IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 20899/21

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

30.1.2022
DATE SIGNATURE

In the matter between:

DNG POWER HOLDINGS (PTY) LTD APPLICANT

(REGISTRATION NUMBER 2015/094255/07)

And

DEPARTMENT OF MINERAL RESOURCES AND ENERGY FIRST RESPONDENT

MINISTER OF THE DEPARTMENT OF MINERAL SECOND RESPONDENT

RESOURCES AND ENERGY

THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY	THIRD RESPONDENT
INDEPENDENT POWER PRODUCER PROCUMENT PROGRAMME	FOURTH RESPONDENT
KARPOWERSHIP SA (PTY) LTD	FIFTH RESPONDENT
MULILO TOTAL COEGA (PTY) LTD	SIXTH RESPONDENT
MULILO TOTAL NIEWE-COEGA (PTY) LTD TRADING AS MULILO TOTAL HYDRA STORAGE	SEVENTH RESPONDENT
OYA ENERGY (PTY) LTD	EIGHTH RESPONDENT
UMOYILANAGA ENERGY	NINTH RESPONDENT
ACWA POWER	TENTH RESPONDENT

JUDGMENT

RAULINGA J

INTRODUCTION

1. This review application concerns the Government's procurement of an emergency supply of 2000 megawatts ("MW") of generation capacity under the Risk Mitigation Independent Power Procurement Programme("RMIPPPP") as an immediate measure intended to alleviate the on-going electricity supply constraints. Put differently, the procurement in issue is urgent and designed to fulfil a pressing and compelling public interest that every party in this litigation accepts.

2. In this judgement, the applicant will be referred to as ("DNG"), the first to fourth respondents as the state respondents, the fifth respondent as Karpowership and the rest of the respondents retain their designated citations as appears in the notice of motion.

3. In part A of the initial notice of motion, DNG sought four separate interim interdicts whose purpose, as against the preferred bidders, was to prevent them from achieving commercial and financial closure of their bids, and thereafter from executing their energy projects so as to bring on board their energy supply within the relevant time-frames set out in their respective bids.

4. During a case management conference held before this Court on 18 May 2021, the parties agreed that Part B proceedings would be expedited and DNG decided that it would no longer pursue part A proceedings.

5. In its notice of amendment to Part B of the Notice of Motion in terms of Rule 53(4) DNG states as follows:

> *"Be pleased to take notice that the applicant hereby amends the relief set forth in Part B of its Notice of Motion, in terms of Rule 53(4), by the deletion of some in its entirety and the substitution therefor with the following:*
>
> *5.1 Joining the above named 11th, 12th and 13th Respondents, as parties to these proceedings as per paragraph 10, 11 and 12 of the supplementary*

founding affidavit.

5.2 *Directing, that the decision to disqualify the applicant's Bid submissions in respect of Tender number: DMRE/001/2020/21 is reviewed and set aside.*

5.3 *Directing that the Briefing Notes 3,4,15 and 24 issued by the first respondent together with the forth respondent in the course of the Tender vender number DMRE/001/2020/21 are reviewed and set aside.*

5.4 *Directing that the appointment of the fifth respondent as a Preferred Bidder under Tender number: DMRE/001/2020/21 is reviewed and set aside.*

5.5 *Directing that the decision in disqualifying the applicant as aforesaid is remitted to the first respondent for reconsideration upon the consideration of relevant and material factors, as stated in the request for Proposals ("the RFP"), in respect of the Tender under Tender number DMRE/001/2020/21, including but not limited to substituting the fifth respondent and or any of the other Preferred Bidders, whose bids were properly and fairly scored below that of the applicant with the applicant as Preferred Bidder.*

6. *Directing, to the extent necessary for purposes of such remittal as set forth in 5 above and pending the final determination of such remittal;*

6.1 *interdicting, prohibiting and restraining, the first and/ or second and/ or third and/or fourth respondents from giving effect to the disqualification of the applicant as a Preferred Bidder in terms of the RFP under Tender number: DMRE/001/2020/21.*

6.2 *Interdicting, prohibiting and restraining the first and/or second and/or third and/or fourth respondents from concluding and/or implementing any agreements flowing from the RFP under Tender number DMRE/001/2020/21;*

6.3 *Interdicting, prohibiting and restraining the fifth and/or sixth and/or seventh and/or eighth and/or ninth and/or tenth and/or- eleventh and/or twelfth and/or thirteenth respondents from concluding and/or implementing any agreements flowing from the RFP under Tender number DMRE/001/2020/21, with the first and/or second and/or third and/or fourth respondents.*

6.4 *Interdicting, prohibiting and restraining the fifth and/or sixth and/or seventh and/or eighth and/or ninth and/or tenth and/or eleventh and/or twelfth and/or thirteenth respondents from taking any further action in relation to*

and/or in furtherance of concluding and/or implementing any agreements with the first and/or second and/or third and/or fourth respondents and/or other interested or related parties and/or otherwise moving in furtherance of giving effect to Tender number: DMRE/001/2020/21.

7. *Directing that the first and/or second and/or third and/or fourth and/or fifth respondents be ordered to pay the costs of both Part A and Part B of this application, including the costs of two counsel.*
8. *Directing that the fifth and/or sixth and/or seventh and/or eighth and/or ninth and/or tenth respondents is/are only ordered to pay the costs of the application (including the costs in respect of Part A hereof, only in the event of their continued opposition hereto.*
9. *Directing that the eleventh, twelfth and thirteenth respondents is/are only ordered to pay the costs of this application, only in the event of their opposition hereto."*

6. We now know that DNG having filed its 1st supplementary founding affidavit (1st S FA) it continued to file further additional supplementary affidavits and a replying affidavit. In certain respects, it raises new arguments in these affidavits and also in its main and supplementary heads of argument. In the words of DNG the comprehensive supplementary founding affidavit is capable of replacing the principal founding affidavit in it's entirely[1]. As a consequence, the Notice of Motion was amended to be in line with the said supplementary affidavit. The trite principle is that a litigant should make its case in the founding papers and not in the replying affidavit and the heads of argument. DNG must stand or fall by its founding papers, i.e. its 1st supplementary affidavit. A deviation from this principle can only be made if there exist exceptional circumstances permitting DNG to make out a case in reply.[2]

7. It is necessary, to at this stage mention that at 16h27 on 29 November 2021, DNG filed an oral argument presented on 30 November 2021, when the matter commenced. DNG'S note goes beyond its pleaded case. In certain respects, it raises new arguments not pleaded in their supplementary affidavits and in the heads of

[1] See para 7 of the 1st S FA.
[2] *Open Secrets and Another V Minister of Finance and Another* Open Secrets and Another v Minister of Finance and Others (55493/2020) [2020] ZAGPPHC 670.

argument. When the hearing of this matter commenced, DNG applied for the joinder of the eleventh to thirteenth respondents. By agreement between the parties these respondents were accordingly joined.

Factual background

8. South Africa currently faces significant challenges when it comes to the stable and continuous provision of electricity that is needed to meet the energy needs of the country. South Africans have had to contend with intermittent electricity supply coupled with rising cost structure. This situation has not only affected the daily lives of South Africans, but it has adversely impacted economic growth and production.

9. In response to a weakened economy, persistent energy insecurity, the Economic Reconstruction and Recovery Plan, which aimed to ensure economic growth and transformation, could not be achieved without security of energy supply.

10. As such, the Department of Mineral Resources and Energy ("DMRE") fast tracked the procurement of 2000 MW under the RMIPPPP to meet the immediate electricity supply gap.

11. On 24 August 2020, the DMRE published the RFP in respect of the RMIPPPP. The RFP was prepared by the Independent Power Producer Office ("IPP Office") with input from ESKOM, NERSA and various other government stakeholders. The RFP was duly approved by the Bid Specification Committee ("BSC") and thereafter the Bid Adjudication Committee ("BAC").

12. In response to the RFP, the DMRE received 28 bid responses on the bid submission dated 22 December 2020. The bids were evaluated in the first instance by the Bid Evaluation Committee ("BEC").

13. The RFP created a two-stage evaluation process whereby bids would first be evaluated by the BEC on the functional and qualification criteria specified in Part B. The functional and qualification criteria under Part B specified the general

requirements that each bid submission was to meet to be accepted as a complaint bid. The qualification criteria in Part B were grouped under the following categories:

13.1 Legal qualification criteria which included criteria related to securing land and land use rights, water supply rights and environmental consents;

13.2 Technical qualification criteria, including criteria relating to the project feasibility study, the project development plan, and fuel supply arrangements;

13.3 Financial qualification criteria, including various criteria relating to the evaluation price, financial standing and robustness of the funding proposal, and the robustness of the financial model;

13.4 Economic development criteria, including Broad Based Black Economic Empowerment and local content;

13.5 Value for money, which contemplated an assessment of whether the bid demonstrated value for money to the buyer (Eskom) and Government; and

13.6 Completion of the Power Purchase Agreement ("PPA") and implementation tables.

14. Only if a bid met these minimum threshold requirements in Part B would it be evaluated in a comparable manner based on the criteria specified in Part C. The comparative evaluation assessed the ("Evaluation Price") and economic development as specified in Part C of the RFP. This was done in accordance with a 90/10 points system, with the Evaluation Price scored out of 90 points and economic development scored out of 10 points.

15. Prior to arriving at a final recommendation on the outcome of the evaluation of a bid submission, clarification question where required and issued to the relevant bidder.

16. The BEC members relied on their professional knowledge and experience to access whether instances of non-compliance with the qualification criteria constituted

a material deviation from the purpose of qualification criteria. Following receipt of the clarification responses, the BEC completed its Part B evaluation of the functional and qualification criteria to identify the complaint and non-complaints' bids.

17. Bids that complied with the qualifying criteria in Part B were then evaluated, in a comparative manner, by the finance and economic development members of the BEC who made a recommendation to the BAC.

18. Of the 28 bids that were received in response to the RFP, the BEC identified 17 bids as being as being complaint with the function and qualification criteria specified in Part B of the RFP. The DNG'S three bid responses, being Khensani, Busisiwe and Mpenyisi were all found not to, have met the criteria specified in Part B of the RFP.

19. Following scoring and ranking of the 17 complaint bids in terms of Part C of the RFP the process resulted in the selection of 11 preferred bids (an initial eight preferred bids and the subsequent acceptance of the three eligible bids). On the recommendation of the BEC and the BAC the Director-General ("the DG") approved the list of the preferred bidders.

20. There were various structures and safeguards embedded in the RMIPPPP, which ensured that the process achieved an optional and equitable outcome. It was designed to guarantee a process in accordance with the five principles of procurement: a process that is fair, equitable, transparent, competitive, and cost-effective.

21. The Integrated Resources Plan ("IRP") is an electricity infrastructure development plan based on least-cost electricity supply and demand balance, taking into account security of supply and the environment (in order to minimize negative emissions and water usage).

22. The promulgated IRP identified the preferred generation technology required to meet expected demand growth up to 2030. It incorporated government objectives such as affordable electricity reduced greenhouse gas ("GHG") emissions, reduced water

consumption, diversified electricity generation source, localization and regional development.

23. The IRP attempts to harmonies this trichotomy, namely nuclear, gas and energy storage technologies. As it stands, the South African power system consists of dated generation options, which are 38 GW, (Gigawatt) installed capacity from coal, 1.8 GW from nuclear, 2.7 GW from pumped storage, 1.7 GW from hydroelectric sources, 3.8 G.W from diesel and 3.7 GW from renewable energy. The electricity generated from the aforementioned is transmitted through a network of high-storage transmission lines that connect to the load centers, whereafter Eskom and local municipalities distribute the electricity to various end users. In addition to the local end users, Eskom also supplies a number of international customers, including electricity utilities in the SADC region.

24. In line with the IRP and in consideration of the imminent retirement of various and numerous coal energy plants, the South African Government is seeking to invest heavily in alternative energy producing means, which include, inter alia: nuclear energy, natural gas energy, renewable energy, hydro energy and energy storage solutions.

25. Accordingly, in line with the IRP, and as a direct result of the current acute energy crisis faced by South Africa, on or about 25 May 2020, the Minister of DMRE ("the Minister") issued a determination providing that new generational capacity is needed to be procured to contribute towards energy security. Accordingly, 2000MW should be procured from a range of energy source technologies in accordance with the short-term risk mitigation capacity allocated under the heading "others" for the years 2019-2020, in table 5 of the IRP. The procurement programme shall target connection to the South African Electrical Grid for the new generation capacity as soon as reasonably possible, but by no later than December 2021. ("Determination").

26. The RMIPPPP was designed to procure the target of 2000 MW of new generation capacity to be derived from different types of dis-patchable power generation projects, the providers of which would enter into Power Purchase Agreement ("PPA'S) with

Eskom to provide new generation capacity in compliance with the specified performance requirements, among other things. Furthermore, the selected projects would contribute towards socio-economic development and sustainable economic growth, while enabling and stimulating the participation of independent power supply program.

27. As such on or about 24 August 2020, the Minister, on behalf of DMRE initiated the RMIPPPP to secure the 2000 MW needed in terms of the RMIPPPP, and as a result, the Minister published the RFP in relation to the Tender, a summary of which forms part of the papers.

28. It is important to mention that there are two key design principles that underpin the RMIPPPP and evaluation process that was followed by BEC. These principles include that the RMIPPPP:

28.1 concerns emergency power generation procurement that would allow for power to be injected into the grid in the shortest timeframe possible; and

28.2 is "technology agnostic" in that it seeks to procure generation capacity from any energy resource.

Arguments by parties in support of their cases

29. It seems to me that the nub of DNG'S case is that:

29.1 The Bid notification date together with the additional submission dates of the Bid submissions was extended (without prior public notice) by approximately 1 (one) month due to undue interference by third parties;

29.2 Throughout the bidding process, certain of Karpowership to tenth respondents were (wrongfully and unlawfully) granted various exceptions in respect of material requirements of the RFP, which exceptions came at the expense of the common good of South African population, in addition to defeating the true spirit, purport and intention of the RFP;

29.3 DNG has a good reason to believe that undue influence played a decisive role, not only on the decision to appoint Karpowership up to the tenth respondents as Preferred Bidders in the Tender process, but also in the decision to disqualify DNG from the Tender process; and

29.4 Additionally, DNG submits that undue influence was present prior to the tender having been conceptualized, researched and published, given that certain steps were taken within government, to put to place measures and/or approvals which would ultimately serve to assist with the extension of such aforementioned undue influence in due course.

29.5 Given the effect of the undue influence on the process of the Tender, the appropriate public functionaries deliberately and/ or otherwise, eventually failed to take relevant factors pertaining to DNG'S bid into consideration when making the relevant assessments and/ or decisions as to the selection of Preferred Bidders;

29.6 Conversely, and given the effect of the undue influence on the process of the Tender, the appropriate public functionaries deliberately and/or otherwise, eventually considered irrelevant factors pertaining to DNG's Bid, when making the relevant assessments and/or decisions as to the selection of Preferred Bidders;

29.7 Having met, alternatively, substantially met material and essential requirements of the original RFP without the need, for any exemptions and/or material extensions, DNG has a real right, alternatively, a prima facie right to be considered as Preferred Bidder.

29.8 In addition, DNG submits that the state respondents abused the briefing notes and condonation, because they didn't grant similar exemptions to DNG as was done to other bidders.

30. These arguments by DNG reverberate in their founding affidavit as well as in the numerous supplementary affidavits and their heads of argument, albeit with some minor variations.

31. On the contrary, the state respondents submit that DNG puts the relative merits of its bids against those of Karpowership to argue that it was superior on one or other respect. What DNG fails to understand, or attempts to obscure, is that the Part B qualification criteria-on which its bids were disqualified- were not used in a relative or comparative way vis-à-vis any of the Preferred Bidders. But rather, the Part B qualification criteria were used to assess the merits of DNG's bids as against the RFP. DNG's bids did not fail in comparison to Karpowership (or any other Preferred Bidders); they failed in comparison with the requirements of the RFP. DNG was disqualified because it did not meet the financial, technical and land legal evaluation criteria.

32. Furthermore, the state respondents submit, that even if DNG had met these requirements and progressed to Part C of the evaluation, where its bids would then have been comparatively evaluated against other compliant bids, it would still have not been appointed as a Preferred Bidder because its evaluation price- a component which counted for 90% of the Part C evaluation- was substantially higher than any of the preferred bidders.

33. It is also the submission of the state respondents that DNG's conduct is self-serving. It reformulates tender criteria and argues that on its own reformulated criteria it should have been appointed as Preferred Bidder. Where it was unable to meet clearly defined RFP prescripts it argues that those requirements were irrelevant and shortsighted. While it was content to accept the RFP and briefing notes that amended the RFP, it believed that it was in the running to be appointed as a Preferred bidder. It now contends that the RFP which was never challenged was riddled with errors and bias from the inception.

34. The DNG's review application relies heavily on suggestions of undue influence and ulterior motives without furnishing any cogent evidence to support its insinuations. Its theory of undue influence and ulterior motives unravels considering the extensive record kept by the DMRE which shows that the decision to disqualify DNG's bid was made, in the first instance by the BEC- a committee of independent subject- matter expert firms (called Transaction Advisors) who, using their professional judgment

collectively decided to recommend the disqualification of DNG's bids. A recommendation that was approved first by the BAC and then the DG.

35. The state respondents furthermore submit, that while DNG's review rails against the appointment of Karpowership as a Preferred Bidder, it ignores that this was done after a competitive and transparent process in which the Transaction Advisors found that Karpowership complied with qualification criteria and recommended its appointment as preferred bidder having regard to its composite score based on price and economic development.

36. That notwithstanding DNG's allegations and insinuations, the pleadings and the extensive and detailed record of the evaluation and adjudication process reflect, above all, the one reason DNG does not refer to in its heads of argument- the demonstrable reason for DNG's unsuccessful bids was because it failed to meet a myriad of keeping qualification criteria. This excludes an inference of an ulterior motive for which DNG has furnished no evidence and is a finding, which cannot in view of the dispute of facts thereon, be made on papers.

37. In their supplementary heads of argument, the state respondents object to the issue arising from the supplementary founding affidavit and that the ensuing affidavit canvassing the supplementary affidavits should not be accepted by this Court. They submit that DNG raises new evidence in those affidavits without an application to the Court for permission to file such affidavits. Further, that DNG does not challenge the validity of the RFP.

38. Karpowership submits that the review application brought by DNG is vague unfounded and ever changing. DNG makes screaking allegations of fraud and corruption against the state respondents and Karpowership to thirteenth respondents. That DNG makes a range of allegations based on incomplete facts, misrepresentations, unfounded suspicious and hearsay evidence.

39. Furthermore, Karpowership argues that there is a significant misalignment between the case made out in DNG's papers and the relief sought in its Amended Notice of Motion. In DNG's affidavits and heads of argument DNG seeks an order

directing that the Tender process be set aside in its entirety and re-issued de novo. This relief is not requested in the Amended Notice of Motion. This is inconsistent with the substitution order sought in that Notice.

40. It is also the submission of Karpowership that DNG's bid was correctly disqualified, as it did not comply with the mandatory and material provisions of the RFP.

41. Regarding DNG's relief for reviewing and setting aside Briefing Notes 3, 5,8,15 and 24, Karpowership submits that these claims are unsubstantiated. DNG impermissibly asks the Court to draw inferences that are not borne out by the facts in this regard.

42. Furthermore, Karpowership submits that DNG's prayer, that the decision to disqualify it as a Preferred Bidder be remitted to the DMRE for reconsideration, which may result in the DMRE "substituting" DNG in the place of Karpowership or any of the Preferred Bidders, is incompetent.

43. Karpowership further submits that it is a misconception for DNG to seek interdictory relief to prohibit any of the Preferred Bidders from concluding or implementing any agreement flowing from the RFP with the state respondents, from concluding or taking further steps towards implementing any agreement with the state respondents or other interested parties an/or from otherwise giving effect to the Tender.

44. The sixth and seventh respondents' submission is that DNG does not seek to review and set aside the decisions to appoint them as Preferred Bidders in the Amended Notice of Motion. They therefore contend that without DNG seeking an express order to review and set aside these decisions, the appointments may not be set aside as a result of this review application because the decisions are binding and have legal consequence that may not be undermined without a direct review of the decisions.

45. Furthermore, that in the amended Notice of Motion, DNG also does not seek to review and set aside the procurement process or Tender in terms of which the sixth and seventh respondents were appointed as Preferred Bidders. They find this surprising, in the content of the express relief DNG seeks, because the consequential orders of remittal for which DNG prays assume and are dependent on the validity of the preceding RFP process.

46. The sixth and seventh respondents contend that the attacks that DNG makes on their bid submissions and their subsequent appointment as Preferred Bidders must, as a matter of law, fail given DNG's express concessions made in its replying affidavit- That "the applicant has already stated that it seeks no pointed relief against the sixth to tenth respondents and the sixth to tenth respondents are interested parties solely as a result of their status". Further, DNG also states that "the sixth to tenth respondents are not at the center of this application and their opposition to same is not strictly necessary herein". It also states that "the sixth to seventh respondents are correct- there is no specific 'attack' in respect of the sixth to tenth respondents' appointment".

47. The request for remittal and substitution is misplaced because DNG does not directly attack and review the decisions to appoint the sixth and seventh respondents as Preferred Bidders. The remittal is therefore unjustified as against the sixth and seventh respondents. Having regard to different sizes of DNG's bid submissions compared to those of the sixth and seventh respondents, whether jointly or separately, those bids are wholly incomparable, and the order of substitution sought by DNG against them would not make any sense at all.

48. The sixth and seventh respondents also submit that the interdict sought in paragraphs 6.1 to 6.4 of the Amended Notice of Motion is inappropriate, because it does not meet the requirements of interdicts.

49. The eighth respondent is of the view that DNG's case is not about it, DNG's case is about its disqualification and Karpowership's appointment. The eighth respondent argues that DNG pleads no grounds of review against it and establishes none against the Tender Process.

50. Furthermore, in Part A, DNG's case was an interim interdict pending a review. In Part B of the First Notice of Motion it did not mention the eighth respondent at all. Its case was about a review of the state respondents' decision to disqualify DNG, review the briefing notes and an order substituting DNG for Karpowership. All these had nothing to do with the eighth respondent. Further, there is no basis for an interim interdict.

51. The ninth respondent submits that although it opposes DNG's arguments made in prayers 2, 3, 5, 6, and 8, it is of the view that no recognizable case for review is made out against it. According to the ninth respondent, it aligns its arguments in Prayers 2 and 3 with those of the other respondents.

52. The tenth to thirteenth respondents make common cause with arguments advanced on behalf of the sixth to ninth respondents. Although they make submissions, those submissions are aligned with those of the other respondents.

The Scope within which the application is to be decided

53. It is common cause that this is an urgent application. For that reason, the application can be decided on a few issues as raised by the parties. It is therefore not necessary to deal with all the aspects canvassed by counsel during the hearing of this matter.

Should the supplementary Affidavit filed after the Postponement of the Application on 9 September 2021, be admitted as evidence?

54. On 9 September 2021, DNG applied to postpone the main review application with the stated intention of placing before this Court evidence that it hoped would emerge from three ongoing processes:

54.1 An investigation by the Directorate of Priority Criminal investigations ("DPCI") of the South African Police Service in regard to RMIPPPP Tender;
54.2 Parliamentary hearings regarding the RMIPPPP; and

54.3 The hearings of NERSA pertaining to applications for electricity generation licenses by the Preferred Bidders.

58 In its founding affidavit in the postponement application, DNG envisaged that it was reasonably confident that the relevant information would have emerged from these processes by the end of November 2021, and stated that, by that date, "*such information will have been placed (sic) before the Honorable Court by way of a further affidavit from the applicant wherein leave to do so will be sought by the applicant…*"

59 Immediately, after the postponement application was granted on 9 September 2021, a case management meeting was held in which the parties agreed on a timetable for the delivery of further legal process. As reflected in the direction issued by this Court on 14 September 2021, DNG was to "*deliver any and all supplementary affidavits by no later than 11 October 2021*".

60 I agree with counsel for the state respondents that the agreement at the case management meeting as to the time period for filing of any further affidavits- and ensuing direction- did not obviate the need for DNG to apply for leave to file any supplementary affidavits, as it had undertaken to do. In its supplementary founding affidavit and supplementary heads of argument, DNG contends that the SFA constitutes a further affidavit in terms of Rule 6(5e). DNG's assertion that the Court, in issuing the direction, granted leave to it to deliver its supplementary founding affidavit is without merit. This Court never granted such leave. Moreover, it could not have done so without considering the content of the supplementary affidavit that DNG ultimately sought to file.

61 Even if this were the case, any implied leave to file further affidavits, that may be said to have been granted must have been limited to affidavits dealing with new information arising from the specified processes and which was relevant to the review application. It could never have been intended that the Court in granting the postponement and directing that the parties comply with the agreed-upon timetable, gave DNG carte blanche to file supplementary founding papers, which canvassed matters that did not emerge from the specified processes.

62 On 12 October 2021, DNG filed the supplementary founding affidavit (almost ten months after it initially launched its review application) and it did so without seeking the leave of this Court. Strikingly, DNG's affidavit contained no information emerging from the specified process (save for various allegations relating to alleged irregularities in the NERSA licensing process which are irrelevant to these review proceedings). Moreover, the vast majority of the allegations in the affidavit related to events that took place prior to the launch of these proceedings and are, on DNG's own version, facts of which it was at all-time aware.

63 It is trite that an applicant must make its case in the founding papers. In *Esau v Minister of Cooperative Governance and Traditional Affair*[3] the Court reiterated that last-minute renovations in reply are impermissible:

> *"In motion proceedings, applicants are requested to make out their case in their Founding affidavit and may not make out their case in reply. These challenges were not raised in the Founding affidavit, but only in the replying affidavit, with the result that the respondents had no opportunity to answer them".*

64 It is also trite that parties in review proceedings are normally confined to three sets of affidavits. Rule 6(5) (e) of the Uniform Rules of Court stipulates that the Court "*may in its discretion permit the filing of further affidavits*". The filing of further affidavits is only permitted "*with the indulgence of the Court*" and following a formal application for leave to do so. [4]

65 A Court will only exercise its discretion to allow further affidavits "*where there is good reason for doing so*" and will do so only in exceptional circumstances. [5]

66 Erasmus[6] explains that:

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[3] 2021(3) SA 593 (SCA). *See also Mkwanazi V Van der Merwe and Another* [1970] 1 ALL SA 513 (A).
[4] *Hino Trading CC v JR209 Investments (Pty) Ltd and Another* at para 11, and *Standard Bank of SA Ltd V Sewpersadth and Another* para 18.
[5] *M & G Media Ltd V President of the Republic of South Africa and Others* 2013 (3) SA 591 (GNP) at para 27
[6] Check Supreme Court Practices RS 9 (2019) D1-68.

"there should in each case be a proper and satisfactory explanation, which negatives mala fides or culpable remissness, as to why the facts or information had not been put before the Court at an earlier stage, and the court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs."

67 According to *Gamble Investments (Pty) Ltd V Santam Ltd and Another*[7] in which the Court stated that, it is settled law that, the party seeking indulgence of bringing new evidence must establish that the evidence it seeks to present was not available to it or could not reasonably be required. If it was available, an acceptable explanation must be furnished as to why it was not presented.

68 One seems to agree with Karpowership's submission that DNG's supplementary affidavit was filed to 'relieve the pinch of the shoe'. DNG failed to produce this additional information until it received and considered the heads of argument of the respondents in the matter. The Court in *Du Plessis V Ackerman*[8] noted that after a close of arguments, there a "special" danger of abuse in the opportunity for deliberate colouring or manufacture of testimony to suit some specific need which may be apparent only after the opposing counsel's argument has revealed where the emphasis of his claim is placed and what conclusions he founds on the evidence already presented."

69 In *casu*, DNG upon receipt of the heads of argument, it realised that its review application, (and particularly, its claims that the tender process was tainted by connection) was flimsy. The supplementary affidavit has been tailored in an attempt to fill the gaps in DNG'S case.

70 Furthermore, as the sixth to thirteenth respondents correctly submit in their supplementary heads of argument, except for one newly stated ground of review that appears for the first time in DNG's supplementary replying affidavit, DNG mostly regurgitates the same allegations it made in its initial affidavits. DNG's late-breaking ground of review points to Regulations 8(3)(a)(b) and (f) of the Framework for supply

[7] 2021/2017 2020 ZAECPEH at para 10.
[8] 1939 EDL at 143.

chain Management and Treasury Regulation 9(1), (f). DNG did not make out this case in its founding papers. This relief is also not set out in the Notice of motion, and is left largely unexplained in the DNG's affidavits.

71 DNG tendered its affidavit both late and out of its ordinary sequence. DNG is not seeking a right, but an indulgence from this Court. It must both advance its explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be accepted. DNG has failed to adequately offer an explanation for the late tendering of the affidavit. As a result, the impugned supplementary affidavit is not admitted as evidence in this proceedings.

Whether DNG's Notes to heads of Argument should be disregarded

72 It is trite that an applicant in review proceedings must make out its case in its founding papers. It is not permitted to make its case for the first time in its reply or its heads of argument, let alone in a supplementary note to heads of argument filed on the eve of the hearing.

73 In *casu*, DNG at 16H27 on 29 November 2021, a day before the hearing of this matter, DNG served its note to heads of argument. The note raises numerous new allegations and counter pleas irregularities relating to tender process. To make matters worse this note was only received by the Court on the day of the hearing of the matter. All the respondents were not in possession of this note when the matter was argued by DNG on 30 November 2021. As a consequence, they could not refer to this note. The state respondents could only file their response to the note a few days after the hearing of the matter.

74 In the circumstances, one agrees with the state respondents and the other respondents that the contents of the note be disregarded.

Alleged Undue Influence

75 In its founding affidavits and main heads of argument, DNG alleges that, throughout the bidding process, certain of Karpowership up to the tenth respondents were (wrongly and unlawfully) granted various exemptions in respect of material requirements of the RFP, which exemptions came at the expense of the common good of the South African population, in addition to defeating the true spirit, purport and intention of the RFP. Therefore, DNG has good reason to believe that undue influence played a decisive role, not only to the decision to appoint Karpowership to tenth respondents as Preferred Bidders in the Tender process, but also in the decision to disqualify DNG from Tender process.

76 DNG contends that on or about 26 July 2020, shortly before the RFP was published, its director was approached by a businessman with close ties to the Minister, who informed him, inter alia, that:

76.1 The RFP would be released in due course;

76.2 DNG should be assisted by certain undisclosed parties should it wish to be Preferred Bidder and ultimately be awarded the Tender and that the Business Associate of the Minister would be able to facilitate the relation with the undisclosed parties; and

76.3 The outcome of the Tender process was determined.

77 In response to the above, DNG refused to be involved and/or associated with any collusion and/or unlawful conduct in relation to the tender. However, the pressure to accept such "assistance" continued as, on or about 26 October 2020, its director was informed that a representative from Karpowership had approached a close family member of the Minister for an extension of the bid notification date, which extension was granted on 30 October 2020.

78 On Monday 2 November 2020, DNG's director was requested by the Business Associate of the Minister to attend a meeting at the Kream restaurant in Pretoria with a senior official of the DMRE, together with his direct subordinate, which request he

duly complied with ("Kream meeting"). To this extend, DNG submits that, the aforesaid officials and other parties have been compelled to confirm that they were at the Kream restaurant that afternoon. That when one considers DNG's version, with the contrasting versions, it is clear that such contrasting versions fall to be rejected out of hand as being clearly fabricated and totally implausible. Moreover, so DNG submits, its version is supported by both the prior events as afore-referred to, as well as the subsequent events of 15,17 and 18 March 2021, as detailed in the supplementary founding affidavit.

79 In its supplementary affidavit and supplementary heads of argument, DNG states that it sought a postponement in the matter due to the fact that the DPCI had approached DNG's Mr. Mbalati (the deponent to its founding affidavits) and requested him to cooperate with them in their own investigations into the matter. Prior to that, Mr. Mbalati was in the process of preparing his own criminal complainant. As at the due date of DNG' s supplementary founding affidavit, the DPCI had not made significant process in its own investigation. DNG then sought the services of a private investigator, who conducted such investigations as best as possible within the curtailed- timeframe, and which investigation did in fact yield some critical information which the "DG" has failed to address meaningfully in his affidavit.

80 The investigation revealed that the DG is in the process of constructing an immovable property in Pretoria in circumstance where his disposable income in fact cannot sustain such construction works. In DNG's contention, this funding has been sourced from Karpowership and key individuals, which include the DG in the course of the selfsame method of corrupt activity which the attendees of the Kream meeting proposed to DNG, which it denied.

81 DNG avers that although Karpowership denies DNG's version, it admits that Thabo George Mokoena is a shareholder of Karpowership's bidding entity, albeit indirectly. That this denial by Karpowership does nothing to assist it, as it would be surprising that Thabo George Mokoena in fact took direct shareholding in Karpowership that would result in the scheme by the attendees of the Kream meeting being easily discoverable.

82 According to DNG, the minister's wife was approached to seek the Minister's approval of an extension of the final bid notification date. The Minister simply denies that his wife approached him in order to secure an extension in the final bid notification date. However, no confirmatory affidavit from his wife to that effect, appears as part of the papers. Therefore, so DNG submits, this bare denial by the Minister simply cannot be relied upon. Further, that the Minister and the DG also deny several key relationships with critical figures who have been identified by DNG, without facts or confirmation to support such bare denials.

83 DNG's version is that the deponent ("Mr. Mbalati") allegedly attended a meeting at Kream restaurant with the unnamed businessman, a senior DMRE official and the latter's subordinate (both of whom are unnamed). And an unnamed "familial relation of the Minister at which the senior official was said to have offered assistance in respect of the Tender, which the deponent rejected and provoked "anger and vitriol" and that the DMRE subordinates suggested that DNG needed to "be part of the system" in order for its bid to succeed.

84 Though DNG did not disclose the identities of the DMRE officials, the DMRE officials of their own volition disclosed their identities and those of the other persons, who attended the meeting and offered a full and frank account of the meeting that took place, explaining that:

84.1 The meeting was attended by the DG and the DDG as well as two businessmen, Messrs. Gaga and Makasi, neither of whom are business associates of the Minister or have "close ties" to the Minister.

84.2 The meeting was not attended by "a familial relation of the Minister".

84.3 The invitation came from Mr. Makasi, an acquaintance of the DDG, who had indicated that he wished to introduce him to a potential investor in the energy sector. The DG accepted the invitation as it is important for the DMRE to engage potential investors in the energy space and encourage investment. (All this information is contained in an affidavit deposed to by the DG).

84.4 Neither the DG nor the DDG were aware that they would be meeting Mr. Mbalati or that he was presenting a company that was bidding in the RMIPPPP. The DG explained that:

> *"Following introduction Mr. Mbalati explained that he was involved with a potential bidder or bidder in the RMIPPPP and he requested that the DMRE should not postpone the closing date for the submission of bids. The DG responded to say that the RMIPPPP was an administrative process with which [he] would not interfere, and that [he] was not in a position to refuse a proper request for a postponement that came through from the Independent Power Producer Office… and the Bid Adjudication Committee. the DG emphasized that [he] would not interfere with the process.*
> *The DG also made the point that the DMRE and IPP Office were running a transparent and fair process and that there could be no shenanigans. The DG added that if the entity, which Mr. Mbalati represented, wished to succeed in the process, it would need to comply with all of the tender requirements, and that it would not succeed if it does not comply. Mr. Mbalati responded to say that he did not want any interference in the process and went on to explain the nature of the proposed projects with which he was involved and where they were located. In response, the DG said that was fine and reiterated that [he] would not interfere with the Tender process".*

85 The DG confirms that save for this meeting, he has had no other interactions with Mr. Mbalati. The account of the DG and the DDG disputes that:

85.1 The meeting took place on 2 November 2020.

85.2 The restaurant allowed limited guests.

85.3 That they were present when Mr. Mbalati arrived at the table.

85.4 That a familial relation of the Minister attended the meeting.

That the DG asked how the attendees "could help in respect of

85.5 the Tender"

That Mr. Mbalati's remarks were met with anger and vitriol. The DDG simply made the point that if a bidder does not comply with

85.6 Tender requirements, its bid will fail.

85.7 That Mr. Mbalati was the first person to leave the meeting. (All this evidence is contained in the DG's supporting affidavit).

86 A further contention by DNG is that this Court must reject the contrasting versions of the state respondents in light of the events of 15-18 March 2021; where DNG alleges that:

86.1 A business associate of the Minister sent "*another message*" implying that DNG had won the bid on 15 March 2021.

86.2 On 17 March 2021, DNG received a phone call from the "*Business Associate of the Minister*".

86.3 On 18 March 2021, the "*Business Associate of the Minister*" approached DNG.

87 In disputing these allegations, the state respondents say that, it is apparent from the vaguely stated allegations concerning the events of 15-18 March 2021, that DNG has failed to give a full and frank account of its interactions with the "*Business Associate*" even though these are facts within the personal knowledge of the deponent to DNG's affidavits.

88 In response to all the allegations levelled against the state respondents and Karpowership, Karpowership refutes these claims and avers that it never accepted the invitation to the meeting nor unlawfully colluded with state officials. Karpowership was never invited to meetings, or received calls, of the kind described by DNG. Karpowership was never approached to pay a bribe or to engage in a corrupt relationship; and Karpowership has at all times conducted itself properly and with integrity. That DNG does not put up facts to prove the contrary.

89 The sixth and seventh respondents rejected the allegations by DNG of undue influence and bias in the awarding of the Tender to the Preferred Bidders. They submit that nowhere in the publications by Energy Intelligentsia and the Daily Maverick, as well as the supplementary founding affidavit is there reference to the sixth and seventh respondents as parties to the alleged undue influence. They therefore ask the Court to reject the unfounded conclusion made in DNG's supplementary affidavit.

90 All the other respondents make common cause with the arguments of the state respondents and Karpowership and the sixth and sevenths respondents.

91 In response to DNG's allegations of undue influence and bias, the state respondents in their answering affidavits and their main heads, submit that, the allegations are not borne out in the pleadings, or the record and DNG has failed to substantiate them. Therefore, in considering the allegations made by DNG, this Court must have regard to the following established legal principles:

91.1 First, the allegations of undue influence and impropriety are disputed by the state respondents and could never be resolved, on the papers in favour of DNG[9]. That in an application for final relief, the version of the state respondents on factual conflict must be accepted. The rule in Plascon Evans applies equally in review proceedings.[10]

91.2 Second, the state respondents have offered up cogent and full explanation on affidavit coupled with an extensive and detailed record of the evaluation on affidavits and adjudication process. The version of the state respondents does not consist of bald or uncreditworthy denials, it does not raise fictitious, implausible, or far- fetched disputes of facts that are clearly untenable.[11]

91.3 Third, the more serious the allegation (or its consequences) the stronger the evidence required before a Court will the allegations be established.[12]

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[9] *Plascon Evans Paints Ltd V Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A) at 643 H-I.
[10] *South African Veterinary Council v SZynanski* 2003 (4) (SCA) at para 25.
[11] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* 2008 (2) SACR421 and *National Director of Public Prosecutions v Zuma* 2009(1) SACR 361 (SCA) [26].
[12] *Zuma* at para 27.

92 Concerning the Kream meeting, the state respondents are of the view, that although it is common cause that the meeting took place, there are material discrepancies between the version of DNG and that of the DMRE'S officials, Messrs. Mokoena and Maqubela ("the DG and DDG").

93 The argument proffered by the state respondents and Karpowership is that there are no merits in the allegations of undue influence as contended by DNG. I seem to agree with this contention.

94 Regarding the dispute of fact argument as raised by the state respondents, in particular with reference to undue influence allegations and the Kream meeting, I am of view that the principle laid down in Plascon Evans supra, must be applied in this matter.

95 In *Fakie NO V CCII Systems Pty Ltd*[13], the SCA was at pains to emphasis that no matter how robust a court might be inclined to be when dealing with disputes of fact "a respondent's version can be rejected in motion proceedings only if it is fictitious' or so far-fetched and clearly untenable that it can confidently be said, on papers alone, that it is demonstrably and clearly unworthy of credence". This is not such a case in this matter. The state respondents have offered up cogent and full explanations on affidavit of what occurred at the meeting and where the specific factual disputes arise. There is nothing clearly untenable or palpably implausible about the state respondents' version to justify its rejection on the papers [14].

96 With regards to "bias" in BTR Industries *South Africa (Pty) Ltd v Metal and Allied Worker Union*[15], the Appellant Division held that the affected individual merely had to prove an appearance of partiality rather than its actual existence. The advantage of

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[13] 2006(4) 326 (SCA) para 55.
[14] *South African Reserve Bank v Leathem NO and Others* Case No: 854/2020 dated 20 July 2021 para 24.
[15] 1992 (3) SA 673(A).

this approach, is that the Court is not asked to investigate that actual state of mind, or general probity of the decision maker.[16]

97 A family relationship, friendship, or enmity may give rise to a personal interest, real or apparent, which disqualifies the decision maker.[17].

98 However, this must be considered on the backdrop of the factual matrix of each case. There is also a need to compare the above judgment with the other decisions of our courts.

99 In the Supreme Court of Appeal in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others V Chief Executive Officer, South African Social Security agency, and Others*[18] Nugent JA stated the following of significance about litigants seeking to create an atmosphere through innuendoes and unsubstantiated allegation:

> "[3] *It is as well at the outset to clear the atmosphere in which this case has been conducted so as to have certainty on what is before us.*
>
> *[4] Whatever, place mere suspicion of malfeasance or moral turpitude might have in other discourse; it has no place in the courts- neither in the evidence nor in the atmosphere in which cases are conducted. It is unfair, if not improper, to impute malfeasance or moral turpitude by innuendo and suggestion. A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond. It is also prejudicial to the judicial process if cases are adjudicated with innuendo and suggestion hovering in the air without the allegations being clearly articulated. Confidence in the process is built on transparency and that calls for the grounds upon which case are argued and decided to be openly ventilated".*

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[16] See also Hoexter; administrative Law in South Africa 2nd Ed, page 53.
[17] See *President of the Republic South Africa V South African Rugby Football Union* 1999(4) SA 147 (CC).
[18] 2013 (4) SA 557 (SCA) at [3]-[4].

100 Karpowership is correct in its submission that, the threshold for proving bad faith is high. In *Barnard v Minister of Justice, Constitutional Service*[19], Keightley J stressed that allegations of bad faith must be supported by cogent evidence. In that case, Mr. Barnard had alleged that when refusing his parole application, the Minister of Justice acted in bad faith and with alleged political bias against him because some of the victims of his crimes were targets of the old apartheid regime. The Court stated:

> *"it is common cause that at least some of Mr Barnard's offences were committed with a political objective. However, it does not follow as a necessary inference that in identifying the gaps listed in paragraphs 3.1 to 3.6 of the decision document the Minster was acting in bad faith and with a view to thwarting Mr. Barnand's efforts to secure parole for political purposes. In the absence of actual evidence of this kind of motive on the Minister's part, such an inference would only be justifiable if there was no other reasonable explanation for the Minister having identified the gaps listed in the decision document, and recommending the steps outlined in paragraph 3.1 to 3.6".*

101 DNG has not advanced cogent evidence of bad faith, bias, corruption, dishonesty of fraud on behalf of the state respondents or Karpowership. In each instance where DNG makes allegations of bad faith, there is another reasonable explanation for the state respondents' conduct-as appears from the papers.

102 It is important to put the reasoning in the above quoted judgment in context.

103 The key relationships that DNG alleges were in place "*in order for the required conceptive authorities to occur successfully*" are between the DG and Ace Magashule ("Magashule") and his cohorts, including Sechaba Moletsane ("Moletsane"); George and David Mahlobo ("Mahlobo") and in turn, between the Minister and "*other members of the cabal which has organized itself to secure illicit benefits from the award of the tender*", and between the DG, the Minister and the Minister's wife. The state respondents are correct in stating that, while DNG strains to draw an interlocking web

[19] [2015] 4 ALL SA 648 (GP) at [63].

of political connections, it is unable to show how its alleged web influenced the evaluation or adjudication of bids and the selection of the Preferred Bidders.

104 While one admits that corruption is difficult to prove, because those who are involved in it do it in the darkness of the night, regrettably, the allegations must in law be proven by cogent evidence.

105 Based on the evidence placed before this Court, there is no convincing evidence to prove that:

105.1 The DG has had a close relationship with either Magashule or Moletsane and his organizational and work interactions with Magashule regarding this matter;

105.2 It seems to me that the Minister does not have a close relationship with Mahlobo, in particular regarding this matter;

105.3 The Minister was not involved in the bid evaluation process for the RMIPPPP or making decisions in relation to the extension of time periods, the evaluation of bids or appointment of Preferred Bidders; and

105.4 Apparently, the relationship between the Minister and the DG is merely a professional one.

106 As can be gleaned from the papers placed before this Court, George acquired 4.8% in Karpowership prior to the submission of the bids, while Goba does not hold shares in Karpowership. DNG is wrong in asserting that George and Goba acquired shares in Karpowership following its appointment as a Preferred Bidder.

107 Another allegation by DNG in its supplementary affidavit is that the DG's disposal income as a public servant does not correlate to assets registered in his name in light of the fact that he is building immovable property" without proof of a bond with any banking institutions". In answer, the DG candidly noted that: the property is jointly owned with his wife, the purchase price was financed through his wife's family; the building was being undertaken at the builder's risk until a bond could be registered on

the property; and other costs associated with the project are being financed through personal earnings and the use of a revolving credit facility with Standard Bank.[20]

108 While the DG'S explanation might be suspect, anyone who wishes to challenge it must provide cogent facts based on credible evidence. DNG has failed to successfully challenge this evidence.

109 I pause to say that one is disgusted and disappointed in the conduct of the DG and the DDG by attending a meeting at Kream with a potential Preferred Bidder. The best they could have done was to immediately leave the venue once Mr. Mbalati started to make the request that he is alleged to have insinuated. Such overtures ought to have rang a bell in the minds of the two officials.

110 Having said that I now turn to deal with the circumstances in which all these occurred.

111 As already discussed *supra* in this judgment, DNG filed a supplementary founding affidavit after postponement of the hearing of the application on 9 September 2021. This was done without leave of this Court. DNG has offered no reason why the allegations contained in the supplementary founding affidavit, the replying affidavits and heads or argument, which consist almost exclusively of alleged facts that were known and available to DNG when it filed its previous affidavits, were not made at the time. This Court has already, rejected the admission of this evidence. However, it is necessary to deal with the discrepancies in the evidence contained in these affidavits. Significantly, is the claim by DNG that various parties had an influence over the tender process.

112 DNG's supplementary founding affidavit raised a number of additional allegations. In particular, DNG alleged, for the first time, that:

[20] The DD's supplementary affidavit para 22 page 58-59.

112.1 Several protagonists of which DNG had previously made no mention; Samora Goba ("Goba"), George Mokoena ("George"), Alessandro Piaceri ("Piaceri") and "Shamir" allegedly played central roles. These persons are said to have approached the deponent to DNG's affidavits, Mr Mbalati suggesting that they would assist in the award of the Tender to DNG in exchange for 40% stake in the profits. Mbalati says that he met with them on at least three occasions between March to April 2020 and July 2020, and that he subsequently interacted with "Goba et al" in relation to their proposal[21]. A meeting on 22 July 2020, Luvuyo Makasi ("Makasi") similarly offered to assist Mbalati with the Tender in exchange for a 40% stake in the profits.

113 Makasi and Goba who both attended the meeting at Kream restaurant, are now said, respectively, to be "close associate and confidants of the family of the Minister, and Goba is alleged a person who grew up in the Minister's household and considers himself to be their son"[22]. It is also alleged that George and Goba became shareholders in Karpowership after the latter's appointment as a preferred bidder.

114 George Mokoena mentioned as one of protagonists should be distinguished from the Mokoena who is the DG. Although they share the same surname, they don't seem to have any family relationship.

115 In support of its allegations, DNG refers to annexure DAM1 to its supplementary founding affidavit- page 53 -40. DAM1 does not indicate that Mbalati was summoned to the meeting. It simply indicates that the DG wished to meet at Kream in Pretoria rather at Mbalati's office. The state respondents dispute that the meeting took place at his instance or that Mbalati was summoned to the meeting. DAM1 is entirely consistent with Makasi having arranged the meeting in circumstances in which the DG was not aware that Mbalati was representing a company that was bidding or potentially interested in bidding, in the RMIPPPP.

[21] SSFA paras 26-32 pp 54-13- 54-15.
[22] SSFA para 23, p54-12.

116 I agree with the state respondents that DNG, for the first time in reply and in clear attempt to bolster its newly cast case on undue influence asserts that George and Goba were present at the Kream meeting. That allegation is implausible and is therefore rejected. It is materially inconsistent with the version that DNG had previously advanced in the matter.

117 In the founding affidavit and the initial supplementary founding affidavit, DNG stated that, in addition to Mbalati and the DMMRE officials (DG and DDG), the meeting was attended by two other persons: "the Business Associate of the Minister and: "a familial relation of the Minister".

118 The DG's initial affidavit also indicated that the meeting was attended by two persons other than himself, the DDG and Mbalati; i.e. Makasi and Goba. DNG did not dispute the state respondents' account of the Kream meeting in either its initial supplementary founding affidavit or its initial replying affidavit.

119 In the supplementary founding affidavit that was filed later, DNG makes no mention of George and Goba being present at the meeting. The deponent rather claims that Makasi, Mokoena (i.e. DG), the DDG and Goba were present when he arrived at the table.

120 In addition, the supplementary founding affidavit indicates that, following an interaction with "Goba et al" at some point following the publication of the RFP in which Mbalati advised that he would not be working with them, his interaction "summarily ended... with these persons". It is therefore a reasonable deduction that the content in which this allegation appears in the affidavit indicates that this took place at some point prior to the Kream meeting, and thus indicates that George and Goba could not have been present at that meeting.

121 DNG alleges that the attendees at Kream meeting were aware that DNG was bidding for the RMIPPPP because DNG had submitted its notification prior the meeting.[23] This allegation, which is also made for the first time in reply, is speculative.

[23] RA to states respondents SAA paras 41.5 and 41.6 page 59-24.

There is no evidence that the DG and DDG were aware, prior to the meeting, that DNG was bidding for RMIPPP. On the contrary, the DG confirms that he was not aware he would be meeting with Mbalati or that he was representing a company that was bidding, or interested in the RMIPPPP. To the extent that there is a dispute of fact on this score, the DG's version is to be accepted. The DG's supplementary affidavit makes clear, that he has no relationship with George, Mokoena. Even if one were to draw an inference, it does not follow that it would be the only reasonable inference.

122 It is clear from the deponent's affidavits that the alleged facts on the DNG's version, were within Mr Mbalati's knowledge at the time of launching these proceedings. DNG is continually changing its tact on the facts and tailoring its allegations in order to strengthen it's undue influence claim. As a consequence, the undue influence story cannot stand in the absence of a credible report by the DPCI. Since the private investigator's report is not properly before the Court, these allegations are rejected.

123 It is worth remembering that DNG claims that during the encounters with the DMRE officials, the DDG stated that: "*one thing you must understand is that there is a system in this Country and if you don't work in accordance with that system you will fail, even if your project is the best, and I suspect that your project will be the best but that means that you must be part of the system…*"[24]. *DNG maintains that it refused to engage with corrupt individuals and, as a consequence, its bid was disqualified. In support of this allegation, DNG put a redacted WhatsApp message (attached as "DNG 18" to the founding affidavit). This redacted message does not disclose the author or recipient of the message.*

124 On 7 March 2021, Karpowership served on DNG a request in terms of Rule 35(12), requesting an un-redacted version of DNG 18. On 12 May 2021, DNG responded to the request in terms of Rule 35(12) declining to provide the requested documents. In the same vein, the state respondents were at pains to insist that DNG makes a disclosure of the un-redacted message, even on confidential basis, but in vain. This attitude by DNG is suspect in that it might be hiding some crucial information,

[24] SFA page 17-48 at para 114.

to its detriment, contained in the un-redacted message. In the same request, DNG also failed to produce copies of submissions, which Mr Mbalati made to DPCI. This is an indication DNG was never serious about the existence of the criminal complaint.

Reasons for the State Respondents' Decision to disqualify DNG.

125 It is common cause that after its disqualification from Part A of the Tender, DNG requested a meeting with the IPP Office to discuss its disqualification. This meeting could only materialize on 16 April 2021 at 12H30. DNG was advised by the IPP Office that the principal grounds for DNG's disqualification, related to an alleged insufficient proof of ownership of the land rights in respect of the land to be utilized, an alleged insufficient proof of water supply, an alleged failure to provide proof of an uninterrupted fuel supply risk in ocean conditions and an alleged failure to provide proof of its confirmation of its equity funders and to illustrate suitable debt track record for capital raising ability of its member for a period of 5 (five) years predating the RFP.

126 Before I deal with the reasons for the disqualification of DNG, it is worth repeating what DNG stated in its replying affidavit in response to the respondents' assertions in their answering affidavit, in particular, the sixth to the thirteenth respondents. DNG unequivocally stated that *"DNG has already stated that it seeks no pointed relief against the sixth to tenth respondents and the sixth to tenth respondents are interested parties solely as a result of their status". Further, DNG also states that "the sixth to tenth respondents… are not the center of this application and their opposition to same is not strictly necessary herein"*[25]*. It also states that "the sixth to seventh respondents are correct- there is no specific "attack in respect of the sixth to seventh respondents' appointment"*[26]

127 Consequently, these assertions impliedly apply to the eleventh to thirteenth respondents who belatedly joined to these proceeds. It seems to me that this review is not about the sixth to the thirteenth respondents; DNG's gripe is about its disqualification and Karpowership appointment. This case is therefore between DNG, the state respondents and Karpowership. It is for that reasoning that in dealing with

[25] *DNG's RA caselines p25-9 para 11 and caselines p25-13 para 21.*
[26] *DNG's RA Caselines p25-15 para 23.7.*

the reasons for the disqualification of DNG the sixth to the thirteenth respondents will be excluded from that discussion.

128 Reverting to the topic under discussion, the state respondents succinctly provide reasons for DNG's disqualification.

129 The state respondents say that DNG failed to provide sufficient proof that it had rights upon which its gas power plants were to be built as required in the RFP, DNG was afforded several opportunities to comply but failed.

130 In relation to Khensani's project, what DNG submitted, pursuant to a clarification question, was an option to lease between DNG (project company) and DNG Property (a sister company). While the option to lease claimed that DNG Property was the owner of the property, the title deed and conveyancer's certificate indicated that Elrik CC was the owner of the property and not DNG. [27]

131 Thinking that this was an error, the IPP Office requested DNG to furnish it with the required agreements. It received an additional conveyancer's certificate in which the conveyancer confirmed that he had been advised that the property was in the process of being transferred. Moreover, the conveyancer's certificate did not specify to whom the property was being transferred.[28] No confirmation nor update on the status of the transfer of the property were furnished. In particularly, no agreement or other documentation was provided reflecting a sale or transfer of the land from Elrik CC to DNG Property.

132 In relation to Mpenyisi's project, while there was again, an option to lease between DNG Property and DNG, the title deed and the conveyancer's certificate for the project site indicated that the owner was Marie Meyers (Pty) Ltd. No agreement or other documentation was provided reflecting a sale or transfer of the property from Marie Meyer (Pty) Ltd to DNG Property. There was thus no confirmation that the property was in the process of being transferred to DNG Property.

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[27] State respondents AA para 76.1 p 15-27.
[28] State respondents AA para 289 p 15-115.

133 Similarly, the Busisiwe bid failed on the land right evaluation on the basis that DNG did not provide a copy of the land rights agreement as part of its bid submission. Given that this noncompliance appeared to be an error, DNG was requested to provide the requisite agreement as part of the classification process. In response to the request for clarification, DNG still failed to provide the land rights agreement.

134 It is correctly submitted by the state respondents that, the reason for the land rights criterion in the RFP is to demonstrate that a bidder can secure the requisite rights over the projects site by financial close.

135 Concerning water allocation from a water services provider; the state respondents argue that Khensani and Mpenyisi's bids failed to provide confirmation of water allocation. They say DNG bid submission included a letter it addressed to Nkomazi's local Municipality requesting written confirmation of water allocation for the water consumption needs of the project but did not include any response from the Municipality. This response was not forthcoming by the time that DNG responded to the request for clarification. DNG thus failed to confirm that it had in-principle secured the requisite water allocation as no confirmation of water allocation was submitted for the projects either as part of original bid submission or clarification.

136 In response to this failure, DNG again pivots to argue that it will only require small amounts of water for its power plants, but the same is unlikely to be true for construction.[29]

137 Regarding technical evaluation criteria, DNG's three bids failed to provide for an interrupted fuel supply to all three of the projects sites as required in the technical qualification requirements of the RFP.

138 DNG's Khensani and Mpenyisi's projects involve gas-fires power generation at Komatipoort and Malelane in Mpumalanga to be supplied with gas via Republic of Mozambique Power Company pipeline (ROMPCO). The gas derived from Liquefied

[29] DNG's Heads of Argument para 117 to 121 pp 33-46.

Natural Gas ("LNG"), would be delivered to the Port of Maputo, regasified on board a floating storage and regasification Unit ("FSRU") in the port and transferred via a pipeline which was intended to interconnect to the ROMPCO pipelines. This was DNG's primary fuel supply mechanism for these projects.

139 A critical shortcoming in DNG's Khensani and Mpenyisi bids was that it did not demonstrate the viability of timeously constructing a pipeline that would link the FRSU in Maputo to the ROMPCO pipeline, and thus failed to show how the fuel (i.e. gas) would be supplied between these two points.

140 In as far as the Busisiwe project is concerned, i.e. the gas-fired power generation in Coega, Eastern Cape, DNG failed to convince the IPP Office, how it was going to deal with the risks impacting the primary fuel mechanism of the projects. In its heads of argument, DNG accepts the substantial risk in ocean conditions in Algoa Bay, but argues that despite this it has been granted a license to provide bunkering (i.e. refueling of vessels) from Transnet National Ports of ("TNPA").[30] It thus relies on its bunkering license from the TNPA to argue that it demonstrated that it could mitigate the risks in ocean conditions.[31]

141 However, the fact that an FSRU is licensed to provide refueling does not mean that it would also be suitable for the operation of an FSRU, which needs to provide gas on an ongoing basis for use in gas-fired plant. I agree that the risk when there is downtime to an FSRU intended to provide refueling is significantly different to an FSRU intended to provide gas on a continuous basis. In the case of the latter, the downtime of the FSRU will have a direct knock on the impact on security of energy supply to the national electricity grid.

142 DNG contests the state respondents' contention that its bids failed the financial criteria. However, there is glaring evidence that DNG failed to provide crucial confirmations in its letters of support.

[30] DNG Heads of Arguments para 131.
[31] DNG Heads of Argument para 131.

143 There is evidence that DNG failed to provide a letter of support from each member and each ultimate provider of equity finance substantially in the form Appendix 4B as required by the RFP.[32] This is evident from the fact that a clarification question was specifically addressed to DNG requesting letters of commitment in the form Appendix 48. As requested, and consequently failed to provide critical confirmation embedded in Appendix 4B.[33] DNG simply has no answer to this failure and does not address the fact that the letters that if furnished did not provide the requisite confirmations required by Appendix 4B. The only argument offered by DNG is that it submitted some letters of supporting.[34]

144 DNG's woes don't end up there, it also failed to demonstrate a debt track record. DNG did not provide a proven debt track record of any of its members having in the last five years, raised debt of a similar nature and amount to the debt as proposed to be raised by DNG, as required by the RFP. In response to this failing, DNG now argues that this requirement is irrational and shortsighted given that it relied on equity financing as its principal financing and its projects had "little to no debt sitting needs". It also argues that bidders submitted bids through newly incorporated entities which would not have capital raising records.[35]

145 DNG cannot simply disregard the requirements of the RFP and instead lay down its own requirements for assessment.

146 Furthermore, DNG's bid submission did not include a plan from each of equity finance setting out objectives and indicative dates for the achievement of commercial close and financial close within four months after the announcement of Preferred Bidders. DNG had to be prompted through clarification questions in order for it to comply with this requirement. DNG then submitted a project implementation plan for each of its projects, which expressed reservations at meeting the timelines within four months. DNG strongly suggested that DMRE should extend the project closing window

[32] State respondents AA para 82.1 pp 15-36 to 15-37.
[33] State respondents AA para 82.3 p 15-37.
[34] DNG's Heads of Argument para 139 p 33-56.
[35] DNG's Heads of Argument para 134 to 137 pp 33-34 and para 141.1 p 33-57.

from four to six months. In its cover letter, DNG stated that it would "in good faith adhere to the activities and timelines as much as reasonably possible".[36]

147 In its heads of argument, DNG only asserts that it submitted its implementation plan, but it is silent in response to the issue raised that it has tentative and expressed reservations as to whether its implementation plan was achievable within the required timeframe.

148 The state respondents criticizes DNG's reliance on the decision in *Minister of Social Development v Phoenix Cash and Carry*[37]. This criticism is justified in that in *Phoenix*, the case concerned, a tender to supply food hampers to the Department of Social Development and in which the SCA found that this was a tender what was intended to "*encourage bidders with little to no financial history and so requiring "audited financial statement*" might not be reasonable for a small business only beginning to find its feet. It is on this basis that the SCA found that the RFP merely advised on the kinds of proof of financial resources that it would require rather than create a peremptory lift. The present tender is different and also that DNG does not fall in the category of a small business or a beginner to find it its feet. DNG is a well established business entity.

149 The failure by DNG to comply with these requirements is substantial and material and fatal to its application to review and set aside the decisions of the state respondents.

DNG's challenge to Karpowership's Preferred Bidder status

150 DNG's review application pits bids against those of Karpowership to argue that its bids were superior. While the Part B evaluation only concerned a comparison of the bids submitted against the requirements of the RFP, DNG blames its failure to be recommended as one of the Preferred Bidders on the state respondents' irrationality and unreasonableness. DNG blames the state respondents for being biased in favour of Karpowership.

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[36] See state respondents AA para 82.5 pp 15-39.
[37] [2007] 3 All SA 115 SCA.

151 DNG submits among others that, Karpowership didn't submit Environmental Import Assessment reports in respect of each of their sites, especially in so far as the power generator facilities are concerned. It also raises concerns about Karpowership's non-compliance with legal land rights.

152 DNG argues that per Karpowership's own version, its FSRUs are a key component of its power generation facility, so much so, that without the FARUs, the power ships would not be able to generate power at all, in that the power ships lack gas storage capacity at all. That the power ships cannot generate the necessary power without LNG. This LNG is stored and supplied to the power ships by way of FSRUs, which are to be tethered to the power ships. This explanation is disputed by the state respondents and in particular by Karpowership.

153 DNG also challenges Karpowership's non-compliance with legal land rights. It argues that the decision by the state respondents to reject its proof of ownership of sites on which its projects would be located (i.e. for Khensani and Mpenyisi; was irrational. DNG says that it provided irrevocable proof of its right to leasehold in respect of same. In complete contrast, considering the nature of Karpowership's bid, it is Karpowership's own version that the site of its projects will be the ports in which its ships will moor and or the bodies of water on which its ships will float.

154 During the hearing of this matter, Karpowership was at pains to define what a "Key Equipment" entails and where the FSRU is located in relation to the powership".

155 Karpowership submits that, its FSRUs do not constitute "Key Equipment". It is indeed clear to me that on the definitions in the RFP, the FSRU does not form part of a "facility" and does not constitute "Key Equipment: Rather, it is an off-site vessel from which gas is supplied from the FSRU (which is opened by the Fuel suppliers) via a gas pipeline (at each of the respective Project site) to the Powership. In this regard; FSRUs constitute "Fuel Storage" as contemplated by clause 5.7.5 of Volume 3 of the RFP", which defines "*Equipment*" as including "*one or a combination of the following technologies… Fuel storage and or fuel pipeline facilities*". "*Fuel storage*" in clause 1.7 volume 3, part 1 of the RFP, is defined as "*containers located at the facility that hold*

either liquids or compressed gases or mediums used for the production of electricity". I agree with the explanation by Karpowership that FSRUs are not "located at the facility" and do not form part of the facility used for production of electricity. Given that the FSRUs do not constitute "Fuel storage" they are not "Key equipment" (as defined in the RFP).

156 Pertaining to legal land rights, DNG acknowledges that the bidders were only required to obtain the TNPA consents and approvals during the Preferred Bidders stage line (after the appointment of Preferred Bidders had been made). However, it claims that the state respondents should have required bidders to apply for, or obtain, the necessary TNPA consents and approvals by the time that their bids were submitted. Alternatively, it claims that the RFPS's Legal Land requirements should have been replaced.[38] Indeed this is the point on which one would agree with Karpowership and the state respondents that DNG seeks to impose additional obligations, which are not contained in the RFP or the applicable law.

157 This is because the required TNPA approvals/consents are not equivalent to the legal land requirements set out in the RFP and Briefing Notes. There is no provision in the RFP or Briefing Notes, which states that these requirements should be treated equally. On the contrary, they cannot be the same because:

157.1 The requirements apply to different solutions that bidders may elect to propose. In its amended Notice of Motion, DNG does not seek to set aside the RFP because of its inequality in treatment between those bidders proposing a solution that is land-based versus those bidders proposing a solution that is not[39].

157.2 The requirements do not treat bidders differently. The RFP and Briefing Notes stipulate that all bidders may prove that they have obtained the requisite regulatory permissions and approvals by Financial Close. This allowance applied equally to DNG. The TNPA approvals/ authorizations constitute such regulatory approvals and proof of

[38] See DNG Confidential Heads of Argument, para 33 and 35.
[39] See *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* 2020 (4) SA 17 (SCA) at para 18.

land rights do not constitute such "regulatory approvals" so this requirement falls into a different category (and are applicable to relevant bidders).

157.3 I agree that Karpowership's ability to secure the necessary TNPA authorizations in the future is irrelevant to the validity of its appointment as a Preferred Bidder. The RFP only requires proof of regulatory authorizations at Financial close, not at the time of the bid submissions.

158 Consequently, DNG's claims cannot succeed for the above reasons.

DNG was appropriately disqualified

159 The rules of the game in this Tender are to be found in the RFP as amplified through the Briefing Notes and other mechanism. This enabled the parties to know what was required of them, and what information to put forward in order to meet the requirements in the RFP. The RFP also informed them whether they should invest their time and money in the bid. *Rainbow Civils CC V Minister of Transport and Public Works, Western Cape*[40]. The rules are binding and compliance with them is legally required[41]. They also enable bidders to know on what basis their bids would be evaluated and the method that would be followed in adjudicating the *Tender*.[42] Our Courts have held that the evaluation of tenders must be undertaken by means that are explicable and clear. It undermines both fairness, transparency, equity and competitiveness for tender evaluators, having stipulated the requirements of the tender, to overlook material non-compliance with those requirements.

160 I reiterated that DNG did not substantially and materially meet the requirements in Part B of the RFP. DNG failed on multiple qualification criteria in Part B of the RFP. In order for DNG's challenge to be sustainable, it would have to succeed in challenging all of the grounds on which its bids were found to be non- compliant. Any one of these

[40] 2013 JDR 0198 (WCC) at para 72.
[41] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of South African Social Agency and Others* (2014) (1) SA 604 (CC) at para 40.
[42] *Rainbow Civils CC* supra, at page 72.

grounds would suffice to disqualify DNG's bids. Having analyzed and assessed numerous of these qualification criteria, it is not necessary to deal with all of them.

161 The state respondents are correct in submitting that DNG's reliance on *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province*[43] (*Millennium Waste*) to argue that our law permits condonation of non-compliance with peremptory requirement is entirely misplaced.

162 This is so because the nature of the non-compliance that the SCA was dealing with was highly technical, the failure to sign a declaration of interest form, which was clearly an oversight. In this case, we are dealing with material non-compliance across multiple qualification criteria. DNG's bids were materially non-compliant, and its disqualification was not because of innocent tender occasions.

163 In *JS Moroka Municipality and Others v Betram (Pty) Ltd and Another*[44], the SCA expressly clarified that the decision in *Millennium Waste* should be regarded as incorrect if it being construed accepting that a failure to comply with the peremptory requirement of tender may be condoned by a functionary who is of the view that it would be in public interest for such tender to be accepted. The SCA stated that this offends the principle of legality.[45]

164 The argument by DNG that it should have been appointed a preferred bidder because of the alleged economic benefits associated with its bids "properly construed" in light of relevant and correct considerations is misplaced. The thrust of DNG's contention is that the DMRE should have overlooked its non-compliant bids based on alleged economic benefits projects. This contention, although it may serve as a good motivation, does not assist DNG in circumstances where DNG has failed to comply in multiple instances.[46]

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[43] 2008(2) SA 481 (SCA).
[44] [2014] 1 All SA 545 (SCA).
[45] JS Moroka Municipality supra, para 18.
[46] Rainbow Civils CC supra para 109.

165 It also bears mentioning that the decision to disqualify DNG was made by Transaction Advisors exercising their special expertise and experience to come to their findings of fact. In such circumstances due weight should be given to the findings of fact made by these subject- matter experts who concluded that DNG's bids did not meet the qualification criteria. The assertion by DNG that Transaction Advisors cannot stand in the place of the officials has no merit. In *Bato Stars Fishing (Pty)Ltd V Minister of Environmental Affairs and Tourism and Others*[47] O'Reagam J held that:

> *"...Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of facts and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts..."*

166 In this matter, one is dealing with issues involving the provision of power by independent providers. The issues involved are very technical and require special knowledge in that field of study. It is for this reason that DMRE acquired the assistance of Transaction Advisors who evaluated all the bids and concluded that the nature and extent of DNG's non-compliance with the qualification, criteria in Part B of the RFP was material and substantial. Condoning DNG's failures would have undermined fairness and equity to other bidders. It would also not have promoted competiveness and cost-effectiveness given that DNG failed to show that the projects were feasible from legal, technical and financial perspective.

DNG's challenge to Briefing Notes

167 Under this heading, it is not necessary to deal with each Briefing Note individually. It suffices to deal with all of them collectively.

[47] 2004 (4) SA 490 (CC) para 514-515.

168 In the first place, the DMRE reserved for itself the discretion to issue briefing notes. Secondly, DNG concedes that the briefing notes are common place and standard in all tender processes. However, DNG seeks to argue that this Court must conclude that there was malfeasance in respect of the briefing notes that were issued by the DMRE. It alleges that most if not all of them were for the benefit of Karpowership.

169 However, it is evident that, in the interest of fairness, transparency, cost-effectiveness, and competitiveness, the DMRE reserved for itself the flexibility to amend the RFP where appropriate, particularly in response to clarification questions and issues raised by prospective bidders *Sanyathi Civil Engineering and Construction (Pty) Ltd and Another v EThekwini Municipality and Others; Group Five Construction (Pty) and Others*[48]. This was made clear to all bidders in the RFP including the clause headed "Briefing Notes and Changes to Bids Process" which provides that:

> *"The Department may, at any time and for any reason, whether at its own initiative, or in response to a clarification requested by a Bidder, supplement, amend, vary or modify any part or aspect of the RFP by the issue of Briefing Notes".*

170 One is with the state respondents that it is apparent that the RFP made provision for it to be amended varied or supplemented from time to time either at the initiative of the DMRE or in response to a query, clarification or proposal submitted by a bidder. In my view, there is no malfeasance in respect of these briefing notes.

The relief sought by DNG has no merit

171 All the respondents in this matter make common cause that the relief sought by DNG has no merit. They base this on the Amended Notice of Motion delivered together with DNG's supplementary founding affidavit on 9 September 2021. In particular, the sixth to thirteenth respondents do so for the following reasons:

[48] (2012) 1 All SA 200 (KZP) at para 34.

171.1 Firstly, DNG makes it clear that the amended notice of motion replaces "in its entirely" and substitutes the relief sought in the initial Notice of Motion;

171.2 Secondly, the Amended Notice of Motion unequivocally describes the parameters and scope of the review relief DNG seeks, notwithstanding broad and sweeping claims it makes against the Preferred Bidders, including the sixth to thirteenth respondents. This is significantly important because there is nothing in the Amended Notice of Motion that directly attacks and seeks a review of the appointment of sixth to thirteenth respondents as Preferred Bidders; and

171.3 Thirdly, because DNG is required to identify the "decision or proceedings" sought to be reviewed in terms of Rule 53(1) of the Uniform Rules of Court.
172 In the Amended Notice of Motion, DNG expressly identifies the following decisions it asks this Court to review and set aside:

172.1 The first is the decision to disqualify the bid of DNG;

172.2 The second is the decision to issue the five Briefing Notes; and

172.3 The third is the decision to appoint Karpowership as a Preferred Bidder instead of it.

173 Without DNG seeking an express order to review and set aside these decisions, the appointments of the sixth to thirteenth respondents may not be set aside as a result of this review application because the decisions are binding and have legal consequences that may not be acknowledged without a direct review of the decision.[49].

174 In the Amended Notice of Motion, DNG also does not seek to review and set aside the procurement process or tender in terms of which the sixth to thirteenth respondents were appointed as Preferred Bidders.

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[49] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA).

175 I repeat now for the third time in this judgment that, *"DNG has already stated that it seeks no pointed relief against the sixth to tenth respondents and sixth to tenth respondents are interested parties solely as a result of their status". This now includes the eleventh to thirteenth respondents after they were joined as respondents to these proceedings. Further, DNG also states that "the sixth to tenth respondents…are not at the center of this application and their opposition to same is not strictly necessary herein" [Impliedly this includes the eleventh to thirteenth respondents). It also states that the "sixth to seventh respondents are correct- there is no specific 'attack' in respect of the sixth to seventh respondents' appointment.*[50]

176 DNG also asks that the decision to disqualify its bid should be remitted *"for reconsideration upon the consideration of relevant and material factors, as stated in the RFP, in respect of the Tender under Tender number: DMRE/001/2020/21, including but not limited to substituting the fifth respondent and or any of the other Preferred Bidders, whose bids were properly and fairly scored below that of the applicant) with the applicant as a Preferred Bidder"*

177 It is the case of the respondents that the version and evidence as pleaded in DNG's supplementary affidavit and the version of the state respondents and that of the sixth and seventh respondents, that DNG has not made out any case for such order of remittal, in so far as bids of the sixth and seventh respondents are concerned (now including the eleventh to thirteenth respondents).

178 This is because DNG's bid submission did not make it to the comparative evaluation phase of the evaluation process in Part C. DNG's bid submission failed during the Part B assessment because the bid submission did not meet the threshold functional qualification criteria prescribed in Part B. further, the quantum of the megawattage for which DNG bid, compared to the megawatts for which the sixth to thirteenth respondents have been appointed as Preferred Bidders, are incomparable. Furthermore, in their initial answering papers, the state respondents have made it clear that the order of substitution is not likely to make a material change in any

[50] *DNG' RA- caselines p 25-13 para 23.7.*

reconsideration of the bids because the bid prices of DNG's projects were "substantially higher" than those of any of the Preferred Bidders, as they ranged from R2506.92 to R2519.20 per MWH, whilst the bid prices of the Preferred Bidders ranged from R1468 to R1885 per MWH.

179 It is also worth mentioning that in *Millennium Waste Management*,[51] the Court makes it clear that, in a competitive bidding process such as the present, a bidder whose bid, was mistakenly disqualified has no right to the award of a tender after the Court order of remittal and upon a reconsideration of the competing bids, second time around. All that such a bidder has lost, and the Court order of remittal seeks to redress, for the benefits, is a fair consideration or reconsideration of its Bid.[52]

180 It is my considered view that a finding of remittal does not exist in the circumstances of DNG's bid non-compliance with the RFP and the fact part of its evidence has been excluded from being considered. This conclusion also impacts on the allegations against the state respondents and Karpowership against whom no case of remittal has been made.

The interdict sought in paragraphs 6.1 to 6.4 of the Amended Notice of Motion is Inappropriate

181 In Part A of the initial Notice of Motion, DNG sought four separate interim interdicts whose sole purpose, as against the Preferred Bidders, was to prevent them from achieving commercial and financial closures of their bids, and thereafter from executing their energy projects so as to bring on board their energy supply within the relevant time – frames set in their respective bids. Surprisingly, DNG has not explained why this interdict is necessary or appropriate as against all the respondents, notwithstanding that it elected to no longer proceed with a similar set of interdicts of Part A proceedings; not sought to review and set aside the decision of the state respondents to appoint the sixth to thirteenth respondents as Preferred Bidders; and requested an order or remittal (on which the current interdicts are dependent) that is neither appropriate nor just and equitable.

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[51] at paras 24 and 25.
[52] *Millennium Waste Management* supra, para 25.

182 Therefore, this contention by DNG failed because it has failed to meet the requirement of an interim interdict DNG has failed to show; (i) a prima facie right, (ii) evidence of irreparable harm; (iii) that the balance of convenience favours the grant of the relief sought; (iv) evidence of the absence of adequate alternative remedy.

Remedy

183 The respondents are of the view that if this Court makes a finding of invalidity in terms of section 172(1)(a) of the Constitution and declares the decisions to be unlawful, then it may exercise a discretion in terms of section 172(1)(b).

In Bengwenyama *Minerals (Pty) Ltd v General Resources (Pty) Ltd*[53] the Court held:

> "...*when making the choice of a just and equitable remedy in terms of PAJA, to emphasis the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding*".[54]

184 A failure to comply with the requirements of Treasury Regulations does not, in and of itself, render the tender process void. In *CEO of the South African Social Agency N.O v Cash Paymaster Service (Pty) Ltd*, the Supreme Court of Appeal held that when a Court considers the consequences for failing to comply with the requirements of Treasury Regulation 16A 6.4. Considerations of public interest, pragmatism and in particular should inform the exercise of a judicial discretion whether to set aside administrative action or not.[55]

185 In *Millennium Waste Management*, the Supreme Court of Appeal held that determining a just and equitable remedy in terms of section 8 of PAJA "*involves a*

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[53] 2011 (4) SA 113 (CC) at para 84.

[54] *See Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* (1306/18) [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA) (31 January 2020) at para 53 and *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013 at para 25 confirmed the dictum of Bengwenyama *Minerals (Pty) Ltd* at para 84.

[55] CEO of the SA Social Security Agency N.O para 2.

process of striking a balance between the applicant's interests on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself... to the interests of the one side only"[56] The question of what is just and equitable is a question that will always be informed by the circumstances of each case[57]

186 The circumstances of this case are that there is an emergency for Government to supply 2000 megawatts of generation capacity under the RMIPPPP, as an immediate measure intended to alleviate the on-going electricity supply constraints. It also involves huge public interest which and may prejudice the public if the application is granted.

187 Having dismissed almost all the contentions raised by DNG the conclusion is that the DNG's application is to be dismissed. However, the only possible issue on which one could have been obliged to exercise a discretion is the aspect of undue influence. Unfortunately, on this very issue, DNG has failed to present credible evidence implicating the DMRE and its officials. I have already expressed my disgust in the DG and DDG of their continued attendance of the meeting. I am not convinced however that this has affected the bid to the extent that the process is rendered invalid and therefore unlawful. As a consequence there is no reason for this Court to make a finding of invalidity and declare the process unlawful. In my view the provisions of section 172(1)(b) are not applicable in this case.

Conclusion.

188 Based on the reasoning above in this judgment, I am of the considered view that the application must be dismissed with costs on basis that DNG has failed to comply with the requirements of the RFP and also that it filed additional supplementary founding papers without leave of the Court.

Order

189 Consequently, the following order is made:

189.1 The 11th,12th and 13th respondents' are joined as parties to these proceedings.

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[56] Millennium Waste Management para 22.

[57] Millennium Waste Management, supra para 22.

189.2 The supplementary founding papers filed after the postponement of the matter on 9 September 2021, are not considered as evidence.

189.3 The oral argument note filed by DNG on 29 November 2021, is disregarded.

189.4 The application is dismissed with costs. DNG is ordered to pay the costs of the application, such costs to include the costs of two counsel where so employed.

JUDGE T. J RAULINGA

JUDGE OF THE HIGH COURT

Appearances:

Applicant's Counsel	: Adv. M Nowitz
Applicant's Instructing Attorney	: Andre Pienaar & Associates
1st -4th Respondent's Counsels	: Adv. N. Maenentje SC
	: Adv. L. Zikalala
1st-4th Instructing Attorney	: Webber Wentzel Attorneys
5th Respondent's Counsels	: Adv. J. Babamla SC
	: Adv. E. Webber
5th Respondent Instructing Attorney	: Pinsent Masons South Africa INC.
6th -13th Respondent's Counsels	: Adv. V. Maleka SC
	: Adv. A. Bham SC
	: Adv. G. Snyman

	: Adv. J. Mitchell
	: Adv. M. Salukazana
6th-13th Instructing Attorney	: Herbert Smith Freehills
Date of hearing	: 30 November - 02 December 2021
Date of judgment	: 30 January 2022