



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case No: 797/2022

In the matter between:

TRANSNET SOC LTD

APPELLANT

and

TIPP-CON (PTY) LTD

FIRST RESPONDENT

SA FENCE AND GATE (PTY) LTD

SECOND RESPONDENT

GORDIAN FENCE SA (PTY) LTD

THIRD RESPONDENT

SIYANOKU (PTY) LTD

FOURTH RESPONDENT

SINOVILLE FENCING SA (PTY) LTD

FIFTH RESPONDENT

COCHRANE PROJECTS (PTY) LTD

SIXTH RESPONDENT

SECUREMESH CC

SEVENTH RESPONDENT

Neutral Citation: *Transnet SOC Ltd v Tipp-Con (Pty) Ltd and Others* (797/2022)
[2024] ZASCA 12 (31 January 2024)

Coram: Petse DP and Meyer JA and Windell, Keightley and Siwendu
AJJA

Heard: 28 August 2023

Delivered: 31 January 2024

Summary: Administrative law – legality review – self-review by state organ
– delay – whether delay unreasonable – whether delay should be overlooked.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mali J, sitting as a court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Windell AJA (Meyer JA and Keightley AJA concurring):

Introduction

[1] This is an appeal against the judgment and order granted by the Gauteng Division of the High Court, Pretoria, per Mali J (the high court). The appeal is with leave of the high court. The parties in this appeal are the appellant, Transnet SOC Ltd (Transnet), and the first respondent, Tipp-Con (Pty) Ltd (Tipp-Con). The remaining respondents did not participate in the high court proceedings and are not active parties in this appeal.

[2] The high court dismissed an application by Transnet to self-review its decision to award a tender to Tipp-Con (the review application). The tender was for the manufacture, supply, and installation of a high security fence at Transnet's City Deep, Kascon and Kaserne premises (the premises). The premises had been the subject of various incidents of crime, necessitating the installation of a security fence to protect Transnet's assets.

[3] After the tender had been awarded to Tipp-Con, the parties concluded a contract and Tipp-Con proceeded to install the fence. During the installation of the fence, disagreement arose between the parties regarding the fence's specifications. The dispute was referred to an adjudicator, (Mr Patrick Lane SC, the adjudicator), in accordance with the dispute resolution mechanism of the contract. The adjudicator

found that the fence was installed according to contractual specification and Tipp-Con was entitled to payment under the contract.

[4] Transnet purported to file a notice of dissatisfaction against the adjudicator's determination. Transnet was out of time, so it was unable to contest the ruling of the adjudicator. Tipp-Con sought Transnet's permission to return to the premises to complete the installation of the fence, but Transnet refused. Tipp-Con launched an application in the Gauteng Division of the High Court, Johannesburg, to make the adjudication award an order of court. In response, Transnet launched the review application in the Gauteng Division of the High Court, Pretoria.

[5] Transnet's case on review was based on three grounds. The first ground related to the award of the tender. Transnet's complaint was that Tipp-Con provided a non-compliant sample of the fence (the tender sample) during the tender evaluation process (it was not 'hot dip galvanized'), and even though the actual fence later erected was hot dip galvanized, and therefore compliant with the terms of the contract, the tender should be declared unlawful and set aside. Transnet's second and third grounds were aimed at the contract that was concluded between the parties after the tender had been awarded to Tipp-Con. Transnet argued that the contract was not lawfully concluded because Tipp-Con didn't submit the test results on the tender sample which was a pre-condition to the contract being concluded, and the fence erected did not comply with the tender specifications and Tipp-Con's 'best and final offer'. Thus, the contract was unlawful and must be set aside.

[6] In dismissing the review application, the high court agreed with Tipp-Con that Transnet had delayed in initiating the self-review and only brought the review application to 'escape its contractual obligations'. It is this finding of the high court that is now the subject of this appeal.

[7] First, Transnet argues that the high court failed to apply the two-stage inquiry of first establishing whether there was an unreasonable delay in bringing the application, and if so, whether the delay should be overlooked. As a result of erroneously concluding that there was no explanation for the delay, the high court failed to assess the reasonableness of the delay or engage in an enquiry whether the

delay should be overlooked. Secondly, despite the absence of corruption in the awarding of the tender, the awarding of the tender was unlawful due to non-compliance with the terms and conditions of the Request for Proposal (RFP) which constitutes a violation of section 217 of the Constitution.¹ Therefore, so it is argued, the appeal should be upheld and both the award of the tender to Tipp-Con, as well as the contract concluded between the parties, should be set aside.

[8] Consequently, this appeal involves two preliminary issues: first, whether the delay in initiating the self-review was unreasonable; and second, if it was, whether the delay should be overlooked. While the severity of the purported irregularities is a determinant in the second phase of the inquiry, the merits of the review application will only be considered if either preliminary point is decided in Transnet's favour.

[9] Context is paramount. As in so many other cases involving self-review, the peculiar facts of this case ultimately influence the outcome.

Background facts

[10] Commencing on 29 November 2018, Transnet invited interested parties to submit tenders for the high security fence at the premises in terms of the RFP. Part 2 of the RFP in section 'T2.2-47: Contractor's Design and Technical Compliance' provides as follows:

'Note to tenderers:

Tenderers are to submit a sample of the fence in accordance to the specification. The measurement of the sample should be 400mmx400mm.

The sample checked according to the specification listed below . . .

100% compliance is required, failure to comply will result in disqualification.'

[11] The tender sample provided would be evaluated for compliance with, inter alia, the following specifications as set out in in the RFP under 'C3: Scope of Work': wire diameter will be *3mm minimum*; all panel fixtures shall be on the inside of fence line;

¹ Section 217 of the Constitution provides: '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'.

and panel and fixtures shall be *hot dip galvanised* coatings on fabricated steel in accordance with SANS121:2011. The latter is a process, (simply speaking) by which a protective zinc coating is applied to steel or iron by dipping it in molten zinc to prevent rusting.

[12] There were seven bidders that provided tender samples. Tipp-Con's tender sample was received on 21 January 2019. The tender sample met the criteria for the scope of works in the RFP, save that it was not hot dip galvanized. Tipp-Con disclosed this fact in its tender response and provided a reason for the non-compliance. It explained that: 'The sample is not hot dip galvanized coated due to time and closure of the factory on holiday. However, the actual panels and fixtures will be hot dip galvanized coated on fabricated steel. Ref SANS 121:2011.'

[13] Transnet accepted the explanation and unanimously rated Tipp-Con's tender sample as substantively responsive to the RFP on 30 January 2019. On 19 February 2019, the Tender Evaluation and Evaluation Committee produced a report. Under 'Prequalification' and 'Substantial Responsiveness' only Tipp-Con and 'Securemesh CC' were compliant. Despite passing the technical evaluation, Securemesh CC was disqualified at the functionality stage for failing to register with the Construction Industry Development Board despite being given 21 days to do so. Tipp-Con was recommended as the 'highest ranked bidder on the Automated Scorecard', and authorization to negotiate with Tipp-Con was requested.

[14] Permission was apparently granted, as there was a meeting of the 'tender negotiation team' on 2 April 2019. Tipp-Con's price was above market related prices and it was required to submit its best and final offer (the final offer). On 10 April 2019, it submitted the final offer, being a total price of R34 371 970.15. It advised that the final offer had effectively reduced its initial price by R4 862 450.79 and stated that it was 'still offering the High Quality Steel welded wire mesh Fencing with a 4mm wire diameter and . . . using the H-beam posts'. On 11 July 2019, the Transnet Head Office Acquisition Council met and approved the award of the tender to Tipp-Con. On 7 August 2019, Transnet notified Tipp-Con by letter that the latter had been appointed the winning bidder. The letter continued by stating:

‘All business transactions emanating from this bid process shall be subject to the terms and conditions of the bid document, your response thereto, other contractual conditions negotiated thereafter and the following: Your acceptance of this letter by 9 August 2019.’

[15] Tipp-Con accepted its appointment as successful bidder on 8 August 2019. At the 'kick-off meeting', Tipp-Con was informed that the project was an expedited one that had to be completed within Transnet's fiscal year (by 31 March 2020) and that execution of the works had to begin on 16 September 2019. To meet the anticipated completion date and to finalize the program, Transnet advised Tipp-Con to initiate the procurement process and obtain lead times for the material's supply. Concerns were raised about Tipp-Con's capacity to perform on time, given that this was the first project in which Tipp-Con had been appointed to execute and complete works for Transnet. Transnet proposed an inspection of the manufacturing facilities of Tipp-Con's suppliers (to inspect capacity and quality control procedures).

[16] Arrangements were made to visit the locations of two material suppliers (these being Cochrane, the current material supplier, and Bestfence, the supplier of the tender sample). Transnet instructed Tipp-Con to construct full-scale samples of the fences in accordance with the RFP's specifications (i.e. the works information contained in C3: Scope of Work which provides for minimum wire thickness of 3mm). Tipp-Con procured the installation of three full-size samples of the 3.6-metre-high fence and two full-size samples of the 1.2-metre-high fence, and on 13 September 2019, representatives of Transnet and Tipp-Con attended the inspection. Representatives of Transnet examined the physical properties of the samples and chose one. The mesh wire diameter of the selected fence was *3mm horizontal and 4mm vertical*, with a 13mm vertical flat bar per section. They remarked that the chosen sample 'complied with the minimum tender requirements' and was superior to the product described in the works information because it was modular (comprised of sections) and featured a 13mm vertical flat bar and double post at the base that provided increased strength and security. Tipp-Con was instructed to procure the materials necessary for the construction of the selected sample.

[17] Following the selection of the fence to be erected, the 'C1.1 Form of Offer' was signed and submitted to Transnet on 20 September 2019. The Form of Offer included,

among other things, the works information, the bill of quantities, and a 'P&G summary' (the preliminary and general costs not directly related to the building costs). Significantly, the contract was not signed based on Tipp-Con's final offer of a 4mmx4mm wire diameter, but rather on the fence Transnet selected after inspecting full-sized samples, namely a 3mm (horizontal) and 4mm (vertical) wire. It is not disputed that although these specifications differed from Tipp-Con's final offer, it was in compliance with the RFP that provided for a minimum of 3mm diameter. The initial shipment of materials was delivered on site on 11 October 2019, and Transnet accepted, invoiced, and paid for them on 20 November 2019.

[18] On 21 October 2019, Tipp-Con began installation of the fence, with Transnet's approval. On 31 October 2019, Transnet delivered to Tipp-Con a copy of the contract based on the June 2005 NEC 3 Engineering and Construction Contract (with amendments in June 2006).

[19] On 26 November 2019, Transnet requested via email specific information regarding 'all tests performed' on 'the already installed fence' (the test request email). In this regard, Transnet relied on Section C3 of the RFP, which stated:

'1.3 Description of the works

1.3.1 The works shall conform to the following specifications:

This description of works covers Transnet Freight Rail specification for perimeter fencing and the galvanising of the material. The material needs to comply to the below specifications and proof has to be provided that the material was tested by Contractor as stated below. The security fence tendered must comply to the below tests. The submission of the test results or test certificates will be a condition precedent for concluding the contract.

CSIR Test

SABS Test 2536/YM139

SABS 064'

[20] This email was responded to by Tipp-Con on 28 November 2019. It provided Transnet with a document drafted by Cochrane that detailed the specifications and working drawings for the wire used to construct the fence. Cochrane assured Transnet that 'all steel material shall be of good commercial quality, galvanized steel. All pipes shall be galvanized. . . Zinc coating shall be smooth and essentially free from lumps,

globs or points. Miscellaneous material shall be galvanized and Alu coated. And the wire diameter will be 3mm'. On 29 November 2019, representatives from Tipp-Con, Transnet, and Cochrane attended a meeting and site inspection at the location to, amongst other things, inspect the fence that had been erected at that point (the November site inspection). During the meeting, Transnet revealed that a third party had complained that the tender sample submitted by Tipp-Con differed from the actual fence being erected, and that the actual fence was not galvanized and did not conform to the specifications. On the surface, the meeting was productive, and Tipp-Con continued installing the fence. Additionally, Transnet agreed to pay Tipp-Con's second invoice dated 30 October 2019. Payment was received for this invoice on 4 December 2019.

[21] Tipp-Con submitted a third invoice to Transnet for R7 211 800.40 on 26 November 2019, which was due by 15 December 2019. The invoice was not paid. On 20 December 2019, Transnet's construction sites closed for the annual holiday break, and Tipp-Con was required to re-establish and resume work on 13 January 2020. Approximately 57% of the work had been completed by that point. On 7 January 2020 the Project Manager for Transnet issued a 'Early Warning Notification', in accordance with the contract, in which Transnet complained about the specifications of the fence being installed. It was stated that the final offer submitted to Transnet on 10 April 2019 was for a fence with a 4mm diameter, but what had been installed was entirely different, as the thickness/diameter of the wire ranged from 2.95mm and 4mm and the posts were not H beams. Tipp-Con was consequently instructed not to 're-establish the site' until a risk-reduction meeting had taken place.

[22] At the risk reduction meeting held on 14 January 2020, the complaint remained about the installation of the fence. The Acting Chief Engineer of Transnet explained that:

'The meeting was called because it has come to Transnet's attention that the fence that is currently being installed on site at City Deep is not the same as the sample that was submitted by Tipp-Con when they tendered for the work and were successfully awarded based on the sample submitted'.

[23] Mr Barbarossa Ntshingila from Transnet's legal department attended the meeting. The parties were unable to resolve their issues and Transnet informed Tipp-Con that it should not resume work. In the interim, Tipp-Con inquired about the third outstanding invoice. Transnet responded on 27 January 2020, stating:

'The invoice number 3 of amount R 7 211 800.40 was not approved and signed due to decision taken in our meeting held in City deep on 29 November 11:00 to stop all the payment until we resolve the issue of quality and standard of fence that was installed.'

[24] On 28 January 2020, Transnet issued a 'Project Manager's Instruction' instructing Tipp-Con to 'restart stopped work' and to immediately remove the fence already installed and install the fence according to the specifications on which Tipp-Con was 'awarded the contract'. On 3 February 2020 Transnet notified Tipp-Con of alleged defects in the fence, more particularly, that the mesh panels were not hot dip galvanized and did not comply with SANS121:2011 standard.

[25] On 9 March 2020, Tipp-Con gave notice of the dispute in accordance with the dispute resolution provisions of the contract. On 25 June 2020, Tipp-Con collected two mesh wire fence panels (approximately 3m by 3m) from the City Deep site and delivered them to the 'Hot Dip Galvanizers Association (Southern Africa)' for analysis and evaluation. According to their report (dated 1 July 2020), the wire was hot dip galvanized and compliant with SANS675:2009. The adjudicator ruled in favour of Tipp-Con on 7 August 2020, noting that the average of the wire measurements taken was marginally less than 3mm, which was insignificant and *de minimis*. On 7 October 2020, Transnet initiated the review application.

Delay in bringing the review application.

[26] The principles governing delay in self-reviews by state organs are well established. The court assesses delay according to a two-step analysis. In step one, the question is whether the state organ unreasonably or unduly delayed in bringing the review. If not, the court proceeds to the merits. If the delay was unreasonable, the court proceeds to the second step: Should the unreasonable delay nevertheless be overlooked?²

² *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC); *State Information Technology Agency SOC Ltd v*

[27] There is no fixed period within which to bring a legality review. In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd (Asla)*,³ the Constitutional Court stated that ‘the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken’.

[28] The high court determined that Transnet became aware of the alleged non-compliance with the RFP when Tipp-Con submitted its tender sample on 21 January 2019. Transnet waited approximately 20 months, until October 2021, to launch the review application. The high court found that the delay was unexplained and dismissed the review application.

[29] In determining whether the delay was unreasonable, a court engages in a factual inquiry in the nature of a value judgment, taking into account the relevant circumstances.⁴ It exercises a strict discretion, which intimates that a court of appeal may only interfere if the discretion was not exercised judicially.

[30] The high court seemingly found that there was an unreasonable delay in bringing the review, but failed to consider whether the delay should nonetheless be overlooked. The high court erred in this regard, and it is thus open for this Court, as a court of appeal, to assess the delay afresh.⁵

[31] Transnet’s first complaint in the review application and basis for setting aside the award, is that Tipp-Con’s bid was treated as compliant whilst its tender sample was not hot dip galvanized and therefore should have been disqualified at the pre-qualification stage. To determine whether Transnet’s delay was unreasonable, it is therefore necessary to establish the date when Transnet became aware, or ought to

Gijima Holdings (Pty) Ltd [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC); *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC); *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC).

³ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) para 49.

⁴ *Gqwetha v Transkei Development Corporation Ltd and Others* [2005] ZASCA 51; [2006] 3 All SA 245 (SCA); 2006 (2) SA 603 (SCA) para 24.

⁵ *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; [2009] 1 All SA 133 (SCA); 2009 (1) SA 216 (SCA) paras 12-13.

have become aware, of the fact that Tipp-Con's tender sample was not hot dip galvanized.

[32] Transnet's second complaint on review is that the contract was concluded without the requisite submission of the test results under section C3 of the RFP, which was a condition precedent to the conclusion of a valid contract. It is thus necessary also to establish the date when Transnet became, or ought to have become, aware of the alleged breach of the tender prescripts in this regard. Its third complaint is that the fence that was erected does not comply with the tender specification, Tipp-Con's final offer, and the contract concluded between the parties. This requires a consideration of when Transnet became, or ought to have become, aware of such failure. It is with reference to these dates that Transnet's obligation to initiate its self-review proceedings arose.

[33] Ms Jabosigo, the Executive Manager: Legal (Litigation) for Transnet, deposed to the company's founding affidavit. She stated that she became aware of the alleged irregularities only after Transnet had lost the case before the adjudicator. However, this is not the test. What matters is the knowledge of the institution, not that of the deposing legal advisor.⁶

[34] The evaluation committee that evaluated the bids and scored Tipp-Con as compliant were all employed by Transnet and consisted of Mr Thakhani Shai (Transnet's Engineering Manager), Mr Viwe Mshuqwana (Transnet's Technical Manager), and Ms Monique Lee (Transnet's Senior Engineering Manager). They had the requisite knowledge at the time that the tender sample was submitted, that it was not hot dip galvanized and not compliant with section T2.2-47 of the RFP. Yet, Transnet failed to secure an explanation from any of these employees. In answer to this, Transnet tries to divert the attention away from this failure, by casting aspersion on the conduct of the evaluation committee in awarding the tender to Tipp-Con. Transnet suggests that it must be clear to this Court that there must have been some mischief or collusion of some sorts during the award of the tender between the parties and that is why it acted against the 'wrongdoer', Mr Shai, who was dismissed by

⁶ See *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) paras 45-46.

Transnet for misconduct during July 2021. It is for this reason it could not produce a version from the evaluation committee.

[35] Firstly, Transnet's case is not based on corruption or fraud. In its founding affidavit, it distanced itself emphatically from any manifestations of collusion or corruption. Second, Mr Shai was not fired for his role in awarding the tender. He was dismissed for his post-award conduct in failing to 'correctly implement the contract in accordance with the award of the tender' and for deviating 'from the awarded specification of 4mm fence contrary to what was specified in the first respondent's best and final offer as approved and awarded by Transnet'. In other words, he was dismissed for mishandling a contract that (on Transnet's case) should not have been awarded. Thirdly, it does not explain why the other two officials who were part of the evaluation committee and not disciplined for any misconduct were not approached to give an explanation.

[36] In *City of Cape Town v Aurecon South Africa (Pty) Ltd*,⁷ the Constitutional Court rejected the explanation for the delay in instituting a self-review under similar circumstances:

'The distinction that the City attempts to draw between what is within its own knowledge and what is within the knowledge of its committees is superficial. It is common cause that the BEC and the BAC are committees mandated by the City for purposes of the tender procurement process. These committees form part of an internal arrangement by the City. Accordingly, it may reasonably be expected that all information regarding the tender process which is within the knowledge of the BAC or BEC, may be deemed to be within the City's knowledge. In my view, that is a weak attempt by the City to deny knowledge of what it ought reasonably to have known.'

[37] There is no legally relevant distinction to be drawn between Ms Jabosigo and other officers of Transnet who had the requisite knowledge. The first complaint, that the tender sample submitted was not hot dip galvanised, was raised for the first time in the review application. As noted earlier, it was not a complaint before the adjudicator

⁷ *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) para 39.

and there is no explanation from Ms Jabosigo, or any member of the evaluating committee as to why the alleged irregularity was not discovered and acted upon earlier. This, even though Tipp-Con made no attempt to hide the fact that its tender sample was not hot dip galvanised. Quite the contrary, it drew specific attention to this fact and tendered rectification.

[38] As to the second complaint - that the test results were not submitted prior to the contract being concluded - Transnet was aware of this alleged irregularity as early as 26 November 2019, the date the test request email was sent. In a similar vein, the complaint that the fence erected did not comply with the tender specifications, the final offer and the contract, was within Transnet's knowledge prior to 28 November 2019, when it was discussed at the November site inspection. The nearly year-long delay by Transnet in initiating the review of the contract on these grounds remains unexplained. Transnet maintained its stance in the arbitration despite having knowledge of at least the third complaint upon review and having a reasonable expectation of being aware of the others. It delayed initiating the review until it could no longer contest the adjudicator's award. Likewise, no explanation exists for the delay that this has caused.

[39] In the absence of any explanation from the evaluation committee or any of the other officials that were involved in the meetings with Tipp-Con after the award of the tender means that Transnet's delay is unexplained. As remarked in *Asla*, if there is an explanation for the delay, it must cover the entirety of the delay. If there is no explanation for the delay, it will be necessarily unreasonable.⁸ In these circumstances the delay was unreasonable.

Should the delay be overlooked?

[40] It is trite that for the efficient functioning of public bodies, a challenge to the validity of their decisions by judicial review should be initiated without undue delay.⁹ In *Asla*, it was emphasized that the approach to overlooking a delay in a legality review is a flexible exercise that entails a legal evaluation considering a number of factors:

⁸ *Asla* para 52. See also *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* [2021] ZASCA 90 (SCA) para 29.

⁹ *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC), para 74, citing *Khumalo v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC) at para 39-73.

Potential prejudice to affected parties as well as the possible consequences of setting aside the impugned decision; the nature of the impugned decision, which essentially requires a consideration of the merits of the legal challenge against that decision; and the conduct of an applicant, taking into account that an organ of state is subject to a higher duty to respect the law.¹⁰

The egregiousness of the alleged irregularities

[41] The review is, at its essence, about the tender sample provided by Tipp-Con during the tender evaluation process. Transnet's first complaint is that the tender sample was not hot dip galvanized, which was a requirement of the RFP. Notably, the adjudicator has determined that the fence being erected conformed to the terms of the contract and that it has been hot dip galvanized. The non-compliance with the RFP was certainly not egregious. It had no adverse effect on the tender specifications or the public purse and Tipp-Con had not displayed any improper conduct. In fact, Tipp-Con drew attention to the issue, explained the shortcoming and confirmed that the fence supplied would be hot dip galvanised as required. The evaluation committee accepted this submission. As noted earlier, the lengthy delay on the part of Transnet until it sought to review the award of the tender on this basis is unexplained. It is difficult to escape the inference that the complaint was an afterthought called into action in an effort to avoid the binding arbitration award in Tipp-Con's favour.

[42] Furthermore, whilst it is so that 'the test for irregularities and their import' should not be conflated,¹¹ the ancient *de minimis non curat lex* – the law does not concern itself with trifles – principle is an established part of our law.¹² Looking at the totality of the facts present here, this is a classic case where the *de minimis non curat lex*

¹⁰ In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC), the Constitutional Court held that even where there is no basis for a court to overlook an unreasonable delay, the court may nevertheless be constitutionally compelled to declare the state's conduct unlawful (the *Gijima* principle). In *Asla*, Theron J recognised the conflict between the *Gijima* principle and established principles regarding delay and remarked that the *Gijima* principle must be interpreted narrowly and restrictively so as not to undermine the valuable rationale underlying the rules on delay. This is achieved by balancing the objectives of the rules on delay with those objectives of declaring unlawful conduct as such.

¹¹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Security Agency and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR (CC) paras 22, 28-9 and 56.

¹² See: Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* (3rd ed) at 546-7, 640 and 727, and the authorities therein referred to by the learned authors.

principle should be applied as far as the defect with Tipp-Con's tender sample is concerned.

[43] Additionally, Transnet complains that the submission of certain test results (mentioned previously) was a condition precedent to the signing of the contract. It is argued that due to the fact that the condition precedent was not met, the contract is unlawful and should be set aside.

[44] On the facts, this argument is without merit for mainly three reasons: First, Transnet had provided no evidence that it was ever concerned about the test results prior to the contract's conclusion. It did not request these test results and there is no allegation that Tipp-Con refused to provide them or was unable to do so. Second, the contract was signed by Transnet. As with the first complaint, it provided no explanation from any of the employees involved for why it signed before obtaining the test results. There is no allegation that it was due to corruption or misrepresentation by anyone. Without an explanation of why it signed, Transnet must accept responsibility for its conduct. Third, on 13 September 2019, prior to the signing of the contract, Transnet selected one of the samples to be erected (after inspecting their physical properties) and instructed Tipp-Con to procure the materials for the erection of the selected sample. Not only was it uninterested in the test results, but it also disregarded their necessity.

[45] The third complaint from Transnet is that the contract between the parties was different from the RFP, Tipp-Con's bid, and its final offer. Therefore, so it is argued, the contract ought to be set aside. The RFP itself contemplates that negotiations may take place after the award of the tender. This was recognised by Transnet in its letter of award dated 7 August 2019 referred to earlier. The letter of award came after Tipp-Con's final offer, which was made to Transnet on 10 April 2020. Tipp-Con's final offer (including the 4mm specification) was thus subject to negotiation. In circumstances where the contract concluded is what was provided for in the RFP, there can be no complaint that the contract breached the RFP or s 217 of the Constitution.

[46] In any event, as *All Pay*¹³ explains, not all deviances from the requirements of a tender are material and require a declaration of illegality. An immaterial irregularity does not establish a ground for review. The materiality of a deviation is gauged by linking the question of compliance with the purpose of the provision. On the facts of this case, the purpose of the tender was achieved: Transnet was supplied with a fence that was hot dip galvanised; the diameter of the wires for all material purposes met the requirements of the RFP; Transnet itself was satisfied with the superior quality of the fencing it chose; Transnet secured the benefit of the superior fencing without additional cost; and no other parties have been shown by Transnet to have been unfairly prejudiced in the process that was followed. To the extent that there were any deviations regarding the contract (or indeed in the grant of the tender), they were immaterial.

Prejudice

[47] There are three categories of affected parties when assessing prejudice: the state organ, the successful bidder, and the public. Transnet contended that it will be prejudiced if it is compelled to accept a 3mm fence when Tipp-Con referred to a 4mm fence in its bid and its final offer.

[48] The alleged prejudice Transnet complains about is attributable to the terms of the contract and not to the awarding of the tender. Transnet cannot get away from the fact that a 3mm fence was at all material times considered by it to be sufficient. That is why the specification in the RFP was 3mm and why the contract refers to a 3mm diameter fence. Transnet ignores this matter. It is incomprehensible that Transnet could suffer any prejudice when it solicited bids for the supply of a 3mm fence and ultimately contracted for exactly that. It did so after inspecting the erected samples and satisfying itself of the quality. It then pronounced the selected fence to be superior. The selection of the fence that was erected resulted in no change to the contract price. In other words, Transnet paid the original negotiated contract price for a product that it regarded as superior.

¹³ Ibid, paras 22, 28.

[49] Then, Transnet participated in the adjudication proceedings. In those proceedings, there was no tender sample-related complaint. The complaint concerned the installation of the fence. This position was made clear in Transnet's notice of dissatisfaction, which outlined the grounds for appeal: (1) The fence should have been hot dip galvanized; and (2) The adjudicator ought to have found that the 'fence does not comply with the specification provided for in the agreement'. The adjudicator found the fence to be hot dip galvanised and any deviation from the 3mm diameter to be so minor as to be *de minimis*. It was only when the adjudicator held that Tipp-Con is entitled to payment that Transnet raised an issue about the tender sample.

[50] Whilst no prejudice had been established by Transnet, Tipp-Con had shown that it is not only suffering potential prejudice, but actual prejudice. To perform under the contract Tipp-Con had incurred obligations. It owes approximately R 4 210 000 to its suppliers. About 57% of the work, at a cost to Tipp-Con of more than R22 500 000 had been finalized. To date it has been paid R10 400 000, approximately only a third of what it is owed. For as long as Transnet continues to delay payment to Tipp-Con, it cannot pay its suppliers. It has been listed as a 'defaulter' by a credit insurer which can potentially have a devastating effect on its viability. Tipp-Con's directors are also at risk of sanction under the Companies Act 71 of 2008.¹⁴ This imperils Tipp-Con's very existence.

[51] When it comes to the third category of affected persons (the public), counsel for Transnet argued that it is in the public interest to overlook the delay and entertain the review application. In support of this contention counsel relied, amongst other cases, on *Passenger Rail Agency of South Africa v Swifambo Rail Leasing (Pty) Ltd (Swifambo)*.¹⁵ However, the facts in *Swifambo* are completely distinct from the facts in the present case, so relying on this case is erroneous. In that matter, the court dealt with multiple allegations of bid-rigging, collusion, and corruption. On appeal, this Court observed that neither party was innocent and that the awarding of the contract to Swifambo was corrupt.¹⁶ The delay was therefore excused in the interest of good

¹⁴ Sections 22 and 218 (2) of the Companies Act, 2008.

¹⁵ *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* [2017] ZAGPJHC 177; [2017] 3 All SA 971 (GJ); 2017 (6) SA 223 (GJ). Upheld on appeal *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa* [2018] ZASCA 167; 2020 (1) SA 76 (SCA).

¹⁶ *Swifambo Rail Leasing (Pty) Ltd v Passenger Rail Agency of South Africa* [2018] ZASCA 167; 2020

governance and justice.¹⁷ In the present case, Transnet denied relying on fraud or corruption during the procurement process. Tipp-Con played open cards by disclosing to Transnet that the tender sample was not hot dip galvanized when it submitted its bid. Upon examining the full-size samples, Transnet chose the sample with ‘excellent technical features’ and ‘superior to the product described in the works information’. There are no facts to the contrary.

[52] In the present case, the alleged irregularity in the awarding of the contract does not warrant judicial intervention ‘in the interests of justice and in the public interest’ and the ‘interests of clean governance’.¹⁸ The public interest overwhelmingly favours Tipp-Con. City Deep Terminal is the largest land-based container port in the country and its security indirectly affects the economy of the country. According to Transnet, completion of the fence is urgent because an incomplete fence exposes Transnet’s assets to ‘increased criminal activity’. If this Court disregards Transnet’s unreasonable delay and set aside the tender award and contract, Transnet will be required to reissue the tender and remove the already-erected fence. That would inevitably result in significant delays and expenses.

Transnet’s conduct in the matter

[53] Consideration of Transnet’s conduct is an important factor in deciding whether to overlook an unreasonable delay. As an organ of State, Transnet has a heightened obligation to act properly.¹⁹

[54] Transnet not only delayed unreasonably, but also acted in an unreasonable manner. It did not adhere to the constitutionally prescribed standard for state actors and did not respect the rights of Tipp-Con. It refused to recognize the outcome of an adjudicative process in which it had voluntarily participated. In fact, in the adjudication before the adjudicator, Transnet sought to enforce the very contract it now seeks to

(1) SA 76 (SCA) paras 41-42.

¹⁷ Ibid, with reference to *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209; [2016] 1 All SA 313 (SCA); 2016 (2) SA 199 (SCA).

¹⁸ Ibid.

¹⁹ *Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Limited t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) para 82, see also *Special Investigating Unit and Another v Engineered Systems Solutions (Pty) Ltd* [2021] ZASCA 90; [2021] 3 All SA 791 (SCA); 2022 (5) SA 416 (SCA).

annul. The only issue was the fence's alleged lack of hot dip galvanization and the wire diameter. The adjudicator has rejected both issues.

[55] Having lost the preceding argument, Transnet seeks to circumvent the adjudicator's conclusion by focusing on the tender sample. It wants the court to disregard all of Transnet's prior actions, including its decision to enforce the contract. This conduct by Transnet is opportunistic, especially when concerns have been raised in this Court about the growing reliance on legality reviews by state organs where corruption is not involved. In *Altech Radio Holdings Pty Ltd and Others v City of Tshwane Metropolitan Municipality*,²⁰ Ponnann JA remarked as follows:

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

[56] Transnet cannot escape the facts. There is much to be said in response to Tipp-Con's counsel's assertion that Transnet did not initiate the review because it sought to vindicate clean and open governance, but rather to evade its contractual obligations. Transnet was represented by the same attorneys before the adjudicator, who now advised it to review the award of the tender. It is only after Transnet realized that it could not appeal the decision of the adjudicator that, for the first time, it complained about the tender sample and asserted that it was not hot dip galvanized.

[57] This is a cynical self-review. The purpose of an organ of state's self-review should be to promote open, responsive, and accountable governance. Transnet is required to promote these goals through its actions. Given the prejudice suffered by Tipp-Con, the nature of Transnet's complaints, the fact that the irregularities were not egregious, and the unconscionable conduct of Transnet, the unreasonable delay cannot be overlooked.

²⁰ *Altech Radio Holdings Pty Ltd and Others v City of Tshwane Metropolitan Municipality* [2020] ZASCA 122; 2021 (3) SA 25 (SCA) para 54.

[58] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

L WINDELL
ACTING JUDGE OF APPEAL

Siwendu AJA dissenting (Petse DP concurring):

[59] I have read the judgment by my colleague, Windell AJA (the main judgment). Regrettably, I take a divergent view to the facts and the merits before the high court. As a result, I differ in the approach to the exercise of the value judgment and discretion to determine whether the Court should overlook the delay. In my view, the facts overwhelmingly support a contrary finding that there was no delay, and if there was, it was not unreasonable²¹ and it should therefore be overlooked. Besides, the irregularities complained of cannot be considered in isolated components. They must be viewed cumulatively to weigh their overall effect on a fair and transparent tender process. I am constrained to write separately to explain the reasons for my departure.²²

[60] It has been consistently held that lawful procurement is patently a constitutional issue.²³ Although stated in the context of a PAJA review, in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*,²⁴ Froneman J remind courts that:

‘The suggestion that “inconsequential irregularities” are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process . . .

. . .

The proper approach is to establish, factually, whether an irregularity occurred . . .

. . .

This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements . . . the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the Constitution and PAJA . . .

²¹ *State Information Technology Agency SOC Limited v Gjiima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) SA 23 (CC); 2018 (2) BCLR 240 (CC) (*Gjiima*).

²² *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC) (*Buffalo City*) para 48.

²³ *Buffalo City supra* para 35, referring to *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) (*Steenkamp*) para 20. See also *Minister of Finance v Atribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) para 19. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*Allpay*) para 4.

²⁴ *Allpay supra* paras 22, 28, 29 and 56.

...

Once a finding of invalidity under PAJA review grounds is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made.'

[61] It is necessary to place the irregularities complained of in their proper context. Transnet mounted a two pronged attack of the decisions taken, before and after the award of the tender to Tipp-Con. The particulars of the irregularities are in respect of: (a) the sample submitted by Tipp-Con, which rendered the bid a 'non-responsive tender'; (b) Tipp-Con's Best Final Offer (BFO) for a 4 mm x 4mm wire diameter fence contrasted with; (c) the final terms of the NEC contract providing for a 3mm wire diameter, which differed from the terms of the RFP and the BFO. The complaint after the award of the tender concerns the implementation and installation of a fence of between 3mm and 2.96mm. This was at variance from the terms of (a) the tender specification, (b) the BFO and (c) the final NEC contract.

[62] The appeal raises important questions of public procurement law which involve (a) the compass of the right to 'negotiate' the NEC contract contemplated in the RFP after the award of the tender on terms outside those contemplated in the RFP, (b) if such a right exists, who in the tender adjudication process has the authority to do so. In the present matter, these questions implicate who had the right to negotiate or authorise the selection of a fence other than the persons authorised to evaluate the tenders. Another important question raised is whether this Court on appeal can, without more, rely on the conclusion made by the Adjudicator that 'any deviation from the 3mm diameter to be so minor as to be *de minimis*' as the reason to deprive Transnet the right to a review.

[63] The Constitutional Court in *Buffalo City Metropolitan Municipality v Asla*,²⁵ comprehensively clarifies the approach to delay in a self-review and lays to rest any previous misconception that delay and the merits are discrete inquiries.²⁶ This Court in *Valor IT v Premier, North West Province and Others*²⁷ pointed to a 'factual, multi-

²⁵ *Buffalo City* fn 2 para 40.

²⁶ *Buffalo City* fn 2 paras 56 to 59 refers to other decisions as well.

²⁷ *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397 (SCA); 2021 (1) SA 42 (SCA) para 30; also referred *Department of Transport and Others v Tasima (Pty) Ltd* ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) para 144 and *Khumalo and Another v MEC*

factor and context-sensitive inquiry — in which a range of factors — the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits — are all considered and weighed before a discretion is exercised one way or the other’ come into play.

[64] In the present matter, factors relevant to the question of delay, the reasonableness thereof and whether it should be overlooked call into the inquiry: (a) when the deviations occurred during the procurement process, (b) the manner in which they occurred and (c) their materiality and cumulative effect on the overall tender process. It merits emphasis that the bulk of the deviations occurred after the award of the tender. Given the view I take, it is necessary to amplify additional relevant facts to elucidate the points of departure from the main judgment.

[65] A discernment of the role of Transnet, as the holding company and custodian of the group’s constitutional obligations, on the one hand, and Transnet Freight Rail (TFR), a division of Transnet on the other is material in this case. TFR is the division responsible for the rail transport of commodities for exports within the regional and domestic markets. City Deep, Kascon and Kaserne, for whose benefit the security fencing tender was procured, form part of the corridor of inland container terminals managed by TFR. This is a crucial factor that has not been addressed in the main judgment. Whilst the invitation for the bids admittedly went out in the name of Transnet, there can be little doubt – a fact that emerges from the record – that TFR was in fact at the forefront of the entire bidding process from beginning to end. I elaborate on this in the paragraphs below.

[66] Although Transnet ‘as employer’ published the invitation to tender (RFP) for the contract, it assigned TFR to act as ‘its agent’ to manage the tender evaluation process. The bids were submitted to the TFR RME Acquisition Council. On 30 January 2019, Mr T Shai (Project Manager); Ms M Lee (Senior Engineering Manager) and Mr V Mshuqwana (Technical Manager) all employees at TFR, evaluated the bids. After the evaluation, on 11 July 2019, the Transnet Head Office Acquisition Council (TAC)

for Education, KwaZulu-Natal [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) para 44.

supported recommendation to award the tender to Tipp-Con. The resolution by the Head Office Acquisition Council records that:

‘The matter was before the Council previously in terms of which permission was sought to *negotiate the contract value* with the recommended bidder. The CFET reported to the Council that they had managed to negotiate with the bidder and ultimately obtain a savings of R 4 862 450.79. The amended contract value thus came to R 34 371 970.15 and the approved budget was thus adjusted to R 39 155 322.00.’ (Emphasis added.)

[67] The letter dated 7 August 2019, confirming the award and the terms thereof advised Tipp-Con that, Mr Thakhani Shai (Mr Shai), an employee at TFR, was the ‘initial point of contact’. The letter reflects the ambit of Mr Shai’s responsibilities thus:

‘Management issues:

- a) . . .
- performance monitoring of Supplier;
- day-to-day service provider arrangements such as premise access and security issues;
- statutory compliance issues such as occupational health and safety, environmental, industrial and human resources management issues;
- payments and remuneration arrangements including invoice processing...’

The letter is consistent with the assignment of the implementation of the tender by Transnet to TFR.

[68] The review proceedings were brought by the Executive Manager: Legal (Litigation) of Transnet as the principal, and not by TFR. In the founding affidavit, Transnet stated amongst others that the employees involved misrepresented the status of the sample to the TAC, and certified that the sample was hot dip galvanised when it was not. Tipp-Con’s tender was not a ‘responsive tender’. The Acting Head of Litigation employed within the TFR division, filed a further affidavit in support of the review by Transnet, detailing steps taken after the irregularities were uncovered. The thrust of the further affidavit is that Transnet was misled to make an invoice payment of R10 467 106.67 for a product which was not in accordance with the scope of work it had assigned or the BFO it had accepted, flowing from the open tender process. She confirmed that the resultant contract ought not to have been implemented in the manner it was.

[69] Tipp-Con did not dispute the above averments. Instead, it focused on the question of balance convenience, the prejudice it had endured, and the remedy. However, as *All Pay* tells us, those matters are, as a matter of law, appropriately considered and only germane in a separate inquiry and engage the remedial powers of a court after the decision on the question of invalidity has been made.

[70] Insofar as it is said Transnet's TAC approved the 'non-responsive' sample, I am not persuaded that the TAC itself engaged the compliance aspects of the tender before supporting the recommendation of Tipp-Con.²⁸ The record of its deliberation appeared to confine its involvement to financial negotiation, correctly, to ensure that value for money accrued to Transnet. Transnet's assertion that there was a misrepresentation of compliance with the tender prescript by the employees of TFR must be accepted. It must be viewed in the light of the principle in *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others*.²⁹ In that case, the Court held that an acceptance by an organ of State of a tender which is 'not acceptable' within the meaning of the prescribed legal framework is an invalid act and falls to be set aside. Although that case dealt with the Preferential Act, it makes clear that the requirement of acceptability is a threshold requirement.³⁰ Regardless of the reasons for how it came about that Tipp-Con's tender was accepted it cannot, from what emerges from the record, however be gainsaid that it was patently 'non-responsive'.

[71] Even if it said that Transnet is estopped from relying on the non-responsive tender on account of the sample, that is not the end of the inquiry. The approach to overlooking a delay in a legality review is flexible.

²⁸ The resolution by the Head Office Acquisition Council records that: . . . 'The matter was before the Council previously in terms of which permission was sought to *negotiate the contract value* with the recommended bidder. The CFET reported to the Council that they had managed to negotiate with the bidder and ultimately obtain a savings of R4 862 450.79. The amended contract value thus came to R34 371 970.15 and the approved budget was thus adjusted to R39 155 322.00.' (Emphasis added.)

²⁹ *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] ZASCA 90; 2008 (2) SA 638 (SCA); [2005] 4 All SA 487 (SCA).

³⁰ *Ibid* para 11.

[72] Transnet stated that it was alerted to the irregularities by the contents of the statement of claim filed by Tipp-Con in the arbitration proceedings. The deponent states that she became aware of the irregularities after the adjudication process, which prompted her investigation. A belated investigation and consequent discovery of tender irregularities is not uncommon. In *Swifambo Rail Leasing (Pty) Ltd v Prasa*³¹ the review was brought some 793 days late. Although the length of the delay in the present review is not comparable, and the period in the present case shorter, a lengthy period is not in and of itself a bar to overlooking the delay.

[73] Significantly, TFR employees attended to the adjudication process which completed on 7 August 2020. They claim to have received the ruling dated 4 August 2020 on 7 August 2020. They filed the notice of dissatisfaction with the Adjudicator's determination on 7 September rather than on 4 September 2020, thereby denying Transnet the right to appeal the award. The above facts ineluctably point to yet another mismanagement of the process by the employee (s) concerned and should not deprive Transnet the right to a review.

[74] Furthermore, Transnet was not a direct participant in the arbitration process. It looked at the irregularities retrospectively, similarly to the Prasa board in *Swifambo*. Its unchallenged version in that regard must be accepted. The effect is that the 'proverbial clock' for computing the delay started 'ticking' from the date of the completion of the arbitration, on 7 August 2020. Transnet instituted the review application in October 2020. On the strength of the Court's decision in *Buffalo City*, there was no delay, alternatively, the delay was not undue or unreasonable.

[75] Even if it is found that the delay was undue or unreasonable which was not the case here, that does not bring an end to the inquiry in a legality review. Skweyiya J explained in *Khumalo*³² that '[a]n additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision'. This entails analysing the impugned decision and considering the merits of the legal challenge made against that decision. The bulk of the irregularities of which Transnet complains occurred after

³¹ *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa* [2018] ZASCA 167; 2020 (1) SA 76 (SCA).

³² *Khumalo* fn 9 para 57.

the award of the tender, evidently, after the meeting of the TAC on 11 July 2019. How the deviations pertaining to the installation of the fence occurred is important.

[76] It should be recalled that the letter of award envisaged that the start date of the contract would be 16 August 2019, and the completion date 17 March 2020. According to Tipp-Con, Transnet ‘approved’ the choice of a different sample on 13 September 2019, a month before the contract was signed. TFR signed the contract on 30 October 2019, and furnished it to Tipp-Con on 31 October 2019. Yet, the different sample ostensibly ‘authorised’ before the signature of the contract was not embodied in the subsequent contract. Tipp-Con conceded that its final offer was not carried over to the NEC Contract, a matter I return to later. In any event, part of the complaint is that the NEC contract deviated from the RFP.³³

[77] Tipp-Con’s defence is that: ‘it had put up various samples and what it installed was selected by Transnet’. It explains the background to the selection of a sample other than the sample provided in the RFP or its BFO in this manner:

‘[C]oncerns were raised about Tipp-Con’s capacity to perform on time and Transnet enquired from Tipp-Con who the supplier would be for the fencing material. It was suggested that an inspection of Tipp-Con’s material supplier’s manufacturing facilities be conducted (so as to inspect capacity and quality control procedures), given that Tipp-Con had indicated that it had engaged more than one supplier at the time.’

[78] The first official engagement between Transnet and Tipp-Con after the award of the tender occurred at a ‘project kick- off’ meeting on 28 August 2019. The concerns referred to in the answering affidavit were not recorded in the minutes of the ‘project kick-off’ meeting. The first reference to a need to install samples is in correspondence from Tipp-Con dated 4 September 2019, by Mr Madiri (of Tipp Con) who wrote to Mr Shai stating:

‘...We would like our suppliers to erect the fencing samples for your approval. This process will assist the Quality Control of the fence to be erected. May you let us know the person to coordinate this with and the place where we can construct the sample. *Also indicate the sizes and detail which must be shown by the samples.*

³³ *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) at 245.

Once we receive the details requested we will inform you the date for the sample construction. However at the moment, we would like the supplies to erect the sample early next week on Tuesday the 10th of September 2019 and then review them, the following day, the 11th of September 2019 . . .’ (Emphasis added.)

Mr Shai wrote in reply on 9 September 2019.

‘Please use the sizes that are on the tender document including the specification.

You can erect the sample fence at the gate where we have a kick off meeting in City deep terminal.’

[79] Of the two meetings recorded in Tipp-Con’s ‘meeting notes’ on 13 September 2019, the first of which was at the premises of a supplier, only two of TFR’s representatives attended these meetings. There is no explanation why a meeting to ‘verify the production capacity’ of suppliers occurred after the award of the tender. Since the tender had already been awarded, such a step is illogical. Members of the bid evaluation structure were not present. Be that as it may, the recorded extract of ‘meeting notes’ supplied by Tipp-Con states that:

‘On the same day, Transnet’s representative selected one of the samples (after having inspected their physical properties) to be erected on the sites and Tipp-Con was instructed to proceed with the procurement of the materials for the erection of the sample so selected, which had a mesh wire diameter of 3mm horizontal wire and 4mm vertical wire, and 13mm vertical flat bar per section.

. . .

The Transnet representatives led by the Transnet Project Manager (Mr T Shai) identified and approved Sample No 1 erected onsite, *which also complied with the minimum tender requirements*. (Emphasis added.)

VN as the user client indicate that [the] he approves sample No 1 as it was economic in terms of maintenance and possibility for other suppliers to be considered for supplying the size of the panel. The modular joint provided extra rigidity and a solid joint to the panel. The 8mm flat bar provided more steel and increased the delayed cutting time and the double posts improved the stability of the fencing system.’

[80] On the other hand, the minutes of the risk reduction meeting attended by TFR representatives on 14 January 2020 recorded that:

‘Mr. Siala stated the following: Post the award there was an issue whereby Tipp-Conn had to engage with the technical team and during that time *Tipp-Conn realised that there were other*

things that they did not foresee. The Project Manager, Mr Shai requested that we install the sample after we had a kick-off meeting attended by all the Stakeholders from Security and end users. They emphasized that because it was a high risk area, security was of the utmost importance. *When we were requested to present a sample of what we were going to do we then proposed two products that could be installed bearing in mind what the minimum requirement should be.* So we brought in these samples (Mr. Siala showed the samples to the meeting). *We had an alternative product which we considered to be a better product for such a high risk security area. Mr. Siala said after he showed the two samples to the team on site and demonstrated that the second sample is stronger and more durable, he then suggested that this product would be better to install.* Subsequently the sample was approved where-after installation took place. In November 2019 we were questioned why we are installing something different from the original sample and we responded that the product being installed has much stronger features than the original sample.’ (Emphasis added.)

[81] Tipp-Con unilaterally offered an alternative product outside of the sanctioned tender process which was accepted by people who were not authorised. The impression is that it had not fully considered the technical implications of its offer. There is no evidence that Transnet as the principal authorised the deviations after its acceptance of Tipp-Con’s BFO. Even if it did, the finding by this Court in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*³⁴ is that an organ of state did not have the authority to contract outside of a competitive bidding process, to do so contravenes s 217 of the Constitution. That it must comply with a mandatory and material procedure prescribed has not changed, and applies with equal force in this matter. All this falls to be evaluated against Tipp-Con’s undertaking during the price negotiations and in the light of the price reduction it offered.

[82] The question of the ‘materiality’ of the deviations as well as that of Transnet’s participation in the arbitration process has a twofold effect on the merits of the review and why the Court should overlook the delay. Tipp-Con stated that: ‘the 3 mm wide diameter is within the tolerance of +/- 0.08 mm diameter as indicated by SANS 675:2011. In contrast, the tender evaluation criteria required that ‘panel and fixtures shall be hot dipped galvanised coatings on fabricated steel SANS 121:2011.’ Tipp-

³⁴ *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] 4 All SA 842 (SCA) para 21.

Con in its bid undertook that “the actual panels and fixtures will be hot dip galvanised coated on fabricated steel. Ref. SANS 121:2011.” The report by the GP Galvanizers Association Southern Africa dated 1 July 2020 states that from the results of the laboratory tests, they could surmise that on both panels the horizontal wires were galvanized to SANS 675:2009-Class D, since the masses of about 60-80g/ correlate to the requirements of this standard. On 3 February 2020, Ms Ndletyana confirmed the non-compliance with SANS 121:2011. Even though I make no definitive finding in this regard, these facts point to questions about the grade and quality of the product offered to Transnet and installed at the premises. They are in addition to the complaint about the ‘non-responsive’ tender. Thus, all of these shortcomings cannot redound to the benefit of Tipp-Con.

[83] Prior to the negotiations after its selection as a preferred bidder, Tipp-Con’s tender price was considered ‘above market related prices’. Tipp-Con’s BFO offer of R34 371 970.15 entailed a reduction in its initial preliminary and general price by R4 827 073.23. It stated that:

‘It should be noted that we have not made any changes to the Technical specification in our offer. We are offering the High Quality Steel welded wire mesh Fencing with a 4mm wire diameter and with Aperture of 12 x76mm and using the H-beam Posts’.

[84] As is now common cause, what Tipp-Con ultimately installed varied from its BFO and as noted above, also varied from the quality assurance standard. That brings me to the finding by the adjudicator that the variance was a ‘*deminimis deviation*’ and the acceptance of this finding in the main judgment. The arbitration process was conducted on paper without hearing evidence. In view of Transnet’s complaints and their cumulative effect on the tender process and the impugned contract, such a finding can only be supported if it was based on a proper consideration of *inter alia* the: (a) agreed contract price; (b) impact on the direct cost of the fence; (c) effect on the margin after the reduction of the bid contract price and (d) the incentive for Tipp-Con to cut its costs to improve its margin. Accordingly, notwithstanding the differing quality standard, the consequence of Tipp-Con’s defence, that ‘the 3 mm wide diameter was within the tolerance of +/- 0.08 mm diameter as indicated by SANS 675:2011, albeit on a SANS standard not stipulated in the RFP was never tested. In my view, a determination of whether there was an incentive to cut costs and benefit

Tipp-Con's margin on the one hand or whether on the other hand, Transnet nevertheless obtained value for money, would have been necessary prior to concluding that the deviation is '*deminimis deviation*'. In any event, the central focus of the inquiry before the arbitrator was the contract concluded after the award of the tender. Understandably, the arbitrator was acutely cognisant of the fact that his task in the arbitration process was not to review the tender process as the power to do so resides in the exclusive domain of the courts. Thus, the arbitrator's finding cannot avail Tipp-Con in this case.

[85] It was submitted that Transnet initially sought to enforce the contract, participated in the arbitration process and should be barred from instituting the review. To the extent that this suggests that the review is a self-serving, reactive challenge driven by a desire to avoid the consequences of the arbitration award, the above facts point to the contrary. In any event, I cannot conceive of any reason why in the context of the facts of this case Transnet should be precluded from challenging the award of the tender by one of its divisions to Tipp-Con in circumstances where it subsequently discovered cumulative irregularities in: (a) the selection of Tipp Con; (b) irregular deviation from the terms of the RFP; and (c) a contract which deviates from the RFP, and the accepted offer, leading to an installation of a fence it never tendered for. To my mind, one ought not to lose sight of the fact that although it was Transnet that published the RFP, it played a limited role in the process after approving the financial terms, as is borne out by the record. TFR, independently conducted the entire bidding process every step of the way from beginning to the end. And when disputes arose in relation to the contract that precipitated the arbitration process, it was only the employees of TFR who participated in that process. In these circumstances the finding in the main judgment that Transnet was lackadaisical and dilatory in challenging the propriety of the award is not justified. It has the effect of unduly constraining the ability of a holding company like Transnet from investigating and undoing the consequences of irregular award of its contracts.

[86] In sum: Transnet was obliged to resist the irregular award, and to set aside a resultant contract which was not in accordance with a lawful tender process. In particular, it was compelled to resist the implementation of a contract for goods not contracted for. In my view, Transnet's functionary acted in good faith or with the intent

to ensure clean governance.³⁵ During argument, Tipp-Con's counsel accepted that a private party contracting with an organ of state has a reciprocal duty to ensure that it complies strictly with the legislative prescripts and tender requirements. The concession was well made and is consistent with the requirements for fairness, transparency, competitiveness and cost efficiency, all of which were breached at every turn through the tender mismanagement in this case. I therefore cannot subscribe to the view that in instituting a self-review, Transnet acted otherwise than in good faith.

[87] In the result, I would have upheld the appeal and grant consequential relief with costs of two counsel.

N T Y SIWENDU
ACTING JUDGE OF APPEAL

³⁵ *Buffalo City* fn 3 para 62 referring to *Tasima* in fn 10.

APPEARANCES

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