



**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)\**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE: **17 NOVEMBER 2022**

SIGNATURE: *eiees*

**Case No. 64288/2021**

In the matter between:

**BABCOCK NTUTHUKO ENGINEERING (PTY) LTD**

**Applicant**

And

**ESKOM HOLDINGS SOC LIMITED**

**1<sup>ST</sup> Respondent**

**ACTOM (PTY) LTD**

**2<sup>ND</sup> Respondent**

**STEINMULLER AFRICA (PTY) LTD**

**3<sup>RD</sup> Respondent**

**Coram:** Millar J

**Heard on:** 11 October 2022

**Delivered:** 17 November 2022 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 13H00 on 17 November 2022.

**SUMMARY:** Administrative Law – Mandatory requirements of tender ambiguous-party disqualified for failure to submit a 'certificate' when 'certification' a mandatory precondition for consideration – contradictory and inconsistent use of terms in tender documents without clarification or correction – disqualification despite 'certification' confirmed in covering letter – disqualification irrational and award of tender reviewed and set aside – order suspending invalidity– circumstances require the continued provision of maintenance services pending a new tender.

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## ORDER

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It is ordered: -

- A.1 The decision of the Board of Directors of the first respondent ("**Eskom**") to award tender CORP 4495 for maintenance and outage repair services for boiler pressure parts and/or maintenance and outage repair services for high pressure pipework for fifteen fossil-fired power stations ("**the services**") to the second and third respondents, taken on or about 7 October 2021, is reviewed and set aside.

- A.2 In consequence of the order in paragraph A.1, the contracts concluded between Eskom and the second and third respondents for the provision of the services are declared unlawful and are reviewed and set aside.
- A.3 Eskom is directed to conduct a fresh tender process in respect of the services on the terms described in paragraph A.5 (**"the fresh tender process"**).
- A.4 The order in paragraph A.2 is suspended pending the finalisation of the fresh tender process or the expiry of the time period referred to in paragraph A.5 of this order for the finalisation of the fresh tender process (whichever is earlier), whereafter it will take effect.
- A.5 The fresh tender process is to be conducted and finalised in accordance with the following timetable:
- A.5.1 Eskom is to formulate the terms of the fresh tender, and publish it, within two months of the date of this Court's order.
- A.5.2 Eskom is to determine that the closing date for the tender should be no more than two months from the date on which it is published.
- A.5.3 The tender is to be evaluated within two months of the closing date of the tender.
- A.5.4 Negotiations with the successful tender(s) shall be conducted and concluded within one month of the identification of the successful tenderer(s) as envisaged in paragraph A.5.3 above.
- A.5.5 The award of the contract to the successful tender(s) shall be made within one month of the conclusion of the negotiations described in paragraph A.5.4 above.
- A.5.6 Subject to paragraph A.6 below, the time periods set out above shall not be capable of being extended.

- A.6 Any party may approach the Court on the same papers, amplified as necessary, for an amendment to the timetable in paragraph A.5 above on good cause shown.
- A.7 The first, second and third respondents are ordered to pay the applicants taxed costs of the application jointly and severally, the one paying the others to be absolved.
- A.8 The costs are to be taxed on the scale as between party and party and are to include the costs consequent upon the employment of two counsel.
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## JUDGMENT

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### MILLAR J

1. This is an application in which the applicant ("Babcock") seeks to review and set aside a decision of the first respondent ("Eskom") to award a tender for maintenance and outage repair services for 15 of its fossil fuel powered electricity generation stations ("power stations") to the second ("Actom") and third ("Steinmuller") respondents on 7 October 2021.
2. Babcock, Actom and Steinmuller are engineering concerns that have over a number of years, and in the case of Babcock, for at least 20 years, tendered for and been awarded maintenance and outage repair service contracts at one or more of Eskom's power stations.
3. Prior to the award of the tender, Babcock rendered services at 4 of Eskom's power stations.<sup>1</sup> These services were rendered in terms of a contract that had been entered into on 3 June 2016 and had thereafter been renewed on several occasions.

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<sup>1</sup> The facilities located at Hendrina, Kendal, Lethabo and Matla.



4. The tender in question was issued on 6 August 2018 with an initial closing date of 21 September 2018. When the tender was issued, it was issued with an extension from initial closing date to 24 October 2018.
5. The tender was thereafter on 7 October 2021 awarded to Actom and Steinmuller in terms of which they were to render the maintenance and outage repair services for 7 and 8 of the 15 power stations respectively. Babcock was unsuccessful in its tender bid having been disqualified at an early stage of the process.
6. The 2 issues upon which the review is predicated are:
  - 6.1 firstly, whether the disqualification for non-compliance was unlawful and irrational
  - 6.2 secondly, whether the award of the tender as a “split tender” was unlawful.
7. Eskom is an organ of state and is required, in the issue, consideration of and award of tenders to comply with section 217<sup>2</sup> of the Constitution of the Republic of South Africa.
8. The applicable legislative framework was set out succinctly in *Waco Africa (Pty) Ltd t/a SGB-Cape v Eskom Soc Ltd and Others*<sup>3</sup> by Adams J, as follows:

<sup>2</sup> “(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-

- (a) Categories of preference in the allocation of contracts; and
- (b) The protection of advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.”

<sup>3</sup> The full citation for the case is *Waco Africa (Pty) Limited ta SGB-Cape v Eskom SOC Limited and Others; TMS Group Industrial Services (PTY) Limited v Eskom SOC Limited and Others, Southey Contracting (PTY) Ltd v Eskom SOC Limited and Others* (5798/2021; 290/2022; 3047/2022) [2022] ZAGPJHC 631 (2 September 2022)

[7] *The procurement of goods and services by the state and other public entities is subject to various legal constraints, Section 217(1) of the Constitution requires all organs of state, when they contract for goods or services, to do so 'in accordance with a system which is fair, equitable, transparent, competitive and cost effective'. That is taken up in the Public Finance Management Act, Act 1 of 1999 ('the PFMA'), which provides in s 51(1)(a)(iii) that the accounting authority of a public entity (which includes Eskom) 'must ensure that the public entity.... Has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective'. It has also been held that public procurement constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act, Act 3 of 2000 ('PAJA') and must comply with the provisions of that Act.*

[8] *Section 217 of the Constitution, the Preferential Procurement Policy Framework Act, Act 5 of 2000 ("the Procurement Act") and the Public Finance Management Act, Act 1 of 1999 provide the constitutional and legislative framework within which administrative action may be taken in the procurement process. The lens for judicial review of these actions, as with other administrative action, is found in PAJA. The central focus of this enquiry is not whether the decision was correct, but whether the process is reviewable on the grounds set out in PAJA".*

9. A tender is in effect an invitation to quote for business – whether for the supply of goods or services or both. The invitation to quote is made up of Eskom's Procurement and Supply Chain Management Procedure ("SCM procedure"), the Request for Proposal ("RFP") which includes the Specific Tender Data as well as Eskom's Standard Conditions of Tender ("the Standard Conditions")<sup>4</sup>.

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<sup>4</sup> *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another 2016 (3) SA 1 (SCA) at paragraph 43 where it was held that a "tender invitation, which sets out the evaluation criteria, together with the constitutional and legislative procurement provisions, constitute the legally binding framework within which tenders have to be submitted, evaluated and awarded. There is no room for departure from these provisions." Referring to Allpay paragraph 38 (paragraph 27 and footnote 12 infra)*



10. The SCM procedure sets out in detail the process that is followed in the evaluation of a tender. The process involves 6 stages of evaluation and consideration:
  - 10.1 Stage 1 is an evaluation of the responsiveness criteria - *"This includes the eligibility of the tenderer, pre-qualification criteria, copy received of tender, etc."*
  - 10.2 Stage 2 is the mandatory requirements/gatekeepers - *"These requirements (if any), and the supporting documents required to verify the tenderers compliance should be listed in the enquiry document. A condition should also be added to the enquiry stating that these are "must meet" criteria i.e. they must be met in order to qualify for further evaluation. Tenderers who do not meet all the mandatory criteria will be disqualified."*
  - 10.3 Stage 3 is functionality – *"The need to invite tenders on the basis of functionality as a criterion depends on the nature of the specific goods, works or services taking into account quality, reliability, viability and durability of a service and the tenderers technical capacity and capability to execute a contract."*
  - 10.4 Stage 4 is local production and content – if this is a requirement this must be specified in the tender and *"The declaration certificate for local content must form part of the tender enquiry as part of a mandatory returnable"* – in respect of both designated and non-designated sectors. It provides also that *"If thresholds have not been applied for local production and content, this stage may be removed and the evaluation may commence from the next stage."*
  - 10.5 Stage 5 is price and preference which provides that in regard to price *"The PPPFA prescribes that the lowest acceptable tender will score 80 or 90 points for price"* and in regard to preference *"It must be stated in the enquiry that points will be awarded to a bidder for attaining B-BBEE status."*
  - 10.6 Stage 6 is objective criteria – *"If Eskom intends to apply objective criteria it must stipulate the objective criteria in the enquiry documents with the associated*

*returnables required for purposes of compliance. Functionality and any element of the B-BBEE scorecard may not be used as objective criteria.”*

11. It is the application of the criteria in stages 2, 5 and 6 which are germane to the present proceedings. The 2<sup>nd</sup> criteria are relevant to the disqualification decision and the 5<sup>th</sup> and 6<sup>th</sup> criteria to the award to more than one tenderer. These criteria are implemented/considered sequentially beginning with the first.
12. Was the decision to disqualify Babcock or to award the tender to more than one tenderer, besides the highest scoring tenderer<sup>5</sup> either, ‘*lawful, reasonable and procedurally fair*’.<sup>6</sup> It is the case for Babcock that the decision did not meet these criteria and was impeachable for want of adherence to the provisions of specifically section 6(2)(c)<sup>7</sup> of PAJA.
13. The basis upon which Babcock was disqualified from the tender process was that it had not submitted a “*Mandatory returnable for evaluation*”. The particular item in respect of which it was alleged that it had not made the appropriate submission was item 3.2 - “*Certification to ISO 3834*”.
14. The RFP contained a “*List of Commercial Tender Returnables*” (CTRs) – these were divided into two categories – the first as “*Mandatory returnable for evaluation*” and the second “*Mandatory Returnable for Contract Award*”. In paragraph 1.3 of the RFP, this was further described in the following terms:

*“The tenderer must submit the returnables set out hereunder as part of its tender. (Mandatory returnables are indicated by a tick (✓), and if they are not included by tender deadline, the tenders (sic) will be disqualified from further evaluation).*

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<sup>5</sup> See Section 2(1) of the Procurement Act.

<sup>6</sup> The purpose for which PAJA was enacted which reads in full – “To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996 and to provide for matters incidental thereto.”

<sup>7</sup> ‘*The action was procedurally unfair*’



*Documents preceded by \*\* do not need to be physically submitted to Eskom (either at tender deadline or before contract award, if the tenderer is registered with CSD, has provided a valid registration number as required in **Annexure B** (the tenderer's particulars) and such documents can be verified on CSD."*

15. A consideration of the list of CTRs categorizes various of those returnables as either mandatory for evaluation or mandatory for contract award. These are two separate parts of the process – once the evaluation has taken place, tenderers having met all the requirements then move onto the second part of the process which is for consideration of the award. Having regard to the categorization of the individual items, some specify the requirement that a written document be submitted in each of the two categories.
16. Item 3 of the CTRs deals with technical requirements. There are two technical requirements, both of which are described as *"mandatory returnable for evaluation"* – they are:
  - "3.1     *The tenderer must have experience in the maintenance of fossil fired boiler and high-pressure piping producing > 60MW (in line with the scope above) for a minimum combined period of greater or equals to 36 months.*
  - 3.2     *Certification to ISO 3834"*
17. None of the items contained on the CTRs list are preceded by "\*\*\*" as indicated in paragraph 1.3 and it is ostensibly on this basis that Eskom took the view that the failure to submit an ISO 3834 certificate as a mandatory returnable, disqualified Babcock from consideration in the tender.
18. Although item 3.1 did not require the submission of a specific document to evidence the tenderer's experience, this was provided and set out in a letter by Babcock to Eskom on 24 October 2018 when its tender was submitted. It established its experience by stating in summary that *"Babcock Ntuthuko*

*Engineering has been performing boiler repair and maintenance work for Eskom since 2003 on various Power Stations including Lethabo, Hendrina, Matla and Grootvlei”.*

19. As far as item 3.2 of the CTRs is concerned, in the same letter of 24 October 2018, Babcock stated that *“The company is also certified in terms of ISO 3834 since 2013 / 2014.”*
20. It was contended by Eskom that “Certification” meant “Certificate” and that the failure to submit an ISO 3834 Certificate was failure to submit a mandatory returnable for evaluation. It is clear that on consideration of the various items on the CTR list, that where documents are required these are specified – see for example, item 1.1 which required *“Tenderers should submit at least one original and one copy of every tender document and soft copies”*<sup>8</sup>.
21. Pertinent to the present matter, item 5 which is headed “Quality” requires under 5.1, a *“Certificate issued by a(sic) Approved and Authorized Certification Authority”* and *“Certification Authority is has (sic) Recognized International Accreditation”* and *“Validity (expiry date) of Certificate”*.
22. Thus, within the list of CTRs, the words “Certificate” and “Certification” both appear. On a plain reading of the use of these terms it is clear that they were not intended to be used as synonyms – this much is apparent from paragraph 5.1 of the CTR. The reference to certificate<sup>9</sup> is clearly a reference to a specific document whereas the reference to certification<sup>10</sup> in the CTR is to the body that has the authority to issue a certificate.

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<sup>8</sup> There are a number of further instances for example item 1.4 requires a “letter of intent to form a JV/consortium form”, item 1.11 requires “Failure on the part of the supplier to submit a valid current certificate for purposes of evaluation and scoring by the tender closing deadline will result in disqualification”, item 1.12 requires “Tenderers must, where subcontracting is a pre-qualification requirement, submit proof of signed subcontracting intent agreement”.

<sup>9</sup> The Shorter Oxford English Dictionary, Vol I, Oxford Press 6<sup>th</sup> Edition, 2007 page 375 - used in this context as a noun meaning ‘A document in which a fact is formally certified or attested; esp. one attesting status’

<sup>10</sup> *ibid* – used in this context as a verb meaning ‘The action or an instance of certifying the truth’



23. Properly construed reference to a certificate means reference to the specific document which evidences the certification having been obtained. In the present matter, it is not in dispute that Babcock informed Eskom in its letter submitting its tender that it was indeed possessed of the “certification” referred to in paragraph 3.2 of the CTRs.
24. The tender was submitted on 24 October 2018 and on 27 November 2018, a month after the closing date for the tender, Eskom wrote to Babcock to enquire “Where can we find Certification to ISO 3834 in your submitted tender.”
25. On 29 November 2018, Babcock then wrote to Eskom drawing to their attention to the fact that they had referred to their certification in their letter enclosing the tender but did not appear to have (had not) submitted the certificates in support thereof. The certificates were then all enclosed<sup>11</sup>.
26. Does “Certification to ISO 3834” have the same meaning as providing a “Certificate demonstrating ISO 3834 certification”?
27. In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)*<sup>12</sup>, it was stated:

*“Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.”*

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<sup>11</sup> The certificates which were enclosed reflected their validity from 30 July 2012 up 29 July 2020.

<sup>12</sup> 2014 (1) SA 604 (CC) at paragraph 40



28. To interpret the language used in documents, the test to be applied was set out by the by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>13</sup> as follows:

*“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax the context in which the provision appears the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”*

29. It was argued on behalf of Babcock that Eskom was aware of the fact that it had both certification and the relevant certificates – these having been requirements that it had fulfilled in its successful award of prior tenders. While it is not in dispute that Eskom were indeed in possession of this, to permit such an approach to the submission of a valid tender, would offend “*the demands of equal treatment, transparency and efficiency*” referred to in *Allpay*<sup>14</sup> in that tenderers who had a prior relationship with Eskom would have an advantage over those who did not.
30. However, the argument by Eskom that ‘certificate’ and ‘certification’ are to be read as synonyms and interchangeably in the context of the CTR list and in particular paragraph 3.2 is without merit. To do so would render the requirements set out in paragraph 5.1 of the CTR list redundant, irrational and out of place in keeping with the formulation of the RFP and its purpose. It is for this reason that the

<sup>13</sup> 2012 (4) SA 593 (SCA) at paragraph 18; see also *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) at paragraphs 27-30.

<sup>14</sup> Paragraph 25 supra

interpretation cast upon paragraph 3.2 of the CTR list by Babcock is to be preferred. To construe it in any other way would be irrational and inimical to the RTP and the purpose for which the tender was issued.

31. *"The issues in these matters are to be decided with reference to the laws relating to public procurement and the notion that public procurement is not a mere showering of public largesse on commercial enterprises. It is the acquisition of goods and services for the benefit of the public".*<sup>15</sup>
32. A tender must be clear and unequivocal in the terms in which it is issued so as to ensure that all those who accept the invitation to tender and do so, are able to place before the party issuing the tender, a fair representation of their ability to meet the requirements of the tender.
33. In a process which is intended to be '*fair, equitable, transparent, competitive and cost effective*',<sup>16</sup> there is no place to argue compliance with the tender with reference to documents previously submitted in respect of other tenders. With that being said, a tender must be framed in a manner that is not ambiguous and affords all tenderers an equal opportunity to understand what the requirements of the tender are and to meet those requirements<sup>17</sup>. It is inevitable that a poorly drafted and ambiguous (a least insofar as paragraphs 3 and 5 of the RFP are concerned) tender, such as the one in the present case, would be impeachable.
34. The present matter is distinguishable from the case in *Dr JS Moroka Municipality and Others v Betram (Pty) Ltd and Another*<sup>18</sup> where an original tax clearance certificate was required but a copy was furnished and *WDR Earthmoving Enterprises and Another v Joe Gqabi District Municipality and Others*<sup>19</sup> where the tender required the prior three years audited financial statements to be submitted but only two years were submitted. In both of these cases it was found that the

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<sup>15</sup> Waco supra at paragraph 6

<sup>16</sup> See paragraph 8 supra

<sup>17</sup> See *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 (SCA) at paragraph 13 provided that whatever is done "*may not cause the process to lose the attributes of fairness.*"

<sup>18</sup> [2014] 1 ALL SA 545 (SCA); 2013 JDR 2728 (SCA)

<sup>19</sup> 2018 JDR 1295 (SCA)



failure to comply with the requirements justified disqualification. In both instances the requirements were clear and unequivocal in their terms unlike in the present instance.

35. It follows that if the mandatory returnable tender requirements were ambiguous, Eskom was required at the very least, to have recognized the ambiguity and afforded Babcock and every other tenderer who was disqualified in consequence thereof, an opportunity to comply with what it had intended the requirements to be, particularly given that a failure to submit any of those returnables would at that second stage of the process disqualify any tenderer who did not comply. Its failure to do so, was procedurally unfair as provided for in section 6(2)(e) of PAJA and in consequence, the disqualification of Babcock from consideration in the award of the tender was both unlawful and irrational. For these reasons this ground of review succeeds.
36. The second ground of review was that the tender had been improperly split between Steinmuller and Actom. In view of my finding in regard to the disqualification decision, I do not propose to deal with this ground of review save to say that I am not persuaded that it has any merit. The concession by Babcock that *"It was nevertheless always anticipated, because of the sheer volume of the work, that the scope of the work would be divided amongst at least three bidders"* is to my mind fatal to this ground.
37. It does not behove a tenderer in the position of Babcock to engage in a tender process well knowing the tender was going to be split,<sup>20</sup> and to then after its disqualification for other reasons, attempt to review the award on this basis. It seems to me to have been raised in consequence of a 'belts and braces' approach to the review, a not unreasonable approach given the importance of the matter to all concerned.

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<sup>20</sup> The splitting of a tender amongst more than one successful bidder was found to be permissible – see *South African Container Stevedores (Pty) Ltd v Transnet Port Terminals* 2011 JDR 0357 (KZD) and cited with approval in *Waco supra*.



38. Having found that the decision to disqualify Babcock from the tender was unlawful and irregular, what then is the appropriate remedy? There is a wide discretion conferred upon the Court in terms of Section 8<sup>21</sup> of PAJA as to the remedy that can be granted.
39. Babcock sought initially, when it first challenged its disqualification from the tender, to set aside the award of the tender as a whole and to have the decision to make the split award remitted for reconsideration within 30 days.<sup>22</sup> The order sought in this regard was predicated on the basis that it was only Babcock who had been prejudiced by the disqualification decision.
40. Thereafter, on 4 April 2022 and after the full record had been made available to it, Babcock amended the relief that it sought by seeking an order that the whole of the award of the tender be set aside and in the alternative, that the disqualification of Babcock and the award of the tender to Actom and Steinmuller be set aside and that the decision to award the tender be remitted back to Eskom for reconsideration.
41. Having regard to the finding that the RFP was ambiguous and that it was undisputed that, besides Babcock, other tenderers had been disqualified on the same basis as it had, it would be inappropriate to only set aside the award of the tender and remit it for reconsideration by Eskom. The ambiguity had the effect of disqualifying other tenderers who may or may not have qualified for the award of all or part of the tender. The fact that it was always contemplated by all the parties who are presently before the Court that the tender would in fact have been split, means that any decision which does not accommodate the inclusion of those who were affected in the manner Babcock was, may in itself be unjust.
42. In determining what an appropriate order is in circumstances such as the present matter, the Constitutional Court held in *Bengwenyama Minerals (Pty) Ltd v*

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<sup>21</sup> The Section inter alia empowers a court to set aside the administrative action (section 8(1)(c)) or to make any order that is just and equitable (section 8(2))

<sup>22</sup> This was the relief sought in the original Notice of Motion issued on 23 December 2021.

Genorah Resources (Pty) Ltd (Bengwenyama-yeMaswati Royal Council Intervening)<sup>23</sup>:

*"It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise 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 the fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it."*

43. In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*<sup>24</sup> the Constitutional Court expanded upon this:

*"[32] This corrective principle operates at different levels. First, it must be applied to correct the wrongs that led to the declaration of invalidity in the particular case. This must be done by having due regard to the constitutional principles governing public procurement as well as the more specific purposes of the Agency Act, Second, in the context of public procurement matters generally, priority should be given to the public good. This means that the public interest must be assessed not only in relation to the immediate consequences of invalidity – in this case the setting aside of the contract between SASSA and Cash Paymaster – but also in relation to the effect of the order on future procurement and social-security matters."*

*[33] The primacy of the public interest in procurement and social security matters must also be taken into account when the rights, responsibilities, and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range."*

<sup>23</sup> 2011 (4) SA 113 (CC) at paragraph 84

<sup>24</sup> 2014 (4) SA 179 (CC) at paragraphs 32 – 33



44. The role played by Eskom in sustaining the very fabric and life of the Republic, cannot be overstated. It is a matter of public record that the provision of electricity is constrained. The purpose for which the present tender was awarded was to ensure the continued and uninterrupted operation of Eskom's fleet of coal fired power stations. Babcock, Actom and Steinmuller have and will no doubt continue to play a pivotal role in Eskom's delivery of electricity. For this reason, it would be imprudent to simply set aside the tender and to interrupt the essential services being currently provided by Actom and Steinmuller. Babcock argued that if the tender was to be set aside but both Actom and Steinmuller were to remain in situ pending a new tender process, that they should forfeit any profit they would have earned in consequence. This argument was advanced on the basis that "*neither contracting party should unduly benefit from what has been performed under a contract that no longer exists*".<sup>25</sup>
45. However, both Actom and Steinmuller are commercial enterprises, the viability and profitability of which are essential to their provision of maintenance and other services at the 15 power stations that are serviced between them. For this reason, it is similarly, in my view, imprudent to interfere with the contracts in terms of which those services are currently rendered. In the present matter, the setting aside of the award of the tender is not in consequence of any impropriety in the ordinary sense by either Eskom, Actom or Steinmuller.
46. This tender is to be set aside in consequence of the disqualification of a tenderer because of an ambiguity in the tender document. It was never suggested by any of the parties that the award of the tender was tainted in any way with regards the price ultimately agreed between Eskom, Actom and Steinmuller and for this reason, it can be accepted that the price (and whatever profit margin it includes) is not in and of itself impeachable such that it would warrant the forfeiture of any profit there may be by either Actom or Steinmuller.

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<sup>25</sup> Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd 2022 (5) SA 56 (SCA) at paragraph 39



47. In my view, it is appropriate that besides declaring the award of the tender to be unlawful and invalid, the order setting it aside should be suspended pending the commencement and finalization of a new tender process.
  48. While the process in the present instance where the period between the submission of the tenders on 24 October 2018 and the award of the tender on 7 October 2021, took some 3 years, the present circumstances militate in favour of the interests of all parties that the process should be expedited and commenced and completed within a period of 6 months.
  49. Given the nature of this particular matter it was a wise and reasonable precaution for the respective parties to have briefed two counsel to represent them. While the main dispute was between Babcock and Eskom, and it is my view that the costs ought to follow the result as between them, what of Actom and Steinmuller?
  50. Both did not take a supine approach to the matter and elect to abide the decision of the court. They both made common cause with Eskom in resisting the challenge to the legality of both Eskom's disqualification of Babcock (and others) and the award of the tender to themselves. They are both commercial enterprises which defended their own interests in the matter.
  51. They have benefited from the award of the tender and will, having regard to the order that I intend to make, continue to do so until a new tender process is completed. For this reason and in the exercise of my discretion I am of the view that they should bear the costs of the application together with Eskom.
- A. In the circumstances, it is ordered:

- A.1 The decision of the Board of Directors of the first respondent ("**Eskom**") to award tender CORP 4495 for maintenance and outage repair services for boiler pressure parts and/or maintenance and outage repair services for high pressure pipework for fifteen fossil-fired power stations ("**the services**") to the second and third respondents, taken on or about 7 October 2021, is reviewed and set aside.
- A.2 In consequence of the order in paragraph A.1, the contracts concluded between Eskom and the second and third respondents for the provision of the services are declared unlawful and are reviewed and set aside.
- A.3 Eskom is directed to conduct a fresh tender process in respect of the services on the terms described in paragraph A.5 ("**the fresh tender process**").
- A.4 The order in paragraph A.2 is suspended pending the finalisation of the fresh tender process or the expiry of the time period referred to in paragraph A.5 of this order for the finalisation of the fresh tender process (whichever is earlier), whereafter it will take effect.
- A.5 The fresh tender process is to be conducted and finalised in accordance with the following timetable:
- A.5.1 Eskom is to formulate the terms of the fresh tender, and publish it, within two months of the date of this Court's order.
- A.5.2 Eskom is to determine that the closing date for the tender should be no more than two months from the date on which it is published.
- A.5.3 The tender is to be evaluated within two months of the closing date of the tender.

- A.5.4 Negotiations with the successful tender(s) shall be conducted and concluded within one month of the identification of the successful tenderer(s) as envisaged in paragraph A.5.3 above.
- A.5.5. The award of the contract to the successful tender(s) shall be made within one month of the conclusion of the negotiations described in paragraph A.5.4 above.
- A.5.6 Subject to paragraph A.6 below, the time periods set out above shall not be capable of being extended.
- A.6 Any party may approach the Court on the same papers, amplified as necessary, for an amendment to the timetable in paragraph A.5 above on good cause shown.
- A.7 The first, second and third respondents are ordered to pay the applicants taxed costs of the application jointly and severally, the one paying the others to be absolved.
- A.8 The costs are to be taxed on the scale as between party and party and are to include the costs consequent upon the employment of two counsel.



**A MILLAR  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**



HEARD ON: 11 OCTOBER 2022

JUDGMENT DELIVERED ON: 17 NOVEMBER 2022

**FOR THE APPLICANT:** ADV A COCKRELL SC

ADV A FRIEDMAN

INSTRUCTED BY: BOWMAN GILFILLAN ATTORNEYS

REFERENCE: MS L LUDICK/6212412

**FOR THE FIRST RESPONDENT:** ADV A FRANKLIN SC

ADV P SMITH

INSTRUCTED BY: CHEADLE THOMPSON & HAYSOM INC

REFERENCE: MS K NORVAL/ESK20014

**FOR THE SECOND RESPONDENT:** ADV J BABAMIA SC

ADV K ILES

INSTRUCTED BY: PINSENT MASONS SOUTH AFRICA  
INC

REFERENCE: MR J SMIT

**FOR THE THIRD RESPONDENT:** ADV A BOTHA SC

ADV H MARTIN

INSTRUCTED BY: WERKSMANS ATTORNEYS

REFERENCE: MS J SMIT/STEI32637.12