

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION
8(1) OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

Report No. 26 of 2017/18

978-1-928366-48-5

“Allegations of failure to follow proper procurement processes by the North West Department of Education and Sports Development”

**REPORT ON AN INVESTIGATION INTO ALLEGED FAILURE TO FOLLOW
PROPER PROCUREMENT PROCESSES THAT RESULTED IN THE AWARDING
OF TENDER NO: EDU 04/12 NW TO MATLOSANA BOOKS AND STATIONERY
BY THE NORTH WEST PROVINCIAL DEPARTMENT OF EDUCATION AND
SPORTS DEVELOPMENT**

INDEX

Executive Summary	3
1. INTRODUCTION	5
2. THE COMPLAINT	6
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	9
4. THE INVESTIGATION	11
5. CONCLUSION	12

FINAL REPORT

Executive Summary

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- (ii) The report was as a result of an investigation into the alleged failure to follow proper procurement processes by the North West Provincial Department of Education and Sports Development (Department) in the awarding of Tender No: EDU 04/12 NW to Matlosana Books and Stationery.
- (iii) The complaint was lodged by Mr N Naane (the Complainant), on behalf of Batlile Dikgosi CC on 13 June 2013.
- (iv) In the main, the complaint was that the Department failed to follow proper procurement processes in the awarding of Tender No: EDU 04/12 NW to Matlosana Books and Stationery.
- (v) On analysis of the complaint, the following initial issues were identified for investigation:
 - (a) Whether the Department failed to follow proper procurement processes when it awarded Tender No. EDU 04/12 NW to Matlosana Books and Stationery;
 - (b) Whether the Complainant suffered prejudice as a result of the Department's conduct in the circumstances; and
 - (c) Whether the Department failed to provide the Complainant with information relating to Tender No. EDU 04/12 NW in terms of the Promotion of Access to Information Act, 2000 (PAIA), and if so, whether such failure constitutes maladministration.
- (vi) The investigation process was conducted through interviews and meetings with the Complainant; correspondence with the Department; analysis of all relevant

documentation; and consideration of and application of all relevant laws, policies and related prescripts.

(vii) However, during the course of the investigation, the Public Protector discovered the following:

(a) Regarding whether the Department failed to follow proper procurement processes when it awarded Tender No. EDU 04/12 NW to Matlosana Books and Stationery:

(aa) During the course of the investigation the Public Protector discovered that the Complainant had filed an application with the North West High Court (case No: M155/14) for an order to review and set aside the decision taken by the Department to award Tender No: EDU 04/12 NW to Matlosana Books and Stationery on 27 February 2013.

(bb) The Court dismissed the Complainant's application with costs on 24 March 2016.

(cc) In terms of section 182(3) of the Constitution the Public Protector may not investigate court decisions.

(dd) Section 6(6) of the Public Protector Act, 1994 further provides that the Public Protector is not empowered to investigate the performance of judicial functions by any court of law.

(ee) Based on section 182(1) of the Constitution, section 6(6) of the Public Protector Act and the North West High Court judgment, the Public Protector could not proceed investigating the matter further and no remedial action as envisaged in section 182(c) of the Constitution could therefore be taken.

REPORT ON AN INVESTIGATION INTO ALLEGED FAILURE TO FOLLOW PROPER PROCUREMENT PROCESSES THAT RESULTED IN THE AWARDING OF TENDER NO: EDU 04/12 NW) TO MATLOSANA BOOKS AND STATIONERY BY THE NORTH WEST PROVINCIAL DEPARTMENT OF EDUCATION AND SPORTS DEVELOPMENT

1. INTRODUCTION

- 1.1. This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation:
 - 1.2.1. The North West Premier: Honourable SOR Mahumapelo;
 - 1.2.2. The North West Director-General: Dr L Sebegu;
 - 1.2.3. The Member of the Executive Council for Education and Sports Development: Honourable JS Lehari; and
 - 1.2.4. The Acting Head of Department of Education and Sports Development: Ms S Semashwe.
- 1.3. A copy of the report is also provided to Mr N Naane, the Complainant, to inform him of the outcome of the investigation.
- 1.4. The report relates to an investigation into the alleged failure by the North West Provincial Department of Education and Sports Development (the

the awarding of Tender No: Edu 04/12 NW) to Matlosana Books and Stationery.

2 THE COMPLAINT

2.1. The complaint was lodged by Mr N Naane (the Complainant), on behalf of Batlile Dikgosi CC, the Complainant's Close Corporation (Batlile), on 13 June 2013.

2.2. The Complainant in essence alleged that:

2.2.1. On or about 17 and 18 June 2012, the Department placed an advertisement in numerous newspapers, such as Stellalander and Sunday Times, stipulating the following:

- a) The Supply Chain Management of the Department was inviting bidders for Bid Number: Edu 04/12 NW Delivery, to supply and install, as well as train Educators on the use of Assistive Devices to Full Services for a period of three (3) Years (the Tender);
- b) A compulsory site inspection or briefing session would be held on 24 July 2012 at 11H00, at the departmental district offices, in Mahikeng; and
- c) The evaluation criteria would be 90/10; therefore, the BBBEE Status Certificate is compulsory.

2.2.2 In addition to the advertisement, the Department issued a document titled "*Specifications for assistive devices to 20 full service schools*" signed by Mr Z Sprang and dated 13 June 2012 which listed the number of assistive devices, but did not include the prices. The Complainant completed the document and

indicated prices for specific items. The Complainant tendered at an amount of R6 875 240.00;

2.2.3 The initial closing date for the Tender was 06 November 2012. The Department subsequently extended it to 06 January 2013;

2.2.4. The following bidders were shortlisted by the Department's Bid Evaluation Committee (BEC) at a meeting held on 27 February 2013:

- a) Batlile Dikgosi CC;
- b) Matlosana Books and Stationery;
- c) Lesedi Corporate Technology; and
- d) Beduko Trading;

2.2.5. After 06 December 2012, the Complainant received a letter inviting him to do a sample presentation, though this requirement was never outlined in the Tender document. On 10 December 2012, the Complainant together with other bidders made presentations to the Bid Evaluation Committee (BEC);

2.2.6 The BEC, as per the minutes signed on 27 February 2013, and after having considered the sample presentations, recommended Matlosana Books and Stationery as the preferred bidder for the Tender;

2.2.7. The Departmental Procurement Committee (the DPC) at its meeting held on 27 February 2013, after having considered the recommendations of the BEC, recommended Matlosana Books and Stationery to the Head of the Department (HOD) as the preferred bidder for the Tender;

2.2.8. On 03 April 2013, the Department directed a letter to the Complainant informing him that he was not the successful bidder; and

2.2.9. The bid process was unfair and unjust in that:

- 2.2.9.1 According to the bid documents, the Department required bidders to bid on the list of items provided on the Tender document and concurrently submit a proposal;
- 2.2.9.2 The Tender documents did not provide quantities for the various items required, despite a requirement for a total rand value. It would therefore be impossible to evaluate each bid against the same bid from another bidder;
- 2.2.9.3. The initial closing date on the Tender was 06 November 2012. The Department subsequently extended the date of the Tender to 06 January 2013. The bid committees sat outside the validity period of the Tender, and as such the Tender ought to have been cancelled and re-advertised as outlined in Supply Chain Management (SCM) prescripts;
- 2.2.9.4. On 18 February 2014 the Complainant received a copy of the minutes of the BEC from the Director: SCM that were not dated. Subsequent to that the Director SCM signed the minutes on the 27th February 2013;
- 2.2.9.5. An anomaly that also appears on these minutes of the BEC is that the other bidders were not scored. The only score that appears on the minutes is that of the winning bidder;
- 2.2.9.6. The Department requested bidders to bid on a number of items provided on the Tender document and to concurrently provide a total bid price and did not provide quantities on the needs and requirements of the initial 20 schools;
- 2.2.9.7. As a result thereof, their bid price was a thumb suck as they did not want to be excluded for not bidding i.e. the process of providing total bids. Remarkably, the winning bidder, Matlosana Books and Stationery was awarded maximum points on price;

2.2.9.8 Matlosana Books and Stationery was awarded a negative score. It is mathematically improbable to award a negative score when scoring bids, which further demonstrates that the applicable formula was not applied and indeed the scores were manufactured. Moreover, this time around the winning bidder was awarded maximum points on price and 8 points of BBBEE awarding them a total score of 98 points;

2.2.9.9 Matlosana Books and Stationery incorrectly filled out the SBD 4 (Declaration of interest form) or rather failed to do so. Despite this, it was not excluded from the evaluation process due to this administrative error;

2.2.9.10 The Superintendent-General (SG) appointed the DPC, which name is not provided for in the SCM processes, instead of Bid Specification Committee (BSC) and the Bid Adjudication Committee (BAC). Had the SG followed proper SCM procedures and guidelines, the BAC could have pointed noticeable flaws with the evaluation criteria and the defective recommendations of the BEC; and

2.2.9.11 The Department failed and/or refused to furnish the Complainant with the record of the Tender despite making a request for access to information in terms of the Promotion of Access to Information Act, 2000 (PAIA) in an email dated 30 September 2013 addressed to Ms Heather Phiri.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1) (a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides:

"The Public Protector has the power as regulated by national legislation:

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action."*

- 3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.
- 3.4. Section 182(3) of the Constitution further provides that the Public Protector may not investigate court decisions.
- 3.5. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.6. Section 6(6) of the Public Protector Act, 1994 further provides that the Public Protector is not empowered to investigate the performance of judicial functions by any court of law.
- 3.7. The Department is an organ of state and its conduct amounts to conduct in state affairs, and as a result, the matter falls within the ambit of the Public Protector's mandate.

4. THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The process commenced with a preliminary investigation which included interviews and meetings with the Complainant, the HOD and other Departmental officials, Alternative Dispute Resolution mechanisms (ADR); correspondence with the Department; analysis of the relevant documentation; conducted research; and the consideration and application of the relevant laws, regulatory framework and jurisprudence.
- 4.1.3 The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of the Public Protector Act to help the parties settle. However, after several attempts to conciliate the matter, the process did not yield the required settlement which compelled my office to proceed with a formal investigation with a view to making a determination of maladministration, prejudice and impropriety in terms of powers conferred on the Public Protector by the Public Protector Act and the Constitution.
- 4.1.4. However, it came to the Public Protector's attention that the Complainant filed an application with the North West High Court (case No: M155/14) for an order to review and set aside the decision taken by the Department to award Tender No: EDU 04/12 NW to Matlosana Books and Stationery on 27 February 2013.
- 4.1.5 The Court dismissed the Complainant's application with costs on 24 March 2016. A perusal of the court order, indicates that the matter was dismissed on

the merits by the High Court, after having heard the Complainant's legal counsel.

4.1.6 In terms of section 182(3) of the Constitution the Public Protector may not investigate court decisions.

4.1.7 Section 6(6) of the Public Protector Act, 1994 further provides that the Public Protector is not empowered to investigate the performance of judicial functions by any court of law.

4.2. **On analysis of the complaint, the following were issues considered:**

4.2.1 Whether the Department failed to follow proper procurement processes when it awarded Tender No. EDU 04/12 NW to Matlosana Books and Stationery.

4.2.2 Whether the Complainant suffered prejudice as a result of the Department's conduct in the circumstances.

4.2.3 Whether the Department failed to provide the Complainant with information relating to Tender No. EDU 04/12 NW in terms of the PAIA, and if so, whether such failure constitutes maladministration.

5. CONCLUSION

5.1 **Regarding whether the Department failed to follow proper procurement processes when it awarded Tender No. EDU 04/12 NW to Matlosana Books and Stationery:**

5.1.1 During the course of the investigation the Public Protector discovered that the Complainant filed an application with the North West High Court (case No: M155/14) for an order to review and set aside the decision taken by the

Department to award Tender No: EDU 04/12 NW to Matlosana Books and Stationery on 27 February 2013.

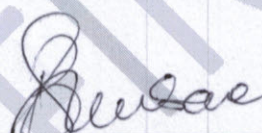
5.1.2 The Court dismissed the Complainant's application with costs on 24 March 2016.

5.1.3 This order by the High Court precludes the Public Protector from investigating the matter. In terms of section 182(3) of the Constitution, the Public Protector may not investigate court decisions.

5.1.4 Section 6(6) of the Public Protector Act further provides that the Public Protector is not empowered to investigate the performance of judicial functions by any court of law.

5.1.5 Based on section 182(3) of the Constitution, section 6(6) of the Public Protector Act and the North West Court judgment, the Public Protector could not proceed investigating the matter further and no remedial action as envisaged in section 182(c) of the Constitution could therefore be taken.

5.1.6 The other two issues that had been identified for investigation also became academic as they were intrinsically linked to the first issue, relating to the procurement processes that were followed in awarding the Tender.


ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 27/11/2017

Assisted by:

Mr Sechele Keebine: Provincial Representative: PPSA: NW

Adv Ike Motshegare: Senior Investigator: PPSA: NW