherwise, APM relies on *Firechem*, submitting that nothing in the language of clause 5.2(d) supports the interpretation contended for by Transnet and ICTSI.

[103] This argument leads to Transnet and ICTSI's reliance on the deeming provision contained in clause 5.2(d), which provides: 'A respondent is deemed to have sufficient financial capacity, when the following criteria are met...'. APM submits that the provision is exhaustive and conclusive as to what was required from a bidder. If Transnet wished to leave it up to the parties as to how they should meet the criteria, APM states it would not have specified the specific formula to be employed in establishing solvency. If this were the case, with reference to *Firechem*, it was submitted that Transnet would not be able to fairly compare the respective bids if compliance were to be determined having regard to criteria that were not objectively clear and concise from the plain language in the tender documents.

[104] The same argument is advanced with regard to *how* the tender specified that financial capacity had to be demonstrated – it expressly said that this was to be met through the financial statements – not any other source document or criteria, as appears in the Growthstone report. APM emphasised that Transnet conceded in its answering papers that it did not use ICTSI's market capitalisation to determine whether it had the required financial capacity to attract funding for the project. Instead, it made its assessment based on 'all the information available to it'.

[105] In the letter dated 1 March 2024, Transnet's Group Chief Executive wrote that Transnet determined that ICTSI has a 'strong balance sheet and high leverage capacity and a sound market position'. The complaint of APM is that it was therefore assessed differently, or on criteria not specified, in the RFQ and RFP, compared to

ICTSI. The reasons eventually proffered, so the argument went, were based on the Growthstone report, which were based on new facts and criteria nowhere to be found in the RFQ or RFP.⁴² This, it was contended, undermines the importance of fairness in the process, which is a value in itself, irrespective of the outcome.

[106] Transnet relies on the deeming provision in clause 5.2(d), contending that the clause should not be narrowly interpreted to mean that 'sufficient financial capacity' could not be established in other ways to that specified in the document. As I understood this assertion, in which Transnet relied on *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari*⁴³ and *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party (Council for the Advancement of the South African Constitution and others as amici curiae)*,⁴⁴ it is argued that the satisfaction of the criteria in clause 5.2(d) merely facilitated proof of the necessary financial capacity to attract investors to the project, as opposed to strict or actual compliance being conclusive of the requirement of the clause. It further contends that there is nothing in the RFQ which stipulates that strict non-compliance with any one of the criteria would result in disqualification.

[107] In respect of APM's reliance on *Firechem* and the submission that non-compliance by ICTSI with the solvency ratio entails that other bidders were treated differently to ICTSI, at odds with s 217 of the Constitution, it was submitted by Mr *Ferreira*, who dealt with this aspect of the argument on behalf of Transnet, that at this particular stage of the process, there was in fact no comparison of competing bids. It was purely to determine 'responsiveness' in terms of verifying qualifications. The assessment of bids only arose at the RFP stage. As pointed out earlier, even if ICTSI achieved a lower solvency ratio than APM at this stage of the process, it would have no bearing on the eventual price shoot-out. The process at the RFQ stage was to 'pre-

⁴² Transnet accepted that Growthstone was not mandated to confirm the RFQ requirements or to assess ICTSI's compliance with the solvency ratio. It was directed to conduct a due diligence on ICTSI as the preferred proponent.

⁴³ *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari* [2018] ZASCA 34; 2018 (4) SA 206 (SCA).

⁴⁴ *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party (Council for the Advancement of the South African Constitution and others as amici curiae)* [2024] ZACC 6; 2024 (7) BCLR 869 (CC).

qualify' bidders. The compliance required at this stage was to only demonstrate financial capacity to attract funding for the project.

[108] Turning to the argument as to whether non-compliance with a tender requirement constitutes a ground of review, *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others*⁴⁵ affirmed that s 217 of the Constitution requires that contracts for the supply of goods and services must be 'fair, equitable, transparent, competitive and cost-effective'. In *Allpay*,⁴⁶ the Constitutional Court held that '[c]ompliance 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'. Of importance to the present dispute is what the Constitutional Court alluded to in the same paragraph of its judgment:

'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 in 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.*' (Footnote omitted and my emphasis.)

[109] In determining whether the non-compliance with the solvency requirement in clause 5.2(d) of the tender should have resulted in ICTSI's disqualification, *Allpay* dictates that the materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.⁴⁷ ICTSI's financial strength and its position as a global terminal operator are undisputed. It is for this reason that Growthstone correctly concluded that ICTSI would add value to the DCT2 project. This was evidenced by ICTSI being prepared to pay the contract price immediately into an

⁴⁵ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) para 4.

⁴⁶ *Allpay* para 40.

⁴⁷ *Allpay* para 62 states the following:

'What one is left with is non-compliance with what the request for proposals regarded as mandatory. This means that a mandatory condition prescribed by an empowering provision was not complied with, which is a ground for review under s 6(2)(b) of PAJA. But the subsection also requires that the non-compliance must be of a material nature. The purpose of separate bids for the provinces was surely to enable SASSA to assess whether the bidder would be able to provide the necessary services in each of the provinces for which it bid. This purpose was attained. The irregularity was not material. No ground for review under PAJA exists.'

escrow account. The price that it offered for the contract to develop the port far outstrips that of APM.

[110] In the context of dealing with the issue of materiality, the provisions of clause 5.3(b) of the RFQ are relevant. It reads, in parts, as follows;

5.3 SOLE DISCRETION, NO LIABILITY

Transnet shall be the sole judge of each Respondent's conformity with the requirements of this RFQ and the merits of each Statement of Qualifications. Transnet reserves the right, subject to applicable laws, to:

...

(b) Waive any requirements of this RFQ.

...

Transnet may exercise any such rights at any time, without notice or liability to any Respondent, Participant or other parties for their costs, expenses or other obligations incurred in the preparation of a Statement of Qualifications or otherwise; and to waive any condition or modify any provision of this RFQ with respect to one or more Respondents."

This clause accords to Transnet, on a plain reading, the privilege of being the sole judge of each bidder's conformity with the requirements of the RFQ and grants it the power to waive *any* requirement of the RFQ. In deciding not to disqualify ICTSI once it became apparent that they had failed to achieve the solvency ratio of 0.4, Transnet was entitled, so the argument went, to secure the best financial deal for itself and to secure a long-term partner to develop the port. This entitlement was permitted in terms of the tender itself, allowing non-compliance with *any* provision of the RFQ.

[111] Transnet emphasised that once ICTSI's non-compliance with the solvency ratio was brought to its attention, it acted in a fair and responsible manner by engaging with the complainant, APM, and conducted a thorough investigation into the matter. As set out earlier, it requested a report from its internal audit department, an external report from Mettle and finally, a report from Growthstone. The latter engagement, which produced a result favourable to ICTSI, was criticised by APM as being a 'private engagement' outside of the processes permitted by the RFP. The point emphasised by Transnet is that it proceeded, acutely aware of the consequences arising from the

disqualification of a bidder following a complaint lodged by a competitor, seeking to act in accordance with s 217 of the Constitution.

[112] A primary feature of the transaction to engage a private partner to develop the port was carefully considered, with the intention being to enable Transnet to use the proceeds from the transaction to settle its debts and reduce its finance costs. This is considered in detail by the Group CEO of Transnet, Ms Phillips, in her memorandum dated 7 February 2024, addressed to the Transnet Board, prior to the announcement of the decision to award the contract to ICTSI.

[113] The memorandum considered the impact of ICTSI's R11.2 billion investment in the project, the impact on Transnet's overall book debt, and the effect on the share of profits of NewCo, amongst other variables. It also included a discussion of APM's complaint in relation to the solvency ratio, the steps taken to address the matter and took into account the views expressed by the TIA, as well as an opinion taken from counsel. Finally, the Board considered the findings of Growthstone, who after completing a financial due diligence on ICTSI, confirmed their financial capacity to implement the project, and that it was in a sound financial position to raise the additional capital required.

[114] In light of the contents of the memorandum, it was recommended to the Transnet Board that it 'proceed with the implementation of the financial close[d] process arising from the award of the Preferred Bidder status' to ICTSI. It is noteworthy, having regard to the earlier debates as to the appropriate decision to be reviewed, that Transnet was clearly of the view that the decision of 1 March 2024 was the '*implementation*' of the award of the preferred bidder decision of 6 July 2023. This is in tandem with my conclusion that the decision of 6 July 2023 ought to have been the target of the review.

[115] The memorandum also contained an annexure which narrated in detail the tender process, from inception to the final awarding of the contract. In this context, it is important to note the workings of the CFAT and its adherence to the Framework, which served as a guide in the assessment of the bids received. Clause 9.2.4 of the Framework (which is referred to in the annexure) provides that:

‘9.2.4 Bidder qualification and evaluation criteria must be carefully designed and documented so as to –

9.2.4.1 *maximise* the level of market interest;

9.2.4.2 minimise the risk of unwarranted disqualification and preserve *maximum flexibility* for Transnet.’ (Emphasis added.)

[116] It was apparent that those entrusted with drawing up the tender document clearly contemplated that the purpose of the tender was to maximise the financial potential from a public/private sector partnership.⁴⁸ In doing so, Transnet was granted maximum flexibility and latitude to ensure that bidders were not disqualified for non-compliance with criteria that were not material to the overall purpose of the project.

[117] Transnet made no secret of its intention to achieve maximum financial yield from the establishment of NewCo, especially as this would be a once in 25-year opportunity. The point which appears to elide APM is that Transnet was seeking a long-term partner to operate a national enterprise, crucial to the national economy. ICTSI’s financial standing and its operational capacity is not gainsaid by APM.

[118] Having satisfied itself through a vast and expansive process, including due diligence exercises, Transnet was satisfied with its choice of ICTSI, even after the complaint of it not meeting the solvency ratio was raised. The investigations which followed provided it with further evidence of the suitability of ICTSI as a partner. It is in this vein that Transnet argues for ‘due deference’ to be shown by this court for the choice of a business partner.⁴⁹

[119] This was not a routine tender for services at the lowest price. Transnet, more than any competing bidder, would be best suited to understand the purpose and

⁴⁸ Contained in clause 1.4(h) of the RFQ.

⁴⁹ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (7) BCLR 687 (CC), where reference is made to the article by Professor Hoexter entitled ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 SALJ 484 at 501-502 where judicial deference was explained as follows:

‘(A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.’

meaning of its own tender process, and more importantly, the specific characteristics it is looking for in a suitable business partner. Again, it bears repeating that this is not a case where the spectre of corruption and malfeasance lingers over the choice of the successful bidder.

[120] The point repeatedly emphasised during argument is that the solvency ratio played no role in the determination of the successful bidder. Transnet contends that what APM is seeking to achieve, via the review application, is to unseat ICTSI's bid worth R11.2 billion and impose APM as the preferred proponent with an offer of R9.2 billion. This would undermine the fundamental purpose of the tender and cannot be said to be rational.

[121] Similarly, Transnet was criticised for engaging the services of Growthstone and is accused of engaging with ICTSI in seeking its views on the non-compliance with the solvency ratio, as well as evaluating its bid on criteria different to that on which APM was evaluated. As regards the criteria used by Growthstone, even if they are nowhere to be found in the bid specifications, Growthstone was not performing an exercise under the auspices of the RFQ or RFP. That was the mandate of the CFAT, who were guided by the Framework for Joint Investment, approved by Transnet's Board. The CFAT had already passed ICTSI through the RFQ, as it was satisfied that ICTSI had met the minimum financial criteria solvency ratio.

[122] Apart from denying these assertions against Growthstone and ICTSI, , Transnet's Framework, which guided the CFAT in its assessment of the bids, provides in clause 9.3.3 that in qualifying a bid and evaluating criteria, Transnet has the right to 'extract further information from bidders' and 'seek clarification from bidders'.

[123] This is exactly what Transnet contends it did when faced with the complaint from APM. Mr *du Plessis* submitted that it acted in a rational and reasonable manner, in accordance with the prescripts of *Allpay* – describing its approach as the 'gold

standard' when caught in the predicament it faced. The obligation to investigate a potential irregularity, or to correct any unlawfulness, was underscored in *Khumalo*.⁵⁰

[124] Further evidence of the latitude granted to Transnet to waive the requirements of the RFQ or to require 'supplemental statement of information from any respondent' and being the 'sole judge' of any bidder's conformity with the requirements of the RFQ, can be sourced in clause 5.3 of the RFQ. On this score, I can find no basis for the contention that Transnet operated outside the parameters of the tender document by engaging with ICTSI, as it invited their representations to the complaint of APM, and even gave notice that it contemplated disqualifying them for the failure to meet the solvency ratio.

[125] Having regard to the record, I agree with Transnet that there was nothing suggestive of untoward, unlawful or irrational conduct on its part, following APM's complaint. It should also be borne in mind that Transnet was in frequent communication with both APM and ICTSI on the solvency ratio complaint, and there can be no insinuation that Transnet adopted a partisan approach to either party during this period.

[126] The test to determine whether the procedure followed by Transnet in ultimately awarding the contract to ICTSI must be measured against the threshold set in *Allpay*, where the following was stated:⁵¹

'The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.'

[127] In answering the *Allpay* test in this matter, it cannot be disputed (applying the rigours of strict compliance) that an irregularity occurred by Transnet overlooking ICTSI's failure to satisfy the 0.4 solvency ratio, and by applying the formula as stipulated in clause 5.2(d) of the RFQ. It used a formula not prescribed by the RFQ. At the same time, although all the remaining bidders used the formula as set out in the

⁵⁰ *Khumalo* para 35.

⁵¹ *Allpay* para 28.

RFQ to establish compliance with the solvency ratio, the RFQ did *not* inform bidders that the *only* way in which total equity could be established was through the company's audited financial statements for the current year, as opposed to the metric of using market capitalisation, or that this would be met with disqualification.

[128] In contrast, part 5(2) of the Assessment of Statements of Qualifications under the RFQ, expressly sets out certain exclusionary criteria, such as where a bidder has been subject to bankruptcy; insolvency; or where directors of the parent company have been found guilty of fraud or corruption. The absence of the exclusionary criteria in s5(2)(d) support the interpretation favoured by Transnet and ICTSI.

[129] Having regard to all of the facets of the tender and its subsequent investigations into ICTSI's standing, Transnet was satisfied with ICTSI's financial status as a long-term business partner, even without it complying with the solvency ratio. The tender framework permitted Transnet to condone non-compliance with certain requirements, and it acted accordingly, without prejudice to any losing bidder, especially APM, whose bid was 17% less than that received from ICTSI.

[130] To have disqualified ICTSI for its failure to achieve a solvency ratio (based on a specified formula), would have been to disqualify a meritorious tenderer, and open the way for a significantly lower bid to have prevailed. This would be contrary to the purpose of the tender and the financial objectives of Transnet. It would also have the effective of retarding, rather than promoting the value of 'competitiveness' which is referred to in s 217 of the Constitution.

[131] As Transnet emphasised throughout its argument, the issue of ICTSI failing to comply with the solvency ratio had no bearing on the ultimate purpose of the RFQ, notwithstanding that such requirement was found to be mandatory. The RFQ process, of which the minimum financial criteria formed part, was intended to pre-qualify bidders before entering the competitive phase in which the bidders submitted their offers for a 49% stake in NewCo. Transnet ultimately selected a business partner, in a globally competitive market, based on ICTSI's sound financial credentials and the ability to raise the necessary funding for the project. ICTSI's financial standing has never been placed in dispute by APM.

[132] Hence, to advance the argument of its non-compliance with the solvency ratio as a basis for its disqualification, would be to unjustifiably elevate form over substance, even in relation to a mandatory requirement. It would be reminiscent of cases which advocated for formalism and strict adherence to tender requirements.⁵² The author, Peter Volmink,⁵³ points out that in determining whether a bid can be regarded as responsive

'... calls for a careful weighing up of multiple factors through a process of fair-minded reasoning, rather than the adoption of a narrow, rigid or pedantic approach. The consequences of non-compliance may vary depending on the purpose and materiality of the bid requirement in question, the language of the request for proposals (RFP), whether there had been substantial compliance etc.'

[133] This was not a case where another bidder had been excluded from progressing to the RFP stage for non-compliance with the solvency formula, or that ICTSI had been accorded different treatment, and been allowed to proceed. When APM and ICTSI entered the RFP stage, they were on an equal footing together with the other bidders who submitted financial offers to Transnet.

[134] The inquiry, since *Allpay*, has shifted to materiality. As stated earlier, there has been no suggestion or a dint of evidence to suggest that ICTSI would not be an appropriate fit for a long-term business relationship with Transnet. It must be emphasised that this court, in finding no basis to unseat ICTIS, should not be seen to be rubber-stamping Transnet's decision, fortified as it was by the Growthstone report. In reaching the decision I have, consideration has been given to the purpose of the solvency ratio in the context of bidders being required to satisfy minimum financial criteria under clause 5.2 of the RFQ, and the overall objective of the tender.

[135] In the result, I conclude, having had regard to the submissions of the parties and the extensive record, that Transnet's decision in awarding the contract for the

⁵² See *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA) in which applications for fishing rights had been disqualified for non-compliance with peremptory lodging requirements.

⁵³ P Volmink 'Legal Consequences of Non Compliance with Bid Requirements' (2012) 1 *African Public Procurement Legal Journal* 41 at 44.

operation of DCT2 to ICTSI did not fall foul of the tender provisions, nor did it constitute a reviewable irregularity under s 6(2) of PAJA or under the principle of legality. Transnet approached the complaint under the *Allpay* test and adopted a 'purposive' approach in ensuring that the steps taken were in compliance with the provisions of the tender, in light of their overall purpose.⁵⁴

[136] My finding on the merits also informs my decision as to whether condonation should be granted for the review of the preferent proponent decision of 6 July 2023. In respect of the application for condonation, I have already concluded that the delay was unreasonable and that the primary target, as far as APM was concerned, was the decision or explanation that eventuated on 1 March 2024. APM was mistaken in its strategy to wait until it received the explanation from Transnet on 1 March 2024. Nothing prevented it from instituting its application to challenge the decision to select ICTSI as the preferred proponent bidder, a decision which had a direct, external effect on the rights of third parties. The explanation that APM was holding out until it received better or fuller reasons from Transnet is neither satisfactory nor convincing. Despite the apparent commercial urgency and knowing the consequences that delays have for various industries associated with the port, the failure to launch the review application timeously is fatal.

[137] For all of the above reasons, I am not persuaded that condonation should be granted for the delay in instituting the review application. If I am wrong in this regard, I am of the view that the review in any event falls to be dismissed on the merits.

[138] On the aspect of costs, it bears noting that APM was granted costs of two counsel at the stage of the interim application. In this court, APM similarly asked for costs in the event of it succeeding, with both Transnet and ICTSI adopting a similar stance in the event of them prevailing. It is trite that this is an aspect in which I exercise my discretion. None of the parties appeared to consider that *Biowatch Trust v Registrar*,

⁵⁴ The author goes on to offer the following explanation of the 'purposive approach' at 52:

'Thus, if the purpose of the bid requirement was achieved despite the fact that the provision was not fully complied with, the bidder should be regarded as sufficiently compliant and not be disqualified. The purposive approach is less formalistic as it focuses attention away from the classification of a requirement as "mandatory" or "permissive" and instead engages with the more fundamental question as to whether the bid requirement in question is material (whether it serves an important purpose) and whether that purpose was in fact achieved, despite the imperfect compliance.'

*Genetic Resources, and Others*⁵⁵ or *Harrielall v University of KwaZulu-Natal*⁵⁶ were of application in this case, despite APM bringing its challenge primarily on the grounds that Transnet's conduct offended the provisions of s 217 of the Constitution, and s 6(2) of PAJA. I assume this approach was informed by the view that the matter related to a tender, was essentially of a commercial nature and devoid of any 'public interest' component.

[139] The Constitutional Court in *Harrielall*, however, stated that the review of the exercise of public power is now controlled by the Constitution and legislation enacted to give effect to it. The application brought by APM, though unsuccessful, cannot be described as frivolous or vexatious, to strip it of the protection afforded by *Biowatch* where parties engage in constitutional litigation. Mossop J found that APM had made out a *prima facie* case for urgent interim relief. At the heart of this matter, despite Transnet labelling APM's case as an attempt to snatch a R2 billion bargain by attempting to unseat ICTSI as the successful tenderer, the dispute nonetheless hinged on whether Transnet, as a public entity, adhered to s 217 of the Constitution and the rigours set out by the Constitutional Court in *Allpay*. The matter is of significant public interest, albeit not in the sense of involving the determination of socio-economic rights.

[140] Rogers J in *SMEC* was faced with a similar predicament and considered⁵⁷ 'Whether a carve-out should be recognised for commercially inspired review proceedings in general, or for reviews by disappointed tenderers in particular, is a question for a higher court.'

[141] I am satisfied that APM's litigation falls within the *Biowatch* net and to that extent, it is insulated from costs in this court, notwithstanding the award of costs in its favour in the interim application.

⁵⁵ *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) (*Biowatch*).

⁵⁶ *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC) (*Harrielall*).

⁵⁷ *SMEC* para 143.

[142] I accordingly make the following order:

1. The application is dismissed.
2. The parties are to bear their own costs, including any costs reserved.



CHETTY J

Counsel for the applicant:

Mr N H Maenetje SC and Mr M Z Gwala

Instructed by: Webber Wentzel

Sandton

Johannesburg

Locally represented by:

Johnston and Partners

Umhlanga Rocks

Counsel for the first respondent:

Mr M du Plessis SC, Mr N Ferreira and

Mr M Salukazana

Instructed by: ENS Africa

Sandton

Johannesburg

Locally represented by:

ENS Africa

Umhlanga Rocks

Counsel for the second respondent:

Mr A Stein SC and Ms T Palmer

Instructed by: Bowman Gilfillan Incorporated

Johannesburg

Locally represented by:

Bowman Gilfillan

Westville

Durban

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