

IN THE INDEPENDENT REVIEW COMMITTEE HEARING ("IRC")

HELD AT MBABANE

IN THE MATTER BETWEEN;

SWAZI TEXTBOOKS & STATIONERY (PTY) LTD APPLICANT



AND

MINISTRY OF EDUCATION & TRAINING RESPONDENT

**RULING ON ADMINISTRATIVE REVIEW PROCEEDINGS IN TERMS
OF SECTION 49 OF THE PROCUREMENT ACT 2011 ON TENDER**

NO. 36 OF 2018/19

QOURUM: **MR. B.S DLAMINI : Chairman**
 MR. A. NGWENYA : Member
 MR. N. MAPHANGA : Member


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1. PARTIES & REPRESENTATION

- 1.1 The Applicant is Swazi Textbooks & Stationery (Pty) Ltd, a company duly registered and incorporated as such in accordance with the company laws of the Kingdom of Swaziland with its principal of business at Dzeliwe Street, Mbabane, District of Hhohho. During the administrative review hearing, the Applicant was represented by its Managing Director, Mr. Greg Herbst.
- 1.2 The Respondent is the Ministry of Education & Training, a Government Department based at the Ministry of Education Building in Mbabane, District of Hhohho. The Ministry of Education & Training was represented by Mr. Vicky Manana, an attorney from the Attorney General's Chambers during the administrative review hearing. There were also several other officers from the Ministry to observe and to make their input on all issues arising at the hearing.
- 1.3 There were other affected and/or interested parties during the hearing who however elected not to make any representation other than to merely observe the proceedings.

2. ISSUES IN DISPUTE

- 2.1 The issues in dispute emanate from Tender No.36 of 2018/2019 advertised by the Respondent in terms of which companies were invited to tender for the supply, printing, packaging and delivery of pupils exercise books and stationery packs for all public primary schools in December 2018.


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- 2.2 On evaluation of the bids, the Applicant's tender documents were found not to be responsive (compliant) on two grounds namely;
- 2.2.1 The total price amounts in words used by the Applicant were unreadable and/or clustered.
- 2.2.2 The Applicant had failed to furnish or supply the required statutory documents "in the order" stipulated in the Tender Document.
- 2.3 The Applicant submitted that the disqualification based on its alleged failure to write the total price amounts in words was improper and unlawful in that the amounts in words in its bid document were readable and/or that the error was not a material error and could have been corrected as stipulated in the Public Procurement Procedures document ("PPP") issued under Section 66 of the Public Procurement Act, 2011.
- 2.4 The Applicant also submitted that on the second point of disqualification, namely the alleged failure to follow a stipulated order of furnishing the required documents, such an order was impossible to follow because the tender document was in itself contradictory and impractical to adhere to.
- 2.5 The Respondent on the other hand submitted that the two grounds on which the Applicant was found not to be compliant were valid grounds and therefore that it did not err in any way in disqualifying the Applicant on the two grounds already highlighted herein above. The Respondent also argued that nothing whatsoever was presented by the Applicant to demonstrate that the Respondent had breached any of the provisions of the Public Procurement Act, 2011.

3. **BACKGROUND INFORMATION**

- 3.1 The Respondent advertised Tender No.36 of 2018/2019 for the supply, printing, packaging and delivery of pupils exercise books and stationery packs for all public primary schools in December 2018.
- 3.2 The tender document stipulated that the tender is made up of two (2) main “lots” with each lot having eight (8) sub-regions. Lot 1 was said to be for the “Printing, Packaging and Delivery of Exercise Books and Stationery Packs” to the eight (8) sub-regions. Lot 2 was for “The Supply and Delivery of Stationery Sets” for the eight (8) sub-regions.
- 3.3 The tender document proceeded to outline in detail or specify how prospective tenderers were to prepare and submit their tender documents to the relevant procuring entity, in this case being the Ministry of Education & Training (“Respondent”).
- 3.4 In response to the tender invitation, 19 companies duly applied to be given the opportunity to deliver the materials required in the tender document. The Applicant was one of such companies.
- 3.5 It appears from the scanty evidence placed at the disposal of the Committee that of the 19 companies which responded to the tender invitation, 11 of these were shortlisted and, from the 11 companies shortlisted, only 8 were identified by the Respondent as being competent and sufficiently capacitated to be awarded certain categories of the total package.
- 3.6 The Applicant, Swazi Textbooks and Stationery, was eliminated at the preliminary or entry stage of the process for allegedly not meeting the basic or standard requirements for it to be considered for the substantive works or services.

- 3.7 Being dissatisfied with the decision to disqualify it, the Applicant invoked the provisions of Section 47 of the Procurement Act which essentially is a review by the procuring entity. The Section 47 procedure allows the procuring entity to conduct a “self-check” and to ensure that the process of awarding the tender was beyond reproach. The Applicant was unsuccessful in his bid to overturn the decision through the mechanism enshrined in Section 47 of the Act.
- 3.8 In line with the provisions of Section 49 of the Procurement Act, 2011, the Applicant has approached the Independent Review Committee for a review of the Controlling Officer’s decision of declining to entertain the Applicant’s complaints being that it was unfairly and/or unlawfully disqualified from being assessed on the merits of its potential to provide the services and/or goods required.
- 3.9 The first sitting of the Committee was on the 30th July 2018 at the Swaziland Public Procurement Regulatory Authority (“SPPRA”) boardroom with those in attendance being the Applicant, Respondent’s officers and other tenderers who have an interest in the tender in question.
- 3.10 During the hearing of the 30th July 2018, several issues were discussed including but not limited to the following issues:
- (i) Introduction of the committee members.
 - (ii) Introduction of all parties involved in the matter.
 - (iii) Declaration of conflict or potential conflict by all parties concerned.
 - (iv) The rights of the parties to legal representation.

- (v) The procedure to be adopted during the administrative review hearing.
- (vi) Exchange of documents between the parties.
- (vii) The documents required by the committee prior to hearing the application.
- (viii) The date, time and venue for the hearing of the review application.

4. **THE APPLICANT'S CASE**

- 4.1 The Applicant filed written submissions which it supported by means of oral submissions on the date allocated for the hearing of the matter.
- 4.2 In a nutshell, the Applicant, through its director submitted that it is not correct to allege that the price amount in words in its bid document was unreadable. The Applicant stated that the total prices in words reflected in its bid document were readable contrary to the allegations by the Respondent.
- 4.3 It was the Applicant's contention that he had taken the liberty to approach a high ranking official in one of the financial institutions in the country who confirmed that there was nothing wrong in "clustering the price amounts in words" since this practice had the overall effect of eliminating fraud when making payments by means of a cheque.
- 4.4 The Applicant submitted that in the past 10 years or so, he had always written the amounts in words using the same style in his bid documents and that he had never been disqualified based on this ground. To illustrate its point, the Applicant attached bid documents in relation to Tender No.33 of 2017/2018 in which it used essentially the same style of writing the total amount in

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words and was awarded a certain category to supply goods worth E 419,324.50.

- 4.5 It was also the Applicant's contention that the amount in words ought not to have presented a problem to the Respondent since there was an amount in numeral form and that if there was any doubt, such doubt could have been removed by adding up the respective unit prices in the relevant section of its tender document to come up with the correct total price tendered for each category of the lots to be supplied.
- 4.6 The Applicant supported its submissions by quoting a number of sections in the Public Procurement Procedures Manual issued under section 66 of the Procurement Act, 2011.
- 4.7 In essence, the Applicant submitted that even if there were deviations or non-compliance on the requirement to write the total amount in words and figures, such deviation, according to the Applicant, was not a material deviation and should not have resulted in a rejection or disqualification of its bid. In Applicant's submissions, the Respondent was required to seek for clarification instead of simply rejecting its bid on a minor deviation.
- 4.8 On the rejection of Applicant's bid based on its alleged failure to furnish the required documents in the specified order, the Applicant submitted that there are various sections of the bid document in which the same documents were being required to be furnished or supplied in a dissimilar pattern.
- 4.9 It was the Applicant's submission that in the 'Tender Data Sheet', a labour compliance certificate was required to be furnished twice as item 6 and 12 of the specified order. The order required could therefore not be followed as a

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tenderer could not know whether to furnish the labour compliance certificate as item 6 or to furnish it as item 12 or to furnish it twice as item 6 and 12.

- 4.10 The Applicant also highlighted that some companies' bids were rejected on account of failing to furnish a certificate of incorporation and yet a certificate of incorporation is not listed as one of the required documents in the Tender Data Sheet. The certificate of incorporation is only required on the section of "Advertisement for Invitation to Tender" (page 2) of the tender document.
- 4.11 The section on "Advertisement for Invitation to Tender" does not require the documents to be furnished in any particular order and yet these documents are substantially the same as the documents required in the "Tender Data Sheet".
- 4.12 Similarly on this point, the Applicant referred to various sections of the Public Procurement Procedures Manual and submitted that even if there had been a deviation, such deviation did not warrant a rejection of its bid but one that required a clarification or a correction since such a deviation does not go to the core or substance of the works or services to be carried out.
- 4.13 In conclusion, the Applicant prayed that the decision of the Respondent of rejecting its bid or disqualifying it be set aside and that the committee directs that it be considered as a qualifying supplier in respect of the tender in question.
- 4.14 The Applicant in its written submissions applied that it be reimbursed all costs associated with the review application including the administrative fee payable to the agency.

5. THE RESPONDENT'S CASE

- 5.1 The Respondent, through its erstwhile attorney made its submissions in rebuttal of all the points made on behalf of the Applicant.
- 5.2 As a starting point, the Respondent's counsel submitted that not even a single point was made by the Applicant to show how the Procurement Act of 2011 was alleged to have been breached by the Respondent.
- 5.3 The submission by the Respondent was that the Public Procurement Procedures Manual was merely a guide and did not have a force of law so as to make it compulsory for procuring entities to follow same on strict terms.
- 5.4 It was the Respondent's submission that the total price amount in words in Applicant's bid document was unreadable because of 'clustering of the words'. According to the Respondent, the instructions to the tenderers were clear that the total price amount must be in words and figures. By clustering the words of the total price amount, the Applicant failed to meet the requirement of writing the total bid amount in words and as such, its bid stood to be rejected on this ground alone.
- 5.5 In support of its contention, the Respondent's counsel submitted that if the amount in words as written by the Applicant in its bid document were to be written in a computer, the clustered words would be highlighted in red or green to show that they are improper or unacceptable.
- 5.6 On the issue of the words format being used by the Applicant as in previous years, the Respondent submitted that each tender is considered on its own and without any reference as to how past tenders were considered and

 
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awarded. According to the Respondent, the reference to past tenders by the Applicant was irrelevant and did not assist it in any way.

- 5.7 The Respondent submitted that the failure by the Applicant to write the total bid price in words for each category of the lot in a legible manner was a material deviation which justified the Respondent's decision in rejecting the Applicant's bid.
- 5.8 On the second ground of disqualification, namely the failure by the Applicant to furnish the required documents in the specified order, the Respondent submitted that in the *Tender Data Sheet*, it was stipulated and bolded that the documents required to be furnished were to be furnished in the exact order outlined in this document. Accordingly, the failure by the Applicant to follow the specified order was a valid ground for the rejection of its bid and the Respondent could not be faulted as the Applicant itself concedes to have failed to follow the instruction to furnish the documents in the required order.
- 5.9 It was the Respondent's further submission that the process of evaluation of the tenders is a process of elimination such that companies that were not responsive or compliant were eliminated and those who were compliant were allowed to progress to next stage of assessment.
- 5.10 In conclusion, the Respondent prayed that the relief or remedies sought by the Applicant be dismissed for lack of legitimacy and validity.

6. ANALYSIS OF ISSUES

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6.1 The process of administrative review is enshrined in sections 48 and 49 of the Procurement Act, 2011. Section 49 (1) of the Act provides that;

“An application for administrative review in accordance with section 48, shall be submitted in writing to the Agency.”

6.2 In Section 49 (3) of the Act, it is provided that;

“Upon receipt of an application for administrative review, the Agency shall-

(a) immediately give notice of the application to the procuring entity;

(b) prohibit the procuring entity from awarding a contract prior to completion of the administrative review process; and

(c) establish an Independent Review Committee in accordance with section 50, which shall investigate and decide on the application in accordance with section 51”.

6.3 Section 51 (1) of the Act on the hand stipulates that;

“Unless the application is dismissed, the Independent Review Committee shall-

(a) immediately institute an investigation; and,

(b) issue a written decision within fifteen working days after submission of the application.”

6.4 The decision by the IRC must, in terms of section 51 (3) state whether the application is upheld in part or in whole or dismissed. The section also requires that reasons of the decision must be properly articulated and that if

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there are any corrective measures to be taken against a procuring entity, such measures be communicated accordingly.

6.5 Having briefly outlined the administrative powers of the IRC as articulated in the Procurement Act, it is opportune at this stage to conduct a brief enquiry on the legal nature of the Public Procurement Procedures made under section 66 of the Act.

6.6 The starting point is section 66 of the Procurement Act which provides that;

“The Agency may issue public procurement manuals, circulars and instructions to provide further guidance on the interpretation and application of this Act and public procurement regulations issued under this Act.”

6.7 In our assessment of the issues at hand, the Public Procurement Procedures Manual is a valid and binding document on all public entities seeking to procure services and goods from third parties. By seeking to argue that this document is nothing else but merely a guide, the Respondent was seeking to contest the argument that it was bound to follow the provisions of this document in making its decision.

6.8 In practical and legal standards, if the Respondent is correct in its argument that the Public Procurement Procedures Manual is not a legal document to which it was bound, then it was duty bound to furnish to the committee that particular legal document which it used in evaluating the tenders of the 19 different companies. We were not referred to any such document and as such we reject the argument advanced on behalf of the Respondent which is that the Public procurement Procedures Manual is not a legal and binding document.

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- 6.9 We now turn to consider the substantive issues as advanced by both the Applicant and the Respondent during the hearing. The first issue for consideration is the rejection of the Applicant's bid on the ground that the total price amounts in words were "unreadable" because of clustering.
- 6.10 In Applicant's bid document, in Lot 2 for Sub-Region 4-Mankayane, for instance, the Applicant stated the total amount as **E 408,533.11 (fourhundredeightthousandfivehundredthirtythree Emalangen and eleven cents)**. In all the categories of its tender document, this how the Applicant would write the price amounts in figures and in words.
- 6.11 Whether we apply a subjective or objective test, clearly this is not how an amount in words should be written. The red highlight by the computer when the amount in words is written in this format is an indication that the letters do not make sense or recognized as letters making up proper words or a proper sentence.
- 6.12 We are therefore inclined to agree with the Respondent that there was a deviation or non-compliance in so far as the instruction to write the total price amount in words is concerned.
- 6.13 The next question to determine on this issue is whether this deviation by the Applicant qualifies to be classified as a material deviation. It is important to decide on whether the deviation was a material or minor deviation because in terms of the Public Procurement Procedures Manual, only a material deviation can result in a rejection of the bid by the procuring entity.
- 6.14 The evaluation criteria as stipulated in the Public Procurement Procedures is based on various stages of the process and on specific issues. Put differently, the evaluation criteria is based on procedural issues as well as substantive

issues. We have established that in the procedures, there is an *Evaluation Methodology and Criteria; Preliminary Examination; Technical Evaluation; Financial Evaluation and Comparison; General Evaluation Rules; Post-Qualification and finally an Evaluation Report and Award Recommendation.*

6.15 The task of the committee is therefore to establish the precise evaluation criteria which was employed by the Respondent when it took the decision to reject the Applicant's bid.

6.16 It is clear to the committee that the Applicant failed to meet the test at the preliminary examination stage. In the Public Procurement Procedures, there are specific rules that apply to an evaluation criteria applicable at the Preliminary Examination stage. In Rule 79 (2) of this heading, it is provided that;

“Any deviations, which are considered to be material deviations, shall result in rejection of the tender and such tenders shall not be subject to technical evaluation. Deviations which are considered to be non-material shall not result in rejection of the tender.”

6.17 In Rule 79 (3) of the Public Procurement Procedures, it is provided that;

“ A material deviation or reservation is one that:-

a) affects in any substantial way the scope, quality or execution of the works;

b) limits in any substantial way, inconsistent with the Tender Document, the Procuring Entity's rights or Tender's obligations under the Contract; or

c) if rectified, would affect unfairly the competitive position of other Tenderers presenting substantially responsive Tenders.”

6.18 In light of the above cited rule of the Procedures, we are unable to agree with the Respondent that the deviation constitutes a material deviation as it does not fall in any of the listed categories of item or rule 79 (3) of the Evaluation Procedures. We have carefully looked at each one of the 3 categories which are defined in the Procedures as constituting material deviations and we cannot comprehend how the clustering of the price amount in words can be said to lead to a material deviation.

6.19 In our assessment of the issues, the clustering of the words in relation to the price amounts by the Applicant constituted a deviation but such a deviation was minor and ought to have been addressed using the “General Evaluation Rules” of the Procedures as contained in Rule or Item 77 of the Procedures. It is for instance, provided in Rule 77 (3) of the General Evaluation Rules of the Public Procurement Procedures that;

“The evaluation committee may in writing ask tenderers for written clarification of their tenders in order to assist in evaluation, but no changes in the substance of tenders, including changes in price, shall be permitted after the date and time of tender closing, unless otherwise provided for in these procedures.”

6.20 In Rule 77 (4), it is stated in the Procedures that;

“The failure of a tenderer to reply to a request for clarification in writing may result in the rejection of its tender.”

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6.21 It surely cannot be said that by requiring the Applicant to correct the price amount in words which would have entailed simply spacing the words could have resulted in a material change or any change at all in its price list.

6.22 Still on the General Evaluation Rules of the Procedures Manual, it is provided in Rule 77 (6) that;

“Where a tender is substantially responsive, the evaluation committee may waive, clarify or correct any non-conformity, error or omission, which does not constitute a material deviation.”

6.23 The Procedures correctly emphasize on substance over form because such is the spirit of the Procurement Act, 2011. It surely would be senseless to, for instance, disqualify a tenderer for putting its documents up-side down when on substance that tenderer could at the end of the evaluation process been the one company to provide significant value to the procuring entity.

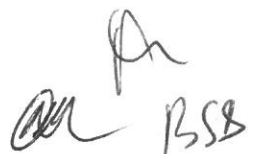
6.24 We now turn to consider the second ground of Applicant’s disqualification and the reasons advanced by the Respondent for such disqualification. In a correspondence dated 17 July 2018, the Controlling Officer of the Respondent wrote in paragraph 5 of the said correspondence as follows;

“Your application [for review in terms of section 47 of the Act] is dismissed for the following reasons:

(a) Your amount in words are unreadable /clustered in the tender form.

(b) Your documents were not submitted in given order.

(c) Your reference to Tender No.33 of 2017/18 in support of your review application under Tender No.36 of 2018/19 is out of order.”



6.25 For starters, it is difficult to comprehend how the alleged failure by the Applicant to follow a particular order in furnishing the required documents could result in a rejection of its bid. This we say because in the report submitted by the Respondent in its “T8 Form”, the alleged failure by the Applicant to furnish the required documents in a particular order was categorized by the Respondent itself as a “minor deviation” that could not lead to a rejection of the Applicant’s bid. The listing of this ground as a basis for rejecting the Applicant’s bid in the correspondence dated 18 July 2018 makes us to wonder if the Respondent’s evaluation committee was really aware of what it was doing or required to do.

6.26 We have also carefully applied our minds to the question of whether or not the Applicant can be said to have failed to follow the stipulated order in terms of furnishing the required documents as set out in the Tender Data Sheet.

6.27 We have observed that the requirement to provide certain documents is in several parts of the Tender Document. In our one part, which is at page 2 of the Tender Document, it is stated that;

“ The documents specified in “Instructions to Tenderers”, including certified current copies of SRA Company Tax Clearance Certificate (for Government tender), Trading License, Original General Receipt, Form J and Form C, Labour Compliance Certificate, SNPF Compliance Certificate, Certificate of Incorporation, One original copy and three copies of the tender document, Manufactures Authorisation, Sample Specification and a Tender Security of E 15 000.00 must be included in the tender.”

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6.28 At page 2 of the Tender Document, quite clearly, there is no particular order in which the documents required were to be submitted. However in the Tender Data Sheet, at pages 11 and 12 of the Tender Document, Item 9 thereof, it is stipulated that;

“In addition to the documents stated in the “Instructions to Tenderers”, the following documents are required in the given order: [underlined for emphasis].

6.29 The same documents required to be furnished at page 2 in no particular are again required to be furnished at pages 11 and 12 and this time in a particular order. This instruction is clearly confusing. Some documents required at page 2 of the Tender Document are not listed at pages 11 and 12 with the result that the companies who failed to furnish the documents required at page 2 but not at pages 11 and 12, for instance, the certificate of incorporation were disqualified at the preliminary stage.

6.30 There is also the duplication of one required document in the Tender Data Sheet, being the Labour Compliance Certificate which is required as item 6 and item 14. The question arising is, in following the stipulated order in the Tender data Sheet, should this document have been attached as Item 6 or Item 14? We did not get a clear answer on this aspect from the Ministry’s representatives.

6.31 We therefore unanimously and without any doubt conclude that it was impossible and impractical for the Applicant to have followed the stipulated order as set out in item 9 of the Tender Data Sheet. Accordingly, the rejection of Applicant’s bid on the second ground must also fail and we so hold.

7. **CONCLUSION**

7.1 Having considered the two grounds advanced on behalf of the Respondent for rejecting the Applicant's bid and the respective submissions by the parties hereto, it is our conclusion that the Applicant's bid was unlawfully and improperly rejected by the evaluation committee of the Respondent.

8. **AWARD AND/OR ORDER**

8.1 The order we make in the matter is that;

8.1.1 The rejection of Applicant's bid in Tender No.36 of 2018/2019 by the Respondent is hereby set aside. The net effect of this finding is that the Applicant's complaints are upheld in whole.

8.1.2 The Applicant is granted leave to correct the price amounts in words in its bid document within three (3) days of receipt of this ruling.

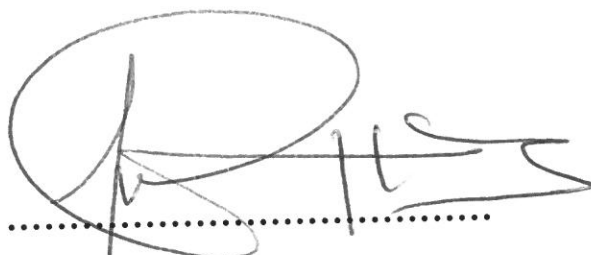
8.1.3 Once the correction by the Applicant in terms of paragraph (8.1.2) above is effected, the Respondent is ordered to forthwith enlist the Applicant for evaluation amongst the 11 shortlisted companies.

8.1.4 The Respondent is ordered to reimburse the Applicant all quantifiable amounts and fees payable in respect of the administrative review process. The Chief Executive Officer of the Agency is to write to the Respondent and certify all fees paid by the Applicant in relation the administrative review process.

8.1.6 The amount in fees to be reimbursed to the Applicant must be so paid within a period of 60 days from the date of this ruling.

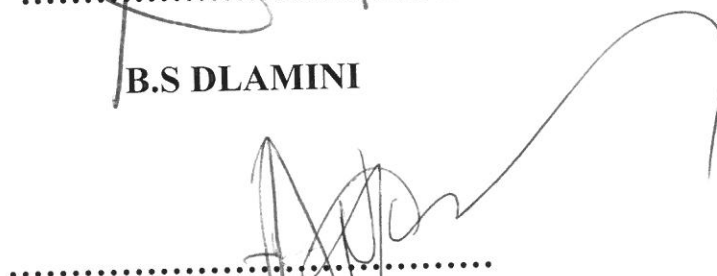
8.1.7 The Respondent is ordered to fully comply with the Public Procurement Procedures Manual issued under section 66 of the Procurement Act, 2011 and fully demonstrate in its evaluation methods and reports of such adherence.

DATED AT MBABANE ON THIS THE 10th DAY OF AUGUST 2018.



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B.S DLAMINI



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A. NGWENYA



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N. MAPHANGA