REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 49114/14

7/4/2015

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**

IN THE MATTER BETWEEN:

VALAZONE 268 CC	**1ST APPLICANT**
SAMOLLO TRADING (PTY) LTD	**2ND APPLICANT**
SIYAKHANYA BUSINESS ENTERPRISES CC	**3RD APPLICANT**
ICONIC VENTRURES (PTY) LTD	**4TH APPLICANT**
IBHOKO TRANSPORT AND TRADING (PTY) LTD	**5TH APPLICANT**
AN VENDE CC	**6TH APPLICANT**
ASITHUTHUKENI BUSINESS ENTERPRISE CC	**7TH APPLICANT**
MAIPI TRADING CC	**8TH APPLICANT**

AND

HEAD OF DEPARTMENT **RESPONDENT**

MPUMALANGA DEPARTMENT OF EDUCATION

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] This is a review application. The applicants are seeking an order to review and set aside the decision of the respondent to re-advertise the bid which is the subject matter of this application.

[2] There are eight applicants. Applicants 1 to 7 were unsuccessful in their respective bids. The respondent submits that four of the seven unsuccessful tenderers who are applicants before me, were disqualified for non-compliance with technical and/or compliance requirements whereas in fact they had complied. The four have as such filed supplementary affidavits attaching the documents it is alleged did not form part of their respective bid documents. I am also informed that applicant 4 has since abandoned its claim because its bid was disqualified for non-compliance with technical and/or compliance requirements. Applicant 8 is one of the tenderers that were awarded the tender and is together with the other successful tenderers currently implementing the bid on a month to month basis.

[3] I shall for convenience, in this judgment, refer to applicants 1, 2, 3, 5, 6 and 7 as applicants 1 to 7 even though applicant 4 is no longer participating in the proceedings. Where I refer to all the applicants, that is, applicants 1 to 7 and applicant 8 together, I shall simply refer to them as the applicants.

[4] The respondent is the ultimate incumbent responsible for the oversight of the National Nutrition Programme (which is the subject matter of the bid) and for the final approval of the bid.

[5] Before me applicants 1 to 7 are represented by Mr A Vorster; applicant 8 by Mr P L Uys and the respondent by Mr Shakoane.

[6] The respondent took two administrative decisions in the lifecycle of the bid. The first administrative decision was taken when the respondent awarded the bid. Due to certain irregularities in the process of awarding the bid, applicants 1 to 7 were dissatisfied with the award of the tender and approached the court to have the decision of the respondent to award the tender reviewed and set aside. The respondent was cited as the fourth respondent in that application. The application was concluded when Janse van Nieuwenhuizen J reviewed and set aside the decision of the fourth respondent to award the bid.

[7] The second administrative decision was taken when, subsequent to a successful review of the first decision, the respondent decided not to award the bid, but rather to re-advertise it. In the application before me, the applicants now apply to have the second administrative decision reviewed and set aside.

[8] At the commencement of the proceedings Mr Shakoane applied for condonation for the late filing of the respondent's heads of argument. Mr Uys opposed the application for condonation on the basis of prejudice as applicant 8 was not afforded adequate time within which to deal with the respondent's heads of argument. According to Mr Uys, the heads were received on the Friday preceding the Tuesday on which the matter was to be heard. Mr Vorster, on the other hand, left the matter in my hands. Due to the intricate nature of the proceedings and the fact that the matter could not be postponed due to its urgency, I granted the application. Heads of argument are, in any way, for the

convenience of the court and I do not think that condonation will cause applicant 8 any material prejudice.

[9] Mr Vorster applied for condonation for the failure by applicants 1 to 7 to comply with the order of Fourie J (This will become apparent in this judgment below). There being no objection either from applicant 8 or the respondent, I granted the application.

HISTORICAL BACKGROUND

[10] The Mpumalanga Provincial Department of Education (the Department) published the following tender in the Mpumalanga Provincial Supply Chain Management (SCM) Unit – Bid Bulletin: Volume No: 204, issued on 8 August 2013:

> "Bid No: EDU/069/13/MP [Appointment of the services provider/s to operate warehouses and supply bulk foodstuffs, fresh vegetables and fruits to schools participating in the National Nutrition Programme within identified CRDP areas for a period of (3) three years, with the option to extend for another 2 (two) years]." ("the bid")

[11] One thousand one hundred and thirty five bids were submitted to the Provincial Supply Chain Management Office of the Department. Included in this number were the bids of the applicants. Only seventeen bids were awarded and, included in this number is the bid of applicant 8.

[12] Due to some alleged irregularities in the bid process, applicants 1 to 7 launched a review application (the first review application) to review and set aside the decision of the fourth respondent to award the bid to the aforesaid seventeen tenderers.

[13] In that review application, all the successful tenderers were cited as respondents. As already stated in paragraph [6] of this judgment, the current respondent was cited as the fourth respondent. It should be noted that even though applicant 8 was cited as one of the

respondents in the first review application, it did not oppose the relief sought therein because the irregularities mentioned in that review application did not relate to the bid submitted by it. Actually, none of the successful tenderers in that application filed any papers in opposition to the application.

[14] The first review application was launched in two parts. The relief sought in Part I of the application was aimed at achieving an expedited hearing of the review application and Part II was in respect of the substance of the review. Part I of that application was heard and adjudicated in favour of the applicants by Preller J. Part II was heard and adjudicated, also in favour of the applicants, by Janse van Nieuwenhuizen J, to whose judgment and order I shall return in due course.

[15] Due to the nature of the bid, that is, providing meals to thousands of disadvantaged and impoverished children, and in the interests of the beneficiaries of the bid, applicants 1 to 7 opted not to seek a relief that would have suspended the implementation of the tender pending a judicial review. Janse van Nieuwenhuizen J took this approach by applicants 1 to 7 into consideration and ordered that the *status quo* in respect of the implementation of the bid be maintained until the fourth respondent has reconsidered and re-adjudicated upon the bid. Hence, the companies which were awarded the tender continued with the implementation of the bid.

[16] Janse van Nieuwenhuizen J found that the awarding of the bid to the incumbent bidders and the disqualification of other bidders, constituted improper and prejudicial conduct, maladministration and abuse of power in state affairs, and as a result, made the following order:

"1. ...

2. ...

3. THAT the awarding of Bid Number: EDU/069/13/MP (Appointment of the services provider/s to operate warehouses and supply bulk foodstuffs, fresh vegetables and fruits to schools participating in the National Nutrition Programme within identified CRDP areas for a period of (3) three years, with the option to extend for another 2 (two) years) (the bid), to the fifth to twenty first respondents, is reviewed and set aside.

4. THAT 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 one (1) month of the granting of this order.

5. THAT 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.

6. THAT the second, third and fourth respondents pay the costs of the application on a scale as between attorney and client, jointly and severally, the one paying, the others to be absolved."

[17] The bid was indeed remitted to the fourth respondent who, as I have said, is the respondent in the current application. After considering and adjudicating on the bid (at least according to the respondent), and due to certain flaws found to exist in the bids, the fourth respondent decided not to award the bid but to re-advertise it and to maintain the *status quo* in respect of the successful tenders. This is the decision which the applicants in the current review application (the second review application) seek to have reviewed and set aside.

[18] In an effort to satisfy the judgment and order of Janse van Nieuwenhuizen J, the respondent appointed a Bid Evaluation Committee (BEC) and a Bid Adjudication Committee (BAC) to assist in implementing the judgment and order.

[19] The BEC was appointed by the respondent on 17 June 2014 with a directive to conclude all the processes by 20 June 2014. Out of the 1 135 initial bid documents received by the SCM office, only 1 099 bid documents were received and evaluated by the BEC. All bids received by the BEC were evaluated for compliance to requirements as stipulated in the specification document, being, for compulsory returnable documents and compliance to requirements checklist. And, in view of the irregularities observed, the BEC resolved not to continue with the evaluation process in terms of the Preferential Procurements Policy Framework Act 5 of 2000 (PPPFA) which would determine bids that were found to have qualified for the final stage and, instead, sent its recommendations to re-advertise the bid to the BAC.

[20] During their evaluations, the BEC discovered the following discrepancies in the bid documents:

1. There were two bid documents that were not relevant to the bid in question but belonged to the cleaning services for Maxa Building (EDU/071/1MP) and appeared in the bid certificates issued by the Provincial SCM Unit for the bid under consideration (EDU/069/13/MP);
2. There were three (3) other bid documents that were without bid numbers but appeared in the bid certificate issued by the Provincial SCM Unit;
3. According to the SCM Unit procedures and processes, all bid documents must bear the central SCM stamp in all pages indicating the closing date of the bid as one of the control measures. There were documents which did not bear the Provincial SCM Unit stamp (some pages were not stamped; furthermore two bid documents were not stamped at all). The BAC was made aware that bid No. (EDU/079/14/MP) for mobile classrooms had similar discrepancies of bid documents partially stamped by the Provincial SCM Unit and based on the

Treasury opinion, it was resolved that the bid be re-advertised. The Department is currently implementing this resolution.

4. Furthermore, upon evaluation, four of the initial seventeen successful bids were disqualified.
5. The BEC also observed that the process seemed to have been tampered with and that should that be proven correct, the Department would be exposed to the risk of a plethora of litigation.

[21] The BEC after consideration of the bid evaluation process, recommended:

(a) that the BAC consider the report submitted by the BEC;

(b) that the BAC consider options of re-advertising the Bid (EDU/069/13/MP) based on the submission provided.

[22] On receipt of the recommendations from the BEC, the BAC, on 23 June 2014, considered the BEC report and took note of the irregularities highlighted therein. After deliberating on the submitted BEC report, the BAC recommended to the HOD that tender EDU/069/13/MP be re-advertised. The reasons of the BAC were that there were documents that had not been stamped by the Provincial SCM Unit and there was no way of verifying that the documents were submitted legally; and that there was a huge discrepancy in the number of documents in the submission certificate and the number of documents that could be physically counted. The BAC further recommended that the current 17 service providers be contracted on a month to month basis until the tender is re-advertised and awarded and that Treasury be made aware of the encountered irregularities. The BAC's final recommendation was that bid EDU/069/13/MP be re-advertised in order to avoid further litigation.

[23] Following the recommendations by the BAC to the respondent, the respondent approved the recommendations and made a decision to re-advertise the bid.

[24] Pursuant to the decision taken, the respondent reported as follows to the applicants:

"1. On 26 may 2014, the Gauteng Division of the High Court of South Africa, Pretoria, under Court number 3258/2014 and *per* Janse van Nieuwenhuizen J delivered a judgment, reviewing and setting aside the award of Bid Number EDU/069/MP [Appointment of 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 (2) years];

2. Amongst others and of essence herewith, the Bid was remitted to me for reconsideration and I was also ordered and directed to consider and adjudicate upon the Bid, having regard to the judgment, within 1 month.

3. Having considered the judgment and having applied my mind thereto and to the laws of the Republic thereto, and in order to promptly comply with it, on 02 June 2014, I requested from Treasury a list of all Bidders for tender: EDU/069/13/MP, requested the Bid documents from the Director General and also requested from the Auditor General the Bid Documents for the appointed Service Providers, for purposes of consideration.

4. Consequent thereto and in order to satisfy the judgment, on 17 June 2014 I appointed a Bid Evaluation Committee and on 18 June 2014, a Bid Adjudication Committee for purposes of assisting me in the consideration and adjudicating the Bid.

5. These committees, as I directed, sat considered and adjudicated upon the Bid, having regard to the judgment, the laws of the Republic and all relevant factors and considerations. Thereafter they made recommendations to me.

6. On 23 June 2014, I received the recommendations from the aforesaid committees, which I thoroughly considered and also applied my mind thereto. Having considered the recommendations and applied my mind as aforesaid and in order to ensure that the process(es) and the decision(s) thereof comply with the laws of the Republic, including the law as alluded to in the Judgment, I am of the view that fair, just, impartial, objective,

equitable, transparent, competitive administration of justice and fairness in the circumstances require that the Bid be re-advertised.

DECISION

7. In conclusion, the Tender for the [Appointment of 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 (2) years] is to be re-advertised.

8. Furthermore, in order not to disrupt the programme, the current 17 service providers shall be contracted on a month to month basis until the appointment of a new Service Provider or Providers."

[25] On 3 July 2014, applicants 1 to 7 launched the current review application. The application was launched in two parts as in the first review application. Part I of the application was heard and decided in favour of the applicants by Fourie J. In essence Fourie J authorised and directed an expedited review of the awarding of the tender. Consequent to the order granted by Fourie J, the applicants amended their respective notices of motion and delivered supplementary affidavits in support thereof in respect of the relief sought in Part II of the review application. The review application is thus before me in its amended format.

[26] When making a determination on Part I of the current review application, and upon application by applicant 8, Fourie J made an order joining applicant 8 as an applicant to the proceedings.

APPLICATION BY RESPONDENT TO DISMISS THE APPLICANTS' CASE

[27] There are two issues which I intend to deal with before going into the main case. These issues were both raised by the respondent during argument, namely, whether the

applicants' case should be dismissed on the basis that they failed in their founding papers to allege bias on the part of the respondent; secondly, whether applicant 8's case should be dismissed on the basis that it during argument abandoned the remedy it sought in its review application.

Dismissal of the Applicant's Case

[28] The oral argument advanced by Mr Shakoane on behalf of the respondent is that the applicants do not in their founding papers and evidence, allege or attack the findings and recommendations of the BEC and the BAC, on which the respondent relied for her decision, as having been influenced by bias and corruption. According to Mr Shakoane, the applicants are as a result, non-suited for tending belatedly and during argument to attack and accuse the respondent of bias and corruption or that her decision to re-advertise was designed or calculated to assist those of the tenderers whose house was not in order to getting the opportunity to get their house in order.

[29] As the issue was raised for the first time during argument before me, I directed Mr Shakoane to prepare supplementary heads of argument and to refer me to specific authorities on the issue. Counsel did indeed furnish me with the supplementary heads of argument. The applicants were also served but opted not to respond thereto. I was, in the supplementary heads of argument, referred to the judgment in South African Post Office v De Lacy (19/08) [2009] ZASCA 45 2009 (5) SA 255 (SCA) para 14 as authority for the proposition advanced by Mr Shakoane.

[30] I, however, did not find the supplementary heads of argument or in particular the authority referred to therein, of assistance. Paragraph 14 of the judgment to which Mr Shakoane specifically referred me to, reads as follows:

"[14] Gore makes it clear, when read with Steenkamp, that irregularities falling short of dishonesty, incompetence on the part of those who evaluated the tenders, and even conduct that amounts to negligence, <u>will not found a claim for damages</u> at the hands of an unsuccessful tenderer. A claim will lie only if it is established that the award of the contract to the rival was brought about by dishonest or fraudulent conduct on the part of one or more of the officials for whose conduct SAPO is vicariously liable, but for which the contract would have been awarded to the complainant. Needless to say, the *onus* rested upon the respondents to establish, as a matter of probability, that the award of the contract was brought about by conduct of that kind, and if that *onus* was not discharged the claim had to fail." (my emphasis).

[31] I am not persuaded that this authority finds application in the circumstances of the current matter before me. The above quoted paragraph indicates clearly that the requirements of the allegation of bias or negligence should be alleged where the claim is for damages. That case differs from the current matter in that, in this instance, the applicants are not claiming damages but are seeking to review an administrative decision. That there are no allegations of bias or corruption in the applicants' founding papers; or that Mr Vorster canvassed such allegations during oral argument does not make the applicants non-suited, in my view.

<u>Dismissal of Applicant 8's Case</u>

[32] I am equally not convinced by the second point raised in respect of applicant 8. In its papers filed of record, applicant 8 seeks the following relief:

"1. ...

2. That the decision of the respondent to re-advertise Bid No: EDU/069/13/MP is reviewed and set aside and replaced with the following decision:

2.1 That Bid No: EDU/069/13/MP is awarded to the first to eighth applicants on an equal distribution basis;

2.2 That the respondent is ordered to negotiate and conclude service level agreements with the first to eighth applicants for a period of 3 (three) years, with the option to extend for another 2 (two) years, within one month from the date of the order;

2.3 That the *status quo* be maintained until the respondent has concluded service level agreements with the first to eighth applicants.

3. That the respondent be ordered to pay all the costs in respect of Part I of the application and the costs of Part II of the application on an attorney and client scale.

4. That the eighth applicant be granted further and/or alternative relief."

[33] In summary, the submission by applicant 8 is that the court should review and set aside the administrative decision of the respondent and should substitute that decision with a decision to award the tender to applicant 8 and any other applicant who qualifies for the tender. Applicant 8's contention is that it is not necessary for the court to re-adjudicate and evaluate its bid since the bid has been adjudicated upon and applicant 8 was found to comply in all respects with the requirement of the tender. Accordingly, applicant 8 required of the court to sanction its implementation of the tender by awarding the tender to it, and to any other applicant who qualifies, on an equal distribution basis.

[34] This is the case which Mr Uys moved in argument before me, but, later abandoned on behalf of applicant 8. And, relying on the prayer for 'further and alternative relief', Mr Uys, on behalf of applicant 8, moved in common cause with applicants 1 to 7 that its bid be remitted to the respondent for reconsideration and adjudication.

[35] Mr Shakoane objected to this move by Mr Uys and prayed for the dismissal of applicant 8's application.

[36] The prayer for 'further and alternative relief' has been held in numerous cases to be redundant and mere verbiage. This superfluous relief has been held not to entitle a court to grant relief that is inconsistent with the factual statements and the terms of the claim expressed in the papers. It is my view that a party who seeks relief must set out clearly and precisely the relief he or she seeks from the court in his or her pleadings for the other party to know what case he or she has to meet. If no such case is set out the proper route is to apply for amendment.[1] Based on this reasoning, my view is that applicant 8 ought to have applied for the amendment of its papers in order to entitle it to the new prayer it seeks.

[37] The new relief applicant 8 seeks is, however, ancillary to the main relief to have the decision of the respondent reviewed and set aside. It is a remedy which applicant 8 seeks in the event that its main relief is granted. In that sense it does not mean that applicant 8 is non-suited in these proceedings, its main relief must still be considered.

THE ISSUE

[38] The broad issue to be determined is whether the decision of the respondent to re-advertise the bid instead of awarding it should be reviewed and set aside. Simply put, the issue is whether the decision taken by the respondent to cancel the tender rather than award it, violated the applicants' rights to procedural fairness in terms of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA). The second issue relates to the appropriate remedy to be granted in the event of the first issue being decided in favour of the applicants.

[1] See Chao v Gomes (2010/16410)[2012] ZAGPJHC 103(21 May 2012)paras 14 to 15 and the judgments quoted therein.

LAW

[39] It is well established that a decision to award government tenders constitutes administrative action. This entitles the applicants to a lawful and procedurally fair process and, where their rights are affected or threatened, to an outcome which is justifiable in relation to the reasons provided for it.[2]

[40] It is also well established that the cause of action for the judicial review of administrative action now ordinarily arises from the provisions of PAJA; it follows that PAJA finds application in this process.[3]

[41] The grounds for judicial review under PAJA are contained in s 6 and provide as follows:

> "6. **Judicial review of administrative action**
>
> (1) . . .
>
> (2) A court or tribunal has the power to judicially review an administrative action if –
>
> *(a)* the administrator who took it –
>
> (i) was not authorised to do so by the empowering provision;
>
> (ii) acted under a delegation of a power which was not authorised by the empowering provision; or
>
> (iii) was bias or reasonably suspected of bias;
>
> *(b)* a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
>
> *(c)* the action was procedurally unfair;
>
> *(d)* the action was materially influenced by an error of law;
>
> *(e)* the action was taken –
>
> (i) for reasons not authorised by the empowering provision;
>
> (ii) for ulterior purpose or motive;

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[2] See Logbro Properties CC v Bedderson NO&Others 2003 (2) SA 460 (SCA) para 5 at 465F-G.

[3] See Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs&Others 2004 (4) SA 490 (CC) para 25.

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action consists of failure to take a decision;

(h) 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 exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) . . ."

THE RELIEF SOUGHT AND THE DISPUTE BETWEEN THE PARTIES

[42] Applicant 8 in its founding papers reconciles itself with the reasons advanced by applicants 1 to 7 as grounds of review of the second administrative decision of the respondent. I shall therefore, deal with their cases together.

[43] In the amended papers, applicants 1 to 7 seek the following relief:

"1. that the applicants' non-compliance with the order of the Honourable Mr Justice Fourie, dated 24 July 2014 be condoned;

2. reviewing and setting aside the decision by the respondent not to award, and to re-advertise Bid: EDU/069/13/MP;

3. ordering the respondent to consider the 1st -3rd & 5th to 7th applicants' bid in terms of the evaluation methodology prescribed in paragraph 9 of the bid document, within 15 (fifteen) days of the granting of the order;

4. provide the applicants with a written report, within 20 (twenty) days of the granting of the order, on the outcome of the evaluation process, with specific reference to:

   4.1 the valuation criteria used for measuring functionality of the applicants' respective bids;

   4.2 the weight that was attached to each criterion;

   4.3 the applicable values that were utilised when scoring each criterion;

   4.4 the score for functionality obtained by each individual application;

   4.5 the points scored by those applicants, who scored the minimum threshold of 70% for functionality, in respect of price and equity ownership;

5. ordering the respondent to consider those applicant/s, if any, who scored the minimum threshold of 70% for functionality, and who scored the highest overall points, for recommendation."

[44] Central to the applicants' case is the question whether or not the respondent, when making the decision to re-advertise the bid, acted within the boundaries of the court order granted by Janse van Nieuwenhuizen J. The main contention being that the respondent unlawfully re-advertised the bid when she should have adjudicated upon the bid and awarded it. The first issue to determine is whether the respondent had the authority to re-advertise the bid. This question encapsulates four sub-questions, namely, whether

(a) the decision to re-advertise was subversive of the court order;

(b) the decision to re-advertise was contrary to the public procurement policy;

(c) the decision to re-advertise was irrational; and

(d) the decision of the respondent to maintain the *status quo* with respect to the implementation of the bid was unlawful.

Re-advertisement Subversive of the Court Order?

[45] The submission by the applicants is that the respondent failed to comply with the order of court in that the bids were only checked for technical compliance and not adjudicated upon, whilst the court order directed the respondent to consider and adjudicate the bids. According to the applicants, the respondent should have adjudicated upon the bids as is provided for in the court order, the bid document and legislation which govern the procurement process under review.

[46] Regulation 16A6.2 of the Treasury Regulations 2005 promulgated in Government Gazette 27388 dated 15 March 2005, provides for the constitution of three committees pursuant to a bid invitation, namely:

(a) The Technical Evaluation Committee;

(b) The Bid Evaluation Committee; and

(c) The Bid Adjudication Committee

The regulation also provides for the approval of the BEC and BAC recommendations.

[47] It is common cause that the respondent appointed two committees, namely, the BEC and the BAC, to assist her to consider and adjudicate the bid. It is not in dispute that when the BEC sat, it only checked the bid for technical compliance and having found the various discrepancies as stated in its report, recommended to the BAC that the bid be cancelled and re-advertised. Similarly, having considered the recommendation contained in the report of the BEC, the BAC recommended to the respondent the re-advertisement of the bid. The respondent, after careful consideration of the recommendations contained in the report of the BAC, took a decision to re-advertise the bid.

[48] Does it mean that, in this way, the bid was not adjudicated upon? If not, what is it that the respondent, including the two committees, should have done for them to have adjudicated the bid?

[49] The evaluation methodology contained in the bid document for the Bid EDU/069/13/MP is stated thus:

> "9. **EVALUATION METHODOLOGY**
>
> 9.1 General
>
> The evaluation shall be conducted by the Bid Evaluation Committee (BEC) on the basis of functionality (100), price (90) and equity ownership (10).
>
> 9.2 Evaluation Phases:
>
> 9.2.1 Phase I – Functionality;
>
> 9.2.2 Phase II – Point of allocation for price and equity ownership; and
>
> 9.2.3 Phase III – Recommendations."

This is what the BEC should have done for it to have evaluated the bid. However, as is apparent from the BEC report, this process was not followed.

[50] Is this what the judge intended the BEC to do when it ordered and directed the respondent to consider and adjudicate the bid?

[51] The determination of the issues in this application depends on the proper interpretation of the judgment and order of Janse van Nieuwenhuizen J. It has been held that the starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.[4]

[52] The judgment and order as it stands is not ambiguous and the language used does not require any interpretation. The intention of Janse van Nieuwenhuizen J is, as such, clear and unequivocal. The respondent is ordered and directed to "reconsider", "consider" and "adjudicate" the bid.

[53] The words "reconsider", "consider" and "adjudicate" are in no way ambiguous as well. I looked up the meaning of the words accessed through the Google search engine from the Free Merriam-Webster Dictionary. The words are defined as follows:

> "reconsider" is described as: 'to think carefully about (something or someone) again especially in order to change a choice or decision you have already made'.
>
> "consider" means: 'to think carefully about (something) typically before making a decision'.
>
> "adjudicate" means: 'to make an official decision about who is right in a dispute'.

This is the same definition provided by the respondent in her heads of argument derived from Thesaurus: English (U.K.).

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[4] See Firestone South Africa (Pty) Ltd v Genticuro 1977 (4) SA 298 (A) at 340 D-H and Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd (363/11) [2012] ZASCA 49 (30 March 2012)

[54] The bid document, however, does not use the words "consider" and "adjudicate". The word used is "evaluation". The definition given to "evaluate" in the Free Merriam-Webster Dictionary accessed through the Google search engine, is 'to judge the value or condition of (someone or something) in a careful and thoughtful way'.

[55] The bid document allows for a two-step process which must be followed before a tender may be awarded. The first step is a disqualification process. Put differently, a compliance process. Bidders are required to furnish what is termed 'compulsory returnable documents'. Failure by the bidders to attach any one of the compulsory documents leads to the disqualification of their bids. The second step is the evaluation process. This step requires the BEC to evaluate the bids for functionality, price and equity ownership.

[56] This, in my understanding is what the judge had in mind and expected the respondent to comply with, when the court ordered and directed her to consider and adjudicate the bid.

[57] However, the respondent's contention is that she could not proceed to the second step of the process because she found that the bid documents might have been tampered with and if this was proven to be correct, might lead the Department to further unnecessary litigation, and, as such, resolved not to continue with the evaluation process.

[58] Having found the discrepancies, was the respondent entitled not to proceed to the second step of the evaluation process? By so doing did it subvert the court order? My view is that she did.

[59] The respondent's submission is that since the award of the bid to the initial 17 incumbent service providers was set aside by the court, the bid was back to the stage of "prior to it being awarded". It is the respondent's contention that by remitting the bid to her, the court left it in her discretion to decide whether to award the bid or to cancel and re-advertise it or negotiate with the current bidders. Having considered all the factors

before her and the recommendation by the BEC and the BAC she exercised her discretion in favour of re-advertising the bid. By exercising her discretion, the respondent's assertion is that she proceeded to reconsider and adjudicate the tender. She is however, wrong. The court order as I have found is not ambiguous. It enjoined the respondent to consider and adjudicate the bid. And, it meant that having checked the bids for compliance the respondent was supposed to have proceeded to the first phase of the next step in the evaluation process, that is, to check the bids that complied for functionality.

[60] It is, therefore, clear that the bids were not adjudicated upon either by the committees or the respondent. The BEC having considered the bid documents for technical compliance only, means that the BAC and the respondent also considered the bids for technical compliance since the information that was referred to them, which they considered at the time they took the decision to re-advertise, was on technical compliance only. For the bids to have been adjudicated upon the BEC should have proceeded to consider the bids through all the stages of evaluation as envisaged in the bid document and referred its findings thereon to the BAC and eventually to the respondent. This process, however, was not undertaken.

[61] I am in agreement with the applicants in their submission that the privilege to re-advertise the tender was neither reserved in the order of court nor was it reserved in the bid document. My view is that, the respondent having found that the tender process and/or the bid documents have been tempered with, instead of resolving to re-advertise the bid, should have approached the court for an order to re-advertise. This she did not do but took it upon herself to act in contravention of the court order and re-advertise the bid.

[62] The argument by the applicants that the respondent should have disregarded all the bids that were non-compliant at the disqualification stage is, thus, correct. There were 522 bid documents that fully complied with all the requirements for submission of bids. Put

differently, 522 bidders had furnished all the 'compulsory returnable documents'. They, therefore, qualified to proceed and be evaluated for functionality. The respondent was duty bound, in compliance with the court order, to evaluate those bids for functionality, price and equity ownership.

[63] It is so that, in any bidding process of the magnitude of the current bid, there will be invariably bids which are invalidated for various reasons. The irregularities discovered by the BEC should not have invalidated the legitimate bids and should not have constituted legitimate grounds to cancel and re-advertise the bid.

[64] Although the provisions of the law do not determine the scope of discretion that the respondent has when contemplating to cancel a tender, however, procedural fairness, as argued by Mr Uys, demanded that the respondent in reconsidering the tenders and taking a decision to re-advertise the bid, should have afforded all the then successful tenderers an opportunity to make representations on any factor that led her not to award the tender at all. It is common cause that the respondent took the decision to re-advertise the bid without informing the then successful bidders of her intention to do so. That opportunity not having been afforded, the respondent's decision has to be set aside on this ground as well.[5]

Non Compliance with the Preferential Procurement Regulations

[65] The applicants' attitude is that the reasons for cancellation and re-advertisement of the bid are in conflict with the legislative framework applicable to the procurement process. In other words, the reason provided by the respondent to re-advertise the bid is in contravention with the Preferential Procurements Policy Framework Act 5 of 2000 (PPPFA) and the Regulations published under it in 2011 (the Preferential Procurement

[5] See Logbro Properties CC v Bedderson NO & Others 2003 (2) SA 460 para 25 at 472/B-C/D.

Regulations, 2011) which prescribe the manner in which tenders should be adjudicated, and the circumstances which should exist for a tender to be cancelled.

[66] The respondent on the other hand, relying on the provisions of regulation 8 (4) *(b)* of the Preferential Procurement Regulations, submits that a bid may be cancelled, prior to it being awarded where funds were no longer available to cover the total envisaged expenditure. The contention being that in the light of possible litigation from other disgruntled bidders, should there be proof that the bids were tampered with, there would be no telling the costs that the department would incur in litigation should the bid not be cancelled. Taking into account the costs incurred in the first review, the current review and the cost of the NSNP itself, there were clearly no funds available to cover the total envisaged expenditure, so it was argued.

[67] In terms of regulation 8 of the Preferential Procurement Regulations, 2011, a bid may be cancelled, prior to it being awarded, under the following circumstances:

> *(a)* due to changed circumstances, there was no longer a need for the services, works or goods requested; or
>
> *(b)* funds were no longer available to cover the total envisaged expenditure; or
>
> *(c)* no acceptable bids were received.

[68] Although the law allows that during a tender process, and before a binding agreement is entered into between the respondent and a successful bidder, a tender may be cancelled, the cancellation of the tender is not an absolute right of the respondent. As stated in paragraph [67] of this judgment, there are circumstances under which a tender may be cancelled and which the respondent must have complied with before cancelling the bid. In cancelling the tender, the respondent received her powers directly or indirectly from the Regulations alone and could only act within its limitations, express or implied.

[69] The respondent does not state that a budget for the implementation of the tender is no longer available, but seems to suggest that the costs of possible litigation is a factor which should be taken into consideration when applying regulation 8 (4) *(b)*. This, however, is incorrect. Costs of possible litigation cannot be considered as a factor when the regulation is invoked. The respondent's reliance on regulation 8 (4) *(b)* is further contradicted by the respondent's statement to extend the program for a further three years.

[70] Mr Shakoane went at great length, during argument, to try and convince me as to how the costs of litigation will have an effect on the envisaged funds of the tender. I, however, remain not persuaded as there was no legal basis which he could use to support his argument. It is a well-known fact that during the budgeting process of a Department, funds are specifically allocated for each tender (the envisaged expense) and that the costs of any litigation that may ensue in respect of a tender are not paid from its budget but from the Department's litigation budget.

[71] What is even worse, Mr Shakoane could not convince me of any potential litigation against the Department in respect of this tender. He was at pains to explain to me how he foresees further litigation ensuing in respect of this tender. His argument that the joinder of applicant 8 in these proceedings was indicative of the probabilities that the floodgates will be opened is unsustainable. If any of the bidders intended to approach the court, they would already have done so.

[72] His further argument that probabilities are that if an order is granted in favour of the applicants, the other bidders will litigate, is also not supported by any evidence and is at best speculative. The extent of such envisaged litigation, if any, is unknown as well.

[73] It is, therefore, my view that the underlying reason given by the respondent is no justification to cancel and re-advertise the bid. The decision as such is in contravention of the applicable law.

The Decision is Irrational

[74] The applicants submit further that the respondent's decision to re-advertise the tender was irrational. According to the applicants, in the absence of irregularities pertaining to their bids, the respondent was enjoined to proceed to evaluate the bids in terms of the evaluation criteria embodied in the bid document. Only in the event of the applicants, or any other bidder who qualifies to be evaluated as prescribed in the bid document, failing to achieve the minimum qualifying score for functionality, may they be finally disqualified, and if no responsive bids remain, may the tender be cancelled and re-advertised.

I agree.

The decision to Maintain the Status Quo with Respect to the Implementation of the Bid is Unlawful

[75] The contention of the applicants is that the decision of the respondent to maintain the *status quo* with respect to the implementation of the bid, pending its re-advertisement, and to enter into "month-to month" agreements with the previously successful bidders, has no legal basis. It is unlawful and therefore *ultra vires*. It gives validity to transactions which are unlawful, so it is contended.

[76] My view, however, is that, even if the applicants' assertions are correct, the circumstances of this tender are such that a *lacuna* cannot be allowed. Put differently, it means that the circumstances of the tender are such that its implementation cannot be suspended pending the finalisation of the litigation and/or the tender processes. Applicants 1 to 7 were well aware of such circumstances when they launched the first application and opted not to request an order suspending implementation of the tender.

[77] Janse van Nieuwenhuizen J, without giving any reasons in her judgment, ordered that the *status quo* in respect of the implementation of the bid be maintained until the respondent has reconsidered and re-adjudicated upon the bid. I have to assume that Janse van Nieuwenhuizen J took the approach by applicants 1 to 7 into consideration when she granted the order.

[78] A long argument ensued during the hearing of this application about the status of the judgment and order of Janse van Nieuwenhuizen J should I grant an order setting aside the decision of the respondent to re-advertise. My view is that the *status quo ante* will be retained. Once the decision of the respondent to re-advertise is no longer in place, the position reverts to the initial order of Janse van Nieuwenhuizen J which ordered the respondent to reconsider and re-adjudicate the bid and to maintain the *status quo* in respect of the implementation of the bid.

[79] Pursuant to the aforementioned grounds, it is my view that the respondent's decision to cancel and re-advertise the bid ought to be reviewed and set aside.

THE REMEDY

[80] It, therefore, follows that, the decision having been set aside the applicants are entitled to the remedy they seek in their notice of motion. The applicant should also be

afforded this remedy since it was also successful in its claim for setting the respondent's decision aside.

COSTS

[81] Applicant 8 applied for an order for costs on an attorney and client scale. I, however, am not of the opinion that the circumstances of this case justify an order for costs on a punitive scale. The present proceedings depended on the interpretation of the judgment and order of Janse van Nieuwenhuizen J. I do not think that the respondent should be penalised for interpreting the order wrongly. The applicants being the successful parties are entitled to their ordinary costs of suit.

ORDER

[82] In the circumstances, the following order is granted:

1. The order marked with an "X" an initialled is made an order of court.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	: 05 MARCH 2015
DATE OF JUDGMENT	: 07 APRIL 2015
APPLICANT'S COUNSEL	: ADV. P A VAN NIEKERK SC.
APPLICANT'S ATTORNEY	: DE KORTE DU PLESSIS INC.
RESPONDENT'S COUNSEL	: ADV. C WOODROW
RESPONDENT'S ATTORNEY	: SNYMAN DE JAGER ATTORNEYS

"X"
Em

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 49114/14

IN THE MATTER BETWEEN:

VALAZONE 268 CC	**1ST APPLICANT**
SAMOLLO TRADING (PTY) LTD	**2ND APPLICANT**
SIYAKHANYA BUSINESS ENTERPRISES CC	**3RD APPLICANT**
ICONIC VENTRURES (PTY) LTD	**4TH APPLICANT**
IBHOKO TRANSPORT AND TRADING (PTY) LTD	**5TH APPLICANT**
AN YENDE CC	**6TH APPLICANT**
ASITHUTHUKENI BUSINESS ENTERPRISE CC	**7TH APPLICANT**
MAIPI TRADING CC	**8TH APPLICANT**

AND

HEAD OF DEPARTMENT	**RESPONDENT**
MPUMALANGA DEPARTMENT OF EDUCATION	

ORDER

Having heard counsel, it is ordered that:

1. The decision by the respondent not to award, and to re-advertise Bid: 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 (2) years] is reviewed and set aside.

2. The respondent is ordered to consider and adjudicate applicants 1 to 3 and 5 to 8's bids in terms of the evaluation methodology prescribed in paragraph 9 of the bid document, within 15 (fifteen) days of the granting of this order.

3. The respondent is ordered to provide the applicants with a written report within 20 (twenty) days of the granting of this order, on the outcome of the evaluation process, with specific reference to:

   (a) the valuation criteria used for measuring functionality of the applicants' respective bids;

   (b) the weight which was attached to each criterion;

   (c) the applicable values that were utilised when scoring each criterion;

   (d) the score for functionality obtained by each individual applicant;

(e) the points scored by those applicants, who scored the minimum threshold of 70% for functionality, in respect of price and equity ownership.

4. The respondent is ordered to pay the costs of application of applicants 1 to 3 and 5 to 7 and applicant 8 on a party and party scale.

BY ORDER OF THE COURT

REGISTRAR