

IN THE HIGH COURT OF SOUTH AFRICA
[NORTH GAUTENG HIGH COURT, PRETORIA]

17/9/2013

DELETE WHICHEVER IS NOT APPLICABLE CASE 5301/13

- (1) REPORTABLE: YES ☒ NO ☐
(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO ☐
(3) REVISED.

In the matter between:

DATE 20/3/09/17

SIGNATURE

OXFORD UNIVERSITY PRESS SOUTHERN AFRICA (PTY) LTD

Applicant

and

THE MEC, LIMPOPO PROVINCIAL GOVERNMENT:

1st Respondent

DEPARTMENT OF EDUCATION

THE ADMINISTRATOR, LIMPOPO DEPARTMENT OF
OF EDUCATION

2nd Respondent

THE HEAD: LIMPOPO DEPARTMENT OF EDUCATION

3rd Respondent

CAMBRIDGE UNIVERSITY PRESS (PTY) LTD

4th Respondent

HEINEMANN PUBLISHERS (PTY) LTD

5th Respondent

KALAHARI PRODUCTIONS AND BOOKSELLERS (PTY) LTD

6th Respondent

MACMILLAN SOUTH AFRICA (PTY) LTD

7th Respondent

MASKEW MILLER LONGMAN (PTY) LTD

8th Respondent

NEW GERENATION PUBLISHING ENTERPRISES CC

9th Respondent

SOUL OF AFRICA

10th Respondent

VIA AFRIKA (PTY) LTD

11th Respondent

VIVLIA PUBLISHERS & BOOKSELLERS (PTY) LTD

12th Respondent

HEARD ON: 09 SEPTEMBER 2013

JUDGMENT DELIVERED: 17 SEPTEMBER 2013

JUDGMENT

LEGODI J,

- [1] The release by the first respondent on the 22 July 2013 of the selection results for the distribution of school textbooks in Limpopo, had resulted in the dispute amongst the parties before me. This judgment has been prepared in the course of a very busy urgent motion roll and parties should therefore not expect a scholarly and detailed judgment.
- [2] The applicant was one of the publishers who were selected to deliver certain textbooks to schools in Limpopo. According to the applicant, it was awarded to place orders only to the value of R1.6 million, instead of orders to the value of more than R40 million.
- [3] The award of orders only to the value of R1.6 million is regarded by the applicant as being prejudicial to him and resulting from unlawful procurement process which contravenes section 217 of the Constitution. The process leading to the decision is said not to be fair, equitable, transparent, competitive and cost effective. Based on all of these, the decisions are said to be liable to be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").
- [4] The alleged unlawful procurement process is said to have caused the Department of Education Limpopo having to place orders for the school textbooks at an increased price to the Department in excess of R6 million, more than the price submitted by the applicant for the 2014 school year. The amount is said to likely increase in respect of the following four years. According to the applicant, this will result in a wasteful and irregular expenditure of public funds.
- [5] The alleged irregularities in the award of the tender is also said to likely cause the applicant loss of revenue of more than R40 million for the 2014 school year as well as further R32 million over the following four years. This is said to be significant portion of the applicant's turnover. The loss of revenue will cause severe prejudice and irreparable harm to the interest of the applicant, so it was

contended. According to the applicant, it has in good faith, invested significantly in the development and production of textbooks in the interests of education in South Africa.

[6] Based on all of the above, the applicant has now approached this court on an urgent basis, in terms of which it seeks relief in Part B of its notice of motion as follows:

- "5. *Condoning non-compliance with the Rules of Court and directing that the application be heard as a matter of urgency in terms of Rule 6(12);*
- 6. *Reviewing and setting aside:*
 - 6.1 *the decision by the second and third respondents to select publishers to provide the textbooks; and*
 - 6.2 *the decision to place any orders issued to publishers for the textbooks.*
- 7. *Directing the second and third respondents to ensure that the officials of the Department;*
 - 7.1 *correct the errors made in capturing the prices submitted by the applicant;*
 - 7.2 *correctly rank the publishers who participated according to prices submitted; and*
 - 7.3 *issue orders for the textbooks on the basis of such a correct ranking.*
- 8. *That the costs of the application be paid by the second and third respondents jointly and severally, unless any of the fourth to twelfth respondents oppose the application, in which event any such respondents who oppose the application, are to pay the costs of the application, jointly and severally, the one paying the other to be absolved.*
- 9. *Further and/or alternative relief".*

[7] Initially, the applicant wanted the second and third respondents to be interdicted from acting in terms of the award of the tender for the distribution of the textbooks in Limpopo, pending finalisation of the review proceedings in terms of Part B of the notice of motion, quoted in paragraph 6 above. The interdict relief was sought in Part A of the notice of motion.

[8] However, when this matter was laid before me, parties had agreed that I should deal with Part B. I agreed, provided that the matter is heard on Monday the 9 September 2013 instead of Tuesday 10 September 2013. The reason for this was, the papers are voluminous, more than 500 pages and in terms of the practice directive, such a matter will require a special date. Monday the 9 September 2013 was meant to be my reading day and Part B of the notice of motion was scheduled for hearing on the 10 September 2013.

[9] This should then bring me to deal with two issues that were raised as points in *limine* or preliminary issues. First, the non-joinder issue and second, lack of urgency.

NON-JOINDER OF PUBLISHERS

[10] The first, second and third respondents articulated themselves on the issue as follows:

"2.1 It is evident from the intervention as published in the Government Gazette that the Minister of Basic Education is the responsible Minister in Central Government who was appointed as the responsible Minister for Basic Education in Limpopo Province. As such the Minister of Basic Education should have been joined a Co-Respondent which the applicant has failed to do. I have been advised in the absence of all parties having a direct and material interest in the matter the above Honourable Court will not grant".

[11] Similarly, the fifth and eighth respondents also took the point that, judging by the nature of the relief sought, all selected publishers have a direct and substantial interest in the case. I find it necessary to deal first with the basis of the attack on the non-joinder of publishers. The issue is therefore whether the non-joined publishers who have been selected and orders had in fact already been placed with them, have a direct and substantial interest in the relief sought.

- [12] One of the reliefs sought in Part B of the applicant's notice of motion, is to review and set aside the decision or decisions of the second and third respondents to select publishers to provide textbooks and to place orders issued to the publishers for the delivery of textbooks.
- [13] The applicant is said to have elected to join only certain publishers. Other ten publishers have not been joined. In its replying affidavit, the applicant seeks to avert the attack by stating that none of the ten publishers would be affected by the correction of the ranking of publishers sought by the applicant, because the titles which have been ordered from them, were not affected by the changing of the applicant's submitted prices. It was contended that none of them have direct and substantial interest in the relief sought.
- [14] One must make a distinction between the relief sought in paragraph 6 and that sought in paragraph 7 of Part B of the notice of motion. The relief sought in paragraph 6 of the notice of motion has been quoted in paragraph 6 of this judgment. Once a relief sought in paragraph 6 of Part B is granted, there would be no legal basis for the Department and the said ten publishers to continue to contract with each other.
- [15] The relief sought in prayer 6 of Part B of the applicant's notice of motion, makes it clear that what is sought to be reviewed and set aside, is the entire decision of the second and or third respondents.
- [16] Counsel for the applicant despite persistent caution by the court insisted that the applicant was content with the relief as sought in prayer 6 of the notice of motion. In other words, that the relief sought is to review and set aside the entire decision in terms of which the selected publishers were required to provide textbooks. Secondly, that the court should review and set aside any order issued to publishers for the delivery of textbooks.

- [17] I had difficulties in understanding applicant's insistence in this regard, for indeed, if a ruling was to be given as prayed for in prayer 6, every publisher who has been selected to deliver or provide books will be affected and therefore, there can be no doubt about their material and substantial interest in the matter.
- [18] In paragraph 12 of the replying affidavit, the applicant seeks to simplify the issue by stating that 'none of them would be affected by the correction of the ranking of publishers sought by OUP, because the titles which have been ordered from them were not affected from them were not affected by the changing of OUP's submitted prices by the Department'. OUP is the applicant. Here, the applicant was referring to the ten publishers who have not been joined in these proceedings.
- [19] The so called 'correction of the ranking of publishers', cannot take place, unless a decision is made under prayer 6. In other words, the entire decision of the second and or third respondent must first be reviewed and set aside as prayed for in prayer 6, before correction of ranking of publishers and correction of the alleged errors made in capturing of the prices by the applicant.
- [20] Counsel for the applicant argued that this court has discretion to deal with a limited review and setting aside of the decision of the second and or third respondent in a manner that will accommodate the ten publishers who have not been cited. This contention should be seen in the light of the attitude by the applicant that there is nothing wrong with the relief sought in prayer 6 of the notice of motion. Of course, the applicant cannot be right if he still wants to argue that the ten publishers do not have direct and substantial interest in the matter. Just on this aspect alone, the applicant's application is destined to fail. In other words, the non-joinder issue should be found to be justified.
- [21] The applicant's main contention on merits is that the second and or third respondent acted unlawfully in substituting its nil pricing on the teachers' guides

with a price that was previously tendered by the applicant. It was not only the applicant who had submitted zero pricing on the teachers' guides. One or two publishers did the same, for example, Shutter and Shooter (PTY) Ltd. Neither of these publishers has been joined in these proceedings. I did not hear the applicant to be suggesting that it cannot be said they have no material and substantial interest in these proceedings.

[22] However, counsel for the applicant suggested that Shutter and Shooter (PTY) Ltd had elected not to be involved seen in the light of the fact that they had previously queried the Department's substitution of their zero pricing with their previous pricing on the teachers' guides. After the Department had given an explanation, the two publishers did nothing to challenge the explanation or the decision to substitute the zero-pricing. Counsel suggested that by so doing, it must be assumed that they never intended to participate in these proceedings and that therefore it was not necessary to join them in these proceedings.

[23] I cannot agree with this submission. There is no evidence to suggest that the present proceedings ever came to their attention. Secondly, counsel for the applicant from the bar suggested that Shutter and Shooter elected not to challenge the decision to change their zero pricing was an indication that they had no interest in the present proceedings, particularly that their query to the Department was raised before the institution of the present proceedings. Without evidence to this effect, the suggestion will remain speculative. Failure to have joined the other publishers in similar situation with the applicant was a fatal blow to the applicant's case.

NON-JOINDER OF THE NATIONAL MINISTER OF BASIC EDUCATION

[24] Limpopo Province had a problem. As a result, its administration was taken over by the National Department. However, an Administrator, (the second respondent) was appointed instead. The decision under attack was taken during the tenure of the administrator. The National Minister of Basic Education has not been joined

in these proceedings. The first to third respondents contend that the Minister should have been joined as a party which has a substantial and material interest in the proceedings.

[25] Effectively, the second respondent has stepped into the shoes of the first respondent on behalf of the National Minister. A question was posed to counsel for the first to the third respondents. The question was, whether the non-joinder point would have been raised, had the administration of the first respondent not have been placed under the control of the second respondent? The answer was no! I therefore can see no difference whether the interests of the National Minister are taken care of by the first respondent or the second respondent.

[26] What prejudice is there for the Minister to suffer? I did not understand the suggestion to be that the respondents' case would have been dealt with differently had the Minister been joined. I therefore find that it was not necessary to join the Minister.

LACK OF URGENCY

[27] The respondents took a swipe at the delay in the institution of the present proceedings. The founding affidavit was deposed to on the 26 August 2013. On the same day, the proceedings were instituted. PART A of the notice of motion was set down for hearing on the urgent motion roll for the 3rd September 2013 and PART B for the hearing on the 10 September 2013. PART A is the interdict pending finalisation of the review proceeding in PART B.

[28] On 3 September 2013, PART A was postponed to 5 September 2013 and on that date the matter was stood down by Kgomo J to the 6 September 2013. The criticism is that, the application as a whole, should long have been instituted before the 26 August 2013.

- [29] A brief background might be necessary. On 7 June 2013, the applicant submitted its prices to the Department. On the 22 July 2013, the selection results were released. The Publisher's Association of South Africa and on behalf of all its members including the applicant, addressed a letter to the Department in which concerns were raised and clarity was sought. Of importance is that, the second respondent was required to make public the selection criteria and pricing list by the close of business on Tuesday 30 July 2013. It was indicated in the letter that it was essential that this be resolved before official orders were released and should be treated as a matter of urgency.
- [30] There was no response to the request and demand made by the Publishers' Association of South Africa. By the 7 August 2013, there was still no response. A reminder was sent to the second respondent on the 7 August 2013. When no response was forthcoming, another letter was sent on the 14 August 2013.
- [31] On the 8 and 9 August 2013, the second respondent started placing orders with various selected publishers. On the 16 August 2013, the second respondent released the Limpopo catalogue together with the prices of the textbooks. The applicant discovered that prices of a number of titles submitted by it had been changed. The change related to the teachers' guides for which the applicant charged nothing. Was it a donation? If so, was it allowed or did it form part of the tender requirements? I deal later with the question.
- [32] Subsequent thereto, a letter was written to the second respondent on the 18 August 2013, and this was on a Sunday. On Monday the 19 August 2013, a discussion ensued with many of the role players. When the discussion did not result into fruition, on the 26 August 2013, the present application was launched.

- [33] Before I come back to the issue under discussion, it is important to mention that the National Department of Basic Education introduced tight time frames to ensure that books to schools are delivered timeously. It is called Basic Education Management Plan for Procurement and Delivery of LTSM 2013. Everything was to start in June 2013 and by October 2013 the schools should have received correct textbooks. The distribution of books to learners is expected to be completed by October 2013. The idea is to ensure that come 2014, all learners must have received the necessary books to ensure schooling starts in earnest almost like on the first day of schooling in 2014. The publishers were aware of these time frames or were expected to have been aware of the time frames.
- [34] The applicant knew or is expected to have known at least on the 22 July 2013 of the selected titles for it. The applicant was not happy about the fact that bid prices and selection criteria were not made public in the release of the 22 July 2013. The applicant like other publishers, decided to speak through their association which then addressed a query to the second respondent on or about 26 July 2013. In the letter, the second respondent was warned not to issue official orders before the concerns raised in the letter were resolved.
- [35] The question then is, could the applicant have proceeded with the present application, in particular, Part A of the notice of motion without issues raised in the letter by the Publishers' Association were resolved? Paragraph 2 of Part A reads as follows:
- "2. *Pending the determination of the relief sought in PART B of this Notice of Motion:*
- 2.1 *interdicting and restraining the second and third respondents from giving effect to its selection of publishers to provide any teacher's guides, learner's books or readers (collectively referred to herein as "textbooks") for Grades 7, 8, 9 and 12 of the 2014 school year;*
- 2.2 *interdicting the second and third respondents to instruct all selected publishers not to implement or proceed with the implementation of any order*

placed with them by any officials of the Limpopo Department of Education ("the Department") in respect of the textbooks for the 2014 school year".

- [36] Clearly, what is being asked for in prayer 2 of Part A of the notice of motion could have been done without publication of the selection criteria and prices requested in the Publishers' Association's letter to the second respondent. The applicant for one reason or the other, waited until the 26 August 2013. Bearing in mind the time frames referred to earlier in this judgment and the fact that other publishers would have been entitled and obliged to act on the basis of official orders placed with them, it was incumbent on the applicant to ensure that the delay in bringing the application did not happen, with or without the prices and or selection criteria. The delay in this regard is self-created and the applicant has only itself to blame. To wait from the 26 July 2013 until the 26 August 2013 was in circumstances of the case unreasonable.
- [37] Similarly, waiting from the 16 August 2013 until 26 August 2013 in the circumstances of the case, was unreasonable, especially bearing in mind what I said about the entitlement and obligation of other publishers who are selected to deliver books. The application therefore ought to be struck off from the roll on the basis of lack of urgency. This then brings me to deal with the other issues that were identified in these proceedings.
- [38] Let me just explain myself before I deal with those issues. PART B of the notice of motion is also being brought on an urgent basis and has been placed on the urgent motion roll. I could as well have dealt with the preliminary issues without dealing with the merits of the review application. However, I decided to deal with the case as a whole. I did so, on the basis of practicality and convenience for the parties. They did not object to this approach. In fact, they all welcomed the approach. But, I also did so seen in the light of the findings I intend to pronounce myself on later in this judgment.

[39] The following issues which have been identified by counsel on behalf of the first to third respondents and agreed to by other parties, have relevance to the merits of the review application. I deal with these issues and make findings on them in the event I was to be wrong with regard to the two preliminary issues disposed of earlier in this judgment. The issues are:

39.1 Did the applicant's quotations comply with the requirements of the Department as set out in annexures BSC1 and BSC2?

39.2 Did the Department commit any reviewable irregularities in placing the orders?

39.3 If the answer in 39.2 above is yes, what should be the appropriate remedy in the circumstances of the case?

DID THE APPLICANT'S QUOTATIONS COMPLY WITH THE REQUIREMENTS OF THE DEPARTMENT AS SET OUT IN ANNEXURES BSC1 AND BSC 2?

[40] The main attack of the decision of the first, second and or third respondent is premised from the fact that, in submitting its procurement documents as a package for the supply of the learners' books, core readers and teachers' guides, the applicant decided not to charge the Department for the sale and delivery of the teachers' guides. The department then on its own decided to put a price, which caused the applicant to be awarded insignificant part of the tender, so it was contended.

[41] All the publishers were informed as early as the 29 May 2012 that the procurement process of textbooks for the 2014 school calendar year will or must be adhered to. Publishers were informed that purchasing will be based on the lowest price and not the largest discount. This appears in a document addressed

to all publishers and titled "LIMPOPO DEPARTMENT OF EDUCATION – PROCUREMENT OF TEXTBOOKS FOR THE 2014 SCHOOL CALENDAR YEAR" dated the 29 May 2012. It is also stated in this document which is marked BSC 2 to the applicant's founding affidavit that the Limpopo Department of Education considers pricing to be the most appropriate criteria for purchasing of all the CAPS aligned textbooks.

- [42] In addition, textbooks, core readers and teachers guides for all languages are to be purchased as a package from the same publisher and that they will not be considered separately. The price consideration for all the three units was to be the comparison of total price for the pack of learners' book, core readers and teachers guides.
- [43] The underlining in the preceding paragraph is my own emphasis. Lastly, in annexure BSC 2 the publishers were required to submit their revised prices on the excel spread sheet of the National catalogue template.
- [44] The applicant as I said earlier in this judgment, decided on its own not to charge anything for the teachers' guides. Having done so, it gave the total price which did not include the price of the teachers' guides. In other words, teachers' guides were given free of charge. Was this allowed? Or was this in accordance with the prescribed requirement by the Department. Put it differently, did this not amount to the largest discount prohibited in paragraph 2 of annexure BSC 2.
- [45] 'Pricing to be the most appropriate criteria for purchasing, price consideration and comparison of total prices', became the basis for procurement in the instant procurement process. This is clearly set out in annexure BSC 2. The Preferential Procurement Policy Framework Act 5 of 2000 requires an organ of state to establish a procurement policy. It becomes incumbent on an organ of a state to follow a tender procedure that is fair and transparent. The process must in terms of section 3(2)(a) of PAJA be lawful, fair and justifiable. Similarly transparency,

equity and fairness are required in terms of section 217 for all tender processes. Such imperative must be decided on the circumstances of each case. What is contained in annexure BSC 2 should be seen as policy envisaged in Procurement Policy Framework Act 5 of 2000.

- [46] The issue therefore is, whether the applicant complied with this policy as set out in annexure BSC2. Of course it did not and the Department would have been entitled to disqualify the appellant. In other words, the Department would have been entitled to exclude the applicant completely from participating in the procurement of books in Limpopo for 2014 due to non-compliance with its guidelines to this particular tender.

- [47] The applicant together with one or two other entities did not price for the teachers guides. This could not have been fair to those who had adhered to what was stated in annexure BSC 2. In other words, it could not have been fair to those who have complied with the procurement policy applicable in the instant matter. For example, if they knew that they did not have to charge for every unit of the tender, like the teachers' guides, they could have adjusted their reduced prices differently.

- [48] Therefore, before the applicant can claim to have its right protected as enshrined in section 217 of the Constitution and those applicable provisions under PAJA, it must first show that it was entitled to give a zero pricing for the teachers' guides. As I said, it was not entitled to. On this point alone, its application for review and setting aside of the decision or decisions in question was destined to fail in any event. This finding brings me to deal with another issue.

DID THE DEPARTMENT ACT FAIRLY TO OTHER TENDERERS BY ADJUSTING THE APPLICANT'S PRICING?

[49] The department, second and or third respondent sought to accommodate the applicant instead of excluding it completely from the process, so it was contended. In doing so, it went back to what the applicant had previously tendered on teachers' guides and it substituted the nil-price with the previously quoted price. This according to the applicant, was unlawful and the respondents as organs of state were not entitled to do. I cannot agree more.

[50] Remember, this was a tender process and therefore the Department was under obligation to follow a system that was fair, equitable, transparent, competitive and cost-effective. Choosing to accommodate a tenderer who did not comply with a particular policy for a particular procurement cannot be fair, transparent and equitable to other tenderers who had participated in the process. To have allowed this made, the process to lose the attribute of fairness and transparency¹. Having made this finding, the next question that follows is:

WHAT WOULD HAVE BEEN THE APPROPRIATE REMEDY IN THE CIRCUMSTANCES OF THE CASE?

[51] The question is raised in this fashion, seen in the light of my findings with regard to the preliminary issues dealt with earlier in this judgment. As a brief background again, the delay of delivery of school books in Limpopo for 2012 was widely reported. It has become a matter of common cause and concern to many. Any repetition of what had happened will in no doubt bring an outcry. But even most importantly, it will offend against the provisions of section 219 of the Constitution in particular subsection (1)(b) which provides that everyone has the right to further education, which the state through reasonable measures must make progressively available and accessible. That availability and accessibility will be denied should books not be delivered timeously.

¹ See *Metro Projects CC and Another v Klerksdorp Local Municipality and Others* 2004 (1) SA 16 SCA par 11-13

- [52] At the same time, one must guard against encouraging the state organs acting contrary to the spirit of the provisions of section 217 of the Constitution. That is, whenever an organ of the state contracts for goods or services, it must do so in accordance with the system which is fair, equitable, transparent, competitive and cost-effective. I have been referred to a number of case laws dealing with the issue under consideration.
- [53] The real question is whether to set aside an invalid administrative action pertaining to the applicant? Invalid administration action in the sense that the applicant could have been excluded from participating in the procurement process in question due to non-compliance. Put it differently, should the court allow the process to continue despite the invalidity of the action? Invalid also, in the sense that the respondent acted contrary to its requirement by accommodating the applicant on an issue that was not offered to other tenderers.
- [54] A court of review is not obliged to set aside an administrative action if it was unlawfully taken. Court of review is conferred a discretion to make an order that is just and equitable. Unlawfully taken in that the second and or third respondent substituted the applicant's zero pricing with a particular pricing. It is the applicant who is challenging this move and therefore the action could not be legitimised by ensuring that the applicant was not excluded.
- [55] Although the principle of legality requires a court in the case of unlawful administrative action to strike it down, the concept of certainty may persuade a court not to set aside an invalid administrative action, but decline to do so².

² See Chairperson, Standing Tender Committee & Others (PTY) Ltd and Others 2008 (2) SA 638 (SCA) par 29
See also Bengwenyama Minerals (PTY) LTD and Others v Genorah Resources (PTY) Ltd and Others 2011 (4) SA 113 (CC) pars 82 and 85

- [56] A court should when making the choice of a just and equitable remedy, emphasise the fundamental constitutional importance of principle of legality, but a court should also consider whether relief sought does not give full effect to the finding of invalidity is justified in the particular circumstances of the case before it.
- [57] Normally, this will arise in the context of third parties having altered their positions on the basis that the administrative action was valid and will therefore suffer prejudice if the administrative action is set aside. This desirability of certainty needs to be justified against the fundamental importance of legality (**see *Bengwenyana Minerals (PTY) Ltd & Others supra at par 84***).
- [58] The rule of law must never be relinquished, but the circumstances of each case must be exercised in order to determine whether factual certainty requires some notion of legality and if so, to what extent. The approach will depend *inter alia*, the interests involved, the extent of materiality of the breach and the constitutional right to just administrative action (**see *Bengwenyana Minerals (PTY) Ltd and other at par 85 supra***).
- [59] The difficulty that is presented by invalid administrative acts, 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 tender and that is often immediately followed by further contract concluded by the tenderer in executing the contract. To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for the public at large in whose interest 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 equitable³.

³ See *Loghro Properties CC v Bedderson NO & Other* 2003(2) SA 460 (SCA)

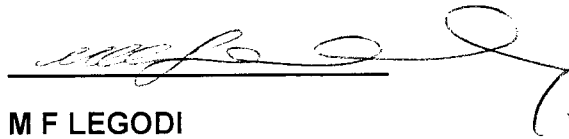
[60] I am satisfied that the facts of the present case falls squarely within the principle articulated in the preceding paragraphs. It is a tender that has a bearing on the education of learners in Limpopo. Any further delay in the process that had already started since, orders were placed with the publishers on the 8 and 9 August 2013. Contracts had already been concluded with publishers and similarly some publishers had already entered into agreements with printers. About 1 673 495 out of 6 600 000 books had already been delivered. The fifth respondent has already delivered textbooks to the value of R12 780 903.04. Similarly, the eighth respondent had already delivered books to the value of R39 666 220.06 with a further value of R8 44 294.00 in transit. All of the textbooks printing orders placed with the printing suppliers for Limpopo are already in production and are set to be completed by the 30 September 2013.

[61] To seek to set aside what has already been done and redo the rating as suggested by the applicant, will have catastrophic consequences. I would therefore not set aside any action that might have been wrong in the present tender process. This means that despite the invalidity, I would have allowed the decision to stand, had it not have been for my findings on the preliminary issues. Effectively therefore, the applicant would still be entitled to act in terms of the decision. However, I do not have to make this an order of the court seen in the light of my findings on the two preliminary issues relating to non-joinder and lack of urgency.

[62] Consequently an order is hereby made as follows:

- 62.1 The application is struck off from the roll due to lack of urgency and non-joinder;
- 62.2 The applicant to pay the costs of the application, such costs to include the reserved costs and costs for preparing heads of argument;
- 62.3 Further, the applicant to pay the costs of two senior counsels and their juniors appearing for the first, second, third, fifth and eighth respondent

respectively. Such costs also to include the costs of counsel for the seventh respondent.



M F LEGODI

JUDGE OF THE HIGH COURT

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