


IN THE GAUTENG DIVISION OF SOUTH AFRICA , PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	<del>YES</del> / NO.
(2) OF INTEREST TO OTHER JUDGES:	<del>YES</del> / NO.
(3) REVISED.	
DATE	SIGNATURE
26.5.2014	

CASE NO: 3285/14

DATE HEARD: 26 May 2014

DATE HANDED DOWN: 26 May 2014

IN THE MATTER BETWEEN:

VALOZONE 268 CC

1<sup>ST</sup> APPLICANT

(REGISTRATION NUMBER: 2011/101543/23

SAMOLLO TRADING (PTY) LTD

2<sup>ND</sup> APPLICANT

(REGISTRATION NUMBER: 2011/001884/07)

SIAKHANYA BUSINESS ENTERPRISES CC

3<sup>RD</sup> APPLICANT

(REGISTRATION NUMBER: 2003/092388/23)

ICONIC VENTURES (PTY) LTD

4<sup>TH</sup> APPLICANT

(REGISTRATION NUMBER: 2011/002496/07)

IBHOKO TRANSPORT AND TRADING (PTY) LTD

5<sup>TH</sup> APPLICANT

(REGISTRATION NUMBER: 2013/009674/07)

AN YENDE CC

6<sup>TH</sup> APPLICANT

(REGISTRATION NUMBER: 2006/090343/23

ASITHUTHUKENI BUSINESS ENTERPRISE CC

7<sup>TH</sup> APPLICANT

(REGISTRATION NUMBER: 2004/030371/23)

AND

MINISTER OF EDUCATION	1 <sup>ST</sup> RESPONDENT
THE PREMIER	2 <sup>ND</sup> RESPONDENT
MPUMALANGA PROVINCIAL GOVERNMENT	
MEMBER OF THE EXECUTIVE COUNCIL	3 <sup>RD</sup> RESPONDENT
MPUMALANGA DEPARTMENT OF EDUCATION	
HEAD OF DEPARTMENT	4 <sup>TH</sup> RESPONDENT
MPUMALANGA DEPARTMENT OF EDUCATION	
ASCUL CONSTRUCTION CC	5 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: (1998/043004/23)	
LWATI VS TRADING	6 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2001/083554/23)	
JOYSPRING TRADE AND INVESTMENT 14 (PTY) LTD	7 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2010/005338/07)	
MAIPI TRADING 46	8 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2003/059594/23	
PROCLASS TRADING AND PROJECTS	9 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2005/151949/23	
TRIPONZA TRADING 804 CC	10 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2003/08269/23	
DAPHM TRADING CC	11 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2006/093665/23)	
GUGULEZWE LETHU LOGISTICS CC	12 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2005/158910/23)	
MATHATA AND GIVEN TRADING	13 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2009/038517/23)	
THUKGELO CONSTRUCTION & BUILDING	14 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2001/024754/23)	
MBETSE LADIES (PTY) LTD	15 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2013/134981/07)	
JUDIES CATERING SERVICE CC	16 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2005/163665/23)	
BASADZI PELE MANAGEMENT CONSULTING & PROJECTS CC	17 <sup>TH</sup> RESPONDENT

(REGISTRATION NUMBER: 2005/118023/23) VLAKBULT TRADING ENTERPRISE CC	18 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2007/086681/23) MFUMELELO BUSINESS ENTERPRISE CC	19 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2002/041550/23) KHANYAKWEZI TRADING CC	20 <sup>TH</sup> RESPONDENT
(REGISTRATION NUMBER: 2007/160176/23) SINGITA CIVIL WORKS & BUILDING CONSTRUCTION (PTY) LTD	21 <sup>ST</sup> RESPONDENT
(REGISTRATION NUMBER: 2012/161426/07) THE PUBLIC PROTECTOR	22 <sup>ND</sup> RESPONDENT

### JUDGMENT

#### JANSE VAN NIEUWENHUIZEN, J

- [1] This is an application for the review of the awarding of Bid Number: EDU/069/13/MP for the appointment of service providers to manage, operate warehouses and supply bulk foodstuffs, fresh vegetables and fruit to schools in the Mpumalanga Province.
- [2] The applicants and the fifth to twenty first respondents all submitted bids in respect of the tender.
- [3] The fifth to twenty first respondents were the successful tenderers.
- [4] The applicants contend that several material irregularities occurred during the adjudication of the various bids.

- [5] I pause to mention that the relief claimed by the applicants at present is in terms of Part II of the notice of motion. Part I dealt with interim relief pending the finalisation of Part II of the notice of motion. Although the first to fourth respondents ("the respondents") filed a notice of intention to oppose the relief claimed by the applicants, they did not file answering affidavits and an order in terms of Part I of the notice of motion was granted by Preller J on 4 February 2014.
- [6] The respondents have similarly failed to file affidavits in answer to the relief claimed by the applicants in Part II of the notice of motion and I proceed to deal with the matter on the facts and allegations contained in the applicants' affidavits.

#### ALLEGED MATERIAL IRREGULARITIES

- [7] Mr Vorster, counsel who drafted the heads of argument on behalf of the applicants, has set out in detail, in the heads, the alleged irregularities that occurred during the adjudication of the bids. I find it apposite to refer to the following extract from his heads in this regard:

"3.

- 3.1. *The alleged irregularities should be viewed against the backdrop of the 2<sup>nd</sup> respondent having being called upon, and directed by an order of court to dispatch the record of proceedings.*
- 3.2. *The record of proceedings should at the very least have comprised of the respective bid documents of the applicants, and the 5<sup>th</sup> to 21<sup>st</sup>*

*respondents.*

- 3.3. *The respondents failed to include the successful bidders' bid documents as part of the record.*
- 3.4. *It is impossible for the applicants to establish whether the successful bidders' submissions complied with the bid criteria in any material respects in the absence of the actual bid documents.*
- 3.5. *It is further impossible to compare the successful bidders' submissions to those of the applicants.*
- 3.6. *One would also expect that the respective bid committees would have kept written records (normally in the form of reports and minutes of the meetings held) of all actions, especially in light of the value of the tender under review.*
- 3.7. *All decisions had to be sufficiently justified and documented to prevent and monitor discriminatory behaviour.*
- 3.8. *The absence of these documents from the record justifies one of two inferences:*
  - 3.8.1. *these documents do not exist, which is an irregularity in itself;*
  - 3.8.2. *these documents were deliberately withheld to conceal impropriety in the tender process, and obfuscate the applicants' efforts to establish grounds for review.*
- 3.9. *This stratagem forced the applicants to rely on inferences and conjecture from external sources to establish grounds for review, and constrained the applicants from raising issues relating to process to prove symptoms of corruption or malfeasance in the process.*
- 3.10. *The applicants invited the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to place before*

*court the following documents:*

- 3.10.1. copies of the compulsory returnable documents in respect of the bids of each of the successful bidders as provided for in paragraphs 7.1 – 7.7 of the bid document;*
- 3.10.2. copies of support documents required for the evaluation process in respect of the bids of each of the successful bidders as provided for in paragraph 7.8 – 7.15 of the bid document;*
- 3.10.3. copies of the minutes of the respective bid committees;*

*but to no avail.*

#### *4.*

- 4.1. All tenders submitted within the set deadline should have been treated equally.*
- 4.2. They must have been evaluated on the basis of the same terms, conditions and requirements set out in the tender documents, and by applying the same pre-announced award criteria.*
- 4.3. As is apparent from paragraph 6 of the submission from the bid compliance committee to the chairperson of the bid evaluation committee, a number of bidders were disqualified, because they failed to submit letters of good standing from the Compensation Commissioner.*

**See: Volume 2 of Bundle C - paragraph 6 on pages 158 to 181**

- 4.4. This approach is correct because the bid document states unequivocally that bidders who fail to attach one of the compulsory requirements would lead to the disqualification of their bid.*

**See: Volume 1 of Bundle C - paragraph 7.6 and caveat at the end of the paragraph on page 25**

4.5. *The 5<sup>st</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, and 20<sup>th</sup> respondents were, at the time of submission of their bids, either not registered with the Compensation Commissioner, or not in good standing.*

4.6. *After the granting of the order in respect of Part I of the application, the applicants' attorneys made enquiries with the Department of Labour and learned that a number of entities which have been awarded the tender, were not registered with the Compensation Commissioner.*

**See: Volume 2 of Bundle B - annexure "SA23" on page 117**

4.7. *In the bid document it is stated unequivocally and unambiguously that failure to attach a letter of good standing from the Compensation Commissioner would lead to a disqualification of the bid.*

4.8. *The fact that the entities listed in the letter from the Department of Labour are not even registered with the Compensation Commissioner is a clear indication that they could not have submitted letters of good standing, and that they should have been disqualified on that basis.*

4.9. *After the applicants learned of the identities of the other successful bidders, the applicants' attorneys were instructed to direct a similar enquiry to the Compensation Commissioner, with a request to verify registration of the complete list of successful bidders.*

4.10. *The Compensation Commissioner all of a sudden made an about turn and indicated that the information will not be made available without an order of court, compelling it to do so.*

4.11. *The applicants found this approach curious because less than a month ago the Compensation Commissioner made the information available, in writing, without any objections.*

4.12. *The Compensation Commissioner was however prepared to give oral*

confirmation that the respondents listed in paragraph 4.5 supra were either not in good standing, or not registered with the Compensation Commissioner.

- 4.13. The recommendation by the chairperson of the bid adjudication committee, which imposes a condition and allows the successful bidders to submit letters of good standing by the Compensation Commissioner, within three months of receipt of letters of appointment, augments the applicants' contention that at least some of the successful bidders were not registered, or in good standing, with the Compensation Commission, at the time of submission of their bids, otherwise the condition would have been superfluous.

**See: Volume 4 of Bundle C - paragraph 14.2 on page 380**

5.

- 5.1. The applicants accessed the Mpumalanga Provincial Government website at [http://www.mpumalanga.gov.za/education/default.asp?nav=awarded\\_bids](http://www.mpumalanga.gov.za/education/default.asp?nav=awarded_bids) on 12 March 2014.

**See: Volume 2 of Bundle B - annexure "SA24" on pages 118 to 119**

- 5.2. As is apparent from the screenshot, a link appears to the list of bidders who submitted bids for the tender under review.
- 5.3. The link further directs to a link ([http://mpumalanga.gov.za/education/PF/Bids/EDU\\_069\\_MP.pdf](http://mpumalanga.gov.za/education/PF/Bids/EDU_069_MP.pdf)) containing a portable document format (pdf) used to present documents in a manner independent of application software, hardware, and operating systems.
- 5.4. The pdf file encapsulates a complete description of a fixed-layout flat document, including the text, fonts, graphics, and other information



*needed to display it.*

- 5.5. *This specific pdf file contains a complete list of all bids received in respect of the tender under review.*

**See: Volume 2 of Bundle B - annexure "SA25" on pages 120 to 153**

- 5.6. *This list reflects that a total number of 1'117 entities submitted bids by the closing date.*

- 5.7. *If one has regard to the submission from the bid compliance committee to the chairperson of the bid evaluation committee, and the submission from the chairperson of the bid adjudication committee to the 4<sup>th</sup> respondent 1'131 submissions were considered.*

**See: Volume 2 of Bundle C - paragraph 5 on pages 113 to 158**

**See: Volume 3 of Bundle C - paragraph 5 on pages 250 to 292**

- 5.8. *The bid compliance and evaluation committees therefore considered the bids of 14 entities which did not submit bids by the closing date.*

## **6.**

- 6.1. *In the minutes of the bid evaluation committee held on 20 – 23 November 2014 the committee resolved that bidders who have tendered more than once for the various municipalities will be disqualified as this is in contravention of the supply chain management prescripts, and not in line with the advert requirements.*

**See: Volume 3 of Bundle C - paragraph 6.1 (resolutions) on page 246 (1<sup>st</sup> asterisk)**

- 6.2. *The committee further resolved that bidders who have tendered more than once and entered into joint venture agreements with several companies will be disqualified as this is considered collusion, which is in contravention to (sic) the SCM prescripts.*

**See: Volume 3 of Bundle C - paragraph 6.1 (resolutions) on page 246 (2<sup>nd</sup> asterisk)**

- 6.3. *It can be seen from the list of disqualifications from the chairperson of the bid adjudication committee to the 4<sup>th</sup> respondent that the resolution was duly implemented.*

**See: Volumes 3 & 4 of Bundle C - paragraph 6 on pages 292 – 323**

- 6.4. *According to the letter of appointment in respect of the 15<sup>th</sup> respondent, an entity by the name of Mbetse Ladies (Pty) Ltd, with contact person, Ms. E.R. Shongwe was appointed as a service provider.*

**See: Volume 1 of Bundle C - pages 61 to 62**

- 6.5. *A search on the website of the Companies and Intellectual Property Commission of all entities, companies and close corporations, which contain the word Mbetse in its name produced only one entity with the word Mbetse in its name, namely Mbetse Ladies (Pty) Ltd (Registration Number: 2013/134981/07).*

**See: Volume 2 of Bundle B - annexure “SA26” on pages 154 to 155**

- 6.6. *From the content of the report it is apparent that the only director of Mbetse Ladies (Pty) Ltd is a certain Ethel Ruth Shongwe.*
- 6.7. *If one has regard to the letter of appointment in respect of the 15<sup>th</sup> respondent, the ‘PERSAL’ check performed by the Department, and to the fact that Mbetse Ladies (Pty) Ltd is the only entity registered with the Companies and Intellectual Property Commission containing the word “Mbetse”, it becomes clear that the entity which has been awarded the tender, is the entity reflected in annexure “SA26”.*

**See: Volume 1 of Bundle C - pages 61 to 62**

**See: Volume 2 of Bundle B - annexure “SA26” on pages 154 to 155**

**See: Volume 4 of Bundle C – PERSAL check (item 10) on page 386**

- 6.8. *If one now has regard to annexure “SA25”, and more specifically item 1’080 thereof, it is apparent that another entity, called Mabeke Women (Pty) Ltd, also submitted a bid.*

**See: Volume 2 of Bundle B – item 1’080 on page 151**

- 6.9. *A search on the website of the Companies and Intellectual Property Commission of all entities, companies and close corporations, which contains the word Mabeke in its name, produces only one result, namely Mabeke Women (Pty) Ltd (Registration Number: 2013/130906/07).*

**See: Volume 2 of Bundle B - annexure “SA27” on pages 156 to 157**

- 6.10. *From the content of the report it is apparent that the only director of Mabeke Women (Pty) Ltd is the very same Ethel Ruth Shongwe, who is the only director of the 15<sup>th</sup> respondent.*

- 6.11. *It is therefore clear that Ms. Shongwe submitted two bids and should have been disqualified in terms of the resolution adopted by the bid evaluation committee.*

- 6.12. *What is nefarious in the extreme is that notwithstanding the fact that Mabeke Women (Pty) Ltd appeared on the list of bidders reflected in annexure “SA25”, the entity miraculously disappears from the submissions from the bid compliance committee to the bid evaluation committee, and the bid adjudication committee to the 4<sup>th</sup> respondent.*

**See: Volume 2 of Bundle C: page 130**

**See: Volume 3 of Bundle C: page 266**

- 6.13. *The court is referred to annexure “FA18”, attached to the founding affidavit, and more specifically paragraph 5 (item 420) and paragraph 13.7 thereof.*

**See: Volume 3 of Bundle A: page 266**

**See: Volume 4 of Bundle A: page 378**

- 6.14. *This document was provided to the applicants by a whistle blower in the Department, and purports to be a submission from the chairperson of the bid adjudication committee to the 4<sup>th</sup> respondent.*
- 6.15. *In this paragraph the chairperson of the bid adjudication committee recommends to the 4<sup>th</sup> respondent that Mabeke Women (Pty) Ltd be awarded the bid.*
- 6.16. *The applicant's respectful submission is that this document represents an accurate reflection of the submission from the chairperson of the bid adjudication committee to the 4<sup>th</sup> respondent, and that the submission contained in the record has been tampered with to conceal tender rigging.*
- 6.17. *It is perhaps not innocuous that Ms. Shongwe is the former deputy chairperson of the Mpumalanga Provincial Tender Board, and that she formed the 15<sup>th</sup> respondent, and Mabeke Women (Pty) Ltd, approximately one month before the closing date of bid submissions.*

**See: Volume 2 of Bundle B – annexure “SA26” on page 154 under company summary (registration date)**

- 6.18. *According to the letter of appointment in respect of the 13<sup>th</sup> respondent, an entity by the name of Mathatha General Trading, with contact person, Mr. C.M. Mashile was appointed as a service provider.*

**See: Volume 1 of Bundle C - pages 57 – 58**

- 6.19. *A search on the website of the Companies and Intellectual Property Commission of all entities, companies and close corporations, which contain the word Mathatha in its name, produced eighteen results of entities with the word Mathatha in its name.*

**See: Volume 2 of Bundle B - annexure “SA28” on page 158**

6.20. *As is apparent from the list none of the names match the exact description of the 13<sup>th</sup> respondent, as it appears from the letter of appointment.*

6.21. *By cross referencing the name with the description in the submission from the chairperson of the bid adjudication committee to the 4<sup>th</sup> respondent, it emerges that the 13<sup>th</sup> respondent is also referred to as Mathatha General Dealer.*

**See: Volume 4 of Bundle C - paragraph 13 on page 378**

6.22. *The same reference is also found in the submission of the bid compliance committee to the chairperson of the bid evaluation committee.*

**See: Volume 2 of Bundle C – Item 518 on page 133**

6.23. *As is apparent from annexure “SA28”, there is an entity by the name of Mathatha General Dealer CC, registered with the Companies and Intellectual Property Commission.*

**See: Volume 2 of Bundle B - annexure “SA28” on page 158**

6.24. *A company report by the Companies and Intellectual Property Commission containing the details of Mathatha General Dealer CC reveals that this entity has been deregistered and ostensibly has no connection with Mr. C.M. Mashile, who was the contact person referred to in the letter of appointment in respect of the 13<sup>th</sup> respondent*

**See: Volume 2 of Bundle B - annexure “SA29” on pages 159 - 161**  
**See: Volume 1 of Bundle C - pages 57 – 58**

6.25. *Company reports in respect of all the entities listed in annexure “SA28” reveals that the only entity which ostensibly has any connection with Mr. C.M. Mashile, is an entity called Mathatha and Given Trading CC.*

**See: Volume 2 of Bundle B - annexure "SA30" on pages 162 - 164**

- 6.26. *Apart from the connection with Mr. Mashile, the postal address reflected on the company report matches the address of the 13<sup>th</sup> respondent, contained in its letter of appointment, and Mr. Mashile's identity number matches the PERSAL check performed on the entity 'Mathatha General Trading'.*

**See: Volume 1 of Bundle C - pages 57 – 58**

**See: Volume 4 of Bundle C – PERSAL check (item 16) on page 386**

- 6.27. *From the content of the reports, the appointment letter, and the PERSAL check, it is apparent that the correct name of the 13<sup>th</sup> respondent is in fact not Mathatha General Dealer or Mathatha General Trading. The entity which has been awarded the bid is the entity reflected in annexure "SA30".*

- 6.28. *If one now has regard to annexure "SA25", and more specifically items 37, 103 and 210 thereof, it is apparent that the 13<sup>th</sup> respondent submitted three bids.*

**See: Volume 2 of Bundle B – page 121, 123 & 126**

- 6.29. *The suffix JV at the end of the names in all three instances further presupposes that the 13<sup>th</sup> respondent submitted bids as part of joint ventures, and not as an individual entity.*
- 6.30. *The 13<sup>th</sup> respondent should have been disqualified in terms of the resolution adopted by the bid evaluation committee on the basis that it submitted more than one bid.*
- 6.31. *Further to the above, bids were ostensibly submitted by a joint venture, but the bid was eventually awarded to an individual entity.*

7.

7.1. *I have dealt with the correct description of the 13<sup>th</sup> respondent in the preceding paragraph.*

7.2. *I respectfully refer the court to annexure “SA30” and more specifically the status of the 13<sup>th</sup> respondent as reflected in the report.*

**See: Volume 2 of Bundle B - annexure “SA30” on pages 162 - 164**

7.3. *It is apparent that the 13<sup>th</sup> respondent has been finally deregistered.*

**See: Volume 2 of Bundle B – annexure “SA30” on page 162 - 164  
under company information (status)**

7.4. *In terms of the bid document it is compulsory for a bidder to submit company registration (CIPRO/CIPC) documents, as part of their bid.*

**See: Volume 1 of Bundle C - paragraph 7.3 and the caveat at the end of the paragraph on page 25**

7.5. *If the bid of the 13<sup>th</sup> respondent was properly considered it would have been noted that the 13<sup>th</sup> respondent has been deregistered, and it is inconceivable how the bid could have been awarded to an entity that has been finally deregistered.*

8.

8.1. *In terms of the bid document the evaluation of the bid was to be conducted on the basis of functionality (100), price (90) and equity ownership (10).*

**See: Volume 1 of Bundle C – paragraph 9.1 on page 27**

8.2. *The bid evaluation committee members were to evaluate the bids*

*received according to pre-determined criteria and a bidder that scored less than 70 for functionality was automatically disqualified, and the bid was not considered for price and equity ownership.*

**See: Volume 1 of Bundle C – paragraph 9.2.1.4 on page 29**

- 8.3. *The 15<sup>th</sup> respondent obtained a score of 71 for functionality.*

**See: Volume 4 of Bundle C - Item 16 on page 324**

- 8.4. *If one has regard to annexure “SA26”, the 15<sup>th</sup> respondent was only registered on 6 August 2013.*

**See: Volume 2 of Bundle B – annexure “SA26” on page 154 under company summary (registration date)**

- 8.5. *The date of registration of the 15<sup>th</sup> respondent was just in excess of one month before the closing date for submission of bids, being 11 September 2013.*

- 8.6. *The effect of the time between registration and closing of the bids means that:*

8.6.1. *the 15<sup>th</sup> respondent had no experience in nutrition and food programmes management, or at most one month’s experience;*

8.6.2. *could not submit three years audited financial statements.*

- 8.7. *The bid evaluation committee should therefore have attached a value of 0 to these items.*

- 8.8. *The items which comprise functionality cannot be adjudicated in isolation, but should be considered conjunctively.*

- 8.9. *The bid evaluation committee should have considered that a letter of good standing from the bank, of an entity that has been in existence for*



*approximately one month, lacks integrity because it would not have reflected account conduct, and would have served no purpose but to signify that the 15<sup>th</sup> respondent had a bank account.*

- 8.10. *The very purpose of these documents is to demonstrate that the bidder has the financial resources to ensure that food of the highest quality is delivered.*

**See: Volume 1 of Bundle C – paragraph 8.4 on page 26**

- 8.11. *This should be considered in conjunction with the fact that the 15<sup>th</sup> respondent could not have submitted three years' audited financial statements.*

- 8.12. *If the 15<sup>th</sup> respondent indeed submitted a letter of good standing from the bank with its bid, the bid evaluation committee could not have attached a value of more than 1 to it.*

- 8.13. *The bid evaluation committee should have questioned the integrity of proof of availability of buildings and vehicles, because it is highly unlikely that an entity which has been in existence for only one month, could obtain the necessary operational capital to put sufficient infrastructure in place to comply with the capacity requirements (an incidence of functionality) of the bid.*

- 8.14. *The bid evaluation committee should have attached a value of 1 to both the items relating to transport capacity and type, and equipment, size and cold storage.*

- 8.15. *It is therefore respectfully submitted that the 15<sup>th</sup> respondent, on a proper interpretation of the bid, could not have scored more than 7 for the sub-category "capacity to deliver on relevant project".*

- 8.16. *If one then accepts that the 15<sup>th</sup> respondent scored full points for the sub-*

category “appropriateness of business plan”, the 15<sup>th</sup> respondent would have scored and aggregate of 62 points for functionality, and should not have been awarded the bid.

8.17. *Juxtaposed to this are the bid submissions by the applicants.*

8.18. *The bid submission of one of the applicants, namely Siyakhanya Business Enterprise, the 3<sup>rd</sup> applicant is attached to the supplementary affidavit.*

**See: Volumes 2, 3 & 4 of Bundle B - annexure “SA31” on pages 165 - 338**

8.19. *The 3<sup>rd</sup> applicant scored 66 for functionality and was excluded from further consideration*

**See: Volume 4 of Bundle C - paragraph 40 on page 325**

8.20. *From the bid submission it is apparent that the 3<sup>rd</sup> applicant’s bid complied in all material respects, both in form and in substance, with both the requirements of Mpumalanga Provincial SCM – Bid Bulletin: Volume No. 204, Issued 08 August 2013, and Bid Document: EDU/069/13/MP.*

8.21. *On a proper consideration of the 3<sup>rd</sup> applicant’s bid it should have scored the minimum threshold of 70 for functionality.*

## **9.**

9.1. *The following respondents scored a negative in the final summary of points allocated in respect of the bid criteria for price.*

**See: Volume 4 of Bundle C - paragraph 10 on pages 375 – 376**

9.1.1. *The 10<sup>th</sup> respondent scored (227.58);*

9.1.2. *the 11<sup>th</sup> respondent scored (227.58);*

9.1.3.     the 12<sup>th</sup> respondent scored (169.35);

9.1.4.     the 16<sup>th</sup> respondent scored (169.35);

9.2.     *The reason why these respondents scored negatives in the summary of points in respect of price is because their tendered amounts are more than 400% higher than the average tender amount, submitted by the other respondents.*

9.3.     *In the final summary of points in respect of price and equity ownership, the aggregate of the scores of the two items, the 12<sup>th</sup> respondent's score in respect of price is all of a sudden reflected as 49.74, as opposed to (169.35), and the 7<sup>th</sup> respondent's score in respect of price is all of a sudden reflected as (169.35), as opposed to 49.74.*

**See: Volume 1 of Bundle C – paragraph 12 (items 13 & 14) on page 377**

9.4.     *The respondents that scored negatives in the summary of points should have been disqualified on the basis of the inflated prices, notwithstanding the fact that they might have qualified in terms of the functionality criteria, because their bids were mathematically and materially unbalanced.*

9.5.     *Due to the nature of the scope of the service, bids were requested in unit price format, with the low bid determined by the price of a food parcel per learner per day, delivered to the relevant school; made up of the cost of dry food, fresh food, and transport.*

9.6.     *The respondents' unbalanced bid is objectionable because it:*

9.6.1.     *may not ultimately prove to be the best offer;*

9.6.2.     *is detrimental to the concepts of competitive bidding.*

- 9.7. *The unbalancing of the respondents' bids is significantly problematic so as to have warranted the rejection of the bid.*
- 9.8. *A mathematically unbalanced bid, with overstated prices, is one in which each bid item fails to carry its proportionate share of the overhead and profit in addition to the necessary costs for the item.*
- 9.9. *A bid that is materially unbalanced has shifted not only a disproportionate amount of overhead and profit, but also some portion of the actual cost of elements of work.*
- 9.10. *An unbalanced bid, whether it is mathematically or materially unbalanced, carries increased potential for disputes and claims with the increased costs of resolution for both government and the bidder.*
- 9.11. *The way in which the unbalanced bids of the respondents were handled is particularly disconcerting.*
- 9.12. *We respectfully refer the court to the recommendation by the chairperson of the bid adjudication committee, which imposes a condition on the tendered rates of the successful bidders be barred on the standard gazetted rate for the National School Nutrition Programme, which is R2.18 for primary schools per day per meal and R3.08 for secondary schools per day per meal beyond a 30 kilometre radius, and R2.10 for primary schools per day per meal and R3.00 for secondary schools per day per meal within a 30 kilometre radius.*

**See: Volume 4 of Bundle C - paragraph 14.1 on page 380**

- 9.13. *If one considers the bid prices of the respondents they either inflated their prices, or the bid prices are what it will cost the respondents to implement the bid.*
- 9.14. *If one accepts the latter scenario the respondents will not be able to deliver at the expected standard due to affordability issues, and there is a*

*real likelihood that sub-standard food will be delivered to schools.*

- 9.15. *The imposition of the unilateral condition was procedurally unfair and the respondents should not have been awarded the bids because the bids were not responsive.*
- 9.16. *The unilateral condition imposed by the chairperson of the bid adjudication committee to augment a non-responsive bid is procedurally and substantively unfair.*
- 9.17. *If the respondents' bids could be cured by unilateral conditions which did not form part of the bid criteria, other non-responsive bids should also have been cured by the imposition of unilateral conditions.*

10

- 10.1. *In terms of the bid document, the bid evaluation committee members were to individually evaluate the responses received against the bid criteria.*

**See: Volume 1 of Bundle C - paragraph 9.2.1.1 on page 27**

- 10.2. *If one has regard to the score sheets of the members of the bid evaluation committee, of the bidders who complied with the technical requirements of the bid, it is glaringly obvious that all the scores of all the members in respect of each and every entity are exactly the same.*

**See: Volumes 4 & 5 of Bundle C - pages 387 – 458**

- 10.3. *If the bids were evaluated individually by the bid adjudication members, as prescribed by the bid document, it is not only improbable, but impossible, that the scores of the individual members in respect of each and every bidder under review could have been exactly the same.*
- 10.4. *The only inference that can be drawn from this is that the bids were not adjudicated by the members individually but adjudicated according to the*

*dictates of another.*

- 10.5. *This do not only fly in the face of the prescripts of the bid document, but also defeat the very raison d'être of a committee as opposed to an individual adjudicating bids.*

11.

- 11.1. *There are numerous discrepancies between the supporting documents attached to the founding affidavit, and the documents which comprise the record, notwithstanding the fact that the documents were generated by the same institutions, dealt with the same subject matter, were generated for the same purpose, and were addressed to the same entities for consideration.*

***Compare Volumes 2 & 3 of Bundle A: paragraph 6 on pages 164 to 204 (list of all bids received – 1'116) with Volume 2 of Bundle C: paragraph 5 on pages 113 to 158 (list of all bids received – 1'131)***

***Compare Volume 3 of Bundle A: paragraph 7 on pages 204 to 223 (list of bids disqualified - 466) with Volume 2 of Bundle C: paragraph 5 on pages 158 to 181 (list of bids disqualified - 456)***

***Compare the inclusion of Mabeke Women (Pty) Ltd in Volume 2 of Bundle B – item 1'080 on page 151, and in Volume 2 of Bundle A on page 178 (item 407), and in Volume 3 of Bundle A on page 231 (item 231), and in Volume 3 of Bundle A on page 266 (item 420), and Volume 4 of Bundle A on page 324 (item 7), and in Volume 4 of Bundle A on page 375 (item 7), and the absence of Mabeke Women (Pty) Ltd from Bundle C (the record)***

- 11.2. *If one compares the list of bidders who scored more than 70 for functionality as it appears in annexure "FA18" to the same list as it appears in the record, one cannot help but to notice that Ms. Shongwe's one company has simply been replaced with the other.*

***See: Volume 4 of Bundle A – paragraph 9 on page 375 (item 7)***  
***See: Volume 4 of Bundle C – paragraph 10 on page 375 (item 16)***

- 11.3. *It will be argued on the applicants' behalf that these discrepancies are indicative of the fact that there has been tampering with the outcome of the tender process, especially in light of the fact that the documents contained in Bundle A accords with the information contained in annexure "SA25".*

12.

- 12.1. *Lastly it will be argued that mere reference to the submission of the bid adjudication committee was not sufficient to satisfy the requirement that the Head of Department had to apply his or her mind to the adjudication of the tender.*
- 12.2. *The bid evaluation and adjudication committees took the decision to exclude certain bidders and approve of others.*
- 12.3. *The decisions by the committees could not merely be endorsed by the Head of Department; the bases of these decisions had to be considered by the Head of Department in order to exercise a valid discretion.*
- 12.4. *The Head of Department needed to establish which issues were taken into account in the process of adjudicating the bid and why, the weight given to the specific issues, and the reasons for the decisions made.*
- 12.5. *The minutes of the bid evaluation committee read with the bid adjudication committee's report to the Head of Department, and especially the part on functionality did not contain any of the above.*

***See: Volume 3 of Bundle C - pages 245 to 247***

***See: Volume 4 of Bundle C - paragraph 7 on pages 323 to 374***

- 12.6. *It is rather curious that the bid adjudication committee met for 3 days but provides a minute of only 3 pages.*
- 12.7. *It will be argued that the fact that the Head of Department merely*

*endorsed the decisions of the committees, without applying his or her mind to the thought processes of the committees which took the decisions, and in doing so deferred the adjudication of the tender to the committees, which, in the absence of a delegation, is unlawful."*

[8] I am satisfied that these alleged irregularities appear clearly from the record filed by the respondents read with the affidavits filed by the applicants.

[9] The applicants rely on section 6 of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA). Mr Vorster submitted in his heads, that the irregularities justifies a judicial review in terms of PAJA, due to the following:

"

15.3 *It will be argued that the irregularities listed in the affidavits have been established and are material because:*

15.1.1. *the administrator who took it was biased or reasonably suspected of bias;*

15.1.2. *the action was procedurally unfair;*

15.1.3. *the action was taken for an ulterior purpose or motive;*

15.1.4. *relevant considerations were not considered;*

15.1.5. *of the unauthorised or unwarranted dictates of another person or body;*

15.1.6. *in bad faith, arbitrarily and capriciously;*

15.1.7. *the action itself is not rationally connected to the purpose for which it*



*was taken, the information before the administrator;*

*15.1.8. the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function;*

*15.1.9. the action is otherwise unconstitutional or unlawful.*

*15.2. It will finally be argued that on a conspectus of all the evidence that the deviations from fair process are symptoms of corruption or malfeasance in the process and the unfair process betoken a deliberately skewed process.*

[10] I agree.

## COSTS

[11] The applicants pray for a punitive cost order against the second, third and fourth respondents. Having regard to the extent and nature of the irregularities referred to *supra*, I am of the view that the conduct of the officials involved in the adjudication of the bid process is abhorrent, shocking and a far cry from the constitutional values enshrined in the Constitution.

[12] The only manner of expressing my displeasure with the conduct of these officials is to award a cost order on an attorney and client scale.

## ORDER

I grant the following order:

1. The tenth to twenty second respondents are joined as respondents in this matter.
2. The applicants' non-compliance with order 4 of the Honourable Mr. Justice Preller, dated 4 February 2014 is condoned.
3. The awarding of Bid Number: EDU/069/13/MP [Appointment of the service provider/s to manage, operate warehouses and supply bulk foodstuffs, fresh vegetables and fruits to schools participating in the National Nutrition Programme with identified CRDP areas for a period of (3) three years, with the option to extend for another two (two) years] (the bid), to the 5<sup>th</sup> – 21<sup>st</sup> respondents, is reviewed and set aside.
4. The bid is remitted to the fourth respondent for reconsideration, who is ordered and directed to consider and adjudicate upon the bid, having due regard to this judgment, within 1 (one) month of the granting of this order.
5. The *status quo* in respect of the implementation of the bid is maintained until the fourth respondent has reconsidered and re-adjudicated upon the bid.
3. The second, third and fourth respondents is ordered to pay the costs of the application, on a scale as between attorney and client, jointly and severally, the one paying, the other to be absolved.



**JANSE VAN NIEUWENHUIZEN**

**JUDGE OF THE GAUTENG HIGH COURT, PRETORIA**

**Applicants' attorneys:**

**Hugo & Ngwenya Incorporated**

**Applicants counsel:**

**Adv Adrian Vorster (Hheads of argument)**

**Adv D Van den Bogert (appeared)**

**First to Fourth Respondent 's attorneys:**

**The State Attorney**