

SOUTH AFRICA / JUDGMENT

Trencon Construction (Pty) Ltd v Public Investment Corporation SOC Ltd and Others (49930/2020) [2021] ZAGPPHC 768 (2 November 2021) [2021] ZAGPPHC 768

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher

CASE / FILE NUMBER

49930/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED. YES

2/11/2021

Case number: 49930/2020

In the matter between:

TRENCON CONSTRUCTION (PTY) LTD

Applicant

and

PUBLIC INVESTMENT CORPORATION SOC LTD First Respondent

GOVERNMENT EMPLOYEES PENSION FUND Second Respondent

GVK-SIYA ZAMA BUILDING CONTRACTORS

(PTY) LTD

Third Respondent

NEUKIRCHER J

[1] This is an application for review of a tender advertised as “PICPROP 015/10/2019 for the appointment of the Principal Building Contractor for the proposed redevelopment of Ga-Rankuwa Shopping Centre, Pretoria”. The applicant (Trencon), in essence, seeks an order that the tender awarded to the third respondent (GVK) be set aside and that it be awarded to it and in the alternative that the decision be remitted back to the first respondent (PIC) for reconsideration in terms of section 8(1)(c)(i) of the Promotion for Administrative Justice Act[1] (“PAJA”).

[2] Both Mr Chaskalson and Ms Pillay[2] have filed practice notes on behalf of their respective clients and the issues are crystallised as follows:

2.1 whether the GEPF is an organ of State;

2.2 whether the PIC, when it undertakes procurement on behalf of the GEPF for the construction and/or refurbishment of properties on behalf of the GEPF, is obliged to act in accordance with “all laws applicable to the PIC” and to open and record bid prices in public, i.e. whether the decision was a) administrative in nature; and b) exercised or performed pursuant to a public power or function;

2.3 if so, whether the grounds of review are sustainable;

2.4 if so, whether substitution is a just and equitable remedy;

2.5 in the event that the finding is that the impugned decision is a private law one and not subject to PAJA and/or the rule of law:

2.5.1 whether there is a contractual relationship between the applicant and the GEPF;

2.5.2 if so, was there a breach of the agreement;

2.5.3 if so, is an order of specific performance appropriate.[3]

[3] Prayer 8 of the original Notice of Motion – in which a declaration is sought that the directors of the PIC breached their fiduciary duties under section 76 of the Companies Act[4] in appointing GVK – was abandoned by Trencon.[5]

The issues

[4] The first issue is whether or not to grant condonation for the late filing of the applicant’s replying affidavit.

The initial application

[5] The application was originally brought as one of urgency and set down for hearing on 17 November 2020. The respondents[6] initially filed a very short affidavit on 12 November 2020 in which they - in the main - took three points:

5.1 the lack of urgency;

5.2 that Trencon has failed to join all the bidders who passed through to the final stage of the bid evaluation process[7];

5.3 the fact that the papers are voluminous and the issues too complex to adjudicate the matter on such short notice.

[6] As a result, the matter was removed from the roll on 13 November 2020 and referred to the Acting Deputy Judge President (“the ADJP”) for a special allocation.

[7] The respondents’ answering affidavit was filed on 2 December 2020 and the replying affidavit was dated 18 January 2021- and was filed on Caselines on 21 January 2021 in circumstances where the parties had agreed that Trencon would file its replying affidavit on 15 January 2021[8]. The reply was served one court day late and filed on Caselines four days later (on 21 January 2021).

[8] The respondents’ position is that there is no explanation - or reasonable explanation - for the late filing of the replying affidavit. The respondents’ position is also that the replying affidavit contains new matter to which they have not had an opportunity to respond.

[9] I will deal with each ground separately.

The replying affidavit

The late filing

[10] The directive sent out to the parties by the ADJP provides the following timelines:

10.1 the answering affidavit was to be filed on/before 1 December 2020;

10.2 the replying affidavit was to be filed by 18 December 2020;

10.3 the applicant’s heads of argument was to be filed by 12 February 2021;

10.4 the respondents’ heads was to be filed by 19 February 2021.

[11] Trencon has set out the reasons it seeks condonation in the replying affidavit. In mentioning this, I must emphasize that the replying affidavit:

11.1 was served one day past the date it stipulated in its letter of 17 December 2020 and one month after the ADJP’s direction;

11.2 the respondents did not file a Rule 30 notice;

11.3 the respondents did not file any formal notice objecting to the late filing of the affidavit;

11.4 the respondents have neither filed a supplementary answering affidavit, nor a duplicating affidavit nor sought a postponement and permission to file a supplementary answering affidavit;

11.5 the “flesh and bones” of the objection has been set out in the respondents’ heads of argument.

[12] In essence, the reason the replying affidavit was filed late:

12.1. in terms of the Directive issued by the ADJP on 25 November 2020 the applicant was to have filed its reply on/or before 18 December 2020;

12.2 on 17 December 2020 the applicant’s attorney wrote to the respondents’ attorney and explained the following:

12.2.1 that when preparing

Trencon’s affidavit their counsel came across pleadings in a matter of PIC v AYO [9] (the AYO litigation) in which the PIC stated that it was an organ of state as defined in section 239 of the Constitution and subject to the PFMA;

12.2.2 in terms the Investment Management Agreement (IMA) concluded between it and the GEPF, the PIC manages the GEPF portfolio of investments, that the GEPF appointed the PIC as its agent in managing its portfolio of investment, including the authority to conclude transactions on behalf of the GEPF and authorise any action on behalf of the GEPF and in so doing is obliged to comply with, inter alia, the PFMA, PIC Act and the GEP Law;

12.2.3 that the PIC’s

position in the AYO litigation is directly contrary to its assertions in this matter;

12.2.4 that those pleadings were drafted by Adv Marcus SC who also acts for Trencon in this application. As a result, Adv Marcus SC cannot argue two diametrically opposing positions on behalf of the same client;

12.2.5 that Trencon sought to brief an alternative senior counsel and was only able to secure Adv M Chaskalson SC’s services on 16 December 2020. He still had to familiarise himself with the papers and would only be able to settle the replying affidavit in the new year;

12.2.6 Trencon then sought an indulgence to file its reply on or before 15 January 2021.

[13] In the replying affidavit, the applicant states that “Chaskalson SC accepted the brief in the middle of December and was able to familiarize himself with the papers after returning from the end-of-year break in January”.

[14] Trencon also points out that the respondents’ attorneys indicated that the delayed delivery of the replying affidavit “prejudices our clients” but fails to set out what prejudice is, or will be, suffered - this despite an invitation to do so.

[15] As far as why Adv Marcus SC needed to be replaced, it is the respondents' position that Trencon knew as far back as 12 November 2020, when they filed a short affidavit in response to the matter being set down in the urgent court that Adv Marcus SC would need to be replaced. In that affidavit, the following is stated:

"12.3 Trencon has failed to make out a case for the declaratory relief sought, in the context of the present matter the GEPP is not exercising public power or performing a public function. The PIC related declaratory relief is ill-conceived..."

[16] Whilst this may be so, this cryptic reference to what eventually became a fully-fleshed explanation in the answering affidavit, and a pointed argument before me, was only properly formulated in the answering affidavit which was filed on 1 December 2020.

[17] In my view, an applicant is only obliged to consider a response to an answering affidavit where the respondent indicates what the case is that must be met. Whilst one usually remarks on this in the context of an answer to a deficient case made out in a founding affidavit, it can be no less true in the context of what reply (if any) should be filed to an answering affidavit which fails to sufficiently set out a defence.

[18] The word "sufficiently" in the context of an affidavit is vastly different to that of a pleading:

"In motion proceedings the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein[10] and the issues and averments in support of the parties' cases should appear clearly thereon..."[11]

Whilst the context of this case was that a party "cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained", equally so must an affidavit contain sufficient particularity to enable a party to respond thereto.

[19] In *Hano Trading CC v J R 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at [10] the court stated:

"...Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. It is accepted that the affidavits are limited to three sets. It follows thus that great care must be taken to fully set out the case of a party on whose behalf an affidavit is filed."

[20] In my view, paragraph 12.3[12] does no more than provide a cursory view of one of the respondents' defences, which is in no way set out with sufficient clarity to elicit a specific response.

[21] Thus, in my view, it was necessary for Mr Marcus to seriously consider his position, vis-à-vis the stance he took in the Aydo matter. From the letter dated 17 December 2020 it is clear that Mr Marcus' untenable position had been anticipated as Mr Chaskalson had, on 16 December agreed to take over. Given that the main answering affidavit was filed on 1 December 2020 and Mr Chaskalson briefed approximately two weeks later it is unsurprising that the

replying affidavit would be late and it was only filed on 18 January 2021 – this especially so given that, by then, the papers had swelled to over 830 pagers and the Rule 53 record constitutes another ± 1370 pages.

[22] The answering affidavit was filed on 1 December 2020. The replying affidavit was filed on 18 January 2021, the applicant's heads on 10 February 2021 (i.e. two days early) and the respondents' heads on 19 February 2021.

[23] Mr Chaskalson makes the submission that there has been no prejudice to the respondents because of the lateness of the affidavit and I agree: the parties' representatives were able to file well-argued and comprehensive heads timeously and it is clear that there was no prejudice to the respondents.

[24] I am also of the view that the lateness of the filing of the replying affidavit has been sufficiently explained and the late filing is therefore condoned.

New matter

[25] The question then is whether there is "new matter" that is contained in the replying affidavit which should not be allowed.

[26] The complaint is formulated thus in the respondents' heads of argument:

"16. ... Trencon is precluded from relying on the new basis of the cause of action. Trencon failed to "explicitly" set out any averment as to why it contended that the decision to invite bidders to the next phase –

which is certainly not a final decision or one that caused adverse consequences for Trencon – amounted to administrative action. Trencon only sought to introduce the substance for this submission in the replying affidavit and the heads of argument. The PIC has never had an opportunity to consider and answer these facts in the context in which the argument is now made. It is prejudicial and impermissible."

[27] Mr Chaskalson's argues that the "new matter" is specifically linked to the respondents' abject failure to provide reasons for the decision it took to exclude Trencon from the final phase of the evaluation retrospectively. The record – which was filed on 23 October 2020 – also completely fails to provide any reasons for the decision. The first time that the respondents provided any "reasons" for Trencon's disqualification was in their answering affidavit, and it was then required of the applicant to respond to

those. Of course, had the reasons been provided sooner, the applicant could have responded to them in the supplementary affidavit

filed on 5 November 2020. Thus it would appear that any "new matter" was elicited by the respondents and constitutes a response to the allegations in the answering affidavit.

[28] The respondents could also have sought an opportunity to file a further affidavit – they chose not to do so.

[29] In my view there is therefore no merit in the objection and it is dismissed.

The point in limine

[30] The respondents have taken the point that Trencon's remedy affects the other bidders who passed the functionality phase of the evaluation process. They allege that, over and above Trencon and GVK, Grinaker LTA Construction and Development Ltd and Concor Construction (Pty) Ltd have a direct and substantial interest in the outcome of the application and the failure to join them is a material non-joinder.

[31] In reply to this, Trencon has stated that neither Grinaker nor Concor have a direct and substantial interest in the outcome of the application as this is primarily a matter for legal argument[13]. However, as a pre-emption of this point, Trencon's attorney contacted both Grinaker and Concor telephonically and by email. Both bidders were advised of the application and were provided with copies of the founding and supplementary affidavit. In this regard, the email sent to these two bidders[14] is quite detailed and refers to both these affidavits.

[32] On 11 January 2021 Grinaker LTA responded and informed Trencon that "we confirm that we are aware of the application and have no interest in the outcome thereof and do not require to be joined as a party to the application".

[33] The conversation between Trencon's attorney and Christo Schoeman of Concor is recorded in an email dated 12 January 2021 in which it is confirmed that Concor does not wish to be joined to this litigation.

[34] It is the respondents' position that this is simply not good enough and "a letter informing a party of litigation is not a substitute for formally joining the party". The respondents also question the authority of the employees who notified Trencon that those companies did not intend to join these proceedings.

[35] In my view both companies have had clear notice of the case Trencon has brought and the grounds upon which its case is based. It was unnecessary to provide them with the answering affidavit as the issue is whether they wish to join or oppose the suit on the basis alleged in the initiating papers.

[36] Furthermore, both Grinaker LTA and Concor had approximately two months to decide whether or not to join the proceedings – they chose not to.

[37] In my view, the point is not a good one and it is dismissed.

The issues to be adjudicated

[38] The parties in their respective practice notes have defined the issues to be adjudicated in para 2 supra.

[39] It is in the context of these issues that the facts of this matter are relevant.

The facts

[40] Trencon is a 100% black owned company which conducts business as a building and civil engineering contractor. It has been issued with a 9GB and 9CE Construction Industry Development Board (CIDB) rating in terms of the CIDB Act[15], which permits Trencon to tender for and be awarded building construction contracts in excess of R200 million.

The bid

[41] During November 2019 the PIC, acting on behalf of the GEPPF, published a request for bid no PICPROP015/10/2019. This was in essence, an invitation to pre-qualify for the proposed Ga-Rankuwa City Project of the Ga-Rankuwa Mall in Pretoria. The project consisted of an extension of approximately 22 000m² and a refurbishment of the existing 37 000m². Upon completion, the re-development of Ga-Rankuwa City would yield 54 723m². The anticipated start date of the project was 27 May 2020 and completion date 24 June 2022.

[42] Bidders were required to undergo a pre-qualification process (Pre-Qualification bid) which would result in shortlisted potential contractors, who would then receive a full tender document which was called the “Main Contractor Tender Document” (“the Main Tender Document”). The closing date for submissions was 2 December 2016.

[43] Amongst other requirements, bidders were required to be black owned and had to have a minimum B-BBEE Level 1 up to Level 4 status.

[44] According to the invitation, the bid documents contained a document checklist setting out all the requirements to be included along with a Pre-Qualification Questionnaire (“the Questionnaire”). Questionnaire responses would be “evaluated in accordance with PIC’s governance procedures”. It states: “PIC intend that those who have adequately demonstrated that they have sufficient financial economic, technical capacity, experience and ability to execute the project, be included in the tender process”.

[45] Importantly, the document states “(c)ompletion of this questionnaire does not guarantee that PIC will shortlist a Contractor for the tender stage”.

[46] The scope of works was detailed as follows:

“...sections of new build, extension and refurbishment. Considering that all construction activity will take place in a live environment, key consideration is taken regarding restricted areas, circulation routes, access points and construction laydown areas. As such, the established programme for this contract employs a phased approach to the works with the possibility of overlapping and concurrent work. Temporary relocation of tenants and restricted trading time will be considered while the primary objective remains the successful delivery of the project...”

[47] In addition to the criteria set out in para 43 supra the PIC required bidders to detail:

47.1 their project experience. In this regard bidders were requested to:

47.1.1 provide the PIC with a list of previous projects completed for PIC;

47.1.2 provide evidence of their company's capability of carrying out works or services, by way of reference to completed or live projects not older than five years and R300 million and above; and

47.1.3 the proposed team structure, with their Curriculum Vitae's and qualifications in respect of which it was expected of them to demonstrate transformation on the resources allocated to certain key personnel.

47.2 how they would manage the development and management of the local community.

[48] For purposes of the tender the bidders were required to allocate 30% of the contract value (as awarded) to local suppliers and contractors and all established contractors were required to partner with emerging local enterprises for developmental purposes. The bidder was required to prepare and submit a detailed Local Participation plan indicating how the minimum 30% target will be achieved based on their own practice experience. In particular, the invitation states "(c)onsideration should also be given towards contributions that promote sustainable income streams for local communities by creating long-term business opportunities and transferring appropriate skills".

[49] The project would be carried out in three phases in order to accommodate the fact that building activity would take place in a live environment.

[50] Similarly, the Pre-Qualification round would also take place in three phases:

50.1 Phase 1: compliance with administrative requirements;

50.2 Phase 2: technical competency evaluation;

50.3 B-BBEE.

[51] In the event that any bidder failed to comply with the requirements, or failed to meet the administrative requirements, it would be disqualified.

[52] Companies were required to score a minimum of 70/100 in respect of functionality in order to proceed to the next round and the weighting of each criteria is also set out in the invitation:

52.1 Company experience

20

52.2 Technical and project management team

20

52.3 Methodology

25

52.4 Programme of works (including a timeline

of deliverables and milestones)

20

52.5 Local participation[16]

15

- [53] Companies that scored 70% and above during the functionality assessment would then be shortlisted and provided with a bill of quantities (“BoQ”) which was then the final stage of the assessment.
- [54] A non-compulsory briefing session was held on 8 November 2019 and bids closed for the pre-qualification process on 2 December 2019.
- [55] The pre-qualification process saw four companies[17] shortlisted. They were given the bill of quantities on 26 February 2020 which had to be submitted by the closing date of 23 March 2020.
- [56] Given that this was the final stage of the tender process, the tender document states that the final stage and phase three bids would be evaluated on price and B-BBEE and that the tenderer who scored the highest points will be awarded the tender.
- [57] It is common cause that:
- 57.1 all four bidders submitted their BOQ in time and that the names and bid amounts of the other bidders were not read out on the closing date;
- 57.2 Trencon submitted the lowest bid, followed by GVK, then Grinaker and lastly, Concor.
- 57.3 Trencon received the highest points for B-BBEE[18] followed by GVK[19], then Grinaker[20] and lastly, Concor[21].
- [58] It is also common cause that on 13 July 2020, after Trencon had submitted its BOQ and been scored, the PIC invited Trencon to a meeting. This invitation was titled “Re: Clarification meeting – COVID-19 Ga-Rankuwa Main Contractor” and was to be held on 15 July 2020.
- [59] Clause 1.10 of the bid document for phase three makes provision for the meeting. It provides that:

“During the period when Tenders are open, and as soon as practicable after the closing date of the Tender, the Employer may require the Tenderer to attend a meeting in order to clarify matters relating to the Tender.

The Employer may ask any Tenderer to clarify any aspect of his Tender, but the Tenderer will not be permitted to alter the sum stated in the Tender after Tenders have been opened.

The Employer may ask any Tenderer to provide evidence that his financial, labour and other resources are adequate for the requirements of the Contract.

All written information submitted by the Tenderer together with and in support of his Tender, shall be considered to form the basis

on which the Tender has been prepared and submitted.”

[60] Trencon complains that:

60.1 the PIC did not inform Trencon that this initial stage was re-opened for consideration; and

60.2 subsequent to this clarification meeting Trencon’s functionality score was altered in such a way that it was retrospectively disqualified from the phase three bid process.

[61] On 25 August 2020 Trencon was notified that its bid was unsuccessful.

[62] In correspondence to the PIC during August and September 2020, Trencon sought written reasons for the decision and the details of the successful bidder – that was met with a deafening silence.

[63] It was only when the record was provided[22] for purposes of the review proceedings that Trencon realised that its functionality scoring had been altered and was reduced from 73% to 61% i.e. below the functionality threshold of 70%.

[64] It is also common cause on the papers that GVK was the second highest scoring bidder and that, as Trencon’s functionality score was reduced, it became the highest scoring bidder and was awarded the bid.

[65] However, Trencon argues that what is absent from the record are any reasons explaining the basis of the altered functionality score. The PIC’s only explanation for this is contained, for the first time, in its answering affidavit. In fact, what is apparent is that the Bid Evaluation Committee (BEC) noted that that Trencon had “not on its own completed any refurbishments of a similar nature to the project in the previous three years and had undertaken only new building projects. The Ga-Rankuwa Shopping Centre is a 90% refurbishment of an existing facility, and the inexperience

demonstrated by Trencon in this respect was concerning”.

[66] Before one can assess whether or not the PIC’s actions were indeed irregular and irrational, Trencon needs to pass certain hurdles and, to start with, it must show that the GEPP is an organ of state and, if so,

whether the decision was a) administrative in nature; and b) exercised

or performed pursuant to a public power or function.

Trencon's argument

[67] An “organ of state” is defined in section 239 of the Constitution as follows:

“In the Constitution, unless the context indicates otherwise-

“organ of state” means-

- (a) any department of state or administration in the national, provincial or local
 - (b) any other functionary or institution sphere of government; or
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation,
- but does not include a court or a judicial officer”

[68] In furtherance of its argument that the GEPP is an organ of state, Trencon argues that the GEPP is Africa's largest pension fund, the single largest investor in the Johannesburg Stock Exchange and exists to provide pension and related benefits to what it describes as “public” employees and their dependents, which means that it is performing a public function[23].

[69] It argues that as:

69.1 50% of the Board is made up of employee representatives (that it terms “public employees”)

69.2 the Board acts “in consultation with” the Minister of Finance (“the Minister”) in determining the investment policy of the Fund – which requires that there “is agreement between them” – thus the Minister has control over the GEPP's investment policy;

69.3 the Board is responsible for making Rules regarding the administration of the Fund and these are binding

on Government, the Fund, its members and pensioners and their beneficiaries as well as any other person who has a claim against the Fund; and

69.4 Government is ultimately responsible for meeting the obligations of the Fund;

all these factors point to the fact that the GEPP is an organ of state under section 239 of the Constitution.

[70] Thus, says Trencon, as the power exercised by the GEPP is a public power it constitutes an administrative action which means that it must be exercised in terms of section 33[24] and section 217[25] of the Constitution and is subject to review in terms of PAJA.

[71] It argues that this view is supported by the stance that the respondents have adopted in the AYO litigation. In this, the PIC and GEPP are respectively first and second plaintiffs. In the Particulars of Claim the following is pleaded:

“1. The first plaintiff is the Public Investment Corporation SOC Limited (“PIC”).

The PIC:

1.1 is a corporation with separate juristic personality established in terms of section 2 of the Public Investment Corporation Act, 23 of 2004 (“PIC Act”), duly registered in accordance with the Companies Act, 71 of 2008 (“the Companies Act”) as a state-owned company;

1.2 is an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996

(“Constitution”);

1.3 is subject to and obliged to comply with the Public Finance Management Act, 1 of 1999 (“PFMA”)

and is listed as a public entity under Schedule 3 of the PFMA;

1.4 carries on business as a financial services provider and in particular as an asset manager in terms of

the Financial Advisory and Intermediary Services Act, 37 of 2002 (“FAIS”)...”

and it states that the PIC “acted as agent for the GEPPF” in the subscription of shares and GEPPF would be the beneficiary owner of the shares even though registered in the name of the PIC.

[72] Paragraph 36 of the Particulars of Claim states:

“36. On behalf of the GEPPF, and in terms of a written Investment Management Agreement concluded between the PIC and the GEPPF in or about 2007 (“the Investment Agreement”), the PIC manages the GEPPF’s portfolio of investments, which are owned by the GEPPF and have been assigned by the GEPPF to be managed by the PIC as deposits, as defined in section 1 of the PIC Act. The Investment Management Agreement was concluded on or about 12 June 2007.

37. In terms of the Investment Agreement and the GEPPF Rules:

37.1 the GEPPF has appointed the PIC as its agent and granted it authority to represent the GEPPF in managing its portfolio

of investments. Including the authority to conclude transactions on behalf of the GEPPF and to authorise any action on behalf of the GEPPF; and

37.2 it is recorded that the PIC is obliged to comply with the FIS Act and its regulations, the Securities Services Act, 36 of 2004 (repealed and replaced by the Financial Markets Act, 19 of 2012), the Financial Institutions (Protection of Funds) Act, 28 of 2001, the PFMA, the PIC act, the GEP Law.”

- [73] In the Ayo litigation, the PIC – acting as agent on behalf of the GEPF – purchased a 29% stake in Ayo. The PIC now seeks to undo that decision. Trencon argues that the decision at stake in Ayo is clearly an “investment decision” as opposed to the “pure procurement decision” which it seeks to review and set aside in these proceedings. Trencon argues that PIC’s stance in this matter is directly contrary to what is argued by PIC in Ayo.
- [74] It also argues that the GEPF considers itself to be an organ of state and has published a manual in terms of the Promotion of Access to Information Act[26] (“PAIA”) in which it states that the manual is prepared in accordance with section 14 of PAIA which “prescribes that a Public Body must provide details of records held by such Body so that any request for information may be accommodated”.
- [75] That same manual also sets out the records that are available in terms of PAIA. All of these relate to the GEPF in respect of pension benefits, claims etc. – all relate only to the GEPF as regards its obligations towards its members. None of the records regarding its relationship with the PIC are listed, nor any with respect to its investments or funding.
- [76] Trencon argues that, even if it is found that the decisions do not qualify as administrative action under PAJA, they are subject to challenge under the principle of legality which is an incident of the rule of law.[27]

The Respondents’ argument

- [77] It is the respondents’ case that the remedy sought by Trencon is incompetent as the decision to appoint GVK is not an “administrative action” as the GEPF is not an organ of state. A declarator that the GEPF is an organ of state, in terms of section 239(b)(ii) of the Constitution would create a precedent which would be absolute and apply beyond the narrow dispute before this court.[28]
- [78] The respondents argue that the test of whether an entity is an organ of state is twofold:
- 78.1 firstly, there is an enquiry of whether the power or function is a public one; and
- 78.2 secondly, whether it is authorised by the Constitution or legislation[29].
- [79] Whilst the respondents concede that the GEPF is established and empowered in terms of legislation, it argues that the GEPF does not exercise any powers or perform any functions under the PFMA, Treasury Regulations or the PPPFA.
- [80] Thus, the central issue is whether the exercise of powers or the performance of functions under the empowering stature are public in nature.
- [81] In deciding this issue it argues that four main criteria have been crystallised in our jurisprudence[30]. These, in essence are:
- 81.1 that it is not the identity of the functionary that is decisive but rather the test focuses on the nature of the function being performed;[31]

81.2 whether the entity is under the control of Government[32] or whether the entity is performing what is traditionally a government function despite being independent;[33]

81.3 what the source of the power is; and

81.4 whether the functionary owes a duty of accountability to the public when exercising the power.[34]

[82] In answering these criteria, the respondents argue that the true question is: what is the task of the GEPPF? It argues that at its core, its function is a domestic function and not a public one.[35]

[83] The framework upon which the respondents' argument rests is comprehensively explained in their answering affidavit. In that they set out the core functions and responsibilities of the PIC and GEPPF and explain the relationship between the two.

The GEPPF

[84] The GEPPF was established in 1996[36] in order to manage pensions and related benefits on behalf of qualifying government employees of South Africa. It is the

largest pension fund in South Africa and one of the largest in Africa and the world. Its current benefit structure offers members withdrawal benefits, retirement benefits, ill-health or disability benefits and death benefits. It is also the single largest investor in the Johannesburg Stock Exchange ("JSE").

[85] The GEPPF is managed by a Board of Trustees[37]. According to section 6(7) of the GEPPF Act, the Board acting in consultation with the Minister[38], determines the investment policy of the Fund. The administration and investment activities of the GEPPF has been outsourced to the Government Pensions Administration Agency ("the GPAA") [39] and the PIC respectively. The GPAA carries out the day-to-day administration of the fund, while the PIC invests funds on its behalf.

[86] The GEPPF is not listed as a public entity in the PFMA and, so the respondents argue, it is:

86.1 not subject to the PFMA and Regulations, including the Treasury Regulations;

86.2 it is not an organ of state for purposes of section 239 of the Constitution;

86.3 it is not subject to the PPPFA in respect of its investment decisions.

[87] It is the respondents' position that the decision to appoint GVK was not

subject to the Preferential Procurement Policy Framework Act[40] ("the PPPFA") and its regulations because the PIC and GEPPF do not meet the definition of an "organ of state" for purposes of investment decisions. Their view is that the PPPFA and its regulations do not apply to the GEPPF and the PIC when the latter is acting as the GEPPF's agent.

[88] In this, the GEPPF states that the above decision is “sensible and deliberate” as “[t]he financial model of the GEPPF – which includes investing the funds of its members – would be hamstrung and rendered

ineffective if it was required to obey laws pertaining to public procurement. Investment decisions cannot be subject to the

constraints imposed on public procurement. For example, the GEPPF does not have to seek approval or go through a competitive

bidding process when it acquires shares on the JSE”.

[89] Insofar as its investments are concerned, the GEPPF has an Investment Commission which is chaired by the GEPPF’s Chairperson and “has a management team dedicated to the execution of the Board’s responsibility to manage the Fund”.

[90] The GEPPF does have a Supply Chain Management (“SCM”) Policy but this does not form part of the IMA with the PIC – it pertains to the GEPPF internal procurement decisions[41] and this policy is not law as the GEPPF is not subject to the PFMA and its regulations and the GEPPF SCM policy was not created in terms of those laws. The SCM policy is an internal document.

[91] The respondents also argue that Trencon’s argument that the PIC has to comply with “all laws applicable to the PIC” when it administers the GEPPF’s funds is misplaced: different rules apply based on whether the PIC is handling “corporate funds” or “assets under management”. The PFMA and PPPFA apply to the former but not the latter.

[92] The GEPPF Board of Trustees (the Board) has elected voluntarily to incorporate sustainability into its investment policy, and this forms part of the PIC’s mandate. The GEPPF’s Development Investment Policy Statement demonstrate investments that deliver both financial and social returns. The GEPPF allocated 5% of the total portfolio for developmental investments. Through this the GEPPF plays an important role in addressing many of the pressing economic, social and environmental challenges such as growth, unemployment and inequality. Some of the important principles recognised are:

92.1 that investment capital should be put to use for the pursuit of financial and social returns;

92.2 that sound investment can be combined with socially beneficial outcomes;

92.3 that good financial returns for members and pensioners can be made while helping to make South Africa more competitive, reducing social backlogs, making the economy more sustainable, creating jobs and supporting transformation;

92.4 that development investments provide large-scale and long-term investment opportunities which are well suited to the needs of the GEPPF as a large investor with long-term liabilities.

92.5 that development investment enhances the sustainability of returns in the long-term, which is in the long-term interests of the GEPPF’s members and pensioners and their families.

[93] The respondents argue that the GEPF does not exercise a public power or perform a public function when it manages the investment of the pension funds it holds in trust on behalf of its members:

93.1 the GEPF does not own or invest public money. Its assets belong to its members who are private

citizens (albeit State employees). The State has no control over the funds that are invested and managed nor does it fund or supplement the Fund;

93.2 the fact that the government and public-at-large has an interest in the good governance of the GEPF, that public interest does not equate to a public function or a public power;[42]

93.3 the government does not control the GEPF and the Board is solely required to act in the interests of its members, all of whom are private individuals;

93.4 the fact that the GEPF is created and regulated by legislation is of no moment as the PFMA does not list it as a public entity and the GEP Law prescribes its own processes for how its investment policy is developed, implemented and monitored. The fact that the only reason that the PFMA applies to the GEPF is because it has voluntarily chosen to incorporate some of the principles of the PFMA, Treasury Regulations and other laws into its management policies and its contractual relationships with financial service providers and this include the PPPFA;

93.5 the GEPF does not owe a duty to the public, as the relationship between government and its employees is an employer-employee relationship and governed by contract. It is therefore not subject to administrative law processes and principles;[43]

93.6 this being so, the GEPF has no general duty to the public – its sole duty is to its members and pensioners;

93.7 the fact that government guarantees the commitments of the GEPF is also of no great moment: the government

has a general interest in the good governance of the GEPF, has the authority to appoint trustees and the Minister has the right to participate in the creation of the investment policy. In exchange (for what the respondents term as “its limited

participation in the administration of the GEPF (which would ordinarily be a private matter))” the government has opted to

guarantee the GEPF’s commitments. However, say the respondents, this does not transform the GEPF into an entity exercising a public power or performing a public function.

[94] In sum, the respondents argue that the GEPF is not accountable to persons with whom it has no relationship, does not manage public money, is not controlled by Government, and therefore does not perform a public function.

The PIC

[95] The PIC is an entity listed under Schedule 3B of the Public Finance Management Act[44] (“the PFMA”). The PIC is a state-owned asset management company that invests across various sectors of the economy whilst most of its clients are public sector entities[45], it does provide financial services to private sector clients and it invests funds on behalf of its clients based on the client’s

investment mandate.

[96] The respondents concede in the answering affidavit that as an organ of state, the PIC is bound by other legislation relating to procurement such as the PFMA. However, they state that “when the PIC procures on behalf of its clients (who are not governed by the PFMA and are not organs of state as listed under Schedule 3 of the PFMA) the provisions of the procurement legislation listed above do not apply”. Accordingly, argue the respondents, any procurement decisions undertaken by the PPIC on behalf of the GEPPF are domestic in nature.

[97] As a financial services provider the PIC is regulated with the Financial Sector Conduct Authority (FSCA) and its investment activities are governed by the Financial Advisory and Intermediary Services Act.[46] PIC is registered with the FSCA[47] and it must comply with the provisions of the FAIS Act when providing financial services on behalf of its clients.

[98] PIC also states that it is regulated by the Public Investment Corporation Act[48] (“the PIC Act”), the PFMA, the Companies Act and the Prevention of Organised Crime Act[49]. It also adheres to the provisions of the Financial Intelligence Centre Amendment Act[50].

[99] The PIC concedes that it is a state owned company and states that it is “a going concern that is financially strong and stable” and that it “contribute(s) to the fiscus”.[51]

[100] The PIC manages two sets of funds:

100.1 so-called “corporate funds” which belong to the PIC in the form of remuneration for the services it performs on behalf of a client[52] which are public funds. PIC concedes that the expenditure and investments of these funds is subject to the PFMA and Treasury

Regulations;

100.2 so-called “assets under management” which are the funds which the PIC holds in trust, and which it invests and manages on behalf of its clients in terms of the client’s

mandate. As these funds do not belong to the PIC, its view is that these funds are not public funds and in managing these, the PIC is not bound by the PFMA, Treasury Regulations and the PPPFA[53], but it is bound to comply with statutory requirements applicable to all financial service providers.

[101] According to the PIC, it acts as an agent when performing functions on behalf of its clients. The PIC's stance is that they accordingly legally bind their clients with their actions in a structure governed by the law of agency, which requires that the agent always acts in the best interests of the principal and within the scope of the power granted by the principal.

[102] In essence, the PIC states that, as the GEPP funds are "assets under management"[54], the PFMA and Treasury Regulations do not apply unless their provisions are voluntarily incorporated into the contract agreement

and, even then, only apply inter se.

The relationship between the PIC and the GEPP

[103] The IMA governs the relationship between the PIC and the GEPP and has done so since 2007.[55]

[104] The respondents do not attach the IMA to their papers as they state that it contains confidential and sensitive commercial information, and they "risk grave financial harm should the contents of the agreement be disclosed".[56]

[105] This notwithstanding, the respondents allege that:

105.1 "in a nutshell, in terms of the IMA, the GEPP appoints the PIC as its financial agent with the authority to invest and manage its assets"; and

105.2 the relationship between the GEPP and the PIC is one of agency;

105.3 the IMA has no bearing on these proceedings as Trencon does not need the IMA to prosecute its claims against the GEPP – if the PIC has breached the terms of the IMA, then the GEPP will have recourse against the PIC based on the IMA. As against Trencon, the GEPP is bound by the conduct and representations made by the PIC on its behalf;

105.4 it is not disputed in these proceedings that the PIC was acting as the GEPP's agent when the PIC issued the invitation

to bid, and:

"103. In terms of the mandate given by the GEPP, the PIC is required to seek approval from the GEPP only for any single investment above R2 billion for unlisted and property investments. For Investments under this threshold, the agency agreement permits the PIC to choose which projects to invest in. (The investment at the centre of this case was not above R2 billion,

and the PIC accordingly did not seek approval.)"

[106] In order to even consider any of Trencon's claims, the question is whether the impugned action is an "administrative action" and, by extension, whether the GEPP is an organ of state as envisaged by section 217 and section 239 of the Constitution and PAJA.

The Relevant Statutory Provisions

[107] 107.1 Section 217(1)[57] of the Constitution serves to ensure that any procurement decision taken by an organ of state must be “in accordance with a system which is fair, equitable, transparent, competitive and cost-effective”. A failure to apply these important principles exposes the organ of state to judicial review of its decision either in terms of section 6 of PAJA or in terms of the principle of legality.

107.2 Section 239 of the Constitution reads:

107.3 Lastly, PAJA defines an “administrative action” as

“(i) “*administrative action*” means any decision taken, or any failure to take a decision, by—

- (a) ~ organ of state, when—
- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation;...”

The relationship between the PIC and GEPP

[108] As already stated, the relationship between the GEPP and the PIC is governed by agency and the written mandate entered into between the two in terms of the IMA. Whilst the supplementary founding affidavit complains that as the IMA is not part of the record the authority of the PIC to act on behalf of the GEPP is absent, this is cured in the answering affidavit. There is no true denial of this put up by Trencon in its papers[58] and any purported denial must be decided[59] in favour of the respondents.

[109] This being so, the first issue to be decided is whether review proceedings are competent.

Is the GEPP an organ of state?

[110] The GEPP’s position is that this application falls to be dismissed on this ground alone. Its stance is that it is not an organ of state, as it does not perform a public function, nor does it exercise a public power.[60]

[111] It holds this view as it states:

111.1 that one must analyse the function performed rather than the functionary who performs the function;[61]

111.2 GEPP performs a “quintessentially domestic function” rather than a traditional government function;[62]

111.3 the government does not control the GEPP;

111.4 the fact that the GEPP is established and empowered in terms of legislation does not support the view that it is an organ of state[63] as the PFMA does not list the GEPP as a public entity and therefore the PFMA, PPPFA and Treasury Regulations do not automatically apply to its conduct;[64]

111.5 the GEPF does not owe a duty to the public.

The legal position vis-à-vis the facts

[112] The question of whether a functionary such as the GEPF is an organ of state for purposes of section 239 of the Constitution involves a two-stage enquiry: a) is the power or function public; and b) is it exercised pursuant to the Constitution or legislation[65].

[113] The respondents have accepted that the second leg of the test is satisfied subject to its proviso that the GEPF does not exercise any powers or perform any functions under the PFMA or the PPPFA. Thus the respondents accept that the dispute centres on whether the power or functions exercised under the GEP Law and Regulations are public in nature.

[114] It is without doubt so that the GEPF applies to a limited class of persons who are specifically described in the GEP Law as an “employer” and “employee” and its function is to pay pensions and “other benefits” to a select group of people who are “appointed in the service of the employer”. An “employer” is defined in section 1 of the GEP Law as including certain Government Departments which are tasked with the collection of contributions from members and payment thereof to the Fund, but also

“(b) for all other purposes of this Law in relation to members in the service of the departments, administrations, organisational components, bodies and institutions referred to in paragraph (a), the Government;”

[115] In fact, the GEP Law[66] was enacted

“To make provision for the payment of pensions and certain other benefits to persons in the employment of the Government, certain bodies and institutions, and to the dependents or nominees of such persons; to repeal certain laws, and to provide for matters incidental thereto”.

[116] The GEPF is also funded by virtue of the contributions made to it by the employers and employees who make their respective contributions in terms of their contractual relationship.

[117] Our courts have found that the singularity of the fact that a functionary is an organ of state does not automatically transform the very function performed by it to an administrative action. This is particularly so when the relationship between the parties is regulated by an employment contract.

[118] In *Chirwa v Transnet Ltd and Others*[67] the court dealt with the issue concerning the jurisdiction of the Labour Court and the High Court to hear certain disputes involving

employment and labour relations. One of the issues was whether or not the conduct of Transnet in dismissing Ms Chirwa constituted an administrative action.

[119] In finding that the Transnet[68] Pension Fund was a business unit of Transnet and therefore also an organ of state, the court nonetheless concluded that the dismissal

did not constitute administrative action[69], a view endorsed by Langa CJ[70]. The view taken was that not every conduct by an organ of state constitutes an administrative action:

“[142] The subject matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the

power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant’s contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment

contract does not, in my view, constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant’s employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of state. It follows therefore that the conduct of Transnet did not constitute administrative action under section 33.”

[120] Thus the singularity of the fact that Transnet was an organ of state did not automatically convert its action into one reviewable under PAJA or the principle of legality. For this, a more multi-faceted inquiry is necessary.

[121] In the matter to hand, the fact that the relationship between an employer and employee is governed by contract, and the contributions made by both to the GEPPF is governed by it, is not of its own decisive – there are other factors which must be taken into account, such as:

121.1 who controls and manages the GEPPF;

121.2 is public money used in funding the GEPPF;

121.3 does government regulate, supervise and inspect the performance of the function;

121.4 can members of the public, who are not direct contributors to the GEPPF, hold the GEPPF to account for the manner in

which the GEPPF spends its funds.

Management and control of the GEPPF

[122] The GEPPF is managed by a Board[71] which is required to “manage the Fund and shall in respect thereof exercise the powers, perform the functions and carry out the duties conferred upon, assigned to or imposed upon it by this Law”.

[123] The Board consists of 16 members with 50% being nominated by the Minister and the other 50% by the members[72], and whose term is four years.[73] Both the Chairperson and Vice-Chairperson of the Board are elected by the Board.[74]

[124] The management of the Fund is entrusted to the Board and, in terms of Rule 4.1.1 “The Board shall comply with all the obligations imposed upon it by the rules and do everything necessary to ensure the proper functioning of the Fund”.

[125] In *Government Employees Medical Scheme and Others v Public Protector of the Republic of South Africa and Others*[75] one of the issues that served before the SCA was whether it could be said that the business of a medical scheme encompasses the

performance of a public or government function or the exercise of a public power. In deciding that it did not and that the

functions and powers were domestic in nature, Ponnann JA stated:

“[21] Common to both ss 6(4)(a)(ii) and (v) is the expression ‘performing a public function’. The debate thus centred on whether it can be said that GEMS performs a public function. ‘Medical scheme’ is defined in the MSA to mean any medical scheme registered under s 24(1). A medical scheme is a sui generis non-profit entity, which operates for the benefit of its members. According to the MSA, no person shall carry on the business of a medical scheme unless registered as such. The functions and powers of a medical scheme are limited by its registered rules and the MSA.

[22] The business of a medical scheme does not appear to encompass the performance of a public or government function or the exercise of a public power. The relationship between members and the scheme is essentially one of a contractual nature. The rules of a medical

scheme and any amendment thereof is binding on the medical scheme concerned, its members, officers and any person who claims any

benefit under the rules or whose claim is derived from a person so claiming. GEMS is a restricted medical scheme and only employees

qualifying to be registered as members and their dependants may be registered as beneficiaries of the scheme. The Rules are thus not of general application. They only apply to a restricted class of persons. It is so that membership of GEMS is restricted to government employees. But such membership is not compulsory.

[23] GEMS does not itself provide a health service. Like other medical schemes, it operates rather in the nature of a health insurance. As Rule 5.1 makes plain, in exchange for the payment of a premium, GEMS ‘undertakes liability in respect of health and health-related expenses in respect of its members and their dependants’. Failure by a member to pay any amount due may result in the suspension or termination of membership as provided for in the Rules. Accordingly, complaints arising from the Rules do not concern the general public. They remain domestic in nature and cannot be described as the exercise of a public power.”

[126] One cannot ignore either the fact that the factual matrix in GEMS bears remarkable similarity to that under which the GEPPF operates:

“[36] GEMS is a body corporate. It is managed by a board of twelve trustees. It is so that 50% of the trustees are appointed by the Minister. But, the remaining 50% are elected by the members of the scheme. In terms of the rules: (i) ‘the Board is responsible for the proper and sound management of the Scheme’; (ii) the trustees are required to ‘act with due care, diligence, skill and in good faith and run the Scheme for the benefit of the Beneficiaries’; and, (iii) any trustee ‘found not

to be a fit and proper person may be removed as such by the Board’. It thus follows that the mere fact that the Minister may appoint 50% of the trustees, does not mean that the government exercises control over the affairs of GEMS. In any event, although the right to appoint 50% of the trustees is given to the Minister by the internal rules of GEMS, those rules may be changed by the Board of Trustees, without reference to the Minister.”

[127] It is the respondents’ argument that this latest judgment is almost on all fours with this matter and that as a result, any power or function performed by the GEPPF (and by extension its agent, the PIC) in awarding the bid to GVK is not pursuant to anything other than the exercise of a domestic function or power. It is for this reason that the respondents argue that the decisions in *Solidarity v GEPPF*[76] and *GEPPF v Buitendag*[77] are wrongly decided.

[128] In *GEPPF v Buitendag* the Supreme Court of Appeal considered a review application in respect of gratuities payable to children of a deceased member. In that, Conradie JA, in a concurring judgment stated:

“[24] ...The Fund is an organ of state that performs an administrative function.”

[129] However, in stating so, no explanation or reasoning for this remark is given.

[130] In *Solidarity v GEPPF* the issue was whether the court should certify a class action brought with the purpose, if successful, of launching a review application to set aside amended actuarial interest factors imposed by the GEPPF.

[131] One of the defences raised by the GEPPF was that it was not an organ of state. In dismissing this argument, Raulinga J stated:

*“44. The issue whether an entity is an organ of state or not, was decided in *Chirwa v Transnet Ltd and Others* 2008(4) SA 367 (CC) para [42] and [73] in which the Constitutional Court found that the Transnet Pension Fund, which is a unit of Transnet, is an organ of state. Not only is the GEPPF established by Legislation but it is also created for the benefit of the public service employees. The fact that the Minister of Finance plays a decisive role in the functioning of the GEPPF makes even more so be regarded an organ of state. See also *GEPPF and Another v Buitendag and Others* {2007} 1 All SA 445 (SCA) at 456 para [24] in which the minority judgment of Conradie AJ accepted that the GEPPF is an organ of state which performs an administrative function.*

45. The GEPPF submits that the board's decision to amend actuarial interest factors in this case

does not qualify as administrative action and Solidarity's foreshadowed application stands to fail on this ground alone.

46. In *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies*

[Pty] Ltd [2016] 1 All SA 332 (SCA) at para [23], the SCA accepted that the definition of administrative action in section 1 of PAJA has seven components namely:

"there must be (a) a decision of an administrative nature;

(b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions"

47. GEPPF questions whether the determination of actuarial interest factors in terms of the rules, (a) qualifies as an administrative action as defined and

(b) qualifies as a decision of an administrative character.

48. In determining the actuarial interest factors for the members, the board of the GEPPF acts from a position of superiority or authority by virtue of being a public authority. See *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others* 2001 (3) SA 1013 (SCA) para 18. In *Cape Metropolitan Council* the Court stated that, the Council is a public authority and derived its power to enter into the contract with the first respondent from statute, although it derived its power to cancel the contract from the term of the contract and the common law. In *Popcru v Minister of the Correctional Services (No 1)* 2008(3) SA 91 (ECD), at p115 para {53} the Court postulated, that the elusive concept of public power is not limited to exercise of power that impact on the public at large. Such exercise of public power may include the decision of the Amnesty Committee of the erstwhile Truth and Reconciliation Commission. At p 116 para (54) the Court expressed its view that, the statutory basis of the power to employ and dismiss correctional officers, the subservience of the respondent to the Constitution generally and section 195 in particular, the public character of the department and the pre-eminence of the public interest in the proper administration of prisons and the attainment of the purposes specified in section 2 of the Correctional Services Act all strengthen the view that the powers that are sought to be reviewed in the matter are public powers as envisaged by the common

law.

49. In my view, the GEPPF falls in the category of the entities mentioned in *Cape*

Metropolitan Council Case, and therefore exercises public power as a public functionary."

- [132] Thus it appears that in *Solidarity v GEPP* the two main factors taken into account by the court when deciding that the GEPP is an organ of state are (a) the fact that the GEPP was established by legislation; and (b) that it was created for the benefit of public service employees; and (c) the Minister plays a decisive role in the functioning of the GEPP.
- [133] However, there are a number of factors which, on the facts and the law, firstly make the matter at hand distinguishable from the *GEMS* decision and secondly, aligned to the outcomes in the *Solidarity* and *Buitendag* matters.
- [134] Firstly, the issue is whether the GEPP is funded by public money[78]: the employees are government employees and their salaries are derived from funds allocated to the respective National Departments in the yearly Division of Revenue Act (DORA). These allocated funds are derived from, inter alia, the fiscus which is funded through taxation. A similar argument holds true for the employer's GEPP contributions. However, this is only a minor element in this argument.
- [135] Secondly, section 31 of the GEP Law specifically provides that government is responsible for meeting the obligations of the Fund. It states:
- "This Law shall bind the State and the Government shall be responsible for meeting the obligations of the Fund, whether properly funded or not, in favour of its members, pensioners and beneficiaries: Provided that any change in the investment policy of the Fund referred to in section 6 (7) or the benefit structure of the Fund, as provided for in the rules which may have an effect on the Government's financial obligation towards the Fund, shall be subject to the approval of the Minister: Provided further that the Minister's approval shall not be required in the event of changes to the benefit structures brought about by agreements reached in the bargaining structures for the Public Service."*
- [136] Thirdly, under section 6(7) of the GEP Law "The Board, acting in consultation with the Minister, shall determine the investment policy of the Fund", but it is the Board that has, inter alia, the power to "invest, loan, advance on interest and place on deposit such monies not needed immediately for the current expenditure of the Fund"[79] and "employ personnel or make any other suitable arrangements to administer the Fund and to manage the investments of the Fund".[80]
- [137] The phrase "in consultation with", has been defined in *Freedom Under Law v National Director of Public Prosecutions and Others*[81] as "with the occurrence or agreement of". In *McDonald and Others v Minister of Minerals and Energy and Others*[82] at para 18 the court stated:
- "Likewise where the law requires a functionality to act "in consultation with" another functionary, this too means that there must be concurrence between the functionaries..."*[83]

Thus investment policy must be decided "in consultation with" the Minister and in so doing he effectively exercises a veto right as, without his consent, the Board's investment policy comes to naught.

[138] Fourthly, the investment policy of the GEPF includes the decision to incorporate sustainability and in so doing, the GEPF specifically states that through developmental investments it plays an important role in addressing many of the pressing economic, social and environmental challenges such as growth, unemployment and inequality[84].

[139] Fifthly, the Bid specifically provides that bidders were required to allocate 30% of the contract value (as awarded) to local suppliers and contractors, and all established contractors were required to partner with emerging local enterprises for developmental purposes. The bidder was required to prepare and submit a detailed Local Participation plan indicating how the minimum 30% target will be

achieved based on their own practice experience. In particular, the invitation states “(c)onsideration should also be given towards contributions that promote sustainable income streams for local communities by creating long-term business opportunities and transferring appropriate skills”.

[140] Given the evinced intention of the GEPF as set out in para 138 supra, it is quite clear that the purpose of including the 30% allocation to local suppliers and contractors was for the exact purpose of economic, social and environmental upliftment of the local community.

[141] Thus, in my view it can never be said that the broad general public are neither affected by, nor have any interest in, the performance and good governance of the GEPF.

[142] Therefore, in my view, in issuing this tender it cannot be said that the GEPF was performing a quintessentially domestic function. In my view both the function and power were public ones and this being so, the GEPF is an organ of state and the action of the award to GVK was an administrative one and reviewable under PAJA[85].

Has Trencon made out a case?

[143] In the matter at hand, Trencon complains that the decision to award the bid to GVK, falls foul of the guiding principles of section 217(1) in that it was (a) taken without good reason[86],

(b) was procedurally unfair[87],

(c) irrational[88], and (d) there is a reasonable apprehension of bias[89],

(e) the PIC shifted goalposts and changed criteria[90],

(f) the PIC failed to comply with mandatory and material procedures and conditions[91],

(g) the decision was procedurally unfair, (h) the decision was informed by an error of law[92], and (i) it was made in bad faith, arbitrarily and capriciously[93].

[144] Very briefly the basis upon which each of these four grounds for review rest are:

144.1 re: without good reason

144.1.1 The respondents failed to respond to Trencon's letters of August and September 2020 requesting reasons for the PIC's decision. The respondents also failed to provide reasons in terms of Rule 53(1)(b) with the filing of the Rule 53 record;

144.1.2 Trencon was first notified of why its bid was unsuccessful when the respondents filed their answering affidavit on 12 November 2020;

144.1.3 Trencon's view is that the failure to provide reasons means that the presumption created in section 5(3) of PAJA, i.e. that "in any proceedings for judicial review [that] the administrative action was taken without good reason", applies;

144.1.4 it also holds the view that, as neither the PIC nor the GEPP have disputed an obligation to file a record in terms of Rule 53, and indeed filed a record, this is an implicit acknowledgement that the GEPP is an organ of state and that the decision of the PIC is reviewable under PAJA alternatively the rule of law;

144.1.5 the respondents state that no reasons were required prior to the answering affidavit as the action was not an administrative one as it was not taken by an organ of state, and furthermore the Notice of Motion did not call upon the respondents to provide written reasons for the impugned decision;

144.1.6 in this regard, the Notice of Motion states:

"Kindly take further notice that the first respondent[94] is called on to dispatch to the Registrar of this Honourable Court, with a copy to the applicant's attorneys, an indexed and paginated record of proceedings culminating in the impugned decision..."

144.1.7 In any event, it is also clear that the PIC must communicate its reasons within 90 days.[95] Given that reasons were only requested (at best for Trencon) in August 2020, and this application launched on 29 September 2020, it puts the PIC well within the 90-day period;

144.1.8 as to the argument set out in para 144.1.4 supra, it is in my view a stretch – the respondents were obliged to respond to the procedure laid down by Trencon in its notice of Motion and this includes filing a record. It would create in my view an absurd position were a respondent to comply with the applicant's choice of procedure and by doing so, be stripped of its right to argue its case or raise objections to the procedure adopted by the applicant.[96]

144.2 re: procedural unfairness

144.2.1 This is based on what Trencon

complains is an impermissible re-opening of the phase 2 functionality adjudication, which occurred after the clarification meeting of 15 July 2020[97] and where Trencon's functionality score was revised so that it fell below the 70% threshold which effectively disqualified it from further assessment on pricing and B-BBEE.[98]

144.2.2 Trencon also complains that, according to it, the purpose of the clarification meeting was to seek clarification from Trencon in relation to its COVID-19 protocols.

144.2.3 It is the respondents position that Trencon has misunderstood the tender process: the invitation to bid was but one phase in a multi-stage process; the clarification meeting was catered for in para 1.10 of the main contractor document and in this regard bidders were notified:

144.2.3.1 that the PIC was permitted to ask any bidder to provide evidence of their capacity to carry out the contract;

144.2.3.2 all written information submitted by a bidder would be considered during the evaluation of the tender.

144.2.3.3 the decision was not a separate one but part of the evaluation process of the bids as a whole.

144.2.4 In fact, it appears that all four short-listed bidders were invited to a clarification meeting. The respondents state that these “centred on the bidders’ submitted proposals, the addenda and the impact of COVID-19 on their proposals.” The bidders’ qualifications were discussed, together with details of the bidders’ insurance, work programmes and community management approach and experience. These issues were central to the purpose of the meetings. They could not reasonably be construed as side issues that were tagged onto meetings about COVID-19.

144.3 re: the decision was irrational

144.3.1 Trencon complains that the retrospective revision of its functionality score is irrational as no proper explanation has been provided in the record for this decision and that the reasons provided in the answering affidavit demonstrate the respondents’ fundamental misconception of their obligation to apply quantifiable criteria in an objective and fair manner;

144.3.2 the respondents state that the rationality of the decision stems from the bid document and from the outcome of the clarification meeting as set out supra. It is “connected to the purpose of ultimately awarding the contract to a party who could perform taking into account the relevant factors”.

144.4 re: a reasonable apprehension of bias

144.4.1 Trencon alleges that it is clear from the respondents’ conduct that the PIC is biased against it and in favour of GVK as, inter alia, it manufactured^[99] issues pertaining to Trencon’s functionality after it realised that Trencon’s bid would outscore GVK’s. This is compounded, it says, by the respondents’ volte-face on its position on whether or not it is an organ of state^[100] which is demonstrative of its intention to frustrate Trencon’s review application.

144.4.2 The respondents state that none of these issues were pleaded in either the founding or supplementary affidavits and, as a result should be dismissed.^[101]

144.5 re: shifting goalposts and changing criteria

144.5.1 that the pre-qualification

questionnaire set out the criteria by which adjudication for phases 1 and 2 of the bid would be adjudicated but that at the clarification

meeting, these goalposts shifted and Trencon was rescored using different criteria to those specified in the questionnaire which

resulted in its score being reduced – it agrees that this ex post facto change to the criteria of adjudication and the adjustment of its score is unlawful[102];

144.5.2 it alleges that the result is also that the change in criteria rendered the bid vague and uncertain and contrary to section 6(2)(i) of PAJA;

144.6 re: failure to comply with mandatory and material procedures or conditions

144.6.1 in this regard Trencon alleges that the questionnaire makes it clear that only shortlisted bidders would be eligible to be scored on price and B-BBEE, the questionnaire also makes it clear that the bid would be awarded to the highest scoring bidder and that the respondents are bound by the provisions of not only the bid documents, but the provisions of the PPPFA regulations which provide:

144.6.1.1 functionality is defined as “the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender documents”

144.6.1.2 Regulation 5(7) states:

“Each tender that obtained the minimum qualifying score for functionality must be evaluated further in terms of price and the preference point system and any objective criteria envisaged in regulation 11.”

144.6.2 of course, the respondents argue that as it is not an organ of state, the provisions of the PPPFA do not apply.

144.7 re: the decision was procedurally unfair

this, once again has to do with the fact that Trencon was not advised that the clarification meeting would result in a re-evaluation of scoring, nor was it given notice of the criteria that would be applied pursuant to this. The questionnaire was silent on this issue;

144.8 re: the decision was informed by an error of law

i.e. that the PIC was erroneously of the belief that it was entitled to revisit the scoring of phase 2, which it was not;

144.8.1 the respondents state that this contention asserts no meaningful reason and cannot constitute a meaningful ground of review;

144.9 re: the decision was taken in bad faith, arbitrarily and capriciously

144.9.1 the respondents deny this allegation.

[145] In my view, there are four main themes upon which this application is based:

145.1 that no good reasons have been provided by the PIC;

145.2 that the process was procedurally flawed and unfair;

145.3 that the decision to appoint GVK was irrational;

145.4 that there is a reasonable apprehension of bias.

[146] In my view, if any one of the complaints set out in para 150 supra is successful, so too must Trencon be successful.

No good reasons

[147] The main issue here is that no reasons were provided by the PIC in response to the demand in terms of section 5(1) of PAJA, or as part of the record under Rule 53.

[148] Whilst I am of the view that the respondents' actions are administrative decisions in terms of PAJA which require reasons, I am also of the view that the presumption set out in section 5(3) does not apply: the fact that Trencon initially brought the application by way of urgency does not mean that the time period set out in section 5(1) is automatically truncated and no good reason was provided why it should be.

[149] Although a review may be brought on an urgent basis, the procedure may include interim relief on a rule nisi procedure[103], it is still incumbent upon the applicant to convince the court that the circumstances warrant a departing from the normal circumstances[104].

[150] Although the application was initially set down for hearing on 17 November 2020, it did not proceed on that date. The respondents filed a short affidavit detailing their objection to truncated hearing periods and the matter then proceeded to be heard in March 2021 in the third court after all the papers had been filed. Trencon also never sought any interim interdictory relief.

[151] Thus, by the procedure it chose and the Notice of Motion that initiated these proceedings, Trencon pinned its colours to the mast and it cannot now complain that the reasons were only provided in the answering affidavit.

[152] I am therefore of the view that this ground should be dismissed.

The process was procedurally flawed and unfair

[153] Trencon approaches this issue from the premise that the tender process consisted of three phases and two separate and distinct administrative actions: it argues that the short-listing of bidders and the issue of the BoQ to the four short-listed bidders constitutes one administrative action, and the final evaluation and award of the tender to GVK constitutes a separate administrative action.

[154] I do not agree: clause 1.2.4 of the tender document sets out the selection criteria of the tender and states:

“Selection of the tender shall be based on the following pass/fail criteria for compliance and standing of the company:

- a) First Phase: Compliance with Administrative Requirements (completed)
- b) Second Phase: Technical and Competency Evaluation (completed)
- c) Third Phase: Price and B-BBEE”

[155] In my view what the tender provides for is a singular process with a singular outcome after a phased approach to the evaluation of the bid process.

[156] I also do not agree that the fact that there were two separate documents[105] submitted by the four short-listed bidders is proof that there were two separate and distinct stages to the bid process. The respondents explain it thus:

“However, almost all selection processes involve a shortlisting (and consequently exclusion) of bidders or candidates. This does not mean that each step of the process amounts to distinct administrative action.”

[157] In my view all Phases 1 and 2 supra did was invoke a “sifting” process which eliminated bidders who were unsuited to the project. It did this by firstly excluding those who did not comply with the administrative requirements of the bid – that process would, of its own, shortlist bidders who would then, secondly, be considered in the second round of the process. This was clearly a more involved process as those “shortlisted” bidders were then evaluated on technical and competency abilities.

[158] There are several instances where a final appointment of a candidate is made after a series of shortlistings[106]: for example in *South African Post Office v De Lacy and Another*[107] (SAPO) where SAPO put out a tender to implement a biometric payment service for the payment of State pensions and other benefits, to the government of the North West Province in return for a fee on each payment. A three-phased scoring process was employed to evaluate the bid:

“[48] A ‘three-phased’ scoring process is provided for. First, members of the Review Panels must read the proposals independently and formulate their initial scores. The second phase takes place ‘after the Review Panels convene for consolidation of the scores and (as a full Evaluation Committee) discuss and motivate their findings.’ The final phase of the scoring takes place, if applicable, after presentations have been made by short-listed bidders. The process is designed to ‘ensure that [evaluation committee] members have an opportunity to interrogate the correctness of their scores on more than one occasion.’”

[159] At the end of the day and nothing turned on this – the point I made is that it is not unusual for a multi-layered evaluation to take place in the process of awarding a bid. Where a project, such as this one, sees an eventual capital outlay of in excess of R400 million and a significant impact on the local community via job creation and local commercial participation it is important to eliminate bidders unsuited to the project.

[160] It also is so that in its approach to the evaluations of all the bids received, the PIC treated all the bidders equally and subjected each to the same process i.e. an evaluation in three phases and a bid clarification meeting.

[161] In *Rodpaul Construction CC t/a Rods Construction v Ethekwini Municipality and Others*[108] D Pillay J stated the principle as follows:

”In several decisions, the Supreme Court of Appeal emphasises that for fairness tenders must be evaluated equally. Contractors should be treated equally. A tender which is adjusted during the process resulting in the bid that is accepted being different from one that was tendered initially is unfair. It is imperative that all tenderers tender for the same thing...”

[162] In my view all four bidders were subjected to the same process of evaluation.

[163] The second leg to Trencon’s complaint is that relating to the actual clarification meeting: it states that the purpose of this was to determine its safety protocols for COVID-19 and the PIC never informed it that this meeting would be used to re-open the functionality evaluation which had been concluded in Phase 2.

[164] Trencon says the fact that it was one of the four bidders who had passed the pre-qualification stage and gone on to receive the BoQ meant that the only process left for the evaluation committee was to score the top four bidders on price and B-BBEE[109] and the bidder that then scored the highest points would be awarded the bid. It complains that the evaluation committee used the

clarification meeting to impermissibly shift the goalposts and alter Trencon’s scoring.

[165] The Main Contractor Document is instructive in this regard. Paragraph 1.10 states the following:

“INTERVIEW WITH AND ADDITIONAL INFORMATION REQUIRED FROM TENDERER

During the period when Tenders are open, and as soon as practicable after the closing date of the Tender, the Employer may require the Tenderer to attend a meeting in order to clarify matters relating to the Tender.

All written information submitted by the Tenderer together with and in support of the Tender shall be considered to form the basis on which the Tender has been prepared and submitted.”

[166] Paragraph 1.25 of the Main Contractor Document sets out what is termed the “Evaluation Criteria” and states “System to be followed for the evaluation of this Tender (my emphasis). What follows is the list which sets out:

166.1 the three phase selection criteria per para 50 supra

166.2 the price and B-BBEE level criteria[110].

[167] I do not agree that the clarification meeting could only be used to clarify issues on price and B-BBEE. It is clear from clause 1.10 of the Main Contractor Document that it applies to “the Tender” and that includes the Tender as an entirety.

[168] It also appears that all four bidders were subject to the same scrutiny.

[169] The main issue is that Trencon complains that the clarification meeting

had the result of reducing its functionality score on criteria that were not part of the bid[111]: that its score was reduced because a) it had ostensibly not done too many retail projects; and b) the methodology employed by Trencon relating to local disruption.

[170] In Allpay (supra) it was stated that

“[42] It is apparent from section 6 that unfairness in the outcome or result of an administrative decision is not, apart from the unreasonableness ground, a ground for judicial review of administrative action. That is nothing new. The section gives legislative expression to the fundamental right to administrative action “that is lawful, reasonable and procedurally fair” under section 33 of the Constitution. It is a long-held principle of our administrative law that the primary focus in scrutinising administrative action is on the fairness of the process, not the substantive correctness of the outcome.

[43] The legislative framework for procurement policy under section 217 of the Constitution does not seek to give exclusive

content to that section, nor does it grant jurisdictional competence to decide matters under it to a specialist institution. The framework thus provides the context within which judicial review of state procurement decisions under PAJA review grounds must be assessed. The requirements of a constitutionally fair, equitable, transparent, competitive and cost-effective procurement

system will thus inform, enrich and give particular content to the applicable grounds of review under PAJA in a given case. The facts of each case will determine what any shortfall in the requirements of the procurement system – unfairness, inequity,

lack of transparency, lack of competitiveness or cost-inefficiency – may lead to: procedural unfairness, irrationality, unreasonableness

or any other review ground under PAJA.

[44] Doing this kind of exercise is no different from any other assessment to determine whether administrative action is valid

under PAJA. In challenging the validity of administrative action an aggrieved party may rely on any number of alleged irregularities in the administrative process. These alleged irregularities are presented as evidence to establish that any one or more of the grounds of review under PAJA may exist. The judicial task is to assess whether this evidence justifies the

conclusion

that any one or more of the review grounds do in fact exist.

- [45] Section 217 of the Constitution, the Procurement Act and the Public Finance Management Act 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. There is no magic in the procurement process that requires a different approach. Alleged irregularities may differ from case to case, but they will still be assessed under the same grounds of review in PAJA. If a court finds that there are valid grounds for review, it is obliged to enter into an enquiry with a view to formulating a just and equitable remedy. That enquiry must entail weighing all relevant factors, after the objective grounds for review have been established.
- [60] First, tenderers have a right to a fair tender process, irrespective of whether they are ultimately awarded the tender. Second, the subject matter of the review is the decision to award the contract to Cash Paymaster, not each decision along the way in the process. Third, the “no effect” argument wrongly seeks to splinter the process in asserting that AllPay’s rights were not affected. The decision to exclude AllPay from the second, pricing stage certainly affected its rights and legitimate expectations. Because of its exclusion we are not in a position to know what the outcome of the pricing stage would have been; it is mere speculation. Fourth, in Grey’s Marine it was stated, with reference to the phrase “adversely affect the rights of any person” in section 1 of PAJA, that what “was probably intended [was] rather to convey that administrative action is action that has the capacity to affect legal rights.” Irregularities in the process, which may also affect the fairness of the outcome, certainly have the capacity to affect legal rights.”[112]
- [171] It is as against this backdrop that the process adopted by the PIC in re-visiting the functionality scoring must be assessed.
- [172] The question is: by recording in the Main Contract Document that Phases 1 and 2 of the assessment had been “completed” was the PIC entitled to re-visit this when considering which of the four final bidders to appoint?

[173] The question becomes even more relevant when taking into account the following: a) that although the PIC stated that when Trencon was retrospectively disqualified their BoQ had not been assessed on price and B-BBEE, it clearly had and was clearly scored the highest[113]; and b) Trencon was the highest scoring bidder overall and the Tender document specifically provided that the highest scoring bidder would be appointed.

[174] When assessing functionality in phase 2, the Bid Document (the Questionnaire) specifically states that it would be scored based on five separate criteria:

1. Company experience

20

2. Technical and project management team

20

3. Methodology

25

4. Programme of works

20

5. Local participation

25

[175] The “Company Experience” criteria is described in the Questionnaire thus:

“Track record demonstrating the successful(ly) execution (initiation to completion) of Three (3) commercial projects with a minimum value of R300 million including Three (3) relevant contactable references for each within the past Five (5) years.”

[176] In its answering affidavit the PIC explains that the BEC had noted that Trencon had not on its own completed any refurbishment of a similar nature to the project in the last three years, and it had undertaken only new building projects. The Ga-Rankuwa Shopping Centre is a 90% refurbishment of an existing facility, and the evaluation committee was concerned about Trencon’s inexperience. This as against GVK who had recently completed a “live” refurbishment and extension of a shopping centre worth over R450 million lasting two and a half years.

[177] Trencon’s argument is that if the PIC had wanted specific refurbishment or retail experience they should have asked for it – Trencon has demonstrated this ability in other similar projects and it attaches, in reply, proof.

[178] In Allpay, the Constitutional Court declared the award of a bid unlawful in similar circumstances where a retrospective exclusion of a bid took place after that bidder's functionality scores were altered following a clarification meeting. In commenting on this, Froneman J stated:

"[90] In the context of a tender process, the tender documents give notice of the proposed administrative action, while the responding bids in effect constitute representations before the decision is made. Adequate notice would require sufficient information to enable prospective tenderers to make bids that cover all the requirements expected for the successful award of the tender."

[92] The purpose of a tender is not to reward bidders who are clever enough to decipher unclear directions. It is to

elicit the best solution through a process that is fair, equitable, transparent, cost-effective and competitive. Because of the uncertainty caused by the wording of the Request for Proposals and Bidders Notice 2, that purpose was not achieved in this case.

[93] For all these reasons the decision to award the tender to Cash Paymaster is constitutionally invalid."

[179] In my view where Trencon is incorrect is that, as part of the information required by the PIC a bidder's "experience and capability" was requested. This included the following:

"4.2 Provide evidence of your Company's capability of carrying out works or services, by way of reference to completed or live projects no older than 5 years and R300 million above, demonstrating the skills, efficiency, experience and reliability of your organisation."

Specific reference to commercial projects.

Provide the information sought against the items below:

- ClientProject location
- Project value
- Size (m2)
- Project duration
- Contract type
- Procurement route..."

(my emphasis)

[180] I am of the view thus that the functionality assessment set out in para 175 supra cannot be viewed in isolation – it must be viewed in conjunction with the information Trencon was obliged to provide in terms of section 4.2 of the Questionnaire.

[181] Turning to the scorecards, it is also clear that Trencon was given an opportunity to provide the BEC with information regarding their “live” project experience during the clarification meeting. For example:

181.1 the scoresheet of MO Phala shows the score given on 6 December 2019 when the Questionnaire was assessed and on 18 August 2020 after the clarification meeting. Trencon’s original score was adjusted from ‘4’ to ‘2’[114] as: “post clarification meeting not too many retail”.

181.2 Z Mabase scored Trencon a ‘2’ and stated “the contractor is struggling to manage Tlhabane is a similar project Village Walk and 72 Greyston” – there is no post clarification meeting scoresheet.

181.3 L Phillips scored Trencon a ‘3’ and stated, inter alia

“- current Tlhabane Square – R605 million

- The Square Retail – R95 million
- 72 Greyston drive – R81 million 2016

Not many retail but demonstrates refurbishment work

- Village Walk mixed use and dev – R1.8 B (JV with Aveng)”

[182] Other members of the evaluation committee scored Trencon a ‘5’ and there is no evidence of their scores being adjusted.

[183] Some of the GVK scores were also adjusted following the clarification meeting.

[184] What appears to have weighed in GVK’s favour is that it recently completed a “live” refurbishment of a shopping centre in Witbank – a contract worth more than R450 million and completed over two and a half

years. According to the outcome of the clarification meeting, GVK’s scores were adjusted higher (by some of the evaluation

committee members) because (inter alia) of this and its recent demonstrable successful methodology.

[185] Two other factors influenced some of the committee members after the clarification meeting

185.1 Trencon has sought an indemnity for losses of disruptions caused by local contributor lasting longer than 15 months which was considered a risk factor by the committee – GVK did not;

185.2 Trencon also did not adequately facilitate the necessary community engagement and management in another project it won the bid for (the Tlhabane Development). This required continuous client intervention and more delays, which increased the cost in benefit for the contractor and resulted in additional capital expenditure being required. During the clarification

meeting, the members of the BEC asked Trencon to provide more specific examples of the actions that Trencon took to prevent disruptions but Trencon was unable to provide clarity on the issue (at least from the perspective of a majority of the members of the BEC). Trencon also spoke in general terms whereas GVK spoke about specific instances where they had experienced problems in the past and the sort of strategies it adopts to minimise disruptions.[115]

[186] In *Metro Projects CC and Another v Klerksdorp Local Municipality*[116] an award made to a bidder was set aside as the offer put before the mayoral committee was not made in that bidder's bid, nor was it elicited by the specifications and conditions of the tender. Instead it appeared that the successful bid had been augmented by the city civil engineer who had analysed the tenders and Conradie JA then stated

"[13] In the Logbro Properties case supra at 466H-467C Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever

is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency,

competitiveness and cost-effectiveness.

[14] Was the tender process followed in the present case fair? A high-ranking municipal official purported to

give the ninth respondent an opportunity of augmenting its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not."

[187] In my view both GVK and Trencon[117] were provided an equal opportunity to clarify their respective bids and in so doing the one was not preferred above the other. The adjusted scoring that was the result of this may have had an outcome that saw Trencon's bid fail, but that per se does not make the process unfair[118] and it does not provide any evidence that there is a reasonable apprehension of bias.

[188] In my view, none of the review grounds advanced by Trencon demonstrate that the process adopted by the PIC was procedurally flawed or unfair and therefore the application for review must fail.

Costs

[189] Usually costs would follow the result, however in the exercise of my discretion I must take into account that an equal portion of the argument, in the affidavit and the heads were devoted to two main issues i.e. a) whether the GEPF is an organ of state and if so, are its actions susceptible to review? and b) if so, does Trencon make out a case in terms of section 6 of PAJA?

[190] Both the GEPF and Trencon have been equally successful and it is for this reason that I am of the view that each party should pay their own costs.

Order

[191] Therefore, the order I make is the following:

The application is dismissed.

B NEUKIRCHER

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 2 November 2021.

Appearances:

For the Applicant:

: Adv M Chaskalson SC

Adv S Pudifin-Jones

Instructed by

: Joubert, Galpin Searle Attorneys

For the 1st and 2nd Respondents : Adv K Pillay SC

Adv C Tabata

Adv M Dafel

Instructed by

: Bowmans (Bongumusa Sibiya)

Matter heard on

: 6 March 2021

Date of judgment

: 2 November 2021

- [1] Act no. 3 of 2000
- [2] The former on behalf of the applicant and the latter, with Ms Tabata and Mr Dafel
- [3] The Notice of Motion was amended by the applicant. It is the amended relief that is set out herein
- [4] Act 71 of 2008
- [5] In a Notice of Withdrawal dated 15 January 2021
- [6] The third respondent has chosen not to oppose the application and thus any reference in this judgment to “the respondents” is a reference to the GEPF and the PIC
- [7] The complaint further related to the non-joinder of the directors of the PIC but as the relief is no longer relevant this is a non-issue
- [8] A Friday
- [9] Under case number 9141/2019 in the Western Cape Division of the High Court
- [10] 2006(1) SA 591 (SCA) at para [28]
- [11] Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA) at 200
- [12] See paragraph 15 supra
- [13] Mr Chaskalson argues that the outcome of this matter will constitute a judgment in rem which has a public character that transcends the interests of only the litigating parties and it is therefore unnecessary to join Grinaker and Concor : Airports Company South Africa V Big Five Duty FREE (Pty)Ltd and Others (CCT 257/17) [2018] ZACC 33; 2019 (2) BCLE 165 (CC); 2019 (5) SA 1 (CC) (27 September 2018)
- [14] Dated 5 January 2021
- [15] Act 38 of 2000
- [16] See paragraph 48 supra
- [17] Trencon, GVK, Concor and Grinaker
- [18] A score of 97%
- [19] A score of 91.86%
- [20] A score of 90.85%
- [21] A score of 88.49%
- [22] On 23 October 2020

[23] Hoffmann v South African Airways 2001(1) SA 1 CC at para 23 where the Constitutional Court found that SAA was an organ of state because it is “a statutory under the control of the state which has public powers and performs public functions in the public interests”.

[24]

33. Just administrative action.- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has; the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must- (a) provide for the review of administrative action by a court or, where appropriate as independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.

[24]

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 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

[25]

217. Procurement.- (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 hi]-: 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 or 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 (3) must be implemented.

[25]

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legislation, contracts for goods or services, it must do so in accordance with a system which is hi]-: equitable, transparent.

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- (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 or 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 (3) must be implemented.

[26] Act no. 2 of 2000

[27] Law Society of South Africa and Others v President of the Republic of South Africa and Others [2018] ZACC 51 at para 6

[28] It also argues that as the PIC is an agent of the GEPPF (which is not seriously denied by Trencon) the principles of agency are applicable

[29] AllPay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42

[29] AllPay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42

[30] Although no rigid test has been set

[31] President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98)

[1999] ZACC 11; 2000 (1) SA 1

[32] Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting 1996 (3) SA 800 (T) at 810 F-H

[33] Mittalsteel South Africa Ltd. (Formerly Iscor Ltd.) v Hlatshwayo 2007 (1) SA 66 (SCA) para 22

[34] Chirwa v Transnet Limited and Others

[2007] ZACC 23; 2008 (4) SA 367 (CC) para 186

- [35] Eden Security Services CC and Others v Cape Peninsula University of Technology and Others (17703/2013) [2014] ZAWCHC 148 (8 September 2014)
- [36] By the Government Employees Pension Law, 1996 - Proclamation 21 published in GG17135 of 19 April 1996
- [37] Section 6 of the GEPP Act
- [38] Being the Minister of Finance
- [39] The GPAA is established in terms of section 7A(4) of the Public Service Act, Proclamation 103 of 1994. Approximately 7% of the work done by the GPAA is for the GEPP and the remainder on behalf of National Treasury
- [40] Act 5 of 2000
- [41] For example, procurement of IT and cleaning services
- [42] The GEPP has more than 1 million members whose livelihoods post-retirement must be safeguarded
- [43] See Chirwa supra at para 63 – the confines are not exhaustive though
- [44] Act 1 of 1999 – Schedule 3B lists National Government Business Enterprises. The PIC was inserted in GG27773 of 15 July 2005.
- [45] With its main clients including the GEPP, the Unemployment Insurance Fund (UIF), the Compensation Commissioner Fund, the Compensation Commissioner Pension Fund and the Associated Institutions Pension Fund
- [46] Act no. 37 of 2002 (FAIS Act)
- [47] As are all financial service providers whether operating in the public or private sector
- [48] Act no. 23 of 2004
- [49] Act no. 121 of 1998
- [50] Act no. 1 of 2017
- [51] It declared a dividend to the shareholder in the past financial year of R80 million. In terms of section 3 of the PIC Act
- (a) the State is the sole shareholder of the PIC shares, and (b) the rights attached to those shares are exercised by the Minister on behalf of the State.
- [52] For example a % of the growth in a client's assets
- [53] The PIC states that in managing these funds it is not required to obtain Treasury approval
- [54] The PIC manages most of the GEPP's equity, bonds, money marked and property portfolios

- [55] There are two addendums to the IMA
- [56] The IMA was treated as a confidential document before the Mpati Commission (the Commission of Inquiry into allegations of impropriety of the PIC which was commissioned on 4 October 2018 and proclaimed in GG No, 41979 of 17 October 2018. The report was finalised on 13 December 2019
- [57] “Procurement.-(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.”
- [58] *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082; *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) at 16E - H
- [59] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.*
- [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A). Also: *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D): where lack of authority of an alleged agent has not been put in issue in the pleadings it cannot be canvassed in evidence without an amendment to the plea
- [60] Constitution Act 108 of 1996 section 239
- [61] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000
- (1) SA 1 (CC) at para 141 – in what has been deemed “the governmental interest test” - *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) at para 29
- [62] *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* (410/09) [2010] ZASCA 94; 2010 (5) SA 457 (SCA)
- [63] See *Calibre Clinical Consultants (Pty) Ltd supra*
- [64] Although the GEPPF has chosen to incorporate some of the principles found in the PFMA and Treasury Regulations and other laws into its management policies and contractual relationships with financial service providers
- [65] Allpay (No.
- 2) (supra) 2014(4) SA 179 (CC)
- [66] Proclamation 21 published in GG17135 of 19 April 1996 and commenced on 1 May 1996
- [67] 2008(4) SA 367 (CC)
- [68] Transnet is listed in Schedule 2: Major Public Entities of the PFMA

- [69] At para 73. At para 72 he states: “The focus of the enquiry as to whether the conduct constitutes administrative action is not on the position which the functionary occupies but the nature of the power being exercised.”
- [70] On the basis that there was no legislative source for the decision and because the dismissal was not the exercise of a public power or the performance of a public function
- [71] GEP Law section 6
- [72] GEP Law Rules, Schedule 1, Rule 4.1.2, also called “the employer nominees” and “the employee nominees”
- [73] Rule 4.1.2
- [74] Rule 4.1.4 and 4.1.8
- [75] 2021 (2) SA 114 (SCA)
- [76] *Solidarity v Government Employees Pension Fund and Others* (37300/2016)
- [2017] ZAGPPHC 1307 (14 December 2017)
- [77] *Government Employees Pension Fund and Another v Buitendag* 2007 (4) SA 2 (SCA)
- [78] See *Caliber Clinical Consultants* at para 42
- [79] Rule 4.2.2
- [80] Rule 4.2.5
- [81] 2014 (1) SA 254 (GNP)
- [82] 2007 (5) SA 642 (C)
- [83] See *Premier, Western Cape v President of the Republic of South Africa and Another*[83] at footnote 94 where it was stated that “the difference between ‘in consultation with’ and ‘after consultation with’ is that the former requires concurrence whereas the latter does not.”
- [84] Para 92 supra and all the factors listed therein as specifically set out by the GEPF papers
- [85] I am not of the view that the declaratory relief set out in 2.4.1 (supra) is overbroad and shall be limited to this application
- [86] I.e. it falls foul of section 5 of PAJA as it failed to provide any reasons for its decision: “5. (1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

- (2) the administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons

in writing for the administrative action.

- (3) If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.”

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[87] PAJA section 6(2)(c)

[88] PAJA section 6(2)(f)(ii)(cc)

[89] PAJA section 6(2)(a)(iii)

[90] PAJA section 6(2)(d)

[91] PAJA section 6(2)(b)

[92] PAJA section 6(2)(d)

[93] PAJA section 6(2)(e)(v) and (vi)

[94] Which is the PIC

[95] PAJA section 5(1)

[96] See for example, *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A)* – even though this case deals with urgent applications the essence is that a respondent is obliged to comply with the procedure adopted by an applicant and voice his objection thereto in his papers. In my view this applies to any matter before court.

- [97] See para 58 supra
- [98] Although, in its answering affidavit, the respondents state: “55.1 On price and B-BBEE scored after Phase 3, Trencon achieved a percentage score of 97.00. Its tendered amount excluding VAT was R476 436 023.71.”
- [98] Although, in its answering affidavit, the respondents state:
- “55.1 On price and B-BBEE scored after Phase 3, Trencon achieved a percentage score of 97.00. Its tendered amount excluding VAT was R476 436 023.71.”*
- [99] My word – not used by the applicant
- [100] As evidenced in the Ayo litigation
- [101] It is not permissible to make out new grounds in a replying affidavit: Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H – 636B; Tumisi v African National Congress 1997 (2) SA 741
- [102] 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)
- [103] Jockey Club of. South Africa v Forbes 1993(1) SA 649 (A); Safcor Forwarding (Johannesburg). (Pty) Ltd v National Transport Commission 1982 (3) SA 654 (A); National Transport Commission v Airoadexpress (Pty) Ltd 1981(3) SA 109 (N); Metro Transport (Pty) Ltd v National Transport Commission 1981(3) SA 114 (W)
- [104] Pietermaritzburg City Council v Local Road Transportation Board 1959(2) SA 758 (N); Airoadexpress (supra); Metro Transport (supra)
- [105] i.e. the Questionnaire and BoQ
- [106] Also for example, in an employment situation: Massmart Holdings Ltd v Theron
- (2018) 39 ILJ 870 (LC) at para 14
- [107] 2009(5) SA 255 (SCA) at para 48 and 52
- [108] (10075/13)
- [2014] ZAKZDHC 18 (2 June 2014) at para 50
- [109] Para 56 supra
- [110] 80 points would be awarded for price and 20 points for B-BBEE compliance
- [111] It is important to note that not all members of the evaluation committee reduced Trencon’s functionality score
- [112] It should be noted that in Allpay a similar evaluation strategy was employed

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- [113] Its price being approximately R8 million lower than GVK
- [114] Scoring was done as follows: 0 = not addressed at all; 1 = poor; 2 = average, 3 = good, 4 = very good, 5 = excellent
- [115] In Calibre (supra) some members of the BEC did arrive at different decisions after the clarification meeting but not all changed their scoring
- [116] (602/2002) [2003 ZASCA 91; [2004] 1 All SA 504 (SCA) (22 September 2003)
- [117] In fact all 4 shortlisted bidders
- [118] Allpay (supra) at para 42
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