IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 07/27391

In the matter between:

THE NEW RECLAMATION GROUP (PTY) LIMITED Applicant

and

ESKOM HOLDINGS LTD First Respondent

KWANDA FERRO-ALLOY AFRICAN RESOURCES (PTY) LTD Second Respondent

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J U D G M E N T

BLIEDEN, J:

[1] During March 2007 the first respondent, Eskom Holdings Ltd (Eskom) formally invited tenders, in the form of a request for quotations (RFQ) for the

collection and disposal of non-ferrous scrap metal for a period of two years. Eight companies responded to the invitation to tender. Included amongst those eight are the present applicant, The New Reclamation Group (Pty) Ltd (Reclamation) and the second respondent Kwanda Ferro-Alloy African Resources (Pty) Ltd (Kwanda).

[2] The tender was awarded to Kwanda. It is against this award that Reclamation has brought the present review proceedings.

[3] Although Reclamation in its Notice of Motion applied for it to be substituted in place of Kwanda as the successful tenderer this relief is no longer being claimed. Reclamation‘s claim is limited to claiming a review and setting aside of the proceedings in which Kwanda was awarded the relevant tender.

The Tender Procedure:

[4] The process for considering the tenders was divided into three phases, the first of which involved utilising the criteria set out in clause 5.4.1 of the RFQ to arrive at a short list of bidders; the second stage involved specified departments within Eskom conducting further assessments of the short listed tenderers to narrow down the selection; and the last stage of the process required the corporate divisions of the R35M Tender Committee to make the

final decision to identify the successful tenderer from the short listed candidates.

[5] In terms of the first stage, the tenders were evaluated by a team from Eskom's Corporate Procurement Department in accordance with the evaluation criteria set out in clause 5.4.1 of the RFQ. Scores were allocated under each of the items listed in this clause. This evaluation incorporated, inter alia an evaluation of each tenderers experience and acumen as well as a financial analysis of each tender based upon financial statements submitted as part of the tender. It is plain from a perusal of this clause that its purpose was to evaluate the capacity of the various tenderers to comply with their obligations in terms of the tender.

[6] A copy of clause 5.4.1 is reproduced.

5.4.1 APPOINTMENT/ EVALUATION CRITERIA

The following criteria and their individual weight in % will be used for the evaluation of the technical proposal:

Technical evaluation criteria (70%)	Weight
Approach and Methodology • Does the contractor have the necessary acumen to lift the project? • Does the contractor have the experience of the industry? • Is their confidence that the contractor will be able to do the job?	50%
National Commitment and Success Rate • Environmental Requirements Form.	10%
Fees, timing and contracts conditions • Fee structure Acceptance of Eskom's General Conditions of Service Contract Conditions as attached.	10%
Financial Analysis: • Copies of the firms Financial Statements For 2005 and 2006 must be submitted with the response to the RFQ • Tax Clearance certificate	 15% 15%
Total	**100%**

Price evaluation criteria (30%)	Weight
Price Schedule Schedule of Transport Charges (and Area Map)	75%
BEE	25%
Total	**100%**

Note:

Eskom's commercial process will be followed and this process is dependent on the decisions made by different Eskom Adjudicating authorities.

In terms of Eskom's procurement policy, scrap collection Contractors are required to illustrate that they support black economic empowerment, women empowerment and employment equity in their business practices.

Eskom reserves the right to set aside 25% of the contract value to capable black Economic Empowered Companies.

[7] After the initial evaluation by the Corporate Procurement Department, four tenders were short listed for further adjudication by Eskom's other adjudicating authorities.

[8] Eskom's Corporate Management Accounting Department Reviewed the short list of tenders for the purpose of deciding whether the bidders were sound enough financially to be awarded a contract.

[9] Thereafter Eskom's Treasury Department completed a financial evaluation of the short listed tenders on the basis of the price quoted by each tenderer. This evaluation was distinct from the financial evaluation which was conducted in the first stage in the process by the Corporate Procurement Department for the purpose of the criteria under clause 5.4.1 of the RFQ as well as the financial analysis conducted by the Corporate Management Accounting Department. Neither of these two initial assessments considered the comparative prices offered by the various tenderers. This assessment was

the task of the Treasury Department. This price is the price offered by the tenderer to Eskom for the right to remove and dispose of the scrap metal concerned. Eskom would therefore become the creditor of the successful tenderer.

[10] Thereafter a Site Technical evaluation was conducted by Eskom's Security Risk Management/Conductor Theft Unit. This assessment was necessary in order to evaluate whether the short listed tenderers managed and operated a site which would enable them to discharge their obligations in terms of the tender.

[11] In the final stage of the process the Corporate Division R35M Tender Committee (The Tender Committee) was presented with a recommendation from the Procurement Department, which had consolidated the various evaluations conducted in the second phase that the contract was awarded.

[12] The minutes of the initial meeting at which this recommendation was presented states that The Tender Committee took the view that the saving of just less than 3 million rand which Kwanda's tender presented could be outweighed by the ratings scored in relation to the Security and Site evaluations which were conducted in the second phase of the process. As a result, the committee requested that an updated report be submitted providing a motivation on the impact of the considerations on the Procurement

Department's recommendation.

[13] At a subsequent meeting it was recorded that the submissions of the Procurement Department which had been approved on a round robin basis on 1 July 2007 were again considered and discussed. It was ultimately recorded that the Tender Committee granted approval for the tender to be awarded to Kwanda and for a contract to this effect to be concluded.

The Relevant Legal Principles:

[14] A tender process by government or an organ of state is subject to the provisions of Section 33 of the Constitution of the Republic of South Africa, 1996 (The Constitution) and as a result it is also subject to the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA): Logbro *Properties CC v Bedderson NO and Others 2003(2) SA 460 SCA* at par 5. It was not in issue that Eskom was to be accepted as an organ of state.

[15] The evaluation and award of the tender by Eskom, which forms the subject matter of the present case is therefore subject to the requirement of lawful and procedurally fair administrative action as stipulated by the constitution and codified under PAJA. (Minister of Health and another NO v New Clicks SA Pty Ltd and Others 2006 (2) SA 311 (CC) at par 92 –

105.)

[16] The requirements that Eskom, a quasi state body, in evaluating and awarding the tender, conducts itself in a manner that is lawful and procedurally fair also embraces the principal of legality, upon which our Constitution is founded and which informs all administrative conduct. Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) at par 48 and 49.

[17] The overriding consideration that applies to every tender process is that of fairness.

[18] The fair procedure is not a matter of secondary importance; it goes to the very heart of the administrative process. As stated by Wade and Forsyth, Administrative Law, 7 edition “Procedural fairness and regularity are of the indispensable essence of liberty”. The same authors make the point that a violation of natural justice makes the decision concerned void (see pages 491-516).

[19] The situation which is relevant to the present case has been summed up by the Supreme Court of Appeal in *Metro Projects CC v Klerksdorp Local Municipality 2004 (1) SA 16 at page 21*, where Conradie, JA speaking of the obligations of a local authority, set out the relevant

principles in par 12 and13 of that judgement. In my view what was said there applies equally in the present case.

> *"[12] There is another reason that the tender procedure of a local authority must be fair .Invitations to tender by organs of State and the awarding of tenders where it is done in the exercise of public power is an administrative process (see Logbro Properties CC v Bedderson NO and Others 2003(2) SA 460 SCA par [5] at 465F – 466C, where the leading cases are collected).Section 3(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 requires the process to be lawful, procedurally fair and justifiable. But primarily, in the case of a local authority, the process must be fair because s 10G (5) (a) of the Local Government Transition act 209 of 1993 requires it.*
>
> *[13] In the Logbro Properties case supra, par [8] and [9] 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 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."*

[20] In the present case upon the response by the bidders to the invitation to tender, in law an offer came into existence between Reclamation and Eskom, governed by the provisions of the invitation to tender, the PAJA and the principles of Administrative justice. Eskom was not at liberty to depart from the requirements or the provisions of the tender documents without at least advising Reclamation and all the other bidders of this fact. The question as to whether Eskom acted fairly and within the constraints of the constitution and PAJA is what must be decided in the present case as a first issue.

Reclamation's Case

[21] The case for Reclamation is that Kwanda did not qualify for being short listed as a contender for the tender for the following reasons:

21.1 Kwanda is a company which was formed on 8 September 2006. Its shares are owned by a black empowerment partnership and by a company Rappa Holdings (Pty) Ltd (Rappa) on an equal basis.

21.2 Rappa is a holding company which owns three other subsidiaries, being Knightsbridge Copper and Cables (Pty) Ltd (Knightsbridge), Waste Product Utilisation (Pty) Ltd (Waste Products) and Three Marais Mines (Pty) Ltd (Three Marais).

21.3 It is not in dispute that Kwanda did not, because it could not, submit its own financial statements or proof of its own financial worth as required in the RFQ because these did not exist.

21.4 As far as the prior experience of Kwanda and Rappa are concerned, the following undisputed facts are referred to: According to the papers filed by the respondents:

21.4.1 there is no evidence that prior to 20 June 2007 either Kwanda or Rappa had commenced business or had undertaken any work in the disposal of non-ferrous scrap metal or any other work.

21.4.2 it is not stated anywhere on behalf of Kwanda that any of the subsidiaries of Rappa are engaged in the business of the disposal of non- ferrous scrap metal.

21.4.3 reference is made to various representatives of Rappa on whose technical skills and expertise Kwanda was able to draw. The same individuals are referred to in Kwanda's tender submissions. None of these people profess to have any experience let alone expertise, in the scrap metal business.

[22] The affidavits filed on behalf of Kwanda make it plain that it was only after the award of the tender that:

22.1 it commenced hiring employees.

22.2 concluded agreements with Rappa to lease trucks and trailers and purchase vehicles.

22.3 acquired the equipment that was necessary to enable it to render the services required of it under the tender.

22.4 concluded a lease agreement with Rappa for the lease of office and factory premises.

[23] It is plain therefore; that it is only subsequent to the award of the tender that Kwanda could possibly have acquired the necessary skills and equipment to meet the tender requirements.

[24] In its evaluation of Kwanda, Eskom's stance is that it was aware that Kwanda lacked the necessary requisite resources, skills and expertise, but it took into account that these could be supplied by Rappa from its resources and accepted the Kwanda tender on this basis.

[25] The financial analysis conducted by Eskom as required by the RFQ and as revealed in the documents furnished by Eskom shows:

25.1 the analysis conducted relates solely to Rappa and does not

mention Kwanda;

25.2 the stated purpose of the financial analysis is "*solely for purposes of deciding whether Rappa Holdings (Pty) Ltd is sound financially to be awarded a contract of 29 million rand for the recovery of metal over a period of two years as per reference corp949*";

25.3 the conclusion that is reached is that Rappa Holdings is sound enough financially.

25.4 the statement in Eskom's answering affidavit that Kwanda was sound enough financially to be awarded the contract is a non-*sequitur* as Kwanda's financial ability was at no stage questioned.

[26] As regards the evaluation of the technical capabilities of the tenderers site inspections were conducted. The reports relating to these inspections are at pages 341-349 of the Eskom documents. In its answering affidavits it is conceded by Eskom that these inspections were "*… necessary for Eskom to assess whether the short listed tenderers managed and operated a site which would enable them to discharge their obligations in terms of the tender*".

[27] Kwanda, however had no site to be inspected, nor did Rappa, as the

latter is an investment and holding company. As is plain from the actual report which is confirmed by the Eskom official who had the duty to make it, he relied on a site which would be provided for in the future (Eskom documents page 345-346).

[28] The same considerations relate to the well trained personnel which are attributed to Kwanda. These did not exist at the time of the submission of the tender by Kwanda but could only come into being after the acceptance of its tender.

[29] It is claimed by Reclamation that the approach of Eskom to the Kwanda tender is based on three fundamental fallacies. These are:

29.1 A failure to realise that Kwanda as the contracting party is an entirely separate legal entity and no account can be taken of its owners in assessing its ability. Therefore the consideration of Rappa's expertise was an irrelevant consideration and legally impermissible. Insofar as Eskom relied in its evaluation of Kwanda and on Rappa's subsidiaries such as Waste Products this was incorrect and inappropriate.

29.2 The tender was for the work to be performed by Kwanda. The fact that Rappa or its subsidiaries might have had the means or

ability to perform it is not a relevant consideration for the purposes of deciding whether or not the tender should be awarded to Kwanda.

29.3 The failure by Eskom to take into account the fact that no evidence placed before it warranted the conclusion that Rappa itself had any experience in the business of waste scrap metal collection and disposal. The closest that Rappa got to any contention in this regard, is the finding by Eskom that

> "*The Rappa Group have been involved in ferrous, non-ferrous and precious metals industries for many years.*"

However on the evidence before Eskom "*Rappa Holdings (Pty) Ltd carries on the business of an investment and holding company. Its subsidiary companies carry on the business of extraction of gold from mine waste, recovery, refining and benefication of metals*". This is clearly demonstrated in the Eskom report on Rappa at page 335 of the tender papers

Eskom and Kwanda's Response To Reclamation's Case:

[30] In the introductory letter to its tender submission Kwanda indicated that it was a company formed in partnership with Rappa Holdings to target a niche of steel and foundry customers in Africa which are perceived as risky due to

their size, and geographical positioning etc. The Relationship between Rappa and Kwanda is explicitly set out in the following terms:

30.1 Rappa is a fifty percent shareholder in Kwanda

30.2 Rappa is the holding company of Knightsbridge, WPU and the Three Marais Mines.

30.3 Kwanda is integrated in terms of production to Rappa and is independent in terms of the way its business is run.

30.4 Kwanda has access to the weighing and production facilities which allow Kwanda to sort, weigh and process scrap purchased from Eskom in sellable products as per its customer specifications. In addition Kwanda set out its black empowerment credentials. This was to the effect a fifty percent shareholding in Kwanda was identified as being held by various black entities.

[31] In addition to this the tender documents included a letter from Rappa indicating that Kwanda is a subsidiary of that company and that the two companies conduct business from the same property.

[32] When dealing with the tender requirements that annual financial statements be provided, Kwanda indicated that by virtue of the fact that it had been incorporated only five months prior to tendering, it had not yet completed one, and as a result had provided financial statements of its shareholder, Rappa, for consideration by Eskom. Similarly as regards the documents to prove environmental compliance, it provided the documents of WPU, one of Rappa's subsidiaries.

[33] The RFQ indicates the appropriateness of tendering in a joint venture by suppliers in the industries. Clause 4.8.1.3 of this document indicates the following:

> "*In terms of Eskom's policy to support, small, medium and micro enterprises preference will be given for qualified SMME'S, BEE's tendering on their own, or in joint venture with established suppliers*."

Both Eskom and Kwanda classify Kwanda's tender as that of a joint venture and claim that Eskom was correct in assessing it as such.

[34] It is also important to place in perspective Reclamation's contentions that Kwanda lacked expertise and skills. The tender in this matter is not of a technically complex nature. In substance it involves no more than the removal of cable from Eskom's premises or other designated sites, machine granulating, bagging, loading and delivering the material to customers. It was submitted the expertise, experience and skills possessed by Kwanda's directors, shareholders and management was disclosed in the tender

documents to Eskom and is set out in detail in Kwanda's answering affidavit.

[35] It is further submitted that the procurement process as stated in the RFQ is designed to encourage competition and hence the introduction of new entrants to the industry. If Reclamation's approach is accepted, it would be almost impossible for any new entrant to the industry to submit tenders. This is so because it will often be the case that a new entrant to the industry cannot justify the expenditure on the necessary purchasing or increase of its workforce unless and until it has in fact been awarded a tender. To require of a tenderer that the necessary expenditure be made on a tender is commercially unviable for most new entrants. If this was a prerequisite to tendering, it is unlikely that anyone other than the established players, and more particularly, the incumbent would be able to tender.

[36] What is relevant for the purposes of Eskom's adjudication of the tenders is not whether a tenderer has not already purchased the equipment necessary to carry out the tender at the time that it tenders, but rather whether Eskom is satisfied that it "*is placing its business in viable companies*" and that the tenderer "*will be able to comply with the terms of the agreement once a contract has been awarded*". Nowhere in the RFQ does it state that a tenderer must be in possession, prior to tendering, of the relevant equipment and staff. Provided the tenderer ensures that it is able to comply with the terms of the agreement once it is awarded the tender, the necessary

expenditure on additional equipment and increasing its staff complement can competently be made after the award of the tender to it.

[37] In the light of Eskom's explicitly stated preference for joint-venture tenderers, it was entirely appropriate and consistent with the terms of tendering as set out in the RFQ that Kwanda formed itself in partnership with Rappa for the purposes of tendering for the contract at issue in these proceedings; furthermore it was appropriate for Eskom to have considered the information relating to Kwanda's joint venturer Rappa, when it evaluated Kwanda's tender.

[38] What should further not be lost sight of is the fact the tender was for the collection of scrap metal from Eskom, i.e. scrap metal was put up for sale for which Kwanda offered 29 million rand which was almost 3 million rand more than the amount offered by Reclamation. The criterion of price is included in the RFQ by implication and by law.

[39] The minutes of the tender show that a new, small, BEE compliant entity was `established to supply a rather substantial joint shareholder with scrap metal for its foundry, and with the full support of that joint shareholder, offered almost 3 million rand more than Reclamation for Eskom's scrap metal.

Analysis of The Parties' Cases

[40] Both Eskom and Kwanda premise their case on the proposition that Kwanda's bid is in fact that of a joint venture between it and Rappa. In my view this contention is misplaced.

[41] The classic description of the relationship between the bodies constituting a company is that of Greer LJ stated in *John Shaw and Sons (Salford) Ltd vs. Shaw* [1935] 2 KB (113) (CA) at 134:

> "*A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles be exercised by its directors; certain other powers may be reserved for the shareholders in general meetings. If powers of management are vested in the directors they and they alone can exercise these powers. The only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles, or if the opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders*."

[42] It has been a principle of Company Law for more than 100 years that a company like Kwanda, as the contracting party, is an entirely separate legal entity from its members or shareholders (see Salomon v Salomon &Co Ltd [1897] AC 22; Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530.

[43] For A joint venture to have existed both Kwanda and Rappa would have had to be jointly and severally responsible and accountable for every

aspect of the to be awarded contract. This was not Kwanda's tender to Eskom.

The fact that Rappa is nothing more than a shareholder in Kwanda carries the implication with it that it is not responsible for any of Kwanda's liabilities. It cannot be held to any undertakings made Kwanda and therefore any action of Kwanda is its own responsibility. By referring to Rappa's financial statements and to the ability of WPU to comply with environmental requirements, as examples, Eskom acted beyond its powers and contrary to its duty to ascertain the ability of Kwanda to comply with its offer as contained in its tender. It is irrelevant that Kwanda is to pay Eskom approximately 3 million rand more than Reclamation; the final offer price is meaningless without the tenderer, Kwanda, being in a position to provide proof that it, not one of its shareholders, is in a position to comply with its obligations in terms of the tender. This it failed to do.

[44] Eskom's decision to consider the Kwanda tender on the same basis as the other seven tenderers in my view cannot be found to be objectively rational. Kwanda, as Kwanda was not in a position to furnish any information that it had the ability to carry out the contract for which it was tendering. It is not relevant whether Eskom acted in good faith. It did not act in an objectively rational manner. As to the meaning of "*rational*" referred to in this sense, what was said in *Pharmaceutical MNFRS of SA: In Re Ex Parte President of the RSA* 2000 (2) SA 674 (CC) at 709 par 90 is applicable here:

> "*Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries'. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of its functionary and as long as its functionary's decision viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision. This is such a case.*"

[45] In the present case the whole purpose of the RFQ and the rest of tender process was to ensure that suitably experienced, qualified and economically viable entities place their offers before Eskom for consideration. Kwanda was not such an entity. Rappa and its subsidiaries cannot be said to be tenderers as their financial and technical expertise are legally irrelevant in assessing Kwanda's qualifications. Rappa and its subsidiaries are not in anyway obligated to Eskom in terms of Kwanda's tender. If Eskom wanted inexperienced companies who demonstrate that they may be able to comply with its requirements this should have been stated in the invitation to tender. A reading of the relevant documents and particularly clause 5.4.1 the RFQ shows a totally different picture.

[46] In the circumstances the award of the tender to Kwanda cannot be allowed to stand and must be set aside on review.

The Exercise Of A Discretion

[47] As submitted by Kwanda's counsel, it is a well-established principle of judicial review that a court exercises a discretion whether to set aside an invalid administrative act. According to the Supreme Court of Appeal:

> "*It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.*"
>
> *Oudekraal Estates (Pty) Ltd of Cape Town* 2004 (6) SA 222 (SCA) at par 3

[48] As has already been stated, in terms of PAJA, the yardstick against which this discretion is to be exercised is what is "*just and equitable*".

[49] Our courts have identified a number of rationales for this discretionary feature of administrative law:

49.1 prejudice caused to the respondent by any delay in bringing the review; *Wolgroeiers Afslaers (Edms) BPK vs. Munisipaliteit van Kaapstad* 1978 (1) SA13 at 41

49.2 the public interest element in the finality of administrative

decisions and the exercise of administrative functions: *Associated Institutions Pension Fund and Others v Van Zyl* 2005(2) SA 302 (SCA) at par 46.

49.3 considerations of pragmatism and practicality. *The Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] 4 ALL SA487 (SCA) ('JFE Sapela') at par28

49.4 In the specific context of tenders, our courts have further held that there will be cases where by reason of the effluxion of time (and intervening events) an invalidly awarded tender must be permitted to stand. *JFE Sapela*' at par 29.

[50] In the Constitutional Court decision in *Pharmaceutical Manufacturers Association: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 614 (CC) at par 51, Chaskalson P held that judicial review of administrative action was inevitably a constitutional matter.

[51] As a consequence of the constitutionalisation of judicial review, the discretionary nature of the Courts' power when reviewing administrative action has been given further constitutional entrenchment in section 172(1) (b) (ii) of the Constitution, which empowers a court, when deciding a constitutional

matter, to make an order that is just and equitable, including an order suspending the declaration of invalidity of any conduct for any period and on any conditions. *Tantoush v Refugee Appeal Board and others* 2008 (1) SA 232 (T) at par 4.

[52] On behalf of Kwanda it was submitted that because Reclamation had waited some two months after having given notice that it was about to launch the present review, the Court's discretion should be exercised in either non suiting Reclamation, alternatively, setting aside the award of the tender, but postponing this order to the end of May 2009, when the contract in any event comes to an end.

[53] As stated by Jafta JA in Millennium Waste Management v Chairperson, Tender Board 2008(2) SA 481 at page 490 par 23:

> *"[23] The difficulty that is presented by invalid administrative acts, as pointed out by this court in Oudekraal Estates, is that they often have been acted upon by the time they are brought under review. That difficulty is particularly acute when a decision is taken to accept a tender. A decision to accept a tender is almost always acted upon immediately by the conclusion of a contract with the tenderer, and that is often immediately followed by further contract by the tenderer in executing the contract. To set aside the decision to accept a tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act .Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable."*

[54] It was submitted on behalf of Kwanda that having been awarded the tender, Kwanda had incurred expenditure in performing under the contract with Eskom in excess of 41 million rand. This expenditure includes the following:

54.2 employment of 84 employees for whom the salary and wage bill liability is 450 thousand rand per month.

54.2 the hiring of trucks with trailers and three four wheeler forklifts at an aggregate cost of 6.1 million rand.

54.3 the purchasing of 12 vehicles for 4.3 million rand

54.4 the purchasing of equipment including forklifts hydraulic lifting equipment, cherry pickers, grabs and cable shredding and cutting equipment at an aggregate cost of 24.5 million rand, plus insurance cover for the larger machines.

[55] It was finally submitted that the disposal agreement which was concluded between Eskom and Kwanda in July 2007 is Kwanda's largest contract; it generates the majority of Kwanda's income and accounts for the majority of its business. If this court were to set aside Eskom's award of the tender, Kwanda would not only suffer a financial loss in the vicinity of 41 million rand, but it would also be forced to downscale its operations and retrench many employees.

[56] From the point of view of Eskom serious questions arise as to the consequences which would flow from having its contract with Kwanda now set aside. It is not put in issue that Kwanda is presently performing in terms of the contract. However can one say that this will be the position in 6 months time? In my view, Eskom as a state institution, governed by the provisions of PAJA and the Constitution has a duty to ensure that those with whom it contracts prove that they can comply with the terms of the contract entered into. Eskom failed to take the necessary steps to ascertain any of the requirements for the tender. To this day there is still no evidence that Kwanda can pay what it originally offered, nor that can it continue to perform in terms of the tender. It seems therefore that it is in the public interest that Kwanda be stopped from performing in terms of the tender as soon as possible and that an organisation that meets the requirements of Eskom as stated in the RFQ is substituted for it. This of special importance as there is still one year left for the contract to be completed.

[57] It was further pointed out on behalf of Reclamation, that by far the largest portion of Kwanda's expenditure as shown above was incurred after the present application had been served on it. It therefore embarked on this expenditure well knowing the dangers it faced in the present litigation and also well knowing that the tender awarded it was contrary to law. If it suffers any losses these are of its own making. It can hardly be classified as an innocent

party in these proceedings.

[58] It is further of relevance that the action of Eskom in awarding Kwanda the contract as it did, continues to place Eskom in danger of being in a situation where Kwanda, despite having purchased certain equipment, remains a company with no proven assets of its own and with no proven infrastructure. In the event of it not being able to continue to perform its contract with Eskom, the latter will be in jeopardy of proceeding against a company with extremely limited assets for the remaining year of the contract.

[59] It seems to me that the above considerations are sufficient to outweigh the fact that Reclamation has not satisfactorily explained the two month delay between it becoming aware of the award of the tender to Kwanda and the launching of the present proceedings.

[60] In all the circumstances I make the following order:

60.1 The decision of the First Respondent which had communicated to the Applicant by way of a letter dated 26 June 2007 awarding the Second Respondent a tender for the collection and disposal of non-ferrous scrap metals, issued pursuant to a request for quotation number CLRP 949 dated 16 March 2007, is reviewed

and set aside.

60.2 The First and Second Respondents are ordered to pay the Applicant's costs of suit jointly and severally.

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P BLIEDEN
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT: Adv. B E Leech

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DATE OF HEARING: 24 April 2008

DATE OF JUDGMENT: 14 May 2008