IN THE EASTERN CAPE HIGH COURT, BHISHO

CASE No.: 280/2011

In the matter between:

FREEDOM STATIONERY (PTY) LIMITED **Plaintiff**

and

THE MEMBER OF EXECUTIVE COUNCIL FOR EDUCATION **1st Defendant**

and

THE SUPERINTENDENT-GENERAL OF THE DEPARTMENT

OF EDUCATION, EASTERN CAPE PROVINCIAL GOVERNMENT **2nd Defendant**

JUDGMENT

Y EBRAHIM J:

[1] The plaintiff has instituted action against the first and second defendants for damages in the sum of R3 788 762,64 for loss of profit. The plaintiff claims that it suffered such loss due to the failure of the Department of Education, Eastern Cape, ('the Department') to award the plaintiff a contract, or any part thereof, pursuant to a tender advertised by the Department.

[2] I outline briefly the common cause details of the historical background to this action. Prior to September 2010, the Department advertised a tender under contract no. SCMU6-10-11-0005 for the manufacture, packaging and supply of scholastic

stationery for grades R to 12 to local distribution centres in the Eastern Cape. The plaintiff and other bidders submitted tenders for this contract and in a letter dated 17 December 2010[1] the Eastern Cape Provincial Treasury informed the second defendant that the Interim Bid Advisory Committee supported the recommendation of the Department to award the contract to a group of six qualifying bidders, which included the plaintiff.

[3] On 11 January 2011 a notice appeared in the Daily Dispatch newspaper cancelling the tender process. The plaintiff and another bidder, Power Stationery (Pty) Ltd, thereupon instituted urgent proceedings against the first and second defendants, and other affected parties, to review the second defendant's decision to cancel the tender and to award the contract, or parts thereof, to two other suppliers. On 17 March 2011, by agreement between the parties, an order was issued setting aside the cancellation of the tender and the award of the tender to the other affected parties, and the second defendant was directed to adjudicate on the tender for contract no. SCMU6-10-11-0005 from the stage when the Interim Bid Advisory Committee addressed the letter dated 17 December 2010 to the second defendant.[2]

[4] In a letter dated 1 April 2011[3] the second defendant conveyed to the plaintiff, *inter alia*, that:

'[T]he accounting officer of the Department of Education must take all reasonable steps to prevent abuse of the supply chain management process, including investigating any allegations against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management process. …… The letter dated 17 December

[1] Annexure "A" of the papers
[2] Annexure "B" of the papers
[3] Annexure "C" of the papers

2010, which was addressed to Advocate Mannya, is an internal document intended for the consumption of Advocate Mannya in his capacity as accounting officer for the Department of Education. In order for the accounting officer of the Department to determine whether Freedom Stationery and/or any official of the department has abused the supply chain management process of the Department or conducted itself/herself/himself in an improper manner, Freedom Stationery is hereby called upon to furnish the Department with detailed particulars regarding how, when and from whom it obtained possession of the letter dated 17 December 2010. You are further informed that the failure to make a proper disclosure …… may be construed as being tantamount to influencing the supply chain process.'

[5] Shepstone & Wylie Attorneys, representing the plaintiff, informed the second defendant in a letter dated 4 April 2011,[4] despatched via facsimile transmission and e-mail, that the plaintiff received a copy of the letter from a competitor and did not know how the competitor came into possession thereof. The attorneys referred the second defendant to an affidavit of a Mr Vishal Seebram (filed in Case No. 59/2011) wherein he said the letter dated 17 December 2010 was sent on the same day (according to the attorneys presumably by a Mr Tolisa of the Department). The attorneys pointed out that the second defendant had attested in an affidavit dated 17 February 2011 that this constituted a compromise of the supply chain management system by Paper Active (Pty) Ltd and African Paper Products (Pty) Ltd, not their client (the plaintiff). The attorneys said: 'It cannot conceivably be improper conduct on our client's part to receive a copy of a letter confirming that it is the number 1 supplier recommended by your treasury department. Our client certainly did not solicit private information from the Department. Nor do we believe that possession of documentation of the bid process can be regarded as affecting the outcome of the process. We note the requirement of section 217 of the Constitution that all State procurement processes be transparent. …… We accordingly deny that there has been any improper

[4] Annexure "D" of the papers

conduct on our client's part and we continue to assert that no lawful reason exists why our client should not be awarded the tender or part thereof. Furthermore, should the Department award the contract contrary to law, our client shall not hesitate once more to challenge any unlawful decision.'[5]

[6] The second defendant, not satisfied with this reply, informed the plaintiff's attorneys in a letter dated 12 April 2011,[6] sent by facsimile transmission, that:

'Your client's failure to give full particularity on how, when and from whom it received a copy of the letter dated 17 December 2010 addressed by the Interim Advisory Award Committee [*sic*] to Advocate Mannya leaves the Department with no alternative but to conclude that your client's possession of the said letter came about through an abuse of the supply chain management processes of the Department or improper conduct. In view thereof, the accounting officer of the Department intends rejecting your client's bid in accordance with regulations 16A9.2(a)(i) and (ii) of the Treasury Regulations, 2005 which permits the accounting officer to disregard the bid of any bidder if that bidder, or any of its directors have abused the Department's supply chain management system or have committed any other improper conduct in relation to such system.

Your client is once again afforded the opportunity of stating, in writing by no later than 13H00 on 12 April 2011, of how, when and from whom it obtained a copy of the letter dated 17 December 2010 addressed by the Interim Advisory Award Committee (*sic*) to Advocate Mannya before a final decision is taken on the matter.

All correspondence should be addressed to Adv. M. Mannya, Superintendent General of the Eastern Cape Department of Education, at the following address Steve Vukile Tshwete Complex, Zone 6 Zwelitsha, 5608, Private Bag X0032, Bhisho, Fax: 040 608 4249.'

[7] The same day the plaintiff's attorneys replied in a letter[7] sent by facsimile transmission.[8] However, the letter was incorrectly dated and the attorneys sent a

[5] Annexure "D" of the papers
[6] Annexure "E" of the papers
[7] Annexure "F" of the papers
[8] Annexure "F1" of the papers

further letter with the correct date by facsimile transmission and e-mail,[9] which read as follows:

'We refer to your telefax dated April 12 2011 which was sent to us this morning.
A copy of the December 17 letter was sent to the writer by Power Stationery on February 8 2011 while the writer was taking instructions with regard to the interdict proceedings which were then taken against your Department to confirm our client had been shortlisted.
Our client's position is that it cannot be contended on any basis that is (*sic*) guilty of "improper conduct" or has "abused" your supply chain management processes as you allege.'

[8] The Chief Financial Officer of the Department in a letter dated 19 April 2011[10] informed the plaintiff that '[i]t is regretted that your company has not been successful in Bid SCM 6-10/11-0005 which is on (*sic*) supply of stationery to section 20 schools in 2011 academic year in the Province of the Eastern Cape.'

[9] The plaintiff's attorneys responded on 20 April 2011[11] requesting the second defendant to furnish reasons for the plaintiff being unsuccessful with its bid.

[10] The State Attorney, Bisho replied on behalf of the second defendant and in a letter dated 21 April 2011[12] detailed the reasons for the second defendant's decision to reject the bid of the plaintiff.

[11] Subsequent thereto the plaintiff instituted these proceedings against the defendants.

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[9] Annexure "F2" of the papers
[10] Annexure "G" of the papers
[11] Annexure "H" of the papers
[12] Annexure "I" of the papers

[12] The principal averments of the plaintiff's cause of action are set out in the following paragraphs of the plaintiff's particulars of claim:

'20. When Second Defendant made his decision on 13 April 2011 he was in receipt of Plaintiff's reply of 12 April 2011. The reason given for Second Defendant's rejection of Plaintiff from the tender process, namely that Plaintiff had not replied to inquiry dated 12 April 2011 was not correct.

21. In the circumstances the ignoring of Plaintiff's response was arbitrary and unreasonable.

22. The reasons furnished by Second Defendant as to why Plaintiff had been unsuccessful in the tender were unfounded and irrational.

23. Second defendant awarded part of the tender to Power, which was identified in Plaintiff's response of 12 April 2011 as Plaintiff's source of "A".

24. The inference arising from Second Defendant's ignoring of Plaintiff's response of 12 April 2011 and the award of part of the tender to Power and from the reasons given by Second Defendant for Plaintiff's exclusion is that the decision was made in bad faith and with the express intention of excluding Plaintiff from the tender process.

25. In the result the decision to exclude Plaintiff from the tender process was wrongful and founds an action on behalf of Plaintiff against the Defendants in damages.'[13]

[13] The defendants have denied liability and the crux of the defence of the defendants is contained in the following paragraphs of their plea:

'8.2 In terms of the Treasury Regulations issued in terms of the Public Finance Management Act, 1999 (Act 1 of 1999) published under GN R225 in GG 27388 of 15 March 2005 (the Regulations) an accounting officer, such as is the second defendant, may disregard the bid or tender of any bidder if that bidder, or any of its directors have abused the institution's supply chain management system.

8.3 The second defendant had information at his disposal pointing to the plaintiff having abused the supply chain management system.

8.4 The plaintiff was afforded an opportunity to make written submissions anent the information referred to in paragraph 8.3.

[13] Paragraphs 20 to 22 of the particulars of claim at p 10 of the papers

8.5 The plaintiff did not advance facts and reasons showing that it had not abused the supply chain management system.

8.6 In view thereof, the plaintiff's bid was disregarded in terms of regulation 16A9.2(a)(i) of the Regulations.

8.7 The defendants particularly deny having been in possession or receipt of annexure F either before or after a decision was taken on 13 April 2011 in respect of the award of the tender. The defendants also deny the correctness and authenticity of the fax transmission report marked "F".

8.8 In the circumstances, the defendants deny that –

8.8.1 the decision of the second defendant was arbitrary, unreasonable, unfounded and irrational; and

8.8.2 the second defendant acted in bad faith either as alleged or at all,

and put the plaintiff to the proof thereof.'

[14] Pursuant to an order issued at a previous hearing the merits and quantum of the plaintiff's claim have been separated and the only issue for determination at present is the merits.

[15] Mr Paterson SC, with Ms Watts, appeared for the plaintiff and in presenting the plaintiff's case stated in his opening address that the essence of the plaintiff's cause of action was encapsulated in paragraph 24 of the particulars of claim.

[16] A list of admissions was handed in by Mr Paterson and by agreement between the parties admitted into evidence. The admissions are:

'1. The Defendants admit the content of the Rule 36(9)(b) Notice, dated 27 July 2012 and the supplementary notice, dated 31 August 2012, of Garry Jevons is true and correct and that the expert notices may be admitted into evidence at the trial without calling the witness.

2. The Defendants admit that the content of the Rule 36(9)(b) Notice of Mathys Jacobus Blignaut, dated 27 July 2012, is true and correct and that the expert notice may be admitted into evidence at the trial without calling the witness.

3. The Defendants admit that on 4 April 2011 Ms Rose Lorimer, an employee of Shepstone & Wylie Attorneys, sent the facsimile attached to the Particulars of Claim as “D” to facsimile number 040 608 4249, being the facsimile number of the Second Defendant, and that such facsimile was received by the Second Defendant.

4. The Defendants admit that on 12 April 2011 at 13H19 Ms Rose Lorimer, an employee of Shepstone & Wylie Attorneys, sent the facsimile attached to the Particulars of Claim as “F1” to facsimile number 040 608 4249, being the facsimile number of the Second Defendant.

   4.1 That the facsimile was received by the facsimile machine of the Second Defendant.

5. The Defendants admit that on 12 April 2011 at 13h44 Ms Rose Lorimer, an employee of Shepstone & Wylie Attorneys, sent the facsimile attached to the Particulars of Claim as “F2” to facsimile number 040 608 4249, being the facsimile number of the Second Defendant.

   5.1 That the facsimile was received by the facsimile machine of the Second Defendant.

6. The Defendants admit that on 12 April 2011 at 13H36 Ms Rose Lorimer, an employee of Shepstone & Wylie Attorneys, sent an email which attached “F1” to the email address gcobisa.katikati@edu.ecprov.gov.za.

7. The Defendants admit that on 12 April 2011 at 13H34 Ms Rose Lorimer, an employee of Shepstone & Wylie Attorneys, sent an email which attached “F1” to the email address Nonto1@webmail.co.za.
8. The Plaintiff admits the content of the report of Mornay van Staden, dated 13 August 2012 is true and correct, and that the expert notice may be admitted into evidence at the trial without calling the witness.’

[17] After elucidating on the aforesaid admissions Mr Paterson closed the case for the Plaintiff.

[18] A further admission was admitted into evidence, by agreement, after the defendants had closed their case, namely: ‘9. The Defendants admit that Exhibit “A” is an authentic record of the email received by Rose Lorimer, as appears in Exhibit “A”.’

[19] Mr Mbenenge SC, with Ms Da Silva, appeared for the defendants and adduced the evidence of Ms Gcobisa Katikati and Mr P Zokwe.

[20] The substance of the testimony of Ms Gcobisa Katikati was that during April 2011 she was the assistant professional assistant to the second defendant. One of her duties was to acknowledge receipt of e-mails that were sent to her e-mail address – gcobisa.katikati@edu.ecprov.gov.za, print these out and hand them to Mr P Zokwe, who was responsible for incoming and outgoing correspondence in the office of the second defendant. He then captured the e-mails on the system before passing them on to the other officials in the office.

[21] According to Ms Katikati, the second defendant did not share her e-mail address and had his own e-mail address, which to her recollection was modima.mannya@gmail.com. The second defendant did not have a fax (facsimile) machine in his own office and fax number 040-608 4249 was that of the machine located in the main reception area of the office of the second defendant. Neither she nor the receptionist named Mamubolekwa dealt with faxes they received as these were the responsibility of Mr Zokwe.

[22] Ms Katikati stated she did not receive the e-mail letter dated 12 April 2011 from Shepstone & Wylie Attorneys. Had she received it she would have replied by acknowledging receipt, printing it out and giving it to Mr Zokwe to capture on the system. Mr Zokwe would then pass it on to the senior professional assistant (PA) to hand to the second defendant as the PA had access to him.

[23] Cross-examined by Mr Paterson, Ms Katikati said she did not receive the letter dated 4 April 2011 (Annexure “D”) on which her e-mail address and the e-mail address Nonto1@webmail.co.za appeared. She did not receive it on 4 April 2011 or at any time thereafter.

[24] Asked if she read each document she received Ms Katikati said that due to the volume of correspondence received by the office of the head of department (HOD) she did not have the time to go through document but knew from whom an e-mail came including the date, subject and address. She acknowledged receipt by pressing reply, printing out the e-mail and giving it to Mr Zokwe. He placed a date stamp on it and captured the e-mail on the system before handing it over to the PA

and kept a record of all e-mails, faxes and correspondence received by the office of the HOD and scanned the documentation.

[25] On being shown a copy of an e-mail dated 4 April 2011[14] that read, 'Confirmed receipt of your e-mail and have forwarded to the relevant official', which Ms Rose Lorimer of Shepstone & Wylie Attorneys had received, Ms Katikati replied she could not confirm typing the acknowledgement as she did not recall receiving the e-mail sent by Shepstone & Wylie Attorneys. A search had been conducted on her computer for their e-mail but it could not be found.

[26] Ms Katikati denied receiving either Annexure "F1" or Annexure "F2" that were e-mailed to her e-mail address on 12 April 2011 and also transmitted by facsimile by Shepstone & Wylie Attorneys. She said she clearly remembered not receiving these as it was not the first time the question of receipt of these had arisen. In July or August 2011 the staff members in the office were asked to look for the e-mails and confirmed they were not received.

[27] She could not recall being asked on 12 April 2011 to look out specifically for a letter or e-mail from Shepstone & Wylie Attorneys. She was not sure if she was at work on 12 April 2011 but if she was she would constantly have updated the e-mails on her computer. She had a laptop which was open the whole time and e-mails would automatically appear on it in minimised form until she opened the e-mail.

[14] Exhibit 'A' *supra*

[28] Questioned on whether she knew what a server was, Ms Katikati replied she did not understand how it functioned and that it stored e-mails she received on her computer. Asked to explain why the particular e-mail from Shepstone & Wylie Attorneys, which the defendants admitted was received by the server, had not reached her computer she replied she could not and that it was for an IT expert to explain how this occurred. She refuted her denials were based on subsequent investigations she conducted and her not finding the e-mails and said it was based on the fact that she did not receive the e-mails.

[29] Mr Pilasande Zokwe testified that during April 2011 he was employed as a state accountant in the Education Department. His duties entailed receiving faxes, date stamping and scanning these and capturing the faxes on the system. He would then take the faxes to the PA of the HOD for distribution to the intended recipients.

[30] Mr Zokwe stated he did not receive Annexure “F”, the letter dated 12 April 2011 that Shepstone & Wylie Attorneys addressed to ‘Office of the Head: Education Eastern Cape’. He kept a register of all incoming and outgoing correspondence, including e-mails, and if he had received the letter he would have scanned it and passed it on to the PA.

[31] He was shown a document by Mr Mbenenge and confirmed it was a photocopy of the register of 12th and 13th April 2011 of incoming and outgoing documents. He reiterated he did not receive Annexure “A” and said he had not handed it to the second defendant.

[32] During cross-examination by Mr Paterson, Mr Zokwe said he could not recall seeing Annexure “C”, the letter dated 1 April 2013 the second defendant addressed to the plaintiff. He could also not recall seeing Annexure “D” and denied receiving it as an e-mail or a fax. Questioned about Annexure “E” (the second defendant’s reply to Annexure “D”) he denied seeing it before. When asked how the second defendant could have replied to Annexure “D” (the letter sent by Shepstone & Wylie Attorneys) if the second defendant had not received their letter, Mr Zokwe replied that if he had received Annexure “D” it would have been on his system. He conceded, however, that on occasions the second defendant had dealt with correspondence through his PA and not through him.

[33] Mr Zokwe said he read incoming documents as he needed to know the subject being dealt with so that he could enter this in the register. He, and not the secretary, collected the incoming faxes and scanned them. It was not possible for a PA to take a fax directly to the second defendant as ‘most of the times’ each fax that came in had to go through him to the second defendant. It was put to Mr Zokwe that his use of the phrase ‘most of the times’ indicated there were exceptions but he replied this was not possible.

[34] Mr Paterson referred to the fact that the defendants admitted Annexure “F” was received by facsimile machine with number 040-6084249, and put to Mr Zokwe that as Annexure “F” had not been entered in his register it must have been delivered to the second defendant without passing through him. Mr Zokwe’s reply to this was that he had no knowledge thereof and he received every fax that came in and took the fax to the relevant official.

[35] He did not remember anyone alerting him on 12 April 2011 to look-out at 13h00 for a faxed reply to Annexure "E". The second defendant had not at any time asked him if a fax had come in from Shepstone & Wylie Attorneys.

[36] In reply to a question from the Court, Mr Zokwe said there were occasions when someone asked for a particular fax or e-mail and he informed the person he had no record thereof. Usually it was the PA who would ask for the documents. This concluded the case for the defendants.

[37] At issue in this matter is whether or not the second defendant was in receipt of Annexure "F" (plaintiff's reply dated 12 April 2011) prior to his taking the decision on 13 April 2011 to reject the plaintiff's bid in tender contract no. SCMU6-10-11-0005.

[38] Mr Paterson submitted that a process of inferential reasoning[15] was to be used in analysing the evidence and this would lead to the conclusion that the answer to the aforementioned question was in the affirmative. I did not understand Mr Mbenenge to differ with this approach save that Mr Mbenenge submitted that the inference contended for by Mr Paterson was not justified on the evidence.

[39] The nub of Mr Paterson's submissions was that the plaintiff had shown that the facsimiles were received in the office of the second defendant and could go no further than this as it did not have insight into the internal mechanisms of the office of

[15] See *S A Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) at para [35]; See further *Macleod v Rens* 1997 (3) SA 1039 (E), *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A), *Administrator Transvaal and First Investments v Johannesburg City Council* 1971 (1) SA 56 (AD) at 80A-F, *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) and *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A)

the second defendant. Reliance could however be placed upon the reliability of the previous means of communication utilised by the parties, namely e-mails and facsimile transmissions, to show there had not been any difficulties or a breakdown in communication. The previous exchange of correspondence between the parties confirmed this to be so. The second defendant had designated the plaintiff should reply via facsimile and the plaintiff had done this. Mr Paterson submitted that given the reliability of the previous line of communication and the irrationality of the denials, the inference to be drawn, that was consistent with all the proved facts, is that it is more probable than not that the facsimiles were received by the second defendant.

[40] Mr Mbenenge's submissions succinctly were that the case the defendants had been called upon to meet was that the decision taken by the second defendant on 13 April 2011 was arbitrary and unreasonable. The plaintiff averred in the particulars of claim that the second defendant was in receipt of the plaintiff's letter of reply dated 12 April 2011 when he made his decision on 13 April 2011. It was Mr Mbenenge's contention that the onus was on the plaintiff to prove that the second defendant himself, and not merely the facsimile machine, had in fact received and was in possession of the plaintiff's reply when he took the decision in question. He submitted the plaintiff had failed to discharge this onus, and the inferences the plaintiff urged upon the Court to draw could not, on application of the two cardinal principles enunciated in *R v Blom*,[16] be drawn and the plaintiff's action had to fail.

[41] I turn to consider the evidence with the admissions made by the defendants and the submissions of counsel.

[16] 1939 AD 188 at 202 to 203

[42] During her testimony Ms Katikati denied receiving Annexure “D” on 4 April 2011 or any other date, either by e-mail or facsimile. Annexure “D” is the reply Shepstone & Wylie Attorneys sent to the letter (Annexure “C”) second defendant had addressed to the plaintiff. The admission of the defendants that Annexure “D” was received by facsimile machine with facsimile number 040-608 4249 and that the facsimile was received by the second defendant contradicts the denial of Ms Katikati. Her denial is, in addition, contradicted by her own actions since she sent an e-mail to Ms Lorimer acknowledging she received her e-mail and was forwarding it to the relevant official. In the circumstances, her denial is rendered valueless.

[43] Ms Katikati also denied receiving Annexure “F1” or Annexure “F2” as e-mails. Although the defendants admit Ms Lorimer of Shepstone & Wylie Attorneys transmitted Annexure “F1” on 12 April 2011 at 13h19 to facsimile machine with the number 040-608 4249 and that she sent Annexure “F1” at 13h36 to Ms Katikati’s e-mail address they do not admit receipt of either and deny the second defendant received Annexure “F1”. The fact that Ms Lorimer sent Annexure “F1” to the e-mail address: Nonto1@webmail.co.za is also admitted.

[44] Mr Mbenenge has recognised there are contradictions in the testimony of Ms Katikati and particularly her disavowal of authorship of the acknowledgement (Exhibit ‘A’) sent to Ms Lorimer on 4 April 2011. Mr Mbenenge submitted, however, that this did not mean that all of her evidence was to be rejected.

[45] The difficulty I have with the testimony of Ms Katikati is that she was not willing to admit to any fact or concede any proposition that might reflect adversely on her

diligence in carrying out her tasks. She denied whatever concession counsel sought to obtain even if it obviously was in contradiction of the admissions made by the defendants. She claimed her denial was based on her actual recollection of not receiving the e-mail and not as a result of an investigation she and staff members conducted a few months later that failed to locate the e-mails.

[46] If Ms Katikati indeed had an independent memory of the receipt or the sending-off of e-mails I would have expected her to have remembered sending Exhibit 'A' which clearly originated from her computer. Even in the face of the admission by the defendants that Ms Lorimer received, Exhibit 'A', Ms Katikati persisted in denying receipt of the e-mail from Ms Lorimer to which Exhibit "A" was Ms Katikati's reply. Her explanation that she did not recall receiving Ms Lorimer's e-mail and therefore could not admit sending the e-mail acknowledging receipt is evasive and indicates a refusal to accept the established fact that she had indeed sent this e-mail to Ms Lorimer.

[47] I am not persuaded that the lack of candour by Ms Katikati on issues peripheral to the main question of whether or not the second defendant received Annexure "F1" does not reflect adversely on her credibility as a witness as a whole. There was no reason for her to be evasive regarding such issues. In my view, her denial of receipt of the e-mails to which Annexure "F1" was attached cannot be afforded any weight.

[48] The testimony of Mr Zokwe was similarly unsatisfactory. He, like Ms Katikati, would not concede anything which he considered brought into question his diligence in carrying out the tasks for which he was responsible.

[49] Mr Zokwe was adamant that all e-mails, facsimiles and correspondence, received by, or sent from, the office of the second defendant were recorded in his register before being passed on to the relevant official. Yet, it became apparent during cross-examination that this was not the case. Even though the defendants admitted that Annexure "D" was received by facsimile machine with the number 040-608 4249 he denied receiving it and had no recollection or record of it or Annexure "C". When confronted with the fact that the second defendant had replied to Annexure "D", despite there not being any record of it in his register, he was constrained to concede that someone else must have collected the facsimile and taken it directly to the second defendant.

[50] The explanation furnished by Mr Zokwe for the absence of any record in his register of receipt of the facsimile of Annexure "F' was by no means satisfactory. All he could proffer was that he had no knowledge of the facsimile and no one else could have delivered it to the second defendant since he alone collected the faxes received and took them to the relevant officials. This obviously contradicted his previous explanation for not having recorded receipt of Annexure "D", namely that someone may have collected it.

[51] I am of the view that the evidence of Mr Zokwe should be treated with circumspection. I am not persuaded that his testimony can be accorded the weight Mr Mbenenge contended it should. The issue is not whether he was untruthful or not. His testimony, in my view, was of such a nature that the probability that someone else could have attended to a facsimile received in the office of the second defendant without his (Mr Zokwe's) knowledge cannot be excluded.

[52] It is against this background that I consider what inferences may be drawn from the evidence as a whole and the admissions made by the second defendants.

[53] In his letter dated 12 April 2011 addressed to the plaintiff the second defendant stipulated that correspondence, namely the plaintiff's reply, should be addressed to 'Adv. M Mannya, Superintendent General of the Eastern Cape Department of Education, at the following address Steve Vukile Tshwete Complex, Zone 6 Zwelitsha, 5608, Private Bag X0032, Bhisho, Fax: 040 608 4249.'

[54] It is admitted that Ms Lorimer sent Annexure "F1" on 12 April 2011 at 13h19 as a facsimile to facsimile machine with the number 040-608 4249, which is the second defendant's facsimile number, and the fax number to which the second defendant had stipulated the reply should be sent. It is admitted further that the facsimile was received by the particular facsimile machine. It is similarly not in dispute that Ms Lorimer also sent Annexure "F2" on 12 April 2011 at 13h44 as a facsimile to the second defendant's facsimile machine and that it was received. What the parties are at variance about is whether or not the second defendant received the facsimiles.

[55] If the facsimile was received by the facsimile machine stipulated by the second defendant does the plaintiff nevertheless bear the onus of proving that the facsimile was also received by the second defendant personally? In my view, the plaintiff does not attract such an onus. The second defendant had stated in his letter that the reply should be addressed to him at a particular address and provided a facsimile machine number to which it should be sent. There was no stipulation that the

plaintiff was also required to ensure that the reply was received personally by the second defendant.

[56] The manner in which facsimiles were dealt with on receipt thereof in the office of the second defendant was not within the knowledge of the plaintiff. The internal procedures staff members were required to apply are peculiarly within the second defendant's knowledge and control. I cannot see on what basis the plaintiff should be called upon to account for any failure on the part of staff members to adhere to internal office procedures. In my view, it would be unjust to place an obligation on the plaintiff to explain what happened to the facsimile after it was received by the specified facsimile machine. Moreover, as the plaintiff had complied with the second defendant's stipulated mode of communication, I do not consider the plaintiff was compelled to do anything more than ensure that his reply was received by the second defendant via the means specified by him.

[57] I am satisfied that the plaintiff has proved that both Annexure "F1" and Annexure "F2", sent by the plaintiff via facsimile transmission, were properly delivered to the specified facsimile machine. The admissions, taken with the evidence as a whole, establish *prima facie* that the office of the second defendant received the plaintiff's reply dated 12 April 2011.

[58] I turn to Mr Paterson's submission that as the plaintiff had made out a *prima facie* case an unfavourable inference can be drawn from the failure of the second

defendant to testify and rebut the plaintiff's case.[17] As certain facts were within the second defendant's personal knowledge he attracted an evidential duty of rebuttal. It was thus necessary for the second defendant to substantiate his denial of receipt of the plaintiff's reply or furnish some other explanation. Unlike a witness who may not have been available to the defendants, the second defendant is a party to this action and available to testify. I find merit in this argument. I am in agreement that in the absence of second defendant testifying and rebutting the *prima facie* case made out by the plaintiff, the *prima facie* case is strengthened and becomes conclusive against the second defendant and, by corollary, against the first defendant too.[18]

[59] On an evaluation of all the evidence the most readily apparent and acceptable inference is that the plaintiff's letter dated 12 April 2011 (Annexure "F") was received not only by the office of the second defendant but by him.[19] When considered against the probabilities it is 'the more natural, or plausible, conclusion from amongst several conceivable ones'.[20]

[60] Mr Mbenenge requested an opportunity to file supplementary heads of argument as to whether the plaintiff would be entitled to damages in the absence of evidence to sustain its allegations in paragraph 19 of the particulars of claim.[21] This

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[17] *Galante v Dickinson* 1950 (2) SA 460 (A)

[18] *S v Boesak* 2000 (3) SA 381 (SCA); See also *Union Government Minister of Railways v Sykes* 1913 AD at pp 173 and 174

[19] See fn 16 *supra;* See further *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-D and *AA Onderlinge Assuransie Bpk v De Beer* 1982 (2) SA 603 (A) at 614H-615B

[20] See fn 15 – *S A Post Office v De Lacy and Another* at para 35 and *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D quoted there

[21] At page 10 of the papers:

'19. Due to the urgency of the matter and the requirement not to further negatively affect the constitutional rights of learners, it was not open to plaintiff to institute a further urgent interdict and review to set aside the decision of the second defendant to exclude Plaintiff from the tender process.'

was granted and Mr Paterson was afforded a similarly opportunity of filing supplementary heads of argument.

[61] It is submitted briefly in the defendants' supplementary heads of argument that the plaintiff should have lead evidence in support of the allegations in paragraph 19 to sustain a delictual cause of action. As the plaintiff had not done so, the action had to fail. In substantiation of this submission the defendants referred to what the Court said in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*.[22]

[62] In the plaintiff's supplementary heads of argument Mr Paterson is emphatic in his criticism of the defendants' submission and disputes the relevance of the authority quoted by the defendants. The central issue Mr Paterson raised in his extensive submissions in reply to those of the defendants is that a further interdict and review of the second defendant's decision in April or May 2011 would have been an infringement of the constitutional rights of learners since this would have resulted in the supply of scholastic stationery to learners being delayed. Since the rights of learners had to trump the potential and unqualified prejudice to the commercial interests of the plaintiff, an application for a further interdict and the concomitant review would have been dismissed by the Court. The consideration of public interest is well established in our law and by April/May the balance of convenience had swung in favour of the overwhelming interest of the learners requiring the stationery. Mr Paterson quoted a series of cases in support of his submissions.[23]

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[22] 2004 (6) SA 222 (SCA) at para [26]

[23] In particular: *Ferreira v Lewin NO and Others*; *Vryenhoek and Others v Powell NO* and Others 1995 (2) SA 813 (W) at 841F-842C and *Reitzer Pharmaceuticals (Pty) Ltd v Registrar of Medicines* 1998 (4) SA 660 (T) at 690E-691E with reference to the Canadian cases cited there

[63] Mr Paterson submitted that the *Oudekraal* case was not apposite as it did not relate to a claim in damages. In the present instance the plaintiff's action was not for the purpose of impugning the decision of the second defendant but to claim damages because of the decision. The case of *Millenium Waste Management v Chairperson, Tender Board*[24] was far more pertinent authority, and there the Court said, reviews had to be brought timeously to avoid prejudice to the public arising from a successful review. Relevant to the decision as to whether to grant a review was prejudice to third parties and to the public.

[64] I am not persuaded that the argument postulated by the defendants in their supplementary heads of argument has merit. I, as in the case of Mr Paterson, am unable to discern the relevance of the passage in the *Oudekraal* matter that the defendants quoted in substantiation of their argument. On the other hand, the plaintiff's argument is persuasive and must prevail.

[65] I accept that a further interdict at that late stage in the school year for the purpose of reviewing the second defendant's decision would have infringed the constitutional rights of learners and been severely detrimental to their interests. An application for an interim interdict would probably have been dismissed as the balance of convenience would have been in favour of the defendants and the public interest far outweighed any potential economic loss the plaintiff might suffer.

[24] 2008 (2) SA 481 (SCA) at 490E and 491F

[66] In the circumstances I do not uphold the submission by the defendants that for this reason alone the plaintiff's action falls to be dismissed.

[67] This brings me to the question of whether the plaintiff's possession of the letter dated 17 December 2010, addressed by the Eastern Cape Provincial Treasury to the second defendant, could 'be construed as being tantamount to influencing the supply chain process' of the Department or 'an abuse of the supply chain management process' by the plaintiff, as claimed by the second defendant in his letter dated 4 April 2011.

[68] Prior to the plaintiff receiving the letter from Power Stationery, the second defendant had attested on oath, in another matter, that Paper Active (Pty) Ltd and African Paper Products (Pty) Ltd had compromised the supply chain management process by being in possession of the letter which apparently was sent by a member of the Department. As the process had already been compromised by the conduct of the two companies, any subsequent possession of the letter by someone else could certainly not be considered as compromising the process, and even much less 'as being tantamount to influencing the supply chain process' or 'an abuse of the supply chain management process'. In addition, the plaintiff received the letter from another bidder and not through any conduct on the part of the plaintiff involving a member of the Department or any other individual in the supply chain management process. I am unable to find support for the second defendant's allegations against the plaintiff.

[69] It follows, that there was no justification for the second defendant drawing an adverse inference from the plaintiff's possession of the letter of the Eastern Cape Provincial Treasury dated 17 December 2010 that the plaintiff had influenced and/or

abused the Department's supply chain management process. In my view, the inference that the second defendant acted *mala fide* in doing so is inescapable.

[70] Upon due consideration of all the evidence I find the plaintiff has established, on a balance of probabilities, that the second defendant was in receipt of the plaintiff's letter dated 12 April 2011 when he made the decision on 13 April 2011 to exclude the plaintiff from the tender process.

[71] I find, further, that the second defendant acted arbitrarily and unreasonably in ignoring the plaintiff's reply and that the decision was made in bad faith and with the express intention of excluding the plaintiff from the tender process. I find, too, that the decision to exclude the plaintiff from the tender process was wrongful.

[72] The first defendant and the second defendant are consequently liable to the plaintiff for such damages as the plaintiff may prove.

[73] In regard to costs, there is no reason not to grant costs in favour of the plaintiff as the successful litigant. The costs of the action are to include the costs of an application to compel the defendants to grant access to the computers and the attendant inspection thereof. Mr Mbenenge has not advanced reasons in opposition to this and such an order will ensue. The parties have also agreed that the plaintiff is entitled to an order for costs omitted from an order issued on a previous occasion when an exception was argued and the trial was postponed.

[74] In the result, there is an order in the following terms:

1. The first and second defendants are liable to the plaintiff for such damages as the plaintiff may prove;

2. The first and second defendants are liable jointly and severally, the one paying the other to be absolved, for the costs of the action which includes the costs of an application to compel, and inclusive further of the costs consequent upon the employment of two counsel;

3. The first and second defendants, jointly and severally, the one paying the other to be absolved, are to pay the wasted costs of suit of the postponed trial occasioned by the Exception, as between party and party on the High Court scale, as taxed or agreed, such costs to include, but not be limited to:

   2.1 the costs consequent upon the employment of two counsel;

   2.2 the reasonable qualifying expenses, if any, of the expert witnesses of the plaintiff, namely Garry Jevons and Thys Blignaut, in respect of whom the plaintiff filed Rule 36(9)(a) & (b) notices.

4. Rose Latimer is declared a necessary witness.

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pp Y EBRAHIM **9 September 2013**

JUDGE OF THE HIGH COURT, BHISHO

Judgment delivered on:	12 September 2013
Counsel for the Applicant:	T J M Paterson SC with Ms Watt
Attorneys for the Applicant:	Gordon McCune Attorney King Williams Town
Counsel for the First Respondent:	S M Mbenenge SC with Ms Da Silva
Attorneys for the First Respondent:	State Attorney EAST LONDON