REPUBLIC OF SOUTH AFRICA

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

CASE NO: 21/3970

Reportable: Yes
Of interest to other judges: Yes
29 June 2021 Vally J

In the matter between:

ESKOM HOLDINGS SOC LIMITED	Applicant
and	
ECON OIL & ENERGY (PTY) LTD	First Respondent
FFS REFINERS (PTY) LTD	Second Respondent
SASOL OIL (PTY) LTD	Third Respondent
BRITISH PETROLEUM SOUTHERN AFRICA (PTY) LTD	Fourth Respondent
ENGEN PETROLEUM LIMITED	Fifth Respondent
EXOL OIL REFINERY (PTY) LTD	Sixth Respondent
REFINEX (PTY) LTD	Seventh Respondent
NATIONAL TREASURY	Eighth Respondent
KEVIN TRISK NO	Ninth Respondent

JUDGMENT

Vally J

A INTRODUCTION

[1] Econ Oil & Energy (Pty) Ltd (Econ), the first respondent, is firmly of the view that it holds a contract with the applicant, Eskom Holdings SOC Limited (Eskom). The

alleged contract is for the supply of fuel oil for a period of five years commencing 1 October 2019. The total value of the contract is approximately R8bn. The contract is supposed to have resulted from a tender issued by Eskom referred to as Bid Corp 4786 (the tender). Eskom maintains that the process adopted in executing the tender by various committees and individuals within Eskom was blemished by numerous irregularities, resulting in an outcome that is unlawful. Following the process, a recommendation was made to its Board of Directors (Board) to award the tender to various parties, Econ being one of them. Only Econ maintains that it has a valid and binding contract with Eskom. It is Eskom's case that as the process and outcome of the tender is unlawful, the decision of its Board to award the tender to various parties should be reviewed and set aside. It seeks, in addition, a declarator to the effect that no binding contract was ever concluded between itself and Econ. The review and the declarator are the principal issues to be addressed in this matter. There are other issues ancillary to these, but their outcome is contingent on the outcome of the principal issues.

[2] A conditional counter-application has been brought by Econ where it seeks the following relief: (i) a declarator that the contract between it and Eskom subsists, (ii) that Eskom be ordered to specifically perform its obligations in terms of the contract and, (iii) that a decision by the ninth respondent – who was appointed to adjudicate on this issue - holding that such a contract subsists be found to be correct, and that the remedy granted to Econ in terms of his adjudicative powers be made an order of this court. It is patent that the conditional counter-application depends on Econ succeeding in resisting Eskom's case on the two principal issues. If not, the conditional counter-application falls away.

B INTERLOCUTORY APPLICATIONS

[3] There are three interlocutory applications: two by Eskom and one by Econ. All relate to the admission of new evidence after pleadings had closed. Eskom does not oppose the application of Econ, but on the other hand Econ opposes Eskom's applications. In my judgment the opposition was well taken. The evidence that Eskom wishes to have admitted concerns two reports, one by Mr N Cassim SC (Mr Cassim) and one by Mr I Semenya SC (Mr Semenya). The report by Mr Cassim deals with a disciplinary hearing against the Chief Procurement Officer, Mr Solly Tshitangano (Mr Tshitangano) for misconduct relating to a number of issues, one of which concerns the tender and the alleged contract concluded between Eskom and Econ after the tender was processed. At first blush it would appear that the contents of Mr Cassim's report are pertinent, if not central, to the determination of the principal issues in this matter, but upon further reflection it becomes clear that its value for such determination is at best peripheral. The issues and evidence before Mr Cassim were not exactly the same as those before this court. His findings have no bearing on the outcome of this case, and it is trite that those findings are no more than his opinions. Similarly with the report by Mr Semenya. The issue before him was the veracity of certain allegations made by Mr Tshitangano against the Chief Executive Officer of Eskom, Mr Andre Marinus De Ruyter (Mr De Ruyter), some of which trespass on issues raised in this matter but, once again, the determination of those issues by Mr Semenya has no value for the determination of the principal issues in this matter. Accordingly, both applications stand to be dismissed with costs. As for Econ's application, it was unopposed and is therefore granted.

C THE MERITS OF THE CASE

(i) Did Eskom resolve to, as a first option, purchase certain types of fuel oil from refineries before seeking recourse to blenders?

[4] It is Eskom's case that in a quest to reduce its costs of production its Board resolved on 30 January 2019 to adopt a new strategy for the procurement of fuel oil. The core element of the strategy was to procure as a first option certain types of fuel oil directly from refineries and not from manufacturers, blenders, distributors, importers and wholesalers who all acquire their fuel oil from refineries and sell it on to Eskom. Econ denies that Eskom adopted the said resolution. To this end, Econ draws succour from a statement made by a Board member, Mr Sifiso Dabengwa, (Mr Dabengwa) who insisted that no such resolution was ever passed – see [37] below – and points out that Eskom is unable to furnish a written copy of the resolution, or to show from the minutes of the meeting that such a resolution was passed.[1] In contrast to Econ, Eskom draws on a number of facts to show that the resolution was passed by the Board.

[5] The facts Eskom draws attention to are:

a. The minutes of the said Board meeting record that Mr Tshitangano raised the issue of purchasing fuel oil from refineries only. According to the minute a resolution in the following terms was adopted:

> '[Mr Tshitangano] is authorised to review the fuel/oil contract and take the necessary steps including taking into consideration ... further negotiation with the refineries.'

[1] The failure of Eskom to provide a copy of the resolution and the minutes of the meeting is concerning. Sub-sections 73(6) and (7) of the Companies Act 71 of 2008 (Companies Act) impose a duty on Eskom to have these resolutions and minutes at hand.

b. On 1 February 2019, Mr Tshitangano, who was present at the meeting, wrote to National Treasury reporting on the decision of the Board:

> '1. Eskom Board held a meeting on 30 January 2019, in which a new strategy for the procurement of fuel oil, diesel and liquid sulphur to all Eskom's coal-fired Power Stations, was approved in order to save costs. The strategy was recommended by National Treasury on a letter dated 30 November 2018 ...
>
> 2. The Board directed management to procure fuel oil, diesel and liquid sulphur directly from refineries/manufacturers and in cases where there is a government agency, the government agency will be approached first, as directed by paragraph 4.4.1(iii) of "Supply Chain Management guidelines on the implementation of the demand management" which requires an institution to consider optimum methods to satisfy the need.
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> 3. The refineries/manufacturers will be requested to submit proposals or quotations using a closed bid process. Eskom will comply with the principles of section 217(1) of the Constitution because refineries will compete against each other.
>
> 4. The Board further resolved that Bid Corp 44403 for the supply, delivery and off-loading of heavy fuel oil (HFO) to Eskom's coal-fired power stations should be cancelled due to material irregularities in the tender process. The bid was advertised to replace the interim contract.
>
> 5. National Treasury is requested to support the implementation of the optimum procurements approach approved by the Board.'

c. National Treasury responded about two weeks later stating that:

> 'National Treasury support the implementation of the optimum procurement approach on condition that it is cost-effective for the business and that refineries compete against each other.'

d. On 7 February 2020, long after the tender was already awarded to Econ and others, the Interim Group Executive: Legal and Compliance officer of Eskom Mr Bartlett Hewu (Mr Hewu) made reference to this decision

when he compiled a memorandum for the Board on 7 February 2020.[2]

He wrote:

> '5. The Board, at its subsequent meeting held on 30 January 2019, approved a new strategy for the procurement of fuel oil by Eskom for all its coal-fired power stations directly from the refineries as a cost saving measure.
>
> ...
>
> 19. If Eskom were to proceed with the conclusion of the contracts with successful bidders under the circumstances, it will be in defiance of the Board Strategy and thus will result in the exclusion (for 5 years) of other suppliers such as BP and Engen who have the product at competitive prices.'

It has to be borne in mind that he was addressing the very Board that is supposed to have adopted the resolution.

e. Mr Tshitangano and Mr Hewu have both provided sworn testimony – in the form of confirmatory affidavits – to this effect, which is not refuted but instead is only met with a bare denial by Econ. In fact, Mr Tshitangano avers in his affidavit that he was present at the Board meeting of 30 January 2019, and that the decision was indeed passed. Hence his letter to the National Treasury.

f. In addition there is sworn testimony from a Mr Calib Cassim (Mr C Cassim), the Chief Financial Officer of Eskom, who says that he was present at the Board meeting of 30 January 2019 where 'a new strategy for the procurement of, amongst others, fuel oil for Eskom's coal fired power stations was approved in order to save costs. In terms of this

[2] It was compiled by Mr Hewu but sent to the Board by Mr De Ruyter

new strategy, the board had decided to procure fuel oil from the refineries.'

[6] There are other facts that also bear reference on this issue. They are:

a. The tender document is crafted in a manner that gives priority to refineries over blenders;

b. The employees who assessed the bids operated on the basis that the resolution was passed.

[7] The denial by Econ is supported only by the statement made by Mr Dabengwa that no such resolution had been passed. On the other hand, the facts set out in [5] and [6] above, are more detailed and at least supported by the minute of the relevant Board meeting, even though it is not as explicit on this issue as it could have been. At the very least though, it records that Mr Tshitangano should explore the possibility of sourcing fuel oil from the refineries in a manner that does not compromise the efficiency or security of the supply. And two days later Mr Tshitangano sought National Treasury's approval to proceed with this mandate, which he characterised as being a 'new strategy for the procurement of fuel oil'. The resolution, his letter, National Treasury's response, the conduct of the employees during the process of executing the bids and finally Mr Hewu's memorandum are all primary facts. By dint of inferential reasoning they allow for the drawing of a conclusion as to the existence or otherwise of another secondary fact:[3] that the resolution as claimed by Eskom had

[3] See *Willcox and others v Commissioner of Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (SCA) at 810I - 811A; *Knoop v Gupta* 2021 (3) SA 88 (SCA) AT [19]

been passed by the Board on 30 January 2019. Put differently, on the established facts the most probable inference to be drawn is that a resolution to the effect claimed by Eskom was passed by the Board on 30 January 2019. And, so I hold.

[8] This fact must bear weight when scrutinising the outcome of the tender.

(ii) Should the decision to award the tender to Econ, FFS and Sasol be reviewed and set aside?

[9] The tender trailed the resolution. It was a closed tender issued on 24 May 2019. It was issued to seven refineries and four pre-qualified blenders and manufacturers for the supply, delivery and off-loading of fuel oil for a period of five years. The total value of the tender was more than R14bn. The tender invited the participants to supply, deliver and off-load fuel 'to all Eskom's coal fired power stations on an "as and when" basis for a period of five years'. The tender identified three different grades of fuel oil that were required, *viz*, Grade 1, Grade 2 and Grade 3. A specific grade was identified for a specific power station. Importantly the tender document identified a hierarchy of bidders with refineries placed on top and blenders below that. The tender was to be evaluated in three stages as follows:

(i) Stage 1: Basic Compliance;

(ii) Stage 2: Mandatory tender returnables; and lastly,

(iii) Stage 3[4]: The scoring system would be that outlined in the Regulations made in terms of the Preferential Procurement Policy Framework Act, 2000 (the PPPFA), where the total would be 100 points and the lowest acceptable tender would score 90 points, while the remaining 10 points

[4] This is referred to as Stage 4 in the tender document

would be awarded for 'specific goals' which include contracting with persons who 'were historically disadvantaged' by being unfairly discriminated against on the basis of 'race, gender or disability'. This is referred to as the 90/10 points scoring system.

[10] The tender document repeats Regulation 7 of the Regulations proclaimed in terms of the PPPFA (Regulations). The relevant portions of Regulation 7 are:

> '7 90/10 preference point system for acquisition of goods or services with Rand value above R50 million
>
> (1) The following formula must be used to calculate the points out of 90 for price in respect of a tender with a Rand value above R50 million, inclusive of all applicable taxes: Where Ps = 90(1 - (Pt – Pmin/Pmin)) Ps = Points scored for price of tender under consideration; Pt = Price of tender under consideration; and Pmin = Price of lowest acceptable tender.
>
> ...
>
> (8) Subject to subregulation (9) and regulation 11, the contract must be awarded to the tenderer scoring the highest points.
>
> (9) (a) If the price offered by a tenderer scoring the highest points is not market-related, the organ of state may not award the contract to that tenderer.
>
> (b) The organs of state may-
>
> (i) negotiate a market-related price with the tenderer scoring the highest points or cancel the tender;
>
> (ii) if the tenderer does not agree to a market-related price, negotiate a market-related price with the tenderer scoring the second highest points or cancel the tender;
>
> (iii) if the tenderer scoring the second highest points does not agree to a market-related price, negotiate a market-related price with the tenderer scoring the third highest points or cancel the tender.
>
> (c) If a market-related price is not agreed as envisaged in paragraph (b)(iii), the organ of state must cancel the tender'

[11] These were the principles by which the tender would be implemented. By including them in the tender documents Eskom, while alerting all the tenderers to them, committed itself to upholding them. More importantly, in terms of the provisions of the PPPFA and the Regulations they are the peremptory requirements by which the tender was to be effected.

[12] Bids were received from Econ, FFS Refineries (Pty) Ltd (FFS), the second respondent, Sasol Oil (Pty) Ltd (Sasol), the third respondent, British Petroleum Southern Africa (Pty) Ltd (BP), the fourth respondent, Engen Petroleum Limited (Engen), the fifth respondent, Exol Oil Refinery (Pty) Ltd (Exol), the sixth respondent, and Refinex (Pty) Ltd (Refinex), the seventh respondent.

[13] Evaluation of the bids commenced with a review on paper by the Chief Engineering Advisor of Eskom of the technical submissions by the bidders. On 28 June 2019 he issued a letter explaining his findings: noting that a peremptory requirement for the supply was that the successful bidder must not be an intermediary but an original refiner or manufacturer of the fuel supplied, he concluded that Econ and FFS should be allowed to go to the next phase of the evaluation only once Econ provided a 'manufacturing certificate', and that while Exol and Refinex met the requirement of being an original manufacturer their fuel had to be evaluated for compatibility with Eskom's system before they should be allowed to proceed to the next phase.

[14] The next phase of the evaluation involved an assessment of the financial components of the respective bids by the Corporate Finance Division of Eskom

(Corporate Finance). One of its senior managers reported on 5 July 2019 on this aspect. He recorded that Corporate Finance discovered that while a technical evaluation was done for some of the suppliers, a technical evaluation was still required for the major refineries, as well as the blenders which are also manufacturers, in order to ensure that all the tenderers remained technically compliant. Without this it was impossible to undertake a price comparison exercise. He concluded the report :

> 'Based on our work described in this report, the information provided to us and from a financial point of view, we are unable to recommend the most cost-effective supplier and comment on the reasonableness of the prices submitted as the tenders [sic] are not on a comparable basis.
>
> We therefore recommend that the issues indicated in the [report] be clarified to enable [Corporate Finance] to do a proper financial evaluation.'

[15] The report is unambiguous. There was no 'proper financial evaluation' of the various bids received. Already at this stage the impossibility of complying with s 2 of the PPPFA was highlighted. Instead of addressing this issue the employees of Eskom proceeded with the process of awarding the intended contracts. Thirteen days later, on 18 July 2019, an employee of Eskom compiled a report which was signed by senior employees and was sent to the chairperson of the Executive Tender Committee (ETC), seeking a mandate to conclude contracts for a period of five years with Sasol, BP and Econ. Sasol and BP are refineries, whereas Econ is a blender. The mandate they sought was as follows:

Fuel Oil Type	Stations	Supplier	5 Years total
Grade 1	Three power stations	Sasol	R3 377 812 077.51
Grade 3	Nine power stations	Sasol	R7 466 916 883.50
Grade 3	Three power stations	BP	R2 737 447 269.33
Grade 2	Hendrina power station	Econ	R 853 155 374.40
Total			R14 435 331 604.74

[16] The reason given for recommending Econ be awarded a contract for Hendrina was that none of the refineries had tendered to supply fuel oil to that power station.

[17] Having regard to the bids, the ETC came to the conclusion that Sasol was the cheapest supplier of Grade 1 fuel oil to three power stations and the cheapest supplier of Grade 3 fuel oil to nine power stations; BP was the cheapest supplier of Grade 3 fuel oil to three power stations; and finally that Econ was the cheapest non-refinery supplier of fuel oil to the Hendrina power station. Sasol should - if the mandate was accepted - receive contracts worth R10 844 728 961.50 in return for supplying fuel oil to twelve power stations, BP should receive contracts worth R2 737 447 269.33 in return for supplying fuel oil to three power stations and Econ should receive only one contract to supply fuel oil to one power station to the value of R 853 155 374.40. The total value of the contracts would be R14 435 331 604.74. This conclusion is problematic as it is pertinently recorded that the outcome is based on the fact that there was 'no proper financial evaluation' of the bids.

[18] The report made it explicit that should a mandate be received then '(t)he NEC/Bespoke contract conditions will be negotiated with all the recommended

tenderers.' This aspect is relevant for determination of whether a contract between Eskom and Econ was eventually concluded. It is dealt with in greater detail below.

[19] On 22 July 2019 the ETC met. It recommended that negotiations with the winning bidders proceed.[5] Notwithstanding that there was 'no proper financial evaluation' of the bids, this would only have been necessary if the winning bids were not market related. Sub-regulation 7(9) of the Regulations says that if the winning bid's price is not 'market related' Eskom must either negotiate with the said bidder regarding the market related price or cancel the tender. Should it adopt the former approach and the said bidder is willing to supply the fuel oil at a market related price it should be awarded the tender, but if it is unwilling to do so then Eskom could either cancel the tender or negotiate with the second highest scoring tenderer over the market related price and repeat the process. If that fails then it should go to the third highest bidder and repeat the process. If that fails to secure a positive response, it should cancel the tender.

[20] Thus, if that is what was envisaged by the negotiations there would be no problem. And, if the prices of the winning bidders were already market related then the outcome should have been brought before the Board, and if the Board accepted it then it would have acted consistently with its decision to, as a first option, seek to purchase directly from refineries. This was not done, and instead the ETC asked for a mandate to commence negotiations with individual bidders and, at the same time,

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[5] It bears noting that the ETC specifically recorded that 'blenders were requested to submit tenders due to major refineries not being able to meet the total requirements.' This is another indication that Bid Corp 4786 was conducted on the basis that the Board had resolved to, as first option, only purchase fuel oil directly from refineries and only look to non-refineries such as blenders if none of the refineries was able to meet its requirements.

said that the process of comparing the prices of the various suppliers should be undertaken after the negotiations were concluded. To this end, it said that the lowest tender rate should be used as a base for the negotiations. The ETC it seems attempted to overcome the problem of not being able to financially evaluate the bids by seeking to negotiate directly with each of the bidders. By seeking to do this the ETC was asking for the bidding process to be rendered nugatory. In normal circumstances, once the bids were evaluated, the ETC would have applied sub-regulation 7(9) of the Regulations. Because the financial evaluation was impossible it called for a complete deviation from the requirements set out in sub-regulation 7(9). It called for a rupture, which certainly took place as we will see below. Importantly, if there was any malfeasance in the awarding of the tender – in its founding papers Eskom claimed there was - this established the gateway for such malfeasance to take place. The ETC was asking for a deviation from the open transparent and fair process it initially followed but was unable to complete. The Constitutional Court (CC) has already warned of the dangers inherent in such a deviation:

> '[27] There is a further consideration. As Corruption Watch explained, with reference to international authority and experience, deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences.'[6]

[21] On 26 July 2019 the ETC recommended to the Investment and Finance Committee (IFC) – a sub-committee of the Board - that it approve the commencement

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[6] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at [[27]

of private individual negotiations with the bidders. The recommendation included a very pertinent comment which read:

> '(b)ased on the concerns raised in the attached financial evaluation report, Michael Ndima from the Treasury Evaluation Department was unable to conduct price evaluations.'

[22] The comment should have been a matter of concern for the IFC, which was chaired by Mr Dabengwa, a member of the Board. It met on 1 August 2019 and accepted the recommendation without more.

[23] By adopting this course of action the IFC flouted a number of legal prescripts, the most important being the provisions of s 217 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). Section 217 prescribes that when an organ of state such as Eskom 'contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. Compliance with its terms is peremptory. Thus, the method and system by which the tender is awarded has to achieve five objectives: 'fairness, equity, transparency, competitiveness and cost effectiveness.'[7]

[24] As soon as the IFC mandated a closed system of private negotiations, the risk of failing to comply with the legal requirement of transparency and fairness in the process and the outcome became real.

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[7] *Municipal Manager, Qaukeni Local Municipality and Another v FV General Trading CC* 2010 (1) SA 356 (SCA) at [11] and [13]; *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) at [11]

[25] But there was another problem arising from the failure to be able to financially evaluate the bids because, *inter alia*, the bids 'were not on a comparable basis'. The financial evaluation was dependent on a technical evaluation. The technical evaluation, which included an evaluation of the quality of the product, was not done for some of the bids, and thus whatever financial amount was indicated in that bid would not necessarily reflect the true cost of the fuel oil purchased from that particular bidder, or the fuel oil purchased may not be of a quality suitable for Eskom's needs. Closed private negotiations on a one-on-one basis would not solve this problem. The technical evaluation has to take place and then only would a financial evaluation be possible. Since the negotiations were to be conducted in the absence of this technical evaluation they would not bear the fruit the ETC was possibly hoping for, i.e. to secure the most competitive or cost-effective price for the fuel oil. The approach of using the lowest price as a base for the negotiations did not overcome Eskom's problem of not being able to compare 'like with like' as the prices and quality of the fuel oil were simply not comparable. Continuing in these circumstances would result in the whole process losing all credibility. It would result in the suppliers not being treated equally and their respective offers not being adjudged fairly.[8] This is regardless of whether it is an open transparent bidding process or a closed one-on-one negotiation process. Thus, if Eskom proceeded with this new process suggested by the ETC, it risked acting unlawfully as the entire process and the outcome would not be 'fair, equitable, transparent, competitive and cost-effective.' And this, as we will see below, is exactly what happened.

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[8] Compare: *Premier of the Free State Provincial Government v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA), especially at [30]

[26] Once the IFC mandate was received employees of Eskom commenced negotiations with BP, Engen, Econ Oil, FFS and Sasol to supply the fuel oil sought. The negotiations took place during the period 6 - 9 August 2019. Minutes of 'negotiations' with Econ merely reveal that Ms Nothemba Mlonzi (Ms Mlonzi) of Econ made a presentation to the employees outlining what Econ could offer, at what price and how it would supply the fuel oil. Other than this slender piece of evidence there is nothing placed before court about the negotiations that were conducted with any of the other parties. The negotiations were clearly conducted in petto and the risk referred to in [25] above materialised.

[27] On 30 August 2019, a recommendation signed by three senior employees, Mr Ntombizodqa Mokoatle (Mr Mokoatle), Mr Tshitangano, and Mr Bheki Nxumalo (Mr Nxumalo), was placed before the Board. They recommended that the Board approve the outcome of the negotiations and mandate the conclusion of various contracts with suppliers of fuel oil. The outcome was set out in the following Table:

Fuel Oil Type	Stations	Supplier	5 Years total
Grade 1	Duvha South and Kriel	Sasol	R 1 656 345 568.76
Grade 1	Arnot	Econ	R 1 618 082 019.00
Grade 2	Hendrina	Econ	R 827 560 540.80
Grade 3	Camden, Duvha North, Grootvlei, Kendal Komati, Kusile, Letlhabo, Matla and Matimba	Econ	R 5 518 367 388. 46
Grade 3	Majuba and Medupi	Sasol	R 4 579 812 662.88
Grade 3	Tutuka	FFS	R 1 877 415 902.76
Total			R14 200 168 297.92

They said the outcome was based 'on the negotiated rates, committed volumes and readiness to start supply.'

[28] Econ benefitted handsomely from the decision to open negotiations with the parties. It received contracts to the value of R7 964 729 948.26, when the sum total of the contracts was R14 200 168 297.92. It acquired fifty-six percent (56%) of the value of the tender. Econ is a blender not a refinery. In terms of the tender it was only allowed to supply Grade 3 fuel oil to Eskom if none of refineries were willing or able to supply it directly. Initially Hendrina was the only power station that was awarded to Econ. It was for the supply of Grade 2 fuel oil at a price of R827 560 540.80. That would be 0.57% of the total value of the tender. Now, in addition, it was awarded contracts for Grade 3 fuel oil at the Camden, Duvha North, Grootvlei, Kendal Komati, Kusile, Letlhabo, Matla and Matimba power stations for a globular sum of R5 518 367 388.46, plus a contract to the value of R1 618 082 019.00 for the supply of Grade 1 fuel oil to the Arnot power station. In total Econ secured contracts for eleven power stations. This occurred in circumstances where refineries were able and willing to supply that particular fuel oil to these power stations, save for Hendrina.

[29] Econ being a blender should not, in terms of the Board's resolution, be awarded contracts to supply Grade 3 fuel oil as it only distributes these grades of fuel oil. In any event, what is clearly troublesome is that the burning question, how is it that as a distributor it is able to supply fuel oil cheaper than the refineries when it sources the fuel oil from one or other of these refineries and then re-sells it to Eskom, remains unanswered. I must pause here to point out that the question is not based on speculation. It will be seen from the analysis below – see [54] to [64] - that

according to Eskom, Econ had to convince Eskom that it had concluded back to back contracts with refineries. Econ claimed that it did not have to convince Eskom of this, but nevertheless it had concluded such contracts. By so doing, Econ admits that it is re-selling fuel oil purchased from refineries to Eskom. Hence, the question asked here should have been asked by whoever conducted the negotiations, for it goes to the very core of whether the contracts to be concluded with Econ would be competitive and cost-effective. This is apart from the fact that it would be a breach of the Board's decision of 30 January 2019 to award the tender for Grade 3 fuel oil to Econ.

[30] On 11 September 2019 a financial evaluation of the latest information received from the negotiations was conducted by Corporate Finance, which is the same division that initially evaluated the bids. It noted that the ultimate total value of the contracts - R14 200 168 297.92 – was R421 947 348.00 more than the mandate endorsed by IFC. In statistical terms it represented an increase of 3.1% of the initial mandate. And this was after all the discounts negotiated were taken into account. The team conducting the evaluation emphasised that they were concerned that no technical evaluation was done for the tenders from Exol and Refinex, and were therefore not able 'to comment if the prices submitted are on a common base'. At the same time, the suppliers did not clarify a number of issues. Some of these being:

a. that Sasol 'had indicated that the HFO and Catlight comprises of material cost component and a fixed portion.' Sasol had 'also indicated that the fixed portion will be escalated annually on the first Wednesday of July by the average Producer Price Index (PPI) as published by Stats SA.' It is still not clear which portion of the price is the material portion

and which is the surcharge portion and thus 'it will be difficult to apply the CPA [Contract Price Adjustment] formula to their price';

b. Engen 'did not complete all the sections of the price schedule provide [sic] as part of the enquiry by Eskom' making it unclear as to whether the price was fixed in South African Rands and 'will not be subject to any rate of exchange adjustments';

c. Engen's transport component for the all the power stations 'is R800.00', but its 'delivery prices are different'. Further clarification from Engen was necessary;

d. Exol had only provided an example of its cost structure. It did not provide a CPA for its price adjustment which 'would make it difficult for Eskom to independently verify its price adjustments';

[31] As a result, the evaluators supported the request to conclude contracts with the respective suppliers, Sasol, Econ and FFS only after these issues were clarified and a technical evaluation was done in regard to the 'Exol Oil and Refinex' tenders.

[32] The clarification was never obtained. The technical evaluation, too, was not done. Nevertheless, a recommendation was placed before the Board on 29 October 2019 that the tender be awarded to the parties as per the Table in [27] above. The Board accepted the recommendation and resolved that contracts be awarded to

Sasol, Econ and FFS. The resolution is crafted in rather convoluted terms.[9] It is this resolution – referred to in the papers as a decision - that Eskom seeks to have reviewed and set aside (the impugned decision).

[33] It seems to have escaped the attention of the Board that Econ was being awarded contracts to supply Grade 3 fuel oil when it is a blender and not a refinery, and that such award was contrary to its earlier resolution that this grade of fuel oil should, as a first option, be procured directly from refineries to reduce its costs of production, and only be sourced from non-refineries if no refinery was able or willing to supply that particular fuel oil. The Board was always aware that Econ was merely an intermediary of Grade 3 fuel oil. By purchasing from it when refineries were able and willing to supply the said fuel oil Eskom would have paid more for the fuel oil than it should have. That, it will be recalled, was the *raison d'être* for its resolution of 30 January 2019. In my judgment, the members of the Board breached their fiduciary duties by taking this decision. They simply failed to carry out their duties with the requisite care, skill and diligence required of them by the Companies Act and the common law.[10] Put simply, the Board should never have accepted the

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[9] The resolution reads:

> Subject to the schedule giving a breakdown of the price per ton to be paid to the supplier being shared with the IFC Chairman with confirmation to the Board approval is granted for the outcome of the negotiations with all the tenderers (Refineries and Blenders) in accordance with the mandate to negotiate with both Refineries and Blenders in one basket as follows [what follows is the recommendation captured in the table in [27] above]

[10] See s 76 of the Companies Act, especially s 76(3) which provides:

> '... a director of a company, when acting in that capacity must exercise the powers and perform the functions of director-
> (a) In good faith and for a proper purpose;
> (b) In the best interests of the company; and
> (c) with a degree of care, skill and diligence that may reasonably be expected of a person-
> (i) carrying out the same functions in relation to the company as those carried out by that director; and
> (ii) having the general knowledge, skill and experience of that director.'

As for the common law duties these have been extensively canvassed in the authorities.There is no need to burden this judgment with listing them and providing citations.

recommendation of the IFC. Unfortunately, no explanation has been proffered in the papers as to why it did so. The issue was raised at the hearing, and again no explanation was proffered.

[34] After the award was issued to Econ it commenced discussions with Eskom regarding the award. Those discussions ended without the parties agreeing on a fundamental question: does a contract between them exist? I invest my attention to that issue later in the judgment. Of importance for the moment is what Eskom did with regard to the tender. Soon after the impugned decision was taken, some of its employees wrote a memorandum addressed to the ETC asking for authorisation to increase the value of the tender by more than R4bn - from R14 200 168 297.82 to R18 330 959 054.32. The ETC approved this and made a recommendation to this effect to the IFC. Why there was a need to increase the price of the tender is not explained. At this point Eskom had appointed Mr De Ruyter as its new Chief Executive Officer (CEO), who queried the tender process and the outcome. After receiving reports from the relevant persons and structures in Eskom he recommended to the Board that it resolve to cancel the tender 'due to allegations of fraud and corruption between suppliers and Eskom employees, and a new strategy for the procurement of fuel oil'.[11] In the founding papers Eskom placed substantive evidence of alleged corruption in the awarding of the contract to Econ, and relied on this as one of its bases for having the impugned decision reviewed and set aside. The alleged corruption implicated Econ. Unsurprisingly, these were vehemently denied by Econ. In its replying papers Eskom indicated that 'it is not necessary for

[11] The new strategy he proposed was nothing more than a replica of the old one, which was as a first option to procure certain types of fuel oil directly from refineries in order to reduce the cost of production. In other words, there was no need for a new strategy.

this Court to find that Econ acted improperly' for the review to succeed. This is correct. There is no need for me to conclude on the issue.[12] I pause to mention that Eskom and Econ are engaged in other litigation wherein these issues are certain to prominently feature. Eskom has commenced arbitration proceedings against Econ for overcharging it to the tune of R1 279 739 385.11 during the period 2012 – 2017. Econ in turn has instituted a claim for damages suffered as a result of an alleged defaming of its name and reputation by Eskom and Mr De Ruyter.

[35] Eskom appointed a Mr Werner Mouton (Mr Mouton) to scrutinise the tender in its entirety and to report on his findings, which he did. His report indicates that there were many problems with the process and the outcome of the tender. He presented his report on 3 February 2020. He reported that, (i) Econ as a reseller did not add any value to the product – although he did not mention it, this could only apply to Grade 3 fuel oil - it supplied, (ii) BP's tender was cheapest but it was only able to supply after 4 months, (iii) Engen was only excluded because clarity was not obtained as to its pricing, (iv) it was not clear as to why Econ could supply fuel oil cheaper than the refineries as it purchased it from these refineries and merely transported it to Eskom, (v) Eskom had not conducted a technical evaluation of the infrastructure, (vi) the pricing relied upon was not accurate since no hedging was in place, which placed Eskom in peril as it was subject to foreign exchange and commodity price fluctuations, (viii) some of the components in the CPA used could not be verified by Eskom, and (ix) negotiations were conducted by Account Managers who lacked the skill 'or the will' to undertake the task. In the founding papers Eskom relied on the contents of the

[12] One basis for seeking to admit the report by Mr Cassim was that it made reference to some of this corruption. I have, it will be recalled, refused to admit Mr Cassim's report.

report to have the Board's decision reviewed and set aside. Econ is very critical of Mr Mouton's report. Eskom in reply says that it does not rely on the report for the relief it sought. Econ's criticism and Eskom's change in stance is of no moment, as I have scrutinised the papers and drawn conclusions without having regard to his conclusions. There may be some similarities in our conclusions but this is purely coincidental.

[36] Thereafter, Mr Hewu, who clearly had sight of Mr Mouton's report, prepared a memorandum addressed to the Board wherein he recommended that the tender be cancelled 'with immediate effect'. He motivated the recommendation by voicing the following concerns: (i) BP was the cheapest supplier yet excluded from the tender, (ii) there may be a breach of s 4(1)(b) of the Competition Act by the bidders in that they may have colluded during the tender, (iii) the pricing methodologies and formulae utilised by the bidders was obscure, (iv) the financial team's evaluation of Engen's bid was inconclusive, (v) there was an acute lack of 'skills, competence and understanding' by the 'cross-functional team that evaluated' the tender, (vi) there was non-compliance with s 217 of the Constitution as well as of s 51(1)(a)(iii) and 51(1)(b)(ii) of the Public Finance Management Act 1 of 1999 (PFMA)[13], and (vii) the Board's decision to procure fuel oil directly from the refineries was not adhered to.

[37] On 13 March 2020 the Chairman of the Board, Professor Malegapuru Makgoba (Professor Makgoba) circulated a request for a 'round robin resolution' to have the tender cancelled and asked that members of the Board consider it. Two

[13] Section 51(1)(b)(ii) of the PFMA provides that 'an accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct and expenditure not complying with the operational policies of the public entity.' The Board is Eskom's accounting authority.

members of the Board objected to the resolution. The objections were in writing, one from Mr Dabengwa –who is also the chair of IFC – and one from Dr Pulane Molokwane (Dr Molokwane). Mr Dabengwa's criticism of the proposed resolution was that it was strong on allegation but weak on fact. He pointed out that the process engaged was lengthy, involved the full participation of the cross functional team of Eskom employees, and in his view the contracts awarded were based solely on the cheapest bids received, including those from refineries, blenders 'and any other potential suppliers'. He rejected the contention that the cross functional team lacked the 'understanding, requisite skills and competence of the fuel market' in order to assess the various bids. He also rejected the claim that the award breached an earlier decision by the Board to, as a first option, purchase certain types of fuel oil only from refineries. According to him no such decision was taken. Dr Molokwane's first concern was that Eskom had developed a 'culture of delaying, cancelling awards on some flimsy reasons.' Secondly, she was anxious that cancelling the tender could result in a lawsuit against Eskom. Thirdly, there was no evidence to support the allegation of collusion between bidders. Fourthly, the alleged corruption in Bid Corp 4786 was found not to have been proven. And, fifthly, the entire process, including the award of the tender, had Board approval.

[38] Mr De Ruyter in turn put in writing his reasons for recommending that the tender be cancelled.

[39] The Board met on 25 March 2020 where whether or not to cancel the tender was considered. A resolution for the cancellation of the tender, subject to the approval of National Treasury, was eventually tabled. Seven Board members voted in favour

of cancelling it, while three voted against. The reasons given for cancelling it were the same as those provided by Mr De Ruyter. By reversing the impugned decision, the seven Directors had now taken the necessary steps to remedy the situation.

[40] Two letters were sent to National Treasury informing it of the Board resolution and seeking its approval, one on 3 April 2020 and one on 4 May 2020. Eventually on 17 July 2020 the National Treasury responded saying that it did not support the cancellation. National Treasury had three problems with the recommendation: firstly, it was not clear if Mr Mouton was assessing the bids and why he recommended Engen and BP be awarded contracts when they 'failed to comply with the requirements of the tender process'; secondly, it is not clear what Eskom's defence to litigation from parties who were furnished with 'award letters' would be; and thirdly, the cancellation of the tender is not consonant with paragraph 3 of the PPPFA Regulations.

[41] Eskom persisted with its view that the tender was marred by unlawful conduct requiring it to cancel it altogether. It then decided to bring this application. It was obliged by law to do so.[14] This then is a self-review brought by an organ of state. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is therefore not applicable.[15] It can only be reviewed under the principle of legality.[16] The application should be brought within a reasonable time and whether this has been the case here is dealt with later in the judgment.

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[14] *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* 2014 (5) SA 579 (CC) at [29], [34] and [36]; *Merafong City Local Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) at [61]
[15] *State Information Technology v Gijima Holdings (Pty) Ltd* 2018 (2) SA 1 (CC) at [37] and [41]
[16] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at [45]

[42] There was in the meantime a flurry of correspondence between Eskom and Econ focussing on the contract that was supposed to follow the awarding of the tender. This is dealt with in greater depth below when the question of whether a binding contract between the two was concluded or not is considered.

[43] On the facts and the analysis set out above I find that in managing and implementing the tender Eskom simply failed to comply with the prescripts set out in s 217 of the Constitution, the provisions of the PFMA and those laid out in the Regulations. The conclusion therefore that the impugned decision is unlawful is ineluctable. Unable to escape this conclusion Econ shifted the focus to the IFC decision to grant the ETC the mandate to commence open ended negotiations with all the bidders. It contended that the impugned decision cannot be disturbed unless the IFC decision itself is reversed. That decision, Econ contends, constitutes administrative action which has legal effect until set aside by a court of law. As Eskom has not sought to have it set aside it remains in place. Econ relies on well-established authority relating to administrative action. The authorities are unequivocal that an administrative action remains in place even if it is unlawful until it is set aside by a court. This is because 'it exists in fact and it has legal consequences that cannot simply be overlooked.'[17] Thus contends Econ, the impugned decision cannot be attacked, at least not until the IFC decision is set aside.

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[17] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at [26]; *Merafong City Local Municipality* above n 14 at [36]

[44] I am unable to accept the contention. Firstly, the IFC decision may exist in fact, but it does not have any legal consequences. Secondly, the decision, in my view, does not constitute administrative action. Administrative action is defined in s 1 PAJA as:

> 'any decision taken, or any failure to take a decision, by-
> (a) an organ of state, when-
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation;
> which adversely affects the rights of any person and which has a direct, external legal effect.. '

[45] In this case, the decision to grant the ETC a mandate to open negotiations had no impact or effect, both internal (on Eskom) and external (on Econ) unless and until it was endorsed by the Board. The IFC decision was the one that ruptured the lawful process and rendered everything that followed – the negotiations and their outcome – unlawful. Radical as it was it, nevertheless, did not 'adversely affect' anyone's rights nor did it have 'direct external effect'.[18] It was a decision that mandated negotiations to commence. After the IFC took that decision the ETC commenced negotiations. Upon its conclusions it recommended to the IFC that the outcome be endorsed. The IFC did so, and then recommended to the Board that it endorse the outcome. The Board had every right to reject the recommendation coming from the IFC, and I hold, for the reasons set out above, that it should have done so. Until it accepted the decision, however, the outcome of the negotiations, just like the IFC decision mandating the negotiations, was legally meaningless; it did not 'adversely' affect 'the rights of any person' and it had no 'direct, external legal effect'. Action by the Board

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[18] Compare: *Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd and Another* 2019 (6) 400 (SCA) at [29] – [34]

was required for it to have legal effect. In other words, by adopting it through the impugned decision the Board bestowed legal effect upon it. Hence, that is the decision that has to be impugned. Not the recommendation of the IFC to the Board, nor the decision of the IFC to mandate the ETC to commence open ended negotiations with all the bidders.

[46] Econ's contention is really an attempt to cultivate an argument already rejected by our courts. In *Allpay* the CC reminded us that the subject matter of a review should be the decision to award the contract and 'not each decision along the way in the process.'[19] This is precisely what the IFC decision was. In *National Energy Regulator of South Africa* it held that even if an intermediate decision – decision taken along the way - constitutes administrative action the law nevertheless permits a review of the ultimate decision.[20] Hence, even if I am wrong and the IFC decision could have been reviewed, it does not preclude Eskom from seeking to review the Board decision.

[47] Having found that the impugned decision was unlawful, it is necessary to craft a remedy that is just and equitable. In this case there is only one: the decision has to be set aside in its entirety.

[48] In consequence of the Board resolution of 29 October 2019, Eskom and Econ were to conclude a contract that embodied terms and conditions acceptable to both of them. Eskom says that discussions and negotiations between it and Econ commenced immediately after the Board's decision, but these did not bear fruit. Econ

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[19] *Allpay* above n 6, at [60]
[20] *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* 2020 (1) SA 450 (CC) at [36]

disagrees. It points out that upon being awarded the tender an offer was made to it which included a copy of a standard NEC Supply Contract,[21] (NEC3) and which it accepted. Thus it claims that upon its acceptance of the offer a binding contract, embodying the terms set out in NEC3, was concluded between them. In the light of my finding that the Board's decision was unlawful and should be reviewed and set aside, the question as to whether there was a binding contract concluded between the parties is moot, as are all the other ancillary issues raised in this application. However, both parties expended substantial time and resources on that issue, which had been referred to adjudication by Econ[22] and finalised there. They are in the circumstances entitled to a decision on the issue. And, in any event, if I am wrong on the first issue, the second issue would remain alive. It is therefore best that it be resolved once and for all in this court. Thus it is to this issue that I now turn my attention.

(iii) Was a valid contract between Eskom and Econ concluded?

[49] On 8 November 2019 an employee of Eskom, Ms Portia Khumalo (Ms Khumalo) sent an email to Ms Mlonzi of Econ with an attachment consisting of an acceptance letter and draft contract, the NEC3 contract, for her consideration. The NEC3 is a standard supply contract used by Eskom. It has to be supplemented with other documents, or contracts as referred to in the papers, before it can be said that a proper and complete contract has been concluded with a party. On its own it is incomplete. The other documents would constitute annexures to the NEC3. In the present case the NEC3 would have to contain the following annexures: (i) the

[21] NEC is an acronym for New Engineering Contract. It is a standard form contract which is easily available in the market place, see *Transnet SOC Limited v Group Five Construction (Pty) Ltd and Others* [2016] ZAKZDHC 3 (9 February 2016) at [5]
[22] Econ relied on clauses in the NEC3 to refer the matter to adjudication.

Conditions of Contract; (ii) the Agreements and Contract Data; (iii) the Pricing Data; and (iv) the Scope of Work. These were ultimately sent but they too do not take the matter any further.

[50] The same day Ms Khumalo withdrew her email and replaced it with another. The second email included a new letter of acceptance but the same NEC3. The letter of acceptance was signed on behalf of Eskom by Mr Nxumalo, the Group Executive: Generation. Ms Mlonzi responded stating that she had 'gleaned through the draft contract' and she required 'some preliminary clarity'. This concerned whether the parties would choose 'the consignment stock model or the purchase order model', and which particular power stations were allocated to Econ. It is strange that at this stage Ms Mlonzi was not clear which supply model was to be adopted given that she, on behalf of Econ, participated in the post bid negotiations. Similarly with the issue of the particular power stations that were allocated to Econ after the negotiations. In any event, further emails were sent to her by Ms Khumalo on 7 November 2019. And on 8 November 2019 Ms Mlonzi responded and attached the letter of acceptance, which she had now counter-signed on behalf of Econ. Her email reads: 'Please find attached hereto the signed acceptance letter for Corp 4786 for your attention.' On 11 November 2019 Ms Khumalo responded, per email again, asking Ms Mlonzi to 'go through the draft' NEC3 and informing her that she would arrange a 'telecon meeting' for discussion and hopefully finalise the NEC3 'on Thursday (14/11/2019)'.

[51] The annexure titled, Agreements and Contract Data contained a 'Form of Offer', which makes clear that once the offeree accepts it the offeree becomes the 'Supplier', and, very importantly:

> 'Notwithstanding anything contained herein, this agreement comes into effect on the date when the tenderer receives one fully completed and signed original copy of this document, including the Schedule of Deviations (if any)'

[52] It is common cause that an original copy of documents, the NEC3 or any of the annexures attached thereto, was not completed and signed.

[53] On 14 November 2019 Ms Mlonzi met with senior managers of Eskom's procurement division. The meeting was an invitation to Econ 'to clarify the required fuel oil back-up letters.' This meeting laid the foundation of what was required from Econ for the parties to finalise the NEC3. Its importance cannot be overstated, and for that reason it is necessary to quote at length from the minutes. The meeting opened with an employee of Eskom – identified as 'Boiketlo' in the minutes - explaining how it came to be that Econ was awarded the tenders for the supply of fuel oil. He proceeded to say:

> 'During the evaluation process, Eskom also considered the letter of support you have provided and they contributed the stations you were awarded on a letter dated 6 November 2019.
> Because you are not a Refinery, we understand that you may not have 20 million liters [sic] of HFO [a grade of fuel oil] readily available hence the request for supply back up letter. The acceptance or Offer letter was awarded to you on the basis of the support assurance you have given to Eskom. So before the NEC contract can be signed, you will need to firm up or authenticate the proposed back-ups information provided to Eskom during the tendering period. This is to ensure that the non-supply risk will be mitigated by Eskom through the supply back to back agreements with your sources.
> In simple terms, we are saying that the offer letter sent to you on 6 November 2019 is conditional or subject to you coming up with the supply back to back agreements as you have indicated on your tender documents.' (Quotation is verbatim)

Ms Mlonzi raised a question about whether the volumes indicated in the offer letter were different from those in the NEC3, or whether the offer letter is based on whether

Econ has a back to back agreement that equals the volumes on the offer letter. The Eskom employee explained Eskom's stance as follows:

> 'So if we are giving you 11 stations you must give us the supply back to back agreement for 11 stations. If your source says we can only give you 9 that basically mean we may have to revise the offer letter to match the volumes on the supply back to back agreement. If you go to your source and they withdraw their support then the offer falls off the table. And I think you will appreciate that this request comes on the experience whether proven or not from time to time we struggled with deliveries from Econ Oil hence the request for supply back to back agreement. This requirement is key to Eskom.'

The discussion continued. Attention was focussed on the time Econ required to acquire these back to back agreements and the time Eskom could afford to give Econ. Ms Mlonzi stated that Econ would need 30 days to secure the back to back agreements, to which the Eskom employees responded by saying that, while they are sympathetic to the request, Eskom did not have that much time at its disposal. Ms Mlonzi made the following statement that is of significance as to whether a contract was concluded:

> '...the back to back agreement will exclude Hendrina and Arnot power stations. Grade 1 and 2 are not at risk because they are blended in our plant.'

[54] Later that day Mr Tshitangano wrote a letter to Ms Mlonzi. He basically reiterated what was said and agreed at the meeting with some minor elaboration. He began by informing her that the purpose of the meeting was to ensure that Econ was able to supply the stock Eskom would be seeking. He continued:

> 'The meeting further discussed Econ Oil's obligations to declare quantities that will be sourced from other suppliers and Eskom's right to verify whether there are signed agreements between Econ Oil and its suppliers. <u>These agreements should have been submitted with the bid and further verification should have been done during negotiations</u>.
>
> The discussion revealed that quantities offered by Econ Oil are not firm because there are no signed agreements between Econ Oil and its sub suppliers. Econ Oil further confirmed that Grade 1 and Grade 2 is produced in-house <u>and that</u>

Grade 3 is sourced from refineries. Refineries participated in the bid process which complicates their relationship with Econ Oil.' (Emphasis added)

He concluded by giving Econ seven days – until 21 November 2019 - to furnish Eskom with the necessary back to back agreements with its suppliers.

[55] On 15 November 2019 Ms Mlonzi wrote a letter to Ms Khumalo confirming that Econ was requested to submit back to back agreements with its suppliers and that she would endeavour to submit these by 22 November 2019. She further stated that Econ requests that the start date for the supply be moved to 18 November 2019 as Econ cannot 'mobilise and plan logistics and stock pile' before that. She also agreed that she was to provide Econ's input to the 'draft contract' – NEC3 – by that day. Later she provided Econ's 'comments' which were:

(i) a 'request' for the start date for the supply of the fuel oil to be moved;

(ii) that Econ could not meet Eskom's requirement that Econ provided insurance cover in the amount of R25m as required by clause 84.2 and that the maximum cover it was able to secure was for R10m; and

(iii) a proposal that the parties agree to an 'operational alignment' which is that they either agree that the 'supplier (Econ) may demand take or pay from the seller, [sic] or rateable supply model be applied in case of heightened demand.'

[56] Econ missed the deadline to supply the back to back contracts by 21 November 2019. On 22 November 2019 Ms Mlonzi sent a letter to Ms Khumalo enclosing an agreement between Engen and Econ in terms of which Engen agreed to supply a minimum of 10m litres of Grade 3 fuel oil per month to Econ. Included in

her letter were copies of two letters, one from Total and one from Sasol. The letter from Total states that Total is not able to conclude an agreement with Econ on some of the deliverables sought by Econ, but Total could make available 2500 tons to Econ, however, it could not conclude a contract to this effect as 'a draft contract is sitting with our legal team'. The letter from Sasol states that Sasol 'is offering' Econ 2000m^3 of 'Catlight' and 2000m^3 of 'HFO 150' but this is 'subject to the signing of the supply agreement'. Ms Mlonzi concluded her letter with the following sentence: 'Your acceptance feedback will be appreciated.'

[57] Mr Tshitangano responded to her the next day. He informed her that Econ was required to provide back to back supply agreements by 21 November 2019 and had failed to do so. Thus

> 'In the absence of signed agreements between Econ Oil and refineries, it is not possible for Eskom to sign a supply contract with Econ Oil.'

He further informed her:

> 'Eskom would like to draw your attention to the fact that it is a misrepresentation to offer quantities during the bidding process knowing that you do not have capacity to produce such quantities or secure them from third parties.
>
> Eskom will commence with a process to re-allocate all Grade 3 and Catlight fuel oil quantities to other preferred bidders who will confirm the availability of quantities or volumes on a monthly basis.'

[58] Hence, given Econ's request and its failure to supply the back to back contracts, Eskom claimed that it could not see itself concluding a contract with Econ regarding the purchasing of Grade 3 fuel oil for a period of five years commencing 1 October 2019. Econ, on the other hand, was not in agreement with Eskom's interpretation of the events as well as the consequential legal obligations each party

had assumed in terms of the purported contract. On 25 November 2019 Ms Mlonzi wrote to Mr Tshitangano and informed him of Econ's difference of opinion. She stated that Econ had a contract with Eskom based on the signed 'letter of award' she forwarded to Eskom on 8 November 2019. This, according to her, is because the letter of award did not contain any preconditions. As for the discussion at the meeting of 14 November 2019, she held the view that the meeting was simply for Econ to satisfy Eskom that it had secured the supply of Grade 3 fuel oil. It was given, according to her, until 22 November 2019 and not 21 November 2019 to furnish written proof of this, which it had done.

[59] Mr Tshitangano responded with a lengthy letter explaining Eskom's position. Eskom, he said, was clear that despite the letter issued to Econ no contract was concluded. The conclusion of the contract was to take place after certain conditions were met. The letter specifically informed Econ that the NEC3 which was attached was a draft that was to be finalised after further discussions were held between the parties. Thus, he says, Econ

> 'was and is well aware that no contract existed between the two parties when it signed letter [sic] of acceptance for NEC contract on 8 November 2019.'

He reiterated that Econ had failed to supply the back to back agreements by 21 November 2019 and:

> 'Econ Oil only submitted a belated back to back-Supplier agreement with Engen. Commitment letters from Total and Sasol do not meet Eskom's requirements. The belated agreement with Engen will pose risk to Eskom because its facilities are in Durban, far from the power stations which must be serviced. The long distance transportation will affect the quality of the products.
>
> Consequently, Econ Oil's initial allocation of grade 3 will be reduced to 5 million liters to mitigate the inherent risk of long-distance transportation of the products.

> Econ oil is free to make representations to Eskom if there are any acceptable measures to mitigate long distance transportation risks.
>
> Eskom will only sign a contract with Econ Oil based on volumes confirmed by back to back agreements and not commitment letters. Commitment letters were acceptable at bidding stage and not contractual stage.
>
> Any representations should be received before 18H00 on 26 November 2019.' (Quote is verbatim)

[60] While Eskom took the view that no contract existed, it indicated that it was still willing to pursue a contract with Econ for Grade 3 fuel oil. It invited Econ to make representations to it on the same day. Econ responded with an equally lengthy letter penned by Ms Mlonzi. She commenced by vehemently disputing that the back to back contracts had to be supplied by 21 November 2019. That deadline she says was introduced on 23 November 2019. She pointed out that Eskom's concern about the supply coming from Durban has to be viewed in the light that previously Econ supplied this fuel oil 'with maximum success' and that they were presently engaged in a trial run to ensure that the supply would be problem-free. She insisted that at the meeting of 14 November 2019,

> 'Eskom confirmed that it **WAS NOT** the requirement of the tender/bid stage to submit a back to back agreement' (Bold and capital letters in original)

And, in any event, Engen had already signed such an agreement, Total had presented Econ with an agreement which Econ had already signed, and Sasol had presented Econ with a draft agreement. In addition,

> 'It is the practice in the industry that the Refinery commits to a minimum volume. Once you start the supply and submit a confirmed forecast of your volumes, then they plan for you and supply you accordingly.
>
> In this case, the minimum volume required for Grade 3 had been met and allocated in this contract.'

[61] On 27 November 2019 Mr Tshitangano responded saying, *inter alia*, that:

> 'It is clear that Econ Oil did not pay attention to the contents of Eskom's letter dated 14 November 2019. May you kindly read the last paragraph of this letter and withdraw your accusations.'
> ...
> It is important for Econ Oil to note that some suppliers were disqualified for not complying with timelines.'

[62] He wrote another letter on 28 November 2019 where he repeated that the deadline to supply back to back contracts was noted in its letter of 14 November 2019, and further that,

> 'It is unfortunate that Econ Oil does not want to own responsibility for submitting an outdated and irrelevant document and further shifting the blame to Sasol. Eskom is of the view that in the event that Econ Oil fails to deliver fuel oil, the blame will be shifted to Sasol or Engen.'

[63] On the same day, Econ, wrote to Eskom stating, as follows:

> 'It is with great pleasure that we have submitted the contracts from Refineries which satisfy the volume awarded as per letter of award dated 1 November 2019.
>
> The submission is subsequent to the requirements arising from the meeting held on 14 November 2019.
>
> We would like to request a meeting to discuss:-
> 1. The start of the contract.
> 2. The contents of the NEC 3 contract as raised in the meeting and subsequent correspondence.
> 3. The operational model of the contract (including telemetry on the relevant sites).' (Underlining added)

[64] That was the last of the direct communication between the parties regarding the 8 November 2019 letter of acceptance and the requirement that Econ furnish back to back supply agreements with refineries.

[65] Thus far the evidence canvassed above shows that a 'letter of award' was signed by Eskom and it was accepted by Econ, but no formal contract had yet been signed. The NEC3 was to be used as a basis for a detailed comprehensive contract to be concluded. The facts relayed above show that the communication between the parties post the awarding of the tender was intense and that it concluded without consensus.

[66] The NEC3 contract is a generic contract. It does not provide any detail about what the specific rights and obligations of both parties on the purchase and supply of fuel oil for each of the power stations affected are. It is necessary for the parties to conclude a contract which specify these. One would think that it is absolutely essential that such a contract be concluded as to the nature of the product being supplied, the quality of the product, the quantity of the product, the time periods when the product must be supplied, the location where the product has to be supplied, the issue of time-delay in the supply of the product, the issue of a penalty should the product not be supplied on time, the price to be paid, the time period when the payment has to be made, what happens when payment is delayed, what would constitute a beach of the contract, what are the consequences of a breach, when can a party cancel the contract and what the consequences of the cancellation are. They cannot be left unaddressed. This is a contract of significant magnitude for the parties and for the public. It is a contract of national importance and therefore one in which the public has a great interest. In this circumstance these issues have to be detailed in the contract with as much precision as possible.

[67] The parties were not concerned with the level of detail identified in the previous paragraph. They were nevertheless not *ad idem* as to what should be in the contract and whether or not they had actually already concluded a binding contract. They seemed to have arrived at a *cul de sac*. There was a lull in the exchange of correspondence between 28 November 2019 and 17 January 2020.

[68] On 17 January 2020 Ms Mlonzi sent a letter to Mr Nxumalo requesting 'a meeting date to discuss the signing of the contract and particularly to get the start of the contract.' In her mind the contract still needed to be signed. It bears remembering that the contract was to commence on 1 October 2019, and that in her letter of 15 November 2019 Ms Mlonzi stated that Econ requests that the start date for the supply be moved to 18 November 2019 - see [55] above. There was no reply to Ms Mlonzi's letter of 17 January 2020. On 28 January 2020 Ms Mlonzi wrote to Mr De Ruyter informing him that she had not received a response to her letters of 29 November 2019 and 17 January 2020 where she requested a meeting to 'discuss the contract subsequent to the award.' She requested his intervention 'to have the NEC3 contract of the award received on 8 November 2019 signed.' She was concerned that the 90 day period commencing 8 November 2019 was fast approaching. Finally, she pointed out that only one meeting was held since the award letter, wherein the Eskom team had queried Econ's ability to deliver its end of the bargain. To allay any fears or anxieties in this regard, she reiterated that Econ had subsequent to the meeting signed back to back agreements with three refineries. Mr De Ruyter did not respond to her letter. Neither Eskom nor Econ engaged each other again. On 31 July 2020 Econ's erstwhile attorneys wrote a lengthy letter to Eskom outlining Econ's position

and calling for a meeting between Eskom and Econ for the parties to attend to a number of issues. Relevant parts of the letter reads:

> '3. It has been nine (9) months since our client was issued with the Letter of Award and Eskom has failed to take any meaningful steps to progress the matter and implement the tender. ...
> ...
> 5. It is common cause in our law that the award of a tender constitutes administrative action and as the party who was awarded the tender, our client enjoys the full ambit of rights associated therewith.
> 6. In view of the above, our client has instructed to request the Eskom urgently, ...
> 6.1 Advise on a date for a meeting ... to discuss and decide on the commencement date for the tender;
> ...
> 6.3 Take all such steps that are necessary to conclude and sign the NEC3 contract with our client, without delay.'

[69] The letter was not responded to and no meeting was held. Econ appointed new attorneys who wrote to Eskom's attorneys claiming that a contract between Econ and Eskom was concluded and remained extant, that Econ declares a dispute with Eskom, and, relying on a clause in NEC3, has referred the dispute for adjudication. Eventually the ninth respondent, Mr Kevin Trisk SC (Mr Trisk), was appointed as the adjudicator. Eskom participated in the adjudication with it rights fully reserved. It insisted that no contract had been concluded, and said that out of courtesy to and respect for the adjudicator it would participate in the adjudication process. Eskom challenged his jurisdiction on the grounds that it was founded on the existence of a contract and in this case, according to Eskom there was none. Eskom's view was that he was to determine the issue of his jurisdiction separately from whether there was a breach of the contract. Mr Trisk dealt with both issues at once. He found that a binding contract between Eskom and Econ came to be, that it subsists and therefore he was jurisdictionally empowered to deal with the dispute, that Eskom had breached

the contract, was liable for damages and that Econ was entitled to seek specific performance from it from the date of his decision.

[70] Mr Trisk's decision is irrelevant to the main application in this proceeding. That it has no binding effect is elementary. In addition and more importantly, it has no elucidatory benefit for the determination made herein. That is based solely on the facts and contentions presented in the papers and in oral argument before me. The conclusion I arrive at in the main application, which is explained below, is the diametric opposite to that of Mr Trisk. It is obvious then that in my view his decision is wrong. His decision would have been relevant for the conditional counter-application where Econ seeks a declaratory to the effect that Eskom is bound by its outcome. But that could only be if I were to have found that a contract between the two parties subsists. I did not. The conditional counter-application therefore falls away.

[71] It is trite law that:

> '... where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. ... Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that *consensus* on the outstanding matters would have to be reached before a binding contract could come into existence ...The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand. ... Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the

parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances.'[23] (Citations have been omitted).

[72] The evidence relayed above demonstrates that both Econ and Eskom were clear in their minds that the letter of award sent by Ms Khumalo and its acceptance a few days later by Ms Mlonzi was a first step towards concluding a contract. This is manifest in the robust and intense exchanges that took place between them after the letter was sent and signed. There were many unresolved issues that had to be addressed and were being addressed, but which ultimately failed to produce consensus between them. Even Ms Mlonzi for Econ was concerned that it was not clear at that stage as to whether 'the consignment stock model or the purchase order model' was to be used. This issue was never cleared up. Almost one month after the letter of award, Ms Mlonzi recognised that the letter of award did not deal with "the issue of start of the contract', as well as 'the operational model of the contract (including telemetry on the relevant sites).' These were no minor issues. They had to be resolved. Both parties were acutely aware that the NEC3 included in the letter of award was a draft. It, together with the annexures attached thereto, does not constitute a sensible meaningful contract. It could not be used by either party to determine what its rights and obligations for five years would be: there were fundamental issues that had to be cleared up before they could intelligibly identify their respective rights and obligations. Finally, the conduct of the parties in this case throughout was consistent with the understanding that until they both signed an original document attending to their respective concerns, there was no contract. The

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[23] *CGEE Alsthom Equipments ET Enterprises Electriques, South African Division v GKN Sankey* 1987 (1) SA 81 (A) at 92A-E (Citations have been excluded)

understanding was correct. It only changed for Econ much later when it found that after all its efforts Eskom had abandoned the intention to conclude a contract with it.

[73] At the hearing it was contended on Econ's behalf that there was no need for there to be a document signed by both parties for a contract to come into existence, as the NEC3 is normally used by Eskom and many other parastatals. It is normally not signed but parties thereto abide it once it was included – albeit as a draft contract – with the letter of award. That may be so, but in this case there was no mistaking that the parties were aware, *ab initio*, that it did not constitute the contract. They knew and agreed with each other that they had to do more. In particular they knew that essentialia remained unsettled. The objective facts show that they attempted to settle these essentialia, but they came unstuck. Eskom then simply walked away. Econ felt abandoned and helpless. It is aggrieved, but it has no cause of action, at least not one by the law of contract.

[74] In short, the existence of an offer and an acceptance thereto is a necessary but at times insufficient condition for a binding contract to be established. For that to occur there has to be *animus contrahendi*. There was none in this case.

D Delay

[75] Finally, before closing on the merits of the case, it is necessary to address a contention of Econ that the application to have the Board decision of 29 October 2019 reviewed and set aside should not be entertained. The Board resolved on 25 March 2020 to cancel the tender, effectively reversing its earlier decision. Econ contends Eskom is guilty of unduly delaying the application and should therefore be non-suited.

It only brought the application on 28 January 2021. Eskom certainly could have brought the application soon after 25 March 2020. In the meantime Eskom awaited a response from Treasury for approval of its decision to cancel the tender. National Treasury only replied on 17 July 2020. Econ on the other hand was attempting to have the contract concluded. When this failed their respective legal representatives got involved. This entire engagement culminated in the adjudication. Once the adjudication was complete Eskom was left with no choice but to approach this court. Until then the application may not have been necessary, especially if Econ was willing to accept two facts: that no contract between it and Econ had been concluded, and the Board had reversed the impugned decision before the contract was concluded and cancelled the award, rendering it necessary to re-commence afresh with the process of administering the tender. It is correct that once Econ refused to accept both of these facts, Eskom could have brought this application, but it elected, not unreasonably in my view, to follow the route chosen by Econ which ended with the adjudication. Soon after the adjudication was over, Eskom brought this application. In these circumstances, I find myself unable to agree with the contention that Eskom unduly delayed bringing this application. There can be no dispute that the application was brought within a reasonable time after the adjudication was complete. On the other hand, if the period from whence the application should be brought is said to have commenced after National Treasury refused on 17 July 2020 to support the Board's cancellation of the tender, then too the application was brought within a reasonable time. Finally, if the period commenced on 25 March 2020 – when the decision to cancel was taken - then in my judgment it would be grossly unjust to non-suit Eskom for taking 10 months to bring the application: firstly the delay is not inordinate and secondly as Eskom succeeds on the merits – meaning it had strong

prospects when it launched the application – it would be in the interests of justice that the delay be condoned.

E CONCLUSION

[76] The managing and implementation of the tender was blemished by irregularity and illegality of a most fundamental kind, and could under no circumstances be rescued. Had the Board applied its mind properly to the matter it would have had no choice but to forsake the outcome of the negotiations. Instead it chose to adopt it. By so doing it perpetuated the illegality and gave it legal effect. It did right by electing to self-review in order to undo its action. The only just and equitable pathway open to a court in a matter with so fundamental a breach of the law is to review and set aside the decision of the Board.

[77] Upon that conclusion all other ancillary matters become moot. However, for the sake of completion the issue of whether a contract between Eskom and Econ had come to be has been addressed in detail. For reasons set out above it is appropriate to declare that no such contract emerged from their interactions post the managing of the tender.

F COSTS

[78] Econ submitted that even if it loses the application it should not be mulcted with a costs order, but rather that Eskom should be ordered to pay its costs. It says that it was compelled to oppose the application as Eskom made a number of disparaging allegations against it, but then at the very last moment recoiled from pursuing these. Eskom had accused it of engaging in dishonest, fraudulent and

corrupt conduct prior to and during the shepherding of the tender. The allegations, it was submitted, were widely reported in the media thus giving Econ no choice but to oppose the application in order to protect its name and reputation. Since Eskom has recoiled from relying on them, it should bear the consequences by paying the costs of Econ's opposition. Econ, in my view is not correct. Eskom only said that this court need not make a final determination on the issue of whether Econ was engaged in corrupt practices in order to conclude that the tender was marred by unlawfulness. Further, and more importantly, Econ's opposition was not based solely on the need to protect its name and reputation. It was based on protecting and advancing its economic interests. It firmly and steadfastly maintained that it had secured a contract by which it acquired legal rights to financial benefit. Having adopted this view, Econ pursued the contract and the rights it supposedly acquired therefrom vigorously and vehemently. Even after Eskom and its attorneys informed Econ that no such contract was concluded, Econ continued to pursue its case. By so doing it imposed upon Eskom great cost. It also bears recording that Econ was compelled to support and justify the conduct of the ETC and, of course, the IFC. It insisted that that conduct was lawful and that the managing and implementation of the tender was free from impropriety and illegality. By following this course Econ took a risk with the litigation. In summary, I cannot subscribe to Econ's view that it should be immunised from an adverse costs order, and that it should be awarded costs because Eskom sullied its name and reputation. It would be only fair and just for costs to follow the result in the main application, just as in the case of the interlocutory applications.

[79] The papers in the matter were voluminous. The legal issues were not complex but the factual material was. They would warrant the employment of two counsel. The order below will reflect this.

[80] I thank all legal representatives for their co-operation and assistance in this matter.

G ORDER

[81] The following order is made:

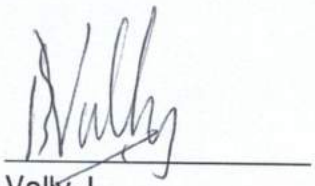
a. The application by the first respondent to have an affidavit in response to the applicant's replying affidavit admitted is granted.

b. The applications by the applicant to have two new affidavits admitted after the closure of pleadings is dismissed with costs, including the costs occasioned by the employment of two counsel.

c. The decision taken by the Board on 29 October 2019 to award the tender referred to as Bid Corp 4786 to the first, second and third respondents is reviewed and set aside.

d. It is declared that no contract between the applicant and the first respondent for the supply of fuel oil for a period of five years commencing on 1 October 2019 exists.

e. Save for the costs order referred to in paragraph b. above the first respondent is to pay the costs of the application which costs include those occasioned by the employment of two counsel.



Vally J
Gauteng High Court (Witwatersrand Division)

Date of hearing:	9 June 2021
Date of judgment:	29 June 2021
For the 1st to 9th applicants:	W Trengove SC with C Steinberg and M Mbikiwa
Instructed by:	Edward Nathan Sonenbergs Inc
For the 1st respondent:	H Epstein SC with S Tshikila and E Richards
Instructed by:	Stan Fanaroff & Associates